OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 19 February 2009 [1]

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:

1 — Original language: German.

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).

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).

'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.

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

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).

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

6 — Raad van bestuur.
7 — Nederlandse Mededingingsautoriteit.
8 — 'Ben'.
9 — 'Dutchtone'.
10 — 'Telfort'.

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

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.

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

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

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).

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.

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.

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).

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.

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.

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.

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-8637 ('*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.

(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

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-10193, 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.

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.

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.

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.

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

(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]

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.

— 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

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.

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 *structure of 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.

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

— 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.

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.

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.

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.

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.

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.

(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.

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

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.

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

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.

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

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).

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]

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.

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]

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.

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

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.

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

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.

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.

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.

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.