

holds by making manifestly excessive demands with regard to the amount of the fee to which it is entitled.

5. It is an abuse of a dominant position for an undertaking to refuse to supply certain products separately, to put pressure on independent distributors to cause them to adopt its discriminatory practices and to refuse to honour the guarantee attaching to tools sold by it where they have been used with consumables produced by other manufacturers.

6. Since an undertaking in a dominant position may, where required to protect

its rights, institute the procedures laid down in the various national laws concerning product liability and misleading advertising, it may not argue that the allegedly dangerous nature or inferior quality of its competitors' products intended to be used with a tool manufactured and sold by it justify abusive practices which seek to eliminate those products from the market in order to protect its commercial position.

7. The turnover referred to in Article 15(2) of Regulation No 17 laying down the criteria for determining the amount of administrative fines that may be imposed on undertakings that have infringed the competition rules is the undertaking's total turnover.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)  
12 December 1991 \*

In Case T-30/89,

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

applicant,

\* Language of the case: English.

v

**Commission of the European Communities**, represented by Karen Banks, a member of its Legal Service, acting as Agent, assisted by Nicholas Forwood QC, of the Bar of England and Wales, with an address for service in Luxembourg at the office of R. Hayder, a national official seconded to the Legal Service of the Commission, Wagner Centre, Kirchberg,

defendant,

supported by

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

and by

**Profix Distribution Ltd.**, whose registered office is at West Bromwich, United Kingdom, represented by Malcolm Titcomb, Solicitor, of Evershed Wells & Hind, Birmingham, and in the oral procedure by Paul Lasok, Barrister, with an address for service in Luxembourg at the Chambers of Messrs Faltz et Associés, 6 Rue Heine,

intervenors,

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).

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

composed of: A. Saggio, President of the Chamber, C. Yeraris, C. P. Briët, D. Barrington and B. Vesterdorf, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 and 25 April 1991,

gives the following

## Judgment

### The facts giving rise to the dispute

- 1 By application lodged at the Registry of the Court of Justice on 21 March 1988, Hilti AG sought the annulment of the Commission Decision of 22 December 1987 in which the Commission (a) found that the applicant held a dominant position within the EEC in the market for nail guns and for the nails and cartridge strips for those guns, and had abused that position within the meaning of Article 86 of the EEC Treaty, (b) fined Hilti ECU 6 000 000 and (c) ordered it to put an end to the abuses of which it was accused.
- 2 The applicant, Hilti, is the largest European producer of PAF nail guns, nails and cartridge strips ('PAF' meaning 'powder-actuated fastening'). Hilti, whose registered office is in Liechtenstein, where it carries on its main manufacturing operations, also manufactures in the United Kingdom and other European countries.
- 3 Profix Distribution Ltd, (previously Eurofix, and referred to hereinafter as 'Profix' or 'Eurofix' according to the material stage in the proceedings) and Bauco (UK) Ltd, whose registered offices are in the United Kingdom, produce *inter alia* nails intended for use in the nail guns manufactured by the applicant. Profix and Bauco claim that the commercial practices pursued by the applicant during the material period were designed to exclude them from the market in nails compatible with Hilti tools.
- 4 By an application lodged on 7 October 1982 under Article 3 of Council Regulation No 17 of 6 February 1962, the First Regulation implementing Articles 85

and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87), Eurofix complained to the Commission that Hilti, acting through its EEC subsidiaries, was pursuing a commercial strategy designed to exclude Eurofix from the market in nails compatible with Hilti products. In essence, Eurofix alleged that Hilti was refusing to supply independent dealers or distributors of Hilti products with cartridge strips without a corresponding quantity of Hilti nails. Eurofix further stated that in order to sell its own nails for Hilti nail guns it had tried to obtain supplies of cartridge strips itself, but that Hilti had induced its independent dealer in the Netherlands to cut off supplies of cartridge strips which Eurofix had previously obtained from that source; finally, Eurofix was also refused supplies of cartridge strips following a direct request to Hilti. Eurofix further stated that it had requested Hilti, unsuccessfully, to grant it a patent licence, and that although it had subsequently obtained a licence of right under the patent legislation in force in the United Kingdom its terms had had to be fixed by the Comptroller of Patents. In that connection Hilti had made it clear to the complainant that it considered that such a licence did not confer any entitlement under the copyright which it claimed to hold in the United Kingdom.

- 5 Bauco made a similar complaint to the Commission, alleging that Hilti had infringed Article 86, and requested interim measures. In its formal application dated 26 February 1985, Bauco maintained that its customers were unable to buy Hilti cartridge strips without Hilti nails, thus making it difficult for Bauco to sell its own nails. Hilti had refused to supply cartridge strips to Bauco, and Bauco's attempt to buy cartridge strips from Hilti's independent distributor in the Netherlands through third parties had been blocked. Lastly, Hilti had reduced its discounts on Hilti goods to Bauco's customers because they bought Bauco nails. Furthermore, Hilti had refused to grant Bauco a licence to manufacture or import cartridge strips. When Bauco had manufactured or imported such strips Hilti had initiated injunction proceedings for copyright and patent infringement. As a result of that action Bauco was obliged to sign an agreement of 4 December 1984 whereby it undertook not to sell, import or manufacture cartridge strips of a design which reproduced drawings of which Hilti owned the copyright or which infringed patents owned by Hilti. Bauco claimed to have applied for a licence of right, but feared that because of Hilti's alleged copyright such a licence would be of little value. In any event, the terms of the licence of right had subsequently to be fixed by the Comptroller of Patents.

6 Following those complaints the Commission requested information from Hilti pursuant to Article 11 of Regulation No 17 and carried out an investigation at the premises of one of its subsidiaries. The Commission considered it probable that Hilti held a dominant position in the market for both nail guns and the 'consumables' intended for them, and that it had abused that position; accordingly, it initiated infringement proceedings against Hilti. In the course of those proceedings Hilti signed a provisional undertaking on 27 August 1985 whereby it declared that it would discontinue the practices of which the Commission complained until the Commission had made a final decision on the case.

7 On 4 September 1987 Hilti signed a permanent undertaking worded as follows:

'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 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.'

## The contested decision

### *The operative part*

8 The operative part of the decision is worded as follows:

### *'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 . . .

*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*

. . . '.



*The products at issue*

- 9 In its decision the Commission gave the following description of the products at issue, and the applicant has not disputed that description during the administrative proceedings or in the course of the present proceedings.
- 10 'Nails' refers to all the studs, nails and other fastening devices fixed by nail guns. 'Cartridges' refers to the brass cartridges which are either inserted into cartridge strips in the case of semi-automatic nail guns or loaded one by one in single-shot nail guns. 'Cartridge strips' refers to strips or holders, plastic in Hilti's case, into which brass cartridges are inserted. Generally, a cartridge strip will refer to a strip with its complement of cartridges. 'Consumables' refers to nails and cartridge strips. 'Powder-actuated fastening systems' means nail guns, nails and cartridge strips.
- 11 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 Mr 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. In a nail gun, however, the nail and the cartridge are totally separate. Most nail guns, including Hilti's, are now based on the indirect action piston system whereby the exploding cartridge propels a piston which in turn drives the nail. 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 PAF systems 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.

- 12 Different types of attachments, and the different materials into which these attachments are to 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. Nails must be appropriate to specific nail guns. Since 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. Early varieties of nail guns required the insertion of a fresh nail and a fresh cartridge after each firing. 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 ten brass cartridges. This strip is automatically fed into the nail gun at every firing. 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.
- 13 Nail guns are used by a wide variety of professional users in the construction industry. The rise of plant-hire shops, particularly in the United Kingdom, has made such guns accessible to a limited extent to private individuals.
- 14 Hilti's range of nail guns, nails and cartridge strips has obtained some patent protection. One of Hilti's latest nail guns, the DX 450, has certain novel features as compared with its earlier models (the DX 100 and DX 350, for example). 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. In the EEC Hilti also obtained patents for certain nails in all Member States except Denmark. These patents had all expired 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 and those of other manufacturers. 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 ten-shot cartridge strip developed by Hilti for use in the DX 350, on the other hand, 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 they expired in 1986. In all the other Member States they expired in 1988 or 1989.

- 15 In the United Kingdom 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 was 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 agreement between the licensor and the licensee, the United Kingdom Comptroller of Patents, Designs and Trademarks fixes the terms of the licence. In addition to patent protection, Hilti maintains that in the United Kingdom the design of its cartridge strips without cartridges benefits from protection under United Kingdom design copyright law.

*The legal assessment set out by the Commission in its decision*

A. *Hilti's behaviour*

- 16 With regard to Hilti's behaviour the Commission states that:

— Hilti pursued 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 ('tying' of cartridge strips and nails).

- It also 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 — again according to the Commission — based substantially on the fact that the customer was purchasing nails from Hilti's competitors.
- Hilti exerted pressure on independent distributors, notably in the Netherlands, not to fulfil certain export orders, notably to the United Kingdom.
- It had a policy of not supplying cartridges to independent nail manufacturers, in particular the interveners.
- It sought to delay or frustrate the grant of patent licences, which were available in the United Kingdom from 1984 onwards in the form of licences of right and were requested by the interveners, by trying to fix the royalty so high as to amount to a refusal.
- Hilti admitted to a policy of refusing to supply cartridge strips, even to long-standing customers, where it thought that the cartridge strips ordered might be sold on to independent nail manufacturers.
- It acknowledged that it refused to honour the guarantees on its tools when non-Hilti nails were used.
- Lastly, Hilti applied selective or discriminatory policies directed against the businesses of both competitors and competitors' customers — normally (the Commission claims) in the form of selective price cuts or other advantageous terms.

*B. The economic consequences of Hilti's behaviour*

- 17 According to the decision, this commercial policy on Hilti's part had the effect of enabling it to limit the market penetration of independent nail and cartridge strip producers who wished to sell consumables for Hilti nail guns. Hilti was able to charge very different prices on the markets of the different Member States and make very large mark-ups on its different products.

*C. The market for the products at issue*

- 18 According to the decision the relevant product markets are:

- (a) the market for nail guns;
- (b) the market for Hilti-compatible cartridge strips;
- (c) the market for Hilti-compatible nails.

These are separate product markets since, although they are interdependent, guns, cartridge strips and nails are subject to different conditions of supply and demand.

The very fact that there exist independent nail and cartridge strip makers who do not produce nail guns shows, according to the Commission, that those articles have different supply conditions. Moreover, certain nail gun manufacturers rely on independent nail and cartridge strip producers to supply at least some of their consumables. Some independent nail makers also supply nail gun manufacturers with nails. On the demand side, 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.

According to the decision, Hilti tools do not form part of the relevant market constituted by fastening systems in general for the construction industry, for the following reasons:

- on the supply side, the Commission notes that the different types of fixing equipment are generally produced with totally separate technologies, under different supply conditions and generally by different firms;
- on the demand side the Commission considers that, if PAF systems and other fixing methods formed part of the same relevant market, small but significant increases (or decreases) in the price of a nail gun, a nail or a cartridge strip would necessarily cause an appreciable shift of demand to (or from) the alternative method of fixing. However, for the products in question the price-elasticity of demand for the different types of fixing methods cannot be such that they form part of the same relevant market. No such shifts were observed, despite Hilti's behaviour. PAF systems have certain characteristics that differ, sometimes radically, from other fixing methods which are relevant in the choice of fixing method to be employed for a particular job on a particular site.

Owing to the wide range of factors which enter into the choice of the fixing method to be used and the great differences in characteristics (be they economic, legal or technical) between PAF systems and other fixing methods, they cannot, according to the decision, 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).

The relevant geographic market for nail guns and consumables is, according to the decision, the whole EEC; in the absence of any artificial barriers these products can be transported throughout the EEC without any excessive transport costs.

#### D. *Dominance*

19 On the basis of the assumptions outlined above concerning the relevant product markets and the considerations set out below the Commission takes the view that Hilti holds a dominant position in these markets. The Decision records that Hilti's share of sales of nail guns in the EEC is around 55%. As regards cartridge strips and nails generally, the Commission estimates that Hilti's share of sales in the EEC is at least equal to its share for nail guns. According to the decision, Hilti's shares of the EEC markets for Hilti-compatible nails and cartridge strips are larger than those which it holds in the markets for nails and cartridge strips generally.

According to the decision, Hilti has other advantages which help to reinforce and maintain its position in the nail gun market. These are, in particular, certain novel and technically advantageous features which are protected by patents, a strong research and development position and a strong and well-organized distribution system in the EEC. Moreover, Hilti's commercial behaviour bears witness to its ability to act independently of, and without due regard to, either competitors or customers in the markets in question.

According to the decision, Hilti abused that dominant position by pursuing all the practices described in the decision.

#### E. *Objective justification*

20 The decision states that there is no objective justification for Hilti's behaviour. With regard to Hilti's expressions of concern on the question of safety, the decision states that if it was concerned it should have referred the matter to the

competent United Kingdom authorities and asked them to take action against the independent producers whose products it considered dangerous. Hilti's behaviour cannot therefore be described as being motivated solely by a concern to ensure the safety and reliability of its nail guns and the use of consumables complying with the requisite standards.

- 21 On the adoption of the contested decision, the Commission issued a press release summarizing it on 24 December 1987.

That press release included the following paragraph:

‘This behaviour constitutes very serious breaches of the rules of competition in that it was an attempt to squeeze small new entrants out of the market and deprive consumers of a choice of suppliers. It constituted an attempt by Hilti to reinforce its already dominant position and enabled it in fact to charge very different prices in different Member States. Consequently an exemplary fine was considered appropriate.’

### **Procedure before the Court of Justice and the Court of First Instance**

- 22 The earlier part of the written procedure was conducted before the Court of Justice, which referred the case to the Court of First Instance by order of 15 November 1989 pursuant to Articles 3(1) and 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

By applications lodged on 2 and 12 August 1988 respectively, Bauco and Profix applied to intervene in the case in support of the defendant. By order of 4 December 1989 the Court of First Instance granted Bauco and Profix leave to intervene.

By order of 4 April 1990 [(1990) ECR II-163), the Court of First Instance allowed the applicant's request for confidential treatment in respect of most of the items of information for which confidential treatment had been sought.



The interveners, Bauco and Profix, submitted their pleas in law on 18 and 10 September 1990 respectively. The Commission and Hilti lodged observations on the statements of the interveners on 23 October and 13 November 1990 respectively.

Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

### **Forms of order sought by the parties**

23 The applicant claims that the Court of First Instance should:

- annul the decision;
- cancel the fine;
- in the event that the decision is upheld in whole or in part, reduce the fine to nil;
- order the Commission to pay the costs.

The Commission contends that the Court should:

- dismiss the application;

— order the applicant to pay the costs.

Bauco (UK) Ltd, intervening in support of the Commission, claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs incurred in connection with its intervention.

Profix Distribution Ltd, intervening in support of the Commission, claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs incurred in connection with its intervention.

## **Preliminary issues**

### *Arguments of the parties*

- <sup>24</sup> Quite apart from its pleas in law seeking dismissal of the action, the defendant raised the issue whether some of the arguments put forward by the applicant in its application should be rejected as inadmissible because — according to the Commission — they resile from concessions expressly made by Hilti during the administrative proceedings or deal with matters which Hilti did not raise with the Commission in those proceedings.

- 25 The defendant expresses the issue in the following terms: ‘Is an applicant who seeks review, under Article 173 of the EEC Treaty, of a Commission decision in a competition case entitled to raise in those proceedings issues and arguments that were not raised by him in the course of the administrative proceedings, or to resile from concessions of fact or law that he made in the course of such proceedings?’
- 26 The Commission states that the concessions previously made and the new arguments put forward by the applicant relate to the following issues:
  - (1) whether, if Hilti held a dominant position, certain of its practices constituted abuses for the purposes of Article 86;
  - (2) whether the practices admitted by Hilti had the requisite effect on trade between Member States, within the meaning of Article 86;
  - (3) the definition of the relevant geographic market.
- 27 The Commission begins by referring to Hilti’s reply to the statement of objections, the relevant passage of which is worded as follows:

‘Under the assumption that Hilti had a position of market dominance — hereinafter accepted *arguendo* — Hilti does not deny that it has contravened Article 86 [of the] EEC Treaty by engaging in some of the marketing practices of which it is accused.

Specifically, Hilti accepts that (under the said assumption) it has contravened Article 86 EEC Treaty by the following practices:

- the refusal by Hilti GB, in individual cases, to supply customers with cartridge strips without nails;
- the grant by Hilti GB, as a general policy, of special discounts for the purchase of cartridge strips and nails . . . ;
- the refusal by Hilti GB to supply customers with cartridge strips destined for Eurofix or Bauco;
- Hilti's request in November 1981 to its independent exclusive distributors within the Community not to supply UK customers with cartridge strips destined for Eurofix;
- discrimination by Hilti GB between "supported" and "unsupported" plant hire dealers and other traders on the basis of criteria that were neither sufficiently objective, nor uniformly applied nor made known to the customers in question;
- the refusal by Hilti to honour its guarantee for the tools where these had been used with consumables of other than Hilti provenance;
- discrimination by Hilti between customers who were, in practice, not always treated in accordance with Hilti's objective discounting criteria applicable in the several Member States.

...

Hilti accepts that its motive for engaging in the contraventions listed above, to assure the continued safety/reliability of its DX Systems, is not sufficient justifi-

cation (under EC Competition Law) for these actions since they did not constitute the least restrictive actions sufficient to achieve the goal by which they were motivated.'

28 According to the Commission, Hilti denies, in its application, that it has been guilty of abusing a dominant position, and this represents a retraction of the concessions, listed above, which Hilti had previously made.

29 With reference to the second point—the effect on trade between Member States—the Commission states that during the administrative proceedings Hilti never disputed the Commission's findings. According to the Commission, by acknowledging that if it held a dominant position it had contravened Article 86 of the Treaty, Hilti conceded by necessary implication that its conduct in question affected, at least potentially, trade between Member States.

30 Turning to the third point—the definition of the relevant geographic market—the Commission points out that Hilti did not, in the administrative proceedings, contest the Commission's identification of the whole of the Community as the relevant geographic market.

31 The Commission contends that the applicant should not, in its application under Article 173 of the Treaty, be allowed to raise substantive arguments which it did not put forward in the administrative proceedings leading to the adoption of the decision under review. The same applies *a fortiori* to issues on which the applicant made express concessions in the course of those proceedings and from which it now seeks to resile. The Commission refers in that respect to the Opinion of Advocate General Warner in Case 30/78, in which the Court of Justice gave judgment on 10 July 1980 (*Distillers Company v Commission* [1980] ECR 2291), and also to the judgment in Case 102/87 (*France v Commission* [1988] ECR 4067).

- 32 On this point the applicant states in its reply that 'for the avoidance of doubt, [it] confirms its admissions as set out in the Reply to the Statement of Objections'.
- 33 However, the applicant maintains that the effects of its practices, which in fact were limited to the interveners in the present proceedings, cannot have been abusive since they were objectively justified by safety considerations. The applicant further argues that the Commission produced no evidence to demonstrate that the practices directed at the interveners had wider effects. Nevertheless, it admits that those practices were capable of producing further effects and, for that reason, were not the least restrictive means of discharging its duty of care as a manufacturer.

### *Legal appraisal*

- 34 The Court notes that the Commission's argument has two aspects, the first of which deals with the question whether some of the arguments put forward by the applicant should be regarded as inadmissible on the ground that they seek to repudiate points which Hilti expressly admitted as correct during the administrative proceedings, and the second with the question whether further arguments on which the applicant has relied should similarly be regarded as inadmissible on the ground that Hilti did not put them forward in those administrative proceedings.
- 35 As far as the first aspect of the Commission's argument is concerned, it must be observed that during the written and oral procedure in this case, before both the Court of Justice and the Court of First Instance, the applicant has expressly confirmed the admissions it made in the course of the administrative proceedings. That part of the Commission's argument therefore serves no further purpose. It should, however, be pointed out that in the administrative proceedings Hilti did not expressly admit the Commission's allegations that Hilti's behaviour was likely to affect trade between the Member States or its definition of the 'relevant geographic market'. The fact that Hilti admitted having 'contravened Article 86' on the assumption that it held a dominant position in the market, without stating

its views on the problems inherent in defining the geographic market and the effects of its behaviour on trade between Member States, cannot be construed as an implicit acknowledgement on its part of the truth of the claims made by the Commission and cannot therefore constrain it in the subsequent exercise of its rights as a litigant.

36 With regard to the second aspect of the Commission's argument, it should be recalled that Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Articles 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47) set out the rights and the duties of undertakings in the administrative proceedings for which Community competition law provides. Article 19(1) of Regulation No 17 states: 'Before taking decisions as provided for in Articles . . . , the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection'. According to Article 2(4) of Regulation No 99/63 the Commission, when giving notice of objections, must fix a time limit 'up to which the undertakings and associations of undertakings may inform the Commission of their views'.

37 With regard to the implications of those provisions, it should be observed that even when read together with Article 3(1) of Regulation No 99/63, under which 'undertakings and associations of undertakings shall, within the appointed time limit, make known in writing their views concerning the objections raised against them', they cannot be construed as compelling the undertaking concerned to reply to the statement of objections sent to it.

38 Furthermore, neither of those regulations, nor indeed any general principle of Community law, obliges undertakings to do any more than supply the Commission with such information or documentation as it has requested under Article 11 of Regulation No 17. Although both regulations seem to be based on a presumption of cooperation on the part of undertakings, cooperation which is desirable from the point of view of compliance with competition law, no obligation to reply to the

statement of objections may be inferred in the absence of any express legal provision to that effect. It should be added that such a duty would, at least in the absence of any legal basis, be difficult to reconcile with the fundamental principle of Community law safeguarding the rights of litigants. The approach for which the Commission argues would in practice create difficulties for an undertaking which, having failed for whatever reason to reply to a statement of objections, wished to bring an action before the Community courts.

39 It follows that the second aspect of the defendant's argument must be rejected.

40 Having rejected the defendant's argument, the Court must point out that Hilti categorically denies having contravened Article 86 of the Treaty by frustrating or delaying legitimately available licences of right under Hilti's patents and by operating selective and discriminatory policies directed against the business both of competitors and of their customers (points 5 and 7 of Article 1 of the operative part of the contested decision).

### Substance

41 In support of its claims the applicant has raised four pleas in law alleging, first, infringement by the Commission of its duty to provide adequate legal proof of the facts and assessments on which it based its decision, secondly, infringement of Article 86 of the Treaty, thirdly, infringement of Article 15(2) of Regulation No 17 inasmuch as the fine imposed is excessive in any event and, fourthly, infringement of Article 190 of the Treaty inasmuch as the statement of reasons for the decision as regards the fine is incorrect.



**First plea: inadequate evidence**

42 The applicant alleges that the Decision is based almost exclusively on assertions without any supporting evidence. It maintains that on every point on which the Commission found an infringement of Article 86 it failed to discharge its duty under Community law of adducing evidence. Thus it claims that the Commission failed to compile the relevant information and did not examine the evidence submitted to it by the applicant.

43 In reply to that allegation the Commission has argued that its decision is supported by adequate evidence.

44 The Court notes that in making the allegation the applicant calls in question all the aspects of the debate regarding the Commission's application of Article 86 of the Treaty in this case. Consequently, consideration of that argument cannot be separated from the examination of the substance of the case. The Court of Justice has consistently held that the Commission must adduce adequate evidence of all the facts on which its decision is based. Accordingly, the question is whether the Commission, when adopting the contested decision, was in possession of sufficient evidence to establish that the information on which it based itself was correct and that its assessments were well founded. The applicant's plea that the Commission failed to discharge its burden of proof cannot therefore be considered in isolation.

**Second plea: infringement of Article 86**

45 The second plea falls into three parts:

— the applicant maintains that it does not enjoy a dominant position in the common market or in a substantial part of it for the purposes of Article 86;

- although it admits that certain aspects of its behaviour might constitute an abuse if it held a dominant position, the applicant takes the view that its behaviour in seeking to limit the sales of nails produced by the interveners could not constitute an abuse, inasmuch as the applicant had a legitimate interest in limiting the use of such nails in its nail guns;
- according to the applicant, its commercial behaviour did not affect, and was not capable of affecting, trade between Member States within the meaning of Article 86.

<sup>46</sup> As far as the substance of the plea is concerned, the review by the Court must therefore concentrate on three points. In the first place, it is necessary to ascertain the applicant's position in the market, which entails, as a preliminary matter, consideration of the definition of the relevant product market and the geographic market. As a second step the Court must verify whether or not the behaviour complained of was improper, particularly with regard to the objective justification pleaded by Hilti in this connection. In the third place, it must rule on the effects of that behaviour on trade between Member States.

### *Dominant position*

<sup>47</sup> In the first part of its plea regarding the alleged infringement of Article 86 of the Treaty the applicant takes issue with the definition of the relevant product market and the geographic market in the decision and dismisses the arguments which led the Commission to the conclusion that it holds a dominant position.

### **The relevant product market**

#### *Arguments of the Parties*

<sup>48</sup> The applicant argues that the Commission has incorrectly defined the relevant product market. In order to show that this market does not consist, as is claimed

in the decision, of three separate markets, namely the markets in nail guns, cartridge strips (and cartridges) and nails, the applicant asserts that all those components must be regarded as making up an indivisible whole. The applicant bases its case on two opinions dated 1986 and 1987, prepared by Professors S. Klee and T. Seeger, engineers in materials mechanics at Darmstadt Technical University, on the interdependence of the components making up a PAF system. The opinions conclude that 'if the criteria with which system components must comply are not covered comprehensively by standards and generally binding rules, system components of different makes cannot be interchanged without the system characteristics being influenced'. The applicant has also produced similar studies carried out by two British engineers, who reach the same conclusions.

According to the applicant, the Commission is mistaken in basing itself on a single criterion for defining the relevant market, namely the cross-price-elasticity test. The fact that the Commission based its case on that one criterion is contrary to economic theory and practice, and even to the case-law of the Court. Moreover, the Commission itself did not in fact apply that test. It did not measure the degree of economic substitutability.

- 49 With regard to demand substitutability, the applicant claims that there is a relationship of economic substitutability between PAF systems and certain other fixing systems which are technically substitutable. In support of that claim the applicant argues that in each application for PAF systems they and alternative systems (notably drilling and screwing) have coexisted, each of them holding a significant market share, for a considerable number of years.
- 50 The applicant further points out that in addition to the price of the product other competitive attributes such as pre- and post-sales service, ready availability etc. may be equally significant to the user. Although the inclusion of differentiated products in a single market invariably presupposes cross-price-elasticity between them, it is not possible in applied economics to test for cross-price-elasticity alone

in defining a relevant product market without having regard to the cross-elasticity of demand in respect of other competitive attributes.

- 51 The applicant claims that by producing an econometric study by Professor Albach of the University of Bonn, to which the Commission referred in paragraph 73 of its decision, it has demonstrated a significant degree of cross-price-elasticity between sales of (1) nails for PAF systems on the one hand and anchors (plugs) on the other, (2) PAF tools on the one hand and drill hammers on the other, and (3) anchors (plugs) on the one hand and PAF tools on the other. The Commission, it argues, has not justified the criticisms of the methodology and findings of Professor Albach which it made in its decision. Furthermore, a further study carried out at Hilti's request by Mr Yarrow of Oxford University, on the basis of a market survey conducted by an independent institute, Rosslyn Research, has now conclusively established, the applicant says, that alternative systems which are substitutable in the various operations involved are in competition with each other.

- 52 Whilst acknowledging that in 1982 it held a patent on cartridge strips, the applicant maintains that it did not derive from its position in the market for cartridge strips for use in Hilti tools a position of power surpassing that derived from its share of sales of PAF systems generally. As a general rule, a strong position or even a monopoly in relation to cartridge strips does not confer on a supplier greater power than that derived from its share of sales of PAF systems generally, in so far as the system composed of all those products together can readily be replaced by another fixing system. That is the case as regards the products made by the applicant, which sells its nail guns at a price which does not prevent the professional end-user from changing products. The net price to the end-user of the Hilti PAF tool most widely used in the United Kingdom is UK £225. The total cost of Hilti PAF consumables for 1 200 fixings equals the investment in a nail gun. On average, two months' expenditure on consumables corresponds, for the end-user, to the investment in a nail gun. In such circumstances end-users would very quickly have reacted to any attempt by the applicant

to exploit its patent position, by switching either to another PAF system or to another fastening system altogether. It follows, according to the applicant, that the relevant product market cannot be correctly defined as limited to cartridge strips or nails suitable for use in Hilti equipment. In conclusion, the applicant takes the view that, correctly defined, the market covers all fastening systems which are substitutable in any PAF application, in particular drilling and screwing systems.

- 53 Turning to supply substitutability, the applicant argues that the general technology involved in the manufacture of power drills (for drilling and screwing systems) is not very different from the technology used in the manufacture of nail guns. The fastening elements in both systems are similar in their function and in their material. Of the applicant's competitors, only Bosch, AEG, Hitachi and Black & Decker do not supply both power drills and PAF tools. All the other suppliers would describe themselves, like the applicant, as suppliers of construction fastening systems generally. As far as consumables are concerned, the applicant maintains that any producer experienced in the manufacture of specialty nails or screws is in a position to manufacture PAF nails without any difficulty. The manufacture of the cartridge strips required for PAF systems is, according to the applicant, a staple activity for any cartridge manufacturer. Although there are only three significant manufacturers of PAF cartridge strips in the Community, it must be borne in mind that transport costs are relatively low, with the result that cartridge strips can readily be obtained from outside the Community. According to the applicant the differences in supply conditions for other construction fastening systems are not so great as to create significant barriers to manufacturers wishing to enter the market in PAF systems.

- 54 In reply to those arguments the Commission first sets out Hilti's earlier statements regarding the relevant markets. The Commission quotes from a letter of 23 March 1983 which it received in reply to the questions which it had put to Hilti after Eurofix had lodged its complaint; the letter states that there are 'at least two different relevant markets with respect to nails and cartridges, apart from the additional market for firing tools'. The Commission contends that those statements

provide the best available evidence of Hilti's internal assessment of the markets in which it operated at that time.

- 55 In regarding cross-price-elasticity as a synthesis of all the factors that determine whether or not two different products can properly be said to be in the same relevant market, the Commission claims that it was doing no more than applying a test which has been consistently applied over many years both by itself and by the Court. In that connection the Commission refers to the judgments of the Court in Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215 (as regards supply side substitution) and Case 27/76 *United Brands v Commission* [1978] ECR 207 (as regards demand side substitution).
- 56 The Commission maintains that there is relatively little economic substitutability between the different fixing systems. The fact that various systems have coexisted over very long periods may be explained by the fact that within each type of application there are a variety of situations, some of which inherently favour one type of fixing whilst others favour another. Thus, the critical threshold in the comparison between the use of nail guns and that of spot-welding — an example taken from Professor Albach's second opinion — is relatively insensitive to the cost of PAF consumables. Other illustrations also show that small but significant increases in the prices of consumables for PAF systems are unlikely to cause large shifts in the choice between the various fastening systems.
- 57 According to the Commission, the fact that Professor Albach's econometric analysis does not disclose cross-price-elasticity cannot really be explained — as the applicant alleges — in terms of 'simultaneous relative changes'; a more natural explanation is that the products are not competing, and belong to different markets.

- 58 The relevant markets are therefore not the market embracing all fastening systems but rather the market for cartridge strips and nails compatible with Hilti equipment.
- 59 With particular regard to supply substitutability the Commission contends that neither for PAF systems nor for PAF consumables is market penetration easy for new suppliers of different products. That is largely due to the need to solve technical problems and to undertake considerable investment. A further important factor is the time lag to be reckoned with before new suppliers are in a position to enter the market. As far as Hilti-compatible cartridge strips are concerned, those general factors were complicated by the fact that Hilti held patents for all EEC countries and intended to take advantage of copyright protection.
- 60 Bauco argues that because of their unique features the use of nail guns is a practical choice in a number of specific instances.
- 61 Bauco further maintains that there is no cross-price-elasticity between nail guns and the consumables used in them on the one hand and tools and consumables for other fastening systems on the other. Hilti's argument that PAF systems constitute 'technically integrated systems' becomes untenable when it is used in relation to other fastening systems, which clearly demonstrates that the relevant markets are indeed the separate markets for nail guns, nails and cartridge strips. Users are compelled to use Hilti PAF systems not only on account of the investment involved in the purchase of a gun but also because of the technical and practical superiority of the Hilti product over all other PAF systems.

- 62 As regards demand substitutability, Bauco argues that if a choice is based on experience, as it usually is, only significant changes to any given feature will have an effect on that choice. A detailed analysis of all the factors influencing the decision to use different types of fastening system would be likely to show that other fastening systems are a poor alternative for the user in a great many cases.
- 63 Profix supports the arguments of the Commission. It also argued, in the oral procedure, that the relevant product market is the market for nails or, more specifically, nails compatible with Hilti nail guns. Profix manufactures nails and hence must necessarily make 'Hilti-compatible' nails, as it has done since the 1960s. Precisely because Profix manufactures only nails, it is pointless to argue against it that alternative systems such as hammer drills can be substituted for PAF systems.

### *Legal appraisal*

- 64 It should be observed at the outset that in order to assess Hilti's market position it is first necessary to define the relevant market, since the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products (judgment of the Court of Justice of 21 February 1973 in Case 6/72 *Continental Can*, cited above, paragraph 32).
- 65 In order to determine, therefore, whether Hilti, as a supplier of nail guns and of consumables designed for them, enjoys such power over the relevant product market as to give it a dominant position within the meaning of Article 86, the first question to be answered is whether the relevant 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.



66 The Court takes the view that 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, it must be concluded that there are separate markets for Hilti-compatible cartridge strips and nails, as the Commission found in its decision (paragraph 55).

67 With particular regard to the nails whose use in Hilti tools is an essential element of the dispute, it is common ground that since the 1960s there have been independent producers, including the interveners, making nails intended for use in nail guns. Some of those producers are specialized and produce only nails, and indeed some make only nails specifically designed for Hilti tools. That fact in itself is sound evidence that there is a specific market for Hilti-compatible nails.

68 Hilti's contention that guns, cartridge strips and nails should be regarded as forming an indivisible whole, 'a powder-actuated fastening system' is in practice tantamount to permitting producers of nail guns to exclude the use of consumables other than their own branded products in their tools. However, in the absence of general and binding standards or rules, any independent producer is quite free, as far as Community competition law is concerned, to manufacture consumables intended for use in equipment manufactured by others, unless in doing so it infringes a patent or some other industrial or intellectual property right. Even on the assumption that, as the applicant has argued, components of different makes cannot be interchanged without the system characteristics being influenced, the solution should lie in the adoption of appropriate laws and regulations, not in unilateral measures taken by nail gun producers which have the effect of preventing independent producers from pursuing the bulk of their business.

69 Hilti's argument that PAF tools and consumables form part of the market in PAF systems for the construction industry generally cannot be accepted either. The

Court finds that PAF systems differ from other fastening systems in several important respects. The specific features of PAF systems, set out in paragraph 62 of the Decision, are such as to make them the obvious choice in a number of cases. It is evident from the documents before the Court that in many cases there is no realistic alternative 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.

- 70 The Court considers that the Commission's description of those features in its decision is sufficiently clear and convincing to provide sound legal justification for the conclusions drawn from it.
- 71 Those findings leave no real doubt as to the existence, in practice, of a variety of situations, some of which inherently favour the use of a PAF system whilst others favour one or more other fastening systems. As the Commission notes, the fact that several different fastening methods have each continued for long periods to account for an important share of total demand for fastening systems shows that there is only a relatively low degree of substitutability between them.
- 72 In such circumstances the Commission was entitled to base its conclusions on arguments which took account of the qualitative characteristics of the products at issue.
- 73 Its conclusions are, moreover, corroborated by the opinion prepared by Mr Yarrow and the survey conducted by Rosslyn Research Ltd, mentioned above, inasmuch as they disclose the existence of a large number of nail gun users who

could see no realistic alternative to the PAF system in circumstances corresponding to most of those in which nail guns have in fact been used.

74 Moreover, the evidence produced by the applicant is not such as to weaken the findings made by the Commission.

75 In the first place it must be observed that the opinion of Mr Yarrow and the survey by Rosslyn Research Ltd do not demonstrate — as their authors claim — a high degree of economic substitutability between the relevant products. The questions put to construction undertakings are not apt to provide an answer to the fundamental question in this case, namely whether slight but significant differences in the price of nails are likely to shift demand to a significant extent. In a market in which, as here, very large discounts on catalogue prices are common, the mere fact that a number of those questioned referred first to price as a decisive factor, without elaborating on the impact which a change in price would have on the choice of method to be used, cannot prove that there is a high degree of cross-price-elasticity.

76 In the second place, it may be noted that Professor Albach's econometric analyses take account of only one factor — price — when it is clear from the documents before the Court, in particular the survey conducted by Rosslyn Research Ltd, that the choice of the consumer depends to a large extent on unquantifiable circumstances.

77 The conclusion must be 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.

- 78 That finding is corroborated by the abovementioned letter of 23 March 1983 from Hilti to the Commission, in which the opinion was expressed that there were separate markets for guns, cartridge strips and nails. Although that did not, at the time, represent an interpretation of the term 'relevant market' for the purposes of Article 86 of the Treaty, the content of the letter is nevertheless quite revealing as to Hilti's own commercial view of the markets in which it operated at the time. Hilti has explained that the letter was prepared by an in-house lawyer, in conjunction with an outside legal adviser and the product manager concerned. The letter was therefore drafted by persons who may be assumed to have had a sound knowledge of the undertaking and its business.

## Geographic market

### *Arguments of the parties*

- 79 As far as the definition of the geographic market is concerned, the applicant argues that, in addition to transport costs, certain other aspects of the distribution of PAF products give rise to differences in market conditions between Member States. Professor Albach pointed out considerable differences between the Member States in the traditional evaluation of certain products and construction or fastening systems. According to the applicant, the existence of price disparities between the various markets is no indication, let alone evidence, of artificial barriers erected by enterprises trading within the Community. With regard to the prices charged by Hilti in the various Member States, the applicant takes the view that in fact they reflect differences in the commercial structure of those markets. It is a mistake to compare the highest prices with the lowest. The only sensible course is to compare the average sales prices charged by the individual Hilti market organizations across the entire product range.
- 80 The Commission contends — with regard to the substance of the issue — that the substantial price differences which were observed could have been expected to lead to parallel trading between national markets. Turning to Hilti's argument on the need for specialist distributors, the Commission objects that even for products such

as motor cars, which require highly specialist outlets, the relevant market from the producer's point of view is clearly the Community.

### *Legal appraisal*

81 The documents before the Court show that there are large price differences for Hilti products between the Member States and that transport costs for nails are low. Those two factors make parallel trading highly likely between the national markets of the Community. It must therefore be concluded that the Commission was right in taking the view that the relevant geographic market in this case is the Community as a whole. The applicant's argument on this point must therefore be rejected.

### **Hilti's position in the market**

#### *Arguments of the parties*

82 As regards the other aspects of the question whether the applicant holds a dominant position in the relevant product market, Hilti observes in the first place that the Commission's estimates of its market share are not sufficient to justify a finding of dominance. Neither the estimates given to the Commission by the applicant itself nor those obtained from the United Kingdom organization PASA (Powder Actuated Systems Association) are sufficiently reliable to serve as a basis for the contested decision. Only the Commission, by virtue of the powers conferred on it by Article 11 of Regulation No 17, is capable of establishing actual market shares, and it did not do so. The applicant claims not to know its share of the properly defined relevant market, which comprises (according to the applicant) all the fastening systems which can be substituted for PAF systems (including in particular drilling and screwing systems). None the less, Hilti does claim to know that its market share is such that it cannot be said to hold a dominant position.

83 The applicant maintains that it derives no significant commercial power from its patents. As far as its patent on cartridge strips is concerned, it reiterates the points set out above in paragraph 52 in order to demonstrate that it does not derive from its share of that market any commercial power beyond that derived from its position on the relevant market in general. With reference to its patents on certain elements of the DX 450 nail gun, the applicant emphasizes that they are only improvement patents. Its competitors have long since been able to incorporate into their tools similar improvements specific to their tool design. Nor does the applicant's research and development position confer on it any extraordinary commercial power. The applicant's major competitor in the manufacture of PAF systems has a sales volume and financial resources largely equivalent to those of the applicant, and the applicant's resources for research and development are dwarfed by those of its other competitors, who are industrial giants. The applicant's distribution system is not organized in such a way as to give it disproportionate competitive strength. The applicant claims that it is not true — as the Commission alleges — that the PAF systems segment of the market in construction fastenings is mature, with consequent high entry barriers and reduced competition.

84 Hilti's commercial behaviour does not, it argues, reflect a dominant position. The practice of 'tying' the sales of cartridge strips and nails was adopted by the applicant with a view to avoiding risks due to the use of defective nails in its nail guns. The practice did not presuppose a dominant position on the market.

85 The Commission replies that the figures on which it based its finding as to Hilti's market shares were supplied to it by Hilti itself under Article 11 of Regulation No 17; Hilti was therefore obliged to provide information which was, to the best of its knowledge, as accurate as possible. With regard to the PASA figures, various internal documents of Hilti show that even its United Kingdom managers relied on them for determining Hilti's market share. The Commission takes the view that it assessed Hilti's market share correctly and that there is even reason to believe that its market shares might be even larger. The Commission points out that the PASA figures attribute to Hilti shares in United Kingdom sales of PAF nails and

cartridge strips of 70% to 80% and 70% respectively, shares which are significantly larger than its 55% share of the market in nail guns.

86 The Commission rejects Hilti's criticism of its appraisal of the other circumstances which, according to the decision, help to maintain and reinforce Hilti's position in the nail gun market. The Commission points out that Hilti has the most advanced product on the market, namely the DX 450 nail gun. Its strong position in research and development is not counterbalanced by the mere possibility that other large potential suppliers may enter the market. The combined effect of a well-organized system for direct distribution to end-users and the high proportion of nail gun users using Hilti equipment make it difficult for other suppliers to oust Hilti and for new companies to enter the market. Lastly, the maturity of the market makes access to it less attractive to other potential participants.

87 According to the Commission, the examples of Hilti's behaviour in the market which it has taken as evidence of a dominant position correspond to behaviour which is normally observed only in a dominant undertaking. The Commission admits that a non-dominant undertaking can behave in that way, but maintains that in practice it is most unlikely to do so because the existence of effective competition will normally ensure that the adverse consequences of such behaviour outweigh any benefits. The 'tying' of sales, for example, is usually a practice which brings no gains for a non-dominant supplier. Such behaviour on Hilti's part is therefore supporting evidence of the power it derives from its status as *de facto* sole supplier of Hilti-compatible cartridge strips.

88 Bauco has no doubt, in the light of its experience of the market place, that Hilti is dominant in the relevant markets. The markets for nails and cartridge strips compatible with Hilti PAF systems are by far the largest and most important. Until

the Commission intervened, Hilti's behaviour made the market an impossible one to enter successfully.

### *Legal appraisal*

<sup>89</sup> The Commission has proved that Hilti holds a market share of around 70% to 80% in the relevant market for nails. That figure was supplied to the Commission by Hilti following a request by the Commission for information pursuant to Article 11 of Regulation No 17. As the Commission has rightly emphasized, Hilti was therefore obliged to supply information which, to the best of its knowledge, was as accurate as possible. Hilti's subsequent assertion that the figures were unsound is not corroborated by any evidence or by any examples showing them to be unreliable. Moreover, Hilti has supplied no other figures to substantiate its assertion. This argument of the applicant must therefore be rejected.

<sup>90</sup> The Court of Justice has held (Case 27/76 *United Brands v Commission* [1978] ECR 207 and Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461) that the dominant position referred to in Article 86 of the Treaty relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers; the existence of a dominant position may derive from a combination of several factors which, taken separately, are not necessarily determinative but among which a highly important one is the existence of very large market shares.

<sup>91</sup> With particular reference to market shares, the Court of Justice has held (*Hoffmann-La Roche* judgment, cited above, paragraph 41) that very large shares are in themselves, and save in exceptional circumstances, evidence of a dominant position.



- 92 In this case it is established that Hilti holds a share of between 70% and 80% in the relevant market. Such a share is, in itself, a clear indication of the existence of a dominant position in the relevant market (see the judgment of the Court of Justice in Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, paragraph 60).
- 93 Furthermore, as regards the other factors noted by the Commission as helping to maintain and reinforce Hilti's position in the market, it must be pointed out that the very fact that Hilti holds a patent and, in the United Kingdom, invokes copyright protection in relation to the cartridge strips designed for use in its own tools strengthens its position in the markets for Hilti-compatible consumables. Hilti's strong position in those markets was enhanced by the patents which it held at the time on certain elements of its DX 450 nail gun. It should be added that, as the Commission rightly contended, it is highly improbable in practice that a non-dominant supplier will act as Hilti did, since effective competition will normally ensure that the adverse consequences of such behaviour outweigh any benefits.
- 94 On the basis of all those considerations, the Court holds that the Commission was entitled to take the view that Hilti held a dominant position in the market in nails for the nail guns which it manufactures.

### *Existence of abuse*

- 95 As regards the second part of its plea regarding the alleged infringement of Article 86 of the Treaty, the applicant denies having behaved improperly and argues that in any event its behaviour was objectively justified.

## **Improper nature of Hilti's behaviour**

### *Arguments of the parties*

96 While admitting most of the behaviour of which it is accused and conceding that such behaviour could have amounted to an abuse had it enjoyed a dominant position, Hilti categorically denies that it frustrated or delayed legitimately available licences of right under the patents which it held or operated selective and discriminatory policies directed against the business of competitors and their customers (points 5 and 7 of Article 1 of the operative part of the decision).

97 As regards the abuse of which Hilti is accused, the Commission contends in the first place that Hilti has modified its line of argument throughout both the administrative and the judicial proceedings. Initially, in its abovementioned letter to the Commission of 23 March 1983, Hilti denied altogether that it had taken any steps to limit the availability of its cartridge strips; subsequently, in its reply to the statement of objections, it admitted having pursued practices intended for that purpose, whereas it now seeks to resile from a number of the concessions made in its reply to the statement of objections.

98 The Commission goes on to note that, as a matter of principle, it does not accept that a dominant supplier of certain goods is entitled to take action on his own initiative to eliminate other products from the market in question, even if he is genuinely concerned about the safety and reliability of those other products in so far as they may be used in conjunction with his own.

### *Legal appraisal*

99 As far as the applicant's policy on the grant of licences of right is concerned, the Court observes that it is clear from the documents before it that at the material time Hilti was not prepared to grant licences on a voluntary basis and that during the proceedings for the grant of licences of right it demanded a fee approximately

six times higher than the figure ultimately appointed by the Comptroller of Patents. A reasonable trader, as Hilti claims to have been, should at least have realized that by demanding such a large fee it was needlessly protracting the proceedings for the grant of licences of right, and such behaviour undeniably constitutes an abuse.

100 As regards Hilti's selective and discriminatory policies towards its competitors and their customers, it is quite clear from the documents cited by the Commission at paragraph 40 of its decision that Hilti did indeed pursue such policies. The strategy employed by Hilti against its competitors and their customers is not a legitimate mode of competition on the part of an undertaking in a dominant position. A selective and discriminatory policy such as that operated by Hilti impairs competition inasmuch as it is liable to deter other undertakings from establishing themselves in the market. The inescapable conclusion is therefore that the Commission had good reason to hold that such behaviour on Hilti's part was improper.

101 Since Hilti has admitted the other behaviour of which it was accused by the Commission and since it has acknowledged that such behaviour would be liable to constitute an abuse if practised by an undertaking in a dominant position, it must be concluded, now that Hilti's dominant position in the market has been demonstrated, that Hilti abused that position by engaging in all the commercial practices of which the Commission accused it in this regard.

## Objective justification of Hilti's conduct in the market

### *Arguments of the parties*

102 In arguing its claim of objective justification, the applicant refers first to the opinion prepared by Professor Seeger (see paragraph 48, above).

103 In support of its argument the applicant has produced a number of technical reports dealing with the quality of the nails manufactured by Bauco and Eurofix, which allegedly revealed 'significant deficiencies in the nails rendering them incompatible for use in the Hilti PAF systems'. On the basis of those studies the applicant concludes that both the interveners engaged in false and misleading advertising by presenting their nails 'as being equivalent to and conforming to the applicant's standards for nails'.

The studies in question are the following:

- reports by Corrosion and Protection Centre Industrial Services, Manchester, on the comparative performance of Hilti nails on the one hand and Profix and Bauco nails on the other;
- observations dated January 1989 of the Corrosion and Protection Centre Industrial Services on the Commission's comments on their reports;
- observations of the Corrosion and Protection Centre Industrial Services on the statements of the interveners;
- report by the Staatliche Material-Prüfungsanstalt Darmstadt of 25 January 1989 on the problems inherent in the hydrogen embrittlement of nails.

104 The applicant has also submitted various statements made by members of its staff and others concerning defects in fastenings made with the interveners' nails. Lastly, it produced a report prepared by a market research firm on 'fastening problems' which English plant-hire companies had experienced with the PAF nail brands that they stocked.

105 The applicant goes on to refer to its duty of care under product-liability law, which it says is increased in the present circumstances by its knowledge of 'the incompatibility and inferiority of the complainant's PAF nails and by its knowledge that these had been made and were distributed specifically for use in Hilti systems and had been so falsely advertised'. In order to demonstrate the existence and extent of that duty the applicant has submitted the opinions of three legal experts on manufacturers' liability under English, German and French law, with particular reference to the problems raised by liability for 'non-compatible' products.

06 Turning to the question why it took no other action than to tie the sale of its cartridge strips to purchase of its nails, Hilti explains that the problem posed by the use of nails made by Eurofix was initially only a local one and that it hesitated to issue public warnings against Eurofix nails because it was afraid of retribution in the courts on account of the 'commercial harm it would thereby inflict upon Eurofix'.

07 In justifying its behaviour Hilti goes on to argue that it had no economic impact, since no PAF nails using the Hilti design and compatible with Hilti systems were offered for sale in the British market in the period during which it tied the sales of cartridge strips and nails. Hilti claims that the obstacles it set up to the entry of the interveners into the market were justified by its duty of care as a manufacturer.

08 According to the Commission, Hilti's behaviour fully justifies the conclusion that its primary concern was the protection of its commercial position rather than a disinterested wish to protect users of its products. The Commission bases its view on the following considerations:

- at no stage during the many years during which Eurofix or Bauco nails have been sold on the United Kingdom market has Hilti made any complaint to the responsible authorities concerning their safety or reliability;
- at no stage has Hilti made any complaint to the responsible authorities concerning statements made by Eurofix or Bauco as to the characteristics of their nails;
- Hilti instructed its salesmen not to record in writing any criticism they might make of the safety or reliability of competitors' nails;
- Hilti never wrote to the interveners or otherwise entered into contact with them to express concern about the reliability, fitness or safety of their nails;
- Hilti failed to take even the basic precautionary measures to warn users of its systems which — according to Hilti's own evidence, in particular the opinion of Professor Spencer of Cambridge University on manufacturers' liability under English law — ought to have been taken by a reasonable manufacturer who was motivated solely by genuine concerns of the kind which Hilti claims;
- even viewed in the most favourable light, the evidence on which Hilti now relies to show the inferiority of Eurofix and Bauco nails cannot justify on grounds of safety or reliability their exclusion from use in Hilti nail guns in all circumstances. On the contrary (as Hilti partly conceded in its reply to the statement of objections) in many circumstances there is no legitimate concern as to safety or reliability arising out of the use of such nails with Hilti guns and cartridges;

— even in its application, Hilti acknowledges that it recognized that its criticism of the complainant's nails might not withstand impartial scrutiny in Court.

109 The Commission contends that the Court of Justice rejected the line of argument now relied on by Hilti in its judgments in Case 193/83 *Windsurfing International v Commission* [1986] ECR 611 and Case 226/84 *British Leyland v Commission* [1986] ECR 3263 (Opinion of Mr Advocate General Darmon, at p. 3286). According to the Commission both cases show that 'abuse' within the meaning of Article 86 cannot be justified by considerations of product safety and reliability.

110 The Commission concludes that by appointing itself sole arbiter of 'Hilti-compatibility', whilst simultaneously withholding the information necessary to allow third parties a sufficient opportunity to judge both the objective necessity of such standards and whether those standards are in fact met by nails produced by other suppliers, Hilti has clearly shown that its real interest lay in ensuring the maximum exclusion of competing producers from the market.

111 Turning to Hilti's alleged duty of care towards third parties, the Commission objects that the assumptions underlying the opinion of Mr Spencer as to Hilti's liability 'bear little resemblance to the facts of the present case', inasmuch as, for example, Hilti asked Mr Spencer to proceed on the assumption that other nails are generally inferior to Hilti's and are liable to shatter in use, with some risk of injury to users. The opinion also shows that Hilti's primary duty — according to Professor Spencer — was to take active steps to warn users against the supposed risks.

112 Bauco asserts that the allegations made by Hilti about safety, the absence of quality control, the incompatibility of Bauco nails with Hilti tools and the

misleading advertising statements about Bauco nails are not borne out by the evidence to which Hilti refers, and are indeed contradicted by it.

113 According to Bauco, what Hilti has tried to do in fact is to extend its patent protection. However, it is now time to permit the establishment of standards for nails, cartridge strips and guns so that consumers and competitors can benefit from a more open market.

114 Profix submitted a study dealing with the expert opinions presented by Hilti, which concludes that products made by Profix are not defective or of lower quality than Hilti's.

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115 It is common ground that at no time during the period in question did Hilti approach the competent United Kingdom authorities for a ruling that the use of the interveners' nails in Hilti tools was dangerous.

116 The only explanation put forward by Hilti for its failure to do so is that recourse to judicial or administrative channels would have caused greater harm to the interests of Bauco and Eurofix than the conduct which it in fact pursued.

117 That argument cannot be accepted. If Hilti had made use of the possibilities available to it under the relevant United Kingdom legislation, the legitimate rights of the interveners would in no way have been impaired had the United Kingdom authorities acceded to Hilti's request for a ban on the use in its tools of nails



produced by the interveners and, where appropriate, on all misleading advertisements issued by them. If on the other hand the authorities had dismissed those requests, Hilti would have had great difficulty in persisting in its allegations against Profix and Bauco.

118 As the Commission has established, there are laws in the United Kingdom attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of any product. There are also authorities vested with powers to enforce those laws. In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products.

119 It must further be held in this connection that the effectiveness of the Community rules on competition would be jeopardized if the interpretation by an undertaking of the laws of the various Member States regarding product liability were to take precedence over those rules. Hilti's argument based on its alleged duty of care cannot therefore be upheld.

## Effect on trade between Member States

### *Arguments of the parties*

120 In the third part of its plea regarding the alleged infringement of Article 86 of the Treaty, the applicant argues that none of the actions of which it is accused had any effect on trade between Member States within the meaning of Article 86. In support of that assertion it states that the market identified by the Commission — that is to say, the market in Hilti-compatible nails — is not a real market since the nails made by the interveners are not truly compatible in the sense in which the applicant understands that term. The interveners can therefore clearly not be described as a legitimate part of any structure of competition. In any event, measures such as those which the Treaty seeks to protect, which are concerned with the prevention of unfair competition, are not apt to alter the structure of

competition for the purposes of Article 86, but rather tend to protect that structure, to the benefit of the consumer.

121 The applicant also argues that the interveners, who market their nails only in the United Kingdom, would have been neither more nor less able to participate in trade between Member States if the applicant had done nothing to restrict the use of Eurofix and Bauco nails in its PAF systems. The applicant further emphasizes that there is no evidence of interference with the normal right of independent distributors in the Community to export Hilti products within the EEC, except in order to limit sales of cartridge strips to Eurofix. The request to that effect which the applicant sent to its independent distributors had only Eurofix in view and was not intended to obstruct exports or imports.

122 In response to that argument the Commission emphasizes that Hilti was not entitled to set itself up as the arbiter of which undertakings satisfy its own test of 'legitimate competition' and which do not. Even if their advertising were proved to be misleading, the interveners would not thereby be disqualified in perpetuity from participating in the relevant markets. The fact that supplies of nails can and do come from outside the United Kingdom clearly shows that Hilti's behaviour was capable of affecting trade between Member States. By imposing on its independent distributors a general ban on the exportation of cartridge strips to all other Member States of the EEC, Hilti manifestly took measures that were capable of affecting trade between Member States.

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123 In this regard the Court must reiterate the wording of Article 86 of the Treaty, under which any abuse which may affect trade between Member States is prohibited as incompatible with the common market.

124 In this case, moreover, the competition arising from the business activities of the interveners must be regarded as legitimate under the Community rules on competition so long as the competent authorities have not ruled that their behaviour infringes Hilti's rights.

125 In its endeavour to prevent the sale of Hilti-compatible nails produced by the interveners, Hilti took steps which were likely to have repercussions on trade between Member States. The abuses which limited the entry of those independent manufacturers into the market not only harmed their commercial interests in the United Kingdom but also hampered, or halted altogether, exports which could have been lucrative because of the significant price differences between the Member States.

126 It follows from all the foregoing considerations that the second plea in law must also be rejected.

## **Pleas concerning infringement of Article 15(2) of Regulation No 17 and Article 190 of the Treaty**

### *Arguments of the parties*

127 Referring to the press release issued by the Commission on 24 December 1987, Hilti claims that the Commission breached Article 15(2) of Regulation No 17 by imposing a fine in respect of alleged facts that are not held in the decision to constitute an abuse.

Pointing to the statement by the Commission in the press release that Hilti's commercial practices enabled it to charge very different prices in different Member States, the applicant submits that the price differences were not regarded in the

contested decision or in the previous statement of objections as anything more than the 'economic consequences of Hilti's behaviour'. The applicant takes the view that this change of perspective amounts to an infringement of its right to a fair hearing, since there was no suggestion at the proper time that the applicant needed to address that issue as if it were an allegation of abuse. The applicant emphasizes that there is nothing in the decision about an exemplary fine and that but for the press release it would never have known the real reason for the fine of ECU 6 000 000.

128 Hilti further submits that the fine is a large one, 'well over 10% of EEC Hilti PAF turnover in 1986 . . .'. The applicant asserts that the reasons which induced it to act, the evidence on which its actions were based, its attempts to limit the effect of its actions and the absence of any real economic effect militate against an 'exemplary' fine. The infringements of which it is accused relate almost entirely to the United Kingdom and thus have no effect on the structure of competition in the Community as a whole. In the United Kingdom the alleged infringements would have been capable of affecting only the interveners. The applicant denies having committed any infringement deliberately. It further maintains that the Commission attached scant value to the positive measures taken by the applicant. A fine of this magnitude has never, to its knowledge, been imposed on a company which had given voluntary undertakings to the Commission and had introduced a competition law compliance programme.

129 According to the Commission, Hilti 'abused its dominant position in several important ways'. Those abuses sought to prevent or limit the entry of competitors into the market, or to damage or even eliminate existing competitors. The Commission contends that the infringements were designed to impair the whole structure of competition. All the infringements were committed negligently at least, and some of the abuses were deliberate. The Commission claims that certain of the abuses go back at least to 1981 and continued at least until the provisional under-

taking given by Hilti in 1985, and that there is evidence that some of them were continued even after the undertaking. As to the reasons for the fine, they emerge clearly from the decision, which states that the infringement was 'serious and long-lasting', which led the Commission to impose a 'substantial fine' on Hilti.

130 The Commission claims to have treated as an extenuating factor the cooperation shown by Hilti, and in particular:

— the temporary undertaking which it gave in 1985;

— the permanent undertaking given in 1987;

— Hilti's admission of behaviour considered improper by the Commission.

131 Lastly, the Commission contends that Hilti's alleged good faith is contradicted by several factors. For instance, it was aware as early as 1982 that it faced 'potential conflict with the rules on competition', as is apparent from a telex message of 8 April 1982 sent by one Hilti manager to another, referring to advice to that effect given by a lawyer consulted in the matter. Moreover, Hilti denied the disputed behaviour in its letter of 23 March 1983 (mentioned above), and took the view that 'any financial damage incurred by a fine is likely to be small in relation to the value of the [relevant] market', according to an undated internal Hilti telex message.

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- 132 Under Article 15 of Regulation No 17 undertakings which contravene the rules on competition may incur fines of an amount not exceeding 10% of their turnover in the preceding business year. As the Court of Justice has held (see judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825), that percentage refers to the undertaking's total turnover. According to the last paragraph of Article 15(2) of Regulation No 17, regard must be had, in fixing the amount of the fine, both to the gravity and to the duration of the infringement.
- 133 The applicant has not alleged that the fine of ECU 6 000 000 imposed on it exceeds the ceiling of 10% of Hilti's total turnover in 1986, and there is nothing in the documents before the Court to suggest that that limit was exceeded.
- 134 The Court finds that the Commission was quite entitled to take the view that the infringements held to have been committed were particularly serious. They sought to eliminate small undertakings which were doing nothing more than exercising their rights, namely the right to produce and sell nails intended for use in Hilti nail guns. Such behaviour does indeed represent a grave impairment of competition. Furthermore, it is common ground that the infringements continued for about four years, which is an appreciable period. In addition, the documents produced by the Commission show that Hilti was aware that its actions were liable to infringe Community rules on competition but was not thereby persuaded to put an end to them, so that it deliberately committed the infringements of which it was accused.
- 135 The extenuating circumstances set out in paragraph 103 of the Decision cannot, in the Court's opinion, change that view, and there is no evidence before the Court to support the conclusion that Hilti pursued an anti-competitive policy on grounds relating to the safety and reliability of its equipment. Indeed, Hilti has not furnished any evidence in the form of studies conducted by independent experts at

the material time to show that the nails produced by the interveners were dangerous or were at least of a quality inferior to its own products.

136 As regards the press release to which objections were raised, it must be observed that this Court can review only the decision adopted by the Commission. There is nothing in that press release to indicate that the contested decision was based on considerations other than those set out therein, and accordingly Hilti's argument in that respect must be rejected. The fact that the Commission described the fine imposed as 'exemplary' does not show that its amount is excessive. Although it is regrettable that in its press release the Commission referred to a causal relationship between the abuse held to have been committed and the prices charged in the various Member States, whereas there is no allusion to such a relationship — at least in that form — in the decision, the recitals in that decision adequately justify the fine imposed. Consequently, there is nothing to support the conclusion that the Commission in fact based its decision on considerations which are not set out therein.

137 In the light of the foregoing, the Court holds that the fine imposed on Hilti is not disproportionate. Hilti's pleas in that regard must therefore be rejected.

138 It follows that the application must be dismissed in its entirety.

### Costs

139 According to the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been asked for by the successful party. Since the applicant has been unsuccessful it must be ordered to pay the costs, including those incurred by the interveners.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the applicant to pay the costs, including those incurred by the interveners.**

Saggio

Yeraris

Briët

Barrington

Vesterdorf

Delivered in open court in Luxembourg on 12 December 1991.

H. Jung

A. Saggio

Registrar

President