JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

25 October 2005 *

In Case T-38/02,

Groupe Danone, established in Paris (France), represented by A. Winckler and M. Waha, lawyers,

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 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), and, in the alternative, for a reduction in the fine imposed on the applicant by Article 2 of that decision,

* Language of the case: French.

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

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

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2004,

gives the following

Judgment

Legal framework

1 Article 15(2) 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), provides:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to [EUR] 1 000 000, or a sum in excess thereof but not exceeding 10% of the 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 of the obligations 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') lay down a method for determining the amount 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' (second introductory paragraph of the Guidelines). According to the Guidelines, 'the 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' (Section 1 of the Guidelines).

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 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 At the time when the facts took place, Interbrew NV ('Interbrew') and Brouwerijen Alken-Maes NV ('Alken-Maes') were the largest and the second-largest suppliers on the Belgian beer market. Alken-Maes was a subsidiary of Group Danone SA ('the applicant'), which also operated on the French beer market through another subsidiary, Brasseries Kronenbourg SA ('Kronenbourg'). In 2000, the applicant ceased its activities on the beer market.

6 In 1999, the Commission initiated an investigation under Case IV/37.614/F3 into possible infringements of the Community competition rules in the Belgian brewing sector.

7 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 Interbrew, Alken-Maes, NV Brouwerij Haacht ('Haacht') and NV Brouwerij Martens ('Martens'). The procedure initiated against the applicant and the statement of objections addressed to it related solely to its alleged involvement in the cartel referred to as 'Interbrew/Alken-Maes' concerning the Belgian beer market.

8 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 to Interbrew, Alken-Maes, Haacht and Martens ('the contested decision').

9 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, secondly, concerted practices in respect of private-label beer. The contested decision finds that Interbrew and Alken-Maes participated in the first infringement, while Interbrew, Alken-Maes, Haacht and Martens participated in the second.

10 Although the applicant was, at the material time, the parent company of Alken-Maes, the contested decision makes only one finding of infringement on its part. In the light of its active involvement in the Interbrew/Alken-Maes Cartel, the applicant was held responsible both for its own involvement in the cartel and for that of Alken-Maes. By contrast, the Commission considered that there was no reason to attribute responsibility to the applicant for the participation of its subsidiary in the concerted practice relating to private-label beer, since the applicant was not itself involved in that cartel.

11 The infringement found to have been committed by the applicant consists in its participation, both directly and through its subsidiary Alken-Maes, in a complex set of agreements and/or concerted practices relating to a general non-aggression pact, prices and promotions in the off-trade, customer sharing in the on-trade, including 'national' customers, the restriction of investment and advertising in the on-trade, a new pricing structure for the on-trade and the off-trade, and the exchange of information about sales in both the on-trade and the off-trade.

12 The contested decision finds that the infringement took place over the period from 28 January 1993 to 28 January 1998.

13 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.

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

15 In that regard, the Commission held in the contested decision that all the participants in the Interbrew/Alken-Maes Cartel had committed the infringement intentionally.

16 For the purpose of setting the fines to be imposed, the Commission applied in the contested decision the method laid down in the Guidelines and the Leniency Notice decision.

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

'*Article 1*

[Interbrew], [Alken-Maes] and [the applicant] have infringed Article 81(1) [EC] by taking part in a complex set of agreements and/or concerted practices relating to a general non-aggression pact, prices and promotions in the off-trade, customer sharing in the on-trade (both the "traditional" sector and national customers), the restriction of investment and advertising in the on-trade, a new pricing structure for the on-trade and the off-trade, and the exchange of information about sales in both the on-trade and the off-trade during the period from 28 January 1993 to 28 January 1998.

Article 2

The following fines are hereby imposed on [Interbrew] and [the applicant] in respect of the infringements found in Article 1:

(a) on [Interbrew]: a fine of EUR 45.675 million;

(b) on [the applicant]: a fine of EUR 44.043 million.

...'

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance on 22 February 2002, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. Pursuant to Article 64 of its Rules of Procedure, the Court requested the parties to produce certain documents and to answer a number of written questions. The parties complied with those requests within the prescribed period.

20 By letter of 30 November 2004, the applicant requested the Court, first, to place on the file the Commission Decision of 29 September 2004 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/C.37750/B2 — Brasseries Kronenbourg, Brasseries Heineken), notified under number C (2004) 3597 final ('the Kronenbourg/Heineken Decision'), and, secondly, by way of measures of organisation of procedure under Article 64(4) of the Rules of Procedure, to invite the Commission to indicate, before or at the hearing, the results of its investigation into possible abuses of Interbrew's dominant position on the Belgian beer market.

21 By decision of 3 December 2004, the Court, first, added to the file the letter referred to above and informed the Commission that it would be invited at the hearing to put forward its observations on the applicant's request that the Kronenbourg/Heineken Decision be added to the file. Secondly, it rejected the application for a measure of organisation of procedure directing the Commission to indicate the results of its investigation into possible abuses of Interbrew's dominant position on the Belgian beer market.

22 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 8 December 2004. The Commission stated at the hearing that it did not object to the applicant's request that the Kronenbourg/Heineken Decision be added to the file, which was done by decision of the Court.

23 The applicant claims that the Court should:

— annul the contested decision in accordance with Article 230 EC or, in the alternative, reduce the fine imposed by Article 2 of that decision in accordance with Article 229 EC;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

25 In support of its application, the applicant raises eight pleas in law. Two pleas, which are raised as primary pleas, seek annulment of the contested decision and allege infringement of the rights of the defence and the principle of sound administration (first plea) and infringement of the obligation to state reasons (second plea). Six other pleas, raised in the alternative, seek a reduction in the amount of the fine. They allege: incorrect assessment of the gravity of the infringement for the purpose of setting the starting amount of the fine, in breach of the principles of proportionality, equal treatment and *non bis in idem* (third plea); incorrect assessment of the duration of the infringement (fourth plea); lack of basis for the finding that the pressure put on Interbrew constituted an aggravating circumstance (fifth plea); lack of basis for the taking account of the applicant's repeated infringements as an aggravating circumstance against it (sixth plea), failure to take sufficient account of the applicable attenuating circumstances (seventh plea) and an incorrect assessment of the extent of the cooperation provided by the applicant, in breach of the principle of equal treatment and the Leniency Notice (eighth plea).

A — *The heads of claim seeking annulment of the contested decision*

1. *The plea alleging infringement of the rights of the defence and the principle of sound administration*

26 The plea is divided into three parts. In the first part, the applicant submits that it was not given an opportunity to enquire into the circumstances in which a document used against it by the Commission was drawn up. In the second part, it states that, prior to the adoption of the contested decision, the Commission refused to inform it of the matters taken into account in setting the amount of the fine. Lastly, in the third part, the applicant submits that the fact that no records were kept of meetings between the Commission and Interbrew and the Commission's refusal to send it Interbrew's response to the statement of objections constitute not only an infringement of the rights of the defence but also an infringement of the principle of sound administration.

(a) The first part, alleging that the applicant was not given an opportunity to enquire into the circumstances in which a document used against it by the Commission was drawn up

Arguments of the parties

27 The applicant maintains that the contested decision should be annulled on the ground that it was not given the opportunity to comment on and challenge a passage in a document a copy of which was originally taken by the Commission at the premises of Heineken NV ('Heineken') in the context of an investigation into a related matter in the Netherlands ('the Heineken Document'). The Commission invoked that document in recital 55 to the contested decision in support of its finding that the applicant had put pressure on Interbrew by threatening it with

reprisals on the French market in order to force it to widen the scope of the cartel. The other items taken into account in support of that finding, which are referred to in recital 54 to the contested decision, consist solely of unilateral statements by Interbrew.

28 The applicant acknowledges that the Heineken Document is referred to in the statement of objections and that it read that document when it was given access to the file. In the contested decision, however, the Commission merely referred to the place where and the circumstances in which the Heineken Document was obtained, treating that document as reliable without further formalities, and failed to give the applicant an opportunity to investigate the circumstances in which it had been prepared.

29 Thus, since they are not included in the file, the applicant did not have access to the letters or internal memoranda which preceded or followed that document. No material connected with that document which might have been obtained during the investigation in the Netherlands was placed on the file, despite the applicant having requested that this be done. Nor were any observations made by Heineken and Interbrew regarding the implications of the document placed on the file. Furthermore, the correspondence between the Commission and Heineken regarding the confidential nature of the Heineken Document, which the Commission did disclose, provided no new information and did not demonstrate that the Commission itself had the material which it needed in order to interpret the document.

30 The applicant puts forward two alternative complaints in that regard. Either the material needed to interpret the document existed and was not on the file, in which case the applicant was not given proper access to the file, in breach of the rights of the defence, or that material did not exist, in which case it was for the Commission, under its duty to investigate all matters favourable to the applicant too, to ascertain the credibility of the information contained in the Heineken Document by seeking to determine the circumstances in which it had been drawn up.

31 The applicant submits that, in any event, if it had been aware of the identity of the author of the Heineken Document and of the circumstances in which it was drawn up, the outcome of the administrative procedure might well have been different, as it might have been in a position to establish that the document was not authentic or that it was inaccurate. Were that to have been the case, Interbrew's individual statements would not have been sufficient to prove the alleged pressure put on that company. There was therefore an infringement of the rights of the defence, according to the case-law of the Court of First Instance (Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, 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 ('*Cement*'), paragraph 247).

32 The Commission observes that the applicant had access to the Heineken Document and was fully able to assess the 'circumstances' in which it was drawn up and that it never claimed during that administrative procedure that there had been an infringement of the rights of the defence. In any event, the Heineken Document is not the only evidence of the threat made by the applicant against Interbrew.

B — *Findings of the Court*

33 According to settled case-law, the right of access to the file in competition cases is intended, in particular, to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections (see Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 334 and the case-law cited). Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (see *Atlantic Container Line and Others*, paragraph 334 and the case-law cited).

34 The Commission is thus under a duty to make available to the undertakings involved in proceedings under Article 81(1) EC all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the institution or other confidential information are involved (see *Atlantic Container Line* v *Commission*, paragraph 33 above, paragraph 335 and the case-law cited).

35 If the Commission is found to have relied in the contested decision on inculpatory documents that were not in the investigation file and were not disclosed to the applicant, those documents should be excluded as evidence (see, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30; *Cement*, paragraph 31 above, paragraph 382; and *Atlantic Container Line and Others* v *Commission*, paragraph 33 above, paragraph 338).

36 As regards the documents which might have contained exculpatory evidence, where those documents are contained in the Commission's investigation file, any finding of an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure and with the question whether that undertaking was obliged to ask the Commission for access to its file or have it send particular documents to it (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 96, and *Atlantic Container Line and Others* v *Commission*, paragraph 33 above, paragraph 340).

37 By contrast, where the documents which might have contained exculpatory evidence are not in the Commission's investigation file, the applicant must expressly ask the institution for access to those documents, and failure to do so during the administrative procedure will mean that its right in that respect is barred in any action for annulment which may be brought against the final decision (*Cement*, paragraph 31 above, paragraph 383, and *Atlantic Container Line and Others* v *Commission*, paragraph 33 above, paragraph 340).

38 It is in the light of those principles that the Court must determine whether the applicant's claims are well founded.

39 The first point to note is that there is no dispute that the Heineken Document originally came into the Commission's possession in the course of an investigation carried out by it under Article 14(3) of Regulation No 17 in the premises of Heineken in the Netherlands on 22 and 23 March 2000, in a different case from the present one. The Commission subsequently demanded, on 14 April 2000, in the administrative procedure relating to the present case and by means of a request for information under Article 11 of Regulation No 17, that Heineken send it a fresh copy of the document, which was placed on the file.

40 It should also be noted that the applicant acknowledges that the Heineken Document is referred to in the statement of objections and that it read it when it had access to the file during the administrative procedure. As regards that particular document, the applicant was therefore actually able to exercise its right to be heard.

41 However, the applicant maintains that it was not given access to any letters or internal memoranda which might have preceded or followed the drawing-up of the Heineken Document and which might have contained exculpatory evidence.

42 The applicant's claim that the Commission failed to disclose such letters or internal memoranda in its possession cannot be accepted. According to settled case-law, the applicant may rely on an infringement of the rights of the defence only if it submitted to the Commission during the administrative procedure an express request for access to the documents in question (see paragraph 37 above).

43 The applicant made no such request. First, in its response to the statement of objections, the applicant merely asserted in relation to the Heineken Document that 'the probative value of that document appears doubtful [and that] there is nothing in the [statement of objections] or in the document which allows the applicant to establish the author or to examine the circumstances in which it was written'. That assertion cannot be regarded as an express request for access to the letters or internal memoranda in question. Moreover, when questioned on that point by the Court at the hearing, the applicant confirmed that its request for access to the file during the administrative procedure was a general one. Secondly, in its letters of 24 and 28 January 2002, the applicant merely makes, in very general terms and without any express reference to the documents in question, a second request for access to the file, which in any event was made after the administrative procedure had been closed.

44 As regards the applicant's claim that, if the Commission was not in possession of any letter or internal memorandum which preceded or followed the drawing-up of the Heineken Document, it was in breach of its duty of impartiality since it failed to investigate whether the contents of that document were true, it is sufficient to observe that that claim has no bearing on the problematic of the rights of the defence. The applicant is in effect asking the Court to determine whether the Commission established to the requisite standard what it intended to prove by means, inter alia, of the Heineken Document and whether, to the extent that that document was essential for such proof, the truth of the words reported in it is sufficiently established. The applicant is thus calling into question the probative value of the Heineken Document, an issue which is irrelevant to the consideration of the present plea alleging infringement of the rights of the defence (see, to that effect, Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraph 72) and which will be analysed in paragraphs 260, 261, 271 to 273 and 284 to 290 below.

45 The first part of the plea must accordingly be rejected.

(b) The second part, alleging that, prior to the adoption of the contested decision, the Commission refused to inform the applicant of the matters taken into account in setting the amount of the fine

Arguments of the parties

46 The applicant alleges an infringement of the rights of the defence on the ground that at no time did the Commission give it the opportunity to be aware of or to express views on the matters the latter proposed to take into account in setting the amount of the fine. In the statement of objections, the Commission simply summarised in a few lines the method set out in the Guidelines and the statement of objections contained nothing to enable the applicant to foresee the particularly unfavourable treatment which the Commission had in store for it and that it would consequently receive unequal treatment by comparison with Interbrew.

47 In particular, there was nothing in the statement of objections to indicate to the applicant that the Commission intended to rely on the fact that this constituted a repeated infringement by the applicant, while that aggravating circumstance has been applied only intermittently in the Commission's decision-taking practice. Thus, in 2001, the Commission made findings of re-infringement against a number of undertakings but did not invoke that aggravating circumstance when setting the amount of the fine. That was the case with F. Hoffmann-La Roche AG ('Hoffmann-La Roche') in Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1) ('the Vitamins Decision'), and Commission Decision 2002/742/EC of 5 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.604 — Citric acid) (OJ 2002 L 239, p. 18) ('the Citric Acid Decision'), and, although it was the addressee of the decision under another name, with Stora Kopparbergs Bergslags AB ('Stora') in the case which gave rise to Commission Decision 2004/337/EC of 20 December 2001 relating to a

proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/36.212 — Carbonless paper) (OJ 2004 L 115, p. 1) ('the Carbonless Paper Decision'), or again with Volkswagen AG ('Volkswagen') in Commission Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen) (OJ 2001 L 262 p. 14) ('the Volkswagen II Decision'). The applicant maintains that there is no justification for such a difference in treatment.

48 The failure to give such an indication was all the more damaging since, in the case which culminated in Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin) (OJ 2002 L 143, p. 1) ('the Michelin II Decision'), where the Commission also established a repeated infringement as an aggravating circumstance, the undertaking concerned was given an opportunity to submit arguments on that point prior to the adoption of the decision.

49 The Commission contends that it has a discretion in setting the amount of a fine and that it set out in the statement of objections all the matters which it proposed to take into account for that purpose, including those necessary to comply with the requirement to state reasons. Furthermore, it was not required to indicate its intention to take into account the aggravating circumstance of a repeated infringement. In any event, the applicant could not fail to be aware that the Guidelines expressly refer to repeated infringement as an aggravating circumstance or that it had already been held to have committed an infringement on two previous occasions.

Findings of the Court

50 It is settled case-law that where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and it also indicates the main factual and legal criteria capable of giving rise to the imposition of a fine, such as the gravity and the duration

of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21, and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 78).

51 So far as the setting of the amount of the fines is concerned, the rights of defence of the undertakings in question are guaranteed before the Commission by virtue of the fact that they have the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement. Moreover, undertakings have an additional guarantee, as regards the setting of the amount of the fine, in that the Court of First Instance has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 17 of Regulation No 17 (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235, and, to that effect, *ABB Asea Brown Boveri* v *Commission*, paragraph 50 above, paragraph 79).

52 In the present case, it must be held, in the first place, that the Commission stated in point 213 of the statement of objections that its intention, in the light of the facts, was to impose fines on the undertakings to which the statement was addressed, including the applicant. In point 214 of the statement of objections, the Commission added that, in determining the amount of the fines to be imposed, it was required to take into account all the circumstances of the case and, in particular, the gravity and the duration of the infringement. Furthermore, the Commission stated in point 216 of the statement that, among the facts set out in the statement of objections, it would pay particular attention to the fact that the agreements in question constituted a deliberate infringement of Article 81(1) EC.

53 The Commission also indicated in point 216 that the market-sharing and price-fixing agreements described in the statement of objections constituted by their very

nature the most serious type of infringement of Article 81(1) EC. In point 215 of the statement of objections, it stated that in assessing the gravity of the infringement it would take account of its nature, its actual impact on the market, where that could be measured, and the size of the relevant geographic market. It also indicated in point 216 of the statement of objections that it would determine the role of each undertaking in the infringement by taking account, inter alia, of the role played by each of them in the secret agreements in question and the duration of their participation in the infringement.

54 The Commission also stated in point 217 of the statement of objections that the amount of the fine to be imposed on each undertaking would reflect any aggravating or attenuating circumstances, and that it would apply, where relevant, the Leniency Notice. Lastly, the Commission indicated in point 218 that it proposed to set the amount of the fines at a sufficiently high level to ensure that they had a deterrent effect.

55 It follows from the foregoing that, in accordance with the case-law referred to above, the Commission expressly indicated in the statement of objections (points 213 to 218) that it intended to impose fines on the undertakings to which the statement was addressed and the factual and legal matters which it would take into account in setting the fine that would be imposed on the applicant, so that its right to be heard was therefore observed in that regard.

56 In the second place, with more particular regard to the aggravating circumstance of repeated infringement that was found in the applicant's case, it must be observed that the Guidelines cite repeated infringement of the same type by the same undertaking as an example of an aggravating circumstance and also that the Commission indicated in the statement of objections that it would take account of the individual role played by each undertaking in the secret agreements in question and that the amount of the fine would reflect any aggravating or attenuating circumstances. The applicant could not therefore fail to be aware that the Commission would take that aggravating circumstance into account if it were to conclude that conditions for its application were satisfied.

57 In the third place, as regards more specifically the argument that the applicant suffered discriminatory treatment by comparison with other undertakings which had committed repeated infringements and which had not had that aggravating circumstance taken into account against them, it must be pointed out that the mere fact that the Commission has found in its previous decisions that certain factors did not constitute an aggravating circumstance for the purpose of determining the amount of the fine does not mean that it is obliged to do so also in a subsequent decision (see, inter alia, by way of analogy, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 357; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 234 and 337). Moreover, as the considerations set out in paragraph 56 above make clear, the opportunity afforded to an undertaking in another case to make known its views on the intention to make a finding of repeated infringement on its part does not mean that the Commission is obliged to do the same in all cases, or that, where such an opportunity is not afforded, the applicant is prevented from fully exercising its right to be heard.

58 In those circumstances, the second part of the plea must be rejected.

(c) The third part, based on the fact that no record was kept of meetings between the Commission and Interbrew and the Commission's refusal to send the applicant a copy of Interbrew's response to the statement of objections

Arguments of the parties

59 The applicant claims, first, that neither the statement of objections nor the contested decision contains detailed information which would enable it to determine what was discussed at and the scope of the meetings between the Commission's staff and representatives of Interbrew referred to in recital 34 of the

contested decision. Nor was any minute of those meetings, which were not drawn to the applicant's attention before the adoption of the contested decision in this case, placed on the Commission's file. Secondly, in refusing, by letter of 7 February 2002, to grant the applicant access to Interbrew's response to the statement of objections, the Commission infringed its rights of defence and the principle of sound administration.

60 The applicant maintains, in the first place, that it was not given the opportunity of checking and, if appropriate, challenging any statements made by Interbrew at those meetings, which may nevertheless have had a significant influence on the Commission's assessment of the facts at issue and of the cooperation provided by the undertakings under investigation.

61 In that regard, the applicant submits in particular that the Commission displayed a generally favourable attitude towards Interbrew, in contrast to the severity shown to the applicant. Thus, the absence of any reference during the procedure to the dominant position held by Interbrew, which was none the less at the origin of the investigation, may be explained in the light of the matters discussed at the informal meetings in question. Furthermore, there is no support in the file for the reference in the contested decision to a telephone conversation between Mr L.B. (Alken-Maes) and Mr A.B. (Interbrew) on 9 December 1996. The same is true of the summary of an internal meeting at Interbrew on 5 May 1994, where the Chief Executive Officer ('CEO') of Interbrew (Mr M.) described a scenario allegedly demanded by the applicant, under which Interbrew was to transfer 500 000 hectolitres of beer to Alken-Maes.

62 The applicant claims, in the second place, that it did not have access to Interbrew's response to the statement of objections, as access was refused by the Commission. By letters of 24 and 28 January 2002, the applicant again expressly requested the Commission to provide it with fresh access to the file, in particular access to Interbrew's response to the statement of objections, which the Commission refused by letter of 7 February 2002.

63 The Commission contends that the applicant was aware that the informal meetings had taken place and that during the administrative procedure it never requested access to any minutes of those meetings, which, moreover, do not exist and which in any event would have served no purpose. All the factual information contained in the contested decision is based on the documents in the file, to which the applicant has never denied having had access. As regards the request for access to documents made under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), it was withdrawn.

Findings of the Court

64 With respect, in the first place, to the informal meetings with the parties, it should be noted that neither the applicant nor the Commission denies in its written pleadings that no minutes were taken of those meetings. This part of the first plea relating to those meetings thus amounts to a contention that observance by the Commission of the right of access to the file in competition cases requires that it draw up minutes of such meetings and make them available to the parties.

65 It should be borne in mind in that regard that the case-law paragraphs 33 and 34 above establishes that the right of access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that the right to be heard can be effectively exercised. Thus, the Commission has an obligation to make available to the undertakings involved all documents, whether in their favour or otherwise, which it has obtained during the investigation, with the exception of the business secrets of other undertakings, the internal documents of the Commission or other confidential information.

66 It is also clear from case-law that there is by contrast no general duty on the part of the Commission to draw up minutes of discussions in meetings with the other parties which take place in the course of the application of the Treaty's competition rules (see, to that effect, *Atlantic Container Line and Others* v *Commission*, paragraph 33 above, paragraph 351).

67 However, the absence of such an obligation does not mean that the Commission is relieved of the obligations incumbent on it as regards access to the file. The practice of using information provided orally by third parties cannot be permitted to infringe the rights of the defence. Thus, if the Commission intends to use in its decision inculpatory evidence provided orally by another party it must make it available to the undertaking concerned so as to enable the latter to comment effectively on the conclusions reached by the Commission on the basis of that evidence. Where necessary, it must create a written document to be placed in the file (see, to that effect, *Atlantic Container Line and Others* v *Commission*, paragraph 33 above, paragraph 352).

68 In the present case, with the exception of two specific allegations, the applicant's arguments merely consist in generally asserting, first, that the informal meetings may have had a significant influence on the assessment of the facts and of the cooperation provided by the undertakings under investigation, secondly, that the Commission adopted a generally favourable attitude towards Interbrew during the procedure, in contrast to the severity with which the contested decision treats the applicant and, lastly, that if the information provided at the informal meetings was helpful to Interbrew, it could not fail to affect the applicant's position.

69 Those general arguments, which do not explain how the inculpatory evidence relied on by the Commission in the contested decision is based on information provided at the informal meetings, are not of such a kind as to establish that there was, in fact, an infringement of the rights of the defence, which is a question to be examined in the light of the circumstances of each particular case (see, to that effect, *Solvay* v *Commission*, paragraph 36 above, paragraph 60). As was stated in paragraph 33 above, the right of access to the file in competition cases is recognised solely so that

the undertakings concerned can express their views effectively on the conclusions reached by the Commission in its statement of objections. Since the applicant has not, apart from the two specific allegations considered below, identified any objection taken into account in the statement of objections and subsequently in the contested decision which was based on evidence provided orally at the informal meetings and to which it did not have access, it cannot maintain that the Commission infringed the rights of the defence on that point (see, to that effect, *Atlantic Container Line and Others* v *Commission*, paragraph 33 above, paragraphs 353 and 354).

70 As regards the two specific allegations mentioned above, according to which the references in the contested decision to a telephone conversation of 9 December 1996 and the discussions that took place at an internal meeting of 5 May 1994 could only be based on discussions that took place during informal meetings, it is necessary to consider whether the facts in question are based on specific information in the file.

71 With respect, first of all, to the telephone conversation of 9 December 1996, referred to in recital 91 of the contested decision, it must be noted that point 93 of the statement of objections states that 'following a meeting which [took place] on 19 September, Mr L.B. (Alken-Maes) [had] a telephone conversation on 9 December 1996 with Mr A.B. (Interbrew)'. Those words are accompanied by footnote 116, which indicates: 'Letter from Alken-Maes of 7 March 2000, and especially Annexes 42 and 44 to that letter ([pp.] 7884, 8513 and 8528 to 8530 [of the Commission's file]), with references to the following documents: inspection at the offices of Alken-Maes, document AvW19 ([pp.] 150 to 153 [of the Commission's file]) and document MV17 ([pp.] 532 to 541 [of the Commission's file])'. The same references appear in the contested decision, in footnote 123, corresponding to recital 91.

72 In answer to a written question from the Court asking it to specify the factors which led it to conclude that a telephone conversation took place on 9 December 1996

relating to Interbrew's prices between Mr L.B. (Alken-Maes) and Mr A.B. (Interbrew), the Commission stated that it reached that conclusion on the basis of p. 8513 of the Commission's file, which comprises the last page of Annex 42 to Alken-Maes's letter to the Commission of 7 March 2000.

73 Examination of that document, which consists of handwritten notes by Mr L.B. (Alken-Maes), shows that, although no telephone conversation of 9 December 1996 is referred to in it, it does however include several annotations, plainly added after it was originally prepared, which appear to represent replies to questions, drawn up at the outset, relating to Interbrew's pricing conditions. Three of those annotations include the date '(9/12/96)' and two of them the abbreviation 'IB' (Interbrew), one also including the initials of Mr A.B. (Interbrew).

74 Accordingly, it must first be held that the statement of objections does indeed refer to there having been contact on 9 December 1996 between Interbrew and Alken-Maes relating to Alken-Maes's pricing conditions and that the contact to which the Commission refers is supported by a document which, as it was included in the file, was accessible to the applicant, since its former subsidiary Alken-Maes itself supplied it to the Commission. Whether or not the contact took place by telephone is irrelevant as regards the right to be heard, since, although it is unfortunate that the Commission's assertion on that point is not supported, the applicant's right to be heard arises in relation to the question whether contact took place and not whether or not such contact took the form of a telephone conversation, a matter which is of no relevance to the determination of whether or not it constituted an infringement.

75 As regards, next, the statement in recital 53 of the contested decision that the 'scenario' described by Interbrew's CEO at an internal meeting of 5 May 1994 was 'requested by Danone/Kronenbourg', that is to say that 'Interbrew was to transfer 500 000 hectolitres to Alken-Maes, essentially in the off-trade', it must be held that point 55 of the statement of objections states that 'at an internal discussion within

Interbrew, [Mr M.] described the following scenario, corresponding to Danone/ Kronenbourg's request. Interbrew was to transfer 500 000 hectolitres to Alken-Maes (essentially in the off-trade)' and that if 'Interbrew did not comply with that request, Interbrew France would be annihilated in France with Heineken's assistance, and an attack would be mounted on Interbrew in Belgium by means of very low prices'. Point 56, which follows, states that 'the scenario put forward by Kronenbourg [was] examined at an internal meeting of Interbrew on 5 May 1994'. Point 55 of the statement of objections is accompanied by footnotes 35 and 36, which refer to a letter from Interbrew of 28 February 2000 and Annex 18 to that letter (p. 7683 of the Commission's file). The same document references are given in the contested decision, in recital 53.

76 It must be noted in that regard that Annex 18 to Interbrew's letter of 28 February 2000, which consists in a statement by Mr C. of Interbrew, contains, on p. 2 of that statement, the following comment:

'During an internal meeting (held on 5 May 1994), [Mr M.] described to us the scenario requested by Kronenbourg. Essentially, KRO was using blackmail to persuade ITW to transfer 500 000 [hectolitres] to AM (especially in the off-sales sector). Otherwise, they would annihilate ITW-France with Heineken's assistance and an attack would be mounted on ITW-Belgium by means of very low prices.'

77 It is therefore plain that the statement set out in recital 53 of the contested decision and points 55 and 56 of the statement of objections essentially amounts to a repetition of information provided by Interbrew in writing, which is contained in the file and was, accordingly, available to the applicant. The applicant cannot therefore claim with respect to the statement referred to in recital 53 of the contested decision that it was unable effectively to exercise its right to be heard.

78 It follows from the foregoing, first, that the statements allegedly made at informal meetings with Interbrew were set out in the statement of objections and, secondly, that, in so far as they were necessary for the purpose of establishing an infringement of Article 81(1) EC, they had their basis in documents to which the applicant had access. It must therefore be held that the applicant had the opportunity of stating its position in relation to those statements and that its right to be heard was observed.

79 With respect, in the second place, to the argument that, in breach of its rights of defence, the applicant was refused access to documents placed on the file after it had access to the file on 5 October 2002, including, in particular, Interbrew's response to the statement of objections in so far as it might have contained evidence favourable to the applicant, it is sufficient to observe that the request for access to documents added to the file was made by letters of 24 and 28 January 2002, after the administrative procedure had been closed. A failure to make such a request during the administrative procedure will mean that an applicant's right to do so in any subsequent action for annulment is barred (see, to that effect, *Cement*, paragraph 31 above, paragraph 383). That argument must accordingly be rejected.

80 As regards the application for access made on 4 March 2002 under Regulation No 1049/2001, it is sufficient to observe that Article 7(2) of that regulation states that 'in the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position'. Following the Commission's refusal of 26 March 2002 to consent to the applicant's request for access, it must be held that, by failing to make a confirmatory application within the prescribed period, the applicant withdrew its request of 4 March 2002, as it accepted at the hearing in answer to a question from the Court.

81 It follows that the third part of the plea must be rejected, as, accordingly, must the plea in its entirety.

2. *The plea alleging infringement of the obligation to state reasons*

(a) Arguments of the parties

82 The applicant argues that the contested decision is inadequately reasoned in that, first, it contains no definition of the relevant markets, which is a necessary precondition for any assessment of anti-competitive conduct and, secondly, that, in setting the amount of the fine, it does no more than refer to the Guidelines, without indicating the precise impact of the criteria used in determining the amount of the fine imposed on it.

83 Thus, in the first place, the contested decision is inadequately reasoned in that, contrary to what the Court's case-law requires (Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403 *'Flat Glass'*, paragraph 159), it is not founded on an adequate definition of the market relevant to the case, but only on a finding that a 'Belgian beer market' existed. The Commission erred in failing to carry out an analysis of the precise geographic extent of the market or markets in question and of the potential substitutability of the various beer products. The use by the Commission in its defence of the expression 'Belgian brewing industry' in place of that of 'Belgian beer market' does not address the applicant's complaint that in the present case the definition of the market was one and the same as the definition of the infringement. The geographic markets referred to, namely the Belgian and French markets, are defined in an insufficiently documented manner in the contested decision.

84 Furthermore, the Commission took into account factual information relating to the French market without considering it necessary to analyse its significance against

the yardstick of the actual characteristics of that market. In particular, the Commission relied on the argument of a threat of reprisals on the French market, allegedly made by the applicant to Interbrew, whereas the existence of such anti-competitive conduct can be established only when a certain power on a properly-defined market has been found.

85 In the present case, the Commission took the view that the relevance of some of the material used in support of the finding of infringement in the contested decision, including the meeting of 11 May 1994, the telephone conversation of 6 July 1994 and the meeting of 17 April 1997 was not limited to Belgium. Furthermore, the interrelationship between France and Belgium and the similarity of the conduct in both countries were, in the Commission's view, important elements of the infringement, particularly as regards the alleged threat.

86 In that regard, the Commission's decision to deal separately with conduct which displays similarities differs from its customary practice of making findings of more than one infringement in a single decision where there is a connection between them owing to the identity of the parties to the cartel, the similarity of the mechanisms used by the cartel in different countries or the interrelationship between different territories or products (see, for example, Commission Decision 96/478/EC of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty (IV/34.279/F3 — ADALAT) (OJ 1996 L 201 p. 1) ('the ADALAT Decision'), and the Vitamins and Carbonless Paper Decisions).

87 The adoption of several decisions places the applicant in a position of legal uncertainty and has the effect that the Commission, by the repeated application of starting amounts and possibly weightings, can artificially inflate the total amount of the fines imposed in respect of a given set of facts, without the undertakings in question having had the opportunity of knowing why the activities were treated separately and why they constituted separate infringements.

88 In the second place, the contested decision is also inadequately reasoned as regards the calculation of the fine. In referring, in recital 294 of the contested decision, simply to the method set out in the Guidelines, when their purpose is to 'ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike', the Commission failed to fulfil its obligation to state adequate reasons and infringed the principle of legal certainty.

89 As the basis of determining the amount of the fine consists in taking a figure as a starting point and applying adjustments to it, it is essential that the Commission sets out in sufficient detail the full significance of the criteria used in setting the fine in order to satisfy the objective of the obligation to state reasons, namely to allow the applicant to assess whether the fine has been set in a manner which is both consistent and lawful in order to defend its rights, to allow the Court of First Instance and the Court of Justice to exercise their power of review and to allow any party concerned to be aware of the manner in which the Commission applied the EC Treaty.

90 In the present case, notwithstanding the fact that the Commission is not tied to an arithmetical formula, the contested decision sets out neither the detail of the calculation of the fine imposed nor the precise significance of each of the criteria used in determining its amount. Thus, contrary to the procedure followed in other cartel decisions, such as the Vitamins and Carbonless Paper Decisions, the arbitrary selection of a fixed amount of EUR 25 million and the reasons underlying the attempt to ensure that the fine had a deterrent effect, invoked in recital 305 of the contested decision, are not supported by quantified criteria. The absence of an adequate definition of the relevant market also demonstrates the lack of sufficient reasoning in the calculation of the fine, as the Guidelines provide that the starting amount is to be fixed having regard to the size of the relevant geographic market, the impact of the cartel on that market and the turnover achieved there.

91 In particular, in respect of the two aggravating circumstances found against the applicant, namely the fact that it put pressure on Interbrew and the fact that its conduct constituted a repeated infringement, the Commission applied only a single percentage increase of 50%, without indicating the extent to which each relevant aggravating circumstance gave rise to it. The absence of detailed information regarding the respective importance of the criteria used in setting the amount of the fine did not allow the applicant to assess the proportions in which the fine imposed should be reduced.

92 Furthermore, that absence of clear and relevant information is all the more inexcusable since the Commission acknowledges the existence of documents prepared by its staff for internal consultation and discussion regarding the calculation of the fine and no access to those documents was provided. That suggests that the Commission took account in the contested decision of information other than that which was available to the applicant, but made no reference to it in the decision.

93 More specifically, the applicant maintains that the Commission failed to provide adequate reasons for applying the aggravating circumstance of repeated infringement to the applicant. That failure to state proper reasons is particularly prejudicial to the applicant inasmuch as the Commission does not systematically increase the amount of the fine on that ground, but has shown evidence in its past decisions of some hesitation as to the role and importance to be attributed to it in the determination of the fine, and the adoption of the Guidelines has not been sufficient to remove the consequent uncertainty.

94 The Commission disputes the applicant's arguments.

b) Findings of the Court

95 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 their legality. 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 a decision liable to annulment. Secondly, the Court has power 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 laid down under Article 253 EC does not as such require to be set out in the contested 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).

96 As regards the 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 *Commission* v *Belgium* [1996] ECR I-723, paragraph 86; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and *Cheil Jedang* v *Commission*, paragraph 95 above, paragraph 216).

97 As regards the scope of the duty to state reasons as it applies to the setting of a fine imposed for infringement of the Community competition rules, it should be noted, first, that such a fine falls to be fixed having regard to the terms of the second subparagraph of Article 15(2) of Regulation No 17, which states that 'in fixing the amount of the fine, regard shall be had both to the gravity and 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). Secondly, the Guidelines and the Leniency Notice indicate what factors the Commission is to take into consideration in measuring the gravity and duration of an infringement (*Cheil Jedang* v *Commission*, paragraph 95 above, paragraph 217). That being so, 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 95 above, paragraph 218).

98 In the present case, the Commission has satisfied those requirements.

99 As regards, in the first place, the complaint alleging the absence of a prior definition of the relevant market by the Commission, it must be held that the Commission was, in the circumstances, under no duty to define the relevant market. It is clear from case-law that, for the purposes of applying Article 81 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; *Cement*, paragraph 31 above, paragraph 1093; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707,

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 and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105, and *Volkswagen* v *Commission*, paragraph 230). The applicant does not deny that the agreements or concerted practices in question were liable to affect trade between Member States and had as their object the restriction and distortion of competition within the common market. Accordingly, since the application by the Commission of Article 81 EC did not, in the present case, require a prior definition of the relevant market, it cannot be held that the duty to state reasons was infringed in that regard.

100 For the same reasons, while the Commission's finding, for the purposes of the application of the Guidelines, that a threat had been made by the applicant must disclose in a clear and unequivocal fashion the reasoning followed if it is to satisfy the requirements of Article 253 EC, by contrast, it is not an essential precondition that the reasoning followed define the market in question. The applicant's argument to the contrary must therefore be rejected.

101 The same applies to the reasoning regarding the taking account of the size of the geographic market. In so far as the applicant maintains that the inadequate reasoning relating to the national nature of the market allowed the Commission to find, without any basis for doing so, that there had been separate infringements and hence artificially to increase the fines imposed on the applicant, it is sufficient to observe that the basis on which such an intention is ascribed to the Commission is entirely hypothetical as the allegation is founded on pure conjecture, without any *prima facie* evidence to support it. The argument founded on it must therefore be rejected.

102 As regards, in the second place, the allegation that the reasons given for the calculation of the amount of the fine are inadequate, it must be noted that in recitals 296 to 328 of the contested decision the Commission set out the factors which it took into account in calculating the fines imposed on each of the undertakings concerned. Those recitals of the contested decision plainly set out the reasoning followed by the Commission in a clear and detailed manner, thereby allowing the applicant to ascertain the factors taken into account in order to measure the gravity and duration of the infringement for the purposes of calculating the amount of the fine and the Court to exercise its power of review. It must therefore be held that the contested decision satisfies the duty to state reasons imposed on the Commission under Article 253 EC.

103 This plea must therefore be rejected, as, accordingly, must all of the submissions seeking annulment of the contested decision.

3. *The heads of claim raised in the alternative seeking a reduction in the amount of the fine imposed*

104 The applicant raises six pleas in law seeking a reduction in the amount of the fine. They allege, respectively, incorrect assessment of the gravity of the infringement for the purposes of setting the starting amount of the fine, in breach of the principles of proportionality, equal treatment and *non bis in idem*; incorrect assessment of the duration of the infringement; lack of basis for the finding that the pressure put on Interbrew constituted an aggravating circumstance; lack of basis for the taking account of the applicant's repeated infringements as an aggravating circumstance; failure to take sufficient account of the applicable attenuating circumstances; and, lastly, incorrect assessment of the scope of the cooperation provided by the applicant, in breach of the principle of equal treatment and the Leniency Notice.

4. *The plea alleging incorrect assessment of the gravity of the infringement for the purposes of setting the starting amount of the fine, in breach of the principles of proportionality, equal treatment and non bis in idem*

(a) Arguments of the parties

Arguments of the applicant

105 The applicant submits that there is no basis for the specific starting amount set by the Commission for the gravity of the infringement on the basis of four successive complaints, namely incorrect assessment, in breach of the Guidelines and a number of general principles of Community law, first, of the gravity of the infringement; secondly, of the applicant's effective economic capacity to cause significant damage to other operators, in particular consumers; thirdly, of the level which ensures that the fine has a sufficiently deterrent effect; and, fourthly, of the requirement to take account of the fact that the applicant had legal and economic knowledge and infrastructures which enabled it more easily to recognise that its conduct constituted an infringement and to be aware of the consequences stemming from it under competition law.

106 The applicant contends that, in the light, in particular, of the very limited quantitative significance of the product covered by the cartel compared with total consumption of beer in the European Union, the very limited size of the geographic area covered by the cartel and the extremely modest level of turnover it achieved for the product concerned, the starting amount should not in any event have exceeded EUR 8 million.

— The assessment of the gravity of the infringement: infringement of the principles of equal treatment and proportionality

107 As regards the Commission's assessment of the gravity of the infringement for the purposes of the first subparagraph of Section 1.A of the Guidelines, the applicant does not contest the characteristics of the infringement set out in recital 297 of the contested decision, which it asserts that it and Alken-Maes acknowledged and communicated to the Commission, but only the significance attributed by the Commission to the evidence, seen as a whole, set out in the part of the contested decision which deals with the gravity of the infringement and the ultimate classification of the infringement, on the basis of that evidence, as very serious. The applicant contends that by adopting such a classification, when it had never classified similar infringements as very serious, the Commission infringed the principle of equal treatment by treating comparable situations differently (*Hercules Chemicals* v *Commission*, paragraph 57 above, paragraph 295).

108 The applicant maintains, first, that although it referred to the method for determining the gravity of infringements set out in the Guidelines, the Commission did not investigate the question of the actual impact of the cartel in question on the market.

109 It next submits that the Commission's finding that the infringement was very serious is inconsistent both with the examples it gives in the Guidelines and with the decision-making practice which followed their publication. A cartel is normally to be classified as very serious only when it is organised, or indeed institutionalised, which implies sophisticated systems of monitoring, organisation and surveillance which bear no relation to the conduct complained of in the present case, and operates worldwide or in a number of large Member States; the smallest territory covered by infringements classified as very serious comprised four of the largest Member States of the Community (Commission Decision 2003/382/EC of 8 December 1999

relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B — Seamless Steel Tubes) (OJ 2003 L 140, p. 1) (the 'Seamless Steel Tubes Decision').

110 The applicant contends, first, that having regard to its unstructured nature, the infringement should have been classified as serious and not as very serious, particularly as the Commission has classified as serious infringements of a degree of sophistication at least equivalent to that of the infringement in the present case (Commission Decision 2003/25/EC of 11 December 2001 relating to a procedure under Article 81 of the EC Treaty (Case COMP/E-1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany) (OJ 2003 L 15, p. 1) ('the German Banks Decision'), Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding under Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109 p. 24) ('the Greek Ferries Decision') and Commission Decision 1999/210/EC of 14 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/F-3/33.708 — British Sugar plc, Case IV/F-3/33.709 — Tate & Lyle plc, Case IV/F-3/33.710 — Napier Brown & Company Ltd and Case IV/F-3/33.711 — James Budgett Sugars Ltd) (OJ 1999 L 76, p. 1) ('the British Sugar Decision')).

111 Secondly, in the light of Belgium's small size, the Commission displayed undue severity in the present case, in breach of the principles of proportionality and equal treatment, as its decision-making practice shows that has held on several occasions that an infringement fell to be classified as serious and not as very serious when it involved only a small or geographically-limited market (the Greek Ferries Decision, the British Sugar Decision and the German Banks Decision).

112 Thirdly, the Commission's argument that one of the criteria applied in assessing the gravity of the infringement was its direct impact on consumers lacks force. First, the

cartels referred to in the German Banks Decision and the British Sugar Decision had the same characteristics, but were not classified by the Commission as very serious on that ground and, secondly, in the present case the distribution structure for the products concerned, both as regards supermarkets and the on-sales sector, represented, in view of the size of the warehouses, a powerful counterweight to the cartel, which allowed its negative effects on consumers to be mitigated in part.

113 The applicant concludes that the Commission could not, without infringing the principle of equal treatment, classify the infringement established in the contested decision as very serious when it did not take the form of an organised cartel having sophisticated structures and systems to ensure compliance with commitments between undertakings and when it concerned only a limited area and a small proportion of beer production in the European Union. The fine should therefore be substantially reduced.

114 In any event, even if the Commission did not infringe the principle of equal treatment in classifying the infringement as very serious, the starting amount of the fine should nevertheless be reduced so as to take account of the minimal impact of the infringement on the Community market and the low volume of sales of the products covered by the cartel, as the Commission did in the Seamless Steel Tubes Decision. In that decision, without changing the classification of the infringement, the Commission applied a starting amount of less than half that provided for in the Guidelines for very serious infringements, on the ground that the sales of the products concerned by the members of the cartel in the four Member States concerned represented only approximately 19% of Community consumption. In the present case, the products covered by the cartel represented less than 2.5% of total consumption in the European Union. The specific starting amount applied by the Commission is thus disproportionate in relation to the volume and the value of those products and must therefore be reduced.

— The assessment of the applicant's effective economic capacity to cause significant damage to other operators: infringement of the principle of proportionality

115 As regards the Commission's assessment of its economic capacity to restrict competition, the applicant maintains that the Commission's point of reference should be the market on which the infringement occurred, and that the amount of fine must be reasonably commensurate with the turnover achieved on that market (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94).

116 Moreover, it is necessary to take account of the position of the undertakings concerned on the reference market in order to assess their capacity to influence competition.

117 Although those two principles are referred to in the contested decision, the Commission did not observe them. While Interbrew's turnover for sales on the market during the period in question was four times higher than the applicant's, the specific starting amount determined for Interbrew was less than twice as high as that applied to the applicant. Such a lack of proportionality is contrary to the Commission's recent practice, as illustrated by its Decision 2003/674/EC of 2 July 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case C.37.519 — Methionine) (OJ 2003 L 255, p. 1) ('the Methionine Decision'), in which it took the view that the difference between the fines imposed should reflect the imbalance between the market share of the leading producer on the market worldwide and one of its competitors having a market share that was five times smaller.

118 In addition, the Commission failed to take account of Interbrew's dominant position on the Belgian beer market, which of necessity severely restricted the applicant's

effective economic capacity to influence the market or indeed to cause significant damage to other operators. Moreover, the applicant was seeking merely to put an end to its gradual marginalisation.

119 In considering that it was entitled to determine the starting amount of the fine on the basis of the applicant's overall turnover, which constituted an indication of its 'capacity to cause harm', rather than on the basis of the turnover achieved on the market in question, the Commission lost sight of the criterion of the 'capacity to cause significant damage to other operators' referred to in the contested decision. If it wished to take account of a higher turnover figure than that achieved on the Belgian market for beer, the Commission should both have defined the relevant markets and shown how the applicant's activities on those other markets allowed it to cause damage on the beer market.

120 Far from reflecting the glaring imbalance between their respective situations, the amounts of the fines imposed on Interbrew and the applicant are on the contrary evidence of the manifestly disproportionate nature of the specific starting point applied to the applicant by reference to its actual capacity to influence the market.

121 Thus, while the fine of EUR 45 million imposed on Interbrew corresponds to less than 6.6% of its turnover for 1998, by imposing a fine of EUR 25 million on the applicant, the Commission set an amount which exceeded 20% of the turnover in 2000 of the undertaking which was really involved in the cartel, Alken-Maes, with the result that, if that company had been penalised for its own conduct, the limit of 10% of total turnover laid down under Regulation No 17 would have been greatly exceeded.

— The setting of the amount of the fine at a level which ensures that it has a sufficiently deterrent effect: infringement of the principle of proportionality

122 The applicant maintains, first, that the Commission failed to provide details of the element of deterrence involved in the calculation of the fine and that, although it stated in the contested decision that the applicant and Interbrew are large international undertakings and that the former is also a multi-product undertaking, the Commission did not specify the principles adopted in applying the criterion of deterrence.

123 Secondly, the increase by the Commission of the amount of the fine to reflect the deterrent purpose of the penalty is based on reasoning which is irrelevant and disproportionate.

124 The determination of the deterrent level of the fine should thus have a competitive object and, according to the applicant, that level should be assessed solely by reference to the size of the undertaking on the relevant market and its prospects of gaining from the offending conduct on that market. Factors such as the international dimension of the undertaking or the fact that this was a repeated infringement are irrelevant. Contrary to what the Commission found in relation to ABB Asea Brown Boveri in Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4 — Pre-insulated Pipe Cartel) (OJ 1999 L 24, p. 1) ('the Pre-insulated Pipe Cartel Decision'), it was not even suggested in the present case that the applicant's structure and the existence of foreign subsidiaries outside the beer sector facilitated the impugned conduct.

125 Furthermore, economic theory shows that the amount of a fine is adequate when it exceeds the benefits which the parties to the cartel expected to achieve. In the

present case, a significantly lower fine would have satisfied that condition, as the applicant's profitability on the market concerned was negative throughout the infringement period.

126 In addition, even if, as the Commission claims, the object of deterrence meant that the lower the probability of detection of an infringement, as is the case with secret cartels, the higher the fine should be, the applicant submits that its amount ought to have remained very significantly lower than the sum imposed by the Commission. Moreover, the cartel in question was not a secret one, as a number of meetings relating to it were held in the presence of competitors, such as the meetings of the working party known as 'Vision 2000', or of distributors, such as the meeting of 28 January 1993, the distributors having followed the activities of the parties to the cartel very closely, as is shown by a letter to the brewers from the wholesalers' federation.

127 Lastly, the taking into account of any object of deterrence whatsoever served no purpose, as the effect of deterrence — illustrated by the fact that the exchange of sales information ceased immediately — was achieved in the present case as soon as the investigation started and the applicant began to cooperate, as is evidenced by the immediate exchange of sales information.

— The taking into account of the legal and economic knowledge and infrastructures that large undertakings usually possess: infringement of the principle *non bis in idem*

128 The applicant submits that, in taking account of the fact that it had legal and economic knowledge and infrastructures which enabled it more easily to recognise that its conduct constituted an infringement and be aware of the consequences

stemming from it under competition law, the Commission infringed the principle *non bis in idem* in that it also increased the amount of the fine in the contested decision on the ground of repeated infringement.

Arguments of the Commission

129 With respect to the assessment of the gravity of the infringement, the Commission refers to the gravity of the facts at issue and maintains that the classification of infringements limited to a single Member State as very serious is not inconsistent with its decision-making practice. Furthermore, the size of a sector should not be measured by reference only to its geographical extent, but must also be gauged in terms of economic importance. As the beer sector in Belgium accounts for some EUR 1 200 million, the infringement was committed in a very important sector. Lastly, the infringement had a direct impact on consumers, which the characteristics of beer distribution did not mitigate in any way.

130 As regards the criterion of the effective economic capacity to cause significant damage to other operators, in particular consumers, the Commission claims that the applicant's overall turnover is much higher than Interbrew's. Furthermore, the Commission is free to determine the type of turnover to be taken into account, namely overall turnover or that achieved in the relevant sector, and indeed to combine the two, where appropriate. Lastly, the fact that the specific starting amount represents 20% of Alken-Maes's total annual turnover of is of no relevance, since the limit set by Regulation No 17 applies in the present case to the applicant's turnover.

131 As regards the identification of a sufficiently deterrent level of fine, the Commission observes that in the case of a secret infringement, the fine must be set at a much higher level than the expected benefit, size and the multi-product nature of the

applicant's activities being relevant criteria for the purpose of determining deterrence. Moreover, neither the cessation of the infringement nor the cooperation provided by the applicant permits the conclusion that an appropriate level of deterrence was achieved.

132 Lastly, as regards the taking into account of the legal and economic knowledge and infrastructures which large undertakings usually have, the argument alleging infringement of the principle *non bis in idem* has no factual basis. In determining the specific starting amount, the Commission based itself on the applicant's recognition that its conduct constituted an infringement, while the fact that this was a repeat infringement was taken into account because the applicant had committed infringements in the past.

(b) Findings of the Court

133 It should be borne in mind at the outset that Article 15(2) of Regulation No 17 states that 'the Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to [EUR] 1 000 000, or a sum in excess thereof, but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently ... they infringe Article [81](1) ... of the Treaty'. The same provision states that 'in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement' (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 223).

134 It is, moreover, settled case-law that, in the context of Regulation No 17, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition

rules (Case T-150/89 *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).

135 Moreover, the fact that in the past the Commission applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy (*Musique diffusion française and Others* v *Commission*, paragraph 50 above, 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 50 above, paragraph 109, and *LR AF 1998* v Commission, paragraph 57 above, paragraphs 236 and 237).

136 However, Article 17 of Regulation No 17 gives the Court unlimited jurisdiction within the meaning of Article 229 EC in proceedings brought against decisions in which the Commission has fixed the amount of a fine and may, accordingly, cancel, reduce or increase the fine imposed. In the exercise of its unlimited jurisdiction, the Court must consider whether the amount of the fine imposed is proportionate to the gravity and duration of the infringement (see, to that effect *Deutsche Bahn* v *Commission*, paragraph 134 above, paragraphs 125 and 127, and *Cheil Jedang* v *Commission*, paragraph 95 above, paragraph 93) and must weigh the seriousness of the infringement with the circumstances invoked by the applicant (see, to that effect, Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 48).

137 It should next be noted that it is settled case-law that the gravity of infringements has to be determined by reference to numerous factors, such as, in particular, the

actual circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of the Court of Justice of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 328; and *LR AF 1998* v *Commission*, paragraph 57 above, paragraph 236). In particular, the gravity of the infringement is to be appraised by taking into account the nature of the restrictions on competition (Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraph 53; and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 246). The Commission must also have regard to the deterrent effect of its action, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique diffusion française and Others* v *Commission*, paragraph 50 above, paragraphs 105 and 106, and *ABB Asea Brown Boveri* v *Commission*, paragraph 50 above, paragraph 166).

138 However, the case-law provides that, where the Commission adopts guidelines which are consistent with the Treaty and are designed to specify the criteria which it intends to apply in the exercise of its discretion, the Commission itself then limits that discretion in that it must comply with the guidelines which it has imposed upon itself (*Hercules Chemicals* v *Commission*, paragraph 57 above, paragraph 53, upheld on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75). In determining the gravity of infringements once guidelines are adopted, the Commission is thus obliged to take into account, amongst other factors, the matters referred to in those guidelines, save where it specifically sets out the reasons justifying, should the case arise, its departure from them in a specific area (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913 *'FETTCSA'*, paragraph 271).

139 The Guidelines provide that the Commission is to take as its basis in setting the amount of the fine a general starting amount determined according to the gravity of the infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where that can be measured, and the

size of the relevant geographic market (first paragraph of Section 1.A). Within that framework infringements are put into one of three categories, namely 'minor infringements', where fines are likely to fall within the band EUR 1 000 and EUR 1 million, 'serious infringements', where fines are likely to fall within the band EUR 1 million to EUR 20 million, and 'very serious infringements', where fines are likely to exceed EUR 20 million (first to the third indents of the second paragraph of Section 1.A).

140 The Commission states in that regard that minor infringements might for example be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market (first indent of the second paragraph of Section 1.A). Serious infringements will more often than not be horizontal or vertical restrictions of the same type as minor infringements, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market. There might also be an abuse of a dominant position (second indent of the second paragraph of Section 1.A). Lastly, very serious infringements will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly (third indent of the second paragraph of Section 1.A).

141 The Guidelines state that within each of those categories of infringement, and in particular as far as 'serious' and 'very serious' infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed (third paragraph of Section 1.A). 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 (fourth paragraph of Section 1.A). In addition, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (fifth paragraph of Section 1.A).

142 Within each of those three categories defined above, it may be necessary in cases involving several undertakings, such as cartels, to apply weightings to the amount determined in order to take 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. Consequently, it may be necessary to adopt the general starting amount according to the specific nature of each undertaking (sixth paragraph of Section 1.A).

143 The Guidelines also state that the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without that differentiation being governed by arithmetic calculation (seventh paragraph of Section 1.A).

144 It is in the light of those principles that it is necessary to consider, first, whether in its application in the present case of the method laid down in the Guidelines for the purposes of determining the gravity of the infringement, the Commission infringed the principles invoked by the applicant. It should next be determined whether — on the assumption that, as the applicant claims in the alternative, the infringement must classified as very serious — the specific starting amount of EUR 25 million ultimately applied in the applicant's case is itself appropriate having regard to the circumstances invoked by the latter, namely the very limited impact of the infringement on the Community market and the low volume of sales of the products covered by the cartel.

The assessment of the gravity of the infringement

145 In the present case, the contested decision shows that the Commission assessed the gravity of the fine on the basis of the following factors: the actual nature of the infringement; the fact that the cartel concerned all segments of the beer market, that the discussions in question were conducted at the highest management level and that the agreements and consultations concerned a wide variety of competition parameters; the fact that it could not be concluded that the cartel had no, or only a limited effect on the market; and the fact that the geographic market was the whole territory of Belgium.

146 In the first place, as regards the question whether the assessment of the gravity of the infringement complied with the Guidelines and the principle of proportionality, it is necessary to consider the manner in which the Commission assessed that gravity in the light of the three relevant criteria, namely the nature of the infringement, its actual impact on the market, where that can be measured, and the size of the relevant geographic market (see paragraph 139 above).

147 With respect, first, to the actual nature of the infringement, it should be noted that the applicant does not challenge the points mentioned in recital 297 of the contested decision, namely that the agreement comprised a general non-aggression pact, the exchange of information about sales, the direct and indirect agreement of and consultation on prices and promotions in the off-trade, the sharing of customers on the on-trade market and the restriction of investment and advertising on that market. It is settled case-law that horizontal price agreements are particularly injurious under Community competition law and may, by reason of that fact alone, be classified as very serious (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 103, and *FETTCSA*, paragraph 138 above, paragraph 262). As well as representing a price-fixing agreement, the arrangements described by the Commission in recital 297 of the contested decision 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. The Commission's conclusion that the agreements and consultations at issue constitute, by their nature, a very serious infringement, cannot be disputed. Nor can that conclusion be called into question by the fact that the Commission also found that the agreements and consultations concerned a wide variety of competition parameters and related to all segments of the beer market, as those findings flow directly and logically from the points mentioned in recital 297 of the contested decision, which are not disputed by the applicant. Nor can the holding of meetings relating to the cartel at the highest level of responsibility, namely the senior managers of the applicant and its subsidiary, which, again, are not disputed, mitigate the extreme gravity of the actual nature of the infringement.

148 As regards, next, the criterion of the impact of the cartel, it must be held that, although the Commission found in the contested decision that certain parts of the agreement were not, or were not fully, implemented, it held, by contrast, that it could not be concluded that there was no effect, or only a limited effect, on the market. In support of that finding, the Commission relied not only on the written evidence represented by the notes taken by a representative of Interbrew at the meeting of 28 January 1998, which record a number of achievements, but also on the fact, determined by the Commission, that the arrangements for the exchange of information about sales between Alken-Maes and Interbrew were actually implemented. The fact that an agreement having an anti-competitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market.

149 The applicant's argument that the agreement was unstructured and informal, which is evidence of a low degree of intention to infringe, is disproved by the facts. The multiplicity and the simultaneity of the objectives pursued by the cartel, which are not disputed by the applicant, go to prove the existence of an anti-competitive plan, which is evidence, not of a low, but of a high degree of intention to infringe. Even if the cartel was relatively informal, it was none the less highly structured.

150 As regards, lastly, the criterion of the size of the relevant geographic market, the Commission found in the contested decision that the agreement extended to the whole of Belgium, which the applicant does not dispute. It is clear from case-law that where a geographic market extends to the whole of a country, that market represents a substantial part of the common market (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28). Moreover, the Commission indicated in the Guidelines that horizontal restrictions such as price cartels and market-sharing quotas or other practices which jeopardise the proper functioning of the single market will more often than not be classified as very serious infringements (see paragraph 140 above). It follows from that indicative description that agreements or concerted practices involving in particular, as in the present case, the price-fixing and customer-sharing may be classified in that way on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is supported by the fact that, while the indicative description of the types of infringement liable to be considered as serious mentions that they comprise infringements of the same type as those defined as minor '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 an impact or that there be effects in a particular geographic area.

151 It follows from the foregoing that in classifying the infringement as very serious within the meaning of Section 1.A of the Guidelines, the Commission did not infringe the principle of proportionality.

152 It should be noted in that regard that the Court has held in relation to a price cartel operated on a limited geographic market that the classification of the agreement as serious by reason of its limited impact on the market already represented an attenuated classification having regard to the criteria generally applied when fixing fines in price cartel cases, which should have led the Commission to classify the agreement as very serious (*Tate & Lyle and Others* v *Commission*, paragraph 147 above, paragraph 103).

153 With respect, in the second place, to the argument that the Commission failed to have regard in this case to its decision-making practice, in breach of the principle of equal treatment, it should be pointed out, first, that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 234) and, secondly, that it is settled case-law (see paragraph 134 above) that the Commission possesses a wide margin of discretion under Regulation No 17 when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules. It is accordingly for the Commission, in the exercise of its discretion and in the light of the matters referred to in the third indent of the second paragraph of Section 1.A of the Guidelines, to determine whether the individual circumstances of the case under consideration call for the infringement to be classified as very serious. It is clear from paragraphs 146 to 152 above that that was the case.

154 As has already been mentioned in paragraphs 134 and 135 above, the fact that in the past the Commission has applied fines of a certain level to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy. On the contrary, the effective application of the Community competition rules means that the Commission must be able, at any time, to adapt the level of fines to the requirements of that policy. Such conduct does not constitute an infringement by the Commission of the principle of equal treatment by reference to its earlier practice (see, to that effect, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931 (*'PVC II'*, paragraph 1232).

155 It must therefore be held that in categorising the infringement in question as very serious within the meaning of Section 1.A of the Guidelines, the Commission complied with its guidelines and did not infringe either the principle of proportionality or the principle of equal treatment.

The appraisal of the effective economic capacity of the applicant to cause significant damage to other operators

156 The Guidelines provide that, where an infringement is sufficiently serious, it may be necessary in cases involving several undertakings, such as cartels, to apply weightings to the general starting amount in order to establish a specific starting amount taking account of the 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 (sixth paragraph of Section 1.A, see paragraph 142 above). In particular, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers (fourth paragraph of Section 1.A, see paragraph 141 above).

157 It is also evident from case-law that the Guidelines do not provide that fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover in the relevant market. Nor, however, do they preclude the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of Community law and where circumstances demand it. In particular, turnover may be relevant when considering the various factors mentioned in paragraphs 141 to 143 above (*LR AF 1998* v *Commission*, paragraph 57 above, paragraphs 283 and 284, and *Cheil Jedang* v *Commission*, paragraph 95 above, paragraph 82).

158 It is in addition settled case-law that the criteria for assessing the gravity of an infringement may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that, on the one hand, it is permissible, for the purpose of fixing a fine, to have regard both to the overall turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed,

which gives an indication of the scale of the infringement. On the other hand, it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors and that the fixing of an appropriate fine cannot be the result of a simple calculation based on overall turnover (*Musique diffusion française and Others* v *Commission*, paragraph 50 above, paragraphs 120 and 121; *Parker Pen* v *Commission*, paragraph 115 above, paragraph 94; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 176; and *Cheil Jedang* v *Commission*, paragraph 95 above, paragraph 83).

159 In this case, the first point to note is the limited scope of the applicant's argument that the difference in the proportion which the starting amounts applied to each undertaking bore to the market share of those undertakings on the Belgian beer market shows that the Commission disregarded the principle that the effective capacity to cause damage is adequately reflected by the volume and value of the goods sold by each party. It must be held that the starting amounts referred to by the applicant incorporate not only the adjustment applied to take account of the effective capacity to cause damage to competitors on the market, but also the adjustment applied to reflect the objective of a deterrent effect.

160 In that regard, recital 305 of the contested decision shows that the adjustment of the amount of the fines with a view to ensuring their deterrent effect was made by the Commission in two stages. First, the applicant and Interbrew were placed on equal footing in that in setting the starting amounts in each case the Commission took account of the fact that they '[were] large international undertakings'. Secondly, the Commission indicated that it was 'important that [the applicant was] a multi-product company', thereby indicating that there was a need for a higher level of deterrence in its case. It is therefore clear that, as regards the objective of deterrence and without addressing at this point the validity of the conclusions reached by the Commission in that respect, the specific starting amount of the fine imposed on the applicant took account of a greater need to ensure deterrence than in Interbrew's case.

161 It must none the less be noted that the specific starting amount applied to the applicant is approximately 45% lower than that applied to Interbrew. Moreover, the Commission stated, in recital 303 of the contested decision, that it had taken account of the effective economic capacity of the offenders to cause significant damage to other economic operators and, in recital 304, that there was a considerable difference in size between Interbrew, the market leader in Belgium with a market share of approximately 55%, and Alken-Maes, the number two on that market, with approximately 15%.

162 It therefore appears that the Commission took account, in accordance with the Guidelines, of the relative economic capacity of the two undertakings to cause damage to other operators when, in setting the specific starting point for the applicant, it applied a significant discount to the general starting amount corresponding to the gravity of the infringement, for the purposes of the first paragraph of Section 1.A of the Guidelines. The fact that recital 303 refers to the capacity to 'cause material harm to competitors', [1] rather than repeating verbatim the expression used in the Guidelines, is of no relevance. Likewise, the fact that the ratio of the starting amounts applied to each undertaking differs from the precise ratio of their respective market shares has no bearing on the validity of the Commission's approach. The Commission has indicated in the seventh paragraph of Section 1.A of the Guidelines that the imposition of different fines need not be governed by arithmetical calculation.

163 As regards, in the second place, the applicant's arguments that the specific starting amounts imposed do not reflect the glaring imbalance resulting from Interbrew's dominant position on the Belgian beer market, which led Alken-Maes to seek to put an end to its gradual marginalisation and is, in any event evidence of the applicant's inability to restrict competition, it must be borne in mind that the infringement established in the contested decision is not denied by the applicant. That infringement, which consists in a set of agreements and/or concerted practices,

1 — Translator's note: the French text of recital 303 of the contested decision refers to the capacity of offenders 'to cause material harm to competition' ('porter gravement atteinte à la concurrence'), whereas the wording used in the Guidelines is 'cause significant damage to other operators' ('créer un dommage important aux autres opérateurs'). The English text of the recital adopts the same wording as that used in the Guidelines.

implies both an agreement of wills between the parties and that the damage done to competition resulted from that agreement and, accordingly, from the will of each of the parties. Accordingly, the applicant cannot invoke pressure which it claims was on it and thereby avoid liability for the damage done to competition.

164 For the sake of completeness, it should also be noted that it is settled case-law that an undertaking which participates with others in anti-competitive behaviour cannot rely on the fact that it did so under pressure from the other participants. It could have complained to the competent authorities about the pressure brought to bear on it and have lodged a complaint with the Commission under Article 3 of Regulation No 17 rather than participating in the activities in question (Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraphs 123 and 128; Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 58; and *LR AF 1998* v *Commission*, paragraph 57 above, paragraph 142).

165 As regards, lastly, the argument that the specific starting amount applied to the applicant represents a much higher percentage of Alken-Maes's turnover than the amount applied to Interbrew represents of the latter's turnover, it should first be noted that those amounts, as already mentioned in paragraphs 159 and 160 above, reflect not only the actual damage caused by each of the parties to competition but also the objective of deterrence referred to in the Guidelines. The argument that the starting amount applied to Alken-Maes is higher than the limit laid down in Regulation No 17 in terms of percentage of turnover is, in any event, wholly irrelevant, as the contested decision was addressed to the applicant.

166 The arguments alleging incorrect appraisal by the Commission, in breach of the principle of proportionality, of the effective capacity of the participants to cause significant damage to other operators, in particular consumers, must accordingly be rejected in their entirety.

The setting of the fine at a level which ensures that it has a sufficiently deterrent effect

167 The Guidelines provide that where an infringement involves several undertakings, such as cartels, a weighting may be applied to the general 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 undertakings committing infringements of the same type (see paragraph 142 above). In particular, it is necessary to set the fine at a level which ensures that it has a sufficiently deterrent effect (see paragraph 141 above).

168 The taking into account, for the purposes of determining the amount of the fine imposed in respect of the gravity of the infringement, of that objective of deterrence reflects settled case-law according to which the deterrent effect of fines constitutes one of the factors which the Commission is entitled to take into account in assessing the gravity of the infringement and, accordingly, in setting the level of the fine, as the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 137 above, paragraph 54; *Ferriere Nord* v *Commission*, paragraph 137 above, paragraph 33; and *Sarrió* v *Commission*, paragraph 137 above, paragraph 328).

169 Similarly, the case-law provides that the Commission's power to impose fines on undertakings which, intentionally or negligently, commit an infringement of Article 81(1) EC is one of the means conferred on the Commission in order to enable it to carry out the task of supervision conferred on it by Community law. That task encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that, in assessing the gravity

of an infringement for the purpose of fixing the amount of the fine, the Commission must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique diffusion française and Others* v *Commission*, paragraph 50 above, paragraphs 105 and 106, and *ABB Asea Brown Boveri* v *Commission*, paragraph 50 above, paragraph 166).

170 In the light of the foregoing, the Commission was justified in taking account of the objective of deterrence in setting the specific starting amount of its fine, which precisely reflects the gravity of the infringement committed. The taking into account of the deterrent effect of fines forms an integral part of the weighting of fines to reflect the gravity of the infringement, since the purpose of doing so is to ensure that a calculation method does not lead to fines which, for certain undertakings, would not be sufficiently high to ensure that the fine had a sufficiently deterrent effect (*ABB Asea Brown Boveri* v *Commission*, paragraph 50 above, paragraph 167).

171 With respect to the applicant's argument that there was a failure to specify the part played by the need to ensure a deterrent effect in the calculation of the fine, it must be pointed out that the Commission did not lay down in the Guidelines any method or specific criteria as to the manner in which the objective of deterrence was to be taken into account and which, had they been set out expressly, would have been capable of having binding effect. That argument must accordingly be rejected.

172 The same is true of the argument that the principles adopted in the present case for the purposes of assessing the need to ensure a deterrent effect were not made explicit. The applicant itself accepts that the Commission stated in recital 305 of the contested decision that the applicant and Interbrew are large international undertakings and that the applicant is also a multi-product company. The Commission added in recital 306 that it took into account the fact that the applicant had legal and economic knowledge and infrastructures which enabled it

more easily to recognise that its conduct constituted an infringement and be aware of the consequences stemming from it under competition law. It is therefore clear that, contrary to the applicant's contention, the principles applied in assessing the need to have a deterrent effect were made explicit.

173 It is necessary, lastly, to consider the various arguments whereby the applicant seeks to show that the Commission's reasoning in support of its finding that there was a need for a specific deterrent effect is irrelevant and disproportionate.

174 The argument that the fact that this constituted a repeat infringement cannot be deemed relevant must be rejected at the outset, since the Commission's reasoning relating to the deterrence was not based on such an objection.

175 With respect to the argument that the overall size of the undertaking and its international dimension are irrelevant as regards the object of competition which the Commission should pursue, it should first of all be noted that the fact that the applicant had legal and economic knowledge and infrastructures which enabled it more easily to recognise that its conduct constituted an infringement and be aware of the consequences stemming from it under competition law may be considered to reflect the overall resources of the undertaking and thus its size, of which its international dimension is one item of evidence amongst others. The Commission was therefore fully entitled to take account of it. The fact that the applicant participated in the cartel despite the fact that it had the resources to recognise that it constituted an infringement and to be aware of its consequences objectively indicates an additional need for deterrence by comparison with an undertaking without such resources.

176 The argument that the taking account, for the purposes of determining the necessary level of deterrence, of the secret nature of the cartel is irrelevant, as the cartel was not kept secret, or, at least, not kept secret due to the applicant, is based

on the claim that, in the context of the cartel, a number of meetings took place in the presence of competitors, for example the meetings of the working party known as 'Vision 2000', or distributors, such as the meeting of 28 January 1993, which included beer wholesalers. In addition, a letter of 4 August 1997 sent to the brewers by the federation of beer wholesalers shows that the latter followed the activities of the members of the cartel very closely.

177 As regards, first, the meetings of the 'Vision 2000' working party, it should be pointed out that in recitals 128 to 155 of the contested decision the Commission does not contend that those meetings, which were official since they were held under the auspices of the Confédération des brasseries de Belgique ('the CBB') and included a large part of the trade, were, as such, constitutive of the infringement. The Commission found that Interbrew and Alken-Maes, in the context of their bilateral contacts, acted together in the CBB and saw the advantages of taking certain initiatives through the organisation and that Interbrew and Alken-Maes had agreed that part of the cartel, namely that which related to investment and advertising in the on-trade and the new pricing system, could be implemented within the CBB. The Commission thus refers to the use of the CBB as a means of implementing, without the knowledge of the other participants in the meetings in question, an agreement between Interbrew and the applicant to influence certain pricing discussions conducted within that body to reflect the objects of their cartel, without suggesting that the other participants were informed of its existence. It must further be held that the objectives pursued by Interbrew and the applicant through the auspices of the CBB and the meetings of the 'Vision 2000' working party, namely a restriction of investment and advertising in the on-trade and the development of a new pricing structure, represented in any event only a limited aspect of the cartel, which comprised other secret elements, such as a general non-aggression pact, an agreement on prices and promotions in the off-trade, customer-sharing on the on-trade market and also an exchange of sales information. The fact that the meetings of the 'Vision 2000' working party were held cannot therefore lead to the conclusion that the agreement was not secret.

178 As regards, next, the meeting of 28 January 1993 (see paragraphs 126 and 131 above), it must be held that, although the minute of that meeting, prepared by a representative of Interbrew, refers to a 'meeting of beer wholesalers' and records the terms of an agreement to raise prices and impose minimum prices in respect of beer sold through certain distribution channels, it cannot in any way be inferred from that minute that full details of the anti-competitive arrangements included in the agreement were given to the beer wholesalers at the meeting of 28 January 1993. While those arrangements confirm that the trading policy of Alken-Maes and Interbrew were closely coordinated, they do not, by contrast, imply that the beer wholesalers were informed of the cartel.

179 As regards the letter of 4 August 1997 sent by the federation of beer wholesalers to Alken-Maes, it is clear that it does no more than criticise the distribution policy of Alken-Maes for jeopardising the future of independent distributors. Accordingly, it does not imply in any way that the beer wholesalers were aware of the cartel.

180 The argument that the cartel which the contested decision found to exist was not secret must therefore be rejected.

181 The Commission was accordingly entitled, in carrying out the tasks set out in the case-law in paragraphs 134 and 135 above and in complying with the legal framework laid down in Article 15(2) of Regulation No 17, to take account of those matters in assessing the need to ensure a deterrent effect.

182 The applicant's argument that it is unnecessary to take an objective of deterrence into account since the Commission's intervention put an end to the infringement must be rejected and it should be emphasised that the purpose of establishing a

deterrent effect is to guide the future conduct of the undertaking and that the fact that an undertaking ceases its offending conduct immediately that conduct is exposed by the Commission, an initiative which the undertaking is objectively bound to take, does not constitute sufficient grounds for concluding that it will be effectively deterred from repeating such conduct in the future.

183 All of the arguments alleging incorrect determination of the deterrent level of the fine, in breach of the principle of proportionality, must therefore be rejected.

The taking account of the legal and economic knowledge and infrastructures which large undertakings usually have

184 It is clear from case-law that the principle *non bis in idem*, enshrined also in Article 4 of Protocol No 7 to the European Convention on Human Rights and Fundamental Freedoms ('the ECHR') signed in Rome on 4 November 1950, is a general principle of Community law which will be upheld by the Community judicature (Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 103, 119; Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, paragraph 3; and *PVC II*, paragraph 154 above, paragraph 96, upheld on appeal in *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 97 above, paragraph 59).

185 In the field of Community competition law, that principle prohibits an undertaking being punished or having proceedings brought against it by the Commission on a second occasion in relation to anti-competitive conduct in respect of which a penalty has been imposed on it or for which it has been declared not to be liable by an earlier decision of the Commission which is no longer capable of being appealed against. The application of the principle *non bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (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, paragraph 338).

186 In the present case, it must be pointed out that in recital 306 of the contested decision, the Commission took as grounds for increasing the level of the fine to be imposed on the applicant the fact that it had legal and economic knowledge and infrastructures which enabled it more easily to recognise that its conduct constituted an infringement and be aware of the consequences stemming from it under competition law. In addition, in recital 314 of the contested decision, the Commission took as grounds for increasing the level of the fine to be imposed on the applicant the fact that it had already been found to have infringed Article 81 EC on two previous occasions.

187 In that regard, it is clear, first, that the conditions governing the application of the principle *non bis in idem*, as laid down by the case-law in the field of competition (see paragraph 185 above), are not satisfied in the present case, as, in setting the amount of the fine, the Commission did no more than take into account factual considerations, namely, first, that by reason of its economic and legal knowledge and infrastructures the applicant was in a position to recognise that its conduct constituted an infringement and be aware of its consequences and, secondly, that it had already been found to have infringed Article 81 EC on two previous occasions. In any event, it was on other grounds that the Commission increased the level of the fine in recitals 306 and 314 of the contested decision. The fourth part of the plea must accordingly be rejected.

The appropriateness of the specific starting amount in the light of the circumstances invoked by the applicant

188 The applicant submits in the alternative that, even if it is accepted that the Commission did not contravene the principle of equal treatment in classifying the infringement as very serious, the starting amount of the fine should nevertheless be reduced in order to take account of the minimal impact of the infringement on the Community market and the low volume of sales of the products covered by the cartel.

189 It should be borne in mind that, as required by the method set out in the Guidelines (see paragraphs 139 to 143 above), the Commission took as its starting-point in setting the fines a general starting amount determined according to the gravity of the infringement, that it next applied a weighting to that general starting amount by reference, first, to the effective capacity of the undertakings in question to cause significant damage to other operators, in particular consumers, secondly, to the requirement to set the fine at a level which ensures that it has a sufficiently deterrent effect and, thirdly, the requirement to take account of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

190 It was held in paragraphs 133 to 187 above that in classifying the infringement as very serious and in making the series of adjustments referred to above the Commission did not contravene any of the principles invoked by the applicant. Moreover, it should be borne in mind that the Guidelines contemplate that fines will be imposed in excess of EUR 20 million in cases of very serious infringements.

191 As regards the applicant's argument that the specific starting amount applied was in any event disproportionate having regard to the fact that the products covered by the cartel represented less than 2.5% of the total consumption of those products in the European Union, it must be held that the gravity of an infringement does not depend only on its geographic extent and on the proportion which the sales covered by the infringement bears to sales made in the whole of the European Union. Irrespective of those criteria, the absolute value of the sales in question is also a relevant indication of the gravity of the infringement, since it is an accurate reflection of the economic importance of the transactions which the infringement seeks to remove from the normal interplay of competition. It is not disputed in the present case that the approximate value of the sales concerned could be assessed at

approximately EUR 1 200 million, which signifies that the sector is of considerable economic importance. In that context, the specific starting amount of EUR 25 million applied to the applicant cannot be regarded as excessive.

192 As regards the reference to the Commission's practice in the Seamless Steel Tubes decision, it is sufficient to note that it is irrelevant in the light of the case-law referred to in paragraph 153 above.

193 It should, moreover, be pointed out that the Commission took account in that decision of the fact that the type of seamless steel pipes and tubes that were the subject of the infringement represented only 19% of all the seamless steel pipes and tubes which were capable of being used by the oil and gas industry, with the result that the impact of the infringement was limited since the industry could turn to other products that were unaffected by the cartel. In the present case, the infringement covered a much more significant share of the beer available in Belgium, since the Commission stated in recital 4 of the contested decision, without being challenged on the point, that the parties to the agreement brewed about 70% of the total beer sold in Belgium in 1998.

194 In the light of all the foregoing considerations, the applicant's argument that the amount of the fine imposed was inappropriate must be rejected.

195 The plea must therefore be rejected in its entirety.

5. *The plea alleging incorrect assessment of the duration of the infringement*

(a) Arguments of the parties

196 While it states that it does not deny the substantive truth of the facts established against it, the applicant submits that the Commission incorrectly assessed the significance of certain facts in determining the duration of the infringement. In particular, reference was made by the Commission to a telephone conversation and two meetings between the applicant and Interbrew, which took place after July 1996 and several months apart and on which it relied in support of the conclusion that the infringement continued until 28 January 1998. However, the Commission failed to establish that the infringement continued after July 1996. It should therefore be accepted that the duration of the offending conduct did not exceed three years and six months, which justifies an increase in the specific starting amount of the fine considerably lower than 45%. In accordance with its case-law, the Court must accordingly reduce the fine imposed on the applicant, having regard to the actual duration of the infringement.

197 As regards, in the first place, the telephone conversation of 9 December 1996 between Interbrew and the applicant, the applicant states that, contrary to what the Commission's reference to other documents in the file implies, the handwritten and annotated notes of Alken-Maes's management controller Mr L.B. dated 27 November 1996 were the only document on which the Commission based its findings.

198 The applicant does not deny that those handwritten notes were drawn up at an internal meeting which took place in November 1996, the purpose of which, according to the applicant, was to consider Interbrew's new prices, as a result of Alken-Maes having been given Interbrew's new conditions of sale by its customers. By contrast, the applicant does challenge the Commission's interpretation of the three sets of annotations subsequently added to those notes, each of which includes the date '9/12/96' and plainly represents a reply to three questions put in the original notes, regarding aspects of Interbrew's pricing policy which were unclear at the time

the original notes were drawn up. The Commission was wrong to hold that Mr A.B. of Interbrew should be asked for his opinion regarding them, which was done on 9 December 1996, when Interbrew gave one positive answer and two negative ones. According to the applicant, the other documents in the file which the contested decision refers to provide no support for that interpretation. The annotations made to the notes of 27 November 1996 could have been the result of enquiries made quite independently of any direct contact with Interbrew, made, for example, of distributors, who would only have echoed the interpretation given to them by Mr A. B. As one of the distributors of Interbrew's products, it was natural for Alken-Maes to seek to understand Interbrew's new prices for logistical reasons. The document in question accordingly is not sufficient to establish the truth of the Commission's case.

199 As regards, secondly, the meeting of 17 April 1997, the applicant submits that that meeting is not evidence of the cartel relating to the Belgian market, since its purpose, according to the statement of Mr J.D. of Interbrew referred to in recital 96 of the contested decision, was to establish potential synergies between the two groups and an increase in the profitability of the two undertakings, in the event that Interbrew were to reacquire the applicant's subsidiary Alken-Maes.

200 The applicant contests the Commission's conclusion that Mr J.D.'s statement demonstrates the anti-competitive nature of that meeting. That statement contains a summary of all the contacts between Interbrew and Alken-Maes. As regards, specifically, the meeting of 17 April 1997, Mr J.D. states only that those taking part in the meeting undertook a line-by-line analysis of Alken-Maes's profit and loss account, that being a necessary part of any negotiations on the possible transfer of an undertaking. The five points referred to in the document are all matters having a bearing on Alken-Maes's operating results or the method used to calculate them.

201 The applicant also challenges the Commission's finding that it is unlikely that Mr R. V., the head of Alken-Maes, would have been present at the meeting in question if

the discussion had related to the disposal of Alken-Maes, since such a disposal might not have been to his benefit. According to the applicant, there was nothing out of the ordinary about his presence, particularly if the person concerned wished to retain a role in the company. Moreover, there was all the more reason for him to be present, as Interbrew envisaged an acquisition by way of a management buy-out, which implied an important role for the existing management, as is evidenced by two statements placed in the file, namely those of Mr C. and Mr T.

202 As regards, in the third place, the meeting of 28 January 1998 involving inter alia Mr A.D. of Interbrew and Mr N.V. of Alken-Maes, the applicant contends that the discussion essentially involved a summary of past relationships. It also observes that, according to Interbrew's representative, the representative of Alken-Maes was wholly unaware of those events.

203 The applicant maintains that there is nothing to support the Commission's contention that Mr A.D.'s handwritten notes of 28 January 1998 proves that the cartel existed at that date. In particular, there is nothing which leads to the conclusion that the content of those notes may be attributed to both parties, which the Commission wrongly does in identifying the material contained in Mr A.D.'s notes as representing an alleged conversation, when it is possible that the material contained in the notes reflects the views of Interbrew alone. It would be surprising in the circumstances if the representative of Alken-Maes, who had no knowledge of the matter, could have given a detailed description of the agreements concluded in 1994. Moreover, the contested decision does not deny that the meeting of 28 January 1998 was not followed up. It therefore follows that the notes in question do not prove the existence or the implementation of an agreement or a concerted practice at that date, but go simply to show a positive assessment by Interbrew of the agreement concluded in 1994 and its desire to renew it.

204 The applicant accordingly argues that the period of the offending conduct did not exceed three years and six months and that the increase in the fine for duration should be reduced.

205 The Commission points out first that, in contending that the agreement ended in July 1996, the applicant is disputing its duration, whereas it claims that it does not substantially contest the facts. Next, the Commission established to the requisite legal standard that anti-competitive contacts between the applicant and Interbrew were in place until 28 January 1998. Lastly, as the applicant did not publicly distance itself from meetings which were shown to have an anti-competitive object and which it accepts that it participated in, its responsibility until 28 January 1998 is substantiated in any event.

(b) Findings of the Court

206 Article 15(2) of Regulation No 17 provides that the duration of the infringement is one of the factors that must be taken into account in determining the amount of the fine to be imposed on undertakings which infringe the competition rules.

207 The Guidelines distinguish between infringements of short duration (in general, less than one year), where no increase should be made to the starting amount determined for gravity, infringements of medium duration (in general, one to five years), where that amount may be increased by up to 50%, and infringements of long duration (in general, more than five years), where that amount may be increased by up to 10% per year (first to the third indents of the first paragraph of Section 1.B).

208 In recital 281 of the contested decision, the Commission stated that it had evidence concerning the Interbrew/Alken-Maes Cartel from at least 28 January 1993 to 28 January 1998. It stated that 'on 28 January 1993 a report was made of a first meeting with a clearly anti-competitive aim' and that 'on 28 January 1998 the last meeting within the framework of the cartel took place in respect of which the Commission has documentation'. The Commission concluded that 'the duration of the

infringement is thus five years and one day'. That finding was repeated in the operative part of the contested decision, in which the Commission stated that the infringement took place 'during the period from 28 January 1993 to 28 January 1998'.

209 In recital 282 of the contested decision, the Commission stated that the applicant disputed that the infringement had lasted as long as that and that it maintained that the discussions between Alken-Maes and Interbrew started only on 12 October 1994 and ended in July 1996. However, the Commission rejected those arguments and found that the duration of the infringement had been established to the requisite legal standard.

210 In this plea, the applicant's arguments refer again to the fact that the Commission did no properly determine the duration of the infringement. The applicant disputes the increase in the fine solely in so far as, in its contention, the infringement did not continue beyond July 1996.

211 Nor does the applicant expressly seek annulment of Article 1 of the contested decision, which defines the duration of its participation in the cartel. It invoked the plea relating to the duration of the infringement only in the alternative, in support of a request for a reduction in the amount of the fine imposed on it.

212 Nevertheless, the applicant's written pleadings in the present case show that it is essentially contesting the validity of the contested decision inasmuch as the decision finds, as Article 1 of its operative part states, that the infringement took place over the period from 28 January 1993 until 28 January 1998. Thus, the applicant stated in its application that 'the [contested] decision is invalid, since it finds that the period of the infringement was from 28 January 1993 to 28 January 1998' and that the

Commission '[has failed] to establish ... to the requisite legal standard that the infringement continued beyond July 1996'. The applicant went on to state in its reply that 'a correct reading of the file should have ... led [the Commission] to find that the infringement was of a lesser duration and to draw the appropriate consequences as regards the level of the fine'. Moreover, it is common ground that the applicant disputed the duration of the infringement in the course of the administrative procedure, in particular in its response to the statement of objections, as is mentioned in paragraph 512 below.

213 In the light of the foregoing, it should therefore be held that by the present plea relating to the duration of the infringement, the applicant seeks not only a reduction in the fine but also the partial annulment of the contested decision, in particular Article 1 of its operative part, in that the Commission wrongly held that the infringement continued until 28 January 1998.

214 It is accordingly necessary to determine, in the context of the present plea, whether the Commission established to the requisite legal standard, on the basis of the recorded facts, that the infringement continued until 28 January 1998.

215 It should be noted in that regard that as regards proof of 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 circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86). Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.

216 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the ECHR, which is one of the fundamental rights which, according to the settled case-law of the Court of Justice, reaffirmed in the Preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and by Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1), are protected in the Community legal order. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence 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 (see Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176).

217 It is accordingly necessary for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see *Volkswagen* v *Commission*, paragraph 99 above, paragraphs 43 and 72 and the case-law cited).

218 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 (see, to that effect, *PVC II*, paragraph 154 above, paragraphs 768 to 778, and in particular paragraph 777, confirmed on the relevant point by the Court of Justice, on appeal, in its judgment in *Limburgse Vinyl Maatschaapij and Others* v *Commission*, paragraph 97 above, paragraphs 513 to 523).

The telephone conversation of 9 December 1996

219 As regards the alleged unlawful contact which took place on 9 December 1996, it should first be noted that the Commission stated in recital 91 of the contested

decision that 'following on from the meeting of 19 September, Alken-Maes's management controller contacted Interbrew's off-trade manager, on 9 December, to ask a number of questions Alken-Maes had with regard to the pricing study'. The Commission relies in support of that finding on the final page of a document which comprises Annex 42 to the letter from Alken-Maes to the Commission of 7 March 2000 (see paragraph 72 above), a copy of which appears at page 8513 of its file. The parties are agreed that that document contains handwritten notes taken by Mr L.B. of Alken-Maes at an internal meeting held to discuss Interbrew's new prices and that annotations which represent replies to the questions the author had originally set out in his notes were subsequently added to the document by him.

220 On being invited by the Court, by means of a written question, to specify the factors leading it to find in recital 91 of the contested decision that a telephone conversation had taken place on 9 December 1996 in relation to Interbrew's prices between Mr L. B. (Alken-Maes) and Mr A.B. (Interbrew), the Commission first indicated that the background to the internal meeting of 27 November 1996, at which the handwritten notes were taken, was a meeting held on 29 July 1996 between Interbrew and Alken-Maes at which Interbrew's intentions regarding the logistical element of its trading policy, as it was to be amended and implemented by the entry into force of the new prices from 1 January 1997, were discussed in detail.

221 The Commission stated that the conclusion resulting from its consideration of the notes taken on 27 November 1996, which contain six dashes followed by handwritten text of one or two lines each containing a question mark, was that those notes contained questions which Mr L.B. (Alken-Maes) put to himself on that day regarding Interbrew's prices and that the annotations subsequently made to the document gave either the place where the answer was to be found or the answer to those questions. In this instance, the annotations representing an answer to some of the questions go to establish that the replies to the questions were obtained from Interbrew on 9 December 1996.

222 As the applicant has formally contested that interpretation, it is necessary to consider to what extent those additions result from, and accordingly represent evidence of, an anti-competitive contact between Alken-Maes and Interbrew.

223 It should be noted in that regard that final page of the document dated 27 November 1996 and headed 'Tariefstudie' is presented as a list of six questions relating to Alken-Maes's prices.

224 It seems that each of the six questions called, in the mind of the author of the initial notes, for an answer that had not yet been given at the date they were framed. The document effectively suggests that steps had been taken in relation to each of the six questions with a view to finding an answer to them. Thus, the first and sixth questions, which refer to legal matters, expressly mention a person called '[P.V.D.]' and refer in all probability to the then legal adviser of Alken-Maes. Similarly, the third question asks for a check to be carried out with customers through the distribution department (*checken bij klanten via distributie*).

225 As regards the second, fourth and fifth questions, against which the three annotations under discussion were subsequently made, it is important to note that the second question begins with the words 'check IB', where 'IB' plainly signifies Interbrew. It was specifically against that second question that the subsequent handwritten note 'Ja, volgen [Mr A.B.] (IB) 9/12/96' was made. That annotation suggests that Mr A.B. (Alken-Maes) adopted that proposed method of dealing with the question and contacted Interbrew on 9 December 1996, speaking to Mr A.B., who replied in the affirmative. The two other handwritten additions dated 9 December 1996 should therefore be interpreted in the same way.

226 As regards the applicant's argument that it is possible that the replies referred to were obtained from distributors, it must be held that that suggestion is contradicted by the fact that the notes relating to the third question specifically seek an answer from customers and the distribution department and that no annotation of the kind made to the second, fourth and fifth questions was made to the third question.

227 It thus appears to be established that the answers to the third question, on the one hand, and the second, fourth and fifth questions, on the other, came from the sources referred to. In those circumstances, the fact that the third question specifically sought clarification from customers and that the second question expressly called for a check to be made with Interbrew confirms that it was intended to contact the latter for the purposes of obtaining the answer to certain questions. Furthermore, the fact that the three notes setting out replies to the questions carry the same date of 9 December 1996 confirms beyond reasonable doubt that an anti-competitive contact did indeed take place on 9 December 1996, whether by telephone or otherwise.

228 It must therefore be held that evidence of unlawful contact on 9 December 1996 has been adduced.

The meeting of 17 April 1997

229 As regards the allegedly unlawful meeting of 17 April 1997, the Commission states in recital 95 of the contested decision that managers of Interbrew, the applicant and Alken-Maes met in Paris on 17 April 1997. The applicant does not deny that such a meeting took place.

230 In addition, the Commission mentions in recital 96 of the contested decision the statement of the general manager of Interbrew at the time, Mr J.D., relating to the matters addressed at that meeting and concludes that the subject of that meeting was the coordination of the market behaviour of Interbrew and the applicant, which the applicant categorically denies.

231 In that regard, it should be noted at the outset that the applicant does not dispute the probative nature of Interbrew's statement in so far as it consists solely of the unilateral statement of an undertaking, but only to the extent that the minute of the meeting does not establish that it had an anti-competitive object.

232 The passage from Interbrew's statement relating to the meeting of 17 April 1997 is worded as follows:

'There were top-level meetings ... which I did not attend. After the top-level meetings we had "instructions meetings" which we all attended (general managers and managers for the off-trade and the on-trade)

...

The meeting of [17 April 1997] was just one of these instructions meetings with [the applicant] ([the applicant] was represented by Mr K.). We ("Belgium" and "France", but each separately) were to report on synergies. At that meeting we went through profit and loss line by line, and systematically examined how costs could be lowered and profitability improved. Subjects discussed were: (1) production; (2) joint

distribution platforms; (3) discounts on price to be given before or after excise duties (this was also a CBB subject); (4) marketing and investment in advertising ("share of voice"); (5) growth of the beer market, and methods of increasing volume, based on the success achieved by the water business in France.

In the off-trade we achieved a number of things, far more than in the on-trade, where little or nothing happened.

In the off-trade there were agreements on:

— rebates on promotions aimed at the consumer (e.g. 5 + 1 free)

— marketing issues (e.g. value of coupon at promotional events)

— advertising brochure frequencies (e.g. maximum 10 brochures for crates of beer at GIB).

...'

233 The reference in the statement to a 'line-by-line' review of the profit and loss account does not allow it to be determined with certainty whether it refers to a scrutiny of the combined profit and loss account of Kronenbourg and Alken-Maes or to a scrutiny of the latter's profit and loss account and that of Interbrew in parallel.

234 It should also be pointed out that, irrespective of the discrepancies in the written explanations provided by the parties to a written question put by the Court, the passage from the statement regarding the meeting of 17 April 1997 shows beyond reasonable doubt that the meeting was unlawful.

235 The anti-competitive object of the meeting is clear, in the first place, from the particular points discussed. The mere fact that issues such as 'production','discounts on price' and 'marketing and investment in advertising' were the subject of consultation between the most senior managers of the two principal competitors on the beer market permits the conclusion that the meeting had an anti-competitive object.

236 In the second place, it is clear from the passage from Interbrew's statement set out in recital 96 of the contested decision that the meeting of 17 April 1997 is given as an example of the 'instructions meetings' intended to give effect to other higher-level cartel meetings, with the result that its anti-competitive nature is not in doubt.

237 In the third place, and in that context, the use of the term 'synergy' in the passage from the statement set out in recital 96 suggests that it refers generically to the results that those in authority at the highest level of the cartel expected of the 'instructions meetings', of which the meeting of 17 April 1997 is given as an example, and not to the specific question of the reacquisition of Kronenbourg/ Alken-Maes. Furthermore, as the Commission rightly points out in its rejoinder, that

term was previously used by the author of the statement to designate not the discussions on the possible reacquisition of Kronenbourg/Alken-Maes, but certain elements of the collaboration between Interbrew and Alken-Maes in France. Those points also go to support the finding that the meeting of 17 April 1997 was anti-competitive.

238 In the fourth place, as the Commission points out, all of the points referred to above should be examined in the light of other statements made by Alken-Maes during the administrative procedure. In its reply of 27 December 1999 to the Commission's request for information of 11 November 1999, Alken-Maes indicated, while seeking at the same time the benefit of the Leniency Notice, that 'numerous meetings [had taken] place between executives of Alken-Maes, notably Mr R.V., who was managing director between 1992 and 1998, and executives of Interbrew, especially Mr T. and Mr J.D., at which there [had been] consultation about the distribution and sale of beer in Belgium'.

239 With respect to the argument based on the presence of Mr R.V. at the meeting of 17 April, it must be held that his presence gives rise to no presumption in either direction, and that it should accordingly be disregarded.

240 In the light of all of the foregoing considerations, it must be held that the unlawful nature of the meeting of 17 April 1997 was established by the Commission to the requisite legal standard.

The meeting of 28 January 1998.

241 With reference to the matters discussed at the meeting of 28 January 1998, which the applicant does not dispute took place, the significance to be ascribed to the

handwritten notes of Interbrew's Belgian marketing manager, Mr A.D., depends on the conclusions to be drawn from two points, namely the nature of their contents and the extent to which they were up-to-date.

242 As regards, first, their contents, the coherent and structured nature of the notes made by Interbrew's representative, Mr A.D., which contain no crossings-out, leads to the conclusion that they do not constitute a record of a conversation but an *aide-mémoire*.

243 As regards, next, the extent to which the content of the notes was up-to-date, it appears that their originator regarded a number of issues as being current. That is the case, for example, with the first two points, headed respectively 'organisation of consultations' and 'current issues' in the first section, headed 'Subjects'. In the same way, the third section, headed 'consultation on on-trade' appears to refer to the future arrangements relating to such consultations. Furthermore, the second section, headed 'Points decided on 1.1.1994' mentions 'achievements' and does not go to disprove the fact that, as far as the author was concerned, those achievements continued to have an effect.

244 As there is no dispute that the meeting of 28 January 1998 between Interbrew and the applicant took place, the Court must examine, as it did in the case of the meeting of 17 April 1997 (see paragraph 237 above), the significance to be attributed to those notes in the light of Alken-Maes's reply of 27 December 1999 to the Commission's request for information of 11 November 1999, in which it was stated that 'numerous meetings took place between executives of Alken-Maes, notably Mr R.V., who was managing director between 1992 and 1998, and executives of Interbrew, especially Mr T. and Mr J.D., at which there was consultation about the distribution and sale of beer in Belgium'. That statement on its own constitutes an acknowledgement by the applicant that anti-competitive meetings in which it took part continued until 1998. Its content therefore means that Mr A.D.'s handwritten notes can be treated as establishing the anti-competitive nature of the meeting of 28 January 1998.

245 In addition, it is clear from case-law that, once it has been established that an undertaking has taken part in meetings between undertakings having a manifestly anti-competitive nature, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (*Hüls* v *Commission*, paragraph 216 above, paragraph 155; *Montecatini* v *Commission*, paragraph 216 above, paragraph 181; and *Aalborg Portland and Others* v *Commission*, paragraph 185 above, paragraph 81). Failing such evidence of distancing, it may be concluded from participation in those meetings that the undertaking is participating in the cartel which results from them, even if it does not actively do so (*Aalborg Portland and Others* v *Commission*, paragraph 185 above, paragraph 84, and Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 223). In addition, the fact that an undertaking does not abide by the outcome of those meetings is not such as to relieve it of full responsibility for the fact that it participated in the cartel (*Aalborg Portland and Others* v *Commission*, paragraph 185 above, paragraph 85; *Mayr-Melnhof v Commission*, paragraph 57 above, paragraph 135; and *Cement*, paragraph 31 above, paragraph 1389).

246 It is clear in the present case that the applicant has produced no evidence to establish that its participation in the meeting of 28 January 1998, which is not in dispute, had no anti-competitive intention by demonstrating in particular that it indicated to Interbrew's representative that it was participating in those meetings in a spirit that was different from his.

247 It follows from the foregoing that the Commission has established to the requisite legal standard that the infringement in question continued until 28 January 1998.

248 In those circumstances, the plea must be rejected.

6. *The plea alleging that there was no basis for the finding that the pressure put on Interbrew constituted an aggravating circumstance*

(a) Arguments of the parties

249 The applicant maintains that, in finding that it put pressure on Interbrew at the meeting of 11 May 1994 which, in the form of a threat to force it off the French market if it refused to grant it a sales quota of 500 000 hectolitres on the Belgian market, led to an extension of the cartel after that date, the Commission is mistaken as to the impact of the facts in issue.

250 In the first place, while it is true that, during the period prior to the meeting of 11 May 1994, discussions related essentially to prices, the introduction of additional factors after that period, namely respect for each party's customer base together with new prices, could not be interpreted as a significant extension of the scope of the infringement. In particular, the concern that the mutual customer bases be respected arose only from the problems created by Interbrew's failure to respect the exclusive agreements between Alken-Maes and a number of its customers. In addition, other topics were put on the agenda for the meetings, both before and after the meeting of 11 May 1994, so that it would be unreasonable to categorise the topics discussed by the parties as an extension of the cooperation in May 1994.

251 In the second place, while relations between the parties did indeed move towards a more structured cartel after 1994, that development was in the interests of both parties and indeed, as regards pricing, those of Interbrew in particular, and no aspect of the cartel was in the exclusive interest of the applicant.

252 Accordingly, Interbrew's interest in concluding, prior to May 1994, a non-aggression pact is shown by its concern that prices would tumble on the Belgian market. As the

Commission acknowledges in the contested decision, Interbrew was very keen that there be consultations on prices in Belgium so as to protect itself against the aggressive policy of the applicant in that field, although at the same time it pursued an aggressive policy towards the exclusive agreements between Alken-Maes and a number of its customers, and so as to avoid low-priced parallel imports from France. Although its strong position would have allowed it to eliminate Alken-Maes from the market by means of a price war, Interbrew set itself the objective of restoring calm to a Belgian market which it dominated in order to be able to fund its international expansion through profits made in Belgium, where prices were higher. Alken-Maes stood in the way of that that desire to restore calm, at least initially, by conducting itself in a fiercely competitive manner with the admitted aim of achieving break-even. Interbrew thus had an immediate interest in concluding a non-aggression pact.

253 Interbrew also had an interest in reaching agreement with the applicant in relation to the reacquisition of its 'beer' division. Its cartel with Alken-Maes can also be explained by its desire to have a partner in imposing a new pricing structure on the market. Furthermore, as it risked a finding of infringement for the abuse of its dominant position, Interbrew might have had an interest in reaching agreement with Alken-Maes rather than eliminating it from the market.

254 Moreover, the alleged reluctance on Interbrew's part prior to 1994, on which the Commission relied in the contested decision and in its defence, with particular reference to an Interbrew internal memorandum of March 1993, results in the Commission misinterpreting the scope of that document. While the passage quoted by the Commission does indeed refer to reluctance, its use is however misleading inasmuch as that document shows not only that that reluctance related to a finding of infringement under Article 82 EC, but also that Interbrew's CEO at the time had instructed the author of the memorandum to enter into discussions with Alken-Maes, thereby on the contrary demonstrating a willing and unhesitating participation in the cartel, decided upon at the time by Interbrew's most senior manager. Lastly, the Commission failed to point out that the author of the memorandum mentioning reluctance in 1993 is the same person who, six months later, having become CEO of Interbrew, took steps which forced Alken-Maes to cooperate in achieving the price sought by Interbrew.

255 The Commission also overlooked the fact that Interbrew set clear objectives for the cartel in 1994, as is evidenced by a number of recitals of the contested decision, thereby demonstrating that it played a leading role in the cartel prior to 1994, as the contested decision also mentions. The fact that Interbrew used a code name to refer to the cartel also confirms its structured approach to the practices in question. Lastly, the statement of the former managing director of Alken-Maes that the great majority of Interbrew's managers wanted a cartel even before 1994 also shows that the alleged reluctance on Interbrew's part did not exist.

256 In the third place, while the applicant acknowledges that it did indeed warn Interbrew at the meeting of 11 May 1994 that the latter was involved in the breach of its distribution agreements in France, it none the less failed to ensure that those agreements were fully complied with, and thus did not, in fact, exert any pressure. Furthermore, the contention that threats were made against Interbrew is contradicted in the contested decision by the finding that Interbrew did not accept the applicant's demand that it transfer 500 000 hectolitres to Alken-Maes.

257 In addition, the imbalance between the relative strengths of the applicant and Interbrew in France and Belgium was extremely strong. As the applicant did not have a dominant position in France, it would in any event not have been capable of forcing Interbrew out of that country. Because sales outlets with distribution agreements with the applicant represented only 16% of the total outlets in France, there is plainly no basis for the view that Interbrew might take any threat of being forced out of the market seriously. Moreover, the possible consequences of a strict application by the applicant of its distribution agreements in France were out of all proportion to the risk incurred by the applicant's subsidiary in Belgium, having regard to the real influence of Interbrew's strength in Belgium. There is thus a manifest lack of proportionality between the alleged existence of a threat which would not have been implemented and the increase in the fine applied for that circumstance.

258 Furthermore, although the Commission ascribed importance to the warning given to Interbrew, which, according to the applicant, contemplated only the use of lawful means (which in the event were not implemented) to put an end to Interbrew's involvement in the breach of its agreements in France, the Commission ignored the threats and reprisals made by Interbrew against Alken-Maes during the whole of the period. Thus, Interbrew's disproportionate reaction to the aggressive marketing policy of Alken-Maes in 1994, the reckless manner in which Interbrew sought to persuade Alken-Maes to follow its policy of raising prices in 1993 and the attacks made by Interbrew on cafés tied to Alken-Maes are all evidence of the constant aggression shown to the applicant by Interbrew, a dominant undertaking which 'terrorised the market', thus threatening to exclude Alken-Maes.

259 The satisfaction expressed by Interbrew in January 1998 regarding the cartel's achievements, which is evidenced by the notes taken by its marketing manager for Belgium, is not consistent with the argument that Alken-Maes exerted pressure on Interbrew.

260 Fourthly, and lastly, the applicant submits that in any event proof of the threat made by it has not been adduced. All of Interbrew's statements were made in 2000 and supplied to the Commission at an advanced stage in the investigation procedure. They reflected Interbrew's defence strategy and cannot accordingly be held by the Commission to be probative evidence. The only document from a third party which supports the Commission's argument, namely the Heineken Document, also has no probative value.

261 Inasmuch as that document records statements made by Interbrew, it does not constitute independent confirmation of the alleged pressure. As neither its author nor its date are known, the authenticity of the allegations made must also be in doubt, particularly as it is impossible to establish whether the document was framed by an employee of Heineken or Interbrew. Furthermore, its nature is difficult to determine and its content is obscure. The document is neither a letter nor a note, but rather a passage from a list which includes the misspelt name of a director of

Interbrew who held office during the 1990s (Mr C.) and which appears to consist of three phrases linked by dashes, which give the impression of forming part of a list. The second dash is followed by the following words written in Dutch 'Three years ago [Mr K.] left Interbrew a choice: either they gave [Maes] an extra 500 000 [hectolitres] or he would drive them out of France'. The word 'gave' is not used in the Dutch text and the words 'Alken-Maes' were added in manuscript. It is therefore impossible to give a clear meaning to the four lines, isolated from their proper context in the Heineken Document. As the Commission did not attempt to obtain further information about the Heineken Document and the meaning of its content, its content has no probative value whatsoever.

262 According to the Commission, it is clear from recitals 45 and 46 of the contested decision, which are not contested by the applicant, first, that before the meeting of 11 May 1994 Interbrew was reluctant to extend its cooperation with the applicant in Belgium and that it decided that its approach should be one 'of not starting a war' and, secondly, that after that date a non-aggression pact was entered into. The applicant's contention that, prior to 1994, Interbrew had wanted to reach agreement with Alken-Maes in order to put an end to the latter's aggressive marketing policy is only speculation, whereas the aggressive nature of Alken-Maes's policy towards Interbrew is established. Given the significant change in Interbrew's attitude, a causal link can be inferred between the threat made by the applicant, which, moreover, admits that the cooperation was in fact extended after 11 May 1994, and the change in Interbrew's attitude.

263 The fact that Interbrew is the most important player on the Belgian beer market does not mean that it was not reluctant to see the cartel extended, or that it was not subject to threats of a trade war from an economic actor that was larger than it in overall terms and especially powerful in France, a country in which Interbrew was, by contrast, in a weak position. Such a scenario is all the more credible, given that the threat in question consisted of concerted action on the part of the applicant and Heineken and that Alken-Maes was not an independent undertaking but a

subsidiary of the applicant and thus of an international group. Lastly, the fact that Interbrew was able to declare itself satisfied, towards the end of the cartel, with the results achieved does not mean that there was no initial reluctance.

264 As regards the applicant's argument that the passage quoted from Mr M.'s note of 12 March 1993 is a misleading representation of the true position, the Commission maintains, first of all, that the use of that quotation in recital 45 of the contested decision does not in any way conceal the pressure applied by Interbrew's management. In addition, it is clear from that passage that the applicant wished to strengthen that cooperation and that it had more to gain from doing so than Interbrew, a point which the applicant was careful not to mention. The fact that Interbrew's reluctance could be based on a fear that proceedings might be taken against it for infringement of competition law does not mean that no such reluctance existed. The same is true of the initiative of which person who originally expressed Interbrew's reluctance (Mr M.) undertook when he sought to force Alken-Maes to achieve the price levels desired by Interbrew. The statement by the former managing director of Alken-Maes that the great majority of Interbrew's managers wanted a cartel to be entered into before 1994, was made after the facts and the use made of it was highly selective, there being no reference to some of its passages referring to the threat made against Interbrew.

265 The Commission repeats that it never cast doubt on Interbrew's interest in entering into a cartel, but simply established that the extension of the cartel was the result of the threat made by the applicant.

266 There is no evidence to support the applicant's argument that, prior to 1994, Interbrew wished to reach agreement on prices in order to put an end to Alken-Maes's aggressive marketing policy and to prevent low-priced parallel imports from France. The documents which are alleged to prove Alken-Maes's aggressive marketing policy refer to a meeting between representatives of Alken-Maes and Interbrew after May 1994, from which it cannot be inferred that the extension of the cartel at that date was the result of Interbrew's intention. The documents relating to parallel imports are not conclusive, nor are those which are alleged to show

Interbrew's desire to finance its international expansion through profits made in Belgium. The discussions relating to a possible reacquisition of Kronenbourg by Interbrew do not demonstrate a spontaneous interest on the latter's part in the cartel, any more than the fear of proceedings relating to abuse of its dominant position was likely to encourage Interbrew to extend a cartel, which was equally illegal under competition law.

267 The Commission contends next that the applicant's explanation regarding the meeting of 11 May 1994 and the applicant's reference to the 500 000 hectolitres is not credible, and points out at the same time that the applicant does not deny that it did indeed refer to that quantity and to a particular type of threat.

268 As regards the applicant's challenge to the evidence of that threat, the Commission argues first of all that the applicant mentioned in its response to the statement of objections that a representative of Alken-Maes (Mr R.V.) informed Interbrew, 'which was annoyed by its aggressive policy, that he did not expect to get more than 500 000 hectolitres, which represented his break-even point'. In addition, Interbrew was informed that predatory practices in the on-trade in Belgium meant that the applicant 'might adopt a tougher policy towards Interbrew in France if Interbrew did not put an end to its abuses in Belgium'. Those two statements reveal a certain threat, as asking a competitor to put an end to certain practices at the same time as informing it of the need to achieve a particular volume of sales in order to break even is tantamount to demanding the transfer of such a volume under threat of reprisals.

269 The Commission also notes that a representative of Interbrew (Mr C.) stated that a representative of Alken-Maes (Mr K.) 'repeated his demand that 500 000 [hectolitres] be transferred to Alken-Maes and threatened that otherwise Interbrew would be

destroyed in France'. He also 'wanted [Interbrew]/[Alken-Maes] to conduct themselves on the Belgian market in line with "the agreements in France"', noting that the 'French mechanism can be summarised as follows: Heineken's and Kronenbourg's off-trade sales managers consult together very often in order to check their respective market shares and to manipulate promotions, prices and conditions'.

270 The Commission also produces in its rejoinder, in response to the applicant's contention that it relied solely on the Heineken Document in order to demonstrate that a threat was made, a statement from Interbrew of 14 January 2000 in which the author of the statement wrote: '[the applicant's] position was that the position of [Alken-Maes] was very difficult and that [Interbrew] should help it. The big stick they used to persuade us with was that Kronenbourg could make life very difficult for us in France'.

271 Furthermore, the threat is demonstrated independently by the Heineken Document, which is referred to in the statement of objections and in the contested decision. That document, which is undated and unsigned but was discovered in a drawer in the desk of a member of Heineken's board of directors, records that, three years earlier, a representative of Alken-Maes, a Mr K., 'left Interbrew a choice: either they gave Alken-Maes an extra 500 000 hectolitres or they would be ejected from France. He referred to the details of the cooperation between Heineken and Kronenbourg in France'.

272 The Commission contends that the probative value of that document, to which the applicant had access in its non-confidential version, is not affected by the lack of a date and identification of its author and the people who were aware of it. Given the place where it was found, there is every reason to believe that the document was drawn up for or by a member of Heineken's board of directors. Moreover, Heineken's lawyer confirmed that his client was indeed behind the document.

273 According to the Commission, the consistency between the applicant's admissions, Interbrew's statements and the contents of the Heineken Document demonstrate that a threat was indeed made against Interbrew.

274 As regards the arguments which the applicant puts forward in its reply in support of its contention that the threat produced no effects, the Commission observes first of all that they implicitly accept that a threat was made. Moreover, the statements of one of its managers at the material time, on which the applicant relies, are inconsistent. Although the person concerned indicated that 'Kronenbourg was in no position to eject Interbrew', that is inconsistent with his statement that 'Danone could adopt a tougher policy towards Interbrew in France if Interbrew did not put an end to its abuses in Belgium'. It is not likely that a threat would be made in the full knowledge that it would be impossible to put it into effect. As regards the allegation that Interbrew paid no heed to the threat, the applicant is not in a position to establish it, whereas the file shows that, by contrast, Interbrew took the threats seriously.

275 Furthermore, the possibility of a counter-attack by Interbrew as a result of the initiatives taken by Alken-Maes in relation to drinks outlets does not mean that Interbrew did not take seriously what it perceived to be a threat. The documents relied on to show Interbrew's 'reign of terror' on the market are not decisive. None of them shows that Interbrew systematically attacked Alken-Maes's sales outlets.

276 Lastly, the Commission notes that, while the applicant denies having made a threat, it does not appear to dispute that a threat, even if it is not followed up, constitutes an aggravating circumstance.

(b) Findings of the Court

277 As is clear from the case-law, where an infringement has been committed by several undertakings, it is appropriate, when setting the amount of the fines, to consider the relative gravity of the participation of each of them (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 623), which implies in particular that the roles played by each of them in the infringement for the duration of their participation in it should be established (*Commission* v *Anic Partecipazioni*, paragraph 215 above, paragraph 150, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 264).

278 That conclusion follows logically from the principle that penalties must fit the offence, according to which an undertaking may be penalised only for acts imputed to it individually. That principle applies in any administrative procedure that may lead to the imposition of sanctions under Community competition law (see, as regards fines, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless et Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63).

279 In accordance with those principles, Sections 2 and 3 of the Guidelines provide for the basic amount of the fine to be varied by reference to a number of aggravating and attenuating circumstances, which are specific to each undertaking involved. Section 2 sets out, in particular, a non-exhaustive list of aggravating circumstances which may be taken into account.

280 In the present case, the Commission found in recital 315 of the contested decision that Alken-Maes 'compelled Interbrew to extend the cooperation, by threatening to take measures against Interbrew if the latter did not cooperate'.

281 It should be noted at the outset that the Commission was correct to hold that the fact that an undertaking which is a member of a cartel forces another member of that cartel to extend its scope by threatening that member with reprisals if it does not cooperate may represent an aggravating circumstance. Such conduct has the direct effect of aggravating the damage caused by the cartel and an undertaking which conducts itself in that way must bear a special responsibility (see, by analogy with the assessment of the role of 'ringleader' of a cartel, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 57 and 58; Case C-298/98 P *Finnboard* v *Commission* [2001] ECR I-10157, paragraph 45; and *Mayr-Melnhof* v *Commission*, paragraph 57 above, paragraph 291).

282 In support of the finding that such an aggravating circumstance existed, the Commission established that there was a causal link between the extension of the cooperation, summarised in particular in recitals 236, 239, 243 and 244 of the contested decision, which are based in turn on the facts relating to 1994 described in recitals 51 to 68, and the threat, made by the applicant, of reprisals against Interbrew if it refused to extend the cooperation.

283 In order to determine whether the Commission's finding of an aggravating circumstance against the applicant was well founded, it is necessary to consider in turn whether a threat of reprisals was actually made, whether the cooperation was extended and, if both of those points are confirmed, whether the threat made in fact resulted in the cooperation being extended.

284 As regards, in the first place, the evidence that a threat was made, the Commission reached its conclusion in that regard on the basis, first, of the statement of Mr C. of Interbrew of 12 January 2000 which is set out in Annex 18 to Interbrew's letter to the Commission of 28 February 2000 and, secondly, the terms of the Heineken Document (see paragraph 271 above). According to the Commission, the accuracy of Interbrew's statement that a threat was made at the meeting of 11 May 1994 is confirmed by the Heineken Document, which records that such a threat was made.

285 As regards the applicant's argument that Interbrew's statement should not be regarded as probative, it should be noted that settled case-law provides that there is no provision or any general principle of Community law which prohibits the Commission from relying, as against an undertaking, on statements made by other accused undertakings. If that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 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 (*PVC II*, paragraph 154 above, paragraph 512). However, 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). As, in the present case, the cartel comprised only two parties, it is sufficient for the applicant to challenge the material contained in Interbrew's statement for other evidence to be required in support of it. That applies particularly to a statement which seeks to attenuate the responsibility of the undertaking in whose name it was made by emphasising the responsibility of another undertaking. It must therefore be determined whether Interbrew's statement is supported by other evidence.

286 As the Commission also based its finding that Interbrew's statement was accurate on the Heineken Document, which establishes that the threat was made and the probative value of which is also contested by the applicant, it is necessary to determine whether that document establishes, in a sufficiently probative manner, that a threat was made so that, on the basis of that document and Interbrew's statement, the making of a threat can be considered to be established. In that regard, it should be borne in mind that in order to assess the probative value of a document, regard should be had first and foremost to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (opinion of Judge Vesterdorf acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, II-869 at II-956; *Cement*, paragraph 31 above, paragraph 1838).

287 In the present case, it should be held first of all that, according to the Heineken Document, the general manager of the applicant's beer division at the time of the relevant facts 'left Interbrew a choice: either they gave Maes an extra 500 000 [hectolitres] or he would drive them out of France [and] ... the form of cooperation that existed between Heineken and Kronenbourg in France was referred to'. In that regard, inasmuch as it refers to the making of a demand coupled with possible reprisals, it is a record of a threat.

288 As regards, next, the degree of reliability of the document, it must be held, first, that, although undated, the Heineken Document must necessarily have come into being prior to 22 March 2000, since a copy of it was originally taken from Heineken's premises in the course of an investigation carried out under Article 14(3) of Regulation No 17 on that date (see paragraph 39 above) and it therefore precedes the initiation of the procedure and the sending of the statement of objections to the undertakings concerned. Secondly, it must be held that, although the Heineken Document is unsigned, its discovery in the drawer of a member of Heineken's board of directors, namely in the office of a senior director of an unconnected undertaking, leads to the conclusion that the content of the document is reliable. Thirdly, the fact that the information in question may have been furnished to Heineken by Interbrew, as the applicant suggests, does not call the accuracy of that information into question. It is impossible to accept the only argument which could support such a challenge to the accuracy of the information contained in the document, namely that Interbrew might have intentionally passed on false information to Heineken for the sole purpose of providing a basis, in view of the possibility that the Commission might decide to impose a fine, for an argument that pressure had been put on it, thereby enabling it to minimise its role in the cartel.

289 Lastly, it must be noted that, while the applicant denies that the meeting of 11 May 1994 gave rise to the making of a threat, it does not, however, dispute that a warning was given on that occasion (see paragraph 256 above), or that a volume of 500 000 hectolitres was mentioned at the meeting, or, finally, that the Heineken Document refers to the meeting of 11 May 1994.

290 It follows from the foregoing that the Heineken Document has a high degree of probative value and that, having regard to the factual background which the applicant does not dispute, the combination of the statement of Mr C. of Interbrew of 12 January 2000 and the Heineken Document establishes that the applicant did indeed make a threat against Interbrew on 11 May 1994.

291 As regards, in the second place, the question of whether the cooperation was in fact extended, it must first of all be pointed out that, while the applicant takes the view that it is unreasonable to categorise alterations to the subject-matter of discussions between the parties as an extension of the cooperation, it none the less acknowledges that the discussions after May 1994 took a different course, even if those changes related, according to it, initially only to the 'respect for each other's customer base' where those customers were tied by exclusive arrangements.

292 It must also be pointed out that the applicant does not contest the findings in the contested decision that the cartel included a market-sharing agreement in the form of a non-aggression pact. The applicant itself told the Commission that a non-aggression pact existed, as may be seen from the letter of 7 March 2000 from Alken-Maes to the Commission, which states:

'It appears in particular that at the end of 1994 an agreement was entered into between the two companies covering all the distribution channels in Belgium, but with particular attention being paid to the on-trade channels. The agreement included ... a non-aggression pact ...'

293 Lastly, it is clear that, in particular in recitals 56, 59 to 65, 73 and 104 of the contested decision, the Commission established to the requisite legal standard that from the second half of 1994 the cartel included a market-sharing component. Furthermore, recitals 53 to 58 of the contested decision show that the process leading to that inclusion was under way in May 1994.

294 It must therefore be concluded that the cooperation was extended to a sharing of the beer market by means of a non-aggression pact from May 1994.

295 It is necessary, in the third place, to consider whether the threat made by the applicant on 11 May 1994 was decisive in compelling Interbrew to agree to an extension of the cartel to a non-aggression pact. The Court's examination must be based on a comparative analysis of the attitude adopted by the applicant and its subsidiary Alken-Maes, on the one hand, and by Interbrew, on the other, before, during and after the second half of 1994, when the extension of the cartel led to the non-aggression pact concluded on 12 October 1994. In that regard, the examination of Interbrew's attitude is particularly important.

296 As a preliminary point, it should be noted that the Commission stated in recital 313 of the contested decision that both the applicant and Interbrew took initiatives concerning various parts of the cartel, with the result that none of the parties concerned took a leading role in the cartel as a whole.

297 As regards, first of all, the attitude of each of the parties to the cartel before and during the second half of 1994, it should first be held that the contested decision shows that the applicant and its subsidiary Alken-Maes were indeed the originators of the extension of the cartel to include a non-aggression pact involving consultation on market shares or, at the very least, on customer-sharing.

298 While the cartel extended originally to prices and a reduction of marketing investments, the applicant's approach, as expressed, according to Interbrew's statements, at an internal meeting of Interbrew on 5 May and repeated at the meeting of 11 May 1994, with the latter point being supported by the Heineken Document, was to demand for the first time that sales volumes be taken into

account as a criterion, which may be assimilated to a proposal to extend the cartel to market-sharing. Furthermore, the Interbrew statement referred to in recitals 54 and 57 of the contested decision is supported by an internal memorandum from the author of that statement of 5 October 1994, which is referred to in recital 58 in the decision, that the proposal to share the market was put forward by Alken-Maes and understood by Interbrew as a desire to transpose to Belgium certain consultation mechanisms in which the applicant was participating in France. Those documents also show that Interbrew was reluctant to accept such a proposal.

299 It must however be pointed out that Interbrew's attitude is evidence of its active conduct in the cartel until May 1994. Thus, the Commission states in recital 310 of the contested decision that Interbrew took the initiative concerning the exchange of information in 1992 and that it is clear from the written evidence that in August and November 1993 Interbrew played a leading role concerning the pricing agreements in the off-trade. It must also be held from Interbrew's internal memorandum of 12 March 1993 that the most senior manager of that undertaking had played an active part in the first phase of the cartel by requiring his subordinates to participate in the consultation process. The memorandum contains the following passage: 'they probably want to increase "cooperation" in Belgium. [The former CEO of Interbrew] forced us to talk as "we needed some money", but we are most reluctant to do this as we want to avoid any problems under Articles [81 EC] and [82 EC]'.

300 It also appears that, five months later, the author of the memorandum, who had become Interbrew's CEO, endorsed that positive attitude towards the cartel. In an Interbrew internal memorandum of 19 August 1993, Mr M. indicated his readiness to help to convince Alken-Maes to undertake a price increase of 4%. Moreover, in a memorandum of 3 November 1993, he recorded the contacts he had had with large distributors in the following terms:

'... would appreciate an initiative on the part of Interbrew to make contact with ... and ... (... are the three largest Belgian supermarket chains) in order to arrive at a

gradual increase in the price of beer ... to the level desired by [Interbrew]. ... If a consensus begins to emerge, consideration will be given to the possibility of a three-way meeting ... I think it would be no bad idea if I was invited along to the top-level meeting with ... and ... . The initiative taken by Maes last year did not prove feasible: (a) there was a lack of trust, but certainly also (b) Maes was too small. This is something only [Interbrew] can do'.

301 It follows from the foregoing that, although the conduct of the applicant and its subsidiary Alken-Maes in the second half of 1994 shows their willingness to extend the cooperation to market-sharing, Interbrew's conduct during the first phase of the infringement was active, as is evidenced by the taking of initiatives the restrictive object of which cannot be disputed.

302 As regards, secondly, the attitude of the parties to the cartel between 11 May 1994, when the threat was made, and 24 November 1994, when the non-aggression pact concluded on 12 October 1994 was again discussed between the parties, it should first be held that, notwithstanding the threat made by the applicant, Interbrew's attitude was not that of an undertaking compelled to accept, under pressure, the extension of the restrictive agreement to which it was a party.

303 Thus, it should be noted that the CEO of Interbrew stated on 7 July 1994 that he had agreed with the chairman of the applicant that 'we would not launch a war but instead try to gain time' (recital 56 of the contested decision). The approach adopted by the applicant and Alken-Maes during the first phase of the cartel, which lasted from the beginning of 1993 to the end of the first half of 1994, was aggressive towards Interbrew, and the applicant's position on 11 May 1994, although coupled with a threat, was adopted against a background of the possibility of the onset of commercial hostilities in France. Interbrew's attitude can therefore be understood not only as one of compliance with the threat made by the applicant, but also as a refusal to enter into a price war, that is to say to act competitively. It should also be

pointed out in that regard that the Commission stated in recital 51 of the contested decision, after referring to the making of the threat, that 'Interbrew did not accept [the applicant's] demand that it transfer 500 000 [hectolitres] of beer to Alken-Maes, but it did not want war either, and the parties stayed in close contact with one another'.

304 It therefore appears, first, that Interbrew paid only moderate attention to the threat and, secondly, that Interbrew's conduct resulted from its desire not to enter into conflict with the applicant, which suggests that the extension of the cartel may have been the result not of pressure but rather of a choice on Interbrew's part. Moreover, the Commission indicated in recital 235 of the contested decision that no effect was given to the requirement to transfer 500 000 hectolitres to Alken-Maes, although it immediately qualified that finding by stating that Interbrew was nevertheless quite ready from that moment on to extend the agreements with Alken-Maes and no longer to limit them to the exchange of information and agreements on off-trade prices.

305 Furthermore, the memorandum prepared by Interbrew's marketing manager for the on-trade in Belgium for the meeting of 12 October 1994 at which the non-aggression pact was concluded does not show that he was reluctant in principle to enter into such a market-sharing agreement or felt under the type of pressure which would lead to such an attitude. Rather, it reflects a reasoned assessment by its originator of the advantages and disadvantages of such an agreement for Interbrew, including a comparative assessment of the advantages that Alken-Maes might draw from it. It thus states that 'because of its dominant position and the Law of April 1993 relating to that subject, [Interbrew] is incurring an additional risk' and that 'such agreements offer more advantages to the challenger than to the market leader'. The memorandum does not present the possibility of an agreement with Alken-Maes in a positive light, as its originator wrote: 'Personal view: I do not believe in these agreements because they can never be put into practice and because they are

fundamentally not to [Interbrew's] benefit'. However, it is not necessarily evidence of pressure being put on Interbrew, since the points recorded can also be interpreted as being the outcome of a process of reflection within Interbrew as to the manner in which the anti-competitive agreements could be implemented effectively.

306 It should also be noted that Interbrew's internal memorandum of 14 October 1994, which records the outcome of the meeting of 12 October 1994, does not suggest that the non-aggression pact was imposed on Interbrew under pressure, but rather that Interbrew participated fully in the discussion, going so far as to impose its approach on Alken-Maes. Interbrew's general manager for Belgium stated in the memorandum: 'enclosed you will find a document from our friends as well as the one-page approach which I proposed. This was accepted by our friends in terms of principle'. The 'one-page approach' proposed by Interbrew, which is set out by the Commission in recital 60 of the contested decision, specifically refers to a 'gentlemen['s] agreement', including in particular the following points: '[n]o attack of obligations' (that is to say, on-trade outlets with an exclusive purchasing agreement) and '[n]o systematic attack of brands in each other's obligations'.

307 As regards, thirdly, the attitude of the parties after the second half of 1994, it should first of all be pointed out that the Commission stated in recital 77 of the contested decision, on the basis of certain documents of July 1995 which were internal to Interbrew, that its managers believed that they had complied with the agreement in Belgium. The Commission also notes in recital 310 of the contested decision that Interbrew took the initiative in 1995 concerning price discussions. The description in recitals 83 to 92 of the discussions held by the two parties in 1996 regarding their proposed new pricing systems confirms that a spirit of spontaneous cooperation prevailed. In recital 92, the Commission quotes, for example, from a fax of 11 October 1996 from a manager of Interbrew to a shareholder in the company, which states: 'we have been talking about ... constructive competition in Belgium [for] one year now. Fundamentally, nothing has happened. And most probably the responsibility for this is shared. We will try to restart this process in the following week'.

308 Lastly, it is clear that the notes of Interbrew's marketing manager for the Belgian on-trade drawn up at the meeting of 28 January 1998 show a positive attitude towards the cartel and include amongst the objectives of the cartel in relation to the on-trade a reference to 'respect for ties and supply rights'. The notes also refer, as regards consultation relating to the on-trade, to 'direct contact over difficult issues and competition for national customers' (recital 104 of the contested decision).

309 It follows from the foregoing that, over the whole of the infringement period, the parties to the cartel each took initiatives having an anti-competitive object and, in particular, that it cannot be concluded from the material in the file that it was only as the result of pressure that Interbrew agreed to the extension of the cartel to include a non-aggression pact. Although the Commission states in its written pleadings that the aggravating circumstance imputed to the applicant does not relieve Interbrew of its responsibility in relation to the cartel, Interbrew's attitude over the whole of the infringement period does not permit the conclusion that there was a direct causal link between the threat made by the applicant on 11 May 1994 and the extension of the cartel.

310 It follows that, having regard to the attitude of the parties to the cartel before and after the second half of 1994, and also to the impact which the threat may have had in the light of the context in which it was made, the Commission has failed to establish to an adequate standard the causal link between the threat and the extension of the cartel, as the causes of its extension may not have been confined to a threat but have resulted more generally from the objective of eliminating competition pursued in concert by the two parties to the cartel.

311 It therefore follows from the foregoing that the Commission was wrong to find as against the applicant the aggravating circumstance consisting in forcing Interbrew to extend their cooperation by threatening it with reprisals if it were to refuse.

312 Questioned at the hearing as to the percentage increases applied by it in relation to each of the two aggravating circumstances found as against the applicant, given that an overall increase of 50% of the basic amount had been applied, the Commission stated that having regard, first, to the relative importance ascribed to each of the two aggravating circumstances in the reasons for the contested decision and, secondly, to its decision-making practice in the matter, it should be considered that the aggravating circumstance of repeated infringement played a predominant role and that the aggravating circumstance found in respect of the pressure put on Interbrew therefore played a lesser role.

313 In those circumstances, the Court considers that it should exercise its unlimited jurisdiction under Article 17 of Regulation No 17 and fix the overall increase of the basic amount of the fine in respect of aggravating circumstances at 40%.

7. *The plea that alleging there was no basis for the taking into account the aggravating circumstance of repeated infringement in the applicant's case*

(a) Arguments of the parties

314 The applicant submits in the first place that by taking into account an alleged repeated infringement on its part the Commission infringed the delegation of power conferred by Article 15 of Regulation No 17, inasmuch as the Commission has the power to determine the amount of the fines which it imposes only by reference to the intrinsic gravity of the infringement and its duration.

315 Under the national laws of the Member States, a repeated infringement does not belong to the circumstances what aggravate an infringement, that is to say, to the objective assessment of the gravity of the facts, but to recognition of a fact specific to the perpetrator of the infringement, namely its tendency to commit such infringements.

316 In reply to the Commission's argument that repeated infringement features in the Guidelines as an aggravating circumstance, the applicant states that it does not seek to challenge the Commission's entitlement to publicise its methodology in setting fines by way of an interpretative communication. However, it does challenge what it considers to be an abuse of power, namely the Commission's arrogation of the power to increase the level of a penalty for repeated infringement, without having any authority at law to do so, and to assume a discretion as to the manner in which that concept is to be applied.

317 As regards the Commission's observation that the applicant did not raise a plea of illegality under Article 241 EC, the applicant argues that the existence of such a remedy does not prevent it from invoking the unlawfulness of the contested decision under Regulation 17, even where the decision applies the Guidelines. With respect to the rejection by the Court of the plea of illegality raised in *HFB and Others* v *Commission*, paragraph 245 above, on which the Commission also relies, the applicant states that the plea was rejected in that case purely on the basis of a particular point in the Guidelines and accordingly does not have the wide significance which the Commission would ascribe to it.

318 With respect to the Commission's argument that the Court has accepted the concept of repeat infringement in several cases, the applicant replies that in none of them did the Court rule expressly on the lawfulness of the application of the concept of repeat infringement under Regulation No 17, or indeed under the general principles of Community law. Thus, in *PVC II*, paragraph 154 above, the Court

relied on the fact that an undertaking had previously committed a similar infringement, not in order to increase the fine imposed, but only for the purposes of holding that the Commission was correct to reject the application of an attenuating circumstance. The Court has accordingly never affirmed the principle of repeat infringement.

319 While the applicant acknowledges that the Commission may, in determining the starting amount of the fine, take previous infringements into consideration in support of a finding that the new infringement was knowingly committed by it, that does not mean that the fact that a previous infringement was committed may lead to a more onerous penalty being imposed for repeated infringement without an express power to do so being conferred by law. Such an increase would be tantamount to creating a new form of penalty, falling to be added to the main penalty, a point which goes to show that the concept of repeat infringement is considered in the national legal orders to being a matter for statute and as being of strict interpretation. Regulation 17 contains no express power which would allow the Commission to increase a fine on the ground of repeated infringement.

320 With respect to the judgments in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347 and *Enichem Anic* v *Commission*, paragraph 277 above, the applicant maintains that while the Court did indeed refer to repeated infringement as an aggravating circumstance, the unlawfulness of the application of the concept under Regulation No 17 was not raised by the applicants.

321 The applicant submits in the second place that the Commission infringed the principle *nulla poena sine lege*, since there is no legal basis in the Community legal order for taking the aggravating circumstance of repeated infringement into consideration. The Court of Justice has held that the general legal principle *nulla poena sine lege* imposes a limit on the discretionary power of the institutions inasmuch as a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11). Furthermore, the European Court of Human Rights has also held that

the general principles and the guarantees attached to the rights of the defence apply to every penalty having both a deterrent and punitive purpose, whatever the classification of the infringement under national law (see Eur. Court H.R., the *Öztürk* v *Germany* judgment of 21 February 1984, Series A No 73). Only the Council and the Parliament are empowered, by virtue of their legislative power, to confer on the concept of repeated infringement the legal basis necessary for its application as an aggravating circumstance by the Commission.

322 The applicant also submits that the Court of Justice never had the opportunity to rule on the lawfulness of the principle of repeated infringement in the light of the principle *nulla poena sine lege* in the cases cited by the Commission in its defence, namely *PVC II*, paragraph 154 above, *Thyssen Stahl* v *Commission*, paragraph 320 above, and *Enichem Anic* v *Commission*, paragraph 277 above.

323 An analysis of the national legal rules also highlights the very strict application of the concept of repeated offending in the Member States and the requirement that the acts establishing it are of a legislative nature.

324 In the third place, the applicant submits that the Commission infringed the principle of legal certainty and the principles *nulla poena sine lege* and of respect for the rights of the defence (Joined Cases 42/59 and 49/59 *SNUPAT* v *High Authority* [1961] ECR 53, 87), as, in the absence of any provision specifying in particular the maximum period between two findings of infringement which allow the concept of recidivism to be applied, it took into account infringements penalised in 1984 and 1974, respectively.

325 An analysis of the national laws shows that one of the strict conditions for the taking of the concept of repeated offending into account is that of a maximum period, normally not exceeding 10 years, between the infringement under consideration and an earlier finding of infringement. The situation of which the applicant complains is

untenable precisely because the Guidelines fail to specify any limitation period for the application of the concept of repeated infringement, on which the Commission relies in its defence, and in the applicant's contention the Commission ought to have laid down such a limit in its Guidelines. It is unacceptable that the Commission should take account of infringements committed 40 years previously, or committed by a different legal entity.

326 In the fourth place, the applicant submits that the contested decision infringes the general principle of Community law *non bis in idem* on two occasions. The application of a higher penalty in the case of repeated infringement relies on two fundamental grounds, namely the need to deter the party committing a repeated infringement from infringing again in the future and the fact that that party was aware of the unlawfulness of its acts by reason of the previous finding of infringement against it. While acknowledging that those two grounds constitute the basis for its finding of repeated infringement, the Commission commits the error of invoking each of them for the second time in the contested decision and thus increasing the amount of the fine twice on the same grounds.

327 Thus, the Commission had already taken account in the contested decision both of the need to have a deterrent effect, when it assessed the gravity of the infringement, and of the fact that the applicant was aware that its conduct constituted an infringement, when the Commission stated that it was taking into account the fact that the applicant had legal and economic knowledge and infrastructures which enabled it more easily to recognise that its conduct constituted an infringement and be aware of the consequences stemming from it under competition law. In going on to increase the amount of the fine for repeated infringement for the same reasons as those which formed the basis for setting the level of the fine in the light of the gravity of the infringement, the Commission accordingly contravened the principle *non bis in idem*.

328 In the fifth place, the applicant argues that, in taking repeated infringement into consideration on the basis of facts going back almost 40 years, and therefore outside

the period of five years laid down under Article 1 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), the Commission contravened the limitation rules applying to proceedings and the enforcement of sanctions relating to competition.

329 In the sixth, and last, place, the applicant submits in the alternative that the Commission adopted a manifestly excessive interpretation of the concept of repeated infringement.

330 First, the Commission's reasoning is, in part, incorrect inasmuch as Commission Decision 74/292/EEC of 15 May 1974 relating to proceedings under Article 85 of the EEC Treaty (IV/400 — Agreements between manufacturers of glass containers) (OJ 1974 L 160, p. 1) ('the Glass Containers Decision') did not constitute a finding of infringement against Boussois-Souchon-Neuvesel (BSN) SA (the applicant's predecessor), but merely a refusal, following the notification of agreements, to exempt the agreements under Article 81(3) EC. Moreover, the Commission implicitly accepted the point, by stating in its defence that even if that decision ought not to be taken into account, the Benelux Flat Glass Decision provided adequate grounds for a finding of repeated infringement.

331 The taking into account, for the purposes of making a finding of repeated infringement, of a decision taken on the basis of a notification is of itself evidence of unreasonable severity towards the applicant, as such a procedure is intended to provide legal certainty to undertakings until such time as the Commission has resolved the matter. It is therefore wrong to classify that decision as a 'finding of infringement' in order to justify increasing the fine imposed on the applicant.

332 Secondly, even if there were to be no limitation period for the power of the Commission to make a finding of repeated infringement, the increase in the fine on the basis of very old facts, going back in the present case almost 40 years, not only gives rise to legal uncertainty, but is also manifestly unreasonable. It has the effect of imposing on the smaller of the two undertakings on the market a fine equivalent to that imposed on the undertaking which was the dominant player. It also gives the impression that the applicant is an undertaking which has committed infringements on a regular basis and has been contravening Community law for 40 years.

333 The Commission submits that repeated infringement is mentioned in the Guidelines as an aggravating circumstance and that it could be properly taken into account. The Commission has found that aggravating circumstance on a number of occasions without being contradicted by the Court.

334 The principle *nulla poena sine lege* is a matter for criminal law and does not apply in the present case. The applicant also overlooks the fact that the legal basis of penalties imposed in competition law is Article 15 of Regulation No 17 and that the Commission possesses a wide margin of discretion in setting fines in order to direct the conduct of undertakings. In making repeated infringement an aggravating circumstance, the Guidelines did not create an additional penalty which lacks any legal basis.

335 As regards the alleged infringement of the principle of legal certainty, the examples of national legal rules given by the applicant are restricted to the field of criminal law, and there is no limitation in Guidelines on the maximum period which may elapse between a previous finding of infringement and the taking into account of repeated infringement. Lastly, the applicant is wrong to refer to a finding of repeated infringement relating to 40-year-old facts, when the two findings of infringement concerned were made 19 and nine years respectively before the start of the infringement in question, and attempts to suggest that the findings related to legal entities other than the applicant, when it is only its name which has been changed.

336 As regards the alleged infringement of the principle *non bis in idem*, the Commission contends that the taking into account of repeated infringement is not duplicated with the taking into account of the fact, relating to gravity, that the applicant could, given its legal and economic knowledge, be aware that its conduct constituted an infringement.

337 As regards the alleged infringement of Regulation No 2988/74, the facts in question do not fall within the scope of the rules relating to limitation periods for the imposition of fines and it would be absurd to apply limitation on the basis of the date of the facts which were the subject of a previous finding of infringement. To take the facts underlying previous infringements as a starting point would in any event be irrelevant, as in a case of repeated infringement it is the finding of infringement resulting from the facts at issue that is decisive.

338 Lastly, the Commission denies having interpreted the concept of repeat infringement in a manifestly unreasonable way and observes that repeat infringement is, in any event, established, having regard to the Benelux Flat Glass Decision.

(b) Findings of the Court

339 As regards the alleged infringement of Regulation No 17, it should first be noted that Article 15(2) of Regulation No 17 provides that 'the Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to [EUR] 1 000 000, or a sum in excess thereof, but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently ... they infringe Article [81] (1) ... of the Treaty'. The same provision states that 'in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement' (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 223).

340 The first paragraph of point 1 of the Guidelines states that in calculating the amount of fines, the basic amount is to be determined according to the gravity and the duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 224).

341 The Guidelines then set out, by way of example, a list of aggravating and attenuating circumstances which may be taken into consideration in order to increase or reduce the basic amount and refer to the Leniency Notice (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 229).

342 By way of general comment, the Guidelines state that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17 (Section 5(a)). The Guidelines further provide that, depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as the specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and that the fines should be adjusted accordingly (Section 5(b)) (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 230).

343 It follows that, under the method laid down in the Guidelines, fines continue to be set according to the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, and the maximum percentage of turnover of each undertaking as laid down in that provision is observed (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 231).

344 Consequently, the Guidelines cannot be regarded as going beyond the legal framework relating to penalties set out in that provision (*LR AF 1998* v *Commission*, paragraph 57 above, paragraph 232).

345 In the first indent of Section 2 of the Guidelines, the Commission referred to the possibility of increasing the basic amount of the fine in cases involving an aggravating circumstance such as repeated infringement of the same type by the same undertaking or undertakings.

346 It is settled case-law that the deterrent effect of fines constitutes one of the factors which the Commission is entitled to take into account in assessing the gravity of the infringement and, accordingly, in setting the level of the fine, as the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (see, to that effect, order in *SPO and Others* v *Commission*, paragraph 137 above, paragraph 54; *Ferriere Nord* v *Commission*, paragraph 137 above, paragraph 33; *Sarrió* v *Commission*, paragraph 137 above, paragraph 328; and *HFB and Others* v *Commission*, paragraph 245 above, paragraph 443).

347 It is also clear from case-law that, in assessing the seriousness of an infringement for the purpose of setting the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurred and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique Diffusion Française and Others* v *Commission*, paragraph 50 above, paragraphs 105 and 106, and *ABB Asea Brown Boveri* v *Commission*, paragraph 50 above, paragraph 166).

348 In that respect, the analysis of the gravity of the infringement must take account of any repeated infringements (*Aalborg Portland and Others* v *Commission*, paragraph 185 above, paragraph 91). In the context of deterrence, repeated infringements are a matter which justifies a significant increase in the basic amount of the fine. It is evidence that the sanction previously imposed was not sufficiently deterrent (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 293).

349 Furthermore, contrary to the applicant's contention, although repeated infringement relates to a characteristic specific to the perpetrator of the infringement, namely its propensity to commit such infringements, it is precisely, for that very reason, a very significant indication of the gravity of the conduct in question and, accordingly, of the need to increase the level of the penalty in order to achieve effective deterrence.

350 It must therefore be held that, since it is for the Commission to ensure that the fine has a sufficiently deterrent effect, particularly in cases involving the most harmful infringements and inasmuch as the objective of deterrence falls within the scope of the assessment by the Commission of the gravity of the infringement under Article 15 of Regulation No 17, the Commission did not infringe that article in applying the aggravating circumstance of repeated infringement in respect of the applicant.

351 Nor did the Commission infringe the principle *nulla poena sine lege* in finding that the applicant had committed a repeated infringement, since it is not disputed that it is entitled to do so by virtue of the first indent of Section 2 of the Guidelines and they cannot be regarded as going beyond the legal framework relating to penalties set out in Article 15(2) of Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 57 above, paragraphs 231 and 232).

352 As regards the alleged infringement of the principle of legal certainty, it must be borne in mind that a limitation period can only fulfil its function of ensuring legal certainty, and the infringement of the rules relating to limitation can only constitute a breach of that principle, if the period has been fixed in advance (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 19).

353 Neither Article 15 of Regulation No 17, which constitutes the legal framework for the penalties which may be imposed by the Commission for an infringement of the Community competition rules (see paragraphs 133 to 135 above), nor the Guidelines, specify a maximum period in relation to the finding that an undertaking has committed repeated offences. It accordingly cannot be held that there has been an infringement of the principle of legal certainty in the present case.

354 In any event, in order to establish infringement, the Commission at least relied on the fact that the applicant had previously been found to have committed an infringement on 23 July 1984 in the Benelux Flat Glass Decision. Having regard to the objective pursued by the Commission in increasing the fine to take account of repeated infringement, namely to deter the offender from committing a similar infringement, the fact that a finding of infringement made 17 years earlier was taken into account to that end cannot infringe the principle of legal certainty. That is all the more the case since in the present case the infringement began on 28 January 1993, that is to say only eight years and six months after the adoption of the Benelux Flat Glass Decision. A policy of penalising repeated infringement can have no practical effect on a person who has committed a first infringement unless the threat of a more severe penalty for a new infringement can be effective over time and thus influence that person's conduct.

355 The validity of that reasoning cannot be called into question by the fact that the Commission also mentioned in the contested decision that the first infringement of the same type had been found in respect of the applicant on 15 May 1974 in the Glass Containers Decision, that is to say 27 years before the finding of infringement

in the present case. That is all the more so since, as the Commission rightly observed at the hearing, the fact that on two occasions less than ten years have elapsed between the findings of infringement made on 15 May 1974 and 23 July 1984 and the applicant's repetition of unlawful conduct shows its propensity not to draw the appropriate consequences from a finding that it has infringed the Community competition rules.

356 As regards the alleged infringement of the principle *non bis in idem*, it should be pointed out that the Commission indicated, in the fourth paragraph of Section 1.A of the Guidelines, its intention to take account, in setting the starting amount of the fine on grounds of gravity, 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. Moreover, the Commission added in the fifth paragraph of the same section of the Guidelines that account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law. Lastly, the Commission gave in Section 2 of the Guidelines, as an example of aggravating circumstances which may increase the starting amount, repeated infringement of the same type by the same undertaking.

357 In the present case, the Commission indicated in recital 305 of the contested decision that, having regard to the need to ensure that fines are set at a level which ensures that they have a sufficiently deterrent effect, it was taking into account the fact that the applicant is a large international undertaking and, in addition, a multi-product company. The Commission went on to indicate in recital 306 that it was also taking into account the fact that the applicant and, on the date of adoption of the decision, its subsidiary Alken-Maes had legal and economic knowledge and infrastructures which enabled them more easily to recognise that their conduct constituted an infringement and be aware of the consequences stemming from it under competition law. Lastly, in recital 314 of the contested decision, the

Commission stated, when developing its reasoning relating to the increase in the fine for aggravating circumstances, that the applicant had already been found to have committed similar infringements of Article 81 EC twice before.

358 In that regard, it must be held, first, that the conditions governing the application of the principle *non bis in idem*, as laid down by the case-law on competition (see paragraph 185 above), are not satisfied in the present case, as, in setting the fine, the Commission did no more than take into account a number of factual considerations which were considered to be relevant for the purposes of setting the fine at a level which would ensure that it would have a sufficiently deterrent effect.

359 In any event, it appears that each of those criteria for assessing gravity was taken into account for different reasons. Thus, in the first place, the fact that the applicant is an international and multi-product organisation was taken into account in order to reflect the need to set the fine at a level which has a sufficiently deterrent effect having regard to its economic and financial strength (see paragraphs 167 to 182 above). Next, the applicant's possession of legal and economic knowledge and infrastructures which enabled it more easily to recognise that its conduct constituted an infringement and be aware of its consequences was taken into account because of the need for a higher level of deterrence having regard to the fact that the applicant committed the infringement notwithstanding the fact that it had resources at its disposal which enabled it to recognise that its conduct constituted an infringement and the consequences of that conduct (see paragraph 175 above). Lastly, the fact that this was a repeat infringement was taken into account owing to the need to ensure a higher level of deterrence, as demonstrated by the fact that two previous findings of infringement had not been sufficient to prevent the commission of a third.

360 As regards the alleged infringement of Regulation No 2988/74, it is sufficient to hold that that regulation governs the limitation period which applies to the Commission's power to impose fines in respect of an infringement of the competition rules, but that, by contrast, it contains no provision limiting the Commission's power to take into account, as an aggravating circumstance and for the purpose of determining the

amount of a fine for infringement of the competition rules, the fact that an undertaking has already been found to have infringed those rules. There can thus be no infringement of Regulation No 2988/74 by reason of the Commission's finding of such an aggravating circumstance the applicant's case.

361 As regards the argument that the Commission adopted a manifestly unreasonable interpretation of the concept of repeated infringement, it must be noted that in Section 2 of the Guidelines the Commission defined the aggravating circumstance concerned as 'repeated infringement of the same type by the same undertaking(s)'.

362 It should also be noted that the concept of repeated infringement, as understood in certain national legal systems, implies that a person has committed new infringements after having been penalised for similar infringements (*Thyssen Stahl* v *Commission*, paragraph 320 above, paragraph 617, and *Michelin* v *Commission*, paragraph 348 above, paragraph 284).

363 However, it is important to state that, bearing in mind the objective it pursues, the concept of repeated infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement has been made in the past. Repeated infringement is taken into account, for a particular infringement, so that a more severe penalty may be imposed on the undertaking responsible for the relevant facts when it transpires that a previous finding of infringement on its part has not been sufficient to prevent the repetition of unlawful conduct. It is not the previous imposition of a fine that determines that conduct constitutes repeated infringement, which is determinative of recidivism, but the fact that a previous finding of infringement has been made against the person concerned.

364 As regards the applicant's argument that the Glass Containers Decision addressed to it in 1974 should not be taken into account for the purpose of determining repeated

infringement in this case, on the ground that that decision originated in a notification and did not impose any fines, it must be observed that Article 3 of that decision states that 'those undertakings which are party to the agreements referred to in Article 1 are required to bring the infringements established to an immediate end'.

365 The applicant has therefore already been found to have committed an infringement on the basis of facts similar to those in the present case. That has not prevented the applicant from repeating its unlawful conduct. The Commission was therefore entitled to establish repeated infringement on the applicant's part.

366 In any event, it is plain that the Benelux Flat Glass Decision of 1984 imposed a pecuniary sanction and that repeated infringement is established in that regard. There is nothing in the contested decision to indicate that the Commission's finding that repeated infringement followed on from two previous incidents led to a greater increase in the fine for an aggravating circumstance than that which would have been applied had only one previous incident been identified.

367 As regards, lastly, the argument that the increase in the fine for repeated infringement is unreasonable in that it resulted in the fine imposed on the applicant being equivalent to that imposed on Interbrew, notwithstanding its smaller size on the market, it should be borne in mind that it is settled case-law that the criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that it is permissible, for the purpose of fixing a fine, to have regard both to the overall turnover of the undertaking and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, but that it is important not to confer on one or other of those figures an importance which is disproportionate in relation to other factors (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 50 above, paragraphs 120 and 121; *Parker Pen* v *Commission*, paragraph 115 above, paragraph 94; and *SCA Holding* v *Commission*, paragraph 158 above, paragraph 176).

368 Furthermore, the deterrent effect of fines constitutes one of the factors which the Commission is entitled to take into account in assessing the gravity of the infringement and, accordingly, in setting the level of the fine, as the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO and Others* v *Commission*, paragraph 137 above, paragraph 54; *Ferriere Nord* v *Commission*, paragraph 137 above, paragraph 33; and *Sarrió* v *Commission*, paragraph 137 above, paragraph 328).

369 It follows that the fact that a fine may have been imposed on the applicant which was not proportionate to its size on the market in question does not arise from a manifestly unreasonable conception of the context of repeated infringement, but from all of the factors which the Commission rightly took into account in setting the amount of the fine to be imposed on the applicant.

370 As all of the objections raised by the applicant under the present plea have been rejected, the plea must be rejected in its entirety.

8. *The plea alleging failure to take proper account of the applicable attenuating circumstances*

371 This plea is divided into four parts. In the first part, the applicant invokes the Commission's refusal to take into account the fact that the infringement did not have any effects on the market. In the second part, it submits that the Commission erred in failing to take into account the influence which the price-control system and the long-standing tradition of collective action in the beer sector had on the

relevant conduct. In the third part, the applicant invokes the crisis which prevailed at the relevant time. Lastly, in the fourth part, it invokes the threatening attitude adopted by Interbrew.

(a) The first part, based on the Commission's refusal to take into account the fact that the infringement did not have any effects on the market

Arguments of the parties

372 The applicant maintains that the Guidelines, which reflect the Commission's current practice in that regard, require the Commission to take into account, as an attenuating circumstance, the fact that the cartel had only a limited effect on competition. There are numerous cases in which the Commission took account, as an attenuating circumstance, of the absence of any effect on the market on the part of the agreements at issue and the fact that those agreements had not been implemented or had only been implemented in part. The fact that the Commission is not bound by its previous practice cannot justify its failure to follow that practice when faced with similar facts.

373 Furthermore, the Commission failed to distinguish between the assessment of the gravity of the cartel and the taking into consideration of attenuating circumstances. Notwithstanding the requirement that the Commission was required to take the effects of the infringement on the market into consideration for the purposes of assessing its gravity, it was under a duty to take account, as an attenuating circumstance, of the fact that the unlawful agreements or practices in question were not in fact implemented.

374 In concluding that the fact that the parties did not implement every aspect of the cartel did not mean that the cartel, as such, was not actually given effect to and that the fact that some elements of the offending conduct were not put into practice was not in itself equivalent to a finding of an attenuating circumstance, the Commission failed to have regard to the reality of the situation.

375 In fact, only a small part of the agreements reached between Interbrew and the applicant relating to pricing structure and product promotion were put into practice and the effect on the market was accordingly extremely limited.

376 Next, Alken-Maes and Interbrew indicated on numerous occasions, including in the internal documents drawn up at the time of the consultations, that the discussions remained tentative and had no effect on competition. A number of the documents and statements cited by the Commission in the contested decision prove the lack of practical effect given to the discussions. Numerous aspects of the competitive situation remained intact, as may be seen in particular from the fierce struggle between the parties to the cartel to enter into contracts with tied cafés. In addition, the Commission's file contains a number of other documents which show the absence of any effect on competition.

377 Moreover, the sales statistics sufficiently demonstrate the lack of actual effect, or, at the very least, the low level of impact on the market, of the discussions between Interbrew and Alken-Maes. The parties continued to engage in fierce competition in all market sectors. In particular, it is clear from the file that Alken-Maes had an aggressive policy of commercial rebates in the food distribution sector in 1992 and 1993. Furthermore, Alken-Maes continued to lose market share between 1993 and 1998 and was the main loser during the relevant period in both the Pils and the alcohol-free beer sectors.

378 In addition, Alken-Maes continued during 1994 to carry out surveys on price elasticity for the purposes of its marketing policy, which established that Interbrew would have been the main loser if prices were to be reduced. Alken-Maes thus pursued a competitive policy, the primary object of which was to acquire sales from Interbrew, notwithstanding the discussions that took place in relation to prices, which were initiated by Interbrew.

379 The applicant maintains, lastly, that there were no enforcement mechanisms that might have ensured that the agreement was complied with and implemented in practice, a circumstance which was taken into account by the Commission as an attenuating factor in the Polypropylene Decision.

380 The Commission submits that the precedents cited by the applicant are irrelevant as they preceded the publication of the Guidelines and related to circumstances which are not always comparable to those of the present case. In this case, the anti-competitive arrangements were implemented and the fact that certain aspects were only partially put into practice was duly taken into account in assessing the gravity of the cartel.

381 The argument that the fierce struggle between the parties to enter into contracts with licensed cafés shows that a situation of open competition continued to exist is irrelevant. The doubts expressed by a manager of Interbrew as to the effectiveness of the cartel are not sufficient to minimise the significance of the statement by the parties to the cartel at their meeting of 28 January 1998 that certain objectives had been achieved. Lastly, the reduction in Alken-Maes's market share does not establish a lack of effects since that reduction would have been even greater had the cartel not existed. The surveys of price elasticity carried out by Alken-Maes were only of a preliminary nature and cast no doubt on the unlawful nature of the collusion.

Findings of the Court

382 As is clear from the case-law cited in paragraphs 277 and 278 above, where an infringement has been committed by a number of undertakings, the Court must examine the relative gravity of the participation in the infringement of each of them, which implies in particular that the role played by each of them in the infringement throughout the period of its participation must be established.

383 Section 3 of the Guidelines lays down, under the heading attenuating circumstances, a non-exhaustive list of circumstances which may lead to a reduction in the basic amount of a fine. Reference is made to the exclusively passive or 'follow-my-leader' role of undertakings in the infringement, to the non-implementation in practice of agreements or offending practices, to termination of the infringement as soon as the Commission intervenes, to the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement, to infringements committed by negligence and not intentionally and to effective cooperation by the undertaking in the proceedings, outside the scope of the Leniency Notice. Those circumstances are therefore based on the individual conduct of each undertaking.

384 It follows that in order to assess any attenuating circumstances, including that relating to the non-implementation of agreements, it is necessary to take into account not the effects arising from the infringement as a whole, which must be taken into consideration in assessing the actual impact of an infringement on the market for the purposes of determining its gravity (first paragraph of Section 1.A of the Guidelines), but the individual conduct of each undertaking, for the purposes of examining the relative gravity of the participation of each undertaking in the infringement.

385 In the present case, it is accordingly necessary to ascertain whether the arguments put forward by the applicant are capable of showing that during the period in which

it adhered to the unlawful agreements it actually avoided applying them by adopting competitive conduct in the market (see, to that effect, *Cement*, paragraph 31 above, paragraphs 4872 to 4874).

386 The applicant essentially puts forward five arguments in support of its reliance on the attenuating circumstance of non-implementation in practice of the agreements.

387 With respect to the first argument, alleging that only a small part of the discussions between Interbrew and the applicant were put into practice, it must be held that the applicant does not contend that the consultations on pricing structure and product promotion were not applied to, but simply that they were implemented only in part. It should, moreover, be noted that that consultation represents only a part of the infringement established, which included in particular a general non-aggression pact, an agreement on prices in the off-trade, customer-sharing in the on-trade sector, the restriction of investment and advertising on the on-trade market and an exchange of sales information in the on-trade and the off-trade.

388 As regards the second argument, which alleges that the discussions remained tentative and had no effect on competition, it is sufficient to observe that, even if that were so, such a matter would show not the non-implementation in practice of the agreements, but rather a desire, albeit unrealised in practice, to implement them. The same is true of the significance to be attributed to the correspondence between Interbrew and Alken-Maes relating to tied cafés. The mutual recriminations made in that regard must be seen in the light of the general non-aggression pact between those two undertakings (see paragraph 147 above) and goes more to show a desire to ensure that that agreement was complied with than that it was not implemented in practice. In any event, the correspondence which is supposed to illustrate a fierce struggle over the contracts entered into with tied cafés covers a period of only six months, that is to say from August 1996 to January 1997.

389 As regards the third argument, namely that statistics show that there were no effects on the market, it must be held that, even if that were shown, it would be irrelevant, as it would not prove that the agreements had not been implemented in practice. The same is true of the aggressive rebate policy alleged to have been pursued, as the applicant has failed to establish that such a policy represents an attempt on its part to avoid the agreements to which it was a party. In any event, it is clear that such conduct affected the implementation of the agreements to only a limited degree, as the scale of those agreements exceeds, both in substance and duration, the episodes of competitive struggle referred to. Thus, what is alleged to have been the aggressive commercial rebate policy pursued Alken-Maes in the food distribution sector was limited, as the applicant itself states, to 1992 and 1993.

390 As regards the fourth argument, it should be observed that the fact that Alken-Maes continued in 1994 to carry out surveys on price elasticity, even if those surveys showed that Interbrew had more to lose from a reduction in the price of Maes beer, does not show in any way that the applicant and its subsidiary actually avoided applying the agreements by adopting competitive conduct in the market.

391 Accordingly, none of the first four arguments put forward by the applicant permits the conclusion that during the period in which it was a party to the offending agreements, it actually avoided applying them by adopting competitive conduct in the market.

392 Moreover, the conclusion drawn by the applicant itself from its arguments, namely that the consultations had a limited impact on the market, shows in itself that those arguments do not relate to the problematics of attenuating circumstances but to the gravity of the infringement as a whole, which is not the subject of the present plea.

393 The same is true of the fifth argument put forward by the applicant, namely that there were no enforcement mechanisms that might have ensured that the cartel was complied with in practice, since that characteristic, should it be proved, would have to be taken into account under the Guidelines in relation to the gravity of the infringement and could not constitute an attenuating circumstance based on the individual conduct of the applicant. It is settled case-law that the absence of measures to monitor the implementation of a cartel does not, of itself, constitute a mitigating factor (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 318).

394 It should also be pointed out that in the Polypropylene Decision, on which the applicant relies, the Commission did not consider the absence of enforcement mechanisms to be an attenuating circumstance, capable of being applied separately to the undertakings to which the decision was addressed, but on the contrary as a factor to be taken into account in assessing the gravity of the infringement taken as a whole.

395 Lastly, with respect to the argument that both the absence of effects on the market and the absence of enforcement mechanisms have been taken into account by the Commission in the past as a mitigating factor, it must be stated that 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 (see paragraph 57 above). The Commission's previous decision-making practice does not constitute part of the legal framework relating to fines in competition matters (see the case-law cited in paragraph 153 above). It is clear from the case-law paragraphs 134 and 135 above that, in the context of Regulation No 17, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules, and that the fact that the Commission may have applied fines of a certain level in the past to certain types of infringement does not mean that it is estopped from raising that level,

within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy. 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.

396 The first part of the plea should accordingly be rejected.

(b) The second part, alleging that the Commission failed to take into account the influence of the system for controlling prices and the long-standing tradition of collective action in the beer sector

Arguments of the parties

397 The applicant maintains that, following its practice in the Greek Ferries Decision, which, contrary to what it stated in recital 320 of the contested decision, is comparable to the present case, the Commission should have taken the influence of long-standing practices in setting prices on the beer market into account as an attenuating circumstance.

398 Thus, the Commission failed to take into account the fact that the Law on prices, which was in force from 1945 to 1993, required every undertaking subject to the legislation, including the applicant and the other brewers, to apply for authorisation to increase prices, either individually or collectively. That Law applied until May 1993 and thus forms part of a long-standing tradition of consultation and exchanges of information among brewers. The applicant also states that although two separate procedures existed, applications for price increases were brought collectively by the

CBB, as that procedure was expressly preferred by the Minister of Economic Affairs for reasons of ease of administration. Furthermore, by requiring that the collective application brought by the CBB regarding prices and other conditions of sale be very detailed, the system of price controls necessarily favoured consultation on prices between brewers.

399 The continuation of the offending conduct after May 1993 shows the continuing influence of a set of rules which served only to reinforce a long-standing tradition of consultation among brewers. That tradition explains the difficulties faced by the parties in immediately departing from those traditional arrangements. That is why the price control system, which had encouraged an attitude of inertia, should be taken into account as an attenuating circumstance, as the Commission did in Decision 82/896/EEC of 15 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.883 — AROW/BNIC) (OJ 1982 L 379, p. 1; 'the BNIC Decision', recital 77) and in Decision 86/596/EEC of 26 November 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.204 — MELDOC, OJ 1986 L 348; p. 50; 'the MELDOC Decision', recital 77).

400 Furthermore, the Commission was wrong to consider that, if it were to accept that the price control system influenced the consultations, that influence continued only until 23 December 1992, which was the date of the final application for a collective price increase brought by the CBB, whereas brewers were in fact and in law encouraged until 1 May 1993, the date on which the ministerial decree repealing the price control system entered into force, to consult on the prices of a number of beers. The Commission was accordingly wrong to conclude in recital 247 of the contested decision that, since the meeting of 28 January 1993 took place after 23 December 1992, it could not be considered to be a meeting among brewers within the framework of the CBB regarding a collective application for a price increase.

401 Lastly, in referring in recital 247 of the contested decision to the fact that a meeting was held with beer wholesalers as a ground for its refusal to take price controls into

account as an attenuating circumstance, the Commission failed to have regard to the fact that the price control system applied not only to brewers but also to importers of beer.

402 The Commission contends that it stated in the contested decision that, contrary to the facts underlying the Greek Ferries Decision, collective action by the brewers in order to notify a price increase was only a right and not an obligation. It is irrelevant in that regard that the Minister of Economic Affairs expressed a preference for collective measures. The Commission adds that, if the legislation on prices had had the impact which the applicant ascribes to it, all of the brewers would have been involved in the consultation, whereas it was only the two leading brewers that were involved.

403 The Commission adds that, although the price controls ended on 1 May 1993, the last collective application for a price increase was in any event presented on 23 December 1992 and that the first incidences of consultation taken into account, which took place on 28 January 1993, came after that date. Even on the assumption that it is established, the 'tradition of collective action' cannot constitute a perpetual attenuating circumstance. As regards the BNIC and MELDOC Decisions, they preceded the publication of the Guidelines and did not find that the existence of a system of price controls constituted an attenuating circumstance.

Findings of the Court

404 As a preliminary point, it should be noted, first, that the applicant does not challenge the Commission's finding as to the existence of an infringement from 28 January 1993. Next, it is apparent from the contested decision, and is not contested by the applicant, either that a price control mechanism applied to the brewery sector in Belgium until 1 May 1993, the date on which it ceased. It is accordingly necessary to determine whether the existence of that mechanism until that date constituted an attenuating circumstance which the Commission ought to have taken into

consideration. In that regard, the applicant's reasoning essentially amounts to invoking the applicability of the attenuating circumstance referred to in the fourth indent of Section 3 of the Guidelines, namely the 'existence of a reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement'.

405 In the first place, it should be pointed out that, in reply to questions put by the Court at the hearing as to the exact scope of the price control system in place until 1 May 1993, the applicant stated that it is clear from the legislation relating to price controls that brewers could submit for approval by the Ministry of Economic Affairs either a collective application, preserving, if appropriate, price confidentiality, through the CBB, or separate applications.

406 In the second place, it should be held that, having regard both to the very high degree of gravity which the facts in question inherently involve (see paragraphs 145 to 155 above) and to the material and intellectual resources available to the applicant and its subsidiary Alken-Maes, which enabled them to recognise the nature of their legislative environment and the consequences which might, as a consequence, stem from their conduct under Community competition law, it cannot validly be argued that the price control system in place until 1 May 1993 gave rise to a reasonable doubt on the applicant's part as to whether the restrictive conduct did indeed constitute an infringement. That is all the more the case as previous findings were made against the applicant in relation to similar infringements of Community competition law.

407 In the third place, as regards the decisions which the applicant claims constitute precedents for the taking into account by the Commission of the existence of a price control system as an attenuating circumstance, it must be held that, having regard to the case-law paragraph 395 above, 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 (see paragraph 57 above). The Commission's previous decision-

making practice does not constitute part of the legal framework relating to fines in competition matters (see the case-law paragraph 153 above). It is clear from the case-law referred to in paragraphs 134 and 135 above that, in the context of Regulation No 17, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules and that the fact that the Commission may have applied fines of a certain level in the past to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy 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.

408 As the existence of a price control mechanism is not capable in the present case of constituting an attenuating circumstance in respect of the period from 28 January to 1 May 1993, it must be concluded that such a circumstance cannot *a fortiori* be held to apply to the applicant for the period after 1 May 1993.

409 The second part of the plea must therefore be rejected.

(c) The third part, based on the Commission's refusal to take account of the crisis in the sector

Arguments of the parties

410 The applicant maintains that the Commission ought, in accordance with its practice until 1998 and the case-law of the Court of Justice, to have taken account of the fact

that the cartel evolved when the market was in crisis and to have treated that situation as an attenuating circumstance. In fact, the Commission merely held that the position in the present case was not comparable to the situation in decisions where a crisis was taken into account and referred, without more, to the Cement, PVC II and Seamless Steel Tubes Decisions.

411 However, the Belgian brewers were faced with a continuing decline in demand and overcapacity as well as with pressure from distributors in the off-trade on the price of Pils. Furthermore, the Commission itself recognised in the contested decision the difficulties arising on the market during the 1990s. In the event, the business of the applicant's subsidiary in Belgium was in a very weak state financially in 1993. The applicant adds that, while it is true that it is a crisis in the sector and not in an individual undertaking which falls to be taken into account, it none the less wished to emphasise that the difficult financial situation in which Alken-Maes found itself was the direct result of the decline in the beer market, where, far from being 'slight', as the Commission asserts, the reduction in consumption came to 15% over the period from 1993 to 1998, generating excess capacity which should also have been taken into account by the Commission, following the example which it set in the PVC II and Cement Decisions.

412 The Commission contends first of all that the financial situation of an undertaking is not evidence of a crisis in the economic sector concerned, which might be taken into account as an attenuating circumstance, and that the case-law of the Court of Justice has always refused to take into account the fact that an undertaking is making a loss. Furthermore, the decisions relied on by the applicant precede, for the most part, the publication of the Guidelines and are accordingly irrelevant. In any event, the crisis referred to is not in any way comparable to those which the Commission has hitherto taken into account.

Findings of the Court

413 It must first of all be noted that it is settled case-law that the Commission is not required, when determining the amount of the fine, to take account of an undertaking's financial losses, since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market (see, to that effect, *IAZ and Others* v *Commission*, paragraph 281 above, paragraphs 54 and 55; Case T-319/94 *Fiskeby Board* v *Commission* [1998] ECR II-1331, paragraphs 75 and 76; and *Enso Española* v *Commission*, paragraph 393 above, paragraph 316). The arguments based on Alken-Maes's financial difficulties in 1993 cannot therefore be taken into account in the context of the assessment of the existence of an attenuating circumstance.

414 Moreover, even if factors such as a continuing decline in demand — which, in any event, as the Commission stated, was originally assessed by the applicant in its response to the statement of objections at 15% over ten years and not over five years —, the resulting overcapacity and the pressure on prices from distributors in the off-trade were to be established, they would represent risks inherent in any economic activity which, as such, do not denote an exceptional structural or economic situation capable of being taken into account in determining the amount of the fine.

415 As regards, lastly, the argument that the Commission is bound by its previous practice, it should be pointed out that, according to the case-law cited in paragraph 395 above, 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. The Commission's previous decision-making practice does not constitute part of the legal framework relating to fines in competition matters. In the context of Regulation No 17, the Commission possesses a wide margin of discretion when setting fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules and the fact that the Commission may have

applied fines of a certain level in the past to certain types of infringement does not mean that it is estopped from raising that level, within the limits set out in Regulation No 17, if that is necessary in order to ensure the implementation of Community competition policy. 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.

416 The third part of the plea should therefore be rejected.

(d) The fourth part, based on the aggressive attitude adopted by Interbrew

Arguments of the parties

417 The applicant contends that the Commission ought, in accordance with its decision-making practice and the case-law of the Court of Justice, to have taken into account as an attenuating circumstance the weak and dependent position of Alken-Maes in relation to Interbrew at the time of the cartel, as Interbrew had occupied a dominant position on the market since 1987.

418 The aggressive attitude adopted by Interbrew is clearly demonstrated by the file. Thus in a memorandum of 19 August 1993 to Mr C., Mr M., then Interbrew's CEO, stated that he was prepared to 'convince' Alken-Maes to follow Interbrew after Interbrew had unilaterally decided to increase prices. Furthermore, the correspondence between Interbrew and Alken-Maes following the latter's protest against Interbrew's canvassing of drinks outlets that were contractually tied to Alken-Maes, where Interbrew proposed to reimburse the costs of breeching the contracts in

exchange for signing a new contract with it, shows Interbrew's strategy of exclusion, which its increasing vertical integration served to fortify. Moreover, Interbrew's disproportionate reaction to Alken-Maes's new policy in 1994 showed that it had the ability to inflict harm, to such a degree that Alken-Maes feared for its survival.

419 The applicant also maintains that the Commission is wrong to contend that the aggressive attitude allegedly adopted by Interbrew towards Alken-Maes is illogical and contrary to the nature of the infringement. The Commission is forgetting the interest which Interbrew had in setting up and proceeding with the cartel. Furthermore, it is astonishing that the Commission sees no inconsistency between submitting, on the one hand, that the applicant posed a threat to Interbrew and, on the other, that it entered into an agreement with Interbrew at the same time.

420 Lastly, in accusing the applicant of overlooking its own participation in the cartel in alleging that Interbrew had adopted an aggressive position in relation to it, the Commission wrongly exaggerates its influence over Alken-Maes, whereas, far from playing an active role within Alken-Maes, the applicant sought, on the contrary to disengage itself from its 'beer' activities with as little damage as possible.

421 The Commission contends that, in invoking the aggressive position adopted by Interbrew, the applicant forgets not only its own size and its strong position on the French beer market, but also the fact that an agreement would have served no purpose if the applicant or its subsidiary had been wholly dependent on Interbrew. Moreover, there is a difference in kind between the threat made by the applicant, which sought to have the cartel extended to the Belgian market, and the alleged threat made by Interbrew, which is supposed to have concerned the same market as that covered by the cartel. While it would be logical to accept that a threat in France should lead Interbrew to agree to extend the cartel to Belgium, it would be illogical, on the other hand, for Interbrew to have agreed to collude with an undertaking which was under its influence.

Findings of the Court

422 It should first of all be noted that, in the present case, the applicant does not deny having participated in an infringement of Article 81 EC, comprising in particular a set of agreements having an anti-competitive object. It is settled case-law that there will be an agreement within the meaning of Article 81(1) EC when the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way (see, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 352 above, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86; *Hercules Chemicals* v *Commission*, paragraph 57 above, paragraph 256; Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 67; and Case T-56/02 *Bayerische Hypo- und Vereinsbank* v *Commission* [2004] ECR II-3495, paragraph 59). It follows that the concept of an agreement within the meaning of Article 81(1) EC, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties (*Bayerische Hypo- und Vereinsbank* v *Commission*, paragraph 61, and *Bayer* v *Commission*, paragraph 69 and the case-law cited). The applicant therefore cannot claim that it acted exclusively under pressure from Interbrew.

423 It is also settled case-law that an undertaking which participates in meetings with an anti-competitive object, even under constraint from other participants with greater economic power, can always report the anti-competitive activities in question to the Commission rather than continue to participate in the meetings (*HFB and Others* v *Commission*, paragraph 245 above, paragraph 226).

424 It follows from the foregoing that neither the applicant's alleged dependence on Interbrew nor the aggressive position purportedly adopted by Interbrew in relation to the applicant can denote a situation capable of being taken into account by the Commission as an attenuating circumstance.

425 The fourth part of the plea must therefore be rejected and, accordingly, the plea must be rejected in its entirety.

9. *The plea based on an incorrect assessment of the extent of the cooperation provided by the applicant, in breach of the principle of equal treatment and the Leniency Notice*

426 The applicant maintains that it ought to have been given, in application of Section D of the Leniency Notice, a reduction of 50% in the fine imposed on it. The plea is divided into two parts. In the first part, the applicant submits that the Commission incorrectly assessed its cooperation for the purposes of the first indent of Section D.2 of the Leniency Notice, by underestimating its extent by reference to its decision-making practice and in breach of the principle of equal treatment. In the second part, the applicant contends that, after receiving the statement of objections, it did not substantially contest the facts on which the Commission based its allegations and claims infringement of the Leniency Notice in that the Commission took the view that the applicant was not eligible for a reduction in the fine under the second indent of Section D.2 of the notice.

(a) The first part, alleging an incorrect assessment by the Commission of the extent of the applicant's cooperation, by reference in particular to its decision-making practice and in breach of the principle of equal treatment

Arguments of the parties

427 The applicant submits in the first place that the Commission underestimated the extent of its cooperation before the statement of objections was sent. The

Commission itself recognised that Alken-Maes had supplied information which went beyond answering the request for information concerning it. In addition, the applicant claims that, in order to give guidance to the Commission on the background to and the machinery of the cooperation between Alken-Maes and Interbrew, on 7 March 2000, its subsidiary supplied a summary of the facts involved based on the records held by the company at the time, including a chronological history of the meetings and contacts between it and Interbrew from 1990, referring to all relevant documents and included documents supplied by it. Information was also provided in the letters of 10 and 27 December 1999, on which the Commission does not comment.

428 In reply to the Commission's argument that that it was already aware of most of the information supplied, the applicant contends not only that that point is not referred to in the contested decision, but also that it reflects an incorrect application of the first indent of Section D.2 of the Leniency Notice. That provision is not intended to limit the benefit of leniency only to undertakings which have supplied evidence to the Commission of which it was unaware, but is also meant to provide favourable treatment to those which, in facilitating the Commission's investigation, have allowed it to use its resources more effectively and, accordingly, to be more active in challenging infringements. Under the first indent of Section D.2 of the Leniency Notice, an undertaking is entitled to a reduction in a fine where it has supplied not only evidence of which the Commission was not aware, but also evidence which 'materially contribute[s] to establishing the existence of the infringement'. In the event, the documents and information supplied by Alken-Maes were of considerable assistance to the Commission in establishing or confirming the existence of the infringement.

429 The applicant maintains that the reduction granted to it is manifestly lower than the reductions normally granted by the Commission, as an analysis of a number of decisions taken by the Commission since 1998 shows.

430 Thus, the Commission has awarded reductions in fines of between 40 and 50% to undertakings which, like the applicant, have been the first to accept that an infringement had taken place, which have provided the statements of former employees and have supplied their files for review. The Commission has awarded reductions of between 20 and 50% to undertakings which have supplied it with evidence allowing it to confirm that an infringement had taken place or to add to its knowledge of it, going so far, in the Pre-insulated Pipes Decision, as to grant a reduction of 20% to two undertakings merely because they had not challenged the substantive truth of the facts — and even a reduction of 50% to an undertaking which had clarified the meaning of documents already in the Commission's possession in order to give it a clearer picture of the facts at issue.

431 Not only was Alken-Maes the first to acknowledge formally that an infringement had taken place in its memorandum of 27 December 1999, but it also undertook a detailed examination of its records, which enabled it to produce a number of new documents. Moreover, while the Commission wrongly denies that the applicant provided new information, it has, by contrast, never disputed that the information supplied in the letter of 10 December 1999 and, in particular, in the letter of 7 March 2000, which comprised a full chronological summary of the facts, on which the contested decision was based, provided detailed confirmation of the facts at issue.

432 The applicant contends in the second place that, in granting it a smaller reduction in its fine than that received by Interbrew, the Commission contravened the principle of equal treatment.

433 It notes that immediately after the investigations took place on 26 and 27 October 1999, its subsidiary Alken-Maes, with a view to assisting the Commission in its work, set up an internal inquiry, questioned each of the members of its management committee on possible contacts with Interbrew and initiated a survey of its records. While that work was made particularly difficult because of the complete

replacement of its management team shortly before the start of the investigation, the reply of 10 December 1999 was provided within the period prescribed by the Commission and Alken-Maes provided the Commission with statements from all current and former members of staff referred to in the request.

434 Thus, in the covering letter to its reply of 10 December 1999 to the request for information of 11 November 1999, which expressly referred to the investigation of its records, Alken-Maes provided detailed confirmation of the facts to which the request related, and included an annex setting out tables and notes regarding the meetings referred to in the request. Interbrew's reply to the same request, 13 days later, on 23 December 1999, also confirmed material of which the Commission was already aware.

435 By contrast, Interbrew, whose management team was nonetheless in place at the time of the facts at issue, did not reply to the Commission until 23 December 1999, following the latter's refusal to allow it an extension of time until 10 January 2000. Interbrew's reply did not, at the time, include any statement from the members of staff referred to in the Commission's request, and it was only by letter of 14 January 2000 that Interbrew supplied the statements of seven of the 16 persons referred to in the request.

436 Furthermore, Alken-Maes was the first to supply, on 27 December 1999, a memorandum containing an official statement of its former managing director formally acknowledging the existence and nature of the infringement which was the subject of the Commission's investigation and more particularly: (a) the fact that the cartel originated in the 'Vision 2000' discussions instituted by the CBB; (b) the fact that an agreement was concluded at the end of 1994 between Alken-Maes and Interbrew covering all distribution channels in Belgium; (c) the fact that that agreement included a non-aggression pact, the restriction of marketing investments in the on-trade and in publicity and consultation on prices and (d) the fact that the proper implementation of the agreement required regular consultation between

managers of Alken-Maes and Interbrew. While the Commission was already aware of point (d), the documents obtained at the time of the investigations and requests for information did not yet allow it to establish points (a) to (c) to the requisite legal standard.

437 The applicant observes in that regard that although Interbrew also provided additional statements and documents in January and February 2000, it was unable, notwithstanding the alleged quality of its cooperation, to supply a statement to support the suggestion of threats made by the applicant, despite the participation at the meeting of 11 May 1994 of its CEO.

438 In addition, on 7 March 2000, the applicant supplied a statement supplementing the information given on 10 December 1999, relating specifically, in accordance with the meeting with the Commission on 14 January 2000, to the context in which the documents communicated by Alken-Maes in reply to the request for information of 11 November 1999 had been drawn up and also to the CBB's 'Vision 2000' project. Further documents, which had been found in the meantime in the files of the company's former marketing manager, were also supplied.

439 Those points demonstrate, first, that although the applicant and Alken-Maes cooperated quickly and fully, that cooperation was given unreasonably little credit by the Commission by reference to the treatment given to Interbrew and, secondly, that the Commission completely failed to take account of the fact that the applicant and its subsidiary were, despite their best efforts, handicapped by the presence of a new management team at the time of the investigation, whereas Interbrew had the advantage that those responsible for the anti-competitive practices in question remained in office. Such an attitude is characteristic of an infringement of the principle of equal treatment.

440 Lastly, and in the third place, although in the contested decision the Commission justified the different reductions in the amount of the fines for cooperation on the

ground of the alleged challenges to the facts by the applicant after receipt of the statement of objections and not on the ground of a qualitative difference in the cooperation of the parties before the statement of objections was sent out, it relies on such a difference in its defence, thereby seeking to compensate for the lack of reasoning in the contested decision. In so doing, it impliedly acknowledged that the applicant had been the victim of unequal treatment.

441 The Commission cannot, without contradicting itself, state in its defence that Interbrew supplied it with material information before the applicant did, by reference in particular to Interbrew's letters of 14 and 19 January, and 2, 8 and 28 February 2000, when those letters were written after Alken-Maes's letter of 27 December 1999 containing a statement from its former managing director which expressly confirmed the essential points of the infringement.

442 Furthermore, the Commission is wrong to claim that part of the information supplied related to a period prior to 28 January 1993, which was not covered by the infringement, when the documents supplied as Annexes 3 to 23 and 26 to 29 to its letter of 10 December 1999 related to a period after 28 January 1993.

443 In any event, the Commission errs in taking the view that the information relating to the period prior to 28 January 1993 is not eligible to be taken into account under the Leniency Notice, when the request for information of 11 November 1999 related to the period between September 1992 and December 1999. In so doing, the Commission is confusing the period in relation to which it made a finding of infringement with the period covered by its investigation. According to the applicant, it is the latter period which should have been considered relevant for the purposes of assessing cooperation. In fact, the applicant provided information relative to the period from September 1992 to January 1993, which clarified the leading role played by Interbrew and the influence of the price control system.

444 The Commission contends that the extent of the applicant's cooperation was not underestimated and denies that the reduction awarded to it is manifestly smaller than the reductions it normally grants. The degree of cooperation afforded by the applicant cannot be compared to those referred to in the cases invoked by the applicant in support of its arguments. With respect to the alleged infringement of the principle of equal treatment, the Commission argues that Interbrew's cooperation was quantitatively and qualitatively greater than that provided by the applicant, as is shown by a comparison between the documents supplied by each of the parties which are relied upon in support of the contested decision. The differentiation in the percentage reductions granted for cooperation is therefore fully justified and is by no means to be explained solely by the Commission's finding that the applicant contested the facts.

(b) Findings of the Court

445 It should be noted at the outset that the Commission set out in the Leniency Notice the circumstances in which undertakings cooperating with it during its investigation into a cartel may be exempted from a fine or be granted a reduction in the fine which would otherwise have been imposed on them (Section A.3 of the Leniency Notice).

446 As regards the application of the Leniency Notice to the applicant, it is not disputed that its conduct falls to be appraised by reference to Section D of the notice, headed 'Significant reduction in a fine'.

447 Section D.1 of the notice states that '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'.

448 Section D.2 of the Leniency Notice provides:

'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.'

449 It should be pointed out that, according to settled case-law, a reduction of the fine on grounds of cooperation during the administrative procedure is justified only if the conduct of the undertaking concerned enabled the Commission to ascertain the infringement more easily and, if appropriate, to put an end to it (*SCA Holding* v *Commission*, paragraph 158 above, paragraph 156, and *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 278 above, paragraph 270).

450 It must also be noted that Article 11(1) of Regulation No 17 allows the Commission, inter alia, in carrying out the duties assigned to it by Article 85 EC and by provisions adopted under Article 83 EC, to obtain all necessary information from undertakings and associations of undertakings, which are required by Article 11(4) to supply the information requested. Where an undertaking or association of undertakings does not supply the information requested within the period specified by the

Commission, or supplies incomplete information, Article 11(5) of Regulation No 17 provides that the Commission may, by way of decision, require the information to be supplied; should the undertaking or association of undertakings persist in its refusal, it will be liable to a fine or periodic penalty payments.

451 In that regard, the case-law provides that the cooperation of an undertaking in the investigation gives no entitlement to a reduction in a fine when 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 135 above, paragraphs 341 and 342). By contrast, where the undertaking provides information in response to a request for information under Article 11 of Regulation No 17 which is well in excess of that which the Commission may require it to provide under that article, the undertaking concerned may benefit from a reduction in the fine (see, to that effect, judgment of 14 May 1998 in Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 262).

452 It must also be noted that where, in the course of the Commission's investigation of a cartel, an undertaking makes available to it information concerning acts for which it could not in any event have been required to pay a fine under Regulation No 17, that does not amount to cooperation falling within the scope of the Leniency Notice or, *a fortiori*, Section D thereof.

453 It should also be noted that it is clear from the case-law that in appraising the cooperation shown by undertakings the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which, according to settled case-law, 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 278 above, paragraph 237).

454 It is clear in that regard that the appraisal of the extent of the cooperation shown by undertakings cannot depend on purely random factors. A difference in the treatment of the undertakings concerned must therefore be capable of being ascribed to differences in the degree of cooperation provided, particularly where different information was provided or that information was supplied at different stages in the administrative procedure or in dissimilar circumstances (see, to that effect, *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 278 above, paragraphs 245 and 246).

455 It is also the case that where an undertaking providing cooperation does no more than confirm, in a less precise and explicit manner, certain information already provided by another undertaking by way of cooperation, the extent of the cooperation provided by the former undertaking, while possibly of some benefit to the Commission, cannot be treated as comparable to that provided by the undertaking which was the first to supply that information. A statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly and therefore sufficiently to justify a reduction in the fine for cooperation.

456 It is in the light of those principles that it should be determined in the present case whether the reduction in the fine which the Commission granted to the applicant under the first indent of Section D.2 of the Leniency Notice is the consequence of an incorrect assessment of the extent of the applicant's cooperation, in particular in the light of the Commission's decision-making practice, and infringes the principle of equal treatment.

457 In the first place, it should be noted both that the Commission stated in the Leniency Notice that where an undertaking cooperates pursuant to Section D of the notice, it is to benefit from a reduction of 10 to 50% of the fine that would have been imposed if it had not cooperated and, secondly, that the applicant does not dispute that the extent of its cooperation had to be assessed by reference to Section D of the notice. The Commission has indicated with respect to the applicant that a reduction

of 10% of the fine under the first indent of Section D.2 of the Leniency Notice was appropriate, having regard to the fact that the applicant's subsidiary provided information relating to the existence and nature of the infringement which went beyond merely replying to the request for information under Article 11 of Regulation No 17. It must therefore be held that, in granting the applicant a reduction of 10% of the fine under the first indent of Section D.2 of the Leniency Notice, the Commission did not depart from the bracket of reductions of fines applicable to the type of cooperation provided by the applicant.

458 As regards, in the second place, the argument based on the previous decision-taking practice of the Commission, it is sufficient to note that the mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (*Mayr-Melnhof* v *Commission*, paragraph 57 above, paragraph 368, and *ABB Asea Brown Boveri* v *Commission*, paragraph 50 above, paragraph 239). That argument must accordingly be rejected.

459 In the third place, it is necessary to determine whether the reduction in the fine granted by the Commission to the applicant under the first indent of Section D.2 of the Leniency Notice infringes the principle of equal treatment.

460 It must be held in that regard that recital 324 of the contested decision, read together with recital 325, shows that the Commission granted a reduction of 30% of the fine imposed on Interbrew on two cumulative grounds, namely, first, that its cooperation in proving the relevant facts went beyond its obligations under Article 11 of Regulation No 17 (the first indent of Section D.2 of the Leniency Notice) and, secondly, that it did not substantially contest the facts which constituted the infringement (the second indent of Section D.2 of the Leniency Notice).

461 By contrast, recital 326, read together with recital 327, leads to the conclusion that the Commission granted the applicant a reduction of 10% only on the ground that its cooperation in establishing the facts went further than its obligations under Article 11 of Regulation No 17 (the first indent of Section D.2 of the Leniency Notice). In effect, the Commission took the view that the applicant substantially contested the facts on which it had based its allegations and was accordingly not entitled to any reduction under the second indent of Section D.2 of the Leniency Notice.

462 The difference between the reduction of fine granted to Interbrew and that granted to the applicant under the first indent of Section D.2 of the Leniency Notice is accordingly less than the final percentage reductions awarded of 30 and 10% suggest, as the reduction of 30% granted to Interbrew includes the reduction given to it under the second indent of Section D.2 of the Leniency Notice.

463 As regards the reductions granted to the applicant and Interbrew in respect of their cooperation under the first indent of Section D.2 of the Leniency Notice, it must be pointed out that the Commission refers implicitly in the contested decision to a qualitative difference between the cooperation provided by Interbrew and that provided by the applicant. While the Commission acknowledged that both undertakings provided material in response to the request for information of 11 November 1999 which went further than simply replying to it, the Commission none the less found that Interbrew 'contributed significantly to establishing the relevant facts', whereas it mentioned that the applicant merely '[supplied] information about the existence and substance of the infringement which went further than answering the request for information under Article 11 of Regulation No 17'.

464 In order to determine whether there was a material difference between the degree of cooperation provided by Interbrew and that provided by the applicant, it is necessary to compare the extent of their cooperation from both a chronological and a qualitative point of view.

465 As regards, in the first place, a comparison between the cooperation provided by the undertakings concerned from a chronological perspective, it must be pointed out, with respect to the applicant and its subsidiary Alken-Maes, that the latter replied to the request for information of 11 November 1999 by letter of 10 December 1999. Next, Alken-Maes provided the Commission with a statement in which it invoked the Leniency Notice on 27 December 1999, which it supplemented and clarified on 7 March 2000. Alken-Maes also replied on 5 April 2000 to a supplementary request for information by the Commission under Article 11 of Regulation No 17 of 22 March 2000. Lastly, the applicant replied on 10 May 2000 to a supplementary request for information which had been sent to it on 14 April 2000.

466 As regards the cooperation provided by Interbrew, it should first be pointed out that Interbrew replied to the request for information of 11 November 1999 on 23 December 1999. Next, by letters of 14 and 19 January 2000, Interbrew provided information supplementing the information contained in its letter of 23 December 1999. In the light of that information, the Commission sent a fax to Interbrew on 21 January 2000 containing an informal supplementary request for information. Interbrew replied to it by letter of 2 February 2000 and sent additional information on 8 and 28 February 2000. In addition, on 29 February 2000, Interbrew submitted a statement to the Commission relating to the Belgian market and invoked the Leniency Notice at the same time. Lastly, Interbrew also sent to the Commission on 21 December 2000, that is to say after the initiation of the procedure and the sending of the statement of objections adopted on 20 September 2000, two documents relating to two meetings held with Alken-Maes in connection with the bilateral agreements between them.

467 It follows from the foregoing that the Commission's argument that the information submitted by the applicant was of less value than that submitted by Interbrew, as it was provided at a later time, cannot be accepted. All the information submitted by the parties was supplied in a relatively short period of time, at substantially the same

stage of the administrative procedure. There is thus nothing from a chronological point of view which can be held to be determinative for the purpose of a comparative assessment of the applicant's cooperation and Interbrew's.

468 As regards, in the second place, the comparative analysis of the cooperation provided by the parties from a qualitative perspective, it must be held with respect to the applicant and its subsidiary Alken-Maes, that in its reply of 10 December 1999 to the request for information of 11 November 1999, Alken-Maes did not explicitly invoke the Leniency Notice. However, Alken-Maes stated that 'the reply reflects the intention of the company to cooperate fully with the Commission on the basis of the documents kept at that date and the information available from the staff concerned who are still with the company'. It also stated that 'Alken-Maes has also attempted to contact former employees of the company and the replies obtained are annexed', and that 'despite its best efforts, Alken-Maes is not in a position to guarantee the exhaustiveness of its reply and reserves the right to supplement or amend it'. The reference to the attempts made to gather information from former employees of the company provides initial support for the suggestion that the cooperation provided by Alken-Maes went beyond the obligations imposed on it by Article 11 of Regulation No 17. However, it is clear that the information and the documents provided by Alken-Maes cannot be regarded as falling outside the scope of those obligations. With the possible exception of that relating to the exchange of information between Alken-Maes and Interbrew, the material provided does not in any way reveal conduct having a manifestly anti-competitive object, disclosure of which to the Commission is incriminating and therefore not covered by the obligations laid down in Article 11 of Regulation No 17.

469 In its letter of 27 December 1999, Alken-Maes for the first time explicitly states that its cooperation is being provided in the context of the Leniency Notice. In that letter it also acknowledges the existence of unlawful practices, as the managing director of Alken-Maes states that it does not substantially contest the facts as described by the Commission in its request for information of 11 November 1999 and that, in particular, there was a concerted practice between Interbrew and Alken-Maes by virtue of which, first, information was exchanged each month regarding their respective sales of beer in Belgium and, secondly, numerous meetings took place

between representatives of Alken-Maes and Interbrew, during which there was consultation concerning the distribution and sale of beer in Belgium. Lastly, Alken-Maes attaches a note as an annex to that letter in which it stated that it appeared that at the end of 1994 'an agreement was entered into between the two companies covering all of the distribution channels in Belgium but with particular emphasis on the on-trade channels'. That agreement 'included in particular ... a pact providing for non-aggression, the reduction of marketing investment in the on-trade and in outside advertising, and concerted pricing' and 'there were regular meetings between the senior managers of the two companies with a view to ensuring that the agreements were properly implemented'.

470 In the statement of 7 March 2000 Alken-Maes acknowledged the existence of matters that could be analysed as anti-competitive practices and which as such substantially contributed to establishing the existence of the infringement, as the Commission itself accepts. However, it is clear that the statement is essentially based on documents and information that was already in the possession of the Commission. Thus, while the document provided by Alken-Maes in Annex 42 to the statement of 7 March 2000 proved extremely useful to the Commission, since it was on the basis of that document in particular that the Commission was able to establish that the cartel, contrary to the applicant's contention, continued after July 1996, that document had already been provided to the Commission in Annex 37 to Alken-Maes's reply of 10 December 1999 to the request for information of 11 November 1999, which reduces the value, from the aspect of cooperation, as its submission was covered by the obligations placed on that undertaking by Article 11 of Regulation No 17 (see paragraph 451 above).

471 It is also clear that a substantial part of the information submitted by Alken-Maes in its statement of 7 March 2000 relates to a period before that in respect of which the infringement was found to have occurred. Contrary to the applicant's contention, therefore, that information cannot be regarded as having made it easier for the Commission to establish the infringement referred to in the contested decision. In that regard, the fact that an undertaking makes information available to the

Commission in the course of its investigation concerning acts for which it could not in any event have been required to pay a fine under Regulation No 17, does not amount to cooperation for the purposes of the Leniency Notice (see, to that effect, the case-law cited in paragraph 451 above).

472 With respect to the replies of 5 April and 10 May 2000 to the requests for information of 22 March and 14 April 2000, it should be held, as regards the former, that it plainly concerned the private-label beer cartel and, as regards the latter, that while it is referred to on six occasions in the contested decision, it is not possible, since the parties to the proceedings have not adopted a position on the subject, to identify any contribution which went beyond the obligations arising under Article 11 of Regulation No 17.

473 As regards the cooperation provided by Interbrew, it must be held that while its reply of 23 December 1999 to the request for information of 11 November 1999 comes in part within its obligations under Article 11 of Regulation No 17, the reply none the less goes significantly further and plainly contributes to establishing the reality of facts constituting an infringement of Article 81 EC. In its reply, Interbrew described and explained the cartel to an extent which significantly exceeds its obligation under Article 11 of Regulation No 17.

474 As regards the letters from Interbrew of 14 and 19 January 2000, the letters sent on 2, 8 and 28 February 2000 in reply to the informal request for information of 21 January 2000, the statement of 29 February 2000 and, lastly, the two final documents submitted on 21 December 2000, it must be held that those letters and the annexes to them provide detailed information of the contacts between Interbrew, Alken-Maes and the applicant, which clearly falls within the scope of the Leniency Notice.

475 It follows from the foregoing that, from a qualitative point of view, Interbrew made a more decisive contribution to the establishment and the confirmation of the existence of the infringement.

476 In the light of the foregoing, it must be held that the difference between the percentage reductions of fines granted by the Commission under the first indent of Section D.2 of the Leniency Notice does not constitute an infringement of the principle of equal treatment.

477 The first part of the plea must accordingly be rejected.

(c) The second part, alleging that the Commission erred in concluding that the applicant had substantially contested the facts on which the Commission based its allegations

Arguments of the parties

478 The applicant maintains that the Commission's interpretation of the purpose and nature of the response to the statement of objections was manifestly incorrect, in so far as the Commission considered that the reply cast doubt on the existence of the infringement as described in the statement of objections. In its reply to the statement, the applicant merely raised points which it felt were necessary for a proper appraisal of the facts by the Commission and did not substantially contest the facts, but simply the significance or the classification ascribed to them by the Commission. The applicant indicated that, without substantially contesting the facts established by the Commission, it wished to clarify a number of points and to put the facts at issue into perspective, in order to show that they did not have the significance ascribed to them by the Commission. The applicant submits that it

would be contrary to the most fundamental rights of the defence for the Commission to be entitled to require that undertakings seeking the benefit of the Leniency Notice waive the right to challenge not only the facts but also their classification, the level of the fine or legal reasoning employed by the Commission. The Commission had itself accepted the validity of that distinction in the Pre-insulated Pipe Cartel Decision, in which it did not penalise an undertaking which, while not denying the essential factual allegations made against it, had contested the significance given to them by the Commission, which had found that they constituted an infringement. As the applicant had done no more than provide a different classification of the facts, the Commission's finding that its cooperation was not continuous and complete is therefore incorrect (*Tate & Lyle and Others* v *Commission*, paragraph 147 above, paragraph 162).

479 Thus, in the first place, the applicant emphasises in its application the five points which it raised in its response to the statement of objections, and that does not require to be interpreted as casting doubt on the existence of the infringement as described by the Commission in the statement of objections.

480 First, the applicant stressed the failure of the Commission to take account of Interbrew's abuses of its dominant position in Belgium, when there was a link between those abuses and the cooperation which had evolved between the applicant and Interbrew and which, had they been taken into account, would have clarified the background to the infringement and the relative strengths of the parties concerned.

481 Secondly, it drew attention to the special nature of the Belgian regulatory system at the time, which, far from casting doubt on the reality of the infringement, permitted a better assessment of the gravity of the facts and the existence of attenuating circumstances.

482 Thirdly, it claimed that Interbrew had acted as the instigator, as it was the latter that had taken the initiative in relation to the various discussions and agreements with Alken-Maes.

483 Fourthly, it contested the significance given to the discussions with Interbrew, which were not binding on it in any way.

484 Fifthly, the applicant specified the significance and classification which it considered fell to be given to the facts complained of, which, although constituting an infringement of Article 81 EC, did not fall to be categorised as a bilateral agreement on prices and market sharing, but only as a non-aggression pact and a restriction of investment and advertising.

485 Next, in its reply, the applicant provides a point-by-point response to the Commission's reasoning in its defence relating to the facts which the Commission considered it to have challenged in the administrative procedure. Among those facts, the Commission maintains that two are still being challenged before the Court, while five others no longer appear to be challenged. Having regard to each of those points, the applicant repeats that it did not substantially contest the facts in question, but merely the significance or the classification ascribed to them by the Commission.

486 In the first place, as regards the two facts challenged before the Court, namely the threat made against Interbrew and the duration of the infringement, the applicant asserts, in relation to the former, that while it does not deny that in discussions between the parties to the cartel regarding their respective policies in France it sent a lawful and commercially legitimate warning to Interbrew following the abuses the latter was found to have committed in Belgium, it continues, by contrast, to deny that those discussions, although referring to the figure of 500 000 hectolitres, may be taken as constituting pressure in the sense understood by the Commission, since, in particular, the warning had no coercive effect.

487 As regards the duration of the infringement, the applicant confirms that it continues to deny that the cartel continued beyond July 1996. However, that does not represent the vigorous denial of a number of established facts, as the Commission wrongly maintains, but a challenge to the significance which the Commission ascribes to the contacts between the parties after July 1996, which cannot be reconciled with the context and effects of those contacts, as after that date they no longer had an anti-competitive object. As Interbrew notified its customers of its pricing system during 1996 and applied it from 1 January 1997, there was no longer any reason for such discussions to take place.

488 In the second place, with respect to the five other facts which the Commission considered were being challenged in the response to the statement of objections but are no longer challenged in the application, the applicant makes the following observations.

489 First, as regards its alleged challenge to the fact that the cartel also covered customer sharing and in particular price setting, the applicant confirms that it acknowledges the existence of the facts and does not deny that they constitute an infringement of Article 81 EC, but asserts that they cannot be classified as a bilateral agreement on prices, which affects not the existence of the infringement but its gravity. In particular, while it does not contest that prices were discussed at the meeting of 9 November 1994, the applicant still maintains that in deeming that those discussion constituted an effective agreement on prices, the Commission's characterisation of the facts was particularly harsh. The applicant wished in particular to contest the significance attributed by the Commission to the handwritten formula 'J=SA=A-M=275,-'.

490 Secondly, with regard to the time when the cartel began, the applicant acknowledges that it is true that in its response to the statement of objections it maintained that the cartel did not begin until October 1994. However, the Commission fails to point out that that response covered the discussions between the parties that had taken place since the end of 1992. Without denying that contacts and exchanges of

information with its competitors regarding its pricing structure had taken place from the end of 1992, the applicant submits that they must be placed in context and taken for what they really are, in particular against the background of the role of the CBB in the regulation of price increases.

491 Thirdly, as regards the argument that the object of the meeting of 11 May 1994 was not restricted to the introduction of the applicant's new general manager of its beer division, the applicant maintains that it did indeed state that the primary purpose of the meeting was to allow that introduction to take place, but it also stated that the broader purpose of that meeting related to Interbrew's proposal to enter into a non-aggression pact which included France.

492 Fourthly, as regards the discussions of 6 July 1994, the applicant submits that, contrary to the Commission's contention, it did not deny that those discussions concerned the cooperation between Interbrew and Alken-Maes. It indicated that the discussions related primarily to Interbrew's market position in France, but nevertheless immediately went on to state that the conclusion of a non-aggression pact concerning France and Belgium was proposed by Interbrew in those discussions.

493 Fifthly, as regards the question of Interbrew's influence within the CBB, the applicant did not contest the fact established by the Commission that Interbrew did not determine the policy of the CBB. Furthermore, even if it had contested that fact, it would have contested the Commission's interpretation of the influence exercised by Interbrew and not contested an established fact.

494 Lastly, as regards the Commission's contention that the applicant declared that it was refraining from contesting only the facts set out in the statement of objections that the applicant itself had acknowledged, the applicant claims that the Commission distorted its statements and thus misinterpreted their actual meaning.

495 Thus, the Commission distorted the applicant's words by adding the word 'only' to its statement, that is to say that by writing that the applicant had declared that 'the facts [set out in the statement of objections] were not in dispute only in so far as they were based in part on information supplied to the Commission by Alken-Maes'. The applicant had in fact indicated that it did not deny 'the existence of the events that occurred during the period in question, in so far as they [were] in part based on the information provided by representatives of Alken-Maes to the Commission'.

496 Moreover, the Commission misconstrued the significance of the expression 'in so far as'. The use of those words did not reflect an intention to restrict, even in part, the extent to which the essential factual allegations were accepted, but on the contrary to emphasise that it would have been particularly inappropriate for the applicant to have contested the accuracy of the facts established by the Commission where they were established in part on the basis of material provided by the applicant. That misunderstanding led the Commission to conclude, incorrectly, that the applicant had cast doubt on the existence of the infringement.

497 The applicant submits in its reply that the Commission continues in its defence to adopt an incorrect, or even misleading, interpretation of the terms of the applicant's response to the statement of objections, in indicating that the applicant 'confined itself to acknowledging the facts "in so far as they are based in part on information provided by representatives of Alken-Maes itself to the Commission"'. In using the expression 'confined itself', the Commission introduced a qualification where the original text contained none. While the expression 'in so far as' may have a restrictive connotation when it is accompanied by a negation or a restrictive verb, it should by contrast be construed as having an explanatory connotation where it is used without any negation or restrictive verb.

498 The applicant also contends that a finding that it had sought to contest the facts is all the more damaging in that it is clear from the Commission's decision-making practice that the a mere failure to contest the facts, without submitting any new

information, may lead to a reduction of almost 20% of the fine, as illustrated by the Greek Ferries and Pre-insulated Pipe Cartel Decisions. The Commission has even granted in the past a reduction equivalent to that granted to the applicant in the present case to an undertaking which did not cooperate (recital 98 of Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy surcharge) (OJ 1998 L 100, p. 55)).

499 The Commission first notes that it is settled case-law that a reduction of a fine for not substantially contesting the facts assumes that the facts established in the statement of objections have been expressly accepted. It is clear from both the applicant's response to the statement of objections and the application that the latter sought vigorously to deny, and continues to deny, that a threat was made against Interbrew and that the cartel continued beyond July 1996. Moreover, in its response to the statement of objections the applicant originally contested certain essential facts which it did not persist in denying in the application.

500 With respect to the argument that the Commission interpreted as a challenge to the facts what had in fact been a challenge to the significance attributed by it to those facts and its legal classification of them, the Commission observes that on the contrary the challenge related to the substance of a number of the facts.

501 It is in any event incorrect to claim that the absence of a challenge to the facts justifies generally a reduction of the fine of 20%, as the reduction normally granted on that ground is of the order of 10%. As regards the allegation that parties which did not cooperate with the Commission have benefited from a reduction equivalent to that granted to the applicant, it is unfounded.

502 Lastly, the Commission claims that, unless the rules of grammar are ignored, the purported acceptance of the facts by the applicant was only conditional. In the response to the statement of objections, the applicant confined itself to accepting the facts 'in so far as they are based in part on information provided by representatives of Alken-Maes itself to members of the Commission's staff'.

Findings of the Court

503 The second indent of Section D.2 of the Leniency Notice (see paragraph 448 above) states that where an undertaking cooperates in terms of Section D it is to benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated if, after receiving a statement of objections, it informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

504 If it is to benefit from a reduction of the fine by reason of the absence of a challenge to the facts, pursuant to the second indent of Section D.2 of the Leniency Notice, an undertaking must expressly inform the Commission that it has no intention of substantially contesting the facts, after perusing the statement of objections (*Mayr-Melnhof* v *Commission*, paragraph 57 above, paragraph 309).

505 However, it is not sufficient for an undertaking to state in general terms that it does not contest the facts alleged for the purposes of the Leniency Notice if, in the circumstances of the case, that statement is not of any help to the Commission at all (Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 193). In order

for an undertaking to benefit from a reduction of the fine for its cooperation during the administrative procedure, its conduct must facilitate the Commission's task of identifying and penalising infringements of the Community competition rules (see, to that effect, *Mayr-Melnhof* v *Commission*, paragraph 57 above, paragraph 309).

506 In the light of those principles, it is necessary to determine whether, as the applicant claims, the Commission erred in finding in recital 326 of the contested decision that the terms of the applicant's declaration that it did not contest the facts and the doubt cast by it on the existence of the infringement as described in the statement of objections did not warrant a reduction in the fine under the second indent of Section D.2 of the Leniency Notice.

507 In that regard, it must be observed, with respect, in the first place, to the applicant's general statements that it did not substantially contest the facts, that prior to the sending of the statement of objections, in its letter to the Commission of 27 December 1999, Alken-Maes stated that 'it [did] not substantially contest the facts as described by the Commission in its request for information sent on 11 November 1999 and that, in particular, ... there [had] been a concerted practice between Interbrew and Alken-Maes by virtue of which, first, information [had] been exchanged each month regarding their respective sales of beer in Belgium; ... between 1992 and 1998 there had been numerous meetings between executives of Alken-Maes, and notably Mr R.V., the then managing director, and executives of Interbrew, especially Mr T. and Mr J.D., at which there [had been] consultation about the distribution and sale of beer in Belgium'. It added that 'without prejudice to the mitigating circumstances which have been notified to the [Commission's] staff, Alken-Maes acknowledges and will not deny that those facts represent an infringement of Article 81 ... EC'.

508 It must also be observed that in its response to the statement of objections the applicant stated that 'without denying the existence of contacts and concerted

practices between Interbrew and Alken-Maes in so far as they are in part based on the information provided by representatives of Alken-Maes itself to members of the Commission's staff, [it wished] to ... clarify a number of points and put the facts concerned into perspective in order to show that they do not have the significance ascribed to them by the Commission'. In p. 1 of its response to the statement of objections, the applicant rephrased its words slightly in stating that 'without denying the existence of the events that occurred during the period in question, in so far as they are in part based on the information provided by representatives of Alken-Maes to members of the Commission's staff on [the applicant's] instructions, [the applicant] wishes in this reply to clarify a number of points and to put the facts concerned into perspective, in order to show that they did not have the significance ascribed to them by the Commission, or even, in some cases, that the Commission's findings in law result from an incorrect classification of the relevant circumstances'.

509 It is therefore clear from the applicant's response to the statement of objections that, although it maintains that it did not contest the existence of 'contacts and concerted practices between Interbrew and Alken-Maes' or of 'facts that occurred during the period in question', it did not assert expressly and in a clear and precise manner that it did not substantially contest the facts on which the Commission had based its allegations. On the contrary, that assertion was accompanied by reservations relating to its intention to 'clarify a number of points', to 'put the facts concerned into perspective' in order to show that they 'do not have the significance ascribed to them by the Commission' and that the Commission's legal findings 'result from an incorrect classification of the relevant circumstances'.

510 As regards, in the second place, the applicant's observations relating to the specific facts recorded by the Commission in its statement of objections (see paragraphs 486 to 493 above), it is evident that the applicant did not confine itself to clarifying the significance attributed to them by Commission, but contested the content or the existence of a number of them.

511 Thus, as regards the duration of the infringement, the Commission indicated in the statement of objections that it had evidence relating to the cartel for the period from at least 28 January 1993 to 28 January 1998 and that the cartel had accordingly continued until 28 January 1998. For the period after July 1996, the Commission relied, in reaching that conclusion, on three facts, namely, first, that a telephone conversation took place on 9 December 1996 between Alken-Maes (Mr L.B.) and Interbrew (Mr A.B.); secondly, that the meeting between Interbrew, the applicant and Alken-Maes held in Paris on 17 April 1997 had an anti-competitive object and, thirdly, that the meeting of 28 January 1998 between Interbrew and Alken-Maes concerned the cartel.

512 In its response to the statement of objections, the applicant stated that it '[was] astonished that the Commission should take [28 January 1998] as marking the end of the unlawful practices, when all the material contained in the investigation file shows that all bilateral discussions had ceased by the second half of 1996'. In particular, the applicant maintained that 'the discussions on pricing structure ended with Interbrew's decision in July 1996 to introduce its new prices on 1 January 1997' and that 'the lack of any discussions after July 1996' could be seen, for example, from a note from a consultant with Alken-Maes comparing Interbrew's new general terms with Alken-Maes's draft terms, which would have been unnecessary 'if there had been contacts between the two undertakings in relation to that matter', that 'the meeting [of 17 April 1997] did not form part of the discussions covered by the [statement of objections]' and that the purpose of the meeting of 28 January 1998 was not to 'reintroduce the former practices'.

513 In the light of the foregoing, and in particular of the applicant's observations regarding the duration of the infringement, it must be held that its statements that it does not substantially contest the facts do not justify a reduction of the fine under the second indent of Section D.2 of the Leniency Notice.

514 First, as regards an agreement having an anti-competitive object, it must be pointed out that the establishment of the facts alone is sufficient, in principle, to establish two of the essential elements of an infringement of Article 81(1) EC, namely the existence of an agreement and its anti-competitive object. It is therefore clear that the applicant could not, in its response to the statement of objections, contest the significance of the relevant facts in July 1996, which the Commission has validly established and which themselves constitute the infringement in question, without substantially contesting the facts within the meaning of the second indent of Section D.2 of the Leniency Notice (see, by analogy, *Corus UK* v *Commission*, paragraph 505 above, paragraphs 195 and 197).

515 In the second place, a declaration that a person does not substantially contest the facts, accompanied, as in the present case, by a series of observations by which the applicant allegedly seeks to clarify the significance of certain facts but which, in reality, amount to contesting those facts, cannot be considered to facilitate the Commission's task of identifying and penalising the relevant infringement of the competition rules.

516 It is plain that, contrary to what the applicant maintains, it is not the incorrect significance attributed by the Commission to certain facts, namely the contacts which took place on 9 December 1996, 17 April 1997 and 28 January 1998, that the applicant contests, but the very nature of those facts. Thus, in its response to the statement of objections (see paragraph 512 above), the applicant did not merely contest the significance of the contact which took place on 9 December 1996 between Alken-Maes and Interbrew, but contested the very fact that there had been contact between the two competitors on that date. Similarly, the applicant denied the very fact that the meeting of 17 April 1997 had an anti-competitive object and not the significance ascribed to that fact by the Commission or its legal analysis of it. Lastly, with respect to the meeting of 28 January 1998, the applicant did not merely submit that the fact that the cartel was perceived still to be in existence, as has been validly established by the Commission, did not have the significance or the legal classification attributed to it by the Commission, namely that of an infringement, but contested the very fact that the terms of the discussion relating to the cartel showed that it was still in existence.

517 It must therefore be held, without there being any need to consider the other arguments developed by the applicant, that the Commission was correct to find in recital 326 of the contested decision that the applicant had cast doubt on the existence of the infringement as described in the statement of objections and that it considered that that did not justify a reduction of the fine within the meaning of the second indent of Section D.2 of the Leniency Notice.

518 It is therefore necessary to reject the second part and accordingly the plea in its entirety.

The method of calculation and the final amount of the fine

519 As established in paragraph 313 above, the increase in the basic amount of the fine in respect of aggravating circumstances must be reduced from 50 to 40%.

520 As regards the calculation of the final amount of the fine resulting from that amendment, it should be pointed out that in calculating the fine imposed on the applicant the Commission departed from the method laid down in the Guidelines.

521 Given the wording of the Guidelines, the percentages corresponding to increases or reductions applied to reflect aggravating or attenuating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of

the infringement, and not to the figure resulting from any initial increase or reduction to reflect an aggravating or attenuating circumstance (see, to that effect, *Cheil Jedang* v *Commission*, paragraph 95 above, paragraph 229).

522 In the present case, it is clear that while the Commission adjusted the amount of the fine to take account of two aggravating circumstances and then of one attenuating circumstance, the final amount of the fine imposed shows that the Commission applied one of those two adjustments to the amount which resulted from the application of an initial increase of reduction. Such a method of calculation has the consequence that the final amount of the fine is altered by reference to the amount which would result from the application of the method laid down in the Guidelines.

523 In that regard, while the method of calculating the amount of fines contained in the Guidelines is, admittedly, not the only permissible method, it is capable of ensuring a coherent decision-making practice in relation to the imposition of fines, which in turn guarantees equality of treatment for undertakings which are penalised for infringements of the rules of competition law. In the present case, the Court finds that the Commission has departed from the Guidelines with regard to the method of calculating the final amount of the fines, without providing any justification for doing so.

524 It is therefore appropriate, in the exercise of the full jurisdiction conferred on the Court by Article 17 of Regulation No 17, to apply the increase of 40% for the aggravating circumstance of repeated infringements to the basic amount of the fine imposed on the applicant.

525 The final amount of the fine imposed on the applicant is therefore calculated as follows: the basic amount of the fine (EUR 36.25 million) must first be increased by

40% of that basic amount (EUR 14.5 million) and then reduced by 10% of that amount (EUR 3.25 million), which gives an amount of EUR 47.125 million. Next, that figure is reduced by 10% for cooperation, which gives a final amount of the fine of EUR 42.4125 million.

Costs

526 Under Article 87(3) of the Rules of Procedure, the Court of First Instance 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. In the present case, it must be held that the applicant is to bear its own costs and pay three quarters of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Sets the amount of the fine imposed on the applicant at EUR 42.4125 million;**

2. **Dismisses the remainder of the application;**

3. **Orders the applicant to bear its own costs and to pay three quarters of those incurred by the Commission and the Commission to bear one quarter of its own costs.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 25 October 2005

E. Coulon M. Vilaras

Registrar President

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