JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

27 July 2005 *

In Joined Cases T-49/02 to T-51/02,

Brasserie Nationale SA (formerly Brasseries Funck-Bricher and Bofferding), established in Bascharage (Luxembourg), represented by A. Carnelutti and L. Schiltz, lawyers, with an address for service in Luxembourg,

Brasserie Jules Simon et Cie SCS, established in Wiltz (Luxembourg), represented by A. Carnelutti and J. Mosar, lawyers,

Brasserie Battin SNC, established in Esch-sur-Alzette (Luxembourg), represented by A. Carnelutti and M. Santini, lawyers,

applicants,

* Language of the case: French.

Commission of the European Communities, represented by W. Wils and A. Bouquet, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Article 1 of Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 — Luxembourg Brewers) (OJ 2002 L 253, p. 21) in so far as it relates to the applicants, and for annulment of Article 2 of that Decision in so far as it imposes fines on the applicants or, in the alternative, a substantial reduction in the amount of those fines,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of A.W.H. Meij, President, N.J. Forwood and I. Pelikánová, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2005,

gives the following

Judgment

Facts

1 These cases concern Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 — Luxembourg Brewers) (OJ 2002 L 253, p. 21, 'the Decision').

2 The Decision relates to an agreement ('the Agreement') concluded on 8 October 1985 between five Luxembourg brewers ('the parties'), namely Brasserie Nationale ('Brasserie Nationale'), Brasserie Jules Simon et Cie, formerly Brasserie de Wiltz ('Wiltz'), Brasserie Battin ('Battin') (referred to collectively as 'the applicants'), Brasserie de Diekirch ('Diekirch') and Brasseries Réunies de Luxembourg Mousel et Clausen ('Mousel').

3 In 1999 Mousel and Diekirch were acquired by Interbrew SA ('Interbrew'). In July 2000 Diekirch became a subsidiary of Mousel. At that time Mousel was renamed Brasserie de Luxembourg Mousel-Diekirch ('Brasserie de Luxembourg').

4 In the Decision Brasserie Nationale is called 'Brasserie Nationale — Bofferding', abbreviated to 'Bofferding'. At the hearing its lawyer nevertheless confirmed that these titles referred to the same legal entity. It will be referred to below as 'Brasserie Nationale'.

5 Article 1 of the Agreement states:

'This Agreement is intended to prevent and settle disputes which, in the Grand Duchy, may arise as regards the mutual observance and protection of brewery clauses, otherwise known as "beer ties", whether stipulated separately or contained in any other agreement or undertaking.'

6 Article 2 of the Agreement states:

'Beer tie means any written agreement, irrespective of its legal validity and/or its duration and/or its enforceability, by which one of the contracting brewers has agreed with a publican that he will stock only Luxembourg beers produced by that brewer or brewed under licence by a Luxembourg brewer and/or sold by a Luxembourg brewer for a fixed period and/or for a given quantity of beer ...'.

7 Article 4 stipulates that:

'The undersigned brewers shall refrain, and undertake to strictly prohibit their distributors, from selling any beer to an on-trade outlet which is guaranteed under the terms of this Agreement to one of the other signatory brewers.

In the event of a repeat infringement by the distributor, the following action will be taken:

The contracting brewer will formally prove that its customer is selling the beers of a competing brewer and will, if necessary, draw his attention to the supply agreement. It will also draw that agreement to the distributor's attention and formally warn him to stop all supplies of beer. At the same time it will ask the competing brewer to summon its distributor and duly order him to cease all supplies to the customer tied by contract to its colleague, so as to avoid any complicity by the competing brewer in its distributor's actions. ...'

8 Article 5 of the Agreement provides that:

'Each contracting brewer undertakes before contracting with and/or making a supply of beer to a publican previously supplied by the other brewer to inquire of the latter in advance whether there is a "beer tie" in its favour.

The request for information shall be addressed in writing to the other brewer, which shall be obliged to provide the information, accompanied if necessary by supporting documents, to establish whether or not there is a "beer tie". ... A copy of the request for information may be sent to the director of the Luxembourg Brewers Federation.'

9 Articles 6 and 7 of the Agreement lay down penalties for infringement of Articles 4 or 5. Articles 8, 9 and 10 establish conciliation, arbitration and consultation procedures. Article 11 provides for terminating the Agreement in the event of a takeover by a foreign company or cooperation with a foreign brewer. Lastly, Article 12 stipulates that the Agreement is concluded for an indefinite period and that the period of notice for withdrawal is 12 months.

10 The Agreement is supplemented by a declaration of intent, also signed on 8 October 1985 ('the declaration of intent concerning Battin'), which reads as follows:

'[Battin] is not infringing Article 2 [of the Agreement] by distributing the beers of its licensor "Bitburger Brauerei Th. Simon", Federal Republic of Germany, according to the current forms and methods of distribution.

If in the future the forms or methods of distribution change or if a significant increase in volume should upset the current balance of distribution, ... the [Agreement] may be terminated at any time in respect of [Battin].'

11 The Agreement was also supplemented by a declaration of intent signed at the meeting of the Fédération des Brasseurs Luxembourgeois (Luxembourg Brewers Federation, 'the FBL') on 2 December 1986 ('the declaration of intent concerning foreign brewers'). It provides that:

'The signatory brewers to [the Agreement] declare that they wish to reserve priority for canvassing and for the conclusion of a supply contract to one of their Luxembourg colleagues in the event that written information from the brewer holding a contract indicates that one of its customers is being canvassed and is preparing to conclude a supply agreement with a foreign brewer, despite being tied to one of them by a supply contract that comes within the scope of the [Agreement].

Should a colleague manage to conclude a supply contract with the former customer of a brewer that has granted it canvassing priority in writing, that colleague undertakes, at the first available opportunity for such an exchange, to offer the other brewer one of its customers in a similar position for canvassing by that brewer.'

The contested decision

12 In the Decision the Commission considers that the object of the Agreement was, first, to maintain the parties' respective clienteles in the 'Horeca' sector (hotels, restaurants and cafés, in other words the on-trade) in Luxembourg and, second, to impede penetration of that sector by foreign brewers (recitals 47 to 73).

13 It goes on to consider that the Agreement was likely to restrict competition appreciably in that sector and to have an appreciable effect on trade between Member States. It therefore concludes that, by adopting the Agreement, the parties infringed Article 81(1) EC (recitals 74 to 85).

14 According to the Decision, the infringement was committed intentionally, within the meaning of Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962 (II), p. 87), which was then applicable (recitals 89 and 90).

15 Article 1 of the Decision states that:

'[The parties] have infringed Article 81(1) [EC] by concluding an agreement which had the object of maintaining their respective clienteles in the Luxembourg on-trade and of impeding penetration of that sector by foreign brewers.

The infringement lasted from October 1985 to February 2000.'

16 Article 2 of the Decision imposes a fine of EUR 400 000 on Brasserie Nationale and fines of EUR 24 000 each on Wiltz and Battin.

Procedure

17 By three applications lodged at the Registry of the Court of First Instance on 26 February 2002, the applicants brought the present actions.

18 The written procedures were concluded on 25 November 2002.

19 After the parties had been heard on the point, the President of the Second Chamber, by an order of 15 February 2005, joined the cases for the purposes of the oral proceedings and the judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

20 Since the President of the Second Chamber was unable to take part in the present proceedings, on 22 February 2005 the President of the Court of First Instance designated Judge N.J. Forwood to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure.

Forms of order sought by the parties

21 In each of the cases the applicant concerned claims that the Court should:

— annul Article 1 of the Decision in so far as it finds that the applicant has infringed Article 81(1) EC;

— in any event, annul Article 2 of the Decision in so far as it imposes a fine on the applicant, alternatively, reduce that fine substantially;

— order the Commission to pay the costs.

22 In each of the cases the Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

23 In each of the cases the applicant concerned raises two pleas, the first alleging infringement of Article 81(1) EC and the second infringement of Article 15(2) of Regulation No 17 and non-compliance with the obligation to state reasons enshrined in Article 253 EC.

1. *First plea: infringement of Article 81(1) EC*

24 The first plea is divided into five parts, in which the applicants complain, first, that when assessing the object of the Agreement the Commission did not take due

account of its context; second, that it considered that the Agreement applied where no 'beer tie' existed; third, that it classified the Agreement as being designed to retain customers and hence anti-competitive by object; fourth, that it concluded that the object of the Agreement was to impede penetration of the Luxembourg on-trade by foreign brewers; and, fifth, that it considered that the Agreement had an appreciable effect on competition.

25 The third part of the first plea relates to the first restrictive object identified by the Commission, namely the maintenance of the parties' respective clienteles in the Luxembourg on-trade, and the fourth part of this plea refers to the second restrictive object identified by the Commission, namely blocking the penetration of the Luxembourg on-trade by foreign brewers. The first part of the first plea alleges failure to state reasons for the assessment of the object of the Agreement.

26 As the third, fourth and first parts of the first plea all thus relate to the assessment of the object of the Agreement, they should be examined together.

Assessment of the object of the Agreement (third, fourth and first parts of the first plea)

The contested decision

27 The Decision notes, first, that, according to the minutes of the meeting of the FBL on 7 October 1986, as amended by the minutes of the meeting of the FBL on

2 December 1986, the parties agreed to interpret the term 'beer tie' more widely than in Article 2 of the Agreement. Those minutes state (recital 9):

'[I]t is agreed that the following will be accepted and treated in the same way as a "beer tie":

— the transaction consisting of taking out a lease and contributing financially to fitting out of a café, without a "beer tie" being expressly mentioned, e.g. brewer X leases a building and contributes to the cost of its refurbishment for that purpose but does not, or does not manage to, enter into an obligation with the owner, and

— the taking over of a drinks outlet licence (droit de cabaretage) by a brewer, without a "beer tie" being expressly mentioned.

These two interpretations are an integral part of the existing provisions relating to this matter.'

28 According to the Decision, this interpretation was confirmed by a letter dated 23 October 1991 from Wiltz to the FBL, according to which (recital 9):

'[T]he brewers agree to accept and to treat in the same way as a "beer tie":

— the transaction consisting of taking out a lease;

— the provision by a brewer, on whatever basis, of a drinks outlet licence.'

29 As regards the legal assessment of the object of the Agreement, the Decision states (recital 47):

'The Agreement has the object, first of all, of restricting competition between the signatory brewers by maintaining their respective clienteles in the Luxembourg on-trade. This is clear from Articles 4 and 5, the penalties for infringing which are laid down in Articles 6 and 7 (see recitals 48 to 66). The Agreement also aims to impede penetration of the Luxembourg on-trade by foreign brewers. This second anti-competitive object is clear, in particular, from the second declaration annexed to the Agreement (see recitals 67 to 73).'

30 With regard to the first anti-competitive object, the Commission considers that Article 4 of the Agreement prohibited each signatory brewer and its distributors from supplying beer to outlets that were guaranteed to other Luxembourg brewers. According to the Decision, that prohibition applied in three situations, namely where there was no supply contract or 'beer tie', where the 'beer tie' was void or unenforceable, and where there was a valid 'beer tie', and entailed a restriction on competition in each case. According to the Decision, in each situation the very object of the Agreement was to restrict competition (recital 48).

31 With respect to the first situation, the Decision states that when a brewer financed the fitting out of an outlet or acquired an outlet licence but did not conclude a contract with the outlet operator or did not impose an exclusive purchasing clause

on him, Article 4 of the Agreement prevented the outlet operator from obtaining his supplies from other Luxembourg brewers. Thus the first brewer maintained its customers, and the freedom of action of the outlet operator and third-party brewers was limited (recital 50).

32 With respect to the second situation, the Decision finds that the Agreement went beyond the restrictions imposed by law, as it obliged the parties to honour 'beer ties' which were either invalid or unenforceable, for example because the brewer had breached his contractual obligations to the outlet operator. Thus, the parties reduced their freedom of action and granted each other advantages, in terms of maintaining their clientele and of legal certainty, which would not have applied under normal competitive conditions. The Decision adds that the Luxembourg case-law which led to the setting aside of contracts on the grounds that the prices or quantities were undetermined no longer applied after March 1996, but that the parties did not terminate the Agreement at that time. Furthermore, according to the Decision, the expression 'irrespective of its legal validity and/or its duration and/or its enforceability' extended the guarantee in Article 4 to contracts that would be invalid or unenforceable on grounds other than the fact that prices or quantities were undetermined (recitals 52 to 55).

33 With respect to the third situation, the Decision states, first, that Article 4 of the Agreement prohibited 'any sale of beer to an outlet ... guaranteed to one of the other signatory brewers', whereas the obligation referred to in Article 7(1) of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81] (3) EC to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended most recently by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27), was limited to beers of the same type as those supplied by the contracting brewer. Second, the Agreement completely prohibited any supply to an outlet that was tied to another party, whereas in civil law the penalty for making such supplies is limited, according to the parties themselves, to the payment of damages and interest. For various reasons, according to the Decision, it is possible that an operator might wish to breach his contract and to assume the financial consequences of the breach. In the view of the Commission, the Agreement made this type of arbitrage by outlet operators impossible, and thus served to maintain inefficient relationships (recitals 56 to 58).

34 The Decision then states that the restriction of competition on account of the object of the Agreement stems first from the fact — not contested by the parties — that the Agreement applied even in cases where there was no supply contract or 'beer tie' and it could therefore not be the subject of any dispute (recital 59).

35 Second, the Decision notes that the Agreement was preceded by several other agreements between Luxembourg brewers, for example the agreement of 1 September 1966 involving all the contracting undertakings and the agreements of 13 June 1975 and 28 April 1983 involving Brasserie Nationale and Mousel. According to the Decision, these earlier agreements required the signatory brewers to honour each other's clienteles absolutely, without referring to any exclusive purchasing clause or any problem of legal certainty. According to the Decision, the interpretation of the Agreement cannot be entirely dissociated from this historical context, which is such as to cast doubt on the legal uncertainty relied on by the parties as a justification for the Agreement (recital 60).

36 Third, it is noted that the assessment of the object of the Agreement does not depend on the parties' subjective intentions, in that the nature of the Agreement is obviously such as to restrict or distort competition (recital 61).

37 Fourth, the Commission emphasises, with regard to the problem of legal uncertainty raised by the parties, that, depending on the applicable rules of national civil law, this type of problem can affect various types of contract in different industries and different Member States, and forms part of the overall commercial risks that every undertaking has to deal with independently. According to the Decision, this problem 'does not justify an agreement whose benefits are reserved for national undertakings' and 'does not merit a derogation' from Article 81(1) EC (recital 62).

38 Moreover, the Decision notes that the director of the FBL expressly acknowledged that the Agreement was not legally valid by observing, at the conciliation meeting between Brasserie Nationale and Diekirch on 19 March 1996, that 'even if the inter-brewer provisions do not have legal force, there is the spirit which has been put into them and which prevails' (recital 63).

39 The Decision then notes that Article 5 of the Agreement reinforces the restriction of competition resulting from Article 4 by ensuring that it is effectively applied, and that Articles 6 and 7 are intended to strengthen the obligations imposed by Articles 4 and 5 and provide for penalties that exceed those provided by civil law (recitals 64 to 66).

40 With regard to the second anti-competitive object, namely to impede penetration of the Luxembourg on-trade by foreign brewers, the Decision notes that the declaration of intent regarding foreign brewers provides for consultation between the parties in order to reserve canvassing priority for one of its 'Luxembourg colleagues', followed, should the canvassing be successful, by a compensatory mechanism for exchanging outlets between the two parties concerned. According to the Commission, this object is confirmed by the fact that, at the conciliation meeting between Brasserie Nationale and Diekirch on 19 March 1996, the director of the FBL stated that 'the aim [was] to avoid ...the massive incursion of foreign brewers onto [their] market'. Although that remark does not commit the parties, it should nevertheless be taken into account for the purpose of interpreting the Agreement, as it was made at a meeting relating to the application of the Agreement. According to the Decision, this second anti-competitive object cannot be dissociated from the first, since restricting the penetration of the Luxembourg market by foreign brewers helped to preserve the stability of relations between the parties. According to the Commission, the declaration of intent concerning Battin was intended to preserve 'the current balance of distribution', which indicates that the parties considered that the sector enjoyed a degree of equilibrium that merited protection. Lastly, the Decision notes that Article 11 of the Agreement makes it possible to terminate the Agreement in respect of a contracting brewer which cooperates with a foreign brewer (recitals 67 to 73).

Arguments of the parties

— Allegedly wrong classification of the Agreement as having the object of maintaining clienteles (third part of the first plea)

41 The applicants complain that the Commission classified the Agreement as an agreement to maintain clienteles and hence anti-competitive by object.

42 According to the applicants, the sole purpose of the Agreement was to ensure compliance with the exclusive arrangements contractually agreed between publican and brewer, which the Court of Justice has recognised as not having an anti-competitive object (Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935). Brasserie Nationale adds that this objective of the Agreement can be deduced from each of the cases in which the Agreement was invoked, which are reported in the Decision.

43 With regard to the consideration that the benefits of the Agreement were reserved for national brewers (recital 62 of the Decision), the applicants claim that the Agreement was open to all the brewers operating in Luxembourg. They add that Mousel and Diekirch were not ejected from the Agreement as a result of their takeover by Interbrew.

44 According to the applicants, the machinery for exchanging information provided for in Article 5 of the Agreement made it possible to limit the scope of the Agreement to written 'beer ties'. They assert that in the copy of the contract that was exchanged, commercially sensitive information was deleted. Brasserie Nationale adds that Article 4 of the Agreement merely expressed the commitment of the parties to

respect exclusive arrangements. The term 'guaranteed outlet' used in that article simply means 'tied' to a brewer by virtue of a 'beer tie', as confirmed by the third paragraph of that article.

45 With regard to the agreements preceding the Agreement, mentioned in recital 60 of the Decision, the applicants maintain that their assessment in the Decision is distorted. They state that the agreements of 1980 and 1981 and the Agreement were aimed at ensuring contractually agreed exclusivity, unlike the agreements of 1975 and 1983. Brasserie Nationale further states that most of these agreements predate the EEC Treaty, that agreements subsequent to that Treaty bound only two of the parties, that among these latter agreements the 1980 agreement was ignored by the Commission, and that the only multilateral agreement dates from 1966, in other words before expiry of the transitional period, and was terminated long before the Agreement.

46 With regard to the remark of the director of the FBL referred to in recital 63 of the Decision (see paragraph 38 above), Brasserie Nationale disputes the authority of the director, in that the FBL has a limited mandate and that the profile of its director does not enable him to know the market. Moreover, his view on the validity of the Agreement is incorrect. In the opinion of Brasserie Nationale, since the Agreement was aimed only at ensuring compliance with exclusive agreements not involving the crossing of frontiers, it did not relate to imports or exports (Case 43/69 *Bilger* v *Jehle* [1970] ECR 127). Consequently, according to Brasserie Nationale, the Agreement was exempt from notification, pursuant to Article 4(2) of Regulation No 17, so that it remained valid until any finding of infringement was made. Wiltz and Battin also dispute the authority of the statement by the director of the FBL and submit that the Agreement did not relate to imports or exports.

47 The applicants then maintain that the Agreement was adopted for three reasons. Brasserie Nationale, for its part, relies on these reasons only as regards the second and third situations mentioned in the Decision, that is, the one in which the 'beer tie'

was void or unenforceable and the one in which there was a valid 'beer tie', repeating that the first situation, namely where there was no 'beer tie', does not fall within the scope of the Agreement.

48 With regard to the first reason, the applicants claim that contracts containing a 'beer tie' were systematically annulled by Luxembourg courts on the grounds that prices and volumes were undetermined, on the basis of French case-law concerning similar provisions of the Civil Code. Brasserie Nationale adds that the Agreement was an alternative means of settling disputes which, in view of that case-law, disregarded the question of the validity of 'beer ties', and that it was for that reason that the words 'irrespective of its legal validity ... and/or its enforceability' were included in Article 2 of the Agreement.

49 The applicants state that there was a risk that a contract containing a 'beer tie' would be declared void by the Luxembourg courts, whatever the origin of the dispute, as any civil proceedings, including those stemming from withdrawal from or non-performance of the contract, exposed the brewer concerned to that risk. Although the abovementioned French case-law was overturned in 1995, and this change was followed in Luxembourg by a single judgment of a court of first instance in March 1996, the applicants maintain that that single judgment was not sufficient to eliminate the risk in question. In their view, it was irrelevant whether the French case-law was followed by all or a majority of the courts. In reply to the arguments of the Commission, Brasserie Nationale adds that the fact that the overturning of the French case-law occurred in two stages has no bearing on the actual date of the overturning of the Luxembourg case-law, that it was necessary to wait for three or four years for a Luxembourg appeal judgment in a beer case to endorse the change in France, and that the conceivable ways of complying with the case-law in question were also subject to uncertainty and in any case were inappropriate to beer distribution. With regard to the addition proposed to express the fact that the Agreement was aimed at cases in which contracts were declared void for reasons other than the fact that prices and volumes were undetermined, Brasserie Nationale maintains that the fact that this addition was not formally included indicates precisely that it was not accepted by the parties.

50 As to the second reason, the applicants claim that a brewer that had concluded with a publican a new contract containing a 'beer tie' was at risk of being sued by another brewer for third-party complicity in the infringement of the publican's obligations. According to the applicants, although under the abovementioned case-law on void contracts that risk was slight, it could lead to long and costly proceedings. Conversely, according to the applicants, although proceedings for third-party complicity could, in marginal cases, be a remedy for a brewer that was a victim of disloyalty on the part of a publican, this remedy necessitated a similar procedure if it was to be effective.

51 With regard to the third reason, the applicants maintain that the brewers did not have an effective judicial remedy to ensure that exclusive agreements were honoured. Correcting the shortcomings of national law is, in their view, a classic motive for recourse to private rules. Whether the Agreement is contrary to public policy is within the sole jurisdiction of the Luxembourg courts, so that it should be assumed to be lawful.

52 The applicants then claim that, far from restricting their freedom of action, they exercised it to ensure that contracts were honoured. Even supposing that the Agreement had a restrictive effect on competition that could be separated from that inherent in 'beer ties', in their opinion it was justified by the need to preserve commercial loyalty. Brasserie Nationale relies in this respect on the judgments in Cases 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649 and C-309/99 *Wouters and Others* [2002] ECR I-1577. According to the applicants, the state of Luxembourg law cannot be a 'frontier' fixing the level of guarantee that they could grant themselves in order to ensure commercial loyalty. In addition, they seek to establish an analogy with Article 5(c) of the Code of Conduct of the Institute of Professional Representatives before the European Patent Office ('the EPI'); they contend that in its decision that was the subject of the judgment in Case T-144/99 *Institute of Professional Representatives* v *Commission* [2001] ECR II-1087, paragraphs 89 and 90, the Commission acknowledged that it had no objection to that article. According to the applicants, the Agreement only prohibited a brewer from concluding a contract with a publican who was already tied to a competitor by a contract containing a 'beer tie' and entailed no prohibition where the commercial relationship had ended.

53 Furthermore, the applicants dispute the claim that the Agreement protected 'inefficient brewer-operator relationships' (recital 57 of the Decision). They contend that the concepts of validity and enforceability mentioned in Article 2 of the Agreement referred only to flaws in the contract at the time it was made and that the Agreement had neither the object nor the effect of prohibiting withdrawal in the event of serious failings on the part of the brewer towards the outlet operator.

54 With regard to the consideration that the Agreement was more restrictive than 'beer ties', because Article 4 prohibited 'any sale of beer' to an outlet tied to one of the parties (recital 56 of the Decision), the applicants state that the Agreement applied only to 'pils'-type beers. Brasserie Nationale indicates that for a Luxembourg brewer the concept of beer related only to beers of this kind, adding that it was only well after the conclusion of the Agreement that Mousel and Diekirch began to distribute other types of beer. Wiltz and Battin maintain that Article 4 could only mean that it prevented the parties from supplying the beers that they produced or distributed, and these were in fact exclusively of the 'pils' type.

55 Brasserie Nationale submits, finally, that the system for exchanging information provided for in the Agreement bears no relationship to the one that was the subject of the judgments in Cases T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905 and T-35/92 *John Deere* v *Commission* [1994] ECR II-957, which it says are the only judgments in which the Court of First Instance has imposed penalties for the exchange of information that does not concern prices or underpin another anti-competitive mechanism.

56 The Commission contends that this part of the first plea is not well founded.

— Allegedly wrong classification of the Agreement as having the object of impeding the penetration of the Luxembourg on-trade (fourth part of the first plea)

57 The applicants claim that the Commission wrongly considered that the object of the Agreement was to impede the penetration of the Luxembourg on-trade by foreign brewers.

58 According to the applicants, the Agreement was designed merely to counter the breach of 'beer ties' by foreign brewers while maintaining the possibility for a Luxembourg brewer to respond successfully to the offer of a publican contemplating a contract with a foreign brewer. Moreover, in their view, the Agreement was justified by the exceptional situation in Luxembourg, in particular the imbalance in strength between Luxembourg and foreign brewers, and by the abnormal situation created by the disloyalty of publicans. Brasserie Nationale adds that, since the Commission does not contest the 'beer ties', it cannot attack them indirectly. Furthermore, the Agreement did not prevent foreign brewers from concluding contracts. Finally, the compensation mechanism provided for in the declaration of intent concerning foreign brewers did not attract particular criticism.

59 Brasserie Nationale maintains that the first paragraph of the declaration of intent concerning Battin actually encouraged the penetration of foreign beers into Luxembourg. The term 'balance' used in the second paragraph meant only a desire to keep open the possibility for domestic products to be on offer when an outlet was opened up to competition.

60 The applicants also state that Article 11 of the Agreement was never implemented. Brasserie Nationale adds that it had no dissuasive effect, nor was any sought. Wiltz

and Battin add that Article 11 was only ancillary, as was acknowledged in recital 72 of the Decision. The possibility of termination provided for in the declaration of intent concerning Battin was therefore not, in their view, a restriction in itself either.

61 With regard to the statement by the director of the FBL reported in recital 68 of the Decision, the applicants repeat the argument that his authority can be disputed. Brasserie Nationale adds that the statement commits only the director himself and does not represent the opinion of Brasserie Nationale.

62 Finally, Brasserie Nationale maintains that the Decision is vitiated by contradictory reasoning, in that it accuses the parties of denying to foreign brewers advantages that are nevertheless judged to be inadmissible between national brewers.

63 The Commission contends that this part of the first plea is not well founded.

— Failure to take sufficient account of the context of the Agreement in assessing its object (first part of the first plea)

64 The applicants claim that, when assessing the object of the Agreement, the Commission did not take sufficient account of its context. In their opinion, that error justifies annulment of the Decision, particularly as it was the source of serious misunderstandings in the interpretation of the Agreement.

65 The applicants maintain that, although it is not necessary to demonstrate the effects of a restrictive agreement by its object, the identification of a restrictive object requires analysis of the context (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 23 to 25). Brasserie Nationale also relies on Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at 249-250, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 26, *Wouters and Others*, paragraph 97, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraphs 44 to 53, and Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, paragraph 76.

66 According to the applicants, with one exception, the actual context in which the effects of the Agreement unfolded was left out of the assessment of its object. With regard to that actual context, the applicants rely on the vitality of the sector concerned in terms of market shares, which differ widely from one brewer to another, and the sector's openness to imports, which they consider to be unique in the Community. They point out that more than 33% of the beer consumed in Luxembourg is imported and emphasise the presence of major producers just across the borders. Brasserie Nationale also cites the existence of a large number of outlets not tied to the parties that can constitute fertile ground for additional competition between Luxembourg and foreign brewers. At the hearing it added that these outlets were tied to foreign brewers by exclusive purchasing contracts.

67 According to the applicants, none of the factors put forward in recitals 59 to 63 of the Decision to justify the Commission's assessment of the object of the Agreement contains a description of its economic context, not even by reference to recitals 74 to 76, which have the purpose of establishing the appreciable nature of the restriction, a step in the reasoning that is distinct from that consisting in classifying the Agreement as restrictive by object.

68 In their view, the same goes for the classification of the restriction of competition in regard to foreign brewers (recitals 67 to 73 of the Decision).

69 The Commission contends that this part of the first plea is not well founded.

Findings of the Court

— Allegedly wrong classification of the Agreement as having the object of maintaining clienteles (third part of the first plea)

70 The Court will examine first the applicants' arguments intended to cast doubt on several factual elements which the Commission took into account in the Decision in order to conclude that the Agreement had the object of maintaining clienteles.

71 First, as regards their objection to the statement that the Agreement prohibited any sale of beer to a publican tied to one of the parties (recital 56 of the Decision), it is sufficient to observe that Article 4 of the Agreement refers explicitly to 'any sale of beer'. In the light of these clear terms, this argument must be rejected, as it is not supported by any specific evidence.

72 Second, the same applies to the claim that the concepts of validity and enforceability mentioned in Article 2 of the Agreement referred only to flaws in the contract at the time it was made. In fact, Article 2 does not provide for such a restriction, and this claim is not supported by any specific evidence.

73 Third, with regard to the argument that the system for exchanging information provided for in Article 5 of the Agreement made it possible to limit the scope of the Agreement to written 'beer ties', it is sufficient to note, as does the Commission, that this argument is belied by the fact that the Agreement was intended to be applicable in its full scope even where no 'beer tie' existed, as will be set out in the examination of the second part of this plea.

74 Fourth, the applicants criticise the account taken, in recital 60 of the Decision, of agreements that predated the Agreement.

75 It must first be observed that the agreements of 1980 and 1981 are not mentioned in the Decision. Hence, the argument that they are different from those of 1975 and 1983 is irrelevant. It must then be stated that the Commission took account of the agreements of 1966, 1975 and 1983 only in order to conclude that the interpretation of the Agreement could not be entirely dissociated from those agreements and that they were such as to cast doubt on the argument of legal uncertainty put forward by the parties to justify the Agreement. In relation to that conclusion, the assertions of Brasserie Nationale regarding those agreements are irrelevant.

76 Lastly, the applicants object to the taking into account of the remark of the director of the FBL referred to in recital 63 of the Decision concerning the protectionist spirit of the Agreement (see paragraph 38 above).

77 It must be noted, as does the Commission, that the director was an actor in and a privileged witness of the Agreement. For example, it is common ground that it was at a conciliation meeting between two of the parties that he made the remark in question. Moreover, Article 5 of the Agreement provided that a party could send

him a copy of a request for information addressed to another party under that provision. The director was therefore given the role of conciliator by the parties.

78 With regard to the alleged incorrectness of this remark, in that the Agreement did not relate to imports or exports, it is sufficient to note that, in the light of the declarations of intent concerning Battin and concerning foreign brewers, the applicants cannot validly claim that the Agreement did not relate to imports or exports. The *Bilger* judgment, relied on to support this assertion, is irrelevant, in particular in that it concerned a vertical agreement, whereas the Agreement at issue was horizontal.

79 It follows that the applicants have not succeeded in casting doubt on any of the factual elements taken into account by the Commission in the Decision in order to conclude that the object of the Agreement was to maintain clienteles.

80 The other arguments adduced by the applicants to support this part of the first plea must be examined next.

81 As regards the three reasons which supposedly underpin the Agreement, referred to in paragraphs 47 to 51 above, it must be stated that, even if established, they are not such as to justify a restrictive arrangement with an anti-competitive object. It is unacceptable for undertakings to attempt to mitigate the effects of legal rules which they consider excessively unfavourable by entering into restrictive arrangements intended to offset those disadvantages on the pretext that they have created an imbalance detrimental to them (see, to that effect, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 256, in the context of the application of Article 81(3) EC, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P,

C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 487, with regard to a crisis in the market). It must be added that not only the applicants but all economic operators had to contend with the difficulties that the Agreement was allegedly intended to mitigate.

82 Moreover, as the Commission notes, it is clear from the file that, as will be shown in connection with the second part of this plea, the Agreement was intended to be applicable even where no 'beer tie' existed and that its object was not confined to remedying the three problems adduced by the applicants, to which reference is made in paragraphs 47 to 51 above.

83 In so far as the applicants' arguments, as clarified at the hearing, must be understood to be that the purpose of the Agreement, in the face of the three problems mentioned above, was to restore a legal situation that complied with Regulation No 1984/83, it must be observed that the prohibition referred to in Article 4 of the Agreement goes significantly further than is permitted by Article 7(1) of that regulation. Moreover, that regulation permits only certain restrictions on competition in the vertical relationship between reseller and supplier (see in particular Articles 1 and 6), whereas the Agreement is a horizontal agreement. In any case, the applicants have not even attempted to demonstrate that a horizontal agreement was an indispensable means of resolving the problems that allegedly existed on the vertical plane.

84 The applicants then maintain that the sole purpose of the Agreement was to ensure compliance with the exclusive arrangements contractually agreed between outlet operator and brewer. In addition, according to them, the Agreement was justified by the need to preserve commercial loyalty.

85 Even supposing that those circumstances were established, the conclusion that the Agreement had the object of restricting competition within the common market cannot be invalidated by the supposed fact that it also pursued a legitimate object (see, to that effect, *IAZ and Others* v *Commission*, paragraph 25). The applicants cannot rely to any purpose on *Delimitis*, because that judgment was delivered in a case relating to vertical relationships, whereas the present case concerns a horizontal agreement. Moreover, the reference made by Brasserie Nationale to *Cassis de Dijon* and *Wouters and Others* must be rejected. Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of Article 81(1) EC by virtue of the fact that it also pursued other objectives, such as those at issue in those judgments.

86 With regard to the argument based on *Institute of Professional Representatives* v *Commission*, it must be stated, first, that Article 5(c) of the Code of Conduct of the EPI contained only a prohibition on offering unsolicited services in respect of cases which were being handled by another representative (paragraph 89). Such a prohibition is far from comparable with those imposed by the Agreement. In the case referred to, the prohibition applied only to an initiative to solicit a client, whereas the Agreement prohibited the parties, in particular, from responding to a request to conclude a contract. Second, that prohibition was based primarily on reasons of professional etiquette, in contrast to the Agreement, which was aimed at parcelling out clienteles. This argument must therefore be rejected.

87 Finally, the applicants dispute the claim that the benefits of the Agreement were reserved to national brewers (recital 62 of the Decision). This objection is insufficiently substantiated. Although the applicants claim that the Agreement was open to all brewers operating in Luxembourg, it was not signed by a single foreign brewer. The argument that two Luxembourg brewers were not expelled from the Agreement following their takeover by a foreign brewer does not demonstrate that

foreign brewers as such could join the Agreement. On the contrary, the provision in Article 11 for a party to the Agreement to be expelled if it came under the control of a foreign company or cooperated with a foreign brewer shows that the Agreement was supposed to be reserved exclusively to national brewers. The fact that this article was never implemented does not alter that finding.

88 It follows that none of the arguments put forward in support of the third part of the first plea can be accepted. That part must therefore be rejected.

— Allegedly wrong classification of the Agreement as having the object of impeding the penetration of the Luxembourg on-trade (fourth part of the first plea)

89 In the declaration of intent concerning foreign brewers the parties reserved for each other the priority for canvassing and for the conclusion of a supply contract with a publican tied to one of them if he was preparing to conclude a contract with a foreign brewer. The declaration of intent concerning Battin provided for terminating the Agreement in respect of Battin if there were a change in the terms under which Battin distributed certain foreign beers. Finally, Article 11 of the Agreement provided for termination in the event of control by a foreign company or cooperation with a foreign brewer.

90 Moreover, as the Commission rightly points out, the machinery established by the declaration of intent concerning foreign brewers related only to a foreign brewer wishing to supply a Luxembourg publican but did not protect a foreign brewer

whose Luxembourg customer was preparing to take supplies from a Luxembourg brewer.

91 In those circumstances, it must be concluded that the Commission did not err in law by considering that the object of the Agreement was to impede the penetration of the Luxembourg on-trade by foreign brewers.

92 None of the applicants' arguments is such as to invalidate that conclusion.

93 First, as regards the argument that the Agreement was intended merely to counter the breach of 'beer ties' by foreign brewers, it must be observed at the outset that that argument is not based on fact, since the Agreement applied even where no 'beer tie' existed, as will be shown in connection with the second part of this plea.

94 Furthermore, it should be pointed out, as it was in connection with the rejection of the third part of this plea, that the circumstance adduced by the applicants, even if it were assumed to be correct, could not justify the restrictive object of the Agreement, as has just been found.

95 Lastly, by submitting that the Agreement was aimed at preserving the possibility for a Luxembourg brewer to respond to the offer of a publican contemplating a contract with a foreign brewer, the applicants themselves admit that the Agreement was restrictive by object. In that it preserved that possibility, by definition it changed the conditions of competition to the detriment of the foreign brewer concerned.

96 Second, the applicants claim that the Agreement was justified by the exceptional situation in Luxembourg and by the abnormal situation created by the disloyalty of outlet operators. In addition, they submit that Article 11 of the Agreement was never implemented. Brasserie Nationale adds that the Agreement did not prevent foreign brewers from concluding contracts.

97 With regard to all these arguments, it must be noted once again that, even if they were accepted, they could not justify the restrictive object of the Agreement that emerges from the factual evidence which is adduced by the Commission and not disputed by the applicants. More especially, the allegation that the Agreement did not prevent foreign brewers from concluding contracts is irrelevant, in that the Agreement had the object of restricting competition, so that there is no need to examine whether it also had the effect of restricting it (see, to that effect, Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 231).

98 Third, the applicants repeat the argument that the authority of the director of the FBL can be disputed. Brasserie Nationale adds that the director's remark reported in recital 68 of the Decision commits only the director himself and does not represent the opinion of Brasserie Nationale.

99 The argument disputing the authority of the director of the FBL must be rejected for the reasons described in connection with the rejection of the preceding part of this plea. Moreover, as mentioned in recital 68 of the Decision, that remark was made at a conciliation meeting on the application of the Agreement. It should therefore be taken into account when making a legal assessment of the Agreement. In so doing, the Commission in no way considered that the remark represented the opinion of Brasserie Nationale.

100 Brasserie Nationale maintains, fourth, that the first paragraph of the declaration of intent concerning Battin actually encouraged the penetration of foreign beers into Luxembourg. It alleges that the term 'balance' used in the second paragraph meant only a desire to keep open the possibility for domestic products to be on offer when an outlet was opened up to competition.

101 In that regard, it is sufficient to note that, although that declaration of intent did allow Battin to distribute certain foreign beers, it nevertheless led to a substantial restriction of Battin's freedom of action, and hence to a restriction of competition.

102 Finally, Brasserie Nationale maintains that the Decision is vitiated by contradictory reasoning, as it accuses the parties of denying to foreign brewers advantages that are elsewhere considered to be impermissible between national brewers.

103 Although extending the guarantee of 'beer ties' to foreign brewers was perhaps capable of reinforcing the restrictive nature of that guarantee, it remains a fact that Article 11 of the Agreement and the declaration of intent concerning Battin made it possible to exclude foreign brewers from the albeit unlawful 'advantages' of that guarantee in terms of the protection of clientele, and hence to impede their penetration of the Luxembourg on-trade.

104 It follows that the fourth part of the first plea must be rejected.

— Failure to take sufficient account of the context of the Agreement in assessing its object (first part of the first plea)

105 Recital 47 of the Decision, entitled 'Restriction of competition by object', states that the Agreement had the object, first, of maintaining the parties' respective clienteles in the Luxembourg on-trade and, second, of impeding penetration by foreign brewers. That recital refers to recitals 48 to 66 of the Decision with regard to the first of these objects and to recitals 67 to 73 with regard to the second.

106 It thus follows from the scheme of the Decision that, contrary to the inference underlying the applicants' arguments, the identification of the object of the Agreement is not confined to recitals 59 to 62 but derives from recitals 47 to 73 taken as a whole.

107 The mere reading of those recitals as a whole reveals that the applicants cannot validly claim that the context of the Agreement was disregarded in the assessment of its object. Reference is made in this regard to the summary of recitals 48 to 73 of the Decision in paragraphs 30 to 40 above.

108 Furthermore, the contextual factors that, according to the applicants, the Commission did not take sufficiently into account in assessing the object of the Agreement are the vitality of the sector concerned in terms of market shares, the sector's unique openness to imports, and the existence of a large number of outlets not tied to the parties. However, these contextual factors relate not to the object of the Agreement but to its effects. It is settled case-law that the Commission is not

required to examine the effects of an agreement that is anti-competitive by object (see, to that effect, *Volkswagen* v *Commission*, paragraph 231). That is not disputed by the applicants, who recognise that it is unnecessary to demonstrate the effects of an agreement that is restrictive by object.

109 It should be added that the applicants' allegations that the Commission did not take sufficient account of the contextual elements are not well founded. In paragraphs 23 to 25 of the judgment in *IAZ and Others* v *Commission*, on which the applicants seek to rely, 'the content [of the agreement at issue in that case], its origin and the circumstances in which it was implemented' had been taken into account. These are precisely the kind of elements that the Commission took into account to reach the conclusion that the Agreement was restrictive by object. In that regard, reference is again made to the abovementioned summary of recitals 48 to 73 of the Decision.

110 It follows that the first part of the first plea must be rejected.

Second part of the first plea, alleging that the Commission wrongly concluded that the Agreement applied where no 'beer tie' existed

The contested decision

111 In the Decision the Commission considered that, according to the minutes of the meeting of the FBL on 7 October 1986, as amended by those of the meeting of the FBL on 2 December 1986, the parties agreed to interpret the term 'beer tie' more

widely than in Article 2 of the Agreement. According to the Decision, this interpretation was confirmed by a letter dated 23 October 1991 from Wiltz to the FBL (recital 9).

Arguments of the parties

112 The applicants maintain that the Commission wrongly concluded that the Agreement extended to cases where no 'beer tie' had been duly concluded and was in force.

113 According to the applicants, although an agreement may derive from a document other than a formal text, it is still necessary to verify whether it is the 'faithful expression of the joint intention of the parties' (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 110 to 114, and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86). They assert, however, that no such intention existed in the present case. They observe, first, that the minutes of the meeting of the FBL on 7 October 1986, referred to in recital 9 of the Decision, state that 'the three documents held over ... [were] approved and [would be] signed at the next meeting', to which the minutes of the meeting of the FBL on 2 December 1986, also referred to in recital 9 of the Decision, attest when they state that 'the [parties] proceed[ed] to sign [those documents]'. According to the applicants, such signature is thus a formality without which no joint intention of the parties can be identified. They note that neither of the two minutes mentioned above record such a signature as regards the interpretation of the Agreement as it emerges from the two minutes, whereas that interpretation cannot be dissociated from the three documents referred to above. Furthermore, they observe that it is clear from the minutes of the meeting of the FBL on 2 December 1986 that the documents mentioned in paragraph 2 of the minutes of the preceding meeting of the FBL had been amended. That document was therefore not approved after either the first or the second meeting. Lastly, the

applicants note that the wording of the letter of 23 October 1991 from Wiltz to the FBL, referred to in recital 9 of the Decision, is headed 'Proposal'. They add that it contains the two interpretative indents featuring in the minutes referred to above, with shortened and improved wordings. According to the applicants, Wiltz would have had no interest in making this proposal if the minutes in question already reflected the disputed broader interpretation.

114 With regard to the alleged admission by Wiltz of the disputed broader interpretation, the applicants reply that Wiltz used the conditional mood in the declaration concerned. With regard to the alleged admission of that broader interpretation by Brasserie Nationale, the latter replies that in the declaration concerned it merely indicated the origin of the proposal for such an extension, and that the expressions 'it agreed to sign' and '[i]t did not bother [it] to sign' only indicated its readiness to sign in the future.

115 Brasserie Nationale also states, with reference to correspondence in the file, that no dispute between the parties had ever arisen where there was no signed contract.

116 Lastly, Brasserie Nationale claims that the Commission itself recognised that the Agreement did not apply to cases where there was no 'beer tie', as recital 92 of the Decision states that 'the scope of the infringement [was] limited ... only to those outlets tied to the parties by an exclusive purchasing clause'.

117 The Commission contends that this part of the first plea is not well founded.

Findings of the Court

118 It is established case-law that, for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (see, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 112, *Van Landewyck and Others* v *Commission*, paragraph 86, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 67). As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 112, *Van Landewyck and Others* v *Commission*, paragraph 86, and *Bayer* v *Commission*, paragraph 68).

119 It follows that the concept of an agreement within the meaning of Article 81(1) EC, as interpreted by the case-law, centres round the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (*Bayer* v *Commission*, paragraph 69).

120 In the present case, the minutes of the meeting of the FBL on 7 October 1986, referred to above, state as follows:

'2. Beer tie

The three documents held over ... are approved and will be signed at the next meeting.

In addition, it is agreed that the following will be accepted and treated in the same way as a "beer tie":

— the transaction consisting of taking out a lease and contributing financially to fitting out of a café, without a "beer tie" being expressly mentioned,

— where a brewer takes over a drinks outlet licence and invests funds, without a "beer tie" being expressly mentioned.

These two interpretations are an integral part of the existing provisions relating to this matter.'

121 The minutes of the meeting of the FBL of 2 December 1986, mentioned above, state as follows (the passages are reproduced as in the original):

'1. The minutes of the meeting of 7 October 1986 call for the following amendments:

... Point 2) — 1st indent

— "the transaction consisting of taking out a lease and contributing financially to fitting out of a café, without a 'beer tie' being expressly mentioned, e.g. brewer X leases a building and contributes to the cost of its refurbishment for that purpose but does not, or does not manage to, enter into an obligation with the owner".

2nd indent

will read as follows:

— the taking over of a drinks outlet licence by a brewer, without a "beer tie" being expressly mentioned.

2. The brewers proceed to sign [the three documents mentioned in point 2 of the minutes of the meeting of 7 October 1986].

All the brewers have received a copy of these signed documents, the originals of which will be deposited with the [FBL]. These documents are confidential.'

122 The letter of 23 October 1991 from Wiltz to the FBL, mentioned above, reads as follows:

'Proposal:

In respect of Article 2 of the Agreement, the brewers agree to accept and to treat in the same way as a "beer tie":

— the transaction consisting of taking out a lease,

— the provision by a brewer, on whatever basis, of a drinks outlet licence.'

123 It must therefore be examined whether, in the light of the factors adduced by the applicants, the Commission established to the requisite legal standard that a concurrence of wills existed among the parties on the application of the Agreement even where no 'beer tie' had been duly concluded and was in force.

124 The minutes of the meeting of the FBL on 7 October 1986 explicitly state that the extension of the scope of the Agreement mentioned therein had been 'agreed' and '[was] an integral part of the existing provisions relating to this matter.' Neither these minutes nor those of the meeting of the FBL on 2 December 1986 provided for that agreement to be formalised in any manner. To that extent, the fact that the first minutes also provided that certain documents to which they referred '[were] approved and [would] be signed' is of no relevance. Similarly, the fact that the second minutes contain (relatively minor) amendments to the text contained in the first minutes does not invalidate the agreement reached between the parties precisely with regard to the text so amended.

125 Furthermore, as recital 29 of the Decision states, both Brasserie Nationale and Wiltz admitted that the Agreement also applied to certain brewer-publican relations where there was no supply contract or 'beer tie' at all.

126 Indeed, in its reply to the questions put by the Commission after its hearing, Brasserie Nationale stated, with regard to the situation in which a brewer takes out a lease and provides financing but there is no contract containing a 'beer tie':

'In this case, the 1986 documents [that is, the two sets of minutes referred to above] say, it must also be considered that there is a "beer tie" within the meaning of the Agreement. That clause is, it has to be admitted, surprising a priori, since no brewer invests without a contract ... That having been said, this implausible clause has never ... been implemented. In reality, what was referred to was the absurd hypothesis imagined by ... The working hypothesis of that person was obviously absurd, but as [Brasserie Nationale] had none of the intentions ascribed to it, it agreed to sign the text in question. ... It did not bother [Brasserie Nationale] to sign, because it had no intention of acting in accordance with the hypothesis referred to in the clause in question ...'

127 Wiltz, for its part, stated as follows in its reply to the statement of objections:

'The [Agreement] could at most be considered in this way on the basis of the interpretation of the "beer tie" terms agreed between the parties at the [meetings of the FBL] on 7 October and 2 December 1986, but there too the sole and legitimate aim was to be sure of getting the necessary information to prevent legal uncertainty if heavy investment was involved.'

128 In that regard, the applicants' argument that in its statement cited in the preceding paragraph Wiltz used the conditional mood must be rejected. In that statement Wiltz explicitly referred to the 'interpretation of the "beer tie" terms agreed between the parties'.

129 Brasserie Nationale further maintains that, in its statement cited in paragraph 126 above, it merely indicated the origin of the proposal to extend the scope of the Agreement to cases in which there was no 'beer tie' and that the expressions 'it agreed to sign' and '[i]t did not bother [it] to sign' merely signalled its readiness to sign the proposal in the future.

130 Those arguments must also be rejected. In the circumstances of the case, the statement cited above cannot invalidate the finding that Brasserie Nationale consented to the extension of the scope of the Agreement following the meetings of 7 October and 2 December 1986. It is of little relevance who originated the proposal to extend the scope of the Agreement, since a concurrence of wills can be established (see, to that effect, Cases 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 7, and T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 37).

131 In any event, if Brasserie Nationale did not accept the extension of the scope of the Agreement, it was up to that undertaking to distance itself from the new interpretation of 'beer ties' (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1353 and the case-law cited). However, it is not disputed that it did not do so.

132 Furthermore, if the extension of the scope of the Agreement had not been decided among the parties, logically Brasserie Nationale would not have relied, in its reply to the Commission, solely on the fact that the extension had not been applied.

133 As to the argument based on the letter from Wiltz, referred to above, it must be considered that Wiltz may well have made the proposal mentioned in that letter not for the reason put forward by the applicants but out of a desire to amend the text resulting from the two minutes referred to above. Furthermore, contrary to the applicants' assertions, this proposal from Wiltz contains more than stylistic improvements. For example, according to the proposal, 'the transaction consisting of taking out a lease' is to be treated in the same way as a 'beer tie', whereas the minutes of the meeting of the FBL on 2 December 1986 provided that 'the transaction consisting of taking out a lease and contributing financially to fitting out of a café' is to be treated in the same way as such a tie. That amendment cannot be regarded as purely stylistic.

134 Lastly, with regard to the supposed recognition by the Commission that the Agreement did not apply where there was no 'beer tie', it must be noted that, although the phraseology used in recital 92 of the Decision — according to which 'the scope of the infringement is limited ... only to those outlets tied to the parties by an exclusive purchasing clause' — is perhaps infelicitous, a simple combined reading of recitals 9 and 48 to 63, and especially of the reference made in recital 50 to recital 9, shows that the Commission was of the opinion that the Agreement also applied where there was no 'beer tie'. Moreover, it should be recalled that in this part of the first plea the applicants dispute that opinion. They cannot therefore validly claim that the Commission was of a different opinion.

135 In the light of the foregoing, the applicants have not adduced sufficient evidence to call into question the Commission's finding that a concurrence of wills existed among the parties on the application of the Agreement, even where there was no 'beer tie' duly concluded and in force.

136 The second part of the first plea must therefore be rejected.

Fifth part of the first plea, alleging that the Agreement had no appreciable effect on competition

The contested decision

137 The Decision states that the Agreement was liable to restrict competition appreciably in the Luxembourg on-trade. In that regard, it notes first that the parties limited the scope of the Agreement to the Luxembourg on-trade, which indicates that they considered their position in this sector to be significant enough, and the conditions of competition there to be sufficiently different from those in other sectors or in neighbouring countries, to ensure that the Agreement was effective. Second, it points out that, taking into account their own production and their distribution of imported beers, the parties controlled approximately 85% of beer sales in the sector concerned, and that more than half the drinks outlets in Luxembourg were tied to them by a 'beer tie' (recitals 74 to 76).

Arguments of the parties

138 The applicants maintain that the Commission's conclusion that there was an appreciable restriction on competition was incorrect and that the statement of reasons was inadequate. They observe that the Commission did not define the relevant market. They then claim that the limitation of the scope of the Agreement to the on-trade demonstrates nothing but merely corresponds to the extent of the problem identified by the parties, in view of which they were likely to cooperate. Moreover, according to the applicants, although the share of 85% of the volume of beer distributed by the parties may appear high, the proportion of 40 to 45% of outlets open to other brewers did not justify a finding that the restriction was appreciable. Furthermore, the fact that the restriction regarding foreign brewers was not implemented should lead to the conclusion that the restriction was not appreciable.

139 The Commission contends that this part of the first plea is not well founded.

Findings of the Court

— Alleged error of assessment

140 In this regard, it suffices to recall that undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 81(1) EC by claiming that their agreement should not have an appreciable effect on competition (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraphs 130 and 196).

141 As the object of the Agreement was to maintain the parties' respective clienteles in the Luxembourg on-trade and to impede penetration of that sector by foreign brewers, its existence made sense only if its object was to restrict competition in this sector appreciably, that is to say in a manner commercially useful to them (see, by analogy, *Mannesmannröhren-Werke* v *Commission*, paragraph 131).

— Alleged failure to state reasons

142 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

143 Having regard to the information referred to in recitals 74 to 76 of the Decision, Brasserie Nationale was fully able to put forward arguments that the Commission's conclusion regarding the appreciable nature of the restriction on competition was unlawful.

144 Furthermore, with regard to the complaint about the failure to define the market in question, suffice it to say that there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 206). Such a situation does not arise in the present case, as is clear in particular from the rejection of the third and fourth parts of this plea.

145 It follows that the fifth part of the first plea must be rejected.

146 As all the parts of the first plea have been rejected, the first plea must be rejected in its entirety, so that it is necessary to examine the second plea.

2. *Second plea: infringement of Article 15(2) of Regulation No 17 and non-compliance with the obligation to state reasons enshrined in Article 253 EC*

147 The second plea is divided into three parts, claiming, first, that the infringement was not intentional; second, that an error of assessment was made with regard to the gravity and duration of the infringement; and, third, that the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) CS (OJ 1998 C 9, p. 3, 'the Guidelines') with regard to mitigating circumstances were not applied. The plea in Case T-49/02 also includes a fourth part, alleging failure to state reasons for the initial base amount used by the Commission in calculating the fines.

First part of the second plea, claiming that the infringement was not committed intentionally

The contested decision

148 The Decision states that an infringement of the Community competition rules is regarded as being committed intentionally if the parties are aware that the object or effect of the act in question is to restrict competition. It is not essential that they should also be aware that they are infringing a provision of the EC Treaty. As regards the provisions relating to foreign brewers, the Commission considered that the parties could not have been unaware of their restrictive object. Indeed, according

to the Commission, they had not sought to justify those provisions. As to the restrictions of competition between the parties resulting from their mutual observance of 'beer ties', it was possible that when the Agreement was concluded, and up until March 1996, the parties were motivated by the legal uncertainty created by the Luxembourg case-law relating to undetermined prices or quantities. However, that justification had disappeared in March 1996 when that case-law was overturned. Consequently, the Commission concluded that the parties committed the infringement intentionally, even if the Luxembourg case-law may have created a doubt about the illegal nature of certain clauses during a particular period (recitals 89 and 90).

Arguments of the parties

149 The applicants submit that the Commission was wrong to conclude that they had committed the infringement intentionally.

150 With regard to the restriction involving the maintenance of clienteles, the applicants allege, first, that the Commission itself recognises that Luxembourg case-law could create a doubt as to whether that restriction was an infringement. The applicants repeat the assertion that that justification should be accepted not until 1996 but until mid-1998, and add that, if the Commission's reasoning in the Decision is followed, it was only in the last two years of the duration of the Agreement that an 'intentional' infringement could have been committed. Second, according to the applicants, in the Decision the Commission does not definitively dispute their contention that the sole object of the Agreement was to ensure that 'beer ties' were honoured. They assert that that object is lawful (*Delimitis*).

151 Moreover, the applicants claim that they are not of such size that their ignorance of the law cannot be accepted. They maintain that as recital 96 of the Decision classifies Brasserie de Luxembourg as a large undertaking, the contrary inference is that this description is not applicable to any of the other parties. Moreover, they were never aware of the restriction on trade between Member States. Brasserie Nationale adds, with regard to the latter point, that the Commission has not proved the contrary.

152 The applicants also claim that none of the parties sought to obstruct foreign brewers. Brasserie Nationale adds that none of the parties considered that the objective of preserving the possibility of domestic competition could be regarded as anti-competitive. The reservation expressed by Diekirch with regard to the lawfulness of the Agreement was merely a conventional formula used in contact letters during a dispute.

153 With regard to the statement of reasons in the Decision on the question of whether the applicants acted intentionally, Brasserie Nationale claims that the argument that, as far as the provisions relating to foreign brewers were concerned, 'the parties could not have been unaware of their restrictive object' is a circular argument and does not constitute proof, and that the argument that 'the parties have not sought to justify these provisions' is incorrect. According to Brasserie Nationale, these two accusations are not sufficient for the reasoning in the Decision to be accepted as meeting the requirements as to clarity and precision. Wiltz and Battin claim that the statement of reasons contained in recital 89 of the Decision does not constitute proof. In their view, Article 253 EC has therefore not been complied with.

154 The Commission contends that this part of the second plea is not well founded.

Findings of the Court

— Alleged error of assessment

155 It is settled case-law that for an infringement of the competition rules in the EC Treaty to be regarded as having been committed intentionally, it is not necessary that the undertaking was aware that it was restricting competition; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition, and it is unimportant whether the undertaking was aware that it was infringing Article 81 EC (*Miller* v *Commission*, paragraph 18, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41 and the case-law cited).

156 As is clear from the rejection of the third and fourth parts of the first plea, the Commission could legitimately conclude that the object of the Agreement was to maintain the parties' clienteles in the Luxembourg on-trade and to impede the penetration of that sector by foreign brewers. The Agreement therefore amounts, first, to a market-sharing arrangement and, second, to a partitioning of the common market. In those circumstances, the Commission could consider, without committing an error, that the applicants could not be unaware that the object of the Agreement was to restrict competition.

157 From that perspective, the applicants' arguments that they are not of such size that their ignorance of the law cannot be accepted, that they were never aware that the Agreement restricted trade between Member States, that none of the parties sought to obstruct foreign brewers and that none of the parties considered that the objective of preserving the possibility of domestic competition could be regarded as anti-competitive are all necessarily irrelevant in the present case.

158 The applicants further contend that in the Decision the Commission itself recognised that Luxembourg case-law at that time could create a doubt as to whether the restriction concerning the maintenance of clienteles was an infringement. As the Commission states, even if that doubt were well founded, it has no relevance with respect to the intentional nature of the restriction of competition, precisely because it relates not to the object of the Agreement, which was to restrict competition, but, at most, to whether it was an infringement. As is clear from the case-law cited in paragraph 155 above, the concept of intent referred to in Article 15(2) of Regulation No 17 relates only to the restrictive object of the agreement concerned and not to whether it is an infringement of Article 81(1) EC.

159 Finally, as regards the argument that, as recital 96 of the Decision classifies Brasserie de Luxembourg as a large undertaking, the contrary inference is that this description does not apply to the other parties, it must be noted that, as the Commission points out, the size of Brasserie de Luxembourg was mentioned only to justify the use of the multiplier applied to the latter as a deterrent. That assessment of the size of the undertaking is therefore of no relevance for the examination of the intentional nature of the restriction of competition.

— Alleged failure to state reasons

160 In the light of the requirements as to stating reasons referred to in Article 253 EC and recalled in paragraph 140 above, recitals 89 and 90 of the Decision disclose in a clear and unequivocal fashion the reasons why the Commission concluded that the restriction of competition was intentional.

161 It follows that the first part of the second plea must be rejected.

Second part of the second plea, alleging an error of assessment as to the gravity and duration of the infringement

The contested decision

162 With regard to the gravity of the infringement, the Decision states on the one hand that, as the object of the Agreement was to maintain the parties' clienteles and to impede penetration of the market by foreign brewers, the infringement is one of the most serious that could be committed. On the other hand, it considers that the scope of the infringement is limited to the on-trade and only to those outlets tied to the parties by an exclusive purchasing clause, that the provisions concerning foreign brewers were not implemented, and that the Luxembourg beer market is the smallest in the Community. For all of these reasons, the infringement is finally classified as serious (recitals 92 and 93).

163 With regard to the duration of the infringement, the Decision notes in particular that it ceased on 16 February 2000, the date on which Interbrew informed the Commission that it had instructed its subsidiaries Mousel and Diekirch to stop implementing the Agreement (recital 86). From this it is concluded that, as the infringement lasted for more than 14 years (1985-2000), it is of long duration (recital 97).

Arguments of the parties

164 The applicants maintain that the Commission wrongly assessed the gravity and duration of the infringement.

165 With regard to the gravity of the infringement, they claim that, under the Guidelines, minor infringements are defined as 'trade restrictions ... but with a limited market impact and affecting only a substantial but relatively limited part of the Community market' and serious infringements are defined as horizontal or vertical restrictions of the same type, but 'more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market'. According to the applicants, the infringement at issue should have been classified as minor, in that recital 92 of the Decision states that the provisions affecting foreign brewers were not implemented, that the Agreement affected only the Luxembourg on-trade, and that the information exchanged was very limited. Brasserie Nationale repeats its assertion that the Agreement was exempt from notification.

166 With regard to the duration of the infringement, the applicants state that the provisions relating to foreign brewers were not implemented.

167 The Commission contends that this part of the second plea is not well founded.

Findings of the Court

— Gravity of the infringement

168 The Guidelines state, in particular, that in assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements are thus put into three categories, distinguishing between minor infringements, serious infringements and very serious infringements (first and second paragraphs of Section 1.A).

169 It should be noted that the Guidelines do not prejudge the assessment of the fine by the Community judicature, which has unlimited jurisdiction in this respect under Article 17 of Regulation No 17. In addition, while the Commission may determine the amount of the fine in accordance with the method prescribed by the Guidelines, it must remain within the context of the penalties defined by Article 15 of Regulation No 17 (Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, paragraph 188).

170 It should be recalled that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, without there being any binding or exhaustive list of the criteria which must be applied. In addition, consistent case-law shows that, in the context of Regulation No 17, the Commission has a wide margin of discretion in fixing the amount of fines in order to steer the conduct of undertakings towards compliance with the competition rules. The Court of First Instance is, however, under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement, and to weigh the gravity of the infringement and the circumstances invoked by the applicant (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127, and *General Motors Nederland and Opel Nederland* v *Commission*, paragraph 189).

171 In the present case, the Commission followed a two-stage reasoning in the Decision, but without referring explicitly to the Guidelines.

172 With regard to the first stage of the reasoning, it should be recalled that, as stated in the context of the examination of the third and fourth parts of the first plea, the Agreement amounts to a market-sharing arrangement and, in addition, to a partitioning of the common market.

173 As regards the market-sharing arrangement, agreements of this type are among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC. They are categorised in the case-law as obvious restrictions of competition (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136).

174 As regards the partitioning of the common market, it should be recalled that such a patent infringement of competition law is, by its nature, particularly serious. It goes against the most fundamental aims of the Community and, in particular, the accomplishment of the single market (see, to that effect, Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 42, and *General Motors Nederland and Opel Nederland* v *Commission*, paragraph 191).

175 In these circumstances, the Commission was right to consider, in the first stage of its reasoning, that the Agreement constituted one of the most serious infringements of Article 81 EC.

176 With regard to the second stage of the reasoning, it is settled case-law that a geographical market of national dimension corresponds to a substantial part of the common market (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28, and *Deutsche Bahn* v *Commission*, paragraph 58).

177 As it is not disputed that the infringement at issue relates to the Luxembourg on-trade as a whole, it covers a substantial part of the common market.

178 Moreover, in the Guidelines the Commission indicates that very serious infringements are 'generally ... horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets' (third indent of the second paragraph of Section 1.A). It follows from this indicative description that agreements or concerted practices involving in particular, as in the present case, the parcelling out of clienteles on the one hand and the partitioning of the common market on the other may warrant being classified as very serious solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or have a particular impact. That conclusion is corroborated by the fact that, while the indicative description of serious infringements mentions that 'these will more often than not be horizontal or vertical restrictions ... but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market', that of very serious infringements does not mention any requirement as to the actual market impact or the effects produced in a particular geographical area.

179 It follows that the classification of the present infringement as serious rather than very serious, as stated in the Decision, is already less strict by comparison with the criteria generally applied for fixing the amount of fines in cases of agreements aimed at sharing the market and, furthermore, partitioning the common market (see, to that effect, *Tate & Lyle and Others* v *Commission*, confirmed by the judgment in Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 103).

180 Moreover, in the first indent of the second paragraph of Section 1.A of the Guidelines the Commission states that minor infringements 'might be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market'.

181 A horizontal agreement covering the entire territory of a Member State and with the object both of dividing the market and of partitioning the common market cannot be classified as minor within the meaning of the Guidelines.

182 The fact that the second infringement identified was not implemented does not alter that finding. As recalled in paragraph 174, such a restriction is an infringement described in Article 81 EC and, more broadly, an infringement of the objectives of the Community.

183 For all of these reasons, it must be held that, by finally classifying the present infringement as serious, the Commission did not infringe the applicants' rights under Community law.

— Duration of the infringement

184 It suffices to state that, even if it were established as fact that the provisions of the Agreement relating to foreign brewers were not implemented, that fact is irrelevant.

185 Since the Commission was under no obligation to prove the effects of the agreement in question, as it had as its object the restriction of competition, it is irrelevant for calculating the duration of the infringement whether or not an aspect of the agreement at issue was implemented. To calculate the duration of an infringement the object of which is to restrict competition, it is necessary merely to determine the

period during which the agreement existed, that is, the time between the date on which it was entered into and the date on which it was terminated (*CMA CGM and Others* v *Commission*, paragraph 280).

186 It follows from the foregoing that the second part of the second plea must be rejected.

Third part of the second plea, alleging failure to apply the Guidelines with regard to mitigating circumstances

The contested decision

187 In the Decision it is considered that the doubt which the Luxembourg case-law of the time may have created until March 1996 as to whether the restrictions relating to the mutual observance of 'beer ties' constituted an infringement justifies a 20% reduction in the amount of the fine (recital 100).

Arguments of the parties

188 In support of this part of the plea, the applicants submit, first, that the Commission was wrong to recognise the mitigating circumstance resulting from the doubt created by the abovementioned Luxembourg case-law only up to March 1996, as that date cannot be regarded as the final date of the risk that gave rise to the Agreement. Brasserie Nationale adds that the possibility of appeal and of diverging case-law justifies that that doubt be recognised as a mitigating circumstance until the termination of the Agreement, or at the very least until the expiry of the average period for processing an appeal in a Member State such as Luxembourg, that is to

say three years. In those circumstances, according to Brasserie Nationale, a reduction of at least 40% in the fine is justified.

189 Second, the applicants claim that the mitigating circumstances listed in the Guidelines include the 'Non-implementation in practice of the offending agreements or practices' (third indent of Section 3). Consequently, the non-implementation of the provisions of the Agreement with regard to foreign brewers justifies an additional reduction of the amount of the fines.

190 The Commission contends that this part of the second plea is not well founded.

Findings of the Court

191 With regard to the applicants' first argument, it must be recalled that the Commission considered that the problem of legal uncertainty raised by the parties did not merit a derogation from Article 81(1) EC (recital 62). As the Court has found when examining the third part of the first plea, that consideration is not wrong, as such a concern cannot justify a restrictive practice with an anti-competitive object.

192 Since that problem did not justify a restrictive practice of that kind, it cannot be taken into account as a mitigating circumstance warranting a reduction in the fine imposed because of that restrictive practice.

193 The problem of legal uncertainty raised by the parties cannot justify the recognition of reasonable doubt as to whether the anti-competitive conduct in the present case was an infringement, within the meaning of Section 3 of the Guidelines, because, as has been found above, the Agreement constituted an agreement with the object of sharing the market and, in addition, partitioning the common market.

194 It follows that, by reducing the applicants' fine by 20% on account of that doubt, the Commission did not infringe their rights under Community law.

195 As regards the applicants' second argument, the second indent of Section 3 of the Guidelines, mentioned above, may not be interpreted as referring to the case in which an agreement as a whole is not implemented, regardless of the conduct of each undertaking, but must be understood as a circumstance based on the individual conduct of each undertaking.

196 The applicants adduce no evidence from which it may be concluded that they should have had the benefit of the mitigating circumstance that the Agreement was not implemented in practice, pursuant to the second indent of Section 3 of the Guidelines, in other words evidence demonstrating that they actually desisted from implementing the agreement by behaving competitively in the market.

197 It follows from the foregoing that the third part of the second plea must be rejected.

Fourth part of the second plea (raised only in Case T-49/02), alleging the failure to state reasons for the initial basic amount used by the Commission for calculating the fines

The contested decision

198 In the Decision, the infringement is classified as serious, for the combination of reasons described above. The Commission considered that it was also necessary to take account of the effective economic capacity of the parties to cause damage, while setting the amount of the fine at a level which ensures that it has a sufficiently deterrent effect, and to apply weightings to that amount in order to take account of the specific impact of the offending conduct of each party. Hence, on the basis of their respective sales in the sector concerned, the parties were divided into three groups and the amount used in respect of the gravity of the infringement for the first group referred to in recital 95 of the Decision, concerning Brasserie de Luxembourg, was set at EUR 500 000 (recitals 92 to 95).

Arguments of the parties

199 Brasserie Nationale complains that the Commission did not provide an adequate statement of reasons for the initial basic amount for the first group of undertakings referred to in recital 95 of the Decision, which amount affects all the calculations for each party. That prevents judicial review of the fine imposed on Brasserie Nationale and therefore justifies annulment of the fine.

200 The Commission contends that this part of the second plea is not well founded.

Findings of the Court

201 In the light of the requirements as regards stating reasons referred to in Article 253 EC and recalled in paragraph 142 above, it must be held that, having regard to the information contained in recitals 92 to 95 of the Decision, Brasserie Nationale was fully in a position to raise pleas alleging that the calculation criteria that led the Commission to use the amount of EUR 500 000 for the first group referred to above were unlawful.

202 It is clear from those recitals that the Commission arrived at that amount by first classifying the infringement as serious and then taking account of the economic capacity of Brasserie de Luxembourg to cause damage to other operators, of the need to set the amount of the fine at a sufficiently deterrent level, and of the specific weight of its offending conduct, determined on the basis of its sales in the Luxembourg on-trade.

203 Hence, the fourth part of the second plea must be rejected.

204 As all the parts of the second plea have been rejected, the second plea must be rejected in its entirety.

205 Consequently, the present actions must be dismissed in their entirety.

Costs

206 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

207 Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the actions;

2. Orders the applicants to pay the costs.

Meij Forwood Pelikánová

Delivered in open court in Luxembourg on 27 July 2005.

H. Jung A.W.H. Meij

Registrar President

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