



EUROPEAN COMMISSION
Competition DG

CASE AT.40134

(Only the English text is authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) 1/2003

Articles 7 and 23(2) Regulation (EC) 1/2003

Date: 13/5/2019

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Brussels, 13.5.2019
C(2019) 3465 final

COMMISSION DECISION

of 13.5.2019

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union (the Treaty)**

AT.40134 – AB InBev beer trade restrictions

(Only the English text is authentic)

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COMMISSION DECISION

of 13.5.2019

relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty)

AT.40134 – AB InBev beer trade restrictions

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union¹,

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,² and in particular Articles 7 and 23(2) thereof,

Having regard to the Commission Decision of 29 June 2016 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty,³

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

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

Whereas:

1. INTRODUCTION

- (1) This Decision concerns Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV. The undertaking comprising those three entities is referred to in this Decision as "AB InBev".

¹ OJ, C 115, 9.5.2008, p.47.

² OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the Treaty will be used throughout this Decision.

³ OJ L 123, 27.4.2004, p. 18.

⁴ Final report of the Hearing Officer of 6 May 2019.

- (2) In this Decision, the Commission finds that from 9 February 2009 to 31 October 2016 (the “Relevant Period”), AB InBev restricted imports of AB InBev beer products from the Netherlands into Belgium through the following four practices:
- (a) limiting the volumes of beer products supplied to [a wholesaler] (“[...]”) in the Netherlands to restrict imports of these products into Belgium,
 - (b) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands to restrict imports of these products into Belgium,
 - (c) making the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands, and
 - (d) making promotions for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium - with the overall aim to maintain higher prices and profits in Belgium.
- (3) The Commission finds that AB InBev participated in a single and continuous infringement of Article 102 of the Treaty in the period from 9 February 2009 to 31 October 2016 (the “Relevant Period”).

2. THE UNDERTAKING CONCERNED

- (4) Anheuser-Busch InBev NV/SA is the world's largest beer brewer, selling its beer brands in more than 100 countries and employing about 180,000 employees worldwide.
- (5) The legal entities concerned by the present proceedings are: InBev Belgium BVBA/SPRL (“InBev Belgium”)⁵, based in Leuven, Belgium; InBev Nederland NV (“InBev Nederland”), based in Breda, the Netherlands; and Anheuser-Busch InBev NV/SA (“Anheuser-Busch InBev”), based in Brussels, Belgium. InBev Belgium and InBev Nederland are respectively the Belgian and Dutch subsidiary of Anheuser-Busch InBev.
- (6) AB InBev is the result of a succession of several large-scale mergers. In 2004, Interbrew (Belgium) and AmBev (Brazil) merged to form InBev. InBev acquired Anheuser-Busch (US) in 2008, to create AB InBev. In 2013, AB InBev acquired the Modelo Group (Mexico). In 2016, AB InBev merged with SABMiller.
- (7) AB InBev had a worldwide turnover of 46 295 million EUR in 2018.
- (8) Throughout the Relevant Period, Anheuser-Busch InBev owned 100% of InBev Belgium and of InBev Nederland.⁶

⁵ Since 2 November 2016, InBev Belgium changed its legal form from NV/SA to BVBA/SPRL; see ID 1269, Annex 3. According to a publication in the *Moniteur belge* of 25 November 2016, this change in legal form of InBev Belgium to a private limited company qualifies as legal succession and, as a result, InBev Belgium BVBA/SPRL is also liable for the conduct of InBev Belgium NV prior to the change on 2 November 2016, ID 1576.

⁶ ID 1268, Annex 2.

3. PROCEDURE

- (9) In 2012 and 2013, the Commission gathered market information from individual retailers and retailer associations about the existence of price differences for identical (branded) Fast Moving Consumer Goods in Europe, in particular between Belgium and other Member States, including France and the Netherlands. According to the market information, part of these price differences can be explained by the fact that brand manufacturers allegedly artificially seclude the existing national markets for the wholesale supply of products by restricting import possibilities and accordingly appear to partition the Internal Market in order to be able to maintain artificial price differences between Member States. On the basis of this market information the Commission has started an ex-officio investigation.
- (10) On 22 and 23 January 2015, the Commission carried out inspections under Article 20 of Regulation (EC) No 1/2003 at the premises of Koninklijke Ahold NV (“Ahold”) in Zaandam, followed by written requests for information under Article 18(3) of Regulation (EC) No 1/2003 in January and May 2015. Ahold provided its reply by letter in March and July 2015.
- (11) Between 9 November 2015 and 13 November 2015, the Commission, assisted by the Dutch and the Belgian National Competition Authorities, carried out inspections under Article 20 of Regulation (EC) No 1/2003 at the premises of AB InBev in Breda, the Netherlands, and Anderlecht and Leuven, Belgium. On 26 January 2016 continued inspections took place at the Commission's premises.
- (12) On 29 June 2016, the Commission initiated proceedings against AB InBev under Article 2(1) of Regulation (EC) No 773/2004 with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (13) The Commission sent written requests for information to AB InBev in December 2016, February 2017, April 2017 and May 2017, and received AB InBev's reply by letters in February, March and May 2017.
- (14) The Commission sent written requests for information to AB InBev's main competitors in December 2016, March 2017 and May 2017, and received their replies by letter in the period December 2016 to May 2017.
- (15) The Commission sent written requests for information under Article 18(3) of Regulation (EC) No 1/2003 to AB InBev's main off-trade customers in November 2016 and March 2017, and received their replies by letter in the period January to April 2017.
- (16) On 30 November 2017, the Commission adopted a Statement of Objections alleging that AB InBev engaged in restrictive practices constituting an abuse of dominance within the meaning of Article 102 of the Treaty.
- (17) Following the Commission's adoption of the Statement of Objections, AB InBev expressed an interest to cooperate with the Commission in [...].
- (18) On [...], after several rounds of cooperation discussions, AB InBev submitted a formal offer to cooperate in Case AT.40134 in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 (the “settlement submission”). The settlement submission contained:
 - an acknowledgement in clear and unequivocal terms of AB InBev’s joint and several liability for the infringement summarily described as regards

its object, the main facts, their legal qualification, including AB InBev's role and the duration of its participation in the infringement;

- an indication of the maximum amount of the fine AB InBev would accept in the context of a cooperation procedure;
- the confirmation that AB InBev had been sufficiently informed of the Commission's objections through the Statement of Objections, that it has had full access to the Commission's file at the time of the Statement of Objections, that it does not envisage requesting further access to file and that it had been given sufficient opportunity to make its views known to the Commission;
- the agreement to receive the final Decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English;
- an offer to commit following a remedy consisting of providing the mandatory food content information in both Dutch and French languages on the individual packaging labels of all their products relating to 19 specific beer brands, including Jupiler, sold by InBev Belgium BVBA/SPRL, AB InBev France SAS, InBev Nederland NV and any of their controlled companies or their successors to off-trade customers in the Netherlands, Belgium and/or France, for a period of five years, and reporting to the Commission on the implementation of the remedy within nine months from the date of this Decision, as well as reporting to the Commission on the impact of that remedy at the end of the five-year period (the "Remedy");
- an acknowledgment that the Remedy is suitable and proportionate in the framework of the cooperation procedure to ensure that the practice as referred to in the Statement of Objections in Section 7.4.1.1 remains fully terminated and that it considers that parallel trade across the Netherlands, Belgium and France will be enhanced.

(19) AB InBev has subsequently presented its formal settlement submission and offered to commit to implement the Remedy during a five-year period after the adoption of this Decision, conditioned upon the imposition of a fine by the Commission, which would not exceed the maximum amount it has accepted to bear.

4. AB INBEV BEER PRODUCTS CONCERNED BY THE INFRINGEMENT

(20) AB InBev is the largest brewer present in Belgium, followed by Heineken, which took over Alken-Maes in 2008, and Duvel Moortgat. Other internationally active brewers selling their beer in Belgium are Palm, which is part of the Bavaria Group, and Carlsberg. Besides these large players there are many small to medium sized breweries, such as Haacht and Chimay. Finally, Belgium also has a large number of very small (micro-) breweries, selling artisanal specialty beers in certain regions of the country.

(21) AB InBev owns a large number of well-known beer brands commercialised in the EU.

- (22) The main beer brands of AB InBev in Belgium are: Jupiler, Leffe, Stella Artois, Hoegaarden and Piedboeuf. These AB InBev beer brands are all produced in Belgium⁷ and exported by AB InBev to other Member States, including the Netherlands. For example, absent of any intentional packaging differentiation by AB InBev, the exact same Jupiler beer products produced in the brewery in Jupile are supplied by AB InBev to its off-trade customers in Belgium and in the Netherlands.
- (23) Jupiler is a particularly well established AB InBev beer brand in Belgium and the Netherlands as shown by the following circumstances. Firstly, in Belgium during the Relevant Period, Jupiler has consistently and by far been the most sold beer brand, representing volumes of sales that are about [more than 5 times] larger than those of the next beer brand. In addition, Jupiler is the main sponsor of the Belgian First Division A football competition that, since 1995, is named "Jupiler Pro League".⁸ Jupiler is an official partner of the Belgian Football Federation and also sponsors the Belgian national football team during European and world cup football tournaments.⁹ It is also the sponsor of major music festivals in Belgium (for example, Rock Werchter, Tomorrow Land). Secondly, in the Netherlands, AB InBev identifies Jupiler as [...] brands that together deliver [80-90%] of the volume sold in the Netherlands and on its own delivers [...] of that volume.¹⁰ In addition, the Jupiler brand has been a major sponsor of the "Eerste Divisie" (or "Jupiler League"), the second-highest tier of the Dutch football competition, for more than 10 years,¹¹ and of several music festivals, including Dance Valley and Parkpop.¹²
- (24) Some branded beer products are considered so important by consumers in a particular country at a particular point in time that a retailer or convenience store in that country considers it needs to put these particular products on the shop shelves to avoid a substantial loss of sales and/or customers. These products are referred to as "Essential Products". During the Relevant Period, certain AB InBev beer products of the Jupiler, Leffe, Hoegaarden, Stella Artois and Piedboeuf brand are considered as "Essential Products" for the Belgian market in some internal documents of AB InBev itself¹³ and by its retail and wholesale customers.¹⁴
- (25) AB InBev beer products are sold in various types of packaging: crates (boxes with usually 24 glass bottles), cans of specific sizes (for example, 33cl, 50cl) grouped in packs (4-packs, 6- packs, 8-packs, or 12-packs), small bottles (25cl or 33cl) grouped in baskets of 4/6/8, large bottles (75cl), draft or home-tap machine.

4.1. The trade channel concerned by the infringement

- (26) AB InBev supplies to customers operating in the so-called off-trade and on-trade channels. The present proceedings exclusively concern the wholesale supply of AB InBev's beer products to the off-trade channel, where end-consumers purchase

⁷ ID 1424.

⁸ ID 1394.

⁹ ID 1622.

¹⁰ Internal AB InBev document ID 650/87, slide 108.

¹¹ ID 1421.

¹² See for example, ID 1422.

¹³ Internal AB InBev documents ID 1014/34, slides 34-36 and 38, ID 660/176, ID 660/178, and ID 660/195, slide 9.

¹⁴ ID 886, ID 908, ID 2214, ID 917, ID 1621, ID 1597, ID 930-931, ID 2201, ID988, ID 1506, ID 952, ID 1706, ID 967-968, ID 1512, replies to question 16(b).

these products in stores for consumption outside these premises. The wholesale channel of supply to on-trade customers, that is customers selling to final consumers for consumption at their premises, for example, restaurants, bars, hotels, etc., is not covered by these proceedings.

- (27) In the off-trade channel AB InBev supplies to two types of customers, retailers and wholesalers selling to convenience stores.
- (28) The first type of customers consists of retailers or retail customers. Retailers directly buy beer products from beer manufacturers. Beer manufacturers deliver their beer products to the retailers' distribution centres. The retailers in turn distribute these products to their shops and then directly sell beer products to the end consumer. The three largest off-trade customers of beer manufacturers in Belgium are the three largest retailers in Belgium:¹⁵ Colruyt, Carrefour, and Ahold Delhaize.¹⁶ Throughout the Relevant Period, AB InBev has been supplying all the main retailers in Belgium, [...].¹⁷
- (29) The second type of customers consists of wholesalers or wholesale customers. These wholesalers procure beer products from beer manufacturers and supply “off-trade convenience stores”. These convenience stores include among others smaller, local grocery shops, which do not belong to a retail chain, shops linked to petrol stations, newsagents, etc. Convenience stores are usually offering smaller assortments of products to consumers than retailers' shops. Important off-trade wholesale customers of AB InBev selling beer to the convenience segment in Belgium are Ameel, Conway (Belgian branch of the German based undertaking Lekkerland), Lyfra, Metro (Belgian branch of the German based Metro Group), [a wholesaler in the Netherlands], Trendy Foods and V.A.C./Districo.¹⁸

4.1.1. *Contractual relationships between AB InBev and its off-trade customers*

4.1.1.1. Contractual arrangements

- (30) Generally, AB InBev enters into contractual arrangements with its main off-trade customers [for 0-2 years].¹⁹ The contracts are concluded per country and InBev Belgium deals only with off-trade customers in Belgium while InBev Nederland deals with off-trade customers in the Netherlands.²⁰
- (31) The supply contracts define the overall terms of trade for [0-2 years], such as duration of the contract, payment terms, pricing principles, budget to finance promotions, etc.²¹ These contracts do not include all details of the commercial deal, such as

¹⁵ ID 1389 and ID 1084.

¹⁶ Before their merger in 2015, Ahold and Delhaize operated independently from one another in the Belgian retail market and Delhaize was among the three largest retailers in Belgium

¹⁷ ID 1139.

¹⁸ ID 1139, ID 1014/15, slides 11-13, and ID 660/163, slides 2, 5 and 6.

¹⁹ ID 886, ID 908, ID 2214, ID 915, ID 917, ID 1621, ID 1597, ID 930-931, ID 2201, ID 988, ID 1506, ID 952, ID 1706, ID 968 and ID 1512, replies to question 3(a).

²⁰ ID 1139, reply to question 8 and the annexes provided which show that the agreements with its off-trade customers in the Netherlands are concluded with InBev Nederland and the agreements with its off-trade customers in Belgium are concluded with InBev Belgium.

²¹ Contract terms may differ per country and per off-trade customer. [...]. During the negotiations for the [...] contract in Belgium, Ahold requested AB InBev to apply the

precise volumes to deliver or exact prices. Key account managers and other operational people at AB InBev agree with the off-trade customers the exact volumes and prices on a regular basis (for example weekly or monthly) throughout the contract period. This is particularly the case for promotions that materialise many times throughout the contract period as part of the normal commercialisation of beer products in the off-trade channel²², and which - in the case of price promotions - are part of the regular pricing and volume decisions made by the off-trade customers. In that context, most promotions for beer products are not promotions to launch a new product to the market, but discounts to support the normal sales of long-established products.

4.1.1.2. AB InBev's pricing policy of its beer products

- (32) The price setting of a particular beer product supplied by AB InBev to its off-trade customers consists of different steps. AB InBev has a standard list price for each of its beer products and for every country. This list price is [...]. AB InBev negotiates a set of deductions from the list price with each of its off-trade customers. The final wholesale price is then equal to the list price minus these deductions.
- (33) AB InBev generally applies deductions from the list price. These can be on-invoice discounts, off-invoice discounts and discounts related to investments:²³
- (a) On-invoice discounts: This type of discount is immediately deducted from the list price on the invoice. Examples of on-invoice discounts are volume discounts (relating to the volume sold) and early-payment/cash discounts (rewarding off-trade customers' payment behaviour). Also promotions in the form of discounts on the prices of products to the final consumer²⁴ can be deducted from the list price on the invoice. The price after deduction of on-invoice discounts is called the wholesale on-invoice price.
 - (b) Off-invoice discounts: This type of discounts is also called "backward compensations" or "back margins"; they may include commercial, promotional and innovation payments by AB InBev which do not appear on the invoice at the time of delivery of the order. Examples include the financing of displays and other promotional activities on AB InBev products in supermarkets, the financial support for newly launched or innovative AB InBev products, and assortment fees. These discounts can be conditional to, for example, attaining certain final sales targets or unconditional like, for instance certain temporary discounts granted for promotional purposes. The wholesale price after deduction of all on-invoice and off-invoice discounts is called the wholesale off-invoice price.

[...].

²² See for example, ID 1712/66, Sections 1.6 and 1.7.

²³ ID 1710/293.

²⁴ An example of such promotion is "buy three get one free", equivalent to a 25% discount on the total purchase. The manufacturer pays to the retailer the 25% deduction for all sales achieved with the promotion. This is different from a promotion like "buy this crate and receive an exclusive gadget"; in that case the manufacturer supplies the gadgets with the products on promotion but the consumer end price is not affected by the promotion.

- (c) So-called investments by the manufacturer in new store openings of retailers or financial support for advertisements of AB InBev beer products in the retailer's leaflet are examples of a third category of deductions from the list price. The wholesale price after deduction of all on-invoice and off-invoice discounts as well as these "investments" is called the wholesale dead net price.
- (34) AB InBev distinguishes between Member States in the on- and off-invoice allocation of the deductions from the list price granted. For instance, in Belgium [...]. In contrast, in the Netherlands [...], which results [...] in the Netherlands compared to Belgium.²⁵
- (35) In addition, as explained in Recital (31), promotions are part of the normal commercialisation of beer products in the off-trade channel. It is therefore relevant to look at prices also at times of promotions. Compared to Belgium, price promotions are deeper and more frequent in the Netherlands. [Business secrets – marketing and sales strategy]. This is because the promotions in the Netherlands consist more often of price discounts and because these discounts tend to be higher in the Netherlands. [Business secrets – marketing and sales strategy].²⁷ In the Netherlands promotions also tend to take place more often during the year, [Business secrets – marketing and sales strategy].²⁸
- (36) This difference in [business secrets - pricing] by AB InBev in Belgium and the Netherlands can be explained in part by the existence of Belgian rules imposing pricing restrictions, such as the law prohibiting sales below cost. According to this Belgian "sales below cost law", retailers in Belgium cannot resell the goods below the cost of the goods. That cost is essentially defined as the price at which the goods are bought, that is the wholesale price that excludes conditional discounts and investments by the manufacturer.²⁹ In other words, this law prevents retailers in Belgium from passing on to the Belgian end consumer all types of

²⁵ Internal AB InBev document ID 660/431.

²⁶ [...] ID 660/431 and ID 650/69, slide 2.

²⁷ Internal AB InBev document ID 660/174, slide 4.

²⁸ ID 2156.

²⁹ Article VI.116 of the Belgian Code of Economic Law which provides: “§ 1. In order to ensure fair market practices between undertakings, [each undertaking is] prohibited to offer for sale or sell goods at a loss. As sale at a loss is considered, any sale at a price that is not at least equal to the price at which the undertaking purchased the good or that the undertaking would pay to resupply, after deducting any granted and vested discounts as well of unvested volume discounts calculated on the basis of 80% of the volume discount that the company has acquired in the past year for the same good. In order to determine whether sales are at a loss, no account shall be taken of discounts which, whether or not exclusively, are granted in exchange for commitments from the undertaking other than for the purchase of goods. § 2. In case of joint offers of several goods, whether identical or not, the prohibition referred to in paragraph 1, first sentence, only applies if the whole offer constitutes a sale at a loss.” (English working translation).

conditional discounts or investments that they obtain. Therefore, when brand manufacturers and retailers agree to include fewer unconditional and more conditional discounts or investments for a given category of competing products, the conditional discounts or investments for the retailers cannot be passed on to consumers as lower retail prices. From the manufacturers' perspective, the use of conditional discounts or investments under the Belgian sales below cost law keeps end consumer prices higher, reducing the downward pressure on prices to their benefit. From the retailers' perspective, conditional discounts or investments increase their margins as they may not be passed on to consumers. This ultimately reduces the scope for competition on price between retailers in Belgium.

- (37) In contrast, in the Netherlands there is no legislation prohibiting sales below cost and retailers in the Netherlands can pass on any discounts or investments to the Dutch end consumer.³⁰

4.1.2. *Trade of AB InBev products supplied in the Netherlands for resale in Belgium*

- (38) Several AB InBev off-trade customers operating in Belgium are also operating in the Netherlands. This includes, inter alia, the retailer Ahold under its Albert Heijn banner and the wholesaler [...].³¹
- (39) Ahold is an international retailer based in Amsterdam, the Netherlands, and operates supermarkets in the Netherlands under the banner Albert Heijn. Ahold entered the Belgian market in 2011 when opening its first Albert Heijn shop in the Antwerp area. The Belgian Albert Heijn shops developed significantly between 2011 and 2015 and Ahold operated 38 Albert Heijn shops in the North of Belgium by the end of 2015.³² Because the Northern part of Belgium is Dutch-speaking and borders the Netherlands, it was convenient for Ahold to expand towards Belgium with its Albert Heijn shops. During the Relevant Period all Albert Heijn shops in Belgium received deliveries of the products they sell through Ahold's distribution centre in Tilburg, the Netherlands, that also delivers Albert Heijn shops in the Netherlands.³³
- (40) [A wholesaler in the Netherlands], headquartered in [...], the Netherlands, is a wholesaler supplying food and beverages to undertakings operating convenience shops in the Netherlands and Belgium.³⁴ Since at least 2009, [a wholesaler in the Netherlands] supplies directly certain off-trade customers from Belgium, for example, [...] or indirectly affiliates from Belgium of certain of its customers in the Netherlands.³⁵
- (41) Several AB InBev off-trade customers operating in Belgium and in the Netherlands have reported that the wholesale prices, either outside promotional periods or during promotions, for specific AB InBev beer products, including Jupiler beer products, are lower in the Netherlands compared to Belgium.³⁶ In 2013 and 2014, Albert Heijn made several price comparisons for AB InBev beer products between Belgium and

³⁰ See internal AB InBev document ID 660/75.

³¹ Other retailers and wholesalers operating in both Belgium and the Netherlands include Lidl and Makro (retailers) and Lekkerland and Metro (wholesalers).

³² Decision of the Belgian Competition Authority of 15 March 2016, BMA-2016-C/C-10 regarding the merger between Delhaize NV and Royal Ahold NV, https://www.bma-abc.be/sites/default/files/content/download/files/2016cc10_bma-pub.pdf.

³³ Internal AB InBev documents ID 660/609 and ID 648/7.

³⁴ ID 1429.

³⁵ ID 930-931, reply to question 1(a), ID 648/13, slide 2, and ID 1670.

³⁶ ID 886, ID 917, ID 952, ID 968, ID 2201, replies to questions 17 and 18.

the Netherlands. It showed that the wholesale price paid to InBev Nederland, not including any possible discounts related to investments and lump sums, was much lower than the wholesale price paid to InBev Belgium, for example for the Jupiler crate 25cl and Jupiler 33cl cans (6-pack).³⁷ Throughout the Relevant Period, off-trade customers in Belgium have complained to AB InBev that wholesale prices of Jupiler beer products in the Netherlands were significantly lower than in Belgium, and made it impossible for them to match the prices offered to customers in Belgium by their competitors from the Netherlands, including in particular Albert Heijn and [a wholesaler in the Netherlands].³⁸ Finally, a [...] price comparison confirms these wholesale prices differences between Belgium and the Netherlands during the Relevant Period both regarding sales during and outside promotions.³⁹ Wholesale prices of Jupiler beer products, in particular the top-selling Jupiler crate 25cl, Jupiler 12-pack 33cl cans, Jupiler 8-pack 50cl cans, are generally lower in the Netherlands compared to Belgium.

- (42) The above considerations show that because of the price differences off-trade customers present in both Belgium and the Netherlands had an interest in importing AB InBev beer products from the Netherlands into Belgium and that, consequently, a parallel trade flow developed introducing additional retail price competition in Belgium.⁴⁰

5. RELEVANT MARKET

5.1. Principles

- (43) For the purpose of determining whether an undertaking holds a dominant position, it is appropriate to first define the relevant market, both in its product and geographical dimension, and second to assess the market power of that undertaking on that market, including assessing the possibilities of competition existing in the context of the relevant product and geographic market definitions retained.
- (44) The relevant product market comprises the totality of products or services that are particularly suitable for satisfying constant needs and that are only to a limited extent interchangeable with other products or services.⁴¹ This analysis cannot be limited solely to the objective characteristics of the relevant products or services, but must also take account of the structure of demand and supply as well as the competitive conditions on the market.⁴² The substitutability of a product or service from a

³⁷ ID 1995, ID 2101 slides 2 and 3, ID 1899, and ID 2100, slide 4.

³⁸ Internal AB InBev documents ID 660/39, ID 660/263, ID 660/283, ID 660/286, ID 660/287, and ID 660/475.

³⁹ [...] ID 648/57.

⁴⁰ Differences in VAT rates and excise duties between Member States do not preclude AB InBev's off-trade customers from importing beer products cross-border as is also confirmed by internal documents of AB InBev. See ID 660/517.

⁴¹ Judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paragraph 91; and Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 31. See also Commission Notice on the definition of relevant market for the purposes of Community competition law ("Commission Notice on Market Definition"), OJ C 372, 9.12.1997, p. 5, paragraph 7.

⁴² Judgment of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission* ("Michelin I"), Case 322/81, EU:C:1983:313, paragraph 37; Judgment of 21 October 1997, *Deutsche Bahn v Commission*, T-229/94, EU:T:1997:155, paragraph 54; and Case T-219/99 *British Airways*, cited above, paragraph 91.

demand-side perspective is the most important assessment criterion since it constitutes the most immediate and effective disciplinary force on the suppliers of a given product or service, in particular in relation to their pricing decisions.⁴³

- (45) The relevant geographic market covers the territory in which the undertakings concerned operate with regard to the products or services concerned in the same or sufficiently homogeneous conditions of competition.⁴⁴

5.2. The relevant product market

- (46) According to almost all competitors⁴⁵ and off-trade customers⁴⁶ of AB InBev, the market for beer constitutes a separate product market as beer is not substitutable with other beverages, both from a supply- and demand-side perspective.

- (47) Moreover, AB InBev agreed, in the context of the procedure concerning its recent merger with SABMiller, that the beer market is distinct from the markets for other beverages.⁴⁷

- (48) The market for the supply of beer can be further segmented in an on-trade and an off-trade channel since the demand is different in both channels.

- (49) In previous Commission decisions, a further segmentation of the beer market was made based on the sales channels, namely between on-trade and off-trade.⁴⁸ The on-trade channel concerns the distribution of beer products to pubs, bars, hotels and restaurants while the off-trade channel comprises the distribution of beer products to retailers and to wholesalers which in turn supply to small retail and convenience stores.

- (50) All competing producers⁴⁹ and all off-trade customers⁵⁰ of AB InBev confirmed that the demand in the on-trade channel is different from the demand in the off-trade channel. This is in the view of competitors and off-trade customers due to differences in, inter alia, the consumption pattern, the distribution system, the price level, the product assortment, the packaging, promotions and the accompanying experience or services in the on-trade channel.

- (51) AB InBev consistently applies this distinction between on-trade and off-trade as shown in internal sales reporting and presentations on budget and strategy.⁵¹

⁴³ Judgment of 4 July 2006, *easyjet v Commission*, T-177/04, paragraph 99. See also Commission Notice on Market Definition, paragraphs 13 and 14.

⁴⁴ Judgment of 14 February 1978, *United Brands v Commission*, Case 27/76, EU:C:1978:22, paragraphs 11, 44 and 53; Judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 91; Case T-229/94 *Deutsche Bahn*, cited above, paragraph 92; and Case T-219/99 *British Airways*, cited above, paragraph 108. See also Commission Notice on Market Definition, paragraph 8.

⁴⁵ ID 890, ID 1584, ID 1362, ID 898, ID 1468, and ID 1564, see replies to question 4.

⁴⁶ ID 886, ID 908, ID 2214, ID 915, ID 1621, ID 1597, ID 930-931, ID 2201, ID 988, ID 1506, ID 952, ID 1706, ID 968, and ID 1512, see replies to question 4.

⁴⁷ ID 1052, para 17.

⁴⁸ ID 1052, para 29; ID 1690, para. 7; ID 1689, para. 11; ID 1691, para. 21; ID 1692, para. 8; ID 1685, para. 7; ID 1693, para. 7. See also judgment of 28 February 1991, *Stergios Delimitis v. Henniger Bräu AG*, C-234/89, EU:C:1991:91, para 16.

⁴⁹ ID 890; ID 1584; ID 1362; ID 898; ID 1468; ID 1200 and 1569; and ID 1564, see replies to question 5.

⁵⁰ ID 886; ID 908; ID 2214; ID 915; ID 917; ID 1621; ID 1597; ID 930-931; ID 2201; ID 988; ID 1506; ID 952; ID 1706; ID 968; ID 1512, see replies to question 5.

⁵¹ See for example internal AB InBev documents ID 660/10, slide 4; ID 660/131, slides 6, 12 and 30; ID 1014/1, slides 8 to 20; ID 714/28, slide 4; ID 660/172, slides 7, 28 and 45-48.

- (52) Based on its assessment of all the facts and circumstances of the case and account taken of the above-mentioned reasons in Recitals (46) to (51), the Commission considers that the relevant product market is the off-trade wholesale beer market.

5.3. The relevant geographic market

- (53) In its past decisional practice, the Commission considered the relevant geographic markets for the supply of beer to be national in scope.⁵²
- (54) In its 2016 decision concerning the merger between AB InBev and SABMiller, the Commission again found the geographic market to be national in scope in line with its past practice and the results of its market investigation in that merger procedure.⁵³ This assessment was not contested by AB InBev.
- (55) For the reasons set out in Recitals (56) to (58), Belgium is a distinct area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from the neighbouring national markets because the conditions of competition are appreciably different.
- (56) Firstly, all off-trade customers⁵⁴ and all competitors but one⁵⁵ perceive the off-trade wholesale beer market as national in scope.
- (57) Secondly, in the Relevant Period, the imports of beer products remained relatively limited in the off-trade wholesale beer market in Belgium compared to the sales of beer products by locally established beer manufacturers. During the period 2009 - 2015 beer imports - including both the off-trade and on-trade channels – represent only between [...] % in 2009 and [...] % in 2015 of total beer consumption in Belgium.⁵⁶
- (58) Thirdly, off-trade customers of beer manufacturers in Belgium essentially procure their beer supplies in Belgium.⁵⁷ The fact that there are some imports of beer into Belgium does not change the fact that the relevant geographic market is national in scope.
- (59) Based on its assessment of all the facts and circumstances of the case and account taken of the above-mentioned considerations, the Commission finds that the relevant geographic market is national in scope and corresponds to Belgium.

6. AB INBEV'S DOMINANCE IN THE OFF-TRADE WHOLESAL BEER MARKET IN BELGIUM

6.1. Principles

- (60) Dominance is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the

⁵² See footnote 43.

⁵³ ID 1052, para 37.

⁵⁴ ID 886, ID 908, ID 2214, ID 915, ID 917, ID 1621, ID 1597, ID 930-931, ID 2201, ID 988, ID 1506, ID 952, ID 1706, ID 968, ID 1512, see replies to question 6.

⁵⁵ ID 890, ID 1584, ID 1362, ID 898 and ID 1468, ID 1200 and 1569, and ID 1564, see replies to question 6.

⁵⁶ Commission calculations based on ID 1089, Annex 3.

⁵⁷ ID 1139, see reply to question 8 and the accompanying annexes which show that the agreements with off-trade customers in Belgium are concluded with InBev Belgium.

relevant market by affording the undertaking the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.⁵⁸

- (61) A finding of dominance does not require that the concerned undertaking is able to eliminate all opportunity for competition in the market.⁵⁹ A finding of dominance is also not precluded by the existence of lively competition on the concerned market, provided that the undertaking is able to act without having to take account of such competition in its market strategy and without suffering detrimental effects from such behaviour.⁶⁰
- (62) Therefore, the fact that there may be competition on the market is a relevant but not a decisive factor for determining whether a dominant position exists.⁶¹
- (63) The existence of a dominant position derives from a combination of several factors which, if taken separately, may not necessarily be determinative.⁶²
- (64) One important factor is the existence of large market shares, which may provide, save in exceptional circumstances, evidence of a dominant position.⁶³ This is the case where a company has a market share of 50% or above.⁶⁴ An undertaking which holds such a very large market share for some time, without smaller competitors being able to meet rapidly the demand from those who would like to break away from that undertaking, is by virtue of that share in a position of strength which makes it an unavoidable trading partner and secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.⁶⁵
- (65) Another important factor for assessing dominance is the existence of barriers preventing or hindering potential competitors from having access to the market and actual competitors from expanding their activities on the market.⁶⁶ Such barriers may result from a number of elements, including (i) legal barriers such as exclusive

⁵⁸ Judgment of 14 February 1978, Case 27/76, *United Brands*, ECLI:EU:C:1978:22, paragraph 65; Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, Case 85/76, EU:C:1979:36, paragraph 38; and Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 229.

⁵⁹ Judgment of 14 February 1978, *United Brands*, Case 27/76, ECLI:EU:C:1978:22, paragraph 113.

⁶⁰ Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 70.

⁶¹ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 101.

⁶² Judgment of 14 February 1978, *United Brands*, Case 27/76, ECLI:EU:C:1978:22, paragraph 66; and Case 85/76 *Hoffmann-La Roche*, paragraph 39.

⁶³ Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraphs 39 and 41; and Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 154.

⁶⁴ Judgment of 3 July 1991, *Akzo v Commission*, C-62/86, EU:C:1991:286, paragraph 60; Judgment of 30 January 2007, *France Télécom*, Case T-340/03, ECLI:EU:T:2007:22, paragraph 100; and Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 150.

⁶⁵ Judgment of 13 February 1979, *Hoffmann-La Roche* Case 85/76, ECLI:EU:C:1979:36, paragraph 41; Judgment of 22 November 2001, *AAMS v Commission*, Case T-139/98, EU:T:2001:272, paragraph 51; Judgment of 23 October 2003, *Van den Bergh Foods*, Case T-65/98, ECLI:EU:T:2003:281, paragraph 154; and Judgment of 29 March 2012, *Telefónica*, Case T-336/07, ECLI:EU:T:2012:172, paragraph 149.

⁶⁶ Judgment of 14 February 1978, *United Brands*, Case 27/76, ECLI:EU:C:1978:22, paragraphs 91 and 122; and Judgment of 13 February 1979, *Hoffmann-La Roche*, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 48.

concessions⁶⁷ and intellectual property rights,⁶⁸ (ii) technical and commercial advantages enjoyed by an undertaking such as an established distribution and sales network,⁶⁹ economies of scale from which newcomers to the market cannot derive any immediate benefit,⁷⁰ and network effects that would entail additional cost for attracting new customers,⁷¹ as well as (iii) exceptionally large capital investments that competitors would have to match.⁷²

- (66) Lastly, a factor for assessing dominance is that an undertaking's customers should not be in a position to exert any meaningful competitive constraint on the undertaking's market power.⁷³ If countervailing buying power is of a sufficient magnitude, it may be able to deter or defeat an attempt by a dominant undertaking to behave independently from its competitors on a relevant market by, for example, being able to profitably increase prices. Moreover, buying power of customers may not be considered a sufficiently effective constraint on a dominant undertaking, if it only ensures that a particular or limited segment of customers is shielded from the market power of the dominant undertaking.⁷⁴

6.2. Application of the principles in the present case

- (67) Based on the review of the file and the assessment of the circumstances of the case, the Commission makes the following findings of facts as the AB InBev's dominance on the off-trade wholesale beer market.
- (68) Throughout the Relevant Period, AB InBev held a dominant position in the off-trade wholesale beer market in Belgium. The dominant position is established by the following four factors: (1) the market shares of AB InBev in absolute terms and in comparison with the shares of AB InBev's competitors in Belgium, (2) the pricing ability of AB InBev, (3) the existence of barriers to significant entry and expansion in the market, and (4) the fact that there is limited countervailing buyer power of AB InBev's off-trade customers.
- (69) Firstly, concerning market shares, AB InBev has had a high and slightly increasing market share in the Relevant Market, with volumes constantly above 50%.⁷⁵ Throughout the Relevant Period there has been a considerable difference in size between AB InBev and all its competitors in the Relevant Market, including both

⁶⁷ Judgment of 4 May 1988, *Bodson v Pompes funèbres des régions libérées*, Case 30/87, EU:C:1988:225, paragraphs 26-27.

⁶⁸ Judgment of 31 May 1979, *Hugin v Commission*, Case 22/78, EU:C:1979:138, paragraph 9; Judgment of 12 December 1991, *Hilti*, Case T-30/89, EU:T:1991:70, paragraph 93; and Judgment of 6 October 1994, *Tetra Pak International SA v Commission*, Case T-83/91, EU:T:1994:246, paragraph 110, confirmed on appeal by Judgment of 14 November 1996, *Tetra Pak International SA v Commission*, C-333/94 P, EU:C:1996:436.

⁶⁹ Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 48.

⁷⁰ Judgment of 14 February 1978, *United Brands*, Case 27/76, ECLI:EU:C:1978:22., paragraph 122.

⁷¹ Judgment of 17 September 2007, *Microsoft*, Case T-201/04, ECLI:EU:T:2007:289, paragraph 558.

⁷² Judgment of 14 February 1978, *United Brands*, Case 27/76, ECLI:EU:C:1978:22., paragraphs 91 and 122.

⁷³ Judgment of 13 February 1979, *Hoffmann-La Roche* Case 85/76, ECLI:EU:C:1979:36, paragraph 38; and Judgment of 7 October 1999, *Irish Sugar plc v Commission*, T-228/97, EU:T:1999:246, paragraphs 97 to 104.

⁷⁴ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, 7, para 18.

⁷⁵ ID 1458.

brands and the private labels.⁷⁶ Based on the volumes sold in the Relevant Market, all AB InBev's competitors manufacturing and supplying competing branded beer products hold volume shares below [10-20%], and only three of them have a volume share significantly above [0-5%] throughout the Relevant Period: Heineken, Duvel Moortgat and Haacht.⁷⁷

- (70) Even beyond the Relevant Period, namely over the last 25 years, AB InBev has enjoyed a constantly high share of more than 50% of the Relevant Market. AB InBev had an average market share (in volume) of 55% over the period 1992-1998,⁷⁸ only [...] percentage points higher than its market share of [50-60%] in 2016, and a market share in the range of [50-60%] in 2002.⁷⁹
- (71) Secondly, concerning AB InBev's pricing ability, while the average price of AB InBev beer products increased in terms of value per hl sold, AB InBev's beer sales volumes remained rather stable during the Relevant Period.⁸⁰ In the Relevant Period AB InBev was able to increase the prices of its beer products in the Relevant Market. These price increases were possible due to AB InBev's strong ability to price independently from other manufacturers, [...].⁸¹
- (72) In its 2016 decision approving the merger between AB InBev and SABMiller,⁸² the Commission noted that AB InBev was the market leader in the supply of beer products in Belgium and that its competitors closely followed its pricing policy, showing limited rivalry for AB InBev's leadership in the market.
- (73) During the Relevant Period, the main competitors and off-trade customers in Belgium⁸³ indeed confirmed that AB InBev was able to autonomously increase the prices of its beer products and that its competitors mostly followed by increasing their prices as well.⁸⁴ [...] customers consider that AB InBev did not suffer from any negative consequences in terms of loss of sales or a decrease of

⁷⁶ ID 1458, ID 1139, ID 1086 and RFI replies of competitors ID 890, ID 1468, ID 1474, ID 1564, ID 1565, ID 898, ID 1366, ID 1200, ID 1569, ID 1362, 1376, ID 1584, ID 1582, ID 1458, ID 1416. Internal AB InBev document ID 1014/799, slides 21-22 and ID 1014/745, slide 143.

⁷⁷ ID 1458.

⁷⁸ See Recital 304 in 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, 2003/569/EC, ID 2318.

⁷⁹ See Recital 10 in Commission Decision of 19 December 2013 based on Art.6(1)(b) of the Merger Regulation 4064/89 in case COMP/M.3289 – Interbrew/Spaten-Franziskaner, ID 1685. See also Belgian Competition Authority, Decision BMA-2016-V/M-36 of 21 November 2016, regarding the request for temporary measures concerning the acquisition of Brewery Bosteels by AB InBev, ID 2315. ID 1014/1005 and ID 1458.

⁸⁰ ID 1014/1005 and ID 1458.

⁸¹ [...] ID 1014/741, slides 7-8 and 59-60, ID 1014/5, slide 95, ID 1014/31, slide 1, ID 660/656, slide 21, ID 1081/8607, slide 7, ID 1014/178, slide 93, ID 1014/746, slide 75, ID 1014/753, slide 32 ID 1014/741 slide 12 and 61, ID 1014/799, slide 16, ID 1014/1, slide 1, ID 1014/745, slides 5-7 and 36 ID 1014/60, slide 5.

⁸² Case M.7881 – AB InBev/SABMiller Commission decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area, ID 1052.

⁸³ RFI replies of competitors and customers ID 1362, ID 898, ID 1468, ID 1564, ID 988, ID 1597, ID 1506, ID 968, ID 1512.

⁸⁴ AB InBev internal documents ID 1014/1, slide 2, ID 1014/774, slide 4, ID 1014/773, slide 41, ID 1081/8607, slide 8, ID 1014/94, slide s 2 and 4, ID 1014/741, slide 50, ID 1014/745, slide 37, ID 1014/758, slide 222, ID1014/742, slide 173, ID 1014/786, slide 20.

market share whenever it increased the prices of its beer products because, as indicated by off-trade customers, there is no or low consumer switching between beer brands.⁸⁵

- (74) Thirdly, there was no significant entry or expansion of competitors in the Relevant Market. The largest expansion that took place during the Relevant Period was a 1.5 percentage points increase in the market share by volume of Duvel Moortgat. In addition, neither entry nor expansion of competitors affected AB InBev's position in the market during the Relevant Period. The overall strength of AB InBev's brands as well as its size and availability of adequate channels of distribution for its beer products indicate that its existing as well as its potential competitors faced barriers to significant entry and expansion in the Relevant Market.⁸⁶ In particular, the strong brand recognition of AB InBev's products is an advantage over other breweries in the Relevant Market that prevented significant entry or expansion.⁸⁷
- (75) Fourthly, concerning the potential countervailing buying power of AB InBev's off-trade customers, in the Relevant Market, the bargaining power of the three large retailers is largely offset by the specific and unique value of the portfolio of the products that AB InBev supplies, both in terms of the brands offered and in terms of width of assortment.⁸⁸ AB InBev supplies the by far best-selling brand Jupiler, which on its own represents approximately 40% of the market. The three large retailers have stated that some of AB InBev's products (including the Jupiler brand or specific Jupiler products) are "Essential Products". In other words, in their view they would lose significant sales and/or clients if they did not obtain them.⁸⁹ This prevented these three large retailers from being able to strongly bargain on these products since this could ultimately lead them to having to switch to a product assortment made of all or mostly products of AB InBev's competitors.⁹⁰
- (76) Finally, AB InBev's dominance in the Relevant Market is confirmed by internal AB InBev documents throughout the Relevant Period.⁹¹
- (77) In sum, throughout the Relevant Period, AB InBev held a dominant position in the off-trade wholesale beer market in Belgium.

⁸⁵ As stated by AB InBev customers ID 886, ID 908, ID 2214, ID 917, ID 1621, ID 1597, ID 2201, ID 988. [...] ID 1014/144, slide 17, ID 660/478, slide 38, ID 1014/742, slide 142, ID 660/10, slide 4, ID 1014/35, slides 27, 117 and 119, ID 1014/23, slide 42-44, ID 1014/796, slide 10, ID 714/43, slide 24.

⁸⁶ As stated by AB InBev competitors ID 1584, ID 1362, ID 898, ID 1468, ID 1200 and 1569.

⁸⁷ As stated by AB InBev customers ID 886, ID 908, ID 2214, ID 917, ID 1621, ID 1597, ID 2201, ID 988, ID 1506, ID 952, ID 1706, ID 968, ID 1512, ID 915. AB InBev internal documents ID 660/219, slide 9 and 23, ID 1014/794, slide 6-7, ID 572/300, slide 42, ID 1054, slide 12, ID 572/300, slide 42-43, ID 1014/1, slide 1, ID 714/43, slide 24, ID 1053, slide 12-13, ID 1054, slide 13, ID 1014/769, slide 2, ID 1014/799, slide 20 ID 1014/33, slide 157, ID 1014/804, slide 19.

⁸⁸ As stated by AB InBev customers, ID 2201, ID 1706, ID 2214, ID 915, ID 1512. Internal AB InBev document ID 660/223, slide 20.

⁸⁹ As stated by AB InBev competitors ID 1621, ID 2201, ID 1706. Internal AB InBev documents ID 1014/34, slides 34-36 and 38, ID 660/89, p. 64, ID 660/219, slide 17-18.

⁹⁰ Albert Heijn presentation ID 572/236. See also ID 1712/19 and ID 1710/22.

⁹¹ AB InBev internal documents ID 648/17, slides 24 and 30 and ID 660/177.

7. THE INFRINGEMENT OF ARTICLE 102 OF THE TREATY

7.1. Partitioning of the Internal Market by restricting cross-border trade as an abuse of a dominant position

7.1.1. Abuse of dominance- introduction

- (78) Article 3(3) of the Treaty sets as aim of the Union the establishment of an Internal Market, which, in accordance with Protocol No 27 on the Internal Market and Competition, annexed to the Treaty, is to include a system ensuring that competition is not distorted within the Internal Market.
- (79) Article 102 of the Treaty is one of the main provisions ensuring a system of undistorted competition referred to in Protocol No 27. Article 102 of the Treaty prohibits any abuse by a dominant undertaking of its position within the market that may affect trade between Member States.
- (80) In considering the scope of an abuse of dominance, the Court has established that a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the Internal Market.⁹² The precise content of the special responsibility incumbent on the dominant undertaking has to be considered in light of the specific circumstances of the case and the evidence showing how and to what extent competition has been weakened.⁹³
- (81) Article 102 of the Treaty generally prohibits a dominant undertaking from strengthening its position by adopting methods that are other than those which come within the scope of competition on the merits.⁹⁴
- (82) The concept of abuse of a dominant position is an objective concept relating to the behaviour of an undertaking in a dominant position which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to means different from those governing normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.⁹⁵
- (83) An abuse of a dominant position does not necessarily have to consist in the use of the economic power conferred by a dominant position. An abuse of such a position is

⁹² Judgment of 9 November 1983, *Michelin I*, Case 322/81 ECLI:EU:C:1983:313, paragraph 57; Judgment of 2 April 2009, *France Télécom v Commission*, Case C-202/07 P, EU:C:2009:214, paragraph 105; Judgment of 27 March 2012, *Post Danmark*, Case C-209/10, EU:C:2012:172, paragraph 23; Judgment of 12 June 2014, *Intel v Commission*, Case T-286/09, EU:T:2014:547, paragraph 205.

⁹³ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, Joined Cases C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 114; Judgment of 17 February 2011, *TeliaSonera Sverige*, Case C-52/09, EU:C:2011:83, paragraph 84.

⁹⁴ Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 91; Judgment of 3 July 1991, *Akzo*, Case 62/86, ECLI:EU:C:1991:286, paragraph 70; Judgment of 7 October 1999, *Irish Sugar*, T-228/97, ECLI:EU:T:1999:246, paragraph 111; Judgment of 1 July 2010, *AstraZeneca*, T-321/05, ECLI:EU:T:2010:266, paragraph 354; and Judgment of 12 June 2014, *Intel*, Case T-286/09, ECLI:EU:T:2014:547, paragraph 219.

⁹⁵ Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 91; Judgment of 9 November 1983, *Michelin I*, Case 322/81, paragraph 70; Case 62/86 *Akzo*, paragraph 69; Case C-95/04 P, *British Airways v Commission*, ECLI:EU:C:1983:313, paragraph 66; Judgment of 2 April 2009, *France Télécom*, Case C-202/07 P ECLI:EU:C:2009:214, paragraph 104; Judgment of 14 October 2010, *Deutsche Telekom v Commission*, Case C-280/08 P, EU:C:2010:603, paragraph 174; and Judgment of 17 February 2011, *TeliaSonera*, Case C-52/09, ECLI:EU:C:2011:83, paragraph 27.

prohibited under Article 102 of the Treaty regardless of the means and procedure by which it is achieved and irrespective of any fault.⁹⁶

- (84) In the same vein, there is no need to establish the existence of an abusive intent on the part of the dominant undertaking in order to render Article 102 of the Treaty applicable. While intent is not a necessary prerequisite to show an abuse, it is, however, one of the criteria which can be used for assessing the abusive nature of behaviour under Article 102 of the Treaty.⁹⁷
- (85) Moreover, in *Hoffmann-La Roche*, the Court confirmed that certain practices are by their very nature capable of restricting competition and accordingly are considered to be contrary to Article 102 of the Treaty, without the need to prove the concrete anticompetitive effects of such practices.⁹⁸
- (86) Article 102 of the Treaty does not require the dominance, the abusive conduct and the effects all to be in the same market. The Court emphasised in *TeliaSonera* that Article 102 of the Treaty gives no explicit guidance as to what is required in relation to where on the product markets the abuse takes place.⁹⁹ Consequently, "*certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non-dominated markets themselves can be categorised as abusive*".¹⁰⁰ In previous cases, the case law confirmed that an abuse can also take place in a market where an undertaking is not dominant in order to protect its position in the market where it is dominant.¹⁰¹ Similarly, the application of Article 102 of the Treaty cannot be excluded where the abusive practices take place in another geographic market than where the undertaking holds its dominant position in so far as these practices enable the undertaking to better exploit its dominant position on the dominated market.
- (87) Finally, it is settled case law that a dominant undertaking may abuse its dominance by also entering into anticompetitive agreements.¹⁰² In *Hoffmann-La Roche* the Court explained that in such cases '*the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets in which they operate to proceed on the basis of Article [101] or Article [102]*'.¹⁰³
- (88) In this respect, in *Compagnie Maritime Belge*¹⁰⁴ the Court clarified that a same practice may give rise to an infringement of both Articles 101 and 102 of the Treaty.

⁹⁶ Judgment of 21 February 1973, *Continental Can*, Case 6/72, EU:C:1973:22, paragraphs 27 and 29; Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 91; Judgment of 12 December 2000, *Aéroports de Paris v Commission*, Case T-128/98, EU:T:2000:290, paragraph 170; and Judgment of 1 July 2010, *AstraZeneca*, Case T-321/05, ECLI:EU:T:2010:266, paragraph 354.

⁹⁷ Judgment of 19 April 2012, *Tomra Systems and Others v Commission*, Case C-549/10 P, EU:C:2012:221, paragraphs 19-22.

⁹⁸ Judgment of 13 February 1979, *Hoffmann-La Roche*, Case 85/76, ECLI:EU:C:1979:36, paragraph 89.

⁹⁹ Case C-52/09 *TeliaSonera*, cited above, paragraph 84 - 86.

¹⁰⁰ Case C-52/09 *TeliaSonera*, cited above, paragraph 85, with reference to case C-333/94 P *Tetra Pak*, cited above, paragraph 25.

¹⁰¹ Judgment of 6 April 1995, *BPB Industries and British Gypsum v Commission*, Case C-310/93, EU:C:1995:101.

¹⁰² Case 27/76 *United Brands v Commission*, cited above, paragraph 161.

¹⁰³ Case 85/76 *Hoffmann La Roche*, cited above, paragraph 116.

¹⁰⁴ Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA v Commission*,

The Court pointed out that the objectives pursued by each of those two provisions are distinct to the extent that Article 101 TFEU applies to agreements, decisions and concerted practices which may appreciably affect trade between Member States, regardless of the position on the market of the undertakings concerned, while Article 102 of the Treaty, deals with the conduct of one or more economic operators consisting in the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.¹⁰⁵

7.1.2. *Partitioning of the Internal Market by restricting cross-border trade as an abuse by nature*

- (89) Territorial restrictions on resale in the form of import restrictions or other types of restrictions regarding the territory into which goods can be resold may be regarded as being contrary to Article 102 of the Treaty if imposed by a dominant undertaking.
- (90) In the *United Brands* case, a contract provision imposed by a supplier on wholesalers not to sell bananas while they were still green was found to constitute an abuse under Article 102 of the Treaty, because the clause limited ‘markets to the prejudice of consumers and affected trade between Member States, in particular by partitioning national markets.’¹⁰⁶
- (91) While Article 102 of the Treaty does not explicitly refer to the imposition of territorial restrictions as one form of abuse of dominance, the list of abusive practices set out in Article 102 of the Treaty is not exhaustive.¹⁰⁷ Practices mentioned explicitly in Article 102 TFEU are mere examples of an abuse.¹⁰⁸ Any practice that leads to a compartmentalisation of the Internal Market is seen by the Court to run counter to the very idea of the Treaty of eliminating national barriers: ‘*Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several*

cited above.

¹⁰⁵ Cited above, paragraphs (45)–(46).

¹⁰⁶ Case 27/76 *United Brands*, cited above, paragraphs 157 and 159. The Court found a restriction despite the fact that the bananas were a perishable good and therefore only had limited possibilities of being re-sold.

¹⁰⁷ See Judgment of 21 February 1973, *Continental Can*, Case 6/72, ECLI:EU:C:1973:22, paragraph 26; Judgment of 16 March 2000, Joined cases C-395/96 P and C-396/96 P *Compagnie Maritime belge*, ECLI:EU:C:2000:132, paragraph 112; Judgment of 14 November 1996, Case C-333/94 P *Tetra Pak II* EU:C:1996:436, paragraph 37 and Judgment of 15 March 2007, Case C-95/04 P *British Airways v Commission*, EU:C:2007:166, paragraph 57.

¹⁰⁸ See Case 6/72 *Continental Can*, cited above, paragraph 26; Joined Cases C 359/96 P and C 396/96 P *Compagnie Maritime belge*, cited above, paragraph 112; Case C-333/94 *Tetra Pak*, cited above, paragraph 37; Case C-95/04 P *British Airways*, cited above, paragraph 57; Case T-201/04 *Microsoft*, cited above, paragraphs 860 and 861; Judgment of 14 October 2010, 14 October 2010 *Deutsche Telekom v Commission*, cited above, Case C-280/08 P, EU:C:2010:603, paragraph 173; and Case C-52/09 *TeliaSonera*, cited above, paragraph 26.

*provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.*¹⁰⁹

- (92) Article 102 of the Treaty has been applied on several occasions to the unilateral conduct of dominant undertakings that restricted intra-EU trade and intra brand competition.¹¹⁰ In *British Leyland*, a dominant company was found to have violated Article 102 of the Treaty by refusing to issue type certificates for vehicles that had been re-imported to the UK from the continent; the Court held that this refusal manifested ‘*a deliberate intention [...] to create barriers to re-importations.*’¹¹¹ In *Irish Sugar*, a dominant company granted a special rebate to customers solely by reference to their geographical location which was intended to deter imports of sugar, including reimports of its own sugar, from a neighbouring Member State. The Court held that it is of the very essence of a common market that the pricing policy of companies active principally on a neighbouring market influences that of companies active on another national market. ‘*Anything which restricts that influence must therefore be regarded as an obstacle to the achievement of that common market and prejudicial to the outcome of effective and undistorted competition, especially with regard to the interests of consumers. Therefore, where such obstacles are brought about by an undertaking holding a dominant position [...], that is an abuse incompatible with Article 86*’ [Article 102].¹¹²
- (93) Also under Article 102 of the Treaty, certain conducts are by their very nature capable of restricting competition.¹¹³ With reference to its case law regarding market partitioning agreements as a restriction by object under Article 101 of the Treaty, the Court in *Sot.Lelos* held for the application of Article 102 of the Treaty: ‘*In the light of the Treaty objectives, and of ensuring that competition in the Internal Market is not distorted, there can be no escape from the prohibition laid down in Article 102 TFEU for practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States [...]*.’¹¹⁴ Such practices, by partitioning the national markets, neutralise the benefits of effective competition in terms of supply and the prices that those exports would obtain for final consumers in other Member States.

¹⁰⁹ Judgment of 13 July 1966, *Consten and Grundig v. Commission*, Joined cases 56 and 58-64, EU:C:1966:41, 340; see also Judgment of 4 October 2011, *Football Association Premier League Ltd*, Joined Cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 139; Judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, Case C-501, 513, 515, 519/06, EU:C:2009:610, paragraph 61; Judgment of 16 September 2008, *Sot.Lélos kai Sia and Others*, Joined Cases C-468/06 to C-478/06, EU:C:2008:504, paragraph 65.

¹¹⁰ See for example Joined Cases C- 468/06 to C-478/06 *Sot.Lélos kai Sia and Others*, cited above; Case 27/76, *United Brands*, cited above; Judgment of 16 December 1975, *Coöperatieve Vereniging ‘Suiker Unie’ UA and others v Commission*, Joined cases 40-48, 50, 54-56, 111, 113 and 114-73, EU:C:1975:174; Case T-139/98, *AAMS v Commission*, cited above.

¹¹¹ Judgment of 11 November 1986, *British Leyland Public Limited Company*, Case 226/84, EU:C:1986:421, paragraph 24.

¹¹² Case T-228/97, *Irish Sugar plc v Commission*, cited above, paragraph 185.

¹¹³ For parallel trade cases, see Judgment of 14 December 1983, *Société de vente de ciments et béton de l’Est*, Case 319/82, EU:C:1983:374, paragraph 6.

¹¹⁴ Joined Cases C-468/06 to C-478/06 *Sot.Lélos kai Sia and Others*, cited above, paragraph 66.

7.2. AB InBev's aim to maintain higher prices and profits for the supply of its products in Belgium through limitations of cross-border trade

- (94) Based on the review of the file and the assessment of the circumstances of the case, the Commission makes the following findings as to the aim pursued through AB InBev's conduct during the Relevant Period.
- (95) Throughout the Relevant Period AB InBev has pursued the aim to maintain higher prices and profits for its beer product supplies in Belgium,¹¹⁵ by restricting imports of such products from the Netherlands and France into Belgium.
- (96) That aim is evidenced by the fact that, throughout the Relevant Period, AB InBev:
- (1) monitored the wholesale prices charged to its off-trade customers operating in different Member States and the resulting cross-border trade potentials;
 - (2) carefully scrutinised and calculated the potential negative effects on its profits of possible imports of lower-priced beer products from the Netherlands and France into Belgium with the evident objective to counter such effects;
 - (3) carried out its decision-making in different business areas and at different levels of the undertaking with a view to implementing a variety of practices that cannot be justified by any objective other than to counter cross-border trade.

7.2.1. AB InBev monitored the price difference and cross-border trade potential at wholesale level

- (97) AB InBev regularly compared prices between the Netherlands and Belgium for Albert Heijn before and after the latter's entry in the Belgian retail market and was aware that these price differences may trigger Albert Heijn to buy certain AB InBev products in the Netherlands for sale in its shops in Belgium.¹¹⁶
- (98) [Business secret – commercial meeting], when the first commercial meetings between InBev Belgium and Albert Heijn Belgium took place, InBev Belgium feared that in the future Albert Heijn would buy the Jupiler crate in the Netherlands because of the lower price there and that the lower prices in the Netherlands would affect the price level and its corresponding profits in the Belgian market.¹¹⁷
- (99) After Albert Heijn started operating shops in Belgium, AB InBev continued its monitoring. In February 2013, AB InBev started an extensive price comparison between the prices for its main Jupiler, Leffe, and Hoegaarden products charged to Albert Heijn in the Netherlands, Albert Heijn in Belgium, and Delhaize, Carrefour, Colruyt and Spar in Belgium.¹¹⁸ AB InBev aimed at protecting higher prices and/or profits of all its beer products and assessed the risk of retail price alignment by retailers in Belgium on a large number of its most important beer products.
- (100) In 2014, AB InBev concluded that when its off-trade customers in the Netherlands can purchase AB InBev beer products at lower on-invoice prices

¹¹⁵ Internal AB InBev documents ID 644/34, ID 646/202 and ID 60/496, slide 3.

¹¹⁶ Internal AB InBev documents ID 660/517, ID 660/10, slide 4, ID 648/57, ID 646/16, slide 3, ID 660/75, ID 660/431, ID 660/562 and ID 660/248.

¹¹⁷ Internal AB InBev documents ID 660/517 and ID 660/10, slide 4.

¹¹⁸ Internal AB InBev document ID 648/57.

compared to their competitors in Belgium, it entails that they can resell the products in Belgium at lower end consumer prices compared to their competitors in Belgium.¹¹⁹ AB InBev was particularly concerned about the risk that these lower purchase prices for off-trade customers in the Netherlands could result in lower prices in the entire Belgian market since they would increase price competition; this would ultimately reduce AB InBev's revenues.

(101) In May 2015, AB InBev made an internal price comparison between Delhaize and Albert Heijn Belgium, [business secret - pricing] mainly because of the higher promotional discounts [...] in the Netherlands.¹²⁰ Later, in July 2015, InBev Belgium and InBev Nederland discussed a significant wholesale price difference per hectolitre between [a wholesaler] in the Netherlands and wholesalers in Belgium.¹²¹

7.2.2. *AB InBev calculated the negative effects of cross-border trade on its profits in Belgium*

(102) InBev Belgium was well aware of the possibility:

- that its off-trade customers operating in Belgium as well as in the Netherlands or France would source their supplies from the Netherlands and France at lower wholesale prices given also the higher promotions offered in the Netherlands;¹²²
- that this would have an impact on the entire market in Belgium as its off-trade customers only operating in Belgium could ask AB InBev to grant the same wholesale prices and/or promotions that competing off-trade customers received abroad.¹²³

(103) No later than from 2009 and during the Relevant Period, some of AB InBev's off-trade customers active in both Belgium and the Netherlands or France, started importing AB InBev beer products, previously supplied to them in the Netherlands, into Belgium. AB InBev then feared that imports of lower-priced AB InBev beer products from both the Netherlands and France into Belgium and the corresponding claims could cause a drop of the wholesale prices by off-trade customers for many beer products sold in Belgium, thus having a substantial negative effect on InBev Belgium's profits.¹²⁴ AB InBev's overall aim was then to preserve the higher prices, safeguard its profits at all retailers and/or wholesalers in Belgium. Therefore, AB InBev has carefully calculated the risk of a downward pricing adjustment that could derive from cross-border trade to the retailers/wholesalers just operating in Belgium.¹²⁵

(104) Throughout the Relevant Period AB InBev monitored that risk of possible downward alignment of prices in Belgium towards the lower prices in the Netherlands and

¹¹⁹ Internal AB InBev documents ID 646/16, slide 3 and ID 660/75, slide 3.

¹²⁰ Internal AB InBev document ID 660/431.

¹²¹ Internal AB InBev document ID 660/562.

¹²² Internal AB InBev document ID 660/163, slide 2.

¹²³ Internal AB InBev documents ID 660/48 and ID 660/70.

¹²⁴ Internal AB InBev document ID 660/79, slide 7.

¹²⁵ Internal AB InBev documents ID 644/24, ID 650/69, slide 2 and 5, ID 648/57, 660/562 and ID 660/163.

France, by calculating the financial impact of cross-border sales on its profits in Belgium with the aim of preventing such an occurrence.¹²⁶

- (105) That conclusion is particularly illustrated by one example. In 2015, AB InBev calculated the possible loss of revenues that it faced as a result of what it called "cross border risks".¹²⁷ These cross-border risks were divided into three categories, namely (i) "deadnet risk": the risk that a retailer buys at lower deadnet prices elsewhere; (ii) "Promo PTR [Price To Retailer] risk": the risk that a wholesaler gets a highly discounted wholesale price from another wholesaler (B2B); and (iii) "PTC [Price To Consumer] risk": the risk of margin claims by other retailers due to low consumer prices. AB InBev also identified Albert Heijn and [a wholesaler in the Netherlands] as the two off- trade customers that had provoked these risks.
- (106) According to AB InBev's risk assessment, the highest risk came from [a wholesaler in the Netherlands] with an estimated financial loss of revenues of over [5-15] million euro. In order to counter this threat to its revenues, AB InBev also listed a number of possible measures some of which were implemented. The contemplated measures for [a wholesaler in the Netherlands] included, inter alia, raising barriers to cross-border trade of the Jupiler crate and cans and limiting the supplies of Jupiler cans. The contemplated measures for Albert Heijn included building barriers by having a differentiated assortment between Belgium and the Netherlands with different languages and aligning the national promo plans.¹²⁸
- 7.2.3. *AB InBev sought to impair cross-border trade in its decision-making process in different business areas and at different levels within the undertaking*
- (107) During the Relevant Period, AB InBev's concerns about cross-border trade influenced its decision-making in different business areas with plans of adoption of a variety of practices to counter such trade, and the impact of cross-border trade on AB InBev's business in Belgium was discussed at different levels of the undertaking.
- (108) The imports of Jupiler products from the Netherlands and Leffe products from France caused the biggest concerns to AB InBev because these are the two most important AB InBev beer brands in Belgium.¹²⁹
- (109) At the beginning of the Relevant Period, AB InBev's aim to keep higher prices in Belgium manifested itself in short-term commercial decisions. From February 2009 until December 2010, AB InBev received complaints by wholesalers supplying the Belgian convenience market about lower prices for Jupiler cans offered by [a wholesaler in the Netherlands]. The prices offered by [a wholesaler] in the Netherlands were below the prices paid by wholesalers in Belgium and made it more attractive for the customers of these wholesalers to buy directly from [a wholesaler] in the Netherlands, thereby by-passing the wholesaler in Belgium. AB InBev did not react by reducing the prices of its products in Belgium. Rather, AB InBev curtailed the volumes offered to [a wholesaler] in the Netherlands during promotions, hereby restricting the volumes that [a wholesaler in the Netherlands] could sell from the Netherlands to customers in Belgium.¹³⁰

¹²⁶ Internal AB InBev documents ID 646/1, slide 3, ID 660/163, slides 2, 7 and 8, ID 644/24, ID 648/26, slide 3, ID 660/75, slide 1.

¹²⁷ Internal AB InBev document ID 650/69, slide 2.

¹²⁸ Internal AB InBev document ID 650/69, slide 5.

¹²⁹ Internal AB InBev document ID 1710/293, slides 42-43.

¹³⁰ Internal AB InBev document ID 660/286.

- (110) Later in the Relevant Period, AB InBev's aim to keep higher prices in Belgium manifested itself in more forward-looking commercial policy discussions. In December 2010 and at the beginning of 2011, AB InBev assessed the impact of Jupiler imports coming from the Netherlands and France on its business in Belgium. In particular, in an internal presentation of 22 December 2010, AB InBev calculated the impact of Albert Heijn's entry into the Belgian retail market and proposed ideas to deal with the risk of Albert Heijn's entry in Belgium, such as limiting promotions, delisting certain SKUs and differentiating the packaging.¹³¹ While only those changes set out in Section 7.2 were implemented, these assessments show AB InBev's aim during the Period. Similarly, an internal AB InBev presentation of January 2011 discusses the potential impact of the pricing of Jupiler in France on Belgium, and calculates the financial loss of revenues if AB InBev off-trade customers in Belgium would claim for the same dead net price as their competitors obtain in France.¹³² These assessments illustrate AB InBev's aim by quantifying the stakes.
- (111) In the later years of the Relevant Period, and particularly since 2013 when Albert Heijn started to buy more AB InBev beer products in the Netherlands, AB InBev addressed in a broader set of internal documents, including documents addressing pricing strategy and revenue management, portfolio optimisation, and customer negotiation strategies, the impact of imports of its beer products from other Member States into Belgium. In these documents, AB InBev examined this impact on certain strategic decisions, and/or presented ways to avoid negative impacts on AB InBev's revenues by enacting restrictions of imports from the Netherlands into Belgium. It follows that the restrictions of imports of its beer products into Belgium, or so-called cross-border trade¹³³, were one of the key drivers of the commercial policy of AB InBev during the Relevant Period, because:
- Imports into Belgium were part of discussions about revenue management and the pricing of Jupiler. For instance, in order to avoid imports from the Netherlands into Belgium, InBev Nederland would have to increase the price of the Jupiler 33cl cans it sells in the Netherlands since the cans are priced higher in Belgium. This, however, would have had negative effects on the competitive position of AB InBev in the Netherlands. Therefore, to avoid higher prices for Jupiler 33cl cans in the Netherlands, AB InBev considered switching towards 30cl cans and/or changing the design of the cans in the Netherlands to make it more difficult for off-trade customers in the Netherlands, such as Albert Heijn and [a wholesaler in the Netherlands], to import the Jupiler cans into Belgium.¹³⁴ Although this idea was not implemented for the Jupiler 33cl can, it was implemented for the Jupiler 50cl can¹³⁵ and illustrates AB InBev's aim during the Period.

¹³¹ Internal AB InBev document ID 660/341, slide 3.

¹³² Internal AB InBev document ID 646/1, slides 4-7.

¹³³ See examples of AB InBev's references to "cross-border" issues/risks/impacts/concerns in the context of potential exports of its products from the Netherlands and France to Belgium in ID 660/341, slide 3, ID 646/91, ID 660/683.

¹³⁴ Internal AB InBev documents ID 646/149, slide 10-13, ID 646/199, slide 4, ID 660/163, ID 648/13, ID 646/91 and ID 714/20.

¹³⁵ See Section 7.3.3.1.

- Imports into Belgium were a factor in the decisions about the optimal Jupiler portfolio.¹³⁶ For example, AB InBev considered adopting packaging differentiation between national markets and not selling certain Jupiler products to Albert Heijn and [a wholesaler] in the Netherlands, or not selling certain Jupiler or Leffe products to [...] in France.¹³⁷ The optimisation of the Jupiler portfolio with a view to hindering imports into Belgium had already previously led to the replacement in the Netherlands in 2014 of the Jupiler 50cl cans by 44cl cans.¹³⁸ Also, during the football world cup campaign in the first half of 2014 orange "Jup Holland Jup" cans replaced the regular Jupiler 33cl cans in the Netherlands specifically with a view to hindering imports into Belgium.¹³⁹ In both cases, the main reason for the portfolio changes in the Netherlands was to restrict the imports of these products into Belgium by Albert Heijn and [a wholesaler in the Netherlands].¹⁴⁰ Similarly, for France, the main reason for its plans not to offer certain beer products to certain AB InBev off-trade customers was related to cross-border risks.¹⁴¹ These plans illustrate AB InBev's aim and were partially implemented.
- Imports into Belgium have been a key element of the [0-2 years] negotiations with Albert Heijn. Several presentations referring to the [...] and [...] negotiation cycles between InBev Belgium and Albert Heijn include proposals and action plans to make Albert Heijn purchase more products in Belgium (and therefore reduce imports from the Netherlands).¹⁴² Those plans, which were partially implemented as set out in Section 7.2, illustrate AB InBev's aim during the Period.
- AB InBev contemplated packaging differentiation as an effective solution to avoid that off-trade customers could source products in the Netherlands for sales in Belgium.¹⁴³
 - In 2014, AB InBev envisaged to only have text in Dutch on the Jupiler 44 cl cans,¹⁴⁴ while the Jupiler 50cl cans, which it replaced,¹⁴⁵ had text in both French and Dutch.¹⁴⁶ AB InBev

¹³⁶ Internal AB InBev documents ID 650/5, slides 36-40 and ID 714/21.

¹³⁷ Internal AB InBev documents ID 660/683 and ID 660/67.

¹³⁸ Internal AB InBev document ID 646/91.

¹³⁹ [...].

¹⁴⁰ Internal AB InBev documents ID 646/91, ID 660/570, ID 648/9 and ID 660/43.

¹⁴¹ Internal AB InBev document ID 660/683.

¹⁴² Internal AB InBev documents, for example, ID 648/17 and ID 646/10.

¹⁴³ Internal AB InBev document ID 646/127.

¹⁴⁴ Internal AB InBev document ID 660/410. The artwork in IDs 660/411 and 660/412 shows that most text is indeed only in Dutch.

¹⁴⁵ See Section 7.3.3 below.

¹⁴⁶ Belgian legislation on food labelling requires that the information on the label is provided at least in a language comprehensible to the average consumer, in view of the linguistic region where the products or services are marketed, cf. Article IX.9. of the Code of Economic Law and judgment of the Belgian Constitutional Court of 5 October 2011, no. 147/2011. In practice, written information on the label needs to be at least in Dutch to market products in the Dutch language area, in French for the French

considered specifically removing the French text, so that the Jupiler 44cl cans could not be legally sold throughout almost all of Belgium.¹⁴⁷ Without the text in French the Jupiler 44cl cans could only be sold legally in the Dutch-speaking area of Belgium. For AB InBev's wholesale customers supplying the convenience segment in Belgium, this would be a decisive limitation because such customers were often distributing beer to convenience shops throughout Belgium, and needed to comply with the Belgian packaging standards, including the need to have labels in several languages, and at least in Dutch and French. This plan was ultimately not implemented.

- In 2015, AB InBev was concerned that launching the Leffe Blonde/Blond 33cl sleek can at [...] in France involved a huge cross-border risk for InBev Belgium in terms of either alignment of prices in Belgium to the lower levels in France, or trade from France to Belgium because of the lower price in France.¹⁴⁸ To restrict imports of such Leffe cans from France into Belgium, AB InBev considered changing the labels of its Leffe Blonde/Blond 33cl sleek cans, which previously could be marketed in Belgium, as well as in Luxemburg, the Netherlands, and the UK, by removing the text in Dutch, while retaining the French and English information on the labels.¹⁴⁹ This plan was ultimately not implemented.
- In 2015, an internal AB InBev presentation shows that AB InBev considered several possibilities to restraining off-trade customers in Belgium from sourcing the Jupiler 33 cl cans and other products in the Netherlands for import into Belgium, including (a) to stop selling (delisting) the 12-pack of Jupiler 33cl cans in the Netherlands and replacing it by another format (for example, 4-pack);¹⁵⁰ (b) changing the EAN code and language on Jupiler products;¹⁵¹ (c) not offering certain promotions on Jupiler 33cl to Albert Heijn or significantly reducing the depth of the promotions (and move to value creating promotions instead of price promotions);¹⁵² (d) not offering certain pack types to Albert Heijn in the Netherlands.¹⁵³ While these plans were not implemented, they also reveal AB InBev's aim during the Period.

language area, in German for the German language area, and in Dutch and French for the Bilingual Brussels-Capital area. An operator supplying throughout almost all of Belgium needs to have products with at least markings in Dutch and French.

¹⁴⁷ Internal AB InBev document ID 660/410.

¹⁴⁸ Internal AB InBev documents ID 660/383, ID 660/384 and ID 660/70. See also ID 660/519 concerning Jupiler.

¹⁴⁹ Internal AB InBev documents ID 660/68, ID 660/683, ID 650/3, ID 660/562, ID 646/195, ID 646/169, ID 660/383 and ID 660/46.

¹⁵⁰ Internal AB InBev documents ID 660/163, slide 8, ID 646/91, ID 660/79, slides 12-13, ID 646/169.

¹⁵¹ Internal Ab InBev document ID 660/79, slide 24, ID 646/140.

¹⁵² ID 648/59.

¹⁵³ Internal AB InBev documents ID 646/48, slide 4, ID 646/97, slides 8 and 10, ID 1014/1006, ID 650/48, slides 12 and 19, ID 646/46.

- (112) The discussions on cross-border trade between Belgium and the Netherlands/France took place between the AB InBev sales people and some members of the management. The aim of the participants in such discussions was to restrict imports of its beer products from the Netherlands and France into Belgium, in order to keep higher prices and profits in Belgium.¹⁵⁴ In addition, some members of the top management of InBev Belgium, InBev Nederland and AB InBev France were aware of this overall aim and the practices implemented by the sales people and their management.¹⁵⁵ According to the evidence available, AB InBev ultimately implemented only the plans in the Netherlands and Belgium as set out in Section 7.2.
- (113) In sum, during the Relevant Period AB InBev planned and sought to impair cross-border trade in its decision-making process in different business areas and at different levels within the undertaking.

7.3. Description of the conduct constituting the infringement

- (114) Based on the review of the file and the assessment of the circumstances of the case, the Commission makes the following findings as to AB InBev's conduct during the Relevant Period.
- (115) During the period from 9 February 2009 until 31 October 2016, AB InBev planned and implemented several practices restricting its off-trade customers from importing and reselling certain Jupiler beer products into Belgium, with the overall aim to maintain higher prices and profits for its beer products in Belgium.
- 7.3.1. AB InBev restricted its wholesale customer [...] from supplying AB InBev beer products sourced in the Netherlands to off-trade customers in Belgium*
- (116) During the period from 9 February 2009 to 31 October 2016, AB InBev actively restricted its off-trade customer [...], active in the area of food [...] wholesale in the Netherlands, from supplying Jupiler 33 cl cans to customers in Belgium.¹⁵⁶
- (117) An internal InBev Belgium e-mail of 9 February 2009 shows that InBev Nederland limited the volumes for [a wholesaler in the Netherlands] during promotions in the Netherlands because part of those volumes re-entered Belgium through [a wholesaler in the Netherlands]'s customers in Belgium.¹⁵⁷
- (118) At the beginning of 2010, certain wholesale customers of InBev Belgium complained that [a wholesaler in the Netherlands] obtained better purchase prices from InBev Nederland which would lead them to lose clients to [a wholesaler in the Netherlands].¹⁵⁸ As a result, in February 2010 InBev Belgium and InBev Nederland discussed two options in reaction to sales by [a wholesaler in the Netherlands] of AB InBev products, which were sourced in the Netherlands, to customers in Belgium:

¹⁵⁴ Internal AB InBev documents ID 646/10, ID 648/55, ID 660/562, ID 646/172, ID 660/85, ID 646/55, ID 644/30, ID 644/61 and ID 650/69.

¹⁵⁵ Internal AB InBev documents, for example, ID 650/3, ID 660/562, ID 646/195, ID 646/169, ID 660/383, ID 660/46.

¹⁵⁶ Internal AB InBev document ID 648/13, for example slide 2.

¹⁵⁷ Internal AB InBev document ID 660/286.

¹⁵⁸ Internal AB InBev document ID 660/285.

- (i) reducing promotions and/or (ii) reducing volumes provided.¹⁵⁹
- (119) Subsequently, in June 2010, InBev Nederland warned [a wholesaler in the Netherlands] that Jupiler beer products purchased in the Netherlands should not be sold to customers further importing these products into Belgium.¹⁶⁰ [A wholesaler in the Netherlands] communicated this message internally to its employees and forwarded this internal warning to InBev Nederland to show that it was complying with its request.¹⁶¹
- (120) InBev Nederland forwarded this internal warning by [a wholesaler in the Netherlands] to InBev Belgium to demonstrate that it had demanded that [a wholesaler in the Netherlands] take appropriate measures to avoid cross-border trade.
- (121) That demand by AB InBev to [a wholesaler in the Netherlands] and its subsequent internal warning to its employees had the desired effect for a certain period of time. However, in 2012, [a wholesaler in the Netherlands] tried to buy more volumes of promotional Jupiler 33cl cans than usual from InBev Nederland.
- (122) On 16 April 2012, InBev Nederland informed [a wholesaler in the Netherlands] that its orders of Jupiler 33cl cans under promotion in the Netherlands exceeded the expected volumes and that accordingly the quantities yet to be delivered would be capped and any additional orders would be cancelled.¹⁶² On the same occasion, AB InBev requested [a wholesaler in the Netherlands] to adapt its future quantities ordered during promotions in the Netherlands, hereby setting an appropriate quantity for future deliveries during promotional periods.
- (123) On 22 May 2012, in the context of another promotion in the Netherlands, InBev Nederland reminded [a wholesaler in the Netherlands] of the maximum number of Jupiler products which had been set for the Dutch market and warned [a wholesaler in the Netherlands] that it had exceeded that limit.¹⁶³ Moreover, InBev Nederland demanded from [a wholesaler in the Netherlands] that it withdraws part of its remaining orders within the limits set by AB InBev, as otherwise it would unilaterally cancel those deliveries.
- (124) On 6 May 2013, [a wholesaler in the Netherlands]'s offer for Jupiler 33cl cans to customers in Belgium again triggered complaints to AB InBev by some of its wholesale customers in Belgium.¹⁶⁴ Since these wholesale customers were buying these products from InBev Belgium at higher prices, they had difficulties in competing with [a wholesaler in the Netherlands] who was sourcing the products from InBev Nederland at lower prices. These wholesalers in Belgium emphasised that as a result they may lose the entire customer and not only the sales of AB InBev beer products to the respective customers.
- (125) InBev Belgium and InBev Nederland discussed the options available to solve the issues caused by [a wholesaler in the Netherlands]'s cross-border sales from the Netherlands to Belgium. Such options included reducing the depth of promotions and further restricting supply volumes to [a wholesaler] in the Netherlands during promotions, so that [a wholesaler in the Netherlands] would only have sufficient volumes to supply customers in the Netherlands.¹⁶⁵

¹⁵⁹ Internal AB InBev document ID 660/457.

¹⁶⁰ ID 930 and ID 931, reply to question 30.

¹⁶¹ Internal AB InBev document ID 660/272.

¹⁶² ID 933.

¹⁶³ ID 948.

¹⁶⁴ ID 660/263.

¹⁶⁵ ID 660/263.

- (126) On 9 July 2013, InBev Nederland explained to InBev Belgium that it had unilaterally cancelled [a wholesaler in the Netherlands]'s orders of Jupiler 33cl cans in the Netherlands because it considered that [a wholesaler in the Netherlands] had received sufficient volumes to deliver the Dutch market.¹⁶⁶
- (127) At least during two further promotions in the Netherlands, namely on 25 June 2014 and on 19 December 2014, InBev Nederland referred [a wholesaler in the Netherlands] to the limited volumes of Jupiler 33cl cans which it considered sufficient for [a wholesaler in the Netherlands] to supply the Dutch market.¹⁶⁷
- (128) [A wholesaler in the Netherlands] stated that these volume restrictions on Jupiler 33cl cans during promotional periods in the Netherlands were in place until 31 October 2016.¹⁶⁸
- (129) In sum, in the period from 9 February 2009 to 31 October 2016, AB InBev restricted its off-trade customer [...], active in the area of food [...] wholesale in the Netherlands, from supplying Jupiler 33 cl cans to customers in Belgium.

7.3.2. *InBev Belgium pressed Albert Heijn to procure products for the Belgium market exclusively in Belgium*

- (130) In 2013, Albert Heijn requested AB InBev to grant the same pricing conditions in Belgium as the ones it practised in the Netherlands by sourcing all its supplies from InBev Nederland on the basis of [...] contracts for Belgium and the Netherlands. AB InBev refused since it wanted Albert Heijn to source all its assortment needs for its shops in Belgium from InBev Belgium.
- (131) Albert Heijn subsequently decided to source more AB InBev beer products in the Netherlands for sales in its stores in Belgium, for example, by starting to purchase as of week 39 the Leffe Blonde/Blond and Leffe Brune/Bruin bottles from InBev Nederland.¹⁶⁹
- (132) In September 2013, in line with earlier requests to source the entire assortment in Belgium,¹⁷⁰ InBev Belgium demanded from Albert Heijn that it buys eight "Essential Products" for the Belgian market in Belgium rather than in the Netherlands.¹⁷¹ Albert Heijn preferred to buy these products in the Netherlands¹⁷² and, despite AB InBev's persistence,¹⁷³ effectively continued to buy seven of them (that is all products except the Jupiler crate 33cl) in the Netherlands.¹⁷⁴ After a contentious negotiation about the 2013 contract, in autumn 2013, Albert Heijn secured buying additional quantities of Leffe, Hoegaarden and Belle-Vue products in the Netherlands.¹⁷⁵
- (133) Thereafter, Albert Heijn procured in the Netherlands the most important AB InBev beer products, with the exception of the Jupiler 25cl crate,¹⁷⁶ for sales in its shops in

¹⁶⁶ ID 660/263.

¹⁶⁷ ID 935 and ID 936.

¹⁶⁸ ID 930, ID 931, ID 1574 and ID 1575.

¹⁶⁹ ID 2197.

¹⁷⁰ Internal AB Inbev document ID 1710/240, slide 7.

¹⁷¹ ID 2036.

¹⁷² ID 2002.

¹⁷³ ID 2010.

¹⁷⁴ Internal AB InBev document ID 660/393.

¹⁷⁵ ID 2197 and ID 2010.

¹⁷⁶ Since the start of the negotiations in 2011, purchasing the Jupiler crate 25cl in the Netherlands for import into Belgium has always been a clear deal breaker for InBev Belgium, see ID 2197.

Belgium.¹⁷⁷ Albert Heijn could hereby benefit from lower wholesale prices as well as deeper and more frequent promotions in the Netherlands and offer them to consumers in Belgium.

(134) Despite ultimately having tolerated Albert Heijn's procurement strategy in 2013, InBev Belgium recognized the negative impact of Albert Heijn's purchasing behaviour and that it had to react to protect its revenues in Belgium (see Section 7.3.3). Therefore, it wanted to discuss the reasons why Albert Heijn did not source certain AB InBev beer products from InBev Belgium.¹⁷⁸ Albert Heijn's procurement strategy not only affected InBev Belgium's revenues, but also the position of competing off-trade customers in Belgium that requested from InBev Belgium the same supply conditions as Albert Heijn. This put even more pressure on InBev Belgium's revenues.¹⁷⁹

(135) In sum, in 2013, AB InBev pressured Albert Heijn to procure products for the Belgian market exclusively in Belgium.

7.3.3. *AB InBev implemented packaging changes to hinder off-trade customers in Belgium from sourcing their suppliers in the Netherlands*

(136) AB InBev decided to take further action to restrict Albert Heijn and [a wholesaler in the Netherlands] from buying products in the Netherlands for sales to consumers and off-trade customers in Belgium. In this respect, InBev Belgium and InBev Nederland envisaged packaging differentiation between Belgium and the Netherlands as a more effective solution to avoid cross-border trade.

(137) Firstly, AB InBev considered that different packaging for its beer products creates a more effective obstacle to imports into Belgium and also allows AB InBev to maintain its distinct pricing and promotional policies for its beer products in the Netherlands as opposed to Belgium.¹⁸⁰

(138) Moreover, it could benefit from the Belgian legislation on food labelling which requires that the information on the label is provided at least in a language comprehensible to the average consumer, in view of the linguistic region where the products or services are marketed.¹⁸¹ In practice, written information on the label needs to be at least in Dutch to market products in the Dutch language area, in French for the French language area, in German for the German language area, and in Dutch and French for the Bilingual Brussels-Capital area. An operator supplying throughout almost all of Belgium¹⁸² needs to have products with at least markings in both Dutch and French.

(139) In August 2013, InBev Nederland reported internally that Jupiler was priced too highly in the Netherlands compared to the prices of competing beer products from [...] and [...].¹⁸³ AB InBev realised that hindering imports of Jupiler products from the Netherlands into Belgium by further aligning prices between both

¹⁷⁷ ID 1710/297.

¹⁷⁸ ID 1710/24 and ID 1710/297.

¹⁷⁹ See for example, internal AB InBev documents ID 660/283 and ID 648/13, slide 11.

¹⁸⁰ Internal AB InBev document ID 646/127.

¹⁸¹ Article 8 of the Law of 24 January 1977 regarding the protection of the health of consumers of foodstuffs and other products.

¹⁸² Not taking into account the German language area.

¹⁸³ Internal AB InBev document ID 646/149.

countries (that is increasing the prices in the Netherlands) was not a feasible option because it would have led to a further loss in competitiveness in the Netherlands. Instead, AB InBev wanted to change its assortment in the Netherlands by replacing the Jupiler 33cl and 50cl cans by Jupiler 30cl and 44cl cans.¹⁸⁴

- (140) These packaging changes by AB InBev served two goals, to create a barrier for cross-border trade because consumers in Belgium were accustomed to the Jupiler 33cl and 50cl cans that are the standard references in that market, and to increase the competitiveness of Jupiler cans in the Netherlands as AB InBev could then price the 30cl and 44cl cans without having to take into account the competitive situation in Belgium where these cans are not available to its off-trade customers.¹⁸⁵
- (141) An impact study about the introduction of the 30cl Jupiler cans showed, however, a negative impact of the switch from the Jupiler 33cl to the 30cl can on AB InBev's volumes and revenues in the Netherlands.¹⁸⁶ Therefore, in week 13 of 2014, AB InBev only replaced the Jupiler 50cl can in the Netherlands by a 44cl can.¹⁸⁷
- (142) In conclusion, AB InBev has planned and to some extent implemented packaging changes of its beer products differentiating between Belgium and the Netherlands with the aim to restrict cross-border trade of its beer products.

7.3.3.1. Replacing the Jupiler 50cl can in the Netherlands by a Jupiler 44cl can

- (143) The introduction by AB InBev of this unique Dutch Jupiler 44cl can was unappealing to off-trade customers in Belgium. In doing so, AB InBev managed to restrict imports from the Netherlands into Belgium because consumers in Belgium were not accustomed to the new size and preferred instead the standard reference Jupiler 50cl can. InBev Belgium and InBev Nederland even envisaged removing all text in French from the Jupiler 44cl can so that it could not be legally sold throughout almost all of Belgium.¹⁸⁸ This was, however, eventually not implemented.
- (144) As a result, InBev Belgium and InBev Nederland attentively monitored the effects of replacing the Jupiler 50cl can by the new Dutch Jupiler 44cl can and in July 2015, they saw this packaging change as a real success.¹⁸⁹ In an e-mail exchange between InBev Nederland and InBev Belgium they noted that changing the Belgian standard to a different size in the Netherlands raised an additional barrier for customers in Belgium to purchase Jupiler cans from [a wholesaler] in the Netherlands.¹⁹⁰ An internal AB InBev presentation on cross-border issues of October 2015 also confirmed the success as it noted that at that point in time the convenience segment in Belgium was not selling the Jupiler 44cl cans.¹⁹¹
- (145) Due to the switch to Jupiler 44cl cans in the Netherlands, off-trade customers of AB InBev could no longer import the lower-priced Jupiler 50cl cans from the Netherlands into Belgium but Albert Heijn could still sell the Jupiler 44cl cans in its

¹⁸⁴ Internal AB InBev document ID 646/149.

¹⁸⁵ Internal AB InBev documents ID 644/30, slide 23 and ID 646/140.

¹⁸⁶ Internal AB InBev document ID 650/40.

¹⁸⁷ ID 1014/1006, annex 1 to question 10a.

¹⁸⁸ Internal AB InBev document ID 660/410.

¹⁸⁹ Internal AB InBev document ID 646/91.

¹⁹⁰ Internal AB InBev document ID 646/140.

¹⁹¹ Internal AB InBev document ID 644/30, slides 17 and 23.

Albert Heijn supermarkets in Belgium, although at a higher price per litre than the Jupiler 50cl can.¹⁹²

- (146) It follows from the above that AB InBev effectively managed to restrict imports into Belgium by replacing the Jupiler 50cl can in the in the Netherlands by a Jupiler 44cl can.
- 7.3.3.2. Introducing a specific Dutch Jupiler 33cl can for the football world cup in Brazil
- (147) Separately, AB InBev continued to face imports of the 33cl Jupiler cans from the Netherlands into Belgium.¹⁹³
- (148) On the occasion of the football world cup in 2014, AB InBev decided to implement another packaging measure with the specific objective to hinder its off-trade customers in Belgium from sourcing the Jupiler 33cl cans in the Netherlands.¹⁹⁴
- (149) From 1 January 2014 to 13 July 2014, InBev Nederland and InBev Belgium created two distinct country-specific versions of the Jupiler 33cl can. InBev Nederland introduced orange "Jup Holland Jup" Jupiler 33cl cans with reference to the Dutch football team, in order to restrict Albert Heijn from sourcing in the Netherlands its supplies for its shops in Belgium.¹⁹⁵ This Dutch Jupiler 33cl can had an orange border at the top and the bottom as well as a customised version of the common Dutch football fan slogan, "Hup Holland Hup", in support of the Dutch national football team, whereby the "Jup" in "Jup Holland Jup" refers to Jupiler, at the bottom of the cans and was packed in an orange sleeve. The Belgian Jupiler 33cl can became the "red devil" can with an image of individual players of the Belgian national football team.
- (150) In addition to changing the layout of the orange "Jup Holland Jup" Jupiler 33cl can, AB InBev removed the text in French from the can, as well as all Belgium-specific information, such as Belgian phone numbers for consumer contacts, and only kept information in Dutch.¹⁹⁶
- (151) All these packaging changes for the Jupiler 33cl cans hindered AB InBev's off-trade customers in Belgium from sourcing their supplies in the Netherlands¹⁹⁷ and, in particular, were intended to restrict Albert Heijn from importing them into Belgium.¹⁹⁸
- (152) InBev Belgium and InBev Nederland knew that it was "schizophrenic" for AB InBev to support both the Dutch and Belgian national football teams for the 2014 football world cup¹⁹⁹, especially since Jupiler was an official partner of the Belgian Football

¹⁹² Internal AB InBev document ID 644/30.

¹⁹³ Internal AB InBev document ID 646/140.

¹⁹⁴ Internal AB InBev documents ID 660/44 and ID 1014/199, slide 3.

¹⁹⁵ Internal AB InBev documents ID 660/163, slide 8, and ID 660/570.

¹⁹⁶ Internal AB InBev document ID 648/9.

¹⁹⁷ Internal AB InBev document ID 660/452.

¹⁹⁸ Internal AB InBev document ID 660/43.

¹⁹⁹ Concretely Jupiler was the official sponsor of the Belgian national football team (the Jupiler cans showed it extensively through the inclusion of photos of the team and players on the packaging) and an indirect supporter (and not the official sponsor) of the Dutch national football team through the labelling of the Jupiler cans (there were no photos of the team and players on the packaging but an encouragement of the national team through the slogan "Jup Holland Jup" based on the football slogan "Hup Holland Hup" for the Dutch national football team).

Federation and an official sponsor of the Belgian national football team during the world cup football in Brazil in 2014 but not of the Dutch national football team nor of the Royal Dutch Football Federation which is sponsored by Heineken, and the fact that this could damage the brand.²⁰⁰ Effectively, the presence of the Jup Holland Jup Jupiler 33cl cans in Albert Heijn shops in Belgium resulted in negative reactions from Belgian end consumers on social media.²⁰¹

- (153) Nevertheless, in the context of discussions about possible 2014 budget cuts, AB InBev confirmed that the football can project could not be stopped because of the risk of imports of the Jupiler 33cl cans into Belgium.²⁰² AB InBev was willing to inflict damage on itself by keeping separate cans for the Netherlands and Belgium in the context of the football world cup, especially as some of the Jup Holland Jup Jupiler 33cl cans ended up in the Belgian market. AB InBev's aim to maintain higher prices for its beer products in Belgium by segregating the Belgian market from the Dutch one outweighed other considerations.
- (154) InBev Belgium and InBev Nederland at first were also convinced that differentiating the football cans in Belgium and the Netherlands would be sufficient to stop imports by Albert Heijn (and other off-trade customers in Belgium) into Belgium, which would stop the negative reactions on social media and limit the damage to the Jupiler brand.²⁰³ However, Albert Heijn kept on sourcing the Jup Holland Jup Jupiler 33cl cans in the Netherlands and selling them in its shops in Belgium (since their wholesale purchase price²⁰⁴ excluding any possible discounts related to investments and lump sums was much lower).²⁰⁵ As a consequence, to safeguard the brand image of Jupiler in Belgium (see Recital (74)), InBev Belgium required Albert Heijn to stop selling the orange Jup Holland Jup cans in its Albert Heijn stores in Belgium.²⁰⁶
- (155) In order to further convince Albert Heijn to stop sourcing the Jup Holland Jup cans in the Netherlands for sales in Belgium, InBev Nederland also threatened to increase the price of the Jupiler 33cl cans in the Netherlands [business secret - pricing].²⁰⁷ Although the price increase did not materialise in the end, with this threat InBev Nederland wanted to force Albert Heijn in Belgium to source the Jupiler 33cl cans in Belgium in the months before and during the 2014 football world cup.
- (156) The introduction of the Dutch Jup Holland Jup Jupiler 33cl can by InBev Belgium and InBev Nederland also harmed wholesalers in Belgium. Wholesalers in Belgium did not consider it realistic to import and sell the lower-priced orange Jup Holland Jup Jupiler 33cl cans to consumers on the Belgian market.²⁰⁸ The specific packaging linked the cans to the Dutch national football team while consumers in Belgium were during the football world cup especially looking for the advertised Belgian version of the Jupiler cans with players of the Belgian football team on them.

²⁰⁰ Internal AB InBev document ID 648/7.
²⁰¹ Internal AB InBev document ID 648/7.
²⁰² Internal AB InBev document ID 646/209.
²⁰³ Internal AB InBev document ID 648/7.
²⁰⁴ ID 2100, slide 4.
²⁰⁵ ID 1435 and ID 1996.
²⁰⁶ Internal AB InBev document ID 648/7.
²⁰⁷ ID 1435 and ID 2026.
²⁰⁸ ID 2214, reply to question 20.

- (157) It follows from the above that, during the football world cup in 2014, AB InBev effectively limited the possibility for its off-trade customers in Belgium sourcing the Jupiler 33cl cans in the Netherlands by introducing the Jup Holland Jup Jupiler 33cl can in the Netherlands.
- 7.3.4. *AB InBev made the supplies to Albert Heijn in Belgium of beer products, which were not otherwise available in the Netherlands, conditional on the purchase in Belgium of other products, which otherwise could have been sourced in the Netherlands*
- (158) AB InBev implemented another type of conduct to force Albert Heijn to buy more AB InBev beer products in Belgium in the second half of 2014. AB InBev did not want Albert Heijn to "cherry-pick", that is purchase AB InBev beer products at a lower promotion price from InBev Nederland when the same or similar beer products are also available in the assortment of InBev Belgium.²⁰⁹
- (159) From July 2014 to June 2016 (that is the end of the 2015/2016 contract between Albert Heijn and InBev Belgium²¹⁰), InBev Belgium made its sales to Albert Heijn of Belgium-specific beer products (that is AB InBev beer products that Albert Heijn purchased from InBev Belgium because they are not included in the assortment of InBev Nederland), including a number of "Essential Products" (see Recital (24)), conditional on the purchase of other AB InBev beer products in Belgium which Albert Heijn could otherwise have sourced from InBev Nederland.
- (160) During the negotiations for the 2014/2015 contract, InBev Belgium requested Albert Heijn to purchase a larger assortment of AB InBev beer products in Belgium (similar to InBev Belgium's attempts in 2013 – see Recital (132)). This request required Albert Heijn to keep on procuring the Jupiler crate 25cl in Belgium (see Recital (162)), and procure from InBev Belgium beer products purchased from InBev Nederland and sold in its Belgian stores.²¹¹ This concerned, in particular, the following beer products that were most important for InBev Belgium at that point in time: [...].²¹²
- (161) Albert Heijn did not agree with InBev Belgium's request to buy in Belgium all its assortment needs for the Albert Heijn shops in Belgium.²¹³ However, InBev Belgium insisted and, later in the negotiations, threatened to stop supplying any products to Albert Heijn in Belgium. If Albert Heijn refused purchasing additional beer products from InBev Belgium, including non-Belgium-specific beer products, Albert Heijn would no longer have access to more than [10-30] Belgium-specific beer products, including [1-10] "Essential Products" for the Belgian market.²¹⁴ In other words, InBev

²⁰⁹ See for example, internal AB InBev documents ID 648/17, slide 8 and slide 30, and ID 1014/91, slide 6.
²¹⁰ ID 476.

²¹¹ Internal AB InBev documents ID 648/17, slide 24, ID 644/6, slides 40 and 41, and corresponding Excel table, ID 660/178 and ID 660/179, slide 11.

²¹² Internal AB InBev documents ID 660/176 and ID 660/178.

²¹³ ID 1714/37.

²¹⁴ ID 1899, ID 2055 and ID 2148.

Belgium required Albert Heijn to purchase from it additional beer products which Albert Heijn at the time purchased from InBev Nederland.²¹⁵

- (162) Since 2014, InBev Belgium had been requesting in particular that Albert Heijn purchase the [...],²¹⁶ that is the [business secrets – sales strategy]²¹⁷ and the [business secrets – sales strategy] and [business secrets – sales strategy], in Belgium because these products were fundamental for InBev Belgium's revenues and profitability. There was thus a real threat by InBev Belgium of punishing Albert Heijn by not supplying Belgium-specific beer products, including "Essential Products", if it sourced these [...] SKUs in the Netherlands.²¹⁸
- (163) Albert Heijn ran the risk of a significant reduction in the scope of the AB InBev beer assortment in its shops in Belgium and, in particular, the elimination from that assortment of "Essential Products" for the Belgian market.²¹⁹ This risk of losses was not limited to Albert Heijn's sales of AB InBev beer products but also in terms of its overall sales given that AB InBev beer brands and, in particular, the "Essential Products" are important to attract consumers to its shops (so-called 'traffic builders') for their overall grocery purchases.²²⁰
- (164) In October 2014, InBev Belgium obtained the contractual commitment from Albert Heijn to buy the [...] in Belgium.²²¹ Albert Heijn accepted the deal offered by InBev Belgium, despite the fact that it wanted to source these Jupiler products in the Netherlands.²²²
- (165) [Business secret – sales strategy].²²³ The agreement ultimately materialised for the Jupiler 50cl cans and the Jupiler crate 25cl but not for the Jupiler 33cl cans due to technical constraints in the Tilburg distribution centre of Ahold.²²⁴
- (166) [Business secret – sales strategy].²²⁵ [Business secret – sales strategy]. Due to the prohibition of sales below cost in Belgium, Albert

²¹⁵ Internal AB InBev documents ID 648/61, slide 8, ID 2160 and ID 1712/8.

²¹⁶ See, for example, internal AB InBev documents ID 646/94; the Excel file attached mentions the [...] SKUs, ID 646/95. "SKU" stands for "Stock Keeping Unit" and is a product identified with a specific EAN code (European Article Number or a 13 digit barcode). The EAN codes enable notably retailers to scan and recognize the products at the check-out of the store.

²¹⁷ With regard to the [...], InBev Belgium already made it clear since 2011 that it would be a deal breaker if Albert Heijn would source it from the Netherlands instead of InBev Belgium, see ID 2197.

²¹⁸ ID 2201, reply to question 10, and ID 2118.

²¹⁹ See footnote 209, ID 2160.

²²⁰ ID 1014/1.

²²¹ Internal AB InBev documents ID 646/94 and the attached Excel file with the "[...]" SKUs, ID 646/95. ID 1712/8, ID 1887, ID 1899, ID 1972, ID 1976, ID 2148 and ID 2202.

²²² ID 1712/8, ID 1887, ID 1899, ID 1972, ID 1976, ID 2148 and ID 2202.

²²³ ID 1710/40.

²²⁴ ID 2197: Given that the BE and NL SKU's for the 33cl cans were identical, it was impossible to separate the BE and NL deliveries. ID 1435, ID 1976 and internal AB InBev document ID 660/592.

²²⁵ ID 1712/33 and ID 1712/66.

Heijn could therefore not pass on [...] to its Belgian end consumers (see Section 4.1.1.2). In other words, Albert Heijn could not offer lower Dutch prices for the Jupiler crate 25cl and the Jupiler 50cl cans at Albert Heijn shops in Belgium.²²⁶ As a consequence, competitors of Albert Heijn in Belgium did not have to compete with or align to lower prices from Albert Heijn on these AB InBev beer products (see also Recital (99)).²²⁷

- (167) Moreover, for the [...] contract, InBev Belgium maintained its practice of leveraging its position vis-à-vis Albert Heijn to purchase the [...] in Belgium²²⁸ and the same off-invoice compensation was included in the [...] contract²²⁹ despite the fact that Albert Heijn maintained its view that it should be free to procure products where it wished.²³⁰ The [...] contract was in force until June 2016.
- (168) In sum, in the above-mentioned period from July 2014 to June 2016 AB InBev effectively made the supplies to Albert Heijn in Belgium of beer products, which were not otherwise available in the Netherlands, conditional on the purchase in Belgium of other AB InBev beer products that were instead available in the Netherlands.
- 7.3.5. *InBev Nederland refused to grant a promotion to Albert Heijn because it could have imported the products concerned by such promotions in Belgium*
- (169) Albert Heijn kept on sourcing the Jupiler 33cl cans in the Netherlands for distribution to its Belgian stores and continued to bring the lower prices and deeper promotions from the Netherlands to Belgium for this product.
- (170) Against that background, InBev Nederland considered several complementary possibilities to continue restraining off-trade customers in Belgium from sourcing the Jupiler 33cl cans and other AB InBev beer products in the Netherlands for import into Belgium.²³¹ Such possibilities included not offering certain promotions on Jupiler 33cl to off-trade customers in Belgium or significantly reducing the depth of the promotions (and switching to value creating promotions instead of price promotions). Although these ideas were not implemented, they reveal AB InBev's aim during the Period.
- (171) Between 13 and 18 March 2015, InBev Nederland made a promotional offer to Albert Heijn that consisted of two Jupiler 33cl cans for a recommended retail price of 99 cents.²³² Before granting this promotional offer, InBev Nederland requested Albert Heijn to confirm that it would not bring the same promotion to its retail shops in Belgium.

²²⁶ ID 2197.

²²⁷ This is particularly relevant for Colruyt, who has a pricing and marketing strategy based on being always the cheapest in the neighbourhood. See also [...].

²²⁸ Internal AB InBev documents ID 660/78, ID1710/5 and ID 650/48.

²²⁹ ID 963.

²³⁰ ID 2464/6.

²³¹ Internal AB InBev documents ID 660/174 and ID 650/48.

²³² Internal AB InBev document ID 648/59.

- (172) Albert Heijn did not want to provide such assurance to InBev Nederland. It indicated that all promotions are normally also implemented in its Belgian stores. As a result, InBev Nederland withdrew the promotional offer of two Jupiler 33cl cans for a recommended retail price of 99 cent to Albert Heijn as it considered it too disruptive for the Belgian market.²³³
- (173) It follows from the above that, in the above-mentioned period between 13 and 18 March 2015, InBev Nederland effectively refused to grant a promotion to Albert Heijn because it feared that Albert Heijn could bring such promotions to the Belgian market by parallel trade.

7.4. AB InBev's restrictions of imports into Belgium of beer products supplied to off-trade customers in the Netherlands

- (174) Based on the review of the file and the assessment of the circumstances of the case, the Commission makes the following findings of law as to the incompatibility with the Internal Market, contrary to Article 102 of the Treaty, of AB InBev's conduct of restricting parallel trade of certain beer products between the Netherlands and Belgium, during the Relevant Period.

7.4.1. AB InBev's volume limitations of beer products supplied to [a wholesaler] in the Netherlands to restrict imports of these products into Belgium

- (175) As set out in Section 4.1.1.1, regular price promotions are part of the normal commercialisation process of beer products, including long established beer products such as Jupiler. Price differences between AB InBev beer products in Belgium and the Netherlands are substantial in particular at times of such promotions in the Netherlands (see Recital (41)). This implies that AB InBev's off-trade customers in Belgium and the Netherlands may have an interest in buying higher volumes during promotional periods in the Netherlands and importing these lower-priced products into Belgium or in exporting them from the Netherlands to customers in Belgium.
- (176) AB InBev considered that these imports of its beer products from the Netherlands into Belgium and the exports from the Netherlands to customers in Belgium constituted a threat to its revenues in Belgium. In the Relevant Period, off-trade customers in Belgium complained to AB InBev about the lower prices offered in Belgium by competing retailers, who imported its products at lower prices from the Netherlands, and by wholesalers in the Netherlands supplying the convenience segment in Belgium. On top of these complaints, AB InBev was concerned that its off-trade customers in Belgium could request the same conditions as those offered in the Netherlands.²³⁴
- (177) As shown in Section 7.3.1, from 9 February 2009 onwards, AB InBev has deliberately (i) capped the volumes supplied to [a wholesaler in the Netherlands] during promotional periods in the Netherlands based on the volumes needed to supply customers in the Netherlands,²³⁵ (ii) insisted with [a wholesaler in the Netherlands] that Jupiler beer products ordered in the Netherlands should not end up in Belgium, and (iii) required [a wholesaler in the Netherlands] to comply with this instruction. If [a wholesaler in the Netherlands]'s orders of Jupiler 33cl cans during promotions in the Netherlands exceeded the volume restrictions imposed by AB InBev, it refused to

²³³ Internal AB InBev document ID 648/59.

²³⁴ See for example, Recitals (122) and (164).

²³⁵ ID 930 and ID 931.

meet the entire orders and cancelled part of them. According to [a wholesaler in the Netherlands], such volume restrictions were in place until 31 October 2016.²³⁶

(178) It follows that AB InBev effectively reduced the volumes of Jupiler 33cl cans supplied to [a wholesaler in the Netherlands] during promotions in the Netherlands in the period from 9 February 2009 until 31 October 2016. That practice amounts to an abuse by AB InBev of its dominant position by restricting imports of its beer products into Belgium in order to maintain higher prices for its beer products in Belgium. Although that conduct was specifically implemented towards [a wholesaler in the Netherlands], as explained in Section 7.1, AB InBev aimed at restricting imports and avoiding the consequences of imports from the Netherlands of certain of its beer products in the entire Belgian off- trade market.

7.4.2. *AB InBev's changes in the packaging of beer products supplied to off-trade customers in the Netherlands to restrict imports of these products into Belgium*

7.4.2.1. Removing certain languages from the label

(179) As set out in Section 7.3.3.2, in the period from 1 January (week 1) 2014 until 13 July 2014, AB InBev deliberately deleted information in French from its Jupiler 33cl "Jup Holland Jup" cans in the Netherlands in order to restrict imports of Jupiler cans from the Netherlands into Belgium. The deleted language is an official language in Belgium.

(180) Without information in French on the labels of the Jup Holland Jup Jupiler 33cl cans off-trade customers could not import and market such beer products in the Bilingual Brussels-Capital area nor in the French language area in Belgium. Without markings in both Dutch and French they were restricted from supplying (almost) all of Belgium with these Jupiler products (as is customary for retailers with shops throughout Belgium and for wholesalers supplying the convenience segment).²³⁷

(181) In theory, off-trade customers could remedy the missing markings on the labels by, for example, themselves affixing a label with the text in the omitted language. However, this entails additional costs, as recognised by AB InBev and which it was not willing to bear.²³⁸ This additional cost for off-trade customers may outweigh the price difference as each beer can would need to have a sticker. Moreover, this may pose particular difficulties for beer cans stored in a fridge, which is often the case in the convenience segment, due to the humidity.

(182) The intentional removal of the French language markings from the labels of the Jup Holland Jup Jupiler 33cl cans supplied in the Netherlands in the period from 1 January 2014 to 13 July 2014 amounts to an abuse by AB InBev of its dominant position by restricting imports of its beer products into Belgium in order to maintain higher prices for the supply of beer products in Belgium.

7.4.2.2. Changing layout and size

(183) In the period from 1 January (week 1) 2014 until 13 July 2014 (the end of the 2014 Brazil football world cup event), AB InBev intentionally changed the layout of the Jupiler 33cl can sold in the Netherlands to avoid that these cans could be imported

²³⁶ ID 930 and ID 931, reply to questions 2 and 30 and further clarification in ID 1574 and ID 1575.

²³⁷ ID 2201, reply to question 18.

²³⁸ Internal AB InBev document ID 644/30, slide 24.

for resale in Belgium (see Section 7.3.3.2). It created a specific Dutch “Jup Holland Jup” version of the Jupiler 33cl can with orange borders to clearly differentiate it from the Jupiler 33cl cans supplied by AB InBev in Belgium. As shown in Section 7.3.3.1, in March (week 13) 2014, AB InBev replaced the Jupiler 50cl can in its assortment in the Netherlands by the Jupiler 44cl can. The Jupiler 50cl can, a standard reference for consumers in Belgium and an "Essential Product" for most off-trade customers in Belgium, was from that date onwards only available in Belgium. As a consequence, since March 2014, off-trade customers of AB InBev have been prevented from sourcing their supplies of Jupiler 50cl cans from InBev Nederland.

- (184) These changes in layout and size were not merely justified by packaging optimization needs or by other commercial or marketing reasons. AB InBev intentionally introduced the said changes in layout and size of its Jupiler cans in order to restrict imports of its own lower-priced Jupiler 33cl and 50cl cans from the Netherlands into Belgium (see Recital (140)). AB InBev wanted to oblige retailers, like Albert Heijn, to exclusively purchase such beer products from InBev Belgium for sales in their shops in Belgium or to restrict convenience shops in Belgium from purchasing such beer products from wholesalers in the Netherlands, like [...], which source these products from InBev Nederland.
- (185) The changes by AB InBev to the layout of the Dutch Jupiler 33cl cans (orange Jup Holland Jup cans) in the first half of 2014, made it difficult and unpopular towards consumers in Belgium, that generally support the Belgian national football team and not the Dutch national team, for off-trade customers in Belgium to import and sell the Dutch Jupiler 33cl cans in Belgium. AB InBev was aware that separately supporting both the Dutch and Belgian national football teams during the 2014 football world cup could risk diminishing the popularity of the Jupiler brand amongst football supporters. Nonetheless, AB InBev took that risk in order to maintain higher prices for its beer products and to secure its profits in Belgium.
- (186) In a similar way, the replacement by AB InBev as of March 2014 of the Jupiler 50cl can by a Netherlands-specific Jupiler 44cl can, made it unappealing to off-trade customers to import and sell this product in Belgium. End consumers in Belgium were not accustomed to the new size and preferred instead the Jupiler 50cl can, being the standard reference in Belgium (see Recital (140)).
- (187) The abusive nature of these business practices put in place by AB InBev is confirmed by the finding that the dominant undertaking was prepared to shoulder the additional costs involved in each packaging change for differentiating previously common cans with the same packaging into separate Jupiler cans for Belgium and the Netherlands.
- (188) In certain cases the abusive practices of AB InBev ultimately curtailed trade in the Internal Market. Notably, AB InBev completely stopped the imports by its off-trade customers of Jupiler 50cl cans from the Netherlands into Belgium as from March 2014 and compelled its off-trade customers, like Albert Heijn, to buy these cans in Belgium, at higher prices than previously applicable in the Netherlands.
- (189) In sum, it follows from the above description in Recital (183) to (188) that the practice of changing the packaging of the Jupiler 33cl can in the Netherlands and introducing a specific Jupiler 44cl can in the Netherlands amounts to an abuse by AB InBev of its dominant position by restricting imports of its beer products into Belgium in order to maintain higher prices for its beer products in Belgium. The

practice started on 1 January 2014 and its effects persisted, as part of the overall aim to maintain higher prices in Belgium pursued by AB InBev, until 31 October 2016.

7.4.3. *AB InBev made the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands*

- (190) As set out in Section 7.3.4, InBev Belgium coerced Albert Heijn to purchase certain Jupiler products from it that Albert Heijn could and otherwise would have sourced from InBev Nederland. If Albert Heijn did not follow this demand from InBev Belgium, InBev Belgium would refuse to supply Albert Heijn certain other beer products, including "Essential Products" in the Belgian retail market, which Albert Heijn could only purchase from InBev Belgium.
- (191) As illustrated above in Recital (24), AB InBev itself was aware that some of its beer products, including, in particular, of its Jupiler brand, are "Essential Products" for off-trade customers in Belgium to avoid a substantial loss of sales and/or customers in their shops.
- (192) Some of AB InBev's beer products, including some "Essential Products" for Albert Heijn in Belgium, are Belgium-specific (see Recital (159)). This is the case for instance of the [...], the [...] and (since 2014) the [...]. These products therefore cannot be imported from the Netherlands into Belgium.
- (193) The importance of AB InBev's "Essential Products" to Albert Heijn in Belgium together with the difference in the assortment between InBev Belgium and InBev Nederland provided AB InBev with leverage in its negotiations with Albert Heijn in Belgium.
- (194) In the period July - October 2014, during the negotiations for the 2014/2015 supply contract, AB InBev leveraged these Belgium-specific "Essential Products" in its negotiations with Albert Heijn to force it to also buy its [...] (see Recital (162)) from InBev Belgium, instead of sourcing them in the Netherlands from InBev Nederland and importing them into Belgium. Indeed, AB InBev threatened to no longer supply Albert Heijn in Belgium (meaning that it would not supply it at all with AB InBev Belgium-specific beer products, including "Essential Products", not available in the Netherlands) and Albert Heijn ultimately accepted to buy these three Jupiler products from InBev Belgium. This was laid down in their supply contract in October 2014 and remained in force at least until June 2016.
- (195) It follows that AB InBev effectively made the supply of beer products, including "Essential Products", not available in the Netherlands, dependent on the purchase from InBev Belgium of other AB InBev products that were also available in the Netherlands, from July 2014 until at least June 2016 and that this amounts to an abuse by AB InBev of its dominant position by restricting imports of its beer products into Belgium in order to maintain higher prices for its beer products in Belgium. Although the conduct was specifically implemented towards Albert Heijn, as explained in Section 7.1, AB InBev aimed at restricting imports and avoiding the consequences of imports from the Netherlands of certain of its beer products in the entire Belgian off-trade market.

7.4.4. *AB InBev made promotions for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium*

- (196) In March 2015, InBev Nederland explicitly made its promotional offer to Albert Heijn for two Jupiler 33cl cans for a recommended retail price of 99 cents dependent on the fact that this promotion was limited to the Dutch territory and not also offered in Albert Heijn shops in Belgium (see Section 7.3.5). Since Albert Heijn did not want to commit to such a territorial limitation of the promotion offered by InBev Nederland, from which Albert Heijn purchased all its supplies of the Jupiler 33cl cans, InBev Nederland refused the proposed promotion. As a result, Albert Heijn missed out on a specific promotion in the Netherlands and was at a disadvantage compared to its competitors in the Netherlands.
- (197) It follows that AB InBev has made a promotional offer for the Jupiler 33cl cans supplied in the Netherlands conditional upon not offering such promotion in Belgium from 13 - 18 March 2015 and that this amounts to an abuse by AB InBev of its dominant position by restricting imports of its beer products into Belgium in order to maintain higher prices for its beer products in Belgium. Although the conduct was specifically implemented towards Albert Heijn, as explained in Section 7.1, AB InBev aimed at restricting imports and avoiding the consequences of imports from the Netherlands of certain of its beer products in the entire Belgian off-trade market.

7.5. Lack of objective justification

- (198) Based on the review of the file and the assessment of the circumstances of the case, the Commission makes the following findings of law as to the lack of justification for AB InBev's conduct during the Relevant Period.
- (199) Conduct capable of being abusive may escape the prohibition of Article 102 of the Treaty if the dominant undertaking can provide an objective justification for its behaviour or if it can demonstrate that its conduct produces efficiencies that outweigh the negative effects on competition.
- (200) AB InBev acknowledges in its settlement submission that there is no objective justification for its conduct constituting the infringement as described in Section 7.3 of this Decision.
- (201) In conclusion, based on its review of all the facts and circumstances of the case, the Commission finds that there is no objective justification for the conduct described in Section 7.3.

8. SINGLE AND CONTINUOUS INFRINGEMENT

8.1. Principles

- (202) An abuse consisting of a series of acts by a dominant undertaking(s) may constitute a single and continuous infringement. The concept of a 'single infringement' for cases under Article 101 of the Treaty concerns a complex of practices adopted by various parties in pursuit of a 'single anti-competitive economic aim'.²³⁹ Typically, in the context of an infringement extending over several years, the fact that an agreement is shown to have been applied during different periods, which may be separated by longer or shorter intervals, does not have an impact on the existence of the agreement

²³⁹ Judgment of 11 July 1996, Joined Cases T-25/95 and others *Cement* EU:C:1996:295, paragraph 3699.

as such. That is so provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement.²⁴⁰ Indeed, of particular significance is whether there is evidence to prove an overall plan to restrict competition.²⁴¹ The principles developed for the application of Article 101 of the Treaty are also relevant for cases assessed under Article 102 of the Treaty, where the abuse consists of different practices, which may take place in different product or geographic markets.

- (203) An infringement of the competition rules may result not only from an isolated act but also from a series of acts or from a continuous conduct.²⁴² It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in abusive behaviour.
- (204) Such interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of the competition rules of the Treaty. When the different actions form part of an ‘overall plan’, because their identical object distorts competition within the common market, it is possible to impute responsibility for those actions on the basis of the participation in the infringement considered as a whole.²⁴³ As to the existence of such an ‘overall plan’, the Courts have established that the notion of a single infringement covers the situation in which undertakings participated in an infringement in which continuous conduct in pursuit of a single economic objective was intended to distort competition, and also individual infringements linked²⁴⁴ to another by the same object (all the elements sharing the same purpose) and the same subjects (same undertakings who are aware that they are participating in the common object).²⁴⁵ For the purpose of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they complement each other and contribute to the realisation of the objectives of the overall plan.²⁴⁶
- (205) The fact that undertakings participate to different degrees in the anti-competitive behaviour does not exclude their responsibility for the infringement as a whole, even for acts committed by others, but which pursue the single economic objective and follow the overall plan.

²⁴⁰ See judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 72 and the case-law cited. See also judgment of 7 January 2004 *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, (*Aalborg*) paragraph 260.

²⁴¹ See, for instance, *Aalborg*, paragraph 260.

²⁴² Judgment of 17 December 1991, *Polypropylene*, Case T-6/89, EU:T:1991:74, paragraph 204 refers to a series of single efforts.

²⁴³ See *Aalborg*, paragraph 258, see also Case C-49/92 *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 78-81, 83-85 and 203.

²⁴⁴ As to the links of different practices and their complementary inter-action, see Judgment of 12 December 2007, *BASF v Commission*, Case T-101/05, EU:T:2007:380, paragraphs 157-210.

²⁴⁵ Judgment of 8 July 2008, *BPB plc v Commission*, Case T-53/03, EU:T:2008:254, paragraph 257; Judgment of 6 February 2014, *AC Treuhand v Commission*, Case T-27/10, EU:T:2014:59, paragraph 238 with reference to other case-law.

²⁴⁶ Case T-286/09 *Intel Corp v Commission*, cited above, paragraph 1562 seq.

8.2. Application of the principles in the present case

(206) Based on the review of the file and the assessment of the circumstances of the case, the Commission makes the following findings as to the participation of AB InBev in a single and continuous infringement, by the implementation of the above-described practices in Sections 7.4.1, 7.4.2, 7.4.3 and 7.4.4 in the Relevant Period.

(207) As explained, Anheuser-Busch InBev's controlled companies InBev Belgium and InBev Nederland implemented the above-described practices in Sections 7.4.1, 7.4.2, 7.4.3 and 7.4.4 in relation to off-trade customers, notably including:

- (a) limiting the volumes of beer products supplied to [a wholesaler] in the Netherlands to restrict imports of these products into Belgium,
- (b) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands to restrict imports of these products into Belgium,
- (c) making the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands, and
- (d) making promotions for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium,

with the overall aim to restrict imports of AB InBev beer products from the Netherlands into Belgium and with the overall aim to maintain higher prices and profits in Belgium.

(208) Taken separately, each of the said practices constitutes an infringement of Article 102 of the Treaty in its own right. However, considering the commonality of their object to restrict imports of AB InBev beer products into Belgium and the fact that they have all been implemented during the Relevant Period as part of a common overall aim by AB InBev, namely to maintain higher prices and profits for AB InBev beer products in Belgium, the four practices (as referred to in Sections 7.4.1, 7.4.2, 7.4.3 and 7.4.4), if taken together, also constitute a single and continuous infringement of Article 102 of the Treaty. Moreover, although certain restrictions have been implemented towards specific individual customers, AB InBev aimed at restricting imports and avoiding the consequences of imports from the Netherlands of certain of its beer products in the entire Belgian off-trade market and thus maintaining its high margins of profit in the Belgian market.

(209) The above conclusion follows from the following circumstances. As explained in Section 7.1, AB InBev, based on its calculations of the risks of cross-border trade on its profits in Belgium, identified Albert Heijn and [a wholesaler in the Netherlands] as the two off-trade customers that were causing the risks of lower prices and lower profits. That prompted AB InBev to fear that imports of lower priced AB InBev products could cause a drop in wholesale prices on the entire off-trade market in Belgium. The entire market would be affected firstly, because AB InBev's off-trade customers in Belgium would (and some had already begun to) ask AB InBev to grant them the same wholesale prices and/or promotions that Albert Hein and [a wholesaler in the Netherlands] were obtaining

abroad. Secondly, the entire market would be affected if more off-trade customers would source their supplies from abroad.²⁴⁷

- (210) That conclusion is further corroborated by the following, AB InBev's practices:
- (a) concerned the same products,
 - (b) were complementary to each other,
 - (c) were implemented within the same contextual conditions of facts and continuously during the Relevant Period.
- (211) Firstly, the practices concerned the same beer products, namely beer products of the most sold AB InBev beer brand in Belgium: Jupiler.
- (212) Secondly, the different practices by AB InBev were often complementary to each other in that they consisted of different ways to make it more difficult for off-trade customers to import lower-priced AB InBev beer products from the Netherlands into Belgium. The packaging changes aimed to restrict retailers and wholesalers from importing or selling AB InBev beer products from the Netherlands into Belgium or to customers in Belgium. AB InBev also made it clear to Albert Heijn and [a wholesaler in the Netherlands], that it did not want them to offer Dutch promotions and prices to customers in Belgium, by limiting [a wholesaler in the Netherlands]'s supply volumes in the Netherlands, and by making promotions for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium. Lastly, by making the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other products also available in the Netherlands, AB InBev made it clear to Albert Heijn that it should source its supplies of AB InBev beer products for sales to the final consumer in Belgium from the AB InBev subsidiary in Belgium. AB InBev focused the implementation of its aim and variety of practices on the best-selling products of the Jupiler brand and on the highest risk off-trade customers as that is where its efforts paid most and on the highest risk off-trade customers that AB InBev identified as carrying out cross- border trade that undermined its aim to protect its profits in Belgium (see Sections 4.1.2 and 7.1).
- (213) Thirdly, the practices took place in the same market context with prices of Jupiler beer products in the Relevant Market being distinctively higher than in the Netherlands. Indeed, as shown in Recital (41), throughout the Relevant Period, prices for Jupiler beer products were lower in the Netherlands compared to Belgium. This context entailed that, with its practices, AB InBev essentially sought to maintain higher prices for its beer products in Belgium by segregating the Belgian dominated market from the Dutch market so that it could continue to charge higher prices in Belgium and maximise its profits through these practices.
- (214) For the reasons above, the four practices (as referred to in Sections 7.4.1, 7.4.2, 7.4.3 and 7.4.4) taken together constitute a single and continuous infringement of Article 102 of the Treaty.

²⁴⁷ See paragraph (100).

9. DURATION OF THE INFRINGEMENT

(215) Based on the review of the conduct referred to in Sections 7.4.1, 7.4.2, 7.4.3 and 7.4.4, the Commission considers that the above-described single and continuous infringement of Article 102 of the Treaty by AB InBev started on 9 February 2009²⁴⁸ and ended on 31 October 2016.²⁴⁹

10. EFFECT ON TRADE BETWEEN MEMBER STATES

10.1. Principles

(216) Article 102 of the Treaty prohibits an abuse of a dominant position as incompatible with the Internal Market "*in so far as it may affect trade between Member States*".

(217) In general, the effect on trade criterion may be fulfilled by considering the following three elements.

(218) First, the concept of trade is not limited to traditional exchanges of goods and services across Member States' borders, but covers all cross-border economic activity and investments. In addition, it also encompasses practices affecting the competitive structure of the Internal Market by preventing, eliminating or threatening to eliminate a competitor from operating in the territory of the European Union.²⁵⁰

(219) Second, the Court of Justice held that 'Article 82 [now 102 of the Treaty] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect'.²⁵¹ This notion implies that it must be foreseeable with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.²⁵² Where a dominant undertaking engages in abusive conduct in more than one Member State, such abuse is normally, by its very nature, capable of affecting trade between Member States.²⁵³

(220) Third, the effect on trade between Member States must be appreciable. This is assessed primarily with reference to the position of an undertaking on a relevant product market.²⁵⁴ The stronger the position of an undertaking, the more likely it is that the effect on trade between Member States of a practice is appreciable.²⁵⁵

²⁴⁸ Internal AB InBev document ID 660/286.

²⁴⁹ ID 930 and ID 931, reply to questions 2 and 30 and further clarification in ID 1574 and ID 1575.

²⁵⁰ Judgment of 6 March 1974, *Commercial Solvents*, Joined Cases 6 and 7/73, EU:C:1974:18, paragraphs 32-33; Joined Cases T-24/93 and others, *Compagnie Maritime Belge v Commission*, cited above, paragraph 203.

²⁵¹ Case 322/81 *Michelin v Commission*, cited above, paragraph 104; see also Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, Case C-41/90, EU:C:1991:161, paragraph 32; and Case T-228/97 *Irish Sugar plc v Commission*, cited above, paragraph 170.

²⁵² Judgment of 9 July 1969, *Franz Völk v Établissement J. Vervaecke*, Case 5/69, EU:C:1969:35, paragraphs 5-7.

²⁵³ Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.4.2004, p. 81, paragraph 75.

²⁵⁴ Case 5/69 *Franz Völk v Établissement J. Vervaecke*, cited above, paragraphs 5-7.

²⁵⁵ Judgment of 1 April 1993, *BPB Industries and British Gypsum v Commission*, Case T-65/89, EU:T:1993:31, paragraph 138.

- (221) Union competition rules apply to an agreement or a practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the Internal Market.²⁵⁶

10.2. Application of the principles in the present case

- (222) Based on the review of file and the assessment of the circumstances of the case, the Commission makes the following findings as to the effects on trade of the above-described single and continuous infringement.
- (223) It is evident that the infringement was per se capable of having an appreciable effect on trade between Member States within the meaning of Article 102 of the Treaty for the following reasons. Firstly, since by its nature AB InBev's conduct is cross-border in scope as it is directed at restricting imports from the Netherlands into Belgium it is concluded that the infringement had an appreciable effect on trade. Secondly, during the period of infringement AB InBev has held a dominant position in the off-trade wholesale beer market in Belgium. As this dominant position concerns the territory of a whole Member State, the conduct was capable of having a significant effect on trade between Member States.
- (224) In conclusion, the Commission considers that the conduct described in Section 7.3 was capable of having an appreciable effect on trade between Member States within the meaning of Article 102 of the Treaty.

11. LIABILITY FOR THE INFRINGEMENT

11.1. Principles

- (225) EU competition rules apply to 'undertakings'. Although the term 'undertaking' is not defined in the Treaty, the Court has consistently held that the concept of an undertaking encompasses every entity engaged in economic activity, regardless of its legal status, form or way of financing.²⁵⁷ In *Shell International Chemical Company v. Commission*, the Court held that '[...] Article 85(1) of the EEC Treaty [now Article 101(1) of the TFEU] is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.'²⁵⁸ The same principles apply for the concept of 'undertaking' in Article 102 of the Treaty.

²⁵⁶ Judgment of 31 May 1979, *Hugin v Commission*, Case 22/78, EU:C:1979:138, paragraph 17; Judgment of 25 October 2001, *Ambulanz Glöckner*, Case C-475/99, EU:C:2001:577, paragraph 47; Judgment of 25 January 2007, *Dalmine v Commission*, Case C-407/04 P, EU:C:2007:53, paragraph 89.

²⁵⁷ Although the notion of 'undertaking' within the meaning of Union competition law is not necessarily the same of the one of company with separate legal personality, it is necessary for the purposes of enforcing decisions to identify the legal entities to which a decision will be addressed. See Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *PVC II* EU:T:1999:80, paragraph 978 and Case T-112/05 *Akzo Nobel and Others v Commission* EU:T:2007:381, cited above, paragraph 59.

²⁵⁸ See Judgment of 10 March 1992, *Shell v Commission*, Case T-11/89, EU:T:1992:33, paragraph 311. See also Judgment of 14 May 1998, *Mo Och Domsjö AB v Commission*, Case T-352/94 EU:T:1998:103, paragraphs 87-96; Judgment of 27 September 2006, *Jungbunzlauer v*

- (226) One or more legal entities may be identified which are responsible for an infringement of Union competition rules by an undertaking. As to the attribution of the responsibility for an infringement of Union competition rules, according to the case-law, ‘Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC [now Articles 101 and 102 of the Treaty] if the companies concerned do not determine independently their own conduct on the market.’²⁵⁹ In the case of a subsidiary controlled by a parent company, if the subsidiary does not determine its own conduct on the market independently, the company which directed its market strategy forms a single economic unit with that subsidiary and may be held responsible for an infringement on the ground that it forms part of the same undertaking.²⁶⁰
- (227) In order to determine whether a subsidiary forms an economic unit with its parent, it is necessary to establish that the parent was able to exercise decisive influence over the subsidiary and that it actually exercised its influence.²⁶¹ The assessment of whether the conduct of a subsidiary can be imputed to its parent company, relates in particular to the economic, organisational and legal links between the two legal entities.²⁶² The existence of an economic unit may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of an economic unit.²⁶³ Relevant factors include, for example, the representation of the parent company in the management bodies of its subsidiary.²⁶⁴ The decisive influence of a parent company does not necessarily have to be established on the basis of explicit instructions, but can be inferred from the totality of the legal and economic links with the parent company.²⁶⁵ Conversely, the

²⁵⁹ *Commission*, Case T-43/02 EU:T:2006:270, paragraph 125; Judgment of 27 September 2006, *Avebe v Commission*, Case T-314/01 EU:T:2006:266, paragraph 136; Case T-330/01 *Akzo Nobel v Commission* EU:T:2006:269, cited above, paragraph 83.

²⁶⁰ Court of Justice in Judgment of 14 July 1972, *Imperial Chemical Industries v Commission*, Case 48/69 EU:C:1972:70, paragraphs 132-133; Judgment of 12 July 1984, *Hydrotherm Gerätebau*, Case 170/83 EU:C:1984:271, paragraph 11 and Court of First Instance in its Judgment of 12 January 1995, *Viho v Commission*, Case T-102/92 EU:T:1995:3, paragraph 50, cited in Case T-203/01 *Michelin v Commission* EU:T:2003:250, cited above, paragraph 290.

²⁶¹ Judgment of 3 March 2011, Joined Cases T-117/07 and 121/07 *Areva and Others and Alstom v Commission* EU:T:2011:69, paragraph 85.

²⁶² Judgment of 13 December 2013, *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, Case T-399/09, EU:T:2013:647, paragraph 29 with reference to T-314/01, *Avebe v Commission*, cited above, paragraph 136; Case T-76/08 *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC, DuPont Performance Elastomers SA v Commission*, judgment of 2 February 2012, EU:T:2012:46, paragraph 60.

²⁶³ Judgment of 20 January 2011, *General Química and Others v Commission*, Case C-90/09 P EU:C:2011:21, paragraph 37 and Case C-97/08 P *Akzo Nobel NV and Others v Commission* EU:C:2009:536, cited above, paragraph 58.

²⁶⁴ Case T-399/09, *HSE v Commission*, cited above, paragraph 30.

²⁶⁵ Case T-399/09, *HSE v Commission*, cited above, paragraph 38 with reference to Case T-344/06 *Total v Commission*, judgment of 27 September 2012, EU:T:2012:479, paragraph 73. The latter judgment makes the point that such link does not require that the representation of the parent company in the management bodies of the subsidiary is significant.

Case T-76/08 *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC, DuPont Performance Elastomers SA v Commission*, cited above, paragraph 62.

existence of a certain autonomy of the subsidiary does not preclude the finding of a 'single economic unit'.²⁶⁶

- (228) It can generally be presumed that a wholly-owned subsidiary follows the instructions given to it by its parent company; and notably that a parent company is not only able to decisively influence the commercial policy of such a subsidiary, but also that it effectively exercises its influence, without having to prove whether the parent company has in fact exercised that power in the specific circumstances of a case.²⁶⁷ However, the parent company and/or subsidiary can rebut this presumption by proving that the subsidiary 'decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an 'undertaking'.²⁶⁸
- (229) Where a number of entities are held liable for the participation of one undertaking in the infringement of competition law, they may be held jointly and severally liable for that infringement.²⁶⁹

11.2. Application of the principles in the present case

- (230) On the basis of the conduct described in Section 7.3, the Commission intends to impute joint and several liability for a single and continuous infringement of Article 102 of the Treaty as follows:
- (1) InBev Belgium BVBA/SPRL for its direct participation in the infringement in the period from 9 February 2009 to 31 October 2016. InBev Belgium BVBA/SPRL has been directly involved in the following practices: (i) limiting the volumes of beer products supplied to [a wholesaler] in the Netherlands (see Section 7.3.1); (ii) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands (see Section 7.3.3); and (iii) making the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands (see Section 7.3.4).
 - (2) InBev Nederland NV for its direct participation in the infringement in the period from 9 February 2009 to 31 October 2016. InBev Nederland NV participated directly in the following practices: (i) limiting the volumes of beer products supplied to [...] in the Netherlands (see Section 7.3.1); (ii) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands (see Section 7.3.3); and (iii) making promotions

²⁶⁶ Case T-399/09, *HSE v Commission*, cited above, paragraph 54.

²⁶⁷ Case C-97/08 P *Akzo Nobel NV and Others v Commission* EU:C:2009:536, cited above, paragraphs 60-61. See also Judgment of 15 June 2005, Joined Cases T-71/03 and others *Tokai Carbon and Others v Commission* ECLI:EU:T:2005:220, paragraph 60; Judgment of 14 May 1998, *Stora Kopparbergs Bergslags v Commission*, Case T-354/94 EU:T:1998:104, paragraph 80, upheld by the Court of Justice in Case C-286/98 P *Stora Kopparbergs Bergslags v Commission*, EU:C:2000:630, cited above, paragraphs 27-29; Judgment of 25 October 1983, *AEG v Commission*, Case 107/82 EU:C:1983:293, paragraph 50.

²⁶⁸ Case T-566/08 *Total Raffinage Marketing v Commission*, cited above, paragraph 496. Joined Cases T-71/03 and others *Tokai Carbon and Others v Commission*, EU:T:2005:220, cited above, paragraph 61.

²⁶⁹ Judgment of 16 November 2000, *Metsä-Serla and Others v Commission*, Case C-294/98 P EU:C:2000:632, paragraphs 33 and 34; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, cited above, paragraphs 57-62.

for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium (see Section 7.3.5).

- (3) Anheuser-Busch InBev NV/SA, as parent company and owner of 100% of the shares of InBev Belgium BVBA/SPRL and InBev Nederland NV (see Recital (20) in the period from 9 February 2009 to 31 October 2016, can be presumed, by virtue of the above-referred case law to have effectively exercised a decisive influence on the commercial policy of these subsidiaries directly involved in the above-mentioned practices, and, because of the influence effectively exercised, has also participated in the four practices (see Sections 7.3.1, 7.3.3, 7.3.4 and 7.3.5) constituting the infringement.

12. REMEDIES

12.1. Article 7 of Regulation (EC) No 1/2003

- (231) Where the Commission finds an infringement of Article 102 of the Treaty, it may by decision require the undertaking concerned to bring such infringement to an end pursuant to Article 7 of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies that are proportionate to the infringement and that are necessary to bring the infringement effectively to an end.
- (232) The requirement for a remedy to be effective also authorises the Commission to require a dominant undertaking to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect.²⁷⁰
- (233) As concluded in Section 9, by 31 October 2016 AB InBev had already ended the infringement. However, it is necessary for the Commission to require AB InBev to refrain from any act or conduct which might have the same or a similar object or effect, and, in particular, from the practice referred to in Section 7.4.2.1. The Remedy will according to AB InBev ensure that this practice remains fully terminated and should also make it easier for off-trade customers to export the products covered by the Remedy between the Netherlands, Belgium and France, thereby enhancing parallel trade.

12.2. Remedy offered by AB InBev

- (234) As part of its offer to cooperate, pursuant to Article 7 of Regulation (EC) No 1/2003, AB InBev has offered to commit to a Remedy consisting in providing, for a period of five years as from the date of notification of this Decision, the mandatory food

²⁷⁰ See for example, Judgment of 6 October 1994, *Tetra Pak International SA v Commission of the European Communities*, T-83/91, EU:T:1994:246, paragraph 220; Judgment of 27 October 1994, *Fiatagri UK Ltd and New Holland Ford Ltd v Commission of the European Communities*, T-34/92, EU:T:1994:258, paragraph 39; Judgment of 20 April 1999, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV, DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Soci  t   art  sienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, H  ls AG and Enichem SpA v Commission of the European Communities*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 1254.

information²⁷¹ in both Dutch and French languages on the packaging of all its products of 19 specific beer brands²⁷², including Jupiler, sold by InBev Belgium BVBA/SPRL, AB InBev France SAS and/or InBev Nederland NV and any of their controlled companies or their successors, supplied to off-trade customers in the Netherlands, Belgium and/or France. The Remedy also covers the introduction of new AB InBev products sold under the 19 brands after the date of notification of the Decision.

- (235) In the case of a 'multipack' package consisting of individual prepacked items which are sold by AB InBev to off-trade customers, the mandatory food information will be applied (in dual language, that is Dutch and French) both on the external packaging (that is the multipack) and on the individual prepacked items. Exceptionally, mandatory food information (in dual language) may be applied only on the external packaging, for example, due to the small size of the individual prepacked item and/or label - provided that those individual prepacked items cannot be sold to the final consumers individually.
- (236) AB InBev finds that the Remedy is suitable and proportionate in the framework of the cooperation procedure to ensure that the practice as referred to in Section 7.4.2.1 above is not reiterated. The Remedy should also make it easier for off-trade customers to export the products covered by the Remedy between the Netherlands, Belgium and France, thereby enhancing the possibility of parallel trade.
- (237) The Remedy applies for a period of five years from the date of notification of the Decision. For current products, the Remedy will be implemented no later than six months from the date of notification of this Decision and apply until the end of the five years. For new products, the Remedy will be implemented as from the date of notification of the Decision.
- (238) AB InBev commits to provide the Commission with a report on the implementation of the Remedy within nine months following the notification of this Decision. This report will contain an overview of the labelling and packaging changes that were made to comply with the Remedy.
- (239) AB InBev further commits to provide the Commission with a final report on the application of the Remedy within three months after the expiration of the Remedy's duration period of five years. This report will contain the following information for each full calendar year during which the Remedy was applicable:
- (a) An overview of all new AB InBev Products and packaging innovations which were introduced in the Netherlands, Belgium and/or France, further specifying if these products contained mandatory food information in dual language (that is Dutch and French);
 - (b) An overview of the volume percentage represented by the brands covered by the Remedy sold in the Netherlands, Belgium and France compared to the total AB InBev off-trade sales volume in the Netherlands, Belgium and France;

²⁷¹ Mandatory food information is the particulars that are required to be provided to the final consumer by Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

²⁷² The 19 beer brands are: 1) Atlas, 2) Belle-Vue, 3) Budweiser, 4) Corona, 5) Coronita, 6) Cubanisto, 7) Deus, 8) Ginette, 9) Goose Island, 10) Hoegaarden, 11) Jupiler, 12) Kwak, 13) Leffe, 14) Modelo, 15) Pacifico, 16) Piedboeuf, 17) Pure Blonde, 18) Stella Artois, 19) Tripel Karmeliet.

- (c) An overview of all 'multipack' packages consisting of individually packed items, for which the individual prepacked items did not contain mandatory food information in dual language (that is Dutch and French).
- (240) AB InBev will provide the Commission with written notice promptly upon becoming aware that any third party has commenced an action before a competent regulatory authority or court alleging that it has violated any of the terms of the Remedy.
- (241) AB InBev may seek review with the Commission of the application of the Remedy needed to alleviate any unforeseen hardship that make appropriate some exception or modification of its terms or in light of any material changes in law or market circumstances. The Commission will retain discretion to decide upon any such application, which it will consider duly.

13. FINES

13.1. Article 23(2) of Regulation (EC) No 1/2003 – principles for determination of the applicable fine

- (242) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 102 of the Treaty. For each undertaking participating in the infringement, the fine cannot exceed 10% of its total turnover in the business year preceding the Commission decision.
- (243) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of a fine, have regard both to the gravity and to the duration of the infringement. The Commission will also refer to the principles laid down in its Guidelines on the Method of Setting Fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003²⁷³ (the “Guidelines on Fines”).
- (244) First, the Commission must determine a basic amount. The basic amount of the fine is to be set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.²⁷⁴ The basic amount consists of a percentage of the value of those sales up to a maximum percentage of 30%,²⁷⁵ depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.²⁷⁶ In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.²⁷⁷
- (245) For calculating the value of sales, the Commission normally takes the sales made by the undertaking during the last full business year of its participation in the infringement.²⁷⁸

²⁷³ OJ C 210, 1.9.2006, p. 2.

²⁷⁴ Point 13 of the Guidelines on fines.

²⁷⁵ Point 21 of the Guidelines on fines.

²⁷⁶ Point 19 of the Guidelines on fines.

²⁷⁷ Point 22 of the Guidelines on fines.

²⁷⁸ Point 13 of the Guidelines on fines.

- (246) The Commission may also include in the basic amount an additional amount of a sum up to 25% of the value of sales²⁷⁹, an entry fee, to deter undertakings from entering into anticompetitive agreements.
- (247) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It does so on the basis of an overall assessment which takes account of all the relevant circumstances.²⁸⁰
- (248) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.²⁸¹

13.2. Calculation of the fine

13.2.1. Value of sales

- (249) The products to be taken into consideration for the purposes of calculating the value of sales in this case are Jupiler beer products sold in the off-trade channel in Belgium and the Netherlands.
- (250) Based on the principles outlined in Recitals (244) and (245) and on the information provided by AB InBev, the value of sales relating to those products should be based on sales made by AB InBev in the financial year 2015 (running from 1 January 2015 to 31 December 2015), which was the last full business year of its participation in the single and continuous infringement in those two Member States.
- (251) Accordingly, the value of sales to be taken into account is EUR [250 000 000 – 300 000 000].

13.2.2. Gravity

- (252) Based on the facts described in Section 7, the Commission takes into account the fact that AB InBev's conduct consisted of the following four practices, namely: (i) limiting the volumes of beer products supplied to [...] in the Netherlands to restrict imports of these products into Belgium; (ii) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands to restrict imports of these products into Belgium; (iii) making the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands; and (iv) making promotions for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium. These practices restricted competition within the meaning of Article 102 of the Treaty by their very nature as they aimed to partition the internal market along national borders. Moreover, the infringement concerns products which have a direct impact on consumers in a market which has always been liberalised. Finally, throughout the duration of the infringement, AB InBev not only held a dominant position in the off-trade wholesale beer market in Belgium, but its market share was much higher than those of its competitors.
- (253) The Commission concludes that the percentage of the value of sales to be taken into account in this case should be set at 10%.

²⁷⁹ Point 25 of the Guidelines on fines.

²⁸⁰ Point 27 of the Guidelines on fines.

²⁸¹ Point 30 of the Guidelines on fines.

13.2.3. *Duration*

(254) The overall duration of the infringement, as set out in Section 9, amounts to 2822 days. Therefore, for the purpose of the calculation of the fine, the amount determined in Recital (251) and (253), should be multiplied by 7.72 to take account of the duration of the infringement.

13.2.4. *Aggravating and mitigating circumstances*

(255) The Commission considers that no aggravating or mitigating circumstances apply in this case.

13.2.5. *Deterrence multiplier*

(256) Point 30 of the Guidelines on Fines provides for the possibility of increasing the fine to ensure that fines have a sufficiently deterrent effect in the case of undertakings which have a particularly large turnover beyond the sales of goods and services to which the infringement relates.

(257) Given that the value of sales to be taken into account in this case amounts to less than [0-1%] of the total turnover generated by AB InBev during the 2018 financial year (in other words, the business year preceding the date of this Decision), and that AB InBev had a particularly large turnover in 2018 (EUR 46 295 million) beyond the revenues generated by its off-trade beer sales in Belgium and the Netherlands, the Commission concludes that the basic amount of the fine should be multiplied by 1.1.

13.2.6. *Application of the 10% turnover limit*

(258) The fine for the infringement does not exceed 10% of AB InBev's total turnover relating to the business year preceding the date of adoption of this Decision pursuant to Article 23(2) of Regulation (EC) No 1/2003.

13.2.7. *Reduction of the fine in view of cooperation*

(259) Point 37 of the Guidelines on Fines allows the Commission to depart from the methodology set out in those Guidelines if the particularities of the case justify it.

(260) In the present case, the Commission considers that AB InBev has cooperated with the Commission. The Commission takes account of AB InBev's cooperation beyond its legal obligation to do so by, first, acknowledging the infringement of Article 102 of the Treaty arising from the conduct, and, second, proposing a remedy referred to in Section 12.2 to prevent reiteration of the practice as referred to in Section 7.4.2.1.

(261) In view of the effective cooperation provided by AB InBev in this case, the Commission considers that the amount of the applicable fine should therefore be reduced by 15%.

13.2.8. *Conclusion: final amount of the fine*

(262) The Commission concludes that the final amount of the fine to be imposed on AB InBev should be EUR 200 409 000.

HAS ADOPTED THIS DECISION:

Article 1

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV have participated in a single and continuous infringement of Article 102 of the Treaty with the overall

aim of restricting imports of AB InBev beer products from the Netherlands into Belgium and of maintaining higher prices and profits in Belgium:

- (a) limiting the volumes of beer products supplied to [...] in the Netherlands to restrict imports of these products into Belgium,
- (b) implementing changes in the packaging of beer products supplied to off-trade customers in the Netherlands to restrict imports of these products into Belgium,
- (c) making the supplies to Albert Heijn in Belgium of beer products, not available in the Netherlands, conditional on the purchase in Belgium of other beer products also available in the Netherlands, and
- (d) making promotions for beer products offered to Albert Heijn in the Netherlands conditional upon not offering the promotions in Belgium.

The infringement lasted from 9 February 2009 until 31 October 2016.

Article 2

For the single and continuous infringement referred to in Article 1, a fine of EUR 200 409 000 is imposed on Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV, jointly and severally.

The fine shall be credited, in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.40134

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046²⁸².

Article 3

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so.

²⁸² OJ L 193, 30.7.2018, p. 80.

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV shall refrain from repeating any act or conduct described in Article 1, and any act or conduct having the same or equivalent object or effect.

Article 4

During a period of five years from the date of notification of this Decision, Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV shall provide the mandatory food labelling information in both Dutch and French languages on the packaging of all its current and future products of 19 specific beer brands, sold by InBev Belgium BVBA/SPRL, AB InBev France SAS and/or InBev Nederland NV and any of their controlled companies or their successors in their supplies to off-trade customers in the Netherlands, Belgium and/or France. The 19 beer brands are: 1) Atlas, 2) Belle-Vue, 3) Budweiser, 4) Corona, 5) Coronita, 6) Cubanisto, 7) Deus, 8) Ginette, 9) Goose Island, 10) Hoegaarden, 11) Jupiler, 12) Kwak, 13) Leffe, 14) Modelo, 15) Pacifico, 16) Piedboeuf, 17) Pure Blonde, 18) Stella Artois, 19) Tripel Karmeliet

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV and any of their controlled companies or their successors shall implement this Remedy for current products, no later than six months from the date of notification of this Decision, and for new products within six months from the date of notification of this Decision.

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV and any of their controlled companies or their successors shall provide the Commission with a report on the implementation of the Remedy within nine months following the notification of this Decision. This report will contain an overview of the labelling and packaging changes that were made to comply with the Remedy.

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV and any of their controlled companies or their successors shall provide the Commission with a final report on the application of the Remedy within three months after the expiration of the Remedy's duration period of five years. This report will contain the following information for each full calendar year during which the Remedy is applicable:

- (a) An overview of all new AB InBev products and packaging innovations which were introduced in the Netherlands, Belgium and/or France, further specifying if these products contained mandatory food information in dual language, that is Dutch and French ;
- (b) An overview of the volume percentage represented by the brands covered by the Remedy sold in the Netherlands, Belgium and France compared to the total AB InBev off-trade sales volume in the Netherlands, Belgium and France;
- (c) An overview of all 'multipack' packages consisting of individually packed items, for which the individual prepacked items did not contain mandatory food information in dual language, that is Dutch and French.

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV and any of their controlled companies or their successors shall provide the Commission with written notice promptly upon becoming aware that any third party has commenced an action before a competent regulatory authority or court alleging that it has violated any of the terms of the Remedy.

Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV and any of their controlled companies or their successors may seek review with the Commission of the

application of the Remedy in light of any material changes in law or market circumstances or to alleviate any unforeseen hardship that make appropriate some exception or modification of its terms. The Commission will retain discretion to decide upon any such application, which it will consider duly.

Article 5

Should Anheuser-Busch InBev NV/SA, InBev Belgium BVBA/SPRL and InBev Nederland NV fail to comply with any of the obligations set out in Article 3 and 4 of this Decision within the deadlines referred to in Article 3 and 4, the Commission shall impose a daily penalty payment on that undertaking of 2.5% of Anheuser-Busch InBev NV/SA's daily consolidated turnover in the proceeding business year in accordance with Article 24(1)(a) of Regulation (EC) No 1/2003.

That penalty shall be calculated as from the first day following the expiry of the deadlines referred to in Article 3 and 4.

Article 6

This Decision is addressed to:

Anheuser-Busch InBev NV/SA, Grand Place 1, 1000 Brussels, Belgium

InBev Belgium BVBA/SPRL, Boulevard Industriel 21, 1070 Brussels, Belgium

InBev Nederland NV, Ceresstraat 1, 4811 CA Breda, The Netherlands

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 13.5.2019

For the Commission
Margrethe VESTAGER
Member of the Commission

