European Court of Justice, 4 June 2009, T-Mobile v NMa

COMPETITION LAW

A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where it is capable of resulting in the prevention, restriction or distortion of competition:

- **not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices.**

An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

In examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice, the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection,

- **according to this presumption, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.**

An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

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European Court of Justice, 4 June 2009

(A. Rosas, A. Ó Caoimh, J. N. Cunha Rodrigues, J. Klučka en U. Lõhmus)

JUDGMENT OF THE COURT (Third Chamber)

4 June 2009 (*)

(Reference for a preliminary ruling – Article 81(1) EC – Concept of 'concerted practice' – Causal connection between concerted action and the market conduct of undertakings – Appraisal in accordance with the rules of national law – Whether a single meeting is sufficient or whether concerted action on a regular basis over a long period is necessary)

In Case C-8/08,

REFERENCE for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 31 December 2007, received at the Court on 9 January 2008, in the proceedings

T-Mobile Netherlands BV,
KPN Mobile NV,
Orange Nederland NV,
Vodafone Libertel NV
v
Raad van bestuur van de Nederlandse Mededingingsautoriteit,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, J. Klučka (Rapporteur) and U. Lõhmus, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure further to the hearing on 15 January 2009,

after considering the observations submitted on behalf of:

– T-Mobile Netherlands BV, by I. VerLoren van Themaat and V.H. Affourtit, advocaten,

– KPN Mobile NV, by B.J.H. Braeken and P. Glazener, advocaten,

– Vodafone Libertel BV, by G. van der Klis, advocaat,

– the Raad van bestuur van de Nederlandse Mededingingsautoriteit, by A. Prompers, acting as Agent,

– the Netherlands Government, by C. Wissels, Y. de Vries and M. de Grave, acting as Agents,

– the Commission of the European Communities, by A. Bouquet and S. Noë, acting as Agents,

after hearing **the Opinion of the Advocate General at the sitting on 19 February 2009**,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 81(1) EC.

2 The reference was made in proceedings between T-Mobile Netherlands BV ('T-Mobile'), KPN Mobile NV ('KPN'), Orange Nederland NV ('Orange') and Vodafone Libertel NV ('Vodafone') and the Raad van besturr van de Nederlandse Mededingingsautoriteit (the Netherlands competition authority) ('NMa') concerning fines which that authority imposed on those undertakings for breach of Article 81 EC and Article 6(1) of the law on competition (Mededingingswet), in the version resulting from the law amending the law on competition (Wet houdende van de Mededingingswet) of 9 December 2004 ('the Mw').

I – Legal context

Community legislation

3 The fifth recital of the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2002 L 1, p. 1) provides as follows:

'In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. ... This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a

case, provided that such rules and obligations are compatible with general principles of Community law.'

4 Article 2 of that regulation, entitled 'Burden of Proof', states as follows:

'In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. ...'

5 Article 3(1) and (2) of that regulation provides as follows:

'1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices.

...

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty ...'

National legislation

6 According to Article 1(h) of the Mw, 'concerted practice' means any concerted practice within the meaning of Article 81(1) EC.

7 Pursuant to Article 6(1) of the Mw, the following are prohibited: all agreements between undertakings, all decisions by associations of undertakings and all concerted practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition on the Netherlands market or a part thereof.

8 Under Article 88 of the Mw, the Nma has the power to apply Article 81 EC.

The dispute in the main proceedings and the questions referred for a preliminary ruling

The facts in the main proceedings

9 It is apparent from the order for reference that the representatives of operators providing mobile telecommunications services on the Netherlands market met on 13 June 2001.

10 At that time, five operators in the Netherlands had their own mobile telephone network, namely Ben Nederland ('Ben', now T‑Mobile), KPN Dutchtone NV ('Dutchtone', now Orange), Libertel‑Vodafone NV ('Libertel‑Vodafone', now Vodafone) and Telfort Mobile BV (subsequently O2 (Netherlands) BV – 'O2 (Netherlands)' – and now Telfort). In 2001, the market share held by the five operators amounted, respectively, to 10.6%, 42.1%, 9.7%, 26.1% and 11.4%. It was unforeseeable that a sixth mobile telephone network would be established because no further licences had been issued. Access to the market for mobile telecommunications services was therefore possible only through the conclusion of an agreement with one or more of those five operators.

11 Within the range of mobile telecommunications services on offer, a distinction is made between prepaid packages and postpaid subscriptions. The characteristic feature of prepaid packages is that a customer pays the cost of communications in advance. In acquiring or reloading a prepaid card, the customer purchases a credit of call minutes which can be used for calls up to the value of the credit purchased. By contrast, postpaid subscriptions are characterised by the fact that the number of minutes called in a particular period is invoiced to the customer subsequently and, in addition, the customer pays a fixed subscription charge which may also include a credit in respect of call minutes.

12 On 13 June 2001, representatives of mobile telecommunications operators offering mobile telecommunications services in the Netherlands held a meeting. At that meeting they discussed, inter alia, the reduction of standard dealer remunerations for postpaid subscriptions, which was to take effect on or about 1 September 2001. As is evident from the order for reference, confidential information came up in discussions between the participants at the meeting.

13 By decision of 30 December 2002, the NMa found that Ben, Dutchtone, KPN, O2 (Netherlands) and Libertel-Vodafone had concluded an agreement with each other or had entered into a concerted practice. Taking the view that such conduct restricted competition to an appreciable extent and was thus incompatible with the prohibition in Article 6(1) of the Mw, the NMa imposed fines on those undertakings.

14 The undertakings concerned lodged an objection against the decision of the NMa.

15 By decision of 27 September 2004, the NMa upheld in part the grounds of challenge put forward by T‑Mobile, KPN, Orange, Libertel‑Vodafone and O2 (Netherlands) and found that the practices described in the decision of 30 December 2002 constituted an infringement not only of Article 6 of the Mw but also of Article 81(1) EC. Accordingly, the NMa upheld all the fines imposed on those companies while at the same time reducing the amounts imposed.

16 T‑Mobile, Orange, Vodafone and Telfort brought an action against the decision of 27 September 2004 before the Rechtbank te Rotterdam (District Court, Rotterdam). In its judgment of 13 July 2006, that court annulled the decision in question and ordered the NMa to adopt a new decision.

17 T‑Mobile, KPN, Orange and the NMa appealed against that judgment to the College van Beroep voor het bedrijfsleven, to which it falls to determine whether the concept of concerted practice was interpreted correctly in the light of the established case‑law of the Court on that matter.

The view of the referring court

18 The College van Beroep voor het bedrijfsleven considers that it is required to determine, first, whether the purpose of the exchange of information on postpaid subscriptions at the meeting held on 13 June 2001 was to restrict competition and whether it was correct for the NMa to omit to consider the effects of the concerted practice and, second, whether there is a causal

connection between the concerted practice and the market conduct of the operators in question.

19 The referring court states, first, that the concerted practice at issue in the main proceedings relates neither to the consumer prices to be applied by the undertakings in question nor to the subscription tariffs to be invoiced by those operators to the end users. What it actually relates to is the remuneration which those operators intend to pay for the services supplied to them by dealers. The point that is therefore emphasised by the referring court is that the direct object of the concerted practice cannot be said to be the determination of prices for postpaid subscriptions on the retail market.

20 Next, the College van Berope voor het bedrijfsleven states that it is uncertain as to whether the object of the concerted practice of the operators in question, which relates to the remuneration paid to dealers for concluding postpaid subscription agreements, may be considered to be the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC. It is of the view that the competition case-law of the Court may be interpreted as meaning that the object of an agreement or concerted practice is to restrict competition if experience shows that, by virtue of that agreement or that practice, irrespective of economic circumstances, competition is always, or almost always, prevented, restricted or distorted. That is the case, according to the referring court, where the actual detrimental effects are unmistakable and will occur irrespective of the characteristic features of the relevant market. It is therefore always necessary, in its view, to examine the effects of a concerted practice in order to ensure that conduct is not regarded as pursuing the object of restricting competition when it is clear that it does not have any restrictive effects.

21 Lastly, as regards the causal link between the concerted practice and the market conduct of the operators, the referring court questions the relevance of the presumption established in Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125 and Case C-199/92 P Hüls v Commission [1999] ECR I-4287, according to which, subject to proof to the contrary, which it is for the economic operators concerned to produce, undertakings participating in concerting arrangements and remaining active on the market are presumed to take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period. The referring court is uncertain whether it is required under Community law to apply that presumption in spite of the fact that different provisions governing evidence apply under national law and whether such a presumption can be applied to situations in which the concerted practice has its roots in participation at a single meeting.

22 It is in those circumstances that the College van Beroep voor het bedrijfsleven decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. When applying Article 81(1) EC, which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market?

2. Is Article 81 EC to be interpreted as meaning that, when a national court applies that provision, the evidence of a causal connection between concerted practice and market conduct must be adduced and appraised in accordance with the rules of national law, provided that those rules are no less favourable than the rules governing similar domestic actions and they do not make the exercise of the rights granted by Community law in practice impossible or excessively difficult?

3. When applying the concept of concerted practices in Article 81 EC, is there always a presumption of a causal connection between concerted practice and market conduct even if the concerted practice is an isolated event and the undertaking which took part in the practice remains active on the market or only in those cases in which the concerted practice has taken place with a certain degree of regularity over a lengthy period?'

The questions referred for a preliminary ruling

The first question

23 As a preliminary point, the definitions of 'agreement', 'decisions by associations of undertakings' and 'concerted practice' are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, Commission v Anic Partecipazioni, paragraph 131).

24 It follows, as the Advocate General stated in essence at point 38 of her Opinion, that the criteria laid down in the Court's case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice.

25 In that regard, it should be noted that the Court has already provided a number of criteria on the basis of which it is possible to ascertain whether an agreement, decision or concerted practice is anti-competitive.

26 With regard to the definition of a concerted practice, the Court has held that such a practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85

Ahlström Osakeyhtiö and Others v Commission [1993] ECR I‑1307, paragraph 63).

27 With regard to the assessment as to whether a concerted practice is anti‑competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 25, and Case C‑209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I‑0000, paragraphs 16 and 21). Moreover, while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive, there is nothing to prevent the Commission of the European Communities or the competent Community judicature from taking it into account (see, to that effect, IAZ International Belgium and Others v Commission, paragraphs 23 to 25).

28 As regards the distinction to be drawn between concerted practices having an anti-competitive object and those with anti-competitive effects, it must be borne in mind that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions in determining whether a practice falls within the prohibition in Article 81(1) EC. It has, since the judgment in Case 56/65 LTM [1966] ECR 235, 249, been settled case-law that the alternative nature of that requirement, indicated by the conjunction 'or', means that it is necessary, first, to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued. Where, however, an analysis of the terms of the concerted practice does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has in fact been prevented or restricted or distorted to an appreciable extent (see, to that effect, Beef Industry Development Society and Barry Brothers, paragraph 15).

29 Moreover, in deciding whether a concerted practice is prohibited by Article 81(1) EC, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the common market (see, to that effect, Joined Cases **56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342**; Case C‑105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I‑8725, paragraph 125; and Beef Industry Development Society and Barry Brothers, paragraph 16). The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (Beef Industry Development Society and Barry Brothers, paragraph 17).

30 Accordingly, contrary to what the referring court claims, there is no need to consider the effects of a concerted practice where its anti‑competitive object is established.

31 With regard to the assessment as to whether a concerted practice, such as that at issue in the main proceedings, pursues an anti‑competitive object, it should be noted, first, as pointed out by the Advocate General at point 46 of her Opinion, that in order for a concerted practice to be regarded as having an anti‑competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.

32 Second, with regard to the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market (see Suiker Unie and Others v Commission, paragraph 173; Case 172/80 Züchner [1981] ECR 2021, paragraph 13; Ahlström Osakeyhtiö and Others v Commission, paragraph 63; and Case C‑7/95 P Deere v Commission [1998] ECR I‑3111, paragraph 86).

33 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, Suiker Unie and Others v Commission, paragraph 174; Züchner, paragraph 14; and Deere v Commission, paragraph 87).

34 At paragraphs 88 et seq. of Deere v Commission, the Court therefore held that on a highly concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

35 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see Deere v Commission, paragraph 90, and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81).

36 Third, as to whether a concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.

37 On the contrary, it is apparent from Article 81(1)(a) EC that concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions'. In the present case, as the Netherlands Government submitted in its written observations, as far as concerns postpaid subscriptions, the remuneration paid to dealers is evidently a decisive factor in fixing the price to be paid by the end user.

38 In any event, as the Advocate General pointed out at point 58 of her Opinion, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.

39 Therefore, contrary to what the referring court would appear to believe, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.

40 Fourth, as regards Vodafone's argument that the object of the concerted practice at issue in the main proceedings cannot be to restrict competition because standard dealer remunerations should, in any event, have been reduced as a result of market conditions, it is, admittedly, clear from paragraph 33 above that the requirement that economic operators should be free to act independently does not deprive them of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.

41 However, as the Advocate General observed at points 66 to 68 of her Opinion, while not all parallel conduct of competitors on the market can be traced to the fact that they have adopted a concerted action with an anti-competitive object, an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object, and that extends to situations, such as that in the present case, in which the modification relates to the reduction in the standard commission paid to dealers.

42 It is for the referring court to determine whether, in the dispute in the main proceedings, the information exchanged at the meeting held on 13 June 2001 was capable of removing such uncertainties.

43 In the light of all the foregoing considerations, the answer to the first question must be that a concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

The second question

44 By its second question, the referring court asks essentially whether, in examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is a concerted practice within the meaning of Article 81(1) EC – the national court is required to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on the market, such undertakings are presumed to take account of the information exchanged with their competitors, or whether that court can apply the rules of national law pertaining to the burden of proof.

45 As the Advocate General pointed out at point 76 of her Opinion, that question seeks to clarify whether national authorities and courts are also obliged to base their application of Article 81(1) EC on the presumption which operates at Community level.

46 According to the referring court, if that presumption is intrinsic to the concept of concerted practice in Article 81(1) EC, the national court is obliged to apply it. It maintains, on the other hand, that if that presumption must be regarded as a procedural rule, it would be permissible for the national court not to apply it, in accordance with the principle of procedural autonomy of the Member States.

47 Vodafone, T-Mobile and KPN observe that there is nothing in Article 81 EC or in the Court's case-law to support the conclusion that the presumption of a causal connection forms an intrinsic part of the concept of concerted practice in Article 81(1) EC. They therefore take the view that, in accordance with established case-law, in the absence of relevant Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are no less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not

render in practice impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

48 On the other hand, the Netherlands Government and the Commission are of the view that the presumption of a causal connection was intended to form a constituent element of the concept of concerted practice within the meaning of Article 81(1) EC and not a procedural rule that is independent of that concept, so that the national courts and tribunals are obliged to apply it.

49 It should be borne in mind at the outset that Article 81 EC, first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically applied by national courts (see, to that effect, Case C‑126/97 Eco Swiss [1999] ECR I‑3055, paragraphs 36 and 39, and Joined Cases C‑295/04 to C‑298/04 Manfredi and Others [2006] ECR I‑6619, paragraphs 31 and 39).

50 In applying Article 81 EC, any interpretation that is provided by the Court is therefore binding on all the national courts and tribunals of the Member States.

51 As regards the presumption of a causal connection formulated by the Court in connection with the interpretation of Article 81(1) EC, it should be pointed out, first, that the Court has held that the concept of a concerted practice, as it derives from the actual terms of that provision, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. However, the Court went on to consider that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period. Lastly, the Court concluded that such a concerted practice is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market (see Hüls, paragraphs 161 to 163).

52 In those circumstances, it must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law.

53 In the light of the foregoing considerations, the answer to the second question must be that, in examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case‑law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

The third question

54 By its third question, the referring court asks essentially whether, when applying the concept of concerted practices in Article 81(1) EC, there is in all cases a presumption of a causal connection between the concerted practice and the market conduct of the undertakings concerned, even if the concerted action is the result of a single meeting.

55 Vodafone, T‑Mobile and KPN essentially take the view that it cannot be inferred from Commission v Anic Partecipazioni or Hüls that the presumption of a causal connection is applicable in all cases. In their view, that presumption should be applied only in cases in which the facts and circumstances are the same as those in those cases. In essence, they submit that it is only where the undertakings concerned meet on a regular basis, in the knowledge that confidential information has been exchanged in the course of previous meetings, that those undertakings can be presumed to have been guided in their market conduct on the basis of the concerted action. Moreover, they consider that it is irrational to take the view that an undertaking should base its market conduct on information exchanged in the course of just one meeting, in particular where, as in the case in the main proceedings, the meeting has a legitimate purpose.

56 On the other hand, the Netherlands Government and the Commission submit that it is evident from the case‑law, in particular Commission v Anic Partecipazioni and Hüls, that the presumption of a causal connection is not dependent on the number of meetings which gave rise to the concerted action. They observe that such a presumption is justified if the contact which took place, regard being had to its context, content and the frequency with which it occurred, is sufficient to result in coordination of conduct on the market that is capable of preventing, restricting or distorting competition within the meaning of Article 81(1) EC and if, moreover, the undertakings concerned remain active on the market.

57 According to the Netherlands Government, the action in the main proceedings is a perfect illustration of the fact that a single meeting is sufficient for concerted action to be established. First, the meeting held on 13 June 2001 enabled the operators concerned to collude in the reduction of dealer remunerations. Second, it was possible as a result of that meeting to remove the uncertainties as to which operator would reduce its expenditure on recruitment, when and to what extent it would do so, and as to the time‑frame within which the other participating operators would do likewise.

58 It is evident from paragraph 162 of Hüls and paragraph 121 of Commission v Anic Partecipazioni that the Court found that that presumption applied only

where there was concerted action and where the undertaking concerned remained active on the market. The addition of the words 'particularly when they concert together on a regular basis over a long period', far from supporting the argument that there is a presumption of a causal connection only if the undertakings meet regularly, must necessarily be interpreted as meaning that that presumption is more compelling where undertakings have concerted their actions on a regular basis over a long period.

59 Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the Treaty. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.

60 As the Netherlands Government correctly pointed out, together with the Advocate General at points 104 and 105 of her Opinion, the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

61 In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.

62 In the light of the foregoing, the answer to the third question must be that, in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

2. In examining whether there is a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice – a connection which must exist if it is to be established that there is concerted practice within the meaning of Article 81(1) EC – the national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such undertakings are presumed to take account of the information exchanged with their competitors.

3. In so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.

[Signatures]

Language of the case: Dutch.

OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 19 February 2009 1(1)

Case C-8/08

T-Mobile Netherlands BV and Others

(Reference for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Netherlands))

(Competition – Article 81(1) EC – Concerted practices – Practice having the object of prevention, restriction or distortion of competition – Criteria for assessing the object of a practice – Only an isolated concerted action

– Causal link between concertation and market conduct of the participating undertakings – Burden of proof – Presumption of a causal link)

I – Introduction

1. The present reference for a preliminary ruling presents the Court with the opportunity to clarify the requirements which must be satisfied to establish a concerted practice with an anti-competitive object for the purposes of Article 81(1) EC.

2. In substance, the Court is called upon to clarify whether and to what extent assessment of the specific market circumstances, the market conduct of the undertakings concerned and the effects of that conduct on competition is required for presumption of an anti-competitive object. In addition, the Community law requirements must be verified governing the standard of proof necessary to establish an infringement of Article 81 EC in proceedings before a national court.

3. The significance of these questions for the effective enforcement of Community competition law under the new, decentralised system introduced as a result of the modernisation of the law on antitrust procedure by Regulation (EC) No 1/2003 (2) cannot be underestimated. In resolving those questions, regard should be had to the risks for the internal market (3) – and for the European consumer, too – resulting from any relaxation of the rules on competition laid down in the EC Treaty.

II – Legal framework

A – Community law

4. The Community law framework for the present case is determined by Article 81(1) EC which is worded as follows:

'The following shall be prohibited as incompatible with the common 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 common 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.'

5. In addition, reference should be made to Regulation No 1/2003 which in Article 2 contains, in particular, the following rule on the burden of proof:

'In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. ...'

6. Moreover, the final sentence of recital 5 in the preamble to Regulation No 1/2003 is worth mentioning:

'This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.'

7. Article 3 of Regulation No 1/2003 governs the relationship between Article 81 EC and national competition law as follows:

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices.

...

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty ...

...'

B – National law

8. As regards Netherlands law, the legal framework for the present case is determined by the Law on competition (Mededingingswet; (4) or 'Mw') as amended by the Law of 9 December 2004, (5) with that amended version entering into force on 1 July 2005.

9. Article 1 of the Mw contains, inter alia, the following definition:

'In this law and the provisions based on it:

...

(h) "Concerted practice" means a concerted practice within the meaning of Article 81(1) of the [EC] Treaty;

...'

10. Article 6(1) of the Mw establishes the following:

'The following shall be prohibited: agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition on the Netherlands market or a part thereof.'

11. In accordance with Article 56(1)(a) of the Mw, in the event of an infringement of Article 6(1) of the Mw, the Council (6) of the Netherlands competition authority, 'the NMa', (7) may impose a fine on the natural or legal person to whom the infringement may be attributed.

III – Facts and main proceedings

The Netherlands market for mobile telecommunication services

12. At the material time for the purposes of the main proceedings, in 2001, five operators in the Netherlands

had their own mobile telephone network: Ben Nederland BV (8) (market share: 10.6%), KPN (42.1%), Dutchtone NV (9) (9.7%), Libertel-Vodafone NV (26.1%) and Telfort Mobiel BV (10) (11.4%). There was no possibility of establishing a sixth mobile telephone network because no further licences were issued. Access to the market for mobile telecommunication services was possible only through the conclusion of an agreement with one or more of the five existing operators.

Prepaid packages and postpaid subscriptions in the Netherlands

13. Within the range of mobile telecommunication services on offer, a distinction is made in the Netherlands between prepaid packages and postpaid subscriptions. The characteristic feature of prepaid packages is that a customer pays in advance; in acquiring or reloading a prepaid card, he purchases a credit of call minutes which can be used for calls up to the value of the credit purchased. In contrast, postpaid subscriptions are characterised by the fact that the number of minutes called in a particular period is invoiced to the customer subsequently; generally there is, in addition, a fixed subscription price which may also include a credit in respect of call minutes.

14. When concluding or extending a postpaid subscription via a dealer, it is the dealer who supplies the mobile telephone and the operator who supplies the SIM card. (11) In addition, the operator pays the dealer remuneration for each mobile telephone subscription concluded. The standard dealer remuneration may be increased by supplementary remuneration, depending on the dealer and the subscription sold.

The meeting of 13 June 2001

15. On 13 June 2001 representatives of mobile telecommunication operators offering mobile telecommunication services on the Netherlands market held a meeting. At that meeting they discussed, inter alia, the reduction of standard dealer remunerations for postpaid subscriptions on or about 1 September 2001. As is evident from the reference for a preliminary ruling, confidential information came up in discussions between participants at the meeting. (12)

The main proceedings

16. By decision of 30 December 2002 ('the initial decision') the NMa found that Ben, Dutchtone, KPN, O2 (Telfort) and Vodafone (formerly Libertel-Vodafone) had concluded an agreement with each other or had entered into a concerted practice relating to mobile telephone subscriptions. The NMa found that the conduct in question restricted competition to an appreciable extent and was thus incompatible with the prohibition in Article 6(1) of the Mw. Consequently, it imposed fines on the undertakings concerned.

17. The five undertakings concerned lodged an objection against the initial decision.

18. By appeal decision of 27 September 2004 the NMa upheld the objections of T-Mobile (formerly Ben), KPN, Orange (formerly Dutchtone), Vodafone and O2 (Telfort) in part and declared them unfounded in part. Whilst it withdrew the allegation of an anti-competitive agreement, it maintained the allegation of an anti-competitive concerted practice and found that in addition to an infringement of Article 6(1) of the Mw the conduct concerned constituted an infringement of Article 81(1) EC. (13) The NMa reduced the respective fines.

19. T-Mobile, KPN, Orange, Vodafone and Telfort brought an action against the appeal decision before the Rechtbank te Rotterdam (District Court, Rotterdam).

20. In its judgment of 13 July 2006, the Rechtbank te Rotterdam annulled the appeal decision and ordered the NMa to adopt a new decision. (14)

21. Three of the undertakings concerned – T-Mobile, KPN and Orange – and the NMa appealed against that judgment to the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry, Netherlands), the referring court. (15) In addition, Vodafone remains a party to the main proceedings, whereas according to the referring court that is no longer true of Orange.

IV – Reference for a preliminary ruling and procedure before the Court

22. By decision of 31 December 2007, lodged at the Court on 9 January 2008, the College van Beroep voor het bedrijfsleven stayed proceedings and referred to the Court the following three questions for a preliminary ruling:

'(1) When applying Article 81(1) EC, which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market?

(2) Is Article 81 EC to be interpreted as meaning that, when a national court applies that provision, the evidence of a causal link between concerted practice and market conduct must be adduced and appraised in accordance with the rules of national law, provided that those rules are not less favourable than the rules governing similar domestic actions and they do not make the exercise of the rights granted by Community law in practice impossible or excessively difficult?

(3) When applying the concept of concerted practices in Article 81 EC, is there always a presumption of a causal link between concerted practice and market conduct even if the concerted practice is an isolated event and the undertaking which took part in the practice remains active on the market or only in those cases in which the concerted practice has taken place with a certain degree of regularity over a lengthy period?'

23. Before the Court T-Mobile, KPN, Vodafone, the Netherlands Government and the Commission of the European Communities submitted written and oral observations. The NMa endorsed the written observations of the Netherlands Government.

V – Appraisal

A – Admissibility of the reference for a preliminary ruling

24. As regards the admissibility of the reference for a preliminary ruling, two points are worth mentioning briefly.

25. First, the referring court queries the interpretation of Article 81(1) EC although the contested decision of the NMa at issue in the main proceedings is based primarily on national competition law (Article 6(1) of the Mw).
26. However, it is uncontested that the substance of Article 6(1) of the Mw is based entirely on the corresponding Community law provision of Article 81(1) EC. According to established case-law, in such a case it is clearly in the Community interest that provisions or concepts taken from Community law should be interpreted uniformly. (16)
27. In addition, Article 3(1) of Regulation No 1/2003 obliges the NMa to apply Article 81 EC to concerted practices which may affect trade between Member States, in addition to the domestic law provisions of Article 6 of the Mw. Accordingly, the appeal decision of the NMa relies for a legal basis not only on Article 6(1) of the Mw but also on Article 81(1) EC. Therefore, in the present case Article 81(1) EC not only functions indirectly as a reference point for the interpretation of Article 6(1) of the Mw but also applies directly to the main proceedings.
28. In those circumstances, there can be no uncertainty as to the relevance of the questions referred on the interpretation of Article 81 EC and on the relationship between Community law and national competition law.
29. Second, Vodafone argues that an answer to the first question is unnecessary as the legal position has already been clarified by the interpretation guidelines published by the Commission. (17) On that point, it must be observed, first, that communications from the Commission are not legally binding and, therefore, are incapable of anticipating interpretation by the Court in the course of proceedings under Article 234 EC. Second, even if the legal position is clear, a reference for a preliminary ruling is admissible; there is at most the possibility that the Court might give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure of the Court of Justice.
30. Finally, Vodafone alleges that the concerted practice at issue in the present proceedings self-evidently did not have an anti-competitive object. Given the bitter dispute which the parties have pursued on that point both in the main proceedings and before the Court, I consider that contention to be mistaken.
31. Therefore, the reference for a preliminary ruling is admissible in its entirety.

B – Substantive appraisal of the questions referred

32. The three questions referred by the national court together seek to clarify the requirements which must be satisfied to establish an anti-competitive concerted practice for the purposes of Article 81(1) EC.
33. In that respect, less importance attaches to the definition of a ‘concerted practice’ as such. According to established case-law, it constitutes a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. (18)
34. Instead, the present case focuses on the determination of the anti-competitive character of concerted practices and the related distinction between concerted practices which are considered anti-competitive only by reason of their effects and those which must already be regarded as anti-competitive by reason of their object. Especially in relation to that latter category, the national court is uncertain whether and to what extent assessment of the specific market circumstances, the market conduct of the undertakings concerned and the effects of that conduct on competition is required in order to presume an anti-competitive object.

1. The first question: criteria for the finding of a concerted practice whose object is the restriction of competition

35. By its first question the referring court seeks in substance to clarify the criteria which must be used in assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market.
36. As is known, the NMa raises the allegation against a series of Netherlands operators of mobile telecommunication services that in the context of a meeting in June 2001 they exchanged confidential information and held discussions on it which in turn resulted in coordination of their market conduct in relation to reductions in certain commission payments to their respective dealers.
37. Not every exchange of information between competitors necessarily has as its object the prevention, restriction or distortion of competition within the common market within the meaning of Article 81(1) EC. (19)
38. Instead, the question of an anti-competitive object must be assessed having regard to the circumstances of the individual case. In making that assessment the same criteria are decisive as those applicable in relation to agreements between undertakings and decisions by associations of undertakings governed by Article 81(1) EC. (20) Therefore, the case-law on agreements and decisions applies also to concerted practices by undertakings.
39. According to that case-law, the criteria from which to develop a presumption of an anti-competitive object are the content (21) and objectives (22) of the concerted practice, subject to the proviso that the subjective intentions of the parties are at best indicative but not decisive in the matter. (23) Account must be taken also of the economic and legal context in which the concerted practice arises. (24)
40. In the present case, it is above all the content and economic context of the concerted practice between the Netherlands mobile telecommunication operators which are disputed. In simple terms, both the referring court and T-Mobile, KPN and Vodafone express uncertainty as to whether, for the purposes of Article 81(1) EC, an anti-competitive object may be presumed,

having regard to the subject-matter of the concerted practice and its economic context.

41. In the light of that uncertainty, the following section will examine in detail the criteria which must be used in determining whether or not a concerted practice such as that at issue in the main proceedings has an anti-competitive object.

a) General observations concerning the concept of an anti-competitive object

42. First, it must be recalled that an anti-competitive object and anti-competitive effects constitute not cumulative but alternative conditions under which the prohibition established in Article 81(1) EC is triggered. (25) Putting it another way, regardless of their effects, concerted practices are prohibited if they pursue an anti-competitive purpose. (26) No account need be taken of the actual effects of a concerted practice, if the object of that practice is to prevent, restrict or distort competition within the common market. (27) Such a practice is prohibited even in the absence of anti-competitive effects on the market. (28)

43. The prohibition of a practice simply by reason of its anti-competitive object is justified by the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition. (29) The per se prohibition of such practices recognised as having harmful consequences for society creates legal certainty and allows all market participants to adapt their conduct accordingly. Moreover, it sensibly conserves resources of competition authorities and the justice system.

44. Certainly, the concept of a restricted practice having an anti-competitive object may not be subject to unduly broad interpretation, (30) given the serious consequences which may befall an undertaking in the case of an infringement of Article 81(1) EC. (31) However, nor may that concept be subject to unduly strict interpretation, if the primary law prohibition on 'infringement by object' is not to be erased through interpretation and, as a consequence, Article 81(1) EC deprived of an element of its practical effectiveness. From the wording itself of Article 81(1) EC, it follows that both concerted practices having an anti-competitive object and those with anti-competitive effects are prohibited. (32)

45. Consequently, contrary to the view which the referring court appears to take, the prohibition on 'infringement by object' may not be interpreted as meaning that an anti-competitive object gives rise merely to some kind of presumption of unlawfulness which may be rebutted, however, if in the specific case no negative consequences for the operation of the market can be demonstrated. (33) Such an interpretation would be tantamount to an improper mingling of both independent alternatives provided for by Article 81(1) EC: the prohibition on collusion having an anti-competitive object and the prohibition on collusion having anti-competitive effects.

46. Thus, it goes too far to make the finding of an anti-competitive object dependent on an actual determination of the presence or absence of an anti-competitive impact in an individual case, irrespective of whether that impact relates to competitors, consumers or the general public. Instead, for the prohibition of Article 81(1) EC to be triggered it is sufficient that a concerted practice has the potential – on the basis of existing experience – to produce a negative impact on competition. (34) In other words, the concerted practice must simply be capable in an individual case, that is, having regard to the specific legal and economic context, (35) of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can at most be of relevance for determining the amount of any fine and in relation to claims for damages.

47. Ultimately, therefore, the prohibition on 'infringements of competition by object' resulting from Article 81(1) EC is comparable to the risk offences (Gefährdungsdelikte) known in criminal law: in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.

48. The judgment of the Court of First Instance in GlaxoSmithKline Services v Commission, (36) on which KPN relies, does not lead to a different conclusion. Admittedly, in the extremely ambiguously formulated paragraph 147, that judgment indicates that the restrictive character of an agreement cannot be inferred merely from a reading of its terms in context, but consideration of its effects is 'necessary'. In my view, that statement implies simply that the object of an agreement (or a practice) must be established not in the abstract but in the circumstances of the individual case, that is, having regard to its specific legal and economic context and the particular conditions of the relevant market; in the case of GlaxoSmithKline Services – according to the Court of First Instance – those resulted from the fact that prices were to a large extent shielded from the free play of supply and demand owing to public regulation and were set or controlled by the public authorities. Interpreted on that basis, there is no discrepancy between paragraph 147 of GlaxoSmithKline Services v Commission and the view I advanced in point 46 of this Opinion. However, if paragraph 147 of GlaxoSmithKline Services v Commission implied that, for the presumption of an anti-competitive object, determination of an actual impact on competition is required in every case (that is, is 'necessary'), the Court of First Instance would have erred in law.

49. The correct position, as I set out above, is that a finding of an anti-competitive object does not depend

on an assessment of the actual impact of a concerted practice but simply the capacity in an individual case for that concerted practice to produce an anti-competitive impact.

b) Objects restrictive of competition in cases such as the present

50. According to the NMa, the concerted practice at issue in the present case arises from the fact that several Netherlands operators of mobile telecommunication services exchanged information concerning their planned reductions in certain commissions payable to their respective dealers.

51. Such exchange of confidential commercial information between competitors concerning their intended market behaviour is capable, in principle, of generating an anti-competitive impact because it reduces or removes the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted. (37) In that connection, it is irrelevant whether such an exchange of information constituted the main purpose of the contact or simply took place in the framework (or under the auspices) of a contact which in itself had no unlawful object. (38)

– Exchange of information between competitors in the light of the requirement of independence for the purposes of competition

52. Regard must be had to the fact that independence of economic participants constitutes one of the basic requirements for competition to function. Accordingly, the provisions of the Treaty relating to competition are based on the concept that each economic operator must determine independently the policy which he intends to adopt on the common market. That requirement of independence precludes any direct or indirect contact between economic operators by which an undertaking influences the conduct on the market of its competitors or discloses to them its decisions or deliberations concerning its own conduct on the market, if as a result conditions of competition may apply which do not correspond to the normal conditions of the market in question. (39)

53. That applies a fortiori when the exchange of information concerns a highly concentrated oligopolistic market. (40) Precisely that structure appeared to characterise the Netherlands market for mobile telecommunication services in 2001: as is evident from the reference for a preliminary ruling, at that time only five undertakings in that country had their own mobile telephone networks, with one of them, KPN, even attaining a market share in excess of 40% whilst development of further independent networks was precluded in the absence of available licences. (41)

54. It is irrelevant in that connection whether only one undertaking unilaterally informs its competitors of its intended market behaviour or whether all participating undertakings inform each other of their respective deliberations and intentions. Simply when one undertaking alone breaks cover and reveals to its competitors confidential information concerning its future commercial policy, that reduces for all participants uncertainty as to the future operation of the market and introduces the risk of a diminution in competition and of collusive behaviour between them.

– No direct link to retail prices necessary

55. The national court, KPN and Vodafone argue that in the present case the exchange of information and concerted practice concern only dealer commissions and do not directly influence retail prices. They contend that retail prices are determined solely in the context of the relationship between an operator of mobile telecommunication services and its customers without any influence from dealers.

56. That argument is unconvincing. Even in the absence of a direct influence on consumers and the prices payable by them, a concerted practice may have an anti-competitive object.

57. From its wording alone, Article 81(1) EC is directed in general terms against the prevention, restriction or distortion of competition within the common market. Nor do the various examples listed in subparagraphs (a) to (e) of Article 81(1) EC contain any restriction in terms such that only anti-competitive business practices having a direct impact on final consumers are prohibited.

58. Instead, Article 81 EC forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structureof the market and thus competition as such (as an institution). In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared. (42)

59. Thus, a concerted practice has an anti-competitive object not only where it is capable of having a direct impact on consumers and the prices payable by them, or – as T-Mobile puts it – on ‘consumer welfare’. Instead, an anti-competitive object must already be assumed if the concerted practice is capable of preventing, restricting or distorting competition within the common market. That provides an indication that a concerted practice – indirectly, at least – may also have a negative impact on consumers.

60. To narrow the prohibition of Article 81(1) EC simply to behaviour having a direct influence on consumer prices would deprive that provision, which is fundamental for the internal market, of much of its practical effect.

– Even an exchange of information concerning individual parameters of competition suffices

61. Moreover, contrary to the view hinted at by the national court, nor is it necessary for a concerted practice to cover every parameter of competition. Such a practice may have an anti-competitive object even where it concerns only individual parameters of competition, such as the standard dealer remunerations at issue in the present case.

62. If an undertaking acts unilaterally to reduce the commission paid to its dealers, that usually results in a reduced incentive for those dealers to broker a subscription agreement between that undertaking and retail consumers. Potentially, that may be a factor which puts at risk the market share of the undertaking concerned, especially as henceforth it may be more attractive for independent dealers (43) to broker to retail consumers the products of other undertakings. (44) Undertakings avoid or at least attenuate that commercial risk – which exists, at any rate, under normal conditions of competition – where they act not unilaterally but, as in this case, in the framework of a concerted practice more or less simultaneously in reducing their commissions, because by that conduct they reduce the uncertainty concerning the market behaviour of their competitors. That may result in the prevention or, at least, in a restriction or distortion of competition within the common market. Consequently such concerted practice is tainted with an anti-competitive object.

63. Additionally, in the present case, from the perspective of mobile telecommunication operators dealer commissions constitute the acquisition price for services supplied to them by dealers brokering postpaid subscriptions. As the Commission rightly stressed, it also follows from Article 81(1)(a) EC, which provides for a standard case of anti-competitive behaviour, that a concerted practice in relation to acquisition prices ('purchase prices') pursues an anti-competitive object prohibited by Community law.

– Influence of market conditions on the behaviour of competitors

64. Vodafone alleges, further, that on account of market conditions prevailing at the time standard dealer commissions had in any event to be reduced. In its view, an anti-competitive object cannot be attributed to parallel conduct of undertakings, if that behaviour can be explained by the structure and economic conditions on the market.

65. That argument does not persuade me either, not even if Vodafone is correct in its assessment of the market conditions then prevailing.

66. Admittedly, not all parallel conduct of competitors on the market can be traced to the fact that competitors have adopted a concerted action with an anti-competitive object. (45) The general market situation may also result in all undertakings operating on a market making similar modifications to their market conduct. (46)

67. None the less, in relation to the exact timing, extent and details of the modifications adopted by each undertaking considerable uncertainties may remain. An exchange of information which is capable of removing those very uncertainties between participants pursues an anti-competitive object. According to the information available, precisely such an exchange of information was effected in the present case, a feature which fundamentally distinguishes it from Woodpulp II to which Vodafone refers. (47)

68. The subject-matter of the exchange of information in the framework of the June 2001 meeting was, in fact, less the issue that modification would be made to certain commission schemes – that fact appears, at least in the case of one of the competitors, already to have emerged – but, instead, the question of how the modifications were to proceed, that is, on which date, to what extent and subject to which arrangements the intended reduction of standard dealer remunerations was to be implemented by each undertaking.

69. There is no basis on which to presume that the economic context prevailing in 2001 implied the complete exclusion of all possibility for effective competition in relation to the timing, extent and details of a potential reduction in standard dealer remunerations. (48)

70. Article 81 EC does not preclude economic operators from shaping their conduct according to the reality of the relevant market and in so doing from reacting intelligently to changes in the economic and legal framework and to any changes in the market conduct of other undertakings. (49) However, Article 81 EC prohibits the implementation of such modifications under elimination of the rules of free competition, for example, where competitors concert their future market conduct and in so doing avoid to some extent the pressure of competition and related market risks.

71. If Article 81 EC did not apply to such practices, ultimately that would shield competitors from competition and accord priority to the interests of the undertakings concerned at the expense of the public interest in undistorted competition (Article 3(1)(g) EC). However, the objective of European competition law must be to protect competition and not competitors, because indirectly that is of benefit also to consumers and the public at large.

c) Interim conclusion

72. Thus, by way of interim conclusion, it may be observed:

A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. In that regard, neither the realisation of such prevention, restriction or distortion of competition nor a direct link between the concerted practice and retail prices is decisive.

An exchange of confidential information between competitors is tainted with an anti-competitive object if the exchange is capable of removing existing uncertainties concerning the intended market conduct of the participating undertakings and thus undermining the rules of free competition.

2. Second question: finding of a causal link between concerted practice and market conduct

73. By its second question the referring court seeks in substance to ascertain whether the requirements for

proving a causal link between concerted practice and market conduct must be derived from Community law alone or, provided certain Community law limits are respected, are a matter for national law.

74. The concept of a concerted practice for the purposes of Article 81(1) EC implies, first, concertation between the undertakings concerned, second, conduct on the market following such concertation and, third, a relationship of cause and effect between concertation and market conduct, (50) without any requirement, however, that this market conduct as such should result in a specific restriction on competition. (51)

75. According to the Court's case-law, the rebuttable presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market; it is for the undertakings concerned to prove the contrary. (52)

76. The question raised by the College van Beroep voor het bedrijfsleven seeks to clarify whether national authorities and courts are also obliged to base their application of Article 81 EC on that presumption of a causal link which operates at Community level.

77. Whether and in what circumstances a relationship of cause and effect between concertation and market conduct may be presumed concerns the issue of proof. Admittedly, questions of proof are often regarded as issues of substantive law. (53) However, in the present case, the concept of a concerted practice as such permits merely the conclusion that concertation must be causally linked to the market conduct of the undertaking concerned. On the other hand, however, contrary to the view taken by the Netherlands Government and the Commission, the concept of a concerted practice within the meaning of Article 81(1) EC does not identify the circumstances in which the causal link between concertation and market conduct may be regarded as proven.

78. In proceedings in which competition decisions of the Commission were contested, the Community Courts have determined issues concerning proof – in the absence of express rules – always on the basis of generally recognised principles. Ultimately, it is on the basis of the maxim 'necessitas probandi incumbit ei qui agit' that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. (54) In that regard, the Court held circumstantial evidence also to be admissible. (55)

79. On the other hand, the Court made it clear that the application of Article 86 of the EC Treaty (now Article 82 EC) by the national authorities is, in principle, governed by national law, (56) including where it is necessary to prove breach of Article 86 of the EC Treaty. (57) There is no apparent reason why in relation to Article 81 EC (formerly Article 85 of the EC Treaty) anything different should apply, (58) irrespective of whether one categorises issues of proof as a matter of substantive or procedural law.

80. Admittedly, Article 2 of Regulation No 1/2003 now provides for an express Community rule governing the burden of proof which applies also in national procedures for the application of Articles 81 EC and 82 EC. However, contrary to the view taken by the Commission, a presumption of a causal link, such as the presumption at issue here, does not concern the burden of proof or the reversal thereof, (59) but the standard of proof. (60)

81. The standard of proof required in national proceedings remains a matter which is not governed by Community law. That is particularly evident on reading Article 2 in the light of the preamble to Regulation No 1/2003. Recital 5 in the preamble makes it clear that the regulation does not affect national rules on the standard of proof. Thus, Community law does not preclude national courts in the application of Articles 81 EC and 82 EC from determining the standard of proof according to rules of national law, again irrespective of whether one considers matters relating to the standard of proof to be an element of substantive law or an element of procedural law.

82. However, in their application of principles and rules of national law governing the standard of proof national courts are obliged to observe certain minimum requirements of Community law resulting, first, from the principle of equivalence, second, the principle of effectiveness and, third, general principles of Community law. (61)

83. As regards, first, the principle of equivalence, this requires national principles on the standard of proof not to be less favourable than those governing similar proceedings under national competition law. That implies in a case such as the present that as regards proof of an infringement of Article 81 EC national competition authorities may not be subject to stricter requirements on proof than those which govern proof of an infringement of Article 6 of the Mw. In the present case, as far as can be seen, the principle of equivalence does not present any difficulties.

84. Turning then to the principle of effectiveness, this requires national rules on the standard of proof not to render impossible in practice or excessively difficult enforcement of the EC Treaty rules on competition. In addition, in cases where Community law is infringed, national law must provide for penalties which are effective, proportionate and dissuasive. (62)

85. In that context, it must be recalled, in particular, that since 1 May 2004 (63) the competition rules of Articles 81 EC and 82 EC operate in a decentralised system which is reliant primarily on the cooperation of national authorities and courts. (64) In those circumstances, it is of fundamental importance that the uniform application of competition rules in the Community be maintained. Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire Community would be undermined if in the

enforcement of the competition rules of Articles 81 EC and 82 EC significant disparities occurred between the authorities and courts of the Member States. For that reason, the objective of a uniform application of Articles 81 EC and 82 EC is a central theme which runs throughout Regulation No 1/2003. (65)

86. Undoubtedly, none of this implies a requirement on Member States to align in every detail the existing standard of proof applicable under national law to the determination of an infringement of Article 81 EC with the standard of proof usually required by the Community Courts when reviewing the legality of decisions adopted by the Commission under Article 81 EC. As recital 5 in the preamble to Regulation No 1/2003 demonstrates, the Community legislature consciously accepted the existence of certain variations in Member State practice. (66) They are, as KPN underlines, in my view correctly, inherent in a decentralised system of legal enforcement.

87. However, it is incompatible with the principle of effectiveness if national courts impose on national competition authorities or private litigants (67) criteria for proof of an infringement of Article 81 EC or 82 EC that are so onerous as to render such proof impossible in practice or excessively difficult. In particular, national courts may not ignore the typical characteristics of evidence adduced in determining infringements of the competition rules.

88. Those characteristics include the fact that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. (68) It is normal for the activities which anti-competitive practices and agreements entail to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. (69)

89. It is not least those characteristics of the evidence tendered in proof of infringements of competition rules which imply that it must be open to the authority or private party on whom the burden of proof lies to draw certain conclusions on the basis of common experience. Thereupon, it is for the opposing party – usually, the undertaking alleged to have infringed the competition rules – to contradict those prima facie conclusions drawn on the basis of common experience, adducing cogent evidence to the contrary, failing which such conclusions are adequate to discharge the burden of proof. (70) In other words, there is an interplay of the respective burdens of adducing proof prior to consideration of the objective burden of proof. (71)

90. The presumption of a causal link between concertation and market conduct which the Court recognises in relation to concerted practices constitutes nothing other than a legitimate conclusion drawn on the basis of common experience. If it is proved that a concertation between two or more undertakings was reached and later those undertakings pursued market conduct precisely in accordance with that concertation, it is natural to presume a relation of cause and effect between concertation and market conduct, unless the undertakings – adducing evidence in support – produce a cogent alternative explanation for their market conduct. (72)

91. If, therefore, as in the present case, competitors exchange information concerning a possible reduction in their dealer remunerations and subsequently, more or less in parallel, in fact effect such reductions, given the absence of plausible alternative explanations, it would be unusual to presume that that exchange of information did not at least contribute to that market conduct. (73) In fact, it can normally be assumed that undertakings participating in concerted actions and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. (74)

92. Finally, it must be recalled that in the prosecution and punishment of infringements of Articles 81 EC and 82 EC national authorities and courts are bound by general principles of Community law and, in particular, fundamental rights recognised at Community level. (75) Those fundamental rights applicable in the prosecution of infringements of the competition rules include the presumption of innocence; (76) that principle is established within the common constitutional traditions of the Member States and can, in addition, be derived from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; (77) it has recently also been enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union. (78)

93. However, the presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience and the undertakings concerned are at liberty to refute those conclusions. (79) After all, classic criminal proceedings allow for the use of circumstantial evidence and recourse to principles derived from experience.

94. To summarise:

For the purposes of proving an infringement of Article 81 EC in proceedings before national courts, it is for national law to determine the standard of proof required, subject to the proviso that the principles of equivalence and effectiveness and general principles of Community law must be observed.

According to the principle of effectiveness, criteria for proof of an infringement of Article 81 EC may not be imposed if they are so onerous as to render such proof impossible in practice or excessively difficult. In particular, national courts may not ignore the typical characteristics of evidence adduced in determining infringements of the competition rules and must permit reference to be made to common experience when evaluating typical events.

Subject to proof to the contrary, which it is for the undertakings concerned to adduce, there must be a presumption before national courts, too, that undertakings participating in concerted actions and

remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.

3. The third question: presumption of a causal link where the concerted practice is an isolated event

95. As a supplement to its second question, by its third question the referring court seeks in substance to establish whether the presumption of a relation of cause and effect between concerted practice and market conduct may apply only to a concerted practice effected over a lengthy period or also to a concerted practice which was an isolated event, subject to the condition that the undertaking which took part in the practice remains active on the market.

96. The background to this question is the fact that in the present case only one meeting of representatives of Netherlands operators of mobile telecommunication services took place, that is, in June 2001.

97. T-Mobile, KPN and Vodafone consider the presumption of a causal link to be an exception subject to strict construction which must remain limited to regular concerted action of undertakings and may not be extended to an isolated event of concerted behaviour.

98. I do not share that view.

99. The judgments in which the Court recognised the presumption of a causal link support neither the proposition that such presumption constitutes an exception to a rule nor the proposition that it applies only in cases where undertakings take part in regular or, at any rate, multiple concerted actions. Instead, from the wording used by the Court, presumption of a causal link may be regarded as standard. The presumption applies ('must be') in general terms and is subject only to one restriction, that is, it may be rebutted by evidence to the contrary, which it is for the undertaking concerned to adduce. (80)

100. The subsequent reference of the Court to concerted action taking place on a regular basis over a long period does not constitute an additional restriction on the presumption of a causal link. On the contrary, that reference must be interpreted as meaning that the presumption of a causal link is even more compelling if undertakings have concerted their actions on a regular basis over a long period. That is apparent from the Court's phrase '[t]hat is all the more true where …'. (81)

101. Nor does the case-law of the Court of First Instance (82) cited by T‑Mobile, in which, according to the statement of facts, participation at several meetings with an anti-competitive purpose was at issue, lead me to discern a general restriction on the presumption of a causal link.

102. If Advocate General Cosmas in his Opinion in Commission v Anic Partecipazioni in distinguishing between participation on an isolated occasion in a meeting and participation in a series of meetings (83) had in mind a more restricted presumption of a causal link, at any rate, the Court did not adopt that solution.

103. Nor in material terms is there any reason to restrict the presumption of causal link to cases of concerted action taking place on a regular basis over a long period. In my view, there is no empirical rule that an isolated exchange of information between competitors may not result in an anti-competitive concertation of their market conduct and only contact on a regular basis over a long period would foster that outcome. (84) Accordingly, the presumption of innocence to which several of the parties refer does not require the case of an isolated concerted action to be treated differently – in terms of the relation between cause and effect – from the case of a concerted action taking place on a regular basis over a long period.

104. As the Netherlands Government rightly points out, it is the subject-matter of the concerted action and market conditions which determine the number, frequency and form of meetings which competitors need to concert with each other on their market conduct.

105. If the undertakings concerned establish a cartel with a complex and sophisticated system of long-term concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the present case, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, an isolated meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve and thus be the cause of the subsequent market conduct.

106. Thus, the fact in itself that only an isolated meeting was held does not imply necessarily that the evidence is weak. Instead, the crucial factor is simply whether the opportunity for contact – even if only a one-off exchange of information at an isolated meeting – allowed the participating undertakings in an individual case in fact to concert their market conduct and thus knowingly to substitute practical cooperation between them for the risks of competition. In the present case, all the information provided to the Court indicates that such was the course of events since subsequent to that isolated meeting a reduction in standard dealer remunerations, was, in fact, effected.

107. However, the number and regularity of meetings between competitors may provide an indication in relation to the duration and gravity of the infringement of competition rules. In that case, those factors must be taken into account in fixing the amount of any fine (85) and may be of potential relevance also in relation to the amount of any third-party claims for damages, inter alia, where punitive damages are available as a matter of national law. (86)

108. To summarise:

Even if only an isolated event of concertation took place between competitors which remain active on the market, the rebuttable presumption may be made that such concertation had an impact on their market

conduct. In particular, such a presumption applies where concertation took place merely on a selective basis in relation to a one-off alteration in the market conduct of the participants with reference simply to one parameter of competition.

VI – Conclusion

109. On the basis of the foregoing, I propose that the Court should answer the questions of the College van Beroep voor het bedrijfsleven as follows:

(1) (a) A concerted practice pursues an anti-competitive object for the purposes of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. In that regard, neither the realisation of such prevention, restriction or distortion of competition nor a direct link between the concerted practice and retail prices is decisive.

(b) An exchange of confidential information between competitors is tainted with an anti-competitive object if the exchange is capable of removing existing uncertainties concerning the intended market conduct of the participating undertakings and thus undermining the rules of free competition.

(2) (a) For the purposes of proving an infringement of Article 81 EC in proceedings before national courts, it is for national law to determine the standard of proof required, subject to the proviso that the principles of equivalence and effectiveness and general principles of Community law must be observed.

(b) According to the principle of effectiveness, criteria for proof of an infringement of Article 81 EC may not be imposed if they are so onerous as to render such proof impossible in practice or excessively difficult. In particular, national courts may not ignore the typical characteristics of evidence adduced in determining infringements of the competition rules and must permit reference to be made to common experience when evaluating typical events.

(c) Subject to proof to the contrary, which it is for the undertakings concerned to adduce, there must be a presumption before national courts, too, that undertakings participating in concerted actions and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.

(3) Even if only an isolated event of concertation took place between competitors which remain active on the market, the rebuttable presumption may be made that such concertation had an impact on their market conduct. In particular, such a presumption applies where concertation took place merely on a selective basis in relation to a one-off alteration in the market conduct of the participants with reference simply to one parameter of competition.

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1 – Original language: German.

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2 – Council regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

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3 – For a recent example referring to those risks, see points 136 and 137 of the Opinion of Advocate General Geelhoed in Case C-407/04 P Dalmine v Commission [2007] ECR I-829, to which the Court also refers in its judgment in the same case (paragraph 84).

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4 – Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging – Mededingingswet (Stb. 1997, No 242).

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5 – Wet van 9 december 2004, houdende wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan (Stb. 2005, No 172).

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6 – Raad van bestuur.

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7 – Nederlandse Mededingingsautoriteit.

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8 – ‘Ben’.

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9 – ‘Dutchtone’.

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10 – ‘Telfort’.

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11 – A SIM (Subscriber Identity Module) card is a card containing a microchip which is inserted in a mobile telephone and identifies the user to the network. In effect, the card constitutes the mobile telephone line of the user.

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12 – Additionally, the Netherlands Government states that those discussions concerned the extent, timing and details of the proposed reduction of standard dealer remunerations.

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13 – According to information supplied by the Netherlands Government, the background to that determination is the entry into force of Regulation No 1/2003, in particular Article 3(1).

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14 – According to the case-file, the Rechtbank te Rotterdam did not consider it established that Orange and Telfort were participants in the concerted practice.

15 – The NMa's appeal addresses the participation of Orange in the concerted practice. In its reference for a preliminary ruling the referring court upholds the judgment of the lower court inasmuch as it does not consider the participation of Orange to be established.

16 – For recent examples, see Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio [2006] ECR I-11987, paragraphs 19 and 20, and Case C‑280/06 ETI and Others [2007] ECR I-10893, paragraphs 21 and 26, and the case-law cited therein.

17 – On that point Vodafone refers to paragraphs 21 and 22 of the communication of the Commission: 'Guidelines on the application of Article 81(3) of the Treaty' (OJ 2004 C 101, p. 97).

18 – Case 48/69 ICI v Commission [1972] ECR 619, paragraph 64; Case 52/69 Geigy v Commission [1972] ECR 787, paragraph 26; Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 Suiker Unie and Others v Commission [1975] ECR 1663, paragraph 26; Case 172/80 Züchner [1981] ECR 2021, paragraph 12; additionally, Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 115; and Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 158.

19 – For example, in Case C-238/05 Asnef-Equifax [2006] ECR I-11125, paragraphs 46 to 48, that object was rejected in relation to the Spanish system for the exchange of credit information.

20 – ICI v Commission, cited in footnote 18, paragraphs 64 and 65; Commission v Anic Partecipazioni, cited in footnote 18, paragraphs 112 and 123; and Hüls v Commission, cited in footnote 18, paragraph 164.

21 – Case 56/65 LTM [1966] ECR 235, 249; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 IAZ International Belgium and Others v Commission [1983] ECR 3369, paragraph 25; and Case C‑209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000 ('BIDS'), paragraph 16.

22 – LTM, cited in footnote 21, p. 249; Case 19/77 Miller v Commission [1978] ECR 131, paragraph 7; Joined Cases 29/83 and 30/83 CRAM and Rheinzink v Commission [1984] ECR 1679, paragraph 26; Case C-551/03 P General Motors v Commission [2006] ECR I-3173, paragraph 66; and BIDS, cited in footnote 21, paragraph 21.

23 – IAZ International Belgium and Others v Commission, cited in footnote 21, paragraph 25, and General Motors v Commission, cited in footnote 22, paragraphs 77 and 78; to the same effect, see BIDS, cited in footnote 21, paragraph 21.

24 – LTM, cited in footnote 21, p. 249; IAZ International Belgium and Others v Commission, cited in footnote 21, paragraph 25; CRAM and Rheinzink v Commission, cited in footnote 22, paragraph 26; General Motors v Commission, cited in footnote 22, paragraph 66; and BIDS, cited in footnote 21, paragraph 16; see also Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342.

25 – LTM, cited in footnote 21, p. 249 et seq., and BIDS, cited in footnote 21, paragraph 15; see also Case C-219/95 P Ferriere Nord v Commission [1997] ECR I-4411, paragraphs 13 to 15.

26 – Commission v Anic Partecipazioni, cited in footnote 18, paragraph 123; Hüls v Commission, cited in footnote 18, paragraph 164; and Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 124.

27 – A principle of established case-law since Consten and Grundig v Commission, cited in footnote 24, p. 342 et seq.; see, for example, Case 123/83 Clair [1985] ECR 391, paragraph 22; and, more recently, Joined Cases C-238/99 P, C‑244/99 P, C‑245/99 P, C‑247/99 P, C‑250/99 P to C‑252/99 P and C‑254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I-8375, paragraph 491; Joined Cases C-204/00 P, C‑205/00 P, C‑211/00 P, C‑213/00 P, C‑217/00 P and C‑219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 261; Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725, paragraph 125; BIDS, cited in footnote 21, paragraph 15; and Joined Cases C‑101/07 P and C‑110/07 P Coop de France Bétail et Viande and Others v Commission [2008] ECR I-0000, paragraph 87.

28 – Commission v Anic Partecipazioni, cited in footnote 18, paragraph 122; Hüls v Commission, cited in footnote 18, paragraph 163; and Montecatini v Commission, cited in footnote 26, paragraph 123.

29 – BIDS, cited in footnote 21, paragraph 17.

30 – On the fundamentally 'restrictive nature' of Article 81(1) EC (formerly Article 85(1) of the EC Treaty), see Case 24/67 Parke [1968] ECR 55, 71.

31 – Under Article 23(2)(a) of Regulation No 1/2003, each undertaking participating in an intentional or negligent infringement of Article 81 EC is liable to a fine not exceeding 10% of its total turnover in the preceding business year (see the fourth indent of the first paragraph of Article 5 for the penalties imposed by national authorities). Independently of that penalty, under Article 7(1) (first indent of the first paragraph of Article 5) of Regulation No 1/2003, an undertaking may by decision be required to bring such infringement to an end. In addition, third parties may potentially have claims to compensation for loss and damage.

32 – To that effect, see Commission v Anic Partecipazioni, cited in footnote 18, paragraph 125; Hüls v Commission, cited in footnote 18, paragraph 166; and Montecatini v Commission, cited in footnote 26, paragraph 126.

33 – Although the national court does not explicitly mention a rule of presumption, it stresses the need to prevent 'false positive outcomes'.

34 – On that point, see paragraph 21 of the Commission guidelines, cited in footnote 17.

35 – To the same effect – although in that case in connection with Article 82 EC – see my Opinion in Case C-95/04 P British Airways v Commission [2007] ECR I-2331, points 68 to 74.

36 – Case T-168/01 [2006] ECR II-2969.

37 – Case C-7/95 P Deere v Commission [1998] ECR I-3111, paragraph 88 in conjunction with paragraph 90, Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81, and Asnef-Equifax, cited in footnote 19, paragraphs 51 and 62; see, in a similar vein, the earlier judgment in ICI v Commission, cited in footnote 18, paragraphs 101, 112 and 119.

38 – See, to the same effect, General Motors v Commission, cited in footnote 22, paragraph 64, and BIDS, cited in footnote 21, paragraph 21.

39 – Suiker Unie and Others v Commission, cited in footnote 18, paragraphs 173 and 174; Züchner, cited in footnote 18, paragraphs 13 and 14; Deere v Commission, cited in footnote 37, paragraphs 86 and 87; Commission v Anic Partecipazioni, cited in footnote 18, paragraphs 116 and 117; Hüls v Commission, cited in footnote 18, paragraphs 159 and 160; and Asnef-Equifax, cited in footnote 19, paragraphs 52 and 53; in a similar vein, see BIDS, cited in footnote 21, paragraph 34.

40 – Deere v Commission, cited in footnote 37, paragraph 88 in conjunction with paragraph 90, and Asnef-Equifax, cited in footnote 19, paragraph 58; in Thyssen Stahl v Commission, cited in footnote 37, paragraphs 86 and 87, the Court clarified that an information exchange system may infringe competition rules even where the relevant market is not a highly concentrated oligopolistic market.

41 – On that issue, see point 12 of this Opinion.

42 – On the issue as a whole, see my Opinion in British Airways v Commission, cited in footnote 35, point 68.

43 – According to the Netherlands Government, independent dealers were responsible for brokering the conclusion of most postpaid subscriptions in the Netherlands in 2001.

44 – According to the reference for a preliminary ruling, in the present case, too, it is for a dealer to determine the manner and sales efforts used in selling postpaid subscriptions to consumers.

45 – Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307 ('Woodpulp II'), paragraph 126; see, to the same effect, CRAM and Rheinzink v Commission, cited in footnote 22, paragraph 20 in conjunction with paragraph 18.

46 – To the same effect, see also the Opinion of Advocate General Mayras in ICI v Commission, cited in footnote 18, to which Vodafone refers. For conduct to be regarded as a concerted practice within the meaning of Article 85(1) of the EEC Treaty (now Article 81(1) EC), according to Advocate General Mayras it is necessary that such conduct 'is not the principal consequence of the structure and of the economic conditions on the market' (see Title I, Section I, heading D of that Opinion [p. 671]; emphasis in the original).

47 – Woodpulp II, cited in footnote 45; Vodafone relies on paragraphs 85 to 88 and 123 and 124 of that judgment, but these are passages which are entirely free of legal analysis by the Court.

48 – To the same effect, see Joined Cases 209/78 to 215/78 and 218/78 van Landewyck and Others v Commission [1980] ECR 3125, paragraph 153; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831, paragraphs 24 to 29; and Montecatini v Commission, cited in footnote 26, paragraph 127.

49 – Suiker Unie and Others v Commission, cited in footnote 18, paragraph 174; Züchner, cited in footnote 18, paragraph 14; Deere v Commission, cited in footnote 37, paragraph 87; Commission v Anic Partecipazioni, cited in footnote 18, paragraph 117; Hüls v Commission, cited in footnote 18, paragraph 160; and Asnef-Equifax, cited in footnote 19, paragraph 53.

50 – Commission v Anic Partecipazioni, cited in footnote 18, paragraph 118, and Hüls v Commission, cited in footnote 18, paragraph 161.

51 – Commission v Anic Partecipazioni, cited in footnote 18, paragraph 124; Hüls v Commission, cited in footnote 18, paragraph 165; Montecatini v Commission, cited in footnote 26, paragraph 125; and Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission, cited in footnote 27, paragraph 139.

52 – Commission v Anic Partecipazioni, cited in footnote 18, paragraphs 121 and 126, and Hüls v Commission, cited in footnote 18, paragraphs 162 and 167.

53 – Seemingly, the Court took a different view in Case C-242/95 GT-Link [1997] ECR I-4449, paragraph 23 in conjunction with paragraph 26.

54 – Established case-law: see, for example, Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 58; Commission v Anic Partecipazioni, cited in footnote 18, paragraph 135; Hüls v Commission, cited in footnote 18, paragraph 154; Montecatini v Commission, cited in footnote 26, paragraph 179; and Joined Cases C-2/01 P and C‑3/01 P BAI and Commission v Bayer [2004] ECR I‑23, paragraph 62.

55 – See, for example, Aalborg Portland and Others v Commission, cited in footnote 27, paragraph 81, and, more recently, Joined Cases C-403/04 P and C‑405/04 P Sumitomo Metal Industries and Nippon Steel v Commission [2007] ECR I-729, paragraph 47, and Coop de France Bétail et Viande and Others v Commission, cited in footnote 27, paragraph 88.

56 – GT-Link, cited in footnote 53, paragraph 23.

57 – Ibid., paragraph 26.

58 – To the same effect, see Case C-60/92 Otto [1993] ECR I-5683, paragraph 14.

59 – Hüls v Commission, cited in footnote 18, paragraph 155, and Montecatini v Commission, cited in footnote 26, paragraph 181.

60 – The standard of proof determines the requirements which must be satisfied for facts to be regarded as proven. It must be distinguished from the burden of proof. The burden of proof determines, first, which party must put forward the facts and, where necessary, adduce the related evidence (subjektive or formelle Beweislast, also known as the evidential burden); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (objektive or materielle Beweislast). In addition, see my analysis in Kokott, J., Beweislastverteilung und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten, Berlin and Heidelberg 1993, p. 12 et seq.

61 – See, first, the wording at the end of recital 5 in the preamble to Regulation No 1/2003, according to which

national rules and obligations must be compatible with general principles of Community law and, second, established case-law following Case 33/76 Rewe-Zentralfinanz and Rewe-Zentral [1976] ECR 1989, paragraph 5. On the significance of the principles of equivalence and effectiveness in competition law proceedings see, in particular, GT-Link, cited in footnote 53, paragraph 26; Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29; Joined Cases C-295/04 to C‑298/04 Manfredi and Others [2006] ECR I-6619, paragraphs 62 and 71; and Case C-421/05 City Motors Groep [2007] ECR I-653, paragraph 34.

62 – Established case-law following Case 68/88 Commission v Greece [1989] ECR 2965, paragraphs 23 and 24; see, for example, Joined Cases C-387/02, C‑391/02 and C‑403/02 Berlusconi and Others [2005] ECR I-3565, paragraph 65, and Case C-212/04 Adeneler and Others [2006] ECR I-6057, paragraph 94.

63 – That date marks the changeover to the modernised law on antitrust procedure contained in Regulation No 1/2003 (see the second paragraph of Article 45).

64 – On that point, see, in particular, recitals 4, 6, 7, 8, 21 and 22 in the preamble to Regulation No 1/2003. Even for the period prior to 1 May 2004, the Court had already stressed the obligation to cooperate in good faith which national courts have to observe in the competition law sphere (Case C‑344/98 Masterfoods and HB [2000] ECR I-11369, paragraph 49).

65 – See, in particular, Article 3(1) and (2) of Regulation No 1/2003. In addition, reference must be had, for example, to Articles 11 and 16 of that regulation and recitals 1, 14, 17, 19, 21 and 22 in the preamble thereto.

66 – Case-law has already adopted a similar approach; see Otto, cited in footnote 58, final sentence of paragraph 14, and GT-Link, cited in footnote 53, paragraphs 23 to 26.

67 – On the private enforcement of competition law, see, in particular, Courage and Crehan and Manfredi and Others, both cited in footnote 61; in general, as regards the application of the principle of effectiveness to the enforcement of private law claims, see, further, Case C-230/01 Penycoed [2004] ECR I-937, paragraphs 36 and 37.

68 – On Article 81 EC, see, for example, Aalborg Portland and Others v Commission, cited in footnote 27, paragraph 57; Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission, cited in footnote 27, paragraphs 94 and 135; Case C-113/04 P Technische Unie v Commission [2006] ECR I-8831, paragraph 165; Sumitomo Metal Industries and Nippon Steel v Commission, cited in footnote 55, paragraph 51; on Article 82 EC, see, for example, Joined Cases 110/88, 241/88 and 242/88 Lucazeau and Others [1989] ECR 2811, paragraph 25, and GT-Link, cited in footnote 53, paragraph 42.

69 – Aalborg Portland and Others v Commission, cited in footnote 27, paragraph 55, and Sumitomo Metal Industries and Nippon Steel v Commission, cited in footnote 55, paragraph 51.

70 – To the same effect, see Aalborg Portland and Others v Commission, cited in footnote 27, paragraph 79; in a similar vein, see the earlier judgment in Lucazeau and Others, cited in footnote 68, paragraph 25.

71 – On that issue, see also my Opinion in Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission, cited in footnote 27, point 73.

72 – To the same effect, see Commission v Anic Partecipazioni, cited in footnote 18, paragraphs 121 and 126, and Hüls v Commission, cited in footnote 18, paragraphs 162 and 167; see, in addition, point 66 of this Opinion and the case-law cited in footnote 45.

73 – On that issue, see the observations I have already made in points 64 to 71 of this Opinion.

74 – Commission v Anic Partecipazioni, cited in footnote 18, paragraph 121, and Hüls v Commission, cited in footnote 18, paragraph 162.

75 – Case C-292/97 Karlsson and Others [2000] ECR I-2737, paragraph 37, and Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paragraph 45; see also Article 51(1) of the Charter of Fundamental Rights of the European Union.

76 – Hüls v Commission, cited in footnote 18, paragraphs 149 and 150, and Montecatini v Commission, cited in footnote 26, paragraphs 175 and 176.

77 – Signed in Rome on 4 November 1950.

78 – The Charter of Fundamental Rights of the European Union was solemnly proclaimed first on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and then again on 12 December 2007 in Strasbourg (OJ 2007 C 303, p. 1). Although the charter as such does not yet have any binding legal effect comparable to that of primary law, as a source of legal guidance it sheds light on the fundamental rights guaranteed by Community law; on that issue, see also Case C‑540/03 Parliament v Council [2006] ECR I-5769 ('Family reunification'), paragraph 38, and point 108 of my Opinion in that case, and, further, Case C‑432/05 Unibet [2007] ECR I-2271, paragraph 37.

79 – To that effect, see also Hüls v Commission, cited in footnote 18, paragraph 155, and Montecatini v Commission, cited in footnote 26, paragraph 181, indicating that such an approach may not be regarded as unduly reversing the burden of proof.

80 – Commission v Anic Partecipazioni, cited in footnote 18, first sentence of paragraph 121, and Hüls v Commission, cited in footnote 18, first sentence of paragraph 162.

81 – Commission v Anic Partecipazioni, cited in footnote 18, second sentence of paragraph 121, and Hüls v Commission, cited in footnote 18, second sentence of paragraph 162.

82 – Joined Cases T‑202/98, T‑204/98 and T‑207/98 Tate & Lyle and Others v Commission [2001] ECR II‑2035, paragraph 66.

83 – Opinion of Advocate General Cosmas in Commission v Anic Partecipazioni, cited in footnote 18, point 56.

84 – Similarly, the Court's case-law recognises that an infringement of Article 81 EC may result from an isolated act, a series of acts or continuing conduct; see Commission v Anic Partecipazioni, cited in footnote 18, paragraph 81, and Aalborg Portland and Others v Commission, cited in footnote 27, paragraph 258.

85 – At Community level, that results expressly from Article 23(3) of Regulation No 1/2003.

86 – On that issue, see Manfredi and Others, cited in footnote 61, paragraph 92.