JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

16 June 2011 *

In Case T-240/07,

Heineken Nederland BV, established in Zoeterwoude (Netherlands),

Heineken NV, established in Amsterdam (Netherlands),

represented by T. Ottervanger and M. de Jong, lawyers,

applicants,

v

European Commission, represented initially by A. Bouquet, S. Noë and A. Nijenhuis, and subsequently by A. Bouquet and S. Noë, acting as Agents, and by M. Slotboom, lawyer,

defendant,

* Language of the case: Dutch.

APPLICATION for partial annulment of Commission Decision C(2007) 1697 of 18 April 2007 relating to a proceeding under Article 81 [EC] (Case COMP/B/37.766 — Dutch beer market) and, in the alternative, for reduction of the fine imposed on the applicants,

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of V. Vadapalas (Rapporteur), acting for the President, A. Dittrich and L. Truchot, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 25 March 2010,

gives the following

Judgment

Facts

1 The applicants, Heineken Nederland BV and Heineken NV, are members of the Heineken group ('Heineken'), whose business is to produce and market beer. Heineken NV is responsible for management of the group, whilst Heineken Nederland is a beer production company. Heineken NV, through its wholly-owned subsidiary, Heineken Nederlands Beheer BV, holds all the shares in Heineken Nederland.

2 Heineken is one of the four main operators on the Dutch beer market. The other leading brewers on that market are, first, the InBev group ('InBev'), which, prior to 2004, was known under the name Interbrew, which is managed by InBev NV and whose production is the responsibility of the subsidiary InBev Nederland NV, second, the Grolsch group ('Grolsch'), which is managed by Koninklijke Grolsch NV, and, third, Bavaria NV.

3 The applicants and the other three leading brewers on that market sell their beer to end-customers, using two distribution channels in particular. A distinction should thus be drawn between the on-trade establishment channel, that is to say, hotels, restaurants and cafes, where drinks are consumed on the premises, and the off-trade channel of supermarkets and off-licences, where beer is sold for home consumption. This latter sector also includes the private label beer segment. Of the four brewers concerned, only InBev and Bavaria are active in that segment.

4 The four brewers are members of the Centraal Brouwerij Kantoor (Central Brewery Office (CBK)). This is an umbrella organisation which, according to its statutes, represents the interests of its members and is composed of a general assembly and various working parties, such as the Working Party for on-trade matters and the Working Party on finance, which has become its steering committee. For meetings which take place within the CBK, its secretariat sends the participating members invitations and sequentially numbered official minutes.

Administrative procedure

5 By letters of 28 January 2000 and of 3, 25 and 29 February 2000, InBev made a series of statements providing information on restrictive business practices on the Dutch beer

market. Those statements were made during an investigation conducted by the Commission of the European Communities, in particular in 1999, into cartel activities and a possible abuse of a dominant position on the Belgian beer market. In conjunction with these statements, InBev made a leniency application in accordance with the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

6 On 22 and 23 March 2000, following the statements by InBev, the Commission carried out inspections at the premises of the applicants and of the other undertakings concerned. Other requests for further information were sent to the applicants and the other undertakings concerned between 2001 and 2005.

7 On 30 August 2005, the Commission sent a statement of objections to the applicants and to the other undertakings concerned. By letter of 24 November 2005, the applicants submitted their written observations on that statement. None of the parties concerned requested an oral hearing.

8 By letters of 26 January and 7 March 2006, additional documents were brought to the applicants' attention by the Commission. These included requests for information sent to InBev and replies to those requests.

9 On 18 April 2007, the Commission adopted Decision C(2007) 1697 relating to a proceeding under Article 81 [EC] (Case COMP/B/37.766 — Dutch beer market) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 20 May 2008 (OJ 2008 C 122, p. 1), which was notified to the applicants by letter of 24 April 2007.

The contested decision

The infringement at issue

10 Article 1 of the contested decision states that the applicants and InBev NV, InBev Nederland, Koninklijke Grolsch and Bavaria participated, during the period from 27 February 1996 to 3 November 1999, in a single and continuous infringement of Article 81(1) EC by entering into a complex of agreements and/or concerted practices the object of which was to restrict competition within the common market.

11 The infringement consisted, first, in coordinating prices and price increases for beer in the Netherlands, in both the on-trade and the off-trade sector, including with regard to private label beer, and, second, in occasionally coordinating other commercial conditions offered to individual customers in the on-trade sector in the Netherlands, such as loans to businesses, and, third, in occasionally coordinating customer allocation, in both the on-trade and the off-trade sector in the Netherlands (Article 1 of and recitals 257 and 258 to the contested decision).

12 According to the contested decision, the anti-competitive conduct of the brewers took place during a cycle of unofficial multilateral meetings which regularly brought together the four main operators on the Dutch beer market and at additional bilateral meetings involving different combinations of the same brewers. According to the contested decision, these meetings took place secretly, intentionally, because the participants knew that they were not permitted (recitals 257 to 260 to the contested decision).

13 Thus, firstly, a series of multilateral meetings known as 'Catherijne overleg' (Catherijne consultation) or 'agendacommissie' (Working Group on agenda) were held between 27 February 1996 and 3 November 1999. The contested decision finds that the main object of these meetings, which focused on the on-trade sector, but could also deal with the off-trade sector, was to coordinate prices and price increases for beer, to discuss limiting the amount of discounts and customer allocation and to consult on certain other commercial conditions. Prices of private label beer were also discussed in these meetings (recitals 85, 90, 98, 115 to 127 and 247 to 252 to the contested decision).

14 Secondly, as far as bilateral contacts between the brewers are concerned, the contested decision states that on 12 May 1997 InBev and Bavaria met and discussed the price increase for private label beer (recital 104 to the contested decision). Furthermore, according to the Commission, the applicants and Bavaria met in 1998 to discuss restrictions relating to points of sale in the on-trade sector (recital 189 to the contested decision). The Commission states that bilateral contacts also took place on 5 July 1999 between the applicants and Grolsch on the subject of compensation granted to customers in the off-trade sector who made temporary price reductions (recitals 212 and 213 to the contested decision).

15 Lastly, according to the contested decision, bilateral contacts and exchanges of information took place between InBev and Bavaria in 1997 consisting in general discussions on beer prices and discussions dealing more with private labels. Bilateral contacts, in the form of exchanges of information, on the subject of private labels also involved the Belgian brewers in June and July 1998. The Commission states that those discussions were attended by the applicants and by Grolsch (recitals 105, 222 to 229 and 232 to 236 to the contested decision).

16 Heineken NV was held liable on the ground that, during the period in which the infringement took place, Heineken Nederland was, directly or indirectly, its wholly-owned subsidiary and this fact, confirmed by other material in the file, shows that it exercised a decisive influence over the commercial policies of its subsidiary (recitals 400 to 414 to the contested decision).

The fine imposed on the applicants

17 Article 3(a) of the contested decision imposes on the applicants, jointly and severally, a fine of EUR 219 275 000.

18 In order to calculate the amount of that fine, the Commission applied Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and the methodology set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines') (recitals 436 and 442 to the contested decision). In accordance with that methodology, the fine imposed on the applicants was determined according to the gravity and duration of the infringement (recital 437 to the contested decision).

19 In particular, the infringement was categorised as 'very serious' in so far as it essentially consisted in regularly coordinating prices, price increases, other commercial conditions and customer allocation (recital 440 to the contested decision). The Commission also took account of the secret and intentional character of the anti-competitive conduct and the fact that the entire territory of the Netherlands and the entire beer market, both the on-trade sector and the off-trade sector, were affected

by the infringement (recitals 453 and 455 to the contested decision). In addition, the Commission stated that the actual effect on the Dutch market of the anti-competitive conduct had not been taken into account in the present case, as it was impossible to measure (recital 452 to the contested decision).

20 Furthermore, the Commission applied differential treatment to the applicants in order to take account of their effective economic capacity and their individual weight in the anti-competitive conduct established. To that end, the Commission used the sales figures for beer sold by the applicants in the Netherlands in 1998, the last full calendar year of the infringement. On that basis, the applicants were placed in the first category, corresponding to the starting amount of EUR 65 000 000 (recital 462 to the contested decision).

21 In order to ensure a sufficiently deterrent effect, a multiplier of 2.5 was applied to that starting amount, in view of Heineken's high turnover (recital 464 to the contested decision).

22 As the applicants had taken part in the infringement from 27 February 1996 to 3 November 1999, that is to say, for a period of three years and eight months, that starting amount was increased by 35 % (recitals 465 and 466 to the contested decision). The basic amount was therefore fixed at EUR 219 375 000.

23 Lastly, the Commission granted a reduction of EUR 100 000 in the amount of the fine since it acknowledged that in the present case the length of the administrative procedure had been unreasonable (recitals 495 to 499 to the contested decision).

Procedure and forms of order sought

24 By application lodged at the Registry of the General Court on 4 July 2007, the applicants brought the present action.

25 By decision of 10 February 2010, the Court referred the case to the Sixth Chamber (Extended Composition) in accordance with Article 14(1) and Article 51(1) of its Rules of Procedure.

26 By way of measures of organisation of procedure of 12 February 2010, the Court sent a number of written questions to the Commission, which replied within the period allowed.

27 The parties presented oral argument and replied to the questions put by the Court at the hearing on 25 March 2010.

28 Since the Judge-Rapporteur was prevented from sitting after the oral procedure was closed, the case was reassigned to a new Judge-Rapporteur and the present judgment was deliberated by the three judges whose signatures it bears, in accordance with Article 32 of the Rules of Procedure.

29 The applicants claim that the Court should:

— annul in whole or in part the contested decision, to the extent to which it concerns them;

— annul or reduce the fine imposed on them;

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

31 In support of their action, the applicants rely on eleven pleas, concerning, first, a breach of the principle of sound administration and an infringement of Article 27 of Regulation No 1/2003, with regard to the refusal to grant access to the replies to the statement of objections made by other undertakings involved, second, a breach of the principle of sound administration, the 'duty of care' and the *audi alteram partem* rule, stemming from an alleged failure to carry out a careful and impartial investigation, third, a breach of the principle of the presumption of innocence, fourth, a breach of the reasonable time principle in the administrative procedure, fifth, insufficient evidence of the infringement, sixth, the absence of agreements and/or concerted practices within the meaning of Article 81(1) EC, seventh, an erroneous determination of the duration of the infringement, eighth, infringements of Article 23(3) of Regulation No 1/2003 and of the Guidelines, breaches of the principles of equal treatment, legal certainty and proportionality and a breach of the obligation to state reasons, in relation to the determination of the amount of the fine, ninth, a misappraisal of

attenuating circumstances, tenth, the effect of the length of the administrative procedure on the amount of the fine and, eleventh, the excessively low reduction of the fine granted by the Commission by reason of the excessive length of the administrative procedure.

32 The Court considers that the fifth, sixth and seventh pleas, which essentially seek to dispute the infringement, should be examined first, followed by the first, second, third and fourth pleas, alleging procedural defects and a breach of the rights of the defence and, lastly, the eighth, ninth, tenth and eleventh pleas, which concern the determination of the amount of the fine.

The fifth and sixth pleas, concerning, respectively, insufficient evidence of the infringement and the absence of agreements and/or concerted practices within the meaning of Article 81(1) EC

Arguments of the parties

33 In the fifth plea, the applicants essentially claim that the evidence relied on by the Commission in the contested decision is not sufficient to prove the existence of an infringement of Article 81 EC beyond reasonable doubt. The Commission's finding to that effect is thus contrary to the principle of the presumption of innocence and the obligation to state reasons.

34 To that end, the applicants dispute the probative value of the statement by InBev, which represents the main pillar of the contested decision, on the grounds that it is very vague and contradictory and that it is based partly on information obtained from third parties. In addition, they allege that the Commission did not assess whether that statement was made responsibly and after careful reflection and did not follow up the exculpatory statements which it contained.

35 The applicants also take the view that the handwritten notes produced by representatives of the Dutch brewers at the meetings in question, being fragmentary in nature, are likewise not sufficient to prove the existence of anti-competitive conduct.

36 In the sixth plea, the applicants dispute the relevance and the Commission's interpretation of certain documentary evidence which formed the basis for the finding of the existence of a complex of agreements and/or concerted practices which restrict competition.

37 The applicants dispute that the contacts between the brewers resulted in an agreement since a consensus was never reached between them on a certain course of action on the market.

38 They also dispute the existence of a concerted practice. In this regard, they claim that the available evidence does not indicate that the contacts between the brewers dispelled or, at least, considerably reduced uncertainty over their future conduct on the market. On the other hand, they take the view that they have sufficiently shown that the brewers' conduct on the market was determined autonomously.

39 In addition, the applicants claim that the meetings in question never had an anti-competitive object. The discussions at those meetings dealt with many legitimate subjects, so that talks about the situation on the market, including consumer prices on the off-trade market and including offers to certain on-trade customers, were only occasional and informal.

40 Lastly, the applicants object to the fact that they were accused of participating in the discussions between Interbrew and Bavaria concerning the private label beer segment, in which they are not active.

41 The Commission contests the applicants' arguments.

Findings of the Court

42 By their fifth plea, the applicants essentially claim that the Commission did not prove, to the requisite legal standard, the factual findings on the basis of which it inferred the existence of the infringement. By their sixth plea, they contest the categorisation of the conduct in question as agreements and/or concerted practices within the meaning of Article 81 EC. As these two pleas seek to challenge the finding of the infringement, they should be examined together.

43 Article 81(1) EC provides that the following are to be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

44 In order for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 199).

45 An agreement within the meaning of Article 81(1) EC can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (see, to that effect, *HFB and Others* v *Commission*, cited in paragraph 44 above, paragraphs 151 to 157 and 206).

46 The concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 115, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 158).

47 In this respect, Article 81(1) EC precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which the operator concerned has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to restrict competition (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 46 above, paragraphs 116 and 117).

48 It should be borne in mind that, as regards establishing an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the

existence of the facts constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and *Commission* v *Anic Partecipazioni*, cited in paragraph 46 above, paragraph 86).

49 Thus, the Commission must produce sufficiently precise and consistent evidence to establish the existence of the infringement (see, to that effect, Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited).

50 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraphs 179 and 180 and the case-law cited).

51 As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the operators concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 55 to 57).

52 Where the Commission has relied on documentary evidence in support of its finding of the existence of an anti-competitive agreement or practice, the burden is on the parties who are contesting that finding before the Court not only to put forward a plausible alternative to the Commission's view but also to allege that the evidence relied on in the contested decision to establish the existence of the infringement is insufficient (*JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 187).

53 As regards the scope of review by the Court, according to settled case-law, where the Court is faced with an application for the annulment of a decision applying Article 81(1) EC, it must undertake in a general manner a comprehensive review of the question whether or not the conditions for the application of Article 81(1) EC are met (see Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 62 and the case-law cited).

54 Any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed, in accordance with the principle of the presumption of innocence, which, as a general principle of European Union ('EU') law, applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hüls* v *Commission*, cited in paragraph 46 above, paragraphs 149 and 150, and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 60 and 61).

55 The question whether, in the present case, the Commission has established to the requisite legal standard that the applicants' conduct amounted to an infringement of Article 81(1) EC must be examined in the light of those considerations.

— The statement by InBev

56 It should be noted, first of all, that the Commission relies to a large extent (see, in particular, recitals 40 to 62 to the contested decision) on the statement made by InBev, in connection with its leniency application, by letters of 28 January and 3, 25 and 29 February 2000, supplemented by the annexed statements made by the five managers from InBev (recitals 34 and 40 to the contested decision; together 'the statement by InBev').

57 According to the contested decision, the statement by InBev indicated the existence of 'various forms of concerted action... between the brewers on the Dutch beer market', drawing a distinction between the official meetings of the CBK general assembly, the informal meetings of the CBK Working Party on finance and the 'other meetings' held in parallel and known as the 'Catherijne consultation', whose composition varied and for which, InBev states, it has not found any written records. The 'other meetings' could be subdivided, inter alia, into: '(i) meetings of the on-trade managers of the four main brewers (Heineken, Interbrew, Grolsch and Bavaria)...; (ii) joint meetings of the on-trade managers and the off-trade managers (two in 1998) and (iii) meetings of the off-trade managers (one in 1999...)' (recitals 41 to 46 to the contested decision).

58 According to the statement by InBev, the Working Party on finance 'had an official agenda, but was also a forum for discussions on fixing prices for the off-trade sector and the on-trade sector[; t]hose discussions were not recorded at all' (recital 43 to the contested decision).

59 According to the same statement, the subjects discussed at the 'other meetings' also covered both the on-trade sector and the off-trade sector and private label beer (recital 47 to the contested decision).

60 With regard, firstly, to the on-trade sector, two main subjects were discussed: '[T]here was an agreement in principle on setting maximum discounts by volume for the on-trade sector... another subject of consultation was the investments made in the on-trade[; t]he idea was to maintain the status quo in the sector and to avoid taking customers from other brewers' (recital 48 to the contested decision).

61 One manager from InBev claims that he does not know the precise content of that agreement and another manager describes it as 'a very complex and vague agreement on sliding scales (discounts granted to the on-trade), in which we have never been involved', stating that '[t]he consultation consisted in a bimonthly meeting of the on-trade managers, at which they discussed known infringements of the "rule" (although this was vague; they talked about market excess)' (recital 48 to the contested decision).

62 With regard, secondly, to the off-trade sector, according to the statement by InBev, the discussions concerned both price levels in general and the specific subject of private label beer.

63 As regards price levels in general, one of the managers from InBev states that 'it was normal for a brewery to increase its prices after informing its fellow brewers in advance …; the initiative always came from one of the big breweries, and generally from Heineken[; i]n such cases, the other breweries had the necessary time to take a position[; w]hilst the breweries broadly aligned their prices with one another, they each had and maintained their own pricing policy' (recital 51 to the contested decision).

64 As regards private label beer, InBev states that the discussions on prices had been conducted between the Dutch operators in the segment (Bavaria and Oranjeboom, subsequently acquired by Interbrew) since 1987. It adds that '[t]he two parties understood, after discussing the matter together, that they would not accept any intrusion

in their respective customer bases for private labels which resulted in a loss of volume' (recital 52 to the contested decision).

65 With regard to the involvement of Heineken and of Grolsch in this sector, according to the statement by InBev, '[t]he Dutch market is characterised by a significant gulf between prices for private label beer ("B brands") and [other brands ("A brands");] Heineken, which is not present in the private labels segment, has always rejected price increases for A brands as long as the price of private label beer did not increase[; i]n this way, it exerted indirect pressure, in particular on private label producers such as Bavaria and Interbrew' (recital 53 to the contested decision).

66 InBev states that prices for private labels were also discussed by the four brewers, in other words also in the presence of Grolsch, in the context of the more general topic of the price gaps to be maintained between prices for beer brands. According to the statement by InBev, 'Heineken and Grolsch did not increase their prices for years and the prices of other brewers' label beers and private label beers did not increase either[; i]n recent years, Bavaria and Interbrew have increased their prices, followed by Grolsch' (recital 54 to the contested decision). It is also pointed out that '[t]hree to four years ago, these informal consultations had been incorporated into the Catherijne consultation on the on-trade, in which representatives of the CBK also participated[; a]fter a few meetings, it was decided to split these meetings back into off-trade meetings and on-trade meetings' (recital 54 to the contested decision).

67 In addition, InBev states that for the Belgian brewer Martens to obtain a certain market share since 1996 to 1997 it had been necessary for 'an agreement between Belgian and Dutch brewers operating on the private labels market[; t]wo meetings took place [in] Breda in 1998[…; i]t was agreed to respect the relevant volumes for private labels

sold to customers established in the Netherlands and in Belgium' (recital 55 to the contested decision).

68 According to the statements by the managers from InBev, the 'other meetings' were organised to give each other reassurance as to a 'limited aggression' on the market (recital 46 to the contested decision).

69 In its reply to the request for information, dated 19 December 2001, InBev states that 'agendas for the previous years and notes taken at the informal meetings were destroyed at the end of November 1998[; i]t was at about that time that the existence of concerted action between Dutch brewers started to be revealed on the market and fears began of an inspection by the Dutch competition authority[; a]gendas were also destroyed in the following years' (recital 61 to the contested decision).

70 It must be noted from the outset that there is no provision or general principle of EU law that prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Articles 81 EC and 82 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the EC Treaty (see *JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 192).

71 In the present case, the applicants do not contest the information given in the statement by InBev to the effect that meetings took place between representatives of the Dutch beer producers. Nor do they dispute that they were represented at most of those meetings or that, at the meetings, the general situation on the beer market was discussed informally. Furthermore, they acknowledge, in the application, that concerns were also expressed occasionally at those meetings regarding off-trade price levels and problems connected with certain customers.

72 However, the applicants deny that the discussions held at those meetings led to the conclusion of an unlawful agreement or an undertaking to engage in a concerted practice. They claim that the meetings mainly dealt with legitimate subjects and that, in so far as the situation on the market was discussed, this was not for anti-competitive purposes. In this regard, they contest the reliability of the statement by InBev, claiming that it is very vague and contradictory and contains, in part, observations which were not known directly to the authors of the statements, thereby constituting 'hearsay evidence'.

73 As regards the contradictory character of the statement by InBev, the applicants point out that it contains a number of exculpatory statements.

74 First, there are statements which are not mentioned in the contested decision, according to which '[t]he discussion concerned known infringements of the sliding scales (which were, moreover, very vague)[; o]n the ground, everyone did as they wished'; '[o]ur conduct on the market was geared very aggressively to winning new customers — including by discounts'; '[w]e therefore acted perfectly lawfully'; '[InBev] did not conclude any agreement and did not respect anything'; '[the] [Catherijne] consultation did not have any tangible results in terms of the effect on the market […; w]e did not speak specifically about conduct on the market on either occasion[; t]he meeting had a more informal character'; '[t]here was no agreement for the food sector'; '[I] never observed that the meeting [of the CBK] was extended by discussions on sensitive market issues[; i]t is always possible that such meetings gave rise to informal bilateral talks but, in my view, there was nothing at stake'.

75 Second, the applicants refer to certain passages of statements cited in the contested decision, according to which: 'Interbrew believes that this consultation never had significant effects on the market per se and was less intensive in recent times […; t]he

discussions were very general in nature' (cited in recital 45); '[w]e talked above all to give each other the impression that we would remain calm on the market[; t]here was little or no discussion of sliding scales or points of sale[; i]n fact, everyone was taking everyone else for an idiot[; i]n recent years, these meetings increasingly lost their substance and the consultation took on a more vague character' (cited in recital 46); '[t]here was also a very complex and vague agreement on sliding scales (discounts granted to the on-trade), in which we have never been involved[; f]urthermore, I never saw any documents on this subject' (cited in recital 48).

76 According to the applicants, those statements, aside from the fact that they are not specific, are incompatible with the Commission's findings as to the existence of the infringement in question. In the view of the applicants, it is clear from the statements that the talks between the brewers were very general, that no agreement was concluded, that InBev did not respect any collusive arrangement and that the consultation did not have any effect on the market.

77 It should first be stated that the inferences made by the applicants on the basis of certain information in the statement by InBev, indicating the general nature of the discussions, the absence of any agreement for certain sectors and the absence of effect of the discussions on the conduct of the brewers on the market, cannot in themselves call into question the Commission's finding relating to the existence of the infringement.

78 As regards the allegedly general character of that statement, it must be pointed out that the Commission often has to prove the existence of an infringement under conditions which are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated therein. Whilst it is necessarily incumbent upon the Commission to establish that an illegal market-sharing agreement was concluded, it would be excessive also to require it to produce evidence of the specific mechanism by which that object was attained. Indeed, it would

be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established. Undertakings are able properly to defend themselves in such circumstances provided that they have an opportunity to comment on all the evidence relied on against them by the Commission (*JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 203; see also, to that effect, Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 50).

79 Second, as regards the purported information on the absence of any effect of the conduct at issue on the market, it follows from the actual text of Article 81 EC that agreements and concerted practices between undertakings are prohibited, regardless of their effect on the market, when they have an anti-competitive object (*Hüls* v *Commission*, cited in paragraph 46 above, paragraphs 163 to 166, and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29).

80 Thus, where the Commission has established the existence of agreements and concerted practices which have an anti-competitive object, this finding cannot be refuted by information relating to the non-application of collusive arrangements or the absence of any effect on the market.

81 As regards the purported information contained in the statement by InBev regarding the absence of any agreement in the off-trade sector or in the on-trade sector, it should be noted that the passages relied on by the applicants, read in context, certainly do not rule out the existence of an agreement or of a concerted practice in the sectors concerned.

82 With regard to the off-trade sector (retail sales), the assertion made by one of the managers from InBev to the effect that '[t]here was no agreement for [that] sector', is followed by a specific description of the price coordination mechanism applied by the brewers. The relevant passage reads as follows (recital 51 to the contested decision):

'There was no agreement for the retail sales ("food") sector. As regards the price increases for beer, it was normal for a brewery to increase its prices only after informing its fellow brewers in advance. When one of the parties made such an announcement, there would be a debate on the impact of such an increase on the market; the price increase for beer had taken place after all. The initiative always came from one of the big breweries and generally from Heineken. In such cases, the other breweries had the necessary time to take a position. Whilst the breweries broadly aligned their prices with one another, they each had and maintained their own pricing policy.'

83 Against this background, the simple fact that the manager from InBev made reference to the absence of any 'agreement' cannot constitute a valid argument in so far as it is for the Commission and, if appropriate, the Court to undertake the legal categorisation of the conduct described in the statements made by the officers of the undertakings concerned.

84 As regards the alleged absence of an agreement and of respect for an agreement in the on-trade sector, it is clear that the statement by a manager from InBev that '[InBev] did not conclude any agreement and did not respect anything' does not refute the finding as to the existence of an agreement within the meaning of Article 81(1) EC. In his statement, the same manager from InBev explicitly mentions the existence of 'a very complex and vague agreement on sliding scales (discounts granted to the on-trade)' and of an agreement whose purpose was to 'avoid too many changes in the on-trade'.

85 In the light of the foregoing, the applicants' claims regarding the contradictory character of the statement by InBev cannot be accepted. Their argument concerning the Commission's supposedly selective use of that statement, in so far as it failed to take account of the alleged contradictions, must also be rejected.

86 Consequently, the applicants have not demonstrated the existence of alleged contradictions which could weaken the reliability of the statement by InBev.

87 Furthermore, in claiming that the statement by InBev includes 'hearsay evidence', the applicants refer to its passages according to which 'Interbrew has never seen a document containing the agreement on discounts to which the discussions referred, but the general rule seemed to be well known' (cited in recital 45 to the contested decision), 'I do not know of this agreement (sliding scales) myself, nor have I seen a document on this subject', and 'I do not know the precise content of the agreement[…; f]urthermore, I never saw any documents on this subject'.

88 It should be noted that the passages mentioned by the applicants concern only the question of the existence of an agreement ('sliding scale') on discounts granted to customers in the on-trade sector. On this specific point, the probative value of the statement by InBev is certainly reduced in the absence of direct evidence. The reliability of the information provided regarding the existence of the 'sliding scale' is nevertheless reinforced because, first, it comes from two different sources and, second, it contains specific details of a 'sliding scale', namely the precise amount of the maximum discount (see recital 48 to the contested decision). The existence of a 'sliding scale' is also confirmed by two pieces of evidence independent of InBev, namely the handwritten notes by a member of the board of directors of Bavaria concerning the meeting held on 1 May 1997 (recital 92 to the contested decision) and notes made by an on-trade manager for Bavaria concerning the meeting held on 12 March 1998 (reproduced in recital 143 to the contested decision).

89 The applicants' argument claiming 'hearsay evidence' cannot therefore call into question the conclusions drawn from the statement by InBev.

90 Lastly, as regards the general assessment of the reliability of the statement by InBev, the appropriate view, contrary to the applicants' contention, is that the Commission was entitled to attribute to the statement by InBev particularly great probative value, since it is an answer given on behalf of an undertaking which as such carries more weight than that of an employee of the undertaking, whatever his individual experience or opinion. It should also be noted that the statement by InBev represented the outcome of an internal investigation carried out by the undertaking and that it was submitted to the Commission by a lawyer, who was under a professional obligation to act in the interests of that undertaking. He could not therefore lightly admit the existence of an infringement without evaluating the consequences of so doing (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 45, and *JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 206).

91 Furthermore, according to case-law, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility that they might tend to play down the importance of their contribution to the infringement and maximise that of others, the fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction of the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of the cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice (Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 70).

92 Admittedly, it must be borne in mind that an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (see, to that effect, Case T-337/94 *Enso-Gutzeit* v *Commission* [1998] ECR II-1571, paragraph 91, and *JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 219).

93 The statement by InBev cannot therefore suffice, in itself, to establish the existence of the infringement, but must be corroborated by other evidence.

94 Nevertheless, in view of the reliability of the statement by InBev, the degree of corroboration required in this case is lesser, in terms both of precision and of depth, than would be the case if that statement were not particularly credible. Thus, it must be concluded that, if it were to be held that a body of consistent evidence corroborated the existence and certain specific aspects of the practices mentioned in the statement by InBev and referred to in Article 1 of the contested decision, that statement might be sufficient in itself, in such a case, to constitute evidence of other aspects of the contested decision. Moreover, provided that a document does not manifestly contradict the statement by InBev as to the existence or the essential content of the contested practices, the fact that it provides evidence of significant elements of the practices which it described is sufficient to endow it with corroborative value within the body of inculpatory evidence (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 220 and the case-law cited).

95 In the light of the foregoing, it is necessary to examine the applicants' arguments concerning other evidence relied on by the Commission in the contested decision in order to corroborate the findings relating to the statement by InBev.

— Other evidence

96 In the contested decision, the Commission asserts that the statement by InBev is corroborated by a number of internal documents from the applicants and the three other Dutch brewers, handwritten notes from meetings, expense reports and copies of agendas obtained following investigations and requests for information.

97 In recital 67 to the contested decision, the Commission mentions the handwritten notes by a commercial manager from Grolsch relating to the meeting held on 27 February 1996, the subject of that meeting being indicated by the note 'CBK cie HOR cath.' Those notes include the following passage: 'Guarantees/financing: fin[ancing] for... in excess of needs of specific points. So... mil[lions]'.

98 According to the Commission, it is clear from this passage that the four brewers in question discussed, at a 'Catherijne meeting', the financial conditions applied or to be applied to certain on-trade customers (recital 72 to the contested decision) and, more specifically, to establishments run by a proprietor of multiple on-trade establishments in the Netherlands.

99 In recital 76 to the contested decision, the Commission mentions the handwritten notes by an on-trade manager for Bavaria concerning the meeting held on 19 June 1996. The notes are reproduced as follows:

'adapt prices

off-trade high – low

Bavaria – Interbrew consultation

... and... -> problem...

Martens

Schultenbrau!! 89 ct

increase only of cask price

arguments

only Hein + Grolsch fully

Friesland US Heit

Interbrew \

| increase together

Bavaria /

->... also

increase bottom more than top

air

agreements

stabilise discount for bars 7.5 per cask Heineken

prepare representatives vis-à-vis possible agreements

Interbrew \

| air can be used

Grolsch /'.

100 According to the Commission, these notes show that the brewers present had detailed discussions of prices, both for private label beer and for beer sold in casks, and the price of cheaper beers, produced by Interbrew and Bavaria, was to increase more than the price of more expensive beers, produced by Heineken and Grolsch (recital 85 to the contested decision).

101 In recital 89 to the contested decision, the Commission mentions a letter which the managing director of Interbrew Nederland sent to InBev's head office in Belgium on 25 March 1997:

'There is now a consensus between the main brewers to implement a price increase before 1998. This will enable the brewers to increase their buffer for the necessary additional promotional budgets. The A brand operators are trying to differentiate the price increase between the A brands (+ 2 NLG/hl) and the B brands (+ 4 NLG/hl). This seems highly unrealistic to me — we must all support a full increase of NLG 4. I would exclude our special beers "which are easy to drink" (DAS, Hoegaarden, Leffe) from the price increase. Negotiations have begun.'

102 The Commission concluded on the basis of that letter that a price increase was planned before 1998 following price negotiations between the main producers. In addition, the same letter confirmed the existence of a distinction between more expensive and cheaper beer producers and brands (recital 90 to the contested decision).

103 In recital 92 to the contested decision, the Commission mentions the handwritten notes by a member of the board of directors of Bavaria concerning the meeting held on 1 May 1997. It cites the following passages:

'Catherijne Club 1/5 – 97

"internal" transfers within the group

must also respect the "sliding scale"

... "The Hague"

Monster ZH [southern Holland] higher competing offer'.

104 According to the Commission, these notes confirm that the brewers were discussing a 'sliding scale' for the commercial conditions granted to individual points of sale, in the case of transfers from one group to another, but also in cases of transfers within a single group (recital 99 to the contested decision).

105 In recital 100 to the contested decision, the Commission states that the above-mentioned notes also contain the names 'Heineken/Amstel/Brand/Grolsch' on the first line and the names 'Interbrew/Bavaria' on the second line, with the two lines being linked by a bracket followed by the words 'no price increases'. The Commission infers that the distinction between the A brands, owned by Heineken and Grolsch, and the B brands, owned by Interbrew and Bavaria, was the focus for the discussions between the brewers concerning the price increases for beer (recital 103 to the contested decision).

106 In recital 117 to the contested decision, the Commission mentions the handwritten notes by a member of the board of directors of Bavaria concerning the meeting held on 17 December 1997. It cites the following passage:

'(2) Price situation: March/April

one-stage rocket/two-stage rocket

(a) Heineken expects little fuss!! Heineken 18.59

(b) in the event of increase: very negotiable; wholehearted; there will be support'.

107 The Commission infers that the brewers present at the meeting held on 17 December 1997, including Bavaria, Grolsch and Heineken, were discussing price increases and possible reactions to price increases (recital 127 to the contested decision).

108 In recital 129 to the contested decision, the Commission mentions a passage from the handwritten notes by an on-trade manager for Bavaria concerning the meeting held on 12 March 1998:

'Not much happened since 1 January

A brands no panic in relation to price Hein

9.95 reduction from 11.49 little point Int

9.75 9.36 Bavaria

2x 4.95 4.75 }→

private labels

prices in the lower market segment

… mid-March Bavaria something

below Amstel (17) Bavaria (15)

from 9.75 to 10.75 if nothing

happens, then Grolsch and Hein

increases pocket brewery

→ fix agreement … and Dick

This must be "demonstrable" via Nielsen otherwise

nothing will happen.'

109 According to the Commission, it is clear that the brewers present at the meeting held on 12 March 1998 discussed reductions granted to Dutch supermarkets (recital 137 to the contested decision) and that the price increases implemented by Bavaria should be demonstrable in the supermarket cash register data compiled by AC Nielsen (recital 133 to the contested decision).

110 In recital 138 to the contested decision, the Commission mentions a second passage from the abovementioned handwritten notes:

'Bav interest 4 %? 6 1/2

unless

there is an advertising commission'.

111 According to the Commission, this passage proves that a discussion was held on the level of interest rates applied to loans granted to on-trade points of sale (recital 142 to the contested decision).

112 In recital 143 to the contested decision, the Commission mentions a third passage of the abovementioned handwritten notes:

'Football clubs concert halls theatres

Student associations

…

Grolsch

above/outside sliding scale

130

… (125) 124.5'.

113 According to the Commission, it is clear that the brewers held a specific discussion on precise on-trade customers in relation to a 'sliding scale', corroborating the statement by InBev as to the existence of an agreement known as the 'sliding scale' (recital 147 to the contested decision).

114 In recital 156 to the contested decision, the Commission mentions a passage from the handwritten notes by a member of the board of directors of Bavaria relating to the meeting held on 3 July 1998:

'… Heineken increased

… >> Heineken cask beer'.

115 The Commission infers from this passage that the brewers discussed the prices applied both to customers in the off-trade sector and to an on-trade customer (recitals 162 to 164 to the contested decision).

116 In recital 165 to the contested decision, the Commission mentions another passage from the abovementioned handwritten notes:

'~~Cafe~~ … 1800 …

… 400 …

60 per hl

650.000,- V.B.K.'.

117 According to the Commission, it is clear from this passage that the brewers discussed a discount given and/or a commission in respect of the reduction applied or to be applied to specific on-trade points of sale (recital 171 to the contested decision).

118 In recital 174 to the contested decision, the Commission mentions a document dated 30 June 1998 and a Heineken price list announcing new prices applicable to bottled beer and draft beer (beer in tanks and beer in casks) from 1 June 1998, discovered in the office of an off-trade sales manager for Grolsch, with the note 'agenda c[ommiss] ie CBK' (CBK Working Party on agenda). According to the Commission, these documents corroborate the statement by InBev to the effect that both off-trade prices and competition on the on-trade market were discussed at the meetings in question (recital 175 to the contested decision).

119 In recital 179 to the contested decision, the Commission mentions a Heineken internal memo dated 14 October 1998, addressed to Heineken's management team, which reads: 'the price increase promised by Bavaria in the CBK is not apparent in the [figures] from Nielsen'. According to the Commission, that memo reinforces the conclusion that, at the meeting held on 12 March 1998, Bavaria had announced its intention to be the first to increase its prices in the off-trade sector, the other brewers were to follow subsequently and the increases implemented by Bavaria were to be 'demonstrable' in the figures from Nielsen (recital 180 to the contested decision).

120 In recital 184 to the contested decision, the Commission mentions a letter sent to a manager of Heineken's Netherlands on-trade unit by a marketing and off-trade manager from the Heineken's Brand BV brewery, regarding his discussion with a member of Bavaria's board of directors:

'At the Noordwijk food fair on 9 September [1998], [a member of Bavaria's board of directors] spoke to me about the matter … and Heineken's reaction. In short, he thought that Heineken could have sat down at the negotiating table with the top management at Heineken and Bavaria on the Netherlands on-trade market much earlier. The hectolitres lost could then have been compensated for in some other way. Furthermore, he added that in the long term Bavaria perhaps had its sights on other potential customers in the on-trade sector who wished to switch voluntarily (with the

emphasis on "voluntarily" as in the case of …, in his view) to Bavaria [first name of a Heineken on-trade manager for the Netherlands], it goes without saying that these comments are part of the well-known rhetoric of … I did not want to keep this information from you. All the best for your discussion.'

121 The Commission takes the view that this letter confirms the statement by InBev according to which the brewers were discussing not only restrictions on reductions, but also restrictions concerning points of sale which opted for another brewer, and not only at multilateral meetings, but also during bilateral meetings (recital 189 to the contested decision).

122 In recital 193 to the contested decision, the Commission mentions the handwritten notes by a managing director of Grolsche Bierbrouwerij Nederland on the invitation to the meeting held on 8 January 1999:

'sales '98

beer price →

pin-partition crates	actions/cat II
crates	bottom
	cask
	NMA.'

123 Accordingly, in the view of the Commission, the discussions on beer prices focused on four aspects: first, promotional measures in the off-trade market, second, the price of cheaper and private label beers, third, the price of cask beer, the large containers used in the on-trade sector of the Dutch beer market and, fourth, the Dutch competition authority, the NMA (recital 194 to the contested decision).

124 In recitals 197 and 199 to the contested decision, the Commission mentions the list of subjects for discussion at the meeting held on 8 January 1999, on which a representative of Grolsch had noted the abbreviation 'BP', which is interpreted by the Commission as 'beer price' (bierprijs) or 'floor price' (bodemprijs), and 'P[rivate] L[abel] 50 ct. more'. The Commission infers from these notes that, as far as cask beer is concerned, the brewers had detailed discussion of prices (recital 203 to the contested decision).

125 In recitals 212 and 213 to the contested decision, the Commission refers to a document which contains a reference to three contacts at management level between Heineken and Grolsch on around 5 July 1999, mentioning a 'price war' between the two brewers. The Commission infers that Heineken had made direct contact with Grolsch about reductions, one and a half months before temporary reductions, made by a chain of shops to which Grolsch refused to grant compensation, were actually implemented (recital 213 to the contested decision).

126 In recital 224 to the contested decision, the Commission mentions a number of documents included in its administrative file which show the subjects discussed at the bilateral meetings between Bavaria and InBev on 8 March 1995, in the second half of March 1997, on 12 May 1997, on 19 June 1997 and on 8 September 1997. It cites the following passages:

— meeting on 8 March 1995: '[Bavaria] and [Interbrew Nederland] both said that they had serious problems with Mr... in the Netherlands' (footnote 491 to the contested decision);

— meeting on 12 May 1997: mention was made of the 'price increase' and 'private labels as a sword of Damocles... psychological pressure from Grolsch and Heineken in particular to increase prices of private label beer' (footnote 493 to the contested decision);

— meeting on 19 June 1997: there was discussion of 'the conduct to be adopted in the private labels segment and, in this connection, Interbrew's position vis-à-vis Martens (regarded as an unwelcome guest in the world of Dutch beer)' (footnote 494 to the contested decision);

— meeting on 8 September 1997: mention was made of 'the situation on the private labels market in the Netherlands and the fact that Bavaria had taken a customer from Interbrew... lower limit offer made to [customer]... Bavaria changing the status quo...' (footnote 495 to the contested decision).

127 The Commission interprets these documents as proof that the bilateral consultations between Bavaria and InBev made it possible to maintain an 'armed peace' or a 'non-aggression pact' as regards private label beer (recital 223 to the contested decision).

128 In recital 227 to the contested decision, the Commission mentions the letter dated 26 September 1997, sent by an exports manager for Interbrew Nederland to an exports manager at Interbrew's head office regarding 'beer sales in Germany and private labels':

'I recently spoke about this with our main competitor in the Netherlands and on that occasion I learnt that they were to meet... on whether or not to increase the volume of TIP beer for 1998. I asked about the price level towards which they expected to work and he confirmed to me exactly the same price, minus a contribution earmarked for the head office of..., and the fact that he would accept a volume of around 200 000 hl at that price.'

129 According to the Commission, it is clear that Interbrew requested and obtained from Bavaria detailed information on prices and volumes relating to the possible supply, by Bavaria, of private label beer to a major German retail chain. The Commission takes the view that this confirms the statement by InBev according to which Interbrew and Bavaria exchanged information on the price levels offered to customers of private label beer. In addition, the Commission asserts that this fact was acknowledged by InBev in a letter dated 21 February 2006 (recital 228 to the contested decision).

130 In recital 234 to the contested decision, the Commission mentions the following statement by the Haacht brewery regarding the meeting held on 14 or 15 June 1998 between Bavaria, Interbrew Nederland and the Belgian brewers Interbrew Belgique, Alken-Maes, Haacht and Martens:

'In the course of that meeting, the Dutch breweries were told about the content of the exchange of information between the Belgian participants. The Dutch breweries consented to an exchange of information on volumes, types of packaging, the length

of contracts and possible renewal dates, and customers. With regard to prices, the participants agreed in principle not to exchange information on this subject...

The participants [in] the meeting considered that a neutral party should be given the job of centralising the exchange of information. This request was made because the parties present on the Netherlands market did not trust the other parties. Haacht was invited to centralise the information since it was not active on the Netherlands market.'

131 The Commission takes the view that, on this point, that statement confirms the statement by InBev (recital 235 to the contested decision).

132 In recital 236 to the contested decision, the Commission mentions the handwritten notes from the abovementioned meeting held on 14 or 15 June 1998, which were discovered in the office of the secretary of a chair of Bavaria's management board:

'Martens → nothing has ever taken shape in the Netherlands

→ bottom – market – price breaker

|→ price offers are made

Interbrew Nederland – Martens -> offer made to a major private label customer

de distributeur

...

7.68 [circled]

Martens – “price drop Belgium”

now NL →...

Interbrew Belgique has made the first move concerning P[rivate] L[abels]

only for ...

Pilsener ...

/ \ / \

multiple single

... – “decided” |→ at Interbrew

CAT I+II'.

133 According to the Commission, these notes confirm that Interbrew Belgique took the initiative at a meeting on private label beer during which it decided that the contract with a retail purchasing organisation 'would go to Interbrew in the Netherlands' (recital 237 to the contested decision).

134 As regards this latter meeting, the Commission also mentions the following statement by an off-trade manager for InBev, submitted by InBev on 21 February 2006 in response to a request for information (recital 238 to the contested decision):

'At one point..., Mr... from... disclosed a low price which Martens had offered him. He told me that he had obtained a price of NLG 0.32 per bottle. This corresponds to the amount of NLG 7.68 per crate of 24 bottles mentioned in the notes by Mr … [manager for Bavaria]. During those discussions, which took place from April to the beginning of June 1998, I suggested to him moving to category II and thereby benefiting from lower excise duties. Eventually, at the beginning of June 1998, we concluded an agreement with... on the supply of a new... category II beer... Following the reduction in excise duties as a result of the move to a category II beer, we were able to propose an amount of NLG 6.36 (including the excise reduction of NLG 0.84), thus fending off the offer from Martens.

...

At the time of the meeting held on 14 or 15 June 1998,... Interbrew had reached agreement with... on supplies of category I... and category II beer. In the course of that meeting, I reported on the discussions and on the agreement reached with... for two

reasons. Firstly, I wanted to confront Martens with the offer which it had made to..., since it had always denied having made price offers in the Netherlands. Secondly, I was keen to inform the other participants that they should no longer make offers to..., in view of the agreement concluded between Interbrew and.... Line n of the [document referred to in recital 236 to the contested decision] bears witness to my communication relating to the conclusion of the contract for the supply of category I and category II beers between... and Interbrew. The existence of that agreement... is evident from the fax of 24 June 1998.'

135 In recital 240 to the contested decision, the Commission mentions a statement by the Belgian brewer Haacht regarding the second Belgian-Dutch meeting held on 7 July 1998, according to which:

'This was the last meeting which was organised between the parties. At the meeting, Haacht circulated the information collected on the Netherlands market.

The parties then changed subjects and discussed certain less important points, but the representative [of] Haacht did not take part in that discussion. Whatever the case, no important information was exchanged on these subjects. This meeting gave the impression of not producing anything concrete.'

136 According to the Commission, the statement by an off-trade manager for Interbrew confirmed the statement by Haacht according to which this was the last Belgian-Dutch meeting. The Commission takes the view that the decision to put an end to these meetings was taken for a specific reason, namely the fear that the Dutch competition authority would make an incursion into one or more breweries, which is confirmed by the statement by InBev (recital 241 to the contested decision).

137 In recital 248 to the contested decision, the Commission mentions a Heineken internal statement according to which 'the extremely low prices currently applied by the Belgian brewery Martens... are frustrating the policy of taking the bottom of the market to a higher price level.'

138 Lastly, in recital 249 to the contested decision, the Commission mentions the statement made during its inspection on 23 March 2000 and signed by a managing director of Grolsche Bierbrouwerij Nederland, who became chair of the board of directors at Koninklijke Grolsch:

'He took the document... entitled "Price scenarios based on a net increase in wholesale prices of NLG 2.00 per hl", which includes the annotation "CBK — Fie — always take away" to the meetings of the CBK Working Party on finance. He used that document to draw the attention of Interbrew and Bavaria (the producers of private label beer in the Netherlands) on price determination, in his view unjustifiable, for private label beer (less than 10 florins per crate).'

139 In the same recital to the contested decision, the Commission also mentions the following statement by a managing director of Heineken Nederland:

'I had already been present at a meeting of the CBK where others spoke about price determination for private labels. Such comments will have been made to express a concern. I did not react because in principle Heineken is not involved in the production of private labels.'

140 The Commission infers from the passages cited in recitals 248 and 249 to the contested decision that the producers of private label beer (Interbrew and Bavaria) revealed their price strategy to Heineken and to Grolsch, which are not active in that sector (recital 248 to the contested decision). It concludes that the bilateral discussions between Interbrew and Bavaria seeking to increase the price of private label beer formed part of the general discussions held between the four brewers (recital 252 to the contested decision).

141 It should be stated that the evidence set out above corroborates the statement by InBev and justifies the finding that representatives of Heineken, Grolsch, Interbrew and Bavaria met regularly in a cycle of informal meetings known as the 'Catherijne consultation' or 'Working Party on agenda', whose composition varied (statement by InBev cited in recital 45 to the contested decision; other evidence examined in recitals 65 to 222 to the contested decision). The 18 meetings mentioned in the contested decision, which are part of that cycle, took place on 27 February 1996, 19 June 1996, 8 October 1996, 8 January 1997, 1 May 1997, 2 September 1997, 16 December 1997, 17 December 1997, 12 March 1998, 9 April 1998, 3 July 1998, 15 December 1998, 8 January 1999, 4 March 1999, 10 May 1999, 11 August 1999, 19 August 1999 and 3 November 1999.

142 As far as the content of the discussions held in those meetings is concerned, the abovementioned evidence corroborates the statement by InBev and proves the following:

— with regard to the off-trade sector:

— the four brewers discussed prices (statement by InBev cited in recital 51 and other evidence cited in recitals 76, 129, 156, 174, 193, 212 and 213 to the con-

tested decision) and increases in the price of beer in the Netherlands (statement by InBev cited in recital 51; other evidence cited in recitals 76, 89, 117 and 179 to the contested decision);

— discussions on prices were also pursued through bilateral contacts, including between Grolsch and Heineken in July 1999 (document cited in recitals 212 and 213 to the contested decision);

— concrete price proposals were discussed (Interbrew internal letter mentioned in recital 89 to the contested decision) and information exchanged was sometimes quite detailed (documents mentioned in recitals 129 and 174 to the contested decision);

— in 1997 and 1998 there was a consensus between the brewers on implementing a price increase before or during 1998 (documents mentioned in recitals 89, 174 and 179 to the contested decision);

— the producers of 'A brand' beer (Heineken and Grolsch), unlike the producers of 'B brands' (private label beer) (Interbrew and Bavaria), which were opposed, insisted that the price increase be implemented 'in two phases', first for B brands and then for A brands, and that the rate of increase be differentiated between A brands and B brands (statement by InBev cited in recital 53; other evidence mentioned in recitals 76, 89, 100, 117 and 193 to the contested decision);

— Bavaria announced (probably at the meeting held on 12 March 1998) its intention to increase its prices (evidence mentioned in recitals 129 and 179 and statement by InBev cited in recital 51 to the contested decision). The other brewers would probably follow Bavaria by increasing their prices subsequently (statement by InBev cited in recital 51 to the contested decision);

— as far as the monitoring mechanism was concerned, it was agreed that the increases made by Bavaria should be demonstrable in the figures from the supermarkets' database compiled by AC Nielsen (documents mentioned in recitals 129 and 179 to the contested decision);

— there is no evidence that the price increase planned for 1998 took place;

— in the consultations on prices, the brewers discussed the situation of certain specific supermarkets (handwritten notes mentioned in recitals 76 and 156 to the contested decision);

— during discussions, the participants indicated specific price figures (documents mentioned in recitals 76, 89, 117, 129 and 174 to the contested decision);

— with regard to private label beer:

— from 1995, the two Dutch producers of private label beer (Interbrew and Bavaria), on several occasions, expressed their concerns over the plans by the Belgian brewer Martens to penetrate the Dutch market in that sector

(statement by InBev cited in recital 55; other evidence cited in recitals 224, 236, 238 and 248 to the contested decision);

— these concerns were discussed in the bilateral consultations between Bavaria and InBev (statement by InBev cited in recital 52; Interbrew internal letter cited in recital 227 to the contested decision) and five bilateral meetings (on 8 March 1995, in the second half of March 1997, on 12 May 1997, 19 June 1997 and 8 September 1997) on the subject of this problem (documents mentioned in recital 224 to the contested decision);

— two 'Belgian-Dutch' meetings took place in Breda on 14 or 15 June 1998 (documents mentioned in recitals 234, 236 and 238 to the contested decision) and on 7 July 1998 (statement by Haacht cited in recital 240 to the contested decision) between Interbrew Nederland, Bavaria and the Belgian brewers Interbrew Belgique, Alken-Maes, Haacht and Martens (statement by InBev cited in recital 55 to the contested decision);

— subjects connected with private label beer were also discussed in the presence of Heineken and Grolsch (which are not active in that segment) as part of the general discussion (statement by InBev cited in recital 54; other evidence mentioned in recitals 156, 193, 248 and 249 to the contested decision);

— the brewers discussed prices of private label beer (statement by InBev cited in recital 54; other evidence mentioned in recitals 193, 199, 227, 236, 238 and 249 to the contested decision);

— Heineken and Grolsch exerted 'psychological pressure' on Bavaria and Interbrew to increase prices of private label beer (documents mentioned in recital 224, in footnote 493 and in recital 248 to the contested decision) by refusing to increase the prices of A brands (statement by InBev cited in recital 53 to the contested decision);

— it was agreed both at bilateral level between Interbrew Nederland and Bavaria and at multilateral level between the Dutch and Belgian brewers active in the sector not to attempt to poach customers and to respect the respective volumes of private labels in the Netherlands and in Belgium; it was decided, among other things, that the contract with a retail purchasing organisation would go to Interbrew Nederland (statement by InBev cited in recital 55; documents mentioned in recitals 224, 236 and 238 to the contested decision);

— the brewers exchanged information on the commercial conditions offered to certain specific customers (letter mentioned in recital 227 to the contested decision and documents mentioned in recitals 236 and 238 to the contested decision);

— during discussions, the participants indicated specific price figures (documents mentioned in recitals 236, 238 and 249 to the contested decision);

— with regard to the on-trade sector:

— the four brewers discussed prices (documents mentioned in recitals 174, 193 and 197 to the contested decision) and price increases (handwritten notes mentioned in recital 76 to the contested decision) in the on-trade sector;

— there was an agreement between the brewers known as the 'sliding scale', which concerned the amount of the discounts to be granted to on-trade customers (statement by InBev cited in recital 48; handwritten notes mentioned in recitals 92, 143 and 165 to the contested decision) and which the brewers should 'respect' (handwritten notes mentioned in recital 92 to the contested decision); respect for that agreement was monitored and known infringements were discussed in the 'Catherijne' meetings (statement by InBev cited in recital 48 to the contested decision);

— the consultations also related to the introduction of restrictions seeking to maintain the status quo in the sector by avoiding stealing customers from other brewers (statement by InBev cited in recital 48; Heineken internal letter concerning Bavaria's poaching of a student association, cited in recital 184 to the contested decision);

— the discussions on such restrictions were also pursued through bilateral contacts; for example, on 9 September 1998, managers from Heineken and from Bavaria discussed Bavaria taking an on-trade customer from Heineken (Heineken internal letter cited in recital 184 to the contested decision);

— the brewers exchanged information on certain customers and specific points of sale (documents mentioned in recitals 92, 143, 156, 165 and 184 to the contested decision);

— during discussions, the brewers mentioned precise figures concerning the level of discounts and commissions for reductions (handwritten notes mentioned in recitals 143 and 165 to the contested decision).

143 It is in the light of this evidence that it is necessary to examine the applicants' arguments relating to the three aspects of the conduct in question, consisting, first, in coordinating prices and price increases for beer in the Netherlands in both the on-trade and the off-trade sector, including with regard to private label beer, second, in occasionally coordinating other commercial conditions offered to individual customers in the on-trade sector in the Netherlands and, third, in occasionally coordinating customer allocation, in both the on-trade and the off-trade sector in the Netherlands (Article 1 of and recitals 257 and 258 to the contested decision).

— The facts relating to the findings, first, of coordination of prices and price increases for beer and, second, occasional coordination of customer allocation

144 The applicants claim, in essence, that the handwritten notes produced by the representatives of the brewers at the meetings in question are interpreted by the Commission in a partial and tendentious manner.

145 They point out that the handwritten notes from Bavaria and from Grolsch are difficult to understand for anyone except those who wrote them. In their observations, they merely address the relevance and the interpretation of certain documents emanating from themselves and of other documents on the subject of which their response to the Commission was reproduced in the text of the contested decision. Moreover, the applicants simply state that the notes mentioned by the Commission are open to a variety of interpretations and that they are not therefore sufficient to prove the existence of an infringement beyond any reasonable doubt.

146 The applicants contest the interpretation of the evidence mentioned in recitals 76, 89, 117, 156, 165, 174, 175, 179, 184, 199, 212, 213, 248 and 249 to the contested decision (see paragraphs 99, 101, 106, 114, 116, 118 to 120, 124, 125, 137 and 138 above).

147 Before examining the applicants' arguments concerning the abovementioned evidence, it should be noted that the majority of the factual findings set out in paragraphs 141 and 142 above are based on several pieces of evidence.

148 With regard to the notes of 19 June 1996 and 17 December 1997 (mentioned in recitals 76 and 117 to the contested decision), the applicants do not dispute the Commission's interpretation of their content, but the way in which their own initial responses regarding those documents were reproduced in the contested decision. Furthermore, the factual findings which the documents in question tend to support are not affected at all by the comments made by the applicants according to which, in their replies, they did not claim that there was a 'negotiation', but only that the discussions at the meeting held on 19 June 1996 probably related to private label beer and they did not criticise the Commission's interpretation of the notes of 17 December 1997 on the ground that the market segment in question cannot be determined, but claimed that those notes did not provide convincing evidence of an unlawful consultation.

149 Furthermore, the notes mentioned in recitals 76 and 117 to the contested decision are corroborated, in relation to each of the findings, by several other items of uncontested evidence (see paragraph 142 above). The same is true of the documents mentioned in recitals 165, 199, 212 and 213 to the contested decision. There is therefore no need to examine individually those documents and the applicants' observations on them for the purposes of the analysis of the facts of the case.

150 The handwritten notes of 3 July 1998 by a member of the board of directors of Bavaria, the Heineken internal memo and the statements by a managing director of Grolsche Bierbrouwerij Nederland, who became chair of the board of directors at Koninklijke Grolsch, and by a managing director of Heineken Nederland (mentioned in recitals 156, 248 and 249 to the contested decision) represent important evidence for the finding that subjects connected with private label beer were discussed in the presence of Heineken and Grolsch (see paragraph 142 above). The applicants do not challenge that finding. However, they do object to the conclusion that Heineken was involved in those consultations between Bavaria and Interbrew. This argument concerning the legal categorisation of the applicants' conduct will be considered as part of the analysis of the existence of agreements or concerted practices (see paragraphs 194 to 198 below).

151 The Heineken internal letter concerning Bavaria's poaching of a student association (mentioned in recital 184 to the contested decision) is the only piece of evidence which specifically bears witness to discussions between the brewers (in this instance Heineken and Bavaria) on the subject of on-trade customers being stolen (see paragraph 142 above). The applicants do not deny that, on that occasion, Bavaria proposed discussing the problem with Heineken, or even resolving it by means of compensation. However, they argue that this was not done and that Heineken would not have allowed it either. The applicants deny, moreover, the existence of a system of compensation between the brewers in the event of customers being poached.

152 These claims made by the applicants are not plausible. In the contested decision, the Commission rightly notes that the sentence '[t]he hectolitres lost could then have been compensated for in some other way', in the text of the letter in question, indicates that there was no discussion between Heineken and Bavaria on the need for compensation, but only on the means of obtaining compensation (recital 185 to the contested decision), and that the use of the words 'well-known rhetoric', 'emphasis' and 'voluntarily' signifies that, according to the author, who comes from the Heineken

group, Bavaria is suspected of failing to respect a rule that brewers must not actively solicit on-trade customers from other brewers (recital 188 to the contested decision).

153 Consequently, the evidence mentioned in recitals 184 to 188 to the contested decision corroborates the statements contained in the statement by InBev, cited in recital 48 to the contested decision, regarding the existence of an arrangement not to steal on-trade customers.

154 The documents discovered in the office of an off-trade sales manager for Grolsche Bierbrouwerij Nederland (mentioned in recitals 174 and 175 to the contested decision) and the Heineken internal memo of 14 October 1998 (mentioned in recital 179 to the contested decision) tend to demonstrate the existence, in 1997 and in 1998, of a consensus between the brewers on implementing a price increase before or during 1998 (see paragraph 142 above).

155 As regards the note 'agenda c[ommiss]ie CBK' on the documents mentioned in recitals 174 and 175 to the contested decision, the applicants claim that they do not know the reasons which led the manager from Grolsch to make such a note and that a personal note cannot constitute convincing proof of the existence of a cartel.

156 However, they do not deny the Commission's finding that those documents show that prices and competition in the off-trade sector were discussed at meetings of the CBK Working Party on agenda, and they do not offer any explanation in relation to the fact that the manager from Grolsch was in possession of a Heineken price list and information about Bavaria's price increase at such a meeting.

157 With regard to the statement in the Heineken internal memo (mentioned in recital 179 to the contested decision) according to which 'the price increase promised by Bavaria in the CBK is not apparent in the [figures] from Nielsen', the applicants comment that the use of the term 'promise' to describe a price increase announcement by Bavaria, which had been known about on the market for some months, does not constitute convincing proof of a cartel. In addition, this conclusion is contradicted by the fact that Heineken opted not to increase its prices until February 2000.

158 In this regard, as the Commission rightly states in recital 182 to the contested decision, to interpret the word 'promise' as simply 'mentioning' a price increase is a departure from its ordinary meaning. The finding of the existence of a commitment by Bavaria to increase its prices is made even more plausible by the mention of the fact that the increase 'is not apparent in the [figures] from Nielsen'. It has already been stated that the supermarket cash register data compiled by AC Nielsen were used as a monitoring tool through which the price increase by Bavaria was to be made 'demonstrable' (see recital 133 to the contested decision and paragraph 142 above). The reference to those data falls more logically into the context of monitoring the implementation of a commitment than verifying a simple mention.

159 With regard to the applicants' argument that Heineken did not increase its prices until February 2000 (whereas the agreed rise was planned for 1998), it is sufficient to note that the simple failure to execute an agreement on prices does not in itself mean that the agreement itself never existed.

160 Lastly, the existence of a consensus to increase prices in 1998 is very clear from the Interbrew internal letter of 25 March 1997 (cited in recital 89 to the contested decision). The applicants' interpretation to the effect that the letter concerns Interbrew's negotiations with its buyers (that is to say, with supermarkets) and not with other

brewers is not convincing in view of the explicit mention of the 'main brewers' as the parties to the 'consensus' in the text of the letter.

161 The fact that the price increase mentioned in the letter was to happen 'before 1998', when the abovementioned evidence was produced in 1998, also cannot confirm the applicants' view that there is no link between those documents. It is conceivable that, on account of the difficulties connected with the negotiation of the arrangements for implementation (in particular, the differentiated price increase for A and B brands referred to in the Interbrew internal letter), the price increase initially planned for a date in 1997 was first put back to the following year and then abandoned by the brewers.

162 In addition, contrary to the claims made by the applicants, the accuracy of the Interbrew internal letter of 25 March 1997 and, more specifically, of the mention of the existence of a 'consensus' is not disproved either by the statements by the managers from InBev (see paragraphs 82 and 83 above) or by the fact that Heineken reportedly did not increase its prices until February 2000 (see paragraph 159 above).

163 In the light of all the foregoing, the body of evidence relied on by the Commission is sufficient to corroborate the statement by InBev in relation to the factual findings concerning coordination of prices and price increases and customer allocation. Moreover, the validity of those findings is not called into question by the applicants' arguments concerning the evidence set out in paragraph 146 above.

164 Consequently, the applicants' arguments alleging an error of assessment of the facts relating to these two aspects of the infringement in question must be rejected.

— The facts relating to the finding of occasional coordination of other commercial conditions offered to individual customers in the on-trade sector

165 The applicants claim that the Commission did not establish that the undertakings concerned coordinated commercial conditions, other than prices, granted to customers in the on-trade sector.

166 The Commission takes the view that the handwritten notes mentioned in recitals 67 and 138 to the contested decision contain proof of occasional coordination, between the four brewers, of certain commercial conditions, such as conditions for loans, offered to individual on-trade customers (recital 258 to the contested decision).

167 The handwritten notes cited in recital 67 to the contested decision include the following: 'Guarantees/financing: fin[ancing] for... in excess of needs of specific points. So... mil[lions]'.

168 According to the Commission, this quotation therefore means that, at the meeting held on 27 February 1996, the brewers discussed the guarantees and financing granted or to be granted by one or more brewers to specific sales outlets (recital 68 to the contested decision).

169 However, it should be noted that the applicants propose another interpretation of the passage mentioned by the Commission, stating that it was part of a discussion on 'bad debtors'.

170 In recital 138 to the contested decision, the Commission mentions the handwritten notes by an on-trade manager for Bavaria relating to the meeting held on 12 March 1998, containing the following passage: 'Bav interest…%? unless there is an advertising allowance'. According to the Commission, this passage proves that a discussion was held concerning the level of interest rates applied to loans granted to on-trade points of sale (recital 142 to the contested decision).

171 However, even supposing that the Commission has correctly interpreted the handwritten notes, the isolated and laconic nature of such a reference and the absence of any specific information concerning participation by the other brewers in a discussion on the subjects in question do not allow those notes to be regarded as sufficient proof of the existence of collusion in relation to occasional coordination of certain commercial conditions.

172 In its answers to the questions asked by the Court, the Commission claims that the handwritten notes, mentioned in recitals 67 and 138 to the contested decision, are corroborated by the statement by InBev, according to which, first, the 'Catherijne' meeting on 12 March 1998 was devoted both to on-trade and to off-trade matters and, second, the participants in the 'Catherijne' meetings consulted on investments in the on-trade sector in order to avoid taking customers.

173 It must nevertheless be stated that the two passages cited by the Commission and the reference made by the Commission to 'the spirit of the statement by InBev' do not offer a specific indication as to the existence of discussions between the brewers concerning the coordination of loan conditions and cannot therefore support the conclusion to that effect drawn by the Commission.

174 Consequently, it should be noted that the finding by the Commission relating to occasional coordination, between the brewers, of the loan conditions offered to individual on-trade customers is based on fragmentary and imprecise evidence.

175 In view of the isolated and laconic nature of the references made in the handwritten notes mentioned in recitals 67 and 138 to the contested decision and the plausible interpretation suggested by the applicants and the absence of specific indications in this regard in the statement by InBev, it should be stated that the Commission did not demonstrate, to the requisite legal standard, that the infringement in question included 'occasional coordination of other commercial conditions offered to individual consumers in the on-trade segment in the Netherlands'.

176 The finding made to this effect, in recital 258 to and in Article 1 of the contested decision, cannot therefore be regarded as established.

177 Consequently, the applicants' arguments alleging an error of assessment of the facts relating to occasional coordination of other commercial conditions offered to individual customers in the on-trade sector must be accepted.

— The alleged error of law and in the treatment of the facts

178 The applicants claim that the finding by the Commission as to the existence of a complex of agreements and/or concerted practices between undertakings within the meaning of Article 81 EC stems from an error relating to the interpretation and the application of that provision (recitals 337 and 341 to the contested decision).

179 It should be stated, first of all, that, in the multilateral meetings and their bilateral contacts, on several occasions the four brewers exchanged sensitive information on the market (prices, the amount of discounts and specific offers to certain customers), which were sometimes fairly detailed (documents mentioned in recitals 129 and 174 to the contested decision) and included specific figures for prices (documents mentioned in recitals 76, 89, 117, 129 and 174 to the contested decision), discounts and commissions for reduction (documents mentioned in recitals 143 and 165 to the contested decision), as well as information on customers and points of sale both in the on-trade sector (documents mentioned in recitals 92, 143, 156, 165 and 184 to the contested decision) and in the off-trade sector (documents mentioned in recitals 76 and 156 to the contested decision).

180 Certain specific proposals concerning conduct on the market were also discussed, in particular the proposal to implement a two-phase price increase in the off-trade sector (document mentioned in recital 89 to the contested decision).

181 In addition, the fact that no official minutes were ever taken for the 'Catherijne' meetings, that the substance of the discussions was almost never reflected in an internal memo and that agendas and notes from those meetings were destroyed in November 1998 (statement by InBev cited in recital 61 to the contested decision) indicates that, contrary to the claims made by the applicants, the discussions were secret and that the participants were aware that their conduct was unlawful and attempted to conceal it.

182 Contrary to the claims made by the applicants, it is apparent from the documentary evidence examined by the Commission that a consensus was reached on certain proposals, such as on awarding a contract with the retail purchasing organisation to Interbrew (document mentioned in recital 236 and footnote 531 to the contested

decision) and on the concerted price increase before or during 1998 (document mentioned in recital 89 to the contested decision).

183 The existence, in this latter case, of an agreement within the meaning of Article 81 EC is not called into question either by the likelihood that the consensus between the brewers did not extend to the practical arrangements for implementing the price increase or the fact that that increase never actually took place on the market.

184 Even supposing that an agreement was never reached on specific elements of the planned restriction, the Commission rightly found that, by regularly holding their discussions, the brewers had clearly shown their common intention to reach an anti-competitive agreement (recital 341 to the contested decision).

185 All the same, the continued exchange of sensitive information, which was not publicly available and which the representatives of the four brewers found useful to note on their agendas and to mention in their internal correspondence, certainly had the effect of reducing, for each of them, uncertainty over the conceivable conduct of their competitors.

186 In this regard, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That will be all the more true where the undertakings concert together on a regular basis over a long period, as was the case here (see, to that effect, *Hüls* v *Commission*, cited in paragraph 46 above, paragraph 162).

187 The applicants essentially consider that they have rebutted this presumption by showing that, despite the discussions, the four brewers determined their conduct on the market autonomously.

188 That argument cannot be accepted. It is certainly true that both the statements by the managers from InBev and the fact that Heineken did not increase its prices until February 2000 demonstrate that, during the period in question, each brewer pursued its own policy on the market. Nevertheless, even though this finding may show the absence of formal commitments or actual coordination between the brewers, it is not sufficient to prove that the brewers never took into account the information exchanged at the meetings in question in order to determine their conduct on the market as they wished.

189 The applicants have not therefore successfully rebutted the presumption established by the case-law cited in paragraph 186 above.

190 Consequently, it should be stated that the constituent elements of a concerted practice, based on the case-law cited in paragraphs 46 and 47 above, are present in this case.

191 In these circumstances, it should be noted that the Commission was entitled to characterise the conduct in question as a 'complex of agreements and/or concerted practices' in so far as that conduct involved at one and the same time elements to be characterised as 'agreements' and elements to be characterised as 'concerted practices'. Given such a complex factual situation, the dual characterisation by the Commission in Article 1 of the contested decision must be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 81 EC, which lays down no specific category for a complex infringement of

this type (see, to that effect, *Hercules Chemicals* v *Commission*, cited in paragraph 44 above, paragraph 264).

192 The applicants nevertheless dispute that their alleged conduct had an anti-competitive object. They claim, in particular, that the object of the meetings was never to consult secretly on competition-sensitive conduct. Occasionally there might have been discussion of the market situation, including consumer prices on the off-trade market and offers to certain on-trade customers. However, the discussions covered such a number of important subjects for the sector and would have been so informal and free that they could not have been described as 'consultations'.

193 It should be noted in this regard that the discussions on market-sensitive information, even assuming that they were occasional and held in conjunction with discussions on non-sensitive subjects, were clearly such as to establish coordination on the market and to reduce uncertainty over the conceivable conduct of competitors. It has already been shown that, even though the coordination between the brewers was not always very effective, the discussions on prices and conditions offered to specific customers enabled them to monitor closely certain aspects of their competitors' conduct and to determine their own conduct in the light of the information obtained (see paragraphs 185 to 189 above). The fact that the brewers' representatives found it useful to note this information on their agendas and to mention it in their internal correspondence is also an indication of the particular importance of that information to them and confirmation of the fact that, even though the anti-competitive effect of the consultations was not always achieved, it was objectively pursued by the participants.

194 Lastly, the applicants contest the Commission's finding that Heineken was involved in discussions held between Interbrew and Bavaria on the private label beer segment. They do not deny that they attended the multilateral meetings in question, but claim

that Heineken was not active in the relevant segment and that its involvement in the arrangements in question cannot be inferred from the fact that a concern regarding prices in the segment in question was expressed by Grolsch, another brewer which was not present in that segment, or from the fact that Bavaria and InBev had set themselves the objective of raising price levels in that segment (recitals 249 to 252 to the contested decision).

195 In this respect, the Court would point out that, according to settled case-law, where an undertaking has, even without playing an active role, attended a meeting during which unlawful concerted action has been mooted, it is deemed to have participated in that concerted action unless it proves that it openly distanced itself from it or informed the other participants that it intended to take part in that meeting in a spirit that was different from theirs (see Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 3199 and the case-law cited).

196 In the present case, it should be noted, first of all, that even though Heineken was not active in the private label beer segment, it is clear from the statement by InBev (recitals 54 and 247 to the contested decision) that the prices applied in that segment were a common concern for the four major brewers, including Heineken.

197 Secondly, the applicants do not dispute that Heineken was present at the unlawful discussions in question on prices in the private label beer segment, a fact confirmed by various pieces of evidence, mentioned in recitals 247 to 251 to the contested decision. The applicants also do not claim that Heineken openly distanced itself from those discussions or that it informed the other brewers that it intended to take part in the meetings in question in a spirit that was different from theirs. Consequently,

the simple fact that Heineken did not play an active role in those discussions, even if established, cannot exclude its liability.

198 Lastly, the file shows that Heineken's involvement in the discussions on prices of private label beer did not amount merely to passive participation in certain meetings and to its interest in the result of those discussions, but also included the pressure that it consciously exerted on Interbrew and Bavaria by refusing to increase the prices of its own brands before prices of private labels were increased. The fact that such pressure was exerted is also attested by the statement by InBev (cited in recital 54 to the contested decision) and by a document concerning the content of the meeting held on 12 May 1997 (mentioned in recital 224 to the contested decision), the interpretation of which is not contested by the applicants.

199 In the light of all the foregoing, the applicants' arguments alleging an error of law cannot be accepted.

200 Lastly, since the applicants have not demonstrated that the contested decision is vitiated by an error of law in the application of Article 81(1) EC, it is also necessary to reject their argument, based on essentially the same premiss, that the Commission misinterpreted that provision, in breach of the principle of the presumption of innocence, and thus failed to provide sufficient grounds in support of the finding of the infringement.

— Conclusion

201 Following the examination of the fifth and sixth pleas above, it should be noted that the Commission's finding as to the existence of occasional coordination of commercial conditions, other than prices, offered to individual consumers in the on-trade

sector in the Netherlands is not demonstrated to the requisite legal standard and cannot be accepted (see paragraphs 167 to 177 above).

202 Consequently, Article 1 of the contested decision must be annulled in so far as it establishes that aspect of the infringement in question and the amount of the fine imposed on the applicants must be adjusted accordingly. The practical consequences of that adjustment will be set out in paragraphs 435 and 436 below.

203 The remainder of the fifth and sixth pleas must be rejected.

The seventh plea, concerning the duration of the infringement

Arguments of the parties

204 The applicants dispute the determination of 27 February 1996 and 3 November 1999 as the start and end dates of the infringement attributed to them. They consider, among other things, that the start and end of the infringement must be directly proven by evidence and are subject to a heavier burden of proof, which is not satisfied in the present case, since the Commission does not have direct proof of the anti-competitive content of the discussions held at the meetings on 27 February 1996 and 3 November 1999.

205 With regard to the meeting on 27 February 1996, the applicants claim that the handwritten notes mentioned by the Commission in recital 67 to the contested decision concern a general discussion relating to 'bad debtors' in the on-trade sector, which cannot be regarded as restrictive of competition.

206 With regard to the meeting on 3 November 1999, the applicants state that the proof of its anti-competitive content is based on a reply by InBev to a request for information from the Commission (cited in recital 221 to the contested decision). They nevertheless consider that that reply is refuted by the more specific statements made by the managers from InBev who personally attended that meeting.

207 The Commission contests the applicants' arguments.

Findings of the Court

208 The duration of the infringement is an intrinsic element of an infringement under Article 81(1) EC, the burden of proof of which is borne principally by the Commission. In this regard, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79, and *Peróxidos Orgánicos* v *Commission*, cited in paragraph 91 above, paragraph 51).

209 In the present case, the applicants dispute the determination of both the start date and the end date of the infringement.

— The determination of the start date of the infringement

210 The Commission held 27 February 1996 to be the start date of the infringement in question, this being the date of the first 'Catherijne' meeting for which it had direct proof of the presence of the four brewers.

211 As was stated in paragraphs 167 to 177 above, the handwritten notes concerning that meeting, cited in recital 67 to the contested decision, do not, in themselves, constitute a body of evidence to justify, to the requisite legal standard, the finding of the infringement relating to occasional coordination of other commercial conditions offered to individual consumers in the on-trade sector.

212 However, this consideration does not mean per se that that same evidence cannot be used to determine the start date of the infringement as a whole.

213 Indeed, the meeting on 27 February 1996 was part of a series of periodic meetings which involved the same participants and took place in similar circumstances. They were known as the 'Catherijne consultation' and the 'Working Party on agenda', brought together representatives of the four Dutch brewers Heineken, InBev, Grolsch and Bavaria, were held in parallel with the official meetings of the CBK and the discussions held were never recorded in minutes and almost never in internal memos. In the statement by InBev, these meetings are also presented as forming part of a series and a table showing names, addresses, dates and locations of the majority of them, including the meeting on 27 February 1996, is annexed (recital 44 to the contested decision).

214 It has already been established, on the basis of both the statement by InBev and a large body of other evidence, that the meetings forming part of this series had an anti-competitive object (see paragraphs 179 to 184 above). Thus, first, a body of evidence showing the systematic character of the meetings and their anti-competitive content and, second, the statement by InBev, which has high probative value, show that, unless proved otherwise, the anti-competitive object applies to all the meetings forming the system, even in the absence of sufficient proof regarding the content of some of them.

215 The applicants essentially consider that this logic cannot be applied to the determination of the start and end dates of the infringement, claiming that, even though, in principle, that infringement can be assumed to have continued uninterruptedly between two specific dates, the start and end of the infringement are subject to a heavier burden of proof and must be established directly by evidence.

216 It should be noted in this regard that, in determining the start date of the infringement, the Commission did not merely rely on evidence relating to the meeting held on 27 February 1996.

217 In recitals 466 to 469 to the contested decision, the Commission states, with regard to each of the brewers concerned, including the applicants, that it participated in the infringement 'at least between 27 February 1996 and 3 November 1999'. In recital 56 to the contested decision, it also states that, according to the statement by InBev, the infringement began well before 1996, namely:

— 'in 1990 or even earlier' with regard to the discussions concerning increases in on-trade prices;

— in '1993-94' with regard to the discussions concerning discounts and transfers between brewers of on-trade points of sale;

— in '1987' with regard to the discussions between Oranjeboom-Interbrew and Bavaria concerning private label beer.

218 In view of the considerable probative value of the statement by InBev, the Commission was able to find that the infringement in question began at least on the date of the first meetings in 1996, set out in the table annexed to the statement by InBev, at which InBev was represented following its acquisition of Oranjeboom in 1995.

219 According to the statement by InBev, Heineken played a role in organising the 'Catherijne' meetings from the very beginning, in 1993 or in 1994. In addition, it has been shown, first, that Heineken was represented at the meeting on 27 February 1996 and, second, that, at the following meeting on 19 June 1996, the brewers continued anti-competitive discussions (see the handwritten notes mentioned in recital 67 to the contested decision and in paragraphs 99 and 100 above). Although Heineken's participation in that meeting has not been proven, the evidence relating to that meeting shows that Heineken's participation in a potential two-stage price increase was discussed.

220 In the light of the foregoing, the Commission was fully entitled to find that the applicants were involved in the infringement in question at least from 27 February 1996.

221 The fact that the contested decision did not determine the existence of an infringement before that date actually constitutes a concession to the addressees of the contested decision. In this regard, it should be noted that the Court is not called on to rule on the lawfulness or the expediency of that concession (see, to that effect, *JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraphs 340 and 341).

222 In these circumstances, with regard to a meeting forming part of a system of regular meetings whose anti-competitive character has been demonstrated to the requisite legal standard, the finding of the start date of the infringement cannot be called into question by the applicants' arguments alleging that there is insufficient tangible proof as to the content of the meeting on 27 February 1996.

223 Consequently, the complaint relating to the determination of the start date of the infringement must be rejected.

— The determination of the end date of the infringement

224 The Commission took 3 November 1999 to be the end date of the infringement for all the brewers concerned (recitals 466 to 469 to the contested decision), this being the date of the last 'Catherijne' meeting for which the Commission had direct proof of the presence of the four brewers. That meeting appears at the bottom of the chronological table annexed to the statement by InBev. According to a reply by InBev to a request for information from the Commission, the meeting on 3 November 1999 was a 'Catherijne meeting (on-trade matters/Working Party on agenda)[; a]s always in the Catherijne consultations, discussions were primarily about excessive agreements and peaceful coexistence' (recital 221 to the contested decision).

225 The applicants take the view that that statement is refuted by the more specific statements of the managers from InBev who attended the meeting held on 3 November 1999, quoting the following passages:

— 'On 19 August 1999, there was a consultation which I attended. On 3 November 1999, there was a meeting which Mr... and I attended. We did not speak specifically about conduct on the market in either case. The meeting had a more informal character';

— 'There were meetings of the four on-trade managers (Heineken, Grolsch, Bavaria and Interbrew). I attended just one of those meetings, on 3 November 1999 in Enschede. Mr... took me to introduce myself. That meeting did not have much substance. It was more a pleasant meeting without a specific agenda. General comments were made about discounts. I had the impression that there had already, for some years, been a sort of sliding scale system or a rule on discounts, but that was never explicitly stated. We only spoke about overall discount levels in very general terms, which was an opportunity to point out certain incidents. My feeling is that the sliding scale was not working. Each operator determined its own strategy. There were perhaps some attempts at intimidation, but everyone still did as they wished'.

226 It should be stated that, contrary to the claims made by the applicants, these passages do not refute the evidence invoked by the Commission. The references to 'excessive agreements', 'peaceful coexistence', the 'sliding scale' and the 'rule on discounts' clearly relate to the coordination of discount rates applied to on-trade customers. The only clarification made in the statements by the managers from InBev concerns the level of detail of the discussions, which were allegedly limited to 'general comments', and the absence of their effect on the market, namely the fact that 'the sliding scale was not working'. However, it has already been noted that neither the general nature of the discussions nor the absence of any effect on the market can refute the fact that the meeting in question constitutes an infringement (see paragraphs 78 and 79 above).

227 The fact that the meeting on 3 November 1999 formed part of a system of anti-competitive meetings (see paragraphs 213 and 214 above) and that the subjects discussed were connected with previous anti-competitive discussions also indicates that the very purpose of calling the meeting was to provide the necessary conditions so that those discussions could continue.

228 In any event, even supposing there is some contradiction between the statements by the employees of InBev relied on by the applicants, on the one hand, and InBev's reply to the request for information, on the other, it should be borne in mind that the probative value of the latter is higher, having regard to the case-law according to which a statement given on behalf of the undertaking as such carries more weight than that of an employee of the undertaking, whatever his individual experience or personal opinion (see, to that effect, *LR AF 1998* v *Commission*, cited in paragraph 90 above, paragraph 45).

229 Consequently, the complaint relating to the determination of the end date of the infringement and, therefore, the seventh plea in its entirety must be rejected.

The first plea, concerning a breach of the principle of sound administration and an infringement of Article 27 of Regulation No 1/2003, with regard to the refusal to grant access to the replies to the statement of objections made by other undertakings involved

Arguments of the parties

230 The applicants complain that the Commission refused their request for access to the replies to the statement of objections made by the other parties involved in the procedure, thus affecting their rights of defence. The applicants consider that it is clear from the contested decision that the Commission inferred evidence from those replies in order to determine the existence of the infringement and to justify the final amount of the fine, and that those replies contained exculpatory evidence from which they could have benefited. Consequently, they claim that, in the light of the principle of equality of arms, they should have had the opportunity to examine that evidence in order to establish their defence autonomously.

231 The applicants take the view, inter alia, that they should have had access to the replies by Bavaria and by Grolsch since, as is apparent from the contested decision, those brewers gave an authentic interpretation of the documents which were subsequently used as incriminating and exculpatory evidence vis-à-vis them. In particular, the applicants point out that, in recital 75 to the contested decision, the Commission mentions Bavaria's replies to the statement of objections in order to show that they attended the meeting held on 19 June 1996. In recitals 124 to 126 to the contested decision, the Commission also used an interpretation based on the replies by Bavaria to prove that beer prices were discussed at the meeting held on 17 December 1997. Lastly, the applicants state that, in recital 135 to the contested decision, the Commission refers to the claims made in the reply by Bavaria as evidence of certain inculpatory statements that they made at the meeting on 12 March 1998.

232 The applicants stress the importance of having access to the reply to the statement of objections by InBev, since they consider that the Commission essentially based the contested decision on its statements. For example, the applicants point out that it can be inferred from recital 476 to the contested decision and from the exchange of letters between the Commission and InBev in February 2006 that the replies to the statement of objections by InBev contained exculpatory evidence.

233 The Commission contests the applicants' arguments.

Findings of the Court

234 Under Article 27(2) of Regulation No 1/2003, '[t]he rights of defence of the parties concerned shall be fully respected in the proceedings[; t]hey 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...'

235 According to settled case-law, the right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that may be relevant for its defence (see, to that effect, Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraphs 125 to 128, and Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 81).

236 Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (*Aalborg Portland and Others* v *Commission*, cited in paragraph 51 above, paragraph 68).

237 As regards incriminating evidence, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if that uncommunicated document had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, cited in paragraph 51 above, paragraphs 71 to 73).

238 By contrast, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence (*Hercules Chemicals* v *Commission*, cited in paragraph 44 above, paragraph 81), demonstrating inter alia that it would have been able to put forward evidence which did not agree with the findings made by the Commission at the stage of the statement of objections and would therefore have been able to have some influence on the assessment in the decision (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 51 above, paragraph 75).

239 Furthermore, it should be pointed out that the statement of objections is a document whose aim is to delimit the scope of the procedure initiated against an undertaking and to ensure that the rights of the defence may be exercised effectively (Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 80 and the case-law cited).

240 It is from that aspect that the statement of objections is subject to procedural safeguards, pursuant to the principle of respect for the rights of the defence, one of which is the right of access to documents in the Commission's file.

241 The replies to the statement of objections are not part of the investigation file proper (see, to that effect, *Cimenteries CBR and Others* v *Commission*, cited in paragraph 195 above, paragraph 380).

242 Since they are documents which are not part of the file compiled at the time of notification of the statement of objections, the Commission is required to disclose those replies to other parties involved only if it transpires that they contain new incriminating or exculpatory evidence.

243 Similarly, under paragraph 27 of the Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7), as a general rule, the parties do not have access to the replies to the statement of objections of the other parties involved in the investigation. A party is granted access to such documents only where they may constitute new evidence, whether of an incriminating or of an exculpatory nature, pertaining to the allegations concerning that party in the Commission's statement of objections.

244 In this respect, concerning, first, new incriminating evidence, it is settled case-law that, if the Commission wishes to rely on evidence from a reply to a statement of objections in order to prove the existence of an infringement, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such new evidence (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 195 above, paragraph 386, and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 50).

245 A document cannot be regarded as an inculpatory document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of its rights of defence, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as further evidence of an infringement in which the undertaking participated (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 35).

246 In the present case, the applicants claim that the evidence based on the replies to the statement of objections made by Bavaria and by Grolsch were used by the Commission as new incriminating evidence. They make reference in this regard to recitals 75, 124 to 126 and 135 to the contested decision.

247 First of all, recital 75 to the contested decision refers to a passage concerning the reply to the statement of objections made by Bavaria, according to which it was 'very possible' that Heineken had been represented at the meeting on 19 June 1996. Although the Commission used this quotation, it nevertheless also stated that the file did not contain any proof of this fact. The recital in question does not state that Heineken was actually represented at the meeting in question, but only that, in any event, it attended the preceding meeting and the subsequent meetings.

248 In these circumstances, the quotation of the passage in question concerning the reply to the statement of objections made by Bavaria cannot be regarded as use of new incriminatory evidence.

249 Second, with regard to recitals 124 and 126 to the contested decision, which concern the meeting held on 17 December 1997, it is clear from recitals 117 to 121 to the contested decision that the subject-matter of that meeting was established on the basis of evidence contained in the investigation file.

250 It was only in order to respond to the arguments put forward by the undertaking concerned that the Commission made reference, in recitals 124 and 126 to the contested decision, to an alternative interpretation of that evidence provided by Bavaria in its reply to the statement of objections. It is also clear from those recitals that the interpretation put forward by Bavaria was not considered to be plausible and was not accepted by the Commission.

251 Lastly, with regard to recital 135 to the contested decision, which summarises another interpretation put forward by Bavaria of the evidence from the file relating to the meeting on 12 March 1998, it should be noted that that interpretation was explicitly rejected in recital 136 to the contested decision and that it could not therefore be accepted as further incriminating evidence.

252 In the light of these considerations, the applicants have not shown that the Commission used further incriminating evidence based on the replies to the statement of objections made by the other parties concerned.

253 On the other hand, as regards new exculpatory evidence, according to the case-law, the Commission is not obliged to make it available of its own initiative. If, during the administrative procedure, the Commission has rejected an applicant's request for access to documents which are not in the investigation file, an infringement of the rights

of the defence may be found only if it is proved that the outcome of the administrative procedure might have been different if the applicant had had access to the documents in question during that procedure (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 195 above, paragraph 383).

254 Moreover, the applicants may not rely on the argument, based on *Aalborg Portland and Others* v *Commission*, cited in paragraph 51 above, paragraph 126, that it cannot be for the Commission alone to determine the documents of use in the defence of the undertaking concerned. That argument, relating to documents within the Commission's file, cannot apply to the replies given by other parties concerned to the statement of objections.

255 Accordingly, contrary to the applicants' claim, respect for the rights of the defence cannot, as a rule, lead to an obligation on the Commission to disclose the replies in question to other parties, so that they can ascertain that there is no exculpatory evidence.

256 In so far as the applicants rely on the existence of the alleged exculpatory evidence in replies which have not been disclosed, it is for the applicants to provide prima facie evidence of the relevance of those documents for their defence.

257 Applicants must, in particular, indicate the potential exculpatory evidence in question or adduce evidence that it exists and therefore of its relevance for the purposes of the case (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 351 to 359).

258 In the present case, the applicants claim that it can be inferred from recital 476 to the contested decision, and from the exchange of letters which took place between the Commission and InBev following the reply to the statement of objections, that InBev provided information which could be understood to dispute the implementation of cartel agreements and the existence or the duration of the infringement in question.

259 With regard, first, to the alleged information regarding the effective failure to implement the cartel agreements in question, it should be pointed out that the fact that, in their replies to the statement of objections, the other parties concerned put forward substantially the same arguments as the applicants to claim that the cartel was not implemented cannot constitute exculpatory evidence (see, to that effect, *Jungbunzlauer* v *Commission*, cited in paragraph 257 above, paragraph 353).

260 Second, as regards the alleged evidence disputing the existence or the duration of the infringement, it should be noted that, in support of that argument, the applicants refer to the letter from InBev's adviser, dated 21 February 2006, sent in reply to questions from the Commission, which states that '[its] customers did not have … any intention to minimise in any way their role in the alleged events or to dispute materially the existence or the duration of an infringement'. However, contrary to the claims made by the applicants, it does not follow from this clarification alone that InBev's reply to the statement of objections could contain information capable of constituting exculpatory evidence.

261 In the light of the foregoing, the applicants have not indicated any exculpatory evidence which might stem from the replies to the statement of objections made by the other undertakings involved and, consequently, have not adduced any evidence of their relevance for their defence.

262 Consequently, the complaint concerning the alleged presence of exculpatory evidence in the replies in question must be rejected.

263 In the light of all the foregoing, the first plea must be rejected as unfounded.

The second plea, concerning a breach of the principle of sound administration, the 'duty of care' and the audi alteram partem rule, stemming from an alleged failure to carry out a careful and impartial investigation

Arguments of the parties

264 The applicants allege that the Commission failed to examine the relevant evidence in the present case carefully and impartially and used the evidence from the file selectively in order to support its view that an infringement of Article 81 EC was committed.

265 In particular, they claim that the Commission based the incriminating evidence on the statements made by InBev in connection with its leniency application, even though they were vague and contradictory and were not based solely on the declarations made by the authors of the statements and thus included, to some degree, 'hearsay evidence'.

266 Moreover, the applicants claim that, during the investigation procedure, the Commission breached the principle of sound administration by disregarding their arguments and, among other things, by rejecting their evidence in order to show that the Dutch beer market had not developed, during the period in question, in a way which pointed to the existence of agreements on prices.

267 The Commission contests the applicants' arguments.

Findings of the Court

268 It is settled case-law that the rights guaranteed by the EU legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

269 In the present case, with regard to the allegation that the Commission failed to examine the evidence carefully and impartially, it must be stated that, as has already been established following the examination of the fifth and sixth pleas above, the Commission set out sufficient proof of the existence of an infringement of Article 81 EC, as far as two aspects of the infringement in question were concerned (see paragraph 163 above). In the examination of those pleas, the Court has already considered the applicants' criticisms concerning the assessment of the statement by InBev and of the evidence seeking to establish proof to the contrary furnished in the administrative procedure.

270 In particular, in so far as the applicants' arguments seek to call into question the probative value of the statement by InBev, claiming it is vague and contradictory and includes 'hearsay evidence', they must be rejected on the grounds set out in the analysis of the fifth and sixth pleas in paragraphs 70 to 90 above.

271 In these circumstances, the applicants' arguments alleging the absence of a full, careful and impartial investigation merge with the arguments examined in connection with the fifth and sixth pleas above and do not require a separate examination.

272 Consequently, this plea cannot be upheld.

The third plea, concerning a breach of the principle of the presumption of innocence

Arguments of the parties

273 The applicants essentially allege a breach of the principle of the presumption of innocence on the ground that the Member of the Commission responsible for competition said, during a Dutch television programme, that 'consumers have paid too much for their beer', thereby prejudging the existence of a cartel on the Dutch beer market.

274 The applicants therefore consider that the infringement was presented as a fact well before the end of the administrative procedure, and even before they had been able to respond to the statement of objections.

275 In addition, the public statement made by the Member of the Commission in question did not allow the arguments put forward by the applicants in reply to the statement of objections to be examined by the Commission objectively and with the necessary distance.

276 The Commission contests the applicants' arguments.

Findings of the Court

277 It must be stated that the applicants' arguments concerning a breach of the principle of the presumption of innocence are not relevant to the outcome of the present dispute.

278 The existence of an infringement must be assessed having regard only to the evidence gathered by the Commission. Where the substance of an infringement is actually established following the administrative procedure, evidence of a premature manifestation by the Commission, during that procedure, of its conviction that the infringement exists is not of such a kind as to deprive the actual evidence of the infringement itself of its reality (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 195 above, paragraph 726).

279 In any event, the comments made by a Member of the Commission during a Dutch television programme, where he mentioned, in connection with examples of action taken by the Commission, that Dutch consumers 'have paid too much for their beer' as a result of the breweries' conduct, though the choice of his words might be unfortunate, cannot show that the Commission prejudged its decision.

280 The Commission, as a college, deliberates on the basis of a draft decision. In this regard, contrary to the claims made by the applicants, the comments by the Member of the Commission in question where he mentioned the action taken by the Commission certainly did not imply that the Commission considered the brewers' guilt to be already established.

281 Given that the words chosen by the Member of the Commission in question did not imply any finding of guilt on the part of the applicants, these considerations cannot be rebutted by the fact, mentioned by the applicants, that the comments in question were made before they could respond to the statement of objections. Consequently, this fact also does not allow the conclusion that the Commission failed to examine objectively and with the necessary distance the replies to the statement of objections made by the applicants.

282 In the light of the foregoing considerations, the third plea must be rejected as unfounded.

The fourth plea, concerning a breach of the reasonable time principle

Arguments of the parties

283 The applicants claim that the contested decision must be annulled on the ground that the total length of the procedure, and the length of each of its constituent stages, greatly exceeded what can be regarded as reasonable. They argue, in particular, that they were not able to prepare their defence, since, in the period prior to the receipt of the statement of objections, the precise subject-matter of the investigation was not clear. They also state that, with the passing of the years, recollection of the facts alleged by the Commission has been weakened.

284 The Commission states that, in recitals 497 to 500 to the contested decision, it expressly acknowledged that the length of the procedure was excessive and that it therefore granted an exceptional reduction of the fine imposed on the applicants. In addition, it points out that, although compliance with the reasonable time requirement in the conduct of administrative procedures is recognised in settled case-law, failure to adjudicate within that time can justify the annulment of a decision establishing an infringement only where it is shown that the breach of that principle adversely affects the rights of defence of the undertakings concerned.

285 In this regard, the Commission claims that the inspection decision of 17 March 2000 sent to the applicants made them aware, contrary to their claims, of the major part of the infringement and the markets and the period to which it related. According to the Commission, that decision made reference to anti-competitive practices consisting in price fixing, the allocation of markets and/or the exchange of information in the Dutch beer sector, in both the retail trade market and the on-trade market. The applicants' argument cannot be valid because of the detailed nature of the questions which the Commission sent it from 2001.

Findings of the Court

286 According to settled case-law, compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the EU judicature ensures (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 167 to 171, and Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 40).

287 For the purposes of the application of that principle, a distinction must be drawn between the two stages of the administrative procedure, namely the investigation stage preceding the statement of objections and the stage corresponding to the remainder of the administrative procedure, each corresponding to its own internal logic (*Technische Unie* v *Commission*, cited in paragraph 286 above, paragraph 42).

288 The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, under the powers conferred by the legislature, takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the infringement concerned (*Technische Unie* v *Commission*, cited in paragraph 286 above, paragraph 43).

— The length of the administrative procedure

289 In the present case, it should first be noted that, in recital 498 to the contested decision, the Commission acknowledged that the length of the administrative procedure had been excessive and that this fact was attributable to it.

290 As regards the first stage of the administrative procedure, from the notification of the applicants of the inspection decision in March 2000 until the receipt of the statement of objections in August 2005, a period of 65 months elapsed.

291 Since the inspections during the investigation were conducted in March and April 2000, the total length of that stage of the administrative procedure cannot be justified solely on the ground that the Commission sent the parties a series of requests for information between 2001 and 2005.

292 Thus, in the absence of further explanation or information from the Commission regarding the measures of inquiry undertaken during that period, the length of the first stage of the procedure must be regarded as excessive (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 245 above, paragraph 77).

293 The second stage of the administrative procedure, from the receipt of the statement of objections to the adoption of the contested decision in April 2007, lasted 20 months, thus exceeding, in the absence of further explanation, the time normally needed for the adoption of the decision.

294 Consequently, it should be held that the length of the administrative procedure in question was excessive and stemmed from inaction on the part of the Commission, resulting in a breach of the reasonable time principle.

— The effect of the excessive length of the administrative procedure on the lawfulness of the contested decision

295 It is settled case-law that a finding that there has been a breach of the reasonable time principle may result in the annulment of a decision establishing an infringement only where the length of the proceedings affected their outcome (see, to that effect, *Technische Unie* v *Commission*, cited in paragraph 286 above, paragraph 48 and the case-law cited).

296 In the present case, the applicants claim, first, that the excessive length of the first stage of the administrative procedure impaired their rights of defence, since they were not able to identify precisely the subject-matter of the investigation conducted by the Commission until the statement of objections was received, which undermined their possibilities of collecting exculpatory evidence.

297 It should be stated in this regard that the applicants wrongly claim that they were unable to identify the subject-matter of the investigation until the statement of objections.

298 First of all, the inspection decision, sent to Heineken NV and Heineken Holding NV on 17 March 2000, stated that the Commission's investigation related to specific anti-competitive practices such as 'price fixing, the allocation of markets and/or the exchange of information in the Dutch beer sector, in both the retail trade market and the on-trade market'. Second, the requests for information sent to Heineken NV in October 2001 specified the types of meetings, the dates and the locations being investigated by the Commission.

299 Contrary to the claims made by the applicants, those statements made them aware, with sufficient precision, of the subject-matter of the investigation, the infringements with which they could be charged and the market segments concerned, and therefore put them in a position to identify and collect any exculpatory evidence.

300 Moreover, even though the applicants make an argument alleging difficulties in collecting certain exculpatory evidence, stating that personal recollections of the persons concerned have become more vague, they fail to support that claim with specific evidence and, in particular, fail to specify the employees concerned and the reasons why it would have been crucial to call on their recollections and the circumstances because

of which it was no longer possible to obtain information from them (see, to that effect, *Technische Unie* v *Commission*, cited in paragraph 286 above, paragraph 64).

301 Moreover, by virtue of a general duty of care attaching to any undertaking or association of undertakings, the applicants are required to ensure the proper maintenance of records in their books or files of information enabling details of their activities to be retrieved, in order, in particular, to make the necessary evidence available in the event of legal or administrative proceedings. When the applicants received requests for information from the Commission under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87), it was a fortiori incumbent on them to act with greater diligence and to take all appropriate measures in order to preserve such evidence as might reasonably be available to them (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 245 above, paragraph 87).

302 In these circumstances, the applicants' claim that they were not informed, from the beginning of the investigation, of the subject-matter of the investigation or of any objections raised by the Commission, with the result that they were not able to prepare their defence or gather the exculpatory evidence available to them, cannot be accepted.

303 In the light of the foregoing, the applicants have not demonstrated the existence of an impairment of their rights of defence as a result of the excessive length of the administrative procedure.

304 Consequently, the fourth plea must be rejected as unfounded.

The eighth plea, concerning infringements of Article 23(3) of Regulation No 1/2003 and of the Guidelines, breaches of the principles of equal treatment, legal certainty, proportionality and 'reasonableness' and a breach of the obligation to state reasons, in relation to the determination of the amount of the fine

Arguments of the parties

305 The applicants dispute the way in which the Commission calculated the basic amount of the fine in the present case, and specifically its analysis of the gravity of the infringement, differential treatment, the multiplier applied as a deterrent and the increase by reason of the duration of the infringement. In essence, they consider that the infringement should not have been categorised as very serious and that the Commission breached its obligation to state reasons in so far as it did not provide sufficient reasons to justify certain stages in the determination of the final amount, including the effect on the market. In addition, the applicants claim that the Commission departed considerably from its previous decision-making practice, in particular in relation to its Decision 2003/569/EC of 5 December 2001 relating to a proceeding under Article 81 [EC] (Case IV/37.614/F3 PO/Interbrew and Alken-Maes) (OJ 2003 L 200, p. 1). Lastly, in the view of the applicants, in so far as the duration of the infringement was not correctly determined by the Commission, a reduction of the basic amount should be applied.

306 The Commission contests the applicants' arguments.

Findings of the Court

307 It should be noted as a preliminary point that, under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC. Under that same provision, for each undertaking and association of undertakings participating in the infringement, the fine may not exceed 10% of its total turnover in the preceding business year.

308 Moreover, according to settled case-law, the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Regulation No 1/2003 (see, to that effect, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 112).

309 In addition, in areas such as determining the amount of a fine under Regulation No 1/2003, where the Commission has such a discretion, review of the legality of its assessments is limited to determining the absence of manifest error of assessment (see, to that effect, Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 79).

310 The discretion enjoyed by the Commission and the limits which it has imposed in that regard have no bearing, however, on the exercise by the EU judicature of its unlimited jurisdiction (*JFE Engineering and Others* v *Commission*, cited in paragraph 50 above, paragraph 538), which empowers it to annul, reduce or increase the fine imposed by the Commission (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 60 to 62).

311 The present plea essentially comprises four limbs, regarding, first, the assessment of the gravity of the infringement in question, second, the determination of the starting amount and the application of differential treatment, third, the increase of the starting amount by reason of the deterrent effect and, fourth, the increase by reason of the duration of the infringement.

312 More generally, the applicants also raise a complaint alleging a breach of the principle of legal certainty, having regard to the unpredictable character of the fine imposed on them by the contested decision.

— The first limb, regarding the assessment of the gravity of the infringement

313 Under Article 23(3) of Regulation No 1/2003, in order to determine the amount of the fine, it is necessary to take into consideration the gravity and duration of the infringement.

314 According to settled case-law, the gravity of an infringement is assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, in respect of which the Commission has a margin of discretion (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 241, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 91).

315 In particular, according to the first paragraph of Section 1.A of the Guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

316 In the exercise of its unlimited jurisdiction, the Court must consider whether the amount of the fine imposed is proportionate to the gravity of the infringement and must weigh the seriousness of the infringement with the circumstances invoked by the applicants (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 136).

317 The applicants put forward three complaints seeking to call into question the determination by the Commission of the gravity of the infringement. First, they object to the categorisation of the infringement as very serious in the light of the nature and the objective of the collusion. Second, they allege that the Commission failed to examine the impact of the cartel on the market and breached its obligation to state reasons in this regard. Third, they consider that, contrary to the conclusions reached by the Commission, the geographic size of the market in question should have been taken into consideration as a moderating factor in determining the gravity of the infringement.

318 In their first complaint, the applicants claim that, in so far as the contested conduct was limited to a general exchange of views on the conditions on the market and did not take the form of a consultation on specific conduct, the infringement can only be categorised as minor or as serious. Furthermore, they state that, in the contested decision, the Commission dropped several aspects of the infringement compared with the statement of objections.

319 It is also important to bear in mind that very serious infringements within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines are 'generally horizontal restrictions such as price cartels and market-sharing quotas'.

320 Furthermore, it is settled case-law that agreements of this kind constitute one of the most serious forms of damage to competition, in that their aim is quite simply to eliminate competition between the undertakings which implement them, and therefore run counter to the fundamental objectives of the EU (see, to that effect, *Groupe Danone* v *Commission*, cited in paragraph 316 above, paragraph 147 and the case-law cited).

321 However, since the Commission rightly found that the applicants had participated in an infringement consisting in a complex of agreements and/or concerted practices the object of which was to restrict competition within the common market, in particular by coordinating prices and price increases and by customer allocation, the applicants' argument that the infringement could not be regarded as very serious cannot be accepted.

322 The finding made in recital 442 to the contested decision, according to which the infringement in the present case, by its very nature, should be categorised as very serious in accordance with the Guidelines, is not therefore vitiated by error. This conclusion cannot be rebutted by the fact that certain aspects of the infringement highlighted in the statement of objections were not accepted in the contested decision, in so far as that decision set outs the evidence to justify categorisation of the infringement as very serious.

323 In their second complaint, regarding the impact of the cartel on the market, the applicants take the view that the Commission wrongly categorised the infringement as very serious, since there was no significant impact on the market. They allege that the Commission failed to take into consideration the findings to this effect included in an economic report by experts which they submitted to it during the administrative investigation, the results of which were confirmed by another expert report which they had commissioned following the adoption of the contested decision. In addition, they claim that the Commission breached its obligation to state reasons by simply stating

that the effect of the infringement could not be measured. Furthermore, recitals 453 and 457 to the contested decision reach the opposite conclusion.

324 It should be pointed out that, while the existence of an actual impact of the infringement on the market is a factor to be taken into account in assessing the gravity of the infringement, it is one of a number of criteria, such as the nature of the infringement and the size of the geographic market. Likewise, it is apparent from the first paragraph of Section 1.A of the Guidelines that that impact is to be taken into account only where this can be measured.

325 Furthermore, the Commission may classify horizontal price or market-sharing agreements, such as the infringement in question in the present case, as very serious infringements solely on account of their nature, without being required to demonstrate an actual impact of the infringement on the market. The actual impact of the infringement is only one among a number of factors which, if it can be measured, may allow the Commission to increase the starting amount of the fine beyond the minimum likely amount of EUR 20 million (Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraphs 74 and 75).

326 In the present case, in recital 452 to the contested decision, the Commission states:

'In this procedure, it is impossible to measure the actual effect on the Netherlands market of the complex of agreements comprising the infringement and the Commission does not therefore rely on a particular impact, in accordance with the Guidelines, which state that account must be taken of the actual impact, where this can be measured... Consequently, the Commission will not take into account the impact on the market in determining the applicable fines in the present case.'

327 In addition, in recital 455 to the contested decision, which sets out the conclusion on the gravity of the infringement, the Commission concludes:

'In view of the nature of the infringement and the fact that it extended to the entire territory of the Netherlands, the undertakings to which the present decision is addressed have committed a very serious infringement of Article 81 [EC].'

328 It is clear from these passages that, in determining the gravity of the infringement, the Commission did not rely on the impact of the infringement on the market, but on the nature of the infringement and on the extent of the geographic market in question.

329 In this regard, in view of the nature of the infringement established, the object of which was, among other things, coordination of prices and price increases and occasional coordination of customer allocation, the Commission could legitimately refrain from taking into consideration the impact of the infringement on the market.

330 In these circumstances, the applicants also cannot complain that the Commission failed to take into consideration the expert report which they provided to it during the administrative procedure, in support of their argument that the infringement did not have an impact on the market.

331 Furthermore, with regard to an optional element in the determination of the amount of the fine, which was not, moreover, taken into consideration in the present case, the applicants cannot reasonably claim that the Commission failed to state the reasons for its finding that the specific impact of the infringement could not be measured.

332 In addition, the applicants wrongly claim that it is apparent from recitals 453 and 457 to the contested decision that the Commission actually took account of an effect on the market in determining the amount of the fine.

333 It is clear from recital 452 to the contested decision that the Commission did not take account of the impact in question. This finding is certainly not refuted by the grounds set out in recitals 453 and 457 to the contested decision mentioned by the applicants. In recital 453, the Commission merely evaluated the size of the market in question, without assessing the impact of the infringement on that market. In recital 457, it simply highlighted the need to identify the starting amounts, in the context of differential treatment, in the light of the individual weight of the conduct of each undertaking involved.

334 Consequently, the applicants' second complaint is unfounded.

335 By their third complaint, regarding the size of the geographic market in question, the applicants point out the small area of the Netherlands and the limited importance of the beer market for its overall economy. In addition, they claim that the fact that the total market share of the brewers concerned represented more than 90 % of the Dutch market does not, in itself, prevent the infringement being categorised as minor or as serious, particularly in the light of the Commission's previous decisions.

336 In recital 453 to the contested decision, in determining the gravity of the infringement, the Commission took account of the fact that '[t]he total market share of the undertakings in question on the Dutch market was greater than 90 %'. The Commission also found that the infringement related to both the on-trade sector and the off-trade sector. It thus concluded that '90 % of the overall Dutch beer market was covered by a cartel'.

337 It is settled case-law that the entire territory of a Member State constitutes a substantial part of the common market (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 28).

338 Having established that the infringement covered 90% of the Dutch beer market and concerned each of the main marketing sectors in that market, the Commission could rightly take into consideration the size of the geographic market in question in order to categorise the infringement as very serious.

339 It should also be pointed out that, according to case-law, infringements such as agreements or concerted practices involving in particular price fixing or market sharing may be classified as very serious on the basis of their nature alone, it not being necessary for such conduct to cover a particular geographic area.

340 This conclusion is further confirmed by the fact that, while the indicative description of serious infringements in the Guidelines mentions that 'these will more often than not be horizontal or vertical restrictions …, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market', the description of very serious infringements makes, by contrast, no mention of a requirement that there be a specific impact on the market or that there be effects in a particular geographic area (*Groupe Danone* v *Commission*, cited in paragraph 316 above, paragraph 150).

341 Accordingly, the fact that the size of the geographic market in question extends to the whole of a country does not, in any event, preclude categorisation of the infringement committed in the present case as very serious.

342 That applies all the more in view of the allegedly limited importance of the beer market for the economy of the Netherlands, since the size of the relevant product market is not, in principle, a factor that must necessarily be taken into account but simply one relevant factor among others in assessing the gravity of the infringement and fixing the amount of the fine (see, to that effect, Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 132).

343 In the light of all these considerations, the third complaint and the first limb of the present plea in its entirety cannot be upheld.

— The second limb, regarding the determination of the starting amount and the application of differential treatment

344 The applicants dispute the starting amount of the fine imposed on them, first claiming a breach of the principle of equal treatment in the light of the Commission's previous decision-making practice and, in particular, in the light of the fines imposed on Belgian brewers in Decision 2003/569. Claiming a breach of the same principle, they also refer to certain Commission decisions relating to infringements affecting the market of a single Member State which resulted in the categorisation of the infringement as 'serious' or in the determination of lower starting amounts than those determined in the present case.

345 It should first be pointed out that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 292) and that, within the framework of Regulation No 17 and of Regulation No 1/2003, the Commission has a margin of discretion when fixing the amount of fines, in order

that it may direct the conduct of undertakings towards compliance with the competition rules (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 216) and that it may at any time adjust the level of fines to the needs of that policy (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 314 above, paragraph 169).

346 In the present case, the amount of the fine imposed on the applicants was determined, in accordance with Article 23(3) of Regulation No 1/2003, having regard to the gravity and the duration of the infringement in question. In this respect, the applicants cannot derive a legitimate argument solely from the fact that, in its previous decision-making practice, the Commission has penalised similar conduct by imposing lower fines than the fines imposed on them in the present case.

347 In these circumstances, the applicants also cannot claim a breach of the principle of equal treatment. The Court of Justice has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see *Erste Group Bank and Others* v *Commission*, cited in paragraph 314 above, paragraph 233 and the case-law cited).

348 With regard to the applicants' argument concerning the categorisation of the infringement and the level of the fines imposed by the decisions relating to certain infringements limited to the market of a single Member State, it should be noted that, aside from this latter factor, the applicants do not argue that the infringements mentioned are identical, in particular as regards the products, the undertakings and

the periods concerned. This argument cannot therefore be sufficient to establish the alleged discriminatory treatment.

349 With regard to Decision 2003/569, the applicants infer the existence of a breach of the principle of equal treatment from the fact that the fines imposed on the Belgian brewers involved were much lower than the fines imposed by the contested decision, whilst neither the nature of the infringements nor the conditions on the markets concerned had differences justifying that disparity.

350 It should be noted, in this regard, that the Commission assesses the gravity of infringements by reference to numerous factors, which are not based on a binding or exhaustive list of the criteria which must be applied and it is not, moreover, bound to apply a precise mathematical formula, either for the total amount of the fine or where it is broken down into different elements (see Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraphs 187 and 188 and the case-law cited).

351 In these circumstances, a direct comparison of the fines imposed on the addressees of the two decisions concerning distinct infringements is likely to distort the specific functions performed by the different stages in the calculation of a fine. The final amounts of the fines reflect the specific circumstances of each cartel and the particular evaluations in the case at issue.

352 In the light of all the foregoing, as regards the level of the fines imposed, the applicants' situation cannot be compared to the situation of the undertakings concerned in the previous decisions relied on.

353 In the light of these considerations, the complaint alleging a breach of the principle of equal treatment in the light of the Commission's previous decision-making practice must be rejected.

354 Second, the applicants claim that the Commission applied differential treatment on the basis of erroneous premisses, in contravention of the principles of 'reasonableness', equal treatment and proportionality, and failed to state sufficient reasons for its decision in this regard.

355 In this connection, the applicants allege, wrongly, that the Commission applied differential treatment on the basis of the actual impact of the infringement on the market, in contrast to the conclusion, in recital 452 to the contested decision, that that impact was not taken into account.

356 The applicants' argument stems from an incorrect reading of recital 457 to the contested decision, which simply reproduces the idea expressed in the sixth paragraph of Section 1.A of the Guidelines, according to which, for an infringement of a certain gravity, where an infringement involves several undertakings, such as cartels, it may be necessary to apply weightings to the starting amount in order to establish a specific starting amount which takes account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

357 Contrary to the claims made by the applicants, the consideration of the 'specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition' concerns the division of the members of a cartel into categories, in the light of their size on the market during the reference period, and does not mean that the impact on the market of the infringement taken as a whole must be taken into consideration.

358 Contrary to the statements made by the applicants, the application of differential treatment on the basis of that provision does not require the actual impact of the infringement on the market to be taken into consideration and, therefore, does not presuppose that the Commission finds that the infringement in question had such an impact.

359 By claiming a breach of the principles of 'reasonableness' and of equal treatment by virtue of the fact that InBev was granted immunity from a fine, the applicants merely put forward the arguments, already rejected in paragraphs 70 to 90 above, relating to the allegedly vague and contradictory character of the statement by InBev.

360 As regards the allegedly inadequate statement of reasons relating to the application of differential treatment, the essential procedural requirement to state reasons for the method of calculation of the fine is satisfied, according to settled case-law, where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement (see *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 286 above, paragraph 463 and the case-law cited).

361 In the present case, it is clear from recital 458 to the contested decision that, in order to establish the specific starting amount for the applicants, the Commission referred to their beer sales in the Netherlands during the last full calendar year of the infringement, namely 1998. The applicants were placed in the first category in terms of relative importance on the market on the ground that their beer sales were much higher than those of the other brewers.

362 In so far as the Commission gave the sales figures for the applicants in 1998 as the reason for their inclusion in the first category, the applicants' claim of a breach of the obligation to state reasons cannot be accepted. In this regard, the considerations set out in recital 458 to the contested decision in particular are sufficient to enable the applicants to acquaint themselves with the reasons for the contested decision in

this regard and the General Court to have sufficient information in order to exercise its power of review (see, to that effect, judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, not published in the ECR, paragraph 103).

363 Lastly, it should be noted that the approach taken by the Commission in this regard is perfectly compatible with the criteria laid down by the Guidelines and by the case-law cited above, in so far as the sales figures for the undertakings which participated in the infringement, during a reference period, constitute a useful indication of their individual weight on the market. Therefore, the determination of the starting amount based on that approach cannot, as such, lead to a breach of the principle of proportionality.

364 In the light of the foregoing, it must be concluded that the Commission did not breach the principles mentioned by the applicants in determining the starting amount and in applying differential treatment, and did not fail to fulfil its obligation to state reasons in this regard.

365 The second limb of the present plea must therefore be rejected.

— The third limb, regarding the increase by reason of the deterrent effect

366 The applicants claim that, by applying the multiplier in question, the Commission breached the principles of equal treatment, proportionality and legal certainty.

367 It should be noted that, in order to determine the amount of the fine, the Commission must ensure its deterrent effect (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 106, and Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 63).

368 In this respect, the Commission may inter alia take into consideration the size and the economic power of the undertaking in question (see, to that effect, *Musique Diffusion française and Others* v *Commission*, cited in paragraph 367 above, paragraph 120, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 314 above, paragraph 243).

369 Similarly, the fourth paragraph of Section 1.A of the Guidelines provides that it is also necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

370 In the present case, in keeping with these considerations, the Commission stated that it was appropriate to set the fines at a level which ensures that they have sufficient deterrent effect, in view of the size of each undertaking (recital 463 to the contested decision).

371 In the same recital, the Commission decided to apply a multiplier of 2.5 to the starting amount of the fine imposed on the applicants, in view of Heineken's considerable size, based on its sizeable worldwide turnover during the most recent tax year preceding the date of adoption of the contested decision for which figures were available.

372 With regard to the applicants' claim relating to the multipliers applied in previous Commission decisions, it should be pointed out that the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules. The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level, at any time, to ensure the implementation of competition policy and to strengthen the deterrent effect of fines (see Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 49 and the case-law cited).

373 Consequently, the fact that, in its previous decision-making practice, the Commission applied lower multipliers for undertakings of a comparable size to Heineken cannot result in the disproportionate or discriminatory character of the increase in question, or the breach of the principle of legal certainty.

374 As regards the alleged breach of the obligation to state reasons, it should be stated that, by making reference, first, to the need to set the amount of the fines at a level which ensures that they have sufficient deterrent effect and, second, to Heineken's considerable size, based on its sizeable worldwide turnover (recital 463 to the contested decision), the Commission set out, to the requisite legal standard, the aspects taken into consideration with a view to increasing, as a deterrent, the starting amount in respect of the applicants, thus enabling them to acquaint themselves with the reasons for that increase, made in the light of their specific situation, and to assert their rights, and enabling the Court to exercise its power of review.

375 In the statement of reasons explaining the increase in the level of the fine, the Commission is not required to indicate the figures which guided, in particular as regards the deterrent effect sought, the manner in which it exercised its discretion (see, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693,

paragraphs 39 to 48, and Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 125).

376 Furthermore, with regard to the assessment made, rightly, of the size and the economic power of the undertaking in question, the applicants wrongly claim that, in determining the multiplier in question, the Commission was required to take into account other circumstances, such as the nature of the infringement, the alleged absence of its impact on the market, the fact that the infringement had ended before the beginning of the investigation or the fact that the administrative procedure was excessively long.

377 In the light of the foregoing, the third limb of the present plea must be rejected.

— The fourth limb, regarding the increase by reason of the duration of the infringement

378 In recital 466 to the contested decision, the Commission states that Heineken participated in the infringement at least between 27 February 1996 and 3 November 1999, that is to say, for a period of three years and eight months. Consequently, the starting amount of the fine was increased, in respect of the applicants, by 35 %, namely 10 % for each full year of the infringement and 5 % for the remaining period of six months or more.

379 The applicants call into question this assessment, disputing the Commission's findings relating to the start and end dates of the infringement in question.

380 As has already been stated in connection with the examination of the seventh plea in paragraphs 210 to 229 above, the Commission rightly determined that the duration of the infringement, in respect of the applicants, corresponded to the period between 27 February 1996 and 3 November 1999. In this regard, the increase of 35 % effected by the Commission on the starting amount of the fine cannot be called into question.

381 Consequently, the fourth limb regarding the duration of the infringement cannot be accepted.

— The alleged breach of the principle of legal certainty

382 The applicants argue that the amount of the fine as determined by the Commission was not predictable, even approximately.

383 It must be recalled that legal certainty is a general principle of EU law which requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (see Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 66 and the case-law cited).

384 The corollary of this principle is the principle that penalties must have a proper legal basis, which requires that offences and the relevant penalties must be clearly defined by law (*Evonik Degussa* v *Commission and Council*, cited in paragraph 362 above, paragraph 39).

385 It is important to note in that regard that, although Article 23(2) and (3) of Regulation No 1/2003 leave the Commission a wide discretion, they nevertheless limit the exercise of that discretion by establishing objective criteria to which it must adhere. Thus, first, the amount of the fine that may be imposed is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Second, the exercise of that discretion is also limited by rules which the Commission has imposed upon itself in the Guidelines, since the Commission's administrative practice is fully subject to review by the Courts of the EU. A prudent trader, if need be by taking legal advice, can foresee in a sufficiently precise manner the method and order of magnitude of the fines which he incurs for a given line of conduct, and the fact that that trader cannot know in advance precisely the level of the fines which the Commission will impose in each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis (see, to that effect, *Evonik Degussa* v *Commission and Council*, cited in paragraph 362 above, paragraphs 50 to 55).

386 In addition, undertakings involved in an administrative procedure in which fines may be imposed must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 314 above, paragraphs 229 and 230). The fact that the Commission could at any time review the general level of fines when implementing another competition policy is therefore reasonably foreseeable for the undertakings involved (see, to that effect, *Archer Daniels Midland* v *Commission*, cited in paragraph 367 above, paragraph 48).

387 These considerations apply a fortiori in the present case, where there is a very serious infringement consisting in conduct whose unlawfulness has been confirmed by the Commission on many occasions.

388 Thus, even if the applicants could not know in advance precisely the level of the fines which the Commission would impose in the present case, in view, in particular, of the increase in the general level of the fines subsequent to the events constituting the infringement, this is not indicative of a breach of the principle of legal certainty and the principle that penalties must have a proper legal basis, in so far as, as has been stated in the analysis of the present plea, the Commission exercised its discretion in accordance with both the regulatory framework established by Article 23(2) and (3) of Regulation No 1/2003, as clarified by the case-law of the Court of Justice and of the General Court, and the rules of conduct which it imposed on itself in the Guidelines.

389 The present complaint and the eighth plea in its entirety must therefore be rejected as unfounded.

The ninth plea, concerning the failure to take attenuating circumstances into consideration

Arguments of the parties

390 First, the applicants claim that the fact that the end date of the infringement was fixed at 3 November 1999, even though the checks made by the Commission did not take place until 22 and 23 March 2000, should have been taken into consideration by the Commission in order to moderate the basic amount of the fine.

391 Second, they argue that they never increased their prices in the off-trade sector during the period in which the infringement took place. Thus, the alleged coordination

was never implemented. Because around 62% of beer is sold through the off-trade channel, non-implementation is proven for the vast majority of their sales. In addition, the complexity and the opacity of the structure in the on-trade sector make it impossible to implement a genuine agreement or genuine consultation which is restrictive of competition.

392 The Commission contests the applicants' arguments.

Findings of the Court

393 In the present plea, the applicants essentially claim that the Commission infringed the Guidelines in so far as it failed to take sufficient account of the attenuating circumstances relating, first, to the termination of the infringement before it intervened and, second, the effective non-application of the unlawful agreements in question.

394 First of all, with regard to the first circumstance mentioned, it must be recalled that, under Section 3 of the Guidelines, the basic amount of the fine set by the Commission is to be reduced when, for example, the undertaking which is the subject of the complaint terminates the infringement as soon as the Commission intervenes.

395 The grant of such a reduction of the basic amount of the fine is linked to the circumstances of the particular case, which may lead the Commission not to grant that reduction to an undertaking which is party to an unlawful agreement. In particular, to recognise an attenuating circumstance in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted

an infringement could encourage undertakings to continue a secret agreement as long as possible, in the hope that their conduct would never be discovered, while knowing that if it were discovered they could expect, by then curtailing the infringement, their fine to be reduced. Such a recognition would deprive the fine imposed of any deterrent effect and would undermine the effectiveness of Article 81(1) EC (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraphs 104 and 105).

396 This is indeed an attenuating circumstance which, with a view to the effectiveness of Article 81(1) EC, must be given a strict interpretation, and only the particular circumstances of the specific case can warrant it being taken into account (Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraphs 337 and 338).

397 In particular, the fact that an intentional infringement was terminated cannot be regarded as an attenuating circumstance where it was terminated as a result of the Commission's intervention (see *Archer Daniels Midland* v *Commission*, cited in paragraph 396 above, paragraph 341 and the case-law cited).

398 The applicants' a fortiori argument that the attenuating circumstance in question must therefore be granted where the infringement ends before the Commission intervenes is based on an erroneous premiss.

399 In addition, even assuming that these considerations do not apply to the same degree where the infringement ends on the initiative of the offending party before the Commission intervenes, the benefit of the attenuating circumstance in question

nevertheless cannot, in principle, be appropriate where the conduct is intentional and its unlawfulness has been confirmed by the Commission on several occasions.

400 Consequently, the Commission rightly stated, in recital 475 to the contested decision, that, with respect to the infringement in the present case, which is very serious by its nature and manifestly unlawful, the fact that an undertaking terminates this conduct before any intervention of the Commission does not merit consideration as an attenuating circumstance.

401 Furthermore, whilst the applicants argue that the Commission has taken a different position concerning the attenuating circumstance in question in the past, it should be stated that, in accordance with settled case-law, the mere fact that the Commission has found in its previous decisions that certain factors constituted attenuating circumstances for the purpose of setting the fine does not mean that it is obliged to do so also in a subsequent decision (*Groupe Danone* v *Commission*, cited in paragraph 316 above, paragraph 395).

402 In the light of these considerations, the applicants' argument relating to the recognition of the termination of their anti-competitive conduct before the Commission intervened as an attenuating circumstance cannot be accepted.

403 Second, as regards the alleged attenuating circumstance relating to the effective non-application of the agreements, it is necessary to determine whether those circumstances put forward by the applicants are capable of showing that, during the period in which the applicants were party to the offending agreements, they actually avoided implementing them by adopting competitive conduct on the market or, at the very least, whether they clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation (see, to

that effect, Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113).

404 In this regard, the Commission stated, in recital 477 to the contested decision, that none of the participants had shown that they avoided implementing the agreements in question, since the occasional failure to implement them was not reflected in a 'complete and full rejection of the agreements concluded'.

405 The applicants criticise these considerations, stating that, in the off-trade segment, Heineken never increased its prices during the period in which the infringement took place and that, as far as the on-trade sector is concerned, the market structure is so complex that it was impossible to reach a genuine agreement and, a fortiori, to implement such an agreement.

406 They rely in this regard on the economic reports annexed to the application, which show inter alia that their prices in the off-trade segment did not increase during the period in which the infringement took place, that that sector was characterised by competition between the brewers, considerable movement in market shares, strong purchasing power among buyers and an increase in the volume of discounts, and that, with regard to the on-trade sector, their prices did not increase in 1996 or in 1997, as total price increases in that sector during the infringement was lower than the average long-term price increases and the market structure resulted in competition for new and 'released' on-trade sites, with considerable movement in market shares among the brewers.

407 In addition, they allege that the Commission failed to examine the correct figures, as far as prices are concerned, and, in particular, failed to assess the non-application of the agreements for each undertaking taken individually.

408 The Commission denies that it found in the contested decision that the collusion in question led to actual price increases. It considers that the fact that the applicants' participation in coordinating prices was proven is sufficient to reject their argument regarding the non-application of the arrangements in question.

409 The Court cannot accept this argument made by the Commission. Although the fact that an undertaking does not act on unlawful arrangements is not capable in itself of excluding its liability, it is nevertheless a circumstance which must be taken into account, as an attenuating circumstance, in the determination of the amount of the fine.

410 Nevertheless, in the present case, as can be seen from recitals 349 to 354 to the contested decision and as has been confirmed in the analysis of the fifth and sixth pleas above, the infringement in question consisted in a complex cartel implemented by means of agreements and concerted practices which formed part of a common plan for the cartel applied over a long period, which sought to maintain the status quo and to minimise competition. Its participants coordinated prices and price increases for beer in the Netherlands, particularly in the on-trade segment, by limiting reductions, in the off-trade segment, and prices for private label beer. The collusion also included consultations on customer allocation, both in the on-trade segment and, for private label beer, in the off-trade segment. The participants strengthened their positions vis-à-vis their customers, namely supermarkets in the off-trade segment and points of sale in the on-trade segment, holding regular, close consultations and conducting

negotiations on all sensitive aspects of parameters of competition, in order to obtain price increases or at least price stability and to limit the number and the effects of customers in the off-trade segment changing brewer.

411 In view of the existence of this overall plan, which was reflected in meetings held secretly, intentionally, over a considerable period, the evidence presented by the applicants, which seeks primarily to prove the absence of actual price increases, is not sufficient to show that they avoided implementing all these arrangements in question or, at the very least, that they clearly and substantially breached the obligations relating to their implementation to the point of disrupting the very operation of the cartel.

412 As regards the alleged evidence of competitive conduct in the sectors concerned, based on the economic analyses annexed to the application, namely movement in market shares, the increase in the volume of discounts and the particular circumstances characterising the market structure in the on-trade sector, namely the existence of long-term contracts, it should be stated that, even assuming that they are established, these facts do not constitute specific evidence of competitive actions capable of disrupting the very operation of the cartel arrangements described in paragraph 410 above and, consequently, do not, as such, refute the implementation of the cartel in question.

413 Lastly, in so far as the applicants refer to certain indications of the non-implementation of the agreements in question expressed in the statements made by certain managers from InBev, it is sufficient to note that those indications are simple allegations which cannot, in themselves, prove that the cartel was not implemented or that its operation was disrupted.

414 In the light of the foregoing, the applicants have not proved the existence of circumstances to justify the benefit of the attenuating circumstance relating to the non-application of the cartel arrangements in question.

415 Consequently, the ninth plea must be rejected.

The tenth plea, concerning the effect of the excessive length of the administrative procedure on the amount of the fine

Arguments of the parties

416 The applicants claim that the excessive length of the administrative procedure led to a higher fine being fixed, as a direct result of the increase in the level of fines imposed by the Commission compared with earlier periods. They point out, in particular, that if a decision had been taken in a reasonable time, the amount of the fine would have been lower.

417 The Commission contests the applicants' arguments.

Findings of the Court

418 It is settled case-law that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 1/2003 if that is

necessary to ensure the implementation of competition policy. On the contrary, the proper application of the competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique Diffusion française and Others* v *Commission*, cited in paragraph 367 above, paragraph 109, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 314 above, paragraph 169).

419 In the light of this case-law, an applicant cannot validly claim that its penalty could have been lower if the Commission had concluded the administrative procedure earlier, since it increased the general level of penalties in the course of the administrative procedure (see, to that effect, judgment of 8 July 2008 in Case T-52/03 *Knauf Gips* v *Commission*, not published in the ECR, paragraph 486).

420 In the light of the foregoing, the length of the administrative procedure, although excessive, cannot be regarded as having an effect on the content of the contested decision simply because the Commission increased the level of fines in the meantime.

421 Consequently, in the present case, even though the Commission acknowledged at the hearing that it increased the general level of fines in around 2005, that is during the administrative procedure in question, this fact cannot be taken into account in assessing the effect of the failure to respect the reasonable time principle on the content of the contested decision.

422 Consequently, the tenth plea cannot be upheld.

The eleventh plea, concerning the level of the reduction of the fine granted by reason of the excessive length of the administrative procedure

Arguments of the parties

423 The applicants claim that the reduction of the fine by EUR 100 000 granted by the Commission by reason of the excessive length of the administrative procedure is too low having regard to the amount of the fine imposed.

424 The Commission states that it availed itself of the possibility of granting a reduction of the fine on its own initiative, which falls within its powers and for which it has a broad margin of discretion. The applicants have not put forward any arguments to justify a further reduction.

Findings of the Court

425 It should be noted that a procedural irregularity, even though it is not capable of resulting in the annulment of the decision, may justify a reduction of the fine (see, to that effect, *Baustahlgewebe* v *Commission*, cited in paragraph 48 above, paragraphs 26 to 48, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 245 above, paragraphs 436 to 438).

426 Failure to adjudicate within a reasonable time can justify the Commission's decision to make an equitable reduction in the amount of a fine, the possibility of granting such a reduction falling within the scope of the Commission's powers (see, to that effect, *Technische Unie* v *Commission*, cited in paragraph 286 above, paragraphs 202 to 204).

427 In the present case, the Commission decided to grant the applicants a reduction of the fine by reason of the 'unreasonable' length of the administrative procedure (recitals 498 and 499 to the contested decision).

428 The exercise of that power by the Commission does not prevent the Court, in the exercise of its unlimited jurisdiction, granting a further reduction of the amount of the fine.

429 It must be borne in mind that the flat-rate reduction of EUR 100 000 granted by the Commission does not take any account of the amount of the fine imposed in the present case, which amounted to EUR 219 375 000 before that reduction, and does not therefore constitute a reduction of the penalty which is likely to give adequate redress for the breach resulting from the failure to adjudicate within a reasonable time in the administrative procedure.

430 In this regard, the applicants rightly claim that the consequences of the breach of the reasonable time principle were not sufficiently taken into account by the Commission, as regards the reduction of the amount of the fine.

431 As regards the appropriate level of the reduction of the penalty, the Court nevertheless rejects the applicants' argument, mentioned for the first time in the reply, that, because the breach of the reasonable time principle constitutes a harmful event under

the second paragraph of Article 288 EC, the amount of damage must be taken into account in connection with the reduction of the fine.

432 The purpose of reducing the fine in the present case is to rectify the breach of the reasonable time principle and it must therefore be determined at an appropriate level having regard to the fine imposed on the applicants. Nevertheless, contrary to the claims made by the applicants, that reduction is made on an equitable basis and does not have to be preceded by an examination of the conditions for the non-contractual liability of the EU within the meaning of the second paragraph of Article 288 EC.

433 Consequently, since the applicants have not made claims for damages, either in the application or in the reply, there is no need to rule on their argument concerning the amount of the alleged damage, relying on a hypothetical evaluation of the amount of the fine which would have been imposed on them if the Commission had concluded the procedure in a reasonable time, or on their argument that there is a causal link between the breach of the reasonable time principle and that damage.

434 In the light of the circumstances of the case, the Court considers, in the exercise of its unlimited jurisdiction, that, in order to grant the applicants fair satisfaction for the excessive length of the procedure, the reduction in question must be 5% of the amount of the fine.

Conclusion regarding the fine

435 Following examination of the pleas raised by the applicants and in the exercise of its unlimited jurisdiction, the Court adjusts the amount of the fine imposed jointly and severally on the applicants, first by fixing the starting amount at EUR 61 750 000,

rather than EUR 65 000 000, as a consequence of the annulment of Article 1 of the contested decision in so far as it upholds the aspect of the infringement consisting in occasional coordination of commercial conditions, other than prices, offered to individual consumers in the on-trade sector in the Netherlands (see paragraphs 201 and 202 above), and second by altering the reduction for failure to adjudicate within a reasonable time in the procedure to 5 % of the final amount of the fine, rather than EUR 100 000 (see paragraph 434 above).

436 As a consequence of that adjustment, the amount of the fine is calculated by multiplying the adjusted starting amount by 2.5, by way of a deterrent effect, then by increasing it by 35 % by reason of the duration of the infringement, and reducing that amount by 5 %, by reason of the failure to adjudicate within a reasonable time in the procedure. Consequently, the amount of the fine imposed jointly and severally on the applicants is set at EUR 197 985 937.50.

Costs

437 Pursuant to Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

438 In the present case, since the form of order sought by the applicants has been upheld in part, the Court will make an equitable assessment of the circumstances of the present case in holding that the applicants are to bear two thirds of their own costs and to pay two thirds of the costs incurred by the Commission and that the Commission is to bear one third of its own costs and to pay one third of the costs incurred by the applicants.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1 of Commission Decision C(2007) 1697 of 18 April 2007 relating to a proceeding under Article 81 [EC] (Case COMP/B/37.766 — Dutch beer market) in so far as the European Commission found in it that Heineken NV and Heineken Nederland BV had participated in an infringement consisting in occasional coordination of commercial conditions, other than prices, offered to individual consumers in the on-trade sector in the Netherlands;**

2. **Sets the amount of the fine imposed jointly and severally on Heineken and on Heineken Nederland in Article 3(a) of Decision C(2007) 1697 at EUR 197 985 937.50;**

3. **Dismisses the remainder of the action;**

4. **Orders Heineken and Heineken Nederland to bear two thirds of their own costs and to pay two thirds of the costs incurred by the Commission;**

5. Orders the Commission to bear one third of its own costs and to pay one third of the costs incurred by Heineken and by Heineken Nederland.

Vadapalas Dittrich Truchot

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

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