The European German Law of Liabilities and Damages in Competition and Anti -Trust - Cases

by

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Point of Departure

Law is there to protect the weak. Antitrust and competition law is a set of rules that protect the weaker part, in most cases the consumer, against mighty market participants. In German and English languages the words *Macht* = *might* are related to the words *machen* = make. [2] Economy can only exist and develop if somebody is mighty or strong enough to *make* things happen. Therefore economic Macht/might is not prohibited in itself.[3] But power can be abused. Antitrust and competition law aims to prevent abuses to the benefit of individuals as well as for the protection of the market system as such. Powerful market participants would always contend, that their use of power follows from their right to act freely in a free market. They will also often argue, that their economic power is to the benefit of the economy and society as a whole. [4] Weaker market participants, however, tend to view many actions of the rich and powerful as an abuse of power, because it is detrimental to themselves as consumers and also to the common weal. [5] Both contentions, however, are often questionable.

The law is there to find a compromise between both standpoints. The following article deals with the damage claim, which may arise under the German law, in case the claimant is affected an infringement of competition and antitrust law.

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[2] Due to North - German immigration to the British Isles in the 5th century English is basically of German origin.

[3] At European level, the equivalent of German §§ 35 et seq. GWB is Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), based on the European competition law (Article 101 et seq. TFEU).

[4] On a national level this can well be true,. The overwhelming market power of GOOGLE or FACEBOOK is apparently in the political national interest of the USA, as these are able to suck and process untold amounts of data about almost everything and everyone.

[5] A technically mature product, e.g. bicycle, car or airplane, will be sold in ever bigger markets and it amounts to an economic law that it is produced and sold by dominating concerns. So the author is of the opinion that monopolies , as the natural consequence of a mature economies, cannot do any lasting (!) harm to consumers or the nation. But this cannot be deepened here.

Part A Fundamentals

I. Kompetenz- Komptenz of EU ?

The basis of EU – Law is the *Treaty on the Functioning of the European Union (TFEU).* [6] The fundamental question of EU legislation, the one which obviously lies at the core of the British wish to leave the EU (BREXIT), is whether the European Commission and European Court of Law stay within their competences. [7] These competences are enshrined in the TFEU. In these the national legislators transferred certain sovereign rights to EU organs. But such transfer is legal only within the frame of the national constitution of the respective member state. Now, it is conventional wisdom that the EU – Commission and the European Courts are – to put it mildly – very liberal in interpreting and thereby extending their competences. [8] The author of the present article is therefore not the only one to harbor the opinion, that many (many !) acts of the EU – Commission and verdicts the European Court of law are at least partly unconstitutional in Germany and therefore - strictly speaking - not binding neither in Germany nor in any other Member State. In the sphere of competition and antitrust law this viewpoint is supported by the following: *The repressive European antitrust law is characterized by a flagrant democratic deficit. Since 1962, this area of law has been designed to a staggering extent by an alliance between the EU Commission and the EU Court of Justice, excluding the European legislator.*[9] In competition and antitrust law, this interface between law and economic theory, there is a general suspicion that the Commission but also the European courts have a tendency to evade the law and the written treaties and to make their own rules.[10]

However, this cannot be discussed here in depth. For now the fact is, that although EU - Member States remain free to develop their own law on competition and antitrust, the respective EU – law takes precedence over national legislation. [11] EU law in this field has therefore superseded the national law of the EU – Member States, including Germany, to a great extent.

II. Claim basis - Anspruchsgrundlage – Основа Претензии

German law of claims for damages for of antitrust violations dates back to Kartellverordnung 1923. [12] German national law GWB (= Kartellgesetz = Law on

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[6] Fassung aufgrund des am 1.12.2009 in Kraft getretenen Vertrages von Lissabon (Konsolidierte Fassung bekanntgemacht im ABl. EG Nr. C 115 vom 9.5.2008, S. 47)

[7] Aden, Menno, *Internationales privates Wirtschaftsrecht,* 2.ed. München 2009, p. 14, citing the then acting German State President Herzog, who before was president of the Bundesverfassungsgericht - German Constitutional Court, in this sense

[8] This is discussed in Germany as „ ausbrechende Rechtsakte"

[9] de Bronnet, G. NZKart NZKart (= Neue Zeitschrift für Kartellrecht) 2017, 46. – NZKart is the leading German Law Journal on Competion and Antitrust Law.

[10] see: Emmerich, Volker , Kartellrecht C.H. Beck, 13. Aufl. 2014 ISBN 978-3-406-66098-6, § 2, 36 – This book of one of the leading authors on the subject will be cited here *in lieu* of many others. It contains all the necessary references to further reading.

[11] Viz. Art. 101 III TFEU : *Member States usually have their own domestic competition law which they may enforce, provided it is not contrary to EU law.*

[12] The principle however is very old. As legal provision it is first found in the Corpus Iuris Civilis (C 4, 59, 2). Emperor Zeno (483 AC): says: *Iubemus ne quis … monopolium audeat exercere, neve quis ilicitis habitis*

Antitrust) [13] was gradually superseded by European law . The German antitrust law was therefore amended several times (Kartellgesetznovelle). As a result of amendments of 2005 and 2013 the § 33 GWB came up, which considerably facilitated and extended the possibility to claim damage upon antitrust violations. [14]

EU - Competition and Antitrust – Law today follows mainly from Art. 101 and 102 TFEU. Under this authority EU promulgated the

> *Directive 2014/104/Eu of the European Parliament and of the COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.* [15]

In conformity with this Directive Germany has now introduced into her GWB a new § 33 **a** . This provision re-arranges some paragraphs of the GWB and consolidates in conformity with the a.m. Directive the tendency to strengthen the right of claimants to sue for damages suffered as a consequence of an infringements of the competition law.[16] The most conspicuous change of law , enjoined by Art. 17 II of the Directive, is the presumption in § 33 a II: *It is refutably assumed that a cartel causes damage.*[17] § 33a (1) refers to § 33 GWB, which in turn refers to and Art. 101, 102 TFEU. Thus, the legal ground of the damage claim under scrutiny is formally the German § 33a GWB, but in substance it is European law. [18]

It is very difficult, if not impossible, to draw a clear system from the present legal situation in Germany, and for that sake ifor any other EU Member State. There are two overlapping sets of law. On one side: EU – Law according to the TFEU and the Directive and pertaining judicature of the European Court. On the other side: German Law pursuant to GWB and jurisprudence of German courts of law. In order to give a picture of the present disarray of German law in this subject, it will be helpful to go through a part of § 33 a word by word and to give the appropriate commentary .

III. Legal Confusion

Goethe says (Faust): *Gewöhnlich denkt der Mensch, wenn er nur Worte hört, es müsse sich dabei auch etwas denken lassen. - Usually people think that if they only hear words,*

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conventionibus coniuraret aut pacisceretur ut species diversorum corpurum negatiazinis non minoris quam inter se statuerint venumdentur.

[13] GWB . Gesetz gegen Wettbewerbsbeschränkungen In der Fassung der Bekanntmachung vom 15.07.2005 (BGBl. I S. 2114, ber. 2009 S. 3850) zuletzt geändert durch Gesetz vom 30.10.2017 (BGBl. I S. 3618) m.W.v. 09.11.2017

[14] Emmerich, § 40, 2

[15] Directive 2014/104 EU dd 26.11. 2014. .

[16] Rother, Chr. *Kartellschadensersatz nach der 9. GWB- Novelle*, NZKart 2017, 1 ;

[17] Stancke, F, Die Betroffenheit und Aktivlegitimation im Rahmen kartellrechtlicher Schadensersatzklagen, NZKart2017, 636 ; Brunner, U und Bacher Ph. *Ermitttlung von Kartellschäden für die zivilrechtlich Geltendmachung – ein Gebrauchschsanleitung*, NZKart 2017, 345 ff. These and others are linked to multiple artcles.

[18] See Annex I for Legal Texts

these also must have some meaning. If we apply this to § 33 a GWB, we run into an inextricable Normenbrei – legal mash. In order to give a picture of the present state of German law in this subject, it will be helpful to go through part of § 33 a word by word.

§ 33a I GWB Para 1: *Anyone who intentionally or negligently commits an infringement pursuant to § 33 (1) shall be obliged to compensate for the resulting damage .*

§ 33 a GWB refers back to § 33 I of the same GWB :

> *Whoever (1) violates (2) a provision of this Act (3) , Articles 101 (4) or 102 (5) of the Treaty on the Functioning of the European Union or a decision taken by the competition authority shall be obliged to the person affected (6) to rectify (8) the infringement and, where there is a risk of recurrence, to desist from further infringements. …. Affected persons are competitors or other market participants impaired by the infringement.*

1 *Whoever:* Is this the same person as *anyone* in § 33a ? *2 Violates:* Is this the same as what is meant by *intentionally or negligently* plus *commits in § 33a ? 3 provision of this Act:* So also § 1 GWB is meant. This reads:

> *Agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited.*

Is this the same as what is said in Art. 101 TFEU?

Now it becomes really complicated. § 33a - §33 I – Art. 101 TFUI all having they own " legal speak" with their respective history and German and/or European jurisprudence.

4 Art. 101: *1. The following shall be seen as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices (4.1) which may (4.2) affect (4.3) trade (4.4) between Member States and which have as their object or effect (4.5) the prevention, restriction or distortion of competition (4.6.) within the internal market, and in particular those which……:*

4.2: which may: The word "may" asks for a wide interpretation. Literally everything may have this effect, so where is the limitation. Does this follow from "affect" or from an unwritten Tatbestandsmerkmal (criterion) *de minimis rule* which would be about 5 – 10% of the relevant market?
4.3 *affect:* This is not the same as "damage suffered. " But – at least in German Law - the systematic meaning of the element ist very unclear.[19]
8. rectify : Is this reparation (Schadenserstz) in the meaning of §§ 249 sequ. BGB?

The mixt of overlapping rules tends to make a legal interpretation strictly based on the wording, impossible. This mess is not at all cleared by § 22 GWB on the *Relationship*

[19] Stancke, F. NZKart 2017, 636f

between this Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union: (1) The provisions of this Act (=GWB) may also be applied to agreements ….within the meaning of Article 101(1) of the TFEU…… which may affect trade between the Member States of the European Union within the meaning of that provision.

An unclear and confused legal situation is – as we know from tax law - often in the interest of the specialized lawyers, as it may be in the interest of the EU Commission and the European courts who are in the process extending their competences.

V. Dual Purpose of Competition and Antitrust Law

1. The principle of competition as a dead end of evolution?

Competition and Antitrust law is based on a theory. The benumbing number of laws, directives, regulations, legal articles, court verdicts etc. are based on an assumption to which the ultimate proof of correctness is missing. The theory is: competition is good, and impairing competition is bad. A modern scientist says: *Economics has, in fact, taken over the role that theology played in medieval universities; its findings are not so much scientific evidence as beliefs that, in the taste of the time, are wrapped in mathematical cloaks..* [20]

Economies based on competition are indeed more efficient than systems based on central planning. So, this statement is not wrong. But is it true? Or more precisely: True - in terms of what? True – with respect to the individual consumer, who is looking for instant satisfaction of what he feels is good for him? Or true with respect to the general public which includes the interests of the nation and future generations.

Adam Smith in *The Wealth of Nations* (1776) said the famous words: *It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.* This leads to the concept of *homo oeconomicus,* who minds h i s interests, makes a cost / benefit analysis upon full information and decides only then among different possibilities against the good offer for the better one, and against the better one for the best. [21]He will choose th best offer, and all others will be discarded. Thus, the effect of competition is paramount to Darwin`s catchphrase of the *survival of the fittest.* The best offer survives!

Competition is important – but is it really *so* important**?** The Nobel Prize for Economics was awarded to Kahneman (*1934) for his work, on psychology of judgment and decision – making. His empirical findings challenge the assumption of human rationality prevailing in modern economic theory. 2017 Thaler got the prize for his research on behavioral economics. Behavioral economists again show that also other elements than

[20] Miegel, Meinhard (1939/Wien) *Hybris: Die überforderte Gesellschaft*, Propyläen, 2014 S. 49: *Die Volkswirtschaftslehre hat faktisch die Rolle übernommen, die die Theologie an mittelalterlichen Universitäten spielte, ihre Erkenntnisse sind weniger wissenschaftliche Erkenntnisse als vielmehr Glaubenssätze, die, dem Geschmack der Zeit gemäß, in mathematische Mäntelchen gehüllt sind.*

[21] Weber, F, NZKart 2018, 14: Eigennutzenaxion (axiom of self interest) of the fully informed homo oeconimcus

those usually ascribed to the *homo oeconomicus* play a major art in market decisions. So there are , besides competition, also other elements which lead economic decisions.

Darwin made his observations with living creatures. So did Peter Kropotkin. [22] But this Russian thinker came to different or rather additional views. In *Mutual Aid* he says: *The concept of survival of the fittest may be correct, but it has to be supplemented by the concept of mutual aid.* If we apply this to economy, then we would say: The concept of competition for the best offer or deal does have its merits, but it is wrong, if it is seen, as the only element in economic decision making. It has to relativized in favor of other factors that also influence economic decisions of individuals and mankind. Such factors lie outside the sphere of the competition and consumerism. Therefor the presumption of Art. 17 II Directive 2014 and of § 33 a II, that an infringement of competition causes a damage is presumably unfounded.

2. Public Interest

Antitrust law is *a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted*. [23] This law is administered by the Anti - Trust – Authorities. This is in Germany the Kartellamt, previously in Berlin, now in Bonn. On the European level it is the EU- Commission. The EU is aiming at the EU - Market as such, in order to protect consumers. Thus, the main objectives of the EU competition law are to ensure economic efficiency through effective competition and competitiveness. *Als zentrale Aufgabe jeder rationalen Wettbewerbspolitik erweist sich damit die Offenhaltung der Märkte. - The central task of any rational competition policy is to keep the markets open*. [24] This is clearly an area of public interest and has only indirectly a bearing on the consumer`s interest to satisfy what he thinks is good for him. It is only too often, that consumers want, what is n o t good for them, e.g. smoking

3. Private Interest

Competition law does not only affect the general public. It interferes with economic activities by influencing the contractual freedom of market participants and thus their profit and loss opportunities. Long before any EU law came into existence, it was therefore recognized in Germany, that certain violations of the antitrust or competition law do not only affect the market economy as institution, but that they can also harm legally protected private interests and thus will not only be fined by the competent authorities, but will lead to claims for damages.

In German law damages claims follow from §§ 823 I BGB, if a right protected by law is violated (life, freedom, property and so on) and if the violation of just this right causes a damage to the claimant. Whether the tort is causal for the damage follows from a

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[22] Prince Kropotkin (1842- 1921) is today remembered as an activist of 19th century political nihilism. But he seems to be grossly underrated as a scientist and evolutionary theorist. E.g. his *Mutual Aid - A Factor Of Evolution* (orig. English, 1902)

[23] Viz. Directive 2014/104/EU v. 26. 11. 2014: Art. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union in order to ensure that competition in the internal market is not distorted.

[24] Emmerich, p. 5

Adäquanzurteil, i.e. the damage must be linked to the tort in a typically predictable manner. Pursuant to § 823 II BGB a damage claim will also be given, if a law is not only for the general public, but (at least) also wants to protect individual interests Schutzgesetz (protective law).

> Example: § 242 StGB -Criminal Code (Theft) primarily protects the general public in as far private property is a fundamental element of our social order. But § 242 protects the individual owner of a thing from being unlawfully deprived of this.

§ 242 is therefore a "protective law" (Schutzgesetz) in the meaning of § 823 II BGB. In the same sense § 9 KartellVO - Antitrust Ordinance of 1923 was seen as a Schutzgesetz as today § 1 KartellG/Antitrust Law etc are considered a protective laws within the meaning of § 823 II. [25] Whoever contravenes these laws will be liable not only to pay penalties imposed by the public interests authorities (Kartellamt or EU Commission), but also to pay damages to private persons.

4. Consequences

When claims for violations of competition law are examined the objectives of the respective law must be considered. A damage claim aims at the repair of a specific damage of a certain person. But not every breach of competition or antitrust law causes a specific damage to an individual person. If a dominant company arbitrarily sets too high prices, then the damage on the side of the customer is fairly obvious, even if it may be difficult to quantify this depending on the circumstances. If, however, dominant companies A and B A deny market access to a potential competitor C – sure this is this is a violation of Art. 101 TFEU and § 33a. GWB and they will be fined accordingly. But it is less certain, whether this behavior causes a damage to , in any case it is almost impossible for B , let alone for future hypothetical customers of C, to prove it.

Example:

> German toy manufacturers M make an agreement whereby foreign toys are kept away from the German market. Therefore V, father of 13 children, cannot buy these cheap toys, so his kids have to play in the garden instead.

Public interest: Even if M are right, it is not their competence to decide, which suppliers should be allowed to the german market. That is a question of the public. Therefore - no question that such an agreement is unlawful as a breach of § 1 GWB, Art TFEU . M can be fined by the cartel authority. Privat interest: But is this a case for damages for V ?

Part B Damage Claim pursuant § 33 a GWB

[25] see Commentaries to § 823 BGB.- - Breitkreutz, Frank, Das Kartellverbot als Schutzgesetz: Ein Beitrag zum Drittschutz im Kartellrecht (German) Perfect Paperback – 2005

Art. 101 TFEU says: ..All agreements between undertakings, decisions by associations of undertakings and concerted practices **which may affect** trade between Member States ……and in particular ….

New § 33 a GWM refers to §33 I GWB ,which says: Whoever violates a provision of this Act, Articles 101 or 102….. ….. shall be obliged to the person **affected** to rectify the infringement …….. **Affected persons are competitors or other market participants impaired by the infringement.**

I. Causation and Affected Person

The law seeks to ensure that everyone, *any natural or legal person,* who suffers harm through cartel activity, can obtain sufficient compensation for this effect. Who is meant by everyone? A condition for a compensation is a causality between action and damage. So the crucial question arises, what is causal? In a formal sense, every action or state causally reaches back to Adam and Eve. There must therefore be a limitation. This limitation occurs in German law through the so-called adequate causality (see above V, 3). n § 33 the limitation is achieved by defining the term **affected** in the meaning of the law. The term *affected* shall be understood broadly.

An impairment occurs if the antitrust violation interferes with others in a manner contrary to the law. Any deterioration of their legitimate market opportunities over the competitive situation will suffice. But who is affected? *Art. 33 III defines: Affected persons are competitors or other market participants impaired by the infringement.* So, the further question is:

- Who is a competitor? = see VI 2 + 3
- Who are *other market participants in the meaning of the law? =* see VI 4

II. Competitor

1. Concern Privilege

Competition requires at least two persons/ companies offering the same goods in the same market. The question of, who is one supplier, can be difficult.

Example:

The German company AUDI builds luxury cars. The British company Bentley does the same. The Italian carmaker Lamborghini produces ultimate sports cars.
It is the policy of AUDI to build high-end cars for the well – to do- people. Bentley is set to produce cars for the very rich. Audi agreed to not step into the market of Bentley, and Bentley agreed not to go into the market reserved for AUDI. Lamborghini also has its reserved turf.

The point is: All three companies are wholly owned by Volkswagen AG (VAG) in Wolfsburg. Are these three suppliers or just one?

Thus, the question arises , whether cartels are possible between a parent company and its subsidiary or between subsidiaries of the same parent. The legal texts (German and EU – Law) are silent on this point. So in principle the answer should be Yes.[26] Legally independent companies have autonomy to conclude contracts with each other as with third parties, and such contracts can, as in the above example, *have as their object or effect the prevention, restriction or distortion of competition within the internal market* in the meaning of Art. 101 TEFEU. Here arises the problem, which I had the honor to present on 25th April 2016 here in Moscow. [27] In practice it is accepted , that there is a "Konzern-Privileg". This follows from the logic of the law , which want to safeguard competition. But, if real competition does not take place between two or more companies because of their affiliation with one another, then antitrust law will not apply to them. Agreements and concerted practices between a parent company and its subsidiary and between subsidiaries of the same group are, in the opinion of the majority, not covered by the European and German cartel prohibition as long as these companies form an economic unit. This is usually the case if the daughter has lost her competitive autonomy due to the dominant influence of her mother.[28]

2. US - *intra-enterprise conspiracy doctrine*

Term Commodities Cotton Futures Litigation, 12 Civ. 5126 (ALC)(KNF) (S.D.N.Y. Sept. 30, 2014). September 30, 2014, the Southern District of New York.

The plaintiffs alleged that the defendants manipulated the price of cotton futures by "unreasonably and uneconomically demanding delivery of certificated cotton in fulfillment of futures contracts," among other allegations of manipulative behavior. The court dismissed plaintiffs' § 1 claim under the *intra-enterprise conspiracy doctrine* set forth in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752 (1984), but declined to dismiss the CEA or § 2 claims. The five defendants in *Cotton* were all related through a web of parent-subsidiary relationships. The plaintiffs did not specify whether each subsidiary was wholly owned. , or clearly plead the nature of the defendants' relationships. The court held that it could not conclude that the allegations supported "a reasonable inference that Defendants ha[d] '*separate corporate consciousnesses*.'"

3. Same market

Competition exists when at least two actors are active in the same market. If A in South Africa sells apples in Spain and G from Germany cars in Norway, it is difficult to imagine a situation of competition between both. This leads to the term relevant market You have to differentiate regional and relevant market. The general definition is as follows:

1. A *relevant product market* comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;

[26] Emmerich, S. 33
[27] Правоспособность Konzerna
[28] Emmerich, S. 34

2. A *relevant geographic market* comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

Ad 1: The relevant product market is basically formed on all products and services which are interchangeable for the opposite market side without any particular mental or physical adjustment. This is based on a reasonable average buyer who was already decided for a particular product. Decisive are the properties of the asset in question, its price and its purpose. Goods or services which because of their special properties can only be replaced to a limited extent or for a limited period of time form their own market.

Ad 2: The relevant geographic market is defined according to various economic scientific theories. However, in the practice of the European Commission, the following applies. A geographically relevant market includes all companies in different locations that are actually eligible for the opposite market side as an alternative source of sale or supply.. This is generally the case, if market participants can redirect their wishes ion short term and at low cost to another place whenever they feel like it.

4. ***other market participants*** § 2 I 2 UWG (= Gesetz gegen den unlauteren Wettbewerb – Law against unfair marker practices) defines: "Market participants" means, in addition to competitors and consumers, all persons acting as suppliers or purchasers of goods or services.

Other market participants include all other persons/companies within the sphere of influence of the companies involved in a cartel violation as well as consumers. The term coincides with the market participant pursuant to § 2 UWG. According to the jurisdiction of the European Court of Justice, anyone is entitled to damages whose market opportunities have been worsened by the antitrust violation in relation to the situation in the event of competition.

III. Whoever

There can be one (1) defendant , e.g. in case of abuse of market dominance, Art. 102 TFEU. In the case of Art.102 there will be usually more than one. The liability of the cartelants will then be joint and several pursuant to § 33 (3) GWB and § 840 BGB Civil Code

IV. intentionally or negligently

The claim for damages presupposes fault of the offender. The determination of fault will usually not cause any difficulties as soon as the cartel infringement as such exists. It will almost always be intentional. But even negligence is enough.

V. commits - violates etc

A criminal offense or a damage can be done by actively doing and also by omission, if there is an obligation (by contract or law) to prevent the occurrence of the damage. Apparently, German law has developed a particularly sophisticated legal dogmatic here. For German

law, therefore, the question arises as to whether a breach of competition law (infringement in the sense of § 33 a) can also be committed by omission. Example: A, a manufacturer of cars, realizes that B and C who are in the mineral oil industry have made price cartel. If yes/no- which criteria would apply? Should A be obliged to influence B and C to refrain from the cartel ?

Illegality results without further ado from the fact of the infringement, unless there is a justification. However, it is difficult to imagine a justification in the area of antitrust law.

VI. Infringement - Verstoß pursuant to Art. 101 TFEU/ § 1 GWB

1. Anti - competitive agreements: Art. 101 makes illegal all "agreements, decisions and concerted practices" which are anti-competitive and which distort the single market. The term "undertaking" means any person(s) or firms "engaged in an economic activity". The term thus excludes person/organizations, who are not independently exercising an economic or commercial activity (see above: IV) .

Undertakings must then have formed an agreement, developed a "concerted practice", or, within an association, taken a decision. Any kind of dealing or contact, or a meeting of minds between parties could potentially be counted as illegal.

2. Collusion is an agreement among firms or individuals to divide a market, set prices, limit production or limit opportunities. It can involve "wage fixing, kickbacks, or misrepresenting the independence of the relationship between the colluding parties".

Collusion is illegal but implicit collusion in the form of tacit understandings is in principal legal. The practice of conferences and meetings of industry participants almost necessarily allows each firm to see how and why every other firm is pricing their products. The red line to price fixing is therefore often very difficult to draw. See above Art. 101 TFEU : *which may*

Article 101 has been construed by EU – Courts very widely to include both informal agreements and concerted practices where firms tend to raise or lower prices at the same time without having physically agreed to do so.

As far as agreements are concerned the mere anticompetitive effect is sufficient to make it illegal even if the parties were unaware of it or did not intend such effect to take place. See above: § 33a *Intentionally or negligently:*

3. Trade between Member States: Article 101 covers only agreements and anti-competitive practices that might affect "*trade between Member States*". This provision has been interpreted broadly: for example, several agreements amongst firms with no production in the EU have been considered to affect trade between Member States. The ECJ has also held that "trade between Member States" includes "trade between regions of a Member State", to prevent cartels "carving up" territories for their own benefit.

4. de minimis – exception

In August 2014, the European Commission issued a *de minimis notice* stating the conditions under which low-value agreements between companies are not covered by the general prohibition of anti-competitive practices in EU competition law. [29]The notice establishes a protected area (so-called "safe harbor") for companies whose combined

[29] http://ec.europa.eu/competition/antitrust/legislation/deminimis.html.

market share for agreements between competitors is not more than 10% and for agreements between non-competitors 15%. These thresholds have remained unchanged from the previous announcement. However: Agreements whose purpose it is to "restrict competition" will – irrespective of market shares - always be seen as violation of Article 101 TFEU.

VI. a Examples Anti - competitive Agreements

1. Truck Cartel

There is a first judgment of the district court Hanover in the process "truck cartel" (Az. 18 O 8/17). With the decision neither the city of Göttingen, which demands compensation, nor the defendant truck manufacturer MAN should be satisfied. But after all: The judges consider a large part of the claims to be justified. The verdict marks the beginning of an unprecedented series of court proceedings that will keep the courts busy for many years. More than a hundred claims for damages against truck manufacturers are pending in Germany, and hardly a week passes without new lawsuits. The claims have long been worth billions. The judgment is not yet final. It can be assumed that MAN will go to the Higher Regional Court (Court of Appeal) and try to obtain a different verdict.[30]

2. Landgericht Dortmund, 8 O 25/16 Kart. 28.06.2017

Verdict:
1. The action is, in substance, justified on the merits of the claim for damages and interest against the defendant as joint debtors.
2. The decision on costs remains reserved for the final judgment.

The antitrust violations involved price, quota and customer protection agreements. According to the Federal Cartel Office, the agreements aimed to split tenders, inquiries and projects among the cartelists; this in a period of (at least) 2001- May 2011.

The applicant claims that there was also a general increase in prices due to anticompetitive agreements, as non-cartelants also obtained higher prices than competitive ones, so that the applicant would be harmed even if the defendants were able to demonstrate and prove that individual projects were not financed by were affected by antitrust practices.

VII. Infringment pursuant to Art. 102 TFEU (Abuse of Market Dominance)

It is widely accepted that market power can have harmful effects on consumers. But a dominant position in the market does not constitute itself an infringement of competition law under Art. 102 . It is the abuse of a dominant position, which is illegal. Abuse of dominance involves several distinct steps[31]:

[30] Frankfurter Allgemeine Zeitung FAZ v. 8.1.18 S. 18

[31] General Distribution OCDE/GD(96)131 The OECD Competition Committee debated abuse of dominance and monopolisation in February 1996.

- defining the relevant market,
- determining whether the firm is dominant by considering its market share, barriers to entry and other characteristics,
- evaluating whether the behavior was abusive in terms of the objective of the competition law.

Art. 102 does not only mean a monopoly. Dominance is seen, as the ability to prevent effective competition and to behave as if there were no competitors. A market share above 40% is likely to be dominant, below not.

VII a: Examples see Annex

Article 102 TEFEU According to Art. 102 abuse may, in particular, consist in:

(a) unfair prices ..
(b) prejudice of consumers;
(c) applying dissimilar conditions
(d) unfair conditions for contracts

The words "in particular" mean, that the above list is not exclusive. Other cases of presumes abuse may be subsumed under this general cause prohibiting abuse.

Ad a: *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;* ***Deutsche Post AG*** the Commission found the undertaking guilty of predatory pricing in the market for parcel services. According to the Commission, Deutsche Post AG cross-subsidised its activities in the parcel service market by revenue obtained from the monopoly operations, and was hence able to offer parcel services below the incremental costs incurred.
Harm may accrue to consumers from below-the-cost pricing if the pricing is maintained in a relatively long term, hence enabling the foreclosure of a relatively efficient competitor from the market, or if the conduct may be seen to decrease the likelihood of competitors from entering into competition.

Napier Brown/British Sugar, the Commission considered that British Sugar had abused its dominant position when it attempted to drive Napier Brown out of the sugar retail market in the United Kingdom. Cf. e.g. Commission decision IV/30.178, Napier Brown v British Sugar, OJ [1988] L 284, 19.11.1988. British Sugar was in a dominant position both in the industrial sales of sugar and in the retail market. When Napier Brown sought to expand its operations from the wholesale of sugar into the retail market, British Sugar decreased the margin between the wholesale and retail prices of sugar so low that Napier Brown, which was as efficient as British Sugar in the packaging and distribution of sugar, was unable to obtain a sufficient margin from its own sales to enable it to continue to operate.

Price squeezes are particularly significant in sectors in which the access of competitors to the market is dependent on their ability to obtain a certain production input from the company in the dominating market position, which is crucial for the further provision of goods or services on the market. There have been several cases in relation to access to the telecommunications network, for example.

The price-squeeze in the telecommunications sector has been assessed e.g. in the ***Deutsche Telekom* case** (C-280/08 P), in which the Commission found that Deutsche Telekom had abused its dominant position by charging a wholesale price from the tele network services that was higher than the retail price it collected from its own end users. In this situation, even an efficient competitor cannot operate profitably because in addition to the tele network charges other costs will incur e.g. from marketing, invoicing, debt collection etc. Not even the fact that the prices of Deutsche Telekom were regulated eliminated the abuse, because regulation did not prevent it from making independent pricing decisions that would have eliminated the price-squeeze or diminished it.

In case Irish Sugar (C-497/99 P), the Court of First Instance found that the undertaking had sought to restrict the trade between the Member States to protect the high price level in the Irish market. Irish Sugar was found to have treated its own customers unfairly e.g. by granting special border rebates to the retailers located between the borderline area between Ireland and Northern Ireland. The purpose of the rebates was to decrease the import of cheaper sugar intended for retail sugar market from Northern Ireland to Ireland. Additionally, Irish Sugar granted import rebates to customers who imported sugar outside of Ireland and hence discriminated against customers who supplied to the Irish market alone.

In case ***Hoffman-La Roche*** (Case 85/76), the ECJ prohibited loyalty rebates, the granting of which was tied to the condition that, for a specified reference period, the appropriate contracting partner would cover its entire need for vitamins and at any rate a major part of it by deliveries from Hoffmann-La Roche. According to the Court, the act of a dominant undertaking tying buyers – even if at their request – so as to commit them to buying or promising to buy from the said undertaking all the products they need or a majority thereof shall be considered abuse of dominant position, independent of whether the said obligation is imposed as such or whether discounts are obtained as a result of it.

Ad b: *limiting production, markets or technical development to the prejudice of consumers;*

CJE/03/93 Judgment of the Court of First Instance in Case T-65/98
Van den Bergh Foods Ltd v Commission of the European Communities23 October 2003

Van den Bergh Foods, formerly HB Ice Cream Ltd ("HB"), a wholly-owned subsidiary of Unilever plc, is the principal manufacturer of ice-cream products in Ireland. HB provides ice-cream retailers "free of charge" with freezer cabinets for ice-creams for immediate consumption ("impulse ice-creams"), provided that they are used exclusively to stock HB's ice creams ("the exclusivity clause"). HB retains ownership in the cabinets and maintains them. The contract may be terminated by either of the parties on two months' notice. In 1989 many retailers with freezer cabinets supplied by HB began to stock and display the products of **Mars,** an American company, which was trying to penetrate the Irish market. Consequently, HB demanded that retailers complied with the exclusivity clause.

Mars lodged a complaint against HB with the European Commission in September 1991. Its complaint related to the provision by HB, to a large number of retailers, of freezer cabinets which had to be used exclusively for HB products.
In its decision of March 1998, the Commission held that HB's distribution agreements containing the exclusivity clause were incompatible with Community competition law. It found that HB had a dominant position on the relevant market (the market for single-

wrapped items of impulse ice-creams in Ireland), illustrated by the degree of both numeric (79%) and weighted (94%) distribution of HB products and by the strength of the brand.

Ad. c *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

Deutsche Bahn AG, (Germany et al., 15 November 2013, Judgment (extracts) DB Energie GmbH and other subsidiaries within the group practiced of a rebate system for the supply of electric traction energy presumably in order to gain an advantage over the group's competitors operating in Germany by making terminal access more difficult for them or otherwise discriminating against them.

Ad d *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

See Hilti- Case 1987: ……..

(28) After analysis of the information thus collected, the Commission considered that there was a prima facie case that Hilti held a dominant position in the market for both nail guns and consumables and had abused that position inter alia by making the supply of cartridge strips conditional on the purchase of nails. Consequently, the Commission initiated the procedure pursuant to Article 3 (1) of Regulation No 17 and sent a statement of objections to Hilti on 9 August 1985, the object of which was to lead to interim measures being taken.

……..

VIII. Proof of Infringement

Old § 33 4 IV GWB is now § 33 b GW:[32] *Where damages are claimed for an infringement … the court shall be bound by a finding that an infringement has occurred… by the competition authority, the European Commission, or the competition authority … in another Member State of the European Union. …..*

In assessing a claim for damages before a German court on the ground of infringement of competition law, the German court is thus bound by the final findings of the competition authorities and by the courts of other Member States. This regulation met with almost unanimous criticism. There is no guarantee that decisions in the other member states are with the same standards as in Germany. This provision should therefore regarded as unconstitutional in German law. [33]

IX. Damages arising therefrom

§ 33 a II : I*t is refutably assumed that a cartel causes damage. ….*

Causality of infringement is required for the damage claim. In the normal way of

[32] Art. 16 EU directive 1/2003

[33] Emmerich, § 40, 25

procedure (e.g. §§ 249 - 252 BGB and other legislations) the claimant has the burden of prove that the damage, for which he asks compensation is the direct consequence of a certain willful or negligent act of the defendant. § 33 I means a reversal of the burden of proof. The presumption refers to the question of whether any damage has occurred, not to the amount of damage. The claimant must therefore prove that he has been affected by the infringement . This is supposed to have caused damage. However, the plaintiff now has to prove the amount of the damage. Despite the legal presumption of damage, neither in economic theory nor in practice is it possible to identify a typical damage effect as a percentage of the price or of the trading volume. The damage depends on a number of factors that may have an effect on a case-by-case basis. For these reasons, the level of the price effect must be estimated for each market in question. The difference between the observable price , which was charged by the cartel and the hypothetic "as if price" (as if competition had existed) must be estimated. This can be done pursuant to thus determined § 287 German Code of Civil Procedure must then be multiplied by the quantity paid during the duration of the cartel.[34]

X. Pass – on – damage

Example:

> Buyer B buys railway rails from S for 100. B resell the rails to A. B usually calculates with a gross profit margin of 50%. Consequently A pays 150 to B. B realizes later that S was part of a cartel and that the "as if - competition price" for the rails would have been only 80. Apparently there is no damage with B. The overprice has been passed on to A.

But does A have a damage claim against S? If so, in what amount?

The determination of the amount of damage can causes considerable difficulties. There is a rebuttable presumption that the infringer's profit corresponds to the damage of the person concerned, § 33 (3) sentence 3 GWB. [35] So , A would be entitled to 20 from S.

But there are a number of possibilities conceivable.

a. B could have realized that that A was prepared to pay 150 – so his profit would be not 50 but 70. In this case B would have incurred 20 damage as lost profit.
b. A could say: If I had known I would only have agreed to 120 (on the basis of a profit margin of 50 %). I might have bought even more rails at the price of 80 and would have been able to negotiated a rebate.

Etc.

[34] Brunner/Bacher, Ermittlung von Kartellschäden für die zivilrechtliche Geltendmachung - eine Gebrauchsanleitung (=-Determination of antitrust damages for the civil enforcement - an instruction manual) NZKart17, 345 ss

[35] For determining damage, cf. Communication from the Commission on the determination of the extent of damage claims in 2013, OJ 2013 C 167/19

There are numerous approaches to quantify the pass-on- damage in cases like this. [36]But these cannot be discussed in detail here. Generally speaking, the size of the damage would be estimated pursuant to § 287 of the German *Code of Civil Procedure* [*Zivilprozessordnung*] taking into account, in particular, the proportion of the profit which the undertaking has derived from the infringement.

XI. Litigation

Antitrust law is public law. Measures of the antitrust authority, Bundeskartellamt, are therefore acts, against which under German law legal protection must be sought before the Administrative Court (*Verwaltungsgericht*). Due to the intertwining of public with private law issues, however, the legal protection against these acts is granted by the civil courts (*Zivilgerichtsbarkeit*). For such proceedings courts of 1. instance are the Higher Regional Courts (*Oberlandesgericht*) the next instance being the Federal Supreme Court (*Bundesgerichtshof*), each with special chambers.

However, legal actions for damages according to § 33 sequ. GWB/ Art. 101, 102 TFEU are seen as normal civil actions and will accordingly brought to the civil courts in the regular course of instances (Landgericht – Oberlandesgericht – Bundesgerichtshof; § 87 GWB.

Summary

Antitrust violations can lead to two legal consequences. First: fines imposed by the antitrust authorities in Germany or the EU Commission. Second: a damage claim for those, who have suffered a damage caused by this violation. The conditions of this claim for damages are determined by a EU-Directive of 2014 , which was implemented in 2017 into German law, particularly § 33 a GWB..

This creates a complicated legal situation, since European and German law do not always correspond. The current legal situation and the resulting difficulties are the subject of this essay.

Annex I - Laws

II a Text Basis

§ 33 a GWB

1) Wer einen Verstoß nach § 33 Absatz 1 vorsätzlich oder fahrlässig begeht, ist zum Ersatz des daraus entstehenden Schadens verpflichtet.

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[36] Brunner/Bacher NZKart 17, 345; Marco Bellia "Passing On" Defense in Antitrust Litigation Preliminary Notes for a General Analysis (January 15, 2013). Italian language) Available at SSRN: https://ssrn.com/abstract=2226759 or http://dx.doi.org/10.2139/ssrn.2226759

(2) Es wird widerleglich **vermutet, dass ein Kartell einen Schaden verursacht**. Ein Kartell im Sinne dieses Abschnitts ist eine Absprache oder abgestimmte Verhaltensweise zwischen zwei oder mehr Wettbewerbern zwecks Abstimmung ihres Wettbewerbsverhaltens auf dem Markt oder Beeinflussung der relevanten Wettbewerbsparameter. Zu solchen Absprachen oder Verhaltensweisen gehören unter anderem
1. die Festsetzung oder Koordinierung der An- oder Verkaufspreise oder sonstiger Geschäftsbedingungen,
2. die Aufteilung von Produktions- oder Absatzquoten,
3. die Aufteilung von Märkten und Kunden einschließlich Angebotsabsprachen, Einfuhr- und Ausfuhrbeschränkungen oder
4. gegen andere Wettbewerber gerichtete wettbewerbsschädigende Maßnahmen.
(3) Für die Bemessung des Schadens gilt § 287 der Zivilprozessordnung. Dabei kann insbesondere der anteilige Gewinn, den der Rechtsverletzer durch den Verstoß gegen Absatz 1 erlangt hat, berücksichtigt werden.
(4) Geldschulden nach Absatz 1 hat der Schuldner ab Eintritt des Schadens zu verzinsen. Die §§ 288 und 289 Satz 1 des Bürgerlichen Gesetzbuchs finden entsprechende Anwendung.

§ 33a GWB (unofficial translation) Compensation obligation

(1) Anyone who intentionally or negligently commits an infringement pursuant to § 33 (1) shall be obliged to compensate for the resulting damage.
(2) It is refutably assumed that a cartel causes damage. For the purposes of this Section, a cartel is an agreement or concerted practice between two or more competitors to fine tune their competitive behavior on the market or to influence the relevant parameters of competition. Such agreements or practices include but are not limited to:
1. fixing or coordinating the selling or selling prices or other terms and conditions,
2. the distribution of production or sales quotas,
3. the sharing of markets and customers, including bid rigging, import and export restrictions, or
4. anti-competitive measures directed against other competitors.
(3) Section 287 of the Code of Civil Procedure applies to the assessment of damage. In particular, the pro rata profit made by the infringer as a result of the breach of paragraph 1 may be taken into account.
(4) The debtor shall pay interest on the debts in accordance with Paragraph 1 from the date of the damage. Paragraphs 288 and 289, first sentence, of the Civil Code apply mutatis mutandis.

§ 87 Exclusive Jurisdiction of the Regional Courts

Regardless of the value of the matter in dispute, the Regional Courts [*Landgerichte*] shall have exclusive jurisdiction in civil actions concerning the application of this Act, of Articles 101 or 102 of the *Treaty on the Functioning of the European Union* or of Articles 53 or 54 of the *Agreement on the European Economic Area*. Sentence 1 shall apply also if the decision in a civil action depends, in whole or in part, on a decision to be taken pursuant to this Act, or on the applicability of Articles 101 or 102 of the *Treaty on the Functioning of the European Union* or of Articles 53 or 54 of the *Agreement on the European Economic Area*.

Article 101 TFEU (of the Treaty on the Functioning of the European Union)

1. The following shall be seen as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices

which **may affect trade between Member States** and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

any agreement or category of agreements between undertakings,
any decision or category of decisions by associations of undertakings,
any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Businesses ("undertakings") infringing the provisions of Article 101 are liable to **unlimited fines by the Europaen Commission** but the EU has no capability to impose prison sentences. Member States should not intervene here, as the **Commission and the ECJ have the sole authority over EU competition law**. However, **Member States usually have their own domestic competition law which they may enforce, provided it is not contrary to EU law**. The role of the Commission is the area is quasi-judicial and subject to appeal to the ECJ.

Article 102 of the Treaty on the Functioning of the European Union

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Annex 2 Cases

1.OLG Karlsruhe, Urteil vom 31.07.2013 - 6 U 51/12 (Kart.)

Die Klausel in den Vertragsbedingungen eines öffentlichen Auftraggebers, wonach der Auftragnehmer einen Betrag in Höhe von 15% der Abrechnungssumme zu zahlen hat, wenn er aus Anlass der Vergabe nachweislich eine Abrede getroffen hat, die eine unzulässige Wettbewerbsbeschränkung darstellt, ist wirksam.

2.Landgericht Dortmund, 8 O 25/16 Kart. 28.06.2017

Tenor:
1. Die Klage ist betreffend den mit dem Klageantrag geltend gemachten Schadensersatz nebst Zinsen gegen die Beklagten als Gesamtschuldner dem Grunde nach gerechtfertigt.
2. Die Kostenentscheidung bleibt dem Schlussurteil vorbehalten.

Tatbestand

Die Klägerin ist ein in N ansässiges Nahverkehrsunternehmen und beschafft im Rahmen ihrer Betriebstätigkeit regelmäßig Gleisoberbaumaterialien.
Die Beklagte zu 1) ist seit vielen Jahren tätig bei der Herstellung, dem Handel und dem Vertrieb von Weichen, Kreuzungen und sonstigen Teilen des Oberbaus von Schienenbahnen; die Beklagte zu 2) handelt mit Eisenbahnoberbaumaterialien und ist bei der Vorbereitung und Durchführung von Gleis-Oberbaumaßnahmen tätig; im Jahr 2010 übertrug die Beklagte zu 1) im Wege der Umwandlung durch Abspaltung den Geschäftsbereich „Gleisbau“ auf die Beklagte 2).

Die Beklagte zu 3) ist Rechtsnachfolgerin betreffend sämtlicher Aspekte aus dem Geschäftsbereich Gleistechnik diverser Vorgängerfirmen und unterhielt im gesamten Kartellzeitraum fünf Produktionsstätten und acht Vertriebsniederlassungen für Gleisoberbaumaterialien in Deutschland.

Gegen die Beklagten wurden im Mai #### Bußgeldverfahren wegen Kartellverstößen eingeleitet. Am ##.##.#### erließ das Bundeskartellamt gegen die Beklagte zu 1), zu 3) sowie gegen eine Gesellschaft des W-Konzerns, die ursprünglich in diesem Rechtsstreit beteiligte Beklagte zu 5) inzwischen bestandskräftige Bußgeldbescheide wegen kartellrechtswidrigen Absprachen in Bezug auf Oberbaumaterialien in Höhe von insgesamt 97,64 Millionen €, wobei es insoweit zu einer einvernehmlichen Beendigung kam. Nach diesen Bescheiden waren die Adressaten gemeinsam mit der mit weiteren

Unternehmen des W-Konzerns, den ursprünglich hier im Verfahren beteiligten Beklagten 4), 6) und 7) sowie weiteren Unternehmen (im folgenden „Kartellanten"; vgl. Aufstellung der Beteiligten S. 5 des Bescheides Anlage K1) an dem so genannten „Kartell der Schienenfreunde" beteiligt. Die ursprünglich hier im Verfahren beteiligte Beklagte zu 4) – die W GmbH - hatte das Schienenkartell gegenüber dem Kartellamt aufgedeckt und war als Kronzeugin nicht Adressatin eines Bußgeldbescheids. Bei den Kartellanten handelt es sich um die wichtigsten Lieferanten von Oberbaumaterialien in ganz Deutschland. Es liefen oder laufen noch Ermittlungsverfahren wegen des Verdachts des Submissionsbetruges gegen verschiedene Vertreter der Unternehmen.
Bei den kartellrechtswidrigen Absprachen handelte es sich um Preis-, Quoten-und Kundenschutzabsprachen. Nach Feststellung des Bundeskartellamtes bezweckten die Absprachen die Aufteilung von Ausschreibungen, Anfragen und Projekten unter den Kartellanten; dies in einem Zeitraum von (mindestens) 2001- Mai 2011. Die Kartellanten teilten sich in die Kunden unter anderem anhand des „Stammkunden-" beziehungsweise „Altkundenprinzips" auf. Jedem Kartellbeteiligten wurden einzelne Kunden als Stamm- bzw. Altkunden zugeordnet, wobei Grundlage gewachsene Kundenbeziehungen und -vorlieben waren. Die anderen an den kartellrechtswidrigen Absprachen beteiligten Unternehmen schützten dieses Vorgehen, indem sie entweder bewusst keine Angebote für ihnen nicht zugewiesene Projekte abgaben oder Angebote verspätet bzw. gezielt überteuert abgaben. Von dieser Vorgehensweise gab es gemäß den Feststellungen des Bundeskartellamtes gelegentliche Abweichungen, um Kundenzuweisungen zu verschleiern, wobei es in diesem Fall als Ausgleich Unteraufträge gab (vergleiche zu den gesamten Feststellungen Anlage K1). Koordiniert wurde all dies durch einen so genannten Spielführer, dessen Rolle in der Regel durch das Unternehmen eingenommen wurde, welches den Auftrag erhalten sollte. Die Absprachen betraf alle Oberbaumaterialien, also insbesondere Schienen, Weichen und Schwellen und erfasste sowohl Ausschreibungen und Anfragen bezüglich Produktkombinationen, bestehend aus mehreren Losen, als auch Ausschreibung und Anfragen, die aus einzelnen Losen bestanden. Innerhalb des Kartells gab es diverse Mechanismen (bezüglich näherer Einzelheiten wird auf Blatt 14 der Akte Bezug genommen). Über die Jahre hinweg entwickelte sich ein festes System, so dass aufgrund dieser eingeführten Spielregeln ausdrückliche Einzelfallabsprachen zu allen Projekten nicht erforderlich waren.

Absprachen über „weichenlastige" Projekte wurden darüber hinaus auch im Zusammenhang mit Sitzungen des Arbeitskreises Marketing im Fachverband Weichenbau beziehungsweise innerhalb des Verbandes der Bahnindustrie E. V. (VDB) getroffen; an diesen Absprachen waren üblicherweise Vertreter der Beklagten zu 1), ferner U2, W, L6 GmbH, L3 GmbH und W5 GmbH beteiligt. Zumindest vor 2001 erfolgten die Absprachen nach Quoten, im Laufe der Zeit erfolgt ein Übergang zum Stammkundensystem. Darüber hinaus sprachen die Weichenhersteller auch über Preiserhöhungen. Bis zur Auflösung des Fachverbandes Weichenbau im Jahre 2006 dienten die Sitzungen des Arbeitskreises als Rahmen für die beschriebenen Absprachen. Nach Auflösung wurde die Projektaufteilung etc. in identischer Form im Marketingausschuss, auch Marketingarbeitskreis oder Marketingarbeitskreisgruppe genannt, weitergeführt. Anfang 2009 ging der Marketingausschuss in der W8 Fachgruppe Infrastruktur auf; zu diesem Zeitpunkt fanden die Absprachen häufiger einzelfallbezogen und nicht mehr in Verbandstreffen statt, was möglich war, da sich die Stammkundenaufteilung eingespielt hatte.

Die Beklagte zu 1) war im Zeitraum von ####- Mai #### laut Bußgeldbescheid an den

kartellrechtswidrigen Verhaltensweisen beteiligt, wobei sie seit August 2008 nur noch vereinzelt an Absprachen beteiligt war.

Zusätzlich bestand innerhalb des Kartells der Schienenfreunde für den Produktbereich Schienen seit 2001 bis Mai 2011 eine kartellrechtswidrigen Vertriebsvereinbarung zwischen der Beklagten zu 3) und den ursprünglich am Rechtsstreit beteiligten Beklagten zu 4)-7), auf deren Grundlage die Beklagte zu 3) Schienen, die von der ursprünglich Beklagten zu 7) hergestellt wurden, veräußerte. Diese Vertriebsvereinbarung wurde im Jahr #### im Zusammenhang mit der Veräußerung der Geschäftsanteile der ursprünglich hier beteiligten Beklagten zu 7) von U2 an W geschlossen und im Jahre 2008 nochmals bekräftigt.
Die Klägerin trägt vor, dass sich ausweislich des Bußgeldbescheides die Beklagten 3-7 im Zeitraum #### bis Mai #### umfassend und bundesweit am Kartell der Schienenfreunde beteiligt hätten und die Beklagte zu 1) ebenfalls in diesem Zeitraum für Oberbaumaterialien sowie bis mindestens 2008 auch an Absprachen zu Weichen beteiligt gewesen sei (zu den Einzelheiten wird auf Bl. 22 der Akte Bezug genommen).
Die Klägerin bezog in den Jahren 2003 bis 2008 solche Leistungen von der Beklagten zu 1). Davon sind im hiesigen Rechtsstreit die aus Bl. 73-85 ersichtlichen Vorgänge streitgegenständlich; der letzte datiert vom 31.10.2008.

Die Klägerin verlangt nun die Feststellung der Schadensersatzpflicht sämtlicher noch beteiligter Beklagter für diese Aufträge.

Die Klägerin behauptet, dass die Kartell- beziehungsweise Submissionsabsprachen unter Beteiligung der Beklagten 1) jedenfalls auch die hier streitgegenständlichen Bezugsvorgänge aus den Jahren 2003 bis 2008 beträfen. Diese Beschaffungsvorgänge seien im vom Kartellamt festgestellten Kartellzeitraum der Beklagten zu 1) erteilt worden und somit kartellbefangen gewesen; für letztere Behauptung greifen aus Sicht der Klägerin jedenfalls Beweiserleichterung wie eine Umkehr der Darlegungs-und Beweislast sowie ein Anscheinsbeweis; jedenfalls bestehe eine sekundäre Darlegungslast der Beklagten. Es sei festzustellen, dass die streitgegenständlichen Vorgänge allesamt die durch das Bundeskartellamt im Bußgeldbescheid festgestellten Kriterien des Kartells erfüllen würden.

Soweit die Beklagten auf unterschiedliche Absprachen und unterschiedliche Aktivitäten in verschiedenen Regionen abstellen würden, meint die Klägerin, dass laut Bußgeldbescheid eine übergreifende Gesamtabsprache vorliege und die Beklagten auch gerade nicht vortragen würden, das Gebiet der Klägerin sei kartellfreie Region gewesen.

Die Klägerin behauptet, durch die kartellrechtswidrigen Absprachen einen erheblichen Schaden erlitten zu haben, da sie ohne die Absprachen die streitgegenständlichen Oberbaumaterialien zu erheblich günstigeren Preisen, nämlich zu Wettbewerbspreisen, hätte beziehen können. Das Kartellamt selber habe auch im Beschluss vom 03.04.2015 zutreffend ausgeführt, dass aufgrund des kartellbedingt höheren Preisniveaus am Markt die Beschaffung von Oberbaumaterialien zu kartellbedingt überhöhten Preisen abgewickelt worden seien und zwar selbst in Fällen, in denen die Beschaffung nicht unmittelbar Gegenstand der Kartellabsprache waren.

Aus Sicht der Klägerin spricht für die Entstehung eines Schadens nach der

Rechtsprechung der Sinn und Zweck von Kartellen.

Die Klägerin behauptet, es sei auch eine generelle Preissteigerung aufgrund der kartellrechtswidrigen Absprachen gegeben, da auch Nichtkartellanten höhere als die wettbewerblichen Preise erzielt hätten, so dass eine Schädigung der Klägerin selbst dann vorläge, wenn die Beklagten darlegen und beweisen könnten, dass einzelne Projekte nicht von den kartellrechtswidrigen Verhaltensweisen betroffen waren. Das Preisniveau bei Gleisoberbaumaterialien sei bundesweit und somit auch in der hier betroffenen Region angestiegen und habe somit höher gelegen, als es ohne Kartell der Fall gewesen wäre. Für den Anstieg des Preisniveaus streite auch eine Vermutung.
Die Klägerin bestreitet, eine Weiterwälzung des Schadens vorgenommen zu haben.
Die Haftung der Beklagten zu 1) und 2) als Gesamtschuldner ergebe sich nach Abspaltung des Geschäftsbereichs „Gleisbau" von der Beklagten zu 1) auf die Beklagte zu 2) im Jahr 2010 aus § 133 UmwG.

Eine Verjährung der Ansprüche sei wegen des eingeleiteten Güteverfahrens und des auch rückwirkend anzuwendenden § 33 V GWB nicht eingetreten.
Nachdem die Klägerin zunächst die aus Bl. 5 und klageerweiternd aus Bl. 409 d.A. ersichtlichen Anträge stellte, hat sie zunächst gegenüber den ursprünglichen Beklagten zu 4) bis 7) den Rechtsstreit für erledigt erklärt; diese haben der Erledigung zugestimmt und mit der Klägerin Abreden getroffen, wonach in diesem Verhältnis die Klägerin die Gerichtskosten trägt.

Die Klägerin beantragt nunmehr wie folgt:
1. Die Beklagten 1) bis 3) werden als Gesamtschuldnerinnen verurteilt, an die Klägerin Schadensersatz zu zahlen in einer in das Ermessen des Gerichts gestellten Höhe, mindestens jedoch in Höhe von 39.995,24 Euro nebst Zinsen in Höhe von jährlich 8 Prozentpunkten über dem jeweiligen Basiszinssatz aus 3.739,09 Euro seit dem 06.08.2003 und aus 2.943,43 Euro seit dem 12.08.2003 und aus 769,28 Euro seit dem 29.10.2003 und aus 5.010,05 Euro seit dem 23.03.2005 und aus 8.731,59 Euro seit dem 09.09.2006 und aus 13.273,24 Euro seit dem 12.10.2007 und aus weiteren 4.278,10 Eruo seit dem 01.11.2008.

2. Die Beklagten 1) bis 3) werden als Gesamtschuldnerinnen verurteilt, die Klägerin von Kosten der außergerichtlichen Rechtsverfolgung in Höhe von 678,45 Euro freizustellen.

Die Beklagten beantragen,

die Klage abzuweisen.

Die Beklagten zu 1) und 2) rügen den Klagevortrag als unsubstantiiert, da die Betroffenheit der streitgegenständlichen Auftragsverhältnisse von kartellrechtswidrigen Absprachen lediglich pauschal behauptet werde. Aus den Bußgeldbescheiden folge auch nicht, dass die streitgegenständlichen Beschaffungsvorgänge kartellbefangen gewesen seien; die Beklagten bestreiten die Kartellbefangenheit ausdrücklich.
Bekl 1) und 2) rügen, dass den Erwerben keine Ausschreibungen zugrunde gelegen hätten, so dass schon kein Raum für eine Absprache gewesen sei, da die Klägerin offenbar schon auf die Beklagte zu 1) als Lieferantin festgelegt gewesen sei.
Sie bestreiten auch die Zahlungen der einzelnen Rechnungen.

Die Beklagten weisen darauf hin, dass zudem eine Feststellungswirkung nach § 33 Abs. 4 GWB allein dem Bußgeldbescheid, nicht aber dem Bescheid aus dem Akteneinsichtsverfahren zukomme.
Zudem komme eine Anwendung des § 33 Abs. 4 GWB auf Altfälle nicht in Betracht.
Auch habe das Kartell nicht zu einer generellen Preiserhöhung geführt, sondern nur zu einer besseren Auslastung der vorhandenen Kapazitäten; dies zeige sich schon an den nach Ende des Kartells gestiegenen Preisen. Ein Preisschirmeffekt und dessen Voraussetzungen seien vorliegend ebenfalls nicht gegeben.
Die Klägerin habe ihren Schaden zudem nicht substantiiert dargelegt, und zwar nicht einmal in Form einer überwiegenden Wahrscheinlichkeit; ein Anscheinsbeweis komme ihr nicht zugute. Zudem liege der Meterpreis etwa für Vignol-Schienen mit 31,44 Euro deutlich unter dem Nachkartellpreis von 62,41 Euro.
Jedenfalls sei der Schaden aufgrund der Weitergabe etwaiger Schäden an die Kunden wieder entfallen.
Ferner müsse sich die Klägerin aufgrund ihrer Vergabepraxis Mitverschulden anrechnen lassen.
Zinsen in Höhe von 8 Prozentpunkten über Basiszins sei überhöht, eine Mahnung sei keinesfalls entbehrlich. § 33 III 4 GWB sei auf Altfälle, d.h. auf Anspruchsentstehungen vor dem 1.7.2005, nicht anwendbar.
Die Beklagten erheben die Einrede der Verjährung.
Eine Bezifferung sei vor dem Hintergrund des § 287 ZPO auch ohne ausführliches Gutachten möglich; zudem existiere das Gutachten des Instituts IAW, an dessen Erstellung auch die Klägerin beteiligt gewesen sei.
Wegen der weiteren Einzelheiten wird auf die gewechselten Schriftsätze sowie auf die Anlagen Bezug genommen.
Die Beklagten zu 3) hat gegenüber der Klägerin Verjährungsverzichtserklärungen abgegeben; bezüglich der Einzelheiten wird auf Bl. 673 f. d.A. Bezug genommen.

Entscheidungsgründe

Die Klage ist zulässig und begründet.

Aus Gründen der Verfahrensökonomie macht die Kammer im Hinblick auf den mit dem zulässigen Klageantrag zu 1) geltend gemachten bezifferten Schadensersatz von der Möglichkeit Gebrauch, über den Grund der Haftung vorab zu entscheiden (§ 304 Abs. 1 ZPO). Es besteht insoweit sowohl über den Grund als auch über die Höhe des Anspruchs Streit. Die Kammer kann insoweit über den Grund der Haftung vorab entscheiden und das Teil-Grundurteil mit einem Endurteil zu den übrigen Klageanträgen verbinden.

Ein Zwischenurteil über den Grund darf ergehen, soweit alle Fragen, die zum Grund des Anspruchs gehören, erledigt sind und nach dem Sach- und Streitstand zumindest wahrscheinlich ist, dass der Anspruch in irgendeiner Höhe besteht (ständige Rechtsprechung des Bundesgerichtshofs, vergleiche statt aller BGH VII ZR 90/14, Rn 44; BGH VII ZR 12/09 Rn 13 m.w.N. – juris). Diese Wahrscheinlichkeit folgt aus den Feststellungen unten, auf die insoweit verwiesen wird.

Hinsichtlich der Höhe des von der Klägerin geltend gemachten Schadens ist der Rechtsstreit zurzeit nicht entscheidungsreif. Keines der durch die Parteien vorgelegten beziehungsweise anderweitig gerichtsbekannten Gutachten (vergleiche zum

Beispiel „IAW“-Gutachten, „NERA“-Gutachten, „OXERA“-Studie) ist ohne weitere sachverständige Begutachtung angesichts der jeweils dagegen vorgebrachten Monita geeignet, zur Schadensschätzung herangezogen zu werden; insbesondere handelt es sich bei der letztgenannten Studie um eine abstrakt-generelle Meta-Studie ohne konkreten Bezug zu Oberbaumaterialien.

I) **Der Klägerin steht im Hinblick auf die Erwerbsvorgänge vor Juli 2005 dem Grunde nach ein gesetzlicher Schadensersatzanspruch gemäß § 33 GWB in der vom 1. Januar 1999 bis zum 30. Juni 2005 (im folgenden § 33 GWB a.F.) geltenden, nach dem intertemporären Recht für den Belieferungszeitraum 2001-2003 maßgeblichen Fassung zu (vgl. zur Anwendbarkeit des § 33 GWB a.F. BGH KZR 75/10 Rn 13, OLG Karlsruhe 6 U 51/12 Kart Rn 43 - juris).**

Anwendbar für den Schadensersatzanspruch ist das GWB in der Fassung vom 26. August 1998. Denn es kommt insoweit auf die Rechtslage zum Zeitpunkt der vermeintlich schadensbegründenden Handlungen an (OLG Karlsruhe 6 U 51/12 Kart; LG Berlin vom 6. August 2013 - 16 O 193/11 Kart; offengelassen LG Frankfurt 2-06 O 464/14), die hier teils im Jahre 2003, also vor dem Inkrafttreten des aktuellen § 33 GWB am 1. Juli 2005, stattgefunden haben sollen. Die Anwendung der neu eingeführten Anspruchsgrundlage gemäß § 33 Abs. 1 und 3 GWB scheidet dagegen mangels einer dahingehenden Übergangsvorschrift aus (BGH KZR 75/10 = BGHZ 190, 145 = WRP 2012 S. 2009, Tz. 13 – ORWI; LG Berlin, Urteil vom 16. Dezember 2014 – 16 O 384/13 Kart –, Rn. 47, juris).
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Nach § 33 GWB a. F. ist derjenige, der gegen eine Vorschrift des GWB oder eine Verfügung der Kartellbehörde verstößt, dem Betroffenen zur Unterlassung verpflichtet, sofern die Vorschrift oder die Verfügung den Schutz eines anderen bezweckt. Er ist auch zum Ersatz des aus dem Verstoß entstandenen Schadens verpflichtet, wenn ihm Vorsatz oder Fahrlässigkeit zur Last fällt. Dem Verweis in § 33 GWB a.F. auf ein Schutzgesetz kann nicht entnommen werden, dass der Kreis der durch das Kartellverbot geschützten Personen auf solche Abnehmer beschränkt werden muss, gegen die sich die Kartellabsprache gezielt richtet (BGHZ 190, 145 Tz. 16 f. - ORWI zu Art. 101 Abs. 1 AEUV). In jedem Fall ist aber auch nach § 33 GWB a.F. für die Aktivlegitimation eines Klägers erforderlich, dass dieser von dem Kartellverstoß betroffen, er also durch den Verstoß, der den Schadensersatzanspruch begründen soll, beeinträchtigt ist (vgl. auch EuGH Slg 2001, I - 6297 Rdnr. 26 - Courage Crehan; Slg 2006 - I 6619 Rdnr. 61 - Manfredi). Denn nach § 33 GBW a.F. ist der der Vorschrift zuwiderhandelnde Kartellant nur zum Ersatz des "aus dem Verstoß entstandenen Schadens" verpflichtet. Dies verdeutlicht, dass der einen Schadensersatz geltend machende Kläger von dem Verstoß betroffen sein muss (OLG Karlsruhe aaO Rn 44).

Dieser Aspekt der Unmittelbarkeit ist bei der Klägerin als unmittelbarer Abnehmerin ohne weiteres gegeben (so auch in ähnlichem Fall etwa LG Mannheim 7 O 110/13 Kart), so dass die etwa bei indirekten Lieferungen relevante Frage, ob stattdessen oder kumulativ auf § 823 Abs. 2 BGB i.V.m. Art. 81 EG abzustellen wäre, dahinstehen kann (vgl. dazu z.B. LG Frankfurt 2-06 O 464/14).
2) Für die Zeit nach Juli 2005, also im Hinblick auf die danach folgenden Beschaffungsvorgänge) gilt §§ 33 III 1 mit I GWB iVm 830, 840 BGB (vgl. so auch LG Frankfurt 2-06 O 464/14 S. 23 mit Verweis auf BGH KZR 75/10) wegen des – vorsätzlichen – Verstoßes gegen § 1 GWB bzw. Art 101 AEUV.
3) Für die Entscheidung ist davon auszugehen, dass die Beschaffungsvorgänge der

Klägerin von dem Kartell betroffen waren und der Klägerin hierdurch zumindest irgendein Schaden entstanden ist.
a) **Nach den Feststellungen des Bundeskartellamtes in den gegen die Beklagten zu 1), 3) und die ursprünglich hier Beklagten 4) – 7) ergangenen Bußgeldbescheiden (vgl. Anlagen K1 ff.) praktizierten die Hersteller und Händler von Schienen, Weichen und Schwellen spätestens ab dem Jahr 2001 bis zur Aufdeckung des Kartells im Mai 2011 auf dem Privatmarkt in Deutschland, und damit bundesweit – unter Beeinträchtigung auch des zwischenstaatlichen Handels, Preis-, Quoten- und Kundenschutzabsprachen.** Beteiligt waren, wenn auch teilweise nicht in allen Regionen und über den gesamten Zeitraum hinweg, die soeben genannten Beklagten (partiell über Rechtsvorgängerinnen beziehungsweise Konzerngesellschaften) sowie daneben auch einige der Streithelferin (zu den Einzelheiten vergleiche die Bußgeldbescheide in den Anlagen).

Das Bundeskartellamt hat festgestellt, dass die genannten Absprachen sich zwar im Laufe der Zeit hinsichtlich Struktur und Teilnehmer mit den Marktgegebenheiten geänderten, dabei auch von regional unterschiedlicher Intensität waren, aber immer mit dem selben Grundverständnis sowie vergleichbarem Ablauf und endlich der Umsetzung erfolgte. In allen Regionen und im gesamten Kartellzeitraum seien jedenfalls die Unternehmen U2 über die Beklagte zu 3) (Schienen, Schwellen und Weichen) sowie W über die hier ursprünglich beklagten Beklagten zu 4) -7) (insgesamt ebenfalls Schienen, Schwellen und Weichen) beteiligt gewesen. Die Absprachen hätten den Vertrieb von Schienen, Weichen und Schwellen an Nahverkehrsunternehmen, Privat- bzw. Regionalbahnen sowie in einer Reihe von Fällen Industriebahnen und Bauunternehmen betroffen. Dabei sei es um die Aufteilung von Ausschreibungen bzw. Projekten unter den Kartellbeteiligten gegangen. Nicht alle an den Absprachen beteiligten Unternehmen hätten auch alle betroffenen Produkte angeboten. Auch seien nicht alle bundesweit tätig gewesen. Deshalb sei bei Ausschreibungen eine Absprache zwischen den Unternehmen, die als Bieter infrage kamen, erfolgt. Im Bereich Schienen und Schwellen seien die ursprünglich hier Beklagten zu 4), 6) und 7) sowie die Beklagte zu 3) als Händlerin der Beklagten zu 7) im gesamten Zeitraum bundesweit an den Absprachen beteiligt gewesen. Die Beklagte zu 1) und zwei weitere Unternehmen hätten regional bei Ausschreibungen an Absprachen teilgenommen. Nach der Übernahme durch die C6 im August 2008 sei die Beklagte zu 1) nur noch in Einzelfällen an Absprachen beteiligt gewesen.

Im Bereich Weichen seien die Aufträge jedenfalls bis Ende 2008 vor allem im Rahmen bzw. am Rande von Sitzungen des Arbeitskreises Marketing innerhalb des Fachverbandes Weichenbau beziehungsweise innerhalb des Verbandes der Bahnindustrie e.V. (VDB) abgesprochen worden. Beteiligt gewesen seien neben der Beklagten zu 3) unter anderem die Beklagten zu 1) und die ursprünglich hier Beklagte zu 5). Neben der Beklagten zu 3) und den W-Unternehmen habe zumindest ab Anfang 2010 auch die G1-Gruppe das gesamte Produktspektrum (Schienen, Weichen, Schwellen) angeboten.

Die Absprachepraxis im Privatmarkt habe maßgeblich darauf basiert, dass den einzelnen Unternehmen bestimmte „Alt-“ beziehungsweise Stammkunden zugeordnet gewesen seien. Diese Zuordnung der Kunden zu bestimmten Unternehmen sei von den Kartellbeteiligten grundsätzlich respektiert worden. Sie hätten diese Unternehmen „geschützt“, indem sie bewusst auf die Abgabe von Angeboten verzichtet, diese erst nach Ablauf der Angebotsfrist abgegeben oder gezielt überteuerte Angebot abgegeben hätten, so dass der Auftrag an das „vorbestimmte“ Unternehmen habe gehen können. Die

Absprachen seien vorwiegend über telefonische Kontakte und persönliche Treffen sowie E-Mails umgesetzt worden. Dabei sei aufgrund der über Jahre praktizierten Absprachen und gewachsenen Kundenbeziehungen und -vorlieben allen Beteiligten von vornherein klar gewesen, wer den ausgeschriebenen Auftrag bekomme (dieser sei auch „Spielführer" beziehungsweise „Führender" genannt worden). Insoweit sei im Rahmen des ersten Kontakts bestätigt worden, welches Unternehmen im konkreten Fall den Auftrag habe ausführen, also führendes Unternehmen habe sein sollen und wie die anderen Unternehmen an dem Projekt hätten partizipieren sollen. Dem führenden Unternehmen sei bei der Umsetzung der Absprachen insgesamt eine organisatorische und koordinierende Funktion zugekommen. Ihm habe es oblegen, den anderen teilnehmenden Unternehmen entweder die Preise zu nennen, die diese in ihrem Angebot an den Kunden hätten kommunizieren sollen (so genannte „Schutzangebote", welche über den Preisen des führenden Unternehmens und dessen Angebot gegenüber dem Kunden gelegen hätte) oder aber den so genannten „Null-Preis" (häufig mit Sicherheitspuffer für Nachverhandlungen mit dem Kunden), zu dem das führende Unternehmen den Auftrag habe buchen wollen und auf den die übrigen einen Aufschlag vorgenommen hätten. Mit der Zeit habe sich der Ablauf zwischen den Beteiligten so eingespielt, dass das „führende Unternehmen" nicht selten Schutzpreise auch ohne vorherige Anfrage der anderen Unternehmen übersandt habe. Die Kommunikation solcher Preise habe auch telefonisch, getarnt als Aktien- beziehungsweise Börsenwerte oder Lottozahlen sowie in persönlichen Gesprächen stattgefunden. Als Ausgleich für die Abgabe der Schutzangebote seien die Unternehmen meist durch Unteraufträge beteiligt worden. Teils sei auch vereinbart worden, dass sie bei den nächsten gleichwertigen Ausschreibungen den Vortritt bekommen beziehungsweise Essen seien anderweitige Kompensationsgeschichte erfolgt. Insofern hätten die Absprachen einzelne projektbezogene Ausschreibungen betroffen. Der Ausgleich sei zwischen den an der Absprache beteiligten Unternehmen dabei nicht nur projektbezogen erfolgt, sondern vielmehr habe das System auf einem projektübergreifenden Verständnis und Vertrauensverhältnis der einzelnen Unternehmen untereinander basiert. Als Gegenleistung für die Abgabe eines Schutzangebotes in einem konkreten Projekt habe der Schützende grundsätzlich davon ausgehen können, dass er seinerseits bei einem anderen Projekt von den Mitkartellanten geschützt werde. Mit dem Stammkundensystem sei häufig auch die kundenseitig gewünschte spezifische Ausrichtung von Ausschreibungen einhergegangen. Die einzelnen Unternehmen seien bei der Ausschreibung ihrer jeweiligen Stammkunden häufig an der Erstellung der Leistungsverzeichnisse beteiligt gewesen. Durch die Kombination des Stammkundensystems mit auf spezifische Unternehmen zugeschnittenen Produkten in den Leistungsverzeichnissen sei den einzelnen Kartellteilnehmern bereits vor der Ausschreibung klar gewesen, auf wen das jeweilige Projekt bei den einzelnen Kunden zulaufen müsse. Der Ablauf der Absprache sei insgesamt als Spielregel derart etabliert gewesen, dass es häufig keiner ausdrücklichen bzw. Einzelfallabsprache zwischen den beteiligten Unternehmen bei den jeweiligen Projekten mehr bedurft hätte.

Die produktübergreifende Absprachepraxis für Schienen, Weiche und Schwellen sei über Jahre gewachsen. Sie sei durch Einzeländerungen im Laufe der Zeit nicht infrage gestellt worden.
Innerhalb des Kartells habe – nur für Schienen und insofern für Projekte ab 100 t (laut den zu Grunde liegenden Projektlisten sogar ab 50 t) – ab 2001 zwischen der Muttergesellschaft der Beklagten zu 3) und der Vorgängergesellschaft der Beklagten zu 7) eine kartellrechtswidrigen Vertriebsvereinbarung bestanden, auf deren Grundlage die

Beklagte zu 3) Schienen der Beklagten zu 7) veräußert habe. Dies sei jedenfalls bis Mai 2011 praktiziert worden. Ziel sei die gemeinsame Führungsposition auf dem Schienenprivatmarkt (Marktanteil über 90 %), das „Halten“ der aktuellen Führungsposition bzw. die Verhinderung eines Anteilsverlustes durch die Akquisition der Beklagten zu 7) (durch W von U2) und die selektive Erhöhung des aktuellen Preisniveaus beziehungsweise Listenpreiserhöhungen gewesen. Spätestens Ende 2007 sei ergänzend zwischen den Beklagten zu 3), 4), 6) und 7) für den Privatmarkt vereinbart worden, dass über die beiden W-Werke eine gezielte Zuweisung von Projekten an die Beklagten zu 3) beziehungsweise 4) erfolgt. Damit die Projektverteilung zu keiner Verschiebung der Lieferanteilen zwischen der Beklagten zu 3) beziehungsweise zu 7) einerseits und den Beklagten zu 4) beziehungsweise zu 6) andererseits führte, sei Mitte 2008 zudem ein quotaler Verteilungsschlüssel eingeführt worden. Es sei vereinbart worden, dass der Beklagten zu 3) 60 % und der Beklagten zu 4) 40 % der schienenbezogenen Aufträge zugewiesen werden sollten. Diese Verteilung habe den damaligen Marktverhältnissen entsprochen.

Im Bereich Weichen - unter anderem Beklagte zu 1), 3) und 5) - hätten zumindest von 2001-2008 circa fünf bis achtmal jährlich die Sitzungen des Arbeitskreises Marketing innerhalb des Fachverbands Weichenbau beziehungsweise innerhalb des W8 den Kartellunternehmen als Plattform für ihre regelmäßigen Projektabsprachen bei Weichen gedient. Neben der klassischen Verbandsarbeit habe der Arbeitskreis Marketing in erster Linie der Aufteilung von Projekten gedient. Dies sei vor 2001 noch auf Grundlage von Quoten geschehen. Zur Umsetzung dieser Quotenvereinbarung seien im Rahmen der Arbeitskreissitzungen konkrete Projekte diskutiert und deren Zuteilung abgesprochen worden. Dabei seien die beteiligten Unternehmen derzeit überein gekommen, sich bei der Aufteilung der Projekte an Stammkunden zu orientieren bzw. die Projekte jeweils dem Unternehmen zuzuteilen, dass diesen Kunden bereits zuvor geliefert habe. Zur Verringerung des Entdeckungsrisikos dieser Strategie sei gelegentlich von diesem Vorgehen abgewichen worden. Hinsichtlich der Zuteilung von neuen Kunden haben gegolten, dass wer zuerst von einem anstehenden Projekt erfahren habe, es in der Regel habe buchen, das heißt dieses Projekt für sich beanspruchen können. Zudem habe zwischen den Weichenherstellern eine Kundenschutzregelung bestanden, die bewirkt habe, dass diese Hersteller weitgehend respektiert hätten, wenn z.B. aufgrund der räumlichen Nähe eine besonders enge Beziehung eines Herstellers zu einem bestimmten Kunden bestanden habe. Im Fachverband Weichenbau sei es auch immer wieder zu Diskussionen über Preiserhöhungen gekommen. Die Kartellanten hätten sich mehrfach darauf verständigt, die Erhöhungen von Materialpreisen entsprechend weiterzugeben. Eine Nennung konkreter Preise für einzelne Weichen sei dabei nicht erfolgt. Dies sei auch nicht notwendig gewesen, da die Kartellanten wegen der Mitteilungen von Schutzpreisen einen Überblick über den jeweils verwendeten Angebotspreis gehabt hätten. Zumindest zwischen 2001 und 2006 hätten die Arbeitskreissitzungen der Aufteilung aktueller Projektausschreibungen gedient. Nach Auflösung des Fachverbandes und Überführung unter das Dach des W8 habe dort ein Nachfolgegremium bestanden, das ebenfalls der Verteilung aktueller Projektabsprachen gedient habe. Umgesetzt worden sei die Absprachen nach wie vor durch den Bestandsschutz von Stammkunden, durch die exklusive Zuteilung von Neukunden und durch Praktizierung der Kundenschutzregelung. Dabei hätten auch weiterhin Preisabsprachen stattgefunden. Jedenfalls ab 2008 seien Kontakte häufiger einzelfallbezogene erfolgt, da sich die Stammkundenzuordnung und die damit einhergehende Vorgehensweise zwischen den Kartellanten in regional unterschiedlicher Ausprägung eingespielt gehabt habe. Damit verbunden gewesen seien

auch zunehmend E-Mail-Kontakte. Insgesamt sei der Teilnehmerkreis über die Jahre hinweg weitgehend unverändert geblieben.
Alles in allem habe sich in die Kartellabsprache auf das gesamte Bundesgebiet erstreckt und nach den Einschätzungen des Bundeskartellamts auch den zwischenstaatlichen Handel beeinträchtigt.

b) **Diese Feststellungen des Bundeskartellamtes, welche sich die Klägerin zu Eigen gemacht hat, sind gemäß § 33 Abs. 4 GWB der Entscheidung zugrunde zu legen.** Dies gilt auch für die vor Eintreten dieser Norm am 13.7.2005 liegenden Erwerbsvorgänge, da das kartellbehördliche Verfahren Mitte Juli 2005 weder eingeleitet noch bereits bestandskräftig abgeschlossen war.

Die Grundsätze des intertemporalen Rechts dienen dem Schutz des Vertrauens darin, dass das rechtserhebliche Handeln eines Rechtssubjektes auch in Zukunft nur nach dem zu seiner Vornahme (oder Unterlassung) geltenden Recht beurteilt wird. Dieses schutzwürdige Vertrauen gebietet ein Verbot der Rückwirkung ungünstigeren neuen Rechts bzw. ein Gebot zur Anwendung günstigeren alten Rechts jedoch nur in Bezug auf das materielle Recht. Die Regelung des § 33 Abs. 4 GWB stellt zwar eine gegenüber der alten Rechtslage wesentliche Neuerung dar, hat aber lediglich eine Beweiserleichterung für potentielle Privatkläger zur Ermöglichung von Anschlussklagen ("Follow-on"-Verfahren) und damit eine prozessuale Frage zum Gegenstand. Dies führt dazu, dass für die Anwendbarkeit dieser prozessualen Vorschrift nicht auf die Entstehung des Rechtsverhältnisses oder die Eröffnung des kartellbehördlichen oder gerichtlichen Verfahrens, sondern auf den Zeitpunkt dessen bestands- oder rechtskräftigen Abschlusses abzustellen ist. Denn erst der mit Unanfechtbarkeit der Entscheidung einhergehende Abschluss des Verfahrens führt zu einem nunmehr unabänderbaren prozessual erheblichen Sachverhalt. Erlangt die Entscheidung daher wie vorliegend erst nach dem 01.07.2005 Bestands- bzw. Rechtskraft, liegt weder eine unzulässige Rückwirkung noch eine sonstige Enttäuschung schutzwürdigen Vertrauens vor, so dass § 33 Abs. 4 GWB n.F. ohne weiteres eingreift (zu alledem LG Düsseldorf 14d O 4/14 = NZKart 2016, 88, TZ 188; OLG Karlsruhe 6 U 51/12 Rn 47; ferner schon OLG Düsseldorf, Urteil vom 30.09.2009, VI-U (Kart) 17/08 - Postkonsolidierer, zitiert nach juris, dort Rz. 33 ff.; so auch LG Mannheim, Urteil vom 04.05.2012, 7 O 436/11 - Feuerwehrfahrzeuge, WuW/E DE-R 3584, 3587 f.; Bechthold/Bosch, Kommentar GWB, § 33 Rz. 41).

Zudem ist der Inhalt des Bußgeldbescheides von den Beklagten und den Streithelfern nicht bestritten worden, weshalb er auch unter diesem Aspekt der vorliegenden Entscheidung zugrunde zu legen ist (§ 138 Abs. 3 ZPO); vielmehr haben die Beklagten lediglich die Ansicht geäußert, dass sich aus diesen Feststellungen nichts für die Kartellbefangenheit der einzelnen Beschaffungsvorgänge ergebe.

c)Hieraus folgt, dass die **Beklagte zu 1) und die Beklagten zu 3) vorsätzlich gegen das Kartellverbot nach § 1 GWB a.F. und § 1 GWB in der Fassung seit der 7. GWB-Novelle verstoßen haben,** indem sie sich im Beschaffungszeitraum von 2001- Mai 2011 an Vereinbarung zwischen weiteren miteinander im Wettbewerb stehenden Unternehmen, nämlich anderen Herstellern und Händlern von Weichen, Schienen und Schwellen, beteiligt haben, die eine Einschränkung oder Verfälschung des Wettbewerbs bezweckt oder bewirkt haben (dieser Umstand wurde in Bezug auf die genannten Beklagten schon mehrfach gerichtlich festgestellt, vgl. statt aller LG Mannheim 7O 206/14 S. 10 und von der Kammer selbst, vgl. LG Dortmund, 8 O 90/14).

Die entsprechende Verantwortlichkeit der Beklagten 2) folgt aus dem Umwandlungsgesetz. Die Beklagte zu 1) erwarb im Jahr 2010 im Wege einer Umwandlung durch Abspaltung als Gesamtrechtsnachfolge den Geschäftsbereich „Gleisbau“ von der Beklagten zu 2). Diesem Bereich sind die Kartellverstöße von Seiten der Beklagten zu 2) zuzuordnen. Daneben haftet die fortexistierende Beklagte zu 1) selbst weiter für die von ihr jedenfalls zwischen 2001 und 2008 begangenen Zuwiderhandlungen gegen das Kartellverbot. § 133 Abs. 1 S. 1 Umwandlungsgesetz sieht für eine Spaltung zur Aufnahme vor, dass für die Verbindlichkeiten des übertragenden Rechtsträgers, die vor dem Wirksamwerden der Spaltung begründet worden sind, die an der Spaltung beteiligten Rechtsträger als Gesamtschuldner haften.

d) **Auf dieser Grundlage spricht ein Anschein für die Kartellbetroffenheit der einzelnen Erwerbsvorgänge der Klägerin** (einen entsprechenden Anscheinsbeweis anerkennend grundlegend OLG Karlsruhe 6 U 51/12 = NZKart 2014, 366 und jüngst bestätigt durch OLG Karlsruhe 6 U 204/15 Rn 63 - juris; so auch LG Berlin 16 O 384/13 Kart, LG Nürnberg-Führt 3 O 10183/13, LG Düsseldorf 14 d O 4/14; speziell für den Bereich des Schienenkartells LG Frankfurt a.M. 2-06 O 358/14, 2-06 O 464/14; LG Hannover 18 O 259/14; LG Mannheim 7 O 110/13, 7 O 111/13, 7 O 111/14, 7 O 206/14 und LG Erfurt 3 O 1050/14; ablehnend LG Stuttgart 11 O 225/12, LG Stuttgart 41 O 39/12 KFH; LG München 37 O 16434/11 und 37 O 16435/11; zweifelnd auch OLG München U 5006/11 Kart und LG Potsdam 2 O 29/14; vgl. umfassend zum Streitstand Thiede/Träbing NZKart 2016, 422 sowie Galle NZKart 2016, 214 und Fritzsche/Klöppner/Schmidt NZKart 2016, 416).

aa) **Nach der obergerichtlichen Rechtsprechung besteht zunächst ein Anscheinsbeweis dafür, dass sich ein Kartell preissteigernd auswirkt bzw. dass eine wettbewerbswidrige Absprache zu einer Schädigung des Auftraggebers führt** (vgl. OLG Nürnberg, Az. 1 U 2028/07, Protokoll vom 26.02.2008, dort Bl. 1969 d.A.; OLG Karlsruhe 6 U 51/11, 366; KG Berlin 2 U 10/03 Kart = WuW/E DE-R 2773; grundlegend LG Dortmund 13 O 55/02 Kart = WuW/E DE-R 1352). Auch der BGH führt in der Entscheidung „ORWI“ (BGH KZR 75/10) aus, dass die mit Kartellen bezweckte Preisanhebung sich regelmäßig in Form höherer Preise auswirke.

Der BGH weist bereits in einer Entscheidung vom 28.6.2005 (BGH, KRB 2/05, NJW 2006, 163; dies bestätigend BGH KRB 20/12, NZKart 2013, 195, TZ 76 f.) darauf hin, dass es nach der Lebenserfahrung nahe liege, dass die im Rahmen des Kartells erzielten Preise höher lägen als die im Wettbewerb erreichbaren Marktpreise. Die Bildung eines Kartells und seine Durchführung indizierten - so der BGH - daher, dass den Beteiligten hieraus jeweils auch ein Vorteil erwachse. Unternehmen bildeten derartige Kartelle, um keine Preissenkung vornehmen und damit auch keine Gewinnschmälerung hinnehmen zu müssen. Nach ökonomischen Grundsätzen werde laut BGH bei Kartellen regelmäßig eine Kartellrendite entstehen. Deshalb spreche eine hohe Wahrscheinlichkeit dafür, dass das Kartell gebildet und erhalten werde, weil es höhere als am Markt sonst erzielbare Preise erbringe. Es mag laut BGH zwar ausnahmsweise Konstellationen geben, in denen aus der Tätigkeit eines Kartells kein Mehrerlös erwächst oder dies zumindest nicht auszuschließen ist. Da der Mehrerlös durch die Außerkraftsetzung der Marktmechanismen entsteht, werden dabei aber die zeitliche Dauer der Kartellabsprachen und ihre Intensität zu beachten sein. Je länger und nachhaltiger ein Kartell praktiziert wurde und je flächendeckender es angelegt ist, umso höhere Anforderungen sind an die Darlegungen des Tatrichters zu stellen, wenn er einen wirtschaftlichen Vorteil aus der Kartellabsprache verneinen will (zum ganzen BGH KRB

2/05, TZ 20, 21 – Juris). Zwar betrifft diese Entscheidungen des BGH vom 28.06.2005 (wie auch die zitierte Folgeentscheidung) eine Rechtsbeschwerde gegen ein Urteil eines Oberlandesgerichts in einem Ordnungswidrigkeitsverfahren. Jedoch sind die vom BGH getroffenen Aussagen allgemeiner Natur und nicht etwa speziellen materiell- oder prozessrechtlichen Anforderungen des Ordnungswidrigkeitsrechts geschuldet. Insofern lassen sich die vom BGH formulierten Grundsätze auf das hiesige Verfahren übertragen.
Dass sich Kartelle in dieser Weise preissteigernd auswirken, ist darüber hinaus auch wirtschaftswissenschaftlich anerkannt (vgl. z.B. Inderst/Maier-Rigaud/Schwalbe „Preisschirmeffekte“ WUW 11/2014 und Coppic/Haucap „Behandlung von Preisschirmeffekten“ WUW 2/2016; zum ganzen auch Petrasincu WUW 2016, 331 und Inderst/Thomas, Schadensersatz bei Kartellverstößen, 2015, 317) und wurde auch durch das Bundeswirtschaftsministerium bei der Umsetzung der EU-Kartellschadensersatzrichtlinie 2014/104/EU berücksichtigt (vgl. BMWi, Entwurf eines 9. Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, S. 60, 71; vgl. nunmehr auch § 33a Abs. 1 GWB n.F.).

Wenn sich Quoten- und andere Kartelle nach dem zuvor gesagten allgemein preissteigernd auswirken, dann kann für das hier überwiegend praktizierte Stammkundenmodell nichts anderes gelten. Denn auch ein solches hat typischerweise wettbewerbsbeschränkende Effekte, vor allem, wenn es, wie hier, über einen erheblichen Zeitraum und in erheblichem Umfang aufrechterhalten wird (so auch z.B. LG Frankfurt 2-06 O 464/14; LG Mannheim 7 O 110/13, ferner LG Berlin 16 O 384/13). Quoten- und Kundenschutzabsprachen dienen gleichermaßen dazu, den Unternehmen Preissetzungsspielräume zu eröffnen, die sie erfahrungsgemäß auch nutzen. Andernfalls wären der mit der Koordination und deren Überwachung einer Kartellabsprache einhergehende Aufwand und das damit verbundene Risiko entbehrlich. Eine kartellbedingte Erhöhung des Preisniveaus wird auch nicht etwa durch das Vorbringen der Beklagten infrage gestellt, bei den Absprachen sei es nur darum gegangen, auch in auftragsschwachen Zeitenaufträge zu sichern und allen einen auskömmliche Anteil am Gesamtmarkt zu sichern. Denn der damit zugestandene Verzicht auf einen auf Ausweitung der eigenen Marktanteile gerichteten Preiswettbewerb ist auf Dauer nur aufrechtzuerhalten, wenn die Unternehmen durch einen „auskömmlichen“ Kartellpreis entschädigt werden.

Hier haben jedenfalls die Unternehmen U2, im Bereich Schienen und Schwellen ferner auch W mit verschiedenen weiteren Anbietern bundesweit Quoten-und Kundenschutzabsprachen getroffen, wobei es im Bereich „Weichen“ mehrfach auch zu Preisabsprachen gekommen ist, die auf die Weitergabe gestiegener Einstandspreisen gerichtet waren. Damit ist anzunehmen, dass das Preisniveau bei Gleisoberbaumaterialien, da das Kartell bundesweit angelegt war, auch in der gesamten Bundesrepublik und damit auch in der Region Bochum angestiegen ist (zur regionalen Auswirkung vergleiche auch LG Mannheim und LG Berlin aaO.). Dies entspricht auch der Bewertung des Bundeskartellamts, dass in seinem die Akteneinsicht potentieller Geschädigter betreffenden Beschluss vom 3. April 2014 (dort Seite 34; Anlage K4) ausführt, dass wesentliche Teile der Umsätze allein dem Betroffenen in den im Bußgeldbescheid beschriebenen Zeiträumen kartellbefangen gewesen seien und somit der Anschein dafür spreche, dass dem Nebenbetroffenen im Kartellzeitraum erteilte Aufträge zu kartellbedingt überhöhten Preisen abgewickelt worden seien, und zwar selbst dann, wenn die konkreten Aufträge oder Projekte nicht unmittelbar Gegenstand der Absprache gewesen seien. Dies steht auch im Einklang mit der Feststellung des Amtes

im Bußgeldbescheid, wonach die Spielregeln des Kartells so etabliert waren, dass es häufig keiner ausdrücklichen Einzelfallabsprache, bezogen auf ein konkretes Projekt, bedurfte (vgl. zu Anforderungen an ein nach außen deutlich werdendes Abstandnehmen von einer einmal getätigten Absprache jüngst BGH KZR 25/14 „Lottoblock II“). Selbst wenn es danach nicht zu ausdrücklichen Absprachen gekommen wäre, spricht der Anschein dafür, dass die mit den Marktgegebenheiten vertrauten Unternehmen regelmäßig auf Kartellpreisniveau anbieten und abrechnen konnten, da sie nicht mit einem nennenswerten Preiswettbewerb rechnen mussten.

Der Annahme eines kartellbedingt überhöhten Preisniveaus steht es vor diesem Hintergrund auch nicht entgegen, dass nach den durch die Beklagten behaupteten internen Ermittlungen nicht jedes Projekt zwischen den Kartellbeteiligten abgesprochen war bzw. im Bereich Schwellen und Schienen nur circa 10-15 % des Gesamtmarktes von solchen Absprachen betroffen gewesen sein sollen. Es entspricht der dargestellten Funktionsweise des Kartells, dass ausdrückliche Absprachen zwischen den Kartellbeteiligten wegen der eingespielten Abläufe und des Stammkundenprinzips vielfach entbehrlich waren. Der für ein allgemein überhöhtes Kartellpreisniveaus sprechende Anschein ist daher selbst dann nicht erschüttert, wenn man zu Gunsten der Beklagten davon ausgeht, dass im Bereich Schwellen und Schienen nur bezogen auf etwa circa 10-15 % des Gesamtmarktvolumens ausdrückliche Absprachen getroffen wurde. Denn dies war nach der Funktionsweise des Kartells ausreichend, um sich von Zeit zu Zeit über das allgemein angestrebte Kartellpreisniveau zu verständigen und dieses im stillschweigenden Einverständnis der Teilnehmer auch bei solchen Aufträgen durchzusetzen, bei denen keine ausdrücklichen Absprachen getroffen wurden.

Durch die Beklagten ist auch nichts vorgetragen worden, was mit der Annahme eines allgemeinen überhöhten Kartellpreisniveaus unvereinbar wäre. Insbesondere haben sie nicht aufgezeigt, dass sie sich in bestimmten Regionen oder bei bestimmten Arten von Geschäften, die nicht von – ausdrücklichen – Absprachen betroffen sein sollen, ein abweichendes Preisniveau herausgebildet hätte. Das einige der Beklagten nach eigenem Vorbringen – und insoweit in Übereinstimmung mit den Feststellungen des Bundeskartellamtes – nur regional an Absprachen teilgenommen haben, stellt die Ursächlichkeit ihres Beitrags und ihre Mitverantwortlichkeit für das kartellbedingt überhöhte Preisniveau nicht infrage, denn für die durch ein Kartell verursachten Schäden haften alle Kartellteilnehmer nach §§ 830, 840 BGB als Gesamtschuldner (vergleiche BGH KZR 75/10 Tz. 80 – Juris).

Schließlich vermag auch der Vortrag zu den Ergebnissen des IAW-Gutachtens (wie auch das dagegen durch die Beklagten eingeholte „NERA“- Gutachten) den Anschein nicht zu erschüttern, da die dort behandelten Durchschnittspreise und die konkreten Preise der Beschaffungsvorgänge nicht sinnvoll miteinander zu vergleichen sind, weil die Durchschnittspreise der einzelnen Produktkategorien aus den Preisen im Detail sehr unterschiedlicher Produkte gebildet wurden, was somit dem Vergleich von Äpfeln und Birnen (vgl LG Mannheim 7 O 145/15 Kart, S. 22) nahekommt. Dies gilt auch für die übrigen durch die Beklagten angestellten Preisvergleiche.

All dies rechtfertigt daher die Annahme, dass unter dem Schutzschild des Stammkundenkartells das Marktpreisniveau allgemein angestiegen ist, da auch Kartellaußenseiter kartellbedingt im Stande waren, höhere Preise als bei einem intakten Wettbewerb zu fordern, und dass sie von dieser Möglichkeit faktisch auch

Gebrauch gemacht haben wodurch sich die Preise am Markt durch die Abstimmung der Kartellbeteiligten insgesamt erhöhten (so genannter „Preisschirmeffekt“).

Dies gilt auch bereits für den Zeitraum in 2003, in dem die ersten hier streitgegenständlichen Erwerbsvorgänge fallen, da kein Anhaltspunkt dafür vorliegt, dass der Preisschirmeffekte vorliegend erst mit zeitlicher Verzögerung eingetreten wäre. Das Bundeskartellamt hat im Bußgeldbescheid selbst in einer Fußnote ausgeführt, dass die Absprachen im Bereich Schiene mit Beteiligung unter anderem von L8 und U3 in Nord- und Westdeutschland bereits seit Mitte der 80er Jahre praktiziert worden sein sollen, welche die Projekte auf Grundlage eines Quotenkartells untereinander aufgeteilt hätten (Bußgeldbescheid S. 6 Fn 3; Anlage K1). Durch die sich im Laufe der Zeit ändernde Marktstruktur, unter anderem infolge der Übernahme der ursprünglich hier Beklagten zu 7) im Jahr 2001 durch W von U2, habe sich auch die Absprachepraxis gewandelt. Im Bereich Weichen seien die Absprachen bereits vor 2001 praktiziert worden (Bußgeldbescheid aaO.). Von einem Marktüberblick der Kartellaußenseiter ausgehend, wäre es demnach marktwirtschaftlich lebensfern anzunehmen, dass diese sich nicht zumindest an höheren Preisen der Karteiteilnehmer orientiert hätten.

Dies gilt selbst dann, wenn das Produktsortiment der einzelnen Anbieter nicht vollständig homogen gewesen wäre (vgl. so auch LG Frankfurt 2-06 O 464/14). Es ist nichts dafür ersichtlich, dass Kartellaußenseiter ohne Not auf die Erhöhung auch ihrer Gewinnmargen verzichtet haben sollten, obwohl die den Markt bei Gesamtbetrachtung erschienen Kartellamt in mit ebenfalls nicht vollkommen identischen Produkten dort vergleichsweise hohe Preise durchsetzen konnten. Alles andere als eine Preiserhöhung auch durch Außenseiter des Kartells wäre daher ökonomisch nicht nachvollziehbar und muss somit als lebensferne Möglichkeit außer Betracht bleiben.

Damit liegen die Voraussetzungen für eine allgemeine, kartellbedingte Preiserhöhung, wie sie gerade auch durch den Europäischen Gerichtshof statuiert worden sind, hier vor. Der EuGH verlangt, dass erwiesen ist, dass das Kartell nach den Umständen des konkreten Falles und insbesondere den Besonderheiten des betreffenden Marktes einen Preisschirmeffekt durch eigenständig handelnde Dritte zur Folge haben konnte und dass sie diese Umstände und Besonderheiten den Kartellbeteiligten nicht verborgen bleiben konnten (vergleiche EuGH, Urt. v. 05.06.2014 – C-557/12 „L4“ Rn 34 – Juris). Es muss ausweislich der Ausführungen des EuGH – entgegen der durch einige der Beklagten vorgebrachten Auffassung – somit gerade nicht feststehen, dass diese Folge auch tatsächlich eingetreten ist.

Davon, dass Konsequenz des in Rede stehenden Kartells ein Preisschirmeffekt durch außenstehende Marktbeteiligte sein konnte, ist nach den Besonderheiten des Marktes für Oberbaumaterialien und dem ganzen, oben ausgeführten, auszugehen. Dass in relevantem Ausmaß auch solche Kartellaußenseiter als Lieferanten dieser Materialien fungiert hätten, hinsichtlich derer die Kartellanten nicht von einer indirekten Preisangleichung ausgehen mussten, ist weder dargetan noch ersichtlich. Auch im Hinblick auf den späteren Markteintritt von B2 ergibt sich aus den Feststellungen des Bundeskartellamts, dass die durch dieses Unternehmen hergestellten Schienen ebenfalls kartellrechtswidrig von Kartellanten vertrieben wurden. Gegenteiliges haben die Beklagten nicht vorgetragen.

bb) Bereits aus dieser hier im Wege des Anscheins herzuleitenden Annahme eines

Preisschirmeffektes folgt unmittelbar, dass auch die konkrete Beschaffungstätigkeit der Klägerin nicht frei von Einflüssen des Kartells gewesen ist, die streitgegenständlichen Beschaffungsvorgänge also kartellbetroffen waren (vgl. schon Kammer, Urteil vom 21.12.16, 8 O 90/14 = WuW 2017, 98-106 = NZKart 2017, 86 = mit zustimmenden Anmerkungen Thiede NZKart 2017, 68).

(a) Dazu bedarf es keines weiteren, darauf aufbauenden Anscheinsbeweises (so aber wohl z.B. LG Mannheim aaO., ferner Galle NZKart 2016, 214 ff, ferner Fritzsche/Klöppner/Schmidt NZKart 2016, 416; zum Ganzen auch Thiede/Träbing NZKart 2016, 422 ff; vom Ansatz her wie hier im Grunde OLG Karlsruhe 6 U 51/12), sondern ergibt sich unmittelbar aus der Anwendung der aus der Entscheidung L4 des EuGH folgenden Grundsätze.

(aa) Dies lässt sich auf folgende Überlegungen stützen:

Der EuGH billigte im Fall L4 auch demjenigen einen Ersatzanspruch zu, der nicht – sei es mittelbar oder unmittelbar – von einem Kartellanten erwarb, sondern vielmehr von einem Kartell-Außenseiter, der allein aufgrund der durch das Kartell eröffneten Möglichkeit ebenfalls seine Preise erhöhte. Anders als dies vorliegend von den Beklagten und auch von Teilen der oben zitierten, einen Anscheinsbeweis ablehnenden Rechtsprechung, für den unmittelbaren Erwerb vom Kartellanten gefordert wird, kann im Fall des Erwerbs vom Kartell-Außenseiter schon aus der Natur der Sache heraus gar keine Darlegung dahingehend erfolgen, dass das konkrete Geschäft Gegenstand einer Kartellabsprache war. **Dennoch lässt der EuGH hier zu Recht einen Schadensersatzanspruch zu, wenn die Kausalität in der oben näher geschilderten Weise auch für den Erwerb vom Außenstehenden vermittelt wurde.** Dann kann aber – schon unter dem Gesichtspunkt des sowohl durch den EuGH als auch durch den BGH stets in den Vordergrund geschobenen Effektivitätsgedanken (vgl. EuGH aaO. Rn 33 – juris; BGH KZR 25/14 Rn 37 und passim – juris) – jedenfalls für den unmittelbaren Erwerber nichts anderes gelten. Ist die Darlegung, dass das Geschäft Gegenstand der Kartellabsprache war, für den vom Kartell-Außenseiter Erwerbenden weder inhaltlich möglich noch nach der Rechtsprechung des EuGH nötig, so muss dies für den unmittelbaren Erwerber, der direkt vom gegen das Kartellverbot Verstoßenden erwirbt, erst Recht gelten. Es wäre widersinnig, wenn an die Feststellung der Kausalität (also der Kartellbetroffenheit) im Hinblick auf Geschäfte mit dem Rechtsverletzer selber höhere Anforderungen zu stellen wären als an solche Geschäfte mit Dritten, für welche der Rechtsverletzer ebenfalls aufgrund der adäquat-kausalen Auswirkungen seiner Rechtsverletzung laut EuGH zu haften hat.

Gestützt wird dies auch noch durch die Überlegung, dass wenn der Kartellant in Abrede stellt, dass das einzelne, im Kartellzeitraum liegende Geschäft einer gesonderten Kartellabsprache unterworfen war, er sich für dieses Einzelgeschäft gleichsam selber in die Rolle eines Kartellaußenseiters begibt, der demnach das einzelne Geschäft nicht dem Regime des Kartells unterwarf, es aber gleichwohl unter den durch das Kartell geschaffenen ökonomischen Bedingungen – dem Preisschirm – abschloss. Dies zeigt, dass eine Ungleichbehandlung im Hinblick auf den Darlegungsumfang bei reinen Preisschirmgeschäften einerseits und beim Erwerb von einem Kartellanten im Kartellzeitraum andererseits in keiner Weise gerechtfertigt wäre.

(bb)Aus diesen Gründen kann es hier auch zu keiner anderen Bewertung führen, dass den Erwerbsvorgängen hier keine Ausschreibung vorausgegangen ist, da es ökonomisch unsinnig wäre und auch nichts dafür ersichtlich ist, wenn die den Bestellungen zugrunde liegenden Angebote nicht dem – erhöhten – Marktpreisniveau entsprochen hätten.

cc) Damit bedarf es bereits eines weiteren, auf den Anschein der Entstehung des Preisschirms gestützten Anscheinsbeweises nicht, da der erste Anschein bereits vor dem Hintergrund der Entscheidung L4 unmittelbar ausreichend ist, die Kausalität, genauer die Kartellbetroffenheit des einzelnen Erwerbsvorganges, zu begründen.

Auf Grundlage des oben geschilderten Anscheins eines Preisschirmeffektes wird in der (auch obergerichtlichen) Rechtsprechung ein zweiter, darauf aufbauender Anschein dafür angenommen, dass auch die konkrete Beschaffungstätigkeit nicht frei von Kartelleinflüssen waren (so LG Mannheim in den oben zitierten Entscheidungen, sich berufend auf OLG Karlsruhe 6 U 51/12 Rn 56 ff. – Juris; ähnlich auch LG Berlin, LG Erfurt, LG Nürnberg-Fürth jeweils aaO.; ähnlich jetzt OLG Karlsruhe, Urteil vom 09. November 2016 – 6 U 204/15 Kart (2) –, Rn. 64, juris) Dabei hat bereits das OLG Karlsruhe in der erstgenannten Entscheidung keinen zweistufigen, aufeinander aufbauenden Anscheinsbeweis angenommen (so aber Galle, NZKart 2016, 214), sondern vielmehr zwei verschiedene Ansatzpunkte für die Annahme des Anscheins der Kartellbetroffenheit aufgeworfen, nämlich die kartellbedingte Preissteigerung des Gesamtmarktes einerseits und die Einpassung des Einzelgeschäfts in die sachlich, räumlichen und zeitlichen Umstände des Kartells, wobei bereits der erste Aspekt, also die Preissteigerung, genügen soll (so deutlich OLG Karlsruhe 6 U 51/12 Rn 59, 65).
Aber auch die Annahme eines aufeinander aufbauenden Anscheinsbeweises führt zu keinem anderen Ergebnis, zumal auch der Vortrag der Beklagten nicht geeignet ist, einen solchen zu erschüttern.
Insbesondere vermag der Vortrag der Beklagten zu 1), laut Feststellung des Bundesamtes nicht bundesweit, sondern regional an Absprachen beteiligt gewesen zu sein, den Anscheinsbeweis nicht zu erschüttern. Denn für die „Kartellbefangenheit“ kommt es vor dem Hintergrund des oben Ausgeführten gerade nicht auf eine konkrete Beteiligung der Beklagten zu 1) an den Absprachen gerade diese Beschaffungsvorgänge betreffend an.

Darüber hinaus ist festzuhalten, dass die Beklagte zu 1) ausweislich des Bußgeldbescheids (S. 7 Anlage K1) nach August 2008 zwar nur noch in Einzelfällen an Absprachen beteiligt gewesen sein mag; dies führt aber dazu, dass ein mit der Klage geltend gemachter konkreter Vorgang gerade einen solchen Einzelfall darstellen kann und somit kartellbefangen ist und die Beklagte jedenfalls somit auch nach August 2008 noch weiterhin an dem kartellbedingt erhöhten Preisniveau mitgewirkt und von ihm profitiert hat. Dies umso mehr, als ohnehin nur ein einziger Teilakt hier nach August 2008 liegt und zudem lediglich zwei Monate seither vergangen waren.

Ferner genügt auch nicht der Vortrag, die Beklagte zu 1) habe umfangreich interne Ermittlungen durchgeführt, welche keinerlei Hinweise auf eine Kartellbefangenheit der hier interessierenden Vorgänge erbracht habe, da selbst bei einer hohen Intensität interner Ermittlungen nicht notwendig konkrete Hinweise gefunden werden müssen und somit nicht die hier interessierenden Projekte denklogisch zwingend von Einflüssen des Kartells frei gewesen sein müsse. Hinzu kommt abermals, dass es angesichts des durch die Kartellanten geschaffenen erhöhten Marktpreisniveaus auf eine Absprache bezüglich eines einzelnen Erwerbsvorgangs eben auch nicht ankommt.

e) Damit ist gleichzeitig ein Schadensersatzanspruch dem Grunde nach zu bejahen, denn aus den obigen Ausführungen zum kartellbedingt überhöhten Preisniveau ergibt sich gleichzeitig die Annahme, dass durch das Einzelgeschäft der Klägerin jedenfalls durch die geleistete Zahlung ein Schaden, in welcher Höhe auch immer, entstanden ist, was die

Feststellung einer Schadensersatzpflicht dem Grunde nach für beide hier streitgegenständlichen Erwerbsvorgänge rechtfertigt (vgl. statt aller LG Mannheim 7 O 110/13 S. 20 sowie allgemein OLG Karlsruhe 6 U 51/12 Rn 55 und 71 f. – Juris).
f) Soweit demgegenüber die Beklagten die Zahlung bestritten haben – die unmittelbaren Vertragspartner im Wege des einfachen Bestreitens, die übrigen Beklagten im Wege des Bestreitens mit Nichtwissen nach § 138 Abs. 4 ZPO – ist dies unbeachtlich.
109
Die direkten Vertragspartner können sich insoweit nicht auf ein einfaches Bestreiten zurückziehen, zumal weder von ihnen vorgetragen noch sonst ersichtlich wäre, warum im Falle der Nichtzahlung durch die Klägerin der bestehende Anspruch über all die Jahre hinweg nicht verfolgt worden wäre. Es ist kein Grund dafür erkennbar, dass die Beklagte zu 1) von der Beitreibung der offenen Forderungen hätte absehen sollen, wenn sie diese nicht vereinnahmt haben sollte.

Auch das Bestreitet mit Nichtwissen durch die Beklagten 3) steht einer Verurteilung dem Grunde nach nicht entgegen. Zwar sind die genannte Beklagten als einfache Streitgenossen der direkten Vertragspartner grundsätzlich berechtigt, unterschiedlich zu diesem vorzutragen (vgl. z.B. OLG Dresden 7 U 1421/13 Rn 12) und gerade auch Dinge, die nicht ihrer unmittelbaren Wahrnehmung unterlagen, mit Nichtwissen zu bestreiten. Hier liegt der Fall aber insoweit anders, als dass bereits die unmittelbaren Vertragspartner – wie soeben ausgeführt - die Zahlung nicht wirksam bestritten haben, so dass es angesichts dieser Umstände mehr als eines schlichten Bestreitens mit Nichtwissen durch die Beklagte zu 3) – 7) bedurft hätte, insbesondere etwaiger Darlegung, weshalb genau die Zahlungen fraglich sein sollen (vgl. hierzu auch LG Mannheim 7 O 206/14 Kart, S. 22). Ob darüber hinaus nicht aufgrund des gemeinsamen vorsätzlichen Handelns ohnehin von Erkundigungspflichten untereinander auszugehen wäre, kann dahinstehen.
g) **Auch der von einigen Beklagten erhobene Einwand der Schadensweiterreichung („passing-on defense") geht vorliegend ins Leere.**
Die Beklagten können nicht mit dem Einwand gehört werden, die Klägerin habe den Schaden an die nächste Marktstufe, nämlich - womöglich im Wege der Fahrpreiserhöhung - an ihre Kunden weitergegeben. Der Sache nach handelt es sich bei dem Passing-on-Einwand um den Einwand der Vorteilsausgleichung, der auch in kartellrechtlichen Schadenersatzprozess ohne weiteres erhoben werden kann (BGH KZR 75/10 „ORWI", Tz. 57 ff – juris). Ihm liegt der Gedanke zugrunde, dass dem Geschädigten unter bestimmten Voraussetzungen diejenigen Vorteile zuzurechnen sind, die ihm in adäquatem Zusammenhang mit dem Schadensereignis zufließen; denn er soll nicht besser gestellt sein, als er ohne das schädigende Ereignis stünde. Voraussetzung ist aber stets, dass die Preiserhöhung, die der Geschädigte gegenüber seinen Abnehmern durchsetzen kann, in adäquatem Kausalzusammenhang mit dem kartellbedingten Preisaufschlag steht (BGH KZR 75/10 Tz. 58, 59 -juris). Im Einklang mit dem unionsrechtlichen Effektivitätsgebot liegt die Darlegungs- und Beweislast für die tatsächlichen Voraussetzungen der Vorteilsausgleichung und insbesondere der Kausalität des Vorteils beim Schädiger (BGH KZR 75/10 Tz. 64). Dieser Darlegungslast sind die Beklagten letztlich schon nicht hinreichend nachgekommen.

Doch kommt es auf die Frage, ob die Beklagten hierzu hinreichende Darlegungen getroffen haben, aufgrund der Besonderheiten des Falles schon gar nicht an. Zu berücksichtigen ist nämlich, dass der BGH in der vorstehend genannten Entscheidung (dort Tz. 47 ff.) von einem Anschlussmarkt ausgeht, also die Weiterlieferung der mit

einem Kartellaufschlag belegten Ware an eigene Abnehmer innerhalb eines durch Konkurrenz - sei es auf Anbieter- oder Nachfrageseite - geprägten Wirtschaftsraums zugrunde legt. In Bezug auf den Verkauf von Fahrscheinen ist aber kein solches Marktgeschehen auf einem Folgemarkt ersichtlich, und zwar weder auf Anbieter-, noch auf Abnehmerseite. Auf Anbieterseite steht isoliert die Klägerin, denn die U-Bahn- oder Straßenbahnlinien sind weder untereinander, noch gegen solche anderer Städte austauschbar. Dem Geschäftsgegenstand fehlt es aus Sicht der Marktgegenseite an der Substituierbarkeit. Erst recht ist ein Marktgeschehen nicht auf der Nachfrageseite ersichtlich, da es sich dort um Endverbraucher handelte, die naturgemäß nicht miteinander um Fahrtickets konkurrieren.

Mag auch aus einem fehlenden Markt nicht der Schluss gezogen werden können, dass die Klägerin dann "erst recht" in der Weitergabe des Kartellaufschlages frei war (so LG Berlin 16 O 193/11, Tz. 60 – juris), so ist doch zu berücksichtigen, dass die Preisbildung bei Fahrtickets, anders als diejenige beim Weiterverkauf von Waren, in keiner unmittelbaren Relation zum Einkaufspreis für bestimmte Infrastruktur steht, sondern eine Fülle anderer Faktoren für die Bestimmung maßgeblich sind. Nicht allein Schienen, Weichen und Schwellen erzeugen Kosten, sondern in gleicher Weise das Personal, die Bahnen selbst sowie die Energieträger, um nur einige Faktoren aufzuzählen. Die Kosten für Investitionen in Gleisoberbaumaterialien finden damit lediglich Eingang in eine Mischkalkulation, werden aber nicht eins zu eins an den Kunden weitergegeben. Der Spielraum für die Weitergabe kartellbedingter Aufschläge wird dadurch erheblich eingeschränkt. Schließlich ist auch zu berücksichtigen, dass der den Fahrgästen abverlangte Fahrpreis jedenfalls nicht ausschließlich das Ergebnis einer kaufmännischen Kalkulation bildet, sondern soziale Faktoren wie der Zugang der Bevölkerung zu bezahlbarer "Mobilität" in hohem Maß eine Rolle spielen. Dass die Fahrpreise selbst nicht kostendeckend sein können, folgt schon aus den üblichen Ermäßigungen für bestimmte Gruppen (Schwerbehinderte, Arbeitslose), die - eine Kostendeckung des Normaltarifs unterstellt - dann in jedem Fall unter dieser Grenze blieben (vgl. instruktiv LG Berlin aaO.). Damit scheidet die passing-on defense bereits unter diesem Aspekt aus; die Frage, ob sie bei Streuschäden überhaupt Anerkennung finden kann, kann daher offenbleiben (vgl. dazu Polster/Steiner ÖZK 2014, 48; Petrasincu WUW 2016, 332)

h)Ein Mitverschulden der Klägerin wegen ihres Vergabeverhaltens kann auf der Grundlage des hierzu gehaltenen Beklagtenvortrags nicht angenommen werden. Dass die Klägerin nur ein Angebot der Beklagten eingeholt haben mag, genügt hierfür nicht, zumal kartellbedingt ohnehin mit dem entsprechend „günstigsten“ Angebot zu rechnen gewesen wäre. Auch wenn die Ausschreibungen bisweilen kundenspezifisch ausgerichtet gewesen wären und dabei technische Spezifikationen eine Rolle gespielt hätten, läge dies letztlich in der Natur der Sache und begründet keine Verstoß gegen die bei Ausschreibung erforderliche Sorgfalt. Zudem wäre auf dem kartellunterworfenen Markt naturgemäß auch bei einer Ausschreibung nicht mit günstigeren Preisen zu rechnen gewesen, weshalb auch unter diesem Gesichtspunkt nicht ersichtlich ist, wie die Klägerin an der Schadensentstehung mitgewirkt hätte bzw. einen erhöhten Schaden durch ein Mitverschulden verursacht hätte.

i) Zinsen

Dem Grunde nach ergibt sich ein Zinsanspruch für den Zeitraum bis Juli 2005 zumindest aus § 849 BGB; für den Zeitraum danach aus § 33 Abs. 3 S. 4 und 5 GWB. Für das Grundurteil hier kann die Höhe der tatsächlich zuzuerkennenden Zinsen noch dahinstehen; darüber ist sodann im Einzelnen im Betragsverfahren zu erkennen.

h) Verjährung
Auch geht die durch die Beklagten erhobene Einrede der Verjährung ins Leere.
Für nach dem 31.12.2001 entstandene Ansprüche gilt die kenntnisunabhängige zehnjährige Verjährungsfrist, beginnend ab ihrer Entstehung (§ 199 Abs. 3 S. 1 Nr. 1 BGB). Anhaltspunkte für eine Kenntnis beziehungsweise grob fahrlässige Unkenntnis der Klägerin im verjährungsrelevanten Zeitraum liegen nicht vor.

Die Verjährung wurde nach § 33 Abs. 5 GWB durch die Einleitung des Bußgeldverfahrens im Mai 2011 bis mindestens 18 Januar 2014, also bis sechs Monate nach dem Datum des Bußgeldbescheides (vgl. § 33 Abs. 5 S. 2 GWB, § 204 Abs. 2 S. 1 BGB) gehemmt. Da die ältesten hier erfassten Erwerbsakte aus 2003 datieren, ist somit angesichts der Klageerhebung in 2014 eine Verjährung ganz offensichtlich nicht eingetreten.
Die Frage, ob die mit Wirkung zum 1. Juli 2005 eingeführte Bestimmung des § 33 Abs. 5 GWB auf zu diesem Stichtag noch nicht verjährter „Altfälle“ anwendbar ist, ist höchstrichterlich noch nicht geklärt. Die Ausführungen in der Entscheidung BGH KZR 75/10 (RN 13 – juris) gelten ausschließlich der intertemporär anwendbaren materiellen-rechtlich Anspruchsgrundlage, nicht der auf der Schnittstelle zum Verfahrensrecht stehenden Frage der Verjährungshemmung nach § 33 Abs. 5 GWB.
Entgegen der Auffassung der Beklagten und einer Rechtsprechungsmeinung (vgl. LG Düsseldorf, 37 O 200/09 Kart und OLG Karlsruhe, Urt. v. 9.11.2016, 6 U 204/15 Kart, NZKart 2016, 595, 598 f.) ist diese Vorschrift auch auf noch nicht verjährte „Altfälle“ anzuwenden. Der Gesetzgeber hat eine Übergangsvorschrift nicht bestimmt, weshalb der allgemeine, etwa in Art. 169 Abs. 1 EGBGB kodifiziert im Grundsatz eingreift, wonach neue gesetzliche Vorschriften betreffend die Hemmung der Verjährung auch auf unter der Geltung des alten Rechts entstandene, bei Inkrafttreten der neuen Bestimmung aber noch nicht verjährter Ansprüche Anwendung finden. Dies hat der Bundesgerichtshof verschiedentlich für eine Verkürzung der Verjährungsfrist entschieden (statt aller BGH VII ZR 265/77 m.w.N.), wird aber seit jeher auch für eine Erschwerung der Verjährung nicht anders beurteilt (vergleiche schon RG Urt. v. 01.07.1889, RGZ 24, 266, 270). Solange die Verjährung nach dem jeweils gegenwärtigen Recht nicht vollendet ist, genießt weder der Forderungsinhaber ein schutzwürdiges Vertrauen in den vollen Erhalt der bisherigen Verjährungsfrist noch darf der Schuldner sich darauf einrichten, dass die Verjährung nicht verlängert oder sonst erschwert werden kann. In Ermangelung anderweitiger Übergangsvorschriften ist daher anzunehmen, dass das neue Verjährungsrecht auf unverjährte Forderungen Anwendung findet, und zwar auch in dem Fall, dass die Verjährung verlängert oder sonst erschwert wird (vergleiche RG aaO.). Dies muss jedenfalls dann gelten, wenn – wie hier – die Entscheidung des Bundeskartellamtes erst nach dem Inkrafttreten der Norm Bestands- bzw. Rechtskraft erhielt, da dann weder eine unzulässige Gesetzesrückwirkung noch eine sonstige Enttäuschung schutzwürdigen Vertrauens desjenigen vorliegt, gegen den sich die Entscheidung richtet, was gerade auch für die Frage der Anwendbarkeit des § 33 Abs. 5 S. 1 GWB zum Tragen kommen muss (so ausdrücklich OLG Düsseldorf VI U 3/14 Rn 45 – juris). Daher führte das vom Bundeskartellamt betriebene Verfahren zu einer Verjährungshemmung im Verhältnis der Klägerin zu den Beklagten. Dafür streitet im übrigen insbesondere auch der Zweck der Norm, die privatrechtliche Durchsetzung von Schadensersatzansprüchen zu erleichtern (so mit Recht LG Mannheim 7 O 206/14 S. 24).
Hinzu kommen die durch die Beklagte zu 3) abgegebenen Verjährungsverzichtserklärungen.
III. Prozessuale Nebenentscheidungen waren im Rahmen des vorliegenden Grundurteils nicht veranlasst.

Art. 102 TFEU - Hilti – Case

88/138/EEC: Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - Eurofix-Bauco v. Hilti)

Hilti Aktiengesellschaft (Hilti AG) (3) is a large Liechtenstein-based company specializing in the manufacture and distribution of a variety of fastening systems (e.g. drilling equipment, nail guns (4) mostly for professional use in the building industry. It had, in 1986, an annual worldwide turnover of SwF 1 429 million. Among the fastening systems that Hilti produces, it is recognized as a world leader in the field of nail guns and consumables for use therein (nails, cartridges and cartridge strips (1). Hilti's worldwide turnover in these products in 1984 was SwF (. . .) (certain figures have been omitted in the published version of the Decision pursuant to Article 21 of Regulation No 17 concerning the protection of business secrets), of which SwF (. . .) was in the EEC. Hilti develops and manufactures its products not only in Liechtenstein but also at several locations in the EEC, principally the Federal Republic of Germany.

(2) In the EEC Hilti sells nail guns and consumables through wholly-owned subsidiaries in Belgium, France, Ireland, Germany, Spain and the UK. In Denmark, Italy, the Netherlands, Greece and Portugal sales take place through the medium of independent distributors.

(3) Outside the EEC Hilti distributes on a worldwide basis either through wholly-owned subsidiaries (notably in Switzerland, the USA, Canada, Australia and Japan) or through independent distributors (notably in Sweden, Norway and Finland) who are organized on a similar basis to the independent distributors inside the EEC.

Eurofix

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

Bauco

(5) Bauco of Surrey, England, is a small company specializing in the importation and distribution of nails for use in Hilti nail guns. Since 1984, when Bauco was established, it has sold its range of Hilti-compatible nails almost exclusively to plant-hire companies and other distributors. For a short while it produced cartridge strips for Hilti nail guns. It stopped such production following legal action from Hilti.

(b) The products

(6) Prior to the development of nail guns, fastenings in the construction industry were carried out by relatively slow and labour intensive methods of drilling and attaching bolts or hooks as appropriate. When in 1958 Dr Martin Hilti perfected a nail gun it quickly became popular. Nail guns work on a principle similar to

that of a gun in that the exploding cartridge propels a nail with great force and precision into its desired position. In a nail gun, however, the nail and the cartridge are totally separate. Originally nails were driven directly by the exploding cartridge and were consequently fired at very high speeds. Most nail guns, including Hilti's, are now based on the inherently safer indirect action piston system whereby the exploding cartridge propels a piston which in turn drives the nail. As a result, the nail leaves the nail gun at a much lower speed than for direct action nail guns.

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

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

(8) Different types of attachments, and the different materials into which these attachments are to be made or on to which further fastenings can be made, require specific nails. The nails are manufactured especially for use in nail guns and normal nails cannot be used. The strength of the nail and the properties of the point must be adequate to ensure both penetration and the required fastening. For technical reasons nails cannot be made of stainless steel, and therefore to prevent corrosion from damaging the efficiency of the fixing the nails must be zinc coated.

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

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

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

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

12.1. One of Hilti's latest nail guns, the DX 450, has certain novel features as compared with its earlier models (e.g. DX 100 and DX 350) which are patented. Hilti has patent protection for nail guns throughout the EEC which is due to expire between 1986 and 1996 depending on the country and patented feature involved.

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

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

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

~~(1) OJ No 13, 21. 2. 1962, p. 204/62.~~

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

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

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

(1) 'Nails' refers to all the studs, nails and other fastening devices fired or fixed by nail guns. 'Cartridges' refers to the individual brass cartridges that are either

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

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

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

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

II. THE MARKET

(c) Share of sales

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

(15) **Very precise estimates of Hilti's share of sales of cartridge strips and cartridges and nails by Member State are not available.** In the UK, where estimates are available from PASA, Hilti's share of sales for nails is between (. . .) % and (. . .) % and for cartridge strips around (. . .) %. No other company apart from Spit has over (. . .) % of the market. On the basis of the figures available, the Commission considers that the share of sales estimated for the UK (i. e. Hilti having a higher share of consumable sales than for tools) can be taken as an approximation for the situation in other Member States. Therefore it estimates that Hilti's share of sales for consumables in the EEC must be at least equal to that for its tools. Hilti makes its own nails, whereas its cartridges and cartridge strips are made for it by Dynamit Nobel and Nouvelle Cartoucherie de Survilliers - see details below. Formerly Fiocchi also supplied cartridges and

cartridge strips to Hilti but the relationship has been discontinued. Most other nail gun manufacturers make or have made specifically cartridge strips and nails for use in their own guns, whilst a minority rely on third parties to supply one or more of these consumables. Certain of these nail gun producers also produce nails and/or cartridge strips which can be used in other producers' nail guns, including Hilti's.

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

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

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

(19) As stated above the nails and cartridge strips must be made specifically to operate in certain brands or types of nail gun and cannot be used in all brands. As far as the Commission is aware only Hilti has claimed and successfully enforced any patent protection for its cartridge strips and any cartridge strips that could function effectively in Hilti nail guns would apparently breach Hilti's patent. In the UK Hilti maintains that, whilst cartridge strips reproducing the design of Hilti strips would breach its copyright, it is possible to make strips of a different design such as those produced by Fiocchi without breaching such

copyright. However, Bauco alleges that any cartridge strips which can function both safely and effectively in a Hilti nail gun must be so similar in design to the Hilti strips that they would seriously risk infringing Hilti's alleged copyright. Moreover Hilti has not recognized any strips other than those of its own design as being capable of functioning safely and effectively in its own nail guns. It is concluded that Hilti's share in the EEC of the market for Hilti-compatible cartridge strips is therefore very substantial, being greatly in excess of its share of the market for cartridge strips in general.

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

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

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

(a) the distributor is given exclusive rights to sell in the country in which he is to operate;

(b) the distributor agrees only to sell direct to end users; (c) the distributor is not allowed to manufacture, deal in or sell products which compete directly with Hilti products;

(d) Hilti will help the distributor with all necessary information and training;

(e) the distributor agrees to follow the general policy of the Hilti International Group pursuant to the Hilti International Charter, which provides for close cooperation between the parties;

(f) the distributor is free to fix his prices after consultation with Hilti, and taking into account Hilti International Group pricing policy.

(22) In certain Member States, Hilti has started to sell to non-end users such as plant-hire companies or other distributors which are playing a small but significant and increasingly important role in the distribution of nail guns and consumables. There are no formal distribution agreements with these plant-hire companies or other distributors. In the UK, Denmark and Spain in particular, non-direct dealing has now gained a significant if not yet very large proportion of Hilti's sales (1).

(23) Other nail gun manufacturers use a variety of different distribution systems. Certain manufacturers operate through wholly-owned subsidiaries and to a lesser extent exclusive dealers for certain Member States with a policy of selling direct to end-users. Others, often smaller producers, use a mixture of selling direct to end-users and selling via dealers or plant-hire companies which

are organized on an informal and non-exclusive basis. A minority operate mainly through dealers or plant-hire companies on an informal and non-exclusive basis.

(24) Because of their relatively small size, the independent nail makers, including the complainants, who currently manufacture nails for use in Hilti and other nail guns, normally sell via plant-hire companies or similar distributors/dealers. In addition Eurofix has its own salesmen who deal directly with end-users.

III. COMPLAINTS AND UNDERTAKING

(e) Complaints

25) By a formal application dated 7 October 1982, under Article 3 of Regulation No 17, Eurofix complained to the Commission **that Hilti had breached Article 86 of the EEC Treaty. It claimed that Hilti AG, acting through its EEC subsidiaries, was pursuing a commercial strategy designed to exclude Eurofix from the market for nails compatible with Hilti products.** In essence **Eurofix alleges the following: that Hilti refused to supply independent dealers or distributors of Hilti products with cartridge strips without a requisite complement of nails;** that in response, in order to sell its nails for Hilti nail guns, Eurofix tried to obtain supplies of cartridge strips itself; that Hilti induced its independent dealer in the Netherlands to cut off supplies of cartridge strips that Eurofix had previously obtained from this source; and that Eurofix was also refused supplies of cartridge strips following a direct request to Hilti. Eurofix also applied for a licence of right, the terms of which were subsequently fixed by the Comptroller of Patents. Hilti made it clear to the complainant that it considered that such a patent licence did not give any licence under copyrights which Hilti claims to hold in the UK.

(26) Bauco made a similar complaint to the Commission alleging that Hilti had breached Article 86 and requested interim measures. By a formal application dated 26 February 1985, under Article 3 of Regulation No 17, Bauco alleged the following: that its **customers could not buy Hilti cartridge strips without nails, thus making it difficult for Bauco to sell its nails;** that Hilti refused to supply cartridge strips to Bauco; that Bauco's attempts to buy via third parties cartridge strips from Hilti's independent distributor in the Netherlands were blocked; and that Hilti reduced discounts to Bauco's customers on Hilti goods because they bought Bauco nails. Furthermore, Hilti refused to grant Bauco a licence to manufacture or import cartridge strips. When Bauco did manufacture or import such strips Hilti initiated injunction proceedings for copyright and patent infringement. As a result Bauco submitted to an agreement on 4 December 1984 by which it would not sell, import or manufacture cartridge strips of a design which reproduced drawings of which Hilti owns the copyright or which infringed Hilti's patents. Bauco applied for a licence of right but fears that because of Hilti's alleged copyright a licence of right under patent law will be of little value. The terms of the licence of right have subsequently been fixed by the Comptroller of Patents.

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

(1) The proportion of customers dealt with by non-direct dealing is apparently much larger than the proportion of sales because Hilti deals normally direct

with large customers, whereas small customers are more usually served by plant-hire companies or distributors.

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

(27) Acting specifically on Bauco's request for interim measures, the Commission requested information from Hilti pursuant to Article 11 of Regulation No 17 and also carried out an investigation pursuant to Article 14 of Regulation No 17 at the premises of Hilti GB.

(28) After analysis of the information thus collected, the **Commission considered that there was a prima facie case that Hilti held a dominant position in the market for both nail guns and consumables and had abused that position inter alia by making the supply of cartridge strips conditional on the purchase of nails.** Consequently, the Commission initiated the procedure pursuant to Article 3 (1) of Regulation No 17 and sent a statement of objections to Hilti on 9 August 1985, the object of which was to lead to interim measures being taken.

(29) Rather than exercise its right of defence in the case for interim measures, Hilti without prejudice offered, and the Commission accepted, an undertaking on 27 August 1985 which was to last until the Commission had completed its investigations and made a final determination on the case (1). For the duration of this undertaking, Hilti declared that it would no longer tie the sale of cartridge strips to that of nails and would not discriminate by discounts against orders for cartridge magazines alone or take any meaures with similar effect. Subsequent to this undertaking the Commission completed its investigations, which have led to the present Decision.

IV. HILTI'S COMMERCIAL BEHAVIOUR

(g) Tying of cartridge strips and nails

(30) The Commission enquiries reveal that Hilti carried out a policy of supplying cartridge strips to certain end-users or distributors (such as plant-hire companies) only when such cartridge strips were purchased with the necessary complement of nails. In reply to a request for information pursuant to Article 11 of Regulation No 17, Hilti originally denied that any such tying took place. 'The salesmen of Hilti GB offer a full Hilti fastening system but there is no doubt that each item of the system can be obtained separately and independently from the other . . . and there is no doubt that there are independent markets for firing tools, which are sold only once to a particular end user, and for the consumable accessories, such as cartridges and fasteners (nails and studs) which have to be replaced currently' . . . 'The customers of Hilti tools are free to place their orders for nails and cartridges, wherever they want' (point 1.2 of the letter of Hilti of 23 March 1983) (2).

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

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

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

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

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

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

(h) Discrimination relating to cartridge only orders

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

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

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

34.2. Internal Hilti GB documentation made available to the Commission's inspectors shows that **such reduced discounts were used as a way of attempting to block the sale of competitors' nails.** The letter from Hilti GB to Hilti AG of 17 May 1983 discussing the case of a Eurofix customer states: 'Their discount on DX cartridges would be reduced significantly and only granted at the level where equal quantities of fasteners were purchased with cartridges'. This follows this customer's letter to Hilti GB of 9 May 1983 asking for his usual discount on a large cartridge order. Hilti GB internal instructions to all area managers of 6 February 1981 states: 'You must ensure that customers who buy nails from Profix for use in Hilti tools do not continue to receive, after an appropriate length of notice from you, site servicing of tools, training, technical advice and discount on cartridges. It must be brought home to users that such Hilti services will not be made available to purchasers of Profix nails'. A further

example is Hilti GB's letter of 23 May 1985 to one of Bauco's customers, stating Hilti's intention of reducing their discount. Internal Hilti documentation shows that Hilti realised that it would be difficult to refuse to supply long-standing or regular customers but that to reduce discounts could have the same effect. Firth Industrial Services' (a major customer of Bauco) discount was also significantly reduced, as was that of Sandell Perkins. These cases will be dealt with below.

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

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

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

(i) Hindering or preventing exports

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

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

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

in January 1985 Hilti Netherlands offered cartridges on condition that they were for export outside the EEC.

36.2. Hilti documents sent in reply to a request pursuant to Article 11 of Regulation No 17 show that Hilti Netherlands was persuaded not to supply Eurofix, and confirm the above version of the events. In its letter to the Commission of 23 March 1983 Hilti states that the first order of Eurofix in 1981 was fulfilled because it was meant for export and a discount was given because Hilti would have no training costs. In its letter of 21 January 1985 to the Commission (before the second complaint was received) Hilti sent further details concerning this aspect of the case. It appears that once Hilti GB determined the source of Eurofix's cartridges, it contacted Hilti AG which sent a circular letter to all its subsidiaries and independent distributors warning them not to supply Profix (Eurofix), which had no independent supplies of cartridges (see Hilti circular letter of 14 December 1981). An earlier Hilti circular of 24 November 1981 also warned about supplying Profix (Eurofix) with cartridges. It further warned about supplying with cartridge strips certain other named independent distributors of Hilti tools in the UK who were at the time supplied by Hilti GB and who were suspected of supplying Profix. A further letter of 17 June 1982 from Hilti AG was addressed to Hilti Netherlands giving them a model reply with which to refuse any orders from Profix (Eurofix) based on alleged safety considerations.

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

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

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

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

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

(1) EC Bull. 9/1985 (point 2.1.42).

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

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

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

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

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

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

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

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

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

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

(m) System of discriminatory discounts in UK

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

- to be in a central location,

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

- to recognize brand loyalty with a family of products.

(43) In its letter of 23 January 1986 to the Commission, Hilti described the policy and stated that it decided to apply this policy unilaterally and without consultation of plant-hire companies and on-sellers. Hilti has never stated publicly or to its customers that it operates this system or what criteria are involved for obtaining the supported status. In fact unsupported plant-hire

companies have had their discounts significantly reduced without any explanation or even information about the criteria for selection (2). Moreover, since 'brand loyalty with a family of products' is a criterion for selection, it would appear that use of independents' consumables for PAFS may lead in certain cases to unsupported status with its consequent significant reduction in discounts (3).

(n) Refusal to honour guarantees

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

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

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

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

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

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

46.3. The case of Firth deserves special mention as it shows a carefully planned strategy applied by Hilti against the business of one of Bauco's main customers. Firth, a plant-hire company, was a large customer of Hilti for many years, which because of the quantity of its purchases was obtaining high discount rates from Hilti (25 % on PAFS). Its business was growing successfully. Firth started to purchase non-Hilti nails which was noticed by Hilti because of Firth's demand for cartridges without nails. Principally as a result of its decision to take non-Hilti nails and expand its business to customers previously supplied by Hilti direct, Firth's discount was reduced to 10 % across the whole range of Hilti products. This was done unilaterally by Hilti without explanation. When, as expected by Hilti, Firth requested the normal discount and refused to pay the invoices with the low discount, its account was placed on 'stop'. At the same time Hilti identified Firth's customers, who were offered 'competitive consumables' or special package deals going far beyond Hilti's normal discounts in order to

entice them away from Firth. As a result Hilti was able to increase sales in Firth's area at Firth's expense with the effect not only of reducing Firth's sales but also of reducing Bauco's sales to Firth. This version of events is confirmed by Hilti's internal memos of 15 November 1984, 7 December 1984, 4 March 1985 and 10 May 1985. In addition Firth also gave estimates to the Commission of the business lost as a result of Hilti's policy.

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

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

(p) Other behaviour subsequent to the undertaking

(48) In the case of Firth above it has been described how, subsequent to the undertaking, Hilti tried to implement a policy of limiting the number of cartridges ordered without nails to a quantity in line with 'previous requirements'. Companies which were Bauco's or Eurofix's customers may well have had low previous purchase 'requirements' because of Hilti's policy of tying or reducing discounts. A further example of Hilti's practices, after the undertaking, was its attempt to limit Flag Hire to 2 000 cartridges a month when it had ordered 25 000. Following discussions between Hilti and the services of the Commission concerning respect of the undertaking in general this policy was reversed (see Hilti's letter to the Commission of 17 January 1986).

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

V. ECONOMIC CONSEQUENCES OF HILTI'S BEHAVIOUR

(50) **Hilti is by far the most important producer and supplier of consumables in the common market.** It has also been able to limit the market penetration of independent nail and cartridge strip producers who wish to sell consumables for Hilti nail guns, to the extent that these independent producers supply only a relatively small proportion of the consumables used in Hilti nail guns.

(51) Hilti has been able to charge very different prices on the markets of the different Member States. Even on the basis of figures provided by Hilti (which the Commission considers underestimate the differences and exclude certain Member States), the price differences between Member States where Hilti distributes itself can be as large as (. .) % for guns, (. .) % for cartridge strips and (. .) % for nails. If account is taken of the Member States where Hilti operates through independent distributors, the differences can be as great as (. .) % for guns, (. .) % for cartridge strips and (. .) % nails. In addition Hilti is able to make very large mark-ups on its different products. In Member States where Hilti distributes itself the mark-up can be as great as (. .) % for guns, (. .) % for cartridge strips and (. .) % for nails. In fact, if account is taken of the different transfer prices between Hilti AG and its subsidiaries, the mark-ups would appear even greater. These mark-ups should be seen in the light of the fact that the distribution costs for Hilti's subisidiaries are approximately (. .) % of revenue minus cost of purchase.

VI. PROOF AND JUSTIFICATION

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

B. LEGAL ASESSMENT

(a) Article 86

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

(b) Undertakings

(54) This Decision is addressed to Hilti AG (Liechtenstein) which controls directly or indirectly the actions of its subsidiaries forming part of the Hilti Group. Although some of the commercial policies described above were carried

out by Hilti subsidiaries, notably Hilti GB (against whom the original complaint was lodged), there is no doubt from the documentary evidence available that these general commercial policies, if not every individual detailed application of such policies, were carried out under the direction of or with the knowledge of Hilti AG (5). The strategy of attempting to prevent independent nail makers from supplying nails for use in Hilti guns is Hilti AG policy. Hilti AG is therefore responsible for any action of its subsidiary companies undertaken in pursuit of the group policy as well as for its own role in the matters to which objection is taken. Hilti AG and its subsidiaries must therefore be considered to be a single undertaking within the meaning of Article 86.

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

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

(3) Hilti internal memo of 20 September 1983.

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

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

(c) **The relevant market**

Commission's view

(55) Cartridge strips in particular and nails to a lesser extent for most brands of nail gun must be specifically adapted to a particular brand of nail gun in order to function properly. Consequently the user of a Hilti nail gun needs a supply of both cartridge strips and nails specifically produced for use in this gun. As a result the relevant product markets in this case are the separate markets for Hilti-compatible cartridge strips and Hilti-compatible nails. They are separate markets, because from the supply side nails and cartridge strips are produced with totally different technologies and often by different firms. On the demand side it is true that a user needs an equal complement of nails and cartridges, but they are not necessarily purchased together in identical quantities. This may be explained partly by the fact that there are many more different types of nails than cartridge strips and nails are sometimes fixed manually rather than with a nail gun. It should be noted however that, for producers who already manufacture nails and cartridge strips for one brand of nail gun the barriers to entry for the production of such products for other brands of nail gun are relatively low in the absence of any artificial or institutional barriers. In addition, nail guns also constitute a separate relevant market that must be considered in this case competes on the separate relevant markets for cartridge strips and nails in general, it competes directly on the markets for cartridge strips and nails for use in its own guns. Hilti has patent protection for its cartridge strip throughout the Community (except in Greece and Germany where the patents expired in 1986 and in the UK where the patents are subject to a licence of right). In addition, in the UK Hilti claims copyright protection for

its cartridge strips. This has prevented independent producers of cartridge strips from producing or selling such strips. In relation to nails, however, no such institutional barrier exists; in the absence of Hilti's policy of tying the sale of nails to patented cartridge strips or measures tending to the same effect, there would be no significant barriers to entry to the market for Hilti-compatible nails for other nail makers.

The relevant geographic market for nail guns and Hilti-compatible consumables is the whole EEC. In the absence of any artificial barriers these products can be transported throughout the EEC without any excessive transport costs.

Hilti's view

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

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

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

(60) On the demand side the Commission considers that for PAFS and other fixing methods to form part of the same relevant market, at least small but

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

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

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

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

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

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

61.5. buildings laws and regulations;

61.6. time constraints to finish the job or contract;

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

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

- On the one hand:

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

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

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

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

- On the other hand:

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

62.6. PAFS cannot make fixings in certain materials; 62.7. certain other fixing methods have much higher load bearing capacity than PAFS for which the load bearing capacity can never be exactly determined in an individual case (especially in concrete) without a self-destruct test;

62.8. for certain alternative fixing methods the load bearing capacity can be more readily calculated in advance;

62.9. for technical reasons, there is a certain unreliability of PAFS fixings which gives rise to a failure of a proportion of PAFS fixings. Consequently a certain minimum number of fixings are always required. In addition this factor may oblige the operator to make a larger number of fixings than with other fixing systems and/or to come and replace the failures at a later date;

62.10. for certain types of materials the failure of a PAFS to make an adequate and reliable fixing may not always be apparent without a self-destruct test;

62.11. because for technical reasons PAFS nails cannot be made of stainless steel, there may in certain circumstances be doubts about their long term durability and ability to resist rust despite a zinc coating; and

62.12. in certain Member States building regulations forbid the use of PAFS fixings for certain applications.

(63) Because of the wide range of factors which enter into the choice of the fixing method to be used, and the very different characteristics (be they economic, legal or technical) between PAFS and other fixing methods they cannot be said to be part of the same relevant market. The choice of the best fixing method to use is made on the basis of a specific fixing application on a specific site (with all the technical, legal and economic considerations that can vary between specific applications and sites). In view of the great many factors that enter into this choice and of the fact that fixing elements are normally a very small part of building costs, the indications are that the prices of the elements of different fixing methods are not the only or crucial element in the choice of which fixing method to employ for a particular job. **Therefore it is not conceivable that small changes in the price of a nail gun, nail and/or cartridge would cause an immediate and large shift to or from alternative fixing methods.**

(64) On the basis of certain assumptions about wage and consumable costs it is possible that for a limited number of specific fixings the total real cost of making the fixing by a PAFS or an alternative method is very similar, and that for some of these fixings the legal and technical factors discussed above are not critical in the choice of a fixing method. In these limited circumstances and for these fixings, operators may change to or from PAFS, from or to another method of fixing on the basis of relative shifts in price of the different fixing methods. This is not so however for the majority of fixing methods and small relative price changes, although an element will not be the crucial factor in determining the method of fixing (1).

(65) The above reasoning is supported by the material presented by Hilti to show the comparative cost of different methods of fixing used for specific jobs. In most of the cases presented a small but significant change in the price of nails and/or cartridges relative to other fixing methods (e.g. screw and anchor) would not change the order of the cheapest method of accomplishing the fixing. In many cases the cost of the consumable elements used in different fixing methods constituted only a small part of the overall cost of the job. In any case the Commission considers that the examples are not critical in that they only take account of some of the economic considerations that could enter into a full comparative cost analysis and are based on highly specific jobs and assumptions (e.g. concerning wage rates). Consequently it is dangerous to draw any general conclusions from the examples. Furthermore, these comparative cost examples cannot assess adequately for the most part all of the technical, economic and legal considerations listed above.

(1) In comparing fixings made by welded studs and PAFS Hilti's internal documentation comes to the conclusion that the choice of whether to use welded studs or PAFS is not dependent on the price of PAFS consumables. Other factors unrelated to the price of consumables determine the choice. Consequently even if Hilti 'dumped' PAFS consumables for this use it would not change the demand.

(d) Dominance

(66) It is estimated that Hilti's share of sales in the EEC for cartridge strips in general is at least around that which it has in the market for nail guns - around (. . .) %. However, in the market for Hilti-compatible cartridge strips in the EEC which is the relevant one for the purposes of this Decision its market share is substantially higher because of the failure of independent cartridge strip producers to penetrate this particular sub-market: in fact in the EEC Hilti sells virtually all the cartridges consumed in its own guns. Hilti's cartridge strips enjoy patent protection (which is only just expiring in certain Member States) and in the UK allegedly copyright protection which have made it virtually impossible for any cartridge strip producer to enter the market for Hilti-compatible cartridge strips. In the absence of any patent or alleged copyright protection, the barriers to entry for the production of plastic strips (i.e. without cartridges) are apparently relatively low. The individual brass cartridges are more difficult to manufacture but independent suppliers do exist.

(67) As for cartridge strips, it is estimated that Hilti's share of sales for nails in general is at least around that which it has in the market for nail guns - around (. . .) %. However in the market for Hilti-compatible nails in the EEC which is the

second relevant market for the purposes of this Decision its market share is somewhat higher but not as high as that which it enjoys in the market for Hilti-compatible consumables. This is because independent nail makers have had more, albeit still very limited, success than independent cartridge strip makers at penetrating the market for Hilti-compatible consumables. Nevertheless these other competitors, principally the complainants, have small market shares and to date their sales have been limited to the UK. There are some technical barriers to entry for the production of nails for nail guns but the fact that there are independent nail producers, and that other manufacturers of nail guns make their own nails, shows that such barriers are not insurmountable. There are apparently no effective patents for nails.

(68) **The two separate relevant markets for Hilti-compatible cartridge strips and nails are of particular importance because according to the estimates available to the Commission, Hilti has a market share of approximately (. . .) % in the EEC for nail guns.** This position is reflected in all Member States for which data are available. Hilti's market share for nail guns is much greater than that of its nearest competitor (Spit and Impex), and all other competitors have relatively small market shares.

(69) In addition to the strength derived from its market share and the relative weakness of its competitors, Hilti has other advantages that help reinforce and maintain its position in the nail gun market:

- its biggest selling nail gun, the DX 450, has certain novel technically advantageous features which are still protected by patents,

- Hilti has an extremely strong research and development position and is one of the leading companies worldwide not only in nail guns but also other fastening technologies,

- Hilti has a strong and well-organized distribution system - in the EEC it has subsidiaries and independent dealers integrated into its selling network who deal mostly direct with customers, and

- the market for nail guns is relatively mature, which may discourage new entrants since sales or market shares can only be obtained at the expense of existing competitors in the market for replacements.

(70) **The foregoing considerations lead to the conclusion that Hilti holds a dominant position in the EEC for nail guns, as well as the markets for Hilti-compatible nails and cartridge strips. These are the relevant markets for the purposes of this Decision.** It should be stressed that, in this particular case, the relevant markets for Hilti compatible nails and cartridge strips are important because of Hilti's large share of sales of nail guns. Because of this large share, independent manufacturers of nails and cartridge strips must manufacture nails and/-or cartridge strips which can be used in Hilti tools if they are to produce for more than a small segment of the market thus achieving the economies of scale necessary to be both competitive and profitable.

(71**) Hilti's market power and dominance stem principally from its large share of the sales of nail guns coupled with the patent protection for its cartridge strips. The economic position it enjoys is such that it enables it to prevent effective competition being maintained on the relevant**

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

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

(73) The Commission has **examined carefully an econometric study submitted by Hilti which relates to the definition of the relevant market.** This study concludes that because of significant cross-price elasticity, fixings made by nail guns and power drills compete in the same relevant market. The Commission cannot accept these conclusions. In the first place the relevant markets on which most of the abuses were committed and with which this decision is therefore principally concerned are that for Hilti-compatible cartridge strips and nails. Second, the date used in the study and the methodology used lead to conclusions which, on the particular facts of this case, do not produce findings which appear accurately to reflect the realities of the marketplace. In particular, the findings of this study do not concord with the fact that prices for nail guns and consumables do in fact vary widely between Member States. If the demand for PAFS were as price-sensitive as the study suggests, it is highly unlikely that the price differences between Member States could subsist beyond the short term. On the contrary, these price differences confirm rather the dominance of Hilti and its ability to determine the price of nail guns and consumables unaffected by the influence of any cross-price elasticity in related markets. In addition, the Commission does not consider that the reported econometric results support unambiguously the positive

conclusions drawn by this study. Finally, the methodology of the study needs further refinement before definitive results can be established.

(e) Abuse of this dominant position

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

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

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

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

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

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

their source, induced its Dutch distributor to stop the supply of cartridge strips. This action foreclosed that source of supply to customers and further had the effect of partitioning the common market.

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

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

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

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

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

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

(v) Refusal without objective reason to honour guarantees

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

nails currently available cause damage, premature wear or malfunctioning of Hilti guns in excess of that expected as a result of using Hilti nails.

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

(80) The evidence presented shows that Hilti has a policy designed to illegally limit the entry into the market of competitors producing Hilti-compatible nails. On several occasions Hilti singled out some of the main customers of these competitors and offered them especially favourable conditions in order to attract their loyalty, going in certain cases so far as to give away products free of charge. These conditions were selective and discriminatory in that other customers of Hilti buying similar or equivalent quantities dit not benefit from these special conditions. The customers of Hilti who did not receive these special offers are discriminated against and effectively bear the cost of the lower prices to other customers. These special offers were not a direct defensive reaction to competitors, but reflected Hilti's pre-established policy of attempting to limit their entry into the market for Hilti-compatible nails. Only a dominant undertaking such as Hilti could carry out such a strategy because it is able, through its market power, to maintain prices to all its other customers unaffected by its selectively discriminatory discounts.

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

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

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

(82) In the UK Hilti applies a different discount system to supported and unsupported plant-hire companies, whereby the latter do not get the normal

quantity discounts available to supported dealers. In fact these unsupported plant-hire companies often formerly enjoyed the higher rate of discount now reserved for supported plant-hire companies. This policy towards supported and unsupported dealers was applied unilaterally and without explanation by Hilti. Unsupported plant-hire companies were simply informed of a reduction in their rate of discount without any attempt to explain the criteria on which the decision was based. Whilst there may be some objective criteria involved in the selection of supported dealers that would justify higher discounts (e.g. carrying out training or higher volume of purchases), the decision by a dealer to buy competitors' consumables constitutes an impermissible element in this selection process.

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

(viii) Behaviour subsequent to the undertaking

(84) Even after its undertaking to the Commission, Hilti attempted to continue to limit customers who ordered cartridge strips without nails either to the amount of their previous orders of cartridges or to 5 000 cartridges. The figure of 5 000 was used previously in Hilti's monitoring process to try to identify customers who were using the independents' nails. This policy therefore constitutes an attempt to continue its tying practices or an application of measures having equivalent effect. Hilti's behaviour in this respect has apparently changed following discussions between Hilti and the Commission.

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

(f) Effect on trade between Member States

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

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

86.2. Hilti's abusive behaviour was bound to affect the structure of competition within the common market or a substantial part thereof. Its policies were

designed to prevent the penetration of the market by the independent nail makers. Certain policies were designed to eliminate these nail makers altogether from the market.

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

(g) Objective justification

(87) Hilti has expressed concern over certain aspects concerning the reliability, operation and safety of PAFS, which may be summarized as follows: 87.1. Operators of nail guns must be properly trained in the use of nail guns and consumables particularly as regards safety procedures if accidents to the operator are to be avoided and reliable and secure fastenings are to be made.

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

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

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

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

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

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

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

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

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

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

- Hilti rarely put into writing to its customers the alleged dangers of, and unfitness for use of, the complainants' nails. Hilti documentation shows that it was its express policy only to warn verbally and never put in writing its criticism of the complainants products. It was thus creating a situation of doubt over the complainants' products in a way that made it very difficult for them to challenge in the normal legal way the validity of these allegations. This was not the most efficient way for Hilti to warn customers against the use of what it maintains to the Commission are dangerous products.

- Hilti never wrote to or communicated with the complainants to express its concern about the realiability, fitness, safety or otherwise of their nails.

- As far as the Commission is aware Hilti never took the normal course of action of reporting the complainants to the United Kingdom Trading Standards Department for what on the basis of its own arguments would constitute false advertising or misrepresentation in the United Kingdom. The Trading Standards Department could have taken action under the Trade Descriptions Act 1968, infringements of which are a criminal offence. Alternatively Hilti could have sued privately over this advertising or mispresentation or, if it believed the complainants had breached the Code of Advertising Practice, it could have approached the Advertising Standards Authority. It did not do so even though Hilti alleges that the complainants' advertising and representation about their products is patently misrepresentative or false.

- As far as the Commission is aware Hilti never took the appropriate step of making complaints to national or Government bodies in the United Kingdom such as the Health and Safety Executive which could have acted

under the Health and Safety at Work Act 1974 or the Trading Standards Department which could have acted under the Consumer Safety Act 1978. This is so even though Hilti alleges that the complainants' products are unfit for the use for which they are intended or even potentially dangerous.

(90) The Commission considers that in view of the above the behaviour by Hilti cannot be described as being motivated solely by a concern over the safety and reliability of its PAFS and use of substandard consumables. Hilti's actions described as abusive in this Decision reflect a commercial interest in stopping the penetration of the market of non-Hilti consumbles since the main profit from PAFS originates from the sale of consumables, not from the sale of nail guns. This is without prejudice to the possibility that Hilti had a genuine concern about safety and reliability. However, Hilti did not take the actions that would be normally expected had this been its only concern. A company faced with safety worries may not resort to behaviour which is an abuse under Article 86; it should rather explore the other legitimate and normally more efficient ways of dealing with its concerns.

(91) Finally, it should be noted that on the one hand Hilti has shown a marked reluctance to engage in litigation or request action from the appropriate public authorities on the basis of its allegations concerning safety and fitness for use which would have allowed these allegations to be properly evaluated by the competent authorities. On the other hand however Hilti has started numerous court actions to protect its patent and has contested at every stage the complainants' application for a licence of right without incidently evoking the safety arguments. Hilti's failure to act through the normal channels on the safety and fitness for use issue cannot therefore be put down to an unwillingness to engage in litigation. In any case the public authorities responsible for safety and misrepresentation could have been expected to act autonomously if Hilti had presented them with adequate evidence of infringements of the appropriate laws by the complainants.

(92) Hilti purports to have decided unilaterally that the independents' nails were unsafe or unfit for use. On this basis Hilti attempts to justify the policies which are described in this decision and the general thrust of which have the object or effect of preventing the entry into the market of the independent nail producers. Hilti, a dominant company, therefore attempted to impose its own allegedly justified safety rquirements without regard to the safety and product liability requirements that already exist in the different Member States. The Commission examined carefully the different national safety requirements, standards or recommendations relating to nail guns and consumables in the EEC and certain other countries. It also examined the guidelines issued by the professional or trade associations. In the EEC with the exception of Spain none of these provisions oblige or recommend the user to use Hilti nails with Hilti nail guns. Rather they put the onus on the independent producers of nails to guarantee that their nails are of the appropriate standard, and oblige the user to check their fitness for use (1). As far as the Commission is aware there are no moves to alter significantly these arrangements. Finally, in all Member States employers are obliged in general to ensure both that their workers are properly trained and that their equipment is both safe and properly maintained.

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

(94) Furthermore, it is interesting to note that certain manufacturers of nail guns rely on independent manufacturers to supply consumables. This is particularly true in the USA where Phillips Drill (an ITT subsidiary) has given Eurofix a contract to supply nails. In the USA, independents play a bigger role in supplying consumables. There is no apparent unfavourable effect on safety or reliability as a result of this situation.

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

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

(h) Conclusions

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

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

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

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

98.3. Inducing independent distributors not to fulfil certain orders for export.

98.4. Refusing to fulfil the complete orders for cartridge strips made by established customers or dealers, who might resell them.

98.5. Frustrating or delaying legitimately-available licences of right under Hilti's patents.

98.6. Refusing without objective reason to honour guarantees.

98.7. Operating selective and discriminatory policies directed against the business both of competitors and their customers.

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

98.9. Carrying on to a limited extent certain abusive commercial policies even after its undertaking to the Commission.

C. REMEDIES

(a) Fines

(99) Under Article 15 of Regulation No 17 infringements of Article 86 **may be sanctioned by fines** of up to one million ECU or 10 % of the turnover of an undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and the duration of the infringement. In the present case the Commission takes the view that the infringement has been serious and long-lasting and that it should impose a substantial fine on Hilti.

(100) The evidence demonstrates that Hilti abused its dominant position in several important ways. These abuses were all designed to have the same effects; namely to prevent or limit the entry of competitors into the market, or to damage severely or even eliminate existing competitors. As a result Hilti was able to maintain or reinforce its dominant position. It was thus able more effectively to exploit its dominance in the different Member States and to charge high and differing prices. This was only possible because it was free from normal competition and from the general disciplines imposed by market forces.

Furthermore, those infringements were designed adversely to affect the whole structure of competition. In fact, had not the Commission issued the statement of objections that led to Hilti's undertaking, a competitor could have been irreversibly removed from the market. The Commission also considers that all the infringements were committed at the very least negligently and for some of the abuses they were committed deliberately.

(101) From the evidence available to the Commission certain of the alleged abuses started at least as far back as 1981, particularly as regards Hilti's action directed against Eurofix, and 1984 as regards Hilti's action directed against Bauco, i.e. the date Bauco started selling.

(102) These abuses lasted at least until the undertaking given by Hilti in 1985 and there is evidence that certain abuses were continued even after the undertaking, although subsequent discussions between Hilti and the Commission did cause Hilti to modify some aspects of its behaviour.

(103) On the other hand, the Commission takes into account the cooperation it has received from Hilti, in particular:

- the temporary undertaking offered by Hilti in 1985 in response to the proceedings for interim measures,

- the fact that Hilti initiated a compliance programme and submitted to the Commission a permanent undertaking dated 4 September 1987 based on its declared intention to attempt to meet the objections and concerns of the Commission (that undertaking is annexed to this Decision),

- the admission by Hilti to behaviour which the Commission considers abusive either in its reply to the statement of objections or after transmission to Hilti by the Commission of the complaints.

(b) Termination of the infringement

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

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

ADOPTED THIS DECISION:

Article 1

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

The essential features of that infringement are:

1. tying the sale of nails to the sale of cartridge strips;

2. reducing discounts and adopting other discriminatory policies when cartridge strips were bought without nails;

3. inducing independent distributors not to fulfil certain orders for export;

4. refusing to fulfil the complete orders for cartridge strips made by established customers or dealers who might resell them;

5. frustrating or delaying legitimately available licences of right under Hilti's patents;

6. refusing without objective reason to honour guarantees;

7. operating selective and discriminatory policies directed against the business both of competitors and their customers;

8. operating unilaterally and secretly a policy of differential discounts for supported and unsupported plant-hire companies or dealers in the UK.

Article 2

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

The fine shall be paid into:

(a) account No 59000204, Commission of the European Communities (for payment in ECU), Lloyds Bank plc, The Manager, Payments Section, Overseas Centre, PO Box 63, 38a Paradise Street, UK-Birmingham B1 2 AB;

(b) account No 108.63.41, Commission of the European Communities (for payment in pounds sterling), Lloyds Bank plc, Overseas Department, PO Box 19, 6 Eastcheap, UK-London EC3P 3AB, within three months from the date of notification of this Decision. After three months interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, i.e. 10,25 %. Should payment be made in pounds sterling the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

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

Article 4

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

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

Done at Brussels, 22 December 1987.

For the Commission

Peter SUTHERLAND

Member of the Commission

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

ANNEX

Cases IV/30787 and 31488

UNDERTAKINGS

1. Hilti AG, for itself and on behalf of its wholly-owned subsidiary companies in the EEC, undertakes in good faith:

(a) to implement on a permanent basis the undertakings given on 27 August 1985 in the above cases on an interim basis, namely not, within the EEC, either directly or indirectly to tie the supply of direct fastening cartridge magazines to the supply of direct fastening nails; and, as a conequence, not to aggregate purchases of cartridge strips with purchases of other products for the purposes of calculating discounts;

(b) to implement, for direct fastening products, in a manner consistent with the undertakings contained in (a) and subject only to the three exceptions listed below, a discount policy based on precise organic and transparent quantity/value discount schedules applied uniformly and without discrimination;

(The three exceptions referred to above are:

(i) meeting a competitive offer,

(ii) contracts individually negotiated with customers who customarily or given special requirements or circumstances refuse to deal with Hilti except on the basis of such a contract,

(iii) special promotions, properly so called.

As a consequence of implementing such a discount policy certain types of discount would be eschewed including fidelity discounts and loyalty rebates).

(c) not, except for objectively valid reasons, to refuse to suply direct fastening products to existing customers nor, in fulfilling any order, to limit the quantity of direct fastening products to be supplied; and to continue to report to the Commission on a quarterly basis any refusal to supply direct fastening products indicating the reason for such refusal;

(d) to waive, as against present or future licences of right under its UK cartridge strip patent, its rights under its UK copyrights in its cartridge strip and, to the

extent that they may exist in the EEC, under corresponding design rights in such strip;

(e) to provide warranty cover for its direct fastening tools not only where original Hilti consumables are used in them but also where non-Hilti consumables of matching quality are so used;

(f) to implement a competition law compliance programme specific to the Hilti Group and along the lines approved of by the Commission in the National Panasonic case and to inform the Commission of the steps taken to implement such a programme.

2. Hilti AG undertakes to use its best endeavours to encourage the independent distributors in the EEC of its direct fastening products to adopt the undertakings referred to in 1 above as part of their own policy.

3. Hilti AG undertakes to continue to implement the above undertakings in paragraphs 1 and 2 until such time as it is found not to be dominant or circumstances change so that it is no longer dominant. And, in either event undertakes to inform the Commission in writing before ceasing to implement any of the above undertakings.

For and on behalf of Hilti AG

by

Date: 4 September 1987.

HILTI (56) Thus whilst Hilti potentially

Attachment

Two aspects of animal life impressed me most during the journeys which I made in in Eastern Siberia and Northern Manchuria. One of them was the extreme severity of the struggle for existence which most species of animals have to carry on against an inclement Nature; ...And the other was, that I failed to find that bitter struggle for the means of existence, among animals belonging to the same species, which was considered by most Darwinists (as the dominant characteristic of struggle for life, and the main factor of evolution.

Consequently, when my attention was drawn, later on, to the relations between Darwinism and Sociology,…… all recognized that the struggle of every animal against all its congeners, and of every man against all other men, was "a law of Nature." This view, however, I could not accept. A lecture "On the Law of Mutual Aid," which was delivered at a Russian Congress of Naturalists, in January 1880, by the well-known zoologist, Professor Kessler, the then Dean of the St. Petersburg University, struck me as throwing a new light on the whole subject. Kessler's idea was, that besides the law of Mutual Struggle there is in Nature the law of Mutual Aid, which, for the success of the struggle for life, and especially for the progressive evolution of the species, is far more important than the law of mutual contest.

The importance of the Mutual Aid factor did not escape the naturalist's genius so manifest in Goethe. When Eckermann told once to Goethe—it was in 1827—that two little wren-fledglings, which had run away from him, were found by him next day in the nest of robin redbreasts (Rothkehlchen), which fed the little ones, together with their own youngsters, Goethe grew quite excited about this fact. He saw in it a confirmation of his pantheistic views, and said:—"If it be true that this feeding of a stranger goes through all Nature as something having the character of a general law—then many an enigma would be solved." He returned to this matter on the next day, and most earnestly entreated Eckermann to make a special study of the subject, adding that he would surely come "to quite invaluable treasuries of results" (Gespräche, edition of 1848, vol. iii. pp. 219, 221). Unfortunately, this study was never made, although it is very possible that Brehm, who has accumulated in his works such rich materials relative to mutual aid among animals, might have been inspired by Goethe's remark.

After having discussed the importance of mutual aid in various classes of animals, I was evidently bound to discuss the importance of the same factor in the evolution of Man. This was the more necessary as there are a number of evolutionists who may not refuse to admit the importance of mutual aid among animals, but who, like Herbert Spencer, will refuse to admit it for Man. For primitive Man—they maintain—war of each against all was the law of life. In how far this assertion, which has been too willingly repeated, without sufficient criticism, since the times of Hobbes, is supported by what we know about the early phases of human development, is discussed in the chapters given to the Savages and the Barbarians.

I have tried to indicate in brief the immense importance which the mutual-support instincts, inherited by mankind from its extremely long evolution, play even now in our modern society, which is supposed to rest upon the principle: "every one for himself, and the State for all," but which it never has succeeded, nor will succeed in realizing.

I should certainly be the last to underrate the part which the self-assertion of the individual has played in the evolution of mankind. In the history of mankind, individual self-assertion has often been, and continually is, something quite different from, and far larger and deeper than, the petty, unintelligent narrow-mindedness, which, with a large class of writers, goes for "individualism" and "self-assertion." I can only make in this place the following general remark:—When the Mutual Aid institutions—the tribe, the village community, the guilds, the medieval city—began, in the course of history, to lose their primitive character, to be invaded by parasitic growths, and thus to become hindrances to progress, the revolt of individuals against these institutions took always two different aspects. Part of those who rose up strove to purify the old institutions, or to work out a higher form of commonwealth, based upon the same Mutual Aid principles; they tried, for instance, to introduce the principle of "compensation," instead of the lex talionis, and later on, the pardon of offences, or a still higher ideal of equality before the human conscience, in lieu of "compensation," according to class-value. But at the very same time, another portion of the same individual rebels endeavoured to break down the protective institutions of mutual support, with no other intention but to increase their own wealth and their own powers. In this three-cornered contest, between the two classes of revolted individuals and the supporters of what existed, lies the real tragedy of history. But to delineate that contest, and honestly to study the part played in the evolution of mankind by each one of these three forces, would require at least as many years as it took me to write this book.