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Press and Information

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Judgment of the Court of Justice in Case C-8/08

T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlandse Mededingingsautoriteit

A SINGLE MEETING BETWEEN COMPANIES MAY CONSTITUTE A CONCERTED PRACTICE IN BREACH OF COMMUNITY COMPETITION LAW

The presumption of a causal connection between the concerted practice and the market conduct of the participating undertakings established in the Court's case-law must be applied by the national court

Community law prohibits agreements and concerted practices between undertakings. Under Netherlands legislation, 'concerted practice' means any concerted practice within the meaning of Community law.

In 2001, five operators in the Netherlands had their own mobile telephone network, namely Ben Nederland BV (now T-Mobile), KPN, Dutchtone NV (now Orange), Libertel-Vodafone NV (now Vodafone) and Telfort Mobile BV (subsequently O2 (Netherlands) BV and now Telfort).

Representatives of the five operators held a meeting on 13 June 2001. 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.

By decision of 30 December 2002, the Raad van bestuur van der Nederlandse Mededingingsautoriteit (the Netherlands competition authority) found that the five operators 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 prohibited under national law, the Raad van bestuur van der Nederlandse Mededingingsautoriteit imposed fines on those undertakings. The latter challenged that decision.

The case went to appeal before the College van Bereop voor het bedrijfsleven (the Administrative Court for Trade and Industry), which has asked the Court of Justice to clarify the concept of concerted practice, indicating in particular the criteria to be applied when assessing whether a concerted practice pursues an anti-competitive object, to state whether the national court considering whether there is a concerted practice is obliged to apply the presumption of a causal connection established in the Court's case-law on that matter, and to determine whether that presumption is applicable even where the concerted practice has its roots in participation by the undertakings concerned at a single meeting.

The criteria to be applied in determining whether a concerted practice pursues an anti-competitive object

First, the Court observes 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. With regard to the definition of a concerted practice, the Court states 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.

Next, the Court points out that it has already provided a number of criteria on the basis of which it is possible to ascertain whether a concerted practice is anti-competitive, which include, in particular, the details of the arrangements on which it is based, the objectives which it is intended to attain and its economic and legal context. 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, it 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.

Moreover, the Court states that a concerted practice may be regarded as having an anti-competitive object even though the practice has no direct effect on the price paid by end users but relates simply to the remuneration paid to dealers for concluding postpaid subscription agreements.

Lastly, the Court points out that any exchange of information between competitors pursues an anti-competitive object if it is capable of removing uncertainties as to the anticipated conduct of the participating undertakings, including where, as in the present case, the conduct relates to the reduction in the standard commission paid to dealers. It is for the referring court to determine whether the information exchanged at the meeting held on 13 June 2001 was capable of removing such uncertainties.

Whether the national court is under an obligation to apply the presumption of a causal connection established in the Court's case-law

The Court states that the concept of a concerted practice 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. In that context, the Court has established in its case-law a presumption of a causal connection, according to which, subject to proof to the contrary, which the operators concerned must adduce, the undertakings taking part in the concerted action and remaining active on the market are presumed to take account of the information exchanged with their competitors in determining their conduct on that market.

Since any interpretation of Community law provided by the Court is binding on all the national courts and tribunals of the Member States, the national court is obliged to apply that presumption of a causal connection.

Whether the presumption of a causal connection is to be applied in cases in which the concerted action is the result of a meeting on a single occasion

The Court points out that, depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors may, in principle, constitute a

sufficient basis for the participating undertakings to concert their market conduct. 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 present case, the objective of the exercise is only to concert action on a selective basis 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.

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.

Accordingly, 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.

For further information, please contact Christopher Fretwell
Tel: (00352) 4303 3355 Fax: (00352) 4303 2731