JUDGMENT OF THE COURT (Third Chamber)

4 June 2009*

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

* Language of the case: Dutch.

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 Voda-

fone) 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 vor 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-8637, 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]