JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

6 December 2005 *

In Case T-48/02,

Brouwerij Haacht NV, established in Boortmeerbeek (Belgium), represented by Y. van Gerven, F. Louis and H. Viaene, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by A. Bouquet and W. Wils, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of, and in the alternative for a reduction in the fine imposed on the applicant by, Article 4 of Commission Decision 2003/569/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case IV/37.614/F3 PO/Interbrew and Alken-Maes) (OJ 2003 L 200, p. 1),

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President of the Chamber, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 9 December 2004,

gives the following

Judgment

Legal background

1 Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), provides in Article 15(2):

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 [euros], or a sum in excess thereof but

not exceeding 10% of turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81(1)] or Article [82] of the Treaty; or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1) [of the regulation].

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

2 The Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines') establish a methodology applicable to the calculation of the amounts of such fines, 'which start[s] from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances' (Guidelines, second introductory paragraph). According to the Guidelines, '[t]he basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17' (Guidelines, Section 1).

3 The Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice') 'sets out the conditions under which

[undertakings] cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them' (Section A 3 of the Leniency Notice).

4 Section D of the Leniency Notice is worded as follows:

'D. Significant reduction in a fine

1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an [undertaking] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

Facts

5 In 1999, the Commission opened an investigation, under Case IV/37-614/F3, into possible infringements of the Community competition rules in the Belgian brewery sector.

6 On 29 September 2000, in the context of that investigation, the Commission initiated the procedure and adopted a statement of objections against the applicant and also the undertakings Interbrew NV ('Interbrew'), Groupe Danone ('Danone'), Brouwerijen Alken-Maes NV ('Alken-Maes') and NV Brouwerij Martens ('Martens'). The procedure initiated against the applicant and the statement of objections addressed to it referred solely to its alleged involvement in a cartel relating to beer sold in Belgium bearing private labels.

7 On 5 December 2001, the Commission adopted Decision 2003/569/EC relating to a proceeding under Article 81 of the EC Treaty (Case IV/37-614/F3 PO/Interbrew and Alken-Maes) (OJ 2003 L 200, p. 1), addressed to the applicant and also the undertakings Interbrew, Danone, Alken-Maes and Martens ('the contested decision').

8 The contested decision finds two separate infringements of the competition rules, namely, first, a complex set of agreements and/or concerted practices in respect of beer sold in Belgium ('the Interbrew/Alken-Maes cartel') and, second, concerted practices in respect of private-label beer ('the private-label beer cartel'). The contested decision finds that Danone, Alken-Maes and Interbrew participated in the first infringement, while the applicant, Alken-Maes, Interbrew and Martens participated in the second.

9 The infringement established in the applicant's case consists in its participation in a concerted practice concerning prices, customer-sharing and the exchange of information with regard to private-label beer in Belgium during the period from 9 October 1997 to 7 July 1998.

10 Being of the view that a series of factors enabled it to conclude that the infringement had ceased, the Commission did not deem it necessary to require the undertakings concerned to bring the infringement to an end pursuant to Article 3 of Regulation No 17.

11 However, the Commission considered it appropriate, pursuant to Article 15(2) of Regulation No 17, to impose a fine on Interbrew, Alken-Maes, the applicant and Martens for their participation in that infringement.

12 In that regard, the Commission observed in the contested decision that all the participants in the private-label cartel had committed that infringement intentionally.

13 For the purpose of setting the fines to be imposed, the Commission applied in the contested decision the method defined in the Guidelines and also in the Leniency Notice.

14 At recital 335 to the contested decision, the Commission stated that horizontal coordination of prices and market sharing is by its nature a very serious infringement and that the exchange of information was a means of putting that coordination into effect.

15 At recital 337 to the contested decision, the Commission stated that, as regards the impact on the market, it should be noted that the various secret practices of the parties had been aimed at fixing prices above the level they would have attained under conditions of free competition. The Commission also acknowledged that it did not have proof that the consultation, with perhaps one exception, had resulted in any alteration of the market behaviour of the undertakings concerned, but that it was clear, in any event, that at the meetings of the private-label cartel customer-sharing and prices had been discussed and that information had been exchanged in that respect. The Commission considered that the fact that information on private-label beer in Belgium might have been exchanged between the Belgian brewers on only one occasion did not make that any less serious, since in order to achieve the aim of the consultation — not to bid against each other's contracts, in order to prevent a price war — it had not been necessary to exchange information on a regular basis. The Commission stated that it could not simply be concluded that the cartel as such had had no impact, or a limited impact, on the market.

16 At recital 338 to the contested decision, the Commission explained that, as regards the size of the relevant geographic market, it also took into account that while the meetings might have concerned the whole territory of Belgium they had been limited to the private-label Pils segment of the market, which accounted for 5.5% of total beer consumption in Belgium.

17 The Commission concluded at recital 339 to the contested decision that, in view of the foregoing, it considered that the infringement was a serious breach of Article 81 (1) EC.

18 At recital 340, the Commission stated that it must take into account in fixing the amount of the fine the effective economic capacity of offenders to cause significant damage to other operators and that it must set the fine at a level which would ensure that it had a deterrent effect. It further stated at recital 341 to the contested decision

that in order to allow for the actual capacity of the undertakings concerned to cause significant damage on the beer market in Belgium, in particular in the private-label segment, it considered it appropriate to differentiate between the undertakings. Taking account of their turnover in private-label beer, the Commission divided the undertakings into two categories. The applicant and Martens, who had the highest turnovers in the private-label segment, formed one category, and Interbrew and Alken-Maes, who had substantially lower turnovers in the segment, formed the second.

19 At recital 342 to the contested decision, the Commission therefore considered it appropriate to impose fines of EUR 300 000 on the applicant and Martens and of EUR 250 000 on Interbrew and Alken-Maes.

20 In order to ensure that the fine would have a sufficiently deterrent effect, and to take account of the fact that, in contrast to Haacht and Martens, Interbrew, as a large international undertaking, and Alken-Maes, as a member of an international group, had easier access to legal and economic knowledge and infrastructures which enabled them more easily to recognise that their conduct constituted an infringement and to be aware of the consequences stemming from it under competition law, the Commission considered, at recital 343 to the contested decision, that the specific starting point of Interbrew's and Alken-Maes's fines should be adjusted. The Commission stated at recital 344 to the contested decision that, in order to allow for their respective size and general resources, the fines of EUR 250 000 determined for Interbrew and Alken-Maes should be multiplied by a factor of 5 for Interbrew and a factor of 2 for Alken-Maes.

21 At recital 345 to the contested decision, the Commission observed that the duration of the infringement was fixed at nine months, which was not disputed by any of the parties, and which did not warrant an increase in the fine.

22 At recital 347 to the contested decision, the Commission stated that it was established that Interbrew and Alken-Maes had taken the initiative to hold meetings about private-label beer and that, in the light of that aggravating circumstance, the basic fine should be increased by 30% in the case of both Interbrew and Alken-Maes.

23 On the other hand, the Commission found no attenuating circumstance, as all the arguments put forward in that regard had been rejected in recitals 348 to 354 to the contested decision. It is important to note, however, that at recital 351 to the contested decision the Commission considered that there was no reason why the applicant's fine should reflect the fact that its sales of private-label beer accounted for only a small proportion of its total turnover. The Commission recalled that the starting points for calculating the amount of the fine were the gravity and duration of the infringement and that although in the past it had set fines according to a basic rate which was a percentage of the relevant turnover, under Article 15(2) of Regulation No 17 the only restrictions on its freedom to determine the fine were the legal thresholds mentioned in that provision. The Commission further stated that, for the rest, it had taken due account of the economic importance of the specific activity to which the infringement related when it assessed the gravity of the infringement.

24 The Commission then observed, at recital 355 to the contested decision, that all the undertakings concerned had invoked the Leniency Notice.

25 As regards Interbrew, the Commission found that it could not claim a 'substantial reduction' in its fine within the meaning of section C of the Leniency Notice, since it had taken the initiative to hold the discussions on private-label beer. The Commission noted, however, that Interbrew had drawn its attention to the concerted practice when the Commission was completely unaware of the matter,

that it had cooperated fully and without interruption throughout the investigation and that it had not substantially contested the facts on which the Commission had based the allegation of infringement. Under section D of the Leniency Notice, the Commission therefore reduced Interbrew's fine by 50%.

26 As regards Alken-Maes, the Commission observed that it had not substantially contested the facts on which the Commission had based the allegation of a private-label cartel, but that its cooperation had gone no further than simply answering the request for information which the Commission had sent to it on 22 March 2000, in accordance with Article 11(1) of Regulation No 17. The Commission therefore considered it appropriate to reduce Alken-Maes's fine by 10% in accordance with the second indent of section D.2 of the Leniency Notice.

27 As regards the applicant, the Commission stated that in its view the applicant had not substantially contested the facts of the infringement, but that the information which it had supplied to the Commission had gone no further than its reply to the Commission's request for information, dated 22 March 2000, under Article 11(1) of Regulation No 17. The Commission therefore deemed it appropriate to reduce the applicant's fine by 10% in accordance with the second indent of section D.2 of the Leniency Notice.

28 As regards, last, Martens, the Commission observed, first, that in its reply to the statement of objections, Martens had disputed the existence of the infringement as described in that statement, that the information supplied to the Commission before the statement of objections was sent had gone no further than the reply to the Commission's request for information, dated 22 March 2000, under Article 11(1) of Regulation No 17, and, last, that the documents which Martens had supplied to the Commission after the statement of objections was sent either served to underpin its own defence or pointed to the possible existence of a separate infringement of the

competition rules, neither of which circumstances merited a reduction in the fine. However, the Commission noted that Martens had cooperated in the proceedings in a manner that speeded up the proceedings and considered it appropriate to reduce its fine by 10% in accordance with section D of the Leniency Notice.

29 The operative part of the contested decision is worded as follows:

'Article 3

[Interbrew], [Alken-Maes], [the applicant] and [Martens] have infringed Article 81 (1) [EC] by taking part in a concerted practice concerning prices, customer sharing and the exchange of information with regard to private-label beer in Belgium during the period from 9 October 1997 to 7 July 1998.

Article 4

The following fines are hereby imposed on [Interbrew], [Alken-Maes], [the applicant] and [Martens] in respect of the infringements found [in Article 3]:

(a) [Interbrew]: a fine of EUR 812 000;

(b) [Alken-Maes]: a fine of EUR 585 000;

(c) [the applicant]: a fine of EUR 270 000;

(d) [Martens]: a fine of EUR 270 000.

...'

Procedure and forms of order sought by the parties

30 By application lodged at the Court Registry on 27 February 2002, the applicant brought the present action.

31 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 9 December 2004.

32 At the hearing, the Court requested the Commission, in accordance with Article 64 (3) of the Rules of Procedure of the Court of First Instance, to produce certain documents within a specified period. In that context, and in order to allow the parties to submit their observations on those documents, the President of the Fifth Chamber decided, at the close of the hearing, to adjourn the closing of the oral procedure.

33 The Commission complied with the Court's request to produce within the prescribed period the documents specified at the hearing.

34 On 14 March 2005, the applicant submitted its written observations on those documents. On 10 May 2005, the Commission submitted its written observations on the applicant's observations of 14 March 2005.

35 The President of the Fifth Chamber closed the oral procedure on 10 May 2005. The parties were informed of this by letter of 30 June 2005.

36 The applicant claims that the Court should:

— annul Article 4 of the contested decision, which imposes on it a fine of EUR 270 000, and, so far as necessary, decide not to impose any fine on it; and, in the alternative, significantly reduce the amount of the fine;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

38 In support of its action, the applicant puts forward three pleas in law. The first, and main, plea alleges breach of the obligation arising under Article 253 EC and also of Article 15(2) of Regulation No 17 and the Guidelines owing to an incorrect assessment of the applicant's effective economic capacity to cause significant damage to other operators, in particular consumers. The second plea, which is put forward in the alternative, alleges breach of the Guidelines and of the obligation to state reasons owing to the incorrect assessment of the role played by the applicant in the cartel. The third plea, which is also put forward in the alternative, alleges breach of the Leniency Notice and of the principle of equal treatment.

First plea, alleging breach of the obligation to state reasons and also of Article 15(2) of Regulation No 17 and of the Guidelines owing to an incorrect assessment of the applicant's effective economic capacity to cause significant damage to other operators, in particular consumers

39 This plea is presented in two parts. In the first part, the applicant claims that by failing to define the private-label beer segment as the relevant market, the Commission breached its obligation to state reasons. In the second part, the applicant maintains that even if the private-label beer segment is the relevant market, the Commission breached Article 15(2) of Regulation No 17 and the Guidelines when it assessed the applicant's effective economic capacity to cause significant damage to other operators, in particular consumers.

First part, alleging breach of the obligation to state reasons owing to the failure to define the private-label beer segment as the relevant market

— Arguments of the parties

40 The applicant claims that the Commission did not define the relevant market, such definition being an indispensable condition for the purpose of measuring market power and determining the effective economic capacity of offenders to cause significant damage to other operators.

41 The Commission's analysis in the contested decision does not permit the conclusion that the private-label beer segment constituted a market distinct from the general beer market in Belgium, on which the applicant and Martens were protected from the competitive pressure exerted by the two large actors on the Belgian beer market, namely Interbrew and Alken-Maes. It follows, in the applicant's submission, that in the absence of a definition of the relevant market, the Commission was not entitled to assess the applicant's effective economic capacity to cause significant damage to other operators, in particular consumers, solely by reference to its turnover on the private-label beer segment.

42 The applicant contends that in adopting that approach the Commission breached its obligation under Article 253 EC to state reasons.

43 The Commission disputes that line of argument and claims that it fully satisfied the requirement that it state reasons in connection with fines.

— Findings of the Court

44 The Court of First Instance has jurisdiction in two respects over actions contesting Commission decisions imposing fines on undertakings for infringement of the competition rules. First, under Article 230 EC, it has the task of reviewing the legality of those decisions. In that context, it must in particular review compliance with the duty to state reasons laid down in Article 253 EC, infringement of which renders the decision illegal. Second, the Court of First Instance has jurisdiction to assess, in the exercise of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amounts of fines. That assessment may justify the production and taking into account of additional information which the duty to state reasons provided for in Article 253 EC does not as such require to be set out in the decision (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraphs 38 to 40, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 215).

45 As regards review of compliance with the duty to state reasons, it is settled case-law that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719; and *Cheil Jedang* v *Commission*, paragraph 44 above, paragraph 216).

46 As regards the scope of the duty to state reasons for the calculation of a fine imposed for infringement of the Community competition rules, first, it should be borne in mind that the second subparagraph of Article 15(2) of Regulation No 17 provides that '[i]n fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73, and 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, paragraph 463). Second, the Guidelines and the Leniency Notice indicate what factors the Commission takes into consideration in measuring the gravity and duration of an infringement (*Cheil Jedang* v *Commission*, paragraph 44 above, paragraph 217). In those circumstances, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Leniency Notice and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine (*Cheil Jedang* v *Commission*, paragraph 44 above, paragraph 218).

47 In this case the Commission satisfied those requirements.

48 First of all, the Commission indicated in detail in the contested decision the approach which it took in calculating the fines and it explained each stage of its reasoning (see paragraphs 14 to 28 above).

49 Second, the applicant acknowledges the infringement as found by the Commission in Article 3 of the contested decision, which means that it does not dispute the fact

that the cartel related exclusively to the private-label beer segment. Nor does it dispute, in the context of its application for annulment or reduction of the fine, that the cartel related exclusively to the private-label beer segment, or dispute the turnover achieved by each undertaking concerned on that segment as quantified by the Commission, or the division of the undertakings into two categories effected by the Commission on the basis of turnover in that segment.

50 It follows from those factors, first, that there can be no doubt that the infringement of which the applicant is accused, as established by the Commission, related exclusively to sales of private-label beer and, second, that it was precisely in regard to that segment of the market that the Commission evaluated the various factors which it took into consideration, in application of the Guidelines, in order to determine the amount of the fine. In doing so, moreover, the Commission referred either to the private-label beer cartel or to the beer sold under those labels, or to the private-label beer segment.

51 In particular, it is clear from recitals 335 to 339 to the contested decision that the restriction of the object of the cartel to the private-label beer segment played a decisive role in the classification of the infringement as serious, and not as very serious, within the meaning of section 1A, paragraph 2, of the Guidelines. The Commission stated, at recital 338 to the contested decision, that it took account of the fact that while the meetings might indeed have concerned the whole territory of Belgium, they had been limited to the private-label segment of the market, which accounted for 5.5% of total beer consumption in Belgium.

52 It is in that context that the Court must analyse the reasons stated by the Commission for its assessment of the applicant's effective economic capacity to cause significant damage to other operators.

53 In that regard, it appears, first of all, as the Commission correctly contends, that that assessment was merely one among a number of steps in the process of determining the specific starting point of the fine applicable to each undertaking in the light of the gravity of the infringement, which was determined on the basis of a number of criteria.

54 After stating that the infringement must be regarded as serious owing in particular to the fact that it was confined to the private-label segment, the Commission considered, at recital 341 to the contested decision, that it was appropriate to differentiate between the undertakings which had participated in the infringement, '[i]n order to allow for the actual capacity of the undertakings concerned to cause significant damage on the beer market in Belgium, in particular in the private-label segment'. Although the Commission referred to the 'beer market in Belgium', which it described at the hearing as a drafting error, it none the less follows both from the fact that it added 'in particular the private-label segment' and from the fact that it took account of the 'turnover [of the undertakings concerned] in private-label beer' that it was indeed by reference to the private-label beer segment that the Commission intended to distinguish the relative degree of liability of each undertaking in that cartel, by assessing their effective economic capacity to cause significant damage to other operators, in particular consumers, in accordance with the fourth paragraph of section 1A of the Guidelines.

55 That fact that that assessment took the private-label segment as its reference framework is merely the corollary of the fact that all the assessments made by the Commission for the purpose of evaluating the gravity of the infringement necessarily had to take into consideration the fact that the cartel was aimed only at that segment, as the Commission found in Article 3 of the contested decision. Besides, it would have made no sense for the Commission to take account of the fact that the cartel concerned only the private-label beer segment when determining gravity for the purposes of the first and second paragraphs of section 1A of the Guidelines and to assess the effective economic capacity of the undertakings concerned to cause significant damage to other operators, in particular consumers, on the general market for beer sold in Belgium.

56 It follows that the applicant cannot criticise the Commission for having breached its obligation to state reasons in referring, for the purposes of assessing its 'effective economic capacity' to cause significant damage to other operators, to the private-label beer sector, since the Commission indicated in the contested decision the various factors which enabled it to measure the gravity of the infringement and it follows from those indications that the Commission's assessment systematically took account of the fact that the cartel concerned exclusively the private-label beer segment.

57 In any event, for the purposes of assessing, in the context of the application of the Guidelines, the applicant's 'effective economic capacity' to cause damage to other operators, even though it would be appropriate to understand the applicant's argument as supporting a complaint alleging breach of the Commission's obligation to define in advance the private-label segment as a separate market, it must be held, first of all, that the Guidelines do not require that the Commission formally define the relevant geographic market (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 341) and that they do not prescribe a specific method of determining the effective capacity of offenders to cause significant damage to other operators, in particular consumers. Nor do the Guidelines require that the way in which the Commission chooses to assess that effective capacity on the basis of the offenders' sales in the segment concerned by the infringement has as an essential precondition proof that that segment constitutes the relevant market.

58 Next, it must be borne in mind that it is settled case-law that, for the purposes of applying Article 81(1) EC, the reason for defining the relevant market is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 74; 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* ('*Cement*') [2000] ECR II-491, paragraph 1093; and *Volkswagen* v *Commission*, paragraph 57 above, paragraph 230). Consequently, there is an obligation on the Commission to define the market in a decision applying Article

81(1) EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105, and *Volkswagen* v *Commission*, paragraph 57 above, paragraph 230).

59 The Commission cannot therefore be required to prove that the product or products concerned by a cartel having an anti-competitive object constitute a separate market for the purposes of assessing one of the criteria applicable when determining the amount of the fine, since such proof is not essential to the finding of the actual infringement. As the amount of the fine must be determined on the basis of the gravity and duration of the infringement as established by the Commission, the assessment, for the purpose of calculating the fine imposed for the infringement, of the effective economic capacity of the offenders to cause damage to other operators, in particular consumers, cannot be made by reference to products other than those to which the cartel related.

60 The first part of the first plea must therefore be rejected.

Second part, alleging breach of Article 15(2) of Regulation No 17 and of the Guidelines owing to an incorrect assessment of the applicant's effective capacity to cause significant damage to other operators, in particular consumers

— Arguments of the parties

61 The applicant claims that, even if the private-label segment did constitute the relevant market — quod non —, the Commission breached Article 15(2) of

Regulation No 17 and the Guidelines when it considered that the applicant's effective economic capacity to cause significant damage to other operators on that market was greater than that of Interbrew and Alken-Maes, when those undertakings, whose market shares were 55% and 15% respectively, had very strong positions on the general beer market in Belgium. Notwithstanding that on the date taken into account in the contested decision the applicant had a larger turnover than Interbrew and Alken-Maes in the private-label segment, it had a much smaller effective economic capacity to cause significant damage to other operators.

62 In the applicant's submission, that state of affairs is demonstrated, as may be seen from the contested decision, by the fact that Interbrew and Alken-Maes took the initiative to hold the four meetings devoted to private-label beer, a fact which the Commission deliberately ignores and which contradicts its finding that Interbrew and Alken-Maes were less important players on the private-label beer market. For the purpose of assessing the effective economic capacity of the offenders to cause significant damage to other operators on that market, it is impossible to disregard their economic capacity on the general beer market. Because of their high production capacities and by virtue of the higher margins obtained from their own-label sales, Interbrew and Alken-Maes were capable of bringing strong pressure to bear on the applicant and Martens on the private-label beer market.

63 The Commission disputes the applicant's arguments.

— Findings of the Court

64 As regards the applicant's alternative argument relating to an incorrect assessment of its effective economic capacity to cause significant damage to other operators, in

particular consumers, even if the private-label beer segment were the relevant market, it should first of all be recalled that, for the purpose of that assessment, the Commission, at recital 341 to the contested decision, differentiated between the various undertakings which had participated in the infringement and divided them into two categories on the basis of their turnover in the private-label segment.

65 Next, it should be recalled (see paragraph 49 above) that neither the turnover attained by each of the undertakings concerned in that segment, as described by the Commission, nor the division of the undertakings into two categories, as effected by the Commission on the basis of their turnover, is disputed.

66 As regards the argument that the fact that Interbrew and Alken-Maes took the initiative to hold the four meetings devoted to private-label beer sales contradicts the finding that Interbrew and Alken-Maes were smaller players in that segment, it must be observed that the Commission took account of the specific role of ringleader played by Interbrew and Alken-Maes in the private-label beer cartel by finding against each of those undertakings an aggravating circumstance resulting in an increase of 30% in the basic amount of their fines (see paragraph 22 above).

67 As regards, last, the applicant's argument that the fact that the private-label segment was taken into account for the purpose of the assessment of its effective economic capacity to cause damage to other operators, in particular consumers, does not mean that Interbrew's and Alken-Maes's economic capacity on the general beer market can be disregarded, it should be noted that at recital 343 to the contested decision the Commission stated that it took into consideration, with respect to the need to ensure that the fines had a sufficiently deterrent effect, the fact that, in contrast to Haacht and Martens, Interbrew was a large international undertaking and Alken-Maes was a member of an international group and that they thus had

easier access to legal and economic knowledge and infrastructures and were more easily able to recognise that their conduct constituted an infringement and to be aware of the consequences stemming from it under competition law. By doubling and quintupling for that reason the specific starting amounts determined for Alken-Maes and Interbrew, the Commission took into consideration Alken-Maes's and Interbrew's greater economic capacity in general terms.

68 It follows that the second part of the plea must be rejected, and also the first plea in its entirety.

Second plea, alleging breach of the Guidelines owing to the incorrect assessment of the role played by the applicant in the cartel; and breach of the obligation to state reasons

Arguments of the parties

69 The applicant refers to the case-law of the Court of Justice (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 100) and claims that the Commission misapplied the Guidelines and failed in its duty to state reasons by not applying to it the attenuating circumstance referred to in the first indent of section 3 of the Guidelines, namely its having played an 'exclusively passive or "follow-my-leader" role in the infringement', although it played an extremely passive role or, in any event, what was indisputably a less active role than that played by the three other undertakings which participated in the four meetings in question.

70 When called upon by the Court at the hearing to expand upon its argument, the applicant stated that, in addition to placing strict reliance on the attenuating circumstance in respect of the 'exclusively passive or "follow-my-leader" role in the infringement', it was claiming more widely the benefit of an attenuating circumstance on account of its less active role in the cartel than that played by the other three participants. That less active role may be explained, in particular, by the fact that the applicant was not present on the private-label beer market in the Netherlands, which was dealt with at the last two meetings of the cartel.

71 Although the applicant does not deny having been present at the four meetings — the first two of which were held in Belgium and the last two in the Netherlands — or having spoken at the meetings about prices and customer-sharing, it submits that the passive, or in any event less active, nature of its role is illustrated by two factors. First, Interbrew and Alken-Maes took the initiative to hold the meetings. Second, the applicant was not present on the Netherlands market and was therefore not interested in the two meetings held in Belgium, organised by Interbrew at Martens's request.

72 The applicant submits that its presence at the meetings and its participation in the exchange of information does not mean that its role can be described as active, or else the attenuating circumstance in question would be rendered meaningless. Its allegedly active role corresponds in reality only to participation in the cartel in a 'follow-my-leader' role.

73 The Commission disputes the applicant's arguments and contends that a less active role in the cartel cannot in any event be taken into account as an attenuating circumstance.

Findings of the Court

74 As regards, first, the allegation that the Commission was incorrect to find that the role played by the applicant in the cartel could not constitute an attenuating circumstance, it should first of all be pointed out that it is indicated at section 3 of the Guidelines that the basic amount of an undertaking's fine may be reduced where there are specific attenuating circumstances, such as an 'exclusively passive or "follow-my-leader" role in the infringement' (first indent).

75 It should also be borne in mind that, according to the case-law, in order to be eligible for an attenuating circumstance resulting from an 'exclusively passive or "follow-my-leader" role', the undertaking concerned must have adopted a 'low profile', characterised by no active participation in the creation of any anti-competitive agreement or agreements (*Cheil Jedang* v *Commission*, paragraph 44 above, paragraph 167). The Court of First Instance has held that the factors which may indicate that an undertaking has played a passive role in a cartel include, in particular, where its participation in cartel meetings is significantly more sporadic than that of the ordinary members of the cartel, where it enters the market affected by the infringement at a late stage, regardless of the length of its involvement in the infringement, or where a representative of another undertaking which has participated in the infringement makes an express declaration to that effect (*Cheil Jedang* v *Commission*, paragraph 44 above, paragraph 168).

76 Furthermore, in the present case the Commission observed at recital 349 to the contested decision that '[the applicant] and Martens [had] both indicated that their participation in the cartel should be regarded as passive'. The Commission pointed out, however, at the same recital, that '[the applicant and Martens had] played an active part in the private-label cartel', that '[t]hey [had] been present at all the meetings known to the Commission' and that '[i]n addition, [the applicant] [had] acknowledged that it [had] exchanged information about private-label beer in Belgium with the other brewers involved and [had] made agreements on prices and sharing customers'.

77 The applicant does not deny having taken part in all the cartel meetings known to the Commission and acknowledges in its application that it attended the four meetings in issue, the first two of which took place in Belgium and the last two in the Netherlands. Nor does the applicant deny (see paragraph 71 above) that, like the other three breweries involved in the proceedings, it discussed prices and customer-sharing at the meetings.

78 It must therefore be concluded that by attending all the cartel meetings and exchanging information on prices and customer-sharing during those meetings, the applicant demonstrated a degree of active participation in the cartel which is clearly incompatible with that required in order to benefit from the attenuating circumstance which it pleads.

79 That finding cannot be undermined by the fact that Interbrew and Alken-Maes took the initiative to hold the meetings concerning private-label beer. The fact that the Commission takes as an aggravating circumstance in regard to one participant in the cartel the particularly active role consisting in taking the initiative for the cartel does not mean that it must for that reason find that the other participants benefit from an attenuating circumstance because they have planed an exclusively passive or 'follow-my-leader' role. The specific characteristics of one undertaking's conduct cannot determine whether an aggravating circumstance or an attenuating circumstance is applicable to another undertaking. Whether or not such circumstances are taken into account depends on the individual conduct of an undertaking and must therefore necessarily be based on the characteristics of its own conduct.

80 Nor can the less active role which the applicant claims to have played in the cartel be taken into account as an attenuating circumstance distinct from the 'exclusively passive or "follow-my-leader" role' expressly mentioned in the Guidelines. Even if it were the case that the applicant's conduct were actually less active by comparison with that of the other participants, owing, for example, to its absence from the Netherlands market, that mere gradation cannot justify a reduction in the fine. Such conduct demonstrates only less zeal in the conduct of the cartel and does not call in

question the applicant's full involvement in it, as demonstrated in particular by its systematic participation in the anti-competitive meetings throughout the entire duration of the infringement and the absence of factors of such a kind as to support the existence of any reluctance on its part to pursue the objectives of the cartel.

81 Nor can reliance on the Commission's previous practice in taking decisions be accepted. It is settled case-law that in the context of Regulation No 17 the Commission has a margin of discretion when fixing the amount of fines in order that it may channel the conduct of undertakings towards observance of the competition rules (Case T-150/99 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59; Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53; and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringements does not mean that it is estopped from raising that level within the limits indicated in Regulation No 17 if that is necessary to ensure the implementation of Community competition policy (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309; and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89). On the contrary, the proper application of the Community 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*, paragraph 109; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 237).

82 As regards, second, the alleged breach of the obligation to state reasons, it is appropriate, first of all, to refer to the case-law cited at paragraphs 45 and 46 above and then to observe that, when refusing the applicant the benefit of the attenuating circumstance on which it relied, the Commission set out in the contested decision (see paragraphs 76 and 77 above) the considerations on which it decided not to find an attenuating circumstance for the applicant's exclusively passive or 'follow-my-leader' role in that regard. Accordingly, it did not in any way breach its obligation to state reasons on that point.

83 It must therefore be concluded that the Commission was correct to reject the attenuating circumstance pleaded and that it provided sufficient reasons for doing so. The second plea must therefore be rejected.

Third plea, alleging breach of the Leniency Notice and also of the principle of equal treatment

84 The third plea is in two parts. In the first part, the applicant claims that there has been a breach of the Leniency Notice and of the principle of equal treatment owing to the more favourable treatment given by the Commission to Interbrew. In the second part, the applicant claims that there has been a breach of the Leniency Notice and of the principle of equal treatment because the Commission gave the same treatment to the applicant, on the one hand, and to Martens and Alken-Maes, on the other.

First part, alleging breach of the Leniency Notice owing to the more favourable treatment given by the Commission to Interbrew

— Arguments of the parties

85 The applicant submits that its cooperation in establishing the existence of the private-label beer cartel must be regarded as comparable to Interbrew's and that by granting it a reduction in its fine of only 10% for cooperation, whereas Interbrew was given a reduction of 50%, the Commission breached the principle of equal treatment.

86 On the one hand, it is apparent from the case-file and from the contested decision that on 14 January and 2 February 2000, or before receiving the statement of objections, Interbrew sent the Commission a number of statements revealing the existence of the meetings concerning the private-label beer and the levels of prices and customer-sharing. The Commission considered that Interbrew's full and uninterrupted cooperation and the fact that it did not substantially contest the facts justified a reduction of 50% of its fine.

87 On the other hand, on 5 April 2000, in response to the request for information of 22 March 2000, and therefore without being aware of Interbrew's statements and before receiving the statement of objections, the applicant declared that the level of prices of private-label beer in Belgium had been discussed at four meetings. The applicant further declared that information on customers and volumes had been exchanged. Accordingly, in its response to the statement of objections, the applicant, like Interbrew, confirmed the existence of the collusion and of the exchange of information about private-label beer sales in Belgium.

88 Questioned on this point by the Court at the hearing, the applicant maintained, in reliance on the judgment in 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, paragraphs 407 to 410, that, contrary to the Commission's contention, in its response of 5 April 2000 to the request for information of 22 March 2000 it provided information over and above that which it was required to produce pursuant to Article 11 of Regulation No 17. Since it responded to the request for information, it must be deemed to have provided cooperation which the Commission should have taken into account under the Leniency Notice.

89 The applicant maintains that, in so far as Martens disputed the existence of collusion on prices and customers and Alken-Maes did nothing more than not substantially dispute the facts set out in the statement of objections, only the

information which the applicant provided, by confirming the information given by Interbrew, permitted the Commission to establish that there had been an infringement of Article 81 EC.

90 The applicant's statements, confirming those made by Interbrew, were crucial for the establishment of the infringement and were as decisive as Interbrew's. In any event, the fact that Interbrew revealed the existence of the infringement cannot in itself justify their being treated as differently as the Commission treated them.

91 In its written observations on the documents produced by the Commission at the Court's request at the hearing, the applicant further submits that it follows from those documents that it was in a situation entirely comparable to Interbrew's. Both undertakings responded to the requests for information, under Article 11 of Regulation No 17, of 11 November 1999 and 22 March 2000, which had the same object, since the meetings concerning private-label beer sales, which formed the subject-matter of the request for information sent to the applicant on 22 March 2000, also formed the subject-matter of the request for information sent to Interbrew on 11 November 1999. The applicant and Interbrew therefore provided, in the same circumstances, comparable data relating to the same infringement and their cooperation was therefore the same.

92 The applicant relies in that regard on the judgment in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraphs 235 to 249, where it was held that the mere fact that one undertaking recognised the facts before another undertaking cannot constitute an objective reason for treating them differently, since assessment of the degree of cooperation provided by undertakings cannot depend upon purely chance factors such as the order in which they are questioned by the Commission. The fact that Interbrew first revealed the existence of the cartel in response to a request for information cannot therefore be an objective reason for treating the applicant and Interbrew differently.

93 The applicant further submits that the documents produced by the Commission confirm that the Commission was wrong to maintain that Interbrew voluntarily provided information on the agreement concerning private-label beer. That information came within the scope of the Commission's request for information of 11 November 1999. The degrees of cooperation provided by Interbrew and the applicant were merely more comparable.

94 The Commission claims that the degree of cooperation shown by the applicant was in no way comparable with that provided by Interbrew and that there was therefore no breach of the principle of equal treatment.

95 Interbrew spontaneously provided information on 14 January 2000, which it supplemented on two occasions, on 2 and 8 February 2000, about the private-label beer cartel, the existence of which was unknown to the Commission. Interbrew was the first to provide information about that cartel and the information, moreover, was perfectly useful to the Commission as proof of the infringement in issue.

96 The applicant sent information only in response to the request for information sent to it on 22 March 2000. Although useful, the information provided did not go beyond a response to the request for information and was not indispensable to the establishment of the infringement, since the infringement was already established by the information voluntarily sent by Interbrew. The fact that the Commission cited that information in the contested decision does not establish that it constituted evidence essential to the establishment of the infringement and that it went beyond a response to a request for information.

97 In its written observations of 10 May 2005 concerning the applicant's observations of 14 March 2005 in respect of the documents produced by the Commission

following the Court's request at the hearing, the Commission categorically denies that the applicant is correct to rely on the judgment in *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 92 above. The applicant overlooks an essential consideration in that judgment, namely that a breach of the principle of equal treatment can be found only where the undertakings concerned provided the same information, in comparable circumstances and at the same stage in the administrative procedure.

98 However, it follows both from the contested decision and from the documents provided by the Commission that Interbrew and the applicant were clearly not in comparable circumstances and that they did not provide the same information or cooperate with the Commission in the same fashion.

99 The request for information of 11 November 1999 did not in any way refer to the private-label beer cartel, of which the Commission was unaware at that time. Interbrew spontaneously informed the Commission of the existence of that cartel, which led the Commission to request Interbrew to provide further information on the subject. Interbrew therefore cooperated very actively with the Commission. The spontaneous denunciation of its participation in the private-label beer cartel is an example of its active cooperation and should be rewarded.

100 It cannot therefore be contended that the questions put to Interbrew on 11 November 1999 and to the applicant on 22 March 2000 were put in comparable circumstances, at the same stage of the administrative procedure, and that their responses contained the same information. In particular, Interbrew provided detailed information about the private-label beer cartel, whereas the applicant first replied, in its letter of 5 April 2000, that it knew nothing about an infringement of the competition rules and that the meetings were confined to lawful matters, before acknowledging the true content of the meetings.

101 The Commission concludes that without Interbrew's full cooperation it would never have sent the request for information to the applicant and that the private-label beer cartel would not have been disclosed. The investigations carried out in Belgium in connection with the Interbrew/Alken-Maes cartel would not have revealed documents relating to that cartel.

— Findings of the Court

102 It must be borne in mind, as a preliminary point, that in the Leniency Notice the Commission set out the conditions on which undertakings which cooperate with it during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed on them (section A3 of the Leniency Notice).

103 As regards the application of the Leniency Notice in the applicant's case, it is common ground that its conduct must be assessed under section D, entitled 'Significant reduction in a fine'.

104 It must be borne in mind, first, that according to the case-law a reduction in the fine for cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily and, where relevant, to bring it to an end (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 156, and *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 92 above, paragraph 270).

105 Second, under Article 11(1) of Regulation No 17, in carrying out the duties assigned to it by Article 85 EC and by provisions adopted under Article 83 EC, the Commission may, inter alia, obtain all necessary information from undertakings and associations of undertakings, which, under Article 11(4) of Regulation No 17, are required to supply the information requested. Where an undertaking or association of undertakings does not supply the information requested within the time prescribed by the Commission, or supplies incomplete information, the Commission may, in accordance with Article 11(5) of Regulation No 17, request the information by means of a decision, and the undertaking or association of undertakings which persists in refusing to supply the information requested is then liable to a fine or to penalties.

106 Thus, an undertaking's cooperation in the investigation does not entitle it to a reduction in its fine where that cooperation did not go further than that which it was required to provide under Article 11(4) and (5) of Regulation No 17 (*Solvay* v *Commission*, paragraph 81 above, paragraphs 341 and 342). On the other hand, where an undertaking, in response to a request for information under Article 11, supplies information going much further than that which the Commission may require under that article, the undertaking in question may receive a reduction in its fine (see, to that effect, Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 262).

107 In that regard, where, in a request for information under Article 11 of Regulation No 17, the Commission, in addition to putting purely factual questions and requesting production of pre-existing documents, asks an undertaking to describe the object and course of a number of meetings in which it participated and also the results of or the conclusions reached in those meetings, when it is clear that the Commission suspects that the object of those meetings was to restrict competition, a request of that nature is of such a kind as to require the undertaking concerned to admit its participation in an infringement of the Community competition rules, so that the undertaking is not required to answer questions of that type. In such a situation, the

fact that an undertaking none the less supplies information on those points must be regarded as spontaneous cooperation on the undertaking's part capable of justifying a reduction in the fine in application of the Leniency Notice.

108 It should also be observed that, in the context of the appraisal of the cooperation shown by undertakings, the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified (*Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 92 above, paragraph 237, and the case-law cited).

109 It is established, in that regard, that a difference in treatment of the undertakings in question must be attributable to degrees of cooperation which are not comparable, notably in so far as they consisted in supplying different information or in supplying that information at different stages of the administrative procedure, or in circumstances that were not similar (see, to that effect, *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 92 above, paragraphs 245 and 246).

110 In the present case, it follows from recitals 360 and 361 to the contested decision that the Commission granted the applicant a reduction of 10% in its fine on the sole ground that the applicant had not substantially contested the facts constituting the infringement, in application of the second indent of section D.2 of the Leniency Notice. As regards the information which the applicant sent to the Commission on 5 April 2000 in response to its request for information of 22 March 2000, the Commission considered that it was covered by the obligation imposed on the applicant by Article 11 of Regulation No 17 and that, useful though it might have been, the information did not constitute proof indispensable to the establishment of the reality of the infringement. The applicant could not therefore claim a reduction in its fine equivalent to that granted to Interbrew.

111 As regards the line of argument developed by the applicant, it should be pointed out that the applicant maintains that the information which it supplied to the Commission in its response of 5 April 2000 to the request for information of 22 March 2000 went beyond the information which it was required to supply pursuant to Article 11 of Regulation No 17 and also that the information which it supplied was crucial to the establishment of the infringement by the Commission.

112 It must be emphasised in that regard that, although the information supplied by the applicant was as decisive as the applicant would have it, the fact of supplying that information can justify a reduction in the amount of the fine imposed on the applicant, in accordance with the case-law cited at paragraphs 104 to 106 above, only in so far as the information did indeed go beyond what the Commission could require that the applicant supply pursuant to Article 11 of Regulation No 17.

113 It must be held that the information supplied by the applicant in its letter of 5 April 2000 did not go far beyond what it was required to supply pursuant to Article 11 of Regulation No 17. The applicant essentially confined itself to providing factual answers to the questions put in the request for information concerning the dates of and the identity of the participants in four meetings and the subject-matter of those meetings.

114 In so far as the passages in the letter of 5 April 2001 to the effect that 'information was exchanged concerning customers, packaging and volumes' and the conclusions resulting from the meetings were aimed at 'adopting a firmer attitude to prices' may be interpreted as the acknowledgement of unlawful acts, going beyond the information production of which may be required by the Commission under Article 11 of Regulation No 17, that hypothesis must be rejected in any event in respect of another passage in the applicant's response, which states: 'We formally confirm, however, that those meetings did not touch on agreements on prices or on the

sharing of customers'. In the light of such a denial, the fact that certain extracts from the applicant's response suggest the existence of an exchange of information and an intention on the part of those participating in the meetings to adopt a firmer attitude to prices enabled the Commission to establish the existence of an infringement with less difficulty.

115 It must therefore be concluded that in its response of 5 April 2000 to the request for information of 22 March 2000 the applicant did not supply the Commission with information going far beyond what it was required to supply pursuant to Article 11 of Regulation No 17 and that it could not therefore benefit in that regard from a reduction in the amount of the fine imposed on it, in accordance with the case-law cited at paragraph 106 above.

116 Accordingly, the argument that what the applicant alleges to have been the more favourable treatment given to Interbrew, on the ground that that undertaking supplied information to the Commission which it was not required to produce, is characteristic of unequal treatment, is inoperative.

117 The first part of the third plea must therefore be rejected.

Second part, alleging breach of the Leniency Notice and of the principle of equal treatment owing to the similar treatment given to the applicant, on the one hand, and to Martens and Alken-Maes, on the other

— Arguments of the parties

118 The applicant maintains that there is a fundamental difference between the degree of cooperation which it provided to the Commission and that shown by Martens

and, to a lesser extent, Alken-Maes. The fact that each of the three undertakings was granted the same reduction of 10% of the fine is therefore characteristic of a breach of the principle of equal treatment.

119 The applicant claims that it provided the Commission with cooperation of decisive significance. Thus, in its response of 5 April 2000 to the Commission's request for information, it declared that the meetings in question had dealt with private-label beer price levels and that information concerning customers and volumes had been exchanged. The applicant also confirmed in its response to the statement of objections that price levels had been discussed at those meetings. That information, which was consistent with the information supplied by Interbrew, was of decisive significance for the Commission, in so far as it enabled the Commission to establish the existence of an infringement of Article 81 EC. Last, the applicant demonstrated complete and continuous cooperation throughout the procedure.

120 It is apparent from the case-file, on the other hand, that Martens did not indicate, in its response of 6 April 2000 to the Commission's request for information of 22 March 2000 under Article 11 of Regulation No 17, that price levels or customer-sharing had been discussed at the meetings in issue. In its response to the statement of objections, Martens even expressly denied that agreements on prices or market-sharing had been concluded at those meetings and, on the contrary, challenged the veracity of Interbrew's statements. Martens's denial of the existence of the infringement is also evident in the contested decision, where the Commission states that during the proceedings Martens merely cooperated in a manner that speeded up the proceedings.

121 As regards Alken-Maes, its response of 5 April 2000 to the Commission's request for information of 22 March 2000 contains no express confirmation of the existence of collusion on prices or customer-sharing. In the contested decision, the Commission

merely mentions that Danone, on behalf of Alken-Maes, did not deny that prices and customer-sharing had been discussed at the meetings.

122 Therefore, in the applicant's submission, it clearly emerges from a comparison of the degrees of cooperation provided by Martens and Alken-Maes with that provided by the applicant that the Commission breached the principle of equal treatment by placing the applicant on an equal footing with the other two undertakings. Contrary to the Commission's assertion, the applicant went much further than not disputing the facts when, in its response of 5 April 2000 to the request for information, it supplied essential declarations on the object and scope of the meetings relating to the private-label beer cartel.

123 The Commission contends, first, that although the levels of reduction in the fines imposed on the applicant and Martens are the same, the reasons for those reductions are different. Whereas the applicant's fine was reduced because it did not substantially contest the facts, Martens's fine was reduced on the basis of its cooperation throughout the proceedings. Neither of those undertakings received both a reduction for not substantially contesting the facts and a reduction for cooperating throughout the proceedings.

124 Since the applicant claims by implication that the reduction in fine granted to Martens was unwarranted, the Commission contends that it is settled case-law that, in regard to fines, an argument to the effect that the applicant should be granted an unlawful reduction under the principle of equal treatment cannot be accepted. The applicant can therefore be granted an additional reduction only by virtue of the extent of its own cooperation. As the applicant merely complied with its obligation to respond to the request for information sent pursuant to Article 11 of Regulation No 17, without going beyond what it was required to communicate, the extent of its cooperation did not go beyond not substantially contesting the facts which the Commission took into account.

125 As regards, second, the respective situations of the applicant and Alken-Maes, the Commission emphasises that they are comparable in so far as those undertakings confined themselves to not substantially disputing the facts in issue. It is therefore logical that they were treated equally.

— Findings of the Court

126 As the first part of the third plea has been rejected, it is quite proper that the applicant was granted a reduction of 10% in its fine on the sole ground that it did not substantially contest the facts in issue.

127 Accordingly, the argument that in granting Martens a reduction of 10% in its fine the Commission breached the principle of equal treatment in regard to the applicant, in that Martens, which had not acknowledged the facts, ought not to have been granted such a reduction, must be considered inoperative.

128 The applicant's situation, moreover, is perfectly comparable with that of Alken-Maes, which was also granted a reduction, under the second indent of section D 2 of the Leniency Notice, for not substantially contesting the facts. There was therefore no breach of the principle of equal treatment as between the applicant and Alken-Maes.

129 It follows that the second part of the plea must be rejected, as must the plea in its entirety.

130 In those circumstances, the application must be dismissed in its entirety.

Costs

131 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 6 December 2005.

E. Coulon — Registrar

M. Vilaras — President

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