

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

16 June 2011 *

In Case T-235/07,

Bavaria NV, established in Lieshout (Netherlands), represented initially by O. Brouwer, D. Mes and A. Stoffer, and subsequently by O. Brouwer, A. Stoffer and P. Schepens, lawyers,

applicant,

v

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

defendant,

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

* Language of the case: Dutch.

THE GENERAL COURT (Sixth Chamber, Extended Composition),

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

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 24 March 2010,

gives the following

Judgment

Facts

- 1 The applicant, Bavaria NV, is a company whose business is to produce and market beer and soft drinks.

- 2 It is one of the four main operators on the Dutch beer market. The other leading brewers on that market are, first, the Heineken group ('Heineken'), which is managed by Heineken NV and whose production is managed by the subsidiary Heineken Nederland BV, second, the InBev group ('InBev'), which, prior to 2004, was known

under the name Interbrew, which is managed by InBev NV and whose production is the responsibility of the subsidiary InBev Nederland NV, and, third, the Grolsch group ('Grolsch'), which is managed by Koninklijke Grolsch NV.

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

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

Administrative procedure

- 5 By letters of 28 January 2000 and of 3, 25 and 29 February 2000, InBev made a series of statements providing information on restrictive business practices on the Dutch beer market. Those statements were made during an investigation conducted by the Commission of the European Communities, in particular in 1999, into cartel activities

and a possible abuse of a dominant position on the Belgian beer market. In conjunction with these statements, InBev made a leniency application in accordance with the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; ‘the Leniency Notice’).

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

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

- 8 By letters of 7 March and 8 May 2006, additional documents were brought to the applicant’s attention by the Commission. These included requests for information sent to InBev and the replies to those requests, and an internal memo from Heineken.

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

The contested decision

The infringement at issue

- 10 Article 1 of the contested decision states that the applicant and InBev NV, InBev Nederland, Heineken NV, Heineken Nederland and Koninklijke Grolsch participated, during the period from 27 February 1996 to 3 November 1999, in a single and continuous infringement of Article 81(1) EC by entering into a complex of agreements and/or concerted practices the object of which was to restrict competition within the common market.
- 11 The infringement consisted, first, in coordinating prices and price increases for beer in the Netherlands, in both the on-trade and the off-trade sector, including with regard to private label beer, and, second, in occasionally coordinating other commercial conditions offered to individual customers in the on-trade sector in the Netherlands, such as loans to businesses, and, third, in occasionally coordinating customer allocation, in both the on-trade and the off-trade sector in the Netherlands (Article 1 of and recitals 257 and 258 to the contested decision).
- 12 According to the contested decision, the anti-competitive conduct of the brewers took place during a cycle of unofficial multilateral meetings which regularly brought together the four main operators on the Dutch beer market and at additional bilateral meetings involving different combinations of the same brewers. According to the contested decision, these meetings took place secretly, intentionally, because the participants knew that they were not permitted (recitals 257 to 260 to the contested decision).

- 13 Thus, firstly, a series of multilateral meetings known as ‘Catherijne overleg’ (Catherijne consultation) or ‘agendacommissie’ (Working Group on agenda) were held between 27 February 1996 and 3 November 1999. The contested decision finds that the main object of these meetings, which focused on the on-trade sector, but could also deal with the off-trade sector, was to coordinate prices and price increases for beer, to discuss limiting the amount of discounts and customer allocation and to consult on certain other commercial conditions. Prices of private label beer were also discussed in these meetings (recitals 85, 90, 98, 115 to 127 and 247 to 252 to the contested decision).
- 14 Secondly, as far as bilateral contacts between the brewers are concerned, the contested decision states that on 12 May 1997 InBev and the applicant met and discussed the price increase for private label beer (recital 104 to the contested decision). Furthermore, according to the Commission, Heineken and the applicant met in 1998 to discuss restrictions relating to points of sale in the on-trade sector (recital 189 to the contested decision). The Commission states that bilateral contacts also took place in July 1999 between Heineken and Grolsch on the subject of compensation granted to customers in the off-trade sector who made temporary price reductions (recitals 212 and 213 to the contested decision).
- 15 Lastly, according to the contested decision, bilateral contacts and exchanges of information took place between InBev and the applicant in 1997 consisting in general discussions on beer prices and discussions dealing more with private labels. Bilateral contacts, in the form of exchanges of information, on the subject of private labels also involved the Belgian brewers in June and July 1998 (recitals 105, 222 to 229 and 232 to 236 to the contested decision).

The fine imposed on the applicant

- 16 Article 3(c) of the contested decision imposes on the applicant a fine of EUR 22 850 000.
- 17 In order to calculate the amount of that fine, the Commission applied Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and the methodology set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines') (recitals 436 and 442 to the contested decision). In accordance with that methodology, the fine imposed on the applicant was determined according to the gravity and duration of the infringement (recital 437 to the contested decision).
- 18 In particular, the infringement was categorised as 'very serious' in so far as it essentially consisted in regularly coordinating prices, price increases, other commercial conditions and customer allocation (recital 440 to the contested decision). The Commission also took account of the secret and intentional character of the anti-competitive conduct and the fact that the entire territory of the Netherlands and the entire beer market, both the on-trade sector and the off-trade sector, were affected by the infringement (recitals 453 and 455 to the contested decision). In addition, the Commission stated that the actual effect on the Dutch market of the anti-competitive conduct was not taken into account in the present case, as it was impossible to measure (recital 452 to the contested decision).
- 19 Furthermore, the Commission applied differential treatment to the applicant in order to take account of its effective economic capacity and its individual weight in the anti-competitive conduct established. To that end, the Commission used the sales figures for beer sold by the applicant in the Netherlands in 1998, the last full calendar year of

the infringement. On that basis, the applicant was placed in the third of three categories, in respect of which the starting amount of the fine was EUR 17 million (recitals 462 and 464 to the contested decision).

- 20 In addition, as the applicant had taken part in the infringement from 27 February 1996 to 3 November 1999, that is to say, for a period of three years and eight months, that starting amount was increased by 35% (recitals 465 and 469 to the contested decision). The basic amount was therefore fixed at EUR 22 950 000 (recital 470 to the contested decision).
- 21 Lastly, the Commission granted a reduction of EUR 100 000 in the amount of the fine since it acknowledged that in the present case the length of the administrative procedure had been unreasonable (recitals 495 to 499 to the contested decision).

Procedure and forms of order sought

- 22 By application lodged at the Registry of the General Court on 4 July 2007, the applicant brought the present action.
- 23 By decision of 10 February 2010, the Court referred the case to the Sixth Chamber (Extended Composition) in accordance with Article 14(1) and Article 51(1) of its Rules of Procedure.
- 24 By way of measures of organisation of procedure of 12 February 2010, the Court sent a number of written questions to the Commission, which replied within the period allowed.

25 The parties presented oral argument and replied to the questions put by the Court at the hearing on 24 March 2010.

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

27 The applicant claims that the Court should:

- annul in whole or in part the contested decision, to the extent to which it concerns the applicant;
- in the alternative, reduce the fine imposed on the applicant;
- order the Commission to pay the costs.

28 The Commission contends that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

Law

- 29 In support of its action, the applicant relies on six pleas, alleging, first, a breach of the principle of sound administration, second, an infringement of Article 81 EC, disregard for the presumption of innocence, and a breach of the principle of legality and of the obligation to state reasons, third, an error of law and of fact in the determination of the duration of the infringement, fourth, an infringement of Article 23 of Regulation No 1/2003 and of the Guidelines and breaches of the principle of equal treatment and the principle of proportionality in determining the amount of the fine, fifth, a breach of the reasonable time principle and, sixth, a breach of essential procedural requirements, of the principle of sound administration and of the rights of the defence, consisting in the refusal to grant access to the replies of other parties involved to the statement of objections and to a document forming part of the file.
- 30 The Court considers that the second and third pleas, which seek, in essence, to challenge the finding of the infringement, should be examined first, then the first and sixth pleas, which allege procedural defects, and lastly, the fourth and fifth pleas, which concern, respectively, the determination of the amount of the fine and the length of the administrative procedure.

The second plea, alleging an infringement of Article 81 EC, disregard for the presumption of innocence, and a breach of the principle of legality and of the obligation to state reasons

Arguments of the parties

- 31 The applicant essentially claims that the Commission has misinterpreted and misapplied the concepts of 'agreement', 'concerted practice' and 'single and continuous

infringement' and has erred in law and in the assessment of the facts in respect of the finding of the infringement in both the on-trade sector and the off-trade sector, including the private label beer segment.

32 The Commission contests the applicant's arguments.

Findings of the Court

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

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

35 An agreement within the meaning of Article 81(1) EC can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (see, to that effect, *HFB and Others v Commission*, cited in paragraph 34 above, paragraphs 151 to 157 and 206).

- 36 The concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 115, and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 158).
- 37 In this respect, Article 81(1) EC precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which the operator concerned has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to restrict competition (see, to that effect, *Commission v Anic Partecipazioni*, cited in paragraph 36 above, paragraphs 116 and 117).
- 38 It should be borne in mind that, as regards establishing an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 58, and *Commission v Anic Partecipazioni*, cited in paragraph 36 above, paragraph 86).
- 39 Thus, the Commission must produce sufficiently precise and consistent evidence to establish the existence of the infringement (see, to that effect, Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited).
- 40 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (Joined Cases T-67/00, T-68/00, T-71/00

and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paragraphs 179 and 180 and the case-law cited).

- 41 As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the operators concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraphs 55 to 57).
- 42 Where the Commission has relied on documentary evidence in support of its finding of the existence of an anti-competitive agreement or practice, the burden is on the parties who are contesting that finding before the Court not only to put forward a plausible alternative to the Commission's view but also to allege that the evidence relied on in the contested decision to establish the existence of the infringement is insufficient (*JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 187).
- 43 As regards the scope of review by the Court, according to settled case-law, where the Court is faced with an application for the annulment of a decision applying Article 81(1) EC, it must undertake in a general manner a comprehensive review of the question whether or not the conditions for the application of Article 81(1) EC are met (see Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, paragraph 62 and the case-law cited).

- 44 Any doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed, in accordance with the principle of the presumption of innocence, which, as a general principle of European Union ('EU') law, applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (*Hüls v Commission*, cited in paragraph 36 above, paragraphs 149 and 150, and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others v Commission* [2006] ECR II-3567, paragraphs 60 and 61).
- 45 The question whether, in the present case, the Commission has established to the requisite legal standard that the applicant's conduct amounted to an infringement of Article 81(1) EC must be examined in the light of those considerations.

— The statement by InBev

- 46 It should be noted, first of all, that the Commission relies to a large extent (see, in particular, recitals 40 to 62 to the contested decision) on the statement made by InBev, in connection with its leniency application, by letters of 28 January and 3, 25 and 29 February 2000, supplemented by the annexed statements made by the five managers from InBev (recitals 34 and 40 to the contested decision; together 'the statement by InBev').
- 47 According to the contested decision, the statement by InBev indicated the existence of 'various forms of concerted action... between the brewers on the Dutch beer market', drawing a distinction between the official meetings of the CBK general assembly, the informal meetings of the CBK Working Party on finance and the 'other meetings' held in parallel and known as the 'Catherijne consultation', whose composition varied and for which, InBev states, it has not found any written records. The 'other meetings'

could be subdivided, inter alia, into: '(i) meetings of the on-trade managers of the four main brewers (Heineken, Interbrew, Grolsch and Bavaria)...; (ii) joint meetings of the on-trade managers and the off-trade managers (two in 1998) and (iii) meetings of the off-trade managers (one in 1999...)' (recitals 41 to 46 to the contested decision).

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

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

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

51 One manager from InBev claims that he does not know the precise content of that agreement and another manager describes it as 'a very complex and vague agreement on sliding scales (discounts granted to the on-trade), in which we have never been involved', stating that '[t]he consultation consisted in a bimonthly meeting of the

on-trade managers, at which they discussed known infringements of the “rule” (although this was vague; they talked about market excess)’ (recital 48 to the contested decision).

- 52 With regard, secondly, to the off-trade sector, according to the statement by InBev, the discussions concerned both price levels in general and the specific subject of private label beer.
- 53 As regards price levels in general, one of the managers from InBev states that ‘it was normal for a brewery to increase its prices after informing its fellow brewers in advance ...; the initiative always came from one of the big breweries, and generally from Heineken[; i]n such cases, the other breweries had the necessary time to take a position[; w]hilst the breweries broadly aligned their prices with one another, they each had and maintained their own pricing policy’ (recital 51 to the contested decision).
- 54 As regards private label beer, InBev states that the discussions on prices had been conducted between the Dutch operators in the segment (Bavaria and Oranjeboom, subsequently acquired by Interbrew) since 1987. It adds that ‘[t]he two parties understood, after discussing the matter together, that they would not accept any intrusion in their respective customer bases for private labels which resulted in a loss of volume’ (recital 52 to the contested decision).
- 55 With regard to the involvement of Heineken and of Grolsch in this sector, according to the statement by InBev, ‘[t]he Dutch market is characterised by a significant gulf between prices for private label beer (“B brands”) and [other brands (“A brands”);]

Heineken, which is not present in the private labels segment, has always rejected price increases for A brands as long as the price of private label beer did not increase; in this way, it exerted indirect pressure, in particular on private label producers such as Bavaria and Interbrew' (recital 53 to the contested decision).

- 56 InBev states that prices for private labels were also discussed by the four brewers, in other words also in the presence of Grolsch, in the context of the more general topic of the price gaps to be maintained between prices for beer brands. According to the statement by InBev, 'Heineken and Grolsch did not increase their prices for years and the prices of other brewer's label beers and private label beers did not increase either; in recent years, Bavaria and Interbrew have increased their prices, followed by Grolsch' (recital 54 to the contested decision). It is also pointed out that '[t]hree to four years ago, these informal consultations had been incorporated into the Cathelijne consultation on the on-trade, in which representatives of the CBK also participated; after a few meetings, it was decided to split these meetings back into off-trade meetings and on-trade meetings' (recital 54 to the contested decision).
- 57 In addition, InBev states that for the Belgian brewer Martens to obtain a certain market share since 1996 to 1997 it had been necessary for 'an agreement between Belgian and Dutch brewers operating on the private labels market; two meetings took place [in a hotel in] Breda in 1998 [...; i]t was agreed to respect the relevant volumes for private labels sold to customers established in the Netherlands and in Belgium' (recital 55 to the contested decision).
- 58 According to the statements by the managers from InBev, the 'other meetings' were organised to give each other reassurance as to a 'limited aggression' on the market (recital 46 to the contested decision).

- 59 In its reply to the request for information, dated 19 December 2001, InBev states that ‘agendas for the previous years and notes taken at the informal meetings were destroyed at the end of November 1998[; i]t was at about that time that the existence of concerted action between Dutch brewers started to be revealed on the market and fears began of an inspection by the Dutch competition authority[; a]gendas were also destroyed in the following years’ (recital 61 to the contested decision).
- 60 It must be noted from the outset that there is no provision or general principle of EU law that prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Articles 81 EC and 82 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the EC Treaty (see *JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 192 and the case-law cited).
- 61 In the present case, the applicant does not contest the information given in the statement by InBev to the effect that meetings took place between representatives of the Dutch beer producers. Nor does it contest that it was represented at most of those meetings or that, at the meetings, discussions were held on price levels on the Dutch market and on the application of discounts to customers in the on-trade sector.
- 62 In those circumstances, the Commission was entitled to find that the meetings mentioned in the statement by InBev took place and that representatives of the applicant actually participated in at least some of those meetings.

- 63 The applicant nevertheless disputes that the discussions which were held at the meetings in question led to the conclusion of an agreement or an undertaking to engage in an anti-competitive concerted practice. It claims that those meetings dealt with legitimate subjects and that, in so far as the situation on the market was discussed, this was not for anti-competitive purposes. In this regard, the applicant contests the reliability of the statement by InBev, claiming that it is vague, incoherent and inherently contradictory.
- 64 In particular, as regards the contradictory character of the statement by InBev, the applicant points out that it contains a number of exculpatory statements.
- 65 First, there are passages in the supplementary statement by InBev of 3 February 2000 which state: “[W]e talked above all to give each other the impression that we would remain calm on the market. There was little or no discussion of sliding scales or points of sale. In fact, everyone was taking everyone else for an idiot.” In recent years, these meetings increasingly lost their substance and the consultation took on a more vague character’ (recital 46 to the contested decision).
- 66 Second, the applicant refers to certain passages of the statements by managers from InBev according to which: ‘there was no agreement for the food sector’; ‘price increases were not, however, applied under agreements’; ‘I am not aware of agreements in the “private labels” sector’; ‘that meeting did not have much substance. It was more a pleasant meeting without a specific agenda. General comments were made about discounts. I had the impression that there had already, for some years, been a sort of sliding scale system or a rule on discounts, but that was never explicitly stated. We only spoke about overall discount levels in very general terms, which was an opportunity to point out certain incidents’; ‘[Interbrew] did not participate in any agreement on prices’; ‘nor was there any concerted action. We acted completely independently

and, when there were price increases for all beers in 1999, we increased A brands (after Bavaria and Grolsch had done so a few months previously) and there was strong resistance from our customers in favour of private labels... we therefore acted perfectly lawfully’.

- 67 The applicant claims that the abovementioned statements are incompatible with the Commission’s conclusions as to the existence of an infringement of Article 81 EC. According to the applicant, it follows that the price increases applied in the off-trade sector were not agreed or coordinated, that Interbrew determined its selling prices completely independently, that the Dutch brewers have always been in healthy competition, and that there has been no agreement between the brewers on reductions granted to the on-trade sector.
- 68 It should first be stated that the inferences made by the applicant on the basis of certain information in the statement by InBev, indicating the general nature of the discussions, the absence of any agreement for certain sectors and the absence of effect of the discussions on the conduct of the brewers on the market, cannot in themselves call into question the Commission’s finding relating to the existence of the infringement.
- 69 As regards the allegedly general character of that statement, it must be pointed out that the Commission often has to prove the existence of an infringement under conditions which are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated therein. Whilst it is necessarily incumbent upon the Commission to establish that an illegal market-sharing agreement was concluded, it would be excessive also to require it to produce evidence of the specific mechanism by which that object was attained. Indeed, it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was

entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established. Undertakings are able properly to defend themselves in such circumstances provided that they have an opportunity to comment on all the evidence relied on against them by the Commission (*JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 203; see also, to that effect, Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729, paragraph 50).

- 70 Second, as regards the allegedly contradictory character of the statement by InBev, in that it purportedly contains information on the absence of any effect of the conduct at issue on the market, it follows from the actual text of Article 81 EC that agreements and concerted practices between undertakings are prohibited, regardless of their effect on the market, when they have an anti-competitive object (*Hüls v Commission*, cited in paragraph 36 above, paragraphs 163 to 166, and Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 29).
- 71 Thus, because the Commission has established the existence of agreements and concerted practices which have an anti-competitive object, this finding cannot be refuted by information relating to the non-application of cartel arrangements or the absence of any effect on the market.
- 72 As regards the purported information regarding the absence of any agreement in the off-trade sector or in the on-trade sector, it should be noted that the passages relied on by the applicant, read in context, certainly do not rule out the existence of an agreement or of a concerted practice in the sectors concerned.

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

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

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

75 As regards the alleged absence of an agreement and of respect for an agreement in the on-trade sector, the passages of the supplementary statement by InBev of 3 February 2000 and of the statements by the managers from InBev, cited in paragraphs 65 and 66 above, clearly do not have the effect of ruling out the existence of an agreement on the discounts granted to customers in that sector. In pointing out that the discussions were general in nature and rarely related to sliding scales or specific points of sale, those passages concern the level of detail of the discussions, without refuting the existence of an agreement within the meaning of Article 81 EC. They cannot therefore be considered to refute the information given in the statement by InBev to the effect

that '[t]here was an agreement in principle on setting maximum discounts by volume for the on-trade sector' (recital 48 to the contested decision).

- ⁷⁶ In the light of the foregoing, the applicant's arguments concerning the allegedly vague and contradictory character of the statement by InBev and, consequently, the supposedly selective way in which the Commission used that statement are not valid.
- ⁷⁷ Lastly, as regards the general assessment of the reliability of the statement by InBev, the appropriate view, contrary to the applicant's contention, is that the Commission was entitled to attribute to the statement by InBev particularly great probative value, since it is an answer given on behalf of an undertaking which as such carries more weight than that of an employee of the undertaking, whatever his individual experience or opinion. It should also be noted that the statement by InBev represented the outcome of an internal investigation carried out by the undertaking and that it was submitted to the Commission by a lawyer, who was under a professional obligation to act in the interests of that undertaking. He could not therefore lightly admit the existence of an infringement without evaluating the consequences of so doing (see, to that effect, *Case T-23/99 LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 45, and *JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 206).
- ⁷⁸ Furthermore, according to case-law, even if some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility that they might tend to play down the importance of their contribution to the infringement and maximise that of others, the fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction of the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of the cooperation

of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice (Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, paragraph 70).

- 79 Admittedly, it must be borne in mind that an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (see, to that effect, Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571, paragraph 91, and *JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 219).
- 80 The statement by InBev cannot therefore suffice, in itself, to establish the existence of the infringement, but must be corroborated by other evidence.
- 81 Nevertheless, in view of the reliability of the InBev statement, the degree of corroboration required in this case is lesser, in terms both of precision and of depth, than would be the case if that statement were not particularly credible. Thus, it must be concluded that, if it were to be held that a body of consistent evidence corroborated the existence and certain specific aspects of the practices mentioned in the statement by InBev and referred to in Article 1 of the contested decision, that statement might be sufficient in itself, in such a case, to constitute evidence of other aspects of the contested decision. Moreover, provided that a document does not manifestly contradict the statement by InBev as to the existence or the essential content of the contested practices, the fact that it provides evidence of significant elements of the practices which it described is sufficient to endow it with corroborative value within the body of inculpatory evidence (see, to that effect, *JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 220 and the case-law cited).

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

— Other evidence

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

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

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

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

'adapt prices

off-trade high – low

Bavaria – Interbrew consultation

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

Martens

Schultenbrau!! 89 ct

increase only of cask price

arguments

only Hein + Grolsch fully

Friesland US Heit

Interbrew \

| increase together

Bavaria /

->... also

increase bottom more than top

air

agreements

stabilise discount for bars 7.5 per cask Heineken

prepare representatives vis-à-vis possible agreements

Interbrew \

| air can be used

Grolsch /.

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

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

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

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

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

‘Catherijne Club 1/5 – 97

“internal” transfers within the group

must also respect the “sliding scale”

... “The Hague”

Monster ZH [southern Holland] higher competing offer’

⁹¹ According to the Commission, these notes confirm that the brewers were discussing a ‘sliding scale’ for the commercial conditions granted to individual points of sale, in the case of transfers from one group to another, but also in cases of transfers within a single group (recital 99 to the contested decision).

⁹² In recital 100 to the contested decision, the Commission states that the abovementioned notes also contain the names ‘Heineken/Amstel/Brand/Grolsch’ on the first line and the names ‘Interbrew/Bavaria’ on the second line, with the two lines being linked by a bracket followed by the words ‘no price increases’. The Commission infers that the distinction between the A brands, owned by Heineken and Grolsch, and the B brands, owned by Interbrew and Bavaria, was the focus for the discussions between the brewers concerning the price increases for beer (recital 103 to the contested decision).

⁹³ In recital 117 to the contested decision, the Commission mentions the handwritten notes by a member of the board of directors of Bavaria concerning the meeting held on 17 December 1997. It cites the following passage:

‘(2) Price situation: March/April

one-stage rocket/two-stage rocket

(a) Heineken expects little fuss!! Heineken 18.59

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

⁹⁴ The Commission infers that the brewers present at the meeting held on 17 December 1997, including Bavaria, Grolsch and Heineken, were discussing price increases and possible reactions to price increases (recital 127 to the contested decision).

⁹⁵ In recital 129 to the contested decision, the Commission mentions a passage from the handwritten notes by an on-trade manager for Bavaria concerning the meeting held on 12 March 1998:

'Not much happened since 1 January

A brands no panic in relation to price Hein

9.95 reduction from 11.49 little point Int

9.75 9.36 Bavaria

2x 4.95 4.75 }→

private labels

prices in the lower market segment

... mid-March Bavaria something

below Amstel (17) Bavaria (15)

from 9.75 to 10.75 if nothing

happens, then Grolsch and Hein

increases pocket brewery

→ fix agreement ... and Dick

This must be “demonstrable” via Nielsen otherwise

nothing will happen.

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

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

‘Bav interest 4%? 6 1/2

unless

there is an advertising commission.’

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

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

‘Football clubs concert halls theatres

Student associations

...

Grosch

above/outside sliding scale

130

... (125) 124.5.

¹⁰⁰ According to the Commission, it is clear that the brewers held a specific discussion on precise on-trade customers in relation to a 'sliding scale', corroborating the statement by InBev as to the existence of an agreement known as the 'sliding scale' (recital 147 to the contested decision).

¹⁰¹ In recital 156 to the contested decision, the Commission mentions a passage from the handwritten notes by a member of the board of directors of Bavaria relating to the meeting held on 3 July 1998:

'... Heineken increased

... >> Heineken cask beer.’

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

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

‘ Cafe ... 1800 ...

... 400 ...

60 per hl

650.000, - V.B.K.’

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

105 In recital 174 to the contested decision, the Commission mentions a document dated 30 June 1998 and a Heineken price list announcing new prices applicable to bottled beer and draft beer (beer in tanks and beer in casks) from 1 June 1998, discovered in the office of an off-trade sales manager for Grolsch, with the note ‘agenda c[ommiss]ie CBK’ (CBK Working Party on agenda). According to the Commission,

these documents corroborate the statement by InBev to the effect that both off-trade prices and competition on the on-trade market were discussed at the meetings in question (recital 175 to the contested decision).

¹⁰⁶ In recital 179 to the contested decision, the Commission mentions a Heineken internal memo dated 14 October 1998, addressed to Heineken's management team, which reads: 'the price increase promised by Bavaria in the CBK is not apparent in the [figures] from Nielsen'. According to the Commission, that memo reinforces the conclusion that, at the meeting held on 12 March 1998, Bavaria had announced its intention to be the first to increase its prices in the off-trade sector, the other brewers were to follow subsequently and the increases implemented by Bavaria were to be 'demonstrable' in the figures from Nielsen (recital 180 to the contested decision).

¹⁰⁷ In recital 184 to the contested decision, the Commission mentions a letter sent to a manager of Heineken's Netherlands on-trade unit by a marketing and off-trade manager from the Heineken's Brand BV brewery, regarding his discussion with a member of Bavaria's board of directors:

'At the Noordwijk food fair on 9 September [1998], [a member of Bavaria's board of directors] spoke to me about the matter ... and Heineken's reaction. In short, he thought that Heineken could have sat down at the negotiating table with the top management at Heineken and Bavaria on the Netherlands on-trade market much earlier. The hectolitres lost could then have been compensated for in some other way. Furthermore, he added that in the long term Bavaria perhaps had its sights on other potential customers in the on-trade sector who wished to switch voluntarily (with the emphasis on "voluntarily", as in the case of ..., in his view) to Bavaria [first name of a Heineken on-trade manager for the Netherlands], it goes without saying that these comments are part of the well-known rhetoric of I did not want to keep this information from you. All the best for your discussion.'

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

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

sales '98

beer price →

pin-partition crates		actions/cat II
----------------------	--	----------------

crates		bottom
--------	--	--------

		cask
--	--	------

		NMA'
--	--	------

110 Accordingly, in the view of the Commission, the discussions on beer prices focused on four aspects: first, promotional measures in the off-trade market, second, the price of cheaper and private label beers, third, the price of cask beer, the large containers

used in the on-trade sector of the Dutch beer market and, fourth, the Dutch competition authority, the NMA (recital 194 to the contested decision).

- 111 In recitals 197 and 199 to the contested decision, the Commission mentions the list of subjects for discussion at the meeting held on 8 January 1999, on which a representative of Grolsch had noted the abbreviation ‘BP’, which is interpreted by the Commission as ‘beer price’ (bierprijs) or ‘floor price’ (bodemprijs), and ‘P[ri]vate L[abel] 50 ct. more’. The Commission infers from these notes that, as far as cask beer is concerned, the brewers had detailed discussion of prices (recital 203 to the contested decision).
- 112 In recitals 212 and 213 to the contested decision, the Commission refers to a document which contains a reference to three contacts at management level between Heineken and Grolsch on around 5 July 1999, mentioning a ‘price war’ between the two brewers. The Commission infers that Heineken made direct contact with Grolsch about reductions, one and a half months before temporary reductions, made by a chain of shops to which Grolsch refused to grant compensation, failed to be actually implemented (recital 213 to the contested decision).
- 113 In recital 224 to the contested decision, the Commission mentions a number of documents included in its administrative file which show the subjects discussed at the bilateral meetings between Bavaria and InBev on 8 March 1995, in the second half of March 1997, on 12 May 1997, on 19 June 1997 and on 8 September 1997. It cites the following passages:
- meeting on 8 March 1995: ‘[Bavaria] and [Interbrew Nederland] both said that they had serious problems with Mr... in the Netherlands’ (footnote 491 to the contested decision);

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

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

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

¹¹⁴ The Commission interprets these documents as proof that the bilateral consultations between Bavaria and InBev made it possible to maintain an ‘armed peace’ or a ‘non-aggression pact’ as regards private label beer (recital 223 to the contested decision).

¹¹⁵ In recital 227 to the contested decision, the Commission mentions the letter dated 26 September 1997, sent by an exports manager for Interbrew Nederland to an exports manager at Interbrew’s head office regarding ‘beer sales in Germany and private labels’:

‘I recently spoke about this with our main competitor in the Netherlands and on that occasion I learnt that they were to meet... on whether or not to increase the volume of TIP beer for 1998. I asked about the price level towards which they expected to work

and he confirmed to me exactly the same price, minus a contribution earmarked for the head office of..., and the fact that he would accept a volume of around 200 000 hl at that price.’

- 116 According to the Commission, it is clear that Interbrew requested and obtained from Bavaria detailed information on prices and volumes relating to the possible supply, by Bavaria, of private label beer to a major German retail chain. The Commission takes the view that this confirms the statement by InBev according to which Interbrew and Bavaria exchanged information on the price levels offered to customers of private label beer. In addition, the Commission asserts that this fact was acknowledged by InBev in a letter dated 21 February 2006 (recital 228 to the contested decision).
- 117 In recital 234 to the contested decision the Commission mentions the following statement by the Haacht brewery regarding the meeting held on 14 or 15 June 1998 between Bavaria, Interbrew Nederland and the Belgian brewers Interbrew Belgique, Alken-Maes, Haacht and Martens:

‘In the course of that meeting, the Dutch breweries were told about the content of the exchange of information between the Belgian participants. The Dutch breweries consented to an exchange of information on volumes, types of packaging, the length of contracts and possible renewal dates, and customers. With regard to prices, the participants agreed in principle not to exchange information on this subject...

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

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

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

'Martens → nothing has ever taken shape in the Netherlands

→ bottom — market — price breaker

|→ price offers are made

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

...

7.68 [circled]

Martens — “price drop Belgium”

now NL →...

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

only for ...

Pilsener ...

/\ / \

multiple single

... – “decided” |→ at Interbrew

CAT I+II:

¹²⁰ According to the Commission, these notes confirm that Interbrew Belgique took the initiative at a meeting on private label beer during which it decided that the contract with a retail purchasing organisation ‘would go to Interbrew in the Netherlands’ (recital 237 to the contested decision).

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

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

...

At the time of the meeting held on 14 or 15 June 1998,... Interbrew had reached agreement with... on supplies of category I... and category II beer. In the course of that meeting, I reported on the discussions and on the agreement reached with... for two reasons. Firstly, I wanted to confront Martens with the offer which it had made to..., since it had always denied having made price offers in the Netherlands. Secondly, I was keen to inform the other participants that they should no longer make offers to..., in view of the agreement concluded between Interbrew and.... Line n of the [document referred to in recital 236 to the contested decision] bears witness to my communication relating to the conclusion of the contract for the supply of category I and category II beers between... and Interbrew. The existence of that agreement... is evident from the fax of 24 June 1998.’

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

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

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

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

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

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

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

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

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

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

- 128 It should be stated that the evidence set out above corroborates the statement by InBev and justifies the finding that representatives of Heineken, Grolsch, Interbrew and Bavaria met regularly in a cycle of informal meetings known as the ‘Catherijne consultation’ or ‘Working Party on agenda’, whose composition varied (statement by InBev cited in recital 45 to the contested decision; other evidence examined in

recitals 65 to 222 to the contested decision). The 18 meetings mentioned in the contested decision, which are part of that cycle, took place on 27 February 1996, 19 June 1996, 8 October 1996, 8 January 1997, 1 May 1997, 2 September 1997, 16 December 1997, 17 December 1997, 12 March 1998, 9 April 1998, 3 July 1998, 15 December 1998, 8 January 1999, 4 March 1999, 10 May 1999, 11 August 1999, 19 August 1999 and 3 November 1999.

¹²⁹ As far as the content of the discussions held in those meetings is concerned, the above-mentioned evidence corroborates the statement by InBev and proves the following:

— with regard to the off-trade sector:

- the four brewers were discussing prices (statement by InBev cited in recital 51 and other evidence cited in recitals 76, 129, 156, 174, 193, 212 and 213 to the contested decision) and increases in the price of beer in the Netherlands (statement by InBev cited in recital 51; other evidence cited in recitals 76, 89, 117 and 179 to the contested decision);
- discussions on prices were also pursued through bilateral contacts, including between Grolsch and Heineken in July 1999 (document cited in recitals 212 and 213 to the contested decision);
- concrete price proposals were discussed (Interbrew internal letter mentioned in recital 89 to the contested decision) and information exchanged was sometimes quite detailed (documents mentioned in recitals 129 and 174 to the contested decision);

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

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

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

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

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

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

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

- with regard to private label beer:
 - from 1995, the two Dutch producers of private label beer (Interbrew and Bavaria), on several occasions, expressed their concerns over the plans by the Belgian brewer Martens to penetrate the Dutch market in that sector (statement by InBev cited in recital 55; other evidence cited in recitals 224, 236, 238 and 248 to the contested decision);

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

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

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

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

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

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

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

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

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

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

¹³⁰ It is in the light of this evidence that it is necessary to examine the applicant's arguments relating to the three aspects of the conduct in question, consisting, first, in coordinating prices and price increases for beer in the Netherlands, in both the on-trade and the off-trade sector, including with regard to private label beer, second, in occasionally coordinating other commercial conditions offered to individual customers in the on-trade sector in the Netherlands and, third, in occasionally coordinating customer allocation, in both the on-trade and the off-trade sector in the Netherlands (Article 1 of and recitals 257 and 258 to the contested decision).

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

- 131 The applicant claims, in essence, that the handwritten notes produced by the representatives of the brewers at the meetings in question are interpreted by the Commission in a partial and even highly tendentious manner on several occasions.
- 132 In particular, it contests the interpretation of the evidence mentioned in recitals 76, 89, 92, 100, 117, 129, 143, 156, 179, 184, 193, 199, 227, 228, 236 and 238 to the contested decision (see paragraphs 86 to 95, 99 to 101, 106 to 111, 115, 116, 119 and 121 above).
- 133 Before examining the applicant's arguments concerning the abovementioned evidence, it should be noted that the majority of the factual findings set out in paragraphs 128 and 129 above are based on several pieces of evidence.
- 134 Firstly, in various parts of the application, the applicant refers to the documentary evidence mentioned in recitals 76, 100, 117, 156, 193 and 199 to the contested decision to claim, in essence, that that evidence cannot prove coordination of prices in both the off-trade sector, including the private label beer segment, and the on-trade sector.
- 135 With regard to this point, it should be noted, first of all, that the fact that the brewers discussed prices and possible price increases in those sectors is also shown by the documents mentioned in recitals 174, 212, 213 and 249 to the contested decision. Whilst it is true that those documents primarily concern the discussions between Heineken and Grolsch, the fact remains that the applicant knew about those

discussions, at least some of which took place in its presence (see the document cited in recital 249 to the contested decision and in paragraph 125 above), and that it can therefore be held responsible (see, to that effect, *Commission v Anic Partecipazioni*, cited in paragraph 36 above, paragraphs 80 to 83).

¹³⁶ It should also be noted that, contrary to the claims made by the applicant, it is clear from the documents cited in recitals 76, 100, 117 and 156 to the contested decision that there was much more than mere discontent among the brewers over off-trade price levels. These documents prove that in their discussions they touched on the situation of certain customers and specific points of sale and mentioned precise figures for prices and discounts.

¹³⁷ Secondly, the applicant claims that the Heineken internal letter concerning Bavaria's poaching of a student association (recital 184 to the contested decision) is the only piece of evidence which specifically bears witness to discussions between the brewers (in this instance Heineken and Bavaria) on the subject of on-trade customers being stolen (see paragraph 107 above). According to the applicant, it can be inferred from that letter, at the very most, that the representative of Heineken expressed his discontent at the loss of a very big on-trade customer. The applicant denies, moreover, the existence of a system of compensation between the brewers in the event of customers being poached, claiming that the existence of such a system would be incompatible with the existence of the alleged concerted action on customer allocation.

¹³⁸ These claims made by the applicant are not plausible. In the contested decision, the Commission rightly notes that the sentence '[t]he hectolitres lost could then have been compensated for in some other way', in the text of the letter in question, indicates that there was no discussion between Heineken and Bavaria on the need for compensation, but only on the means of obtaining compensation (recital 185 to the contested decision), and that the use of the words 'well-known rhetoric', 'emphasis'

and 'voluntarily' signifies that, according to the author, who comes from Heineken, Bavaria is suspected of failing to respect a rule that brewers must not actively solicit on-trade customers from other brewers (recital 188 to the contested decision).

- ¹³⁹ Consequently, the evidence mentioned in recitals 184 to 188 to the contested decision corroborates the statements contained in the statement by InBev, cited in recital 48 to the contested decision, regarding the existence of an arrangement not to steal on-trade customers.
- ¹⁴⁰ Thirdly, the applicant claims that, despite the mention of a 'consensus' in the letter of 25 March 1997 (cited in recital 89 to the contested decision), of a promise by Bavaria in the Heineken internal memo of 14 October 1998 (cited in recital 179 to the contested decision) concerning the price increase in the off-trade sector and the exact level of such an increase in the handwritten notes made by an on-trade manager for Bavaria (cited in recital 129 to the contested decision), and the discussion of discounts granted to the on-trade sector, reflected in the handwritten notes cited in recitals 92 and 143 to the contested decision, the brewers continued to apply their strategies on the market independently.
- ¹⁴¹ With regard to the statement in the Heineken internal memo (mentioned in recital 179 to the contested decision) according to which 'the price increase promised by Bavaria in the CBK is not apparent in the [figures] from Nielsen', the applicant comments that the use of the term 'promise' to describe its price increase announcement, which had been known about on the market for some months, does not constitute convincing proof of a cartel.

¹⁴² However, it should be noted that, as the Commission rightly states in recital 182 to the contested decision, to interpret the word ‘promise’ as simply ‘mentioning’ a price increase is a departure from its ordinary meaning. The existence of a commitment by the applicant to increase its prices is corroborated by the mention of the fact that the increase ‘is not apparent in the [figures] from Nielsen.’ The supermarket cash register data in question were used as a monitoring tool through which the price increase by Bavaria was to be made ‘demonstrable’ (recital 133 to the contested decision). The reference to those data, which also appears in the handwritten notes by the on-trade manager for Bavaria (cited in recital 129 to the contested decision), falls more logically into the context of monitoring the implementation of a commitment than verifying a simple mention.

¹⁴³ In addition, the existence of a consensus to increase prices before 1998 is very clear from the Interbrew internal letter of 25 March 1997 (cited in recital 89 to the contested decision). With regard to the applicant’s argument relating to the fact that no price increase was actually implemented before 1998, it is sufficient to note that the simple failure to execute an agreement on prices does not in itself mean that the agreement itself never existed.

¹⁴⁴ The fact that the price increase mentioned in the letter was to happen ‘before 1998’, when the abovementioned evidence was produced in 1998, also cannot refute the existence of a link between those documents. It is perfectly conceivable that, on account of the difficulties connected with the negotiation of the arrangements for implementation (in particular, the differentiated price increase for A and B brands referred to in the Interbrew internal letter), the price increase initially planned for a date in 1997 was first put back to the following year and then abandoned by the brewers.

¹⁴⁵ With regard to the applicant's claim that, despite the discussion of discounts granted to the on-trade sector, the brewers continued to apply their own strategies on the market independently, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That will be all the more true where the undertakings concert together on a regular basis over a long period, as was the case here (see, to that effect, *Hüls v Commission*, cited in paragraph 36 above, paragraph 162).

¹⁴⁶ Fourthly, with regard to its bilateral consultation with Interbrew in the private label beer segment, first of all, the applicant claims that the Interbrew internal letter dated 26 September 1997 (cited in recital 227 to the contested decision) and the statement by InBev of 21 February 2006 (cited in recital 228 to the contested decision) concern a customer established in Germany and cannot therefore, in themselves, constitute evidence of an infringement concerning the Dutch market. Second, as regards the evidence relating to the meeting held on 14 or 15 June 1998, namely the handwritten notes by one of the applicant's managers (cited in recital 236 to the contested decision) and the passage from the statement by InBev of 21 February 2006 (cited in recital 238 to the contested decision), according to which it was decided that a contract with a retail purchasing organisation would go to Interbrew in the Netherlands and the manager from InBev informed the other participants that they should no longer make offers to that organisation, the applicant claims that it is clear from the evidence in question that that decision had already been taken at the time of the meeting. According to the applicant, that evidence does not therefore show concerted action between itself and the other brewers on the future supplier for the organisation in question.

¹⁴⁷ It should be noted in this regard that the evidence relied on by the Commission to demonstrate bilateral concerted action between the applicant and Interbrew is not limited to that mentioned in paragraph 146 above, but also includes the documents mentioned in recital 224 to the contested decision, concerning a series of bilateral

meetings between the applicant and Interbrew, the interpretation of which is not contested by the applicant. It is apparent from those documents in particular that the subjects discussed included ‘the situation on the private labels market in the Netherlands and the fact that Bavaria had taken a customer from Interbrew... [and the] lower limit offer made to [the customer]’ (recital 224 and footnote 495 to the contested decision).

¹⁴⁸ In addition, even though the evidence mentioned in recitals 227 and 228 to the contested decision concerns a customer established in Germany and the evidence mentioned in recitals 236 and 238 addresses a *fait accompli*, the fact remains that that evidence provides a pertinent indication as to the existence of a practice between the applicant and Interbrew of exchanging sensitive information on the market and thus corroborates the evidence mentioned in recital 224 to the contested decision in support of the finding of bilateral concerted action between those undertakings in the private label beer segment.

¹⁴⁹ Fifthly, with regard to its participation in the meetings in Breda with Interbrew Nederland and the Belgian brewers Interbrew Belgique, Alken-Maes, Haacht and Martens, the applicant points out that those meetings were organised on the initiative of Interbrew and makes reference to the following statements by the Belgian brewer Alken-Maes and Groupe Danone SA, cited in recitals 160 and 177 to Commission Decision 2003/569/EC of 5 December 2001 relating to a proceeding under Article 81 [EC] (Case IV/37.614/F3 PO/Interbrew and Alken-Maes) (OJ 2003 L 200, p. 1):

— Alken-Maes: ‘As regards the Dutch market, any exchange of information was refused’;

— Groupe Danone: ‘In addition, the private label market was not mapped out in its entirety, as the foreign brewers refused to take part’.

- 150 However, those statements must be interpreted in the light of the evidence mentioned by the Commission in recitals 234, 240 and 241 to the contested decision.
- 151 First of all, according to the statement by Haacht regarding the first meeting on 14 or 15 June 1998, the refusal to exchange information applied only to prices: ‘with regard to prices, the participants agreed in principle not to exchange information on this subject...’ By contrast, the Dutch brewers ‘... consented to an exchange of information on volumes, types of packaging, the length of contracts and possible renewal dates, and customers’. That statement also asserts that ‘the participants [in] the meeting considered that a neutral party should be given the job of centralising the exchange of information[; t]his request was made because the parties present on the Netherlands market did not trust the other parties[;] Haacht was invited to centralise the information since it was not active on the Netherlands market’.
- 152 Next, according to the statement by Haacht on the subject of the second meeting on 7 July 1998, at that meeting, ‘Haacht circulated the information collected on the Netherlands market’.
- 153 Lastly, according to the statement by an off-trade manager for InBev (recital 241 to the contested decision), ‘Bavaria and Interbrew communicated only the volumes for each private label and for each customer, since the [Belgian] breweries had also indicated the reductions[; t]his overview was produced by the commercial manager for Haacht[; h]e sent it to the private addresses of those present’.
- 154 In the light of this evidence, the applicant’s arguments regarding the absence of an agreement with the other participants in the meetings with a view to exchanging confidential business information cannot be accepted.

155 In the light of all the foregoing, in the contested decision the Commission set out a body of specific consistent evidence to demonstrate, to the requisite legal standard, the factual findings relating to the aspects of the infringement in question concerning the coordination of prices and price increases and customer allocation. Moreover, the validity of those findings is not called into question by the applicant's arguments concerning the evidence set out in paragraph 132 above.

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

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

157 The applicant claims that the Commission did not establish that the undertakings concerned coordinated commercial conditions, other than prices, granted to customers in the on-trade segment.

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

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

- 160 According to the Commission, this quotation therefore means that, at the meeting held on 27 February 1996, the brewers discussed the guarantees and financing granted or to be granted by one or more brewers to specific sales outlets (recital 68 to the contested decision).
- 161 However, it should be noted that the applicant proposes another plausible interpretation of the passage mentioned by the Commission, stating that it was part of a discussion on 'bad debtors'.
- 162 In recital 138 to the contested decision, the Commission mentions the handwritten notes by an on-trade manager for Bavaria relating to the meeting held on 12 March 1998, containing the following passage: 'Bav interest...%? unless there is an advertising allowance.' According to the Commission, this passage proves that a discussion was held concerning the level of interest rates applied to loans granted to on-trade points of sale (recital 142 to the contested decision).
- 163 However, even supposing that the Commission has correctly interpreted the handwritten notes, the isolated and laconic nature of such a reference and the absence of any specific information concerning participation by the other brewers in a discussion on the subjects in question do not allow those notes to be regarded as sufficient proof of the existence of collusion in relation to occasional coordination of certain commercial conditions.
- 164 In its answers to the questions asked by the Court, the Commission claims that the handwritten notes, mentioned in recitals 67 and 138 to the contested decision, are corroborated by the statement by InBev, according to which, first, the 'Catherijne' meeting on 12 March 1998 was devoted both to on-trade and off-trade matters and, second, the participants in the 'Catherijne' meetings consulted on investments in the on-trade sector in order to avoid taking customers.

- 165 It must nevertheless be stated that the two passages cited by the Commission and the reference made by the Commission to ‘the spirit of the statement by InBev’ do not offer a specific indication as to the existence of discussions between the brewers concerning the coordination of loan conditions and cannot therefore support the conclusion to that effect drawn by the Commission.
- 166 Consequently, it should be noted that the finding by the Commission relating to occasional coordination, between the brewers, of the loan conditions offered to individual on-trade customers is based on fragmentary and imprecise evidence.
- 167 In view of the isolated and laconic nature of the references made in the handwritten notes mentioned in recitals 67 and 138 to the contested decision and the alternative plausible interpretation suggested by the applicant and the absence of specific indications in this regard in the statement by InBev, it should be stated that the Commission did not demonstrate, to the requisite legal standard, that the infringement in question included ‘occasional coordination of other commercial conditions offered to individual consumers in the on-trade segment in the Netherlands’.
- 168 The finding made to this effect, in recital 258 to and in Article 1 of the contested decision, cannot therefore be regarded as established.
- 169 Consequently, the applicant’s arguments alleging an error of assessment of the facts relating to occasional coordination of other commercial conditions offered to individual customers in the on-trade sector must be accepted.

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

- ¹⁷⁰ The applicant claims that the finding by the Commission as to the existence of a complex of agreements and/or concerted practices between undertakings within the meaning of Article 81 EC stems from an error relating to the interpretation and the application of that provision (recitals 337 and 341 to the contested decision).
- ¹⁷¹ It should be stated, first of all, that, in the multilateral meetings and their bilateral contacts, on several occasions the four brewers exchanged sensitive information on the market (prices, the amount of discounts and specific offers to certain customers), which were sometimes fairly detailed (documents mentioned in recitals 129 and 174 to the contested decision) and included specific figures for prices (documents mentioned in recitals 76, 89, 117, 129 and 174 to the contested decision), discounts and commissions for reduction (documents mentioned in recitals 143 and 165 to the contested decision), as well as information on customers and points of sale both in the on-trade sector (documents mentioned in recitals 92, 143, 156, 165 and 184 to the contested decision) and in the off-trade sector (documents mentioned in recitals 76 and 156 to the contested decision).
- ¹⁷² Certain specific proposals concerning conduct on the market were also discussed, in particular the proposal to implement a two-phase price increase in the off-trade sector (document mentioned in recital 89 to the contested decision).
- ¹⁷³ In addition, the fact that no official minutes were ever taken for the ‘Catherijne’ meetings, that the substance of the discussions was almost never reflected in an internal memo and that agendas and notes from those meetings were destroyed in November 1998 (statement by InBev cited in recital 61 to the contested decision) indicates that,

contrary to the claims made by the applicant, the discussions were secret and that the participants were aware that their conduct was unlawful and attempted to conceal it.

- 174 Contrary to the claims made by the applicant, it is apparent from the documentary evidence examined by the Commission that a consensus was reached on certain proposals, such as on awarding a contract with a retail purchasing organisation to Interbrew (document mentioned in recital 236 and footnote 531 to the contested decision) and on the concerted price increase before or during 1998 (document mentioned in recital 89 to the contested decision).
- 175 The existence, in this latter case, of an agreement within the meaning of Article 81 EC is not called into question either by the likelihood that the consensus between the brewers did not extend to the practical arrangements for implementing the price increase or the fact that that increase never actually took place on the market.
- 176 Even supposing that an agreement was never reached on specific elements of the planned restriction, the Commission rightly found that, by regularly holding their discussions, the brewers had clearly shown their common intention to reach an anti-competitive agreement (recital 341 to the contested decision).
- 177 All the same, the continued exchange of sensitive information, which was not available to the public and which the representatives of the four brewers found useful to note on their agendas and to mention in their internal correspondence, certainly had the effect of reducing, for each of them, uncertainty over the conceivable conduct of their competitors.

- 178 In this regard, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That will be all the more true where the undertakings concert together on a regular basis over a long period, as was the case here (see, to that effect, *Hüls v Commission*, cited in paragraph 36 above, paragraph 162).
- 179 The applicant essentially considers that it has rebutted this presumption by showing that, despite the discussions, the four brewers determined their conduct on the market autonomously.
- 180 That argument cannot be accepted. It is certainly true that both the statements by the managers from InBev and the fact that Heineken did not increase its prices until February 2000 demonstrate that, during the period in question, each brewer pursued its own policy on the market. Nevertheless, even though this finding may show the absence of formal commitments or actual coordination between the brewers, it is not sufficient to prove that the brewers never took into account the information exchanged at the meetings in question in order to determine their conduct on the market as they wished.
- 181 The applicant has not therefore successfully rebutted the presumption based on the case-law cited in paragraph 178 above.
- 182 Consequently, it should be stated that the constituent elements of a concerted practice, based on the case-law cited in paragraphs 36 and 37 above, are present in this case in relation to the conduct in connection with, first, coordinating prices and price increases for beer and, second, occasionally coordinating customer allocation.

- 183 In these circumstances, it should be noted that the Commission was entitled to characterise the conduct in question as a ‘complex of agreements and/or concerted practices’ in so far as that conduct involved at one and the same time elements to be characterised as ‘agreements’ and elements to be characterised as ‘concerted practices’. Given such a complex factual situation, the dual characterisation by the Commission in Article 1 of the contested decision must be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presents the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 81 EC, which lays down no specific category for a complex infringement of this type (see, to that effect, *Hercules Chemicals v Commission*, cited in paragraph 34 above, paragraph 264).
- 184 Lastly, the applicant contests, relying on a breach of the *ne bis in idem* principle, that it cannot be held responsible for the alleged concerted action with the Belgian brewers concerning the private label beer segment.
- 185 It claims, in particular, that the Belgian-Dutch concerted action had already been the subject of Decision 2003/569 and that, in that decision, it was not penalised for attending the meetings in Breda with Interbrew Nederland and the Belgian brewers Interbrew Belgique, Alken-Maes, Haacht and Martens, with the result that the Commission could not penalise it again without breaching the *ne bis in idem* principle, which prohibits an undertaking being liable for conduct of which it has previously been acquitted.
- 186 It should be noted that the *ne bis in idem* principle, which constitutes a general principle of EU law, whose observance the Courts ensure, prohibits the same person from being penalised more than once for the same unlawful conduct in order to protect one and the same legal interest. The application of that principle is subject to three cumulative conditions: the identity of the facts, the unity of offender and the unity

of the legal interest protected (*Aalborg Portland and Others v Commission*, cited in paragraph 41 above, paragraph 338).

¹⁸⁷ In the present case, it should be noted that the applicant is not among the addressees of Decision 2003/569 or the addressees of the statement of objections adopted in the procedure leading to the adoption of that decision. It is clear from recitals 250 to 260 to Decision 2003/569 that the applicant's participation in the meetings in Breda is mentioned solely in the statement of facts and is not the subject of any legal assessment by the Commission. It is also apparent that the purpose of that decision was not to rule on the applicant's involvement in the Belgian-Dutch concerted action.

¹⁸⁸ Consequently, since the applicant was not penalised in Decision 2003/569 for the unlawful conduct in question in the present case, its arguments alleging a breach of the *ne bis in idem* principle are unfounded.

¹⁸⁹ In the light of all the foregoing, the applicant's arguments alleging an error of law cannot be accepted.

¹⁹⁰ Lastly, since the applicant has not demonstrated that the contested decision is vitiated by an error of law in the application of Article 81(1) EC, it is also necessary to reject its argument, based on essentially the same premiss, that the Commission misinterpreted that provision, in breach of the principle of the presumption of innocence, and failed to provide sufficient grounds in support of the finding of the infringement.

— Conclusion

- 191 Following the examination of the second plea above, it should be noted that the Commission's finding as to the existence of occasional coordination of commercial conditions, other than prices, offered to individual consumers in the on-trade sector in the Netherlands is not demonstrated to the requisite legal standard and cannot be accepted (see paragraphs 159 to 169 above).
- 192 Consequently, Article 1 of the contested decision must be annulled in so far as it establishes that aspect of the infringement in question and the amount of the fine imposed on the applicant must be adjusted accordingly. The practical consequences of that adjustment will be set out in paragraphs 344 and 345 below.
- 193 The remainder of the second plea must be rejected.

The third plea, concerning the duration of the infringement

Arguments of the parties

- 194 The applicant disputes the determination of 27 February 1996 and 3 November 1999 as the start and end dates of the infringement attributed to it. It considers, among other things, that the start and end of the infringement are subject to a heavier burden of proof, which is not satisfied in the present case.

- 195 With regard to the meeting on 27 February 1996, held to be the start date of the infringement, the applicant claims that the handwritten notes mentioned by the Commission in recital 67 to the contested decision concern a general discussion relating to ‘bad debtors’ in the on-trade sector, which cannot be regarded as restrictive of competition.
- 196 With regard to the meeting on 3 November 1999, held to be the end date of the infringement, the applicant claims that the Commission’s finding relating to the unlawful character of that meeting is refuted by the statements made by the managers from InBev.
- 197 The Commission contests the applicant’s arguments.

Findings of the Court

- 198 The duration of the infringement is an intrinsic element of an infringement under Article 81(1) EC, the burden of proof of which is borne principally by the Commission. In this regard, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see *Peróxidos Orgánicos v Commission*, cited in paragraph 78 above, paragraph 51 and the case-law cited).
- 199 In the present case, the applicant disputes the determination of both the start date and the end date of the infringement.

— The determination of the start date of the infringement

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

201 As was stated in paragraphs 159 to 169 above, the handwritten notes concerning that meeting, cited in recital 67 to the contested decision, do not, in themselves, constitute a body of evidence to justify, to the requisite legal standard, the finding of the infringement relating to occasional coordination of other commercial conditions offered to individual consumers in the on-trade sector.

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

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

204 It has already been established, on the basis of both the statement by InBev and a large body of other evidence, that the meetings forming part of this series had an anti-competitive object (see paragraphs 171 to 176 above). Thus, first, a body of evidence showing the systematic character of the meetings and their anti-competitive content and, second, the statement by InBev, which has high probative value, show that, unless proved otherwise, the anti-competitive object applies to all the meetings in question, even in the absence of sufficient proof regarding the content of some of them.

205 The applicant essentially considers that this logic cannot be applied to the determination of the start and end dates of the infringement. It claims, inter alia, that the Commission must demonstrate to the requisite legal standard the precise start date of the infringement.

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

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

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

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

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

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

209 Consequently, in so far as, first, it has been shown that the applicant was represented at the meeting held on 27 February 1996 and, second, according to the statement by InBev, the applicant was involved in the ‘Catherijne’ meetings from the beginning in 1993 or in 1994, the Commission was fully entitled to find that the applicant was involved in the infringement in question at least from 27 February 1996.

210 The fact that the contested decision did not determine the existence of an infringement before that date actually constitutes a concession to the addressees of the contested decision. In this regard, it should be noted that the Court is not called on to rule on the lawfulness or the expediency of that concession (see, to that effect, *JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraphs 340 and 341).

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

²¹² Consequently, the complaint relating to the determination of the start date of the infringement must be rejected.

— The determination of the end date of the infringement

²¹³ The Commission took 3 November 1999 to be the end date of the infringement for all the brewers concerned (recitals 466 to 469 to the contested decision), this being the date of the last ‘Catherijne’ meeting for which the Commission had direct proof of the presence of the four brewers. That meeting appears at the bottom of the chronological table annexed to the statement by InBev. According to a reply by InBev to a request for information from the Commission, the meeting on 3 November 1999 was a ‘Catherijne meeting (on-trade matters/Working Party on agenda)[; a]s always in the Catherijne consultations, discussions were primarily about excessive agreements and peaceful coexistence’ (recital 221 to the contested decision).

²¹⁴ The applicant takes the view that that statement is refuted by the statements of the managers from InBev who attended the meeting held on 3 November 1999, quoting the following passages:

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

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

²¹⁵ It should be stated that, contrary to the claims made by the applicant, the statements on which it relies do not refute the evidence invoked by the Commission. The references to ‘excessive agreements’, ‘peaceful coexistence’, the ‘sliding scale’ and the ‘rule on discounts’ clearly relate to the coordination of discount rates applied to on-trade customers. The only clarification made in the statements by the managers from In-Bev concerns the level of detail of the discussions, which were allegedly limited to ‘general comments’, and the absence of their effect on the market, namely the fact that ‘the sliding scale was not working’. However, it has already been noted that neither the general nature of the discussions nor the absence of any effect on the market can refute the fact that the meeting in question constitutes an infringement (see paragraphs 69 to 71 above).

²¹⁶ The fact that the meeting on 3 November 1999 formed part of a system of anti-competitive meetings (see paragraphs 203 and 204 above) and that the subjects discussed were connected with previous anti-competitive discussions also indicates that the very purpose of calling the meeting was to provide the necessary conditions so that those discussions could continue.

- 217 In any event, even supposing there is some contradiction between the statements by the employees of InBev relied on by the applicant, on the one hand, and InBev's reply to the request for information, on the other, it should be borne in mind that the probative value of the latter is higher, having regard to the case-law according to which a statement given on behalf of the undertaking as such carries more weight than that of an employee of the undertaking, whatever his individual experience or opinion (see, to that effect, *LR AF 1998 v Commission*, cited in paragraph 77 above, paragraph 45).
- 218 Consequently, the complaint relating to the determination of the end date of the infringement and, therefore, the third plea in its entirety must be rejected.

The first plea, alleging a breach of the principle of sound administration

Arguments of the parties

- 219 The applicant submits, in essence, that the Commission breached the principle of sound administration in so far as it failed to conduct a full, careful and impartial investigation. Firstly, the applicant claims that the Commission systematically interpreted the documents in the investigation file in a partial and tendentious manner. Secondly, it claims that the statements from InBev's leniency application, as the fundamental pillar of evidence on which the Commission relies, should have been assessed with greater reservations. Thirdly, the applicant states that the Commission was manifestly selective in its use of the other evidence available to it and, in the contested decision, cited only the passages of that evidence which allowed it to establish the existence

of an infringement, whilst deliberately disregarding the arguments of the other parties which would have refuted its conclusions. Fourthly, the applicant criticises the Member of the Commission responsible for competition for the statements which he made to the public in a Dutch television programme immediately after the statement of objections was adopted. Those statements showed, among other things, that, for the Commission, the brewers' guilt was already established before they had had an opportunity to defend themselves against the statement of objections.

²²⁰ Fifthly, the applicant criticises the Commission for modifying the objections in the course of the investigation. In essence, it claims that the objection relating to occasional coordination of customer allocation in the on-trade sector and the off-trade sector did not appear in the statement of objections. Sixthly, the applicant argues that the Commission did not analyse the evidence showing that it competed vigorously and set its prices autonomously.

²²¹ The Commission contests the applicant's arguments.

Findings of the Court

²²² It is settled case-law that the rights guaranteed by the EU legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

- 223 In the present case, firstly, with regard to the allegation that the Commission failed to examine the evidence carefully and impartially, it must be stated that, as has already been established following the examination of the second plea above, the Commission set out sufficient proof of the existence of an infringement of Article 81 EC, as far as two aspects of the infringement in question were concerned (see paragraph 155 above). In the examination of that plea, the Court has already considered the applicant's criticisms concerning the assessment of the statement by InBev and of the evidence seeking to establish proof to the contrary furnished in the administrative procedure.
- 224 In these circumstances, the applicant's arguments alleging the absence of a full, careful and impartial investigation merge with the arguments examined in connection with the second plea above and do not require a separate examination.
- 225 Secondly, in so far as the applicant's arguments relating to the statements made by the Member of the Commission responsible for competition can actually be interpreted as alleging a breach of the principle of the presumption of innocence, it must be stated that the argument put forward is not relevant to the outcome of the present dispute.
- 226 The existence of an infringement must be assessed having regard only to the evidence gathered by the Commission. Where the substance of an infringement is actually established following the administrative procedure, evidence of a premature manifestation by the Commission, during that procedure, of its conviction that the infringement exists is not of such a kind as to deprive the actual evidence of the infringement itself of its reality (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 726).

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

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

229 Thirdly, with regard to the arguments alleging a lack of consistency between the statement of objections and the contested decision, as regards the objection relating to customer allocation in the on-trade and off-trade sectors, the applicant’s criticisms must be regarded as unfounded.

230 According to the statement of objections, the Commission clearly stated that the parties were guilty of such concerted action. Thus, on the one hand, in paragraphs 262 to 272 of the statement of objections, it expressly stated that the brewers had consulted on customer allocation in the on-trade sector. On the other hand, it is clear from paragraphs 311 and 312 of the statement of objections that the objections set out concerned, among other things, customer allocation between the brewers.

231 In the light of the foregoing, the first plea cannot be upheld.

The sixth plea, alleging a breach of essential procedural requirements, the principle of sound administration and the rights of defence of the applicant, consisting in the refusal to grant access to a document in the file and to the replies to the statement of objections of the other undertakings concerned

Arguments of the parties

²³² Firstly, the applicant complains that the Commission refused it access to the replies to the statement of objections of the other parties involved in the procedure, thus affecting its rights of defence. It claims, *inter alia*, that those replies would have enabled it to rely on other exculpatory evidence in support of the conclusion that the brewers never took concerted action on the Dutch beer market. In addition, it claims that, in recital 203 to the contested decision, the Commission used as evidence against it a section of the reply from Heineken in which Heineken acknowledged the existence of discussions on the price of cask beer, even though that section was not communicated to it.

²³³ Secondly, the applicant argues that the Commission refused it access to a document in the file which was relevant to its defence, thereby infringing Article 27(2) of Regulation No 1/2003. It states, in particular, that it did not have access to the summary of the number of customers in the on-trade sector that the brewers gained and lost in the period between 1997 and 2001. Contrary to the claims made by the Commission, it takes the view that that information was not confidential and that, with that document, it could have shown that there were constant changes in the on-trade sector of the Dutch beer market, demonstrating vigorous competition between the brewers.

234 The Commission contests the applicant's arguments.

Findings of the Court

235 Under Article 27(2) of Regulation No 1/2003, '[t]he rights of defence of the parties concerned shall be fully respected in the proceedings; t]hey shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets...'

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

237 Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (*Aalborg Portland and Others v Commission*, cited in paragraph 41 above, paragraph 68).

238 As regards incriminating evidence, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been

different if that uncommunicated document had to be disallowed as evidence (*Aalborg Portland and Others v Commission*, cited in paragraph 41 above, paragraphs 71 to 73).

²³⁹ By contrast, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence (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 318, and *Hercules Chemicals v Commission*, cited in paragraph 34 above, paragraph 81), by showing, in particular, that it would have been able to invoke evidence which was not consistent with the Commission's assessments at the stage of the statement of objections and therefore could have had an influence, in any way at all, on its assessments in the decision (*Aalborg Portland and Others v Commission*, cited in paragraph 41 above, paragraph 75).

²⁴⁰ In connection with this plea, the applicant claims that it did not have access, first, to the replies to the statement of objections given by other undertakings concerned and, second, to a document in the file which was considered to be confidential by the Commission.

— The replies of the other undertakings to the statement of objections

²⁴¹ It should be pointed out that the statement of objections is a document whose aim is to delimit the scope of the procedure initiated against an undertaking and to ensure that the rights of the defence may be exercised effectively (see Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v Commission* [2008] ECR II-2567, paragraph 80 and the case-law cited).

- 242 It is from that aspect that the statement of objections is subject to procedural safeguards, pursuant to the principle of respect for the rights of the defence, one of which is the right of access to documents in the Commission's file.
- 243 The replies to the statement of objections are not part of the investigation file proper (*Cimenteries CBR and Others v Commission*, cited in paragraph 226 above, paragraph 380).
- 244 Since they are documents which are not part of the file compiled at the time of notification of the statement of objections, the Commission is required to disclose those replies to other parties involved only if it transpires that they contain new incriminating or exculpatory evidence.
- 245 Similarly, under paragraph 27 of the Commission notice on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7), as a general rule, the parties do not have access to the replies to the statement of objections of the other parties involved in the investigation. A party is granted access to such documents only where they may constitute new evidence, whether of an incriminating or of an exculpatory nature, pertaining to the allegations concerning that party in the Commission's statement of objections.
- 246 In this respect, concerning, first, new incriminating evidence, it is settled case-law that, if the Commission wishes to rely on evidence from a reply to a statement of objections in order to prove the existence of an infringement, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such new evidence (*Cimenteries CBR and Others v Commission*, cited in

paragraph 226 above, paragraph 386, and Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraph 50).

²⁴⁷ In the present case, the applicant claims that, in recital 203 to the contested decision, the Commission used as evidence against it a section of the reply from Heineken in which Heineken acknowledged the existence of discussions on the price of cask beer, even though that section was not communicated to it.

²⁴⁸ It should be noted that, in the recital mentioned, the Commission states, in response to the arguments raised by the applicant and by Heineken, that the existence of unlawful discussions at the meeting held on 8 January 1999 is clear from the evidence previously set out, namely the statement by InBev and the notes made by representatives of Grolsch and of the applicant. In this regard, although the Commission adds that Heineken itself acknowledged the existence of discussions on prices, 'with certain reservations', in its reply to the statement of objections, this latter statement is only an accessory element in a body of evidence relied on by the Commission in relation to the meeting in question, since it cannot constitute new incriminating evidence against the applicant.

²⁴⁹ Second, as regards new exculpatory evidence, according to the case-law, the Commission is not obliged to make it available of its own initiative. If, during the administrative procedure, the Commission has rejected an applicant's request for access to documents which are not in the investigation file, an infringement of the rights of the defence may be found only if it is proved that the outcome of the administrative procedure might have been different if the applicant had had access to the documents in question during that procedure (*Cimenteries CBR and Others v Commission*, cited in paragraph 226 above, paragraph 383).

- 250 In so far as an applicant relies on the existence of the alleged exculpatory evidence in replies which have not been disclosed, it is for the applicant to provide prima facie evidence of the relevance of those documents for its defence.
- 251 An applicant must, in particular, indicate the potential exculpatory evidence in question or adduce evidence that it exists and therefore of its relevance for the purposes of the case (see, to that effect, Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435, paragraphs 351 to 359).
- 252 In the present case, the applicant claims that the replies of the other parties involved in the proceedings would have enabled it to rely on other exculpatory evidence in support of the conclusion that the brewers never took concerted action on the Dutch beer market.
- 253 In so far as the applicant claims that, in their replies to the statement of objections, the other undertakings also put forward arguments contesting the infringement, it should be pointed out that this is not sufficient in itself to regard those arguments as exculpatory evidence (see, to that effect, *Jungbunzlauer v Commission*, cited in paragraph 251 above, paragraphs 353 and 355).
- 254 In the light of the foregoing, the applicant has not indicated new incriminatory or exculpatory evidence which could be adduced by the replies relied on in the statement of objections.
- 255 Consequently, the complaint alleging a refusal to grant access to those replies must be rejected.

— The allegedly confidential document

- ²⁵⁶ The applicant criticises the refusal to grant access to the list of customers in the on-trade sector which the different brewers gained and lost in the period between 1997 and 2001, which was part of the case-file. It considers that access to that information was essential for its defence on the ground that it could have shown that there were constant changes in the on-trade sector in the Netherlands and that the Commission's conclusion that competition was restricted in that sector was incorrect.
- ²⁵⁷ However, even though there is no need to determine whether the Commission was right to regard the requested information as confidential, it should be pointed out that the applicant has not shown that the list of customers in question could have been useful for its defence.
- ²⁵⁸ According to recital 259 to the contested decision, the Commission's conclusion concerning the applicant's participation in customer allocation in the on-trade sector is based on a Heineken internal letter which concerns an interview with a member of the applicant's board of directors, the text of which is reproduced in recital 184 and interpreted in recitals 187 to 189 to the contested decision. The information concerning the customers gained and lost by the brewers in the period in question cannot, in any event, be considered likely to provide exculpatory evidence with regard to that finding.
- ²⁵⁹ Consequently, the complaint alleging a refusal to grant access to the document comprising a list of customers in the on-trade sector and the present plea in its entirety must be rejected as unfounded.

The fourth plea, alleging an infringement of Article 23 of Regulation No 1/2003 and of the Guidelines and breaches of the principles of proportionality and equal treatment in determining the amount of the fine

Arguments of the parties

- ²⁶⁰ Firstly, the applicant disputes the way in which the Commission calculated the amount of the fine, and specifically its analysis of the gravity of the infringement. In particular, it considers that, since in the contested decision the Commission softened the very serious criticisms that it had made in the statement of objections, it should have categorised the infringement as much less serious. In addition, the applicant criticises the Commission for failing to take into account, in assessing the gravity of the infringement, that it did not have any impact on the Dutch beer market. The applicant also takes the view that, contrary to the statements made in recital 452 to the contested decision, the effect of the infringement on the market can be measured.
- ²⁶¹ Secondly, the applicant considers that the Commission breached the principle of equal treatment by departing considerably from its previous decision-making practice and, in particular, the fines imposed under its Decision 2003/569, its Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 [EC] (Case COMP/37.800/F3 — Luxembourg brewers) (OJ 2002 L 253, p. 21), and its Decision 2005/503/EC of 29 September 2004 relating to a proceeding under Article 81 [EC] (Case COMP/C.37.750/B2 — Brasseries Kronenbourg — Brasseries Heineken) (OJ 2005 L 184, p. 57).
- ²⁶² Thirdly, the applicant submits that the Commission breached the principles of proportionality and equal treatment in so far as the fine was disproportionate in comparison with the fines imposed on Heineken and on Grolsch. In essence, the applicant

points out that the Commission attached disproportionate importance to its turnover in determining the fine, which seriously distorted the balance of power between the brewers and the position it holds on the market in question. Moreover, it considers that, in determining the starting amount of the fine, the Commission should have taken into account its turnover without including excise duties.

²⁶³ The Commission contests the applicant's arguments.

Findings of the Court

²⁶⁴ It should be noted as a preliminary point that, under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC. Under that same provision, for each undertaking and association of undertakings participating in the infringement, the fine may not exceed 10% of its total turnover in the preceding business year.

²⁶⁵ Moreover, according to settled case-law, the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Regulation No 1/2003 (see, to that effect, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission* [2009] ECR I-7191, paragraph 112).

- ²⁶⁶ In addition, in areas such as determining the amount of a fine under Regulation No 1/2003, where the Commission has such a discretion, review of the legality of its assessments is limited to determining the absence of manifest error of assessment (see, to that effect, Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, paragraph 79).
- ²⁶⁷ The discretion enjoyed by the Commission and the limits which it has imposed in that regard have no bearing, however, on the exercise by the EU judicature of its unlimited jurisdiction (*JFE Engineering and Others v Commission*, cited in paragraph 40 above, paragraph 538), which empowers it to annul, reduce or increase the fine imposed by the Commission (see, to that effect, Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, paragraphs 60 to 62).
- ²⁶⁸ The present plea essentially comprises three limbs, alleging, first, an erroneous assessment of the gravity of the infringement, second, a breach of the principle of equal treatment in the light of the Commission's previous decision-making practice and, third, a breach of the principle of equal treatment and the principle of proportionality in the light of the fines imposed on the other addressees of the contested decision.

— The first limb, alleging an erroneous assessment of the gravity of the infringement

- ²⁶⁹ Under Article 23(3) of Regulation No 1/2003, in order to determine the amount of the fine, it is necessary to take into consideration the gravity and duration of the infringement.

- 270 According to settled case-law, the gravity of an infringement is assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, in respect of which the Commission has a margin of discretion (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 241, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others v Commission* [2009] ECR I-8681, paragraph 91).
- 271 In particular, according to the first paragraph of Section 1.A of the Guidelines, in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.
- 272 In the exercise of its unlimited jurisdiction, the Court must nevertheless consider whether the amount of the fine imposed is proportionate to the gravity of the infringement and must weigh the seriousness of the infringement with the circumstances invoked by the applicant (Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 136).
- 273 The applicant put forwards two arguments seeking to call into question the determination by the Commission of the gravity of the infringement.
- 274 Firstly, it objects to the categorisation of the infringement as very serious, stating that, in the contested decision, the Commission abandoned several aspects of the infringement compared with the statement of objections.

- 275 It is also important to bear in mind that very serious infringements within the meaning of the third indent of the second paragraph of Section 1.A of the Guidelines are ‘generally horizontal restrictions such as price cartels and market-sharing quotas.’
- 276 Furthermore, it is settled case-law that agreements of this kind constitute one of the most serious forms of damage to competition, in that their aim is quite simply to eliminate competition between the undertakings which implement them, and therefore run counter to the fundamental objectives of the EU (see, to that effect, *Groupe Danone v Commission*, cited in paragraph 272 above, paragraph 147 and the case-law cited).
- 277 However, since the Commission rightly found that the applicant had participated in an infringement consisting in a complex of agreements and/or concerted practices the object of which was to restrict competition within the common market, in particular by coordinating prices and price increases and by customer allocation, the applicant’s argument that the infringement could not be regarded as very serious cannot be accepted.
- 278 The finding made in recital 442 to the contested decision, according to which the infringement in the present case, by its very nature, had to be categorised as very serious in accordance with the Guidelines, is not therefore vitiated by error. This conclusion cannot be rebutted by the fact that certain aspects of the infringement highlighted in the statement of objections were not accepted in the contested decision, in so far as that decision set out the evidence to justify categorisation of the infringement as very serious.

279 Secondly, the applicant criticises the Commission for its conclusion that the impact of the cartel on the market could not be measured and for failing to take into account the evidence from the file which showed that the infringement did not have any impact on the market.

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

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

282 In the present case, in recital 452 to the contested decision, the Commission states as follows:

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

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

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

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

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

286 Accordingly, in categorising the infringement in question as very serious, the Commission did not depart from its Guidelines and did not breach the principles invoked by the applicant.

287 Consequently, the applicant’s arguments alleging that the cartel did not have any impact on the market and the present limb in its entirety must be rejected as unfounded.

— The second limb, alleging a breach of the principle of equal treatment in the light of the Commission's previous decision-making practice

288 It should first be pointed out that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters (Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 292) and that, within the framework of Regulation No 17 and of Regulation No 1/2003, the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181, paragraph 216) and that it may at any time adjust the level of fines to the needs of that policy (*Dansk Rørindustri and Others v Commission*, cited in paragraph 270 above, paragraph 169).

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

290 In these circumstances, the applicant also cannot claim a breach of the principle of equal treatment. The Court of Justice has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see *Erste Group Bank and Others v Commission*, cited in paragraph 270 above, paragraph 233 and the case-law cited).

291 In the present case, with regard to the applicant's arguments invoking the level of the fines imposed by the three previous Decisions 2003/569, 2002/759 and 2005/503, it should first be noted that, unlike the contested decision, in which the Commission categorised the infringement in question as 'very serious', in Decisions 2002/759 and 2005/503 it held that the infringements were 'serious'. The applicant cannot therefore validly rely on those decisions in order to claim alleged discriminatory treatment against it.

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

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

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

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

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

— The third limb, alleging a breach of the principle of equal treatment and the principle of proportionality in the light of the fines imposed on the other participants in the cartel at issue

297 By the present limb, the applicant essentially disputes the Commission's assessment relating to the determination of the starting amounts of the fines in the context of the differential treatment applied by the Commission (recital 462 to the contested decision).

298 In this regard, it should be noted that, under the Guidelines, where there are infringements involving a number of undertakings, the Commission may, as it did in this case, weight the starting amounts to take account of the specific weight of each undertaking by dividing the members of the cartel into groups 'particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type' (sixth paragraph of Section 1.A of the Guidelines). The Guidelines further 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 this differentiation being governed by arithmetic calculation' (seventh paragraph of Section 1.A of the Guidelines).

299 In accordance with settled case-law, in determining the gravity of the infringement, the Commission is not required to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover. However, it may divide them into groups (Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913, paragraph 385, and Case T-330/01 *Akzo Nobel v Commission* [2006] ECR II-3389, paragraph 57).

300 However, a division of the undertakings concerned by categories must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified. Moreover, according to the case-law, the amount of the fines must, at least, be proportionate in relation to the factors that entered into the assessment of the seriousness of the infringement (Case T-161/05 *Hoechst v Commission* [2009] ECR II-3555, paragraph 124).

301 In the present case, in order to define the categories for dividing up the undertakings concerned, it should be noted that, as is clear from recitals 457 and 458 to the contested decision, the Commission opted to take into consideration their relative weight on the market in question on the basis of a single criterion, beer sales in the Netherlands in the last full calendar year of the infringement, namely 1998.

302 On that basis, the Commission established three categories of undertakings. The first category comprised Heineken, which made beer sales in the Netherlands of EUR 450 to 480 million. The second category comprised Grolsch and InBev, which made sales in the Netherlands of EUR 150 to 180 million. The applicant was placed in the third category, with sales in the Netherlands amounting to between EUR 100 and 130 million. The amounts of the fines established for each category were, respectively, EUR 65 000 000, EUR 25 000 000 and EUR 17 000 000.

- 303 By acting in this way, the Commission opted for a coherent method of dividing the members of the cartel into three categories which is objectively justified by the difference between the market shares held by each of the undertakings in those three categories (see, to that effect, *Tokai Carbon and Others v Commission*, cited in paragraph 288 above, paragraph 220). Furthermore, in doing so, the Commission clearly did not depart from the normal method laid down in the Guidelines. In addition, whilst the applicant takes the view that, among the undertakings involved in the cartel, it occupies the weakest position, its inclusion in the third category obviously reflects this consideration.
- 304 With regard to the applicant's argument that consideration of turnover alone did not reflect precisely the economic capacity of the undertakings to damage competition on the Dutch beer market, it should be pointed out that, despite its approximate nature, turnover is regarded as an adequate criterion, in competition law, for assessing the size and the economic power of the undertakings concerned (see, to that effect, *Joined Cases 100/80 to 103/80 Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 121).
- 305 Since that criterion was properly applied in the present case, there is nothing to suggest that the principle of equal treatment and the principle of proportionality were breached in relation to the starting amount of the fine.
- 306 With regard to the applicant's objection to the use of turnover including excise duties for the calculation of the individual basic amounts, it should be emphasised that, in so far as that calculation involved the relative weighting of the other participants in the cartel on that market, the non-inclusion of taxes or excise duties would not have altered the Commission's final conclusion. Only if the Commission had calculated the individual basic amounts of the other parties involved on the basis of turnover not including excise duties could there be a breach of the principle of equal treatment.

307 Consequently, since the applicant has failed to show that the Commission breached the principle of equal treatment and the principle of proportionality in the differential treatment, the present limb must be rejected as unfounded.

308 In the light of all the foregoing, the fourth plea must be rejected in its entirety.

The fifth plea, alleging the excessive length of the administrative procedure

Arguments of the parties

309 The applicant claims, firstly, that the excessive length of the administrative procedure affected its rights of defence. It argues inter alia that, despite the inspections conducted by the Commission in 2000 and the applicant's replies to the requests for information, the information relating to each meeting was not clarified in such a way that, from that time, it could have questioned the managers involved.

310 The applicant also submits that the excessive length of the administrative procedure resulted in a disproportionate fine, since the Commission's policy on the level of fines became stricter in the meantime.

311 Secondly, it claims that the reduction of the fine by EUR 100 000 on account of the excessive length of the procedure is too low and disproportionate in relation to the total length of the procedure.

- 312 The Commission states that, in recitals 497 to 500 to the contested decision, it expressly recognised that the length of the procedure was excessive and that it had therefore granted an exceptional reduction of the fine imposed on the applicant.
- 313 In addition, the Commission points out that, although compliance with the reasonable time requirement in the conduct of administrative procedures is recognised in settled case-law, failure to adjudicate within that time can justify the annulment of a decision establishing an infringement only where it is shown that the breach of that principle adversely affects the rights of defence of the undertakings concerned.
- 314 In this regard, the Commission claims that the inspection decision of 17 March 2000 sent to the applicant made it aware of the major part of the infringement and the markets and the period to which it related. According to the Commission, that decision made reference to anti-competitive practices consisting in price fixing, the allocation of markets and/or the exchange of information in the Dutch beer sector, in both the retail trade market and the on-trade market. The applicant's argument cannot be valid because of the detailed nature of the questions which the Commission sent it from 2001.
- 315 Lastly, the Commission contests the applicant's argument that the reduction of the amount of the fine on account of the excessive length of the procedure is not proportionate. It considers that it has a broad margin of discretion in this regard and that the possibility of granting such a reduction on its own initiative falls within its powers. Furthermore, the Commission points out that the length of the administrative procedure conducted in the present case was shorter than in other previous cases in which it nevertheless applied the same reduction.

Findings of the Court

- ³¹⁶ According to settled case-law, compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the EU judiciary ensures (*Limburgse Vinyl Maatschappij and Others v Commission*, cited in paragraph 239 above, paragraphs 167 to 171, and Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraph 40).
- ³¹⁷ For the purposes of the application of that principle, a distinction must be drawn between the two stages of the administrative procedure, namely the investigation stage preceding the statement of objections and the stage corresponding to the remainder of the administrative procedure, each corresponding to its own internal logic (*Technische Unie v Commission*, cited in paragraph 316 above, paragraph 42).
- ³¹⁸ The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the infringement concerned (*Technische Unie v Commission*, cited in paragraph 316 above, paragraph 43).

— The length of the administrative procedure

- 319 In the present case, it should first be noted that, in recital 498 to the contested decision, the Commission acknowledged that the length of the administrative procedure had been excessive and that this fact was attributable to it.
- 320 As regards the first stage of the administrative procedure, from the notification of the applicant of the inspection decision in March 2000 until the receipt of the statement of objections in August 2005, a period of 65 months elapsed.
- 321 Since the inspections during the investigation were conducted in March and April 2000, the total length of that stage of the administrative procedure cannot be justified solely on the ground that the Commission sent the parties a series of requests for information between 2001 and 2005.
- 322 Thus, in the absence of further explanation or information from the Commission regarding the measures of inquiry undertaken during that period, the length of the first stage of the procedure must be regarded as excessive (see, to that effect, Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission* [2003] ECR II-5761, paragraph 77).
- 323 The second stage of the administrative procedure, from the receipt of the statement of objections to the adoption of the contested decision in April 2007, lasted 20 months, thus exceeding, in the absence of further explanation, the time normally needed for the adoption of the decision.

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

— The effect on the lawfulness of the contested decision

325 It is settled case-law that a finding that there has been a breach of the reasonable time principle may result in the annulment of a decision establishing an infringement only where the length of the proceedings affected their outcome (see, to that effect, *Technische Unie v Commission*, cited in paragraph 316 above, paragraph 48 and the case-law cited).

326 In the present case, the applicant claims that the excessive length of the first stage of the administrative procedure impaired its rights of defence, inevitably affecting the outcome of the procedure.

327 It claims, in essence, that its possibilities of defending itself effectively against the allegations made in the statement of objections were undermined in so far as, until the receipt of that statement on 30 August 2005, it was not able to identify precisely the subject-matter of the investigation conducted by the Commission. According to the applicant, when it had the opportunity to reply to the objections, nearly 10 years had passed since the alleged conduct, which undermined its possibilities of collecting exculpatory evidence relating to the off-trade segment on account of the departure of some of its employees who had direct knowledge of the alleged facts.

328 It should be stated in this regard that the applicant wrongly claims that it was not able to identify precisely the subject-matter of the investigation until the statement of objections.

- 329 First of all, the inspection decision, sent to the applicant on 17 March 2000, stated that the Commission's investigation related to specific anti-competitive practices such as 'price fixing, the allocation of markets and/or the exchange of information in the Dutch beer sector, in both the retail trade market and the on-trade market'. Second, the requests for information sent to the applicant in October 2001 specified the types of meetings, the dates and the locations being investigated by the Commission.
- 330 Contrary to the claims made by the applicant, those statements made it aware, with sufficient precision, of the subject-matter of the investigation, the infringements with which it could be charged and the market segments concerned, and therefore put it in a position to identify and collect any exculpatory evidence.
- 331 Moreover, even though the applicant makes an argument alleging difficulties in collecting certain exculpatory evidence, it failed to support that claim with specific evidence and, in particular, failed to specify the date on which the employees in question left the undertaking, the reasons why it would have been crucial to obtain information from those persons in order to exercise its rights of defence, and the circumstances because of which it was no longer possible to obtain information from them (see, to that effect, *Technische Unie v Commission*, cited in paragraph 316 above, paragraph 64).
- 332 In these circumstances, the applicant's claim that it was not informed, from the beginning of the investigation, of the subject-matter of the investigation or of any objections raised by the Commission, with the result that it was not able to prepare its defence or gather the exculpatory evidence available to it, cannot be accepted.
- 333 In the light of the foregoing, it should be stated that the applicant has not demonstrated the existence of an impairment of its rights of defence as a result of the excessive length of the administrative procedure.

334 Lastly, the applicant's argument that the penalty imposed on it would have been lower if the Commission had concluded the administrative procedure earlier must also be rejected.

335 Although the Commission acknowledged, at the hearing, that it increased the general level of fines around 2005, that is during the administrative procedure in question, this fact cannot be taken into consideration in assessing the effect of the length of the procedure on the content of the contested decision. It need only be noted in this regard that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No 1/2003 if that is necessary to ensure the implementation of competition policy. On the contrary, the proper application of the competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy (*Musique Diffusion française and Others v Commission*, cited in paragraph 304 above, paragraph 109, and *Dansk Rørindustri and Others v Commission*, cited in paragraph 270 above, paragraph 169).

336 Consequently, since there is no effect on the outcome of the procedure in question, the failure to respect the reasonable time principle cannot result in the annulment of the contested decision.

— The reduction of the fine

337 With regard to the applicant's argument concerning the allegedly too small reduction of the fine granted by the Commission by reason of the excessive length of the procedure, it should be noted that a procedural irregularity, even though it is not capable of resulting in the annulment of the decision, may justify a reduction of the fine (see, to that effect, *Baustahlgewebe v Commission*, cited in paragraph 38 above,

paragraphs 26 to 48, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*, cited in paragraph 322 above, paragraphs 436 to 438).

- 338 Failure to adjudicate within a reasonable time can justify the Commission's decision to reduce, in equity, the amount of a fine, since the possibility of granting such a reduction falls within the scope of the Commission's powers (see, to that effect, *Technische Unie v Commission*, cited in paragraph 316 above, paragraphs 202 to 204).
- 339 In the present case, the Commission decided to grant the applicant a reduction of the fine by reason of the 'unreasonable' length of the administrative procedure (recitals 498 and 499 to the contested decision).
- 340 The exercise of that power by the Commission does not prevent the Court, in the exercise of its unlimited jurisdiction, granting a further reduction of the amount of the fine.
- 341 It must be borne in mind that the flat-rate reduction of EUR 100 000 granted by the Commission does not take any account of the amount of the fine imposed on the applicant, which amounted to EUR 22 950 000 before that reduction, and does not therefore constitute a reduction of the penalty which is likely to give adequate redress for the breach resulting from the failure to adjudicate within a reasonable time in the administrative procedure.
- 342 In this regard, the applicant rightly claims that the consequences of the breach of the reasonable time principle were not sufficiently taken into account by the Commission, as regards the reduction of the amount of the fine.

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

Conclusion regarding the fine

344 Following examination of the pleas raised by the applicant and in the exercise of its unlimited jurisdiction, the Court adjusts the amount of the fine imposed on the applicant, first by fixing the starting amount at EUR 16 150 000, rather than EUR 17 000 000, as a consequence of the annulment of Article 1 of the contested decision in so far as it accepts the aspect of the infringement consisting in occasional coordination of commercial conditions, other than prices, offered to individual consumers in the on-trade sector in the Netherlands (see paragraphs 191 and 192 above), and second by altering the reduction made by reason of the failure to adjudicate within a reasonable time in the procedure to 5 % of the final amount of the fine, rather than EUR 100 000 (see paragraph 343 above).

345 As a consequence of that adjustment, the amount of the fine is calculated by increasing the adjusted starting amount by 35 %, by reason of the duration of the infringement, and by reducing that amount by 5 %, by reason of the failure to adjudicate within a reasonable time in the procedure. Consequently, the amount of the fine imposed on the applicant is set at EUR 20 712 375.

Costs

³⁴⁶ Pursuant to Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

³⁴⁷ In the present case, since the form of order sought by the applicant has been upheld in part, the Court will make an equitable assessment of the circumstances of the present case in holding that the applicant is to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission and that the Commission is to bear one third of its own costs and to pay one third of the costs incurred by the applicant.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

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

- 2. Sets the amount of the fine imposed on Bavaria in Article 3(c) of Decision C(2007) 1697 at EUR 20 712 375;**

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

- 4. Orders Bavaria to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission;**

- 5. Orders the Commission to bear one third of its own costs and to pay one third of the costs incurred by Bavaria.**

Vadapalas

Dittrich

Truchot

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

Table of contents

Facts	II - 3246
Administrative procedure	II - 3247
The contested decision	II - 3249
The infringement at issue	II - 3249
The fine imposed on the applicant	II - 3251
Procedure and forms of order sought	II - 3252
Law	II - 3254
The second plea, alleging an infringement of Article 81 EC, disregard for the presumption of innocence, and a breach of the principle of legality and of the obligation to state reasons	II - 3254
Arguments of the parties	II - 3254
Findings of the Court	II - 3255
— The statement by InBev	II - 3258
— Other evidence	II - 3269
— The facts relating to the findings, first, of coordination of prices and price increases for beer and, second, occasional coordination of customer allocation	II - 3295
— The facts relating to the finding of occasional coordination of other commercial conditions offered to individual customers in the on-trade sector	II - 3302
— The alleged error of law and in the treatment of the facts	II - 3305
— Conclusion	II - 3310
	II - 3351

The third plea, concerning the duration of the infringement	II - 3310
Arguments of the parties	II - 3310
Findings of the Court	II - 3311
— The determination of the start date of the infringement	II - 3312
— The determination of the end date of the infringement	II - 3315
The first plea, alleging a breach of the principle of sound administration	II - 3317
Arguments of the parties	II - 3317
Findings of the Court	II - 3318
The sixth plea, alleging a breach of essential procedural requirements, the principle of sound administration and the rights of defence of the applicant, consisting in the refusal to grant access to a document in the file and to the replies to the statement of objections of the other undertakings concerned	II - 3321
Arguments of the parties	II - 3321
Findings of the Court	II - 3322
— The replies of the other undertakings to the statement of objections	II - 3323
— The allegedly confidential document	II - 3327
The fourth plea, alleging an infringement of Article 23 of Regulation No 1/2003 and of the Guidelines and breaches of the principles of proportionality and equal treatment in determining the amount of the fine	II - 3328
Arguments of the parties	II - 3328
Findings of the Court	II - 3329
— The first limb, alleging an erroneous assessment of the gravity of the infringement	II - 3330

— The second limb, alleging a breach of the principle of equal treatment in the light of the Commission’s previous decision-making practice	II - 3335
— The third limb, alleging a breach of the principle of equal treatment and the principle of proportionality in the light of the fines imposed on the other participants in the cartel at issue	II - 3337
The fifth plea, alleging the excessive length of the administrative procedure	II - 3340
Arguments of the parties	II - 3340
Findings of the Court	II - 3342
— The length of the administrative procedure	II - 3343
— The effect on the lawfulness of the contested decision	II - 3344
— The reduction of the fine	II - 3346
Conclusion regarding the fine	II - 3348
Costs	II - 3349