

Article 102 TFEU Cases (Part II)

Case 1

The products concerned by the Decision are Central Processing Units (CPU) of the x86 architecture. The CPU is a key component of any computer, both in terms of overall performance and cost of the system. It is often referred to as a computer's 'brain'. The manufacturing process of CPUs requires high-tech and expensive facilities.

CPUs used in computers can be sub-divided into two categories: CPUs of the x86 architecture and CPUs of a non-x86 architecture. The x86 architecture is a standard designed by Intel for its CPUs. It can run both the Windows and Linux operating systems. Windows is primarily linked to the x86 instruction set. Prior to 2000, there were several manufacturers of x86 CPUs. However, most of these manufacturers have exited the market. Since 2000, Intel and AMD are essentially the only two companies still manufacturing x86 CPUs.

Furthermore, there are significant barriers to entry and expansion present in the x86 CPU market. They arise from the sunk investments in research and development, intellectual property and production facilities that are necessary to produce x86 CPUs. Intel's strong (must-stock) brand status and the resulting product differentiation also constitute a barrier to entry. The identified high barriers to entry and expansion are consistent with the observed market structure, where all competitors to Intel, except AMD, have exited the market or are left with an insignificant share.

The Decision describes two types of Intel conduct vis-à-vis its trading partners: conditional rebates and so-called naked restrictions.

Conditional Rebates

Intel awarded major OEMs rebates which were conditioned on these OEMs purchasing all or almost all of their supply needs. This is the case for:

- Intel rebates to Dell during the period ranging from December 2002 to December 2005, which were conditioned on Dell purchasing exclusively Intel CPUs,

- Intel rebates to HP during the period ranging from November 2002 to May 2005, which were conditioned in particular on HP purchasing no less than 95 % of its CPU needs for its business desktop segment from Intel (the remaining 5 % that HP could purchase from AMD was then subject to further restrictive conditions),
- Intel rebates to NEC during the period ranging from October 2002 to November 2005, which were conditioned on NEC purchasing no less than 80 % of its CPU needs for its desktop and notebook segments from Intel,
- Intel rebates to Lenovo during year 2007, which were conditioned on Lenovo purchasing its CPU needs for its notebook segment exclusively from Intel.

Similarly, Intel awarded payments to Media Saturn Holding (MSH), Europe's largest PC retailer, which were conditioned on MSH selling exclusively Intel-based PCs. These payments are equivalent in their effect to the conditional rebates to OEMs.

It is also noteworthy that there was in general uncertainty as to the exact proportion of the rebates or payments that would be lost in case of (increased) sourcing from Intel's competitor, AMD. It was expected that the proportion would be significant and disproportionate to the number of units switched to AMD. Furthermore, there was also a possibility that the rebates withdrawn would be allocated by Intel to rival OEMs. As a result of the rebates therefore, the freedom of the OEMs in question and of MSH to source CPUs from AMD was restricted.

Naked Restrictions

Intel awarded major OEMs payments which were conditioned on these OEMs postponing or cancelling the launch of AMD-based products and/or putting restrictions on the distribution of AMD-based products. This is the case for:

- Intel payments to HP which were conditioned on HP selling AMD-based business desktops only to small and medium enterprises, only via direct distribution channels (as opposed to through distributors), and on HP postponing the launch of its first AMD-based business desktop in Europe by six months; the duration of this abuse is from November 2002 to May 2005,
- Intel payments to Acer which were conditioned on Acer postponing the launch of an AMD-based notebook from September 2003 to January 2004,

- Intel payments to Lenovo which were conditioned on Lenovo postponing the launch of AMD-based notebooks from June 2006 to the end of 2006.

Case 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.

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.

"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.

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.

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.

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.

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.

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.

Hilti carried out a policy of supplying cartridge strips to certain end-users or distributors (such as plant-hire companies) only when such cartridge strips were purchased with the necessary complement of nails. 'The salesmen of Hilti GB offer a full Hilti fastening system but there is no doubt that each item of the system can be obtained separately and independently from the other . . . and there is no doubt that there are independent markets for firing tools, which are sold only once to a particular end user, and for the consumable accessories, such as cartridges and fasteners (nails and studs) which have to be replaced currently'.

Danish and a German independent nail maker each alleged that Hilti had a practice of tying nails and cartridge strips making it difficult for them to sell their nails. The letter from Hilti GB to Hilti AG of 17 May 1983 concerning a Eurofix customer states: 'The customer has now been advised that an embargo has been placed on cartridge-only sales (only a verbal restriction has been passed to the customer with nothing in writing)'. The internal memo of 24 June 1983 to Midland Region Sales Force from Hilti GB concerning another Eurofix

customer states that this customer ' . . . wanted a large quantity of Hilti cartridges. These would appear to be required in connection with Profix (Eurofix) nails and should in no circumstances be supplied to a customer. If any of you have similar requests, will you please inform your area manager immediately'. In general, if Hilti considers that the cartridges are for use with nails which Hilti may unilaterally consider as unsafe, such orders are refused. Apparently Hilti considers that any use of Bauco or Eurofix nails in Hilti nail guns is unsafe.

In its complaint Bauco alleged that its customers had had their normal discounts reduced by Hilti because of the purchase of Bauco nails. . Internal Hilti GB documentation made available to the Commission's inspectors shows that such reduced discounts were used as a way of attempting to block the sale of competitors' nails. The letter from Hilti GB to Hilti AG of 17 May 1983 discussing the case of a Eurofix customer states: 'Their discount on DX cartridges would be reduced significantly and only granted at the level where equal quantities of fasteners were purchased with cartridges'. This follows this customer's letter to Hilti GB of 9 May 1983 asking for his usual discount on a large cartridge order. Hilti GB internal instructions to all area managers of 6 February 1981 states: 'You must ensure that customers who buy nails from Profix for use in Hilti tools do not continue to receive, after an appropriate length of notice from you, site servicing of tools, training, technical advice and discount on cartridges. It must be brought home to users that such Hilti services will not be made available to purchasers of Profix nails'. A further example is Hilti GB's letter of 23 May 1985 to one of Bauco's customers, stating Hilti's intention of reducing their discount. Internal Hilti documentation shows that Hilti realised that it would be difficult to refuse to supply long-standing or regular customers but that to reduce discounts could have the same effect. Firth Industrial Services' (a major customer of Bauco) discount was also significantly reduced, as was that of Sandell Perkins.

Bauco claimed that discrimination with regard to cartridge only orders occurred in that one of its customers was told by Hilti that orders of over 5 000 cartridges without nails had to be approved by the regional manager. In view of the facts presented by the second complainant but before the investigation at Hilti GB premises Hilti did not deny these practices. In its letter of 4 June 1985 to the Commission Hilti states: 'In its marketing efforts Hilti does attempt to influence and to persuade customers to use Hilti direct fastening systems only with Hilti supplies. To the same end it attempts to influence and to persuade plant-hire companies to buy the required nails from Hilti when ordering cartridges. In these attempts Hilti grants discounts to plant-hire companies purchasing both cartridges and nails'. The letter

further states with respect to orders of over 5 000 cartridges: 'In such cases the responsible manager also may and frequently will attempt to persuade the customer to purchase the respective other consumables from Hilti as well and he may offer a discount'. Hilti's letter to the Commission of 3 October 1985 after its undertaking confirms again this view: 'It may well be true that one of the reasons given by Hilti to some of the plant-hire companies for withdrawing preferential treatment was their practice of supplying into Hilti DX systems nails which Hilti did not consider sufficiently reliable in respect of the safety of its systems'.

Hilti has a policy of not supplying cartridges to independent producers of nails or to other nail gun producers. In response to requests, Hilti has consistently refused to supply Eurofix and Bauco. In order to sell their nails in the face of the difficulties described above, the complainants attempted to obtain their own independent supply of cartridge strips not manufactured by or for Hilti. Such independent supplies necessitated a patent licence. Hilti was however unwilling to grant any licences. Even though licences of right were available in the UK from 1984, Hilti tried to fix the royalty so high as to amount to a refusal. It also stated to would-be licensees that any patent licence would not give any rights under copyright it claimed for such cartridge strips. Hilti's letter of 20 November 1984 to Eurofix stated that it had a policy of not granting patent licences but that, since Eurofix could obtain a licence of right, it proposed a royalty of 28 %. Hilti further stated that such licence would give no rights under Hilti's alleged copyright.

Bauco's request for a licence of right (proposed royalty 2 %) met exactly the same response - see Hilti's letters of 18 May 1984 and 20 August 1984 which proposed a royalty of 28 % and warned against breach of Hilti's alleged copyright. Bauco started to make cartridges before it had obtained a licence of right and Hilti started proceedings for an interlocutory injunction on the basis of alleged copyright and patent infringements. A High Court injunction restrained Bauco from dealing in cartridge strips that infringed Hilti's patent and alleged copyright. Hilti's internal letter of 25 July 1984 made available to the Commission's inspectors shows clearly that Hilti knew it had to grant a licence of right but 'asked for a high licence fee with the intention that Bauco would not accept'.

Where Hilti thought that cartridge strips for which it had received orders might be sold on to independent nail makers, it refused supplies even to admittedly long-standing customers. Hilti has recognized that it carried out this policy. In addition to the lower discounts on orders of cartridges only described above, Hilti initiated a policy of classifying

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

- to be in a central location,
- to be prepared to enter into an arrangement with Hilti and to accept a policy of continued direct selling, and
- to recognize brand loyalty with a family of products.

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

Hilti had a regular and well-established policy of applying discriminatory tactics (normally in the form of selective price cuts or other advantageous terms) directed against the businesses both of competitors and of competitors' customers. This policy is applied not only against manufacturers of consumables for Hilti nail guns but also against other manufacturers of nail guns. The internal Hilti document of 5 March 1984 made available to the Commission's inspectors compiles a list of certain users of non-Hilti nails guns, notably Spit and Impex. It summarizes the strategy to be adopted to convert the customer to Hilti and involves special trade-in and discount deals and even tools free of charge. Certain users of Profix nails are also identified with a strategy of offering extra discounts in order to encourage conversion to Hilti.

Case 3

Tetra Pak, whose registered office is in Switzerland, coordinates the policy of a group of companies, originally Swedish, which has acquired a global dimension. The Tetra Pak group specializes in equipment for the packaging of liquid and semi-liquid food products, mainly milk, in cartons. Its activities cover both the aseptic and the non-aseptic packaging sectors. They consist essentially in manufacturing cartons and, using the group's own technology, carton-filling machines.

The consolidated turnover of the Tetra Pak group amounted to ECU 2.4 billion in 1987 and ECU 3.6 billion in 1990. Approximately 90% of that turnover is in the carton sector and the remaining 10% in the field of packaging equipment and associated operations. The proportion of that turnover arising in EU territory amounts to a little more than 50%. In the EU, Italy is one of the countries, if not the country, in which Tetra Pak is most firmly established. The consolidated turnover of the seven Italian companies within the group stood at ECU 204 million in 1987.

Some 90% of cartons were used in 1983 for the packaging of milk and other liquid dairy products. According to the same source, in 1987 that share was approximately 79%, of which 72% was for packaging milk. Approximately 16% of cartons were at that time used for packaging fruit juice. Other products (wine, mineral water, tomato-based products, soups, sauces and baby food) accounted for only 5% of cartons used.

As regards the packaging of milk, it should be noted that milk is sold mainly in a pasteurized form (fresh milk) or after an ultra-high temperature treatment under aseptic conditions which makes it possible to attain a storage period of several months in a non-refrigerated environment (UHT milk). As for "sterilized" milk, according to the Decision such milk now has only a relatively small market share in the EU.

In the aseptic sector, Tetra Pak manufactures the so-called "Tetra Brik" system, designed for packaging UHT milk in particular. According to information supplied by the applicant, that system was launched on the German market in 1968 and in the other European countries from 1970 onwards. In that process, the cartons are delivered to the user in the form of rolls, which are sterilized in the filling machine itself by being soaked in a hydrogen peroxide bath and are then used to package the liquid as it flows in an aseptic environment. In the same sector, only one competitor of Tetra Pak, PKL, controlled by the Swiss company SIG (Société Industrielle Générale), also manufactures a system of aseptic packaging in brick-type cartons, known as "Combiblocs". In contrast to Tetra Pak's continuous packaging process, those cartons are pre-shaped at the time of packaging. For technical reasons and because in practice the manufacturers of aseptic machines also provide the cartons to be used in their own machines, possession of an aseptic-filling technique is the key to market entry both for machines and for aseptic cartons.

In contrast, non-aseptic packaging, in particular of fresh pasteurized milk, does not require the same degree of sterility and so calls for less sophisticated equipment. On the non-

aseptic carton market, Tetra Pak initially used brick-type cartons and continues to do so, but its main product on that market is now a gable-top carton, the "Tetra Rex". That carton is in direct competition with the "Pure-Pak" carton produced by the Norwegian group Elopak (hereinafter "Elopak").

Tetra Pak manufactures its own machines for non-aseptic packaging. Moreover, like Elopak and PKL but only occasionally, it also distributes machines manufactured by some ten small producers, the main ones being Nimco, Cherry Burrell and Shikoku. Tetra Pak has patented the basic technology which it has developed in relation to machines, cartons and processes, and also the modifications made subsequently to those products and certain techniques, such as the method of folding the carton. The latest patents protecting the aseptic Tetra Brik cartons, developed in the 1960s, will expire in the early years of the next century (recital 22 of the Decision). As both parties have indicated, Tetra Pak has granted no manufacturing licences for its cartons in the EU.

During the period in question, various standard-form contracts for the sale and leasing of machines and the supply of cartons were in force between Tetra Pak and its customers in the various Member States of the Community. The content of the clauses incorporated in those contracts which had an effect on competition was as follows:

Conditions of sale of Tetra Pak equipment:

Standard purchase contracts exist in the following five countries: Greece, Ireland, Italy, Spain and the United Kingdom. For each clause, the country or countries in which it is applicable are indicated in brackets.

Equipment configuration

In Italy, Tetra Pak reserves an absolute right of control over the equipment configuration by prohibiting the buyer:

- (i) from adding accessories to the machine (Italy);
- (ii) from making modifications to the machine, and adding or removing anything to or from it (Italy);
- (iii) from moving the machine (Italy).

Operation and maintenance of equipment:

There are five clauses concerning the operation and maintenance of equipment, which are intended to give Tetra Pak an exclusivity and a right of inspection in this area:

(iv) it has an exclusive right to maintain and repair equipment (all countries except Spain);

(v) it has an exclusive right to supply spare parts (all countries except Spain);

(vi) it has the right to provide, free of charge, assistance, training, maintenance and updating services not requested by the client (Italy);

(vii) there is a sliding scale for part of the charges made for assistance, maintenance and technical updating (with a possible discount of up to 40% of the basic monthly charge) depending on the number of cartons used on all Tetra Pak machines of the same type (Italy);

(viii) the purchaser is required to inform Tetra Pak of any improvements or modifications to the equipment and to grant Tetra Pak ownership of any resulting intellectual property right (Italy).

Cartons:

There are four clauses relating to cartons which also give Tetra Pak an exclusive right of control over the product:

(ix) the purchaser must use only Tetra Pak cartons on the machines (all countries);

(x) the purchaser must obtain supplies of cartons from Tetra Pak or a supplier designated by Tetra Pak (all countries);

(xi) the purchaser is required to inform Tetra Pak of any improvements or technical modifications made to the cartons and to grant Tetra Pak ownership of any resulting intellectual property rights (Italy);

(xii) Tetra Pak reserves the right to inspect the wording to be used on cartons (Italy).

Inspections

Two clauses are more specifically concerned with monitoring the purchaser's compliance with his contractual obligations:

(xiii) the purchaser is required to submit a monthly report (Italy);

(xiv) Tetra Pak has the right to carry out inspections without notice (Italy).

Transfer of ownership or use of equipment

Two clauses in the contract limit the purchaser's right to resell or transfer the equipment to third parties:

(xv) the purchaser is required to obtain Tetra Pak's agreement before selling or transferring the use of the equipment (Italy), resale is subject to conditions (Spain), and Tetra Pak reserves the right to repurchase the equipment at a pre-arranged fixed price (all countries); failure to comply with this clause may give rise to a specific penalty (Greece, Ireland, United Kingdom);

(xvi) the purchaser must ensure that any third party to whom he resells the equipment assumes all his obligations (Italy, Spain).

Guarantee

The guarantee given on the equipment applies only if the purchaser complies with all of his contractual obligations (Italy) or, at the very least, uses only Tetra Pak cartons (other countries).

Equipment configuration

Clauses (i), (ii) and (iii) (Italy in the case of clause (i); all countries in the case of clause (ii); France, Ireland, Italy, Portugal, United Kingdom in the case of clause (iii)) are included.

(xviii) An additional clause requires the leaseholder to use only cases, outer packages and/or containers supplied by Tetra Pak for transport purposes (Germany, Belgium, Italy, Luxembourg, the Netherlands) or if the conditions are equal to give preference to obtaining supplies from Tetra Pak (Denmark, France).

Cartons

Contracts also contain clauses (ix) (all countries) and (x) (Italy) concerning the exclusive use of Tetra Pak cartons, clause (xi) conferring on Tetra Pak ownership of the rights to any improvements (Denmark, Italy) or, at the very least, requiring leaseholders to grant an

operating licence to Tetra Pak (France, Ireland, Portugal, United Kingdom), and clause (xii) giving Tetra Pak the right to inspect the wording or brand names which the client wishes to use on the cartons (Germany, Spain, Greece, Italy, the Netherlands, Portugal, United Kingdom).

Inspections

In the case of sale, the leaseholder must return a monthly report (clause (xiii) ° all countries), failure to do so giving rise to fixed-rate invoicing (Belgium, Luxembourg, the Netherlands), and allow the premises at which the equipment is installed to be inspected (clause (xiv) ° all countries) without notice (all countries except Denmark, Germany, Ireland, Portugal and the United Kingdom).

(xix) A further clause allows Tetra Pak to examine ° at any time (Denmark, France) ° the accounts of the company leasing the equipment (all countries) and (depending on the country) its invoices, correspondence or any other documents necessary to check the number of cartons used.

Transfer of the lease, sub-leasing, transfer of use or use on behalf of third parties

In the case of sale, ownership may be subsequently transferred only where very restrictive conditions are complied with.

(xx) The terms of lease contracts likewise exclude the transfer of the lease, sub-leasing (all countries) or even simple commission work on behalf of third parties (Italy).