ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
4 April 1990 *

In Case T-30/89

Hilti Aktiengesellschaft, whose registered office is at Schaan, in the Principality of Liechtenstein, represented by Oliver Axster, Rechstanwalt, Düsseldorf, and by John Pheasant, solicitor, of Lovell, White and Durrant, Brussels, with an address for service in Luxembourg at the Chambers of Mr Loesch, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by Karen Banks, a member of its Legal Department, acting as Agent, assisted by Nicholas Forwood, QC, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 88/138/EEC of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30 787 and 31 488, Eurofix-Bauco v Hilti, Official Journal 1988, L 65, p 19)

THE COURT OF FIRST INSTANCE (Second Chamber)

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

Registrar: H Jung

makes the following

* Language of the case: English

Order

1 By application lodged at the Registry of the Court of Justice on 21 March 1988, Hilti AG brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the 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*, Official Journal 1988, L 65, p 19)

2 By applications lodged at the Registry of the Court of Justice on 2 and 12 August 1988, the undertakings Bauco (UK) Limited and Profix Distribution Limited requested leave to intervene in the case in support of the Commission's conclusions

3 On 14 September 1988, when it lodged its observations on the aforesaid applications, the applicant requested that certain passages of the statement of the detailed grounds on which the application is based and of the documents appended to that statement be treated, *vis-à-vis* the interveners, as confidential for reasons of business secrecy The applicant furthermore requested the Court of First Instance to make it clear to any intervening party that the documents made available to that party may be used solely for the purpose of the proceedings in this case

4 By order of 4 December 1989, the Court of First Instance granted the undertakings Bauco and Profix leave to intervene in the case In the same order the Court reserved its decision on the claim for confidential treatment made by the applicant on the ground that the latter had not had the opportunity to give details of its request as regards pleadings other than the application and the documents appended thereto The Court therefore suspended the transmission of the pleadings to the interveners Finally, the Court reserved its decision on the applicant's request that it make it clear to any intervener that the pleadings may not be used for any purpose other than that of the proceedings in this case

5 Following the order of 4 December 1989, the applicant specified, in a note received at the Registry of the Court of First Instance on 20 December 1989,

which passages in the documents in the case other than the application and the exhibits thereto should, in its view, be the subject of confidential treatment In the same note the applicant repeated its request that the Court should make it clear to any interveners that the documents in the case are made available to them purely for the purpose of the proceedings in this case

6 By letter of 5 February 1990 the Commission observed that certain of the passages referred to in the request for confidentiality were prima facie not covered by the grounds relied on by the applicant in support of its request

7 In those circumstances the Court decided to ask the applicant to specify precisely the grounds for its request as regards each item of information for which it claimed confidential treatment

8 By letter lodged at the Court Registry on 28 February 1990 the applicant complied with that request of the Court, stating that the documents for which it claims confidential treatment fall into three principal categories, namely:

(1) those covered by legal professional privilege;

(2) those constituting communications internal to the undertaking and reporting the content of legal advice received from external legal advisers and thus covered by the same privilege;

(3) those constituting business secrets

So far as the last-mentioned category is concerned, the applicant subdivided it on the following lines: business secrets relating to profitability, turnover, customer base, business practices, costs, prices, market share and other sensitive data of a commercial nature

9 Under Article 93(4) of the Rules of Procedure of the Court of Justice, which apply to proceedings before the Court of First Instance, if the Court of First Instance allows the intervention, the intervener is to receive a copy of every document served on the parties The Court may, however, on application by one of the parties, omit secret or confidential documents

10 The aforementioned provision of the Rules of Procedure thus lays down the principle that interveners are to receive a copy of every document served on the parties It is only by way of derogation from that principle that the second sentence of Article 93(4) enables the Court to make certain documents in the case the subject of confidential treatment and thus to exclude them from the obligation of communication to the interveners

11 For the purpose of determining the conditions under which recourse may be had to that derogation, it is necessary to ascertain, in respect of each document on the Court's file for which confidential treatment is claimed, the extent to which a reconciliation will in fact be effected between the applicant's legitimate concern to prevent substantial damage to its business interests and the interveners' equally legitimate concern to have the necessary information for the purpose of being fully in a position to assert their rights and to state their case before the Court Lastly, in considering this matter, account must also be taken of certain general principles of law and certain essential principles such as that of the protection of confidentiality of written communications between lawyer and client

12 Only one document comes within the first of the categories mentioned in paragraph 8 The applicant claims that this document is confidential inasmuch as it is covered by legal professional privilege It points out in that respect that during the administrative procedure before the Commission it waived that privilege *vis-à-vis* the Commission in respect of certain documents, including the one now in point, in order to explain the context of certain other documents on the Commission's file The applicant adds that, although it waived that privilege *vis-à-vis* the Commission, it expressly reserved confidentiality for the document in question It submits that it would be contrary to public policy for documents covered by legal professional privilege to be disclosed to the interveners, even though, *vis-à-vis* the Commission, the applicant waived that privilege, without however waiving the confidentiality of the documents concerned

13 The Court of Justice has held (judgment of 18 May 1982 in Case 155/79 *AM & S v Commission* [1982] ECR 1575) that Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p 87) must be interpreted as protecting the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's right of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment In the same judgment the Court of Justice held that that protection must, in the administrative procedure before the Commission, be recognized as covering all written communications exchanged after the initiation of the administrative procedure which may lead to a decision on the application of Articles 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking The Court of Justice further held that that protection must be extended to earlier written communications which have a relationship to the subject-matter of that procedure

14 In this case the letter in point is one sent to the applicant by an independent lawyer, after the initiation of the administrative procedure before the Commission, for the purposes and in the interests of the applicant's right of defence Since it thus falls within the criteria laid down by the Court of Justice in the judgment cited above, that letter must accordingly be regarded as confidential within the meaning of Article 93(4) of the Rules of Procedure It follows that the applicant's request must be allowed

15 The second category of documents for which confidential treatment is requested is composed of two documents, excerpts from which have been incorporated in the defence According to the applicant, those documents report on legal advice which was received by it and which itself was covered by legal professional privilege The applicant submits that a report of such advice is by its very nature confidential and should not be disclosed to the interveners

16 An examination of the aforesaid documents shows that they are, essentially, notes internal to the undertaking reporting the content of advice received from independent, and thus external, legal advisers

17 Such legal advice would be covered by the principle of the protection of confidentiality laid down by the Court of Justice if it had been received from independent legal advisers by way of written communication

18 In this case it appears that that legal advice was reported on in internal notes distributed within the undertaking so that it might be the subject of consideration by managerial staff In such a case, and although the aforesaid legal advice was not received by way of correspondance, it must be held that the principle of the protection of written communications between lawyer and client may not be frustrated on the sole ground that the content of those communications and of that legal advice was reported in documents internal to the undertaking Thus the principle of the protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications It follows that the request for confidential treatment made by the applicant must be allowed in so far as it refers to those documents

19 The third category referred to contains a large number of documents, or excerpts from documents, and of various items of information The applicant submits in this respect that in the normal course of events the disclosure of such information to a competitor would be prohibited by Article 85(1) of the EEC Treaty The applicant submits that, since business secrets are afforded, by virtue of Article 20 of Regulation No 17/62, confidential treatment in administrative proceedings before the Commission, all such items of information and documents should be afforded confidential treatment also *vis-à-vis* the interveners According to the applicant, it follows from the nature of the information and documents for which confidential treatment is claimed that the applicant has an interest in ensuring that they are not disclosed to third parties who are competitors Disclosure to the interveners would, therefore, damage that interest, albeit that the applicant is not in a position, a priori, to attribute a financial value to that damage

20 The Court has examined in minute detail each of the documents or excerpts from documents falling within the third category described in the request for confidential treatment That examination shows that a large number of those documents or excerpts from documents do qualify, by reason of their nature, as 'secret or confidential documents' within the meaning of Article 93(4) of the Rules

of Procedure The same examination, carried out in the light of the criteria set out above in paragraphs 10 and 11 of this order, discloses sufficient grounds for holding that the application of the aforementioned provision is also justified as regards the majority of the documents and excerpts from documents in question

21 The documents or excerpts from documents referred to above in paragraphs 14, 18 and 20 are, in view of their number, described in Annex I to this order, that annex forming part of the order

22 On the other hand, having regard to the same criteria, the application of the second sentence of Article 93(4) of the Rules of Procedure does not appear justified as regards the items of information in the following documents:

(*omissis*)

23 As regards the applicant's request that the Court make it clear to the interveners that the documents in the case are made available to them purely for the purpose of the proceedings in this case, it should be observed that the rules governing the procedure before the Court do not contain any provision on which such a direction could be based The request must therefore be rejected

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

(1) The request made by the applicant for confidential treatment for all the items of information mentioned in Annex I to this order is allowed;

(2) As regards the following items of information:

(omissis)

the request made by the applicant for confidential treatment is rejected;

(3) A non-confidential version of every document in the case shall be served by the Registrar on the interveners;

(4) A period shall be prescribed within which the interveners may state in writing the grounds for their submissions;

(5) The applicant's request that the Court make it clear to the interveners that the documents in the case may not be used for any purpose other than that of the proceedings in this case is rejected;

(6) Costs are reserved

Luxembourg, 4 April 1990

H Jung
Registrar

D Barrington
President

Annex I

to the order of the Court of First Instance
in Case T-30/89

(omissis)