ISSN 1725-2555

Official Journal

of the European Union

L 200

Volume 46

7 August 2003

English edition

Legislation

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 5 December 2001

relating to a proceeding under Article 81 of the EC Treaty

(Case IV/37.614/F3 PO/Interbrew and Alken-Maes)

(notified under document number C(2001) 3915)

(Only the Dutch and French versions are authentic)

(2003/569/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, the first Regulation implementing Articles 81 and 82 of the Treaty [1], as last amended by Regulation (EC) No 1/2003 [2], and in particular Article 15(2) thereof,

Having regard to the Commission's decision to initiate proceedings in this case, taken on 29 September 2000,

Having given the undertakings concerned the opportunity of being heard on the objections raised by the Commission, in accordance with Article 19(1) of Regulation No 17 and Article 2 of Commission Regulation (EC) No 2842/98 [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case (*),

Whereas:

1. INTRODUCTION

(1) This case concerns long-term and complex restrictive agreements relating to the Belgian market in beer for consumption both on the premises ('the on-trade') and off the premises ('the off-trade'). Interbrew NV and Alken-Maes NV, the largest and the second-largest suppliers to the Belgian beer market, consulted together and concluded agreements concerning a general non-aggression pact; prices and promotions in the off-trade; customer sharing in the on-trade (both the 'traditional' on-trade and national customers); the restriction of investment and advertising in the on-trade; and a new price structure for the on-trade and the off-trade. They shared information about sales to the on-trade and the off-trade. They sought to take some of these measures further through the Confederation of Belgian Brewers.

(2) There was separate consultation between Interbrew NV, Alken-Maes NV and the breweries NV Brouwerij Haacht and Martens NV concerning private-label beer, in par-

(*) OJ C 187, 7.8.2003.
(1) OJ 13, 21.2.1962, p. 204/62.
(2) OJ L 1, 4.1.2003, p. 1.
(3) OJ L 354, 30.12.1998, p. 18.

ticular with regard to customers and prices, and an exchange of information regarding private-label beer between those four brewers.

2. THE BELGIAN BREWING INDUSTRY

2.1. The market for beer in Belgium

2.1.1. *Supply*

(3) The number of firms engaged in brewing in Belgium has been falling slowly. In 1991 there were 76 brewers belonging to the Confederation of Belgian Brewers (Confederatie der Brouwerijen van België/Confédération des Brasseries de Belgique or 'CBB'). At the beginning of 2000 the figure was 68 ([4]). Some of these brewers own more than one brewery each.

(4) Although the number of breweries operating in Belgium is relatively high, brewing is in fact concentrated in the hands of a few firms. In 1998 the five biggest brewers in Belgium accounted for more than 80 % of total output. In the same year the two biggest brewers, Interbrew NV and Alken-Maes NV, together brewed about 70 % of the total volume of beer sold in Belgium ([5]).

(5) As well as the lager beer known as 'Pils', 'Pilsener' or 'Pilsner', there is a great variety of speciality beers brewed in Belgium, including abbey and Trappist beers, gueuze and kriek, white beers, ales, seasonal beers and many local beers ([6]).

2.1.2. *Demand*

(6) Total beer consumption in Belgium has been falling slowly; in 1998 it was slightly over 10 million hectolitres, an average drop of 1,6 % per annum from the 1993 figure ([7]). About two thirds of total consumption consists of Pils. Of the speciality beers that make up the remainder, the most important are amber ale, abbey beer and white beer, each of which has a share of total consumption of 5 % to 6 % ([8]). Between 1993 and 1998 production of beer in Belgium declined by an average 0,4 % per annum ([9]).

(7) About 60 % of total beer consumption takes place on the premises in one of approximately 50 000 outlets; this channel is hereinafter referred to as 'the on-trade', and in Belgium is usually known in both Dutch and French as the 'horeca' sector, an acronym for 'hotels, restaurants and cafés'. Beer is distributed to such outlets mainly by wholesalers specialising in the on-trade. The number of beer wholesalers in Belgium has been falling in recent years as a result of mergers, takeovers and closures, but the number in operation is still relatively large. Estimates range from 1 200 ([10]) to 1 800 ([11]). Some volumes are also distributed direct to the trade by the brewers themselves.

(8) The remaining 40 % or so is sold by food retailers for consumption off the premises; this is hereinafter referred to as 'the off-trade', and in Belgium is usually known as the 'food' or 'retail' trade. As well as the brewers' brands, an increasingly important role is played by retailers' own brands, known in Belgium by the English term 'private-labels'; this is so especially in the Pils segment. In 1998 private-label beer amounted to 550 000 hl, accounting for 5,5 % of total Belgian consumption ([12]).

(9) Thus the main developments in Belgium are: gradually declining demand; a slow decline in the number of brewers, wholesalers and drinks outlets; a growth in the importance of off-trade sales as compared with sales through the on-trade; and within the off-trade, a growth in the importance of private-label beer.

2.1.3. *Price regulation*

(10) Until 1 May 1993 the Belgian beer trade was subject to a Ministerial Order requiring price increases to be submitted to the competent minister. Brewers had to obtain the authorisation of the minister for any increase in the price of beer; they could apply either individually or collectively through a trade association ([13]). Applications for price increases were in fact submitted on the brewers' behalf by the CBB. The application had to provide a detailed statement of the reasons for the increase sought, giving figures, and a detailed list of existing prices and certain rebates. The annual accounts of the firms concerned also had to be attached. The CBB last submitted an application

([4]) CBB reply to request for information, 1.2.2000 (doc. 37614 02686-02701).
([5]) CBB reply to request for information, 1.2.2000 (doc. 37614 06563-06737).
([6]) The CBB distinguishes Pils, amber ales, white beers, abbey beers, Trappist beers, table beers, gueuze and fruit beers, British-style ales, premium lagers, non-alcoholic and low-alcohol beers, strong golden ales, regional beers, and sour beers. See the website http://www.beerparadise.be.
([7]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd (doc. 37614-09997); a table showing annual beer consumption in Belgium from 1993 to 1998 can be found in Annex I.
([8]) CBB reply to request for information, 1.2.2000 (doc. 37614 06563-06737).
([9]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd (doc. 37614 09987).
([10]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd (doc. 37614 09968).
([11]) CBB reply to request for information, 1.2.2000 (doc. 37614 02685).
([12]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd (doc. 37614 09958).
([13]) Article 3 of the Order stated that this requirement did not apply to producers with an annual turnover of less than BEF 50 million, or in respect of certain speciality beers such as sour beers and abbey and Trappist beers.

for a price increase on 23 December 1992. The minister allowed that increase on 6 February 1993, subject to the condition that the system of rebates remained unchanged and that no further price increases were carried out in 1993.

2.2. **Brewers**

(11) Annex II shows the market shares of the four Belgian brewers concerned for the period 1992 to 98 (in volume, rounded to whole figures). Market shares are given for the market as a whole and for the Pils segment. A distinction is also made on the basis of the distribution channel, between the on-trade and the off-trade.

2.2.1. *Interbrew*

(12) Interbrew NV ('Interbrew') is by far the largest Belgian brewer. Its main brands in Belgium are Jupiler and Stella Artois (Pils), Hoegaarden (white beer) and Leffe (abbey beer). All four of these are among the ten biggest selling brands on the Belgian market. Interbrew also has breweries in many other countries, including, in the European Union, the Netherlands, the United Kingdom and France. Outside the European Union Interbrew operates in Canada, where it took over the Canadian brewer Labatt in 1995, and in Eastern Europe and Asia. Interbrew is one of the ten largest brewers in the world. It has had a stock exchange listing since 1 December 2000. In the year 2000 its worldwide turnover was EUR 8 605 million. In the same year its total turnover in beer in Belgium was EUR [>500 million] ([14]), of which EUR [<5 million]; was derived from private-label beer.

2.2.2. *Danone and its subsidiary Alken-Maes*

(13) Brouwerijen Alken-Maes NV ('Alken-Maes') is the number two on the Belgian market; its brands include Maes and Cristal (Pils), Grimbergen (abbey beer), Ciney (a regional beer) and Brugs Tarwebier (white beer). In the year 2000 Alken-Maes' worldwide turnover amounted to EUR 120,78 million. In the same year its turnover in beer in Belgium totalled EUR [>100 million]. In 2000, a turnover of EUR [<5 million] was achieved for private-label beer in Belgium.

(14) Alken-Maes was set up in 1988 as a result of a merger between two brewers, namely Alken-Kronenbourg, which had formerly belonged to the French BSN group, and Maes. In 1992 BSN acquired a majority stake in the merged Alken-Maes, and replaced Alken-Maes's management; in 1994 BSN changed its name to Groupe Danone SA ('Danone'). The brewer Kronenbourg, which operates in France, also belonged to Danone. In the year 2000 Danone sold its beer operations to the UK Scottish and Newcastle group. In 2000 Danone's worldwide turnover was EUR 14 287 million. In 1999 its turnover in beer in Belgium was EUR [>100 million] ([15]).

2.2.3. *Martens*

(15) Martens NV ('Martens') produces mainly private-label Pils for large retail chains such as Aldi. It brews its own beer under the Sezoens brand. It also imports the low-price Karlsberg brand from Germany (not to be confused with the Danish Carlsberg brand). In the year 2000 Martens' worldwide turnover was EUR 33 598 507. Of this figure, sales of beer in Belgium accounted for EUR [<50 million]. Martens' turnover from private-label beer in Belgium was EUR [>5 million] in 2000.

2.2.4. *Haacht*

(16) NV Brouwerij Haacht ('Haacht') is essentially a Pils producer. Its main brand is Primus. In the year 2000 its worldwide turnover was EUR 69 416 371, of which EUR [<50 million] was accounted for by beer sold in Belgium. Haacht's turnover from private-label beer in Belgium was EUR [>5 million] in 2000.

2.2.5. *The trade association CBB*

(17) All of the brewers listed above are members of the trade association, the CBB. The CBB represents the interests of its members. Day-to-day business is handled by a manager. Its activities are distributed between working parties and committees on which its members are represented.

([14]) Information indicated in square brackets is considered to be a business secret by the party concerned.

([15]) As Danone sold its beer operations in the middle of the year 2000, the figures for 1999 give a better picture of its annual turnover in beer than those for 2000.

2.3. **Trade between Member States**

(18) In assessing the available statistics, one factor must be borne in mind. According to the market research bureau Canadean, it is difficult to discern the real pattern of international trade from the official statistics published by the Belgian central bank, the Nationale Bank/Banque Nationale. At the beginning of 1995, for example, Interbrew took over the Dutch Oranjeboom brewery. Since then, in order to maximise production efficiencies, Interbrew has exported some volumes of beer in bulk from Belgium to the Netherlands for packaging, and reimported the packaged goods into Belgium for consumption. For want of a better alternative, however, Canadean nevertheless uses the central bank figures ([16]). In response to enquiries, the CBB has likewise referred to the central bank statistics, which are also published in its newsletter *Het Brouwersblad/Le Journal du Brasseur* ([17]). Thus the statistics given below are not to be understood as a precise measurement — no precise measurement is available — but only as indicative.

(19) According to Canadean, between 1993 and 1998 imports of beer into Belgium rose from 454 000 hl to 916 000 hl, which is about 9 % of total consumption. In 1998 something over 80 % of this came from other Member States. The countries from which most was imported were the Netherlands, Denmark, the United Kingdom, Germany and France ([18]). Interbrew states that over the period 1993 to 98 imports into Belgium rose from 337 453 hl to 731 202 hl. A study carried out for the CBB in 1994 by the consultancy firm Arthur D. Little estimates exports from France to Belgium at 60 000 hl. The terms of reference of that study make it clear that there were concerns within the CBB at the time regarding parallel imports ([19]). Parallel importing occurs, for example, where a Belgian wholesaler buys Pils under Interbrew's Jupiler brand from Interbrew's French establishment, and then sells it in Belgium. The Arthur D. Little report also shows that in 1994 ex-brewery prices were substantially higher in Belgium than in France ([20]).

(20) There are a number of documents dating from 1993 which describe the impact of parallel imports on Interbrew, and the direct link between price differences in Belgium and France and these imports. The possible effect is stated to be a 'destabilisation of the entire Belgian beer market'. It is also said that 'price setting, rebate policy ... is not a domestic question, but increasingly has to be discussed on an international basis.' ([21])

(21) Belgium is a major exporter of beer. Between 1993 and 1998 total exports rose from 3,6 million hl to over 4,8 million hl per annum. Over 90 % of this was exported to other Member States. The countries to which most was exported were France, the Netherlands, Germany, Italy and the United Kingdom ([22]).

3. **PROCEDURE**

(22) On 26 and 27 October 1999 inspections were carried out under Article 14(3) of Regulation No 17 at the offices of Alken-Maes in Waarloos and the CBB in Brussels.

(23) On 11 November 1999 requests for information were sent under Article 11 of Regulation No 17 to Interbrew, Alken-Maes and the CBB. The Commission had already taken copies of documents in the course of a separate proceeding, during an inspection it carried out at Interbrew's premises in Leuven on 13 and 14 July 1999, and Interbrew was now specifically asked to produce certain documents to the Commission afresh, in accordance with the established case law of the Court of Justice of the European Communities ([23]). These documents contained information which led to the inspections carried out in October 1999.

(24) The replies of Alken-Maes, Interbrew and the CBB were received on 10 December, 23 December and 24 December 1999 respectively.

(25) On 27 December 1999 Alken-Maes declared that it was invoking the Commission notice on the non-imposition or reduction of fines in cartel cases ([24]).

([16]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd. (doc. 3714 09954).
([17]) CBB reply to request for information, 1.2.2000 (doc. 37614 02683, 02720).
([18]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd (doc. 37614 09986, 09988).
([19]) Annex 23 to Alken-Maes' reply to the request for information, 10.12.1999 (doc. 37614 01862-01925); inspection at the offices of the CBB, document ROK16 (doc. 37614 01268-01272).
([20]) Annex B9 to Interbrew's reply to the request for information, 22.12.1999 (doc. 37614 02062-02063).
([21]) Inspection at the offices of Interbrew, document MV15 (doc. 37614 8815-8820). Original Dutch.
([22]) *The Beer Service*, Annual Report 1999, Belgium, April 1999, Canadean Ltd (doc. 37614 09992).
([23]) Judgments of the Court of Justice in Case 85/87 *Dow Benelux* v *Commission* (1989) ECR 3137, paragraphs 19 and 20, and Case C-67/91 *Dirección General de Defensa de la Competencia* v *Asociación Española de Banca Privada* (1992) ECR I-4785, paragraphs 39 et seq.
([24]) OJ C 207, 18.7.1996, p. 4.

(26) On 10 January 2000 a request for information was sent to the Belgian Ministry of Economic Affairs. The Ministry replied by letter of 4 February.

(27) On 12 January 2000 a supplementary request for information was sent to the CBB under Article 11 of Regulation No 17. The CBB supplied the information requested by letter on 1 February.

(28) In letters of 14 and 19 January 2000 Interbrew supplied information supplementing its letter of 23 December 1999. In the light of this supplementary information the Commission sent an informal supplementary request for information to Interbrew by fax on 21 January. Interbrew replied by letter of 2 February. Interbrew again sent additional information by letters dated 8 and 28 February.

(29) On 29 February 2000 Interbrew submitted a statement relating to the Belgian market. As Alken-Maes had already done, Interbrew sent this statement to the Commission invoking the Commission notice on the non-imposition or reduction of fines in cartel cases ([25]).

(30) By letter dated 7 March 2000 Alken-Maes supplemented and clarified its statement of 27 December.

(31) On 22 March 2000 the Commission sent requests for information under Article 11 of Regulation No 17 to Alken-Maes, Haacht and Martens. Alken-Maes and Haacht replied on 5 April, and Martens on 6 April.

(32) On 3 April 2000 the Commission carried out an inspection under Article 14(2) of Regulation No 17 at Interbrew's offices in Leuven.

(33) On 14 April 2000 the Commission sent requests for information under Article 11 of Regulation No 17 to Danone, the parent company of Alken-Maes, and to Heineken NV, the Netherlands-based brewer. Danone and Heineken supplied the information requested in letters dated 10 and 11 May.

([25]) See footnote 23.

(34) In addition to the inspections and correspondence described above, a number of meetings took place in the course of the investigation between members of the Directorate-General for Competition and representatives of Interbrew, Alken-Maes and the CBB.

(35) On 29 September 2000 the Commission initiated proceedings in this case and approved a statement of objections addressed to the undertakings who are likewise addressees of the present Decision. All of the parties submitted written observations on the Commission's objections. None requested a hearing, and accordingly no hearing took place.

(36) On 21 December 2000 Interbrew supplied two further documents to complete the file on the case; they concerned two agreements with Alken-Maes concluded in connection with the other bilateral agreements between Interbrew and Alken-Maes. Alken-Maes and Danone were given the opportunity to comment on this letter from Interbrew and its annexes.

4. DESCRIPTION OF THE INFRINGEMENTS

4.1. Preliminary observation: the written evidence

(37) The account of the facts set out below is based on the evidence assembled from the information gathered at the inspections described above, from the replies to requests for information, and from the information supplied voluntarily by the parties.

(38) In the evidence available to the Commission there are frequent references to employees or former employees of the undertakings to which the proceedings relate. In the Decision these names have been replaced by indications of the positions held by those people at the time. Where, as a consequence, a quotation from the evidence presented here differs from the corresponding quotation in the statement of objections, a reference is provided to the relevant paragraph of the statement of objections for the benefit of the addressees of the Decision.

4.2. Introduction and summary

(39) The following recitals set out the facts of long-term and complex restrictive agreements relating to the Belgian market in beer for consumption both on and off the premises. Interbrew and Alken-Maes, the largest and the second-largest suppliers to the Belgian beer market, consulted together and concluded agreements concerning prices and promotions in the off-trade, the sharing

of customers in the on-trade, the restriction of investment and advertising in the on-trade, and their pricing structures (section 4.3); they also shared information on their sales figures (section 4.4). They sought to take some of these measures further through the Confederation of Belgian Brewers (section 4.5). There was separate consultation and an exchange of information between Interbrew, Alken-Maes and the brewers Haacht and Martens concerning private-label beer (section 4.6).

4.3. **The bilateral agreements between Interbrew and Alken-Maes regarding market shares and prices**

4.3.1. *Preliminary observations*

(40) From the end of 1992 at the latest, and in any event up to and including the beginning of 1998, there was a succession of meetings and other forms of contact between representatives of Interbrew and representatives of Danone or of Alken-Maes, which was a subsidiary of Danone operating in Belgium. Most of these meetings between Interbrew and Danone representatives are irrelevant to this Decision, because they were concerned essentially with possible mergers and takeovers and with possible cooperation between these undertakings on markets outside Belgium.

(41) The description of meetings and other forms of contact set out below is therefore not intended to give a complete picture of all the contacts that took place between representatives of the undertakings concerned. It covers only those contacts which are relevant to this Decision and which are documented. Other contacts will be referred to only where this is felt to be necessary for an accurate account of the context in which the relevant and documented contacts took place.

4.3.2. *The facts: chronology*

4.3.2.1. The period from the end of 1992 until 1993

(42) Summary

At the end of 1992 and in the course of 1993 there was regular contact to discuss the off-trade, and agreements were reached regarding prices. There was also discussion of a reduction of marketing investments. Interbrew used the code name 'Université de Lille' for this process ([26]). It was said that Danone wanted to widen the existing cooperation between Interbrew and Alken-Maes. Within Interbrew there was initially a reluctance to widen cooperation, motivated in part by the competition rules. In addition, Interbrew felt that as the market leader it was in a position to take certain decisions alone.

(43) On 17 November 1992 there was a meeting between representatives of Alken-Maes, Interbrew and Kronenbourg/Danone. At this meeting the new general manager of Alken-Maes was introduced to Interbrew ([27]).

(44) On 28 January 1993 Interbrew's manager for the off-trade in Belgium reported to Interbrew's general manager for Belgium on a 'meeting with beer wholesalers' ([28]):

> 'After a great deal of talk we reached the following agreements:
>
> — ITW and Maes will try to raise permanent promotion prices (the GIB retail chain's policy) as rapidly as possible from the present rate to BEF 285 initially and BEF 295 in a second stage ... [NB: This is doubtless the price of a crate of Pils],
>
> — Promise not to pay for any promotion or advertising brochures for crates of Pils in the next three months if the minimum price is not complied with. Extension of this after a meeting in three months.'

([26]) This code name was generally used to refer to cooperation between Interbrew and Alken-Maes: letter from Interbrew, 22.12.1999 (doc. 37614 01984); see also recitals 51, 60, 63, 107 and 108; this cooperation was later referred to by the code name 'project Green' (recitals 68 and 71).

([27]) Letter from Interbrew, 14.1.2000 (doc. 37614 2600), and especially Annex I.2 to that letter; letter from Interbrew, 28.2.2000 (doc. 37614 7551-7552, 7680-7684), and especially Annex 18 to that letter; see also statement of objections, paragraph 44.

([28]) Inspection at the offices of Interbrew, document LVL1 (doc. 37614 8559); see also statement of objections, paragraph 45.

In its reply to the statement of objections, Danone stated that this meeting was a meeting between the brewers and the federation of beer wholesalers which took place on 28 January 1993.

(45) On 12 March 1993, in advance of a dinner with a representative of Danone (then called BSN), the interim Chief Executive Officer of Interbrew was informed in a memo from Interbrew's Executive Vice-President Core Market Beers Europe of the contacts that had taken place up to that time ([29]):

'There have been a few meetings between Mr ... [the chairman and general manager of Danone] and Mr ... [the previous CEO of Interbrew]. What transpired from those is the possibility of exploring closer cooperation ... Personally, I see Mr ... [the chairman and general manager of Kronenbourg, and general manager of Danone] through the Amsterdam Group a couple of times a year. The subject of "cooperation" comes up now and again, however, there are some dangerous strings attached. I've discussed your meeting on March 16 with both our managers in France ... and in Belgium ...

3) Strategic area:

...

Belgium:

This is the trickiest part of your discussion. They probably want to increase "cooperation" in Belgium. Mr ... forced us to talk as "we needed some money", but we are most reluctant to do this as we want to avoid any problems under Articles 85 or 86 ...

Also, they have more to gain than we. I attach a memo showing what we have been talking about up until now, but so far, nothing concrete has been done. We are most reluctant to continue these discussions. I feel in Belgium, we should take the lead and make those decisions, others will follow if they are smart.' ([30]).

(46) The memo described as attached to the internal memo of 12 March 2000 is dated 18 February 1993; the subject is stated to be a 'reduction of marketing spending with a view to improving our profitability in the short, medium and long term' ([31]). The code name used for this by Interbrew is 'Université de Lille' ([32]). On 10 December 1992 and 19 January 1993 there were two internal meetings in Interbrew under this title ([33]).

(47) The memo records the following conclusions and recommendations:

'— Part of the cost of providing POS [point-of-sale] material to be transferred to wholesalers on a 50/50 basis, along with an increase in the price of glasses ...

— Advertising spending should ideally not exceed BEF 300 million in 1993, assuming that the largest competitor does not exceed BEF 140 million. This expenditure relates only to Pils, including NA [non-alcoholic] and Light ...

([29]) Letter from Interbrew, 28.2.2000 (doc. 37614 7551-7552, 7558-7562), and especially Annex 1 to that letter; see also statement of objections, paragraph 46.

([30]) Original English.

([31]) Annex 1 to Interbrew letter of 28.2.2000 (doc. 37614 7562); see also statement of objections, paragraph 48.

([32]) Original French: 'Université de Lille: étude projet de réduction des investissements commerciaux dans le but d'améliorer à court, moyen et long terme notre rentabilité.'

([33]) Annex I.2 to Interbrew letter of 14.1.2000 (doc. 37614 2600-2601).

— Other parameters to be studied: costs of installation and maintenance of pumps, price policy in the off-trade, new pricing system ...' ([34])

(48) At the end of 1993 Interbrew's general manager for Belgium and the general manager of Alken-Maes met at the Duc d'Arenberg restaurant in Brussels ([35]).

(49) On 19 August 1993 the new CEO of Interbrew, who had previously been Interbrew's Executive Vice-President Core Market Beers Europe, stated as follows about the '93/94 Budget' ([36]): As far as the price increase is concerned, 4 % is a challenge ... Of course, we want you to do the 4 %. If you need help to convince Maes, let me know ([37]).

(50) On 2 November Interbrew's CEO had talks with the major retail chain [...]. The meeting is reported in a memo of 3 November 1993. The memo states as follows ([38]):

> '[...] would appreciate an initiative on the part of Interbrew to make contact with [...] and [...] ([...] are the three largest Belgian supermarket chains) in order to arrive at a gradual increase in the price of beer and soft drinks to the level desired by ITW [Interbrew] ... If a consensus begins to emerge consideration will be given to the possibility of a three-way meeting ... I think it would be no bad idea if I was invited along to the top-level meeting with [...]. Only once initial contact has been established and an agreement is in prospect would I involve [Alken-Maes]. The initiative taken by Maes last year did not prove feasible: a) there was a lack of trust, but certainly also b) Maes was too small. This is something only ITW can do.'

4.3.2.2. 1994

(51) Summary

In 1994 the contacts between Interbrew and Danone/Alken-Maes were extended. At a meeting on 11 May Danone put Interbrew under pressure: if the parties did not reach agreement in respect of the Belgian market, life would be made difficult for Interbrew on the French market. Interbrew did not accept Danone's demand that it transfer 500 000 hl of beer to Alken-Maes, but it did not want war either, and the parties stayed in close contact with one another. At two meetings in 1994 the two general managers responsible for Belgium made preparations for a gentleman's agreement between the two brewers. Interbrew referred to this gentleman's agreement by the name 'Université de Lille', although the new project went further than the process of the same name referred to in Interbrew's memo of 18 February 1993, which was aimed at reducing marketing spending (recital 46). The new agreement was confirmed at a meeting between the parties on 19 November 1994. On 24 November, as part of the cooperation between Interbrew and Alken-Maes, an agreement was concluded regarding the sharing of customers.

(52) At the beginning of 1994 Interbrew's CEO made the acquaintance of the new general manager of Danone's beer division ([39]). At their first meeting or meetings — there may have been a meeting in Amsterdam, and there certainly was one at Danone's offices in Paris — one of the subjects discussed was the adoption of a certain course of conduct on the market ([40]).

([34]) Original French: 'Transférer une partie des coûts de la dotation en matériel POS aux revendeurs suivant le principe 50/50 accompagné d'une hausse du prix des verres ... En ce qui concerne les dépenses publicitaires, celles-ci idéalement ne devraient pas dépasser en 1993, 300 MBF en assumant que le concurrent principal ne dépasse pas 140 MBF. Ces dépenses ne concernent que les Pils y compris les N.A. et Lights ... Autres paramètres à l'étude: coût installation/maintenance débit, politique des prix en alimentaire, nouvelle tarification ...'

([35]) Inspection at the offices of Alken-Maes, document MV30 (doc. 37614 00554); letter from Interbrew, 28.2.2000 (doc. 37614 7554); letter from Alken-Maes, 7.3.2000 (doc. 37614 7878); see also statement of objections, paragraph 50.

([36]) Annex 9 to the Interbrew letter of 28.2.2000 (doc. 37614 7597); see also statement of objections, paragraph 51.

([37]) Original English.

([38]) Annex 10 to the Interbrew letter of 28.2.2000 (doc. 37614 7599-7600); see also statement of objections, paragraph 52. Original Dutch.

([39]) Letter from Interbrew, 8.2.2000 (doc. 37614 7478, 7488), and especially Annex 1 to that letter; letter from Interbrew, 28.2.2000 (doc. 37614 7555, 7683), and especially Annex 18 to that letter; inspection at the offices of Interbrew, document MV3 (doc. 37614 8690); see also statement of objections, paragraph 54.

([40]) Original French: 'Ils ont eu des discussions sur un certain scénario de comportement de marché.'

(53) At an internal discussion within Interbrew on 5 May 1994, Interbrew's CEO described a scenario requested by Danone/Kronenbourg ([41]). Interbrew was to transfer 500 000 hl to Alken-Maes, essentially in the off-trade. Otherwise Interbrew would be annihilated in France, and an attack would be mounted on it in Belgium by means of very low prices ([42]).

(54) The scenario put forward by Kronenbourg was discussed by executives of Danone and Interbrew at the restaurant Le Roy d'Espagne in Brussels on 11 May 1994 ([43]); Interbrew has its registered office at the same address, Grote Markt/Grand Place 1, B-1000 Brussels. There was probably also a representative of Alken-Maes present. The following came up for discussion ([44]). '[The general manager of Danone's beer division] repeated his demand that 500 000 hl be transferred to Alken-Maes, and threatened that otherwise Interbrew would be destroyed in France. He wanted Interbrew and Alken-Maes to conduct themselves on the Belgian market in line with "the agreements in France" ... The French mechanism can be summarised as follows. Heineken's and Kronenbourg's off-trade sales managers consult together very often in order to check their respective market shares and to manipulate promotions, prices and conditions' ([45]).

(55) A document from Heineken confirms Interbrew's statement regarding the relationship between the Belgian and the French markets and the proposals put forward by Kronenbourg/Danone. 'Three years ago [the general manager of Danone's beer division] left Interbrew a choice: either they gave Maes an extra 500 000 hl or he would drive them out of France. The form of cooperation that existed between Heineken and Kronenbourg in France was referred to ([46])'.

(56) The situation in France and Belgium was discussed again in a telephone conversation between the CEO of Interbrew and the chairman and general manager of Danone on 6 January 1994 ([47]). In an internal memo from Interbrew's CEO dated 7 July 1994 we find the following ([48]): 'I agreed yesterday with the "Big Boss" of "Green" [Danone] that we would not launch a war but instead try to gain time. Our objective is to arrive at a solution such as a marketing agreement for example, and to put the same thing into practice in Belgium. We will certainly stay in contact.' ([49]) According to Danone the telephone conversation referred to was concerned with Interbrew's distribution efforts in France, but Danone documents confirm the existence of a non-aggression pact between Interbrew and Danone/Alken-Maes on the Belgian market ([50]). There is a reference to 'July 94: peace with [Interbrew CEO] almost signed' ([51]) and 'market shares justice of the peace' ([52]). The same documents also confirm the relationship between the agreements on the Belgian and French markets: 'Peace in Belgium ↔ Regional peace in France → National peace.' ([53])

(57) At a dinner on 29 August 1994 a director of Interbrew met the general manager of Alken-

([41]) Letter from Interbrew, 28.2.2000 (doc. 37614 7683), and especially Annex 18 to that letter; see also statement of objections, paragraph 55.

([42]) Original French: '... a évoqué avec nous, au cours d'une réunion interne (le 5 mai 1994), le scénario qui était une demande de Kronenbourg. En substance, KRO exerçait du chantage pour que ITW transfère 500 000 hl vers AM (surtout dans le Food). Sinon, ils détruiraient ITW-France avec la complicité de Heineken et ils attaqueraient ITW en Belgique avec des prix très bas.'

([43]) Interbrew's reply to the Commission' request for information, 23.12.1999, including Annex B.3 to that reply (doc. 37614 2002, 2039); Annex I.2 to Interbrew letter of 14.1.2000 (doc. 37614 02602); Annex to Interbrew letter of 19.1.2000 (doc. 37614 02672-02674); Annex 18 to Interbrew letter of 28.2.2000 (doc. 37614 7683); inspection at the offices of Interbrew, documents MV5 and MV8 (doc. 37614 8692, 8695); Danone's reply to request for information, 10.5.2000 (doc. 37614 9864-9865); see also statement of objections, paragraph 58.

([44]) Annex 18 to Interbrew letter of 28.2.2000 (doc. 37614 7683).

([45]) Original French: '[...] a réitéré ses exigences de transférer 500 000 HL vers AM sous menace de la destruction de ITW en France. Il a préconisé un comportement ITW/AM en Belgique qui serait calqué sur "les accords en France" ... Le mécanisme français se résume à ce que les Directeurs de vente alimentaire (Food) de Heieneken en Kronenbourg se concertent très fréquemment afin de contrôler les parts de marché respectives en manipulant — les promotions, — les prix, — les conditions.' See also statement of objections, paragraph 56.

([46]) Annex to Heineken's reply to request for information, 11.5.2000 (doc. 37614 9947); see also statement of objections, paragraph 57. Original Dutch.

([47]) Letter from Interbrew, 28.2.2000 (doc. 37614 7552); see also statement of objections, paragraph 58.

([48]) Annex 2 to Interbrew letter of 28.2.2000 (doc. 37614 7564).

([49]) Original French: 'J'ai convenu hier avec le "Big Boss" de "Green" de ne pas commencer une guerre mais d'essayer de gagner du temps. Notre but est de trouver une solution telle que, par exemple, un contrat commercial et de mettre la même chose en pratique en Belgique. Nous allons certainement rester en contact.'

([50]) Danone's reply to request for information, 10.5.2000 (doc. 37614 9829-9831, 9943-9944).

([51]) 'Juillet 94: quasi signer une paix avec [...]'; see also statement of objections, paragraph 60.

([52]) 'Parts de Marché juge de paix'.

([53]) 'Paix Belgique ↔ Paix régionale France → Paix nationale'.

Maes ([54]). The Interbrew representative states the following ([55]): 'Although the on-trade was not discussed at the meeting in the Roy d'Espagne, once ... had become general manager of Alken-Maes he began to call me to suggest that we should align our conduct in order to keep control of the very big increase in investments needed to conclude on-trade beer supply contracts. I had various other conversations, mainly by telephone, with [the general manager of Alken-Maes]. He tried to set up a system of consultation to take place before pubs were bought or sold. I always refused. Against this background I had dinner with [the general manager of Alken-Maes] ... The result was my memo of 5 October 1994 to [the CEO of Interbrew] ... The discussion at the dinner did not go beyond generalities. I repeated that the "French mechanisms" were not transposable to Belgium' ([56]).

(58) In the memo of 5 October 1994 this dinner with the general manager of Alken-Maes is reported as follows ([57]):

'1. He realizes that the situation in France and Belgium is very different and that what can be done in one country can not be done in the other.

2. He is under strong pressure from headquarters to pursue an aggressive marketing policy in Belgium which he fears will be costly and not necessarily efficient.

3. We agreed that discussion in the CBB on the Arthur D. Little Horeca 2000 project [see below, recitals 129 et seq.] also can be a good forum to study ways and means to reduce cost of doing business in Horeca.

4. We have communicated to him that he is the one who has become aggressive and that, particularly in the Food, we will react to his price actions, but we will not take the initiative.' ([58])

(59) On 12 October 1994 Interbrew's new general manager for Belgium and the general manager of Alken-Maes met at the Sheraton Airport Hotel at Brussels airport ([59]). In a preparatory memo from Interbrew's marketing manager for the on-trade in Belgium to Interbrew's general manager for Belgium we read the following ([60]):

'1. Putting an end to expensive attacks

national customers sector ...

extremely difficult to draw a line, few rules or none

traditional on-trade

first of all a method has to be established ...

all dimensions of distribution agreements should be looked at:

a. investment policy

b. rebate policy ...

c. logistical measures

([54]) Interbrew's reply to request for information, 23.12.1999, and especially Annex B.4 to that reply (doc. 37614 2002-2003, 2040); Annex I.2 to Interbrew's letter of 14.1.2000 (doc. 37614 02602).

([55]) Annex 18 to Interbrew's letter of 28.2.2000 (doc. 37614 7683-7684); see also statement of objections, paragraph 59.

([56]) Original French: 'Bien que l'Horeca n'était pas discuté lors du meeting du Roy d'Espagne, [...], quand il est devenu directeur général de AM en Belgique, commence à m'appeler avec la demande de se concerter pour contrôler l'augmentation très forte des investissements pour conclure des contrats de brasserie. Il y a eu plusieurs autres conversations, surtout téléphoniques, avec [...] Il a essayé de mettre sur pied un système de consultation préalable lors d'achats et de ventes de cafés. J'ai systématiquement refusé. Dans ce contexte j'ai eu un dîner avec [...] Le résultat a été ma note du 5 octobre 1994 à [...] Au cours de ce dîner nous en sommes restés à des généralités. J'ai réitéré que les "mécanismes français" n'étaient pas transposables en Belgique.'

([57]) Annex I to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02014); see also statement of objections, paragraph 60.

([58]) Original English.

([59]) Interbrew's reply to request for information, 23.12.1999 (doc. 37614 2003-2004); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02591); letter from Interbrew, 8.2.2000, and especially Annex 3 to that letter (doc. 37614 7478, 7495).

([60]) Annex B5 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02041-02043); see also statement of objections, paragraph 62. Original Dutch.

2. Reducing unproductive spending

sectors: publicity, pumps ...

A joint approach following on from the Arthur D. Little study could produce considerable returns for both parties. The two biggest brewers should be able to dictate the law here by laying down rules together with the beer wholesalers' federation.

...

4. General

— ... that the application of mutual agreements cannot be checked (or that any checks must be carried out by a neutral outside body, and in that case there is too great a danger that it will become known)

— using the CBB to achieve our objectives looks simpler to me.'

(60) In an internal memo of 14 October 1994, on the subject of the 'Université de Lille', Interbrew's general manager for Belgium reports on the meeting of 12 October ([61]): 'Enclosed you will find a document from our friends as well as the one-page approach which I proposed. This was accepted by our friends in terms of principle' ([62]). The document in question originates with Alken-Maes, and gives an outline of the Belgian brewing industry and possible solutions to problems that have arisen ([63]). In the 'one-page approach' referred to here by Interbrew's general manager for Belgium, we read the following ([64]):

'3. Gentlemen agreement:

— No attack of obligations [i.e. on-trade outlets with an exclusive purchasing agreement]

— Price-positioning food

— No systematic attack of brands in each other's obligations

4. Efficiencies/market dynamics

— Diminish unproductive spendings:

— P.O.S.

— Draught services

— Folder activities (no., % rebate, ...)

— Investments in Horeca (definitions?!)

5. Structural measures

Concentration of production

Marketing policies (pricing, BEF 20 ...)' ([65])

(61) Danone too was aware of this agreement. In an internal telephone conversation at the end of 1999 or the beginning of 2000 in connection with the inspection carried out by the Commission at the offices of Alken-Maes, reference was made ([66]) to a '94 agreement carrying the name of [the general manager of Alken-Maes]' ([67]).

(62) In an undated memo by Interbrew's general manager for Belgium in which these subjects are mentioned, there is also a timetable ([68]):

'Project definition and gentlemen agreement 01/11, Market dynamics 01/02, Restructuring 01/04.' ([69])

(63) On 18 October 1994 there was a follow-up meeting between Interbrew's general manager for Belgium and the general manager of Alken-Maes ([70]). From notes kept by

([61]) Annex B6 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02045).
([62]) Original English.
([63]) Annex B6 to Interbrew's reply to request for information (doc. 37614 02046-02059); see also statement of objections, paragraph 63.
([64]) Annex B6 to Interbrew reply to request for information, 23.12.1999 (doc. 37614 02044).
([65]) Original English.
([66]) Annexes 18 and 20 to Danone's reply to request for information, 10.5.2000 (doc. 37614 9879-9881, 9888-9890).
([67]) Original French: 'Accord 94 sur les prix avec le nom de ...'; see also statement of objections, paragraph 63.
([68]) Annex B8 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02061); see also statement of objections, paragraph 64.
([69]) Original English.
([70]) Inspection at the offices of Alken-Maes, document MV26 (doc. 37614 00550); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02004); Annex I.1 to the Interbrew letter of 14.1.2000 (doc. 37614 02591); Interbrew letter of 8.2.2000, and especially Annex 4 to that letter (doc. 37614 7478, 7496).

the marketing manager for the on-trade in Belgium, it is clear that 'Université de Lille' was discussed at this meeting too ([71]).

(64) In an internal memo of 24 October 1994, Interbrew's general manager for Belgium summarised the discussion so far, and proposed other steps to Interbrew's CEO ([72]):

'1. Reply from Green [here Alken-Maes] to ITW-proposal

1.1. Pricing:

OK to establish key lager beers at same price and KRO [Kronenbourg] ± 5 % higher.

1.2. Gentleman agreement:

— limited to classical Horeca,

— not to: national accounts, presence of each others brands in obligations.

1.3. All other elements: OK

1.4. Further proposals:

...

— apply rebates to net prices [prices before excise duties, see in particular recitals 96 and 104 below],

...

small price increase in 1995.

...' ([73])

(65) Talks between Interbrew's general manager for Belgium and the general manager of Alken-Maes continued on 26 October 1994 ([74]). On 7 November Interbrew's general manager for Belgium reported to the Interbrew CEO as follows ([75]):

'1. Basis of any agreement

Spirit accepted regarding respect of each others current position in the market ...

2. Program for profit growth

Basic agreement to work in 3 phases:

A. Priority 1

Pricing in the food to be established.

Maximum rebates or premiums for promotion to be defined.

Review POS materials & costs for Horeca.

Review investment in POS ...

...

B. Priority 2

Production rationalisation.

C. Priority 3

Restructure the market:

— tariffication,

— horeca investments,

— draught costs,

— etc ...

([71]) Annex B7 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02060); see also statement of objections, paragraph 65.

([72]) Annex B9 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02062); see also statement of objections, paragraph 66.

([73]) Original English.

([74]) Inspection at the offices of Alken-Maes, document MV29 (doc. 37614 00553); Interbrew reply to request for information, 23.12.1999 (doc. 37614 02004-02005); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02591); letter from Interbrew, 8.2.2000 (doc. 37614 7479, 7497).

([75]) Annex B10 to Interbrew's letter of 23.12.1999 (doc. 37614 02064-02065); see also statement of objections, paragraph 67.

3. Next steps

04/11: Green [here Alken-Maes] to review program with superiors.

09/11: meeting with respective sales managers to:

— confirm overall spirit;

— define next steps for "Priority 1" ...' ([76])

(66) The meeting which according to the memo of 7 November was planned for 9 November did in fact take place on that date. Interbrew was represented by its Belgian general manager, off-trade manager and marketing manager, and Alken-Maes was represented by its general manager and managers for the off-trade and the on-trade ([77]). A separate document sets out the 'program for profit growth' referred to in the memo of 7 November 1994; some marginal notes have been added ([78]). These notes may well have been made at the meeting of 9 November 1994, and among other things describe a price agreement for the off-trade, showing the price of a crate of Pils at BEF 275 ([79]); such a price agreement had been referred to under 'Priority 1' in the memo of 7 November 1994. It is also noted that the points in 'Priority 3' are to be implemented by the CBB.

(67) Interbrew's marketing manager for the on-trade in Belgium also made notes at or with reference to this meeting; the notes are dated 9 November 1994. Under the heading 'Spirit' the notes mention 'Creative competition — avoid direct attack — pay attention to other competitors — consultation' ([80]).

(68) On 24 November 1994 Interbrew's marketing manager for the on-trade in Belgium and Alken-Maes's manager for the on-trade discussed outstanding differences regarding individual sales outlets, and also 'project Green' ([81]). In handwritten notes made at or with reference to the meeting, the marketing manager gives the following details of the agreement for the 'traditional' on-trade ([82]):

'It was agreed that drink supply contracts should be respected at all times. No new contract if the customer had a contract with more than two years to run, to give the present brewery the opportunity to secure a renewal first. No prospecting for speciality beers among customers that had Pils contracts with the competition (each to his own). No incentives to beer wholesalers to convert specialities by increasing rebates.'

In the margins of the same notes the marketing manager has also made a few critical comments on the agreements. He remarks in one place that there is a danger that 'someone else may run away with the business'.

4.3.2.3. 1995

(69) Summary

In 1995 there was regular consultation between Interbrew and Alken-Maes (and Danone) concerning the implementation of the agreements concluded in 1994. The two brewers also began to consult regarding a new system of pricing for the on-trade and the off-trade ([83]).

([76]) Original English.

([77]) Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02005); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02591); letter from Interbrew, 8.2.2000, and especially Annex 6 to that letter (doc. 37614 7479, 7498); see also statement of objections, paragraph 68.

([78]) Annex B11 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02066).

([79]) Original English: '1. Pricing in the food to be established. J=SA=A-M= 275,-.'

([80]) Annex B14 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02081); see also statement of objections, paragraph 69. Original Dutch.

([81]) Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02006); like 'Université de Lille', 'Project Green' is a code name used by Interbrew to refer to the cooperation between Interbrew and Alken-Maes; Interbrew's reply to request for information, 23.12.1999 (doc. 37614 01984).

([82]) Annexes B15 and B16 to Interbrew's reply to request of information, 23.12.1999 (doc. 37614 02082-02086); see also statement of objections, paragraph 70. Original Dutch.

([83]) The brewers' rebate system for sales for consumption on and off the premises.

(70) On 10 January 1995, at the Roy d'Espagne in Brussels, the general manager for Belgium and CEO of Interbrew and the general manager of Danone's beer division discussed relations between Interbrew and Alken-Maes ([84]).

(71) On 25 January and 10 February Interbrew's general manager for Belgium and the general manager of Alken-Maes discussed the status of 'project Green' ([85]).

(72) On 30 January Alken-Maes's manager for the on-trade sent a letter to Interbrew's marketing manager for the on-trade in which he compared offers made by Alken-Maes with those of Interbrew. The letter states as follows: 'I am forced to conclude that Interbrew has no real intention of acting to bring about a healthier on-trade market, since the spirit of what we have regularly discussed together — in the presence of our respective superiors, and at their express initiative — is manifestly being ignored ... I would be glad to have your reaction, in the hope that you might be able to clarify matters, and especially that you would want to prevent any repetition in future. It should be clear that little or nothing can be expected by way of results from our discussions in the CBB working parties if we see that even bilaterally we are unable to follow a sensible approach on the ground.' ([86])

(73) Relationships and agreements on the market were discussed once again at a meeting in Leuven on 18 April. Present were Interbrew's general manager for Belgium, marketing manager for the on-trade in Belgium, and manager for the off-trade, and Alken-Maes's general manager and managers for the on-trade and the off-trade ([87]). Interbrew's marketing manager for the on-trade in Belgium drew up a preparatory document, dated 14 April, summarising the relevant sectors, ends and means ([88]):

'1. Sector: tie contracts

Objective: maintain the Belgian "system"

Means: respect tie contracts

...

ask for information in cases of doubt

2. Sector: national customers

Objective: avoid an escalation of "sacrifices"

Means: respect current agreements

no attacks on each other's customers

consult on new customers

3. Sector: new business

Objective: contain the cost of doing business

Means: direct contact for all cases of overvaluation/overinvestment,

a common language for the calculation of costs, and a ceiling

4. Sector: competition

Objective: concentrate attacks on other competitors

([84]) Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02006); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02592); Interbrew letter of 8.2.2000, and especially Annex 9 to that letter (doc. 37614 7479, 7501); inspection at the offices of Interbrew, document MV1 (doc. 37614 8688); Annex 24 to Danone's reply to request for information, 10.5.2000 (doc. 37614 9903-9904); see also statement of objections, paragraph 72.

([85]) Inspection at the offices of Alken-Maes, document MV21 (doc. 37614 00545); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02006-02007); Annex I.1 to Interbrew letter of 14.1.1999 (doc. 37614 02592); letter from Interbrew, 8.2.2000, especially Annexes 10 and 12 (doc. 37614 7479-7480, 7502, 7504); letter from Alken-Maes, 7.3.2000 (doc. 37614 7880); see also statement of objections, paragraph 72.

([86]) Annex 14 to Interbrew letter of 28.2.2000 (doc. 37614 7609-7612); see also statement of objections, paragraph 74. Original Dutch.

([87]) Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02007-02008); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02593); letter from Interbrew, 8.2.2000, and especially Annex 15 to that letter (doc. 37614 7580-7481, 7507).

([88]) Annex B20 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02094); see also statement of objections, paragraph 75.

Means: exchange market information

incentives for teams (bonuses!)' ([89])

Notes made at the meeting show that there was talk of a ceiling on investment costs of [...] per hectolitre. At this meeting Interbrew and Alken-Maes also discussed the status of the CBB 'Vision 2000' project (on this project see also recitals 128 et seq.) ([90]).

(74) At an Alken-Maes internal meeting on 15 May 1995, Alken-Maes's management controller announced that Interbrew intended to launch its new prices on 1 January 1996, and gave some details. He also said that Interbrew wanted to enter into contact with Alken-Maes in this connection, and that a meeting was planned for 18 May. The objective was clearly to work in the 'same direction' ([91]). Alken-Maes now decided to speed up its own pricing study, and on 16 May an action plan was sent to a number of senior Alken-Maes managers ([92]).

(75) Interbrew's general manager for Belgium and the general manager of Alken-Maes met on 18 May ([93]).

(76) At an internal presentation of Alken-Maes's pricing study on 12 June, Interbrew's new pricing system was referred to; it was said that 'the exact impact will be looked at together later (IB-AM)', and that 'Alken-Maes must likewise have the first phase ready on 1 January 1996'. One of the requirements for implementation on 1 January 1996 was said to be 'being more or less on the same wavelength as IB' ([94]).

(77) A subsequent meeting between Interbrew's general manager for Belgium and the general manager of Alken-Maes took place at Interbrew's offices on 30 June ([95]). On 4 July the CEO of Interbrew had a telephone conversation with the general manager of Danone's beer division. From a preparatory memo drawn up by Interbrew's Executive Vice-President Western Europe, and the report on the conversation drawn up by Interbrew's CEO, it is clear that Interbrew believed it had complied with its agreements in Belgium ([96]): 'We have respected our deal in Belgium' ([97]).

(78) In an internal memo of 12 July on the subject of 'Pricing and logistics' (without Annexes), Interbrew's general manager for Belgium says 'I believe it could be useful to discuss these prices with A-M. When would that be possible? Appointment set for 30 August' ([98]).

(79) On 28 August 1995 Interbrew's new general manager for Belgium, who had previously been manager for the off-trade, sent a letter to the general manager of Alken-Maes, which read as follows ([99]): 'I would like to thank you and your people for your congratulations on my appointment as general manager for Belgium. You worked in excellent mutual understanding with [the previous general manager for Belgium], and I am looking forward to continuing

([89]) Original French: '1. Domaine: Les contrats d'obligation, Objectif: Préserver le "système" belge, Moyens: Respect des contrats d'obligation ...Demande d'info en cas de doute. 2. Domaine: Les clients nationaux, Objectif: Éviter l'escalade des "sacrifices", Moyens: Respect des accords en cours, Pas d'attaque des clients mutuels, Concertation pour les nouveaux. 3. Domaine: Les nouvelles affaires, Objectif: Contenir le "cost of doing business", Moyens: Contact direct pour tous les cas de surévaluation/surinvestissement, Language commun en matière de calcul de coût et fixation d'un plafond. 4. Domaine: La concurrence, Objectif: Concentrer l'attaque sur les autres concurrents, Moyens: Échange d'informations marketinges, Stimulation des équipes (primes!).'

([90]) Annex B19 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02091-02093).

([91]) Annex 39 to Alken-Maes letter of 7.3.2000 (doc. 37614 8497).

([92]) Letter from Alken-Maes, 7.3.2000, and especially Annex 39 to that letter (doc. 37614 7881, 8495-8501); see also statement of objections, paragraph 76.

([93]) Inspection at the offices of Alken-Maes, document MV23 (doc. 37614 00547); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02008); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02593); letter from Interbrew, 8.2.2000, and especially Annex 16 to that letter (doc. 37614 7481, 7508); see also statement of objections, paragraph 77.

([94]) Inspection at the offices of Alken-Maes, document MV15 (doc. 37614 00519-00527); letter from Alken-Maes, 7.3.2000 (doc. 37614 7881); see also statement of objections, paragraph 78. Original Dutch: 'juiste impact wordt samen later bekeken. (IB-AM)'; 'Alken-Maes moet eerste fase ook klaar hebben tegen 1/1/96'; '+/- op dezelfde golflengte als IB zitten'.

([95]) Inspection at Alken-Maes's offices, document MV24 (doc. 37614 00548); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02593); letter from Interbrew, 8.2.2000, and especially Annex 17 to that letter (doc. 37614 7481, 7509); letter from Alken-Maes, 7.3.2000 (doc. 37614 7881).

([96]) Letter from Interbrew, 28.2.2000, and especially Annexes L-15 and L-16 to that letter (doc. 37614 8970, 9046-9051); see also statement of objections, paragraph 79.

([97]) Original English.

([98]) Annex 18 to Interbrew letter of 8.2.2000 (doc. 37614 7510); see also statement of objections, paragraph 80. Original Dutch.

([99]) Inspection at Interbrew's offices, document MV22 (doc. 37614 8919); see also statement of objections, paragraph 81. Original Dutch .

with you in the same spirit. There are more than enough win/win opportunities, either direct or through a professional CBB, and good communication is a guarantee of success. Till 1 September.'

(80) It was not on 30 August, therefore, but on 1 September that the meeting took place between Interbrew's former general manager for Belgium (who in August had been appointed Chief Operating Officer (COO) Europe/Asia Pacific/Africa), Interbrew's new general manager for Belgium, and the general manager of Alken-Maes ([100]). At this meeting the 'exact impact' was 'looked at' (see above, recital 76) ([101]). Three days later Alken-Maes's general manager reported on the meeting to the company's management controller ([102]).

(81) Around this time the brewers had to consider a request from the Belgian distributive trades federation, Fedis. Fedis wanted a payment known as a 'sorting charge' to be made to its members, the multiple stores, for every crate of sorted empty bottles ([103]).

(82) On 26 October representatives of Alken-Maes and Interbrew agreed a response to Fedis's approach. The meeting was attended by Interbrew's new manager for the off-trade and its invoicing manager, and by Alken-Maes's management controller. According to Interbrew, Alken-Maes and Interbrew had been discussing this sorting charge with Fedis on behalf of the CBB, and were consulting with one another in that connection. From the notes kept by a member of Alken-Maes's staff who was present, however, it is clear that there had not been any meeting in the CBB framework, because it is noted that some measures are to be tackled via the CBB ([104]). Furthermore, Alken-Maes acknowledges that an agreement with Interbrew was discussed ([105]). There was a further meeting between Interbrew's general manager for Belgium and the general manager of Alken-Maes on 31 October ([106]).

4.3.2.4. 1996

(83) Summary

In 1996 there was intensive consultation between the brewers regarding pricing. Both brewers wanted a new system. They discussed the structure of a new pricing system and the direction taken by rebates.

(84) On 10 January 1996 Interbrew's general manager for Belgium and the general manager of Alken-Maes discussed pricing further ([107]). Alken-Maes states the following ([108]):

'Upon his return, [the general manager of Alken-Maes] explained Interbrew's position on pricing policy to [Alken-Maes's management controller]. [Alken-Maes's management controller] noted that there had to be "an agreement in principle with Interbrew by 10 February 1996". In a handwritten note, [the general manager of Alken-Maes] recorded that the pricing study had to cover three dimensions: logistics, pricing proper and marketing. A memo from [Alken-Maes's management controller] set up an action plan inside Alken-Maes, and identified the responsibilities of stated members of staff for each aspect of the study, so as to be able to respond quickly to the Interbrew initiative. It was also decided ... to introduce Alken-Maes's new prices no earlier than 1 January 1998, on the basis of customer behaviour in 1997.

([100]) Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02008); Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02593); letter from Interbrew, 8.2.2000, and especially Annex 19 to that letter (doc. 7481, 7511).

([101]) Inspection at the offices of Alken-Maes, document MV14 (doc. 37614 00494-00502).

([102]) Annex 29 to Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01937-01939); letter from Alken-Maes, 7.3.2000 (37614 7881-7882); see also statement of objections, paragraph 82.

([103]) As to the size of this sorting charge, the values given by the undertakings concerned differ, ranging from [...] (Haacht) to [...] (Danone).

([104]) Letter from Alken-Maes, 7.3.2000, and especially Annex 40 to that letter (doc. 37614 7882, 8502-8504).

([105]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7882): 'On 26 and 31 October representatives of Interbrew and Alken-Maes met in order to arrive at a concerted response to the request from Fedis.' Original French.

([106]) Inspection at the offices of Alken-Maes, document MV25 (doc. 37614 00549); reply to request for information, 23.12.1999 (doc. 37614 02009); see also statement of objections, paragraph 84.

([107]) Inspection at the offices of Alken-Maes, document MV19 (doc. 37614 00543); Annexes 31 and 32 to Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01942-01952); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02009).

([108]) Letter from Alken-Maes, 7.3.2000, and especially Annex 41 to that letter (doc. 37614 7882, 8506-8507), with references to the following documents: Annexes 31 and 32 to Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01942-01952); inspection at the offices of Alken-Maes, documents AvW12, MV3, MV4 and MV13 (doc. 37614 00121-00130, 00385, 00386-00403, 00472-00493).

There was doubtless another meeting between [Interbrew's general manager for Belgium] and [the general manager of Alken-Maes] in January or February. The notes kept by [the general manager of Alken-Maes] summarise Interbrew's position regarding price structure, rebates and logistics. In a memo of 15 February 1996 the consultant, Martichoux, summarised a conversation with [the general manager of Alken-Maes] concerning the progress of the pricing study at Interbrew.

On 1 March Martichoux presented its study to Alken-Maes; the study stated that agreement could be reached with Interbrew regarding the price structure and the timetable. The memo presenting the study also stated that an agreement with Interbrew would simplify the introduction of a future system. This presentation was followed by another on 15 and 16 April.

[The general manager of Alken-Maes] learned that Interbrew wanted to introduce its new system on 1 January 1997; [the general manager of Alken-Maes] asked [Alken-Maes's management controller] to speed up the implementation of the new system so as to be able to introduce it on the same date.' ([109])

(85) The other meeting which according to Alken-Maes took place between Interbrew's general manager for Belgium and the general manager of Alken-Maes (recital 84) may have been the meeting in Leuven on 29 February 1996. Interbrew's Chief Operating Officer Europe/Asia Pacific/Africa was also present at that meeting ([110]). On 28 February 1996, the day before the meeting, he referred in a telephone conversation with the chairman and general manager of Heineken ([111]) to the existence of a 'non-war agreement in Belgium' ([112]).

(86) A subsequent meeting on pricing took place on 24 April. It was attended by Interbrew's general manager for Belgium and manager for the off-trade, and the general manager and management controller of Alken-Maes ([113]). In connection with this meeting Alken-Maes states the following ([114]):

'The meeting discussed the merits of a graded tariff, a more transparent rebate policy, and the logistical aspects of the new pricing system. It appeared that Alken-Maes was a supporter of an open logistical pricing system, while Interbrew did not want to apply a transparent tariff to all its customers. According to the minutes of the meeting, drawn up by [Alken-Maes's management controller], the two competitors felt they would need to study the "legal aspect" in the event that they were to "begin together" on 1 January 1997 and the two systems were to "resemble each other too closely." An internal Alken-Maes document on the new pricing structure, dated 6 May, also refers to the discussions with Interbrew.

On 7 May [the general manager of Alken-Maes] instructed [Alken-Maes's management controller] to contact [Interbrew's manager for the off-trade] as a consequence of an agreement between [the general manager of Alken-Maes] and [Interbrew's general manager for Belgium], on the basis of which [Interbrew's general manager for Belgium] had invited Alken-Maes

([109]) 'À son retour, Monsieur ... expose la position d'Interbrew concernant la politique tarifaire à Monsieur ... Monsieur ... prend note qu'il faut un "accord de principe avec Interbrew pour le 10 février 1996". Dans une note de la main de Monsieur ..., il note que l'étude tarifaire doit comprendre trois dimensions: logistique, purement tarifaire et commerciale. Une note de Monsieur ... met en place un plan d'action au sein d'Alken-Maes et identifie les responsabilités de certains employés pour chaque aspect de l'étude afin de réagir rapidement à l'initiative d'Interbrew. Il est aussi décidé ... d'introduire la nouvelle tarification d'Alken-Maes au plus tôt le 1er janvier 1998, sur base d'une analyse du comportement des clients en 1997. Il y a sans doute eu une autre réunion entre Messieurs ... et ... en janvier ou en février. Des notes manuscrites de Monsieur ... résument la position d'Interbrew concernant la structure des prix, les ristournes et la logistique. Dans une note du 15 février, le consultant Martichoux résume une conversation avec Monsieur ... concernant l'avancement de l'étude tarifaire chez Interbrew. Le 1er mars, Martichoux présente son étude à Alken-Maes, dans laquelle il est noté qu'un accord avec Interbrew est possible sur la structure des prix et sur le calendrier. La note de présentation précise aussi qu'un accord avec Interbrew facilitera la mise en place du futur système. Cette présentation est suivie d'une autre les 15 et 16 avril 1996. Monsieur ... apprend qu'Interbrew introduirait sa nouvelle tarification le 1er janvier 1997. Monsieur ... demande à Monsieur ... d'accélérer la mise en place d'un nouveau système de tarification afin de pouvoir l'introduire à la même date.' See also statement of objections, paragraph 86.

([110]) Letter from Interbrew, 8.2.2000, and especially Annex 25 to that letter (doc. 37614 7483, 7518); see also statement of objections, paragraph 87.

([111]) Heineken's reply to request for information, 11.5.2000.

([112]) Original English.

([113]) Inspection at the offices of Alken-Maes, documents AvW11, MV5 and FK2-13 (doc. 37614 00117-00120, 00404-00407, 00557-00563); Alken-Maes's reply to request for information, 10.12.1999, and especially Annexes 33 and 34 to that reply (doc. 37614 01391, 01953-01965); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02009); Annexes I.4 and I.5 to Interbrew letter of 14.1.2000 (doc. 37614 02613, 02617).

([114]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7882-7883).

to acquaint itself with its [Interbrew's] price list. [The general manager of Alken-Maes] also told [Alken-Maes's management controller] that he would have to analyse Interbrew's system, and that Martichoux's help would no longer be required, since he wanted to use "the same framework" and base himself on Interbrew's system.' ([115])

(87) From the minutes of the meeting drawn up by Alken-Maes (preceding recital) ([116]), it appears that the new pricing system Interbrew wanted to apply was built on three components, or types of rebate: logistics, volume and individual (depending on the particular customer). Clearly there was agreement between the parties on a number of principles, such as that the rebate was to depend on volume, and that the purchase price paid by the on-trade was always to be the same as or lower than [...] (the rebate was always to be [...] % higher). There was also talk of dividing the speciality beers into categories, each with their own rebates, rather than a general rebate spread over all speciality beers bought. In its observations on the statement of objections, Danone argues that it is a fact of the market that the prices paid by beer wholesalers will always have to be [...] % lower than [...], because of the extra services that beer wholesalers provide to on-trade outlets. [...].

(88) As a result of this agreement between Interbrew and Alken-Maes, a meeting took place in Mechelen on 30 May 1996 between Interbrew's off-trade manager and Alken-Maes's management controller ([117]). At that meeting there was further discussion of the components of the pricing system already described, and of the manner in which customers were to be informed ([118]). [...].

(89) A number of documents date from the period between the meeting of 30 May and the next documented meeting on 29 June. Concerning these documents Alken-Maes states as follows ([119]):

'On 11 June 1996 Interbrew wrote to all its customers, including Alken-Maes, to advise them of the introduction of new general terms and a new pricing system with effect from 1 January 1997. On 26 June a presentation memo by Martichoux referred to contacts between Alken-Maes and Interbrew, and analysed the attitude Alken-Maes ought to take to Interbrew's new terms. An internal Alken-Maes memo dated 3 July, drawn up by [Alken-Maes's marketing manager], discussing the merits of delivered-to-premises and ex-factory pricing, referred to comments made by [Interbrew's manager for the off-trade] regarding Interbrew's new pricing system. On 5 July Martichoux made a presentation to Alken-Maes on the possibility of introducing an ex-factory price ... On 25 July Alken-Maes decided not to introduce an ex-factory price after Interbrew had abandoned the idea.' ([120])

([115]) 'Lors de cette réunion, les participants discutent des mérites d'un tarif hiérarchisé, d'une politique de ristournes plus transparente et des aspects logistiques de la nouvelle tarification. Il apparaît qu'Alken-Maes est partisane d'un tarif logistique ouvert, alors qu'Interbrew ne désire pas appliquer un tarif transparent vis-à-vis de tous ses clients. Le procès-verbal de cette réunion, rédigé par Monsieur ..., indique que les deux concurrents estiment devoir examiner "l'aspect juridique" dans l'hypothèse où ils "commenceraient ensemble" le 1er janvier 1997 et si les deux systèmes "se ressemblent trop". Un document interne d'Alken-Maes du 6 mai concernant la nouvelle structure tarifaire se réfère aussi à des discussions avec Interbrew. Le 7 mai, Monsieur ...donne pour instruction à Monsieur ... de prendre contact avec Monsieur ..., suite à un accord entre Messieurs ... et ... selon lequel ce dernier invite Alken-Maes à s'informer de son tarif. Monsieur ... indique aussi à Monsieur ... qu'il doit analyser le système d'Interbrew, et que l'aide de Martichoux n'est plus nécessaire car il veut utiliser le "même cadre" et se baser sur le système tarifaire d'Interbrew.' See also statement of objections, paragraph 88.

([116]) Inspection at the offices of Alken-Maes, document AvW11 (doc. 37614 00117-00120); see also statement of objections, paragraph 89.

([117]) Alken-Maes's reply to request for information, 10.12.1999, and especially Annexes 35 and 36 to that reply (doc. 37614 01391, 01966-01971); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02010); Annexes I.4 and I.5 to Interbrew letter of 14.1.2000 (doc. 37614, 02613, 02617); see also statement of objections, paragraph 90.

([118]) Inspection at the offices of Alken-Maes, documents AvW17, 3PS2 and MV7 (doc. 37614 00145-00147, 00354-00356, 00410-00412); letter from Alken-Maes, 7.3.2000 (doc. 37614 7883).

([119]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7883-7884), with references to the following documents: inspection at the offices of Alken-Maes, documents AVW36 (doc. 37614 00235-00241) and MV8 to MV11 (doc. 00413-00459).

([120]) Original French: 'Le 11 juin, Interbrew écrit à tous ses clients, dont Alken-Maes, pour leur signifier l'introduction de ses nouvelles conditions générales et de sa nouvelle tarification au 1er janvier 1997. Le 26 juin, une note de présentation de Martichoux se réfère à des contacts entre Alken-Maes et Interbrew, et analyse l'attitude qu'Alken-Maes doit adopter face aux nouvelles conditions d'Interbrew. Le 3 juillet, une note interne d'Alken-Maes, rédigée par Monsieur ... concernant les mérites respectifs d'un tarif "franco" et d'un tarif "départ", fait référence à des commentaires de Monsieur ... (Interbrew) concernant la nouvelle tarification d'Interbrew. Le 5 juillet, Martichoux fait une présentation à Alken-Maes concernant la possibilité d'introduire un "tarif départ" ... Le 25 juillet, Alken-Maes décide de ne pas introduire de tarif "base départ" suite à l'abandon du même projet par Interbrew.' See also statement of objections, paragraph 91.

(90) The meeting of 29 July 1996 was attended by Interbrew's manager for the off-trade and Alken-Maes's general manager, marketing manager and management controller ([121]). From the notes of the meeting kept by Alken-Maes, it is clear that the rebate structure already mentioned was not the only subject discussed. There was also talk of a transitional arrangement to apply when the new terms were being introduced: 'Guarantee: ... must be the same amount in 1997 as in 1996 (in absolute figures)' ([122]).

(91) On 19 September 1996 Alken-Maes decided to introduce its new logistical system with effect from 1 July 1997. On 27 November 1996 Alken-Maes decided to explain the new system by means of presentations to be organised with the help of Martichoux. Following on from the meeting of 19 September, Alken-Maes's management controller contacted Interbrew's off-trade manager, on 9 December, to ask a number of questions Alken-Maes had with regard to the pricing study ([123]).

(92) On 11 October Interbrew's Chief Operating Officer Europe/Asia Pacific/Africa sent a fax to a member of one of the families that owned shares in Interbrew. The subject was day-to-day relations with Danone/Kronenbourg/Alken-Maes ([124]): 'We have been talking about a constructive competition in Belgium since one year now. Fundamentally nothing has happened. And most probably the responsibility for this is shared. We will try to restart this process in the following week' ([125]).

4.3.2.5. 1997

(93) Summary

In 1997 contact seems to have grown less intense, probably in part because Interbrew had introduced its new pricing system on 1 January. Alken-Maes ultimately launched its new pricing system some time after Interbrew, which had not been the earlier intention.

(94) Interbrew's new pricing system entered into force on 1 January ([126]).

(95) On 17 April Interbrew's Chief Operating Officer Europe/Asia Pacific/Africa and general manager for Belgium met the general manager of Danone's beer division and the general manager of Alken-Maes in Paris ([127]).

(96) Regarding this meeting on 17 April, the then general manager of Interbrew has stated as follows ([128]):

> 'There were top-level meetings ... which I did not attend. After the top-level meetings we had "instructions meetings" which we all attended (general managers and managers for the off-trade and the on-trade) ... The meeting in Paris on 17 April 1997 was just one of these instructions meetings with Danone (Danone was represented by [the general manager of its beer division]). We ("Belgium" and "France", but each separately) were to report on synergies. At that meeting we went through profit and loss line by line, and systematically examined how costs could be lowered and profitability improved. Subjects discussed were: (1) production; (2) joint distribution platforms; (3) discounts on price to be given before or after excise duties (this was also a CBB subject); (4) marketing and investment in advertising ("share of voice"); (5) growth of the beer market, and methods of increasing volume ...'

([121]) Alken-Maes's reply to request for information, 10.12.1999, and especially Annexes 37 and 38 to that reply (doc. 37614 01373, 01383, 01972-01975); letter from Alken-Maes, 7.3.2000, and especially Annex 42 to that letter (doc. 37614 7884, 8509-8513); see also statement of objections, paragraph 92.

([122]) Annex 42 to Interbrew letter of 7.3.2000 (doc. 37614 8512). Original Dutch.

([123]) Letter from Alken-Maes, 7.3.2000, and especially Annexes 42 and 43 to that letter (doc. 37614 7884, 8513, 8528-8530), with references to the following documents: inspection at the offices of Alken-Maes, document AvW19 (doc. 37614 00150-00153) and document MV17 (doc. 37614 00532-00541); see also statement of objections, paragraph 93.

([124]) Inspection at the offices of Interbrew, document MV18 (doc. 37614 8844-8845); see also statement of objections, paragraph 94.

([125]) Original English.

([126]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7884).

([127]) Inspection at the offices of Alken-Maes, document DvE6 (doc. 37614 00271); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02010-02011, 02115) and especially Annex B25 to that reply; Annexes I.1 and I.4 to Interbrew letter of 14.1.2000 (doc. 37614 02595, 02613); Annex 10 to Interbrew letter of 2.2.2000 (doc. 37614 7443); letter from Interbrew, 8.2.2000, and especially Annex 32 to that letter (doc. 37614 7484, 7525); letter from Interbrew, 28.2.2000, and especially Annex 7 to that letter (doc. 37614 7553, 7589-7592); letter from Alken-Maes, 7.3.2000 (doc. 37614 7884); Annex 22 to Danone's reply to request for information, 10.5.2000 (doc. 37614 9896-9898); see also statement of objections, paragraph 97.

([128]) Annex I.4 to Interbrew letter of 14.1.2000 (doc. 37614 02609-02614); Annex 10 to Interbrew letter of 2.2.2000 (doc. 37614 7442-7447); see also statement of objections, paragraph 98. Original Dutch.

(97) An internal Alken-Maes memo of 25 June reports on the actual implementation of the prices introduced by Interbrew on 1 January, and the departures from those prices observed in practice ([129]).

(98) In another internal memo, dated 4 August, Alken-Maes reviews the situation, and refers to possible difficulties with the Belgian beer wholesalers' federation in the event that it were to change over to the new system of pricing ([130]).

(99) By letter of 1 September 1997 Interbrew asked its customers for their cooperation in an evaluation of its new pricing system ([131]).

(100) In October Alken-Maes decided to introduce a new logistical pricing method. Up to the end of November it carried out simulation exercises for the new system of logistical and commercial pricing ([132]). Alken-Maes's management controller states that there was no further cooperation with Interbrew thereafter, i.e. after November 1997 ([133]).

4.3.2.6. 1998

(101) Summary

At the beginning of 1998 there was a meeting between Interbrew and Alken-Maes to take stock of several years' cooperation. Achievements since the gentleman's agreement of 1994 were specifically detailed. After this meeting cooperation between Interbrew and Alken-Maes seems to have come to an end.

(102) On 1 January 1998 Alken-Maes introduced its new logistical pricing system. It launched its new commercial pricing system on 1 January 1999 ([134]).

(103) On 28 January 1998 Interbrew's marketing manager for Belgium and the marketing manager of Alken-Maes met in Anderlecht in Brussels. The subject was the history of relations between Interbrew and Alken-Maes ([135]). Interbrew's general manager for Belgium and off-trade manager may also have been present at this meeting ([136]).

(104) The notes on this conversation kept by Interbrew's marketing manager for Belgium are as follows ([137]):

'1. Subjects

1. Organisation of consultations

2. Current issues

on-trade	...
off-trade	Limburg
	prices for cans

3. General issues

2. Retroactivity 12 October 1994

— stop expensive attacks

— reduce unproductive expenditure

— stimulate beer consumption

achievements:

• rebates on price net of excise

• advertising credit vouchers adapted [see also recital 147]

settlement of old disputes

Pricing

joint issues

([129]) Inspection at the offices of Alken-Maes, document 2PS2 (doc. 37614 00318-00320); letter from Alken-Maes, 7.3.2000 (doc. 37614 7884-7885).

([130]) Inspection at the offices of Alken-Maes, document 2PS1 (doc. 37614 00316-00317); letter from Alken-Maes, 7.3.2000 (doc. 37614 7885).

([131]) Inspection at the offices of Alken-Maes, document AvW25 (doc. 37614 00208-00212); letter from Alken-Maes, 7.3.2000 (doc. 37614 7885).

([132]) 'Logistical pricing' means the aspect of pricing that is determined by customers' 'logistical behaviour', and is related to the costs incurred by the brewer that depend on that behaviour; a customer might for example place a large number of small orders, or only a few large orders. 'Commercial pricing' covers the rest of the price.

([133]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7885); see also statement of objections, paragraph 102.

([134]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7885).

([135]) Interbrew's reply to request for information, 23.12.1999, and especially Annex II to that reply (doc. 37614 02011, 02015-02016); Annex I.3 to Interbrew letter of 14.1.2000 (doc. 37614 02607-02608).

([136]) Annex 21 to Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01859); Annex 12 to Interbrew letter of 2.2.2000 (doc. 37614 7452); see also statement of objections, paragraph 105.

([137]) Annex II to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02015-02016); see also paragraph 106 of the statement of objections.

- maintenance of draught pumps

  respect for other's ties

  no aggressivity pact

- standardisation of packaging

not achieved:

- regulation of investment
- participation of other players
- outside advertising

The on-trade objectives

"respect for ties and supply rights

regulation of investment

attitude/action on practices of small brewers and private-labels ..."

3. Consultation on on-trade

— three times a year formal consultation with agenda

— direct contact over difficult issues and competition for national customers... ([138])'

(105) On this point the then marketing manager for the on-trade at Interbrew states as follows ([139]):

'The item dated 28 January 1998 is my notes of a meeting ... with ... the new marketing manager (on-trade and off-trade) at AM. He clearly knew nothing about the history. I had no further contact with AM thereafter, and nothing came of the meeting. In 1998 neither AM nor ourselves were under pressure from above, so nothing more happened.'

The representative of Alken-Maes at that meeting writes ([140]):

'As you know, I was always cautious and sceptical of Alken-Maes's biggest competitor. The few conversations referred to never led to any concrete results.'

4.3.3. *The facts: supplementary statements*

(106) In addition to the facts relating directly to particular meetings or events, more general statements have been submitted regarding what happened in the period 1992 to 1998, both by Interbrew, or employees or former employees of Interbrew who played an important role at the time, and by Alken-Maes.

4.3.3.1. Individual statements

(107) Interbrew's general manager for Belgium, later Chief Operating Officer Europe/Asia Pacific/Africa states as follows ([141]):

'There were indeed regular contacts and meetings between ITW and AM/Kronenbourg/Danone. ITW's intention was to create goodwill for Danone, with a view to a merger or takeover of its beer business. The strategy rested on talk, lots of talk, and agreed measures that would allow value to be created jointly

...

Measures to contain aggression/cost explosion ("Université de Lille")

The initiative came from AM, and thus from Danone. We in Belgium wanted some kind of balance with France, where ITW was very weak. There was clearly blackmail in terms of the French market. We were afraid of retaliation in France. So we wanted to break the link with France structurally, by working AM loose from Danone. The issue was: what measures can we take to contain the cost explosion jointly:

— investment in pubs

— promotions in the off-trade.

([138]) Original French: 'respect des obligations et droit de livraison, régulation des investissements, attitude/actions envers pratiques petits brasseurs et private labels (...)'.

([139]) Annex I.3 to Interbrew letter of 14.1.2000 (doc. 37614 02607-02608); see also statement of objections, paragraph 107. Original Dutch.

([140]) Annex 21 to Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01859); see also statement of objections, paragraph 107. Original Dutch.

([141]) Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02586-02590); see also statement of objections, paragraph 109. Original Dutch.

This was followed up by the marketing departments, each with its opposite number. We met every two months to discuss progress.

We achieved very little by way of results.

In the on-trade, there were agreements on the "national accounts" and on the restriction of investment, but [the marketing manager for the on-trade in Belgium] never succeeded in implementing them ...

In the off-trade, prices were set ([Interbrew's off-trade manager and later general manager for Belgium] with [Alken-Maes's marketing manager]), but these agreements were not complied with either ...

As regards the pricing system, I did not deal with that personally. I know there was consultation. The objective at one stage was to do it together with AM, but they were not ready. ITW went ahead, and AM followed ...'

(108) Interbrew's on-trade marketing manager for Belgium states as follows ([142]):

'The term "Université de Lille" originally stood for a form of market behaviour in which we were expected to behave like "gentlemen". We would compete, but we would not go too far. Much later it came to mean keeping market relationships in Belgium balanced with what was happening in France.'

(109) Interbrew's manager for the off-trade, and later general manager, states the following ([143]):

'In the off-trade we achieved a lot, far more than in the on-trade, where admittedly little or nothing happened.

In the off-trade there were agreements on:

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

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

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

[Alken-Maes's marketing manager] was also keen to see standardisation of packaging (joint responsibility for the standardisation project at the CBB).

That did not prevent us from being very aggressive on prices; competition was stiff, especially from 1994 onward. The Nielsen statistics are there to prove it.'

And in answer to a request for clarification he adds ([144]):

'In the period (spring 1996) ... we were looking for better ways to employ our marketing resources in order to get our beer volume growing again.

Practical agreements:

— When we were promoting a multi-pack (a six-pack for example) we would limit ourselves to 5 + 1 free, rather than 4 + 2, [...]. For speciality beers the minimum was 3 + 1 (in a four-pack).

— At promotional events and tastings of our products in supermarkets and hypermarkets at weekends (openings, anniversaries) we would limit ourselves to giving a BEF 30 price coupon (= reduction at the check-out) ...

— In the same spirit, greater discipline was imposed with regard to inserts in supermarkets' advertising brochures and the minimum promotion brochure price (not shelf prices) (...) [...]. Advertising brochure prices were already aggressive (as low as

([142]) Annex I.3 to Interbrew letter of 14.1.1999 (doc. 37614 02605-02608); see also statement of objections, paragraph 110. Original Dutch.

([143]) Annex I.4 to Interbrew letter of 14.1.2000 (doc. 37614 02610-02614); see also statement of objections, paragraph 111. Original Dutch.

([144]) Annex 10 to Interbrew letter of 2.2.2000 (doc. 37614 7443-7447); see also statement of objections, paragraph 111. Original Dutch.

BEF 249 for Maes), and we tried to avoid letting them fall any further, and to secure a minimum advertising brochure price from our customers.'

(110) Interbrew's off-trade manager, who had previously worked in the Belgian direct distribution department, states as follows ([145]):

'I learned that there were regular talks with Alken-Maes, and that they regularly called one another. When I asked whether this was in order legally, I was told by [Interbrew's general manager for Belgium] that this was not a problem. I was also told that it was part of a bigger Belgian-French story.'

And in answer to a request for clarification, he adds, under the heading 'Agreeing an off-trade plan for promotional pressure' ([146]):

'As I explained earlier, there was discussion about pressure of advertising brochures (the number of folders in a given period), promotional price levels and number of free gifts. From memory, and to the best of my knowledge, in 1996 the subject was promotional prices. In 1997 the subject was the number of brochures, price levels and free gifts.'

4.3.3.2. General statements

(111) Interbrew has admitted the existence of the following practices ([147]):

'Collaboration with BSN (later Danone) and/or Kronenbourg about competitive behaviour and cooperation on the Belgian market (as from about March 1993 to January 1998) ... including:

— concerted measures in Horeca (reduction of unproductive investments, reduction of advertisement spendings, draught services...),

— respect of each other's ties,

— market sharing in respect of national accounts,

— agreements on promotions in the food market,

— exchange of information about the structure of the new tarification system (1996) ([148]).'

(112) Alken-Maes has admitted being involved in the following at the end of 1994 ([149]):

'a pact providing for non-aggression, the reduction of marketing investment in the on-trade and in outside advertising, and concerted pricing. Proper implementation of the agreement seems to have been the subject of a procedure for regular consultation between the senior managers of the two companies.' ([150])

'Numerous meetings took place between executives of Alken-Maes, notably [the general manager], who was managing director between 1992 and 1998, and executives of Interbrew, especially [the successive general managers], at which there was concertation about the distribution and sale of beer in Belgium.' ([151])

([145]) Annex I.5 to Interbrew letter of 14.1.2000 (doc. 37614 02616-02618); see also statement of objections, paragraph 112. Original Dutch.

([146]) Annex 12 to Interbrew letter of 2.2.2000 (doc. 37614 7451-7454). Original Dutch.

([147]) Letter from Interbrew, 29.2.2000 (doc. 37614 7696-7697).

([148]) Original English.

([149]) Letter from Alken-Maes, 27.12.1999 (doc. 37614 02521-02523); letter from Alken-Maes, 7.3.2000 (doc. 37614 7880).

([150]) Original French: 'un pacte de non-agression, de limitation des investissements commerciaux dans le domaine de l'horeca et de la publicité extérieure, et une concertation tarifaire. La bonne application de l'accord aurait fait l'objet d'une procédure de consultation régulière directement entre les dirigeants des deux sociétés.'

([151]) Original French: 'Il y a eu de nombreuses réunions entre des collaborateurs d'Alken-Maes et principalement Monsieur ..., alors administrateur délégué, entre 1992 et 1998 avec des collaborateurs d'Interbrew, principalement Messieurs ... et ..., durant lesquelles la distribution et la vente de bière en Belgique ont fait l'objet d'une concertation'; see also statement of objections, paragraph 114.

4.4. **Bilateral exchange of information between Interbrew and Alken-Maes**

(113) Summary

From a large number of documents it is clear that Interbrew and Alken-Maes exchanged detailed sales information on a monthly basis ([152]). Alken-Maes and employees of Interbrew have stated that this exchange began at the initiative of Interbrew ([153]). According to both Interbrew and Alken-Maes, the exchange of information started no later than the end of 1991, on the basis of an oral agreement. The designated contacts at Alken-Maes and Interbrew exchanged the information by telephone ([154]). The information exchange system that operated between Interbrew and Alken-Maes assisted their implementation of the agreements described above (section 4.3).

(114) It is not clear exactly when the exchange of information began. The statements do not correspond. Some indicate that it began as early as 1989 ([155]); but in any event the Commission has evidence that it started no later than the end of 1991. According to Interbrew, it began in December 1991, and according to Alken-Maes in November 1991. The first information exchanged concerned changes in total sales of Pils and non-alcoholic beer to the on-trade and off-trade together, in percentages, in November or October 1991 ([156]).

(115) From April 1992 onward figures were also exchanged for volumes, and not just for percentage changes, for Pils, non-alcoholic beer and light (low-alcohol) beer. Sales were also broken down by distribution channel (identified by the English terms 'food' (the off-trade) and 'trad.' ('traditional', the on-trade), and form of packaging ('barrels' and 'others'). On 22 April 1992, for example, Interbrew's figures for March 1992 were circulated ([157]). These were followed by back sales figures for 1991 ([158]).

(116) No later than October 1992 monthly information was being exchanged on sales by volume in all segments ([159]). Figures for September 1992 were circulated within Interbrew on 15 October ([160]). The time-lag of two weeks between the end of the month and the exchange of information in respect of that month was maintained until the exchange of information came to an end ([161]).

(117) From April 1994 the figures for Interbrew no longer include volumes brewed by Interbrew under licence and sold by other parties (that is to say the Carlsberg and Tuborg brands) ([162]).

(118) From 1997 the figures distinguish between the brands belonging to the brewers themselves and beer produced by them under distributors' own brands ('private-labels') ([163]).

(119) On 8 September 1997 a meeting took place between Alken-Maes's management controller and the marketing information manager and another marketing executive of Interbrew, at which the exchange of information was discussed ([164]). Regarding this meeting Alken-Maes states as follows ([165]):

'on 8 September 1997, at the request of [Alken-Maes's general manager], [Alken-Maes's management control-

([152]) Inspection at the offices of Alken-Maes, documents FK2-1 (doc. 37614 00597), NvHR 4 to 26 (doc. 37614 00599-01038); Annexes 1 to 11 to Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01406-01845); Annexes III and A 1 to 3 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02017-02029).

([153]) Annex I.1 to Interbrew letter of 14.1.2000 (doc. 37614 02587) and Annex 18 to Interbrew letter of 28.2.2000 (doc. 37614 07682); letter from Alken-Maes, 7.3.2000 (doc. 37614 07868-07885).

([154]) Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01370-01374); Interbrew's reply to request for information, 23.12.1999 (doc. 37614 01982-01983).

([155]) Annexes I.5 and I.6 to Interbrew letter of 14.1.2000 (doc. 37614 02615-02622).

([156]) Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01370-01371); Interbrew's reply to request for information, 23.12.1999, and especially Annex A.1 to that reply (doc. 37614 01982, 02022).

([157]) Annex A.2 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02023-02024).

([158]) Alken-Maes's reply to request for information, 10.12.1999 (doc. 37614 01371); inspection at the offices of Alken-Maes, document NvHR26 (doc. 37614 01033-01038).

([159]) Pils, non-alcoholic beers, light beers, table beers, premium Pils, amber ales, abbey and Trappist beers, gueuze and fruit beers, sour beers, white beers, strong golden ales, regional beers, and English-style ales.

([160]) Annex A.3 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02025-02029).

([161]) See Annex III to Interbrew's reply to request for information, 23.12.1999; the memo is dated 12.7.1999, and concerns information for June 1999 (doc. 37614 02017-02021).

([162]) Alken-Maes's reply to request for information, 10.12.1999, and especially Annex 10 to that reply (doc. 37614 01371 and 01834).

([163]) Alken-Maes's reply to request for information, 10.12.1999, and especially Annex 11 to that reply (doc. 37614 01371 and 01842-01845).

([164]) Alken-Maes's reply to request for information, 10.12.1999, and especially Annex 40 to that reply (doc. 37614 01373-01374 and 01978).

([165]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7848-7865).

ler] met [Interbrew's marketing information manager and another marketing executive of Interbrew] at the restaurant Le Roi d'Espagne in Brussels in order to consider the best way of showing sales of private-labels in the statistics exchanged every month between Interbrew and Alken-Maes. During the meeting the general segmentation of the data was also discussed. According to [Alken-Maes's management controller] this meeting followed Interbrew's entry into the private-label beer segment. Interbrew wanted to be able to monitor the movement of its share of sales in this segment, where it believed it could achieve the same market share as it had for sales of beer under its own brands.' ([166])

(120) From various documents it is clear that there was repeated telephone contact in order to optimise the exchange of information ([167]). At the beginning of 1999, for example, there was contact regarding a further breakdown of the figure for Pils by type of packaging. Initially agreement was reached between the marketing managers of Interbrew and Alken-Maes. But this oral agreement was never put into effect.

(121) By letter of 5 November 1999 Alken-Maes told Interbrew that 'on 27 October 1999 we decided to stop notifying our monthly sales figures' ([168]).

(122) Interbrew's former general manager for Belgium states as follows with regard to the exchange of information ([169]):

'As far as I can remember this system was set up by [the then general manager for Belgium] in 1992 ... The objective was to obtain faster and more accurate information for both the on-trade and the off-trade ... There were other statistics available on the market, but they were less reliable and also slower ... There were also the statistics we received from the CBB. But these were much slower, because they were only three-monthly. The figures were never discussed as such with AM. A general commentary on the trend was given from time to time. This was against the background of our agreement with [the chairman and general manager of Danone] that it was in our interest "to approach the market calmly". Thus we looked at these figures to consider whether ITW was doing well in a particular area, and AM less well, etc.'

(123) In response to more detailed questions which the Commission put to Interbrew by fax of 21 January 2000 ([170]), this statement was clarified as follows. To the question whether the exchange of information was used to monitor compliance with agreements with Alken-Maes, the answer was ([171]):

'No. Although Kronenbourg had asked for agreements on market shares, no such agreements were concluded. Thus no monitoring was necessary. Nor did the fact that a general commentary was given mean that internal instructions were issued on the basis of the figures. These were commentaries on the figures. They were never linked to action.'

(124) Interbrew's manager for the off-trade, later general manager for Belgium, has stated as follows ([172]):

'I was aware of the system of exchange between ITW and AM. We looked forward to it, because it was practical and quick ... We sifted the information as carefully as possible in order to obtain good market intelligence. We knew our market share in Belgium to within a tenth of a percentage point. The information we obtained was very important. We looked at that information first, then at the CBB's figures, and then at Nielsen's, where they existed. For market estimates we used the exchanged information most of all. But the

([166]) Original French: 'le 8 septembre 1997, suite à la demande de Monsieur ..., Monsieur ... a rencontré Messieurs ... et ... d'Interbrew au restaurant Le Roi d'Espagne à Bruxelles afin d'examiner la meilleure façon de prendre en compte les ventes des produits sous marques de distributeurs dans les données statistiques échangées mensuellement entre Interbrew et Alken-Maes. Lors de cette rencontre, la segmentation générale des données a aussi été discutée. D'après Monsieur ..., cette réunion fait suite à l'entrée par Interbrew dans le segment de la production de bière vendue sous des marques de distributeurs. Interbrew désirait pouvoir suivre l'évolution de sa part des ventes dans ce segment, dans lequel elle espérait obtenir la même part que pour ses ventes de bière sous ses marques propres.' See also statement of objections, paragraph 121.

([167]) Inspection at the offices of Alken-Maes, document NvHR26 (doc. 37614 00963-00965).

([168]) Annex to Alken-Maes letter of 5.11.1999 to European Commission (doc. 37614 01343-01345). Original Dutch: 'dat we op 27 oktober 1999 hebben beslist het mededelen van onze maandelijkse verkoopcijfers stop te zetten'.

([169]) Annex I.1 to Interbrew letter of 14.1.2000 to European Commission (doc. 37614 02586-02587); see also statement of objections, paragraph 124. Original Dutch.

([170]) Fax from European Commission, 21.1.2000 (doc. 37614 02675-02681).

([171]) Annex 2 to Interbrew letter to European Commission, 2.2.2000 (doc. 37614 7333-7337); see also statement of objections, paragraph 125. Original Dutch.

([172]) Annex I.4 to Interbrew letter to European Commission, 14.1.2000 (doc. 37614 02610-02611); see also statement of objections, paragraph 126. Original Dutch.

information did not influence any decisions. The big competitor was not AM but the private-labels.'

(125) Interbrew has admitted ([173]) the existence of 'Exchanges of information with Alken-Maes: total volumes of sales of beer on the Belgian market (December 1991); monthly exchanges on volumes for Pils and non-alcoholics (as from early 1992). As from October 1992 until November 1999: monthly exchanges of information on all segments (volumes).' ([174])

4.5. **The CBB meetings**

(126) Summary

In the period from October 1990 to June 1997 there were numerous meetings of working parties in which the members of the CBB discussed the pricing structure and other joint measures. The meetings in question were primarily meetings of the Working Party on Pricing Structures, and its successors 'Vision 2000' and the Market Policy Committee. On the Vision 2000 working party, the Market Policy Committee and the subgroups they set up Interbrew and Alken-Maes played a leading role.

(127) Up to August 1993 various discussions took place in the CBB's Working Party on Pricing Structures. In 1990 and 1991 the working party met about ten times. It seems to have been less active in 1992 and the first half of 1993 ([175]). For most of this time the chairman was an Interbrew employee. Alken-Maes was represented by a sales manager ([176]).

(128) From the meeting held on 4 August 1993 onward, the Working Party on Pricing Structures was known as 'Vision 2000'. It consisted of Interbrew's manager for the off-trade, two employees of Alken-Maes, the marketing manager of Haacht, and an employee of the CBB ([177]). This first meeting under the new name discussed the harmonisation of the existing pricing structures for deliveries to the off-trade in Belgium and abroad. As regards the on-trade, it was agreed that rebates should be calculated in the same way as they were in the off-trade ([178]).

(129) The meeting of the working party on 15 October 1993 considered the possibility of having a study carried out in order to arrive at 'a better understanding of possible future developments in the beer wholesale structure and the on-trade' and 'to study one-off problems: parallel imports' ([179]). CBB documents of 9 and 12 November 1993 describe later tasks of the 'Scenario 2000' project. The documents mention the following background factors among others:

'2. Opening of EEC borders

Consequence:

— changes in price structure

— parallel importing

— foreign interference.

3. Professional differences — Comparing Belgium with our neighbours the Netherlands and France

The stated objectives of the project include "An understanding of present and future changes in beer wholesaling and the on-trade in Belgium, to enable us as brewers to develop our marketing strategy in the medium term." ([180])'.

(130) The project was finally carried out for the CBB by Arthur D. Little. The study 'Scenario 2000' compared the Belgian market with the Dutch and French markets, with regard to such things as pricing, the distribution system, investment in the on-trade and the profit margins of beer wholesalers in Belgium, the Netherlands and France ([181]).

([173]) Letter from Interbrew, 29.2.2000, with an Annexed statement by the company dated 28.2.2000 (doc. 37614 7689-7700).
([174]) Original English.
([175]) Letter from Alken-Maes, 7.3.2000, and especially Annexes 1 to 30 to that letter (doc. 37614 7873-7879, 7889-8064).
([176]) See also statement of objections, paragraph 129.
([177]) See also statement of objections, paragraph 130.
([178]) Letter from Alken-Maes, 7.3.2000, and especially Annex 31 to that letter (doc. 37614 7879, 8065-8067).
([179]) Inspection at the offices of the CBB, document ROK18 (doc. 37614 01275-01283). Original Dutch.
([180]) Inspection at the offices of the CBB, document ROK16 (doc. 37614 01268-01272); Annex 32 to Alken-Maes letter of 7.3.2000 (doc. 37614 8069-8072). Original Dutch.
([181]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7879).

(131) The Vision 2000 working party supervised the project. It met for the purpose on 17 January ([182]), 22 February ([183]), 24 May ([184]) and 25 August 1994 ([185]).

(132) In the minutes of the CBB board of directors meeting on 21 September 1994, under the heading 'Vision 2000', we read the following: 'The chairman reminded the meeting that against the background of the opening up of borders and the growth in parallel trade, the board had decided to ask Arthur D. Little for a report on the pricing structure in Belgium and the neighbouring countries.' ([186]) On 26 October 1994 the board discussed the Arthur D. Little report in more detail ([187]).

(133) From various documents it is clear that Interbrew and Alken-Maes, in the context of their bilateral contacts, acted together in the CBB and saw the advantages of taking certain initiatives through the organisation. According to an internal Interbrew document reporting on a meeting with Alken-Maes on 29 August 1994 ([188]):

> '3. We agreed that discussion in the CBB on the Arthur D. Little Horeca 2000 project can be a good forum to study ways and means to reduce the cost of doing business in Horeca.' ([189])

(134) A number of other documents dealing mainly with the agreements between Interbrew and Alken-Maes make reference to the possibility that the two breweries might realise part of their joint objectives and agreements through the CBB ([190]).

(135) The results of the Scenario 2000 study were presented to the CBB by Arthur D. Little on 22 November 1994 ([191]).

(136) The working party met again on 12 December 1994. The Arthur D. Little report served as a point of departure for further discussion. The meeting considered the role of the various players in the distribution chain, the associated returns and prices, and investment in promotion materials for on-trade sales outlets, which it was suggested should be based on purchases of beer in barrels ([192]).

(137) The working party met on 17 ([193]) and 31 January 1995. At the 31 January meeting a number of subgroups were set up to look at six practical areas, including ([194]):

> '... 4. Investment in publicity materials (glasses and beer mats)
>
> (chairman: [Alken-Maes's on-trade manager])
>
> Objective:
>
> — to avoid competition in this area
>
> — harmonisation
>
> 5. Management of delivered-to-premises and ex-factory pricing
>
> (chairman: [Alken-Maes's general manager])
>
> Objective:
>
> — situation in neighbouring countries
>
> — to "finalise" the logistical charge
>
> — to set standards for transport

([182]) Inspection at the offices of the CBB, document ROK15 (doc. 37614 01266-01267).
([183]) Inspection at the offices of the CBB, documents ROK 13 (doc. 37614 01255) en ROK14 (doc. 37614 01256-01265).
([184]) Inspection at the offices of the CBB, document ROK12 (doc. 37614 01230-01254).
([185]) Inspection at the offices of the CBB, document ROK10 (doc. 37614 01222-01224).
([186]) Annex 12 to CBB's reply to request for information, 24.12.1999 (doc. 37614 02226). Original Dutch.
([187]) Annex 12 to CBB's reply to request for information, 24.12.1999 (doc. 37614 02222).
([188]) Annex II to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02014); see also recital 58 above.
([189]) Original English.
([190]) Annexes B5, B9 and B11 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02041-02043, 02062-02063, 02066); see also recitals 58 and 66 above.
([191]) Annex 36 to Alken-Maes letter of 7.3.2000 (doc. 37614 8363-8443).
([192]) Inspection at the offices of the CBB, document ROK8 (doc. 37614 01214-01216); inspection at the offices of Interbrew, document MV11 (doc. 37614 8802-8804).
([193]) Annex 15 to CBB's reply to request for information, 24.12.1999 (doc. 37614 02493).
([194]) Inspection at the offices of the CBB, document ROK7 (doc. 37614 01211-01213); letter from Alken-Maes, 7.3.2000 (doc. 37614 7880); see also statement of objections, paragraph 139.

6. Investment in sales outlets

(chairmen: [Interbrew's marketing manager for the on-trade in Belgium and Alken-Maes's on-trade manager])

Objective:

— practical recommendations

— problems and possibilities' ([195])

(138) On 25 January a more general document entitled 'Vision' was circulated for discussion at the meeting on 15 February. The objectives of the working party were described as follows ([196]):

'To define the role of each link in the distribution chain

To define a framework in which each partner receives a fair price in proportion to the role it actually plays.' ([197])

(139) In connection with the work of subgroup 5, which was chaired by Alken-Maes's general manager, a questionnaire concerning logistical arrangements was sent to Interbrew, Alken-Maes, Haacht, Palm, Silly and Moortgat on 16 February 1995, immediately after the working party meeting of 15 February referred to in recital 138 ([198]).

(140) Subgroup 6, on investment in sales outlets, resumed the examination of the harmonisation of the level of investment in the on-trade which had been begun earlier by the Working Party on Price Structures. The subgroup secured the services of the consultant Opdebeeck ([199]).

(141) On 30 March there was another meeting of the Vision 2000 working party. From the reports made on the work of the subgroups it emerges that the plans of subgroup 4, on investment in publicity materials, were beginning to take practical shape, and that subgroup 5, on delivered-to-premises and ex-factory pricing, had suspended its proceedings to allow the members a period of reflection ([200]).

(142) The proceedings of the Vision 2000 working party were discussed at a meeting on 18 April 1995, at which Interbrew was represented by its general manager for Belgium, its marketing manager for the on-trade in Belgium and its off-trade manager, and Alken-Maes was represented by its general manager, its on-trade manager and its off-trade manager ([201]).

(143) The Vision 2000 working party met again on 7 July 1995 ([202]). The meeting discussed the recommendations of subgroup 4, on investment in publicity material, and approved them unanimously. The most important recommendation was that the brewers ought to apply a standard investment of BEF 60 per hectolitre. The activities of subgroup 5, on delivered-to-premises and ex-factory pricing, were still suspended. In subgroup 6, on investment in sales outlets, there was agreement that investment ought to be rationalised jointly, but disagreement on the procedure to be followed.

(144) A new feature is that consideration was also given to the restriction of outside advertising. A separate subgroup was set up to look at this, chaired by the general manager of Alken-Maes. The report includes the observation 'The measures referred to in this document can be considered only provided they are in line with Belgian and European legislation' ([203]).

(145) In July 1995 Alken-Maes received a copy of a memo presenting Interbrew's new marketing policy, which had been sent by Interbrew's off-trade manager to the CBB ([204]). The memo explains the current pricing structure at Interbrew and its disadvantages, and concludes that a new pricing structure is needed. The objective of the proposal is said to be 'price competition at a higher

([195]) Original French: '4. Investissements dans les articles publicitaires: (verres et sous-bocs), (Président: ...), But: *éviter la concurrence dans ce domaine, *harmonisation, 5. Gestion de la tarification franco/enlèvement, (Président: ...), But: *situation dans les pays limitrophes et possibilité d'harmonisation, *"mise au point" des indemnités logistiques, *fixation des normes pour transporteurs, 6. Investissements dans des points de vente: (Présidents: ... et ...), But: *recommandations concrètes, *problèmes et opportunités'.

([196]) Annex 15 to CBB's reply to request for information, 24.12.1999 (doc. 37614 02493-02513).

([197]) Original French: 'Établir le rôle de chaque maillon de la chaîne de distribution; Établir un cadre qui rémunérera correctement chaque partenaire en fonction du rôle effectif qu'il joue'.

([198]) Annexes 14 and 15 to CBB's reply to request for information, 24.12.1999 (doc. 37614 02490-02513); letter from Alken-Maes, 7.3.2000, and especially Annex 38 to that letter (doc. 37614, 7880, 8444-8493); see also statement of objections, paragraph 140.

([199]) Letter from Alken-Maes, 7.3.2000 (doc. 37614 7880).

([200]) Inspection at the offices of the CBB, document ROK6 (doc. 37614 01208-01210).

([201]) Annex B19 to Interbrew's reply to request for information, 23.12.1999 (doc. 37614 02093); see also recital 73 above; see also statement of objections, paragraph 143.

([202]) Inspection at the offices of the CBB, document ROK5 (doc. 37614 01200-01207).

([203]) Original French: 'Les mesures reprises dans ce document ne pourront être envisagées que sous réserve de leur conformité à la législation belge et européenne.' See also statement of objections, paragraph 144.

([204]) Inspection at the offices of Alken-Maes, document MV12 (doc. 37614 00460-00471); letter from Alken-Maes, 7.3.2000 (doc. 37614 7881); see also statement of objections, paragraph 145. Original Dutch.

level'. It is alsosaid to be a basic condition for success that 'all Belgian beer suppliers work in an identical manner (CBB)'.

(146) According to a statement by Interbrew's then manager for the off-trade, the memo referred to in recital 145 dates from 8 December 1994 and, after discussion with clients, was presented to the members of the CBB as well. Through this channel it also served as a basis for discussion in the CBB committees and elsewhere ([205]).

(147) At the meeting of the Market Policy Committee on 9 January 1996 the members confirmed once again that it had been decided that publicity material would be supplied on the basis of the number of hectolitres, no distinction being made between Pils and speciality beers, and that a proposal would be ready by the end of February ([206]). Interbrew's then manager for the on-trade in Belgium states the following ([207]):

> 'A number of points was allocated per hl or per barrel. This conferred a proportional entitlement to publicity material. The question was also discussed in the CBB.'

This system was known as the 'publicity credit voucher' system (publicitair krediet bon — 'PKB').

(148) The next meeting was on 12 March 1996. It emerged at this meeting that the Haacht brewery no longer wished to discuss investment in sales outlets or the development of a uniform system of calculation for that purpose. The report of the meeting urged that the working party on outside advertising be relaunched, in view of the possibility of securing efficiencies ([208]).

(149) The meeting on 23 May 1996 once again reviewed progress in all subgroups ([209]).

(150) The CBB Market Policy Committee met again on 9 September 1996. The progress of the subgroups was reviewed. In the case of the subgroup on investment in sales outlets, it emerged that only two of the original six brewers were prepared to continue. It is not known which brewers these were. In the light of previous history it is reasonable to suppose that the two brewers were Interbrew and Alken-Maes. The question was asked whether there was still interest in the working party, or whether it should be brought to an end. As regards the subgroup on investment in publicity material, it was observed that the project had been put to the CBB board of directors, and might be launched by 1 January 1997 at the latest. The subgroup considering outside advertising announced that it would be submitting practical proposals at the following meeting ([210]).

(151) The board of directors of the CBB met on 18 September 1996, and discussed the progress of the Market Policy Committee at some length ([211]).

(152) The Market Policy Committee met on 14 November 1996, and once again reviewed the progress of the various subgroups ([212]).

(153) The meeting of the committee on 5 February 1997 discussed various items, including the proposals on outside advertising. The objective was to arrive at common standards ([213]).

(154) The last meeting of the Market Policy Committee for which any evidence is available took place on 13 May 1997. It was stated that a decision had been taken on investment in publicity material, that Alken-Maes would be sending a letter to publicans on 1 July 1997, and that the other brewers would follow. The participants therefore felt that there was no need for the point to reappear on the agenda.

(155) As regards the questions that had been discussed in the subgroups looking at investment in sales outlets and outside advertising, it was noted that unanimity had not been achieved ([214]).

4.6. **The private-label agreements** ([215])

(156) Summary

There were a number of meetings at which the market situation with regard to private-label beer in Belgium was discussed, and information exchanged. None of the parties deny that meetings took place. But the information

([205]) Annex 11 to Interbrew letter of 2.2.2000 (doc. 37614 7449); see also statement of objections, paragraph 145.
([206]) Inspection at the offices of the CBB, document CD2 (doc. 37614 01126-01127).
([207]) Annex I.3 to Interbrew letter of 14.1.2000 (doc. 37614 02608); see also statement of objections, paragraph 146. Original Dutch.
([208]) Inspection at the offices of the CBB, documents CD1 and CD3 (doc. 37614 01125, 01128-01135).
([209]) Inspection at the offices of the CBB, documents WJ3 (doc. 37614 01076-01077) and CD4 (doc. 37614 01136-01141).
([210]) Inspection at the offices of the CBB, documents WJ1, WJ2 (doc. 37614 1074-1077) and CD7 (doc. 37614 01151-01155).
([211]) Inspection at the offices of the CBB, document WJ1 (doc. 37614 01071-01073).
([212]) Inspection at the offices of the CBB, document WJ9 (doc. 37614 01089-01090).
([213]) Inspection at the offices of the CBB, document CD8 (doc. 37614 01156-01161).
([214]) Inspection at the offices of the CBB, document WJ6 (doc. 37614 01082-01084), CD 9 and CD 10 (doc. 37614 01162-01168).
([215]) These agreements are discussed here to the extent that they relate to deliveries of private-label beer on the Belgian market.

supplied is contradictory. The details therefore cannot be established with absolute certainty. It is not even certain exactly how many meetings took place; but there were in any event no less than the four described below ([216]).

Date	Present	Place
Autumn/winter 1997 (probably 9 October 1997)	Interbrew: off-trade manager Alken-Maes: off-trade manager Haacht: marketing and off-trade manager Martens: managing director	Holiday Inn, Diegem, Belgium
Spring 1998	Interbrew: off-trade manager Alken-Maes: off-trade manager Haacht: marketing and off-trade manager Martens: managing director	Elewijt Business Center, Zemst, Belgium
Spring 1998 (probably 15 June 1998)	Interbrew: off-trade manager Alken-Maes: off-trade manager Haacht: marketing and off-trade manager Martens: managing director Representatives of two Dutch brewers ([217])	Novotel, Breda, Netherlands
Summer 1998 (probably 7 July 1998)	Interbrew: manager, off-trade Alken-Maes: manager, off-trade Haacht: manager, marketing and off-trade Martens: managing director Representatives of two Dutch brewers	Novotel, Breda, Netherlands

([216]) Annex I.5 to Interbrew letter of 14.1.2000 (doc. 37614 02615-02618); Annexes 12 and 13 to Interbrew letter of 2.2.2000 (doc. 37614 7450-7456); replies to requests for information from Alken-Maes, 5.4.2000 (doc. 37614 8920-8934), Haacht, 5.4.2000 (doc. 37614 8951-8952), and Martens, 6.4.2000 (doc. 37614 8953-8954); see also statement of objections, paragraph 154.

([217]) For reasons of confidentiality the names of the two Dutch breweries and their representatives are not given in this Decision.

(157) Interbrew's then manager for the off-trade, subsequently general manager for Belgium, who was present at the meetings, has stated the following ([218]):

'There were also meetings between private-label brewers. This was at the initiative of [Interbrew's general manager for Belgium] and [the general manager of Alken-Maes] ...'

'The first meeting took place at the Holiday Inn in Diegem on 9 October 1997, on the instructions of [Interbrew's general manager for Belgium] ... The purpose of the meetings was to map out the private-label beer market in Belgium. The following data was supplied (example) [there follows an imaginary table, with the column headings:] product, volume, customer, type of contract, brewer, price ... I am not sure that the information provided for in the last column was actually exchanged, but that was certainly the intention. The object was that whenever there was a new invitation to tender there would be no undercutting of prices between the four brewers. The brewer who had the contract would bid his price, and the others would make a higher bid ... Because consultation stopped, no adjustments were made, except that Interbrew failed to bid for a particular Aldi contract. The Aldi contract was with one of the other brewers, from memory I think Martens ...'

'At the request of [the managing director of Martens], who also makes sales in the Netherlands, a meeting was convened between the four Belgian brewers and two Dutch brewers ... [The managing director of Martens] was prepared to go on talking in Belgium only if the same thing was done in other markets where Martens supplied private-labels, namely the Netherlands and Germany. Interbrew Belgium acted as a go-between here ...'

'The whole thing was stopped because the participants decided it was too dangerous.'

(158) Alken-Maes, Haacht and Martens all say that the meetings were intended to discuss the sorting charge, that is to say a charge payable to retailers for handling empty bottles in

([218]) Annex I.5 to Interbrew letter of 14.1.2000 (doc. 37614 02615-02618); Annexes 12 and 13 to Interbrew letter of 2.2.2000 (doc. 37614 7450-7456); see also statement of objections, paragraph 155. Original Dutch.

crates; Haacht adds that they were also to discuss the growing importance of retailers' own labels and the bullying attitude of the big multiples ([219]).

(159) Haacht states as follows ([220]):

'the differences between the prices of A-labels and private-labels was growing ... constantly greater, and there was an urgent need for an exchange of views on the situation with a few brewers in the Benelux.'

On the meetings in the Netherlands:

'we were not active on the Dutch market, and so we had no real interest. Information was exchanged on customers, packaging and volumes ...'

'The conclusion that came out of the meetings was that we should take a firmer line on prices, which were already being quoted very low, but this never happened, because the falling price spiral was not halted.'

(160) According to statements made by Alken-Maes ([221]), 'Each participant took his own notes of volumes, types of product and producers. As regards the Dutch market, any exchange of information was refused.' At the last of these four meetings: 'There was discussion of developments on the market in retailers' own labels in the big multiple chains. I [the marketing manager of Alken-Maes ([222])] noted that there was a great deal of mistrust between the different firms at the meeting. My personal conclusion therefore was that the meeting was pointless.'

(161) Interbrew has acknowledged ([223]) that it was a party to an 'agreement on price level and market sharing in the private-label market (1997 to 1998).' ([224])

([219]) See footnote 216.
([220]) See footnote 216. Original Dutch.
([221]) Annexes 3 and 4 to Alken-Maes's reply to request for information, 5.4.2000 (doc. 37614 8930-8934). Original Dutch.
([222]) See also statement of objections, paragraph 158.
([223]) Letter from Interbrew, 29.2.2000 (doc. 37614 7697).
([224]) Original English.

5. THE PARTIES' WRITTEN OBSERVATIONS ON THE STATEMENT OF OBJECTIONS

5.1. Danone and Alken-Maes

(162) In its written response to the statement of objections Danone makes the following observations. Alken-Maes indicates that it wishes to be associated with Danone's view of the matter.

5.1.1. *The bilateral agreements between Interbrew and Alken-Maes*

(163) The supposed link with the French market

Danone argues, first of all, that the Commission accepts that Interbrew was being threatened by Danone in France even though it is not clear from the file that any investigation was carried out at the relevant time into the situation on the French market. This infringes Danone's right to defend itself.

(164) Danone in any event denies that it demanded that Interbrew transfer 500 000 hl to Alken-Maes in 1994 and threatened that otherwise matters would be made difficult for Interbrew on the French market (recital 53). Danone submits that this allegation rests entirely on statements made by Interbrew employees in 2000 (recital 54). None of the documents dating from 1994 show that there was any such demand or any such threat. Danone considers that the Heineken document cited to confirm the Danone demand (recital 55) is of doubtful value as evidence, because the author and the context of the document are unclear.

(165) That no threat was made is in Danone's view also shown by the fact that Kronenbourg was in no position to drive Interbrew off the market. In addition, Interbrew's speciality beers Leffe and Hoegaarden were very important in France. In 1994 Danone brought pressure to bear on Alken-Maes to adopt an aggressive marketing policy in Belgium (recital 58), which according to Danone shows that it was acting competitively. Danone points out that it was in Interbrew's interest to preserve its dominant position on the Belgian market (recital 167 below).

(166) Danone submits that at the meeting on 11 May 1994 a Danone representative told Interbrew to put an end to its abuse of its dominant position in Belgium (recital 167 below), as otherwise Danone would take a tougher attitude to Interbrew in France. The reference was to parallel imports from France into Belgium and strict application of the French distribution contracts; according to Danone, Interbrew's speciality beers were at that time tolerated in drinks outlets that had an exclusive contract with Kronenbourg. Danone says that the figure of 500 000 hl was mentioned by Alken-Maes at a meeting with Interbrew which took place in connection with the aggressive policy adopted by Alken-Maes. According to Danone, the reference was to the extra volume Alken-Maes needed in order to become profitable. There was no question of a demand made on Interbrew to transfer this volume to Alken-Maes. At the meeting with Danone on 11 May 1994 it was Interbrew that wanted to discuss the strengthening of its position in France, and thus Interbrew that sought to link the Belgian and French markets. Interbrew wanted to reinforce its position in France by taking over Danone's beer division, or sections of it, and by improving the distribution of its speciality beers. At the meeting on 11 May 1994 Danone's intention was merely to introduce the new general manager of its beer division.

(167) Failure to appreciate the abuse by Interbrew of its dominant position on the Belgian market

In the second place, Danone argues that account has to be taken of Interbrew's dominant position on the Belgian market. Not only does Interbrew have a 56 % share of the Belgian market, it also owns the best known beer brands; in six of the eight beer segments, the best-selling beer is an Interbrew brand. Since 1990 Interbrew has strengthened its position in the on-trade by taking over beer wholesalers, with the consequence that many other brewers are now dependent on Interbrew for the distribution of their products on this market. And since the beginning of the 1990s Interbrew has also expanded internationally, to the point where it is now the biggest brewer in Europe and the second biggest in the world. According to Danone, this international expansion was financed by Interbrew's strong position on the Belgian market. Danone submits that it was important to Interbrew that that position be preserved; following the aggressive price policy pursued by Alken-Maes from 1992 onward, Interbrew consequently took the initiative for talks with Alken-Maes.

(168) By virtue of its dominant position, Interbrew was able to decide what new pricing structure should be adopted by the industry as a whole. According to Danone, the pricing structure desired by Alken-Maes was rejected by Interbrew, and Alken-Maes had no alternative but to base itself on Interbrew's system. Interbrew then unilaterally decided to introduce its new pricing system on 1 January 1997, and by doing so imposed its chosen structure on Alken-Maes.

(169) Danone argues that during the relevant period Interbrew abused its dominant position. Danone submits that the Commission has acknowledged that Interbrew was guilty of such conduct, by initiating an investigation into the matter, but takes no account of it in the statement of objections. Danone considers that this is unfair, because the abuse helps to throw light on the relationships between Interbrew and its competitors, including Alken-Maes, in the relevant period. The Commission is therefore wrong to speak of pressure brought to bear on Interbrew by Alken-Maes and Danone with a view to concerted conduct on the Belgian market.

(170) According to Danone, Interbrew abused its position by offering beer at loss-making prices in an attempt to prevail upon cafés to break their exclusive contracts with Alken-Maes. At the meeting on 24 November 1994 (recital 68) Alken-Maes asked Interbrew to stop the abusive conduct, and in that context Interbrew and Alken-Maes agreed to respect one another's tied outlets. Alken-Maes repeated its request to Interbrew to put an end to the abuse in a letter dated 30 January 1995 (recital 72).

(171) Price control in Belgium

In the third place, Danone argues that account has to be taken of the price control system which required the undertakings concerned to apply for authorisation for any price increase. According to Danone, this in practice meant that brewers were required to consult each other regarding the prices of certain beers, and to document their cost structures in detail. The brewers were consequently aware of each others' cost structures and pricing policies, which they discussed together quite lawfully.

(172) The meeting with the beer wholesalers' federation on 28 January 1993 took place in this context, and the parties were therefore not aware that they were breaking the competition rules. At that time prices were still under the supervision of the state, and the brewers were awaiting the response of the Minister for Economic Affairs to an application for a price increase which had been submitted by the CBB. Because of the price control system, Danone and Alken-Maes were also not aware of the unlawful nature of the exchange of information between Interbrew and Alken-Maes.

(173) The initiative was always taken by Interbrew

Danone submits that Interbrew took the initiative in the various discussions and agreements with Alken-Maes. In November 1993 Interbrew took the initiative in increasing prices to the off-trade and asked Danone for Alken-Maes's help thereafter (recital 167). The meeting of 11 May 1994 was held at Interbrew's initiative (recital 166). In 1995, too, Interbrew took the initiative in the discussions with Alken-Maes on a new pricing structure ([225]). Danone argues that Interbrew likewise took the initiative in the exchange of information ([226]).

(174) No price or market-sharing agreements

Lastly, Danone denies that there were any price agreements or market-sharing agreements between Alken-Maes and Interbrew in the period 1993 to 1998. In 1993 and 1994 Alken-Maes and Interbrew did talk of putting an end to the fall in prices in the off-trade, but against a background of price control Danone argues that this cannot be regarded as a bilateral agreement on prices. According to Danone, the other discussions in 1993 were not concerned with prices but with the restriction of marketing investment in the on-trade. No price agreement was concluded at the meeting on 9 November 1994 (recital 66); the parties merely noted that distributors could not sell a crate of Jupiler, Stella or Maes Pils for less than BEF 275 without making a loss. Danone acknowledges that from October 1994 onward Interbrew and Alken-Maes consulted together regarding distribution systems in Belgium, and more especially distribution to the on-trade. Danone also acknowledges that in 1994 there was talk of a non-aggression pact in the on-trade, and that in the same year Interbrew and Alken-Maes were in contact regarding a limitation of investment in the on-trade and in outside advertising. According to Danone, discussion of the pricing structure for the on-trade began at the same time. But none of these talks had either the object or the effect of fixing the level of prices. In 1995, according to Danone, only the new pricing structure was discussed, and not prices or market sharing. The discussion of the pricing structure ended in July 1996, after Interbrew unilaterally decided to introduce its new structure on 1 January 1997. Danone submits that the Commission's evidence for the period from July 1996 does not show that there was any continuation of the practices at issue (recitals 91 to 105).

5.1.2. *Meetings within the CBB*

(175) According to Danone, the policy decisions taken in the CBB were guided by Interbrew. The subjects discussed in the CBB were Interbrew's main concerns of the moment: parallel imports, a new pricing structure, and the reduction of investment in the on-trade. Alken-Maes was also interested in the last of these issues. Danone argues that Interbrew employees held important positions on the CBB working parties at that time, and that the chairman of the CBB was the chairman of Interbrew's board of directors.

5.1.3. *The private-label agreements*

(176) Danone emphasises that when Fedis demanded that the brewers pay a sorting charge per crate for branded beer (recital 81), the parties decided to exchange their volume data so as to be able to respond. Fedis did not ask that this sorting charge should be payable on private-label beers, arguing that in view of the small volume of private-label beer there was no danger of 'free riding'. In the parties' view, the volume was greater than Fedis maintained and, as there were no reliable statistics, they decided to exchange their own volume and price figures. The exchange of information on prices may have had the effect that prices did not fall further.

([225]) Danone refers here in particular to the memo from Interbrew's general manager for Belgium dated 12.7.1995 (recital 78).

([226]) Here Danone cites particular statements made by Interbrew employees (recital 113).

(177) According to Danone, there was no formal non-aggression pact. Even if there was an implicit non-aggression pact, Danone argues that it had no effect. In

addition, the private-label market was not mapped out in its entirety, as the foreign brewers refused to take part.

(178) Here too, Danone points to the important role played by Interbrew in the discussions. Interbrew was prepared to pay a charge of BEF [...], for example, which put the other brewers in a financially untenable position.

5.1.4. *Penalties*

(179) On the question of penalties, Danone argues that at the time of the infringement it formed a single economic unit with Alken-Maes. Danone does not deny that it took part in certain meetings concerning the Belgian market, and that as Alken-Maes's parent company it was aware of certain acts of which Alken-Maes now stands accused. Danone concludes that in accordance with the practice developed by the Commission in its decisions and with the case law of the Court of Justice, the Commission can impose only one fine, either on Alken-Maes or on Alken-Maes and Danone jointly.

(180) Danone refers to the practice of the Commission in its decisions and to the case law of the Court of Justice, and draws attention to the following mitigating circumstances.

(181) First, Alken-Maes, with Danone's approval, cooperated in the investigation, admitted the facts, and immediately put an end to the exchange of information with Interbrew.

(182) Second, the discussions had no effect on market shares, consumer prices or the way in which beer supply contracts were concluded with new drinks outlets, and it has not been shown that there was any allocation of particular customers. The discussions on pricing structures and promotion policy were put into practice only to a very limited extent. Furthermore, the private-label meetings produced no results. According to Danone, it also appears from sales figures and market research for the period 1993 to 1998 that the talks between Interbrew and Alken-Maes had no effect on their market shares or prices.

(183) Third, the effect of the talks was felt in only a very limited geographic area, namely Belgium. There was no exclusion of foreign competition.

(184) Fourth, account has to be taken of the price control that existed in Belgium until 1 May 1993. In this connection Danone cites the Commission Decision of 9 December 1998 in the Greek ferries case.

(185) Fifth, Danone draws attention to the background of crisis against which the disputed practices developed. There was falling demand, overcapacity and pressure from retailers. At no time during the period covered by the statement of objections did Alken-Maes show a profit, so that it had secured no advantage from the discussions with Interbrew, says Danone.

(186) Last, Danone takes the view that account should be taken of the fact that Interbrew had a dominant position on the market, and that Alken-Maes tried to prevail upon Interbrew to stop its abuse of that dominant position. Alken-Maes depended on Interbrew to distribute its beer; in this financially weak and dependent situation, Alken-Maes consulted with Interbrew in order to prevent Interbrew from destroying it.

5.2. **Interbrew**

(187) Interbrew's response to the statement of objections relates mainly to the potential imposition of penalties. Interbrew draws attention to the following mitigating circumstances.

(188) Interbrew submits that it is clear from the evidence that it did not initially intend to join a cartel. But under pressure from Danone, which threatened to destroy it in France if it did not work together with Alken-Maes, Interbrew found itself obliged to cooperate with Alken-Maes. At the time, Interbrew argues, it had a share of [...] of the French market, which was dominated by Danone with [...] and Heineken with [...]. According to Interbrew, the initiative came in the first place from Danone, which exploited Interbrew's weak position on the French market. There were repeated talks at that time between Interbrew and Danone regarding the possibility of a takeover or partial takeover of Danone's beer business. There was a tendency at Interbrew, therefore, to treat Alken-Maes gently, in order to create goodwill with Danone.

(189) Interbrew submits that the agreements had only a limited influence on the Belgian market, despite the fact that the talks between Danone, Alken-Maes and Interbrew took place at a high level. The companies involved applied the agreements only in part, or not at all, and the talks in the

CBB framework produced little by way of results. The private-label agreements were confined to an exchange of information between the parties concerned, and did not lead to any actual implementation of what had been discussed.

(190) Interbrew does not contest the duration of the infringements, which according to the Commission was five years and one day for the bilateral cartel and nine months for the private-label cartel.

(191) Interbrew also invokes the Commission notice on the non-imposition or reduction of fines in cartel cases ([227]), on the grounds that it qualifies for a substantial reduction in the fine of the kind provided for in section C of the notice, or in any event for a significant reduction of the kind provided for in section D. Interbrew considers that it qualifies for such a reduction on the following grounds.

(192) First, Interbrew does not substantially contest the facts on which the Commission bases its allegations.

(193) Second, since November 1999, when the Commission sent a formal request for information, Interbrew has cooperated closely with the Commission in these proceedings, in a manner which from the very beginning has gone far beyond merely answering the request for information. The facts and the documentation supplied by Interbrew make up a substantial part of the statement of objections. Furthermore, in December 1999 Interbrew undertook an internal investigation, and informed the Commission of new evidence of restrictive practices. Interbrew disclosed the existence of the private-label cartel at a time when the Commission had no information in this regard.

(194) Third, Interbrew was initially reluctant to enter into any agreement with Alken-Maes on the Belgian market, but after Danone threatened to take action against it on the French market Interbrew found itself obliged to work together with Danone and Alken-Maes.

(195) Lastly, and contrary to what is indicated in the statement of objections, Interbrew has put an end to all infringements of the competition rules, and has taken measures to prevent any such infringements in future.

([227]) See footnote 23.

5.3. **Haacht**

(196) Haacht does not contest the facts regarding the private-label cartel. Haacht emphasises, however, that only the first two meetings were concerned exclusively with the Belgian market. At the third meeting the Belgian brewers explained the system they had set up for private-label beer to the two Dutch brewers present, and the information exchanged at the last meeting concerned the Dutch market only. Haacht does acknowledge that at all four meetings there was an exchange of views which also concerned prices in Belgium. Haacht also accepts the Commission's view that the exchange of information and discussion at the meetings has to be regarded as a form of price agreement and customer sharing.

(197) Haacht points out, however, that in the private-label segment the multiple retailers have been exerting downward pressure on prices for a long time, and that between 1990 and 2000 the prices of private-label beer fell considerably, while the prices of Haacht's branded beers rose markedly over the same period. Haacht estimates that in 1999 total private-label business in Belgium amounted to [...] hl. Haacht supplied about [...] % of this. [...].

(198) In setting the fine, the Commission must, in Haacht's view, take account of the following mitigating circumstances. First, the agreements were never applied, at least by Haacht. Second, the discussions were organised at the initiative of Interbrew and Alken-Maes, with Haacht playing only a follow-my-leader role. Third, Haacht was the only firm with very little international business, and consequently had less experience of the finer points of European competition law. It was not part of an international group with wide experience of European law and specialised departments to handle these questions. Lastly, Haacht points out that it did in fact cooperate with the Commission by spontaneously supplying all the information it was asked for, thus making it unnecessary to conduct an inspection on its premises.

(199) On the final amount of any fine, Haacht argues that the private-label segment accounts for no more than [...] % of its total turnover. As the profits it makes are not used to finance other activities, Haacht takes the view that there is no reason to calculate a fine on the basis of its total turnover.

(200) Haacht also believes it qualifies for a significant reduction in any fine of the kind provided for in section D of the Commission notice on the non-imposition or reduction of fines in cartel cases ([228]), on the grounds that in its letter of 5 April 2000, before it received the statement of objections, it expressly confirmed that a price agreement had been concluded at the meetings, and that it does not contest the facts on which the Commission bases its allegations.

5.4. **Martens**

(201) In its reply to the statement of objections Martens, discusses the facts and their assessment and also considers the question of penalties.

5.4.1. *Facts and assessment*

(202) Martens states that because of its interest in private-label beer, and given the tried and tested culture of consultation in the CBB, which operated in respect of private-label beer as it did elsewhere, Martens accepted Interbrew's invitation to attend the meetings. Martens argues that it has not been shown that Martens expected anything other than to be informed of developments on the market, and it must therefore be presumed that it had no restrictive purpose in mind.

(203) According to Martens, no price agreements or market sharing agreements were concluded at the meetings. Martens cites the statements of employees of Alken-Maes, Haacht and Interbrew in the Commission's possession. It submits that the only unambiguous evidence of the existence of price agreements is Interbrew's statement of 28 February 2000. But Martens throws doubt on the reliability of that statement, in view of Interbrew's involvement in the Interbrew/Alken-Maes cartel, and the Commission's continuing investigation into a possible infringement by Interbrew of Article 82 of the EC Treaty. Martens argues, furthermore, that the statement shows only that Interbrew was a party to such agreements, not that Martens was.

(204) Martens acknowledges that because of its interest in the southern Netherlands region it had an interest in seeing the attendance at the meetings broadened to include Dutch brewers.

(205) Martens submits that from the statements made by the participants at the meetings it is clear that no agreements within the meaning of Article 81 of the EC Treaty were concluded. Nor was there any concerted practice, since the criteria for the existence of a concerted practice formulated by the Court of Justice in the Hüls case are not all met ([229]). There was no consultation between the firms with subsequent conduct on the market and a relationship of cause and effect between the two. The meetings had no restrictive purpose.

(206) Martens believes that the meetings did not lead to any change in the conduct of the firms concerned on the market, since after the meetings between the four brewers prices continued to fall, and after July 1998 Martens continued to accept invitations to tender from potential customers for private-labels. That Interbrew acknowledges refraining from making a bid for an Aldi contract is in Martens's view irrelevant, because it is not known whether Interbrew has ever made any bid to Aldi, and given the lasting relations there were between Aldi and Martens it is unlikely that Interbrew was previously interested in Aldi.

(207) Martens also submits that according to the judgment of the Court of Justice in the John Deere case the exchange of information is not in itself contrary to Article 81 of the EC Treaty ([230]).

(208) Martens refers to the Commission Decision in the case of the Zinc Producer Group ([231]), and argues that the Commission has wrongly failed to show that there was parallel pricing behaviour in the present case.

(209) Martens contends that given its small share of the relevant market there can be no appreciable effect on competition. Martens here refers to the Commission notice on agreements of minor importance which do not fall within the meaning of Article 81(1) of the EC Treaty ([232]). As there is no agreement, Martens argues that the market shares of the participating undertakings cannot be aggregated.

([228]) See footnote 23.

([229]) Case C-199/92 P *Hüls* v *Commission* (1999) ECR I-4287.
([230]) Case C-7/95 P *John Deere* v *Commission* (1998) ECR I-3111.
([231]) Decision 84/405/EEC (IV/30.350), OJ L 220, 17.8.1984, p. 27.
([232]) OJ C 372, 9.12.1997, p. 13.

5.4.2. *Penalties*

(210) Martens asks the Commission not to impose a fine, in view of the absence of intention or negligence. Martens submits that it did not intentionally infringe the competition rules, because it did not know that the object of the talks might be to restrict competition. Martens further contends that there was a forgivable error or good faith on its part, as the talks at issue took place in the framework of talks within the CBB.

(211) In the alternative, Martens takes the view that in line with the Commission's Decision in the Fenex case ([233]) it qualifies for a purely symbolic fine, because its attendance at the meetings was characterised by inexperience. Martens did not intend to infringe the competition rules, and was entitled to believe that the meetings formed part of consultations in the framework of the CBB.

(212) In the further alternative, Martens submits that it qualifies for a reduced fine, on the following grounds. No effective price agreements were concluded, and the meetings had no restrictive object. In addition, Martens's economic capacity to bring about any appreciable damage to competition is limited. Martens lacked legal and economic knowledge, being a small player that did not belong to a large economic unit. Martens further argues that account ought to be taken of the specific weight and real influence on competition of its offending conduct.

(213) Martens draws attention to the following mitigating circumstances. It submits that it did not play an active role, but took part in the meetings under the leadership of Interbrew. The infringement did not have any distorting effect on competition, or at most only insignificant effects, and the meetings did not result in any change in market behaviour. There was no damage to consumers, because prices continued to fall after the meetings. Martens emphasises that it secured no advantage as a result of the meetings; it says this is an important consideration for the calculation of the fine, since the Commission has stated, in its 21st Competition Report, that when it assesses fines it may take as its starting point the financial benefit derived. Martens also draws attention to its cooperation during the administrative proceedings: not only did it reply to the Commission's request for information, but after receiving the statement of objections it supplied further documentation. It also cooperated in a manner that speeded up the proceedings. Martens further submits that a fine might exceed its financial capacity. Lastly, Martens observes that the infringement was short-lived, and that it had come to an end before the Commission undertook its investigation.

(214) Martens considers that in any event it qualifies for a reduction in the fine of the kind provided for in section D of the notice on the non-imposition of fines in cartel cases ([234]), as it cooperated with the Commission investigation at all times and had ended its participation in the infringement at the time of the Commission investigation. In addition, it played no active part in the cartel.

6. **LEGAL ASSESSMENT**

6.1. **Article 81(1) of the EC Treaty**

(215) Under Article 81(1) of the EC Treaty, 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 are prohibited as incompatible with the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, markets, technical development, or investment, or share markets or sources of supply.

6.2. **Agreements and concerted practices**

(216) The prohibition in Article 81(1) of the EC Treaty concerns agreements between undertakings, decisions by associations of undertakings and concerted practices.

([233]) Decision 96/438/EC (IV/34.983), OJ L 181, 20.7.1997, p. 28.

([234]) See footnote 23.

(217) According to established case law, for there to be an agreement within the meaning of Article 81(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way ([235]).

(218) A written document is not required. There are no requirements as to form and contractual penalties and enforcement measures are even less essential. The existence of the agreement may be explicit or implied from the behaviour of the parties.

(219) Article 81 EC draws a distinction between 'concerted practices' and 'agreements between undertakings' or 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition ([236]).

(220) The criteria of coordination and cooperation imply at the very least the working out of an actual plan and must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market. Although it is correct to say that that requirement of independence does not deprive economic operators of the right to adapt intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market ([237]).

(221) Thus, behaviour can be regarded as a 'concerted practice' where the parties have not reached agreement in advance on a common plan defining their action on the market but have adopted or adhered to collusive devices which facilitate the coordination of their commercial behaviour ([238]).

(222) Although it is clear from the actual terms of Article 81(1) of the EC Treaty that the concept of a concerted practice implies, besides undertakings' consulting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two, the presumption must be, subject to proof to the contrary which the economic operators concerned must adduce, that the undertakings taking part in the consultation 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 is all the more true where the undertakings consult together on a regular basis over a long period. A concerted practice is caught by Article 81(1) even in the absence of anti-competitive effects on the market ([239]).

(223) It is not necessary, particularly in the context of a complex infringement over a long period, for the Commission to classify the infringement as consisting exclusively of one or the other form of illegal behaviour. The concepts of 'agreement' and 'concerted practice' are variable and may overlap. Realistically, it may even be impossible to make such a distinction, since an infringement may simultaneously have the characteristics of both forms of prohibited behaviour, whereas, taken separately, some of its elements may correctly be regarded as one rather than the other form. It would also be artificial from an analytical point of view to split what is clearly a continuous, collective enterprise with a single objective into several forms of infringement. A cartel may for instance constitute an agreement and a concerted practice at the same time ([240]).

(224) In the PVC II case the Court of First Instance confirmed that 'the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty' ([241]).

([235]) See, *inter alia*, the judgment of the Court of First Instance of the European Communities in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij* v *Commission* (PVC II) (1999) ECR II-931, paragraph 715.

([236]) Judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries* v *Commission* (1972) ECR 619, paragraph 64.

([237]) Judgment of the Court of Justice in Joined Cases 40-48/73 etc. *Suiker Unie* v *Commission* (1975) ECR 1663; judgment of the Court of First Instance in Joined Cases T-202/98, 204/98 and 207/98 *Tate & Lyle* v *Commission*, not yet reported.

([238]) See also the judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission* (1991) ECR II-1711, paragraph 255.

([239]) Judgment in Hüls, paragraphs 161-163, see footnote 229.

([240]) Judgment in Hercules, paragraph 264; see footnote 238.

([241]) Judgment in Limburgse Vinyl Maatschappij, paragraph 696; see footnote 235.

(225) The Court of Justice confirmed in the Anic case that it follows from the specific wording of Article 81(1) of the EC Treaty that an infringement may result not only from an isolated act but also from a series of acts or from continuous conduct ([242]).

(226) A complex cartel can thus be regarded as a single continuous infringement for the period of its existence. The agreement may change from time to time, or its mechanisms may be adapted or strengthened to take account of new developments. The validity of this classification is not vitiated by the possibility that one or more elements of a series of acts or of continuous conduct could in themselves constitute a breach of Article 81(1) of the EC Treaty.

(227) Although a cartel is a form of collective behaviour, each party to the agreement may play its own specific role. One or more of them may play a leading role. Internal conflicts and rivalries or even deceit may occur, but will not prevent the agreement from forming an agreement/concerted practice within the meaning of Article 81(1), if the parties pursue a collective and continuous goal.

(228) An undertaking that has taken part in an infringement of Article 81(1) through conduct of its own, which formed an agreement or concerted practice having an anti-competitive object for the purposes of that Article and which is intended to help bring about the infringement as a whole, is also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement. That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk ([243]).

6.3. **Nature of the infringements in the present case**

(229) The case in point concerns two clearly distinct infringements. The first is the complex of concerted practices and/or agreements between Interbrew and Alken-Maes/Danone, within the framework of the CBB or otherwise, hereinafter referred to as 'the Interbrew/Alken-Maes cartel', and the second is the concerted practices between Interbrew, Alken-Maes, Haacht and Martens relating to private-label beer, hereinafter referred to as 'the private-label cartel'.

6.3.1. *The Interbrew/Alken-Maes cartel*

(230) The Interbrew/Alken-Maes cartel contains a broad range of anti-competitive agreementsand arrangements.

(231) Bilateral talks took place between Interbrew and Alken-Maes from at least November 1992 (recital 43). At about the same time (October 1992) the two companies also perfected the exchange of information by communicating to each other the sales volumes for all beer sectors (recitals 116 and 125). Off-trade prices were harmonised from at least January 1993 (recitals 44 and 49). In March 1993 Interbrew clearly still had some reservations about extending cooperation (the 'Université de Lille' project), on account, *inter alia*, of the risk of anti-trust proceedings (recital 45). In the second half of 1993 Interbrew continued to hold discussions about raising off-trade prices with a large retailer and wanted to involve Alken-Maes in them as well (recitals 49 and 50). Belgian beer prices were no longer regulated at the time (recital 10).

(232) Clearly under pressure from Danone, Interbrew changed its position as regards extending cooperation in 1994. At a meeting in May 1994 Danone put pressure on Interbrew by setting relations between the two undertakings on the Belgian market in the context of their relations on the French market. In contrast to the Belgian market, where Interbrew had a large and Alken-Maes a small market share, Interbrew in 1994, with approximately [...] %, was the smallest player, relatively speaking, on the French market, where Danone and Heineken had market shares of [...] % and [...] % respectively. Danone's message was that if Interbrew did not help Alken-Maes on the Belgian market — a transfer of 500 000 hl, or 4,7 % of total beer

([242]) Judgment in Case C-49/92 P *Commission* v *Anic Partecipazioni* (1999) ECR I-4125, paragraph 81.

([243]) Judgment in Anic, paragraph 83, see footnote 242.

consumption in Belgium at the time, was mentioned ([244]) — then Danone (together with Heineken) could make life difficult for Interbrew on the French market (recitals 53 to 54).

(233) Danone's position that there was no question of a requirement to transfer 500 000 hl under the threat of destroying Interbrew in France can be rejected for the following reasons. It is clear that there was such a requirement, not merely from individual statements by Interbrew employees (recital 54), but also from a document of Heineken's (recital 55). The Commission does not share Danone's view that the evidential value of the Heineken document is doubtful because a name and a date are missing. In the formal request for information dated 14 April 2000 the Commission asked about a document that was found during the inspection at Heineken in March 2000 in the middle drawer of the desk of a named member of the board of directors, which document was given the code A5.2 by the Commission. The copy sent by Heineken is the document requested, since it bears the same code plus a description of the place where it was found ([245]). The origin of the document is thus established. That the document contains confidential data which is not accessible to the parties in the case does not diminish its evidential value.

(234) That Interbrew took Danone's threat seriously is shown by its changed attitude towards extending cooperation with Alken-Maes after May 1994 (recital 56). Danone's explanations of the change in Interbrew's attitude are not convincing. It should be noted that up to 1994 Interbrew and Alken-Maes had struck agreements only over prices in the off-trade and that Interbrew was hesitating about extending cooperation with Alken-Maes, partly because it thought that as market leader it did not need to do so (recitals 45 and 50). Danone's argument that Interbrew attached importance to its position on the Belgian market and therefore, after the introduction of Alken-Maes's aggressive pricing policy, took the initiative to conclude a non-aggression pact, is not sufficient to prompt a different conclusion. The file shows that Interbrew had made it clear to Alken-Maes that it would react to the latter's pricing measures. Danone itself acknowledged that Alken-Maes was ultimately forced to abandon its aggressive pricing policy: it was only working to its own disadvantage, since Interbrew was copying the policy. Danone's argument that its objective before the meeting on 11 May 1994 was simply to introduce the new general manager of its beer division cannot be accepted, since that person had already met Interbrew's CEO at the beginning of 1994 (recital 52).

(235) A more detailed investigation of the French beer markets would not have altered the above conclusion. The opinion of the former general manager of Danone's beer division ([246]) that Danone's share of the French market was only 16 % is not correct. A Danone document from 1995 shows that Kronenbourg's market share in France in 1994 was [...] % ([...] % for the off-trade and [...] % for on-trade) ([247]). Furthermore, not only is it sufficiently proven that Danone required Interbrew to transfer a number of hectolitres to Alken-Maes or risk being destroyed in France. There is also the fact that Interbrew took the threat seriously: although no effect was given to the requirement to transfer 500 000 hl to Alken-Maes, Interbrew was quite ready from that moment on to extend the agreements with Alken-Maes and no longer to limit them to the exchange of information and agreements on off-trade prices. An investigation of the French market, therefore, would not have altered the conclusion that Danone had successfully put Interbrew under pressure. Even if, after such an investigation, it were to appear that Danone could not have carried out these threats, the conclusion that Danone was successful in its attempt to put Interbrew under pressure is still valid, given the documents in the Commission's possession in this case.

(236) Ultimately, the transfer of a large volume of beer did not take place (recitals 57 and 58), but the parties did reach a truce in July 1994 (recital 56), which was to develop into a comprehensive gentleman's agreement on 9 November that year under the code name already used earlier by Interbrew of 'Université de Lille'. From that moment on the contacts between Interbrew and Danone/Alken-Maes were no longer limited to prices in the off-trade and the reduction of marketing investment in the on-trade, but were considerably extended. The agreement concluded in November 1994 was divided into the following parts: a

([244]) See Annex I to this Decision.

([245]) Request for information dated 14 April 2000 (doc. 37614 9723) and reply from Heineken dated 11 May 2000 (doc. 37614 9947).

([246]) Annex to Danone's reply to the statement of objections.

([247]) Annex L-7b to Interbrew's letter of 28 February 2000 (doc. 37614 8996-9025).

general non-aggression pact, agreements on prices and promotions in the off-trade, customer sharing in the on-trade market (originally limited to the 'traditional' part of the sector ([248])) by perpetuating the then current situation, agreements on advertising and investment in the on-trade, and agreements on a new pricing system for customers in both the on-trade and the off-trade (recitals 58 to 68).

(237) At the meeting on 9 November 1994 between Interbrew and Alken-Maes not only was the 'Université de Lille' gentleman's agreement broadly confirmed but a price agreement for the off-trade was also discussed (recital 66). Danone disputes that an agreement on off-trade prices was reached at this meeting (recital 174). The handwritten notes 'J=SA=A-M=275,-' (see footnote 80) related, according to Danone, to Alken-Maes's and Interbrew's finding that distributors of Pils lagers (Jupiler, Stella and Maes) could not charge consumers less than BEF 275 a crate without making a loss. This argument of Danone's is not convincing, however. There is nothing in the context to show that this was a comment by the brewers on the (profitability of the) prices applied by the distributors. On the contrary, the handwritten notes are found after the sentence 'Pricing in the food to be established' ([249]). Furthermore, the discussion on 9 November 1994 was a continuation of earlier discussions in October 1994, where the fixing of prices in the off-trade had already been talked about (recitals 60 to 65).

(238) The gentleman's agreement of November 1994 coincides more or less with the submission on 22 November 1994 of a report on the Belgian beer market prepared for the CBB by the consultancy firm Arthur D. Little (recital 135). Interbrew and Alken-Maes agreed that the part of the agreement concerning advertising spending in the on-trade could be implemented within the CBB (recitals 59 and 66). This would be done by the Vision 2000 working party and in particular by the following subgroups, which were set up in January 1995: investment in publicity materials, management of delivered-to-premises and ex-factory pricing (the activities of this subgroup were suspended shortly after it was set up), investment in drinks outlets, and outside advertising (set up later).

(239) In the years that followed (up to January 1998), the gentleman's agreement was implemented further. Regular discussions took place between Interbrew and Alken-Maes, and occasionally with Danone, in which the current state of affairs was reviewed. In 1995 the customer sharing agreement for the on-trade market was broadened to include national customers (recital 73). At the same time, under the chairmanship of representatives of Interbrew and Alken-Maes, discussions took place in sub-groups of the CBB Vision 2000 working party on how the brewers' investments in the on-trade market could be reduced (recitals 133 to 154).

(240) From mid-May 1995 to the end of 1996 intensive talks were held on a new pricing system. The agenda for these includes, in particular, pricing structure and the date for introducing the new system (recitals 74 to 91).

(241) Ultimately, the discussions in the CBB, except those on investments in publicity material for the on-trade (such as glasses and beer mats; see also recital 137), turned out to be fruitless and they were broken off in mid-May 1997 (recitals 154 and 155).

(242) In January 1998 Interbrew and Alken-Maes reviewed their cooperation since the 'Université de Lille' agreement of November 1994 (recitals 103 and 104). 'Achievements' included: adaptation of advertising credit vouchers (result of the discussions in the CBB on publicity material in the on-trade; see also recitals 147 and 241), pricing (for both the on-trade and the off-trade), respect for each other's ties (in the on-trade), and the non-aggression pact. No results were achieved concerning the regulation of investment (in the on-trade), the participation of other players and outside advertising (in the on-trade, see also recital 241). At the same time, the parties clearly expressed the intention to hold discussions with each other about the on-trade three times a year as from January 1998. No evidence has come to light that this actually happened (recitals 104 and 105).

([248]) I.e. not including 'national customers', such as catering firms.
([249]) Original English.

(243) During the lifetime of the cartel, therefore, there was regular consultation and agreements were struck on the following subjects:

(a) a general non-aggression pact:

in July 1994 a non-aggression pact was concluded between Interbrew and Danone concerning the Belgian market (recitals 56, 104 and 112);

(b) prices and promotions in the off-trade:

as early as 1993 Interbrew and Alken-Maes struck an agreement on price increases and promotions in the off-trade; these were also part of the gentleman's agreement reached in 1994 (recitals 44, 46, 47, 50, 60, 64 to 66, 107, 109 to 112);

(c) customer sharing in the on-trade (both the 'traditional' on-trade and national customers):

in 1994 the agreement on respecting each other's ties was included in the 'Université de Lille' agreement. The agreement was also called 'Project Green' in 1994. Initially it was limited to the 'traditional' on-trade, but in 1995 it was extended to national customers (recitals 56, 60, 68, 73 and 111);

(d) the restriction of investment and advertising in the on-trade:

although Interbrew and Alken-Maes only made agreements about reducing investments and advertising in the on-trade from 1994 (in the context of the 'Université de Lille' agreement), Interbrew and Danone had already talked about this in 1993. In 1994 Interbrew and Alken-Maes agreed to develop the subject further within the CBB, and this actually occurred until at least May 1997 (recitals 46, 47, 59, 65, 73, 107, 111 to 112 and 133 to 154);

(e) the new pricing structure for the on-trade and the off-trade:

the new pricing structure was also already being discussed by Interbrew and Danone in 1993, and from 1994 was included in the 'Université de Lille' agreement. From May 1995 to November 1997 the agreement was implemented with regard to pricing and, especially in 1996, intensive talks took place between Interbrew and Alken-Maes (recitals 45, 47, 65, 76, 78, 84, 84 to 91 and 100);

(f) the exchange of information about sales in the on-trade and the off-trade:

from at least the end of 1991 to November 1999 Interbrew and Alken-Maes exchanged sales data with each other on a monthly basis. From 1992 the data were expressed in volumes (previously they had been in percentages), by type of beer, distribution channel and form of packaging (section 4.4).

(244) All these agreements and forms of consultation are interrelated. Originally, in 1993, agreements were made by Interbrew and Alken-Maes with regard to prices and promotions in the off-trade. At the time, Interbrew and Danone also discussed possibly extending 'cooperation' in Belgium, the reduction of marketing investments and investments in the on-trade, and the new pricing system (recitals 45 to 47). In the 'Université de Lille' agreement concluded in 1994, which came into existence under pressure from Danone, not only were all these subjects considered but an agreement was made to share out customers in the on-trade. Interbrew's and Alken-Maes's system of exchanging information, and the good 'market intelligence' obtained as a result, was instrumental in the implementation of these agreements (recitals 122 and 124).

(245) The above agreements and meetings took place at the highest management level in the undertakings concerned. At Interbrew, those chiefly involved were the CEO, the COO Europe/Asia Pacific/Africa, the general manager for Belgium, the off-trade manager and the on-trade marketing manager. At Alken-Maes, they were in particular the general manager, the off-trade manager and the on-trade manager, and at Danone the chairman and general manager and the general manager of the beer division.

(246) The existence of agreements between Interbrew and Alken-Maes which distorted competition was admitted by (representatives of) Interbrew and Alken-Maes after the Commission had started its investigation (recitals 106 to 112 and 125).

(247) The justification given by Danone for the price agreements in 1993 and the exchange of information is that until 1 May 1993 prices in Belgium were controlled (recitals 171 to 172). However, Danone's arguments must

be rejected, for the following reasons. Belgian price control for brewers was in force only until 1 May 1993. The rules, moreover, were such that undertakings could choose to submit requests for price increases individually or collectively. The brewers were thus free to submit individual applications. If they decided to make a collective application, however, it had to be submitted through their trade association. This means that in no way was it the intention that individual undertakings should jointly, i.e. without the agreement of a trade association, submit or, where appropriate, discuss a request for a price increase. The Commission would point out that the members of the CBB were free to determine how far and at what moment the authorised price increase should be applied. Even if the Commission were to accept — which is not the case — that discussions about prices between brewers were due to price control, it is significant that the CBB presented a collective application for a price increase for the last time on 23 December 1992. The agreement of 28 January 1993 (recital 44) is from after that date and thus cannot have been an agreement between brewers within the framework of the CBB regarding a collective application for a price increase. This is already clear, too, from Danone's reply to the statement of objections, in which Danone talks of the meeting with the beer wholesalers. Also significant is that the competent minister authorised the price increase on 6 February 1993 subject to the express condition that there should be no further price adjustments in 1993 (recital 10). Consequently, in no circumstances can price control be a justification for restrictions of price competition ([250]).

(248) Nor can price control be a justification for the exchange of information. The Commission acknowledges that detailed information had to be submitted together with a request for a price increase. However, the brewers were supposed to supply that information to the CBB, which submitted the collective request, and not to each other. Furthermore, such information was supplied to the CBB only when a request for a price increase was submitted, and not every month, as in the case of Interbrew and Alken-Maes. Moreover, it was admitted by Danone that information was not exchanged in the context of price control, but started when Alken-Maes, as a result of a strike at Interbrew in 1989, delivered Interbrew beer to on-trade outlets tied to Interbrew. In this respect the Commission has also taken account of the fact that price control for the beer sector was abolished as of 1 May 1993.

([250]) See also Commission Decision of 10 July 1986 (IV/31.371 — Roofing felt), OJ L 232, 19.8.1986, p. 15.

(249) As a justification for the market-sharing agreements, Danone contends that Interbrew abused its dominant position to the detriment of Alken-Maes by trying to prevail upon public houses which had an exclusive contract with Alken-Maes to breach that contract, *inter alia*, by selling beer at loss-making prices. Alken-Maes tried to persuade Interbrew to stop this abuse, which resulted in the agreement to respect each other's tied premises. The Commission takes the view that this cannot be regarded as a justification for the market-sharing agreements. In no sense is it the intention that undertakings should mutually conclude non-aggression pacts, thereby infringing Article 81 EC, in order to put an end to a possible breach of Article 82. And the fact that the Commission may in the meantime have started an investigation into a possible infringement of Article 82 by Interbrew does not necessarily mean that the abovementioned conduct of Interbrew should be regarded as an infringement of that Article.

6.3.2. *The private-label cartel*

(250) From the autumn/winter of 1997 to the summer of 1998 there were four meetings about private-label beer (recital 156).

(251) At these meetings the Belgian brewers involved discussed the private-label segment of the Belgian beer market, and in particular customers and prices. With regard to private-label beer in Belgium, they also exchanged information at any rate on customers and (customer) volumes, and perhaps also on prices (recitals 157, 159 and 160). The discussions and exchange of information were aimed at sharing out customers in Belgium and agreeing or concerting prices (recitals 157 and 159 to 161).

(252) Martens denies that this was the case (recital 203). From the statements of (former) Interbrew employees it is clear, however, that customer-sharing and the price level were topics at the private-label meetings (at each of which Martens was present). Haacht's answer to a request for information from the Commission confirms that the price level was the subject of the four meetings. That this conclusion is not based on a faulty reading of these statements is clear, moreover, from the written replies of Haacht and Interbrew to the statement of objections, in which they acknowledge that prices and customer-sharing were discussed at the meetings. It is

also relevant in this respect that Danone, in its reply to the statement of objections, which was also submitted on behalf of Alken-Maes, did not deny that prices and customer-sharing were discussed at the meetings.

(253) The Commission acknowledges that the evidence of concerted action between the four brewers is based only on statements from the undertakings concerned, but does not agree with Martens that this is not enough to conclude that there was an infringement of Article 81 of the EC Treaty. Martens's argument that Interbrew's statements are dubious because of its involvement in other competition proceedings in the Commission (recital 203) cannot be accepted. Haacht's reply is identical, and neither Danone nor Alken-Maes dispute the Commission's version. In addition, it must also be emphasised that each infringement and the consequences thereof for the undertaking or undertakings concerned is assessed on its own merits.

(254) Although it cannot be established with certainty from the available evidence that there was an agreement between the four brewers, it is at any rate proven that there was a concerted practice. The meetings served to influence the market behaviour of competitors and to report on market behaviour to competitors (recitals 157 and 159 to 161). At the meetings not only was information exchanged but prices and customers were discussed. From statements by Interbrew and Haacht, it is clear that the aim of the meetings was, firstly, to prevent a price war and adopt a position on prices and, secondly, to share out customers by not making (real) offers to the customers of other brewers. Since the aims of the meetings were clearly anti-competitive, it is not necessary to show that their consequences were also harmful to competition.

(255) Since it is thus established that Martens did take part in the meetings of a manifestly anti-competitive nature, it must be accepted that its participation was intended to restrict competition, unless the company can demonstrate that it had in fact indicated to its competitors that it was taking part in a different spirit ([251]). Martens has not been able to do this. Furthermore, it did not terminate its participation in the private-label cartel after the first meeting, but was also present at the following meetings and even tried, as a result of its activities on the Dutch market, to invite Dutch brewers to the meetings as well.

(256) Martens denies that it altered its market behaviour as a result of the meetings (recital 206). According to the Court of Justice, the presumption must be that, subject to proof to the contrary, undertakings taking part in consultation 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 ([252]). The evidence supplied by Martens shows, however, only that Martens did not put into effect the results of the meeting, namely the exchange of information and discussions of customers aimed at not triggering a price war on the private-label market and at sharing out customers ([253]).

(257) Martens's citation of the notice on agreements of minor importance which do not fall under Article 81(1) of the Treaty establishing the European Community ([254]) (recital 209) serves no purpose. According to point 6 thereof, the notice is likewise applicable to concerted practices. Consequently, in the case of concerted practices too, the assessment of whether the notice is applicable must be based on the aggregate market shares of all the undertakings concerned.

(258) Martens's citation of the John Deere case (recital 207) serves no purpose either. In the case at issue, in contrast to the John Deere case, there is no isolated exchange of information: the brewers also discussed prices and market shares.

([251]) Judgment in Hüls, paragraph 155; see footnote 229.
([252]) Judgment in Hüls, paragraph 162; see footnote 229.
([253]) Judgment in Anic, paragraph 127; see footnote 242.
([254]) See footnote 232.

(259) Martens's argument that the Commission must demonstrate that there was parallel pricing (recital 208) is based on an inaccurate interpretation of the decision cited by the undertaking. In the Zinc Producer Group case, the Commission considered that under certain circumstances parallel pricing without evidence of direct contact between the undertakings concerned is insufficient evidence of a concerted practice. It cannot be inferred from that decision, therefore, that evidence of meetings is by itself not sufficient to support the conclusion that there is an infringement of Article 81 of the EC Treaty.

(260) That Fedis's request for a sorting charge was the reason for the private-label meetings, as stressed by Danone (recital 176), is no justification for the talks on prices and customers and the exchange of data. As a reaction to the Fedis request, it would have been sufficient for the private-label brewers to provide volume data to a neutral third party, such as the CBB, which could have subsequently compiled the individual data into an overall survey.

6.4. **Restriction of competition**

(261) Article 81(1) of the EC Treaty specifically states that agreements, decisions and concerted practices which (*inter alia*)

— directly or indirectly fix purchase or selling prices or any other trading conditions, or

— share markets or sources of supply,

are a restriction of competition.

(262) These were the real purposes of the horizontal agreements in the Interbrew/Alken-Maes cartel. Since price is the chief instrument of competition, the separate secret deals made and mechanisms set up by the producers all had as their ultimate goal to force up prices to their advantage and above the level that would have been attained under free competition. The agreement to respect each other's ties and national customers (recitals 60, 68, 73 and 111) must be regarded as an agreement to share customers on the on-trade market and, hence, as a market-sharing agreement, which is expressly considered by Article 81(1) of the EC Treaty as restrictive of competition.

(263) Market sharing and price agreements were the real goals of the private-label cartel. Since price is the chief instrument of competition, here too the separate courses of conduct adopted by the producers all had as their ultimate goal to force up prices to their advantage, above the level that would have been attained under free competition.

(264) The sharing of markets and the fixing of prices restricted competition within the meaning of Article 81(1) of the EC Treaty.

(265) The most prominent aspects of the (complexes of) agreements, pacts and practices which can be classified as restrictions of competition were:

<u>The Interbrew/Alken-Maes cartel</u>

Regular participation in meetings by, and other contacts between, managers of the undertakings concerned in order to agree and implement/amend the following restrictions:

(a) a general non-aggression pact;

(b) direct and indirect agreement of or consultation on prices and promotions in the off-trade;

(c) the sharing out of customers in the on-trade market (both the 'traditional' on-trade and national customers);

(d) the restriction of investment and marketing in the on-trade market;

(e) the agreement of a new pricing structure for both the on-trade and the off-trade;

(f) the exchange of information on sales in both the on-trade and the off-trade;

<u>The private-label cartel</u>

(a) consultation regarding customer-sharing and prices;

(b) the exchange of information about customers.

(266) Given the clearly restrictive purpose of the abovementioned agreements and practices, it is not necessary to investigate how far each restriction contributed to the achievement of the intended purpose in order to decide if there is an infringement of Article 81(1) of the EC Treaty ([255]). It should be noted here that the restrictions of competition referred to in recital 265 are only parts of the Interbrew/Alken-Maes cartel, on the one hand, and the private-label cartel, on the other hand, and that the Interbrew/Alken-Maes cartel and the private-label cartel should each be regarded as a separate infringement.

6.5. **Effect on trade between Member States**

(267) As the Court of Justice has consistently held, in order that an agreement between undertakings may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States ([256]).

(268) The application of Article 81(1) of the EC Treaty to a cartel is not confined to that proportion of the parties' sales that actually involves the carriage of goods from one State to another. Still less is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as distinct from the cartel as a whole, has affected trade between Member States ([257]).

(269) It is clear from recitals 19 and 21 that, even on the basis of the figures provided by Interbrew, considerable quantities of beer are imported into and exported from Belgium. By far the largest part of this trade is with other Member States.

(270) Price differences between Belgium and other Member States may cause parallel trade flows and do in fact do so (recitals 19 and 20).

(271) The ultimate purpose of the Interbrew/Alken-Maes cartel was to set prices at a higher level than would have happened in normal competition. For this reason alone it can be assumed that this complex cartel agreement had an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. In addition, the following remarks should also be made about the cartel agreement. The cartel must be seen in the context of relations on the French market (recitals 51 to 55). The French parent company of Alken-Maes played an active role in the cartel.

(272) Secondly, the partial implementation of the cartel within the framework of the CBB must also be seen in the light of the Scenario 2000 study commissioned by the CBB and carried out by Arthur D. Little. The study was prompted, *inter alia*, by the opening of Europe's internal borders and the consequences thereof for the Belgian market. One of its aims was to gain an understanding of the beer trade and the on-trade sector in Belgium, on which brewers could base their commercial strategy (recital 129).

(273) For the above reasons, the outlined restrictions of competition in the Interbrew/Alken-Maes cartel may distort trade patterns in the brewing sector from the course which they would otherwise have followed. The Commission must therefore find that the restrictions of competition may affect trade between Member States ([258]).

(274) The purpose of the private-label cartel was to set prices at a higher level than would have happened in normal competition. Here again, for this reason alone it can be assumed that the cartel had an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. In addition, the participants in the cartel established a link with neighbouring markets (Netherlands, Luxembourg and Germany). At two of the meetings Dutch producers of private-label beer were also present (recitals 156, 157 and 159).

(275) For the above reasons, the outlined restrictions of competition in the private-label cartel may distort trade patterns in the brewing sector from the course which they would otherwise have followed. The Commission therefore finds that the restrictions of competition may affect trade between Member States ([259]).

([255]) See the judgment of the Court of Justice in Case 123/83 *BNIC* v *Guy Clair* (1985) ECR 391 and the judgment of the Court of First Instance in Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro* v *Commission* (1992) ECR II-1403.

([256]) Judgment of the Court of Justice in Case 42/84 *Remia* v *Commission* (1985) ECR 2545, paragraph 22.

([257]) Judgment of the Court of First Instance in Case T-13/89 *Imperial Chemical Industries* v *Commission* (1992) ECR II-1021, paragraph 304.

([258]) Judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* (1980) ECR 3125, paragraphs 171 to 173.

([259]) Judgment in *Van Landewyck,* paragraphs 171 to 173; see footnote 258.

6.6. **Article 81(3) of the EC Treaty**

(276) The agreements and practices which are the subject of this decision were made in secrecy and were not notified to the Commission. Consequently they cannot be exempted from the application of Article 81(1) of the EC Treaty. In any event, the practices of the undertakings concerned do not in principle satisfy the tests of Article 81(3) of the EC Treaty, since the different parts of the cartel and the combination of them are clearly anti-competitive. More specifically, the Commission is not aware of any information which may lead to the conclusion that that the four conditions for granting an individual exemption are met.

7. **ADDRESSEES OF THIS DECISION**

(277) This decision is addressed to the undertakings which are directly involved in the infringements.

(278) For the Interbrew/Alken-Maes cartel, these are Interbrew and Alken-Maes. Since Danone had control over Alken-Maes during the infringement and was itself involved, this decision is also addressed to Danone.

(279) Although part of the cartel operated within the framework of the CBB, the CBB itself cannot be charged with taking part in the infringement. Interbrew and Alken-Maes used the CBB only as a forum for the further elaboration and implementation of the bilateral cartel agreements. The CBB therefore did not play a separate role in the cartel ([260]).

(280) For the private-label cartel, the addressees are Interbrew and Alken-Maes together with Haacht and Martens. Although Danone had control at the time over Alken-Maes, the Commission has no evidence that it too was actually involved in the private-label cartel. Consequently, Danone is not an addressee as regards the private-label cartel.

8. **DURATION OF THE INFRINGEMENT**

8.1. **The Interbrew/Alken-Maes cartel**

(281) The Commission has evidence concerning the Interbrew/Alken-Maes cartel from at least 28 January 1993 to 28 January 1998 inclusive (recitals 44 and 103). On 28 January 1993 a report was made of a first meeting with a clearly anti-competitive aim. On 28 January 1998 the last meeting within the framework of the cartel took place in respect of which the Commission has documentation. The duration of the infringement is thus five years and one day. It is true that the exchange of information began earlier and finished later, but these proceedings, as formally initiated by the Commission's adoption of the statement of objections on 29 September 2000, relate only to the cartel as it existed in its entirety. There is also no evidence that the proposed discussion of the on-trade, mentioned in the notes of the marketing manager for Belgium (recital 104, point 3), actually took place.

(282) Danone disputes that the infringement lasted as long as this. According to Danone, the discussions between Alken-Maes and Interbrew started only on 12 October 1994 and had already ended in July 1996, when Interbrew decided to introduce its new pricing structure as from 1 January 1997. This argument, however, ignores the evidence held by the Commission of earlier discussions between Alken-Maes and Interbrew, starting on 28 January 1993. As already explained above, Danone's justifications of these discussions are irrelevant (recitals 247 and 248). The fact that only agreements from 12 October 1994 onwards were reviewed at the meeting between Alken-Maes and Interbrew on 28 January 1998 does not alter this. On that date Interbrew and Alken-Maes discussed the agreements existing between them. The fact that, owing to circumstances, the discussion was not followed up does not mean that this was not a meeting within the framework of the existing agreements and consultation between Interbrew and Alken-Maes.

(283) Contrary to what Danone states, the Interbew/Alken-Maes cartel was not ended in July 1996. Interbrew has acknowledged that the infringement lasted until January 1998 (recital 111) and one of the Alken-Maes employees who was involved in the pricing discussions at the time has stated that cooperation with Interbrew ceased in November 1997 (recital 100). The Commission also has evidence that discussions in the context of the cooperation between Interbrew and Alken-Maes took place on 9 December 1996 (by telephone), 17 April 1997 and 28 January 1998 (recitals 91, 95, 96, 103 and 104). The fact that Alken-Maes also had a study carried

([260]) See the judgment of the Court of Justice in Joined Cases 89/85, 104/85, 116/85, 117/85, and 125-129/85 *Wood pulp* (1988) ECR 5193, paragraphs 24 to 27.

out at the time on the (draft) pricing system of Alken-Maes and Interbrew does not alter the conclusion that the infringement continued, given the abovementioned evidence held by the Commission.

(284) Contrary to what Danone states, the subject of the discussion on 17 April 1997 was the coordination of the market behaviour of Interbrew and Alken-Maes/Danone. In view of Interbrew's statement on the content of this discussion (recital 96), it cannot be accepted that what was discussed was a possible takeover of Kronenbourg/Alken-Maes by Interbrew, which moreover is not proven by Danone.

(285) At the 28 January 1998 meeting the subject discussed, according to the notes of the Interbrew representative present, was the relations between Interbrew and Alken-Maes. Not only were the results of previous cooperation reviewed, but current aspects and the method of consultation were also discussed (recital 104). Danone's statement that the meeting on 28 January 1998 was between a brewer (Alken-Maes) and its distributor for the Brussels region (Interbrew) is not plausible. Nor does it appear so from the evidence held by the Commission. On the contrary, it is clear from statements by representatives of both Interbrew and Alken-Maes that the discussion was unproductive and that afterwards the contacts ceased (recital 105).

8.2. **The private-label cartel**

(286) From the evidence available to the Commission it is clear at any rate that the meetings took place between 9 October 1997 and 7 July 1998 (recital 156). The duration of the infringement is therefore at least approximately nine months. This is not disputed by the undertakings concerned.

9. **PENALTIES**

9.1. **Article 3 of Regulation No 17**

(287) Where the Commission finds that there is infringement of Article 81(1) of the EC Treaty, Article 3 of Regulation No 17 empowers it to require the undertakings concerned to bring such infringement to an end.

(288) An employee of Interbrew who was involved at the time in the Interbrew/Alken-Maes cartel stated that after the meeting on 28 January 1998 'nothing more happened' (recital 105). Nor does the Commission have any evidence that either of the parties continued the anti-competitive behaviour after 28 January 1998.

(289) With regard to the exchange of information between Interbrew and Alken-Maes, it is also relevant that Alken-Maes sent the Commission a copy of its letter of 5 November 1999 terminating the exchange.

(290) As far as the private-label cartel is concerned, the participants have stated that there were only four meetings, the last of which took place in July 1998 (recital 156). In addition, one of the employees involved has stated that the consultation was stopped (recital 157). The Commission has no evidence that the consultation continued after the last meeting.

(291) In reply to the statement of objections, Interbrew stated that both the Interbrew/Alken-Maes cartel and the private-label cartel had already been terminated. Interbrew refers in this respect to its letter of 29 February 2000, in which it stated that it had terminated the infringements and taken far-reaching measures to prevent a repetition of such breaches of the competition rules. One of the measures is the introduction of a comprehensive 'compliance programme' consisting, *inter alia*, of a six-monthly internal and external audit. This makes clear among other things that Interbrew employees are not allowed to make agreements on prices, conditions of sale, market-sharing and the exchange of information.

(292) In view of the above, it is not necessary to require the undertakings concerned to terminate the infringement.

9.2. **Article 15(2) of Regulation No 17**

(293) Under Article 15(2) of Regulation No 17, the Commission may by decision impose on each undertaking fines of from EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover

in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the EC Treaty.

(294) In determining the amount of a fine the Commission must take all relevant circumstances into account and in particular the gravity and duration of the infringement. The method applied is that 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) of the ECSC Treaty ([261]).

9.2.1. *The Interbrew/Alken-Maes cartel*

9.2.1.1. On whom should fines be imposed?

(295) The Commission considers that, with regard to the Interbrew/Alken-Maes cartel, it is appropriate to impose a fine on Interbrew and Danone. Danone is responsible for both its own involvement in the infringement and that of Alken-Maes. A parent company which is actively involved in the participation of one of its subsidiaries in a cartel can be held responsible for the behaviour of that subsidiary ([262]). As Danone itself has stated, it formed an economic unit with Alken-Maes at the time of the infringement of Article 81(1). Moreover, at the time, Danone was not only the parent company of Alken-Maes, but was also itself directly involved in the cartel. Danone acknowledges having taken part in meetings concerning the Belgian market and having been aware of certain practices. It should therefore be held responsible for both its own involvement in the cartel and that of Alken-Maes.

9.2.1.2. Intention or negligence

(296) It is clear from the facts that all participants in the cartel intended to make agreements about a general non-aggression pact, prices and promotions in the off-trade, sharing customers in the on-trade (both the 'traditional' sector and national customers), the restriction of investment and advertising in the on-trade, the new pricing structure for the on-trade and the off-trade, and the exchange of information about both on-trade and off-trade sales. The Commission considers that this infringement should be regarded as intentional, since the parties could not possibly have been unaware that the above agreements or the combination of them were intended to restrict competition.

9.2.1.3. Gravity of the infringement

(297) A horizontal agreement or consultation such as the one in question — comprising a general non-aggression pact, the direct and indirect agreement of or consultation on prices and promotions in the off-trade, the sharing of customers on the on-trade market, the restriction of investment and advertising on the on-trade market, the agreement of a new pricing structure for the on-trade and the off-trade, and the exchange of information about sales in the on-trade and the off-trade — is by nature a very serious infringement. The system for exchanging information between Interbrew and Alken-Maes made it easier to achieve the objective of those agreements. Since price is one of the most important factors of competition, the various secret agreements and mechanisms were ultimately intended to force up the price above the level it would have been in conditions of free competition, to the detriment of consumers.

(298) In addition, the cartel as a whole concerned all segments of the beer market and both the on-trade and the off-trade. The Commission has also taken into account that the discussions between Interbrew on the one hand and Alken-Maes and Danone on the other were conducted at the highest management level. It is also significant that the agreements and concerted actions concerned a wide variety of competition parameters (prices and promotions, customers, investment, advertising, pricing structure and the exchange of sales data).

(299) Danone disputes that there were any price or market-sharing agreements. However, it is clear from the evidence available and the statements of both Interbrew and Alken-Maes that price and market-sharing agreements were actually concluded (section 6.3.1).

([261]) OJ C 9, 14.1.1998, p. 3.

([262]) Judgment of the Court of Justice in Case T-309/94 *KNP BT* v *Commission* (1998) ECR II-1007, paragraph 45 et seq.; this part of the judgment was upheld by the Court of Justice on appeal — see Case C-248/98 P *KNP BT* v *Commission* (2000) ECR I-9641.

(300) The various secret agreements of the parties were aimed at setting higher prices to their advantage above the level that would be attained under free competition. From the evidence available to the Commission, it is clear that the non-aggression pact and the agreements about customer-sharing in the on-trade market (in part), the restriction of advertising in the on-trade, the agreement of a new pricing structure for the on-trade and the off-trade, and the exchange of information about on-trade and off-trade sales were regarded by Interbrew and Alken-Maes at the meeting on 28 January 1998 as having been achieved (recital 104). Interbrew has also acknowledged that there were agreements between it and Alken-Maes concerning promotions in the off-trade (recital 109). Moreover, Interbrew and Alken-Maes have acknowledged that every month they exchanged detailed sales data with each other (section 4.4). The Commission realises that, on the basis of the available evidence, it must be accepted that certain parts of the cartel were not, or not fully, implemented by Interbrew and Alken-Maes: certain parts of the gentleman's agreement were not implemented (recitals 92, 107, 236 and 242), the agreement on sharing out customers in the on-trade market was not fully respected by Interbrew (recital 72), and the discussions in the CBB had limited results (recital 241). This does not justify the conclusion, however, that the cartel as such had no, or only a limited effect on the market ([263]).

(301) The relevant geographic market is the whole territory of Belgium; this constitutes a substantial part of the common market.

(302) Taking all the above circumstances (recitals 297 to 301) into account, the Commission has reached the conclusion that the infringement in question must be regarded as very serious.

([263]) The effects on the market are crucial to the determination of the severity of the fine only when one is dealing with agreements which do not directly have as their object the restriction of competition and which are not therefore liable to fall within the scope of application of Article 81(1) except as a result of their actual effects (opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* (2000) ECR I-9855). As already established above, the complex of agreements between Interbrew and Alken-Maes/Danone is by nature restrictive of competition, which means that the extent to which competition is restricted by the cartel does not have to be established separately (section 6.4).

(303) In fixing the amount of the fine, the Commission also takes account of the effective economic capacity of offenders to cause significant damage to other operators.

(304) The participants in the cartel accounted for about 70 % of total beer consumption, and about 80 % of all Pils consumption, in Belgium at the time. However, there was a considerable difference in size between Interbrew, the number one in Belgium, and Alken-Maes, the number two. With an average market share of about 55 %, Interbrew was, and still is, the market leader in Belgium. Alken-Maes had an average market share at the time of some 15 %.

(305) The fine must be set at a level which ensures that it has a deterrent effect. Here the Commission will take account of the fact that Interbrew and Danone are large international undertakings. It is important, too, that Danone is a multi-product company.

(306) The Commission will also take account of the fact that Interbrew on the one hand and Alken-Maes and Danone on the other have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

(307) In calculating the fine to be imposed on Interbrew, the Commission therefore considers it appropriate, given the gravity of the infringement, to impose a fine of EUR 45 million. For Alken-Maes/Danone, a fine of EUR 25 million is regarded as appropriate.

9.2.1.4. Duration of the infringement

(308) For both Interbrew and Alken-Maes the duration of the infringement is five years and one day. The infringement is therefore one of medium to long duration. Bearing in mind that the intensity of the cooperation decreased considerably at the end of the cartel, it is considered appropriate to increase the fine by 45 % for both Interbrew and Danone.

(309) The basic amount of the fine is therefore EUR 65,25 million for Interbrew and EUR 36,25 million for Danone.

9.2.1.5. Aggravating circumstances

(310) It is clear from the evidence that in August and November 1993 Interbrew played a leading role concerning the price agreements in the off-trade (recitals 49 and 50). In 1995 Interbrew also took the initiative concerning price discussions with Alken-Maes (recitals 74 and 145). At the same time it is clear, *inter alia*, from a statement originating with Interbrew itself, that the exchange of information between Interbrew and Alken-Maes in 1992 (and perhaps earlier) was started on Interbrew's initiative (recital 122).

(311) The extension of the cooperation between Interbrew and Alken-Maes in 1994, which led to the comprehensive gentleman's agreement known by the code name 'Université de Lille', was however the result of Danone's intervention in relation to the Belgian market (recitals 232 to 234).

(312) Contrary to what Danone has stated, it cannot be concluded from the available evidence that Interbrew took the lead in order to realise the cartel's aims and agreements within the CBB. Interbrew and Alken-Maes agreed on 29 August 1994 to use the CBB as a forum for achieving certain parts of the cartel (recital 133), which in fact occurred after Interbrew and Alken-Maes had reached agreement in November 1994 over the 'Université de Lille' gentleman's agreement, and the Vision 2000 report prepared by Arthur D. Little and commissioned by the CBB had been presented (recital 135 et seq.). It should be noted in this respect that both Interbrew and Alken-Maes were represented in the Vision 2000 working party and that the chairmen of the four relevant subgroups were all from Alken-Maes, except for the subgroup on investment in sales outlets, which was chaired jointly by representatives of Interbrew and Alken-Maes (recitals 137 and 144).

(313) Since both Danone and Interbrew took initiatives concerning various parts of the cartel, the Commission concludes that none of the undertakings concerned played a leading role in the cartel as a whole.

(314) It is also significant that Danone (called BSN at the time) has already been found to have infringed Article 81 of the EC Treaty twice before [264]. As in the present case, the previous infringements consisted in the exchange of information, restrictions concerning prices and terms and conditions of sale and, in one situation, market-sharing agreements as well. Since Danone has committed a further infringement after being punished for similar breaches, this is a repeat infringement [265]. The fact that Danone operated under a different name at the time does not alter the above. Nor does the fact that both the earlier infringements concerned a different sector from the present one prevent this from being a similar breach, especially given the nature of those infringements. The Commission regards it as relevant in this respect that during the period [266] in which the three infringements were committed by BSN/Danone the same person occupied the post of chairman and chief executive. In addition, at least two of Danone's directors who were responsible for food operations during the bilateral cartel were employed in the company's plate glass division at the time of the earlier infringement(s) [267].

(315) Moreover, Danone threatened to destroy Interbrew on the French market if 500 000 hl of beer were not transferred to Alken-Maes. This led to an extension of the cooperation between Interbrew and Alken-Maes (recitals 232 to 234 and 236). With regard to Danone's role, therefore, the conclusion must be that it compelled Interbrew to extend the cooperation, by threatening to take measures against Interbrew if the latter did not cooperate.

(316) Given the threat of retaliatory measures and the fact that this was a repeat infringement, an increase in the basic fine of 50 % is regarded as appropriate in Danone's case.

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[264] Commission Decision 84/388/EEC (IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries), OJ L 212, 8.8.1984, p. 13; Commission Decision 74/292/EEC (IV/400/EEC — Agreements between manufacturers of glass containers), OJ L 160, 17.6.1974, p. 1.

[265] Judgment of the Court of First Instance in Case T-141/94 *Thyssen Stahl* v *Commission* (1999) ECR II-347, paragraph 617.

[266] At least until 2.5.1996, see Danone's website (www.danonegroup.com) and the company's reply to the statement of objections, 30.11.2000.

[267] Annex 28 to Danone's reply to the request for information, 10.5.2000 (doc. 37614 09915-09938).

9.2.1.6. Attenuating circumstances

(317) The fact that infringing agreements or rules of conduct are not actually applied is an attenuating circumstance. The Commission acknowledges that it is clear from the evidence that the parties did not fully apply each specific agreement of the cartel (recital 300). This does not mean, however, that the cartel as such was not actually applied. The fact that some parts of the infringement were not put into effect is in itself not sufficient to be able to say that there is an attenuating circumstance in the above sense.

(318) As far as Alken-Maes is concerned, however, it must be borne in mind that it terminated the exchange of information with Interbrew after the Commission's inspection on 26 and 27 October 1999.

(319) This circumstance justifies a reduction of the basic amount of the fine by 10 % in the case of Alken-Maes/Danone.

(320) The Belgian system of price control is not a reason for reducing the fine. Price control in the beer sector was only in force until 1 May 1993. Furthermore, this system obliged the parties to request approval for a price increase either individually or collectively through their trade association, not to conclude agreements or consult about prices (recital 247). Danone referred in this connection to the Commission's decision concerning Greek ferries ([268]). In that case, the Commission took account of the attenuating circumstance that during the period of the infringement a collective proposal for domestic rates had been expected from the undertakings concerned themselves and was subsequently confirmed by the Greek government. Because of this, there could have been some doubt about whether the fixing of international rates constituted an infringement. This situation is not comparable with the present case for the following reasons. First, legislation did not provide that brewers were to submit a collective request for a price increase themselves; they were to act through their trade association. Consultations between the brewers about their prices and cost structures were not the direct consequence of the Belgian system of price control, nor were they expected of the brewers by the Belgian government. Second, price control concerned the approval of price increases, not the ratification of nominal prices proposed by undertakings.

(321) Danone also submits that the Commission must take account of the crisis in the Belgian beer market. The Commission acknowledges that in the 1990s demand was declining slightly (recital 6), which possibly led to some overcapacity, and that there was pressure from distributors in the off-trade. This situation is not comparable, however, with cases where the Commission has ruled that in determining the amount of the fine account must be taken of a crisis on the market ([269]). The Commission would point out in this respect that the decline in Belgian beer production at the time was appreciably less steep than that in beer consumption (recital 6). The individual financial situation of one party to an infringement, in this case Alken-Maes, cannot lead to the reduction of the amount of the fine. This would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the requirements of the market ([270]). The fact that an undertaking suffers a loss, moreover, does not mean that it has derived no advantage from an infringement of the competition rules, since that advantage may consist in a reduction of its losses.

(322) Danone also states that account must be taken of the position of dependence which Alken-Maes was in at the time of the infringement with regard to Interbrew. The Commission takes the view that, as already discussed above (recital 247), Alken-Maes's attempt to put an end to a possible infringement of Article 82 of the EC Treaty by Interbrew cannot be accepted as a defence for participation in a cartel. Also, Danone's statement passes over the involvement of Danone, Alken-Maes's parent

([268]) Decision 1999/271/EC (IV 34.466 — Greek ferries), OJ L 109, 27.4.1999, p. 24.

([269]) See, for example, Commission Decision 94/815/EC (IV/33.126 and 33.322 — Cement), OJ L 343, 30.12.1994, p. 1; Commission Decision 94/599/EC (IV/31.865 — PVC), OJ L 239, 14.9.1994, p. 14; and Commission Decision of 8 December 1999 (IV/E1/35.860 B Seamless steel tubes, not yet published).

([270]) Judgment of the Court of Justice in Joined Cases 96-102, 104, 105, 108 and 110/82 *IAZ* v *Commission* (1983) ECR 3369.

company, in the cartel. Lastly, the difference in size between Alken-Maes and Interbrew has already been taken into account in determining the basic amount of the fine.

9.2.1.7. Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases

(323) Interbrew and Alken-Maes have both invoked the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (hereinafter also referred to as 'the notice').

(324) The information which Interbrew supplied after a request for information was sent under Article 11 of Regulation No 17 contributed significantly to proving the relevant facts. This cooperation with the Commission went further than simply replying to the request for information within the meaning of Article 11 of Regulation No 17. Furthermore, Interbrew has not substantially disputed the facts on which the Commission is basing the allegation of infringement.

(325) Interbrew's cooperation justifies a reduction of 30 % in the fine under section D.2. of the notice.

(326) Although Alken-Maes stated during the proceedings that it did not dispute the facts and the existence of the infringement, it, like Danone, declared, in reply to the statement of objections, that the facts were not in dispute only in so far as they were based in part on information supplied to the Commission by Alken-Maes ([271]). Moreover, Danone, on its own behalf and on behalf of Alken-Maes, cast doubt on the existence of the infringement as described by the Commission in the statement of objections. This does not justify a reduction of the fine within the meaning of the second indent of section D.2. of the notice.

(327) Alken-Maes did, however, supply information about the existence and substance of the infringement which went further than answering the request for information under Article 11 of Regulation No 17. The Commission considers that this circumstance justifies reducing the fine.

(328) In Danone's case, therefore, the Commission regards a reduction of 10 % in the fine as appropriate under the first indent in section D.2 of the notice.

9.2.1.8. Conclusions regarding the amount of the fines

(329) A fine of EUR 45,675 million should be imposed on Interbrew for its participation in the Interbrew/Alken-Maes cartel.

(330) A fine of EUR 44,043 million should be imposed on Danone for its own participation and that of its subsidiary, Alken-Maes.

9.2.2. *The private-label cartel*

9.2.2.1. On whom should fines be imposed?

(331) As regards the private-label cartel, a fine should be imposed on the undertakings which committed this infringement, namely Interbrew, Alken-Maes, Haacht and Martens. Although Alken-Maes was a subsidiary of Danone at the time, the Commission does not consider it appropriate to attribute the infringement to Danone, since Danone itself was not involved in the private-label cartel ([272]).

9.2.2.2. Intention or negligence

(332) As consistently held by the Court of Justice and the Court of First Instance, it is not necessary for an undertaking to have been aware that it was breaching Article 81 or infringing the prohibition contained in that provision for an infringement to be regarded as intentional. It is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market and entailed actual or potential consequences for trade between Member States ([273]).

([271]) 'Without denying the existence of the events that occurred during the period in question, in so far as they are in part based on the information provided by Alken-Maes's representatives to the Commission's officials (...)' ('Sans contester l'existence des faits intervenus dans la période en cause dans la mesure où ceux-ci sont en partie fondés sur les informations fournies par les représentants d'Alken-Maes aux agents de la Commission (...)') (Danone); 'Alken-Maes does not dispute the reality of the contacts and practices between Interbrew and Alken-Maes during the period covered by the statement of objections, in so far as they are in part based on the information provided by the representatives of Alken-Maes itself to the Commission's officials' ('Alken-Maes ne conteste pas la matérialité des contacts et pratiques entre Interbrew et Alken-Maes durant la période couverte par la Communication des griefs (la "CG") dans la mesure où ceux-ci sont en partie fondés sur les informations fournies par les représentants d'Alken-Maes elle-même aux agents de la Commission') (Alken-Maes).

([272]) Judgment of the Court of First Instance in Case T-309/94 *KNP BT* v *Commission* (1998) ECR II-1007, paragraph 45 et seq.

([273]) Judgments of the Court of Justice in Case 19/77 *Miller* v *Commission* (1978) ECR 131, paragraph 18, and Case C-279/87 *Tipp-Ex* v *Commission* (1990) ECR I-261; judgment of the Court of First Instance in Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle* v *Commission*, not yet reported.

(333) The Commission considers that none of the participants in the private-label cartel could have been unaware that their conduct was intended to restrict competition within the common market. Direct contacts between competitors concerning prices and the distribution of customers are invariably regarded as suspect from a competition standpoint, irrespective of whether they take place within a trade association, as Martens submitted in order to demonstrate its ignorance in the matter. Nor could the undertakings concerned have been unaware that their conduct entailed possible consequences for trade between Member States.

(334) Even if the discussions did take place within the CBB, as alleged by Martens in order to show that there was a forgivable error or good faith on its part, there would still be an intentional infringement of Article 81(1) EC by the participants in those discussions. This defence of Martens's is therefore irrelevant to the assessment of whether it committed the infringement intentionally.

9.2.2.3. Gravity of the infringement

(335) Horizontal coordination of prices and market sharing is by its nature a very serious infringement. The exchange of information was a means of putting this coordination into effect.

(336) Martens disputes that there were any price or market-sharing agreements. It is clear from the available evidence and the statements of both Interbrew and Haacht, however, that prices and market sharing were coordinated at the four meetings (recital 252). Apart from the inherently serious nature of such conduct, the Commission, in assessing the gravity of the present infringement, also takes account of its impact on the market and the size of the relevant geographic market.

(337) As regards the impact on the market, it should be noted that the various secret practices of the parties were aimed at sharing out customers and ultimately at fixing prices above the level they would have attained under conditions of free competition. The Commission acknowledges that it does not have proof that the consultation, with perhaps one exception, resulted in any alteration of the market behaviour of the undertakings concerned. It is clear, in any event, that at the meetings of the private-label cartel customer sharing and prices were discussed and that information was exchanged in this respect. The fact that information on private-label beer in Belgium may have been exchanged between the Belgian brewers only once does not make this any less serious. To achieve the aim of the consultation (not to bid against each other's contracts, in order to prevent a price war), it was not necessary to exchange information on a regular basis. It cannot simply be concluded, therefore, that the cartel as such had no, or a limited, impact on the market ([274]).

(338) As regards the size of the relevant geographic market, the Commission also takes into account that while the meetings may have concerned the whole territory of Belgium they were limited to the private-label Pils segment of the market (which accounts for 5,5 % of total beer consumption in Belgium — recital 8).

(339) In view of the above, the Commission considers that this infringement is a serious breach of Article 81(1) of the EC Treaty.

(340) In fixing the amount of the fine, the Commission must also take account of the effective economic capacity of offenders to cause significant damage to other operators and must set the fine at a level which ensures that it has a deterrent effect.

(341) In order to allow for the actual capacity of the undertakings concerned to cause significant damage on the beer market in Belgium, in particular in the private-label segment, the Commission therefore considers it appropriate to differentiate between those undertakings. Taking account of their turnover in private-label beer, the Commission divides the undertakings into two categories. Haacht and Martens, who had the highest turnovers in the private-label segment, form one category. Interbrew and Alken-Maes, who had substantially lower turnovers in the segment, form the second.

([274]) In determining the severity of the fine, the effects on the market are crucial only when one is dealing with agreements which do not directly have as their object the restriction of competition and which are not therefore liable to infringe Article 81(1) except as a result of their actual effects (opinion of Advocate General Mischo in *Mo och Domsjö*, see footnote 263). As already shown above, the private-label cartel is by nature restrictive of competition, which means that the extent of the restriction of competition as a result of the cartel does not have to be established separately (section 6.4).

(342) The Commission therefore considers it appropriate to impose the following fines in respect of the gravity of the infringement:

on Haacht and Martens: EUR 300 000;

on Interbrew and Alken-Maes: EUR 250 000.

(343) The Commission considers that the basic amount of the fine thus calculated for Interbrew and Alken-Maes should be adjusted in order to ensure that the fine has a sufficiently deterrent effect, and to take account of the fact that, in contrast to Haacht and Martens, Interbrew, as a large international undertaking, and Alken-Maes, as a member of an international group, have easier access to legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

(344) To allow for their respective sizes and general resources, the Commission considers that the amount of the fines calculated in recital 342 should in Interbrew's case be multiplied by a factor of 5, and in Alken-Maes's case by a factor of 2. This results in a fine of EUR 1 250 000 for Interbrew and a fine of EUR 500 000 for Alken-Maes.

9.2.2.4. Duration of the infringement

(345) The duration of the infringement is fixed at nine months, which is not disputed by any of the parties. This does not warrant an increase in the fine.

(346) For each of the undertakings concerned, therefore, the basic amount of the fine is as set out in recitals 342 and 344.

9.2.2.5. Aggravating circumstances

(347) From a statement originating with Interbrew it is clear that Interbrew and Alken-Maes took the initiative to hold meetings about private-label beer (recital 157). This has been confirmed by Haacht in its reply to the statement of objections (recital 198). The Commission therefore considers it appropriate to increase the basic fine by 30 % in the case of both Interbrew and Alken-Maes.

9.2.2.6. Attenuating circumstances

(348) The parties submit as an attenuating circumstance that they did not actually apply the infringing agreement or practice. In particular, they state that the practice did not alter market behaviour. The Commission acknowledges that on the basis of the available evidence there is no proof, with possibly one exception, that the parties refrained from bidding for other brewers' customers in order to prevent a price war. It cannot be inferred from this, however, that the infringing practice was not applied, since at the four meetings the parties did actually exchange information on customers and volumes and discussed customers and prices.

(349) Haacht and Martens have both indicated that their participation in the cartel should be regarded as passive. The Commission points out, however, that both undertakings played an active part in the private-label cartel. They were present at all the meetings known to the Commission. In addition, Haacht has acknowledged that it exchanged information about private-label beer in Belgium with the other brewers involved and made agreements on prices and sharing customers. It is also significant that Martens took an active part in the discussions, as is substantiated by its attempt to invite Dutch private-label brewers to the meetings. Martens has not shown that it was reluctant to take part in the meetings.

(350) Nor can the need of both Haacht and Martens to gather information about developments concerning private-label beer justify the infringement of the Community competition rules.

(351) There is no reason why the fine for Haacht should reflect the fact that the company's sales of private-label beer account for a small proportion of its total turnover. The starting points for calculating the amount of the fine are the gravity and duration of the infringement. The Commission acknowledges that in the past it has set fines according to a basic rate which was a percentage of the relevant turnover. Under Article 15(2) of Regulation No 17, however, the only restrictions on the Commission's freedom to determine the fine are the legal thresholds mentioned in that provision, which refer, *inter alia*, to the total turnover of the participating undertakings. For the rest, the Commission took due

account of the economic importance of the specific activity to which the infringement related when it assessed the gravity of the infringement.

(352) Recital (351) also applies to Martens's argument that, when calculating the fine, the Commission must take account of the fact that Martens, according to its own submission, did not benefit as a result of the meetings. The fact that the Commission has in the past taken the benefit obtained as the starting point for calculating the fine does not oblige it to do the same in the present case. The Commission will take the amount of gains improperly made from the infringement into account as an aggravating circumstance, where it is necessary to increase the penalty in order to exceed the profit made from the infringement. It cannot be inferred that where there is no such need that fact should be regarded as an attenuating circumstance.

(353) Martens's argument that a symbolic fine should be imposed, in view of the decision in the Fenex case ([275]), must be rejected. The Court of Justice has held that the Commission's judgment concerning the fines it considers necessary may vary from case to case, even if the cases are similar ([276]). Regardless of whether there was inexperience on Martens's side, the present case is not comparable with the situation in the Fenex case, which involved negligence rather than intention. Moreover, the difference between Interbrew and Alken-Maes on the one hand and Martens and Haacht on the other as regards legal and economic knowledge has already been taken into account in the assessment of the gravity of the infringement (recital 343).

(354) Martens and Haacht both asked the Commission to take account of their difficult financial situation when determining the amount of the fine. The individual financial situation of a party to an infringement cannot be a reason for reducing the amount of the fine. This would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market ([277]).

9.2.2.7. Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases

(355) All the undertakings concerned have invoked the notice.

(356) Interbrew considers that, in accordance with section C, it is eligible for a substantial reduction of the fine. The Commission acknowledges that Interbrew drew the Commission's attention to the private-label cartel before the Commission had undertaken an investigation into the infringement and before it had any information about it. The infringement was also terminated before the Commission was informed of its existence, and Interbrew cooperated fully and without interruption throughout the investigation. However, Interbrew is not eligible for a substantial reduction of the fine, since it took the initiative to hold the discussions on private-label beer.

(357) Interbrew is eligible, however, for a significant reduction of the fine in accordance with section D. The Commission will take account of the fact that Interbrew brought the existence of the concerted practice to light when the Commission was still completely unaware of the matter and cooperated fully and without interruption throughout the investigation. In addition, Interbrew has not substantially contested the facts on which the Commission has based the allegation of infringement. The Commission therefore considers that a reduction in the fine for Interbrew of 50 % is appropriate.

(358) Alken-Maes has not substantially contested the facts on which the Commission based the allegation of a private-label cartel. However, its cooperation with the Commission regarding this infringement went no further than simply answering the Commission's official request for information, dated 22 March 2000, under Article 11(1) of Regulation No 17.

(359) The Commission therefore considers that in Alken-Maes's case a reduction of 10 % in the fine is appropriate in accordance with the second indent of section D.2. of the notice.

([275]) See footnote 233.
([276]) Judgment of the Court of Justice in Joined Cases 32 and 36 to 82/78 *BMW Belgium* v *Commission* (1979) ECR 2435.
([277]) Judgment of the Court of Justice in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ* v *Commission* (1983) ECR 3369.

(360) Haacht has not substantially contested the facts on which the Commission has based the allegation of a private-label cartel. However, the information which it supplied to the Commission goes no further than its reply to the Commission's official request for information, dated 22 March 2000, under Article 11(1) of Regulation No 17.

(361) Haacht is therefore eligible for a reduction of 10 % in the fine in accordance with the second indent of section D.2 of the notice.

(362) In its reply to the statement of objections, Martens disputed the existence of the infringement as described by the Commission in that statement. In addition, the information supplied by Martens before the statement of objections was sent went no further than the undertaking's reply to the Commission's official request for information, dated 22 March 2000, under Article 11(1) of Regulation No 17.

(363) The documents which Martens supplied to the Commission after the statement of objections was sent either serve to underpin its own defence or point to the possible existence of a separate infringement of the competition rules. Neither circumstance, however, merits a reduction of the fine which is being imposed on Martens for taking part in the private-label cartel.

(364) During the proceedings, however, Martens did cooperate in a manner that speeded up the proceedings. This cooperation warrants a reduction of 10 % in the fine in accordance with section D of the notice.

9.2.2.8. Conclusions concerning the amount of the fines

(365) A fine of EUR 812 000 should be imposed on Interbrew for taking part in the private-label cartel.

(366) A fine of EUR 585 000 should be imposed on Alken-Maes for taking part in the private-label cartel.

(367) A fine of EUR 270 000 should be imposed on Haacht for taking part in the private-label cartel.

(368) A fine of EUR 270 000 should be imposed on Martens for taking part in the private-label cartel,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

The following fines are hereby imposed on Interbrew NV and Groupe Danone SA in respect of the infringements found in Article 1:

a) on Interbrew NV: a fine of EUR 45,675 million;

b) on Groupe Danone SA: a fine of EUR 44,043 million.

Article 3

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

Article 4

The following fines are hereby imposed on the undertakings referred to in Article 3 in respect of the infringements found therein:

(a) on Interbrew NV: a fine of EUR 812 000;

(b) on Brouwerijen Alken-Maes NV: a fine of EUR 585 000;

(c) on NV Brouwerij Haacht: a fine of EUR 270 000;

(d) on NV Brouwerij Martens: a fine of EUR 270 000.

Article 5

Within three months of the date of notification of this Decision, the fines shall be paid by the undertakings referred to in Articles 2 and 4 into the following Commission bank account:

Account No 642-0029000-95 (IBAN Code BE76 6420 0290 0095; SWIFT Code BBVABEBB), of the European Commission at Banco Bilbao Vizcaya Argentaria (BBVA), Kunstlaan 43 Avenue des Arts, B-1040 Brussels.

After the expiry of the deadline referred to in the first subparagraph, interest shall be automatically payable at the interest rate applied by the European Central Bank for its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points.

Article 6

This Decision is addressed to:

(a) Interbrew NV, Vaartstraat 94, B-3000 Leuven;

(b) Groupe Danone SA, 7 rue de Téhéran, F-75008 Paris;

(c) Alken-Maes NV, Waarloosveld 10, B-2550 Waarloos;

(d) NV Brouwerij Haacht, Provinciesteenweg 28, B-3190 Boortmeerbeek;

(e) NV Brouwerij Martens, Reppelerweg 1, B-3950 Bocholt;

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 5 December 2001.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 30 April 2003

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

Case COMP/ 38.370 — O2 UK Limited / T-Mobile UK Limited ('UK Network Sharing Agreement')

(notified under document number C(2003) 1384)

(Only the English text is authentic)

(Text with EEA relevance)

(2003/570/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty [1], as last amended by Regulation (EC) No 1/2003 [2], and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance pursuant to Article 2 of Regulation No 17 and the notification with a view to an exemption pursuant to Article 4 of Regulation No 17 submitted by O2 UK Limited and T-Mobile UK Limited on 6 February 2002,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17 and to Article 3 of Protocol 21 of the EEA Agreement [3],

After consulting the Advisory Committee for Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case [4],

Whereas:

1. THE FACTS

1.1. *INTRODUCTION*

(1) On 6 February 2002, O2 UK Limited ('O2 UK') (formerly BT-Cellnet Limited and BT3G Limited) and T-Mobile UK Limited ('T-Mobile UK') (formerly One2One Personal Communications Limited) notified the Commission of an Agreement dated 20 September 2001 concerning infrastructure sharing and national roaming on the UK market for the third generation of mobile telecommunications networks ('3G') ('the Agreement'). In their notification O2 UK and T-Mobile UK ('the Parties') requested either negative clearance under Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement or, alternatively, an exemption under Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement [5].

(2) In February 2002 the Commission published a first notice summarising the notified Agreement and inviting observations from third parties [6]. This was followed in September 2002 by a notice pursuant to Article 19(3) of Regulation No 17 which set out the Commission's preliminary view and gave third parties an opportunity to comment on the proposed favourable approach [7]. This Decision represents the final step in the Commission's decision-making procedure.

[1] OJ 13, 21.1.1962, p. 204/62.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ C 214, 10.9.2002, p. 17.
[4] OJ C 187, 7.8.2003.

[5] The Commission is also dealing with a related notification from T-Mobile Deutschland GmbH and O2 Germany (formerly VIAG Interkom GmbH) dated 1 February 2002 which concerns a 3G Network Deployment and 3G Bilateral Roaming Agreement in Germany (Case COMP/38.369 — 'Rahmenvertrag').
[6] OJ C 53, 28.2.2002, p. 18.
[7] Case COMP/C1/N.38.370 — BT Cellnet & BT3G/One2One Personal Communications (United Kingdom Agreement), OJ C 214, 10.9.2002, p. 17.

1.2. *THE PARTIES*

(3) O2 UK is an operator of digital mobile telecommunications networks and services in the United Kingdom using the GSM ('global system for mobile communications') family of standards. It is building and will operate a new 3G network [8] in the United Kingdom. O2 UK is a wholly owned subsidiary of mmO2 plc, the mobile telecommunications business previously controlled by British Telecommunications plc. Through its subsidiaries, mmO2 operates networks in the United Kingdom (O2 UK), Germany (VIAG — renamed O2 Germany), The Netherlands (Telfort — renamed O2 Netherlands), Ireland (Digifone — renamed O2 Ireland) and the Isle of Man (Manx Telecom). In the financial year ending 31 March 2002, the mmO2 group had a turnover of GBP 4,3 billion (about EUR 6,7 billion).

(4) T-Mobile UK is a mobile telecommunications operator of GSM networks in the United Kingdom and is a wholly owned subsidiary of Deutsche Telekom Mobile Holdings Limited, a wholly owned subsidiary of T-Mobile International AG. The parent company of T-Mobile International is the incumbent fixed network operator in Germany, Deutsche Telekom AG ('DTAG'). T-Mobile International AG owns interests in mobile telecommunications operators in the United Kingdom (T-Mobile (UK) Limited, T-Motion, Virgin Mobile), Austria (max.mobil.), the Czech Republic (RADIOMOBIL) and the USA (VoiceStream). T-Mobile International AG also has subsidiaries active in the Netherlands (BEN, CMobil), Russia (MTS) and Poland (PTC). In the 2001 financial year, T-Mobile International AG had a worldwide turnover of EUR 14,6 billion.

1.3. *LEGAL AND FACTUAL BACKGROUND*

1.3.1. THE DEVELOPMENT OF 3G MOBILE COMMUNICATIONS IN THE COMMUNITY

(5) In Europe, the first generation ('1G') of mobile communication systems was based on analogue technology. This was followed at the beginning of the 1990s by the second generation ('2G') systems which introduced digital technology, namely GSM 900 (the European Global System for Mobile Communications) and DCS 1800 (so-called Personal Communications Networks PCN services). Both GSM 900 and DCS 1800 services are now commonly referred to as GSM services. Standard GSM communications are 'circuit-switched', which means that for any call a physical path is set up for and dedicated to a single connection between the two communicating end points in the network for the duration of the connection. Transmission rates for GSM are 9,6 kB/s (kilo bits per second) to 11,4 kB/s, or with compression 14 kB/s, which allows the delivery of basic voice telephony, short messaging service (SMS) and e-mail, and circuit-switched data.

(6) Enhanced '2,5G' mobile technologies that use more efficient packet-switched communications to send data in packets to their destinations, via different routes, without requiring the reservation of a dedicated transmission channel (using radio resources only when users are actually sending or receiving data) are being developed to provide a greater range of services including mobile e-mail, visual communications, multimedia messaging and location-based services. General Packet Radio Service ('GPRS') is one of the principal 2,5G technology platforms that offers 'always-on' connection, higher capacity and packet-based data services. GPRS data transmission rates are between 30 kB/s and 40 kB/s and with EDGE technology 80 kB/s to 130 kB/s, depending on the specific usage situation [9].

(7) Work is now underway to bring about a third generation ('3G') of mobile technology, applications and services to the market [10]. 3G builds on 2,5G technology, integrating packet- and circuit-switched data transmission. It is technically capable of reaching a speed of 144 kB/s and will eventually allow transmission rates that are expected to have a practical maximum rate of 384 kB/s outdoors and up to 2Mb/s indoors [11]. 3G services are mobile communications systems capable of supporting in particular innovative multimedia services, beyond the capability of second generation systems such as GSM, and capable of combining the use of terrestrial and satellite components.

(8) Annex I to Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the coordinated introduction of a third-generation

[8] In May 2000, the UK Government awarded five 3G licences following a frequency auction procedure worth EUR 38,5 billion. The companies awarded the licences were Orange, BT3G, Vodafone, One2One Personal Communications Limited and H3G. BT3G has now been rebranded O2 Third Generation Holdings Ltd and still holds a 3G licence, but this will be operated by O2 UK. One2One has now been renamed T-Mobile (UK) Limited. The 3G licence will be operated by T-Mobile (UK) Limited.

[9] Other less widespread technologies include WAP (Wireless Application Protocol), HSCSD technology (High-speed circuit switched data) and EDGE (Enhanced Data GSM Environment).

[10] UMTS (Universal Mobile Telecommunications System) is one of the major new 'third generation' (3G) mobile communications systems being developed within the framework defined by the International Telecommunications Union (ITU) collectively known as IMT-2000.

[11] The exact transmission rate depends on parameters like the time and location of the call, the number of users within a cell and the applications used as the available speed will be divided between the different users and applications.

mobile and wireless communications system (UMTS) in the Community ([12]) ('the UMTS Decision') sets out the characteristics which UMTS must be capable of supporting. These include multimedia capabilities, full mobility and low mobility applications in different geographical environments beyond 2G capabilities, efficient access to Internet, Intranets and other Internet-protocol-based services, high quality speech transmission commensurate with that of fixed networks, service portability across 3G environments and operation in one seamless environment including full roaming with GSM as well as between the terrestrial and satellite components of UMTS networks. Given that 3G networks and services are not yet available it is not possible to provide a reliable catalogue. However, examples of anticipated services include mobile video-conferencing, mobile video phone/mail, advanced car navigation, digital catalogue shopping and various business to business (B2B) applications ([13]).

(9) The development of 3G in the Community is based on the common UMTS technological platform, on the harmonisation of the radio spectrum and on the definition of a harmonised regulatory environment. The first step towards achieving these harmonisation objectives was the adoption of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services ([14]). This was followed, at the end of 1998, by the UMTS Decision, which required Member States to enable the introduction of UMTS services on their territory by 1 January 2002 and emphasised the role of technical bodies such as the European Conference of Postal and Telecommunications Administrations ('CEPT') and the Europe Telecommunications Standard Institute ('ETSI') in harmonising frequency use and promoting a common and open standard for the provision of compatible UMTS services throughout Europe.

(10) Finally, in March 2001 the Commission published a Communication setting out the state of play and the way forward for the introduction of third generation mobile communications in the European Union ([15]). In that Communication, the Commission took note of the difficult financial situation of telecommunications operators throughout the European Union and of the high infrastructure investment costs involved that led operators to engage in infrastructure-sharing arrangements. It concluded that economically beneficial sharing of network infrastructure should in principle be encouraged, provided the competition rules and other relevant Community law are respected ([16]). In its follow-up Communication of 11 June 2002 entitled 'Towards the Full Roll-Out of Third Generation Mobile Communications' ([17]), the Commission emphasised that it would continue to work with national administrations towards establishing a best-practice approach for network sharing.

1.3.2. NETWORK SHARING

(11) 3G network sharing can take place at a number of different levels and involve varying degrees of cooperation. The degree of independence retained by an operator depends on which network elements are being shared and its remaining ability to install separate elements (planning freedom). The basic distinction that is relevant in the context of the Parties' network-sharing agreement is that between the Radio Access Network ('RAN') and the core or backbone network.

1.3.2.1. ***RAN***

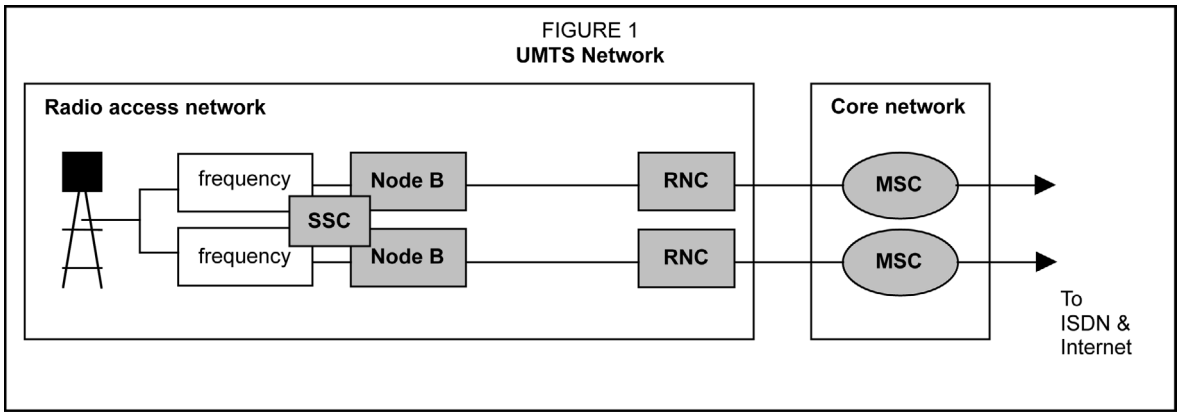
(12) The RAN includes mast/antenna sites, site support cabinets ('SSCs') and power supply, as well as antennae, combiners and transmission links, Nodes B, that is to say, the base stations that receive and send data across frequencies and control a particular network cell, and the radio network controllers ('RNCs') that each control a number of such Nodes B and that are linked to the core network.

1.3.2.2. ***Core network***

(13) The core network is the intelligent part of the network that consists of mobile switching centres ('MSCs'), various support nodes, services platforms, client home location registers and operation and maintenance centres. It is linked to the fixed ISDN (integrated services digital network) and Internet networks.

([12]) OJ L 17, 22.1.1999, p. 1.
([13]) For further information and examples, see http://www.umts-forum.org.
([14]) OJ L 117, 7.5.1997, p. 15. This Directive sets out the procedures associated with the granting of authorisations for the purpose of providing telecommunications services, and the conditions attached to such authorisations.
([15]) 'The introduction of Third Generation Mobile Communications in the European Union: State of Play and the Way Forward' (Introduction of 3G in the EU), COM(2001) 141 Final (20.3.2001).
([16]) Introduction of 3G in the EU, paragraph 4.3.
([17]) COM(2002) 301 Final.

FIGURE 1
UMTS Network



(14) Ranked by the increasing degree to which the network is shared it is possible to distinguish between shared use of:

(a) sites, which ranges from sharing individual mast sites up to grid sharing (requiring a uniform layout of networks), and may include site support infrastructure, such as site support cabinets (SSC);

(b) base stations (Nodes B) and antennae;

(c) radio network controllers ('RNCs');

(d) core networks, including mobile switching centres ('MSCs') and various databases;

(e) frequencies.

(15) Finally, national roaming concerns a situation where the operators concerned do not share any network elements as such but simply use each other's network to provide services to their own customers.

(16) In their notification the Parties use the term 'site sharing' for shared use of infrastructure up to the level of, but not including, Nodes B and RNCs (point (a) in recital 14). The Parties may consider RAN sharing (point (b) in recital 14) for specific point solutions, although this is not currently planned. The Parties do not envisage sharing their core networks, but their Agreement does cover national roaming.

1.3.3. NATIONAL REGULATORY FRAMEWORK

(17) Subject to the principle of the primacy of Community law, the applicable national licensing and regulatory requirements must be taken into account in the context of network infrastructure sharing ([18]). Both the general national regulatory framework in the United Kingdom and the terms of the Parties' 3G licences set out parameters for network sharing. These include:

(a) network roll-out requirements in terms of effective coverage related to a specific timetable, notably a requirement to cover 80 % of the population by the end of 2007;

(b) general obligations as regards, for example, site and antenna sharing relating to planning restrictions and environmental concerns;

(c) the possibility to impose facility sharing, including network sharing, on a case-by-case basis;

(d) limitations as regards the extent of network sharing allowed in relation to, for example, sharing network intelligence and sensitive customer data.

([18]) A number of national regulatory authorities (NRAs) in the Community have issued guidance on the conditions under which infrastructure sharing would be consistent with national licensing and regulatory requirements. In the UK Oftel published a position in May 2001, '3G Mobile Infrastructure Sharing. Note for information', available at http://www.oftel.gov.uk/publications/mobile/infrashare0501.htm. In Germany, RegTP issued its Interpretation of the UMTS Award Conditions in the light of more recent technological advance, RegTP (6 June 2001), available at www.regtp.de. The Dutch and French NRAs have published similar documents, available at http://www.opta.nl/download/concept_notitie_nma_vw_opta_umts_netwerk-en_190701.pdf and at http://www.art-telecom.fr/dossiers/umts/partage-infras.htm.

(18) Oftel is the national telecommunications regulatory authority ('NRA') in the United Kingdom that is responsible for the notified Agreement. In May 2001, Oftel published general guidance in which it encouraged infrastructure sharing subject to a case-by-case assessment of individual proposals ([19]).

(19) The national regulatory framework and the Community competition rules are of parallel and cumulative application. National rules may not conflict with the Community competition rules nor can compatibility with national rules and regulations prejudice the outcome of an assessment under the Community competition rules. Hence a full assessment of the notified Agreement under the Community competition rules is required.

1.4. *THE AGREEMENT*

(20) O2 UK and T-Mobile UK entered into an Agreement ('the Agreement') on 20 September 2001 to cooperate by way of 3G site sharing and national roaming. The Agreement also covers certain 2G and 2,5G infrastructure. The Parties will maintain separate networks and service provision. The Agreement also includes specific provisions to ensure that no more information than strictly necessary is exchanged. The Parties differentiate in the Agreement as notified between three areas: (i) the Initial Build Area ('IBA'); (ii) the Divided Area ('DA'); and (iii) the Remaining Area. At meetings on 6 and 7 March 2003 the Parties informed the Commission that they had agreed to further subdivide the IBA into two parts. On 12 March 2003 they provided the Commission with a statement setting out what they had agreed and how the Agreement would be amended accordingly. The subdivision of the IBA was to be as follows:

(a) a 'core area' of the IBA consisting of the top 10 cities in the United Kingdom covering approximately [32 to 38 %] (*) ([20]) of the population where both parties would separately roll out their networks ([21]);

(b) a 'residual area' of the IBA consisting of a further 13 cities covering [less than 10 %] (*) of the UK population where each Party has been allocated a number of cities in which to roll out its network ([22]).

1.4.1. SITE SHARING AND NATIONAL ROAMING IN THE INITIAL BUILD AREA

(21) The IBA as a whole represents an area covering around [30 to 50 %] (*) of the UK population and more than [50 to 80 %] (*) of UK businesses (the main urban areas). In this area, the Parties' cooperation will focus on site sharing rather than national roaming, although the latter is not excluded. Within this area, the Parties agree:

(a) pursuant to Clause 2.3 of the Agreement, to cooperate in the planning, acquiring (not on the basis of joint ownership), building and deploying and sharing of 2G, 2,5G and 3G sites. This site sharing involves shared housing, that is to say, structures including mast, materials and equipment (power supply, racking and cooling) for 3G, 2,5G and/or 2G equipment, in particular transceivers and base station racks or Node B base station cabinets, but not transmission and antennae;

(b) to disclose and if practical revise respective radio plans to make best use of possible common locations for individual cell sites (Clauses 6.2.1 to 6.2.4 and 6.7 of the Agreement);

(c) to grant the other Party an option over sites identified as suitable for site sharing exercisable for two years and thirty days after 31 December 2001 (Agreed Document 8 of the Agreement);

(d) to grant the other Party first refusal in the event that a third party wishes to share the same site (Agreed Document 8);

(e) in the 'residual area' of the IBA, to roll out a network in the set of cities allocated to the Party concerned and provide roaming services to the other Party until the latter has achieved its own network coverage in this area (in the 'core area' of the IBA, the Parties will both build out their networks separately from the outset and there will be no reliance on roaming).

(22) The degree of site sharing that is envisaged by the Parties does not involve the entire RAN (notably Nodes B and RNCs are not included), nor does it involve sharing of frequencies or the core network.

([19]) 3G Mobile Infrastructure Sharing. Note for Information.

([20]) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

([21]) Greater London, Birmingham, Manchester, Glasgow, Leeds, Edinburgh, Liverpool, Nottingham, Newcastle and Bristol.

([22]) [Sheffield, Leicester, Brighton, Northampton, Cambridge, Southampton, Cardiff, Belfast, Coventry, York , Preston, Stoke-on-Trent and Oxford] (*).

(23) The Agreement also provides for information to be exchanged regularly in order to allow site sharing and roaming. Information to be exchanged includes technical information about present and future sites such as the location and antenna height of the site, the nature and extent of the space available and any specific rights or restrictions and the site configuration parameters to allow seamless roaming. Specific confidentiality provisions are included as a safeguard.

1.4.2. SITE SHARING AND NATIONAL ROAMING IN THE DIVIDED AREA

(24) In the DA (an area covering about a further [40 to 70 %] (*) of the population), the Parties adopt a common radio and roll-out plan for 3G that is based on the principle of a separate territory for each Party. Each Party has been allocated a 'Designated Area' (separate geographic area) of the DA to build and operate its 3G network in accordance with the unitary radio and roll-out plans. Within the respective Designated Area, each Party will provide roaming services to the other Party on a 'retail minus minus' price formula (Clause 22.1), and cannot enter into similar Agreements with third parties in order to provide this service to the other Party (Clause 2.5). In limited cases, RAN sharing may be considered for specific point solutions but this is not currently planned. Clause 9.2 of the Agreement also provides that a Party shall not deploy 3G infrastructure in the Designated Area of the other Party, although this is subject to a number of exceptions which do not require prior consent of the other Party, set out in Clause 11 (for example, for special events, to meet market demand and/or for special needs of important customers).

(25) The Parties also agree that all new sites in the DA will be built with sufficient accommodation and mast space to fit a minimum of two operators, with space reserved by the Party to which the Designated Area has been allocated for later occupation by the other Party. The Parties have an option to share, exercisable after 31 May 2002 for two years and 30 days or for five years and 30 days followed by a right of first refusal of indefinite duration (Agreed Document 8). After the expiry of the Option, if one Party operating a site receives an offer from a third party at a site-sharing fee which is equal to or higher than the fee (price list) agreed and commercially negotiated between the parties and based on fair market prices for sites owned by or under the control of the parties, the 'Site Operator' shall notify the other Party of such a request. The other Party then has 14 days to confirm that it will enter into a site-sharing Agreement with the Site Operator (the Party controlling the site).

(26) Pursuant to Clause 14.7, each Party is able to conclude 3G national roaming Agreements with third-party national 3G operators (for the network it has built and operates itself), but the third-party operator would not have access to the network of the other Party to the Agreement unless the latter gave its approval. However, nothing in the Agreement prevents either Party from reselling its 3G telecommunications wholesale services to non-operator third parties (for example service providers and/or Mobile Virtual Network Operators (MVNOs), whether carried on its own network equipment or via roaming in the other Party's Designated Area. Clause 14.7 does not affect arrangements concerning international roaming.

(27) As is the case in the IBA, the Parties will exchange technical information to allow site sharing and roaming, but the adoption of a common radio plan will require them to also exchange further information, including coverage targets and coverage roll-out plans, Quality of Service (QoS) targets, expected traffic requirements for UMTS services and Node B radio design parameters. Confidentiality provisions are also included as a safeguard.

1.4.3. SITE SHARING AND NATIONAL ROAMING IN THE REMAINING AREA

(28) The Parties agree, when market conditions permit, to extend their respective 3G networks into the Remaining Area, which covers the least densely populated areas of the United Kingdom, using the same principles applied in the DA.

1.4.4. DURATION

(29) The Agreement is for an unlimited duration but can be terminated after 31 December 2007 by either Party giving two years' notice.

1.5. *ARGUMENTS OF THE PARTIES*

(30) The Parties justify the Agreement in terms of the financial difficulties experienced by 3G operators, the regulatory timeframe (the UK requirement of 80 % population coverage by the end of 2007) and the need to address environmental concerns.

1.5.1. ARTICLE 81(1) OF THE TREATY/ARTICLE 51(1) OF THE EEA AGREEMENT

(31) The Parties argue that the Agreement does not have the object or effect of appreciably restricting competition within the common market contrary to Article 81(1) of the Treaty/Article 51(1) of the EEA Agreement as they claim the Agreement will increase competition rather than reduce it. This claim is based on the argument that the Parties will compete with each other at network level in the IBA, whereas cooperation in the DA will enable the Parties to compete at services level with other 3G operators nationwide at an earlier stage than if they did not cooperate.

1.5.2. ARTICLE 81(3) OF THE TREATY/ARTICLE 51(3) OF THE EEA AGREEMENT

(32) If the Agreement is considered to restrict competition, the Parties argue in the alternative, that it may be exempted under Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement. They argue that the Agreement will speed up the provision of 3G services by enabling the Parties to reduce 3G network deployment costs, making 3G services available earlier to end-users. The Parties argue that consumers will benefit through the delivery of faster, more innovative 3G services at lower prices. Finally, as a result of their cooperation, the Parties will not produce standardised services to end-users but will continue to compete directly on content applications, retail pricing, wholesale pricing, terms and conditions of service, channel to market and customer-care services and marketing. Hence they conclude that as a result of the Agreement competition will not merely be preserved but will be increased in the UK markets for 3G networks and services.

1.6. *COMMENTS FROM THIRD PARTIES*

(33) The initial administrative notice and the subsequent notice pursuant to Article 19(3) of Regulation No 17 led to input from the United Kingdom national competition authorities ('the UK authorities'), two mobile network operators and a specialised equipment manufacturer. All respondents indicated that that they were in principle in favour of network sharing but the UK authorities and one mobile operator made detailed comments which were critical of the Agreement in its current form.

1.6.1. COMMENTS BY THE UK AUTHORITIES

(34) The UK authorities submitted detailed comments which focused in particular on the possible competition concerns arising from the cooperation in the IBA as originally notified ([23]). The UK authorities considered that the Agreement appeared to limit network competition in so far as it limited competition on coverage and quality between the two Parties. They were particularly concerned about clauses in the Agreement which appeared to have the effect of limiting network competition in the IBA. Moreover, they were of the view that the Agreement might facilitate tacit collusion between the two Parties and there might be spill-over effects which could weaken competition at the retail level. However as regards site foreclosure, the UK authorities did have concerns but considered that the market for sites was sufficiently competitive for any problem to be relatively minor. Difficulties for another operator gaining access to sites was likely to be limited to particular circumstances in isolated areas of the United Kingdom.

(35) In light of these concerns, the UK authorities recommended that the following conditions should be imposed:

(a) the exemption should lapse within a relatively short time period to allow review of actual benefits to consumers;

(b) the Parties should amend the Agreement so as to prohibit in the IBA the reciprocal roaming arrangements as well as the use of the Joint Radio Plan (so as to optimise the use of common locations);

(c) the exemption should be conditional on the management and control of the Parties remaining the same, and there should be an obligation to notify the Commission of any change in ownership;

(d) it might be desirable to have independent auditing of the confidentiality arrangements, to be subject to periodic reports to the Commission.

([23]) A public version of the UK authorities' response of 10 October 2002 was published on OFTEL's website and can be found at http://www.oftel.gov.uk/publications/oftel_response/.

1.6.2. COMMENTS FROM MARKET PARTIES

(36) One third party stated that it was in favour of network-sharing agreements provided they were open to third parties. As regards this Agreement, it was concerned that the option to site-share and the right of first refusal amounted to de facto exclusivity and could foreclose other operators from the market. It was also concerned that the Agreement gave the Parties an unfair advantage in the market as a result of the cost savings brought about by the Agreement. It concluded that the Agreement would lead to less competition and provide fewer cost savings and consumer benefits compared to an open agreement.

(37) Another third party expressed concerns that the Commission appeared to be excluding antenna-sharing solutions as a technical solution, notwithstanding the operational, environmental and financial benefits.

(38) All third-party comments received were carefully reviewed and to the extent that the comments reflected genuine competition concerns, they were duly considered. The Commission's reasoning on the concerns raised is presented in the Legal Assessment in Part 2 of this Decision.

2. **LEGAL ASSESSMENT**

(39) As the Agreement is mainly technical in nature and does not have as its object the restriction of competition, the effect of the Agreement must be analysed. Whether the Agreement is likely to have negative effects on competition depends not only on the nature of the Agreement but also on its economic context, such as the market power of the Parties and other factors relating to market structure. This analysis requires a definition of the two relevant wholesale markets that are directly affected by the Agreement, and an identification of a number of other wholesale and retail markets where effects may be felt.

2.1. *RELEVANT MARKET*

2.1.1. INTRODUCTION

(40) Markets can generally be divided into wholesale and retail markets. In telecommunications, wholesale markets typically consist of the provision of access to networks or network elements and of network services to operators of networks and services. Retail markets consist of the provision of communications services to end-users ([24]). Within these broad categories, narrower markets can be defined not only on the basis of the characteristics of the service concerned and the degree to which it can be substituted by other services based on price, usage and consumer preference, but by an analysis of competitive conditions and the structure of demand and supply ([25]). It is evident given the advantages of mobility and the premium paid for it that mobile services are in general not substitutable by fixed services. Mobile and fixed voice services are therefore part of different services markets, as has been determined in a number of Commission decisions ([26]).

(41) The network access and services markets that are primarily concerned by the Agreement are:

(a) the market for sites and site infrastructure for digital mobile radiocommunications equipment;

(b) the market for wholesale access to national roaming for 3G communications services.

(42) In addition, the markets for wholesale access to 3G services, as well as the downstream retail markets for 3G services are affected indirectly.

([24]) Notice on the application of the competition rules to access agreements in the telecommunications sector — framework, relevant markets and principles (Access Notice), OJ C 265, 22.8.1998, p. 2, paragraph 45; Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (SMP Guidelines), OJ C 165, 11.7.2002, p. 6, paragraph 64.

([25]) Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5; Guidelines on the application of EEC competition rules in the telecommunications sector, OJ C 233, 6.9.1991, p. 2.

([26]) SMP Guidelines, paragraph 66. Cf. Commission Decision 98/2001/EC in Case COMP/M.1439 — Telia/Telenor (OJ L 40, 9.2.2001, p. 1); Commission Decision of 12 April 2000 in Case COMP/M.1795 — Vodafone Airtouch/Mannesmann (OJ C 141, 19.5.2000, p. 19); Commission Decision of 20 September 2001 in Case COMP/M.2574 — Pirelli/Edizone/Olivetti/Telecom Italia (OJ C 325, 21.11.2001, p. 12); Commission Decision of 10 July 2002 in Case COMP/M.2803 — Telia/Sonera (OJ C 201, 24.8.2002, p. 19).

2.1.2. WHOLESALE MOBILE NETWORK ACCESS MARKETS

(43) Access to physical facilities, such as sites, and site infrastructure, that is to say masts and antennae, as well as ducts, leased lines and rights of way, that serve as part of a mobile telecommunications network infrastructure, may constitute access to particular mobile network markets. In addition, there are wholesale network access and services markets for the provision of digital mobile communications services to other operators. These can be divided broadly into two categories:

(a) wholesale network services related to interconnection that allow communication to take place between the users of different networks;

(b) wholesale access services that relate to the use of a host or visited network by customers of other operators.

(44) The wholesale network services related to interconnection include call termination (the wholesale service of completing a call to an end user), call origination (the wholesale service of enabling a call to be originated by an end user), as well as direct interconnection services (the provision of a direct physical link between terminating and originating networks) and transit services (the provision of an indirect link between terminating and originating networks by means of transit across one or more third networks). Access services that relate to the use of a 'host' or 'visited' network by customers of other operators include the wholesale provision of national and international roaming, and the wholesale provision of airtime.

2.1.3. MARKETS DIRECTLY AFFECTED BY THE AGREEMENT

2.1.3.1. ***The market for sites and site infrastructure for digital mobile radiocommunications equipment***

Product/infrastructure market

(45) Both 2G and 3G mobile telecommunications networks rely on a cellular network architecture based around antennae that are distributed across the coverage area, allowing radio signals to be received from and transmitted to end users within a certain cell radius ([27]). The operators of 2G and 3G mobile telecommunications networks require sites for the location of these antennae and the related site infrastructure such as masts, site support cabinets, power supply, combiners and transmission links.

(46) Acquiring (either purchasing or, more commonly, leasing) such sites requires agreement with the site owners and planning permission from local authorities, and in some cases approval from regulatory authorities to limit the risk of radio frequency interference. Although the number of properties that can be converted into sites for digital mobile communications equipment is in theory unlimited, in practice the number of suitable sites is limited due to planning regulations, health or environmental considerations or space constraints in 'hot spots' (for example, in city centres or airport and railway terminals). To be considered a site, a particular property must therefore be usable as such from a technical point of view, must be made available in accordance with regulatory constraints, and must fit into the planned network architecture spaced across the coverage territory according to capacity needs.

(47) From a demand perspective, sites are at present required primarily by the five operators that hold 3G licences in the United Kingdom and are planning 3G network roll-out, four of which also operate 2G networks ([28]). In principle 2G and 3G sites are interchangeable, although due to the nature of the different frequencies used and the added capacity desired for 3G services, the density of a 3G network is greater, and requires up to twice as many sites as a 2G network. Only a limited part of the demand for 3G sites can therefore be met by using existing 2G sites. Finally, unlike 2G networks, which are already fully rolled out, the roll-out of 3G networks in the United Kingdom is still in its initial stage. Given regulatory roll-out requirements of 80 % population coverage by the end of 2007, the initial demand for sites is highest in urban and other densely populated areas. Although there is some room for substitution between different types of sites (for example, between rooftop sites and mast sites, or between multiple sites serving smaller cells, such as micro or pico cells and single sites serving larger macro cells) there are no other products that can substitute for 2G and 3G sites and site infrastructure.

(48) From a supply perspective, access to 2G and 3G sites and site infrastructure can firstly be provided by 2G and 3G network operators that have located, acquired and developed sites for the purposes of operating their own networks. This is because in principle sites can be shared

([27]) Because 2,5G is based on an overlay of existing 2G networks this is not analysed separately.

([28]) Sites are also required by, for example, digital broadcasters and to a more limited extent by providers of TETRA (Terrestrial Trunked Radio).

between multiple operators, although there are technical limits on the number of operators that can share a particular site, in most cases up to three, depending on the lay-out of the specific site. There appear to be economies of scope involved at the supply side, because network operators are likely to prefer dealing with parties that can provide them with the largest possible number of sites across the largest possible number of locations in order to minimise search costs and to minimise transaction costs. Operators may prefer site sharing with other operators so as to allow the sharing of more elements of site infrastructure, thereby further reducing their costs. Finally, it is possible that in hot spots such as city centres many of the most favourable sites have already been developed and are therefore not always available to market entrants.

(49) There is limited scope for supply by operators of broadcasting networks. In general, broadcast transmission equipment is located on sites affording a much higher level of geographical coverage when compared to the coverage requirements of cellular systems. Consequently, broadcast sites tend to be tall structures in elevated locations that transmit at high powers (tens of kilowatts) in order to achieve optimal population coverage using a limited number of sites. In view of capacity considerations, mobile radio networks are cellular in nature, each site providing sufficient but limited coverage, reducing inter-cell interference and allowing the frequency allocations to be reused in other areas. The size of each cell may range from a few hundred metres to several kilometres, the actual range determined by the level of network capacity required. Site height and transmitted power are the main factors in controlling cell size with typical powers of tens of watts and antenna heights between 10 and 20 meters. There is a tendency for mobile operators to utilise broadcast structures where they are suitable for the local requirements of the service.

(50) There has been market entry by independent companies that specialise in the location, acquisition and provision of sites for use by third parties. Other parties that control sites, such as public authorities or utilities, can likewise enter the market and have already done so in the United Kingdom. Moreover operators have historically also acquired and leased individual sites on a commercial basis directly from the site owners, and continue to do so. Apart from the general planning permission constraints, health rules and requirements to minimise electromagnetic interference, there are no serious legal, statutory or other regulatory requirements that could defeat a time-efficient entry into the market and as a result discourage supply-side substitution. No significant investments or scarce technical expertise are required to enter the market. Market entry therefore remains possible.

(51) Based on the above analysis of supply and demand it should be concluded that there is a market for sites and site infrastructure for digital mobile radiocommunications equipment.

Geographic market

(52) Based on the structure of demand, which is by nationally licensed operators, the market is likely to be national, namely the United Kingdom, although stricter planning rules for sites hosting mobile radiocommunications equipment in Scotland may mean that there is a separate market in Scotland.

2.1.3.2. ***Wholesale market for access to national roaming for 3G communications services***

Product/service market

(53) Mobile roaming occurs when customers use their mobile telephone handset, or more specifically the SIM (Subscriber Identification Module) card which identifies the subscriber, on a different mobile network (host or visited network) from that to which they subscribe and which issued their SIM card (home network). Roaming can be either national or international. In both cases it is based on agreements between the home network operator and the visited network operator for the provision of wholesale roaming access to the visited network which is then passed on as a retail service by the home network to its subscribers. However, the market for national roaming is distinct from international roaming, *inter alia* because it does not involve agreements between foreign operators, it is not based on the standard arrangements developed within the GSM Association ([29]), and the prices are significantly different.

(54) Notwithstanding a possible initial overlap between 2G, 2,5G and 3G retail services, from a demand perspective, wholesale access to national roaming for 3G communications services will be distinct from 2G or 2,5G roaming, because the range of both voice and data services that can be provided based on 3G roaming is broader and different, given that significantly higher

([29]) The GSM Association consists of over 690 different 2 and 3G mobile network operators, manufacturers and suppliers who collectively develop technical platforms to make wireless services work seamlessly, with a focus on roaming and inter-operability. Cf. http://www.gsmworld.com.

transmission speeds will be available (in practice from 144 up to 384 kB/s for 3G versus between 20 and 60 kB/s for 2,5G and between 9 and 14 kB/s for 2G). A more complete discussion of the relevant voice and data services is provided in section 2.1.4.2.

(55) From a supply perspective, only operators of 3G networks or other parties able to provide the relevant type of access to the 3G networks of such operators will be able to supply wholesale access to national roaming for 3G services. Given licensing requirements, the barriers to entry, apart from secondary entry based on access rights to an existing 3G network, are absolute. Wholesale access to national roaming for 3G communications services therefore constitutes a distinct product/service market.

Geographic market

(56) Since licensing of 3G networks takes place at national level, and given pricing differences between national and international roaming, the relevant market is national, namely the United Kingdom.

2.1.4. OTHER POTENTIALLY AFFECTED WHOLESALE AND RETAIL MARKETS

2.1.4.1. ***Potentially affected wholesale markets for 3G network services and access***

Product/service markets

(57) There are a number of other possible wholesale markets for 3G network services and network access that may be affected by the Agreement, such as the market for the provision of wholesale airtime access to service providers, which has existed in the United Kingdom on the basis of regulatory obligations. Wholesale airtime access is similar to national roaming in that it also concerns the wholesale provision of network access and minutes (airtime) by a host network. It has been supplied to service providers by licensed mobile operators in the United Kingdom as a condition of their licences ([30]). The difference between the two forms of access is that an operator relying on national roaming can itself determine the range of services available to its subscribers, and can provide services that are not available to customers of the host network. A service provider, however, can only provide simple resale of the range of services offered by the network operator that is providing it with wholesale airtime.

(58) Another possible wholesale market is the market for call origination services where providers of carrier selection services purchase the right to obtain access to mobile networks in order to originate calls that they terminate under their own responsibility. It is possible that, in addition, new forms of wholesale access to 3G networks and services may develop and come to constitute separate relevant markets.

(59) Wholesale 3G network services and network access are likely to be distinct from network services and access for 2G or 2,5G services, because the range of services that can be provided based on 3G networks is broader and different, given the availability of significantly higher transmission speeds. However given the degree of development of 3G wholesale markets, which are still emerging, it is too early to describe in detail the demand side for network services and access on commercial terms in such markets, with the exception of demand from service providers for access to wholesale airtime. From a supply side these markets are logically limited to 3G network operators and to any other parties that may obtain a right to provide the relevant degree of access to 3G networks.

Geographic market

(60) Given national licensing and pricing patterns, the geographic scope of such wholesale markets is likely to be national ([31]). For the purposes of the present Decision it is not necessary to define those markets more closely. Their definition will therefore be left open.

2.1.4.2. ***Potentially affected retail markets***

(61) Whereas the cooperation covered by the Agreement is limited to site sharing and national roaming at wholesale network level, the effects of this cooperation could be felt in the downstream retail services markets

([30]) Vodafone and O2 UK were held to hold market influence and required to supply wholesale airtime.OFTEL decided to make determinations to remove the MI determinations (5 April 2002), http://www.oftel.gov.uk/publications/mobile/2002/mide0402.htm

([31]) However cf. Commission Decision of 4 October 2001 in Case COMP/M.2598 — TDC/CMG/MIGway JV (OJ C 16, 19.1.2002, p. 16), which identifies EU-wide markets for connectivity to the international signalling network and for wholesale access (SMS) to mobile telephony infrastructure.

where the Parties are active independently of each other. Within the area of mobile retail services, voice and data services have so far been offered in a bundled manner, suggesting that they may be part of the same market. The 3G network operators are likely to offer 'seamless' 2G and 3G voice and data services by providing both types of services on a single SIM card. However, the balance between voice and data services is expected to shift fundamentally: whereas 2G data services are largely limited to fax and SMS, and voice services typically account for over 90 % of 2G mobile operators' revenues, for 3G networks, with services like teleshopping, video telephony and video conferencing, it is expected that eventually between 50 % and two thirds of revenue may be generated by data services. It is therefore useful to analyse digital mobile voice telephony services and digital mobile data services separately. At least initially this distinction largely corresponds with that between circuit-switched and packet-switched services.

Digital mobile voice services

(62) Concerning mobile voice telephony markets the Commission has so far generally not distinguished between different technologies. Most decisions have determined that both analogue and digital GSM 900 and 1800 are part of the same mobile voice telephony market, while testing narrower market definitions to ensure that no dominant positions arose on any market definition ([32]). However, as analogue mobile telephony has been phased out by the operators in the United Kingdom, the services concerned by the Agreement are digital mobile voice telephony. So far the Commission has not defined different markets for 2G, 2,5G and 3G retail services ([33]).

(63) Over time, however, industry sources anticipate that 'rich voice over 3G networks' services may develop that consist of voice services integrated with data services such as consumer videophones and multimedia conferencing that go beyond the capacity of 2G and 2,5G networks. Hence it is possible that a distinct retail market for 3G voice services will develop or, indeed, that 3G voice and data services will merge into a single market. Developments in the quality and the scope of the voice services concerned brought about by 3G technology are likely to enable 3G voice services to command a price premium. Moreover, they are likely to lead to one-way substitution between 2G services on the one hand, and 3G services on the other hand (that is to say, users will substitute 3G services for 2G services, but not vice versa), which would be evidence of the existence of separate markets. For the purposes of the present Decision, however, it is not necessary to conclude on whether 2G and 3G voice services should be considered separate product markets. The relevant product market definition is therefore left open.

Digital mobile data services

(64) A fundamental difference between 2G data services, on the one hand, and 2,5 and 3G data services, on the other, is that the former is circuit-switched, whereas the latter are packet-switched, that is to say, based on a different technology with different and increased technical capabilities. Because services and content available over 3G networks are expected to be considerably improved in relation to 2G both as regards data speeds and the range of services that is consequently enabled, any substitutability between 2G and 3G is likely to be one way. This leads to the conclusion that 2G and 3G services are likely to be separate markets. Although it appears clear that there will be some overlap between 2,5G and 3G services as 2,5G allows, for example, mobile e-mail, multimedia messaging and continuous Internet access, it does not have sufficient data transmission rates to provide the high end of data services that are expected

([32]) Cf. Commission Decision of 21 May 1999 in Case IV/M.1430 — Vodafone/Airtouch (OJ C 295, 15.10.1999, p. 2); Commission Decision of 21 May 1999 in Case COMP/JV.17 — Mannesmann/Bell Atlantic/Omnitel (OJ C 11, 14.1.2000, p. 4); Commission Decision 98/2001/EC in Case COMP/M.1439 — Telia/Telenor (OJ L 40, 9.2.2001, p. 1); Commission Decision of 20 December 1999 in Case COMP/M.1760 — Mannesmann/Orange (OJ C 139, 18.5.2000, p. 15); Commission Decision of 12 April 2000 in Case COMP/M.1795 — Vodafone Airtouch/Mannesmann (OJ C 141, 19.5.2000, p. 19); Commission Decision of 4 August 2000 in Case COMP/M.2053 — Telenor/BellSouth/Sonofon (OJ C 295, 18.10.2000, p. 11); Commission Decision of 11 August 2000 in Case COMP/M.2016 — France Telecom/Orange (OJ C 261, 12.9.2000, p. 6); Commission Decision of 25 September 2000 in Case COMP/M.2130 — Belgacom/Tele Danmark/T-Mobile International/Ben Nederland Holding (OJ C 362, 18.12.2001, p. 6).

([33]) Commission Decision of 12 April 2000 in Case COMP/M.1795 — Vodafone Airtouch/Mannesmann (OJ C 141, 19.5.2000, p. 19); Commission Decision of 31 July 2000 in Case COMP/M.1954 — ACS/Sonera Vivendi/Xfera (OJ C 234, 18.8.2000, p. 6); Commission Decision of 25 September 2000 in Case COMP/M.2130 — Belgacom/Tele Danmark/T-Mobile International/Ben Nederland Holding (OJ C 362, 18.12.2001, p. 6).

to emerge on 3G networks. It therefore appears that there may be an emerging market for the provision of 3G mobile data services.

(65) Based on the distinguishing factor of mobility, the Commission has so far considered that mobile and fixed data services are in separate markets ([34]). However the highest bandwidth 3G data services are likely to be deliverable only under conditions of optimal coverage with very low or no mobility. At the same time wireless local area network services (WLAN) are developing that provide data communications, including broadband Internet access, allowing limited mobility within a circumscribed area (such as within buildings or at public locations). It is possible that a similar measure of limited mobility will, in future, become the norm for all or most high bandwidth data services. Consequently, it is an open question whether services like WLAN will be a complement to or a substitute for 3G services and whether, as a result, the distinction between fixed and mobile data services will break down and a market for broadband wireless data communications may emerge.

(66) Because 2,5G services are still emerging, and 3G services are presently only at the planning stages, it is not possible to determine accurately whether they are in the same market or in different markets, whether digital mobile voice and data services are in the same market or whether certain 3G services are in the same market as broadband data services such as WLAN. However, for the purposes of the present Decision, it is not necessary to conclude on whether 2G, 2,5G and 3G data services and/or voice services should be considered separate product markets. The relevant product market definition is therefore left open.

Geographic markets

(67) Given the fact that retail pricing and services offers of digital mobile telephony are currently national, markets remain national in scope, with the exception of the emerging market for the provision of seamless pan-European mobile telecommunications services to internationally mobile customers that the Commission first identified in the Vodafone/Mannesmann Decision ([35]). International roaming services are not a substitute given the high prices and limited functionality of international roaming ([36]). In addition, network operators have generally refused to allow permanent roaming based on international roaming access, that is to say, to allow a customer of a foreign network to roam permanently on their own network. Consequently the market or markets identified above are national.

2.2. *MARKET STRUCTURE*

2.2.1. THE MARKET FOR SITES AND SITE INFRASTRUCTURE FOR DIGITAL MOBILE RADIOCOMMUNICATIONS EQUIPMENT IN THE UNITED KINGDOM

(68) According to the UK Radiocommunications Agency, there are approximately 35 000 externally sited base stations for cellular transmitters. In order to provide 3G services, the Agency has estimated that the operators will need approximately a further 30 000 to 50 000 sites, although it is difficult to determine the number required with any accuracy as the final figure depends on a number of factors, including the success of 3G.

(69) Information provided by mobile operators confirms that there are approximately 35 000 sites used for 2G transmission (over 95 % population coverage) ([37]). The Commission has estimated on the basis of the operators' replies that a minimum of 40 000 sites will be required to provide 3G covering 80 % of the UK population. A greater number of sites will be required to cover the whole of the UK population.

(70) All the mobile operators control a significant number of sites and, in most cases, lease them from corporate entities such as public utilities, commercial property owners as well as from private landlords. There are also specialist companies ('tower companies') that lease antenna space on wireless and broadcast towers that can accommodate multiple tenants and wireless networks.

([34]) In relation to dial-up access to Internet via mobile handsets and via fixed means. Cf. Commission Decision of 20 July 2000 in Case COMP/JV 48 — Vodafone/Vivendi/Canal+, http://europa.eu.int/comm/competition/mergers/cases/.

([35]) Cf. Commission Decision of 12 April 2000 in Case COMP/M.1795 — Vodafone Airtouch/Mannesmann (OJ C 141, 19.5.2000, p. 19); Commission Decision of 11 August 2000 in Case COMP/M.2016 — France Telecom/Orange, (OJ C 261, 12.9.2000, p. 6).

([36]) Cf. Commission Decision of 22 June 1998 in Case IV/JV.2 — ENEL/FT/DT (OJ C 178, 23.6.1999, p. 15); Commission Decision of 21 May 1999 in Case IV/M.1430 — Vodafone/Airtouch (OJ C 295, 15.10.1999, p. 2); Commission Decision 98/2001/EC in Case COMP/M.1439 — Telia/Telenor (OJ L 40, 9.2.2001, p. 1).

([37]) For general information see Mobile Operators Association www.mobilemastinfo.com/information/masts.htm.

(71) O2 UK has about 7 600 2G sites and owns or controls about 6 000 2G sites. T-Mobile UK has [about 8 600] (*) sites of which around 2 000 are managed by Crown Castle International.

(72) As regards the other operators, Vodafone has about 8 000 sites and Orange has about 9 500 sites. Hutchison, as a new entrant, is still building up its portfolio of 3G sites and has about 4 000 sites, to provide approximately 50 % population coverage. It is expected to add a further [...] (*) sites.

(73) All operators are seeking to acquire further sites in order to provide 3G services across the United Kingdom.

2.2.2. WHOLESALE ACCESS TO NATIONAL ROAMING FOR 3G COMMUNICATIONS SERVICES

(74) Apart from the Parties, three other mobile operators were allocated 3G mobile licences under the Wireless Telegraphy Act 1949 by means of an auction in April 2000: Vodafone, Orange and Hutchison 3G UK (a new entrant). Although there are plans by the UK Government to introduce spectrum trading ([38]), the barriers to entry are high, if not absolute given the cost of rolling out a 3G network and the difficulty of obtaining sufficient appropriate spectrum. New entry via spectrum trading is unlikely for the forseeable future, if at all.

(75) In addition to the operators, service providers (SPs) and, possibly, MVNOs will operate in the 3G wholesale market. SPs — either Tied (TSPs) or Independent (ISPs) — resell minutes purchased (wholesale airtime) from a network partner operator and have their own billing relationship with subscribers, primarily business subscribers. Enhanced SPs (ESPs) represent the next tier of service providers and offer their own tariff structures and packages, including value added services. Virgin Mobile (a 50:50 venture with T-Mobile UK) is an example of an ESP that caters successfully for the private customer. MVNOs are the final tier in the hierarchy of SPs. MVNOs provide similar services to ESPs but they have their own identity and issue their own SIM (subscriber identification module) cards. In certain cases, they may even own network infrastructure elements. However, they are ultimately dependent on a mobile operator's network for the use of the radio spectrum.

(76) Currently 3G national roaming is foreseen only between O2 UK and T-Mobile UK pursuant to the notified Agreement. However, it is possible that further roaming agreements may be entered into between operators, especially to cover remote parts of the United Kingdom.

(77) The supply of wholesale airtime in 3G is likely to be more significant given the scope for new services and SPs and MVNOs operating in niche markets. In 2G, all wholesale airtime has been provided by BT Cellnet and Vodafone ([39]), with the exception of the ESP deal between T-Mobile UK and Virgin Mobile.

2.2.3. 3G RETAIL LEVEL

(78) The five licensed operators are all planning to roll out their networks and, depending on the operator, are expecting to start providing 3G services sometime in 2003 or 2004. As 3G networks and services have not yet been launched commercially, no market shares or assessment of substitutability between 2G and 3G services can at present be provided. For 2G retail services in 2002, the market share by operator by revenue was the following: Vodafone — 34 %, Orange — 27 %, O2 UK — 22 % and T-Mobile UK — 17 % ([40]). However, it is not clear to what extent the position will be replicated in 3G and in addition, the 3G market will see the introduction of a new entrant — Hutchison 3G UK operating under the brand '3'. The entry of Hutchison 3G UK combined with the potential for ESPs and MVNOs to play a greater role may enhance competition, but the market is still likely to see the established operators, including both Parties, with strong market positions due to their existing 2G network and customer base.

2.3. *RESTRICTION OF COMPETITION*

(79) Article 81(1) of the Treaty prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect

([38]) Radiocommunications Agency, 'Implementing Spectrum Trading', A Consultation Document, July 2002. See http://www.radio.gov.uk/topics/spectrum-strat/consult/implementingspectrumtrading.pdf.

([39]) Vodafone and O2 UK were held to hold market influence and required to supply wholesale airtime. OFTEL decided to make determinations to remove the MI determinations (5 April 2002), http://www.oftel.gov.uk/publications/mobile/2002/mide0402.htm.

([40]) Oftel, Market Information Mobile Update, October 2002.

the prevention, restriction or distortion of competition within the Common Market. Parallel provisions in respect of trade between Contracting Parties and effect on competition within the EEA are set out in Article 53(1) of the EEA Agreement. Agreements restricting competition contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement can be exempted provided the conditions set out in Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement are met.

(80) The Agreement between O2 UK and T-Mobile UK involves cooperation in the roll-out of the Parties' 3G networks, via site sharing and national roaming. These key objectives are pursued in three distinct areas of the United Kingdom (i) the Initial Build Area ('IBA'), (ii) the Divided Area ('DA') and (iii) the Remaining Area ('RA'). They are implemented by the Parties cooperating in the planning, acquiring, building, deploying and sharing of 2G sites, 3G sites and 2G/3G sites as well as through the provision of reciprocal roaming services. The Agreement includes detailed implementing provisions, in particular in relation to the exchange of confidential information for the purposes of managing the project.

(81) The Parties are cooperating extensively in the roll-out of their 3G mobile networks. Such far-reaching cooperation between two key players in a market with only a limited number of competitors and high, if not absolute, barriers to entry raises competition concerns. Therefore the Agreement, or more particularly the site sharing and the national roaming, need to be analysed under Article 81 of the Treaty/Article 53 of the EEA Agreement.

(82) The Parties' plans in relation to the RA (the least populated parts of the United Kingdom) are not sufficiently developed to allow the Commission to determine the possible impact of the Parties' cooperation on competition in that area. This Decision therefore does not apply to the Parties' plans for the RA.

2.3.1. SITE SHARING

(83) Site sharing between competitors has been commonplace in 2G but principally on an ad hoc basis. However, the need for up to a twofold increase in the number of sites for 3G heightens environmental and health concerns. Site sharing is therefore increasingly favoured for policy considerations and is expressly encouraged by Community rules. For example, recital 23 of the preamble to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ([41]) states that 'Facility sharing can be of benefit for town planning, public health or environmental reasons, and should be encouraged by national regulatory authorities on the basis of voluntary agreements'.

(84) However, site sharing may have an adverse impact on competition, in particular by reducing network competition, denying competitors access to necessary sites and site infrastructure, thus foreclosing competitors and, possibly in some cases, facilitating collusive behaviour.

(85) The Parties are direct competitors in 2G and 3G wholesale and retail markets and both have well-established positions in 2G mobile telephony. They are therefore in a strong position to individually roll-out their networks, particularly in built-up areas, such as the IBA, which are likely to see the greatest demand for 3G services. The site sharing therefore needs to be analysed under Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement to see if it is compatible with the competition rules.

2.3.1.1. ***Shared network components and radio plans***

(86) The site sharing by the Parties in the IBA and the DA covers certain 'passive' components of the network, such as the aerial support structure, base station (Node B) cabinets, cooling and power supply ([42]). The Parties have also indicated that they may consider RAN sharing (for example, sharing Node Bs) ([43]) for specific point solutions in the DA, although this is not currently envisaged.

(87) The site sharing between the Parties in the IBA and the DA is limited due to the network elements involved. The Parties will retain independent control of the key components of their access networks as well as their core networks, including all intelligent

([41]) OJ L 108, 24.4.2002, p. 33.
([42]) Point (a) in recital 14 above.
([43]) Point (b) in recital 14 above.

parts of the network and the service platforms that determine the nature and range of services provided. Although there is the possibility that additional network elements may be shared in the DA, this should not significantly undermine the Parties' ability to retain independent control of their networks since RAN sharing is only intended to be used in a few specific cases. However the Parties' plans are not sufficiently developed for a conclusion to be reached on this specific issue.

(88) The use of RAN sharing could also increase the risk that the Parties would have a significant level of costs in common which could facilitate the coordination of market prices and output. However, given the limited extent to which the network components are shared by the Parties, the level of common costs arising from the site sharing is likely to be low. This is supported by estimates provided by T-Mobile which show that [a very small proportion of the costs savings] (*) of the capital expenditure cost savings arising from the Agreement will result from site sharing (operational expenditure savings are [limited] (*)). O2 UK has provided figures using a different methodology but the cost savings from site sharing can be expected to be similar. Consequently, the level of common costs arising from site sharing will also be limited.

(89) The Parties were planning to adopt a Joint Radio Plan in the IBA and a Common Radio Plan in the DA, deploying their radio equipment on the same or a substantial number of the same sites. This could have led to an adverse effect on competition since it could have resulted in the assimilation of the Parties' networks, especially in terms of coverage. However, the Parties have decided not to adopt a Joint Radio Plan in the IBA (the most significant area in terms of traffic) and expect less than [7 to 12 %] (*) of the total number of sites used by them in the IBA to be common sites. The Common Radio Plan is limited to the DA and therefore the Parties will not be rolling out similar networks across the whole of the United Kingdom.

(90) As the scope of the site sharing is limited and the Parties will not adopt a Joint or Common Radio Plan across the whole of the United Kingdom, this particular aspect of the site-sharing arrangement does not raise competition concerns.

2.3.1.2. ***Designated Areas in the DA***

(91) The Agreement provides for each Party to be responsible for rolling out the network in the DA, in particular Designated Areas which are broadly consistent. The Parties have also agreed not to build out and deploy 3G sites or networks outside of their own Designated Area, although this is subject to a number of exceptions.

(92) The restriction on rolling-out in the Designated Area of the other Party could be viewed at its simplest as a form of market sharing which is considered as per se restrictive of competition under Article 81(1) of the Treaty. However, the Agreement permits either Party to build out without the other Party's permission in the Designated Area of the other in a wide range of circumstances, including (i) to the extent that either Party considers it necessary to do so due to market demands, to meet competitive challenges or to meet regulatory requirements; (ii) to the extent necessary to meet the 80 % coverage requirement by 31 December 2007 as provided for in the Parties' 3G licences; (iii) on a temporary basis for the purpose of providing coverage at a set of popular or special events such as concerts etc; (iv) for special customers (Clause 11). The Agreement therefore allows either Party to build out in all conceivable situations in the Designated Area of the other Party, including in line with market demand and to meet regulatory obligations. It is also designed for operational reasons to ensure that the Parties concentrate their resources in particular areas so as to develop the sites as quickly and effectively as possible. Given the wide exceptions, the Clause does not therefore have any appreciable adverse effect on competition.

2.3.1.3. ***Option in IBA and DA***

(93) The Parties have provided for a period of exclusivity over the sites, initially on the basis of an exclusive Option and subsequently via a Right of first refusal. The granting of exclusivity raises concerns since it could potentially prevent third parties, in particular new entrants, from gaining access to sites and site infrastructure for the installation of their network equipment and thereby potentially limit their ability to provide services via an effective network. However, a certain degree of exclusivity can be commercially justified as it may lead to more effective site sharing between the Parties.

(94) The Agreement provides for the following exclusivity periods to apply:

(a) IBA — an Option period of two years and thirty days from 31 December 2001 (until 30 January 2004) over the sites of the other Party;

(b) DA — an Option period of five years and thirty days from 31 May 2002 (until 30 June 2007) for a Party in its own Designated Area over 2G sites of the other Party;

(c) DA — an Option period of two years and thirty days from 31 May 2002 (until 30 June 2004) over 3G sites (namely upgraded 2G sites and new 3G sites) of the other Party in that Party's Designated Area.

(95) The Agreement allows the Parties to alter the start date from which the Option periods begins to run. It is therefore conceivable that the Option periods will end later.

(96) One of the third parties which submitted comments in response to the notice pursuant to Article 19(3) of Regulation No 17 raised specific concerns about the impact of the Option and Right of first refusal on other mobile network operators. It emphasised that the Option and the Right of first refusal could be used selectively as a blocking tactic to foreclose market entry. However this is only likely to be a concern if (i) there is a lack of suitable sites available, (ii) the period of exclusivity is too long, leading to market foreclosure, and (iii) no appropriate regulatory solution exists.

Availability of sites

(97) In the United Kingdom, there does not appear to be an overall lack of sites available for use by mobile network operators. In their response to the notice pursuant to Article 19(3) of Regulation No 17 the UK authorities stated that 'overall, we judge that the potential for site foreclosure is likely to be relatively minor. There is a wide range of potential landowners of sites, and site sharing by two or more operators is common. Any difficulties for another operator gaining access to sites may be limited to particular circumstances in isolated areas, where locally there is a strict interpretation of the planning regulations by the planning authority' ([44]).

(98) Site sharing is increasingly prominent amongst mobile operators and around 26 % of all external sites are shared sites ([45]). In addition, the existence of an important secondary market in the leasing of sites and infrastructure for radio communications equipment which helps to ensure that mobile operators do not control access to all sites is also a significant factor. These so-called 'tower' companies have a financial incentive to ensure that their sites are used as extensively and efficiently as possible by operators. There is therefore an inherent incentive for them to allow site sharing. For example, Crown Castle supplies a significant number of sites to each of the five 3G mobile operators and [a significant proportion] (*) of the approximately 3 200 sites that it controls are shared by more than two operators.

(99) However, the public are increasingly concerned about possible health and environmental side-effects resulting from the siting of masts, particularly near schools. This has led in the United Kingdom to a modification of the planning system on the siting of masts to ensure greater public consultation ([46]). In Scotland, the Scottish Executive has introduced stricter planning rules, which has lengthened the time it takes to obtain planning permission ([47]). In addition, 3G requires a greater number of sites and there are five operators, including a new entrant, seeking to simultaneously roll out their networks ([48]). It is therefore possible that in specific areas for example, areas of very high demand

([44]) UK authorities' public response, paragraph 16.

([45]) Department for Transport, Local Government and the Regions ('DTLR') 2001 Regulatory and Statistical returns (Source: Radiocommunications Agency). See also Reply by Minister for Department for Transport, Local Government and the Regions: 'The industry sends site-sharing statistics to the Department on a quarterly basis as part of this commitment. Latest figures show that, out of the current 10 416 sites that are capable of some form of mast/tower share, 3 669 sites have at least one sharer present. In addition, 2 713 applications for site share are pending', 13 May 2002, column 445W, Hansard, see http://www.parliament.the-stationery-office.co.uk.

([46]) Report by the Independent Expert Group on Mobile Phones 'Mobile Phones and Health', May 2000, http://www.iegmp.org.uk; UK ODPM, 'Planning Policy Guidance Note 8 — Telecommunications', PPG8, August 2001, http://www.planning.odpm.gov.uk/ppg/ppg8.

([47]) 'Executive toughens telecommunications mast planning rules', Press Release SE 1534/2001 of 25 June 2001, available at http://www.scotland.gov.uk.

([48]) In the UK network roll-out for 2G was staggered due to the allocation of licences under the Wireless Telegraphy Act 1949 at different times. GSM 900 operators were granted licences in July 1992 (Vodafone and BT Cellnet). DCS 1800 were granted licences later (Mercury One2One in March 1993 and Orange in February 1994).

in urban areas, areas near schools and hospitals, and environmentally sensitive areas, there may be a potential risk that third party operators could be prevented from providing high network quality and coverage by the lack of availability of appropriate sites in certain pressure spots.

Duration of exclusivity

(100) There are a number of suppliers of sites for digital mobile radio communications equipment in the United Kingdom. However the Parties themselves control access to a significant number of sites, the majority of which can be modified for use in 3G.

(101) Some exclusivity is justified to ensure the commercial success of the Agreement. However, if there were an overall lack of sites, a period of exclusivity which would significantly prevent competitors and, in particular, new entrants from site sharing with either of the Parties until just before or after the deadline for operators to meet the coverage requirements in their licence, would require special scrutiny. It could make it more difficult for third party operators to meet their licence conditions as well as to roll out a competitive network. It could also go against the policy of encouraging widespread site sharing.

(102) In the IBA, the Parties enjoy a period of exclusivity over each other's sites until 30 January 2004. In its own Designated Area within the DA, a Party enjoys a period of exclusivity until 30 June 2007 over the 2G sites of the other Party in that area. In the other Party's Designated Area in the DA, a Party enjoys a period of exclusivity until 30 June 2004 over 3G sites of the other Party in that area. Notwithstanding these end dates, there remains the possibility for the Parties to extend the exclusivity periods by agreeing new starting dates for any of the Options due to roll-out delays. There could therefore be a concern, especially in the DA, that the Option periods would not lapse until near or after the roll-out deadline of December 2007. This could potentially impact on the ability of third-party operators to site share with either of the Parties and could make effective market entry more difficult.

(103) Nevertheless, the areas where third-party operators may face difficulties in gaining access to sufficient sites to provide effective coverage are likely to be relatively few, since there is not a general lack of sites in the United Kingdom. The UK authorities stated that difficulties were likely be limited to particular circumstances in isolated areas, where there was a strict interpretation of the planning rules. The Parties have indicated that the Option does not preclude access for third parties to spaces on sites which are capable of accommodating more than two operators during the Option period. Although not all sites will be capable of accommodating more than two operators, many 'greenfield sites' (built without making use of any existing structures) are capable of being redeveloped to allow this. There is also the possibility for site sharing with other mobile operators and there is increasing use by all operators of tower companies, which have a financial interest in allowing multiple use of their structures. Therefore the actual areas of the United Kingdom where third parties may have problems finding sites due to the use of the Option are likely to be few in number and very localised. In any event, there is a specific regulatory remedy available for problem areas where a scarcity of sites would adversely affect-third party operators.

Regulatory remedy

(104) Potential problems of third parties gaining access to infrastructure have been foreseen by Community legislators and, although the problem is often one of planning, both the existing rules and the new regulatory framework which is to be applied from July 2003 ([49]) include specific provisions on infrastructure sharing. Those provisions do not only apply to operators enjoying a monopoly position over infrastructure, such as incumbent owners of the local loop ([50]), but also to any undertaking operating an electronic communications network, such as a mobile operator. Article 12 of the Framework Directive provides that '... Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network ...'. Under the new regulatory framework there is therefore a wide-reaching solution should the Agreement have the effect of restricting competition by denying competitors access to specific sites and/or site infrastructure where the topography of area and/or the specific parameters of demand means that sites are scarce and site sharing is a necessity.

([49]) Article 28 of the Framework Directive.

([50]) 'Local loop' means the physical circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public network. Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7), Article 2(e).

2.3.1.4. ***Right of first refusal in IBA and DA***

(105) The existence of the Right of first refusal over sites — a lesser form of exclusivity than the Option — does not directly harm competition in this case since there is no general scarcity of sites in the United Kingdom. In addition, the time period of 14 days for the exercise of the Right of first refusal allows third parties to know very quickly whether they need to make alternative plans and does not cause a significant bottleneck. However, the fact that the Agreement provides for third parties to pay a licence fee equal to or higher than that of the Parties limits the commercial freedom of the site-owning Party and potentially raises the cost of entry for third parties, even if it is meant to be tempered by the fact that the fee is based on fair market rates. It may even be considered to amount to an agreement to set a minimum price which is per se illegal under Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement.

(106) On the basis of the Commission's concerns, the Parties have agreed to modify the clauses requiring third-parties to pay a licence fee equal to or higher than that of the Parties. The clauses, as amended, now state the following:

> 'If at any time after the expiration of the option the Site Operator receives a bona fide third-party offer at a price acceptable to the Site Operator, it shall promptly notify the Sharer of the third-party offer and the price, whereupon the Sharer shall within 14 days confirm to the Site Operator whether or not it wishes to enter into a Site share Licence for the Site concerned either at that price or at the price agreed on the Rate Card (whichever is lower).
>
> In the absence of written confirmation within such time the Site Operator shall be free to enter into site-sharing arrangement at the Site concerned with the third party concerned on the terms of the bona fide offer of the third party'.

(107) The new wording removes the concern over possible price fixing and also ensures that the Parties cannot raise the entry costs for third party operators by requiring them to pay a higher licence fee. Therefore the clauses as amended no longer have an appreciable effect on competition.

2.3.1.5. ***Conclusion***

(108) The Parties are sharing a limited number of passive components of the access network and they retain independent control of their networks, including the critical core network. The Parties retain the ability to differentiate their services downstream since the level of common costs brought about by site sharing is not significant and the Parties retain control of the core network and service platforms that determine the nature and range of the services provided. The exclusivity over the sites (the Option and Right of first refusal) does not lead to widespread foreclosure for third-party operators since there is not an overall lack of availability of sites in the United Kingdom. In any event, if there are specific problem sites, the new regulatory framework allows National Regulatory Authorities to impose site sharing.

2.3.2. ROAMING

2.3.2.1. ***Background***

(109) The Agreement provides for the Parties to provide 3G services to their customers through the use of national roaming where they have coverage gaps in the IBA, but particularly in the DA. National roaming involves the customer of one mobile operator using the network of another operator within the same country to make or receive phone calls and is underpinned by complex technical arrangements relating to the identification of the roaming customer, the switching of calls, and the exchange of billing information. The Parties are expecting to deploy new software to allow their customers to benefit from 'seamless national roaming', which will allow calls to be handed over when the caller moves across the networks without the call being dropped or any loss of service functions.

(110) Unless parties to a roaming agreement would be unable to roll out their networks individually, such an agreement raises significant competition concerns as it limits almost all network infrastructure based competition and impacts on service-level competition. The operators involved will face similar costs and may only be able to differentiate their customer offering on the basis of the services on offer, rather than on price or quality. The Parties are both established operators in 2G and are in strong positions to roll out their 3G networks individually across the United Kingdom because they have existing infrastructure that can be modified for use in 3G and a strong customer base. Therefore the supply of roaming services needs to be analysed under Article 81(1) of the Treaty.

(111) The Parties have not been able to roll out their network as rapidly as they had initially planned due to capital expenditure constraints. There have also been delays in the availability of the software to enable seamless national roaming. The Parties have therefore agreed to further subdivide the IBA into two parts. First, they have agreed to designate a 'core area' within the IBA where each Party will separately build out its network. In this area, which covers the top 10 cities in the United Kingdom and accounts for approximately [32 to 38 %] (*) of the UK population, the Parties will not rely on national roaming as each Party will have already separately built out its own network by the time seamless national roaming is expected to be available (sometime in [...] (*)). Second, the Parties have designated a 'residual area' of the IBA which covers a further 13 cities ([less than 10 %] (*) of the UK population). Within this residual area, each Party has been allocated a number of cities in which to roll out the network and each Party will supply roaming services to the other Party for such time as the other does not have full 3G network coverage within this area. In the DA, the Parties will continue to roll out the networks in the respective Designated Areas as originally planned, subject to possible delays, and will rely on the provision of national roaming to provide 3G services in the Designated Area of the other Party until such time as they have their own network coverage. However, the Parties are required in their licences to cover 80 % of the population by the end of 2007.

(112) On the basis of the latest available plans, [T-Mobile is expecting to launch 3G services towards the end of 2003 whereas O2 UK does not intend to launch commercial services until the second half of 2004 ([51]). The Parties will not cover the whole of the UK population at launch but coverage will grow between 2004 and 2007] (*).

(113) The Parties have argued that roaming falls outside Article 81(1) of the Treaty and have put forward four main reasons, namely:

(a) roaming will be limited in duration in the IBA and in the majority of the DA, since the Parties are required to comply with roll-out obligations in their 3G licences;

(b) each Party will build separate networks, particularly in the IBA, and will still be able to compete against the other, especially in terms of network quality;

(c) the Parties will be in a stronger position to compete against third party operators and the use of roaming ensures that the launch of full 3G services is not delayed unnecessarily vis-à-vis other operators;

(d) due to the enhanced technology, competition at the retail (service) level will be more important than infrastructure level competition in the 3G market.

(114) In their response to the notice pursuant to Article 19(3) of Regulation No 17, the UK authorities were in favour of allowing the Parties to roam in the DA but were strongly opposed to allowing roaming within the IBA on the basis that it would undermine network competition:

> 'Competing networks compete in terms of the full range of costs and the quality and variety of network and retail services. Competition at the network level positively enhances competition at the service level. In an infrastructure-sharing scenario, there would be arguably less competition on issues such as network coverage and quality. In 3G, there are additional network performance parameters for data transmission where competition might be dampened as well ([52])'.

(115) The UK authorities' reasoning was in part based on the fact that 'network competition will be important particularly in the initial stages of development of 3G infrastructure in higher densely populated areas' ([53]) and that 'economies of scale through infrastructure sharing are not strong outside rural areas' ([54]).

2.3.2.2. ***Network competition***

(116) National roaming between network operators who are licensed to roll out and operate their own competing mobile networks by definition restricts competition between those operators in all related network markets on key parameters such as coverage, quality and transmission rates. It restricts competition on coverage because instead of rolling out its own network to obtain the maximum degree of coverage of territory and population, a roaming operator will rely on the

([51]) Press release of 22 January 2003, 'Response to the [UK] Competition Commission's Recommendations regarding mobile termination charges' — 'delay the planned launch of commercial 3G services until the second half of 2004', see http://www.mmo2.com.

([52]) UK authorities' public version, paragraph 12.
([53]) UK authorities' public version, paragraph 13.
([54]) UK authorities' public version, paragraph 13.

degree of coverage achieved by the network of the visited operator. National roaming also restricts competition on network quality and on transmission rates, because the roaming operator will be restricted by the network quality and the transmission rates available to it on the visited network, which are a function of the technical and commercial choices made by the operator of the visited network.

(117) Finally, based on the Agreement, national roaming will be charged at wholesale rates. Given that national roaming will account for a small but not insignificant proportion of their capacity in the IBA, and potentially up to half in the DA, it is possible that the wholesale rates that one Party will be able to charge to purchasers of its own wholesale network and access services will, to a significant extent, be constrained by the wholesale rates it has to pay to the other Party.

(118) Given the resulting constraints on the ability of O2 UK and T-Mobile to compete on coverage, on quality, on transmission rates, and on wholesale prices, 3G national roaming between O2 UK and T-Mobile will have an impact on competition in all 3G network markets in the United Kingdom including the market for wholesale national roaming access for 3G communications services and the market for wholesale airtime access to 3G services.

(119) In the market for wholesale national roaming access for 3G communications services there are five licensed operators that have the ability to roll out networks. Barriers to entry are very high if not absolute as a result of licensing requirements and investment requirements. As 3G markets are emerging markets there are no market shares available. However, it is clear that cooperation between two established operators in 2G who can be expected to have strong positions on the 3G market has an appreciable effect on competition.

2.3.2.3. ***Retail level***

(120) In addition the question should be examined whether the Agreement on wholesale 3G roaming access restricts competition for 3G retail services. National roaming at wholesale level will lead to a greater uniformity of conditions at retail level, given the fact that the underlying network coverage, quality and transmission speeds are likely to be similar. Transmission speeds will determine to a significant extent the types of service that a particular operator will be able to provide. In addition, the timing of the introduction of particular services will be determined by the moment when certain transmission speeds are reliably available at network level, which will have to be coordinated for purposes of national roaming. Finally, as operators using wholesale national 3G roaming will have to pay charges for wholesale access that will be based on retail minus minus system, the scope for price competition will as a result be limited. Also the retail minus minus system itself could give rise to a risk of coordination on retail price levels.

(121) It is therefore likely that the cooperation between the Parties on wholesale 3G national roaming will have effects on competition between the Parties in downstream retail markets. Although the number of parties present in these retail markets will be greater than at network level and there are no precise market shares available, if the combined market shares of the Parties for 2G retail markets are used as a proxy, this market share is significant (40 %).

2.3.2.4. ***Conclusion***

(122) The reciprocal roaming arrangement has an appreciable effect on competition since it limits the Parties' ability to compete at the network level on coverage, quality and transmission rates. It also has effects downstream since the Parties are dependent on the coverage, quality and transmission rates of each others' networks to provide services.

2.3.3. EXCHANGE OF INFORMATION

(123) There is a presumption that the exchange of commercially sensitive information between competitors is prejudicial to effective competition as it may reduce market uncertainty and may facilitate collusive behaviour. A significant proportion of the information exchanged between the Parties can be considered as business secrets. In this case, the exchange of information is primarily of a technical nature and does not allow one Party to understand the overall competitive strategy of the other Party. It must, however, still be considered in the context of the whole Agreement and the wider market and therefore the issues, including the existence of safeguard provisions, must be analysed in more detail.

(124) As regards site sharing, the commercially sensitive information exchanged in the IBA relates principally to the configuration parameters of the sites. In the DA, the information is more extensive due to the adoption of the Common Radio Plan and also includes information that relates to the functioning of the network, including coverage roll-out plans, Node-B radio design parameters and expected traffic requirements.

(125) For roaming, two types of information will be exchanged on a regular basis. The first is functional, defining, on a national basis, the functionality to be supported on the networks and through the roaming service. The second type of information concerns capacity, whether for different types of service or traffic (Bearer, Teleservices or SMS). It is principally quantitative, relating to types and volumes of traffic to be expected over the network.

(126) Notwithstanding the confidential nature of the information being exchanged, the cooperation must be analysed in the context of the overall agreement. The exchange of information is necessary for the Parties to site share and to provide seamless roaming to their customers. The information being exchanged is primarily of a technical nature and does not allow one Party to understand the overall competitive strategy of the other Party. In particular, a Party cannot determine with any accuracy the nature of the end user applications.

(127) The Parties have introduced safeguards to limit the risk that the cooperation could spill over into anti-competitive activity in downstream markets. The Agreement specifically prohibits the exchange of information on the pricing of products and services, product development and launch plans. The Parties have also undertaken to ensure that all employees engaged in the implementation of the project are provided with appropriate guidance as to relevant competition law, confidentiality and regulatory issues and obligations.

(128) The information being exchanged is necessary to bring about effective site sharing and roaming between the Parties and does not relate to the end-user applications. In addition the safeguard measures help to limit the risk that the exchange of information could spill over into collusive behaviour. The Commission therefore considers that the information sharing does not have an appreciable adverse effect on competition.

(129) The UK authorities have expressed concerns that the close coordination between the Parties and the extensive information exchange could spill over into collusive behaviour and have asked for the Parties to provide the Commission, periodically, with a report on the functioning of the confidentiality arrangements following an independent audit.

(130) The Commission agrees with the UK authorities that in certain specific cases an independent audit of the confidentiality safeguards may be appropriate. In this particular case, the Parties are active in markets which are closely monitored by the competition authorities at national and Community level and by the national regulator. The national competition authorities can seek information directly from the Parties if they have reasonable grounds for suspecting any infringement of the competition rules. Therefore a requirement to audit independently the safeguard measures so as to allow monitoring by the Commission would appear to be disproportionate.

2.3.4. OTHER POSSIBLE RESTRICTIONS

(131) The Agreement also includes a number of other restrictions which could raise competition concerns. In particular the following clauses must be considered under Article 81(1) of the Treaty/Article 51(1) of the EEA Agreement:

(a) contract concluded '*intuitu personae*';

(b) access to other Party's network

2.3.4.1. ***Intuitu personae***

(132) The Agreement provides that neither Party shall build out or make arrangements for building out its network in all or any part of its Designated Area or provide the other with 3G services in its Designated Area by means of any arrangement with any other licence holder in any material respect similar to the arrangements contemplated by the Agreement.

(133) This clause does impact on the extent to which each Party can enter into similar arrangements in its own Designated Area with third-party mobile operators. However, it ensures that both Parties invest comparable resources and is intended to guarantee the quality of the roaming services provided as well as to maintain the confidentiality of the information provided between the Parties. In the light of the overall aim of the Agreement, it does not have an appreciable effect on competition.

2.3.4.2. ***Access to other Party's network***

(134) The Agreement states that each Party remains free to make arrangements for 3G national roaming with third-party licensed 3G operators but that the other Party shall not be obliged to allow subscribers or customers of that third party on to its network via roaming. According to the Parties, there are significant technical complications from allowing national roaming by another major operator on either of the Parties' mobile network. However, in any event, the provision of roaming services between network operators has been identified as a restriction on competition in its own right requiring analysis under the competition rules. Therefore a limit on other licensed 3G network operators joining in this form of cooperation cannot be interpreted as constituting a restriction of competition. On the contrary, should one of the Parties conclude an agreement to resell significant volumes of national roaming access to any of the other licensed 3G network operators, this would require a separate analysis under the competition rules. In such circumstances, the clause does not have an adverse effect on competition, especially as the Parties can offer national roaming to MVNOs and service providers without restriction.

2.4. *EFFECT ON TRADE BETWEEN MEMBER STATES*

(135) The conditions for access to 3G infrastructure and wholesale services of mobile network operators affect trade between EEA States. This is because the services provided over telecommunications networks are traded throughout the Community and the EEA — for example, wholesale access to 3G international roaming — and the conditions for access to telecommunications infrastructure and wholesale services determine the ability of other operators or service providers who require such access to provide their own services ([55]). The conditions for network sharing will also affect purchases of network equipment from producers of network equipment located in different EEA States. In addition the conditions for access to 3G infrastructure and wholesale services significantly affect the climate for investment including investment between EEA States in 3G infrastructure and services. There is therefore an effect on trade in the Community and the EEA.

([55]) Cf. Access Notice, paragraphs 144 to 148.

2.5. *ARTICLE 81(3) OF THE TREATY/ARTICLE 53(3) OF THE EEA AGREEMENT*

(136) The provision of roaming between O2 UK and T-Mobile UK falls within Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement as it has an appreciable effect on competition and affects trade between EEA States. An Agreement that restricts competition contrary to Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement can be exempted provided that it meets the following conditions set out in Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement:

(a) it must contribute to improving the production or distribution of goods or services and promote technical or economic progress;

(b) it must allow consumers a fair share of the resulting benefit;

(c) it must not impose on the undertaking concerned restrictions which are not indispensable to the attainment of these objectives;

(d) it must not afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

2.5.1. CONTRIBUTION OF THE AGREEMENT TO IMPROVING PRODUCTION OR DISTRIBUTION AND PROMOTING TECHNICAL OR ECONOMIC PROGRESS

(137) By offering each other 3G national roaming access the Parties will be able to provide better coverage, quality and transmission rates for 3G wholesale and retail services more rapidly. Their joint networks can be expected to have both a greater density and a more extended footprint than they would have individually. Since they compete with three other operators at network level, the Parties also have an incentive to realise greater density and a more extended footprint rather than merely economising on their network costs. In the light of competition from these other parties as well as from a number of service providers and possibly MVNOs at retail level, the Parties individually have an incentive to provide a wider range and better quality of services.

(138) National roaming allows the Parties to provide better coverage, quality and transmission rates for their services during roll-out phase in the IBA in competition with the other providers of 3G wholesale and retail

services. In particular, roaming within the 'residual area' of the IBA allows the Parties to provide coverage across a number of cities significantly earlier than would be the case without the arrangement.

(139) Moreover, the allocation of Designated Areas in the DA combined with reciprocal roaming arrangements allows the Parties to roll out better quality networks across a wider coverage area in areas where the economic incentives to roll out are lower. This is particularly the case for the areas beyond the 80 % coverage requirement (20 % of the UK landmass). The Parties will be covering at least a further [...] (*) of the UK population which represents a significant increase in the coverage of the UK territory (a further [...] (*) of the UK landmass). This allows 3G services to be made available more quickly to a greater number of customers, thus allowing new technology to be much more widely accessed. It is also likely to enhance competition in the DA between the Parties and the three other operators.

(140) The Agreement therefore promotes competition in the markets for 3G national roaming, for wholesale airtime and at retail level, and consequently contributes to the production and distribution of these services. Because the 3G services concerned are expected to constitute a broad range of new technologically advanced products of enhanced quality and functionality compared to 2G services, the Agreement also promotes technical and economic progress.

(141) In the IBA and the majority of the DA, the Parties are required to roll out separate networks by the end of 2007 under the terms of their licences. However, there are clearly different economic benefits arising from roaming in the IBA and the DA. The IBA covers the most strategically significant area of the UK market where the economic incentives to roll out independent networks are high and where competition between competitors will be the most critical in determining the competitiveness of the market. Even in the 'residual area' of the IBA, the economic benefits arising from roaming between the Parties, both of which are established network operators, are limited. The economic incentives to roll out in the DA, which includes less densely populated and less commercially attractive parts of the United Kingdom, are significantly lower than in the IBA, and the economic benefits arising from the roaming arrangement are correspondingly more significant, especially in the more rural areas.

2.5.2. FAIR SHARE OF THE BENEFITS RESULTING FROM THE AGREEMENT TO CONSUMERS

(142) By enabling the Parties to compete more effectively, the Agreement on 3G national roaming will enhance competition both in digital mobile network and services markets. Competition will develop more quickly and competitors will have incentives to introduce new services into the market and will be under greater pressure to reduce prices as the result of enhanced market entry with wider coverage based on 3G national roaming access between the Parties. This is likely to enable consumers to benefit earlier from a greater range of new and technically advanced 3G services that are expected to be enhanced in quality and range of choice as compared to 2G services. It also makes price competition more likely. For example, as a result of increased competition at retail level, any cost-saving benefits due to the increased competition on national roaming access and on resale of wholesale airtime to MVNOs and service providers can be expected to be passed on to end-users.

2.5.3. INDISPENSABILITY

(143) Although national roaming between licensed network operators has been identified as restrictive of competition, the Clauses in the Agreement that provide for national roaming are indispensable to the benefits.

2.5.4. NO ELIMINATION OF COMPETITION IN RESPECT OF A SUBSTANTIAL PART OF GOODS AND SERVICES CONCERNED

(144) As set out above in section 2.5.1, the competition between the five licensed operators of 3G networks and services that intend to roll out 3G networks in the United Kingdom and between MVNOs and service providers is enhanced by the Agreement.

(145) The Agreement also leaves scope for effective competition between the Parties. In spite of relying on roaming for part of its coverage, the home network operator will control its own core network, enabling it to offer differentiated services. In addition, one of the principles underpinning the Agreement is the maintenance of full competition between the Parties in the supply of 2G services and 3G services to consumers, both directly and through intermediaries (Clause 2.1.f).

(146) The ability of the home-network operator to retain control over the traffic generated by its customers outside the home network and to provide access to services that are not available on the host network is improved by the use of the Camel (customised application for mobile network enhanced logic) technology, including by means of call-back features. For 3G retail services, the control of the home-network operator over the services available to its end-users while roaming will increase because for all data transfers, users will be connected to the packet data network via their home network.

(147) In addition, the responsibility for pricing and billing remains with the home operator. Although billing data is provided by the host operator to the home operator, there is no direct relationship between the commercial conditions for the wholesale roaming offer and for the specific retail services that are based on this offer.

(148) The wholesale costs of 3G roaming are only a transport cost, albeit a significant one, in addition to which there are content costs, which for content-rich 3G data services are expected to increase in significance in relation to transport costs over time. For the core network, the costs of the operators will differ based on vendor decisions, mode of transmission within the core network (for instance based either on fixed leased lines or on a wireless microwave network), the relationship between the number of users and available capacity, operational costs and maintenance and operations. Finally, given the existence of a margin between the applicable wholesale rates and anticipated retail rates, and given that most traffic will not be roamed, it is likely that the potential for a significant degree of price differentiation remains. The Agreement also allows either Party to supply wholesale airtime to MVNOs and SPs, including via roaming on the other Party's network. Competition is therefore not eliminated for a substantial part of any of the markets identified as affected by the Agreement.

2.5.5. CONCLUSION ON ARTICLE 81(3) OF THE TREATY/ ARTICLE 53(3) OF THE EEA AGREEMENT

(149) It is concluded that all the conditions for an individual exemption pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement are met in respect of the restrictions of competition related to the Agreement on wholesale national 3G roaming between the Parties. In particular, it allows the Parties to launch 3G commercially earlier and to provide services across a wider geographic area to the benefit of consumers.

2.6. *DURATION*

(150) Pursuant to Article 8 of Regulation No 17 and to Protocol 21 of the EEA Agreement respectively, the Commission must issue a Decision pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement for a specified period, and may attach conditions and obligations.

(151) The IBA covers the urban areas with the greatest potential for infrastructure competition. Therefore an exemption for roaming even in the 'residual area' of the IBA between two established operators can only be justified for such time as the cooperation helps to promote competition during the initial roll-out phase of the network and the commercial launch and early take-up of 3G retail services. Barring significant unanticipated changes to the commercial or regulatory environment, the economic justification for applying Article 81(3) of the Treaty/Article 53(3) of the EEA Agreement to roaming in the IBA thereafter will cease to exist. In the light of the limited population covered by the 'residual area' of the IBA, the regulatory coverage obligation in the United Kingdom as well as the Parties' own plans and developments by third parties in the United Kingdom, it is appropriate to exempt roaming in the 'residual area' of the IBA until 31 December 2007.

(152) The DA covers less densely populated and commercially less attractive areas of the United Kingdom. Therefore an exemption for roaming in the DA can be justified for a longer period than in the IBA, in particular to the extent that the Parties are going beyond their regulatory obligations to cover some of the more remote parts of the United Kingdom. However, the markets affected by the restrictions in the Agreement are emerging markets and therefore the likely effects of those restrictions cannot be evaluated for a period that substantially exceeds five years. Consequently the Commission considers it appropriate to grant an exemption until 31 December 2008. The commercial and regulatory situation prevailing at the end of that period may be such that Article 81(3) of the Treaty continues to apply to roaming across parts of the DA.

(153) According to Article 6 of Regulation No 17, a Decision pursuant to Article 81(3) of the Treaty must not take effect from an earlier date than the date of notification. Accordingly, in so far as it grants an exemption from Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement , this Decision should take effect from 6 February 2002. It should apply:

(a) until 31 December 2007 in relation to national roaming in the 'residual area' of the IBA;

(b) until 31 December 2008 in relation to national roaming in the DA.

(154) This Decision is without prejudice to the application of Article 82 of the Treaty and Article 54 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, there are no grounds under Article 81(1) of the Treaty or Article 53(1) of the EEA Agreement for action on the part of the Commission in respect of the provisions of the Agreement between O2 UK Limited and T-Mobile UK Limited dated 20 September 2001 and amended on 9 April 2002 ('the Agreement') that relate to site sharing and the exchange of information necessary to permit site sharing and national roaming.

Article 2

Pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Articles 81(1) of the Treaty and Article 53(1) of the EEA Agreement are declared inapplicable to the provisions of the Agreement that concern national roaming within the residual area of the Initial Build Area as defined in the Parties' statement of 12 March 2003 from 6 February 2002 until 31 December 2007.

Article 3

Pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Articles 81(1) of the Treaty and Article 53(1) of the EEA Agreement are declared inapplicable to the provisions of the Agreement that concern national roaming within the Divided Area, from 6 February 2002 until 31 December 2008.

Article 4

This Decision is addressed to:

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and

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United Kingdom.

Done at Brussels, 30 April 2003.

For the Commission

Mario MONTI

Member of the Commission