

## Antitrust Law Blog

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### Top EU Court Rules That Single Meeting Between Competitors Can Be Breach Of European Antitrust Laws

On June 4, 2009, the European Court of Justice (ECJ) gave judgment on a reference from the Dutch courts on the interpretation of Article 81 of the EC Treaty and ruled that a single meeting between five Dutch mobile phone operators in which the companies had discussed the reduction of commission payments made to dealers for the sale of mobile phone contracts to consumers was sufficient to establish a breach of the EU's competition rules. *See Case C-8/08, T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlands Mededingingsautoriteit (June 4, 2009).*

The Dutch courts asked the ECJ to clarify whether it was possible for an anti-competitive practice to have resulted from an information exchange at a single meeting when there was no evidence of an ongoing system of information exchange being agreed or undertaken. In addition, the Dutch courts asked whether it was necessary to establish a causal link between the information exchanged and the prices paid by consumers in light of the fact that the information exchanged did not directly impact the prices that the dealers would charge consumers nor the subscription tariffs that would apply under the contracts which subscribers entered into with a chosen mobile operator.

#### *Concept of Anti-Competitive Concerted Practice*

In response, the ECJ referred to the mobile phone operators' conduct as a concerted practice which it described as "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". *Id.* at par. 26.

For a concerted practice to be regarded as having an anti-competitive object, the Court held that "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". *Id.* at par. 27. Moreover, the Court held 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. *Id.* at par. 39.

The Court also held 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". *Id.* at par. 41. The ECJ referred back to the Dutch courts the issue of whether the information exchanged at this single meeting was capable of removing such uncertainties.

*Presumption of Causal Connection Between Information Exchange at a Single Meeting and Market Conduct*

The ECJ confirmed that for there to be an infringement as a concerted practice, there must not only be some form of coordination such as information exchange but also subsequent conduct on the market by the participants and a relationship of cause and effect between the two. In this regard, the ECJ held that there is a rebuttable presumption that the parties involved have taken account of the information received from their competitors in subsequently operating on the market. Moreover, the Court held that depending on the structure of the market, it is possible 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". *Id.* at par. 59. The Court explained that:

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. *Id.* at par. 60.

The Court emphasized that what matters is not so much the number of meetings or instances of exchange of information between competitors but rather whether the information exchanged influenced, or had the capability to influence, their conduct on the market. *Id.* at par. 61. Thus, a concerted practice may, in principle, constitute an infringement under EU antitrust law even if it derives from a single meeting.

Authored by:

[Neil Ray](#)

(619) 338-6595

[NRay@sheppardmullin.com](mailto:NRay@sheppardmullin.com)