COMMISSION

COMMISSION DECISION
of 5 December 2001
relating to a proceeding under Article 81 of the EC Treaty
(Case COMP/37.800/F3 — Luxembourg Brewers)

(notified under document number C(2001) 3914)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/759/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the Commission decision of 29 September 2000 to initiate proceedings in this case,

Having given the firms concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Council Regulation No 17 and Article 2 of Commission Regulation (EC) No 2842/98 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3],

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

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

Whereas:

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ L 354, 30.12.1998, p. 18.

1. **THE FACTS**

1.1. *SUBJECT AND ORIGIN OF THE CASE*

(1) This case concerns an agreement (the Agreement) concluded on 8 October 1985 between five brewers established in Luxembourg with a view to ensuring the mutual observance and protection of the beer ties which these brewers impose on drinks outlets in Luxembourg. A 'beer tie' or 'brewery clause' is an exclusive dealing clause for the purchase of certain types of beer concluded by the operator of a drinks outlet with a brewer in return for various financial advantages granted to him by that brewer.

(2) The text of the Agreement ([4]) was sent to the Commission on 16 February 2000 by Interbrew SA (Interbrew). When Interbrew informed the Commission of the Agreement's existence, it confirmed that it had instructed its subsidiaries Brasserie de Diekirch and Brasseries Réunies Mousel et Clausen to stop implementing the Agreement. It also invoked the Commission notice on the non-imposition or reduction of fines in cartel cases ([5]).

1.2. *THE UNDERTAKINGS CONCERNED*

(3) All the main brewers established in Luxembourg were party to the Agreement. The undertakings concerned are:

(a) SA Brasserie Nationale-Bofferding (Bofferding). In 1999 its turnover was EUR [30 to 50] million and its beer output [120 000 to 180 000] hectolitres, of which [50 000 to 70 000] ([6]) hectolitres was sold in the 'Horeca' ([7]) sector (i.e. the on-trade) in Luxembourg ([8]);

(b) SA Brasserie de Diekirch (Diekirch). In 1999 its turnover was EUR 12,8 million and its beer output 141 600 hectolitres, of which [40 000 to 50 000] hectolitres was sold in the Luxembourg on-trade ([9]);

(c) Brasseries Réunies de Luxembourg Mousel et Clausen SA (Mousel), which had a turnover of EUR 11,4 million in 1999 and produced 108 000 hectolitres of beer, of which [40 000 to 50 000] hectolitres was sold in the Luxembourg on-trade ([10]);

(d) Brasserie de Wiltz (Wiltz), which had a turnover of EUR 2,3 million in 1999 and produced [20 000 to 30 000] hectolitres of beer, of which [0 to 10 000] hectolitres went to the Luxembourg on-trade ([11]);

(e) Brasserie Battin (Battin), which produced [10 000 to 20 000] hectolitres of beer and had a turnover of EUR 1,8 million in 1999, its sales to the Luxembourg on-trade in that year amounting to [0 to 10 000] hectolitres ([12]).

(4) On 27 September 1999, Interbrew took control of Mousel through the holding company BM Investments. In so doing, it also acquired sole control of Diekirch. Interbrew and Mousel had each held between [… %] and [… %] of Diekirch's capital since January 1986. Lastly, on 28 July 2000, Diekirch became a [… %] subsidiary of Mousel, when Mousel bought Interbrew's shares in Diekirch. On that date Mousel also changed its company name, becoming Brasserie de Luxembourg Mousel-Diekirch SA (Brasserie de Luxembourg).

([4]) Document No 37 800, p. 15 to 23.
([5]) OJ C 207, 18.7.1996, p. 4.
([6]) Information indicated in square brackets is considered to be a business secret by the party concerned.
([7]) Hotels, restaurants and pubs.
([8]) Bofferding's replies, 13.3.2000 and 10.5.2000.
([9]) Diekirch's replies, 8.3.2000 and 3.5.2000.
([10]) Mousel's replies, 8.3.2000 and 3.5.2000.
([11]) Wiltz's replies, 8.3.2000 and 2.5.2000.
([12]) Battin's replies, 10.3.2000 and 9.5.2000.

1.3. *THE LUXEMBOURG ON-TRADE*

(5) According to the parties' estimates, total beer sales in Luxembourg in 1999 were approximately 490 000 hectolitres (320 000 hectolitres produced by the parties ([13]) and about 168 000 hectolitres imported ([14])). Again, according to the parties, the on-trade sector alone accounted for some 207 000 hectolitres, or more than 40 % of the total. In that sector, the parties sold some 162 000 hectolitres of their own output in 1999 ([15]), and approximately 45 000 hectolitres of beer was imported ([16]), of which some 18 000 hectolitres by the parties or their distribution subsidiaries ([17]). Consequently, approximately 75 % of the volume of beer sold in the Luxembourg on-trade in 1999 was produced by the parties and, taking into account their distribution of imported beers, more than 85 % of total sales in the sector were under their control.

(6) Most of the parties put the number of on-trade outlets in Luxembourg at between 3 500 and 3 800 ([18]). More than 2 100 of these are tied to the five signatory brewers by an exclusive purchasing clause (beer tie). The number of outlets tied to each brewer between 1990 and 1999 was as follows:

	1990	1995	1999
Bofferding	[600 to 800]	[800 to 900]	[900 to 1 000]
Diekirch	[500 to 600]	[500 to 600]	[500 to 600]
Mousel	[500 to 600]	[500 to 600]	[500 to 600]
Wiltz	[0 to 100]	[0 to 100]	[0 to 100]
Battin	[0 to 100]	[0 to 100]	[0 to 100]
Total outlets tied to the parties ([1])	1 945	2 103	2 121

([1]) *Source*: parties replies cited in notes 7 to 12.

1.4. *TERMS OF THE AGREEMENT*

(7) The Agreement concluded on 8 October 1985 by the five undertakings concerned 'is intended to prevent and settle the conflicts which, in the Grand Duchy, may arise as regards the mutual observance and protection of brewery clauses, otherwise known as beer ties' (Article 1).

(8) Article 2 of the Agreement states that '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 an outlet operator that the latter will stock only Luxembourg beers manufactured 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'.

([13]) The parties' replies cited in footnotes 7 to 12 above.
([14]) Bofferding's reply, 10.5.2000 (Document No 37 800, pp. 680 and 681).
([15]) See the figures cited in recital 3.
([16]) *Sources:* Bofferding's reply, 10.5.2000 (Document No 37 800, pp. 680 and 681), confirmed by Diekirch's reply, 2.8.2000 (Document No 37 800, p. 1 109) and Wiltz's, 2.5.2000 (Document No 37 800 p. 693).
([17]) Estimate supplied by Bofferding in its reply of 3.4.2001 to the Commission's questions following the hearing on 13.3.2001.
([18]) The parties' replies cited in footnotes 7 to 12 above, and the reply from the Luxembourg Brewers' Federation, 22.5.2000 (Document No 37 800, pp. 699 to 701). Only one party, Battin, gave a lower estimate for the number of on-trade outlets in Luxembourg, i.e. about 2 200.

(9) Furthermore, according to the minutes of the meeting of the Luxembourg Brewers Federation on 7 October 1986 ([19]) (as amended by the minutes of the meeting on 2 December 1986 ([20])), the parties agreed to interpret the term 'beer tie' more widely than in Article 2 of the Agreement. According to these minutes, which were circulated by the Federation, '… it was agreed that the following would 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. where a brewer leases a building and contributes to the cost of its refurbishment for that purpose but does not, or does not manage to, conclude a contract with the owner, and

— where a brewer takes over a drinks outlet licence ([21]), but without a "beer tie" being expressly mentioned.

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

This interpretation was confirmed by a letter dated 23 October 1991 from Wiltz to the Brewers Federation ([22]): '… 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 terms, of a drinks outlet licence'.

It should also be noted that each of the above minutes emphasises that these interpretations of the Agreement are confidential. In addition, the minutes of the meeting of 7 October 1986 state that the brewers agreed not to refer to the documents interpreting the Agreement and '… to carry out transactions relating to the beer tie without referring to it'.

(10) Article 3 of the Agreement sets out the various categories of outlet operator that may be subject to a beer tie. They include operators of drinks outlets, owners of boarding houses, campsites and any other sales outlet for beer, as well as beer wholesalers.

(11) 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'.

(12) Article 4 also states that 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 the customer's attention to the supply agreement. It will also draw that agreement to the distributor's attention and formally warn him to stop supplying 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 activities'.

(13) Under Article 5 of the Agreement, each contracting brewer 'undertakes before contracting with and/or making a supply of beer to an operator previously supplied by the other brewer to inquire of the latter in advance whether there is a "beer tie" in its favour'. A brewer which has failed to make such a prior enquiry will be liable to the brewer supplying the outlet for a fine, equivalent to the value of 100 hectolitres of pilsener beer (Article 6).

([19]) Document No 37 800, p. 616 to 618.
([20]) Document No 37 800, p. 620 to 624.
([21]) 'Droit de cabaretage'.
([22]) Document No 37 800, p. 628.

(14) If a signatory brewer, in spite of commitments which have been drawn to its attention, should contract with an outlet operator already supplied by another contracting brewer, or should deliver its beers to that outlet, Article 7 of the Agreement provides that the new contracting brewer will be liable to pay the former supplier compensation equivalent to the value of 750 hectolitres of pilsener beer, irrespective of any additional compensation set by arbitration.

(15) In the event of disputes or litigation, the director of the Luxembourg Brewers Federation is to summon the parties, at the request of one of the brewers, with a view to conciliation and, if no amicable settlement is reached, the dispute will go to arbitration (Articles 8 and 9).

(16) Article 11 of the Agreement provides that, if one of the contracting brewers should merge with a foreign brewer, or if a foreign brewer should take a majority shareholding enabling it to manage a contracting brewer, the Agreement may be terminated at any time in respect of that foreign brewer. The same will apply if one of the contracting brewers cooperates with a foreign brewer to enable the distribution of foreign beers to Luxembourg drinks outlets.

(17) According to Article 12, the Agreement is made for an indefinite period. Apart from in the circumstances set out in Article 11, the Agreement may only be terminated by the signatory brewers giving twelve months' notice by registered letter. It should also be noted that the Agreement was preceded by several other successive agreements going back to 1938, which had the same purpose and involved essentially the same parties ([23]).

(18) The Agreement is supplemented by a declaration of intent, also signed on 8 October 1985 by the five contracting brewers ([24]). This states that Battin 'is not infringing Article 2 … by distributing the beers of its licensor, Bitburger Brauerei Th. Simon, West Germany according to the current forms and methods of distribution'. The declaration states that 'if in the future the form or method of distribution changes 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 Brasserie Battin'.

(19) Lastly, on 2 December 1986 the Agreement was supplemented again by a second declaration of intent ([25]), which states that the signatory brewers 'declare that they wish to reserve priority for canvassing and for the conclusion of a supply agreement 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'. This declaration also provides for a compensation mechanism where, as a result of this system of priority, a contracting brewer manages to conclude a supply contract with the former customer of another contracting brewer. In that case, the brewer which obtains the supply contract will, in exchange, offer the brewer which previously held the contract one of its customers in a similar position.

1.5. *IMPLEMENTATION OF THE AGREEMENT*

(20) The documents available to the Commission, of which the following are examples, show that all the parties except for Wiltz applied Article 5 of the Agreement (obligation to enquire about the existence of a beer tie before supplying an outlet) ([26]), for example:

(a) the exchange of correspondence between Bofferding and Diekirch in April 1989 ([27]) about the existence of a beer tie for an on-trade outlet in Differdange;

(b) the letter of 20 May 1996 ([28]) from Bofferding to Diekirch inquiring whether there is a beer tie for an on-trade outlet in Rosport;

(c) the letter of 7 February 1997 ([29]) from Bofferding to Mousel seeking confirmation that the [name of café] was no longer subject to a beer tie, and the affirmative reply dated 21 February 1997 ([30]);

([23]) Letter from Interbrew's lawyers, 23.3.2000 (Document No 37 800, pp. 476 and 477).
([24]) Document No 37 800, p. 20.
([25]) Document No 37 800, p. 21.
([26]) See recital 13 above.
([27]) Document No 37 800, pp. 249 and 250.
([28]) Document No 37 800, p. 449.
([29]) Document No 37 800, p. 131.
([30]) Document No 37 800, p. 132.

(d) Battin's reply to the Commission's request for information ([31]), in which Battin acknowledges that it asked another brewer on two or three occasions whether a customer was tied by contract and '… that a faxed reply from the brewer concerned gave us the required information and showed us the course we should take',

(e) Bofferding's reply to the Commission's request for information ([32]), in which the brewer states that ' … the prior enquiry rule was applied in the majority of cases'.

(21) As regards the implementation of Articles 8 and 9 of the Agreement relating to conciliation and arbitration, Diekirch reports that it was involved in four disputes ([33]) with Bofferding concerning the existence or applicability of a beer tie in favour of one or other of the two brewers. The disputes occurred over the following periods:

(a) from December 1992 to August 1996 ([name of café] in Kayl);

(b) from January to August 1996 ([name of café operator]);

(c) from June to August 1996 ([name of café] in Differdange);

(d) from November 1993 to April 1998 ([name of café] in Diekirch).

(22) Bofferding confirms that it resorted to Article 8 of the Agreement in the [name of café operator] ([34]), which it states was concluded in October 1996, on the basis of an arrangement providing for an exchange of outlets between the two brewers.

(23) Mousel also supplied the minutes of a meeting of the Luxembourg Brewers Federation, held on 29 March 1988 ([35]), which refer to Article 5 of the Agreement and note that the chairman of the Federation had intervened in a dispute between two brewers in an attempt to find a compromise.

(24) The correspondence exchanged by the parties during these disputes contains numerous reminders of the obligations imposed by the Agreement and in particular of the penalty provided for by Article 7 in the event of non-compliance with Article 4 (the beer tie guarantee). For instance, in its letter of 30 July 1996 ([36]), Diekirch criticises Bofferding for having advertised outside the [name of café] in Diekirch, one of Diekirch's tied outlets. The letter goes on: 'Your conduct is plainly contrary to the brewers' agreement. Pursuant to Article 7 of that agreement, we would ask you to send us, on receipt of this letter, the required compensation of 750 hl × 4 590 = 3 442 500 francs'. On 5 June 1996 ([37]), Diekirch accused Bofferding of 'flagrant non-compliance … with the brewers' agreement' in respect of a café in Differdange and claimed payment of 'the compensation provided for in Article 7 of the said agreement'. Lastly, in its letter of 16 April 1996 to the director of the Brewers Federation ([38]) concerning the Am Chalet café in Wahlhausen, Bofferding insisted that 'the penalties provided for in the brewers' agreement should be applied' to Diekirch.

(25) It should also be noted that, at a conciliation meeting attended by representatives of Bofferding and Diekirch on 19 March 1996, the director of the Luxembourg Brewers Federation stated, according to the minutes of the meeting ([39]): '… even if the inter-brewer provisions do not have legal force, there is the spirit which has been put into them and which prevails. The aim is to avoid a split between brewers and, above all, the resulting penalisation by the courts and the massive incursion of foreign brewers onto our market'.

([31]) Battin's reply, 10.3.2000.
([32]) Bofferding's reply, 13.3.2000.
([33]) Diekirch's reply, 13.3.2000.
([34]) Bofferding's reply, 13.3.2000.
([35]) Document No 37 800, pp. 70-71.
([36]) Document No 37 800, p. 216.
([37]) Document No 37 800, p. 252.
([38]) Document No 37 800, pp. 337-38.
([39]) Document No 37 800, p. 339.

(26) Lastly, it is worth noting that none of the signatory brewers formally terminated the Agreement [40] before the Commission sent its statement of objections on 2 October 2000.

2. **COMMENTS OF THE PARTIES**

(27) After receiving the text of the Agreement from Interbrew [41], the Commission sent requests for information to the parties and to the Luxembourg Brewers Federation. On 29 September 2000 it adopted a statement of objections against the four undertakings to which this Decision is addressed. All the parties except Battin submitted written comments in reply to the Commission's objections. A hearing was held on 13 March 2001, at which Bofferding and Wiltz submitted oral comments. The parties' main comments are summarised below.

2.1. *LACK OF AN ANTI-COMPETITIVE OBJECT*

2.1.1. PROVISIONS RELATING TO MUTUAL OBSERVANCE OF BEER TIES BY THE BREWERS SIGNATORY TO THE AGREEMENT

(28) Bofferding and Wiltz emphasise that the purpose of the Agreement was to 'prevent and settle conflicts' relating to the mutual observance and protection of beer ties (Article 1). In particular, the Agreement was intended to resolve certain problems arising from Luxembourg case-law relating to the enforcement of beer ties (see recitals 30 to 33).

(29) Bofferding and Wiltz admit, however, that the Agreement also applies to certain brewer-outlet relations where there is no supply contract or beer tie whatsoever, where the brewer merely finances the fitting out of an outlet or acquires an outlet licence, without concluding a contract with the operator or imposing an exclusive purchasing clause [42]. Bofferding explains that the Agreement was altered to that effect at the request of Diekirch's legal affairs manager, who apparently feared that Bofferding might invest in a leasehold café but have the exclusive purchasing contract concluded by the German brewer Binding (with which it had good relations). Bofferding adds that it was not its intention to act in this way, and that the provision was never applied.

(30) As regards the application of the Agreement to supply contracts containing a beer tie within the meaning of Article 2, a distinction must be drawn between two different situations. The first relates to contracts which were invalidated by a line of Luxembourg case-law, which was itself based on French case-law. During the period when the Agreement was concluded, the Luxembourg courts would set aside beer ties on the grounds that the quantity or the price of the goods was undetermined, i.e. where the quantities to be supplied by the brewer or the prices to be paid by the operator were neither determined nor determinable. According to Bofferding, after the French case-law was overturned by a judgment on 1 December 1995 [43], the argument that the quantity or the price was undetermined was hardly ever pleaded again in Luxembourg, and a first instance judgment in March 1996 [44] confirmed the change in the French case-law. As a result of the earlier case-law, an unscrupulous outlet operator who had obtained financial benefits from one brewer, to which he was tied by a beer tie, was able to conceal the existence of that tie and sign a second contract with another brewer at a lower cost. The operator knew that the first brewer would not be able to obtain reimbursement, since its contract was void. According to the parties, it was solely in order to avoid disputes resulting from this case-law that the Agreement was applied to any beer tie 'irrespective of its legal validity, and/or its duration, and/or its enforceability' (Article 2). In the parties' view, therefore, this expression added nothing to their obligations.

[40] See recital 17 on the procedure for terminating the agreement.
[41] See recital 2.
[42] See recital 9.
[43] Court of Cassation *Compagnie Atlantique de Téléphone* v *Sunaco*; *Cofratel* v *Bechtel France*; *Vassali* v *Gagnaire* and *Société Le Montparnasse* v *GST Alcatel Bretagne*, Gazette du Palais, 8.12.1995.
[44] Commercial judgment II No 180/96 of the Luxembourg District Court of 6 March 1996 *Brasserie Nationale* v *Jacoby*.

(31) Bofferding adds that, in any event, Articles 8 and 9 of the Agreement, which relate to conciliation and arbitration, took precedence over Article 2 as regards this first situation. In the event of litigation these articles would have ensured that the rules of law were applied, including those relating to the validity of beer ties. Lastly, Bofferding asserts that, when it applied the prior enquiry system provided for by Article 5, it asked to see a copy of any beer tie relied on by another brewer and that it only respected exclusive contracts which were current and valid (subject to the question of the quantities or prices being undetermined).

(32) The second situation concerns supply contracts that are valid under Luxembourg civil law. As regards these contracts, Bofferding explains that Luxembourg case-law posed, and continues to pose, other problems. First of all, a brewer which concludes a beer tie with an outlet operator who is already tied to another brewer by a valid beer tie, e.g. because the operator conceals the existence of that clause, lays itself open to third party proceedings. It becomes an accessory to the breach of the first contract by the outlet operator and is jointly liable with the operator. Furthermore, Luxembourg brewers are said not to have effective judicial remedies for enforcing their beer ties. In particular, the payment of damages is said to be the only remedy for breach of such contracts under the Luxembourg Civil Code; generally speaking, brewers are not entitled to seek specific performance of the contract. Summary procedure is said not to be an effective instrument either, and full civil proceedings can last at least three years.

(33) As regards such valid supply contracts, Bofferding considers that, if there is any restriction of competition, it arises solely from the exclusive purchasing commitment by the outlet operator contained in such contracts, and not from the Agreement. According to Bofferding, there existed no protection after a beer tie had expired, and the operator could still breach his contract and accept the consequences. Bofferding adds that it cannot be the purpose or the effect of the competition rules to facilitate breaches of contract.

(34) Moreover, Bofferding considers that the Agreement cannot constitute an infringement 'by object', since restrictions of competition by object, since restrictions of competition by object are generally limited to agreements on prices or absolute sharing of territory. It also claims that the Commission could not find that there is a restriction by object without studying the legal and economic context of the agreement and the behaviour of the parties. In this respect, it relies on the IAZ ([45]) and Volkswagen judgments ([46]).

2.1.2. PROVISIONS RELATING TO FOREIGN BREWERS (THIRD PARTIES TO THE AGREEMENT)

(35) As regards Articles 11 and 12 of the Agreement relating to foreign brewers, Bofferding comments that they were never applied. It considers that the remark by the director of the Luxembourg Brewers Federation ([47]) about foreign brewers has no significance and that he was speaking only for himself.

(36) Wiltz questions how the signatory brewers could have reserved canvassing priority for themselves by means of the consultation procedure, given that a beer contract is made between a brewer and an outlet operator and that the latter is free to sell his services to the highest bidder, be it a Luxembourg or a foreign brewer.

(37) Wiltz maintains furthermore that Article 11, which allows for the Agreement to be terminated in respect of a party which merges or cooperates with a foreign brewer, has no effect on competition, since it is optional and not obligatory. Like Bofferding, it considers that the remark by the director of the Brewers Federation is irrelevant.

([45]) Judgment of the Court of Justice of the European Communities of 8 November 1983, in Joined Cases 96 to 102, 104, 105, 108 and 110/82, IAZ and others v Commission [1983] ECR 3369, paragraphs 23 to 25.
([46]) Judgment of the Court of First Instance of the European Communities of 6 July 2000 in Case T-62/98 Volkswagen v Commission, [2000] ECR II-2707, paragraph 178.
([47]) See recital 25.

2.2. *NO APPRECIABLE RESTRICTION OF COMPETITION*

(38) Bofferding considers that, in any event, the Commission has not shown that the alleged restrictions of competition are appreciable and that it has failed to define the relevant market or analyse the structure of the market or the position of the parties on it.

(39) Bofferding and Wiltz also rely on the Commission notice on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Community [48] (the *de minimis* notice) and in particular point 19 thereof, which states that the Commission will not apply Article 85(1) of the Treaty to agreements between small and medium-sized undertakings (SMEs). In addition, Bofferding asserts that the reservation provided for in point 20 of the *de minimis* notice, which nonetheless enables the Commission to intervene in such agreements where they significantly impede competition in a substantial part of the relevant market, does not apply in this case.

2.3. *IMPLEMENTATION OF THE AGREEMENT*

(40) Bofferding claims that the implementation of the Agreement was limited to the prior enquiry rule and to a single instance of conciliation, and that the provisions relating to foreign brewers were not applied.

(41) Wiltz maintains that it did not apply a single provision of the Agreement and comments that Article 11 was not applied against Diekirch and Mousel, despite their cooperation with Interbrew.

2.4. *LACK OF EFFECTS*

(42) Bofferding considers that the Agreement had no effect either on competition between the parties or on trade between Member States. As far as actual effects are concerned, it refers in particular to the fluctuation in the market shares of certain signatory brewers and the increase in imports during the period covered by the Agreement, as well as the relatively high level of imports compared with the situation in other Member States. Wiltz comments, firstly, that between 1989 and 1998 imports of beer into Luxembourg grew by 200 % and, secondly, that despite the Agreement Interbrew did penetrate the Luxembourg market.

(43) As regards potential effects on trade between Member States, Bofferding considers that if an agreement which is implemented in the territory of only one Member State is to affect trade between Member States, it must have some impact on prices or increase the partitioning off of national territories. It asserts that the Commission cannot merely refer to the object of the Agreement or the parties' share of sales in the sector concerned. Lastly, it considers that the Commission has not shown how the restrictions agreed between the brewers in relation to outlet operators could affect trade between Member States.

3. **LEGAL ASSESSMENT**

3.1. *INFRINGEMENT OF ARTICLE 81(1) OF THE TREATY*

(44) Article 81(1) of the Treaty states that 'the following shall be prohibited as incompatible with the common market: all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which … share markets …'.

3.1.1. AGREEMENT BETWEEN UNDERTAKINGS

(45) The Agreement is an agreement within the meaning of Article 81(1) of the Treaty.

(46) The five signatory undertakings mentioned in recital 3 (two of which have since merged) are undertakings within the meaning of Article 81(1) of the Treaty.

[48] OJ C 372, 9.12.1997, p. 13.

3.1.2. RESTRICTION OF COMPETITION BY OBJECT

(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).

3.1.2.1. ***Restriction of competition between the Luxembourg brewers***

(48) Article 4 of the Agreement strictly prohibits each signatory brewer and its distributors from supplying beer to outlets that are 'guaranteed' to other Luxembourg brewers ([49]). The Commission will explain first of all that this prohibition applies in three scenarios and restricts competition in each case:

1. where there is no supply contract or no beer tie (see recitals 50 and 51);

2. where the beer tie is void or unenforceable (see recitals 52 to 55); and

3. where there is a valid beer tie (see recitals 56 to 58).

The Commission will then argue that the restrictions of competition in question should be classified as restrictions by object, despite the legal context in which, according to the parties, they should be placed (see recitals 59 to 63).

(49) Article 5 of the Agreement, which relates to the prior enquiry procedure, should be read in conjunction with Article 4, since it is intended to ensure that that article is applied effectively (see recital 64).

1. **Situation where there is no supply contract or no beer tie**

(50) The prohibition in Article 4 applies, firstly, when a signatory brewer finances the fitting out of an outlet or acquires an outlet licence but does not conclude a contract with the outlet operator or does not impose an exclusive purchasing clause on him ([50]). In this situation, the restriction of competition is obvious: the Agreement prevents an outlet operator who is supplied by a Luxembourg brewer, but is not tied by an exclusive purchasing clause, from obtaining his supplies from other Luxembourg brewers. Thus the first brewer maintains its customers and the freedom of action of the outlet operator and third-party brewers is limited.

(51) The Commission considers that the reason relied on by Bofferding for applying the Agreement in this first scenario is not convincing ([51]). First, it is difficult to see what advantage there is for Diekirch in extending the protection of the Agreement to contracts financed by its competitor, Bofferding, and concluded by a foreign brewer, Binding. Secondly, this amendment does not seem suited to its alleged purpose: instead of expressly dealing with transactions involving a third party brewer, it broadens the definition of a beer tie more generally. Lastly, in any event, the justifications put forward by Bofferding relating to the impact of the case-law plainly do not cover this first scenario.

([49]) See recital 11.
([50]) See in recital 9 the interpretation agreed between the parties at the meetings of 7 October and 2 December 1986.
([51]) See recital 29.

2. **Situation where the beer tie is void or unenforceable**

(52) The prohibition in Article 4 also applies when a signatory brewer concludes an exclusive purchasing clause which is not valid or legally enforceable (irrespective of its legal validity, and/or its duration, and/or its enforceability) ([52]). In this scenario, the Agreement goes beyond the restrictions imposed by law, as it obliges the parties to honour beer ties which either are not valid under national civil law or under competition law or which are unenforceable, e.g. because the brewer has breached his contractual obligations to the outlet operator. Thus, the parties reduce their freedom of action and grant each other advantages, in terms of maintaining their clientele and of legal certainty, which would not apply under normal competitive conditions.

(53) First of all, it is incorrect to assert, as Bofferding does ([53]), that Article 2 adds nothing to the parties' legal obligations. On the contrary, given that the Agreement obliges the parties to honour exclusive purchasing contracts which were invalid according to the Luxembourg case-law then in force, it clearly goes beyond the obligations imposed by the civil law as interpreted by the national courts. Moreover, Bofferding contradicts itself when it asserts, on the one hand, that the only purpose of Article 2 was to overcome the problem of contracts being set aside under the case-law and, on the other, that in the event of litigation, the clauses relating to conciliation and arbitration took precedence over this article and therefore that the rules of law would have been applicable, including those governing the validity of contracts ([54]).

(54) Furthermore, the line of case-law which led to the setting aside of contracts on the grounds that the prices or the quantities were undetermined no longer applied in Luxembourg after March 1996 ([55]). Nonetheless, the parties did not terminate the Agreement at that time.

(55) Next, contrary to what the parties claim ([56]), the expression 'irrespective of its legal validity, and/or its duration, and/or its enforceability' is not limited to contracts that are invalid due to the prices or the quantities supplied being undetermined. Rather, this general expression extends the guarantee in Article 4 to contracts that would be invalid or unenforceable on other grounds as well. For instance, Bofferding's lawyer claimed that the Agreement applied ([57]) in a dispute concerning the early termination of a beer tie by an outlet operator ([58]), i.e. not relating to invalidity on the grounds of the prices or quantities being undetermined. This refutes Bofferding's claim that it only applied the Agreement to current, legally valid contracts (subject to the question of the prices or quantities being undetermined) ([59]). In any event, the fact that one party to an agreement chooses unilaterally to limit its implementation to certain scenarios does not affect the interpretation of that agreement. If the parties only intended to address the problem posed by the case-law, they could have used a more appropriate expression.

3. **Situation where there is a valid beer tie**

(56) Article 4 also applies to beer ties that are legally valid and enforceable. Even in this scenario, the Agreement is more restrictive than the rules of national civil law. In the first place, the prohibition imposed on the signatory brewers by Article 4 is wider than the non-compete obligation imposed on

([52]) See recital 8.
([53]) See recital 30.
([54]) See recital 31.
([55]) See recital 30.
([56]) See recital 30.
([57]) See the letter from Bofferding's lawyer of 19.8.1996, Document No 37 800, p. 324.
([58]) Document No 37 800, pp. 406 and 418.
([59]) See recital 31.

certain outlet operators. The beer ties concluded by certain parties ([60]) were drawn up in accordance with Commission Regulation No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements ([61]), as last amended by regulation No 1582/97 ([62]), and in particular Article 7(1) thereof. Accordingly, the obligation imposed on the operator not to distribute beers supplied by third party brewers is limited to beers of the same type as those supplied by the contracting brewer. Article 4 of the Agreement is more restrictive, since it prohibits 'any sale of beer to an outlet … guaranteed to one of the other signatory brewers', irrespective of the type of beer concerned. Under his contract, therefore, the operator was free to buy from other brewers types of beer not specified in that contract, but the Agreement prevented the other Luxembourg brewers from supplying him with such other types of beer.

(57) Secondly, the Agreement completely prohibits any supply to an outlet that is tied to another signatory brewer, whereas in civil law the penalty for making such supplies is limited, according to the parties, to the payment of damages ([63]). For various reasons, for example due to a deterioration in the quality of the first contracting brewer's services, or because of a need for new equipment, products or services, which that brewer is unable or unwilling to provide, it is possible that an operator might wish to breach his contract and obtain supplies from a competing brewer and to assume with that brewer the financial consequences of the breach. However, the Agreement makes this type of arbitrage by outlet operators impossible, since it prohibits competing brewers from supplying the operator in question. It thus serves to maintain inefficient brewer-operator relationships.

(58) Therefore, it is incorrect to assert, as Bofferding does ([64]), that the restriction of competition results solely from the exclusive purchasing contract or that the Community competition rules are being used to facilitate breaches of contract. On the contrary, it is a matter of preventing competing undertakings from imposing restrictions on each other which go beyond the rules of civil law. It is settled case-law that where competition in a sector is already limited by national law, for example by the rule on third party liability, which penalises a brewer for supplying an outlet operator in breach of a valid beer tie, this cannot justify an agreement which imposes additional restrictions and penalties ([65]).

(59) The restrictions in the Agreement are restrictions of competition by object, firstly, because — and this is not contested by the parties — the Agreement applies even in cases where no supply contract or beer tie exists and therefore cannot be the subject of any dispute (see recital 50).

(60) Secondly, it should be noted that the Agreement of 8 October 1985 was preceded by several other agreements between Luxembourg brewers ([66]), e.g. the agreement of 1 September 1966 involving all the undertakings concerned in the present case, and the agreements of 13 June 1975 and 28 April 1983 involving Bofferding and Mousel. 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 uncertainty. The interpretation of the 1985 Agreement cannot be entirely dissociated from this historical context, which is such as to cast doubt on the defence of legal uncertainty relied on by the parties as a justification for the 1985 Agreement.

([60]) See, for example, Bofferding's exclusive purchasing contracts, Document No 37 800, pp. 126 to 30 and pp. 145 to 49, the December 1988 amendment to the Diekirch contract, Document No 37 800, pp. 199 to 200, and the Diekirch supply contract, Document No 37 800, pp. 342 to 47.
([61]) OJ L 173, 30.6.1983, p. 5.
([62]) OJ L 214, 6.8.1997, p. 27.
([63]) See recital 32.
([64]) See recital 33.
([65]) Judgment of the Court of Justice of the European Communities in Joined Cases 240, 241, 242, 261, 262, 268 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831.
([66]) See recital 17.

(61) Thirdly, the assessment of the object of an agreement under Article 81(1) of the Treaty does not depend on the parties' subjective intentions. If the nature of the agreement is obviously such as to restrict or distort competition, it constitutes a restriction by object, even supposing that the parties had other, legitimate objectives in mind ([67]).

(62) Fourthly, the Commission emphasises that the problem of legal uncertainty raised by the parties is not confined to beer supply contracts in Luxembourg. 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. It forms part of the overall commercial risks which undertakings have to face. Each undertaking must deal with these risks independently. The problem does not justify an agreement whose benefits are reserved for national undertakings and consequently does not merit a derogation from Article 81(1) of the Treaty, which is a rule of public policy ([68]).

(63) To conclude, as far as Article 4 of the Agreement is concerned, the Commission considers that in refuting all the arguments of the parties, it has taken account of the legal context, even though it is not obliged to do so in the case of 'an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets …' ([69]). The Commission notes, moreover, that the director of the Luxembourg Brewers Federation, to whom the Agreement allocates a central role in the event of disputes, expressly acknowledged that the Agreement was not legally valid. At a conciliation meeting between Bofferding and Diekirch he observed 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' ([70]).

(64) Article 5 of the Agreement establishes a procedure for the signatory brewers to consult each other before supplying a new outlet and thereby strengthens the restriction of competition in Article 4 by ensuring that it is applied effectively. No request from a new customer may be satisfied before the signatory brewer has checked that the customer is not tied to one of the other contracting brewers.

(65) In fact, the only means available to the parties to ensure compliance with the prohibition laid down by Article 4 and, if necessary, initiate the conciliation and arbitration procedures laid down in Articles 8 and 9 was to inquire of each other whether there was a beer tie before supplying a new outlet. The central role of Article 5 as an instrument for implementing the Agreement is clear from the minutes of the Federation's meeting on 29 March 1988, where, in the context of a dispute between two parties to the Agreement, the director stresses the importance of complying with the Article ([71]). Moreover, Bofferding stated that '… the prior enquiry rule was applied in the majority of cases' ([72]).

(66) Finally, the Commission observes that the compensation and fines laid down in Articles 6 and 7 of the Agreement ([73]) are 'private' penalties which are intended to strengthen the obligations imposed by Articles 4 and 5. Once again, these penalties exceed the remedies provided by civil law if an outlet operator should breach a beer tie. They are additional to the damages that would be payable by the defendant in third party proceedings. Even if these penalties were not applied, the parties did invoke them on several occasions ([74]).

([67]) See the IAZ judgment already mentioned at paragraph 25.
([68]) Judgment of the Court of Justice of 1 June 1999 in Case C-126/97 Eco Swiss China Time v Benetton International [1999] ECR I-3055, paragraph 39.
([69]) Judgment of the Court of First Instance of 15 September 1998 in Case T-374/94 European Night Services and others v Commission [1998] ECR I-3141, paragraph 136.
([70]) See recital 25.
([71]) See recital 23.
([72]) See recital 20.
([73]) See recitals 13 and 14.
([74]) See the examples quoted in recital 24.

3.1.2.2. ***Restriction of competition between Luxembourg brewers and foreign brewers***

(67) The Agreement has a second anti-competitive object: to impede the penetration of the Luxembourg on-trade by foreign brewers. Thus, where an outlet tied to one of the parties is canvassed by a foreign brewer, the second declaration annexed to the Agreement ([75]) provides, first, for consultation between the parties in order to reserve canvassing priority for one of its 'Luxembourg colleagues' and, then, should the canvassing be successful, a compensatory mechanism for exchanging outlets between the two parties concerned. This collusion between the parties is aimed at preventing foreign brewers from concluding exclusive contracts with Luxembourg outlet operators.

(68) This object is confirmed by the remarks of the director of the Luxembourg Brewers Federation as reported in the minutes of the conciliation meeting of 19 March 1996 ([76]) '… The aim is to avoid … the massive incursion of foreign brewers onto our market'. Although these remarks do not commit the parties, they were made at a meeting relating to the application of the Agreement. They should therefore be taken into account for the purpose of interpreting the Agreement.

(69) This second object of the Agreement cannot be dissociated from the first, since restricting the penetration of the Luxembourg on-trade by foreign brewers helps to preserve the stability of relations between the parties to the Agreement. As the Court of Justice has already held, in a market which is susceptible to imports, the members of a national price cartel can ensure its effectiveness only if they defend themselves against foreign competition ([77]). In the case in point, the defensive provisions are of two types. Firstly, the procedure for consultation and granting priority for canvassing serves to counter the canvassing efforts of foreign brewers. Secondly, these provisions are reinforced by Article 11, and by the first annexed declaration, relating to the distribution of a foreign beer by Battin ([78]), which dissuade the parties from any cooperation with foreign brewers and enable them to exclude the latter from the benefits of the Agreement.

(70) This close link between the two objects of the Agreement is expressed in two places in particular. Firstly, the consultation and canvassing priority system is accompanied by a mechanism for compensation between the parties, so as to restore balance in the number of outlets tied to each. Secondly, the declaration concerning the distribution of foreign beers by Battin is intended to preserve 'the current balance of distribution', which indicates that the parties considered that the sector enjoyed a degree of equilibrium and that this merited protection.

(71) As regards Wiltz's comment on the alleged ineffectiveness of the canvassing priority system ([79]), the Commission points out, firstly, that the effectiveness of an agreement is not a condition for the application of Article 81(1) of the Treaty. Secondly, it notes that, regardless of the freedom of outlet operators, the consultation procedure served to warn the parties of the canvassing plans of foreign brewers and enabled them to react to them. The parties would not have enjoyed this advantage under normal competitive conditions.

([75]) See recital 19.
([76]) See recital 25.
([77]) Judgment of the Court of Justice in Case 246/86 Belasco and others v Commission [1989] ECR 2117, paragraph 34.
([78]) See recital 18.
([79]) See recital 36.

(72) Other provisions in the Agreement reinforce this second restrictive object. Thus, Article 11, which makes it possible to terminate the Agreement in respect of a contracting brewer which cooperates with a foreign brewer, is intended to discourage any cooperation which might result in increased imports of competing products. Despite Wiltz's comment ([80]), the Commission considers that this provision, although not a restriction in itself, is likely to have a dissuasive effect on the conduct of the parties. Thus any party thinking of cooperating with a foreign brewer knows that this could lead to its exclusion from the benefits of the Agreement.

(73) Similarly, the first declaration annexed to the Agreement, which concerns the distribution of a foreign beer by Battin ([81]), gives the parties the right to terminate the Agreement in respect of that brewer, if its distribution of foreign beer were to be modified in such a way as 'to disturb the current balance of distribution'. This declaration shows that the parties intended to control the distribution of foreign beers in the Luxembourg on-trade.

3.1.3. APPRECIABLE RESTRICTION OF COMPETITION

(74) Bofferding comments that the Commission has not established that the restrictions of competition are appreciable ([82]). In this respect, it should be noted, first of all, that the parties limited the scope of the Agreement to the Luxembourg on-trade. This 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.

(75) Secondly, taking into account their own production and their distribution of imported beers, the parties control approximately 85 % of beer sales in the sector concerned ([83]). Furthermore, more than half the drinks outlets in Luxembourg are tied to the parties by a beer tie ([84]). The Commission therefore concludes that the Agreement was liable to restrict competition in the sector appreciably.

(76) As to Bofferding's comment about the definition of the relevant market ([85]), the Commission points out that, in the case of an agreement containing obvious restrictions of competition such as market sharing, it is not necessary to take account of the economic context or the structure of the market concerned ([86]).

3.1.4. APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES

(77) It is settled case-law that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States ([87]).

(78) The Agreement is capable of exerting such an influence on trade between Luxembourg and other Member States. One of its aims is specifically to restrict penetration of the Luxembourg on-trade sector by brewers established in other Member States ([88]). To this end, it contains a defensive mechanism which reserves canvassing priority for the signatory brewers ([89]), as well as a clause intended to limit cooperation with foreign brewers ([90]). The objective is thus to preserve the status quo as regards trade in beer from other Member States to the Luxembourg on-trade and thereby to partition off the national territory. It should be noted in this respect that all the main brewing undertakings in Luxembourg participated in the Agreement and that they control approximately 85 % of beer sales in the Luxembourg on-trade ([91]).

([80]) See recital 37.
([81]) See recital 18.
([82]) See recital 38.
([83]) See recital 5.
([84]) See recital 6.
([85]) See recital 38.
([86]) Case T-374/94 European Night Services and others v Commission (see footnote 70).
([87]) Judgment of the Court of Justice of 11 July 1985 in Case 42/84 Remia and others v Commission [1985] ECR 2545, paragraph 22.
([88]) See recitals 67 to 73.
([89]) See recital 9.
([90]) See recital 16.
([91]) See recital 5.

(79) As regards Bofferding's and Wiltz's comments on the lack of actual effects ([92]), the Commission points out that Article 81(1) does not require proof that such agreements have in fact appreciably affected trade between Member States, but merely requires that they are capable of having that effect ([93]). The Commission is not arguing that the Agreement actually affected trade between Member States but, in view of its provisions and the parties' position in the Luxembourg on-trade, the Commission maintains that it was capable of having an appreciable effect on such trade.

(80) As for Bofferding's comments on the lack of potential effects on trade between Member States ([94]), the Commission points out, first, that the fact that an agreement relates to the marketing of products in only one Member State does not mean that trade between Member States may not be affected ([95]). In the case in point, it considers that, given the Agreement's provisions relating to foreign brewers, the potential for partitioning off the national territory has been clearly established ([96]).

(81) As regards the potential effect on intra-Community trade of the restrictions between the signatory brewers relating to outlet operators, it should be noted, first of all, that Article 81(1) of the Treaty by no means requires that each individual clause in an agreement should be capable of affecting intra-Community trade; rather, it is necessary to examine the effects of the agreement as a whole ([97]). Secondly, it is impossible to dissociate the restrictions in the Agreement relating to the maintenance of the parties' clienteles from the provisions which are intended to impede the penetration of foreign brewers. As explained above ([98]), the two types of restriction are interdependent. Lastly, given that the restrictions between the signatory brewers in relation to outlet operators are intended to maintain the parties' clienteles, they give the parties an advantage over foreign brewers. This discrimination in favour of national brewers is also capable of influencing trade into the sector from other Member States.

3.1.5. THE *DE MINIMIS* NOTICE

(82) Contrary to what the parties maintain ([99]), the Commission considers that they cannot rely on the *de minimis* notice for two reasons. First of all, the Agreement cannot be regarded as an agreement between SMEs, since Diekirch and Mousel do not satisfy the tests in the Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ([100]). To qualify as an SME, an undertaking must not be owned as to 25 % or more of its capital by an enterprise falling outside the definition of an SME. The Interbrew group has held at least [… %] of Diekirch's capital since January 1986, i.e. for the whole duration of the Agreement except the first three months, and at least [… %] of Mousel's capital since September 1999. Where SMEs conclude an anti-competitive agreement with larger undertakings, that agreement cannot qualify for the derogation laid down in point 19 of the *de minimis* notice.

(83) Secondly, as regards the eligibility thresholds laid down in point 9 of the notice, it should be remembered that, under point 11 of the notice, in the case of horizontal agreements which have the object of sharing markets, the applicability of Article 81(1) cannot be ruled out even below these thresholds. The Commission reserves the right to intervene in such cases, especially where an agreement impairs the proper functioning of the internal market. As has already been shown, one of the objects of this particular agreement is to partition off the territory of Luxembourg, something which is contrary to the principles of the common market.

([92]) See recital 42.
([93]) Judgment of the Court of Justice of 1 February 1978 in Case 19/77 Miller International Schallplatten v Commission [1978] ECR 131, paragraph 15 and Joined Cases T-202/98, T-204/98 and T-207/98 Tate & Lyle not yet reported, paragraph 84.
([94]) See recital 43.
([95]) See Belasco (footnote 78).
([96]) See recital 78.
([97]) Judgment of the Court of Justice of 25 February 1986 in Case 193/83 Windsurfing International v Commission [1986] ECR 611, paragraph 96.
([98]) See recitals 69 and 70.
([99]) See recital 39.
([100]) OJ L 107, 30.4.1996, p. 4.

(84) Furthermore, without prejudice to the observations in recital 82, this right of intervention is also reserved for agreements between SMEs which 'significantly impede competition in a substantial part of the relevant market' ([101]). The restrictions in the Agreement (customer sharing and the partitioning off of the national territory) are, by their very nature, significant. Moreover, the sector covered by the Agreement, comprising the entire territory of Luxembourg, constitutes a substantial part of the relevant market, irrespective of the geographical limits of that market. The Commission therefore considers that it is entitled to intervene.

(85) To sum up, the Agreement has the object of restricting competition in the Luxembourg beer on-trade and it is also capable of appreciably affecting trade between Member States. It is therefore caught by the prohibition laid down in Article 81(1) of the Treaty.

3.2. *DURATION OF THE INFRINGEMENT*

(86) The Agreement was concluded on 8 October 1985. Under Article 12, it was concluded for an indefinite period and could only be terminated by the parties giving twelve months' notice ([102]). In response to the statement of objections, which was sent in October 2000, all the parties except Battin informed the Commission that they had, by letter to the other parties, formally terminated the Agreement. Strictly speaking, therefore, the Agreement remained in force until October 2000. However, Interbrew informed the Commission on 16 February 2000 that it had instructed its subsidiaries Mousel and Diekirch to stop implementing the Agreement. The Commission therefore concludes, to the benefit of all the parties, that the infringement ceased on that date. It therefore lasted more than 14 years.

3.3. *ADDRESSEES OF THE DECISION*

(87) It is appropriate to address this Decision to the undertakings directly involved in the infringement, i.e. the parties to the Agreement. However, following the takeover of Diekirch by Mousel and the change in Mousel's company name ([103]), the decision in respect of Diekirch and Mousel will be addressed to Brasserie de Luxembourg Mousel-Diekirch.

3.4. *APPLICATION OF ARTICLE 15(2) OF REGULATION No 17*

(88) Under Article 15(2) of Regulation No 17, the Commission may impose fines up to the maxima provided for where, either intentionally or negligently, undertakings infringe Article 81(1) of the Treaty.

3.4.1. IMPOSITION OF A FINE

(89) 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 Treaty ([104]). As regards the provisions of the Agreement relating to foreign brewers, the Commission considers that the parties could not have been unaware of their restrictive object. Indeed, the parties have not sought to justify these provisions. As to the restrictions of competition between the signatory brewers resulting from their mutual observance of beer ties, it is 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 ([105]). However, this justification disappeared in March 1996 when that case-law was overturned.

([101]) Point 20 of the *de minimis* notice.
([102]) See recital 17.
([103]) See recital 4.
([104]) See Miller, paragraph 18 and Tate & Lyle, paragraph 127, as previously cited.
([105]) See recital 30.

(90) Consequently, the Commission concludes 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.

3.4.2. AMOUNT OF THE FINE

(91) To determine the amount of the fine, the Commission has to take into account all relevant factors and, in particular, the gravity and duration of the infringement.

3.4.2.1. ***Gravity of the infringement***

(92) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. In the case in point, the infringement is intended to maintain the clienteles, and hence the market shares, of the main brewing undertakings established in Luxembourg and to restrict penetration of the Luxembourg on-trade by foreign brewers. It therefore constitutes one of the most serious infringements of Article 81(1) of the Treaty. However, 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 ([106]). Furthermore, it is not possible to conclude from the evidence available to the Commission that the restriction concerning foreign brewers was implemented. Lastly, the Agreement applies only to Luxembourg. The territory of this Member State is relatively small and it is the smallest market in the Community in terms of total beer consumption.

(93) The Commission therefore classifies the infringement as serious.

(94) It is also necessary to take account of the effective economic capacity of the undertakings to cause significant damage to other operators, in particular consumers, and to set the fine at a sufficiently deterrent level.

(95) Where there is a considerable difference in the size of the undertakings involved, the amount of the fines should be weighted to take account of the specific impact of the offending conduct of each undertaking on competition. The respective sales of Wiltz and Battin in the Luxembourg on-trade are less than one tenth of those of Bofferding, whose sales are in turn only 60 % of those of Brasserie de Luxembourg ([107]). Therefore, the undertakings concerned should be divided into three groups on the basis of their turnover in the sector concerned and the amount of the fine determined for gravity for each group should be set as follows:

a) First group:

Brasserie de Luxembourg: EUR 500 000;

b) Second group:

Bofferding: EUR 250 000;

c) Third group:

Wiltz: EUR 15 000;

Battin: EUR 15 000.

(96) Furthermore, the Commission notes that Brasserie de Luxembourg belongs to the Interbrew group, one of the largest brewing groups in the world. In order to ensure that the fine has a sufficient deterrent effect and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law, the Commission considers that the amount determined for gravity in recital 95 for this undertaking should be increased by a factor of three. Therefore, the amount determined for gravity for Brasserie de Luxembourg is EUR 1 500 000.

([106]) See recital 6.
([107]) See recital 3.

3.4.2.2. ***Duration of the infringement***

(97) Lasting as it did for over 14 years ([108]), the infringement is of long duration. The Commission considers that this warrants an increase of 100 % in the starting amounts.

(98) Taking both the gravity and the duration of the infringement into account, the basic amounts of the fines are therefore fixed at:

Brasserie de Luxembourg:	EUR 3 000 000;
Bofferding:	EUR 500 000;
Wiltz:	EUR 30 000;
Battin:	EUR 30 000.

3.4.2.3. ***Aggravating and attenuating circumstances***

(99) The Commission considers that there are no aggravating circumstances in this case.

(100) As regards attenuating circumstances, it is possible that the Luxembourg case-law which raised questions about the validity of certain beer ties may have created doubts at the time the Agreement was concluded, and up until March 1996 (the date when the case-law was overturned), about whether the restrictions relating to the mutual observance of beer ties constituted an infringement. The fine imposed on each undertaking should therefore be reduced by 20 %.

(101) Thus, in the light of all the factors set out in recitals 91 to 100, the amounts of the fines are set as follows:

Brasserie de Luxembourg:	EUR 2 400 000;
Bofferding:	EUR 400 000;
Wiltz:	EUR 24 000;
Battin:	EUR 24 000.

3.4.3. COMMISSION NOTICE ON THE NON-IMPOSITION OR REDUCTION OF FINES IN CARTEL CASES

(102) Brasserie de Luxembourg (formerly Mousel and Diekirch) and its parent company, Interbrew, claim that they meet the conditions for a reduction of at least 75 % in the fine or even for total exemption from a fine in accordance with section B of the Commission notice on the non-imposition or reduction of fines in cartel cases.

(103) In the first place, Interbrew informed the Commission about the existence of the Agreement before the Commission had undertaken an investigation and before it had any information on the Agreement ([109]).

(104) Secondly, by sending the text of the Agreement to the Commission, Interbrew was the first undertaking to supply decisive evidence of the existence of the Agreement.

(105) Thirdly, Diekirch and Mousel terminated their participation in the illegal activity before the Commission was informed about it. When Interbrew told the Commission about the Agreement, it confirmed that it had taken the measures necessary to stop its subsidiaries implementing it.

(106) Fourthly, Interbrew supplied the Commission with all the evidence available to its subsidiaries Mousel and Diekirch relating to the Agreement, thereby exceeding the response required by the Commission's requests for information. It also cooperated fully and without interruption during the investigation and did not dispute the materiality of the facts alleged against the participating undertakings in the statement of objections.

(107) Lastly, there is no indication that Interbrew or its subsidiaries compelled another undertaking to participate in the Agreement, or that they acted as instigator or played a determining role in the illegal activity.

([108]) See recital 86.
([109]) See recital 2.

(108) Consequently, the Commission considers that Brasserie de Luxembourg satisfies the conditions set out in section B of the Commission notice on the non-imposition or reduction of fines and, hence, that no fine should be imposed on that undertaking.

3.4.4. FINAL AMOUNT OF THE FINES

(109) In view of the above, the fines imposed under Article 15(2) of Regulation No 17 are as follows:

Bofferding:	EUR 400 000;
Wiltz:	EUR 24 000;
Battin:	EUR 24 000,

HAS ADOPTED THIS DECISION:

Article 1

Brasserie de Diekirch, Brasseries Réunies de Luxembourg Mousel et Clausen, Brasserie Nationale–Bofferding, Brasserie de Wiltz and Brasserie Battin have infringed Article 81(1) of the EC Treaty 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.

Article 2

The following fines are imposed:

Brasserie Nationale-Bofferding:	EUR 400 000.
Brasserie de Wiltz:	EUR 24 000.
Brasserie Battin:	EUR 24 000.

Article 3

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

Account No 642-0029000-95

Commission européenne — Europese Commissie

Banco Bilbao Vizcaya Argentaria (BBVA)

IBAN Code: BE76 6420 0290 0095

SWIFT Code: BBVABEBB

Avenue des Arts — Kunstlaan 43

B-1040 Brussels.

After expiry of that period, interest shall become payable. The rate applicable shall be that which the European Central Bank applies to its main refinancing operations. The interest shall be payable from the first day of the month in which this Decision was adopted. A supplement of 3,5 percentage points shall be charged.

Article 4

This Decision is addressed to:

1. Brasserie de Luxembourg Mousel-Diekirch SA, 2, Rue de la Tour Jacob L-1831 Luxembourg, Grand Duchy of Luxembourg
2. SA Brasserie Nationale-Bofferding, 2 boulevard J. F. Kennedy, L-4901 Bascharage, Grand Duchy of Luxembourg
3. Brasserie de Wiltz, 14 rue Joseph Simon, L-9550 Wiltz, Grand Duchy of Luxembourg
4. Brasserie Battin, 22 boulevard J. F. Kennedy, 4170 Esch/Alzette, Grand Duchy of Luxembourg.

The Decision is enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 5 December 2001.

For the Commission

Mario MONTI

Member of the Commission