COMMISSION DECISION

of

29 September 2004

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP/C.37.750/B2 – Brasseries Kronenbourg, Brasseries Heineken)

(Only the Dutch and French versions are authentic)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 23(2) thereof,

Having regard to the Commission's decision of 4 February 2004 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty[2] and Article 2 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty[3],

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

Having regard to the final report of the Hearing Office in this case,

Whereas:

1. THE FACTS

1.1. Subject of the case and procedure

(1) This Decision relates to an "armistice" agreement, dated 21 March 1996, between the two main French breweries, Brasseries Kronenbourg S.A. ("Brasseries Kronenbourg") and Heineken France S.A. ("Heineken France", previously: Société Générale de Brasserie S.A.) and their respective parent companies at the

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1 OJ L 1, 4.1.2003, p. 1. Regulation amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

2 OJ 13, 21.2.1962, p. 204/62. Regulation repealed by Regulation (EC) No 1/2003.

3 OJ L 354, 30.12.1998, p. 18. Regulation repealed by Regulation (EC) No 773/2004 (OJ L 123, 27.4.2004, p.18).

time, Groupe Danone ("Danone") and Heineken N.V. The armistice agreement relates to the acquisition of beverage distribution companies and the establishment of equilibrium in the parties' integrated distribution networks, in breach of Article 81 of the Treaty.

(2) In its reply of 23 December 1999 to a request for information sent by the Commission in COMP/37.614/F3 Interbrew + Alken Maes, Interbrew N.V. informed the Commission that certain anticompetitive practices between Interbrew and Alken Maes on the beer market in Belgium were modelled on similar practices between Brasseries Kronenbourg and Brasseries Heineken S.A. ("Brasseries Heineken") in France[4]. In response to this reply, on 25 and 26 January 2000, the Commission carried out investigations under Article 14(3) of Regulation No 17 on the premises of Danone and Heineken France in Paris and of Brasseries Kronenbourg in Strasbourg.

(3) During the procedure, the Interbrew group sent the Commission a number of further letters concerning practices on the French market.

(4) On 22 and 23 March 2000, at the Commission's request, the Dutch competition authority (*Nederlandse mededingingsautoriteit*) carried out an investigation pursuant to Article 13(1) of Regulation No 17 on the premises of Heineken N.V. in Amsterdam.

(5) On 30 March 2000, the Commission sent Danone, Heineken France, Tafanel SA (a wholesaler in Paris) and the *Fédération Nationale des Boissons* requests for information under Article 11 of Regulation No 17 concerning the documents obtained during the investigations carried out in January and March 2000, to which it received replies between 20 April and 19 May 2000.

(6) On 15 May 2000, the Commission sent the *Association des Brasseurs de France* ("ABF") a request for information under Article 11 of Regulation No 17 concerning beer distribution in cash-and-carry outlets, to which it received a reply on 9 June 2000.

(7) On 30 March and 6 April 2001, the Commission sent requests for information under Article 11 of Regulation No 17 to Interbrew France, Heineken France, Danone, Brasseries Kronenbourg, the *Fédération Nationale des Boissons* and the ABF concerning the brewing sector in France and a number of documents obtained during the investigations carried out in January and March 2000. Replies were received between 20 April and 18 May 2001.

(8) On 19 March 2002, the Commission sent requests for information under Article 11 of Regulation No 17 to Interbrew France, Heineken France and Brasseries Kronenbourg concerning *inter alia* their sales and certain documents obtained previously. Replies were received between 16 and 24 April 2002.

(9) On 19 December 2003 and 27 January 2004 respectively, Heineken N.V. and Heineken France and Danone and Brasseries Kronenbourg replied spontaneously

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4 Commission Decision 2003/569/CE 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), paragraph 54, (OJ L 200, 7.8.2003, p. 1).

to an informal Commission request regarding the non-implementation of the agreement and the absence of any effects produced by it[5].

(10) On 4 February 2004, the Commission adopted a statement of objections addressed to Danone, Brasseries Kronenbourg, Heineken N.V. and Heineken France. The four parties presented their written comments between 2 and 6 April 2004. In their replies, they expressly waived their right to a hearing.

1.2. The parties

(11) Brasseries Kronenbourg is the leading brewer on the French market in terms of sales volume. In 1999, its output was [5-15] million hectolitres, and it imported [250-300 000] hectolitres. The trend in its market share (in volume terms) between 1990 and 1999 is shown in Table 1[6]:

Table 1: Brasseries Kronenbourg's market shares (in volume terms) between 1990 and 1999

	1990	**1995**	**1999**
On-trade[7]	[35-45]%	[35-45]%	[35-45]%
Off-trade[8]	[45-55]%	[40-50]%	[40-50]%
Total market	[40-50]%	[35-45]%	[35-45]%

(12) Through its subsidiary, Kronenbourg Holding, formerly Elidis Holding ("Elidis"), Brasseries Kronenbourg has a national network of wholesalers[9] which distributes beer and other beverages mainly to the on-trade. In 1999, Brasseries Kronenbourg achieved a turnover of €[700-750] million through its brewing business in France and €[450-500] million through the distribution business of Elidis[10].

(13) Until July 2000, Brasseries Kronenbourg was wholly owned by Danone, one of the leaders in the international food industry. Danone's three basic business sectors are fresh dairy products, mineral waters and biscuits. Its other brewing interests included Alken Maes in Belgium, holdings in San Miguel and Mahou in Spain and Birra Peroni in Italy, and two joint ventures in China. In 1999, the group's consolidated turnover was €13.3 billion[11]. In July 2000, Danone sold Brasseries Kronenbourg and Alken Maes to the United Kingdom brewer, Scottish & Newcastle plc, [CONFIDENTIAL][12].

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5 Doc. 10695 to 10703 and 10736 to 10737.

6 Brasseries Kronenbourg estimate, doc. 10093-162, and in particular doc. 10097.

7 Beer sold for consumption on the premises.

8 Beer sold in shops and supermarkets – includes distributor brand products and low-price products brewed for large retailers.

9 See, for example, doc. 8031.

10 Doc. 10093-162, and in particular doc. 10095.

11 Source: Danone's website, see in particular doc. 10514.

12 Commission Decision of 11 July 2000 declaring a concentration to be compatible with the common market (Case No IV/M.1925 – Scottish & Newcastle/Groupe Danone) pursuant to Council Regulation (EEC) No 4064/89 (OJ C 238, 27.8.2000, p. 9).

(14) Brasseries Heineken is the second largest brewer on the French market. In 1999, its output was some [6-8] million hectolitres[13]. It also imported some [70 000 – 80 000] hectolitres[14]. Brasseries Heineken is a wholly owned subsidiary of Heineken France, the Heineken group's holding company in France. In 1996, Heineken France acquired Brasseries de Saint-Omer (Saint-Arnould group) and the Fischer group. The trend in Heineken France's market share (in volume terms) is shown in Table 2[15]:

Table 2: Heineken France's market shares (in volume terms) between 1990 and 1999

	1990	**1995**	**1999**
On-trade	[20-30]%	[25-35]%	[30-40]%
Off-trade	[20-30]%	[15-25]%	[25-35]%
Total market	[20-30]%	[20-30]%	[25-35]%

(15) Heineken France also controls France Boissons S.A. ("France Boissons"), whose subsidiaries distribute beer and other beverages to the on-trade through a national network of wholesalers[16]. In 1999, Heineken France had a turnover of €[700 to 750] million in the brewing sector and €[600 to 650] million in the distribution of beverages[17].

(16) Heineken France is a subsidiary of Heineken N.V., a company under Dutch law, listed on the Amsterdam stock exchange. Heineken N.V. controls the Heineken group, one of the leading brewing groups in the world. In 1999, the group's consolidated turnover was €6.1 billion[18].

1.3. The other producers in the French brewing industry

(17) Interbrew France S.A. ("Interbrew France") is the third largest brewer on the French market. Since 1993, it has imported all of the products which it markets. In 1999, its volume amounted to some [1-3] million hectolitres[19]. The trend in its market share (in volume terms) is shown in Table 3[20]:

Table 3: Interbrew France's market shares (in volume terms) between 1990 and 1999

	1990	**1995**	**1999**
On-trade	[15-25]%	[15-25]%	[10-20]%

13 Heineken France's reply, doc. 9297-9334, and in particular doc. 9304.
14 Heineken France's reply, doc. 9297-9334, and in particular doc. 9304.
15 Heineken France estimate, doc. 9297-9334, and in particular doc. 9308.
16 Doc. 8043.
17 Heineken France's reply of 10 May 2001, doc. 10166.
18 Heineken France's reply, doc. 9297.
19 Interbrew France's reply, doc. 10342-363, and in particular doc. 10344.
20 Interbrew France estimates, doc. 10730.

Off-trade	[1-10]%	[1-10]%	[1-10]%
Total market	[5-15]%	[5-15]%	[5-15]%

(18) Interbrew France also controls beverage distribution companies, but its network is less extensive than those of Brasseries Kronenbourg and Heineken France[21]. In 1999, its turnover was €[200-250] million and that of its distribution subsidiaries €[100-150] million[22].

(19) Interbrew France is an indirect subsidiary of Inbev N.V. (formerly Interbrew N.V.), a company under Belgian law, listed on the Brussels stock exchange[23]. Inbev N.V. controls the Interbrew group, which is one of the three leading brewing groups in the world. In 1999, the group's consolidated turnover was around €4.35 billion[24].

(20) In 1999, the other five leading breweries in France were: Saverne (Karlsbräu group), Terken, Météor, Schutz and Brasseurs de Gayant. A number of other companies operate on a purely regional basis, for example, Castelain, Saint Sylvestre, la Choulette and Annoeuillin in Nord – Pas-de-Calais[25].

1.4. Structure of the market

1.4.1. Structure of supply

(21) In 1999, the brewing companies operating in France had a turnover of some €1.75 billion from an output of 19.9 million hectolitres of beer (including exports). Output in 1999 was slightly down on output in 1992 (21.3 million hectolitres). In addition, between 1990 and 2000, the number of brewing companies fell from 27 to 15[26].

(22) The structure of supply remained relatively stable over the ten years. Brasseries Kronenbourg, Brasseries Heineken and Interbrew France accounted for more than [75-85]% of the volume of output in 1999. The companies already held some [75-85]% of the market in 1990, and their respective market shares changed relatively little during the ensuing period[27]. The increase in Heineken France's market share in the mid-1990s is due mainly to its acquisition of the Saint-Arnould and Fischer groups rather than to any internal growth[28]. Similarly, the main beer brands saw little change over the decade.

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21 Doc. 8055.

22 Interbrew France's reply of 18 May 2001, doc. 10342-363, and in particular doc. 10344.

23 At the time of the facts being described, Interbrew France was 99.9% owned by Immobrew, a company 95% owned by Interbrew Belgium, itself a wholly owned subsidiary of Interbrew N.V., see doc. 10047.

24 Interbrew France's reply of 18 May 2001, doc. 10342-363, and in particular doc. 10343.

25 *Boissons de France* magazine, February 2000, doc. 7346.

26 Sources: *Confédération des Brasseurs du Marché commun* ("CBMC"), doc. 10518, and ABF, doc. 7219.

27 See the market shares mentioned in paragraphs (11), (14) and (17).

28 See, for example, *arrêté ministérielle* of 20 August 1996 on a merger in the beer industry, *Bulletin officiel de la Concurrence*, 25 March 1997, doc. 10519-10528.

(23) Since 1995, Brasseries Kronenbourg, Brasseries Heineken and Interbrew France have also taken over a large part of the wholesale beer distribution trade (see paragraph (26)).

1.4.2. Demand

(24) A total of 21.4 million hectolitres of beer were sold in France in 2000[29]. Total consumption fell slightly over the ten years. As in other Member States, demand comprises two distribution channels: on the one hand, the sale of beer for consumption off the premises ("the off-trade") and, on the other, sales of beer for consumption on the premises ("the on-trade"). As may be seen from Table 4, the volume of demand increased very slightly in the off-trade between 1990 and 2000, whereas in the on-trade it fell by around 25% during the same period[30].

Table 4: Volume of sales in France between 1990 and 2000

Beer sales ('000 hectolitres)	**1990**	**1995**	**2000**
On-trade	9 017	7 776	6 634
Off-trade	14 334	14 914	14 786
Total	23 351	22 690	21 420

(25) The off-trade, comprising mainly supermarkets and hypermarkets, accounted for slightly over two thirds of the total volume of beer sales in France in 2000[31], a proportion which tended to increase over the ten-year period. Some 90% of demand in the off-trade is accounted for by seven groups of large retailers[32]. The latter generally obtain their supplies direct from the brewers.

(26) The on-trade accounts for less than one third of the total market in volume terms, and its share declined over the ten-year period[33]. The on-trade has two levels: wholesale and retail. Wholesale distribution is performed by wholesalers, who also sell other types of beverages. Since 1995, the two brewery groups involved in this case and Interbrew have integrated a substantial part of wholesale demand, acquiring numerous independent wholesalers. Thus, [65-75]% of the total volume of draught beer[34] sold in 2000 was distributed by the subsidiaries of the three undertakings, including [55-65]% by the subsidiaries of the Heineken group and of Danone/Brasseries Kronenbourg, whereas in 1995 [70-80]% of the total was distributed by independent distributors. This trend is mainly due to the growth of

29 ABF's reply, doc. 7219-7230, and in particular doc. 7220.

30 Source: ABF, doc. 7219-7230, and in particular doc. 7220.

31 ABF's reply, doc. 7219-7230, and in particular doc. 7220.

32 See, for example, the Commission Decision of 30 October 1997 declaring a concentration compatible with the common market (Case No IV/M.991 - Promodès/Casino) in accordance with Council Regulation (EEC) No 4064/89 (OJ C 376, 11.12.1997, p. 12), and the Commission Decision of 25 January 2000 declaring a concentration compatible with the common market (Case No IV/M.1684 - Carrefour/Promodès) in accordance with Council Regulation (EEC) No 4064/89 (OJ C 164, 14.6.2000, p. 5).

33 ABF's reply, doc. 7219-7230, and in particular doc. 7220.

34 80% of the beer consumed in the on-trade is draught beer, *Boissons de France* magazine, February 2000, doc. 7346.

the Heineken France and Brasseries Kronenbourg networks. The share of the total volume of draught beer sold by the subsidiaries of Heineken France rose from [5-15]% to [30-40]% during the period and that of the subsidiaries of Brasseries Kronenbourg from [5-15]% to [25-35]%, while the share of the subsidiaries of Interbrew France rose from [1-5]% to [5-10]%[35]. The wholesalers of the Heineken France and Brasseries Kronenbourg networks are spread throughout most of the regions of France; their geographical coverage is thus greater than that of the competing networks[36].

(27) This vertical integration trend has created customer-supplier relationships between the main breweries involving substantial quantities of beer. Since 1996, the distribution networks of Heineken France and Brasseries Kronenbourg have each been distributing more than [250 000-350 000] hectolitres of beer of their competitors' brands[37], including, in 2000, more than [25-35%] of the draught beer marketed by Interbrew France[38].

(28) As far as retail sales in the on-trade are concerned, brewers make a distinction between two segments. Firstly, the traditional pub, hotel and restaurant segment. Demand there is highly dispersed, with the number of establishments being estimated at 170 000. Secondly, the more modern sector known as the "third market" comprises national hotel and restaurant chains, and in particular fast-food outlets, canteens, transport, leisure sites, vending machines and local shops[39].

1.4.3. Trade between Member States

(29) The volume of beer imports and exports and their share in national consumption increased between 1991 and 2000, as shown in Table 5[40]:

Table 5: Volume of imports and exports and their share in consumption in France between 1991 and 2000

	1991	1997	2000
Imports ('000 hectolitres) (share in total consumption)	2 906 (13%)	4 319 (20%)	4 882 (23%)
Exports ('000 hectolitres) (share in total consumption)	1 017 (4%)	2 147 (10%)	2 388 (11%)

(30) Imports are mainly from Belgium (some 45%), Germany (20-25%), the Netherlands (some 10%) and the United Kingdom (some 10%). About half of imports are attributable to Interbrew France, most of whose products are brewed by the Interbrew group in Belgium. Exports are mainly to the United Kingdom

35 Interbrew France estimate, doc. 7875-8078, and in particular 8067.

36 Doc. 9141-9157.

37 Brasseries Kronenbourg's reply, doc. 8957-8963 ; doc. 10093-10162, and in particular doc. 10105 ; Interbrew's reply, doc. 10713-10723 and Heineken France's reply, doc. 9335-9356 and doc. 10167-10168.

38 Doc. 8066.

39 *Boissons de France* magazine, January 2001, doc. 7344.

40 Source: CBMC, see in particular doc. 10502 and 10504.

(some 60%), Belgium (some 15%) and Germany (5-10%)[41]. In addition to the official exports, large quantities are purchased by individuals from the United Kingdom in French supermarkets (more than 2 million hectolitres in 2000)[42]. The scale of these purchases is mainly due to the difference between the level of excise duty on beer in France and the United Kingdom.

1.5. The armistice agreement of 21 March 1996

1.5.1. Introduction

(31) As described in paragraphs (33) to (46), on 21 March 1996 Danone, Heineken N.V. and their respective subsidiaries at that time, Brasseries Kronenbourg and Heineken France, concluded an "armistice" on their acquisitions of distribution companies and on maintaining equilibrium in their distribution networks.

(32) In particular, they agreed, firstly, on a provisional freeze on acquisitions (ban on any new acquisitions of distributors outside an agreed list), secondly, on a balancing of the total volume of beer distributed through each party's network and, thirdly, on a balancing of the volume of beer brands marketed by each party that would be distributed by the other.

1.5.2. Context of the agreement

(33) On 12 February 1996[43], a member of the board of Heineken N.V. and the then CEO of Heineken France met in the offices of Danone in Paris with the director of Danone and the CEO of Brasseries Kronenbourg. The management of Heineken France decided to hold this meeting in order to announce to Danone their planned acquisition of the Fischer and Saint-Arnould groups and to see what Danone's reaction was [BUSINESS SECRETS], because of the Saint-Arnould group's distribution of large quantities of Kronenbourg beer. According to Heineken France, the director of Danone and the CEO of Brasseries Kronenbourg reacted vehemently at the meeting to the announcement of Heineken France's planned acquisition of the Saint-Arnould group. "In view of this reaction, it was envisaged at their request that discussions should take place on a possible rebalancing of positions in on-trade distribution"[44].

(34) Heineken France states, however, that such discussions never took place and that Brasseries Kronenbourg reacted unilaterally to the acquisitions of the Fischer and Saint-Arnould groups by taking over the wholesalers Blanchet, Lemay, GBN, Freyssinet and Soleilhavoup, which distributed substantial volumes of Heineken beer. "All in all, in only a few weeks, Kronenbourg had taken over wholesalers distributing almost [180 000-230 000] hectolitres of draught beers of the Heineken group, i.e. around [5-15%] of the group's sales on the French on-trade

41 Source: ABF: Monthly customs survey, doc. 592-601.

42 ABF's reply of 20 April 2001, doc. 7219-30, and in particular 7221.

43 This date is indicated in documents 4680 ; 10175-10180, and in particular doc. 10176 ; 9252-9296, and in particular doc. 9267 ; and doc. 10170-10171 ; however, the date is indicated as 13 February 1996 in doc. 4676-8.

44 Original in French: "Compte tenu de cette réaction, il fut envisagé à leur demande que des discussions sur un éventuel rééquilibrage des positions en distribution CHD aient lieu". Doc. 9252-9296, and in particular 10170-10171.

market for the sale of beer"[45]. Heineken France reacted in turn by purchasing some 20 wholesalers, substantially inflating the value of the businesses. According to Heineken France, "if this situation had continued or intensified, it would certainly have had a lasting effect on the profitability and investment capacity of the two companies. Accordingly, a 'cease fire' was concluded, the only effect of which was a return to normal competition. Since there was no follow-up, it did not affect the behaviour of the two companies, which continued to engage in intense competition with one another"[46].

(35) The meeting of 12 February 1996 is also mentioned in three in-house memos drafted within the Heineken group. First, in a record of the meeting drafted for the board of Heineken N.V. on 14 February 1996, a member of the Heineken N.V. board describes the reaction of the Danone group's representatives to the announcement of Heineken France's acquisition plans, going on to state[47]:

"We quickly came to the conclusion that there is only a problem in distribution and that both parties must ensure that a solution is found for it. [The director of Danone] urged that this must be done before mid-March"[48].

The record concludes as follows on this subject:

"It is of the utmost importance that we ensure that a solution is found for the distribution problem"[49].

(36) Second, a memo from Heineken N.V.'s general manager to the board of the company, dated 22 March 1996, describes the conclusions reached at the meeting as follows[50]:

"As a result of our purchase of the Fischer group and of St. Arnould, the balance of power in the on-trade distribution has been disrupted.

During the meeting in France with our French 'friends', it was agreed that our respective general managers should in one month come up with a proposal designed to restore balance"[51].

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45 Original in French: "Au total, en à peine quelques semaines, Kronenbourg avait pris le contrôle d'entrepôts distribuant pour près de [180 000 – 230 000] hectolitres de bières en fût du groupe Heineken, soit environ [5-15%] des ventes du groupe sur le marché français de la vente de bière en CHD".

46 Original in French: "Si cette situation avait perduré ou s'était intensifiée, elle aurait très certainement affecté durablement la rentabilité et la capacité d'investissement des deux entreprises. C'est pourquoi, un « cessez-le feu » fut conclu, dont le seul effet fut le retour à une concurrence normale. N'ayant donné lieu à aucun suivi, il n'affecta pas le comportement des deux entreprises qui continuèrent à se livrer une concurrence intense". Doc. 9252-9296, 10170-10171.

47 Doc. 4676-4677.

48 Original in Dutch: "Gezamenlijk kwamen wij vrij snel tot de conclusie dat er alleen een probleem ligt in de distributie en dat beide partijen er voor moeten zorgdragen dat er een oplossing gevonden wordt. Door […] werd er op aangedrongen dat zulks voor medio maart moet plaatsvinden".

49 Original in Dutch: "Het is van het grootste belang dat wij zorgen, dat er een oplossing komt voor het distributie vraagstuk".

50 Doc 10172-10174.

51 Original in Dutch: "Als een consequentie van onze koop van de Fischer groep en van St. Arnould is het machtsevenwicht in de horecadistributie verstoord.
Tijdens de vergadering met onze 'vrienden' in Frankrijk werd afgesproken dat na een maand onze respectievelijke general managers een voorstel zouden uitwerken teneinde de balans te herstellen".

(37) Third, the conclusions reached at the meeting are summed up in a memo from Heineken France's CEO to the board of Heineken N.V. entitled "Horeca Distributor acquisitions in France (price war)"[52] and dated 17 March 1996 [53]:

"In a first reaction during the meeting with Danone (Mr [a member of the board of Heineken N.V.] present), on February 12, Danone appeared surprised but only worried about the Horeca distributor development. However during the meeting it was agreed that within one month […] (KRO General Manager) and myself would come back with an acceptable proposal to both parties"[54].

(38) The acquisition war is also described in the memo drafted by Heineken France's CEO on 17 March 1996, referred to in paragraph (37). Heineken France's CEO begins by presenting the situation in the distribution sector following Heineken France's acquisition of the Fischer and Saint-Arnould groups. According to Heineken France's CEO, these acquisitions disrupted the balance between the volume of Kronenbourg beers distributed by Heineken France's integrated network and the volume of Heineken beers distributed by Brasseries Kronenbourg's subsidiaries. The memo notes that, before the acquisitions, France Boissons, a subsidiary of Heineken France, distributed [100-200 000] hectolitres of Danone/Kronenbourg beers, while the Danone group's subsidiaries distributed [100-200 000] hectolitres of Heineken beers. However, following the acquisitions, the volume of Danone/Kronenbourg beers distributed by Heineken France's subsidiaries more than doubled, amounting to [200-300 000] hectolitres.

(39) The memo drawn up by Heineken France's CEO goes on to describe the accelerated pace of distributor acquisitions in the days following the meeting held on 12 February 1996. Thus, Danone is reported to have acquired Blanchet, Lemay, GBN, Freyssinet and Soleilharous [*sic*], while Heineken France purchased Weber-Ritt, Begin, Paray, Michenot, Chaffard, Barth and Rivoise. According to Heineken France's CEO, Danone paid very high prices for these acquisitions. He states that, following these transactions, [200-300 000] hectolitres of Heineken beers were distributed by Danone's subsidiaries, while [300-400 000] hectolitres of Kronenbourg beers were distributed by the Heineken France/France Boissons network. The memo continues:

"Two things are particularly worrying at this point in time.

-A real price war has begun regarding acquisition prices. Until the war, we were able to acquire a wholesaler for approximately […] of its Gross Margin, which gave us an IRR of […] to […]. Now prices are paid of up to […] and […] of Gross Margin, which will never allow for a satisfactory return at wholesaler level. Yet both parties continue because the control of their very keg beer volume is at stake, if not tomorrow, in the long run in any case.

…

…, if Danone and Interbrew do not stop the war, we cannot afford to stop on our own without jeopardising our long term position"[55].

(40) Following this description of the situation, the memo of 17 March 1996 goes on to describe the strategy adopted by Heineken France:

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52 Original in English.

53 Doc. 10175-10180.

54 Original in English.

55 Original in English.

"Our strategy now is to convince Danone that the only losers are our two companies and that it would be much better to make peace, agree on a list of wholesalers 'naturally' belonging to them and those belonging to us. Such list should indicate an equilibrium of total integrated volumes by each company as well as an equilibrium of the branded keg beer volumes controlled back and forth. We could then in the next years continue our respective integration processes at reasonable prices, according to these rules of game. However this policy will be difficult to implement as Interbrew has now entered the battle field and tries to buy the remaining free wholesalers.
So far Danone's position has been agreement to the principle. However, they do not want to recognise volumes as being 'controlled' by them, if realised through wholesalers where they are minority shareholder – even if they have a right of first refusal. Clearly we have not accepted that.
…
I have had a telephone conversation with [the general manager of Brasseries Kronenbourg] on March 15 and he again agreed with the urgency to stop this stupid war, but he was not fully convinced that Messrs. [the deputy CEO and the director of Danone] will share his view. He will call me back Monday morning to give me the Danone position"[56].

1.5.3. The armistice agreement

(41) In a second memo to the Heineken N.V. board, also entitled "Horeca Distributor acquisitions in France (price war)"[57], dated 22 March 1996, Heineken France's CEO describes the terms of the "armistice" agreement concluded the previous day between Heineken France and Danone[58]:

"Armistice
Yesterday we have reached agreement with Danone to put an end to the stupid and costly acquisition war. We share the objective that between our two groups equilibrium must exist according to a general rule that none of the two is dominant in the Horeca market with regard to three main aspects:
1. Volume integrated through each of the distribution networks must be equal. For the time being, minority shareholdings with pre-emptive rights count as controlled by. However, Danone reserved the right to come back to this issue.
2. Volume of the other party's brands, controlled by integrated network of the competitor must be equal.
3. Wholesalers to be integrated in the future must be identified as 'naturally' belonging to one of the two groups, conditional to the long term equilibrium according to items 1 and 2.
In order to avoid any misunderstanding for the short run, we have both signed a list of wholesalers that were either actually acquired during the war, or where we committed ourselves to a firm offer and now await the reaction of the present owner. For the time being no other engagements will be made by either party outside these two lists.
Based on actual 1995 volume figures the status quo regarding the equilibrium will be determined and if necessary adjustments through wholesaler transfers back and forth will be effectuated.
…

56 Original in English.
57 Original in English.
58 Doc. 8335-8337 and doc. 10181-10185.

The following table shows the status quo in terms of volume integrated by each party and volumes controlled back and forth.

Status Quo

Brands controlled by distributors	Heineken distribution	Danone distribution	Interbrew distribution	Independent distribution	Total
	Volume %-age	Volume %-age	Volume %-age	Volume %-age	Volume %-age
Heineken brands	[1200-1300] [50-60%]	[250-350] [10-20%]	[0-100] [1-10%]	[580-680] [20-30%]	[2300-2400] [100%]
Danone brands	[300-400] [10-20%]	[1100-1200] [50-60%]	[0-100] [1-10%]	[600-700] [30-40%]	[2100-2200] [100%]
Interbrew brands	[200-300] [20-30%]	[150-250] [10-20%]	[150-250] [10-20%]	[320-420] [30-40%]	[1000-1100] [100%]
Other	?	?	?	?	[900-1000] [100%]
Total	[1500-2500] [30-40%]	[1600-1700] [20-30%]	[200-300] [1-10%]	[1600-1700] [20-30%]	[6350-6450] [100%]

As can be seen from the table, currently Heineken distributors control [250-350 000] hectolitres of Danone-brands keg beer, whereas Danone controls only [250-350 000] hectolitres of Heineken-brands keg beer. In the following negotiations we will have to determine whether this is sufficiently stable to be regarded and accepted as 'equilibrium' or not. The following table indicates that in the end situation when all relevant wholesalers would be integrated, the position will still be favourable to Heineken. (Integration according the rule 'a current independent wholesaler naturally belongs to that party with a majority volume position in it').

End Situation

Brands controlled by distributors	Heineken distribution	Danone distribution	Interbrew distribution	Independent distribution	Total
	Volume %-age	Volume %-age	Volume %-age	Volume %-age	Volume %-age
Heineken brands	[1600-1700] [70-80]%	[350-450] [10-20]%	[0-100] [0-10]%	[100-200] [0-10]%	[2300-2400] 100%
Danone brands	[350-450] [10-20]%	[1600-1700] [70-80]%	[0-100] [0-10]%	[0-100] [0-10]%	[2100-2200] 100%
Interbrew brands	[300-400] [30-40]%	[200-300] [20-30]%	[400-500] [40-50]%	[0-100] [0-10]%	[1000-1100] 100%
Others	?	?	?	?	[900-1000] 100%
Total	[2400-2500] [30-40]%	[2200-2300] [30-40]%	[500-600] [0-10]%	[200-300] [0-10]%	[6350-6450] 100%

"[59].

(42) [BUSINESS SECRETS][60].

[59] Original in English.

(43) Two lists of wholesalers are attached to the memo[61]. The first sets out the eleven wholesalers in which Danone acquired a holding and two others which were "approached" by it. The second list contains seventeen new subsidiaries acquired by Heineken France and eleven other wholesalers involved in "synergies" with it. The wholesalers included on the lists are from all parts of France.

(44) The "armistice" of 21 March 1996 is also referred to in a memo sent on 22 March 1996 by the general manager of Heineken N.V. to the board of Heineken N.V.[62]:

"Following intensive telephone discussions, a *status quo* has been temporarily declared, and the general managers are trying to reach an agreement to stop the forcing up of prices. In principle, the chairmen of the three companies concerned[63] will meet next week if the general managers are unsuccessful"[64].

(45) Next, the sequence of events leading to the "armistice" agreement is summarised in a handwritten memo drafted on the Heineken N.V. general manager's headed note paper[65]:

"Febr. 12: Lunch: [a member of the Heineken N.V. board]/[CEO of Heineken France] – [director of Danone]/[general manager of Brasseries Kronenbourg]; [CEO of Heineken France] + [general manager of Brasseries Kronenbourg]: Proposal to redistr. wholes. in North.

…

March 4-9: More acquisitions;

11: We give [CEO of Heineken France] approval to react "Keep us informed";

14: [member of Heineken N.V. board] announces in RvC;

17: Noodklok: [CEO of Heineken France] warns;

-Intensive teleph. contact: [CEO of Heineken France – general manager of Heineken N.V.]/[director of Danone];

-Meeting [CEO of Heineken France] – [general manager of Brasseries Kronenbourg]: statu quo;

22: Brief [general manager of Heineken N.V.] – RvC"[66].

(46) Lastly, in its reply of 12 May 2000 to a request for information sent by the Commission, Heineken France confirmed that, following the meeting held on 12 February 1996, the CEO of Heineken France and the general manager of Brasseries Kronenbourg did meet in March 1996 to examine the possibility of a "cease fire" in the distributor acquisition war[67].

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60 [BUSINESS SECRETS].

61 Doc. 10184-10185.

62 Doc. 10172-10174.

63 It appears from this memo that the third company in question is the Interbrew group ("onze Belgische vriend"). However, the Commission has no proof of the participation of that company in the "armistice" agreement.

64 Original in Dutch: "Na intensief telefonisch kontakt is voorlopig een status quo afgekondigd en trachten de general managers tot een vergelijk te komen om deze prijsopdrijving te stoppen. In principe hebben de Voorzitters van de drie betrokken ondernemingen een afspraak volgende week voor het geval de general managers er niet uitkomen".

65 Doc. 4680.

66 Original in English.

67 Doc. 6924-73; 9252-9296, and in particular doc. 9267; doc. 10565.

(47) In its reply to the request for information sent on 30 March 2000 under Article 11 of Regulation No 17, Danone refused to answer the questions concerning the armistice agreement, on the grounds that the questions were intended to get Danone to acknowledge infringement of the competition rules. In reply to a subsequent request for information, Brasseries Kronenbourg confirmed that certain company executives took part in meetings with Heineken group employees from January to April 1996. However, Brasseries Kronenbourg said it had not been able to trace any documents relating to the meetings[68].

1.6. Non-implementation of the agreement

(48) According to the information available to the Commission, the armistice agreement was not implemented. In the first place, it is evident that the parties did not comply with the "short-term" aspect of the agreement, i.e. the undertaking not to acquire the other party's wholesalers, as set out in two lists, and not to acquire wholesalers not included on the lists (see paragraphs (41) to (43)). The reality was that some wholesalers allocated to one party were subsequently acquired by the other party, and the two parties continued to acquire wholesalers not included on the lists. Secondly, the long-term aspect of the agreement, i.e. the equilibrium to be achieved as regards the volume of each party's brands included in the distribution network controlled by the other party and as regards the total volume included in the network of each party (see paragraph (41)), was never pursued in practice. In the period from 1996 to 2002, the parties rather tended, within the distribution network they controlled, to supplant their competitors' beer by their own beer[69]. An agreement intended to ensure equilibrium between brands thus became pointless.

2. PARTIES' MAIN COMMENTS

(49) In their written replies to the statement of objections, the parties presented the following arguments.

(50) Danone made the following main points:

- The meeting held on 12 February 1996, on the initiative of Heineken, did not result in an agreement or a concerted practice. It was not in Danone's interests to conclude any such agreement, and it pursued a unilateral aggressive strategy while at the same time letting Heineken believe that a negotiated solution was possible. On 12 February 1996, all the parties did was note that there was disequilibrium and defer the meeting. The acquisition war after the meeting and Heineken's memo of 17 March 1996, and in particular the reference to the need to convince Danone to make peace (see paragraph (40)), confirm the fact that there was no agreement or concerted practice.

- It does not dispute the fact that the discussions held on 21 March 1996 resulted in the armistice agreement. However, Heineken organised the meeting, and the agreement was not implemented.

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68 Doc. 8942; 8885; 10102; see also doc. 8874-8875.

69 See doc. 10695-10703 and doc. 10736-10737.

– In determining the amount of the fine, account must be taken of the fact that the armistice had no impact on competition, was confined to a very limited business sector suffering a significant decline and lasted for only one day. Furthermore, the geographical size of the relevant market was small. There were no aggravating circumstances, such as repeated commitment of an infringement, to be taken into account. On the contrary, there were mitigating circumstances to be taken into account, notably the fact that the armistice was never implemented, the passive role played by Danone and Danone's cooperation during the procedure.

(51) Brasseries Kronenbourg referred the Commission to Danone's comments.

(52) Heineken N.V. and Heineken France made the following main points:

– No agreement was concluded at the meeting held on 12 February 1996. The sole purpose of the meeting was to reassure Brasseries Kronenbourg as regards Heineken's acquisitions of the Fischer and Saint-Arnould groups (including Saint-Arnould's subsidiary Brasserie Saint-Omer), which distributed a large volume of Kronenbourg beer. The discussions were deferred to another meeting which never took place. The lack of any agreement was demonstrated by the trade war ("wholesaler war") that followed the meeting and by the documents relating to the meeting.

– No agreement was concluded at the meeting held on 21 March 1996. Although the parties met on that date, the meeting dealt essentially with the temporary freeze on acquisitions, i.e. the undertaking to put an end to the "wholesaler war" and to call a halt at the wholesalers acquired during the war. The other aspects of the armistice amounted to no more than vague objectives that were too general to have any practical significance and were never spelt out in explicit terms. The existence of any agreement on a temporary freeze on acquisitions must also be questioned given the circumstances and context relating to such alleged agreement: it was never implemented; the purpose of the in-house memos describing the armistice[70] was to reassure the board of Heineken N.V. of the commercial viability of the acquisitions carried out, and no mention was made of the armistice in any of the documents obtained on the premises of Brasseries Kronenbourg or of Danone. A Brasseries Kronenbourg in-house presentation on "preliminary objectives 1997-1999", on the contrary, mentions "a graduated riposte to counter Heineken's offensive"[71].

– Even if an armistice agreement had actually been concluded between the parties, its impact on competition would have been *de minimis*, since the agreement was not such as to significantly prevent, restrict or distort competition. Furthermore, the relevant product market should be defined as the market for the sale of wholesalers, not the on-trade market. The agreement thus had no impact on the final consumer.

– The armistice agreement was not such as to have any significant effect on trade between Member States because of its extremely limited impact on

70 Doc. 4680, 8335-8337, 10172-10174 and 10181-10185.

71 Original in French: "objectifs préliminaires 1997-1999", "une riposte graduée pour contrer l'offensive Heineken". Doc. 10151-10153.

competition and the fact that it related to competition between brewers for the acquisition of wholesalers and not to the conditions governing the distribution of imported products.

– As far as fines were concerned, given the context and very particular circumstances of the case, and in particular the limited nature and scope (object) of the alleged agreement, the lack of any specific impact whatsoever on the market and the limited size of the relevant geographic and product markets, the armistice could at most be regarded as a "minor" infringement. There was no reason to increase the fine for deterrent purposes or to take account of the duration of the infringement, since the armistice constituted an "instantaneous" infringement that was neither "particularly harmful" nor a "classic" infringement. In addition, no aggravating circumstances could be invoked as far as Heineken was concerned. In particular, Heineken did not play the role of leader or instigator of the armistice, nor did it implement any retaliatory measures or make any gains from the agreement. On the contrary, by way of attenuating circumstances, account should be taken of the fact that the armistice was not actually implemented, that Heineken cooperated during the procedure and that there was reasonable doubt as to whether the agreement constituted an infringement. If a fine were imposed, therefore, it should be limited to at most a symbolic amount.

3. LEGAL ASSESSMENT

3.1. The relevant sector

(53) The Commission notes at the outset that, in accordance with the case law of the Court of Justice of the European Communities, in assessing obvious restrictions of competition such as market-sharing under Article 81(1) of the Treaty, it is not necessary to take account of the structure of the market concerned and thus to define the relevant market[72]. Since the restriction at issue here is one having as its object the restriction of competition (see also paragraphs (66) to (68)), it is not necessary to define the market. The Commission therefore confines itself to the following comments on the relevant sector.

(54) In its previous decisions on the brewing industry, which did not relate to practices having as their object the restriction of competition, the Commission concluded that there was a separate market for beer, which differed from other beverages on account, in particular, of its alcoholic properties, its taste and its price[73]. The Commission's investigation in the present case has not brought to light anything to suggest that the relevant sector is any broader. Apart from the fact that the practice at issue is confined to brewery products, numerous documents obtained

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72 Judgment of the Court of First Instance of 15 September 1998 in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and others* v *Commission* [1998] ECR II-3141, paragraph 136.

73 Commission Decision 96/204/EC of 20 September 1995 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case IV/M.582 - Orkla/Volvo) (OJ L 66, 16.3.1996 p. 17).

from the undertakings concerned indicate that they consider that the relevant sector does not extend beyond beers and shandies[74].

(55) The case law of the Court of Justice and the decisions adopted by the Commission in this sector have also drawn a distinction between the on-trade and the off-trade on the grounds, *inter alia*, that, from the consumer's point of view, the sale of beer in licensed premises is associated with the provision of services and that, on the supply side, the brewers have specific distribution systems for the on-trade[75]. This assessment was confirmed by the Commission's examination of the sector in the present case. In particular, the undertakings concerned determine their business policy, including pricing, and organise the distribution of their products separately for the on-trade and the off-trade. Since the restriction at issue relates to distribution through wholesalers and since, in general, they do not supply the off-trade (see paragraph (25)), the Commission takes the view that the relevant sector is the on-trade.

(56) Heineken N.V. and Heineken France maintain that the relevant product market is the market for the sale of wholesalers, since the armistice related essentially to the temporary freeze on wholesaler acquisitions. The Commission does not share this view. The armistice agreement did not relate solely to the temporary *status quo* or temporary freeze on acquisitions, but stemmed rather from the general objective "that between [the] two groups equilibrium must exist according to a general rule that none of the two is dominant in the Horeca market" (introduction to the description of the armistice agreement, see paragraph (41)). In addition, as is evident from the discussions held on 12 February 1996, the desire to maintain or re-establish such equilibrium existed well before the armistice agreement (see paragraphs (33) to (40)). Apart from the control of investment, the temporary freeze on acquisitions was a preliminary step towards re-establishing equilibrium between the parties' distribution networks in the on-trade. At all events, it should be reiterated that it is not at all necessary to define the market, in view of the obvious restrictions of competition involved (see also paragraph (53)).

(57) Consequently, in line with the case law of the Court of Justice and with previous Commission decisions in this sector, the Commission considers that the relevant sector in this case is that for the supply of beer to licensed premises or the on-trade.

(58) In addition, the case law of the Court of Justice and the Commission's previous decisions in this sector, including a recent decision concerning France, concluded that the markets for beer are, at most, national[76]. The reasons underlying this conclusion include the different preferences and habits of consumers in the various Member States, with brands generally having a distinctive national character, the national organisation of distribution networks, and differences between national rules and regulations, for example, as regards the taxation of

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74 For example, docs. 931-960 and 1961-1972.

75 For example, judgment of the Court of Justice of 28 February 1991 in Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, and Commission Decision 1999/230/EC of 24 February 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.079/F3 - Whitbread) (OJ L 88, 31.3.1999 p. 26).

76 For example, judgment in *Stergios Delimitis* v *Henninger Bräu AG*, loc. cit., Commission Decision 96/204/EC - Orkla/Volvo, loc. cit., Commission Decision Scottish & Newcastle/Groupe Danone, loc. cit. and Commission Decision 1999/230/EC - Whitbread, loc. cit.

alcoholic beverages, the recycling of bottles and cans, advertising and the rules governing licensed premises.

(59) The information available to the Commission indicates that, in geographical terms, the relevant sector does not extend beyond mainland France. In particular, the main beer brands marketed in France do not have any comparable position in neighbouring countries, the relevant companies' distribution systems are confined to the national territory, and their commercial policy is defined by reference to the national territory[77].

3.2. Article 81(1) of the EC Treaty

(60) Article 81(1) of the EC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, 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.

3.3. Existence of an agreement within the meaning of Article 81(1) of the Treaty

(61) It is well established in the case law that an agreement within the meaning of Article 81(1) of the EC Treaty exists where the undertakings have expressed their joint intention to behave on the market in a certain way[78]. It is not necessary for such an agreement to be drawn up in writing; no formality is necessary; neither contractual sanctions nor implementing procedures are required. The agreement may be explicit or be evident implicitly from the behaviour of the parties.

(62) The "armistice" concluded on 21 March 1996 between Heineken N.V. and Heineken France on the one hand and Danone and Brasseries Kronenbourg on the other constitutes an agreement within the meaning Article 81(1) of the Treaty. This is clearly evident from the memo from the CEO of Heineken France of 22 March 1996:

"Yesterday we have reached agreement with Danone to put an end to the stupid and costly acquisition war. We share the objective that between our two groups equilibrium must exist according to a general rule that none of the two is dominant in the Horeca market with regard to three main aspects:

1. Volume integrated through each of the distribution networks must be equal.
…
2. Volume of the other party's brands, controlled by integrated network of the competitor must be equal.
3. Wholesalers to be integrated in the future must be identified as 'naturally' belonging to one of the two groups, conditional to the long term equilibrium according to items 1 and 2.

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77 See, for example, the market study "Le marché bières et panachés – Sources et methodologie", doc. 931-960.

78 See, in particular, judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and Others* v *Commission* (PVC II) [1999] ECR II-931, paragraph 715.

In order to avoid any misunderstanding for the short run, we have both signed a list of wholesalers that were either actually acquired during the war, or where we committed ourselves to a firm offer and now await the reaction of the present owner. For the time being no other engagements will be made by either party outside these two lists"[79].

(63) In addition, contrary to what Heineken N.V. and Heineken France allege (see the second indent of paragraph (52)), the meeting held on 21 March 1996 and the resulting armistice did not relate solely to a temporary freeze on acquisitions ("for the time being no other engagements will be made by either party outside the two lists"). The agreement also related to the establishment of equilibrium between the two groups' distribution networks ("we share the objective that between our two groups equilibrium must exist according to a general rule that none of the two is dominant in the Horeca market with regard to three main aspects: …"). These were not merely vague and general objectives, there was specific agreement on the need for equilibrium on the on-trade market and on the three main aspects of achieving it.

(64) The fact that (i) some details of the armistice agreement were to be negotiated at a later stage and that (ii) the agreement was never implemented (which is also evident from the Brasseries Kronenbourg in-house presentation entitled "Preliminary objectives 1997-1999") and (iii) consideration of the motives of the author of the memo describing the armistice do not in any way affect the existence of an agreement. Furthermore, Danone and Brasseries Kronenbourg do not dispute the fact that the discussions held on 21 March 1996 resulted in an "armistice".

(65) Lastly, the Commission agrees with the parties that there was no agreement or concerted practice between 12 February and 21 March 1996. As is evident from the in-house Heineken N.V. and Heineken France memos described in paragraphs (33) to (40), at the meeting held on 12 February 1996 the parties established the need to find a solution to the disequilibrium in the distribution networks following Heineken France's acquisition of the Fischer and Saint-Arnould groups. The general managers of the two companies were to meet in one month in order to restore equilibrium. However, immediately after the meeting, the parties embarked on a wholesaler acquisition war. Far from restoring equilibrium, therefore, they moved away from it. In addition, as is evident from the in-house memo drafted by Heineken France's CEO on 17 March 1996, Heineken France was at this time still stressing the need to convince Danone to end the acquisition war and establish equilibrium. For these reasons, the Commission considers that there is not sufficient evidence to establish the existence of an agreement or concerted practice at the meeting held on 12 February 1996.

3.4. Nature of the infringement

(66) Article 81(1) of the Treaty specifically identifies as restrictions of competition agreements between undertakings which limit or control investment or share markets. The "armistice" agreement of 21 March 1996 was intended, in the first place, to control investment by the Heineken and Danone groups, since its purpose was to bring about a rapid end to the rising cost of acquiring

[79] See paragraph (41).

wholesalers[80]. Second, the agreement is akin to one whose purpose was to share the on-trade markets between the two groups. By establishing dual equilibrium, the parties were aiming to ensure that one party did not dominate the other on this market. For this purpose, the parties agreed, firstly, on equilibrium between the total beer volumes distributed by each group[81] and, secondly, on equilibrium between the volumes of the other party's brands distributed by each group. This limited the risk that one party, while abiding by the first type of equilibrium (in total volumes), might, in the distribution network which it controlled, reduce the volume of the other party's beer, for the benefit of its own beers. These objectives are evident in particular in the memo which the CEO of Heineken France sent to Heineken N.V. on 22 March 1996 (see paragraph (62)).

3.5. Agreement having as its object the restriction of competition

(67) It is settled case law that, for the purpose of applying Article 81(1) of the Treaty, there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market[82]. It is clear from paragraphs (62) to (66) that the agreement at issue in this case had as its object the restriction of competition, in particular by requiring a freeze on acquisitions and by establishing equilibrium between the parties' distribution networks. Consequently, the Commission can conclude that there is an infringement within the meaning of Article 81(1) of the Treaty even if the agreement did not produce any effects (see paragraph (48)).

(68) Contrary to what Heineken N.V. and Heineken France allege, the fact that the armistice agreement did not produce any effects does not alter the fact that it was such as to significantly prevent, restrict or distort competition within the meaning of Article 81(1) of the Treaty. In particular, the agreement had as its object the restriction of competition between the two leading brewing groups on the French market to the detriment of other brewers and ultimately to the detriment (in terms of choice) of consumers. Any such agreement can in no way be regarded as *de minimis*.

3.6. Significant effect on trade between Member States

(69) It is settled case law that, 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[83]. Contrary to what Heineken N.V. and Heineken France suggest, therefore, there is no need for the agreement to have produced actual effects. The agreement at issue in this case was such as to influence the volume of imports into France from other Member States for the following reasons.

(70) As already noted in paragraph (56), the "armistice" agreement was not aimed solely at controlling investment through a temporary freeze on wholesaler

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80 See in particular paragraphs (39) to (41) and (44).

81 i.e. the distributed volume of their own brands, the brands of the other party and the brands of third parties.

82 See, for example, judgment of the Court of First Instance in *PVC II*, loc. cit., paragraph 741.

83 Judgment of the Court of 11 July 1985 in Case 42/84 *Remia B.V. and Others* v *Commission* [1985] ECR 2545, paragraph 22.

acquisitions, but was also intended to establish equilibrium between the two most highly developed distribution networks on the market. The Commission would point out that, between 1995 and 2000, the share of the total volume of draught beer distributed by the two networks rose from around [15-25]% to more than [55-65]%[84]. The agreement was therefore capable of influencing not only competition between the brewers in their acquisitions of wholesalers, but also the conditions for the distribution of products from other Member States. For foreign brewers without any distribution network in France, the French brewers' networks provided one of the main means of access to the market. Consequently, an agreement aimed at establishing equilibrium at national level[85] between the Heineken France and Brasseries Kronenbourg networks was such as to affect the conditions governing access to the on-trade market for foreign brewers and, hence, the volume of imports. This was moreover acknowledged by Brasseries Kronenbourg in a 1996 strategy analysis when it noted that the bipolarisation of distribution provided "a rampart against a massive and uncontrolled entry … of foreign brewers"[86].

(71) Furthermore, Interbrew France, the leading beer importer in France[87], was and still is dependent on the Heineken France and Brasseries Kronenbourg networks for the distribution of a substantial volume of its products on the on-trade market[88]. An agreement aimed at restricting competition between these two companies' distribution networks was capable of affecting the business terms they offered to Interbrew France for the distribution of its products.

(72) In view of the above, it must be concluded that the agreement was capable of affecting the volume of beer imports into France and of doing so to a significant extent.

3.7. Duration of the infringement

(73) Parties which conclude an agreement designed to restrict competition necessarily intend to reach agreement on their future competitive conduct. However, in the case at issue, the Commission recognises that the evidence available to it indicates that the armistice agreement was not put into effect. There is therefore no need to determine the duration of the infringement.

3.8. Parties to which this Decision is addressed

(74) This Decision must be addressed to the undertakings directly involved in the infringement, i.e. Danone, Heineken N.V., Brasseries Kronenbourg and Heineken France.

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84 Draught beer accounts for around 80% of consumption in the on-trade in France. See also paragraph (26).

85 See paragraph (43) and judgment of the Court of 19 February 2002 in Case C-309/99 *Wouters* [2002] ECR I- 1577, paragraph 95.

86 Original in French: "un rampart contre une entrée massive et non contrôlée … de brasseurs étrangers". Doc. 8419 ; 10093-10162, and in particular doc. 10147.

87 See paragraphs (11) to (19).

88 See paragraph (27).

3.9. Article 81(3) of the Treaty

(75) The "armistice" agreement between Danone, Heineken N.V., Brasseries Kronenbourg and Heineken France was designed to share the market and limit investment[89]. This type of agreement cannot contribute to improving production or distribution or to promoting technical or economic progress. Nor can there be any benefit for consumers. Consequently, the conditions provided for in Article 81(3) of the Treaty are not met and the agreement cannot be exempted from the provisions of Article 81(1) of the Treaty.

4. PENALTIES

4.1. Article 23(2) and (3) of Council Regulation (EC) No 1/2003 (Article 15(2) of Regulation No 17): general observations

(76) Article 23(2) of Regulation (EC) No 1/2003 states that the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty. Under Article 15(2) of Regulation No 17, the provision applicable at the time of the infringement, the fine imposed on each of the undertakings participating in the infringement may not exceed 10% of its turnover in the preceding business year. The same limit applies under Article 23(2) of Regulation (EC) No 1/2003.

(77) Pursuant to Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard both to the gravity and to the duration of the infringement. The fine imposed must also take account of any aggravating and mitigating circumstances.

4.2. Determination of the amount of the fine

(78) It is evident from the facts that Danone, Brasseries Kronenbourg, Heineken N.V. and Heineken France all took part in the discussions leading to the armistice agreement with the intention of limiting investment relating to the acquisition of wholesalers and with the explicit object of establishing equilibrium between the two groups' distribution networks in order to ensure that neither of the groups dominated the on-trade in France. The Commission considers that this infringement must be regarded as having been committed intentionally, since the parties could not have been unaware of the fact that such an agreement was intended to restrict competition. Account must also be taken of the fact that undertakings as large as those involved in this case normally have legal and economic know-how and infrastructures available that allow them to assess properly the lawfulness of their conduct and any consequences arising from it under competition law.

(79) Consequently, each of the undertakings must be penalised since, as is clear from examination of the facts and their legal assessment, each undertaking had an individual share in the infringement at issue. The parent companies, Danone and Heineken N.V., are consequently considered to be jointly and severally responsible with their respective subsidiaries (at the time of the facts), Brasseries Kronenbourg and Heineken France, for the facts at issue.

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89 See paragraphs (33) to (46).

(80) In their replies to the statement of objections, the parties cited a number of Commission decisions in support of their arguments as to the amount of the fine. It is sufficient to note in this respect that any comparison of fines imposed in different cases is a highly theoretical exercise, since the amount of the fine depends on a series of criteria that are examined on a case-by-case basis, taking account of the circumstances peculiar to each case. Earlier Commission decisions regarding fines are not therefore binding on the Commission beyond the cases concerned. The only constraints on the Commission's discretion in determining fines is the legal framework provided for in Regulation (EC) No 1/2003. Within that legal framework, the Commission has spelt out the criteria it intends to apply in exercising its discretion, in the form of 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[90] ("the guidelines"). The guidelines set out indicative rules which the Commission has drawn up for itself[91]. The Commission's previous decisions do not therefore constitute a binding legal framework for fines in competition cases.

4.2.1. Determining the basic amount of the fine

(81) In determining the amount of the fine, the Commission has to take into account all relevant elements and, in particular, the gravity and duration of the infringement.

4.2.1.1. Gravity of the infringement

(82) In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Nature of the infringement

(83) The objectives of the armistice agreement were to control the cost of acquiring wholesalers and to establish equilibrium in the on-trade between the two leading brewery groups in France. The agreement was therefore a horizontal agreement designed to restrict competition between undertakings holding large market shares. However, an agreement designed to bring wholesaler acquisition costs under control in the short term by putting an end to an acquisition war cannot be regarded as a clear infringement on a par with a price-fixing agreement. As far as the agreement establishing longer-term equilibrium between the two brewery groups' distribution networks is concerned, any such agreement is akin to a market-sharing agreement. However, what is involved is not market sharing in the "conventional" sense, since the agreement was intended mainly to prevent one group from dominating the market rather than to eliminate all competition between the groups or impede third parties.

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90 OJ C 9, 14.1.1998, p. 3.

91 Judgment of the Court of First Instance of 29 April 2004 in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd and Others* v *Commission*, not yet reported, paragraphs 157, 191 and 192.

Actual impact of the agreement on the market

(84) As noted in paragraph (48), the agreement was not implemented and did not therefore have any effects on the market.

(85) Contrary to what Danone and Brasseries Kronenbourg allege, the fact that the relevant market is in significant decline cannot be taken into account in assessing the gravity of the infringement. Very often, cartels are formed precisely in sectors that are in crisis. If the argument of Danone and Brasseries Kronenbourg were accepted, the fine would have to be reduced in almost all cases[92].

Size of the relevant geographic market

(86) On the question of the size of the relevant geographic market, the Commission takes account of the fact that the agreement covers the whole of mainland France, but that it is confined to the on-trade, which accounts for less than one third of the total volume of sales in France (see paragraphs (54) to (59)).

Conclusion as regards the gravity of the infringement

(87) Taking into account the nature of the armistice agreement, the lack of any actual impact on the market and the fact that the agreement was confined to the on-trade in mainland France, it must be concluded that the relevant undertakings committed a serious infringement of Article 81 of the Treaty.

(88) No distinction need be drawn as regards the relative strengths of the different parties, since Danone/Brasseries Kronenbourg and Heineken N.V./Heineken France are both international groups and were the leading players on the beer market in France at the time of the infringement.

4.2.1.2.Duration of the infringement

(89) As noted in paragraph (73), the Commission recognises that the evidence available to it indicates that the armistice agreement was not put into effect. There is therefore no need to increase the basic amount of the fine.

4.2.1.3.Conclusion as to the basic amount of the fine

(90) In view of the above, the basic amount of the fine based on the gravity and duration of the infringement is EUR 1 000 000 both for Danone/Brasseries Kronenbourg and for Heineken N.V./Heineken France.

4.2.2. Aggravating and attenuating circumstances

4.2.2.1.Aggravating circumstances

(91) Danone (then known as BSN) was already fined in 1984[93] for market-sharing agreements aimed in particular at maintaining the *status quo* in the parties' overall

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92 Judgment of the Court of First Instance in *Tokai Carbon*, loc. cit., paragraph 345.

93 Commission Decision 84/388/EEC of 23 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (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 of 15 May 1974 relating to proceedings under Article 85 of the EEC Treaty (IV/400 – Agreements between manufacturers of glass containers), OJ L 160, 17.6.1974,

situation and at establishing equilibrium in the market. Since Danone has again committed an infringement after having been penalised for similar conduct, it may be said that this case involves an instance of recidivism[94].

(92) Danone and Brasseries Kronenbourg argued that application of the concept of recidivism would be contrary to the principle of proportionality, since actions dating back very many years would be taken into account in assessing whether there was recidivism. They also argued that the failure to apply any time limit to the notion of recidivism, particularly where it was applied to legal persons whose lifetime was unlimited, would violate the principle of legal certainty.

(93) However, the concept of repeated infringement or recidivism is not subject to any period of limitation. The guidelines do not set any time limit between the previous infringement and the current one. This situation is comparable to the situation regarding limitation in the imposition of fines that existed before the adoption of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition[95]. At that time, no period of limitation was provided for in the imposition of fines. In this context, the Court held that there was no period of limitation[96]. It must similarly be concluded that there is no period of limitation for repeated infringements, since no limitation period has been fixed in advance. Furthermore, since a repeated infringement demonstrates that the penalty previously imposed was not a sufficient deterrent (see also paragraph (94)), increasing the fine to take account of a repeated infringement is not disproportionate, even if the earlier decision dates from twenty years previously. Consequently, the finding against Danone in 1984 should be taken into account in establishing the repeated infringement in the present case, without this violating the principle of proportionality or legal certainty.

(94) Lastly, citing the principle of *nulla poena sine lege*, Danone and Brasseries Kronenbourg also argued that there was no legal basis for the concept of recidivism, since Article 15(2) of Regulation No 17 does not explicitly refer to it. This argument implicitly challenges the compatibility of the guidelines with Article 15(2) of Regulation No 17. It ignores the case law handed down by the Court of First Instance of the European Communities. On 20 March 2002, the Court of First Instance rejected pleas of illegality raised against the guidelines. The Court held that, in drawing up its guidelines, the Commission had in no way exceeded the limits of the discretionary power conferred by Regulation No 17[97]. In addition, the Court of First Instance has on a number of occasions already given its views on recidivism as an aggravating circumstance. In a judgment

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p. 1, to which the statement of objections also makes reference, mainly involved price agreements. Since such agreements are of a different type from the armistice agreement at issue, that case is not taken as evidence of a repeated infringement and as an aggravating circumstance in the present case.

94 Judgment of the Court of First Instance of 11 March 1999 in Case T-141/94 *Thyssen Stahl AG* v *Commission*, [1999] ECR II-347, paragraph 617.

95 OJ L 319, 29.11.1974, p. 1. Regulation amended by Regulation (EC) No 1/2003.

96 "The provisions governing the Commission's power to impose fines for infringement of the rules on competition do not lay down any period of limitation. In order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in advance" (judgment of the Court of 15 July 1970 in Case 41/69 *ACF Chemiefarma NV* v *Commission* [1970] ECR 661, paragraphs 18 and 19).

97 Judgment of the Court of First Instance of 20 March 2002 in Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 458.

delivered on 30 September 2003, it explicitly held that "recidivism is a circumstance which justifies a significant increase in the basic amount of the fine. Recidivism constitutes proof that the sanction previously imposed was not sufficiently deterrent"[98].

(95) For these reasons, the Commission considers that the basic amount of the fine should be increased by 50 % in the case of Danone and Brasseries Kronenbourg.

(96) In the case of Heineken N.V. and Heineken France, it is evident from the context of the armistice agreement and the in-house memos of the undertakings, as described in paragraphs (33) to (46), that the parties participated on a equal footing at the meeting held on 21 March 1996 and in the discussions which preceded it. Even though it is apparent from the memo of 17 March 1996 (see paragraph (40)) that Heineken France wanted to convince Danone on the details of the agreement, it is also clear from the same memo that Danone was already in agreement on the principle of the armistice agreement ("so far Danone's position has been agreement to the principle"). Furthermore, in the discussions preceding the meeting held on 21 March 1996, Danone also urged that it was of the utmost importance that a solution be found for "the distribution problem" (see in particular paragraphs (33) and (35) to (37)). The Commission therefore considers that Heineken N.V. and Heineken France did not play any role of leader or instigator that would justify an increase in the fine imposed on them.

4.2.2.2.Attenuating circumstances

(97) Under the heading of attenuating circumstances, Danone and Brasseries Kronenbourg cite the passive role which they claim they played in the conclusion of the armistice. However, as noted in paragraph (96), it is clear from the in-house Heineken group memos that the two groups wanted to maintain or restore equilibrium between their distribution networks and that they met and negotiated the armistice agreement on an equal footing. Consequently, there is no attenuating circumstance to be taken into account here as regards Danone and/or Brasseries Kronenbourg.

(98) The Commission accepts the parties' argument that they did not implement the armistice agreement and that the agreement did not have any impact on the market. However, these points have already been taken into account in assessing the gravity of the infringement and cannot therefore be taken into account a second time as attenuating circumstances.

(99) As regards the argument put forward by Heineken N.V. and Heineken France that there was reasonable doubt as to whether the armistice agreement of 21 March 1996 constituted an infringement, the Commission takes the view that the parties could not have been unaware of the fact that any such agreement was designed to restrict competition (see also paragraph (78)). The Commission cannot therefore accept this as an attenuating circumstance.

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98 Judgment of the Court of First Instance of 30 September 2003 in Case T-203/01 *Michelin* v *Commission*, not yet reported, paragraphs 282 to 293 and in particular paragraph 293. See also judgment of the Court of First Instance in *PVC-II*, loc. cit., paragraph 1162; judgment of the Court of First Instance in *Thyssen Stahl*, loc. cit., paragraphs 614 to 626; judgment of the Court of First Instance of 17 December 1991 in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II- 1623, paragraph 295.

(100) Lastly, Danone and Brasseries Kronenbourg as well as Heineken N.V. and Heineken France claim that their cooperation in the proceedings should be taken into account as an attenuating circumstance. However, cooperation in proceedings regarding secret cartels should in principle be considered in the framework of the Commission notice on the non-imposition or reduction of fines in cartel cases[99] ("the 1996 Leniency Notice") or the Commission notice on immunity from fines and reduction of fines in cartel cases[100] ("the 2002 Leniency Notice"), in order not to undermine the aim of those Notices.

(101) With respect to the parties in these proceedings, the 2002 Leniency Notice would be applicable *ratione temporis*. No request has, however, been made under the 2002 Leniency Notice, and that Notice, as opposed to the 1996 Leniency Notice, does not provide for the possibility of a reduction in the fine where the facts are not disputed.

(102) Moreover, the fact that the parties did not dispute the facts set out by the Commission in its statement of objections and that Danone/Brasseries Kronenbourg in their reply to the statement of objections did not dispute the fact that the discussions held on 21 March 1996 resulted in an "armistice" cannot be adduced as an attenuating circumstance under the guidelines given that, in any event, these elements have not contributed significantly to the establishment of the infringement.

(103) Furthermore, contrary to what Heineken N.V. and Heineken France claim, the fact that they replied comprehensively to the questions put to them under Article 11 of Regulation No 17 does not constitute an attenuating circumstance, since the parties were obliged to reply to such questions[101]. Similarly, the fact that, on 19 December 2003 and 27 January 2004, the parties replied spontaneously to an informal Commission request regarding the non-implementation of the armistice agreement and the absence of any impact[102] cannot be regarded as cooperation constituting an attenuating circumstance. The replies merely helped to confirm – on the Commission's initiative – the fact that the agreement had not produced any effects. It was therefore wholly in the parties' interest to provide such a reply. In any case, the lack of any impact on the market has already been taken into account in establishing the gravity of the infringement. Lastly, the fact that the parties waived their right to a hearing cannot be taken into account either as cooperation constituting an attenuating circumstance. Waiving the right to a hearing does not in itself contribute to determining the infringement and may be carried out in the parties' own interest.

(104) Therefore, no attenuating circumstance for effective cooperation by the undertakings in the proceedings can be taken into account.

(105) Consequently, no attenuating circumstance is taken into account in the case.

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99 OJ C 207, 18.7.1996 p. 4.

100 OJ C 45, 19.2.2002, p. 3

101 Judgment of the Court of First Instance of 10 March 1992 in Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342.

102 Doc. 10695 to 10703 and 10736 to 10737.

4.2.3. Other circumstances and conclusion as to the final amount of the fine

(106) Although Heineken N.V. and Heineken France argued that the case involved very particular circumstances, citing *inter alia* the war for the acquisition of wholesalers, such circumstances cannot in any way be regarded as specific circumstances justifying any final adjustment in the amounts of the fines envisaged. For the reasons set out above and in view of the clear nature of the infringement, which involved conduct having as its object the restriction of competition, the Commission also considers that it is not appropriate to impose a symbolic fine in the case.

(107) Consequently, the final amount of the fine to be imposed on each undertaking must be as follows:

- Danone and Brasseries Kronenbourg are jointly and severally liable for the sum of: EUR 1 500 000,

- Heineken N.V. and Heineken France are jointly and severally liable for the sum of: EUR 1 000 000,

HAS ADOPTED THIS DECISION:

Article 1

Groupe Danone, Brasseries Kronenbourg S.A., Heineken N.V. and Heineken France S.A. have infringed Article 81 of the Treaty by concluding, on 21 March 1996, an agreement having as its object the introduction of a temporary freeze on acquisitions of wholesalers and the establishment of equilibrium between the respective distribution networks of the groups in the French sector for consumption of beer on the premises (on-trade).

Article 2

For the infringement referred to in Article 1, the following fines are hereby imposed:

- Groupe Danone and Brasseries Kronenbourg S.A. are jointly and severally liable for the sum of: EUR 1 500 000,

- Heineken N.V. and Heineken France S.A. are jointly and severally liable for the sum of: EUR 1 000 000.

Article 3

The fines referred to in Article 2 shall be paid, within three months of the date of notification of this Decision, into the following bank account:

Account No 001-3953713-69 of the European Commission at

Fortis Bank, Rue Montagne du Parc 3, 1000 Brussels

(SWIFT Code: GEBABEBB – IBAN Code: BE71 0013 9537 1369).

After the expiry of that deadline, 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, i.e. at the interest rate of 5.52%.

Article 4

This Decision is addressed to:

Groupe Danone , 17 boulevard Haussmann, 75009 Paris, France;

Brasseries Kronenbourg S.A., 68 Route d'Oberhausbergen, 67200 Strasbourg, France;

Heineken N.V.**,** Tweede Weteringplantsoen 21, 1017 ZD Amsterdam, Netherlands;

Heineken France S.A., 19 Rue des deux Gares, 92500 Rueil-Malmaison, France.

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

Done at Brussels, 29 September 2004 For the Commission

Mario MONTI

Member of the Commission