JUDGMENT OF THE COURT

2 March 1994 *

In Case C-53/92 P,

Hilti AG, whose registered office is at Schaan, Liechtenstein, represented by Oliver Axster, Rechtsanwalt, Düsseldorf, and by John Pheasant, Solicitor, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities in Case T-30/89 of 12 December 1991, between Hilti AG and the Commission of the European Communities, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Karen Banks, a member of its Legal Service, acting as Agent, assisted by Nicholas Forwood QC,

* Language of the case: English.

with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

interveners:

Bauco (UK) Ltd, whose registered office is at Chessington, United Kingdom, represented by Clifford George Miller, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

and

Profix Distribution Ltd, whose registered office is at West Bromwich, United Kingdom, represented by Malcolm Titcomb, Solicitor, and Paul Lasok, Barrister, with an address for service in Luxembourg at the Chambers of Falz et Associés, 6 Rue Heine,

THE COURT,

composed of: G. F. Mancini, President of Chamber, acting as President, J. C. Moitinho de Almeida and D. A. O. Edward (Presidents of Chambers), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse (Rapporteur), M. Zuleeg and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 10 November 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 February 1992, Hilti AG (hereinafter 'Hilti') brought an appeal under Article 49 of the Statute of the Court of Justice of the EEC against the judgment of 12 December 1991 in Case T-30/89 *Hilti AG* v *Commission* [1991] ECR II-1439 (hereinafter 'the contested judgment') in which the Court of First Instance dismissed its application for the annulment of Commission Decision 88/138/EEC 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*, Official Journal 1988 L 65, p. 19, hereinafter the 'decision at issue').

2 Hilti manufactures a range of products used for fastening materials in place: nail guns, cartridge strips, cartridges and nails. The expression 'consumables' refers to

nails and cartridge strips. The term 'powder-actuated fastening systems' (hereinafter the 'PAF systems') refers to nail guns, nails and cartridge strips (paragraph 10 of the contested judgment).

3 Article 1 of the Commission decision at issue provides in particular that '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' (paragraph 8 of the contested judgment) . The decision at issue imposes a fine of six million ECU on Hilti and orders it to bring the infringements to an end.

4 As the Court of First Instance observes (paragraphs 46 and 64 of the contested judgment), in order to determine Hilti's market position, it is first necessary to define the relevant product market.

5 Hilti claims that the Commission has wrongly defined that market. Contrary to what the Commission says in the decision at issue, it is made up not of three separate markets for nail guns, cartridge strips (and cartridges) and nails, but, since those components make up an indivisible whole (paragraph 48 of the contested judgment), of a single market 'which comprises all the fastening systems which can be substituted for PAF systems (including in particular drilling and screwing systems)' (paragraph 82 of the contested judgment).

6 The Court of First Instance concluded, on the contrary, that 'the relevant product market in relation to which Hilti's market position must be appraised is the market for nails designed for Hilti nail guns' (paragraph 77 of the contested judgment; see also paragraph 94).

7 It follows from Hilti's own definition of the scope of its appeal that Hilti seeks to challenge the grounds on which the Court of First Instance arrived at a definition of the market which enabled it to find that the position held by Hilti was a dominant one, and also certain reasoning in the judgment relating to the discharge of the burden of proof by the Commission.

8 The conclusions of the Court of First Instance regarding the definition of the relevant market are based on a 'legal appraisal' (paragraphs 64 to 78 of the judgment) which is, in substance, as follows:

— according to the case-law of the Court of Justice (see the judgment in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215) the relevant product market is defined as the market for those products which, in relation to their characteristics, are apt to satisfy an inelastic need and are interchangeable only to a limited extent with other products (paragraph 64 of the contested judgment); in the present case, it is necessary to determine whether the relevant product market is the market for all construction fastening systems or whether the relevant markets are those for PAF tools and the consumables designed for them, namely cartridge strips and nails (paragraph 65 of the contested judgment);

— nail guns, cartridge strips and nails constitute three specific markets. Since cartridge strips and nails are specifically manufactured, and purchased by users, for a single brand of gun, there are separate markets for cartridge strips and nails compatible with Hilti nail guns (paragraph 66 of the contested judgment);

— with regard, in particular, to the nails whose use in Hilti tools is an essential element of the dispute, there have been, since the 1960s, independent producers of nails intended for use in the nail guns, and even producers specializing solely in the manufacture of nails specifically designed for Hilti tools. That fact in itself is sound evidence that there is a specific market for nails compatible with Hilti nail guns (paragraph 67 of the contested judgment);

— Hilti's contention that guns, cartridge strips and nails form an indivisible whole is in practice tantamount to permitting producers of nail guns to exclude the use in their tools of consumables other than their own branded products, whereas Community competition law permits independent producers to manufacture those products provided that they do not infringe an industrial or intellectual property right (paragraph 68 of the contested judgment);

— PAF systems differ from other fastening systems in several important respects. The specific features of PAF systems, as described in the decision at issue, are such as to make them the obvious choice in a number of cases. It is evident from the documents in the case that in many instances there is no realistic alter-

native to PAF systems either for a qualified operator carrying out a job on site or for a technician instructed to select the fastening methods to be used in a given situation (paragraph 69 of the contested judgment);

— the Commission's description of those features in the decision at issue is sufficiently clear and convincing to justify the conclusions drawn from it (paragraph 70 of the contested judgment);

— those findings leave no real doubt as to the existence, in practice, of a variety of situations, some of which favour PAF systems, whilst others favour other fastening systems; the fact that several different fastening methods have each accounted for an important and stable share of total demand for fastening systems shows that there is only a relatively low degree of substitutability between the different fastening systems (paragraph 71 of the contested judgment);

— those conclusions are corroborated by the opinion of Mr Yarrow and the survey conducted by Rosslyn Research Limited. In particular, they disclose that a large number of users can see no alternative to using PAF systems in those circumstances where they are used (paragraph 73 of the contested decision). Contrary to their intention, those studies do not demonstrate a high degree of economic substitutability between the relevant products. In particular, they do not show that there is a high degree of cross-price-elasticity (paragraph 75 of the contested judgment);

— those findings are not weakened by Professor Albach's opinion, which takes into account only price as a factor, when the survey conducted by Rosslyn Research Limited shows that the choice of the consumer depends to a large

extent on unquantifiable circumstances (paragraph 76 of the contested judgment);

— on the basis of all the grounds given by it, the Court of First Instance reaches the conclusion set out in paragraph 6 of this judgment.

9 In support of its appeal, Hilti puts forward seven pleas in law based on infringement of Article 86 of the Treaty. The first four pleas are also based on '[a misapplication of] accepted principles of economics and ... a manifest error of logical reasoning', the fifth plea on an '[infringement of] ... fundamental principles of Community law', and the seventh plea on an '[infringement of the] fundamental principles of law relating to the application [of Article 86]'.

10 It should be pointed out, before considering Hilti's pleas, that the Court of Justice has consistently held that pursuant to Article 168A of the EEC Treaty and Article 51 of the Statute of the Court of Justice of the EEC an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see, in particular, the judgments in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12, and in Case C-346/90 P *F.* v *Commission* [1992] ECR I-2691, paragraph 7).

The first plea

11 Hilti's first plea is that the Court of First Instance concluded that there was a market for Hilti nails by basing itself solely on the uncontested fact that Hilti nails and Hilti cartridge strips were manufactured and sold specifically for use in Hilti tools

(paragraphs 66 and 67 of the contested judgment), without considering whether or not the PAF systems were interchangeable with other products, as required by the case-law of the Court of Justice (see the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 28). Hilti claims that in order to find that there is a separate market for Hilti nails, the Court of First Instance, applying the rules laid down by the Court of Justice in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, would have to have found that the purchasers of nails were different from the purchasers of nail guns, which the documents before it showed was not the case.

12 The Commission says that the Court of First Instance, after noting the criteria applicable to the definition of the market (paragraph 64 of the contested judgment), then set out at paragraphs 66 to 76 of the contested judgment the reasons for which it considered that the market for Hilti nails satisfied those criteria. Paragraphs 66 and 67 of the contested judgment are only the starting point for the reasoning of the Court of First Instance which, elsewhere in the judgment, considered the question whether PAF systems were interchangeable with other fastening systems. Moreover, the Commission and the intervener Bauco contend that the judgment in *Hugin*, cited above, is not relevant to the present case.

13 As the Commission points out, the Court of First Instance recalled in paragraph 64 of the contested judgment that the Court of Justice has consistently held that products form part of the same market only if they are sufficiently interchangeable with each other. In paragraphs 66 and 67 of the contested judgment the Court of First Instance confined itself to finding that nail guns, cartridges and nails constituted separate markets. It then considered, in paragraphs 69 to 76 of the contested judgment, whether or not PAF systems were interchangeable with other fastening systems, and concluded, on the grounds indicated in particular in paragraphs 69 and 71 of the contested judgment, that the products in question were not interchangeable.

14 There is therefore no basis for the appellant's claim that the Court of First Instance did not consider the question of the substitutability of the products in question.

15 There is also no basis for Hilti's claim that the Court of First Instance failed to apply criteria laid down by the Court of Justice in its judgment in *Hugin*, cited above. As the Advocate General has explained at point 18 of his Opinion, in that judgment the Court did not intend to lay down the criteria for determining whether a market for consumables is distinct from the market for the equipment for which they are intended. The Court merely held that, in the particular case before it, concerning spare parts for cash registers manufactured by Hugin, the purchasers of spare parts, essentially independent undertakings maintaining and repairing cash registers, were different from the purchasers of cash registers, so that the market for spare parts constituted a specific market governed by its own rules of supply and demand.

16 Accordingly, Hilti's first plea must be rejected.

The second plea

17 Hilti's second plea is that the mere finding, in paragraph 69 of the contested judgment, that some users found it to be practically impossible to use fastening systems other than PAF systems, without specifying the number of those users, did not entitle the Court of First Instance to hold that PAF systems were not substitutable for other fastening systems.

18 The Commission contends that the plea is inadmissible because it relates to the appraisal of the facts by the Court of First Instance, and that it is unfounded, because the Court of First Instance, which pointed out in paragraph 69 of the con-

tested judgment that there were numerous users, was not obliged to specify the exact number of those users. Bauco also contends that the plea is unfounded, for the same reasons as those put forward by the Commission.

19 It should first be pointed out that, in holding that it was apparent from the documents before it that in many cases it was impossible for users to use fastening systems other than PAF systems, the Court of First Instance made an appraisal of the facts which cannot be challenged before the Court of Justice. Furthermore, the Court of First Instance did not invalidate its decision on the ground of defective reasoning merely by indicating, in paragraph 69 of the contested judgment, that users stated that it was impossible to use systems other than PAF systems in many cases, without specifying the exact number of those cases.

20 Accordingly, Hilti's second plea must be rejected.

The third plea

21 Hilti's third plea is that the mere existence of technical differences between the various fastening systems, referred to in paragraph 70 and the first sentence of paragraph 71 of the contested judgment, is not sufficient to establish that those systems are not substitutable.

22 The Commission proposes that this plea be examined together with the fourth plea. Bauco contends that the various fastening systems meet different needs and that, as the Court of First Instance indicated, they are therefore not substitutable.

23 The Court of First Instance found that there was only a relatively low degree of substitutability between demand for PAF systems and that for other fastening systems, and based its finding essentially, in paragraphs 69 to 71 of the contested judgment, on the fact that the technical differences between the systems, as described in the decision at issue, gave rise to clearly differentiated conditions for the use of, and hence demand for, the systems, and on the fact that for long periods certain systems accounted for a stable share of total demand for fastening systems.

24 Contrary to Hilti's assertion, the Court of First Instance did not therefore merely cite technical differences between the systems in reaching its conclusion that they were not economically substitutable.

25 Hilti's third plea must also be rejected.

The fourth plea

26 Hilti's fourth plea is that the mere co-existence of the different fastening systems over long periods, referred to by the Court of First Instance in the second sentence of paragraph 71 of the contested judgment, is insufficient to show that there was only a relatively low degree of substitutability between the different fastening systems.

27 The Commission contends, in substance, that the Court of First Instance did not base itself solely, as Hilti alleges, on the features distinguishing the fastening systems and on the co-existence of those systems for long periods in reaching its conclusion that those systems were not substitutable, but that it also based itself on the structure of supply and demand for those products as well as on the competitive conditions in the market. Bauco contends that the Court of First Instance did not base itself solely on the co-existence of the systems in reaching its conclusion that they were not substitutable.

28 As has already been indicated, in both paragraph 8 and paragraph 23 of this judgment, the findings of the Court of First Instance in the second sentence of paragraph 71 of the contested judgment constitute only one of a number of considerations on which it based itself in reaching its conclusion that the fastening systems were not substitutable.

29 Accordingly, Hilti's fourth plea must be rejected.

The fifth plea

30 Hilti's fifth plea is in substance that, by requiring Hilti to demonstrate that the relevant market was the market for construction fastening systems, the Court of First Instance took a wrong approach to the burden of proof.

31 Relying primarily on the judgment of the Court of Justice in Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, Hilti claims that, since the Commission determined the relevant market on the basis of inferences, it was sufficient for Hilti, in order to show that the decision was defective on that point, to demonstrate that the facts established in the decision at issue could be interpreted differently.

32 The Commission, on the other hand, contends that it was for Hilti to demonstrate, if need be by adducing new evidence, that the appraisals in the decision at issue were incorrect.

33 In its judgment in *CRAM and Rheinzink*, cited above, the Court of Justice was adjudicating on an application for annulment of a Commission decision relating to

a proceeding pursuant to Article 85 of the EEC Treaty. The Court found that the Commission's conclusion that there had been concerted action between the applicant companies was based on circumstantial factors and that its reasoning was therefore based on a supposition.

34 It then considered, in paragraph 16 of that judgment, that, faced with such an argument, it was sufficient for the applicants to prove circumstances which cast the facts established by the Commission in a different light and which thus allowed another explanation of the facts to be substituted for the one adopted by the Commission's decision.

35 Although it is true that paragraphs 60 and 63 of the decision at issue referred to a probably slight degree of demand elasticity in relation to the prices of the various fastening systems, those statements are made in the context of a line of reasoning designed to show that the PAF systems and the other fastening systems responded to different conditions of supply and demand and were therefore only to a slight extent interchangeable.

36 In the course of that reasoning the Commission based itself on precise factual evidence, set out at points 60 to 65 of the decision at issue, such as the factors likely to result in the use of PAF systems, and the low impact of the cost of the tools and consumables on that use.

37 The Commission did not therefore determine the market for the products merely on the basis of suppositions, as Hilti alleges.

38 By requiring Hilti to demonstrate that its view was well founded, the Court of First Instance did not therefore require of it any proof beyond that normally required of applicants in order to establish that their pleas in law are well founded.

39 It follows from the foregoing that Hilti's fifth plea must be rejected.

The sixth plea

40 Hilti's sixth plea is that the Court of First Instance wrongly appraised, first, the survey conducted by Rosslyn Research Limited and the opinion prepared by Mr Yarrow as regards the substitutability of the fastening systems, secondly, Professor Albach's econometric analyses as regards the elasticity of demand in relation to the prices of the various fastening systems, and, thirdly, the survey of Rosslyn Research Limited as regards the determinative nature of price for the choice of the fastening method adopted.

41 The Commission contends that this plea is inadmissible because it casts doubt upon the findings of fact made by the Court of First Instance, which the Court of Justice has no power to review on appeal. In the alternative, it contends that the plea is unfounded, because the Court of First Instance did not err in its appraisal of the evidence in question.

42 It should be pointed out that the appraisal by the Court of First Instance of the evidence put before it does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice.

43 Since Hilti challenges the appraisal by the Court of First Instance of certain evidence submitted to it but does not establish, or even, indeed, claim that the Court of First Instance distorted the clear sense of that evidence, its sixth plea is inadmissible and, for that reason, must be rejected.

The seventh plea

44 Hilti claims that the Court of First Instance failed to take into consideration all the evidence put before it by Hilti, evidence which showed there was a high degree of economic substitutability between PAF systems and the other fastening systems.

45 The Commission contends that the Court of First Instance considered all the evidence put before it, as is clear from paragraph 74 of the contested judgment, and that it is not open to Hilti to challenge, before the Court of Justice, the appraisal made by the Court of First Instance of the probative value of that evidence.

46 Contrary to Hilti's claims, the documents before the Court do not suggest that the Court of First Instance failed to consider certain evidence put before it by Hilti. On the contrary, the Court of First Instance clearly indicated that it did not accord any probative value to the evidence submitted by Hilti in support of its claims (paragraph 74 of the contested judgment) and, more particularly, to the opinion of Mr Yarrow, the survey by Rosslyn Research Limited (paragraph 75 of the contested judgment) and also Professor Albach's econometric analyses (paragraph 76 of the contested judgment).

47 It follows from the foregoing that Hilti's seventh plea must be rejected.

Bauco's claim that the fine imposed on Hilti should be increased

48 In its response Bauco asks the Court to consider increasing the amount of the fine imposed on Hilti by the decision at issue, taking into account the delay caused by Hilti's behaviour.

49 Even assuming that that request could be regarded as an application for an order that Hilti pay a fine of an increased amount, it is sufficient to point out that under Article 116 of the Rules of Procedure it is not open to an intervener to seek from the Court of Justice a form of order different from that sought at first instance. The form of order sought by Bauco is different in the proceedings before this Court because Bauco did not make any application to that effect in the proceedings before the Court of First Instance.

50 It follows that, in that respect, the form of order sought by Bauco cannnot be granted.

Costs

51 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the appellant has been unsuccessful, it must be ordered to pay the costs of these proceedings, including those incurred by the interveners, Bauco and Profix.

On those grounds,

THE COURT

hereby:

1. **Dismisses the appeal;**

2. **Dismisses Bauco's claim that the amount of the fine imposed on Hilti by Commission Decision 88/138/EEC of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty be increased;**

3. **Orders the appellant to pay the costs.**

Mancini Moitinho de Almeida Edward

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Murray

Delivered in open court in Luxembourg on 2 March 1994.

R. Grass G. F. Mancini

Registrar acting as President