

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 22 December 1987

relating to a proceeding under Article 86 of the EEC Treaty

(IV/30.787 and 31.488 — Eurofix-Bauco v. Hilti)

(Only the English text is authentic)

(88/138/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic 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 the Act of Accession of Spain and Portugal, and in particular Article 3 thereof,

Having regard to the applications dated 7 October 1982 and 26 February 1985 made to the Commission pursuant to Article 3 of Regulation No 17 by Eurofix Limited of Arley, near Coventry, United Kingdom (now Structural Fastenings Group Ltd) and Bauco (UK) Ltd of Ealing, London, United Kingdom (now Thames Ditton, Surrey) respectively to find that Hilti AG of Schaan, Liechtenstein, had infringed Article 86,

Having regard to the information obtained by the Commission pursuant to its powers under Articles 11 and 14 of Regulation No 17,

Having regard to the Commission Decision of 9 August 1985 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) of

Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17⁽²⁾,

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

Whereas :

A. THE FACTS

I. INTRODUCTION

*(a) The parties**Hilti*

- (1) Hilti Aktiengesellschaft (Hilti AG)⁽³⁾ is a large Liechtenstein-based company specializing in the manufacture and distribution of a variety of fastening systems (e.g. drilling equipment, nail guns⁽⁴⁾ mostly for professional use in the building

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

⁽³⁾ In this Decision 'Hilti' refers to the whole Hilti organization, i.e. to Hilti AG (Liechtenstein) and to all its wholly-owned or controlled subsidiaries. Unless otherwise specified the term excludes the independent Hilti distributors.

⁽⁴⁾ In this document 'powder actuated fastening tools' will be referred to as nail guns with a distinction made when appropriate between the direct action and indirect action types (see also the following footnote).

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

industry. It had, in 1986, an annual worldwide turnover of SwF 1 429 million. Among the fastening systems that Hilti produces, it is recognized as a world leader in the field of nail guns and consumables for use therein (nails, cartridges and cartridge strips⁽¹⁾). Hilti's worldwide turnover in these products in 1984 was SwF (...) (certain figures have been omitted in the published version of the Decision pursuant to Article 21 of Regulation No 17 concerning the protection of business secrets), of which SwF (...) was in the EEC. Hilti develops and manufactures its products not only in Liechtenstein but also at several locations in the EEC, principally the Federal Republic of Germany.

- (2) In the EEC Hilti sells nail guns and consumables through wholly-owned subsidiaries in Belgium, France, Ireland, Germany, Spain and the UK. In Denmark, Italy, the Netherlands, Greece and Portugal sales take place through the medium of independent distributors.
- (3) Outside the EEC Hilti distributes on a worldwide basis either through wholly-owned subsidiaries (notably in Switzerland, the USA, Canada, Australia and Japan) or through independent distributors (notably in Sweden, Norway and Finland) who are organized on a similar basis to the independent distributors inside the EEC.

Eurofix

- (4) Eurofix of Arley near Coventry, United Kingdom (also known as Profix), is a relatively small-sized company specializing in the manufacture and distribution of a wide variety of nails, including since the late 1960s nails for use in the nail guns made by Hilti and other nail gun producers. Eurofix sells its range of Hilti-compatible nails not only via its own specialist sales force but also via plant-hire companies and other distributors.

Bauco

- (5) Bauco of Surrey, England, is a small company specializing in the importation and distribution of

nails for use in Hilti nail guns. Since 1984, when Bauco was established, it has sold its range of Hilti-compatible nails almost exclusively to plant-hire companies and other distributors. For a short while it produced cartridge strips for Hilti nail guns. It stopped such production following legal action from Hilti.

(b) The products

- (6) Prior to the development of nail guns, fastenings in the construction industry were carried out by relatively slow and labour intensive methods of drilling and attaching bolts or hooks as appropriate. When in 1958 Dr Martin Hilti perfected a nail gun it quickly became popular. Nail guns work on a principle similar to that of a gun in that the exploding cartridge propels a nail with great force and precision into its desired position. In a nail gun, however, the nail and the cartridge are totally separate. Originally nails were driven directly by the exploding cartridge and were consequently fired at very high speeds. Most nail guns, including Hilti's, are now based on the inherently safer indirect action piston system whereby the exploding cartridge propels a piston which in turn drives the nail. As a result, the nail leaves the nail gun at a much lower speed than for direct action nail guns.

- (7) Most manufacturers of nail guns produce a range of guns for different types of fixings. Cartridges of different strengths can be employed in these nail guns. Furthermore, certain nail guns incorporate a power regulation system. The use of PAFS enables a fastening to be made generally without the need for time-consuming drilling, and also without any set-up time.

Test fixings must normally be made into the base material to determine whether and with which consumables a suitable fastening can be made. Furthermore, since not all unsuitable fastenings are apparent and a certain failure rate may be expected, a minimum number of fastenings must always be made and reliance should never be put on one individual fastening. The minimum number of fastenings that should be made varies according to the load and base material.

(1) 'Nails' refers to all the studs, nails and other fastening devices fired or fixed by nail guns. 'Cartridges' refers to the individual brass cartridges that are either inserted into cartridge strips for semi-automatic nail guns or loaded individually for single shot nail guns. 'Cartridge strips' refers to the strips or holders (plastic in Hilti's case) into which brass cartridges are inserted. Furthermore, unless otherwise stated, a cartridge strip will refer to a strip with its complement of cartridges. 'Consumables' refers to nails and cartridge strips. 'Powder actuated fastening systems' (hereinafter referred to as 'PAFS') means nail guns, nails and cartridge strips.

- (8) Different types of attachments, and the different materials into which these attachments are to be made or on to which further fastenings can be

made, require specific nails. The nails are manufactured especially for use in nail guns and normal nails cannot be used. The strength of the nail and the properties of the point must be adequate to ensure both penetration and the required fastening. For technical reasons nails cannot be made of stainless steel, and therefore to prevent corrosion from damaging the efficiency of the fixing the nails must be zinc coated.

(9) Nails must be adapted to fit specific nail guns. Because some nail guns are designed to similar standards, there is some interchangeability between the different brands of nails in that they may fit more than one brand of nail gun.

(10) Early varieties of nail guns required the insertion of a fresh nail and fresh cartridge after each firing, a process which required some time and could be difficult in winter when operators wore gloves. More recent nail guns, including Hilti's, permit the use of a magazine containing a number of cartridges. Most cartridge magazines are in the form of a plastic (sometimes metal) strip or disc containing usually 10 brass cartridges. This strip is automatically fed into the nail gun at every firing, obviating the need for the introduction of a fresh cartridge. Such guns are only semi-automatic in that a fresh nail must be introduced each time. Cartridge strips must normally be made to fit specific brands of nail guns and are not generally interchangeable. Individual brass cartridges are more standardized⁽¹⁾.

(11) Nail guns are used by a wide variety of professional users in the construction industry. The cost of the initial outlay for the nail gun in relation to the number of fixings undertaken would normally preclude use by private do-it-yourself enthusiasts. The rise of plant-hire shops particularly in the UK has made such guns accessible to a limited extent to private individuals.

(12) Hilti's range of nail guns, nails and cartridge strips have obtained some patent protection.

12.1. One of Hilti's latest nail guns, the DX 450, has certain novel features as compared with

its earlier models (e.g. DX 100 and DX 350) which are patented. Hilti has patent protection for nail guns throughout the EEC which is due to expire between 1986 and 1996 depending on the country and patented feature involved.

12.2 In the EEC Hilti also obtained patents for certain nails in all Member States except Denmark. These patents have expired already in certain Member States and will all have done so by 1988. This patent protection has not, however, prevented several manufacturers from producing a range of nails of apparently similar characteristics for specific use in Hilti nail guns as well as other manufacturers' guns. Hilti has never taken any legal action on the basis of these patents.

12.3. The individual brass cartridges used before the advent of cartridge strips for semi-automatic nail guns were not patented and supplies of such cartridges were freely available from several sources. The 10 shot cartridge strip developed by Hilti for use in the DX 350 was patented in all Member States. It is now used in other models, notably the DX 450. In Greece these patents expired in 1983 and in the Federal Republic of Germany in 1986. In all other Member States they will expire in 1988 or 1989.

Fiocchi, a former supplier to Hilti, is now an independent cartridge and cartridge strip producer. Hilti has taken legal action against the sale of Fiocchi cartridge strips in the Federal Republic of Germany (where prior to the expiry of the patents it successfully obtained an injunction to prevent sale) and Italy. Legal action for breach of patent was also threatened in Denmark against an independent distributor of cartridge strips for use in Hilti's nail guns but which were not made by Hilti. This caused the withdrawal of the strips. Legal action was taken in the UK in respect of cartridge strips (details below). In the USA Hilti's patent for cartridge strips is more narrowly drawn, therefore independent cartridge strip makers have been able to design and sell cartridge strips for Hilti nail guns without infringing Hilti patents. Other nail gun producers produce or distribute cartridge strips which will operate in their own nail guns but not in Hilti's and which apparently operate on similar principles to Hilti's strips.

⁽¹⁾ Hilti has announced its intention to market nails in holders that will be automatically fed into the nail gun. This will make nail guns fully automatic. This recent development is not however relevant for the present case.

In the UK the original patent granted under the Patent Act 1949 would normally have expired after 16 years in July 1984. The Patent Act 1977 extended the term of all new and existing patents to 20 years in order to harmonize their term with patents elsewhere in the EEC. The cartridge strip patent is thus due to expire in July 1988. All patents which have been extended by this Act are, during the period of extended validity, subject to a 'licence of right'. In the absence of an agreement between the licensor and licensee, the UK Comptroller of Patents, Designs and Trademarks fixes the terms of the licence. In addition to patent protection, Hilti maintains that in the UK the design of its cartridge strips without cartridges benefits from protection under UK design copyright law. The drawings of cartridge strips for which Hilti claims copyright and which would according to Hilti be breached by three-dimensional reproduction are the ones attached to Hilti's patent application.

Ireland	(...) %
Italy	(...) %
Netherlands	(...) %
United Kingdom	(...) %

Note: Hilti estimates that of other competitors only Spit (approximately (...) %) and Impex (...) % have significant market shares of the EEC market as a whole. Other producers have small or insignificant market shares. According to figures available to the Commission, Spit's market share in the EEC may be slightly overestimated by Hilti. In any case its sales are concentrated very much in France and to a lesser extent the UK; in both these countries its market share is still significantly less than Hilti's.

- (13) The information in the Commission's possession does not indicate that any patents claimed by other producers of nail guns for cartridge strips would prevent third parties from manufacturing cartridge strips that could be used in these nail guns.

II. THE MARKET

(c) Share of sales

- (14) The Commission's best estimates of Hilti's market share for nail guns in each Member State are shown in the following table. No estimates are available for Spain and Portugal, but on the basis of the facts available to the Commission there is nothing to suggest the market structure is radically different from other Member States. Hilti has an approximate market share in the whole EEC of around (...) %.

Hilti's estimated approximate market shares (nail guns 1982)

(Source: Hilti own estimates and PASA UK ⁽¹⁾)

Belgium/Luxembourg	(...) %
Denmark	(...) %
Federal Republic of Germany	(...) %
Greece	(...) %
France	(...) %

- (15) Very precise estimates of Hilti's share of sales of cartridge strips and cartridges and nails by Member State are not available. In the UK, where estimates are available from PASA, Hilti's share of sales for nails is between (...) % and (...) % and for cartridge strips around (...) %. No other company apart from Spit has over (...) % of the market. On the basis of the figures available, the Commission considers that the share of sales estimated for the UK (i. e. Hilti having a higher share of consumable sales than for tools) can be taken as an approximation for the situation in other Member States. Therefore it estimates that Hilti's share of sales for consumables in the EEC must be at least equal to that for its tools. Hilti makes its own nails, whereas its cartridges and cartridge strips are made for it by Dynamit Nobel and Nouvelle Cartoucherie de Survilliers — see details below. Formerly Fiocchi also supplied cartridges and cartridge strips to Hilti but the relationship has been discontinued. Most other nail gun manufacturers make or have made specifically cartridge strips and nails for use in their own guns, whilst a minority rely on third parties to supply one or more of these consumables. Certain of these nail gun producers also produce nails and/or cartridge strips which can be used in other producers' nail guns, including Hilti's.

- (16) Apart from the nail gun makers themselves, other producers not manufacturing nail guns also supply consumables for nail guns (independent nail or cartridge producers). There are more independent nail makers than cartridge makers.

⁽¹⁾ PASA UK is the trade association in the UK for PAFS.

- (17) In addition to the complainants, Eurofix and Bauco, there are several independent producers of nails for nail guns in the EEC. Because Hilti nail guns have by far the largest market share, these independent nail makers are mostly interested in supplying nails for use in Hilti nail guns. However, because of commercial practices described below, the sales of independents' nails for Hilti nail guns have been limited, although certain independents have succeeded in selling outside the EEC. These independent makers, and in particular the complainants, allege that Hilti's practice of tying sales of nails and cartridge strips (or measures having the equivalent effect) has severely limited their penetration of the market. They claim that, in the absence of such tying, their sales would be higher and that the maintenance of artificially low production runs increases their costs. Some of these independent nail makers also produce nails for use in makes of nail guns other than Hilti's. It is concluded that Hilti's share in the EEC of the market for Hilti-compatible nails is therefore very substantial, being in excess of its share of the market for nails in general.

- (18) There are only three significant independent producers of cartridges for nail guns in the EEC — Dynamit Nobel (Federal Republic of Germany), Nouvelle Cartoucherie de Survilliers (France), and Fiocchi (Italy). Hilti AG has agreements with Dynamit Nobel and Nouvelle Cartoucherie de Survilliers for cartridge development. These cartridges are sold by Dynamit Nobel and Nouvelle Cartoucherie de Survilliers direct to Hilti's distribution subsidiaries or Hilti's official exclusive distributors. Apart from these producers Fiocchi is the only significant EEC producer of Hilti-compatible cartridge strips known to the Commission. Until recently (1985) Fiocchi, like Dynamit Nobel and Nouvelle Cartoucherie de Survilliers, produced cartridges and strips for Hilti. Because it only recently ceased to be a Hilti supplier it is difficult to estimate its likely future sales of cartridge strips for Hilti nail guns. However, because of continuing patent protection in most Member States (except Greece and the Federal Republic of Germany, and the UK where there is a licence of right), such sales may be limited.

- (19) As stated above the nails and cartridge strips must be made specifically to operate in certain brands or

types of nail gun and cannot be used in all brands. As far as the Commission is aware only Hilti has claimed and successfully enforced any patent protection for its cartridge strips and any cartridge strips that could function effectively in Hilti nail guns would apparently breach Hilti's patent. In the UK Hilti maintains that, whilst cartridge strips reproducing the design of Hilti strips would breach its copyright, it is possible to make strips of a different design such as those produced by Fiocchi without breaching such copyright. However, Bauco alleges that any cartridge strips which can function both safely and effectively in a Hilti nail gun must be so similar in design to the Hilti strips that they would seriously risk infringing Hilti's alleged copyright. Moreover Hilti has not recognized any strips other than those of its own design as being capable of functioning safely and effectively in its own nail guns. It is concluded that Hilti's share in the EEC of the market for Hilti-compatible cartridge strips is therefore very substantial, being greatly in excess of its share of the market for cartridge strips in general.

- (20) In the USA, because cartridge strip patents are more narrowly drawn, cartridge strips from non-nail gun producers are more readily available than in the EEC, and independent cartridge strip and nail producers have a larger share of the market. Some nails produced by nail gun makers for their own guns are sold for use in other brands of nail guns. Furthermore, some of the independent nail makers in the European market also sell in the USA.

(d) Distribution system of nail guns and consumables in the EEC

- (21) Hilti's distribution policy in the EEC has generally been to sell direct to end users. In Belgium, the Federal Republic of Germany, France, Spain, Ireland and the UK, Hilti operates through wholly-owned subsidiaries. In Portugal, Italy, Greece, Denmark and the Netherlands, Hilti has appointed exclusive local distributors who are closely tied to Hilti by the Hilti International Agreement. The agreements with these independent distributors contain most if not all of the following features :

- (a) the distributor is given exclusive rights to sell in the country in which he is to operate ;
- (b) the distributor agrees only to sell direct to end users ;

- (c) the distributor is not allowed to manufacture, deal in or sell products which compete directly with Hilti products;
 - (d) Hilti will help the distributor with all necessary information and training;
 - (e) the distributor agrees to follow the general policy of the Hilti International Group pursuant to the Hilti International Charter, which provides for close cooperation between the parties;
 - (f) the distributor is free to fix his prices after consultation with Hilti, and taking into account Hilti International Group pricing policy.
- (22) In certain Member States, Hilti has started to sell to non-end users such as plant-hire companies or other distributors which are playing a small but significant and increasingly important role in the distribution of nail guns and consumables. There are no formal distribution agreements with these plant-hire companies or other distributors. In the UK, Denmark and Spain in particular, non-direct dealing has now gained a significant if not yet very large proportion of Hilti's sales⁽¹⁾.
- (23) Other nail gun manufacturers use a variety of different distribution systems. Certain manufacturers operate through wholly-owned subsidiaries and to a lesser extent exclusive dealers for certain Member States with a policy of selling direct to end-users. Others, often smaller producers, use a mixture of selling direct to end-users and selling via dealers or plant-hire companies which are organized on an informal and non-exclusive basis. A minority operate mainly through dealers or plant-hire companies on an informal and non-exclusive basis.
- (24) Because of their relatively small size, the independent nail makers, including the complainants, who currently manufacture nails for use in Hilti and other nail guns, normally sell via plant-hire companies or similar distributors/dealers. In addition Eurofix has its own salesmen who deal directly with end-users.

⁽¹⁾ The proportion of customers dealt with by non-direct dealing is apparently much larger than the proportion of sales because Hilti deals normally direct with large customers, whereas small customers are more usually served by plant-hire companies or distributors.

III. COMPLAINTS AND UNDERTAKING

(e) Complaints

- (25) By a formal application dated 7 October 1982, under Article 3 of Regulation No 17, Eurofix complained to the Commission that Hilti had breached Article 86 of the EEC Treaty. It claimed that Hilti AG, acting through its EEC subsidiaries, was pursuing a commercial strategy designed to exclude Eurofix from the market for nails compatible with Hilti products. In essence Eurofix alleges the following: that Hilti refused to supply independent dealers or distributors of Hilti products with cartridge strips without a requisite complement of nails; that in response, in order to sell its nails for Hilti nail guns, Eurofix tried to obtain supplies of cartridge strips itself; that Hilti induced its independent dealer in the Netherlands to cut off supplies of cartridge strips that Eurofix had previously obtained from this source; and that Eurofix was also refused supplies of cartridge strips following a direct request to Hilti. Eurofix also applied for a licence of right, the terms of which were subsequently fixed by the Comptroller of Patents. Hilti made it clear to the complainant that it considered that such a patent licence did not give any licence under copyrights which Hilti claims to hold in the UK.
- (26) Bauco made a similar complaint to the Commission alleging that Hilti had breached Article 86 and requested interim measures. By a formal application dated 26 February 1985, under Article 3 of Regulation No 17, Bauco alleged the following: that its customers could not buy Hilti cartridge strips without nails, thus making it difficult for Bauco to sell its nails; that Hilti refused to supply cartridge strips to Bauco; that Bauco's attempts to buy via third parties cartridge strips from Hilti's independent distributor in the Netherlands were blocked; and that Hilti reduced discounts to Bauco's customers on Hilti goods because they bought Bauco nails. Furthermore, Hilti refused to grant Bauco a licence to manufacture or import cartridge strips. When Bauco did manufacture or import such strips Hilti initiated injunction proceedings for copyright and patent infringement. As a result Bauco submitted to an agreement on 4 December 1984 by which it would not sell, import or manufacture cartridge strips of a design which reproduced drawings of which Hilti owns the copyright or which infringed Hilti's patents. Bauco applied for a licence of right but fears that because of Hilti's alleged copyright a licence of right under patent law will be of little value. The terms of the licence of right have subsequently been fixed by the Comptroller of Patents.

(f) **The interim measure proceedings and subsequent undertaking by Hilti**

- (27) Acting specifically on Bauco's request for interim measures, the Commission requested information from Hilti pursuant to Article 11 of Regulation No 17 and also carried out an investigation pursuant to Article 14 of Regulation No 17 at the premises of Hilti GB.
- (28) After analysis of the information thus collected, the Commission considered that there was a *prima facie* case that Hilti held a dominant position in the market for both nail guns and consumables and had abused that position *inter alia* by making the supply of cartridge strips conditional on the purchase of nails. Consequently, the Commission initiated the procedure pursuant to Article 3 (1) of Regulation No 17 and sent a statement of objections to Hilti on 9 August 1985, the object of which was to lead to interim measures being taken.
- (29) Rather than exercise its right of defence in the case for interim measures, Hilti without prejudice offered, and the Commission accepted, an undertaking on 27 August 1985 which was to last until the Commission had completed its investigations and made a final determination on the case⁽¹⁾. For the duration of this undertaking, Hilti declared that it would no longer tie the sale of cartridge strips to that of nails and would not discriminate by discounts against orders for cartridge magazines alone or take any measures with similar effect. Subsequent to this undertaking the Commission completed its investigations, which have led to the present Decision.

IV. HILTI'S COMMERCIAL BEHAVIOUR

(g) **Tying of cartridge strips and nails**

- (30) The Commission enquiries reveal that Hilti carried out a policy of supplying cartridge strips to certain end-users or distributors (such as plant-hire companies) only when such cartridge strips were purchased with the necessary complement of nails. In reply to a request for information pursuant to Article 11 of Regulation No 17, Hilti originally denied that any such tying took place. 'The salesmen of Hilti GB offer a full Hilti fastening system but there is no doubt that each item of the

system can be obtained separately and independently from the other ... and there is no doubt that there are independent markets for firing tools, which are sold only once to a particular end user, and for the consumable accessories, such as cartridges and fasteners (nails and studs) which have to be replaced currently' ... 'The customers of Hilti tools are free to place their orders for nails and cartridges, wherever they want' (point 1.2 of the letter of Hilti of 23 March 1983)⁽²⁾.

- (31) During the course of the investigation, however, the following facts emerged.

31.1. In their complaints both Eurofix and Bauco reported that their customers had experienced difficulties when ordering cartridge strips without nails from Hilti. For Eurofix this difficulty goes back as far as 1981. Bauco customers have had difficulties since 1984 when Bauco started selling Hilti compatible nails.

31.2. In reply to letters about the market situation, sent pursuant to Article 11 of Regulation No 17, a Danish and a German independent nail maker each alleged that Hilti had a practice of tying nails and cartridge strips making it difficult for them to sell their nails.

31.3. Internal Hilti GB documentation made available to the Commission's inspectors shows that such tying took place with regard to certain customers. The letter from Hilti GB to Hilti AG of 17 May 1983 concerning a Eurofix customer states: 'The customer has now been advised that an embargo has been placed on cartridge-only sales (only a verbal restriction has been passed to the customer with nothing in writing)'. The internal memo of 24 June 1983 to Midland Region Sales Force from Hilti GB concerning another Eurofix customer states that this customer '... wanted a large quantity of Hilti cartridges. These would appear to be required in connection with Profix (Eurofix) nails and should in no circumstances be supplied to a customer. If any of you have similar requests, will you please inform your area manager immediately'.

⁽¹⁾ EC Bull. 9/1985 (point 2.1.42).

⁽²⁾ This denial was repeated in Hilti's letter of 4 June 1985 to the Commission before the inspection at Hilti GB premises 'Hilti does not condition the sale of cartridges to end users or plant-hire companies upon the purchase of its nails' although this remark was qualified (see point 34.4 below).

31.4. In general, if Hilti considers that the cartridges are for use with nails which Hilti may unilaterally consider as unsafe, such orders are refused. Apparently Hilti considers that any use of Bauco or Eurofix nails in Hilti nail guns is unsafe⁽¹⁾.

- (32) In its reply to the statement of objections Hilti acknowledges that in individual cases there was a refusal to supply customers with cartridge strips without nails. Following the undertaking by Hilti, both complainants report that it is now easier to sell their nails, as cartridge strips are generally being made available by Hilti without a complementary supply of nails.

(h) Discrimination relating to cartridge only orders

- (33) In cases where Hilti did not carry out the tying described above, it attempted to block the sale of competitors' nails by a policy of reducing discounts for orders of cartridges without nails. The reduction of discounts was not linked primarily to any objective criteria such as quantity but was based substantially on the fact that the customer was purchasing competitors' nails.

- (34) The facts in relation to this matter are as follows :

34.1. In its complaint Bauco alleged that its customers had had their normal discounts reduced by Hilti because of the purchase of Bauco nails.

34.2. Internal Hilti GB documentation made available to the Commission's inspectors shows that such reduced discounts were used as a way of attempting to block the sale of competitors' nails. The letter from Hilti GB to Hilti AG of 17 May 1983 discussing the case of a Eurofix customer states: 'Their discount on DX cartridges would be reduced significantly and only granted at the level where equal quantities of fasteners were purchased with cartridges'. This follows this customer's letter to Hilti GB of 9 May 1983 asking for his usual discount on a large cartridge order. Hilti GB internal instructions to all area managers of 6 February 1981 states: 'You must ensure that customers who

buy nails from Profix for use in Hilti tools do *not* continue to receive, after an appropriate length of notice from you, site servicing of tools, training, technical advice and discount on cartridges. It must be brought home to users that such Hilti services will not be made available to purchasers of Profix nails'. A further example is Hilti GB's letter of 23 May 1985 to one of Bauco's customers, stating Hilti's intention of reducing their discount. Internal Hilti documentation shows that Hilti realised that it would be difficult to refuse to supply long-standing or regular customers but that to reduce discounts could have the same effect. Firth Industrial Services' (a major customer of Bauco) discount was also significantly reduced, as was that of Sandell Perkins. These cases will be dealt with below.

34.3. Bauco claimed that discrimination with regard to cartridge only orders occurred in that one of its customers was told by Hilti that orders of over 5 000 cartridges without nails had to be approved by the regional manager.

34.4. In view of the facts presented by the second complainant but before the investigation at Hilti GB premises Hilti did not deny these practices. In its letter of 4 June 1985 to the Commission Hilti states: 'In its marketing efforts Hilti does attempt to influence and to persuade customers to use Hilti direct fastening systems only with Hilti supplies. To the same end it attempts to influence and to persuade plant-hire companies to buy the required nails from Hilti when ordering cartridges. In these attempts Hilti grants discounts to plant-hire companies purchasing both cartridges and nails'. The letter further states with respect to orders of over 5 000 cartridges: 'In such cases the responsible manager also may and frequently will attempt to persuade the customer to purchase the respective other consumables from Hilti as well and he may offer a discount'. Hilti's letter to the Commission of 3 October 1985 after its undertaking confirms again this view: 'It may well be true that one of the reasons given by Hilti to some of the plant-hire companies for withdrawing preferential treatment⁽²⁾ was their practice of

⁽¹⁾ Hilti's claims regarding the safety and fitness for their intended use of non-Hilti nails is also discussed below.

⁽²⁾ I.e. normal quantity discount levels.

supplying into Hilti DX systems nails which Hilti did not consider sufficiently reliable in respect of the safety of its systems'.

- 34.5. In its reply to the statement of objections Hilti recognizes that it had a general policy of special discounts for the purchase of cartridge strips plus nails and/or the refusal of normal discounts for cartridge strip only orders.

(i) Hindering or preventing exports

- (35) Hilti exerted pressure on its independent distributors, notably in the Netherlands, not to fulfil certain export orders, notably to the UK. As a result Hilti Netherlands was only willing to fulfil orders for export outside the EEC. The fulfilling of any large export orders including those from the UK would normally be profitable to Hilti Netherlands and it is therefore clear that such unwillingness was a result of the pressure and persuasion on Hilti's part described below.

- (36) The facts in relation to this matter are as follows :

36.1. Both the complainants experienced difficulties. In 1981 Eurofix purchased cartridges via a third party from Hilti Netherlands at approximately half the then current UK list price. Eurofix's subsequent attempts to obtain supplies were refused, when, it alleges, Hilti GB became aware of the source of such cartridges on the UK market. Bauco also alleges in its complaint that it tried to obtain cartridges from Hilti Netherlands via third parties because prices were significantly lower. The reply by Hilti Netherlands to this order was that Hilti AG had given instructions not to supply cartridges without nails. On further contact in January 1985 Hilti Netherlands offered cartridges on condition that they were for export outside the EEC.

36.2. Hilti documents sent in reply to a request pursuant to Article 11 of Regulation No 17 show that Hilti Netherlands was persuaded not to supply Eurofix, and confirm the above version of the events. In its letter to the Commission of 23 March 1983 Hilti states that the first order of Eurofix in 1981 was fulfilled because it was meant for export and

a discount was given because Hilti would have no training costs. In its letter of 21 January 1985 to the Commission (before the second complaint was received) Hilti sent further details concerning this aspect of the case. It appears that once Hilti GB determined the source of Eurofix's cartridges, it contacted Hilti AG which sent a circular letter to all its subsidiaries and independent distributors warning them not to supply Profix (Eurofix), which had no independent supplies of cartridges (see Hilti circular letter of 14 December 1981). An earlier Hilti circular of 24 November 1981 also warned about supplying Profix (Eurofix) with cartridges. It further warned about supplying with cartridge strips certain other named independent distributors of Hilti tools in the UK who were at the time supplied by Hilti GB and who were suspected of supplying Profix. A further letter of 17 June 1982 from Hilti AG was addressed to Hilti Netherlands giving them a model reply with which to refuse any orders from Profix (Eurofix) based on alleged safety considerations.

- (37) Following the undertaking both complainants have been able to obtain either direct or indirect supplies of Hilti cartridges from Hilti Netherlands.

(j) Refusal to supply Eurofix, Bauco or other competitors

- (38) Hilti has a policy of not supplying cartridges to independent producers of nails or to other nail gun producers. In response to requests, Hilti has consistently refused to supply Eurofix and Bauco.

(k) Delaying or frustrating the granting of a licence of right

- (39) In order to sell their nails in the face of the difficulties described above, the complainants attempted to obtain their own independent supply of cartridge strips not manufactured by or for Hilti. Such independent supplies necessitated a patent licence. Hilti was however unwilling to grant any licences. Even though licences of right were available in the UK from 1984, Hilti tried to fix the royalty so high as to amount to a refusal. It also stated to would-be licensees that any patent licence would not give any rights under copyright it claimed for such cartridge strips.

(40) The facts in relation to this matter are as follows :

40.1. Hilti's letter of 20 November 1984 to Eurofix stated that it had a policy of not granting patent licences but that, since Eurofix could obtain a licence of right, it proposed a royalty of 28 %. Hilti further stated that such licence would give no rights under Hilti's alleged copyright.

40.2. Bauco's request for a licence of right (proposed royalty 2 %) met exactly the same response — see Hilti's letters of 18 May 1984 and 20 August 1984 which proposed a royalty of 28 % and warned against breach of Hilti's alleged copyright. Bauco started to make cartridges before it had obtained a licence of right and Hilti started proceedings for an interlocutory injunction on the basis of alleged copyright and patent infringements. A High Court injunction restrained Bauco from dealing in cartridge strips that infringed Hilti's patent and alleged copyright.

40.3. Hilti's internal letter of 25 July 1984 made available to the Commission's inspectors shows clearly that Hilti knew it had to grant a licence of right but 'asked for a high licence fee with the intention that Bauco would not accept' ⁽¹⁾.

40.4. When at a later stage in the proceedings Hilti did not contest the figure proposed by Eurofix, the Comptroller of Patents fixed the royalty at the level requested by Eurofix of three pence per strip (i.e. approximately 5 % of Hilti's list price). Hilti's original proposal was thus approximately 600 % higher than the settled figure. The case is still subject to litigation pending appeal by Hilti on matters not related to the royalty.

(l) Refusal to supply cartridges which might be for resale

(41) Where Hilti thought that cartridge strips for which it had received orders might be sold on to independent nail makers, it refused supplies even to admittedly long-standing customers. Hilti has recognized that it carried out this policy.

(m) System of discriminatory discounts in UK

(42) In addition to the lower discounts on orders of cartridges only described above, Hilti initiated a

policy of classifying plant-hire companies and on-sellers as supported or non-supported. According to this system the former receive a higher rate of discount than the latter, even for orders of similar quantities. In addition to certain qualitative criteria, such as willingness to carry out training, the following conditions for supported plant-hire companies and on-sellers are included :

— to be in a central location,

— to be prepared to enter into an arrangement with Hilti and to accept a policy of continued direct selling, and

— to recognize brand loyalty with a family of products.

(43) In its letter of 23 January 1986 to the Commission, Hilti described the policy and stated that it decided to apply this policy unilaterally and without consultation of plant-hire companies and on-sellers. Hilti has never stated publicly or to its customers that it operates this system or what criteria are involved for obtaining the supported status. In fact unsupported plant-hire companies have had their discounts significantly reduced without any explanation or even information about the criteria for selection ⁽²⁾. Moreover, since 'brand loyalty with a family of products' is a criterion for selection, it would appear that use of independents' consumables for PAFS may lead in certain cases to unsupported status with its consequent significant reduction in discounts ⁽³⁾.

(n) Refusal to honour guarantees

(44) Hilti has a policy of refusing to honour the guarantees on its tools when non-Hilti nails are used. Hilti acknowledges this refusal to honour guarantees.

(o) Selective or discriminatory policies directed against the businesses both of competitors and of competitors' customers

(45) Hilti had a regular and well-established policy of applying discriminatory tactics (normally in the form of selective price cuts or other advantageous terms) directed against the businesses both of competitors and of competitors' customers. This policy is applied not only against manufacturers of consumables for Hilti nail guns but also against other manufacturers of nail guns.

⁽¹⁾ In the proceedings before the Comptroller of Patents, Hilti originally requested a royalty rate of 18 pence per strip which amounted to a royalty of 30 % of Hilti's list price (36 % of price at 20 % discount). Later in the proceedings it did not contest the figure proposed by Eurofix.

⁽²⁾ The system covers other products in addition to PAFS. For PAFS supported dealers have discounts of 15 to 20 %. Unsupported dealers have discounts of 0 to 10 %.

⁽³⁾ Hilti internal memo of 20 September 1983.

(46) The facts in relation to this matter are as follows :

46.1. The internal Hilti document of 5 March 1984 made available to the Commission's inspectors compiles a list of certain users of non-Hilti nails guns, notably Spit and Impex. It summarizes the strategy to be adopted to convert the customer to Hilti and involves special trade-in and discount deals and even tools free of charge. Certain users of Profix nails are also identified with a strategy of offering extra discounts in order to encourage conversion to Hilti.

46.2. Further internal notes of 5 March 1984, 23 September 1983, 20 September 1983, 21 January 1982 and 5 November 1981 confirm that the selective or discriminatory policy towards competitors and their customers did not comprise isolated incidents. In each case specific customers of competitors are identified and special discriminatory deals are offered to convert these customers to Hilti.

46.3. The case of Firth deserves special mention as it shows a carefully planned strategy applied by Hilti against the business of one of Bauco's main customers. Firth, a plant-hire company, was a large customer of Hilti for many years, which because of the quantity of its purchases was obtaining high discount rates from Hilti (25 % on PAFS). Its business was growing successfully. Firth started to purchase non-Hilti nails which was noticed by Hilti because of Firth's demand for cartridges without nails. Principally as a result of its decision to take non-Hilti nails and expand its business to customers previously supplied by Hilti direct, Firth's discount was reduced to 10 % across the whole range of Hilti products. This was done unilaterally by Hilti without explanation. When, as expected by Hilti, Firth requested the normal discount and refused to pay the invoices with the low discount, its account was placed on 'stop'. At the same time Hilti identified Firth's customers, who were offered 'competitive consumables' or special package deals going far beyond Hilti's normal discounts in order to entice them away from Firth. As a result Hilti was able to increase sales in Firth's area at Firth's expense with the effect not only of reducing Firth's sales but also of reducing Bauco's sales to Firth. This version of events is confirmed by Hilti's internal memos of 15 November 1984, 7 December 1984, 4 March

1985 and 10 May 1985. In addition Firth also gave estimates to the Commission of the business lost as a result of Hilti's policy.

46.4. After the undertaking by Hilti, Firth continued to receive unfavourably discriminatory treatment from Hilti. Its order for 20 000 cartridges was refused and only 5 000 were offered. It should be noted that this figure of 5 000 was used by Hilti prior to the undertaking as the threshold for monitoring whether non-Hilti nails were being used. Hilti states that this is a coincidence and Firth was in fact limited to its normal business requirements. It was only after the intervention of the services of the Commission concerning respect of the undertaking in general that Hilti without prejudice agreed to reimburse Firth all the outstanding and disputed discounts and also to fulfil the order for 20 000 cartridges. This version of events is confirmed by Hilti's letter of 16 September 1985 to the Commission, the Commission's letters of 26 September and 4 October 1985 to Hilti and Hilti's letter of 14 October 1985 to Firth.

(47) Sandell Perkins, another plant-hire company and one of Bauco's major customers, also experienced some of the same difficulties as Firth. Its discounts were reduced unilaterally by Hilti because of purchases of Bauco nails, not because of a reduction in the quantity of its purchases⁽¹⁾. This was an example of Hilti's application of its policy towards unsupported plant-hire companies. Following discussion between Hilti and the services of the Commission in respect of the undertaking in general, Hilti on its own initiative reinstated Sandell Perkins' former higher discount level (letter of Hilti of 17 December 1985).

(p) Other behaviour subsequent to the undertaking

(48) In the case of Firth above it has been described how, subsequent to the undertaking, Hilti tried to implement a policy of limiting the number of cartridges ordered without nails to a quantity in line with 'previous requirements'. Companies which were Bauco's or Eurofix's customers may well have had low previous purchase 'requirements' because of Hilti's policy of tying or reducing discounts. A further example of Hilti's practices,

⁽¹⁾ Sandell Perkins had been identified as a Bauco customer in internal Hilti documents (memo of 14 May 1985).

after the undertaking, was its attempt to limit Flag Hire to 2 000 cartridges a month when it had ordered 25 000. Following discussions between Hilti and the services of the Commission concerning respect of the undertaking in general this policy was reversed (see Hilti's letter to the Commission of 17 January 1986).

- (49) Hilti now appears in general to supply cartridge strips without nails. However Hilti still apparently continues in certain cases to give lower quantity discounts on cartridge only orders. This policy can discourage such orders. Hilti's letter to the Commission of 17 January 1986 concerns a customer which was offered only 10 % discount instead of the normal quantity discount of 25 % on an order of 25 000 cartridges. In fact Hilti is apparently still applying its secret and unilateral policy of differential discounts to supported and unsupported plant-hire companies for which one of the criteria is brand loyalty in general and purchase of Hilti consumables in particular.

V. ECONOMIC CONSEQUENCES OF HILTI'S BEHAVIOUR

- (50) Hilti is by far the most important producer and supplier of consumables in the common market. It has also been able to limit the market penetration of independent nail and cartridge strip producers who wish to sell consumables for Hilti nail guns, to the extent that these independent producers supply only a relatively small proportion of the consumables used in Hilti nail guns.
- (51) Hilti has been able to charge very different prices on the markets of the different Member States. Even on the basis of figures provided by Hilti (which the Commission considers underestimate the differences and exclude certain Member States), the price differences between Member States where Hilti distributes itself can be as large as (...) % for guns, (...) % for cartridge strips and (...) % for nails. If account is taken of the Member States where Hilti operates through independent distributors, the differences can be as great as (...) % for guns, (...) % for cartridge strips and (...) % for nails. In addition Hilti is able to make very large mark-ups on its different products. In Member States where Hilti distributes itself the mark-up can be as great as (...) % for guns, (...) % for cartridge strips and (...) % for nails. In fact, if account is taken of the different transfer prices between Hilti AG and its subsidiaries, the mark-ups would appear even greater. These mark-ups should be seen in the light of the fact that the distribution costs for Hilti's subsidiaries are approximately (...) % of revenue minus cost of purchase.

VI. PROOF AND JUSTIFICATION

- (52) The Commission has obtained a considerable amount of evidence to establish the above

described commercial behaviour not only from both the complainants who felt the effects of these policies in the market and their clients who were also the object of Hilti's policies, but also from Hilti's letters or internal memos. This is despite the fact that Hilti had a policy in general of not informing its clients in writing of its policies or the reasons therefor (for example, internal Hilti note of 4 March 1985). It is true that subsequent either to the complaints or to the Commission's investigation and statement of objections most of these practices have been admitted. Whilst admitting these practices Hilti maintains it was motivated by concerns about safety, the necessity to ensure adequate training and a need to exclude sub-standard consumables. These arguments are dealt with below in the legal assessment.

B. LEGAL ASSESSMENT

(a) Article 86

- (53) Under Article 86 of the EEC Treaty and abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

(b) Undertakings

- (54) This Decision is addressed to Hilti AG (Liechtenstein) which controls directly or indirectly the actions of its subsidiaries forming part of the Hilti Group. Although some of the commercial policies described above were carried out by Hilti subsidiaries, notably Hilti GB (against whom the original complaint was lodged), there is no doubt from the documentary evidence available that these general commercial policies, if not every individual detailed application of such policies, were carried out under the direction of or with the knowledge of Hilti AG⁽¹⁾. The strategy of attempting to prevent independent nail makers from supplying nails for use in Hilti guns is Hilti AG policy. Hilti AG is therefore responsible for any action of its subsidiary companies undertaken in pursuit of the group policy as well as for its own role in the matters to which objection is taken. Hilti AG and its subsidiaries must therefore be considered to be a single undertaking within the meaning of Article 86.

⁽¹⁾ For example, letter from Hilti AG to Hilti GB of 15 June 1983.

(c) The relevant market

can be transported throughout the EEC without any excessive transport costs.

Commission's view

Hilti's view

(55) Cartridge strips in particular and nails to a lesser extent for most brands of nail gun must be specifically adapted to a particular brand of nail gun in order to function properly. Consequently the user of a Hilti nail gun needs a supply of both cartridge strips and nails specifically produced for use in this gun. As a result the relevant product markets in this case are the separate markets for Hilti-compatible cartridge strips and Hilti-compatible nails. They are separate markets, because from the supply side nails and cartridge strips are produced with totally different technologies and often by different firms. On the demand side it is true that a user needs an equal complement of nails and cartridges, but they are not necessarily purchased together in identical quantities. This may be explained partly by the fact that there are many more different types of nails than cartridge strips and nails are sometimes fixed manually rather than with a nail gun. It should be noted however that, for producers who already manufacture nails and cartridge strips for one brand of nail gun the barriers to entry for the production of such products for other brands of nail gun are relatively low in the absence of any artificial or institutional barriers. In addition, nail guns also constitute a separate relevant market that must be considered in this case.

(56) Thus whilst Hilti potentially competes on the separate relevant markets for cartridge strips and nails in general, it competes directly on the markets for cartridge strips and nails for use in its own guns. Hilti has patent protection for its cartridge strip throughout the Community (except in Greece and Germany where the patents expired in 1986 and in the UK where the patents are subject to a licence of right). In addition, in the UK Hilti claims copyright protection for its cartridge strips. This has prevented independent producers of cartridge strips from producing or selling such strips. In relation to nails, however, no such institutional barrier exists; in the absence of Hilti's policy of tying the sale of nails to patented cartridge strips or measures tending to the same effect, there would be no significant barriers to entry to the market for Hilti-compatible nails for other nail makers.

The relevant geographic market for nail guns and Hilti-compatible consumables is the whole EEC. In the absence of any artificial barriers these products

(57) The Commission does not accept the view put forward by Hilti that nail guns, cartridge strips and nails must be seen as forming one integral system: powder actuated fastening systems. The very fact that there exist independent nail and cartridge strip makers who do not produce nail guns shows that these articles have different supply conditions. Moreover, certain nail gun manufacturers rely on independent nail and cartridge strip producers to supply at least in part some of their consumables. Hilti itself relies on Dynamit Nobel and Cartoucherie de Survilliers (and formerly Fiocchi) to supply independently its subsidiaries and distributors direct with cartridge strips. Some independent nail makers also supply nail gun manufacturers with nails. Finally, on the demand side, it should be noted that the purchase of a nail gun is a capital investment which, under normal usage, is used and amortized over a relatively long period. Cartridge strips and nails constitute current expenditure for users and are purchased in line with current requirements. Nail guns and consumables are not purchased together; indeed the decision depends on a different set of considerations. These factors were pointed out in Hilti's letter to the Commission of 23 March 1983 which in fact considered nails, cartridge strips and nail guns to constitute separate markets. It can therefore be concluded that nail guns, cartridge strips and nails, even if inter-related, have different sets of supply and demand conditions and constitute separate product markets.

(58) Just as it cannot accept that powder actuated fastening systems (PAFS) must be considered as a single market, the Commission does not accept Hilti's view that these systems form part of the relevant market constituted by fastening systems in general for the construction industry. It may be true that for each type of fixing that can be carried out by nail guns there is at least one other technically acceptable alternative. Fixings can be done by hand drills or with power drills and in certain other cases by spot welding, self tap screws, rivets or bolts and nuts. None of these fixing methods constitutes part of the same relevant market as nail guns for the reasons set out below.

(59) On the supply side the different types of fixing equipment are generally produced with totally separate technologies, under different supply conditions and generally by different firms (for example nail guns and spot welding equipment).

(60) On the demand side the Commission considers that for PAFS and other fixing methods to form part of the same relevant market, at least small but significant increases (decreases) in the price of either a nail gun, a nail or a cartridge would have to cause an appreciable shift of demand to (from) the alternative method of fixing. In other words the different fixing methods would have to be interchangeable on the basis of small cost changes alone. Only in these circumstances would it be impossible for a firm with a large share of the sale of one fixing method to be able to exercise any significant economic power and act independently of customers or competitors. If these conditions were fulfilled any such independent action or exercise of economic power by the producer of one fixing method would cause a large drop in the demand for that type of fixing and a corresponding increase for other fixing methods. This consideration is therefore important for defining the relevant market for purposes of the rules of competition. However, for the products in question the relative demand for the different types of fixing methods cannot be so price sensitive as to result in them forming part of the same relevant market. In fact no such shifts have been observed despite Hilti's behaviour. The reasons for this are set out below.

(61) There are many factors that enter into the choice of a fixing method to be employed for a specified job on a particular site, in particular:

61.1. the different technical possibilities of making a particular fastening, the type of materials to be fixed and the reliability of the necessary equipment when account is taken of the prevailing site conditions;

61.2. availability of the equipment and practicality of the different technical possibilities for the particular job;

61.3. the load bearing capacity and required durability of the fastening to be made;

61.4. technical skill or experience of operators available to make the fastening;

61.5. buildings laws and regulations;

61.6. time constraints to finish the job or contract;

61.7. the cost of the fixings which includes not only the cost of the material (nail and cartridge in the case of PAFS) but also set up time for the job and the time needed to accomplish the fixings (operator's wages), including setting up power sources where applicable.

(62) In view of the above PAFS have certain characteristics that differ sometimes radically from other fixing methods that are relevant in the choice of a fixing method to be employed for a particular job on a particular site.

— On the one hand:

62.1. PAFS are very versatile and easily portable. They can carry out a wide range of different types of fixings (e.g. metal to metal, wood to concrete) and require no on-site power sources;

62.2. no set up time is required to make a fixing (for example spot welding which is an alternative method of making certain metal to metal fixings requires 45 minutes set up time);

62.3. very little operator fatigue is involved with PAFS compared to some other fixing methods;

62.4. the time required to make an individual fixing by a PAFS is often substantially less than for alternative fixing methods (in the examples supplied by Hilti a self-tap screw can take five times longer than a PAFS fixing, or two fixings by drill and anchor for fixing a metal support bracket onto a concrete floor takes three times as long as by PAFS).

— On the other hand:

62.5. the nails and cartridges used to make one fixing are often substantially more expensive than the material used in other fixing methods (e.g. in the metal support bracket example supplied by Hilti the cost of the nail and cartridge was over three and a half times that of the material (screw and anchor) used in the alternative method of fixing);

62.6. PAFS cannot make fixings in certain materials;

- 62.7. certain other fixing methods have much higher load bearing capacity than PAFS for which the load bearing capacity can never be exactly determined in an individual case (especially in concrete) without a self-destruct test ;
- 62.8. for certain alternative fixing methods the load bearing capacity can be more readily calculated in advance ;
- 62.9. for technical reasons, there is a certain unreliability of PAFS fixings which gives rise to a failure of a proportion of PAFS fixings. Consequently a certain minimum number of fixings are always required. In addition this factor may oblige the operator to make a larger number of fixings than with other fixing systems and/or to come and replace the failures at a later date ;
- 62.10. for certain types of materials the failure of a PAFS to make an adequate and reliable fixing may not always be apparent without a self-destruct test ;
- 62.11. because for technical reasons PAFS nails cannot be made of stainless steel, there may in certain circumstances be doubts about their long term durability and ability to resist rust despite a zinc coating ; and
- 62.12. in certain Member States building regulations forbid the use of PAFS fixings for certain applications.
- (63) Because of the wide range of factors which enter into the choice of the fixing method to be used, and the very different characteristics (be they economic, legal or technical) between PAFS and other fixing methods they cannot be said to be part of the same relevant market. The choice of the best fixing method to use is made on the basis of a specific fixing application on a specific site (with all the technical, legal and economic considerations that can vary between specific applications and sites). In view of the great many factors that enter into this choice and of the fact that fixing elements are normally a very small part of building costs, the indications are that the prices of the elements of different fixing methods are not the only or crucial element in the choice of which fixing method to employ for a particular job. Therefore it is not conceivable that small changes in the price of a nail gun, nail and/or cartridge would cause an immediate and large shift to or from alternative fixing methods.
- (64) On the basis of certain assumptions about wage and consumable costs it is possible that for a limited number of specific fixings the total real cost of making the fixing by a PAFS or an alternative method is very similar, and that for some of these fixings the legal and technical factors discussed above are not critical in the choice of a fixing method. In these limited circumstances and for these fixings, operators may change to or from PAFS, from or to another method of fixing on the basis of relative shifts in price of the different fixing methods. This is not so however for the majority of fixing methods and small relative price changes, although an element will not be the crucial factor in determining the method of fixing ⁽¹⁾.
- (65) The above reasoning is supported by the material presented by Hilti to show the comparative cost of different methods of fixing used for specific jobs. In most of the cases presented a small but significant change in the price of nails and/or cartridges relative to other fixing methods (e.g. screw and anchor) would not change the order of the cheapest method of accomplishing the fixing. In many cases the cost of the consumable elements used in different fixing methods constituted only a small part of the overall cost of the job. In any case the Commission considers that the examples are not critical in that they only take account of some of the economic considerations that could enter into a full comparative cost analysis and are based on highly specific jobs and assumptions (e.g. concerning wage rates). Consequently it is dangerous to draw any general conclusions from the examples. Furthermore, these comparative cost examples cannot assess adequately for the most part all of the technical, economic and legal considerations listed above.
- ⁽¹⁾ In comparing fixings made by welded studs and PAFS Hilti's internal documentation comes to the conclusion that the choice of whether to use welded studs or PAFS is not dependent on the price of PAFS consumables. Other factors unrelated to the price of consumables determine the choice. Consequently even if Hilti 'dumped' PAFS consumables for this use it would not change the demand.

(d) Dominance

- (66) It is estimated that Hilti's share of sales in the EEC for cartridge strips in general is at least around that which it has in the market for nail guns — around (...) %. However, in the market for Hilti-compatible cartridge strips in the EEC which is the relevant one for the purposes of this Decision its market share is substantially higher because of the failure of independent cartridge strip producers to penetrate this particular sub-market: in fact in the EEC Hilti sells virtually all the cartridges consumed in its own guns. Hilti's cartridge strips enjoy patent protection (which is only just expiring in certain Member States) and in the UK allegedly copyright protection which have made it virtually impossible for any cartridge strip producer to enter the market for Hilti-compatible cartridge strips. In the absence of any patent or alleged copyright protection, the barriers to entry for the production of plastic strips (i.e. without cartridges) are apparently relatively low. The individual brass cartridges are more difficult to manufacture but independent suppliers do exist.
- (67) As for cartridge strips, it is estimated that Hilti's share of sales for nails in general is at least around that which it has in the market for nail guns — around (...) %. However in the market for Hilti-compatible nails in the EEC which is the second relevant market for the purposes of this Decision its market share is somewhat higher but not as high as that which it enjoys in the market for Hilti-compatible consumables. This is because independent nail makers have had more, albeit still very limited, success than independent cartridge strip makers at penetrating the market for Hilti-compatible consumables. Nevertheless these other competitors, principally the complainants, have small market shares and to date their sales have been limited to the UK. There are some technical barriers to entry for the production of nails for nail guns but the fact that there are independent nail producers, and that other manufacturers of nail guns make their own nails, shows that such barriers are not insurmountable. There are apparently no effective patents for nails.
- (68) The two separate relevant markets for Hilti-compatible cartridge strips and nails are of particular importance because according to the estimates available to the Commission, Hilti has a market share of approximately (...) % in the EEC for nail guns. This position is reflected in all Member States for which data are available. Hilti's market share for nail guns is much greater than that of its nearest competitor (Spit and Impex), and all other competitors have relatively small market shares.
- (69) In addition to the strength derived from its market share and the relative weakness of its competitors, Hilti has other advantages that help reinforce and maintain its position in the nail gun market:
- its biggest selling nail gun, the DX 450, has certain novel technically advantageous features which are still protected by patents,
 - Hilti has an extremely strong research and development position and is one of the leading companies worldwide not only in nail guns but also other fastening technologies,
 - Hilti has a strong and well-organized distribution system — in the EEC it has subsidiaries and independent dealers integrated into its selling network who deal mostly direct with customers, and
 - the market for nail guns is relatively mature, which may discourage new entrants since sales or market shares can only be obtained at the expense of existing competitors in the market for replacements.
- (70) The foregoing considerations lead to the conclusion that Hilti holds a dominant position in the EEC for nail guns, as well as the markets for Hilti-compatible nails and cartridge strips. These are the relevant markets for the purposes of this Decision. It should be stressed that, in this particular case, the relevant markets for Hilti compatible nails and cartridge strips are important because of Hilti's large share of sales of nail guns. Because of this large share, independent manufacturers of nails and cartridge strips must manufacture nails and/or cartridge strips which can be used in Hilti tools if they are to produce for more than a small segment of the market thus achieving the economies of scale necessary to be both competitive and profitable.
- (71) Hilti's market power and dominance stem principally from its large share of the sales of nail guns coupled with the patent protection for its cartridge strips. The economic position it enjoys is such that it enables it to prevent effective competition being maintained on the relevant markets for Hilti-compatible nails and cartridge strips. In fact Hilti's commercial behaviour, which

has been described above and is analysed below, is witness to its ability to act independently of, and without due regard to, either competitors or customers on the relevant markets in question. In addition, Hilti's pricing policy also described above reflects its ability to determine, or at least to have an appreciable influence on the conditions under which competition will develop. This behaviour and its economic consequences would not normally be seen where a company was facing real competitive pressure. Therefore the Commission considers that Hilti holds a dominant position in the two separate relevant markets for Hilti-compatible nails and cartridge strips.

- (72) Even if it were correct as Hilti argues that nail guns form part of a wider market and compete with other fixing methods in general, this would not alter the analysis given above as far as the relevant markets for Hilti-compatible nails and cartridge strips in particular are concerned and Hilti's dominance thereof. For the independent producers of these consumables the relevant markets on which they compete are those for Hilti-compatible consumables. They also compete at least potentially on the market for consumables in general. Hilti's commercial behaviour which is the object of this decision concerns almost exclusively these Hilti-compatible consumables, in particular its attempt to extend the power it enjoyed in the market for Hilti-compatible cartridge strips into the market for Hilti-compatible nails. The freedom of action which it exercised in these markets with a disregard for other competitors and even customers such as distributors, is evidence of this dominance. By its behaviour and power derived from its position in the cartridge strip market Hilti has been able to severely limit any effective competition from independent producers of Hilti-compatible nails. If he is to benefit from his investment in a Hilti nail gun, an operator needs a supply of Hilti-compatible, compatible and nails. These are the relevant markets for the independent producers of Hilti-compatible consumables and on which Hilti both competes and is dominant.

- (73) The Commission has examined carefully an econometric study submitted by Hilti which relates to the definition of the relevant market. This study concludes that because of significant cross-price elasticity, fixings made by nail guns and power drills compete in the same relevant market. The Commission cannot accept these conclusions. In

the first place the relevant markets on which most of the abuses were committed and with which this decision is therefore principally concerned are that for Hilti-compatible cartridge strips and nails. Second, the date used in the study and the methodology used lead to conclusions which, on the particular facts of this case, do not produce findings which appear accurately to reflect the realities of the marketplace. In particular, the findings of this study do not concord with the fact that prices for nail guns and consumables do in fact vary widely between Member States. If the demand for PAFS were as price-sensitive as the study suggests, it is highly unlikely that the price differences between Member States could subsist beyond the short term. On the contrary, these price differences confirm rather the dominance of Hilti and its ability to determine the price of nail guns and consumables unaffected by the influence of any cross-price elasticity in related markets. In addition, the Commission does not consider that the reported econometric results support unambiguously the positive conclusions drawn by this study. Finally, the methodology of the study needs further refinement before definitive results can be established.

(e) Abuse of this dominant position

- (74) Hilti has abused its dominant position in the EEC in the relevant market for nail guns and most importantly the markets for Hilti-compatible cartridge strips and nails. It has done this principally through its attempts to prevent or limit the entry of independent producers of Hilti-compatible consumables into these markets. Hilti's attempts to block or limit such entry went beyond the means legitimately available to a dominant company. The different aspects of Hilti's commercial behaviour were designed to this effect and were aimed at preventing Hilti-compatible cartridge strips from being freely available. Without such availability of Hilti-compatible cartridge strips, for which in the EEC Hilti until recently enjoyed protection afforded by patents, independent producers of Hilti-compatible nails have been severely restricted in their penetration of the market. Furthermore, customers have been obliged to rely on Hilti for both cartridges and nails for their Hilti nail guns. By limiting the effective competition from new entrants Hilti has been able to preserve its dominant position. The ability to carry out its illegal policies stems from its power on the markets for Hilti-compatible

cartridge strips and nail guns (where its market position is strongest and the barriers to entry are highest) and aims at reinforcing its dominance on the Hilti-compatible nail market (where it is potentially more vulnerable to new competition). The individual aspects of this overall policy of hindering new entrants in the market for Hilti-compatible nails by preventing the free availability of cartridge strips are set out below.

Most of the abuses took place in or were centred on the UK which constitutes a substantial part of the common market. However, at least one of these abuses had direct effects in another Member State and in addition the strategy of Hilti was aimed indirectly at the whole EEC in its attempt both to stop new entrants into the market (who might start exporting) and to prevent otherwise profitable arbitrage.

(i) Tying, reduced discounts and other discriminatory policies on cartridge-only orders

- (75) Making the sale of patented cartridge strips conditional upon taking a corresponding complement of nails constitutes an abuse of a dominant position, as do reduced discounts and other discriminatory policies described above on cartridge-only orders. These policies leave the consumer with no choice over the source of his nails and as such abusively exploit him. In addition, these policies all have the object or effect of excluding independent nail makers who may threaten the dominant position Hilti holds. The tying and reduction of discounts were not isolated incidents but a generally applied policy.

(ii) Inducing independent distributors not to fulfil certain orders for export

- (76) Because of these policies the independent nail makers, if they were to sell their nails, had to provide their own supplies of Hilti-compatible cartridge strips. Both complainants attempted to import Hilti cartridge strips from the Netherlands. Therefore, in an attempt to reinforce its tying policy in the UK where it was under attack from independent nail makers, Hilti, once it realised their source, induced its Dutch distributor to stop

the supply of cartridge strips. This action foreclosed that source of supply to customers and further had the effect of partitioning the common market.

Hilti even warned all its independent dealers not to fulfil orders in the UK from certain customers who were actually at the time supplied by Hilti itself. The aim was to prevent independent nail makers obtaining supplies of cartridge strips which were necessary to enter the market in view of Hilti's other abusive behaviour.

(iii) Refusal to fulfil the complete orders for cartridge strips made by established customers or dealers who might resell them

- (77) Hilti further refused supplies of cartridges to its long-standing customers because it objected to their possible resale to independent nail makers. This veto over the rights of a purchaser to dispose of products constitutes an abuse of a dominant position, all the more so when it is designed to prevent the free availability of Hilti-compatible cartridge strips, with the aim of blocking entry into the market for Hilti-compatible nails.

(iv) Frustrating or delaying legitimately available licences of right under Hilti's patents

- (78) In view of the above policies and refusal to supply by Hilti, nail makers were obliged to obtain non-Hilti cartridge strips which necessitated a patent licence. In the UK this was available as a licence of right. Despite its legal availability Hilti still tried to prevent any such licence coming into existence by the size of the royalty demanded. Internal Hilti documentation shows the royalty was not objectively justified but was an attempt to block or at the very least unreasonably to delay any such licence. Even though the royalty for Eurofix was fixed by the Comptroller of Patents at the level requested by demand Eurofix, the effect of Hilti's high royalty demand was to delay substantially the time when the licence of right could become effective. Hilti's behaviour in deliberately demanding an unreasonably high level of royalty with the sole objective of blocking the grant of a licence constitutes an abuse of a dominant position.

Hilti's aim was to prevent competing supplies of cartridge strips in which it holds a dominant position. The effect was seriously to delay, diminish or even to negate the effect of a legitimately available licence of right. This case is all the more serious since Hilti uses its position in cartridge strips to prevent competition for nails.

(v) Refusal without objective reason to honour guarantees

- (79) Hilti's policy of attempting to block the sale of independents' nails took another course in that it was made known that guarantees on nail guns would not be honoured if non-Hilti nails were used. Whilst it may be legitimate not to honour a guarantee if a faulty or sub-standard non-Hilti nail causes malfunctioning, premature wear or breakdown in a particular case, such a general policy in the circumstances of this case amounts to an abuse of a dominant position in that it is yet another indirect means used to hinder customers from having access to different sources of supply. Furthermore, Hilti has not been able to present any data to show that use of any of the non-Hilti nails currently available cause damage, premature wear or malfunctioning of Hilti guns in excess of that expected as a result of using Hilti nails.

(vi) Operating selective and discriminatory policies directed against the business both of competitors and their customers

- (80) The evidence presented shows that Hilti has a policy designed to illegally limit the entry into the market of competitors producing Hilti-compatible nails. On several occasions Hilti singled out some of the main customers of these competitors and offered them especially favourable conditions in order to attract their loyalty, going in certain cases so far as to give away products free of charge. These conditions were selective and discriminatory in that other customers of Hilti buying similar or equivalent quantities did not benefit from these special conditions. The customers of Hilti who did not receive these special offers are discriminated against and effectively bear the cost of the lower prices to other customers. These special offers were

not a direct defensive reaction to competitors, but reflected Hilti's pre-established policy of attempting to limit their entry into the market for Hilti-compatible nails. Only a dominant undertaking such as Hilti could carry out such a strategy because it is able, through its market power, to maintain prices to all its other customers unaffected by its selectively discriminatory discounts.

- (81) An alternative strategy devised by Hilti to illegally limit its competitors' sales is through its carefully orchestrated policy to damage seriously or even eliminate certain of these competitors' main customers. Internal Hilti documentation fully supports Firth's views that its business was singled out in this way, on the one hand by creating difficulties in supplying Firth and by reducing its discount to uneconomic levels, and on the other hand applying the above described favourable and selective discrimination to Firth's customers.

Application of such a policy not only damages the business of Hilti's competitors and their customers directly, but also has a disciplinary and anticompetitive effect on other potential customers for the independents' nails, in that they can be threatened with similar policies which would then discourage them from buying non-Hilti nails.

An aggressive price rivalry is an essential competitive instrument. However, a selectively discriminatory pricing policy by a dominant firm designed purely to damage the business of, or deter market entry by, its competitors, whilst maintaining higher prices for the bulk of its other customers, is both exploitive of these other customers and destructive of competition. As such it constitutes abusive conduct by which a dominant firm can reinforce its already preponderant market position. The abuse in this case does not hinge on whether the prices were below costs (however defined — and in any case certain products were given away free). Rather it depends on the fact that, because of its dominance, Hilti was able to offer special discriminatory prices to its competitors' customers with a view to damaging their business, whilst maintaining higher prices to its own equivalent customers.

(vii) Operating unilaterally and secretly a policy of differential discounts for supported and unsupported plant-hire companies and dealers in the UK

(82) In the UK Hilti applies a different discount system to supported and unsupported plant-hire companies, whereby the latter do not get the normal quantity discounts available to supported dealers. In fact these unsupported plant-hire companies often formerly enjoyed the higher rate of discount now reserved for supported plant-hire companies. This policy towards supported and unsupported dealers was applied unilaterally and without explanation by Hilti. Unsupported plant-hire companies were simply informed of a reduction in their rate of discount without any attempt to explain the criteria on which the decision was based. Whilst there may be some objective criteria involved in the selection of supported dealers that would justify higher discounts (e.g. carrying out training or higher volume of purchases), the decision by a dealer to buy competitors' consumables constitutes an impermissible element in this selection process.

(83) Moreover, in view of Hilti's other policies and the fact that the decision by a distributor to buy non-Hilti consumables is a criterion in the decision to grant a higher/lower discount, the Commission takes the view that this particular policy is part of Hilti's general systematic and organized attempt to discriminate against, and therefore to prevent competition from, independent nail makers. As such, it has the same object as the reduction in discounts for orders of cartridge strips without nails. Therefore the policy of lower discounts to unsupported dealers when not based on considerations of quantity uniformly applied or not objectively justified constitutes an abuse of a dominant position. This is particularly so when the criteria for selection are kept secret and the policy applied unilaterally by Hilti without any explanation.

(viii) Behaviour subsequent to the undertaking

(84) Even after its undertaking to the Commission, Hilti attempted to continue to limit customers who ordered cartridge strips without nails either to the amount of their previous orders of cartridges or to 5 000 cartridges. The figure of 5 000 was used

previously in Hilti's monitoring process to try to identify customers who were using the independents' nails. This policy therefore constitutes an attempt to continue its tying practices or an application of measures having equivalent effect. Hilti's behaviour in this respect has apparently changed following discussions between Hilti and the Commission.

(85) However, as far as the Commission is aware, Hilti is still continuing to apply secretly and without giving reasons its lower discount system for unsupported dealers, one of the criteria for which is the use of non-Hilti nails.

(f) Effect on trade between Member States

(86) Hilti's abusive behaviour not only had an appreciable and direct effect on trade between Member States but affected the very structure of competition within the common market. In the present case where there is not much competition for Hilti-compatible consumables, any impact on the fragile competitive structure will have particularly significant potential impact on trade between Member States.

86.1. Hilti, through pressure on its independent dealers, attempted to block exports that were made potentially profitable by the large price differences existing in the common market.

86.2. Hilti's abusive behaviour was bound to affect the structure of competition within the common market or a substantial part thereof. Its policies were designed to prevent the penetration of the market by the independent nail makers. Certain policies were designed to eliminate these nail makers altogether from the market.

86.3. Consequently the flow of trade will develop along potentially different lines than in the absence of the abuses which restricted the penetration of these independent nail makers into the market.

(g) Objective justification

(87) Hilti has expressed concern over certain aspects concerning the reliability, operation and safety of PAFS, which may be summarized as follows:

87.1.. Operators of nail guns must be properly trained in the use of nail guns and consumables particularly as regards safety procedures if accidents to the operator are to be avoided and reliable and secure fastenings are to be made.

87.2. Substandard cartridges can give rise to mis- or multi-firing or deposit excessive carbon which may override the safety mechanism of a nail gun.

87.3. Substandard nails may give rise to ricocheting or breaking and splintering which may be dangerous to operators or lead to unreliable fastenings.

87.4. Only the manufacturer of PAFS can ensure the compatibility, safety and reliability of the whole system comprising nail guns, nails and cartridges, which must be seen as a unified system. Independent consumable producers cannot through the production of an individual item of the system guarantee its integrity.

87.5. Hilti maintains that nails made by certain independent nail makers, and in particular those made by the complainants Eurofix and Bauco are substandard in that they are not fit for the purpose for which they are intended. Furthermore it is alleged that they are dangerous in that they are not capable of penetrating certain base materials sufficiently such that reliable and secure fixings cannot be made in these base materials. Hilti also alleges that cartridge strips made by Fiocchi (the only significant EEC producer not linked to Hilti) are deficient and may be dangerous.

commercial advantage it may have derived from such action.

(89) As regards Hilti's claim that its behaviour even if not the least restrictive possible to attain its objectives was motivated purely by safety considerations, the Commission would make the following points:

89.1. The abuses and alleged safety problems go back to at least 1981. Hilti only approached the Commission two years later in 1983 with an informal and verbal proposal for a distribution system designed to overcome these safety problems. This was only after a complaint had been lodged with the Commission and communicated to Hilti.

89.2. Hilti was told in 1983 by Commission officials that in view of its apparent dominance a selective system would only be acceptable if it could be objectively justified on grounds of safety, and no quantitative restrictions would be accepted.

89.3. In the meantime the subsequent evidence showed Hilti continued and extended its abusive practices even though it had been warned such practices were unacceptable if they were proved. These practices gave rise to a second complaint by Bauco. Only after this second complaint had been communicated to Hilti did it send to the Commission in May 1985 on an informal basis a proposal for a distribution system. (This was over 18 months after its first informal approach to the Commission). The draft system was only notified to the Commission after a statement of objections concerning proposed interim measures had been sent. Hilti was always warned that the practices of which Eurofix and Bauco complained, if proved, could constitute abuses of a dominant position.

89.4. During all the period in question described above (i.e. from at least 1981 onwards) Hilti did not take any action, legal or otherwise, that would normally be expected of a company that was purely motivated by considerations of safety and reliability. Confronted with the use of what it alleges are the substandard and potentially dangerous nails of the complainants:

(88) Hilti itself accepts that the above concerns relating to the safety, reliability and operation of its PAFS are not sufficient to justify the commercial behaviour which is the object of this Decision since it does not constitute the least restrictive action necessary to attain the objective of safety. Hilti considers its proposed distribution system is the least restrictive way this can be done. It does however maintain that all its actions have been motivated by a desire to ensure the safe and reliable operation of its products, and not by any

- Hilti rarely put into writing to its customers the alleged dangers of, and unfitness for use of, the complainants' nails. Hilti documentation shows that it was its express policy only to warn verbally and never put in writing its criticism of the complainants' products. It was thus creating a situation of doubt over the complainants' products in a way that made it very difficult for them to challenge in the normal legal way the validity of these allegations. This was not the most efficient way for Hilti to warn customers against the use of what it maintains to the Commission are dangerous products.
 - Hilti never wrote to or communicated with the complainants to express its concern about the reliability, fitness, safety or otherwise of their nails.
 - As far as the Commission is aware Hilti never took the normal course of action of reporting the complainants to the United Kingdom Trading Standards Department for what on the basis of its own arguments would constitute false advertising or misrepresentation in the United Kingdom. The Trading Standards Department could have taken action under the Trade Descriptions Act 1968, infringements of which are a criminal offence. Alternatively Hilti could have sued privately over this advertising or misrepresentation or, if it believed the complainants had breached the Code of Advertising Practice, it could have approached the Advertising Standards Authority. It did not do so even though Hilti alleges that the complainants' advertising and representation about their products is patently misrepresentative or false.
 - As far as the Commission is aware Hilti never took the appropriate step of making complaints to national or Government bodies in the United Kingdom such as the Health and Safety Executive which could have acted under the Health and Safety at Work Act 1974 or the Trading Standards Department which could have acted under the Consumer Safety Act 1978. This is so even though Hilti alleges that the complainants' products are unfit for the use for which they are intended or even potentially dangerous.
- (90) The Commission considers that in view of the above the behaviour by Hilti cannot be described as being motivated solely by a concern over the safety and reliability of its PAFS and use of substandard consumables. Hilti's actions described as abusive in this Decision reflect a commercial interest in stopping the penetration of the market of non-Hilti consumables since the main profit from PAFS originates from the sale of consumables, not from the sale of nail guns. This is without prejudice to the possibility that Hilti had a genuine concern about safety and reliability. However, Hilti did not take the actions that would be normally expected had this been its only concern. A company faced with safety worries may not resort to behaviour which is an abuse under Article 86; it should rather explore the other legitimate and normally more efficient ways of dealing with its concerns.
- (91) Finally, it should be noted that on the one hand Hilti has shown a marked reluctance to engage in litigation or request action from the appropriate public authorities on the basis of its allegations concerning safety and fitness for use which would have allowed these allegations to be properly evaluated by the competent authorities. On the other hand however Hilti has started numerous court actions to protect its patent and has contested at every stage the complainants' application for a licence of right without incidentally evoking the safety arguments. Hilti's failure to act through the normal channels on the safety and fitness for use issue cannot therefore be put down to an unwillingness to engage in litigation. In any case the public authorities responsible for safety and misrepresentation could have been expected to act autonomously if Hilti had presented them with adequate evidence of infringements of the appropriate laws by the complainants.
- (92) Hilti purports to have decided unilaterally that the independents' nails were unsafe or unfit for use. On this basis Hilti attempts to justify the policies which are described in this decision and the general thrust of which have the object or effect of preventing the entry into the market of the independent nail producers. Hilti, a dominant company, therefore attempted to impose its own allegedly justified safety requirements without regard to the safety and product liability requirements that already exist in the different Member States. The Commission examined carefully the different national safety requirements, standards or recommendations relating to nail guns and consumables in the EEC and certain other countries. It also examined the guidelines issued by the professional or trade associations. In the EEC with the exception of Spain none of these provisions oblige or recommend the user to use Hilti nails with Hilti nail guns. Rather they put the onus on the independent producers of nails to

guarantee that their nails are of the appropriate standard, and oblige the user to check their fitness for use⁽¹⁾. As far as the Commission is aware there are no moves to alter significantly these arrangements. Finally, in all Member States employers are obliged in general to ensure both that their workers are properly trained and that their equipment is both safe and properly maintained.

bigger role in supplying consumables. There is no apparent unfavourable effect on safety or reliability as a result of this situation.

(93) In view of those apparently adequate safety controls or standards existing in the EEC the Commission does not consider Hilti's argument concerning safety to be an objective justification for the behaviour which is the object of the present proceedings. However, on the subject of the safety of the complainants' nails, it is interesting to note that Eurofix's worldwide unit sales of nails for use in Hilti nail guns have been several tens of millions. Because Bauco is a relatively new entrant and Hilti was successful in limiting its expansion, it has had less sales which nevertheless amount to several million units. Hilti has not been able to show any evidence of accidents to operators as a result of the use of these millions of nails produced by either Eurofix or Bauco. The Health and Safety Executive in the UK have no record of any PAFS accidents caused as a result of using a consumable not manufactured by the nail gun producer. The nail makers themselves have had no reports of safety or abnormal reliability problems nor have they had any claims under their product liability insurance. In addition to the complainants, several other independent nail makers in the EEC have sold several million nails for use in Hilti nail guns. No abnormal safety or operational difficulties have been reported by the other independents or Hilti.

(94) Furthermore, it is interesting to note that certain manufacturers of nail guns rely on independent manufacturers to supply consumables. This is particularly true in the USA where Phillips Drill (an ITT subsidiary) has given Eurofix a contract to supply nails. In the USA, independents play a

(95) Finally, the Commission does not understand Hilti's claim that it would be liable, even criminally so, if it had not taken the action (which is the object of this Decision) to stop the use of consumables it deems unsafe in its nail guns. In view both of the existing national safety rules and of the fact that Hilti warns users in its instruction manual (delivered with all nail guns) not to use non-Hilti consumables, the Commission considers Hilti cannot be considered liable for accidents or damage caused by the use of non-Hilti consumables in its nail guns. This claim of liability is all the more surprising in view of the fact that Hilti took none of the steps that may be normally expected of a company facing the problem of the use of what it claims are dangerous or unfit consumables in its nail guns.

(96) Hilti recognized the weakness of its arguments relating to safety and considered that any justification for non-supply of cartridges without nails based on safety reasons would inevitably not be accepted by the Commission or the Court of Justice even if temporary protection could be afforded by such arguments (see telex of 13 June 1983 from Hilti GB to Hilti AG).

(h) Conclusions

(97) On the basis of the considerations set out above, the Commission considers that Hilti has infringed Article 86 of the EEC Treaty. At all material times Hilti occupied a dominant position in the EEC in the markets for nail guns and for Hilti-compatible nails and cartridge strips. Most of these abuses took place in or were centred on the UK which constitutes a substantial part of the common market. However, certain abuses had direct impact in other Member States or were aimed indirectly at the whole EEC.

(98) Hilti abused its dominant position principally by its efforts to limit or prevent the entry of independent nail makers into the market. This was done by attempting to ensure that its patented cartridges were not freely available on the market. This was done in the following ways:

98.1. Tying the sale of nails to the sale of cartridge strips.

98.2. Reducing discounts and adopting other discriminatory policies when cartridges were bought without nails.

⁽¹⁾ These arrangements are also reflected in the licence of right between Hilti and both Bauco and Eurofix where the following clause is found in relation to quality control/safety: 'The licence shall take all reasonable precautions to ensure that any Product (i.e. cartridge strip) sold under the licence for use with Hilti DX fastening tools is safe and suitable for use in such tools'. This wording was agreed between Hilti and Eurofix, once the Comptroller of Patents had decided in order to protect public interest that there was a justification for such a provision both to ensure quality control of cartridge strips by Eurofix and to protect Hilti's reputation by preventing faulty cartridge strips from being supplied for use in their guns.

- 98.3. Inducing independent distributors not to fulfil certain orders for export.
- 98.4. Refusing to fulfil the complete orders for cartridge strips made by established customers or dealers, who might resell them.
- 98.5. Frustrating or delaying legitimately-available licences of right under Hilti's patents.
- 98.6. Refusing without objective reason to honour guarantees.
- 98.7. Operating selective and discriminatory policies directed against the business both of competitors and their customers.
- 98.8. Operating unilaterally and secretly a policy of differential discounts for supported and unsupported plant-hire companies and dealers in the UK.
- 98.9. Carrying on to a limited extent certain abusive commercial policies even after its undertaking to the Commission.

C. REMEDIES

(a) Fines

- (99) Under Article 15 of Regulation No 17 infringements of Article 86 may be sanctioned by fines of up to one million ECU or 10 % of the turnover of an undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and the duration of the infringement. In the present case the Commission takes the view that the infringement has been serious and long-lasting and that it should impose a substantial fine on Hilti.
- (100) The evidence demonstrates that Hilti abused its dominant position in several important ways. These abuses were all designed to have the same effects; namely to prevent or limit the entry of competitors into the market, or to damage severely or even eliminate existing competitors. As a result Hilti was able to maintain or reinforce its dominant position. It was thus able more effectively to exploit its dominance in the different Member States and to charge high and differing prices. This was only possible because it was free from normal competition and from the general disciplines imposed by market forces.

Furthermore, those infringements were designed adversely to affect the whole structure of competition. In fact, had not the Commission issued the statement of objections that led to Hilti's undertaking, a competitor could have been

irreversibly removed from the market. The Commission also considers that all the infringements were committed at the very least negligently and for some of the abuses they were committed deliberately.

- (101) From the evidence available to the Commission certain of the alleged abuses started at least as far back as 1981, particularly as regards Hilti's action directed against Eurofix, and 1984 as regards Hilti's action directed against Bauco, i.e. the date Bauco started selling.
- (102) These abuses lasted at least until the undertaking given by Hilti in 1985 and there is evidence that certain abuses were continued even after the undertaking, although subsequent discussions between Hilti and the Commission did cause Hilti to modify some aspects of its behaviour.
- (103) On the other hand, the Commission takes into account the cooperation it has received from Hilti, in particular:
 - the temporary undertaking offered by Hilti in 1985 in response to the proceedings for interim measures,
 - the fact that Hilti initiated a compliance programme and submitted to the Commission a permanent undertaking dated 4 September 1987 based on its declared intention to attempt to meet the objections and concerns of the Commission (that undertaking is annexed to this Decision),
 - the admission by Hilti to behaviour which the Commission considers abusive either in its reply to the statement of objections or after transmission to Hilti by the Commission of the complaints.

(b) Termination of the infringement

- (104) Under Article 3 of Regulation No 17, the Commission may, on a finding that there is an infringement of Article 86, require the undertaking concerned to bring such infringement to an end.

It is justified to require Hilti to terminate the infringements in so far as it has not already done so. The question whether any restrictions may be imposed by Hilti in the framework of its proposed distribution system (and not applied secretly and unilaterally by Hilti) will be analysed in the separate case involving the notified distribution system. Therefore the order given below requiring Hilti to bring to an end its infringements in so far as it has not already done so, is without prejudice to any decision that may be made concerning the notified distribution system,

HAS ADOPTED THIS DECISION :

Article 1

The actions of Hilti AG in pursuing, against independent producers of nails for Hilti nail guns, courses of conduct intended either to hinder their entry into and penetration of the market for Hilti-compatible nails or to damage directly or indirectly their business or both, constitute an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

The essential features of that infringement are :

1. tying the sale of nails to the sale of cartridge strips ;
2. reducing discounts and adopting other discriminatory policies when cartridge strips were bought without nails ;
3. inducing independent distributors not to fulfil certain orders for export ;
4. refusing to fulfil the complete orders for cartridge strips made by established customers or dealers who might resell them ;
5. frustrating or delaying legitimately available licences of right under Hilti's patents ;
6. refusing without objective reason to honour guarantees ;
7. operating selective and discriminatory policies directed against the business both of competitors and their customers ;
8. operating unilaterally and secretly a policy of differential discounts for supported and unsupported plant-hire companies or dealers in the UK.

Article 2

For the infringements described in Article 1, a fine of six million ECU is hereby imposed on Hilti AG.

The fine shall be paid into :

- (a) account No 59000204, Commission of the European Communities (for payment in ECU), Lloyds Bank plc, The Manager, Payments Section, Overseas Centre, PO Box 63, 38a Paradise Street, UK-Birmingham B1 2 AB ;
- (b) account No 108.63.41, Commission of the European Communities (for payment in pounds sterling), Lloyds Bank plc, Overseas Department, PO Box 19, 6 Eastcheap, UK-London EC3P 3AB,

within three months from the date of notification of this Decision. After three months interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, i.e. 10,25 %.

Should payment be made in pounds sterling the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

Hilti AG shall forthwith bring to an end the infringements referred to in Article 1 to the extent that it has not already done so. To this end Hilti AG shall refrain from repeating or continuing any of the acts or behaviour specified in Article 1 and shall refrain from adopting any measures having an equivalent effect.

Article 4

This Decision is addressed to Hilti AG, FL-9494 Schaan, Fürstentum Liechtenstein, c/o Hilti GB, Trafford Wharf Road, Trafford Park, UK-Manchester M17 1BY.

This Decision shall be enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 22 December 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission

ANNEX

Cases IV/30787 and 31488

UNDERTAKINGS

1. Hilti AG, for itself and on behalf of its wholly-owned subsidiary companies in the EEC, undertakes in good faith :
 - (a) to implement on a *permanent* basis the undertakings given on 27 August 1985 in the above cases on an interim basis, namely not, within the EEC, either directly or indirectly to tie the supply of direct fastening cartridge magazines to the supply of direct fastening nails ; and, as a consequence, not to aggregate purchases of cartridge strips with purchases of other products for the purposes of calculating discounts ;
 - (b) to implement, for direct fastening products, in a manner consistent with the undertakings contained in (a) and subject only to the three exceptions listed below, a discount policy based on precise organic and transparent quantity/value discount schedules applied uniformly and without discrimination ;

(The three exceptions referred to above are :

 - (i) meeting a competitive offer,
 - (ii) contracts individually negotiated with customers who customarily or given special requirements or circumstances refuse to deal with Hilti except on the basis of such a contract,
 - (iii) special promotions, properly so called.

As a consequence of implementing such a discount policy certain types of discount would be eschewed including fidelity discounts and loyalty rebates).
 - (c) not, except for objectively valid reasons, to refuse to supply direct fastening products to existing customers nor, in fulfilling any order, to limit the quantity of direct fastening products to be supplied ; and to continue to report to the Commission on a quarterly basis any refusal to supply direct fastening products indicating the reason for such refusal ;
 - (d) to waive, as against present or future licences of right under its UK cartridge strip patent, its rights under its UK copyrights in its cartridge strip and, to the extent that they may exist in the EEC, under corresponding design rights in such strip ;
 - (e) to provide warranty cover for its direct fastening tools not only where original Hilti consumables are used in them but also where non-Hilti consumables of matching quality are so used ;
 - (f) to implement a competition law compliance programme specific to the Hilti Group and along the lines approved of by the Commission in the *National Panasonic* case and to inform the Commission of the steps taken to implement such a programme.
2. Hilti AG undertakes to use its best endeavours to encourage the independent distributors in the EEC of its direct fastening products to adopt the undertakings referred to in 1 above as part of their own policy.
3. Hilti AG undertakes to continue to implement the above undertakings in paragraphs 1 and 2 until such time as it is found not to be dominant or circumstances change so that it is no longer dominant. And, in either event undertakes to inform the Commission in writing before ceasing to implement any of the above undertakings.

For and on behalf of Hilti AG

by

Date : 4 September 1987.