II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 14 December 1999
relating to a proceeding pursuant to Article 15(1)(b) of Council Regulation No 17
(Case No IV/34.237/F3 — Anheuser-Busch Incorporated — Scottish & Newcastle)

(notified under document number C(1999) 4499)

(Only the English text is authentic)

(2000/146/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Article 15(1)(b) thereof,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection,

After having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I

INTRODUCTION AND PROCEDURE

(1) This Decision is concerned with the supply of incorrect information in response to a formal request for information under Article 11(3) of Regulation No 17 addressed to Anheuser-Busch Incorporated and Scottish & Newcastle plc.

(2) The Commission sent a Statement of Objections to the parties concerned on 4 August 1998. Anheuser-Busch Incorporated, Anheuser-Busch European Trade Limited and Scottish & Newcastle submitted their replies to the Statement of Objections on 16 October and 27 October 1998 respectively. The parties were given the opportunity to put forward their arguments orally, but both parties declined to use that opportunity. Instead, Anheuser-Busch Incorporated, Anheuser-Busch European Trade Limited and Scottish & Newcastle submitted further replies to the Statement of Objections on 27 April and 6 May 1999 respectively. This Decision takes account of all the responses to the Statement of Objections.

II

FACTS

A. The undertakings concerned

1. Anheuser-Busch Incorporated

(3) Arlheuser-Busch Incorporated (hereinafter 'Anheuser-Busch Inc.') is the brewing subsidiary of Anheuser-Busch Companies Incorporated, based in St Louis, United States of America, and is the world's largest brewing organisation. Anheuser-Busch International Inc. is the company's international beer subsidiary, and was formed in 1981 to explore and develop markets outside the United States. Anheuser-Busch European Trade Limited (ABET), based in London, is the European subsidiary of Anheuser-Busch International Inc. and was formed to develop the sales, distribution and marketing of Anheuser-Busch brands in Europe. Both Anheuser-Busch Inc. and ABET are involved in this procedure and replied to the Commission's letter of 3 June 1997

[1] OJ 13, 21.2.1962, p. 204/62
[2] OJ L 148, 15.6.1999, p. 5.

pursuant to Article 11 of Regulation No 17 and the Statement of Objections of 4 August 1998 ('Anheuser-Busch' being used hereinafter where Anheuser-Busch Incorporated and ABET were both involved in the procedure.) In the United Kingdom, 'Budweiser' beer is the number one premium packaged lager.

(4) The worldwide turnover of Anheuser-Busch Companies Incorporated was USD 13,2 billion in 1998 (approximately EUR 12,3 billion).

2. **Scottish & Newcastle plc**

(5) The Scottish & Newcastle (S & N) Group comprises three business divisions: brewing, pub retailing, and leisure. S & N's brewing business is based principally in the United Kingdom and Ireland, where it brews and distributes its own brands and brews and/or distributes a number of other brands under licence.

(6) In August 1995, S & N acquired the brewing and distribution business of Courage Limited (hereinafter 'Courage'). The combined United Kingdom brewing businesses trade under the name Scottish Courage. These brewing activities represent 28 % of the UK beer market in volume production terms. S & N is the largest brewer in the United Kingdom.

(7) S & N's worldwide turnover for the year ended 3 May 1998 was GBP 3,352 billion (approximately EUR 5,06 billion).

B. **Case history**

(8) On 24 February 1992, the Commission received a notification pursuant to Articles 2 and 4 of Regulation No 17, by Anheuser-Busch and Courage, of agreements concerning the brewing, distribution and marketing of Budweiser beer in the United Kingdom. On 20 July 1993, the Commission received copies of the agreements as amended by the amending agreement of 14 May 1993.

(9) Following the sale of Courage's brewing business to S & N in August 1995, the Commission wrote to S & N on 11 January 1996 for confirmation of the continued operation of the brewing and/or purchase and distribution agreements between Courage and third parties. By letter of 9 February 1996, S & N informed the Commission that revised arrangements had been entered into between Courage and Anheuser-Busch Inc. in May 1995, that these new arrangements were novated to S & N (entered into by S & N, by way of a novation) on completion of the Courage acquisition in 1995 and that the Commission would be formally informed of the new arrangements shortly.

(10) In response to a telephone conversation initiated by the Commission, S & N, by letter of 14 March 1997, informed the Commission that the relationship between Anheuser-Busch and S & N remained governed by the 'original agreements of which the Commission was advised' in S & N's letter of 9 February 1996, that is to say, the 1995 Agreements, and that those agreements were still in the process of renegotiation. It was anticipated that this process would be completed within two months. Under those 'original agreements', ABET and S & N each controlled 50 % of the Stag brewing joint venture in Mortlake, south-west London, which brews and packages Budweiser beer for sale in the United Kingdom. S & N would then distribute Budweiser beer only to the United Kingdom on-trade beer market.

(11) By letter of 3 June 1997, the Commission services made a formal request for information pursuant to Article 11(3) of Regulation No 17 addressed to Anheuser-Busch Inc. and to S & N, and notified to ABET. In the letter the Commission asked 13 questions, including the following:

> '(3) Please give full details of any further changes to the agreements since the novation to S & N'

(12) By letter of 2 July 1997, S & N and Anheuser-Busch gave a joint reply to the Commission's request for information of 3 June 1997. By this letter, the Commission was informed that the relationship between Anheuser-Busch Inc., ABET and S & N remained governed by the May 1995 agreements and that these agreements were still in the process of renegotiation, which was expected to finish in July 1997.

(13) By the same letter, the Commission was informed, in relation to question 3 contained in the Annex to the letter of 3 June 1997, that: 'There have been no further changes in the agreements since the novation [from Courage Limited to S & N]'.

(14) By the same letter, the Commission received 18 documents concerning the revised arrangements entered into in May 1995.

(15) By letter of 17 December 1997 (hereinafter, the 'warning letter'), the Commission services notified Anheuser-Busch and S & N that it had reached a preliminary assessment of the notified agreements as to their compatibility with Article 85 (now Article 81) of the EC Treaty. The Commission was of the opinion that the Beer Supply Agreement of 6 May 1995 contained restrictions contrary to Article 81 of the EC Treaty. These included Article 7 (and schedule 2) of the Beer Supply Agreement concerning the marketing and positioning of the Budweiser beer in the United Kingdom.

(16) By letter of 16 February 1998, Anheuser-Busch and S & N gave a joint reply to the warning letter. By the same letter they informed the Commission that copies of the revised arrangements (as amended in July 1997) would be sent the same day by hand to the Commission. The Commission received a folder, containing 34 documents, on 16 February 1998.

(17) Document No 12 of this folder contained a copy of two letters dated 27 and 28 February 1997, both from Anheuser-Busch to Scottish Courage Limited.

(18) The letter of 27 February 1997 entitled 'Budweiser marketing guidelines' refers to an understanding between Anheuser-Busch and S & N regarding guidelines for the positioning and marketing of Budweiser in the United Kingdom. Attached to the letter, as schedule A, certain guidelines are set forth by Anheuser-Busch. The letter states, first, that Anheuser-Busch has communicated the Budweiser marketing guidelines, contained in schedule A, to its major brewer-wholesaler customers in the United Kingdom, and intends to 'take appropriate steps to assure compliance with the Budweiser marketing guidelines in all material respects'. Secondly, the letter states that Anheuser-Busch 'reserves the right to amend the Budweiser marketing guidelines at its sole discretion at any time and from time to time. Anheuser-Busch shall promptly communicate to Scottish Courage any amendments to the Budweiser marketing guidelines'. Thirdly, the letter states that 'Scottish Courage hereby acknowledges receipt of the Budweiser marketing guidelines and pledges to use its reasonable efforts to ensure compliance with the Budweiser marketing guidelines by its sales staff and customers'. The content of the letter was signed 'agreed and accepted' by Scottish Courage Limited.

(19) On 18 March 1998, the Commission met representatives of Anheuser-Busch and S & N to discuss the Commission's warning letter and the joint response of the parties.

(20) By letter of 23 April 1998, the Strategy Director of S & N responded to informal requests for information made by the Commission at the 18 March 1998 meeting. He also drew to the Commission's attention the Budweiser marketing guidelines (described in recitals 17, 18 and 19). He noted that:

> 'you may wish to consider the marketing guidelines issued by A-B after the supply agreement was executed but which form an integral part of that agreement. These should form part of the agreement pack sent to you and are also enclosed with this letter'.

(21) The Commission issued a second warning letter on 13 July 1998, the core of which concerned the marketing guidelines. After subsequent discussion with the Commission concerning the guidelines dated 27 February 1997, the parties replaced them by revised guidelines in December 1998.

III

LEGAL ASSESSMENT

Introduction

(22) Under Article 15(1)(b) of Regulation No 17, the Commission may by decision impose on undertakings fines where, whether intentionally or negligently, they supply incorrect information in response to a request made pursuant to Article 11(3).

(23) By letter of 3 June 1997, the Commission addressed to Anheuser-Busch Inc. and to S & N (and notified to ABET), a request for information pursuant to Article 11 of Regulation No 17. The purpose of the request for information was as described in the request for information:

> 'to enable the Commission to assess the compatibility of the notified agreements that are listed in the Annex to this letter with the EC rules of competition, in particular, Article 85 of the EC Treaty in full knowledge of the facts and their correct economic interpretation'.

(24) In the letter the Commission asked 13 questions, including the following:

> '(3) Please give full details of any further changes to the agreements since the novation to S & N'.

A. **The parties supplied the Commission with incorrect information**

1. **The Commission's assessment**

(25) The reply to question 3 of the request for information was incorrect. By stating in the reply of 2 July 1997 that 'there have been no further changes in the agreements since the novation,' the parties have omitted the Budweiser marketing guidelines of 27 February 1997.

(26) These guidelines are, for Community competition law purposes, an agreement, since they have been issued and signed by Anheuser-Busch and signed 'agreed and accepted' on behalf of S & N. This view is confirmed by the extract in the letter of 23 April 1998 from Scottish Courage, 'you may wish to consider the marketing guidelines issued by A-B after the supply agreement was executed but which now form an integral part of that agreement'. The reference to the word 'Agreement' must in this context refer to the 1995 agreement, because the guidelines, having been signed in February 1997, predate the July 1997 agreement.

2. **The replies of the parties**

2.1. Scottish & Newcastle's arguments [3]

(27) S & N does not contest the facts on which the Commission's legal assessment is based.

(28) S & N accepts the Commission's assessment that the parties should have made reference to the Budweiser marketing guidelines of 27 February 1997 in their response to question 3 of the Commission's request of 3 June 1997 for information under Article 11 of Regulation No 17.

[3] S & N's reply of 27 October 1998 to the Statement of Objections and its further reply of 6 May 1999 are jointly dealt with.

(29) S & N submits that it regarded the Budweiser marketing guidelines as part of their overall arrangement with Anheuser-Busch from the time of their introduction.

2.2. Anheuser-Busch's arguments ([4])

(30) Anheuser-Busch does not contest the facts on which the Commission's legal assessment is based.

(31) Anheuser-Busch does, however, contest the Commission's legal assessment. Anheuser-Busch submits that the answer to question 3 in the Commission's request for information was only incorrect if the Budweiser marketing guidelines are an agreement and if they represent a change relative to the 1995 Beer Supply Agreement.

The guidelines are not an agreement

(32) Anheuser-Busch submits that the request for information was issued in the context of an existing notification, so as to enable the Commission to assess the notified agreements. The 1995 Beer Supply Agreement is part of a complex series of agreements containing binding legal obligations that set out the terms of the legal relationship between Anheuser-Busch and Courage Limited.

(33) Amongst those agreements, the Beer Supply Agreement contains contractually binding obligations on S & N to purchase and distribute Budweiser, to promote the Budweiser brand, and to observe certain rules regarding the marketing of Budweiser. The guidelines were communicated to S & N in February 1997 completely separate from the Beer Supply Agreement.

(34) The guidelines do not constitute a legally binding agreement but are recommendations made by Anheuser-Busch as to steps which S & N could take in positioning Budweiser so as to promote its image as a premium lager. It is precisely because they have a different status from the Beer supply agreement that they are entitled 'Recommended Budweiser positioning guidelines'. Since they are recommendations, the choice whether to adhere to the guidelines is left entirely to the discretion of S & N. The guidelines are therefore not a specific agreement with regard to the joint implementation of the marketing strategy and objectives for the Budweiser beer.

(35) Not only are the guidelines recommendations and thus not an agreement for the purposes of Community law; they do not constitute a contract under English law either. The guidelines may be revised by Anheuser-Busch unilaterally at its sole discretion: this is inconsistent with the notion of a bilateral agreement or understanding, where changes require the assent of both parties.

(36) The fact that S & N signed the cover letter to the guidelines 'agreed and accepted' is not evidence that S & N accepted any obligations whatsoever. Rather, S & N was merely acknowledging that Anheuser-Busch had communicated its then current brand positioning views in order to help S & N make its decisions about how to position the Budweiser beer it sells.

(37) Anheuser-Busch's statement that it intends to take appropriate steps to ensure compliance with the guidelines in all material respects should not be interpreted as indicating that Anheuser-Busch would seek to enforce them in individual cases. This simply meant that, at its regular meetings with S & N, Anheuser-Busch would discuss any S & N sales policy which it regarded as incompatible with the guidelines and thus threatened to devalue the Budweiser brand. However, all final decisions on how to position Budweiser remained with S & N. S & N is under no obligation to comply with the guidelines and is free to disregard them. In practice, S & N departs from the guidelines, presumably when it determines that it is in its commercial interest to do so. Indeed, on one occasion, in response to comments by Anheuser-Busch, S & N had specifically referred to the unenforceable nature of the guidelines.

(38) The fact that the guidelines were included in the bundle of documents sent to the Commission as part of the response to the December 1997 warning letter does not imply that they are part of the 1997 agreements or that clearance or exemption was being sought for them. In their joint reply, Anheuser-Busch and S & N obviously sought to provide copies of the 1997 agreements, as the Commission was unaware of those agreements and drafted the warning letter on the basis of the 1995 agreements. Rather than merely providing a copy of the relevant contracts, for convenience and in order to be as helpful as possible to the Commission, the parties had supplied a file containing 34 documents, including the guidelines and other documents which are not part of the 1997 agreements.

(39) The guidelines are irrelevant in competition terms. They are specifically phrased as recommendations and are non-binding. The Court of Justice, in its judgment of 28 January 1986 in Case 161/84 *Pronuptia* ([5]), ruled that recommendations (even on price) fall outside Article 81(1). It is noteworthy that following discussions with the Commission in late 1998, Anheuser-Busch issued slightly revised guidelines to S & N which the Commission has provisionally indicated as not falling within the scope of Article 81(1).

([4]) Anheuser-Busch's reply of 16 October 1998 to the Statement of Objections and its further reply of 27 April 1999 are jointly dealt with.

([5]) [1986] ECR 353.

The guidelines are not a change to the 1995 Beer Supply Agreement

(40) Anheuser-Busch considers that its reply to question 3 of the Commission's request was, in itself, correct for a second reason, namely that the guidelines were not a 'change to the agreements', meaning the 1995 agreements. The cover letter to the guidelines makes it clear that they are in no way a part of or a change to the Beer Supply Agreement or the associated agreements but instead have a completely independent status. It would have been inappropriate to include them in documents which created legally binding relationships between Anheuser-Busch and S & N.

(41) The fact that the guidelines were not incorporated in the 1997 Beer Supply Agreement, which is a full restatement of the 1995 Beer Supply Agreement incorporating all amendments to it, and indeed the fact that they were unaffected by the 1997 renegotiation, shows that they were not a change to the 1995 agreements and form no part either of those agreements or of the replacement 1997 agreements.

(42) Further evidence is provided by Clause 20 of the Termination Agreement, which identifies those documents which Anheuser-Busch and S & N considered to be part of the agreement between them, and provides that no other document contains any obligations on either party. Since the Termination Agreement contains no reference to the guidelines, they cannot be part of the July 1997 agreements or part of the 1995 agreements or have the status of those agreements.

S & N's letter of 23 April 1998

(43) Anheuser-Busch is not a party to this letter, which was written unilaterally by S & N without Anheuser-Busch's knowledge.

(44) The letter is not credible, as it was part of an attack on the commercial relationship between S & N and Anheuser-Busch, in particular the 1997 Beer Supply Agreement, and thus contradicts a number of statements which S & N had made in its joint submission with Anheuser-Busch that the Beer Supply Agreement falls outside the scope of Article 81(1).

(45) The letter contradicts S & N's letter of 14 March 1997 to the Commission stating that the relationship between Anheuser-Busch and S & N remained governed by the 'original agreements', namely the 1995 agreements, which implies that S & N did not consider the guidelines (issued in February 1997) set out any of the terms governing its relationship with Anheuser-Busch and thus were not an agreement.

2.3. The Commission's replies

(46) It should be noted that both parties concerned do not contest the facts on which the Commission has relied in its legal assessment.

(47) Moreover, S & N accepts the Commission's assessment that the parties should have made reference to the Budweiser marketing guidelines of 27 February 1997 in their response to question 3 of the Commission's request for information of 3 June 1997.

(48) However, Anheuser-Busch has put forward various arguments to contest the Commission's legal assessment. Anheuser-Busch's arguments will be dealt with below.

The guidelines are an agreement

(49) Any reference to English law by Anheuser-Busch is irrelevant. This case concerns S & N's and Anheuser-Busch's answer to a letter sent on the basis of Article 11(3) of Regulation No 17 relating to a notification by the parties to the Commission under Community competition law. According to the case-law of the Court of Justice, in order for there to be an agreement within the meaning of Article 81(1), it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way (see judgments of 15 July 1970 in Case 41/69 *ACF Chemiefarma* [6] and of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck* [7]).

(50) The Commission cannot accept Anheuser-Busch's view that the guidelines are mere recommendations and that the choice as to whether to adhere to the guidelines is left entirely to the discretion of S & N. By signing the cover letter to the guidelines as 'agreed and accepted', S & N agreed and accepted the content of the letter as a whole and was not merely acknowledging the communication of the guidelines by Anheuser-Busch.

(51) In fact, the last sentence of the letter states: 'if you are in agreement with the foregoing please execute the duplicate original of the correspondence and return a copy to me'.

(52) It is clear from the letters of Anheuser-Busch to S & N dated 27 and 28 February 1997 that the only interpretation possible is that S & N:

(a) acknowledged the communication of the guidelines by Anheuser-Busch, and Anheuser-Busch's intention to 'take appropriate steps to assure compliance with the Budweiser marketing guidelines in all material respects';

(b) assented to Anheuser-Busch's right to amend the guidelines;

[6] [1970] ECR 661, at paragraph 112.
[7] [1980] ECR 3125, at paragraph 86.

(c) acknowledged receipt of the guidelines and pledged 'to use its reasonable efforts to ensure compliance with the Budweiser marketing guidelines by its sales staff and customers'.

(53) To be sure, the guidelines may be revised by Anheuser-Busch unilaterally but as S & N pledges to use its reasonable efforts to ensure compliance, and S & N has agreed to and accepted those two elements of the letter, S & N also pledges to ensure compliance with such amended guidelines as Anheuser-Busch may wish to communicate.

(54) Moreover, it is clear from the letter of 28 February that Anheuser-Busch did not in fact communicate the guidelines unilaterally but had asked S & N for its comments on draft guidelines: 'Scottish Courage's commitment is important to us (...). We look forward to your response to our draft'.

(55) Anheuser-Busch, in its reply to the Statement of Objections, now claims that its intention 'to take appropriate steps to assure compliance with the guidelines in all material aspects' should not be interpreted as 'indicating that Anheuser-Busch would seek to enforce them in individual cases'.

(56) This is wholly unconvincing. S & N has agreed and accepted Anheuser-Busch's intention and has pledged 'to use its reasonable efforts to ensure compliance (...)'. Moreover, Anheuser-Busch, in its letter of 27 February, has stressed that S & N's commitment to the guidelines is important to it. This clearly shows that the guidelines constitute an agreement between the parties.

(57) That the guidelines are called 'recommended' guidelines is in itself not sufficient to demonstrate that the guidelines are not an agreement. Anheuser-Busch's reference to the 'Pronuptia' judgment is therefore irrelevant.

(58) In its reply to the Statement of Objections Anheuser-Busch seems to suggest that the Commission had accepted that the guidelines did not give rise to real competition problems. This presentation distorts the real facts. The Commission was particularly concerned about the guidelines, and even issued a second warning letter drawing the parties' attention to it. It was only after the second warning letter and the following discussions with the Commission that the parties withdrew the guidelines.

(59) In the light of the foregoing, the Commission disagrees with Anheuser-Busch, and considers the guidelines to constitute an agreement for the purposes of Community law.

The guidelines are a change to the 1995 Beer Supply Agreement

(60) The Commission agrees with Anheuser-Busch that the request for information was issued in the context of an existing notification and to enable the Commission to assess the notified agreements. Included in the Beer Supply Agreement, and specifically Article 7 thereof, are obligations regarding the positioning and marketing of Budweiser. As the guidelines imposed further obligations with regard to the marketing and positioning of Budweiser beer, they materially changed the relationship between Anheuser-Busch and S & N as agreed in the Beer Supply Agreement.

(61) The question whether or not the guidelines were incorporated in the Beer Supply Agreement is wholly irrelevant in determining whether they constituted a change to that Agreement.

S & N's letter of 23 April 1998

(62) S & N's letter clearly indicates that S & N is and was of the view that the guidelines alter the overall arrangements between the parties in so far as the marketing and positioning of Budweiser is concerned. It may also be noticed that Anheuser-Busch, in its letter of 28 February, indicated that S & N's commitment to the guidelines was important to it. It is therefore wholly unconvincing that Anheuser-Busch in its reply to the Statement of Objections now accuses S & N of misinterpreting the guidelines in S & N's letter of 23 April 1998.

B. **The incorrect reply of the parties was negligent**

1. **The Commission's assessment**

(63) As the parties have, apart from failing to supply the Commission with the guidelines, cooperated with the Commission constructively, and as the Commission has no evidence that the guidelines were intentionally concealed from the Commission, the conclusion must be that the incorrect reply to the Commission's request under Article 11 was caused by negligence.

2. **The arguments of the parties**

2.1. S & N's arguments ([8])

(64) S & N deeply regrets the omission from the parties' response and states that it was an oversight rather than the result of any intention to mislead the Commission.

2.2 Anheuser-Busch's arguments ([9])

(65) The answer cannot be intentionally incorrect: Anheuser-Busch did not answer the request for information so as deliberately to conceal the guidelines from the Commission.

([8]) See footnote 3.
([9]) See footnote 4.

(66) Anheuser-Busch furnished the guidelines to the Commission on 16 February 1998. This was before the Commission was even aware of the existence of the guidelines. Anheuser-Busch felt confident that the guidelines raised no significant competition problems and therefore would not have been embarrassed to discuss them openly with the Commission, as indeed it did after it had first learnt that the Commission had some preliminary concerns about them when it received a warning letter in July 1998. There is therefore no reason for Anheuser-Busch to have wished to conceal the guidelines from the Commission.

(67) Negligence is essentially equivalent to reasonableness. Thus, if there is a reasonable explanation for the answer to the request for information, even if it was ultimately found to be incorrect, it cannot be negligent. Anheuser-Busch submits that it was reasonable to consider at the time of giving its answer that the guidelines are neither an agreement nor a change to the 1995 Beer Supply Agreement, for the following reasons.

(a) They are very different in nature from the Beer Supply Agreement: one is a set of non-binding recommendations, the other is a set of binding obligations.

(b) The Beer Supply Agreement is designed to formally regulate the details of supply relationship between Anheuser-Busch and S & N. The guidelines are issued for information purposes only.

(c) As the Beer Supply Agreement contains binding legal obligations, it cannot be changed without another formal agreement. The guidelines were issued by Anheuser-Busch alone and can be changed unilaterally by Anheuser-Busch.

(d) The guidelines did not change the 1995 Beer Supply Agreement, as is evidenced by the fact that they were not incorporated into the 1997 Beer Supply Agreement.

2.3. The Commission's replies

(68) The Commission does not allege that the answer to its request for information was intentionally incorrect.

(69) The various arguments put forward by Anheuser-Busch as proof of its submission that it was reasonable at the time of giving its answer to suppose that the guidelines were neither an agreement nor a change to the 1995 Beer Supply Agreement, have been addressed.

(70) The Commission's conclusion as regards the nature of the guidelines is perfectly in line with the case-law of the Courts of the European Communities. As both parties should have ready access to legal advice, the Commission disagrees with Anheuser-Busch's claim that it was reasonable not to have informed the Commission of the guidelines following its formal request for information.

C. **Article 15(1)(b) of Regulation No 17**

1. **The Commission's assessment**

(71) By not including the guidelines in the reply to the request for information, the proper investigation of the file has been hindered: in particular, the assessment made in the warning letter issued by the Commission on 17 December 1997 could not build on the parties' specific agreement, as indicated in the guidelines, with regard to the joint implementation of the marketing strategy and objectives for Budweiser beer.

(72) In accordance with Article 15(1)(b) of Regulation No 17, a fine is appropriate, in view of the following considerations.

(a) Supplying incorrect information to the Commission has a serious impact on the conduct of a case and, in particular, on the approach of the Commission outlined in the warning letter.

(b) Anheuser-Busch Inc. is the largest brewer in the world and S & N is the largest brewer in the United Kingdom; and both have ready access to legal advice.

2. **The arguments of the parties**

2.1. Scottish & Newcastle's arguments ([10])

(73) S & N hopes that in the circumstances the Commission will feel able to deal with the matter with a degree of leniency and conclude the procedure without the imposition of a fine.

2.2. Anheuser-Busch's arguments ([11])

(74) Anheuser-Busch submits that although it does not believe that it has infringed Article 15(1)(b), the following factors should be borne in mind.

(a) This is not a case where the parties have tried to conceal a document from the Commission. Quite the contrary: the Commission learned of the guidelines because the parties gave them voluntarily to the Commission.

(b) Anheuser-Busch discussed openly and constructively with the Commission whether the guidelines might have had competition implications. Those discussions led to Anheuser-Busch's issuing slightly revised guidelines. The Commission has given its preliminary opinion that the revised guidelines fall outside the scope of Article 81(1). In all other respects as well, Anheuser-Busch has fully cooperated with the Commission.

([10]) See footnote 3.
([11]) See footnote 4.

2.3. The Commission's reasoning as to the fines

(75) According to Article 15 (1)(b) of Regulation No 17 the Commission may by decision impose on undertakings or associations of undertakings fines from EUR 100 to EUR 5 000 where, intentionally or negligently, they supply incorrect information in response to a request made pursuant to Article 11(3) of that Regulation.

(76) The infringement which is the subject of this Decision is the negligent supply of incorrect information by Anheuser-Busch and S & N, through their failure to submit the Recommended Budweiser positioning guidelines in response to a formal request for information made pursuant to Article 11(3) of Regulation No 17.

(77) As the Commission is dependent on the parties for a notification for the supply of correct information on the basis of which the Commission is able to assess the notified agreements, the supply of incorrect information to the Commission has a serious impact on the conduct of a case and, in particular in this case, the approach of the Commission services outlined in the warning letter.

(78) Anheuser-Busch Inc. is the largest brewer in the world and S & N is the largest brewer in the United Kingdom and both have ready access to legal advice.

(79) For the reasons set out in recital 72 the Commission considers the imposition of a fine to be appropriate.

(80) However, the Commission has no evidence that the parties concealed the guidelines intentionally and the parties have, apart from the infringement, cooperated constructively and openly with the Commission.

(81) It should also be noted that the parties supplied the Commission with the guidelines voluntarily, on 16 February 1998. The Commission had not asked for the guidelines and was, at that time, not even aware of their existence. It was thus only through the information supplied by the parties themselves that the Commission discovered the guidelines.

(82) It follows that there was only a limited period of time during which the Commission was not in the possession of the correct information: between 2 July 1997 and 16 February 1998. The supply of incorrect information by the parties should not in this case, therefore, be regarded as a major infringement.

(83) For these reasons, the Commission considers it appropriate to fix the amount of the fines at EUR 3 000 for Anheuser-Busch and EUR 3 000 for S & N.

(84) Since ABET is a 100 % subsidiary of Anheuser-Busch International Inc., which in turn is a 100 % subsidiary of Anheuser-Busch Inc. and since moreover both ABET and Anheuser-Busch Inc. played a part in these proceedings, the Commission considers that both ABET and Anheuser-Busch Inc. are jointly and severally liable for the fine,

HAS ADOPTED THIS DECISION:

Article 1

Anheuser-Busch Incorporated and Scottish & Newcastle plc have infringed Article 15(1)(b) of Regulation 17 by negligently supplying incorrect information in response to a request made pursuant to Article 11.

Article 2

A fine of EUR 3 000 is hereby imposed on Anheuser-Busch Incorporated.

A fine of EUR 3 000 is hereby imposed on Scottish & Newcastle plc.

Article 3

The fines imposed under Article 2 shall be payable in euro within three months of the date of notification of this Decision to the following bank account of the European Commission: 310-0933000-43, Banque Bruxelles Lambert, Agence Européenne, Rond-Point Schuman 5, B-1040 Brussels.

After the expiry of that period, interest shall automatically be payable at the rate applied by the European Central Bank to its repo operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely 6,5 %.

Article 4

This Decision is addressed to:

Anheuser-Busch Incorporated
One Busch Place
St Louis, MO 63188
USA

Anheuser-Busch European Trade Limited
8 Devonshire Gardens
Cutler's Gardens
London EC2M 4LP
United Kingdom

Scottish & Newcastle plc
50 East Fettes Avenue
Edinburgh EH4 1RR
United Kingdom

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

Done at Brussels, 14 December 1999.

For the Commission

Mario MONTI

Member of the Commission