Neutral Citation Number: [2025] EWCA Civ 869

Case No: CA-2024-000204

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)
MR JUSTICE ROTH
[2023] EWHC 2826 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2025

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PHILLIPS
and
LADY JUSTICE FALK

- -

Between:

PHONES 4U LIMITED (in administration)	**Claimant/ Appellant**
- and –	
(1) EE LIMITED **(2) DEUTSCHE TELEKOM AG** **(3) ORANGE SA** **(4) VODAFONE LIMITED** **(5) VODAFONE GROUP PUBLIC LIMITED COMPANY** **(6) TELEFONICA UK LIMITED** **(7) TELEFÓNICA, S.A.** **(8) TELEFONICA O2 HOLDINGS LIMITED**	**Defendants/ Respondents**
- and –	
COMPETITION AND MARKETS AUTHORITY	**Intervener**

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- -

Kenneth MacLean KC, Owain Draper and Gideon Cohen (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellant**
Meredith Pickford KC and David Gregory (instructed by **Clifford Chance LLP**) for the **First Respondent**

Robert O'Donoghue KC and Hugo Leith (instructed by **Covington & Burling LLP**) for the **Second Respondent**
Marie Demetriou KC, David Scannell KC and David Heaton (instructed by **Norton Rose Fulbright LLP**) for the **Third Respondent**
Rob Williams KC and Hannah Glover (instructed by **Hogan Lovells International LLP**) for the **Fourth and Fifth Respondents**
Mark Hoskins KC, Matthew Kennedy and Aarushi Sahore (instructed by **Mishcon de Reya LLP and Pallas Partners LLP**) for the **Sixth, Seventh and Eighth Respondents**
David Bailey (instructed by the **Competition and Markets Authority**) for the **Intervener**

Hearing dates: 19 – 23 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 11 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. In September 2014 Phones4u Limited ("P4u") went into administration. It had previously been one of the two main UK suppliers of consumer connections to mobile networks that were independent of the mobile network operators ("MNOs"). P4u's collapse followed decisions by three MNOs that they would not renew contracts to supply connections through it.

2. In December 2018 P4u commenced a claim alleging that P4u was the victim of a collusive anticompetitive scheme in which the three MNOs and their respective parent companies had participated, either through bilateral arrangements or, potentially, multilaterally. The claim related to the period between 2012 and 2014. The claim form alleged, among other things, that it would have been commercially irrational for the MNOs to have reached independent decisions to cease supplies to P4u. P4u sought damages for infringement of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") and/or for breach of section 2 of the Competition Act 1998. It also made contractual claims and a claim that there had been a common law conspiracy.

3. A split trial was ordered, with the first trial addressing most of the liability issues. That trial was heard before Roth J (the "judge") over 11 weeks, concluding on 28 July 2022. The judge decided that the claims should be dismissed. His judgment was handed down on 10 November 2023, some 15 months after the end of the trial ([2023] EWHC 2826 (Ch)). The judge refused permission to appeal, giving detailed reasons in a further judgment handed down on 12 January 2024 ([2023] EWHC 3378 (Ch)). That second judgment also dealt with interest and costs. I will refer to the second judgment as the "permission judgment" and the principal judgment as the "judgment". Unless otherwise indicated, cross-references below to the judge's decision are to the judgment.

4. On a renewed application to this court, permission to appeal was granted by the Chancellor on six of the eight grounds on which it was sought. All six of those grounds challenge the conclusion that the respondents are not liable for breach of Article 101(1) or section 2 of the 1998 Act.

5. In summary, I have concluded that the appeal should be dismissed.

Essential background

6. During the relevant period P4u was the principal trading entity of the P4u group. The group had over 700 retail outlets and around 5,600 employees. It was controlled by BC Partners, a private equity firm, and by 2013 had a significant debt burden.

7. The three relevant MNOs are EE Limited ("EE"), Vodafone Limited ("Vodafone UK") and Telefonica UK Ltd ("O2"). They are the First, Fourth and Sixth Respondents. During the relevant period EE was the largest of the three, with about one third of the market, O2 had just under a quarter and Vodafone about one fifth.

8. EE had been formed as a joint venture between Deutsche Telekom AG ("DT"), the Second Respondent, and Orange SA ("Orange"), the Third Respondent. (EE remained owned by DT and Orange until 2016, when it was acquired by BT.) Vodafone UK's

parent, Vodafone Group plc is the Fifth Respondent (together with Vodafone UK, "Vodafone"). O2's ultimate parent company, Telefónica, S.A., is the Seventh Respondent, and an intermediate parent, Telefonica O2 Holdings Limited, is the Eighth Respondent (together with Telefónica, S.A., "Telefonica").

9. While all three MNOs supplied connections directly to consumers, during the relevant period indirect retailers (also referred to as "indirects") held a substantial share of the UK market. The judge explained the (historic) regulatory reason for this, and the fact that the significant role played by indirect retailers in the UK market was generally not replicated in continental Europe, at [15]. However, the MNOs were investing in expanding their direct store networks.

10. The two most significant indirect retailers were P4u and its rival Carphone Warehouse Limited ("CPW"). Indirect retailers were both competitors of the MNOs in relation to the MNOs' own direct sales of connections to consumers and, effectively, agents or distributors for the MNOs. For each sale through an indirect retailer, the MNO would have to pay it a commission. The presence of indirect retailers, together with the number of network operators operating in the market (which, in addition to the MNOs, included so-called mobile virtual network operators ("MVNOs") who used another operator's infrastructure), benefited consumers but also meant that the UK market was the least profitable of the major European markets. In particular, indirect retailers were often able to offer cheaper deals to consumers by using commissions received to subsidise the supply of handsets.

11. In 2012, P4u had agreements in place to supply connections with each of O2, Vodafone UK and EE. The agreement with O2 ran until 31 January 2013 for new connections and to 31 January 2014 for upgrades and SIM-only connections. The agreement with Vodafone UK had a minimum term expiring on 31 October 2014. The agreement with EE, which was entered into on 10 October 2012, was due to expire on 30 September 2015.

12. On 16 October 2012 P4u was informed by O2 that it would not renew the new connections contract due to expire the following January. A similar notification was given on 10 October 2013 in relation to the upgrades and SIM-only contract. On 7 August 2014 Vodafone UK gave written notice to P4u terminating its contract with effect from 9 February 2015, and on 12 September 2014 EE informed P4u by letter that it would not renew its agreement when it expired in 2015. P4u went into administration three days later.

The core allegations

13. The allegations of collusion were generally pleaded in broad terms, and some aspects were developed during the trial. In outline, and so far as relevant for the purposes of this appeal, the core relevant allegations are as follows:

    a) In September 2012 O2, through its CEO Mr Ronan Dunne, sought to "de-risk" what was at that time a provisional decision to exit P4u by colluding with EE. Specifically, it was alleged that at a lunch at the Landmark Hotel with EE's CEO Mr Olaf Swantee on 19 September 2012 (the "Landmark lunch"), Mr Dunne informed Mr Swantee of O2's wish to reduce the volume of supplies it made via

indirect retailers. P4u asserts that the approach and Mr Swantee's response to it amounted to collusion.

b) At around the same time, Mr Dunne of O2 similarly colluded with Mr Guy Laurence, the CEO of Vodafone UK. Further, Mr Vittorio Colao, the CEO of Vodafone Group, colluded with Mr César Alierta Izuel, the Chairman and CEO of Telefónica, S.A.

c) There was further collusion between Vodafone and O2 in 2013. Specifically, Mr Philipp Humm, the Regional CEO for Europe of Vodafone Group, met with Ms Eva Castillo Sanz, the Chair and CEO of Telefónica Europe, in Madrid in September 2013. P4u maintains that their discussion extended to future strategy concerning indirect retailers.

d) In addition, EE and Vodafone colluded during 2014 by coordinating their decisions to discontinue their relationships with P4u. Specifically, P4u relies on a telephone call on 2 April 2014 between Mr Humm of Vodafone Group and Mr Benoit Scheen, Senior Executive Vice President, Europe Region, of Orange.

Article 101(1)

14. Article 101(1) of the TFEU provides, so far as relevant:

> "The following shall be prohibited as incompatible with the internal 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 internal market,…"

15. The Chapter I prohibition in section 2 of the Competition Act 1998 is to similar effect, save that it relates to arrangements which may affect trade in the United Kingdom and have an anticompetitive object or effect within the United Kingdom.

16. As the judge recorded at [76], it is common ground between the parties that there is no difference between the application of Article 101(1) and the Chapter I prohibition in this case, such that the claims under both stand or fall together. For convenience I will refer only to Article 101(1).

17. The focus in this case was on the alleged existence of "concerted practices" between the MNOs, which were said to have the object of affecting competition. Case T-342/18 *Nichicon v Commission* [2021] 5 CMLR 19 ("*Nichicon GC*") contains a useful summary of the relevant basic principles (citations omitted):

> "105. In that regard, first, it is worth bearing in mind that, according to the case-law, 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 FEU Treaty provisions on competition, according to which each economic operator must determine independently the policy which he or she intends to adopt on the internal market…

106. 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, nonetheless, 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…

107. The Court of Justice has therefore held 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…

108. In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object…

109. The General Court has already held that the provision of sensitive business information, such as an exchange of future price increases, has – where that information is given to one or more competitors – an anticompetitive effect inasmuch as the independence of the undertakings concerned in their conduct on the market is modified as a result. Where such practices occur, the Commission is not obliged to prove their anticompetitive effects on the relevant market if they are 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 internal market…

110. Secondly, the concept of a concerted practice, as it derives from the actual terms of Article 101(1) TFEU, 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…

111. In that regard, the Court of Justice has held 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. In particular, the Court of Justice has concluded that such a concerted practice is caught by Article 101(1) TFEU, even in the absence of anticompetitive effects on the market…

> 112. It is thus apparent from the case-law that the provision of sensitive business information, such as the exchange of information regarding pricing, including future pricing, and information regarding supply and demand, including in relation to future supply and demand (in particular production volumes or increases or decreases in shipments), makes it possible to reduce uncertainty as to the conduct of competitors on the market and to create conditions of competition which do not correspond to the normal conditions of the market and, consequently, gives rise to a concerted practice having as its object the restriction of competition, within the meaning of Article 101(1) TFEU."

18. As can be seen from [110], a concerted practice requires three elements: concertation, subsequent conduct on the market (meaning remaining active on the market), and a relationship of cause and effect between the two. As explained at [111], the third element is subject to a presumption, commonly known as the "*Anic* presumption". The first and third elements are in issue in this case.

19. This passage also emphasises that an infringement can occur not only where the effect of what is done is to distort competition but where that is its object. As the CJEU has explained, certain types of coordination between undertakings are regarded as revealing a sufficient degree of harm to competition to be regarded as being "restrictions by object", so that there is no need to examine their actual effect on competition (see for example Case C-228/18 *Budapest Bank and others* EU:C:2020:265 at [33]-[38]). P4u's allegations in this case are ones of "by object" infringement.

The judgment

20. The judgment is over 200 pages in length, and contains a wealth of detail, reflecting the obvious care the judge took in considering the evidence. What follows is a summary of those elements of the judgment that are necessary to understand the issues raised by this appeal. That summary is of necessity relatively lengthy, because (as discussed further below at [224] and [226]) a careful perusal of the judgment is critical to a full understanding of those issues in the context of the judge's findings as a whole.

21. Those findings include, in particular, explanations of what led each MNO individually to conclude that it should exit from P4u, despite the potential risks of doing so. In outline, all three MNOs had a strategic desire to increase direct distribution and to reduce their reliance on indirect channels. O2 was under pressure from Telefonica to take more risk to improve its lacklustre financial performance, and there was dissatisfaction with the terms that P4u could offer. The lack of coordination over O2's exit from P4u is demonstrated by EE renewing its own contract with P4u after their alleged collusion, and by Vodafone also increasing its supplies through P4u thereafter. The decisions of Vodafone and EE were both made in the important context of CPW's merger with Dixons Retail plc ("Dixons"), the dynamics of which – when combined with P4u's relative inability to offer attractive terms due to its heavy debt burden – made exclusive deals with CPW significantly more attractive in financial terms. Further, the decision-making processes of each of Vodafone and EE demonstrated a lack of insight into the other's plans. Vodafone was particularly concerned about being outflanked by EE and left as the "last man standing" with a weakened P4u, and conversely sought a competitive advantage over EE by securing "first mover advantage" with CPW. EE's decision-making was strongly driven by the "game changer" of the CPW/Dixons merger and the

financial attractiveness of the improved terms it secured from CPW, but its analysis also assumed that Vodafone would remain with P4u following Vodafone's own contract renewal date in 2014.

22. The judge heard from 41 witnesses of fact, as well as four experts. There was also a very significant body of documentary evidence. The judge noted that witnesses were giving evidence about events that took place between 8 and 10 years before the trial. He reminded himself of the observations in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) about the reliability of memory and the need to focus on documentary evidence, the further comments in *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 ("*NatWest v Bilta*") at [50] and [51] about the limitations of that approach where documentary evidence is lacking, and comments of Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] I Lloyd's Rep 1 at 57 about the assistance provided by considering motives and overall probabilities alongside documentary evidence. He reflected these points in a careful self-direction at [47]. He also observed at [48] that some of the short text and email messages included in the documentary evidence were open to different interpretations, that witnesses' interpretations of what was meant at the time were often speculative and that in many cases "the obscurity of the text means that it does not provide a reliable basis for any inferences to be drawn".

23. The judge also considered the approach to witness and documentary evidence that was not available, from which P4u sought to draw adverse inferences. The judge relied on comments made by Lord Leggatt in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863 ("*Efobi*") at [41] about the common sense approach to be taken to the absence of a witness, and applied the same approach to the absence of documents. Relevantly for this appeal, in what the judge described as an "arrogant disregard" for the seriousness of the allegations made, Telefonica had failed to adopt appropriate document preservation procedures when the allegations were first made against it, and for some time thereafter.

24. After directing himself as to the law, the judge made some observations about the culture and attitude of the MNOs to competition law, concluding that a number of senior executives had paid "scant regard" to recommended precautions as regards discussions with competitors (such as agreeing agendas and keeping accurate records), the prevailing attitude being that they were responsible people who knew the boundaries ([94] and [95]). However, the judge did not conclude that the evidence showed any "general culture" of disregarding competition law requirements ([96]).

25. The judge went on to record that it was undisputed that the MNOs did not like the strength of the indirect retailers in the UK market, the (associated) poor profitability of that market relative to other major European markets with which the MNOs and their shareholders were familiar, and the lack of product differentiation between networks characterised by sales by the indirect retailers ([97]-[99]). There was therefore a "common interest to reduce [the defendants'] reliance on indirect distribution" ([100]). But there was a "prisoner's dilemma" in the form of a significant risk that an MNO who ceased to supply an indirect retailer would lose market share, since the relevant retailer could offer connections through other MNOs or MVNOs ([101]). This had been borne out by earlier attempts to cease supplies to P4u or CPW in 2006 ([102]). A unilateral exit therefore involved "significant risk", but businesses take risks and the existence of the dilemma did not preclude such a step ([103]).

Alleged O2 and EE collusion in 2012

26. Section G of the judgment, at [104]-[235], considers the alleged collusion between O2 and EE in 2012. It describes how O2 commenced a review of the distribution market towards the end of 2011, in the context of concerns about its profitability. Negotiations with P4u for an agreement to supply new connections, replacing the agreement expiring in January 2013, also commenced in spring 2012. The judgment contains detailed findings about the development in O2's thinking over the period that followed, ultimately leading to a provisional decision to exit from P4u at an "off-site" meeting on 12 and 13 September 2012.

27. The findings included a recognition that significant changes were needed to improve profitability, dissatisfaction about the terms that P4u was prepared to offer (including in comparison with CPW) and both criticism from O2's parent, Telefonica, of a plan proposed by O2 that rejected exit from the indirect retailers on risk grounds and a clear indication by Telefonica that O2 needed to be bolder in its decision making. Notably, the evidence indicated that, in contrast to O2's "risk averse" approach, executives at Telefonica considered that if O2 took a bold move as regards indirect retailers others would probably follow, and that if withdrawal did not work out then O2 could go back in with the indirect retailers ([119], [121] and [122]). However, it was noted that exit from CPW would be prohibitively expensive since O2 had recently signed a new agreement with them. A further challenge was that it was known that EE was about to introduce a 4G offering, ahead of O2's ability to do so.

28. At the off-site meeting, the P4u deal team at O2 recommended a one year deal with P4u by way of compromise, but this was not accepted. Instead, a provisional decision was made not to renew either contract with P4u when it expired, subject to "the degree of confidence to find substitute volumes" ([132]). The steps O2 then took included discussions with CPW to provide additional connections ([139]). As already noted, P4u was informed of O2's intention not to renew the contract for new connections on 16 October 2012, but the door was left open to allow further discussion. By December 2012, however, O2 was reconciled to not reaching a deal with P4u and, as the judge found, saw an exit as presenting a potential longer term opportunity, notwithstanding the risk ([142]).

29. The judge's detailed description of the evidence and factual findings relating to the Landmark lunch and the events that followed it are at [147]-[201]. The judge explained that the background to the lunch was a dispute over the impending launch of EE's 4G network in advance of an auction of spectrum that would enable other MNOs to offer 4G, a launch which O2 and Vodafone had attempted to block. The 4G spectrum issue was the first topic of conversation, but Mr Dunne started talking about 4G pricing strategy, which made Mr Swantee nervous and uncomfortable. Mr Swantee started to record the conversation on his iPad, without informing Mr Dunne, and spoke to EE's General Counsel, Mr James Blendis, about it following his return to the office. As discussed in further detail below, the judge found that Mr Dunne raised the subject of the indirect retailers.

30. Unfortunately, both the recording and a transcript of it prepared by Mr Blendis from the iPad were subsequently lost. However, there was an email from Mr Blendis to Mr Swantee dated 25 October 2012 and a "script" that Mr Blendis prepared in November 2012 for meetings with his counterparts at O2 and Vodafone UK. The judge found that the email and the script were the "nearest to a contemporary account" and that the email,

which was "closest to a contemporary document", reflected not only the transcript of what was an unclear recording but the account that Mr Swantee had given to Mr Blendis shortly after the lunch ([194] and [195]).

31. The context for the email and script included both the Landmark lunch and other approaches to Mr Swantee. On 10 October 2012 Mr Swantee received a call from Mr Laurence of Vodafone UK, and two days later a call from Mr Andrew Harrison, CPW's CEO. Both calls concerned EE's 4G pricing and both made the same proposal that EE should charge a £10 premium per month for 4G, rather than £5 as EE proposed. Mr Laurence had met with Mr Dunne earlier on 10 October, and the judge found that it was highly likely that they discussed the phone call that Mr Laurence then made to Mr Swantee ([238]). This is reflected in Mr Swantee's evidence of what was said on the call about Mr Laurence and Mr Dunne having the "same concerns" about aggressive pricing by EE ([165]). The judge accepted that Mr Swantee was surprised and angry, that he did not engage and that he contacted Mr Blendis again to inform him about the calls, which the judge unsurprisingly found to have been coordinated ([165]-[169]).

32. The judge also found that at some point in November 2012 Mr Swantee received a telephone call from Mr Dunne about Apple, which also made Mr Swantee angry and led to an immediate further discussion with Mr Blendis. The judge found at [173] and [174] that Mr Dunne had also spoken to Mr Laurence and that what Mr Dunne was seeking to do was to encourage the MNOs to adopt the same strategy towards Apple of conducting negotiations at a group rather than individual country level.

33. Mr Blendis's concerns about the various approaches led him to consult a competition partner at Slaughter and May, Mr Michael Rowe, to whom he first spoke on 17 October 2012. Mr Rowe's advice is reflected in both the email dated 25 October and the "script". (EE waived privilege in relation to Slaughter and May's advice.)

34. The judge set out the material parts of the email at [158] and [177]. They are as follows:

> "At the lunch with Ronan Dunne (RD), RD raised a concern about value in the market, and concerns about the pricing strategy behind 4G. He was keen to emphasise that the opportunity of 4G was to establish a pricing structure that recognised its enhanced value. He raised a difficult scenario whereby discounting on 3G by other competitors and/or retail channels could lead quickly to a reassessment of that premium pricing in order to respond, and that would devalue the market.
>
> He believed the risk of this was particularly acute with the indirect channels, for example Carphone Warehouse, and that an excess of supply in the distribution market contributed to that risk. He appeared to suggest, you believe, that such discounting could be de-risked if that excess of supply was dealt with in some way. RD talked about making some 'unilateral steps', and talked about playing some 'big cards'. Your concern was that the implication of that might have been to suggest they were willing to pull some volume from the indirect channels with a view to protecting that value, but wanted to de-risk that volume being taken up by EE.
>
> While you found the discussion surprising, you believe you were careful not to respond on those points, other than to talk in general about your public

strategy for EE, to increase market share and to grow your business. You have said to the extent that you understood what he was trying to say, which at the time was difficult to piece together, you did not agree with any of his suggestions or take up the point in any way so as to suggest agreement or acceptance of any proposals.

[Mr Blendis then referred to the calls made to Mr Swantee on 10 and 12 October.]

I have said that in broad terms these conversations raise the prospect of collusion, and anti-competitive agreements between you, which is extremely serious. While you have made it clear you have no intention of taking direction from these conversations, nor did you believe you gave or implied any complicity or agreement to those propositions, and indeed that you purposely avoided any impression that you were open to coordination of behaviour, we have since considered whether you should have taken further steps to rebut those proposals, and whether we should now do so, informally or formally.

The options we discussed were;

(a) An informal conversation with all parties, to express your concerns in retrospect at the possible intentions of the communications, and to firmly rebut any notion of complicity or agreement with those proposals;

(b) A more formal meeting, possibly with lawyers, to present the same feedback and clarify our position, and also warn that further dialogue or communication in that vein would inevitably force us to make a more formal disclosure to the competition authorities; or

(c) A disclosure of some form directly to the competition authorities; or

(d) Document these conversations, monitor their behaviour going forward, and prepare a more robust response should any such conversations occur again in the future.

I have since spoken to external competition legal experts, at Slaughter & May, and in conclusion of those discussions my advice is that on the basis of the discussions as reported, it would be acceptable to adopt option (d).

Option (c) would mean that we would have to make admissions to the competition authorities of unlawful behaviour, and I do not believe that is appropriate given the conversations and circumstances.

Option (a) and (b) are something we could think about going forward, but the risk is that this causes a protective response from those parties, possibly even some form of whistleblowing process themselves, which would put us in a more difficult position (having not taken that initiative ourselves).

> Given that no indication has been given to the parties involved that we were in any way intending to follow up on their suggestions or approaches, and in fact have not done so (clearly with the published pricing this week not reflecting any agreement with those proposals), the risks of any action being warranted against you or EE for your part in those discussions is contained and moderated. To the extent that you have flagged them to me, you have adopted the right course of action, and the record of that, and our agreed plan going forward, is sufficient for the time being.
>
> I will follow up with a high level script for you to review, which can form the basis of your response for any future similar calls or meetings. I would also suggest that you avoid any scenarios where this is more likely to occur, in particular one to one meetings without other colleague involvement or legal participation."

35. The (separate) script that Mr Blendis prepared for meetings he then had with his counterparts at O2 and Vodafone followed further discussion with Mr Rowe after Mr Dunne's approach about Apple, in which they agreed that it was necessary to escalate EE's response. One of the bullet points in the script was:

> "Indications of intentions to encourage certain collaborative behaviours included references to actions by o2 that would otherwise be highly sensitive and confidential to the o2 business, and could only have been made to influence decisions by EE to support such actions. For example with reference to value in the distribution space, o2 was indicated to be 'willing to play some big cards'."

36. The core factual findings in relation to the Landmark lunch are at [196]-[200]. The judge found at [196] that Mr Dunne had referred to O2 taking some "unilateral steps" and playing some "big cards", but this was not explained further by him and there was no reference to P4u. The comment in the email that "the implication of [Mr Dunne's remarks] might have been to suggest they were willing to pull some volume from the indirect channels…but wanted to de-risk that volume being taken up by EE" was probably Mr Swantee's interpretation of what was being said. The judge went on:

> "197. Taking all that into account, I do not think that Mr Swantee fundamentally misunderstood or misinterpreted what Mr Dunne was saying at the time. Mr Swantee is clearly highly intelligent, he had immense experience of the telecommunications industry, and he gave his evidence very frankly. Mr Dunne made no mention of P4u, nor did he indicate that O2 were contemplating an exit from an indirect retailer. But, on balance, I consider that he was sounding out Mr Swantee to see whether, if O2 reduced its reliance on the indirect channel, EE might support that move to 'preserve value' in the market. The fact that Mr Dunne did not spell this out in clear terms does not, in my judgment, preclude a finding that this was an invitation to collude: there need not be precision or specificity if he was conveying a message which his competitor could understand."

37. At [198] the judge referred to aspects of the surrounding circumstances that he considered supported his conclusions about what had happened. Relevantly for this appeal, one of

these, at [198c)], was a text message sent by Mr Mark Evans, O2's CFO, to Mr Dunne on 2 January 2013 which read:

> "Our gross connections through Indirects were very high potentially as a result of EE in dispute. Reassuring Olaf [Mr Swantee] given our impending move may be helpful to strengthen the Operators resolve against the Indirects."

The judge found that was consistent with Mr Dunne having attempted to persuade Mr Swantee to "support O2 in an impending move regarding indirect distribution".

38. At [199] the judge rejected a submission by Mr Hoskins KC, for O2 and Telefonica, that Mr Dunne could have been referring to a range of other things, finding that:

> "…although Mr Swantee could not tell to what degree O2 might reduce volume through the indirect channel, and whether that would involve P4u or CPW or both, he had correctly understood the thrust of Mr Dunne's remarks."

The judge then said this:

> "200. I accept Mr Swantee's evidence that he did not say anything during the lunch that could have given Mr Dunne encouragement that EE would go along with what Mr Dunne was suggesting. He essentially did not engage and remained passive while Mr Dunne was speaking, until the conversation moved on to [a different topic]. In that regard, I reject the submission of Mr MacLean KC, made in his oral reply in closing, that in a meeting 'there is inherently a degree of reciprocity'. In my view, that is not necessarily the case as regards every topic which one side might raise. And Mr Swantee was clearly so alarmed and uneasy about what Mr Dunne was saying that, when the opportunity arose, he started recording it, and went with that recording to see EE's General Counsel afterwards. That is not the conduct of someone who is prepared to go along with an anti-competitive proposal. I find that Mr Swantee had absolutely no such intention and he gave no such indication."

39. The judge then analysed whether what had occurred amounted to a "by object" infringement. He decided that Mr Dunne's comments were wholly vague and could not reasonably be seen as benefiting EE by removing uncertainty as to O2's strategy ([208]). Further, the required element of consensus was not present. His conclusion on that, in the final part of [217], was as follows:

> "…Although I have found that Mr Dunne's remarks implied that O2 may seek by a 'big move' to reduce its reliance on the indirect channel and implied that he sought reassurance or support from EE, I have concluded that the remarks were too vague to remove uncertainty in EE as to O2's future conduct and I do not think that the circumstances were such that Mr Dunne could have inferred from Mr Swantee's silence any form of acquiescence or a consensus to cooperate."

40. The judge therefore concluded that the first of the three elements needed for a concerted practice, concertation, was not present. It was therefore not necessary for the judge to consider whether EE had "publicly distanced" itself from O2's anticompetitive approach

so as to avoid being a participant in a concerted practice, but he went on to do so, concluding that public distancing had not occurred. Relevantly for this appeal, in discussing that issue the judge said this in the course of rejecting an argument that Mr Swantee's body language at the Landmark lunch (or a later email) was sufficient to show that he would not participate in any anticompetitive arrangement:

> "225. Moreover, it does not appear that Mr Dunne was left with the impression that EE was objecting or wholly uninterested. If he had felt that Mr Swantee was clearly opposed to any kind of anticompetitive exchange, Mr Dunne would hardly have called him some weeks later seeking to exchange confidential information regarding their companies' negotiations with Apple: paras 170-171 above. It would also be inconsistent with Mr Evans' text message to Mr Dunne of 2 January 2013 suggesting that they should reassure Mr Swantee as part of strengthening 'the resolve against the indirects': para 198.c) above."

41. At [231] the judge considered the third element of concerted practice, causal effect, and concluded that the *Anic* presumption was engaged but rebutted as far as EE was concerned, because it signed a new three year deal with P4u on 10 October 2012, just three weeks after the Landmark lunch, an agreement that was then amended in December 2012 to increase the volume that EE sold through P4u. On the basis of his finding that "Mr Swantee made no disclosure to Mr Dunne of EE's position, nor did he offer to give any support from EE for O2's strategy" the judge saw no scope for the presumption to apply as regards O2 ([232]).

42. The judge also concluded at [233]-[235] that, even if there had been a concerted practice and thus a "by object" infringement, it had not been shown that O2's decision-making had been materially influenced by EE. In other words, causation under domestic law had not been demonstrated. The judge observed at [234] that Mr Dunne could not "possibly have regarded [Mr Swantee's passivity] as indicating that EE would support O2 if it exited from an indirect retailer in general, or from P4u in particular". The judge also relied on the reference in the email set out at [46] below to Mr Swantee's disinclination to discuss distribution plans and a view that Mr Dunne would have appreciated that Mr Swantee would need to discuss any initiative with colleagues.

Alleged O2/Telefonica and Vodafone collusion

43. In section H of the judgment, at [236]-[245], the judge considered and rejected an allegation of collusion between O2 and Vodafone in 2012, centred on the meeting Mr Dunne and Mr Laurence had on 10 October 2012 (see [31] above). As already indicated, the judge found that this meeting included a discussion about 4G pricing. He accepted that it was possible that Mr Dunne had also made a similar approach to the one he had made to Mr Swantee about the indirect retailers, but this was speculative and there was a "wholly insufficient basis on the evidence to support such a finding on the balance of probabilities" ([241]).

44. Section I of the judgment, at [246]-[311], covers other aspects of the allegations of collusion between O2 (or Telefonica) and Vodafone, including in the period leading up to O2's notification to P4u on 10 October 2013 that it would not renew their remaining agreement (see [12] above).

45. The judge found at [251], based on O2's internal documents, that the decision to terminate the remaining agreement derived from its developing strategy of enhancing its direct sales channel and reducing its dependence on indirect retailers. He went on to describe the evidence in detail at [252]-[269]. In outline, this evidence showed the development in O2's thinking between mid-June 2013, when various scenarios were considered, and 9 September 2013 when a decision was reached that O2 should exit from P4u in full on expiry of the contract. It was this decision that P4u was informed about on 10 October, but in fact the required approval from Telefonica was only obtained later, on 25 October, in what the judge found was not a foregone conclusion due to concerns about O2 becoming over-dependent on CPW.

46. The judge then considered an important piece of evidence relied on by P4u in support of its allegation of collusion between Mr Colao and Mr Alierta in 2012 and Mr Humm and Ms Castillo in 2013 (see [13] b) and c) above). This was an email sent on 31 January 2014 by Mr Timothy Whiting, the CEO of P4u, to its Chief Legal Officer, Mr Steven Lloyd, shortly after a private discussion Mr Whiting had with Mr Dunne at the end of a larger meeting between senior executives of P4u and O2. It read:

> "During my meeting with Ronan [Dunne] on 27th January I witnessed some concerning potential anti-competitive behaviour. We were discussing a 3 month extension to our existing deal to discuss further commercial terms. Ronan gave one of the reasons for not wanting to do this was that Cesar Alierta Izuel (CEO, Telefónica) had given commitments to Vettorio Colao (CEO, Vodafone) and Eva Castillo Sanz (CEO, Telefónica Europe) the same commitments to Phillip Humm (Regional CEO, Vodafone Europe). He went on to say that he was less sure of the intentions of EE with respect to independent distribution because Olaf Swantee (CEO, EE) was not inclined to discuss EE distribution plans. I believe this behaviour to be inappropriate but do not think we should do anything at this time at risk of damaging network relationships."

47. The judge accepted Mr Whiting's account of the discussion, namely that Mr Dunne had said these things. However, having considered the evidence he also concluded at [310] that Mr Dunne had made up the comments about commitments made to Mr Colao and Mr Humm to give the impression that the decision not to renew the remaining agreement with P4u was out of his hands.

48. The judge considered the meeting between Ms Castillo and Mr Humm that took place on 20 September 2013 at [287]-[295]. There was a manuscript note by Mr Humm made either before or during the meeting which read, under the heading "UK", "out distribution". The judge found that Mr Humm wanted to find out how Ms Castillo felt O2 was doing having reduced its reliance on indirect distribution, and that he raised that topic. However, the judge also found that there was no commitment by Ms Castillo as alleged. Her briefing notes indicated that she had not expected to talk about that subject. Mr Humm was also in no position to give a commitment because Vodafone UK had not begun to address the issue (see further below). Picking up on P4u's recognition in its pleadings that it was inherently unlikely that sensitive information or a commitment would be provided without some reciprocity, it would have been "extraordinary" if Ms Castillo had given a commitment as alleged, and in any event at the time of the meeting Telefonica had not yet been convinced that O2 should cease dealing with P4u (see [45] above).

49. The judge concluded at [292] that, at most, Ms Castillo told Mr Humm that O2 was doing fine and its move to reduce reliance on indirect retailers had not caused problems, without disclosing future strategy. Further, even if future strategy had been disclosed then the *Anic* presumption was rebutted (on this, see further [269] below). Vodafone UK's decision to leave P4u was reached many months later, after significant developments (see below) and well after O2's exit became public. In addition, in November 2013, the same month that Mr Whiting of P4u told Vodafone in confidence of O2's likely exit, Vodafone signed an "overlay" agreement with P4u for additional volumes.

50. The judge's findings about the alleged collusion between Mr Alierta and Mr Colao are at [296]-[304]. In short, the judge rejected the allegation, having found Mr Colao to be a very impressive witness. The judge found that Mr Colao's firm denials were supported, among other things, by documentary evidence of his scepticism when the proposal for an exclusive deal with CPW was raised with him internally in June 2014 (see [60] below) and by the fact that, in September 2012 when the discussion between Mr Alierta and Mr Colao was alleged to have taken place, Vodafone had itself developed no strategy regarding P4u or CPW. As regards Mr Alierta, he had provided a witness statement but could not give oral evidence for health reasons, and the judge declined to draw an adverse inference from Telefonica's failure to adopt appropriate document preservation measures.

51. The judge briefly returned to the topic of alleged collusion between Vodafone and O2 after his consideration of internal Vodafone evidence relevant to its decision to leave P4u (discussed below). He said this at [422]:

> "It is clear from the account of the development of Vodafone UK's strategy that as at January 2014 Vodafone UK was not seriously contemplating an end to its arrangements with either P4u or CPW. It was seeking to reduce its reliance on the indirect retailers and to strengthen sales through its direct outlets, but that was well-known to be the objective of all the MNOs. However, the decision by Vodafone UK to seek an exclusive supply agreement with CPW and exit from P4u came several months later in 2014, in the circumstances described above. And if Vodafone did not disclose such information to O2/Telefónica, I do not consider that O2/ Telefónica would have disclosed its confidential commercial strategy to Vodafone. It is appropriate to repeat the quotation from P4u's Re-Amended Particulars of Claim, with which I agree:
>
> > '… it is inherently unlikely that an undertaking would provide a competitor with confidential and commercially sensitive information and/or a commitment as to its future conduct on the market unless it had received and/or expected to receive corresponding information and/or commitments in return.'"

P4u's financial position and the Dixons/CPW merger

52. Section J of the judgment, at [312]-[377], considers P4u's financial position. The judge describes its significant debt burden, which included secured notes listed on the Irish Stock Exchange and which was materially increased in 2013 by an issue of loan notes ("PIK" notes) to fund a substantial dividend. Although O2's departure did not significantly weaken P4u since O2 had been a much less important network for P4u than EE or Vodafone, and P4u also signed the "overlay" agreement with Vodafone just

referred to, it did leave P4u more exposed given its dependence thereafter on just two MNOs.

53. There was a further substantial development on 24 February 2014, when it was announced that Dixons was in merger talks with CPW. A further announcement that merger terms had been agreed was made on 15 May 2014. The proposed merger was cleared by the European Commission in June 2014 and completed in August 2014. This was a material blow for P4u. Its most significant competitor, CPW, was greatly strengthened by the merger. P4u would lose the 160 "stores-within-stores" that it previously operated within Dixons outlets, and conversely CPW's footprint would materially increase, making it what a P4u witness accepted would be a "formidable" competitor. The financial market reacted negatively as far as P4u was concerned, and there was a downgrading of the PIK notes.

Vodafone's decision to leave P4u

54. Section L of the judgment, at [329]-[425], contains a lengthy and detailed chronology and analysis of Vodafone's decision not to renew its contract with P4u, taking account of a wealth of contemporaneous documents. I will not attempt to summarise all aspects, and will revert to some points in more detail when discussing the grounds of appeal.

55. A group-wide strategy was launched in November 2013 which aimed to strengthen Vodafone's presence in direct distribution. In line with that, Vodafone UK's new CEO, Mr Jeroen Hoencamp, aimed to reduce the proportion of distribution made via indirect retailers and to improve Vodafone's return on investment under its arrangements with both P4u and CPW.

56. Negotiations for an extension to the agreement with P4u (the minimum term of which was due to expire on 31 October 2014) started in early 2014. There were detailed discussions. It became apparent that the parties were far apart. The judge found at [341] that the terms on offer from Vodafone UK were "impossible" for P4u given its overheads and financial situation. A greater understanding of the financial constraints on P4u, which were explained by Mr Whiting in detail at a meeting on 11 March, led Vodafone UK to start to consider alternative options with CPW, which had previously not been its preferred partner. CPW was also keen to accelerate its own contract renegotiation with Vodafone to garner support for its merger with Dixons.

57. Nevertheless, discussions continued between Vodafone UK and P4u, with P4u offering various terms including exclusivity. Mr Humm summarised his understanding of the talks between Mr Hoencamp and Mr Whiting in an email dated 27 April as being that "the respective proposals are still quite apart". By late May the assessment of Vodafone UK's head of indirect distribution, Philip Roberson, was that no further movement was possible for Vodafone UK on financial terms ([351] and [367]).

58. In the meantime, on 16 April 2014, Mr Humm authorised Vodafone UK to table an initial proposal with CPW, and Vodafone began modelling potential terms in late April. Mr Roberson's unchallenged evidence was that an offer of exclusivity (meaning that CPW would be Vodafone's sole indirect retailer) was the key to unlocking a new deal with CPW, because it would give CPW a significant competitive advantage ([357]). Only an exclusive deal would deliver the improved return on investment that Vodafone wanted ([370]). The judge found that by the start of May a deal with CPW had become Vodafone

UK's preference, provided suitable terms could be agreed ([360]). However, parallel negotiations continued with P4u since it was not clear that CPW would agree such terms, in what ultimately became a "difficult balancing act" ([373]).

59. A memorandum from Mr Roberson dated 30 May compared what was on offer from CPW and P4u, noting "few compelling reasons" to trade with P4u after the expiry of the existing contract ([368]). As well as financial comparisons it noted the risk of being "out flanked" by EE if Vodafone did not contract with CPW. This was a concern that EE might agree its own exclusive deal with CPW, leaving Vodafone exposed to a distressed P4u and having little leverage with CPW. This is referred to elsewhere as the "last man standing" concern.

60. The decision to conclude an exclusive agreement with CPW required approval at Vodafone Group level. Mr Colao was sceptical when briefed on 9 June 2014, concerned about reinforcing CPW as a more powerful indirect retailer and not accepting an assumption that P4u would "fall over", a concern that he continued to hold thereafter ([377] and [382]). He wanted to consider the alternative of an exclusive deal with P4u. This led to a presentation by Mr Hoencamp and others to Vodafone Group executives, including Mr Colao, on 17 June which considered the two options for exclusivity, as well as continuing to trade with both CPW and P4u, with evaluations presented on the alternative bases of P4u continuing and ceasing to trade.

61. The presentation described the (material) benefit of an exclusive deal with CPW, which was not dependent on P4u ceasing to trade ([381]). The slides also referred to Vodafone UK's exposure to an "EE first move" of going exclusive with CPW (the last man standing point), which Vodafone could avoid by its own exclusive deal with CPW ([380]). Mr Colao was persuaded to give conditional approval to proceed with CPW. In other words, it was only on 17 June 2014 that there was a (conditional) decision by Vodafone to leave P4u. Following further negotiations, on 17 July 2014 Vodafone UK signed an agreement with CPW to supply it on an exclusive basis as from February 2015. However, this remained confidential and, in what the judge found at [391] was a subterfuge aimed at discouraging P4u from pursuing an alternative strategy with BT (which was a potentially powerful entrant to the mobile market), Vodafone UK continued discussions with P4u during July.

62. P4u was informed of the true position on 6 August. There were meetings between P4u and Vodafone UK on 27 and 29 August but P4u failed to interest Vodafone UK in a revised proposal ([392]-[395]). On 1 September P4u announced Vodafone's decision to the Irish Stock Exchange ([423]). As explained below, P4u went into administration two weeks later.

63. At [399]-[411] the judge considered the specific allegations against Vodafone. He found that it was reasonable for Vodafone UK to model the possibility of P4u ceasing to trade if it lost one of its two remaining MNOs, and indeed that there was recognition that this was likely to occur if P4u did not restructure. However, a detailed analysis of the contemporaneous documents did not support a finding of "inside information" about EE's intentions ([404]). Rather, what they disclosed was the "very antithesis" of coordinated decisions by Vodafone and EE to discontinue their relationships with P4u or the disclosure or receipt of confidential information about their intentions ([411]).

64. In response to P4u's case of a change between mid-April 2014, when Vodafone UK thought that if it left P4u then P4u would survive, and early June 2014 when Vodafone UK concluded (allegedly on the basis of an exchange of information with EE) that P4u would not survive because EE would leave, the judge observed that there was "no hint" of that in the contemporary Vodafone documents either at UK or Vodafone Group level, "and much that is inconsistent with it" ([409]).

65. The judge found at [409] and [410] that documents from the first half of June showed that Vodafone UK was trying to analyse EE's position without knowing what it was, for example by referring to the scenario of EE staying with P4u on an exclusive basis or to press rumours about what EE might do. The documents also showed that the "last man standing" issue was a key concern. It was particularly acute because EE was a much larger supplier to P4u than Vodafone. In contrast, if Vodafone could reach its own exclusive deal with CPW then it would have "first mover advantage" and would be in a good position to secure favourable terms. There was also a material concern (expressed, in the evidence relied on by the judge, by Ms Cindy Rose, Mr Roberson's boss) that P4u could both retain EE and do a deal with BT to replace Vodafone. As it was put to Mr Colao in the presentation on 17 June, "'Wait & See' is not a viable option" and Vodafone needed to "Mitigate risk of being locked out by EE moving first".

66. Finally in this section of the judgment, the judge referred to some additional matters. One of these was some initial discussions about a possible acquisition of P4u alone or jointly with EE, which Vodafone decided it did not wish to pursue ([412]-[414]). More significantly, at [415]-[417], there is a discussion about the position of Mr Humm. This cross-refers to the judge's conclusion in a later part of the judgment that there was no collusion between Mr Scheen of Orange and Mr Humm in a conversation on 2 April 2014 (see below at [84]-[89]), but also adds that the timing did not support the alleged inference of collusion. On P4u's case, Mr Humm would have learnt of EE's intentions to follow Vodafone in exiting P4u when Mr Scheen and Mr Humm spoke on 2 April. It was put to Mr Humm at trial that he would have shared with Vodafone UK management information he had about the UK market that would be of interest to them, and he agreed. However, if P4u was right about the collusion then Mr Humm must have kept the information to himself for months while Vodafone UK worried about what EE (or BT) might do. Further, the judge considered that Vodafone UK's continued concern about P4u "churning" customers to another network during the run-off period until its P4u contract expired was inconsistent with any knowledge of EE's intentions.

EE's decision-making

67. Section M of the judgment, at [426]-[619], contains a lengthy and detailed account of EE's decision-making process. Again, I will not attempt to summarise all aspects, but an initial point to note is that the judge observed that there was a "wealth of contemporary documentation, from within DT and Orange as well as EE, on the evolving strategy and decision-making of EE" ([431]).

68. The judge found that, like the other MNOs, EE was keen to reduce its reliance on indirect distribution and expand its direct sales channels. But Mr Swantee favoured an "evolutionary" approach which recognised that indirect retailers would continue to play a significant role, and that view prevailed at least in late 2013 and the start of 2014 ([435], [441] and [444]). That was the background to the new three-year agreement with P4u in October 2012 and a new agreement with CPW in December 2012. Further, the agreement

with P4u was amended in December 2012 to increase volumes, taking account of O2's departure. At the time P4u was regarded as strategically more important than CPW. CPW was more focused on 3G connections rather than EE's 4G offering, and there was also a better working relationship with P4u ([436] and [437]).

69. EE commenced a review of its strategy for indirect distribution in the Autumn of 2013. P4u was also keen to explore possibilities, including EE taking an equity stake in P4u and an early renegotiation of the contract due to expire in September 2015. Mr Marc Allera, who during this period became EE's Chief Commercial Officer, led initial negotiations on the latter, with the objective of securing improved terms from P4u ([442]). The announcement of merger discussions between CPW and Dixons was seen as "very bad news" (due to EE's preference for P4u) but also a "real game changer" ([445]). Slides for a monthly Business Review Meeting ("BRM") on 20 March 2014, attended by shareholder representatives, record that EE was "keen for P4U to remain in the UK market" to prevent domination by the merged "retailing giant" ([446]). Although the possibility of leaving P4u was raised, EE management were against it ([449]). During this period active consideration was given to the alternative of acquiring P4u, an idea which EE management strongly promoted. For cost reasons any acquisition would need to be made jointly, with Vodafone as the only realistic co-acquirer ([452] and [456]).

70. The scenarios tabled by EE for the next BRM, on 10 April, covered 1) a joint acquisition, 2) continuing to trade with both P4u and CPW, or 3) pulling out of P4u and securing improved terms with CPW ([460]). There was significant scepticism among senior executives at Orange for option 1), in particular from Ms Marie-Christine Lambert who was strongly opposed and thought there would be an opportunity for leverage to improve terms in an exclusive deal with CPW in exchange for support for the merger. However, option 1) was not ruled out and no specific decision was reached at the meeting, the EE executives instead being pressed to do more in-depth analysis of the alternative scenarios ([473] and [475]).

71. EE's financial modelling was conducted by Mr Roger Eyre, EE's Sales Finance Director. The indirect channel part of Mr Eyre's team was led by Ms Nicola Talbot (who became Mrs Derbyshire by the date of the trial). P4u alleged that the development of the assumptions used in the modelling showed that EE had information about a planned exit by Vodafone UK from P4u, so the judge explained that he would scrutinise the evolution of the modelling in detail, noting that this was an intense period with a large number of slide decks being produced and some difficulties for witnesses in "reconstructing" their sequence ([480]). P4u's allegation focused on discussions that Mr Eyre had with Mr Allera and Mr Neal Milsom, EE's CFO, on 28 and 29 April.

72. The judge also referred to a shareholder strategy meeting between Orange and DT on 23 April 2014, notes of which referred to the CPW/Dixons merger and "discussions with Vodafone", which the judge concluded at [484] was a reference to a joint acquisition of P4u, which was still being promoted by EE management, with its shareholders pressing for more robust analysis.

73. The period leading up to the next BRM, on 21 May, was intense. EE was contending not only with the CPW/Dixons merger but a Vodafone announcement that it would open 150 new stores in the next year ([486]). Orange and DT were still frustrated by what they saw as a lack of rigour in EE's analysis, and the parties agreed to have a "drill-down" workshop on 6 and 7 May. A draft slide deck for that was prepared on Sunday 4 May

setting out seven options, with Mr Eyre producing a further set of slides summarising the financial effects of those options the following day, which his covering email stressed was work in progress. Both at trial and on appeal, P4u has placed reliance on these 5 May slides because they incorporate a change in assumptions. However, the judge found that the modelling "certainly did not assume an early collapse of P4u", since it assumed that EE would only pull out of P4u when its contract expired in September 2015 ([495]).

74. During the workshop, on 7 May, Mr Eyre circulated further slides which focused only on an enlarged deal with CPW and leaving P4u at contract expiry. The judge found that these slides contained similar assumptions to the 5 May slides, such that it was assumed that P4u would survive, but one of the areas suggested in the slides for further consideration was whether that would indeed be the case. Based on these slides the judge concluded that, by 7 May, EE was concerned about P4u's financial position but had not concluded that it would go out of business if EE left ([499]). The judge also returned to some notes made at the workshop later in his judgment, concluding that they did not indicate any inside knowledge of Vodafone's strategy (see [90] below).

75. Following direction from shareholder representatives at the workshop, Mr Eyre no longer worked on an acquisition scenario but instead focused on leaving or staying with both P4u and CPW, or leaving P4u and agreeing a larger deal with CPW. EE was also tasked to consider what would happen to P4u if EE pulled out, and how quickly.

76. On 8 May Mr Eyre sent Mr Allera and Mr Milsom an analysis of the likely effect of EE withdrawal on P4u's cash position. On the assumptions that Vodafone UK would take an additional 10% of new connections and no replacement for EE was able to pay cash upfront, Mr Eyre calculated that P4u would run out of cash some eight months after EE's withdrawal on expiry of its contract in September 2015, namely that it would run out of cash in mid-2016.

77. Draft slides for the May BRM were first produced on 12 May, which concluded that if EE did not renew its contract then P4u would cease trading in June 2016. Significant further changes to assumptions were incorporated in these slides, which were then further revised, with a material impact on the numbers ([506]-[509]). A slimmed down version was circulated on 16 May in preparation for the BRM (and a more formal Board meeting) on 21 May. Of the various alternatives considered in that version, EE's recommendation was to sign an enlarged and improved contract with CPW but continue negotiations with P4u, including the possibility of remaining with better terms and a smaller volume ([516]).

78. The judge considered P4u's allegations about the modelling assumptions at [517]-[526]. I will return to that below, but in outline he concluded that Mr Eyre was mistaken in saying in cross-examination that he thought he reached the view that withdrawal by EE would lead to P4u going out of business after his discussions with Mr Allera on 28 and 29 April, that being inconsistent with an email Mr Eyre had sent Mr Allera on 3 May. Rather, Mr Eyre's change in assumptions emerged in the slide pack produced on 12 May, following pressure from EE's shareholders ([521]). The judge also decided that EE's modelling was "clearly" not based on an assumption that Vodafone was likely to pull out at around the same time as EE, for reasons he set out at [522]. He further concluded at [523] that differences in the modelling between the presentations at the April and May BRM meetings did not give rise to the inference that by 21 May EE knew that Vodafone was likely to withdraw and that P4u was likely to collapse as a result.

79. The BRM on 21 May took place shortly after CPW and Dixons announced that they had agreed merger terms, and also announced a plan to roll out further CPW in-store concessions in Currys/PC World (part of the Dixons group). Indirect distribution was the third item on the agenda, but the minutes under that heading (and the "AOB" heading that follows it) are blank, so that there is no formal record of what was discussed. There was also a divergence of witness evidence as to what had happened. However, based in part on two contemporaneous documents and on EE's qualified recommendation reflected in the slide pack, the judge concluded at [531]-[532] that EE's management was authorised to negotiate an enlarged deal with CPW/Dixons but no firm decision was taken to withdraw from P4u. The possibility of acquiring P4u also resurfaced. The two documents were a summary note written on 22 May by Mr Gilles Deloison, an Orange executive who had not been at the meeting but was briefed by Mr Christophe Naulleau who had attended, and an email sent on 23 May by Mr Allera to Mr Stephen Harris, the Chief Corporate and Strategy Officer at EE. Both Mr Allera and Mr Harris were present at the meeting. Mr Harris was also responsible for the minutes (see further [91] below).

80. The judge then turned to consider the ongoing negotiations with each of P4u and CPW. He concluded that by 21 May EE was deliberately dragging out negotiations with P4u while focusing on securing an enlarged arrangement with CPW, with the aim of keeping the negotiations alive until a deal with CPW could be secured ([545] and [547]). The need for shareholder approval was used as a pretext. On 31 July Mr Whiting sought to exert pressure by informing Mr Swantee that the deal on the table was being withdrawn, but the result of this that the deal was put "on hold" suited EE ([550]).

81. The negotiations with CPW were initially difficult but key aspects were agreed by early July, allowing for much greater volumes and improved financial terms. Further negotiations followed, during which EE agreed to additional demands from CPW, and a contract was finally signed on 7 August. Following EE shareholder approval, the contract became unconditional on 29 August.

82. Immediately after the meeting with Vodafone UK on 29 August (see [62] above) P4u approached EE to request assistance. Over the next few days there were discussions with EE, but it declined to offer support and on 12 September formally notified P4u that it would not replace or extend its agreement following its expiry on 30 September 2015 ([424], [425] and [560]). P4u entered administration three days later, on 15 September 2014.

The "series of unfortunate events"

83. The judgment then proceeds, still in the section of the judgment dealing with EE's decision, to deal with five specific factual issues under the heading "A series of unfortunate events".

84. The first relates to the conversation between Mr Scheen of Orange and Mr Humm of Vodafone on 2 April 2014 (see [562]-[576]). On that date, Mr Scheen sent Mr Humm a text that read:

> "Hello Philipp, I would like to talk to you for 5-10 minutes max regarding a topic for the UK market. When can I call you (possibly today or tomorrow)? Thanks, Benoit Scheen (Orange Europe)."

85. Mr Humm responded that they could speak after 3pm. The telephone records indicated that they did then speak, for just under five minutes.

86. The following afternoon Mr Scheen sent a further text, as follows:

> "Hello Philipp, after review I will unfortunately not be able to come to London before several weeks. Could we then organize a 'secured' call with both of us using a new prepaid number. If we are both using a new prepaid number, the call will be secured. I could have a prepaid number being ready for tonight (to have a potential call tomorrow). Would this be a suitable solution for you? Regards, Benoit Scheen"

87. On the morning of 4 April the following exchange took place:

> "Hello benoit, not knowing what you want to discuss I feel not comfortable making these sorts of arrangements. If there is topic we need to discuss/decide suggest to arrange for a call together with a competition lawyer. Sorry best philipp"
>
> "Hello Philipp, I do not want to force you in a setup that you don't find suitable. I wanted to address a potential interesting joint opportunity on the UK market in an informal way. So, I don't think that the presence of a lawyer would be suitable at this stage. And let me re-assure you, my intends were positive and constructive. But I guess that we will have to look at it in a different way (as potential decisions will have to be taken in the coming weeks) …It is maybe a missed opportunity for our respective companies …Regards, Benoit."

88. The judge records that both Mr Scheen and Mr Humm were cross-examined intensively about this. The judge found as follows at [570]:

> "Mr Scheen eventually accepted that in their 5 minute telephone conversation on 2 April 2014, he would have told Mr Humm, at least in general terms, what he wanted to discuss. It seems to me inconceivable that after the initial text, Mr Humm would not have asked what was the 'topic for the UK market' which Mr Scheen wanted to talk about, in which case Mr Scheen would have answered the question, although I accept that he may not have entered into many details. Mr Humm accepted in cross-examination that he must have learnt enough from Mr Scheen about the topic to think that it was worthwhile having a meeting in London (where Mr Humm was based) in short order."

89. The judge rejected Mr Scheen's suggestion that he may have wanted to discuss a potential network-sharing project, finding his evidence on the exchange "evasive and unsatisfactory". He considered it likely that Mr Scheen had gone further than mentioning a "joint opportunity" (as referred to in his 4 April text) "and referred to the potential for change in the UK market following the announcement of the Dixons/CPW merger discussions", but did not go beyond that ([572]). The judge concluded that, in the context of the discussion at EE's March BRM and the further discussion of the topic planned for the April BRM, what Mr Scheen wished to discuss was whether Vodafone might be interested in a joint acquisition of P4u, but Mr Humm realised the (legal) danger and "deliberately pulled away" by a "strategically worded" message that may not have been

entirely frank. The judge concluded that "no exchange of confidential information actually occurred" ([573]-[575]). The judge also relied on his earlier conclusions that at the time neither Vodafone nor EE had agreed their strategies as regards P4u, and that for the 10 April BRM and a discussion on 16 April the presentation expressly assumed that Vodafone would remain if EE pulled out ([576]).

90. The second issue, dealt with at [577]-[589], relates to what was said by Mr Allera and Mr Milsom at the EE workshop on 6 and 7 May (see [73] above). In brief, the judge rejected the allegation that comments noted as attributed to them indicated any inside information about Vodafone UK's strategy, as opposed to pure speculation.

91. The third issue, addressed at [590]-[598], relates to the minutes of EE's 21 May 2014 BRM (see [79] above). Mr Harris could not explain why the relevant minute was blank. However, while he would usually circulate a draft of the minutes to DT and Orange for correction, there was no record of this for the May BRM in the "numerous emails". The judge concluded that there was no deliberate decision to avoid recording a discussion, and whatever the actual reason (which may have been that Mr Harris never got round to completing the minutes), the blank in the minutes did not support P4u's case.

92. The fourth issue (at [599]-[608]) related to an email sent by Mrs Derbyshire (previously Ms Talbot, see [71] above) to her boss Mr Eyre of EE on 10 August 2014, updating him following his holiday. Her email concluded:

> "Neal [Milsom] wants us to get this deck completed but the focus is P4U, he wants us to be 100% sure of the impact if P4U fold earlier than expected ie In the next couple of months. The expectation is that Voda are about to pull out…"

93. The judge concluded, on a balance of probabilities, that the information came from Mr Milsom, who may have learnt it from Mr Allera. However, he did not consider that it could be inferred that the information came from contact between EE and Vodafone UK. The CPW/Vodafone agreement had by then been signed but it was confidential and there was no reason why Vodafone UK would have wished to disclose its existence to its commercial rival.

94. Rather, there was another explanation that was "equally plausible, indeed more plausible", namely that CPW, with whom Mr Allera had spent much of July negotiating, may well have been pressing EE to agree terms by "play[ing] them off" against Vodafone UK, through indicating that Vodafone UK was also seeking an exclusive agreement with CPW. The judge recognised that this possibility had not been raised at trial but observed that, in deciding whether an inference should be drawn in accordance with P4u's case that there was an exchange of confidential information between EE and Vodafone UK, it was relevant to consider whether there was another realistic possibility, citing *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] UKSC 34, [2020] 1 WLR 3549 ("*Shagang Shipping*") at [96]-[99].

95. The judge went on to observe that the information was not very specific as to exactly when Vodafone UK would exit P4u, and that EE had continued to model P4u "going bust" as late as 31 October 2015. He commented that there was no indication that the expectation referred to by Mrs Derbyshire was conveyed to EE Board members. Rather, the slide decks for the Board meetings that approved the CPW agreement on 8 July and

14 August assumed, in their calculation of "handset cost efficiencies" (see [289] below), that P4u would remain trading until at least September 2015. The judge also accepted the following evidence from Mr Eyre:

> "If I had genuinely believed, or expected, that Vodafone were about to pull out of P4U, I would have spent the whole remainder of August 2014 intensively preparing for that scenario, and I would have been in a much better position and much better prepared, rather than being caught off-guard as I was, when I learned on 29 August 2014 that Vodafone would be withdrawing from P4U and that P4U were at risk of entering administration."

96. The judge noted that P4u relied on Mrs Derbyshire's email to support an allegation of earlier collusion, but concluded that no earlier exchange of information between Vodafone and EE took place, and further that any information obtained in early August had no material effect on EE's decision.

97. The final matter addressed under this heading, at [609]-[615], was a meeting that EE had with Ofcom on 4 September 2014. The meeting was at EE's request. The judge concluded that a slide purporting to set out a timeline of the events leading up to its decision to enter into an exclusive agreement with CPW was "very misleading" and EE's conduct was "deplorable", but that this did not "lead me to change the conclusion I have otherwise reached that its decision in effect to go exclusively with CPW did not follow any collusion or unlawful exchange of information with Vodafone UK" ([615]).

Alleged EE/Vodafone collusion: summary

98. The judge summarised his findings on the pleaded allegations that there was coordinated conduct as between Vodafone UK and EE prior to EE's 21 May 2014 BRM at [616]-[619]. A careful scrutiny of contemporaneous documents of EE and its shareholders, considered in their context, did not support that. Rather, the CPW/Dixons merger was a "game changer" which made the merged entity more attractive for EE than P4u including as regards "convergence", namely increased connectivity between smartphones and household devices, and also provided an opportunity to change the pattern of retail distribution in the UK, which had been a strategic goal of EE. An analysis of the modelling did not show that it came to incorporate an assumption that Vodafone UK had also decided to withdraw from P4u.

Expert evidence

99. Section N of the judgment, at [620]-[635], deals with expert evidence. There is no challenge to this on appeal but a few points are worth noting.

100. The judge concluded that P4u's allegations were not supported by its "economic case" that a decision to cease to supply P4u would only have been rational if there had been collusion between the MNOs. Rather, as he commented at [622], the decision-making was supported by the MNOs' "own strategic desire to reduce their reliance on the indirect retailers and strengthen the role of their direct channels".

101. The judge also commented that, so far as collusion between EE and Vodafone UK was concerned, the analysis by P4u's expert Mr David Thomas left out of account the new CPW agreement. The judge said this at [625]:

> "CPW was offering both substantially increased volumes over their previous agreements and substantially improved financial terms. The volumes to which CPW was ready to commit (supported by a liquidated damages clause) were fundamental to Vodafone UK and EE's modelling. And the financial terms of course materially improved the customer NPV [net present value]. It was only when Vodafone UK and EE had secured a satisfactory deal with CPW that they felt able to exit from P4u."

102. Further, Mr Thomas had also left out of account the MNOs' plan to increase direct sales, which was a "key part of their strategy and approach"; for all three MNOs the decision-making "became part of a wider commercial strategy to strengthen their direct channel and reduce their reliance on indirect retailers" ([627] and [631]). Further, the CPW/Dixons merger "made CPW an inescapable indirect retail partner", with materially better terms than P4u was offering and in the context of a concern on the part of both Vodafone UK and EE of becoming the "last man standing" in P4u (see [59] above and [632] and [633] of the judgment).

Other matters

103. The final parts of the judgment deal with whether Orange and DT were jointly and severally liable for EE's conduct, an allegation of breach of contract by EE and tort claims against DT and Orange. These aspects are not of direct relevance to the appeal. In outline, the judge held at [646] that if EE had violated competition law then DT and Orange would also be liable. This was on the basis that they formed part of a single undertaking with EE, since both exercised decisive influence over it. The judge also rejected the allegation of breach of contract, such that related claims in tort for inducing a breach of contract and for unlawful means conspiracy fell away.

The grounds of appeal

104. In outline, the six grounds of appeal for which permission was granted (out of the eight for which permission was sought) are as follows:

Ground 1: The judge erred in concluding that the exchange between Mr Dunne and Mr Swantee at the Landmark lunch did not amount to concertation, because he adopted too restrictive an approach to that concept, particularly as regards the need for reciprocity and the effect of passivity.

Ground 2: The judge erred in relation to the scope and effect of the *Anic* presumption and the proper approach to related causation issues. In relation to the Landmark lunch, the alleged errors included wrongly proceeding on the basis that the *Anic* presumption could be rebutted by anything other than public distancing or a report to the competition authorities. Further, the judge's reasoning on domestic causation failed to reflect the effect of the application of the *Anic* presumption.

Ground 3: In relation to the alleged collusion between EE and Vodafone in 2014, the judge impermissibly rejected P4u's case based on a factual theory of his own that had not been canvassed at trial.

Ground 4: Given the significant delay in handing down the judgment, the standard of appellate review to factual findings was that identified in *NatWest v Bilta*. There were six

areas where the judge had failed to consider or take into account, or had mis-recollected, material evidence. Those areas were: a) the content of the discussion at the Landmark lunch; b) whether there had been an anticompetitive discussion between Mr Dunne and Mr Laurence; c) the content of the exchange between Mr Humm and Ms Castillo; d) the extent to which what the judge found that Mr Dunne told Mr Whiting of P4u about collusive communications between Vodafone and Telefonica was true; e) the content of the communications between Mr Humm and Mr Scheen; and f) whether Vodafone and EE colluded by exchanging confidential information in 2014.

Ground 5: In respect of the findings referred to in ground 4, the judge also adopted a compartmentalised approach that failed to consider evidence in the round, disregarding inherent probabilities and motivations.

Ground 7: The judge erred in his approach to drawing adverse inferences from Telefonica's failure to adopt appropriate document preservation measures, including by wrongly failing to conclude that the loss of documents was deliberate in the relevant sense and failing to decide that, as a minimum, Telefonica should not be permitted to rely on the absence of internal Telefonica documents that supported P4u's case.

105. We heard oral submissions from Mr MacLean KC and (on ground 7) Mr Draper, for P4u, from Mr Pickford KC for EE, from Ms Demetriou KC for Orange, from Mr Williams KC for Vodafone, from Mr Hoskins KC for O2 and Telefonica and from Mr O'Donoghue KC for DT. We also heard submissions from Mr Bailey for the Competition and Markets Authority ("CMA") which intervened pursuant to paragraph 7.1(5) of Practice Direction 52D (which permits intervention on issues relating to the application of Chapter I or II of Part I of the Competition Act 1998) and was granted permission to make oral submissions. We are grateful for Counsel's assistance, and for the helpful coordination between Counsel for the respondents to ensure that submissions did not unnecessarily overlap.

106. Before proceeding further, I need to say something about DT's position. DT originally filed a Respondent's Notice in relation to P4u's direct allegations of collusion against it (as opposed to the allegation that it was jointly and severally liable for EE's own infringements on the basis that DT and Orange formed part of a single undertaking with EE). The Respondent's Notice sought to uphold the judge's conclusion on those direct allegations for additional reasons. However, the Respondent's Notice fell away because P4u did not challenge the judge's findings that DT executives were not themselves involved in collusive behaviour.

107. Relatively shortly before the hearing, on 8 April 2025, DT applied for permission to file and serve a supplementary skeleton argument. That skeleton sought to advance a further argument to the effect that, given that the actions of DT executives was not being directly challenged, the involvement of DT executives in exchanges or meetings with EE and Orange (including in their capacity as directors of EE) also precluded a finding of collusion against other parties in relation to those events. P4u objected on the basis that this argument was both not advanced in a Respondent's Notice and was raised too late.

108. Given the conclusions that I have reached it is not necessary to say anything about this further challenge.

Ground 1: whether there was concertation at the Landmark lunch

109. Ground 1 is that the judge erred in law in failing to conclude that what occurred at the Landmark lunch amounted to concertation, satisfying the first of the three elements for a concerted practice (see [18] above).

110. The alleged error that is the focus of ground 1 is that the judge wrongly failed to recognise that a passive response to the disclosure of confidential business information is sufficient to infringe competition law by reference to a reduction of uncertainty for the disclosing party. P4u maintains that Mr Swantee's passive response to Mr Dunne's approach itself conveyed useful information to Mr Dunne (and therefore to O2) which reduced uncertainty for O2. Although the oral arguments – including from Mr Bailey at the CMA – at times ranged well beyond this into the more obvious point of what Mr Swantee (and therefore EE) derived from what Mr Dunne said to him and whether concertation existed on that basis, Mr MacLean expressly confirmed that ground 1 was directed at the judge's treatment of the passivity of Mr Swantee's response to Mr Dunne's approach and its impact on O2. I will therefore address that first, despite it not being the obvious starting point in the analysis, before returning to arguments related more directly to Mr Dunne's approach and whether that gave rise to concertation, irrespective of any effect on O2.

The effect of Mr Swantee's passivity as far as O2 was concerned

111. In more detail, Mr MacLean submitted that Mr Dunne's anticompetitive approach disclosed sensitive business information, and that both the approach and the information were passively accepted by Mr Swantee. This provided O2 with information that it could not have obtained lawfully, namely that EE was not "objecting to or wholly uninterested" in taking a strategic and cooperative approach to reducing volume from indirect distributors (the reference to not "objecting or wholly uninterested" is taken from the judgment at [225]). The effect was to create conditions of competition which did not correspond to the normal conditions of the market. At the very least Mr Dunne had managed to rule out hostility on the part of EE to the idea of strategic action against indirect distribution. He gained a valuable insight into Mr Swantee's attitude both to the disclosed information and to the invitation to collude.

112. In *Argos Ltd v Ltd v Office of Fair Trading* [2006] EWCA Civ 1318, [2006] UKCLR 1135 ("*Argos*") this court considered the rationale and requirements for a concerted practice in some detail. Giving the judgment of the court, Lloyd LJ set out the "essential propositions" at [21] as follows:

> "(i) The object of the inclusion of concerted practices in the prohibition is to bring within Article [101] a form of coordination between undertakings which, short of the conclusion of an agreement properly so-called, knowingly substitutes practical co-operation between the undertakings for the risks of competition. A concerted practice does not have all the elements of an agreement but may arise out of coordination which becomes apparent from the behaviour of the participants. Parallel behaviour may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of the market: *Imperial Chemical Industries Ltd v Commission of the European Communities* [1972] ECR 619 ("*Dyestuffs*").

(ii) The requirement of independent determination of policy on the market on the part of competitors strictly precludes any direct or indirect contacts between competing undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which the undertaking has decided to adopt or contemplates adopting on the market: *Suiker Unie and Others v Commission of the European Communities* [1975] ECR 1663.

(iii) The prohibition on concerted practices applies to all collusion between undertakings whatever the form it takes. An agreement arises from the expression by the participating undertakings of their joint intention to conduct themselves in a specific way. Concerted practices include forms of collusion having the same nature as agreements which are distinguishable from agreements by their intensity and the forms in which they manifest themselves: *Commission v Anic Partecipazioni* [1999] ECR I-4125.

(iv) A decision on the part of a manufacturer which constitutes unilateral conduct of that undertaking escapes the Chapter I prohibition (though if the undertaking has a dominant position, it might be caught by the Chapter II prohibition). The concept of an agreement centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention: *Bayer v Commission* [2000] ECR II-3383, upheld by the European Court of Justice, in *Bundesverband der Arzneimittel-Importeure eV v Bayer AG*; *Bayer AG v Commission of the European Communities* [2004] ECR I-23.

(v) Although the concept of a concerted practice implies the existence of reciprocal contacts, that requirement may be met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it: *Cimenteries CBR v Commission of the European Communities* [2000] ECR II-491.

(vi) The fact that only one of a number of competing undertakings present at a meeting reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice: *Tate & Lyle plc and Others v Commission of the European Communities* [2001] ECR II-2035."

The court went on to say this at [22]:

"Counsel for all the appellants submitted that many of the observations in the cases from which these propositions are drawn need to be understood in the light of the particular facts. They pointed out that it is just as essential to a concerted practice as it is to an agreement that there be a consensus between the two or more undertakings said to be parties to the agreement or concerted practice. That is true, but concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for this purpose."

These observations should be read with the summary in *Nichicon GC* at [105]-[112], set out at [17] above.

113. For present purposes, three points are worthy of particular note. First, a disclosure of intended conduct by only one party can be sufficient: *Argos* at [21(ii), (v) and (vi)], reflecting Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle v Commission* [2001] 5 CMLR 22 ("*Tate & Lyle*") at [54], and see also *Nichicon GC* at [106] and [112].

114. Secondly, unilateral conduct is not prohibited. Some reciprocity is required, albeit that this requirement may be met where a disclosure of future intentions or conduct is made to a competitor which "requests it or, at the very least, accepts it" (*Argos* at [21(iv)] (first sentence) and [21(v)]). I would add that the relevant passage of the *Cimenteries* decision (at [1849]) does not explain precisely what "accepts" means in this context (on the facts of that case, the recipient requested the meeting). However, it is clear that there must be a consensus of some form (*Argos* at [22]). This is discussed further below, at [142] onwards.

115. Thirdly, some reduction in uncertainty is required, or (in the context of a "by object" infringement) what is done must at least be capable of reducing uncertainty. There must be coordination which "knowingly substitutes practical co-operation…for the risks of competition" (*Argos* at [21(i)], citing *Dyestuffs*). See also *Nichicon GC* at [107] and [108] and, for example, *Cimenteries* at [1852], which refers to a statement of intention which "substantially reduced uncertainty as to the conduct to expect of the other on the market".

116. Mr MacLean relied heavily on the judge's comment in the first sentence of [225] that "it does not appear that Mr Dunne was left with the impression that EE was objecting or wholly uninterested". However, those words were made in a different context and do not bear the weight that Mr MacLean sought to put on them.

117. By way of recap, [225] reads as follows:

> "225. Moreover, it does not appear that Mr Dunne was left with the impression that EE was objecting or wholly uninterested. If he had felt that Mr Swantee was clearly opposed to any kind of anticompetitive exchange, Mr Dunne would hardly have called him some weeks later seeking to exchange confidential information regarding their companies' negotiations with Apple: paras 170-171 above. It would also be inconsistent with Mr Evans' text message to Mr Dunne of 2 January 2013 suggesting that they should reassure Mr Swantee as part of strengthening 'the resolve against the indirects': para 198.c) above."

118. This paragraph forms part of the judge's reasons for rejecting an argument that Mr Swantee's behaviour had amounted to public distancing (see [149] below for an explanation of this term). As the judge had explained at [220] and [221], public distancing would have required Mr Dunne to have understood, from an unambiguous indication, that there was no willingness on the part of Mr Swantee to take part in unlawful conduct. What the judge was saying at the start of [225] was that Mr Swantee did not make clear his opposition to an anticompetitive approach, which is what public distancing would have required. The judge's choice of the word "objecting" makes obvious sense in that context. The remainder of [225] is also entirely consistent with that interpretation, as is [229], where the judge found that, although Mr Swantee was in fact firmly opposed to

any anticompetitive advance, he was careful not to communicate that given the already strained relations between O2 and EE.

119. In other words, in context the judge was commenting on the fact of the approach rather than Mr Swantee's interest or otherwise in its subject matter. I disagree with Mr MacLean's submission in reply that the third sentence indicates otherwise, because the text message assumed that EE already had some "resolve against the indirects". The second sentence clearly relates only to whether Mr Swantee was "opposed to any kind of anticompetitive exchange" (i.e. the fact of an exchange) and the third sentence is consistent with that as well. The strength of the indirect retailers in the UK market was an obvious challenge for all MNOs (see [25] above).

120. Further, even if the reference to "not … objecting or wholly uninterested" could be read as relating not only to the fact of an approach but also to its content, it does not follow that Mr Dunne was able to glean any comfort that EE would or might be prepared to adopt a cooperative approach to reducing volume from indirect distributors. Not being "wholly uninterested" is equally consistent with EE doing just the opposite of what Mr Dunne was seeking to achieve, namely recognising the potential to exploit an opportunity to take advantage of O2's departure by increasing its own volumes. In other words, it does not follow from the description at [225] that the judge found (contrary to his earlier conclusions) that Mr Dunne derived any form of encouragement or endorsement from Mr Swantee's reaction.

121. P4u relied on the permission judgment at [22], where the judge stated that his finding at [225] was "entirely consistent with the finding that [Mr Dunne] did not think that Mr Swantee was positively supporting the course of action O2 wished to pursue or that his silence implied an agreement to cooperate". Mr MacLean submitted that this showed that the judge was wrongly proceeding on the basis that some positive indication of support was required.

122. A permission judgment can be considered in order to elucidate the full reasons for a judge's decision: see for example *Moore v National Westminster Bank Plc* [2018] EWHC 1805 (TCC), [2018] BLR 586 at [16] and *Quantum Care Ltd v Modi* [2023] EWCA Civ 171 at [42]. However, it is no substitute for the judgment itself. A careful examination of the judgment shows that the judge had correctly directed himself as to the law, including (as discussed below) that tacit approval may amount to consensus, and made his factual findings on that basis. That is also consistent with the second part of the text just quoted from the permission judgment.

123. It follows from this that there is no inconsistency between what the judge said at [225] and his earlier findings, particularly at [200] and [217] (see [38] and [39] above), that Mr Dunne received no encouragement that EE would go along with what he was suggesting and could not have "inferred from Mr Swantee's silence any form of acquiescence or a consensus to cooperate". The judge returned to the same point at [232] and [234], making the points that Mr Swantee made no disclosure and offered no support, and that Mr Dunne could not "possibly have regarded [Mr Swantee's passivity] as indicating that EE would support O2 if it exited from an indirect retailer in general, or from P4u in particular" (see [42] above). The clarity of these statements should be contrasted with the weight Mr MacLean sought to put on what the judge said at [225].

124. Although ground 1 is presented as an alleged error of law on the part of the judge, on analysis the principal target was the judge's factual findings at [200] and [217], placing particular reliance on what the judge said (in a different context) at [225]. P4u maintains that the judge was wrong to conclude that O2 gained nothing from EE in relation to indirect distribution. However, that was a factual conclusion that the judge was entitled to reach, and I have explained that there is no inconsistency with what the judge said at [225]. On the facts as found by the judge there was no reduction of uncertainty for O2, because no information at all was conveyed about EE's attitude to the suggestion of reducing volume from indirect distributors, or indeed to any other strategic action in that area.

125. On that basis, ground 1 fails. Further, and as discussed in relation to ground 2 (see [178] below), in those circumstances it was not necessary for the *Anic* presumption to be rebutted in relation to O2's conduct in the market.

Whether Mr Dunne's approach itself amounted to concertation

126. There is a separate question as to whether Mr Dunne's approach and Mr Swantee's passive reaction to it itself amounted to concertation, irrespective of whether O2 was able to derive anything from it. As already noted, this was not the primary focus of P4u's arguments on ground 1, but we heard argument about it and it is appropriate to say something about it, not least because it raises more obvious questions of law, and points which are logically anterior in the analysis to the impact of Mr Dunne's approach on O2. What I say will however not affect the outcome of this appeal, not only because of the focus of P4u's arguments but because failure on ground 2 means that the judge's conclusion that EE rebutted the *Anic* presumption in relation to the Landmark lunch stands. As a result, Mr Dunne's communication at the lunch could not have given rise to a concerted practice, because the necessary third element (see [18] above) was not present.

127. The arguments on this question raised two main issues. The first relates to specificity, namely whether the judge was wrong to conclude that what Mr Dunne said was too vague to be capable of amounting to concertation. The second relates to whether there is (as the judge held) an additional requirement for consensus, beyond a passive reaction to an anticompetitive disclosure. I will address these in turn.

128. The judge correctly observed at [197] that an invitation to collude does not require precision if the message conveyed is one that can be understood. He also found at [199] that Mr Swantee had "correctly understood the thrust of Mr Dunne's remarks". As I understand the judgment, this meant that the judge concluded that Mr Swantee had correctly interpreted Mr Dunne's references to "unilateral steps" and playing "big cards" as being an approach to ascertain whether, if O2 reduced its reliance on the indirect channel, EE would support that move (see [36]-[38] above, summarising [196]-[200] of the judgment).

129. What is more difficult is the judge's conclusion at [208] (and repeated at [217]) that Mr Dunne's comments were too vague to remove uncertainty as to O2's strategy. This followed an analysis in which the judge noted that an exchange of information does not need to be reciprocal, and that the information conveyed can be vague (judgment at [203]-[204], referring to *Argos*, *Tate & Lyle* and Case T-377/06 *Comap SA v Commission* [2011] 4 CMLR 28 ("*Comap*")).

130. The judge went on, at [205], to observe that the information transmitted must nonetheless be sufficiently clear as to put the recipient in a favourable position in terms of removing uncertainty, and that it was a question of fact as to whether in all the circumstances the information disclosed did so. The judge accepted that ambiguity would not preclude such a finding, which was highly fact-specific. The judge then considered Case T-105/17 *HSBC Holdings plc v Commission* [2019] 5 CMLR 21 ("*HSBC*") at [187]-[191], where it was found that one particular discussion between traders had not given rise to an infringement because it did not provide an informational advantage such as to reduce uncertainty, and contrasted other cases including *Nichicon GC*, before concluding at [208] that in this case:

> "…Mr Dunne's references to taking 'unilateral steps' or playing 'some big cards' were wholly vague, and even if understood as concerning some action to reduce reliance on the indirect retailers, it was wholly unclear what those steps, or 'cards', might be. In my judgment this cannot reasonably be seen as having benefited EE by removing uncertainty as regards O2's strategy or conduct on the market."

131. The judge's references to Mr Dunne's comments being too vague to benefit EE are not obviously straightforward to reconcile with his conclusion that Mr Swantee understood the thrust of Mr Dunne's remarks. On the face of it, information that O2 was minded to take steps to reduce reliance on indirect retailers might be regarded as information of a strategic nature that had the potential to reduce uncertainty for EE. And I am not persuaded otherwise by the respondents' reliance in that context on the conditional nature of the judge's finding at [197] ("if" O2 reduced reliance on the indirect channel, see [36] above). Disclosure of a contemplated course of conduct may be sufficient: *Argos* at [21(ii)]. Further, and while I do not consider that the judge was wrong to refer to *HSBC* since the court there did rely on the fact that the information provided was neither precise nor detailed (such that the recipient was not placed in a favourable position), there was an additional factor in that case, namely the Court's observation at [189] that the trader making the disclosure was boasting rather than doing something that would permit an inference that the object of the conversation was to restrict competition. In contrast, Mr Dunne clearly intended to make an anticompetitive approach.

132. However, I have not been able to detect an error of law in the judge's approach. Overall, he correctly directed himself as to the law. As the judge said, the question is highly fact-specific.

133. "By object" infringements are confined to those exchanges that reveal a sufficient degree of harm to competition such that it is not necessary to examine their effects ([19] above). A particular example of this is where information is exchanged which is "capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market" (*HSBC* at [184], reflected in *Nichicon GC* at [108]). Another is the "provision of sensitive business information", such as in relation to pricing or supply and demand, which makes it "possible" to reduce uncertainty (*Nichicon GC* at [112]). These examples emphasise the need for the information provided to be of such a kind that it is in fact capable of reducing uncertainty. There must, at least to that extent, be specificity.

134. Mr Hoskins referred to Case C-298/22 *Banco BPN/BIC Português SA v Autoridade da Concorrência* [2024] 5 CMLR 16 at [61]-[65] in support of his submissions that a level

of precision was required. In that passage, the CJEU referred to an exchange which makes it possible to remove uncertainty, and for that purpose it was "sufficient for the information exchanged to be, first, confidential and, second, strategic". Confidential information is information not already known to any economic operator active on the market concerned, while strategic information means:

> "…information that may reveal, in some circumstances, once combined with other information already known to the participants in an information exchange, the strategy which some of those participants intend to implement with regard to what constitutes one or more parameters in the light of which competition on the market in question is established." ([63])

This would clearly cover pricing information, but it goes beyond that to include:

> "…any data not already known to economic operators which, in the context of such an exchange, is likely to reduce the uncertainty of the participants as to the future conduct of the other participants with regard to what constitutes, by reason of the nature of the goods or services in question, the actual conditions in which the market functions and the structure of that market, one or more parameters on the basis of which competition on the market in question is established." ([64])

135. Mr Hoskins also relied on a reference to "sufficient precision" at [65], but in context that relates to exchanges of information about current or past events and whether it is possible to infer future conduct from that, so I did not find the reference to be of particular assistance. However, the preceding paragraphs do emphasise the need for information to be of a strategic nature and of a quality which is capable of reducing uncertainty.

136. The point was not a straightforward one for the judge to decide, but I consider that the judge was entitled to conclude on the facts that the information was too vague to reduce uncertainty and thereby affect competition. In the absence of an identifiable error of law, it matters not that a different conclusion might also have been open to the judge.

137. Turning to consensus, P4u does not challenge the requirement for some form of consensus. Its point is that Mr Swantee's passivity evinced the necessary consensus. Mr MacLean submitted that the judge's approach of requiring something that went beyond that conflicted with the established principle that a "one way" provision of sensitive information is sufficient.

138. The judge's analysis, at [209]-[217], can be summarised as follows. He noted that a disclosure could be unilateral but added that an element of concertation was still required. He referred to *Tate & Lyle*, *Comap*, *Nichicon GC* and Case C-286/13 P *Dole Food Co Inc v Commission* [2015] 4 CMLR 16 ("*Dole Food*"), before going on to consider Case C-74/14 *Eturas UAB v Lietuvos Respublikos konkurencijos taryba* [2016] 4 CMLR 19 ("*Eturas*"). *Eturas* is discussed in more detail in relation to ground 2 (see [155] below for the facts), but for present purposes its significance is the judge's reliance on [44] of the CJEU's judgment, which referred to participants who were aware of the anticompetitive practice having "tacitly assented" to it, and the following paragraphs of Advocate General Szpunar's opinion:

> "46. In my opinion also, the concept of a concerted practice does imply reciprocity. A concerted action is necessarily the result of a consensus. However, the level of formalisation of that consensus should not be subject to overly rigid requirements, since this would undermine the versatility inherent in the concept of a concerted practice.
>
> 47. In particular, reciprocity should equally encompass tacit approval.
>
> 48. However, the possibility of inferring tacit approval, and therefore of establishing the existence of a consensus to cooperate rather than compete, depends on the context of the communication.
>
> 49. First, where an undertaking receives information relating to an illicit initiative and does not oppose it, its acquiescence in that initiative may be inferred from the absence of response, provided that the circumstances are propitious to the formation of a tacit consensus. The lack of opposition to an illicit communication is reprehensible because, under certain circumstances, mere lack of reaction from the addressee will lead the other party or parties to believe that the addressee subscribes to the illicit initiative and will comply with it [a reference to the *Aalborg Portland* decision at [82] is footnoted here; see [151] below]. Therefore, in order to infer knowing participation of the addressee in a concerted practice, the context of interaction must be such that the addressee may be deemed to appreciate that the competitor will consider its silence as an approval and will rely on mutual action, even in the absence of response."

The judge also referred to *Argos* at [22], set out at [112] above, before concluding at [217] that Mr Dunne could not have inferred any form of acquiescence or consensus to co-operate (see [39] above).

139. The paragraphs from the Advocate General's opinion in *Eturas* set out above are illuminating and I have found them of assistance. I would make the following points.

140. First, concertation does, as the label indicates, require an element of consensus. It requires some form of coordination, in the form of "practical co-operation", between the participants: *Argos* at [21(i) and (iii)] and [22]. In short, it requires some form of collusive behaviour. There is some force in Mr Pickford's submission that P4u's approach would denude the concept of consensus of any substance.

141. Secondly, whether the required consensus exists will depend on the context. It is entirely possible that passive behaviour will be treated as amounting to consensus, but as Advocate General Szpunar explained it will depend on the circumstances.

142. Thirdly, as already discussed a "one way" disclosure of information can amount to concertation if the recipient "requests or at least accepts" it: *Argos* at [21(ii), (v) and (vi)]. Where information is requested (either expressly or by conduct) it is straightforward to see that consensus exists. As noted at [114] above, the CJEU has not explained precisely what "accepts" means in this context, but given the requirement for some element of consensus it clearly means more than just receiving information without having any wish to do so. It must mean some form of tacit approval, as the Advocate General said.

143. Tacit approval could be exhibited in a number of different ways. It is impossible to be prescriptive.

144. An obvious example would be attendance at a meeting knowing that confidential information will be disclosed or exchanged, as was the case (for example) in *Tate & Lyle*, *Nichicon GC* and *Dole Food*. Attendance would almost certainly be treated as amounting to the necessary consensus. Indeed, unless the attendee's opposition is made clear they may be presumed to have participated in the absence of public distancing: see further [151] and [152] below, discussing the *Aalborg Portland* decision. Conversely, however, an undertaking may be able to prove that it has ceased to participate in a cartel – and so has ceased to give its approval – by means other than public distancing: Case C-634/13 P *Total Marketing Services v Commission* [2015] 5 CMLR 24 ("*Total Marketing*") at [16]-[24].

145. An unanticipated "one way" communication of confidential information from A to B will raise different considerations. If the communication is entirely uninvited, then whether a passive response by B is to be taken as tacit approval will depend on the facts. In many circumstances a failure to object would be taken as tacit approval. I would add to this that it is likely to be difficult in practice for B to persuade a regulator or tribunal that their action did not amount to tacit approval if they are not able to adduce credible evidence to rebut the *Anic* presumption. This is not for a legal reason but for an obvious forensic one, namely that if B has indeed taken account of the information in determining its conduct on the market that would demonstrate consensus. B will have benefited from reduced uncertainty, so contravening the principle that "each economic operator must determine independently the policy which he or she intends to adopt on the internal market": *Nichicon GC* at [105].

146. Further, it is worth reiterating that it is quite possible that A may also derive something from B's reaction to what A says, even if that reaction is entirely passive. It will all depend on the context. If A does, then there has in reality been a mutual exchange of information, and one that may reduce uncertainty for both parties. B's reaction has, on the facts, communicated something to A. If that is so then, again assuming subsequent conduct in the market, the *Anic* presumption would need to be rebutted in relation to the conduct in the market of both A and B.

147. Returning to the facts of this case, I cannot detect an error of law in the judge's approach. The judge found that, on the particular facts, Mr Swantee's passive response did not amount to any consensus to cooperate in relation to O2's proposed move, that nothing was communicated to Mr Dunne and that Mr Swantee was in fact opposed to the approach.

Ground 2: the *Anic* presumption

Introduction: the Anic presumption

148. Although there are a number of strands to ground 2 of the appeal, its gravamen is that the judge wrongly proceeded on the basis that, in this case, the *Anic* presumption could be rebutted by something other than public distancing or a report to the competition authorities. I will consider that point first, after some introductory explanation.

149. By way of prefatory comment, "public distancing" is a term of art. As the judge explained at [220], rather than requiring something to be done publicly in the normal sense, it means that the undertaking makes clear to the other parties involved that it wishes to take no part in the actual or proposed anticompetitive conduct. For convenience, I will also use the term to encompass the alternative of a report to the competition authorities.

150. The *Anic* presumption was established in Case C-49/92P *Commission v Anic* [2001] 4 CMLR 17 at [121]:

> "… subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market…"

151. It is important to distinguish this from a different presumption, also discussed in *Anic* but considered in more detail in Case C-204/00 P *Aalborg Portland A/S v Commission* [2005] 4 CMLR 4 ("*Aalborg Portland*"). In *Anic* at [96], the Court had held that, since the Commission had been able to show Anic's participation in price-fixing meetings, "it was for Anic to adduce evidence that it had not subscribed to those initiatives". In *Aalborg Portland*, the principle was explained as follows:

> "81. According to settled case law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.
>
> 82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.
>
> 83. The principles established in the case law cited at [81] also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.
>
> 84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a

> passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement."

152. Therefore, participation in a meeting at which an anticompetitive agreement is concluded without public distancing is presumed to amount to participation in it, because the undertaking in question is treated as providing tacit approval. The same presumption would apply in relation to the concertation element of a concerted practice, as the *Eturas* decision discussed below illustrates. To distinguish this presumption from the *Anic* presumption I will refer to it for convenience as the "participation presumption".

Whether public distancing was required to rebut the Anic presumption

153. The foundation for Mr MacLean's submission that public distancing was required to rebut the *Anic* presumption is the CJEU's judgment in *Eturas* at [46]. That is said to be authority for the proposition that, where the alleged collusion occurs at a meeting (such as, in this case, the Landmark lunch), the *Anic* presumption can only be rebutted by public distancing. Mr MacLean also relies on what he says was an endorsement of this by the Supreme Court in *Sainsbury's Supermarkets Ltd v Mastercard Inc; Asda Stores Ltd v Mastercard Inc; Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] 4 All ER 807 ("*Sainsbury's v Visa*") at [113].

154. I do not agree. On a proper reading, *Eturas* does not provide support for the proposition, and P4u has not identified any CJEU authority that does. The proposition lacks logic and would lead to unprincipled differences of approach depending on whether there had or had not been a meeting. Further, *Sainsbury's v Visa* concerned a very different issue.

155. *Eturas* concerned an online booking system called E-TURAS which was used by travel agents in Lithuania. Participating firms were sent an electronic message informing them that the maximum discount that could be applied for bookings made using the system was being reduced to 3%. The modified system made it harder to grant a higher discount, though it was still technically possible. The national competition authority concluded that participants who continued to use the system without objection following receipt of the message had participated in an anticompetitive concerted practice.

156. The CJEU reformulated the questions referred by the Lithuanian court as whether "it may be presumed that [the travel agents] were aware or ought to have been aware of that message and, in the absence of any opposition on their part to such a practice, it may be considered that those operators participated in a concerted practice" within Article 101(1) (*Eturas* at [26]). The answer was that the firms "may – if they were aware of that message – be presumed to have participated in a concerted practice…, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of the systematic application of a discount exceeding the cap in question" (see at [50] and the *dispositif*).

157. It is notable that in *Eturas* a concerted practice obviously existed as between the operator of the system and those who were aware of the new arrangement and went along with it. The question was whether firms should be treated as having participated in that concerted practice even if they were not aware of the message. This has nothing to do with the *Anic* presumption. Rather, it relates to the participation presumption referred to in *Anic* at [96] and discussed further in *Aalborg Portland*: see above. Further and in any event, the CJEU was obviously not concerned with meetings.

158. Reflecting the issue in the case, the CJEU's discussion focuses on the question of participation in what was undoubtedly a concerted practice for those who knowingly went along with it. At [28] the CJEU explained that "passive modes of participation", such as being present in meetings at which anticompetitive agreements are reached, are indicative of collusion, since (absent public distancing) the tacit approval it provides encourages the infringement to continue. That reflects *Aalborg Portland* at [84]. The CJEU then went on at [29] to [49] to discuss three considerations in that regard, the first being burden of proof, the second being the three elements required for a concerted practice (see [18] above) and the third being the ability to rebut the presumption of participation. A careful reading of these paragraphs does not support Mr MacLean's submissions.

159. In relation to the first consideration, burden of proof, the CJEU drew a distinction at [34] between the *Anic* presumption (summarised at [33]), which formed an integral part of EU law, and the question of awareness, which was one for national law but subject to EU law considerations, including the potential for a concerted practice to be inferred otherwise than from direct evidence and the presumption of innocence. As to the second, the CJEU set out the three elements of a concerted practice at [42] and then referred to the facts of the case before observing at [44] that they were capable of justifying a finding of concertation between firms aware of the message, provided the other two elements were satisfied, and that depending on the evidence "a travel agency may be presumed to have participated in that concertation if it was aware of the content of that message". In contrast, if awareness was not established then, unless there was other evidence showing tacit assent, the firm's participation could not be inferred ([45]).

160. The CJEU then said this as to the third consideration:

> "46. In the third place, it must be pointed out that a travel agency may rebut the presumption that it participated in a concerted practice by proving that it publicly distanced itself from that practice or reported it to the administrative authorities. In addition, according to the case-law of the Court, in a case such as that at issue in the main proceedings, which does not concern an anticompetitive meeting, public distancing or reporting to the administrative authorities are not the only means of rebutting the presumption that a company has participated in an infringement; other evidence may also be adduced with a view to rebutting that presumption (see, to that effect, judgment in *Total Marketing Services v Commission*, C-634/13 P, EU:C:2015:614, paragraphs 23 and 24).
>
> 47. As regards the examination of whether the travel agencies concerned publicly distanced themselves from the concertation at issue in the main proceedings, it must be noted that, in particular circumstances such as those at issue in the main proceedings, it cannot be required that the declaration by a travel agency of its intention to distance itself be made to all of the competitors which were the addressees of the message at issue in the main proceedings, since that agency is not in fact in a position to know who those addressees are.

> 48. In that situation, the referring court may accept that a clear and express objection sent to the administrator of the E-TURAS system is capable of rebutting that presumption.
>
> 49. As regards the possibility of rebutting the presumption of participation in a concerted practice by means other than public distancing or reporting it to the administrative authorities, it must be held that, in circumstances such as those at issue in the main proceedings, the presumption of a causal connection between the concertation and the market conduct of the undertakings participating in the practice, referred to in paragraph 33 of the present judgment, could be rebutted by evidence of a systematic application of a discount exceeding the cap in question." (Emphasis supplied.)

161. Mr MacLean relied on the words underlined in [46] to support P4u's argument that, where there has been a meeting, the only means of rebutting the *Anic* presumption is public distancing. However, those words do not relate to the *Anic* presumption at all, but instead to the participation presumption. This is apparent from the context, including the question that the CJEU was addressing in that case and the separate specific reference to the *Anic* presumption at [49] (in addition to the reference to the participation presumption at the start of that paragraph), and also from [46] itself. That paragraph not only refers to a presumption of participation ("the presumption that a company has participated in an infringement"), but cites as authority *Total Marketing* at [23] and [24].

162. In *Total Marketing*, the CJEU explained at [20] that public distancing was required to show that participation in collusive meetings was without anticompetitive intent (citing *Aalborg Portland* at [81] and [82]), that there was a presumption of illegality of such participation which must be rebutted through public distancing ([21]), but that it followed that public distancing was only necessary to rebut the presumption in the case of an undertaking that participated in anticompetitive meetings ([22]). In other circumstances the absence of public distancing forms "only one factor amongst others to take into consideration", and the General Court had therefore erred in concluding that public distancing was "the only means available to an undertaking involved in a cartel of proving that it has ceased participating in that cartel, even in the case where that company has not participated in anticompetitive meetings" ([23] and [24]). None of this related to the *Anic* presumption.

163. It makes logical sense that presence at a meeting at which collusion occurs should be regarded as participation in that collusion unless public distancing occurs. The rationale for that is explained in *Aalborg Portland* (see above). The same logic does not necessarily apply outside the context of a meeting.

164. In contrast, there is no logic in applying an equivalent approach to the *Anic* presumption. Whether collusion occurred at a meeting or in some other way should make no difference to the question of cause and effect between concertation and subsequent conduct on the market. Similarly, there is no principled reason why it should be impossible to rebut the *Anic* presumption by anything other than public distancing where there has been a meeting, however compelling the evidence is that there was in fact no causal effect. It would also lead to bizarre distinctions between meetings (presumably in person or virtual) and, for example, WhatsApp chat messages.

165. As Mr Pickford pointed out, P4u's interpretation of *Eturas* at [46] is also not supported by other CJEU decisions. The formulation of the test in Case C-455/11P *Solvay SA v Commission* [2014] 4 CMLR 17 ("*Solvay*") at [43], set out at [171] below, makes no mention of it. Further, the facts of that case involved meetings, yet the CJEU considered whether other evidence could rebut the *Anic* presumption. Similarly, Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2010] Bus LR 158 concerned a meeting, but the CJEU's reference at [61] to evidence required to rebut the presumption is in general terms. Case C-251/22P *Scania AB v Commission* [2024] 4 CMLR 24 does not take the matter any further in its references to both the participation presumption and the *Anic* presumption at [99]-[103].

166. *Sainsbury's v Visa* does not compel a different conclusion. The relevant issue there related to the standard of proof and the nature of evidence required to meet the exemption in Article 101(3). In outline, the Supreme Court held that the former was a question of domestic law but the latter was subject to EU law requirements.

167. In *Sainsbury's v Visa*, both Mastercard and Visa relied on *Eturas* at [30]-[32] to argue that the Court of Appeal had applied an unduly onerous standard of proof. The Supreme Court observed at [113] that this passage was not as helpful to Mastercard and Visa as might first appear because it concerned proof of awareness of the content of the message, which was unsurprisingly a matter for national law, but it added:

> "The Court of Justice went on, however, (at para 33) to distinguish the presumption arising under art 101(1) of a causal connection between a concertation and the market conduct of the undertakings participating in the practice. That presumption, it emphasised, followed from art 101(1) and consequently formed an integral part of the EU law which the national court was required to apply. The Court of Justice then went on (at paras 46-49) to address in detail the nature of the evidence that would be sufficient to rebut the presumption."

168. This obviously refers to the *Anic* presumption. However, the cross-reference to *Eturas* at [46]-[49] is not entirely consistent with the analysis above. On that analysis, [46] refers to the participation presumption and [49] refers both to that presumption and the *Anic* presumption.

169. Ultimately I have concluded, with respect, that there is a minor slip in the Supreme Court's judgment. There was no need in that case to consider the two different presumptions at play. That there was some confusion between them is supported by what the Court went on to say at [114]:

> "In our view, the fact that the Court of Justice in *Eturas* addressed, as a question of EU law, what evidence was capable of rebutting the presumption of participation in a concerted practice provides the key to resolving the present issue."

The Court went on to refer to paragraph 100 of the Advocate General's opinion in *Eturas,* part of a section which discusses rebuttable presumptions in competition law generally.

The scope and standard of the Anic presumption

170. P4u also makes other criticisms of the judge's approach to the *Anic* presumption. It maintains that he wrongly held that the presumption applied only to those in receipt of information (EE in the case of the Landmark lunch) and that he failed to apply the demanding case law test for rebuttal. I will deal with the second of these first.

171. Mr MacLean submitted that, even if EE was entitled to rely on evidence other than public distancing to rebut the *Anic* presumption, the judge failed to apply the exacting standard in *Solvay* at [43], namely that:

> "…it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market… The proof to the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market."

Solvay was not cited at the trial.

172. P4u's case is that, if this high threshold was applied, then EE could not meet it. The judge had focused on the immediate aftermath of the Landmark lunch, rather than EE's ultimate decision in 2014 to exit P4u. It was impossible to rule out an indirect link between the concertation and that later decision. This was because EE would have had the benefit of knowing that, having regard to its anti-competitive approach, O2 must have been so committed to strategic action against indirect retailers that it could probably be relied upon not to recommence supplies at a later date.

173. The judge was entirely right to give this short shrift in the permission judgment.

174. First, the standard of proof remains the usual domestic law one, namely the balance of probabilities: *Sainsbury's v Visa* at [115] and [116].

175. Secondly, the factual allegation that EE gained comfort that O2 would not re-enter the market was not advanced at the trial and was not put to Mr Swantee. It should have been if P4u wished to rely on it.

176. Thirdly, the judge was in any event correct to reject it. When EE made its own decision to leave P4u in mid-2014 it was of course aware that by then O2 had ceased to supply P4u both as regards new connections (from 31 January 2013) and upgrades and SIM-only connections (from 31 January 2014). That was public knowledge. In contrast, at the time of the Landmark lunch there was only a provisional decision to leave P4u but, more importantly for present purposes, the judge found that what Mr Dunne conveyed was limited and vague. When he learnt later of O2's actual departure from P4u, Mr Swantee may well have been able to put two and two together in relation to that, but I do not consider it realistic to suggest that, when EE came to make its own decision in 2014, what Mr Dunne had said almost two years earlier – and obviously in different market circumstances – could provide any comfort as to what O2 might do thereafter, beyond what could be gleaned from the concrete fact of what was by then its complete exit from P4u.

177. Mr MacLean also submitted that the judge erred at [232] by failing to recognise that the *Anic* presumption applies to all participants in concertation, and not just to recipients of information.

178. This is a mischaracterisation of what the judge said at [232], where he referred to the presumption not applying to the party disclosing the information and said that, on the basis of his finding that "Mr Swantee made no disclosure to Mr Dunne of EE's position, nor did he offer to give any support from EE for O2's strategy" there was no scope for the presumption to apply as regards O2 ([41] above). The critical point was that Mr Swantee conveyed nothing to Mr Dunne, so that there was nothing that Mr Dunne gleaned from the meeting which could have influenced O2's conduct on the market: see ground 1, above. In contrast, if Mr Swantee had given some indication or comfort that he was prepared to cooperate or support the move, then that would in effect have been a provision of information by Mr Swantee to Mr Dunne, with scope for the *Anic* presumption to apply as regards O2's conduct thereafter: see the discussion at [146] above.

Domestic law causation

179. Finally under this ground, P4u alleges that the judge erred at [234] in concluding that, even if there had been an infringement, it had no causal effect on O2's decision to leave P4u because he wrongly put the *Anic* presumption to one side at that stage.

180. Given that the judge made no error in concluding that there was no infringement it is not necessary to address this point. I will just note that it faces the hurdle of the principle that causation and loss are matters for domestic law: *Deutsche Bahn AG v Morgan Advanced Materials plc* [2014] UKSC 24, [2014] 2 All ER 785 at [11].

Conclusion on ground 2

181. It follows that I would dismiss ground 2. As a result, the judge's conclusions that the *Anic* presumption was rebutted as far as EE was concerned in relation to the Landmark lunch and by Vodafone in relation to the meeting between Ms Castillo and Mr Humm (see [41] and [49] above, and also [269] below) both stand.

Ground 3: the new case theory

182. Ground 3 relates to the alleged collusion between EE and Vodafone in 2014 and the alternative explanation posited by the judge as to the source of information about Vodafone being "about to pull out", referred to in Mrs Derbyshire's email of 10 August 2014 (see [92]-[96] above). P4u maintains that the judge impermissibly rejected P4u's case based on a factual theory that had not been canvassed at trial. Rather, following the principles set out in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 ("*Al-Medenni*") it was not open to the judge to advance this new theory. P4u relied on the 10 August email as evidence that there had been earlier collusion, in particular between Mr Scheen and Mr Humm in their call on 2 April 2014.

The law on new case theories

183. *Al-Medenni* concerned a claim against Mars for injuries suffered by an employee when a roll of wrapping paper fell from a machine. Her claim pleaded that it had been placed

there by a specific individual, a Mr Braich, whereas Mars defended the claim on the basis that the claimant had put it there herself. During opening submissions the trial judge raised the possibility that a third person had placed the roll on the machine. The point was not put to witnesses, but following a hint from the judge counsel for Mrs Al-Medenni adopted this unpleaded "third man theory" as an alternative in her closing submissions. The judge found for Mrs Al-Medenni on the basis of the third man theory, finding that an unidentified employee was responsible.

184. The Court of Appeal allowed Mars's appeal. Dyson LJ, with whom Brooke and Tuckey LJJ agreed, said at [21]:

> "In my view the judge was not entitled to find for the claimant on the basis of the third man theory. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

185. Dyson LJ went on at [22] to explain that the "starting point" was the pleadings. He referred to comments by Lord Phillips MR in *Loveridge and Loveridge v Healey* [2004] EWCA Civ 173 at [23] to the effect that pleadings mark the parameters of the case and form the basis of decisions about preparations for trial, including about the evidence required, and that where:

> "…departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded…"

186. In *Al-Medenni* there had been no application to amend and the "rather faint-hearted" espousal of the theory in closing submissions was far too late ([23]). The defendants were denied the opportunity to explore the theory with the witnesses or to consider seeking evidence from others ([24]). Rather, the judge should have concluded that the claim was not proved. The judge had "crossed the line which separates adversarial and inquisitorial systems" ([25]).

187. *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287, [2021] BCC 640 ("*Satyam*") concerned the reverse situation of an unpleaded defence being adopted by the trial judge. There the claim advanced was that a former director and sole shareholder of the claimant company had disposed of its assets at an undervalue. The defendant defended the claim on the basis that there was no undervalue. He also pleaded that he had held the company's shares on trust for a third party, a Mr Sharma. The judge dismissed the claim on the basis that the properties disposed of by the company were themselves held on trust for Mr

Sharma, a proposition which had formed no part of either party's case and was not raised at trial.

188. Nugee LJ, with whom Lewison and Arnold LJJ agreed, said at [36]:

> "The present case … is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him…"

189. Nugee LJ then considered *Al-Medenni* before concluding that the course taken by the judge was not open to him, adding at [38]:

> "Judges may sometimes think—and may even sometimes be right—that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point, and to decide a case on a basis that has not been explored in evidence or addressed in submissions is likely to leave at least one, if not both, parties with a profound and justified sense of unfairness."

190. *Al-Medenni* and *Satyam* were considered again in *Ali v Dinc* [2022] EWCA Civ 34. In that case the trial judge had reached a conclusion based on an "intermediate" combination of factual assertions from each party's case, a combination which neither had expressly pleaded. The defendants unsuccessfully appealed.

191. Birss LJ, with whom Green and Whipple LJJ agreed, added the following at [25] to what had been said in *Al-Medenni* and *Satyam*:

> "These problems are all concerned with the interests of justice and, in particular, with circumstances which cause prejudice to the losing party. The common sort of prejudice which is to be avoided is that a new point has arisen in such a way that the losing party was not given a proper chance to call evidence or ask questions which could have addressed it. That is why the function performed by pleadings, lists of issues and so on, which is to give notice of and define the issues, is an important one; but is also why a judge can always permit a departure from a formally defined case where it is just to do so. It is also why the judge's function is to try the issues the parties have raised before them, rather than to reach a conclusion on the basis of a theory which never formed part of either party's case. By placing the emphasis on prejudice, the point I am making is that the modern approach to the definition of the issues requires judges to adopt a pragmatic approach in line with the overriding objective and not seek to be governed by unnecessary formality, provided always that it is just not to do so."

192. In *Ali v Dinc,* the judge reached a decision on the pleadings that was open to her. Her conclusions were "composed entirely of the acceptance or rejection of factual assertions which were pleaded" ([29] and [30]). Further, in rejecting an argument from the appellants that the claimant had narrowed the judge's options by abandoning an alternative case, Birss LJ also observed that it could not be said that the appellants were

ambushed or precluded from advancing submissions or evidence that they might otherwise have done: no prejudice had been identified ([34]).

193. Although the focus in *Al-Medenni* and *Satyam* was on the pleadings, Birss LJ's comments make clear that the key determining factor is the interests of justice, and specifically the question of prejudice. So, for example, it could be that an uncanvassed theory advanced by a judge in relation to an important piece of evidence could be regarded as sufficiently unfair to warrant intervention by an appellate court, even though (being evidence rather than the facts necessary to establish a claim or defence) it did not form, or need not have formed, part of the pleadings. Conversely, I would not rule out the possibility of some departure from pleaded issues as not giving rise to unfairness on the particular facts of a case, although I would expect that to be rare unless the position was fully addressed at trial.

194. Drawing the threads together, I would summarise the position as follows:

    a) The starting point is that a judge is not entitled to decide a case on a basis that has neither been pleaded nor canvassed before him. His function is limited to deciding the issues put before him.

    b) Where, as in *Al-Medenni* and *Satyam*, a "theory" advanced by the judge is outside the scope of the pleaded issues (in the sense of the facts necessary to establish a claim or defence: *Shagang Shipping* at [98]), that will generally be a clear indication that reliance on that theory is impermissible.

    c) However, the key point is the interests of justice and, in particular, the question of prejudice to the losing party.

    d) This may mean that, even if an uncanvassed "theory" is not outside the scope of the pleaded issues, it would be unfair in all the circumstances of the case for the judge to rely on it. Conversely, in some cases it might not be unfair for the judge to depart from the scope of the pleaded issues, although generally only if this was fully addressed at trial.

195. It follows that I would not accept Mr Pickford's submission of a "bright line" distinction between a departure from the pleaded issues and other evidence, the former being always impermissible. I would however agree that there is a spectrum, with cases of a wholesale departure from a pleaded case, as in *Al-Medenni* and *Satyam*, being at an extreme end of decision-making that will clearly be impermissible.

196. An analogy can be drawn with the approach that appellate courts take to raising new points on appeal, summarised by Lewison LJ in *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345 at [34] and [35]. An appellate court will not generally permit a new point to be raised if it would necessitate new evidence or would have resulted in the trial being conducted differently with regards to the evidence. Further, even a new point of law may only be raised if (among other things) the other party has had adequate time to deal with it. However, there is a spectrum of cases and the just outcome will depend on an analysis of all relevant factors, including the question of prejudice.

197. As a general rule, judges should be very cautious about advancing a theory which has not been put forward by the parties. If it is outside the scope of the pleaded cases it should

generally not be done at all: see above. If, short of that, a judge concludes that it is necessary to his decision to address such a theory in relation to any material evidence, the proper course is to raise it with the parties and to provide them with an adequate opportunity to make submissions about it, including as to whether further evidence is required to ensure a just outcome.

Discussion of ground 3

198. Although it was in the category of evidence rather than facts that needed to be pleaded to establish a cause of action (which is the proper scope of particulars of claim), P4u did rely on Mrs Derbyshire's email dated 10 August 2014 in its re-amended particulars of claim. Specifically, it relied on the email (and a comment in the presentation for the 21 May 2014 BRM) to support an allegation of communications between EE's parents, DT and/or Orange, and Vodafone, which was then "reflected in EE's expectation" that Vodafone UK would cease to supply P4u. In response, EE pleaded that Vodafone UK's future conduct was unknown to it and denied that it had any generally held expectation that Vodafone UK was about to discontinue trading with P4u, but also pleaded that "EE did not have the alleged knowledge and/or understanding obtained from Vodafone UK and/or Vodafone Group". For its part, Vodafone denied that any view EE had formed resulted from coordination or collusion with it.

199. The judge found that confidential information had been received, but not from Vodafone. In effect, the judge rejected EE's main defence (that no such information had been received) but accepted both Vodafone's defence and EE's pleading that Vodafone had not been the source of any such information. This was therefore far from the facts of *Al-Medenni* or *Satyam*. This was a question of evidence rather than a fact that was necessary to establish a cause of action, and moreover the judge did not go outside the ambit of the pleadings in deciding the point.

200. Nevertheless, the question remains as to whether there was prejudice to P4u such as to warrant interference in the judge's decision. Further, it is necessary to consider that question in the context of the other grounds of appeal, and in particular grounds 4, 5 and 7, because the assessment of prejudice in this case depends in part on the judge's other factual findings. My conclusions on this ground accordingly depend in part on the view I have reached about those other grounds, discussed below. As noted at [227] below, the same applies in reverse.

201. The arguments for P4u on this point appeared at some points to suggest that, having concluded that EE did receive confidential information, the judge was bound to find that it came from Vodafone (contrary to Vodafone's pleaded case), because no alternative had been advanced by the parties. That cannot be right. A judge cannot be required to conclude (positively) in favour of a factual case that one party is putting forward even if the judge disagrees with it because it does not accord with his own interpretation of the evidence, including as to the inherent probabilities. That is not what either *Al-Medenni* or *Satyam* is authority for.

202. Further, the judge correctly pointed out at [605] that before drawing inferences the court should consider surrounding circumstances to see whether there is another plausible explanation. This was a point that the judge had first made earlier in the judgment in the context of a self-direction about the sparse evidence usually available about unlawful contacts between traders and the need to rely on inferences to determine their existence

([84]-[86]). He cited there a statement in *Eturas* at [36] which refers to "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", and added at [86] that:

> "…before drawing inferences the Court must be careful to ensure that there is no equally plausible and innocent explanation for the fragmentary evidence on which reliance is being placed. To do otherwise would be to reverse the burden of proof as regards serious allegations. Altogether, I consider that the Court has to consider the evidence in the round, looking at the particular items of evidence relied on in context."

203. I agree. It is true that, for obvious reasons, there may be a lack of direct evidence of unlawful activities and therefore a need to rely on drawing inferences from circumstantial evidence (see for example *Aalborg Portland* at [56]-[57], reflected in *Eturas*). However, the recognition of that point does not remove the need for the allegations to be proved on the balance of probabilities.

204. As already noted, the question is whether there was prejudice to P4u such as to warrant interference in the judge's decision. For the reasons that follow I have concluded that there has been no such prejudice. However, that does not mean that the judge took an appropriate course. Assuming the possibility that CPW was the source of the information occurred to the judge only after the trial and he considered it sufficiently important to refer to it, the better approach – however unattractive in practice – would have been to raise it with the parties and provide them with the opportunity of making submissions about it, including as to whether any further evidence was required to ensure a just outcome.

205. Further, I do not consider that the respondents are materially assisted by the judge's emphasis at [605] that he was not making a positive finding that CPW was the source of the information. The existence of that possibility, which the judge found to be "more plausible" than P4u's case as to the source of the information, appears to have been a key reason to reject the contention that Vodafone was the source.

206. Mr MacLean submitted that, if the possibility of CPW being a source had been "in play", it could have sought disclosure of relevant communications and considered whether to seek witness evidence from CPW employees, as well as otherwise exploring the point in the evidence. Further, the judge's alternative reasoning, including that there was no causal effect (see [95] and [96] above) was based on EE obtaining information in August 2014, whereas P4u's case was that the 10 August email evidenced collusion at an earlier date, in April.

207. Mr Pickford submitted that P4u always needed to show both that the email reflected confidential information rather than speculation and that the information came from Vodafone. On the second point, it should have been obvious that it would assist P4u if it could discount other sources. Indeed, P4u's pre-action correspondence showed that its solicitors had considered CPW as a source and indeed had raised that with CPW's solicitors. It was unsurprising that that was not pursued because it would have harmed P4u's case to consider CPW as a source. Mr Williams also emphasised Vodafone's pleaded defence that it was not the source of the information, and that P4u had every chance to prove its case to the contrary but failed to do so.

208. There is strength in each of these submissions, but they are not determinative.

209. One feature of the judge's decision on this point is that there would have been no legitimate complaint if the judge had limited his reasoning to concluding, based on the witness evidence and inherent probabilities, that Vodafone was not the source of the information rather than speculating about other possible sources. The difficulty has arisen because he went further. However, on analysis he did so in a way that was immaterial to his decision that Vodafone and EE did not collude in April 2014.

210. My reading of the judge's findings at [603]-[607] is that he was focusing on the email as reflecting a provision of information in early August. I agree with Mr Williams' submission that that was the context in which the judge concluded that there was a more plausible explanation, and then made further comments about later modelling and Mr Eyre's evidence about what he would have done in August if only he had known what Vodafone was about to do ([95] above). Thus, the theory that CPW was the source assumes, contrary to P4u's case, that the information was provided to EE in August, not April.

211. It is only at [608] that the judge refers to P4u relying on the email to support the allegation of earlier collusion. That allegation had been rejected in the judge's earlier, lengthy, analysis of Vodafone's and EE's respective decision-making processes, but was not explicitly re-addressed in the context of the email from Mrs Derbyshire. The reason for this is apparent from [608] of the judgment, including its reference to "insofar as EE gained information in early August as to Vodafone UK's intention as regards P4u". In other words, and consistent with his reasoning at [603]-[607], the judge did not read the email as referring to anything other than recently obtained information. I do not need to rely on it, but for what it is worth I note that the permission judgment also supports the fact that the judge considered that the information was recently obtained (see [36] and [37] of that judgment).

212. I do not find it at all surprising that the judge's focus was on the position in early August. It is inherently unlikely that a statement that the "expectation is that Voda are about to pull out" could relate to information provided months earlier, as opposed to recently acquired information. Further and importantly, as Mr Pickford pointed out, the extract from the email that is relied on refers to "the impact if P4u fold earlier than expected ie In the next couple of months" (emphasis supplied). EE's expectation in May 2014 had been that P4u would remain in business at least until 2016: see [77] and [78] above, discussed further below in relation to ground 4. This is clearly supportive of the information having been received more recently than then.

213. The judge had dealt in exhaustive detail with the developing positions of EE and Vodafone during the earlier period, as recorded in contemporaneous documents, and concluded that no collusion had occurred: see the summary of the judgment, above. The effect of his findings was that EE made no decision to leave P4u before 21 May 2014 at the earliest, and Vodafone only on 17 June 2014 (see [61] and [79] above). Properly understood, the 10 August email was in contrast a very slender piece of evidence to counter the evidence relied on by the judge in reaching those other conclusions. In particular, the suggestion that information was obtained in early April indicating that "Voda are about to pull out" is very hard to fit with the process by which Vodafone reached its decision in June, a decision which was only made after achieving successful engagement with CPW from April onwards to agree the terms of an exclusive deal, as

well as obtaining approval from Vodafone Group ([58]-[61] above). In contrast, what Mrs Derbyshire said fits well with the information being received in early August.

214. Given P4u's reliance on it, it would have been preferable if the judge had addressed Mrs Derbyshire's email more explicitly in the context of the collusion alleged to have occurred between EE and Vodafone in April 2014, by spelling out why he considered that the email should be read as reflecting only recently obtained information. However, the reality is that the new case theory advanced by the judge was not relied on by him to reject the allegation of collusion on which P4u actually relied, but to explain where he thought the information could have come from in early August. The allegation on which P4u relied was rejected earlier in the judgment based on the judge's analysis of other evidence. He was entitled to do so, and nothing in the email casts doubt on his conclusion.

215. I would therefore dismiss ground 3.

Grounds 4 and 5: the law

216. Grounds 4 and 5 both relate to areas of fact-finding where it is said that the judge erred. P4u relies on the delay in handing down the judgment to justify the application of a lower hurdle than is usually applied to challenges on appeal to findings of fact. The challenge under ground 4 is that the judge failed to consider or take into account, or mis-recollected, material evidence. Ground 5 is that the judge adopted a "compartmentalised" approach, failing to consider the evidence in the round. Some aspects of the complaints under ground 4 overlap heavily with ground 5, so I will deal with the two grounds together. In summary, I have concluded that each of the challenges should be dismissed.

217. The effect of a delay in producing a judgment has been considered by this court on a number of occasions, most recently in *NatWest v Bilta* and a year earlier in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, [2020] 4 WLR 55 ("*Bank St Petersburg*"). Both of those cases also considered challenges based on "compartmentalisation". Rather than repeating all of what is said there, I will summarise some key points and make some additional observations.

Delay

218. As to delay:

    a) The general rule is that judgments should be delivered within three months of a hearing, even in long and complex cases, to avoid a loss of confidence in the justice system: *Bank St Petersburg* at [78] and [84]. I will return to this in my conclusion.

    b) Nevertheless, delay in producing a judgment will not itself be a sufficient ground to impugn a judgment: *NatWest v Bilta* at [45].

    c) The normal approach taken by an appellate court to challenges to findings of fact where there is no other identifiable error (such as an error of law, a finding that has no basis in the evidence or a demonstrable failure to consider evidence) is as follows. The court will interfere with findings of fact only if it concludes that the judge was "plainly wrong", meaning that the decision cannot reasonably be explained or justified: *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [62]-[67]. This approach applies not only to findings of

primary fact but to their evaluation and the inferences to be drawn from them: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] ETMR 26 ("*Fage v Chobani*") at [114], per Lewison LJ.

d) However, a serious delay in the production of a judgment will be an important factor to consider when reviewing the judge's findings, and an appellate court "must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning": *NatWest v Bilta* at [45]. This is because serious delay diminishes the advantage enjoyed by the trial judge in assessing the evidence: *NatWest v Bilta* at [52] and [53], citing *Goose v Wilson Sandford & Co* [1998] TLR 85 at [113].

e) This means that, in the case of a serious delay, the normal approach of considering whether the judge was "plainly wrong" is tempered by an additional test. The precise formulation of that additional test has been expressed differently, but in *NatWest v Bilta* (where there had been a 19 month delay) the court applied the approach of Arden LJ in *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455, a case where there had been a 22 month delay. Arden LJ said this:

> "7. The function, however, of the court on hearing this appeal is not to impose sanctions or to investigate the reasons why the delay occurred. The function of this court on this appeal, which is principally brought against the judge's findings of fact, is to consider whether any of those findings of fact should be set aside and a retrial ordered. Findings of fact are not automatically to be set aside because a judgment was seriously delayed. As in any appeal on fact, the court has to ask whether the judge was plainly wrong. This high test takes account of the fact that trial judges normally have a special advantage in fact-finding, derived from their having seen the witnesses give their evidence. However there is an additional test in the case of a seriously delayed judgment. If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed."

Arden LJ's comments should be taken as applying not only to mistaken recollection but also to a failure to recollect or address material evidence: *NatWest v Bilta* at [57].

219. I would add the following observations to these points.

220. First, one of the points made by Lewison LJ in *Fage v Chobani* at [114] was the fact that the trial judge will have had regard to the "whole sea" of evidence presented to him, whereas an appellate court "will only be island hopping". As the then Chancellor, Sir Geoffrey Vos, said in *Bank St Petersburg* at [33] (in a judgment with which Patten and

Males LJJ agreed), the danger of island hopping is acute where a determination is made after a long trial. The challenges under grounds 3, 4 and 5 of this appeal provide a stark illustration of that danger, which in my view is further increased when an appellate court is invited to apply an additional level of scrutiny to a delayed judgment.

221. Secondly, it is not the case that the existence of a material delay gives a disappointed litigant an uninhibited ability to challenge factual findings with which they disagree. As Arden LJ said, the starting point remains whether the judge was plainly wrong. Further, that test applies to inferences and evaluations as well as to findings of primary facts. The additional test to which Arden LJ referred applies to mistaken recollections, or failures to recollect or address material evidence, which have some connection with the delay. Thus, I agree with Ms Demetriou that a causal link is required. In Arden LJ's formulation the bar is set fairly low ("unless the error could not be due to the delay in the delivery of judgment"). More recently, in *Pickle Properties Ltd v Plant* [2021] UKPC 6 at [29] Lord Hodge referred to "a basis for believing that there may have been a causal link between the excessive delay and the alleged errors or failings in the judgment". I do not think there is a material difference between these formulations, but for myself I find Lord Hodge's approach somewhat easier to apply.

222. Thirdly, the critical test is whether the appellate court is satisfied that the judge's decision is safe, or conversely (and as Arden LJ put it in *Bond v Dunster Properties*) whether it cannot be satisfied that the judge came to the right conclusion. (As to a judgment being "safe" or otherwise, see for example the citation in *Bank St Petersburg* at [80] from the judgment of Lord Scott in *Cobham v Frett* [2001] 1 WLR 1775, 1784 that the appellate court "must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant".)

223. It is true that the application of that test does not require an appellate court to disturb factual findings that are (or may be) tainted by delay only if they are "plainly wrong". It is sufficient if, as in *Natwest v Bilta*, the documents to which the judge failed to refer "could have made a difference to the outcome" (see at [97] and [121]). However, that does not mean that the test should be reinterpreted, as it appears to me that P4u sought at times to do, as meaning that any evidence which may not have been fully considered is sufficient to call a delayed judgment into question if there is any possibility that it might have made a difference. That, in my view, is too low a bar which would inappropriately open the floodgates for challenges to findings of fact, whatever the materiality or otherwise of the evidence in question, and would be unfair to respondents. It is also not what *Natwest v Bilta* says.

224. Rather, faced with a seriously delayed judgment an appellate court must decide whether it is satisfied that the judgment is safe. In order to do this the court cannot confine itself to the islands between which the appellant would wish the court to hop (to adapt Lewison LJ's metaphor in *Fage v Chobani*). The court must carefully consider the judgment, and the judge's consideration of the other evidence, as a whole. As Lord Scott also observed in *Cobham v Frett* at p. 1783, "excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party". Any other approach would not allow the true materiality (or otherwise) of the evidence on which the appellant relies, and thus the potential for injustice, to be determined. If, on analysis and in the context of the judgment as a whole, that evidence was not material then the court is very likely to be satisfied that the judge came to the right conclusion.

225. In contrast, in *NatWest v Bilta* the appellants' submission, which was accepted, was that the judge in that case overlooked key documents in determining central issues about the dishonesty of the relevant traders and whether they had asked appropriate questions at the "CarbonDesk dinner", such as to call into question the judge's conclusion that the traders had turned a blind eye to VAT fraud. The documents in question were material evidence to which the judge had not referred; they were not "minor or peripheral", and as such the judge's omission to address them could not be treated as immaterial (see at [118] and [121]).

226. In this context, it is worth bearing in mind that the nature of an appeal hearing may itself result in the appearance of greater materiality than there in fact is on a close analysis. It is inevitable that an appellant will focus their submissions on the challenges they wish to make. A respondent will obviously need to respond to those challenges and may have limited time to take the court through other evidence that provides the full context. This reinforces the need for the court to pay close attention to the entirety of the judge's findings.

227. Fourthly, it is important, in deciding whether any issue raised in relation to delay is material, to consider all such challenges in the round, together with other relevant grounds of appeal that might touch on whether the court can be satisfied that the judgment is, overall, safe. Although, therefore, I have addressed the individual challenges to the judge's fact-finding in turn, I have also considered them in the round, together with grounds 3, 5 and 7.

228. The respondents did not seek to maintain that the 15 month delay in this case was not a serious delay, so I will proceed on the basis that the principles considered in *NatWest v Bilta* and *Bank St Petersburg* are engaged.

Compartmentalisation

229. Turning to compartmentalisation, P4u relied on Lord Steyn's observation in *Smith New Court Securities v Citibank* [1997] AC 254, 276-277 that a compartmentalised approach may render a judgment unsafe. In fact, the comments made by Lord Steyn relate specifically to findings about the credibility and reliability of witnesses, and the risk of assessing that in isolation from other evidence and inherent probabilities.

230. The question of compartmentalisation was considered more generally in *Bank St Petersburg*, and in the context of a severely delayed judgment (in that case, as in *Bond v Dunster Properties*, 22 months). In *Bank St Petersburg* the Chancellor observed at [59] that the judge appeared to have rather compartmentalised his treatment of the appellants' points, and that while his judgment was structured in a logical and comprehensive way it lacked "an element of standing back and considering the effects and implications of the facts he had found taken in the round" (see also at [82], suggesting that different parts of the judgment may have been written at very different times). Whether that was fatal would however depend on "whether it could properly be said that the somewhat piecemeal approach that he adopted unfairly affected the judge's evaluation of the facts". The question was whether inconsistencies (examples of which the Chancellor identified) were "sufficient to render the judgment inherently unsafe" ([67]). In that case misgivings expressed by the judge in one part of his (very lengthy) judgment were at least partially at odds with a significant number of his findings of fact, such that the judgment as a whole could not be regarded as safe ([68]).

231. It can be seen from this that the problem of compartmentalisation is not necessarily linked to delay. It all depends on the judgment in question. In *NatWest v Bilta* at [85] the court rejected a submission based on the structure of the judgment that the judge had taken a compartmentalised approach. However, in *Bank St Petersburg* the Chancellor observed at [72] that the delay, as well as the scale of the task, had most likely caused the problems. In that case the judgment must have been, and reads as if it was, prepared in stages with individual findings not quite having the "necessary interaction with what has gone before". (In contrast, the Chancellor concluded at [81] that the approach in *Bond v Dunster Properties* had no application in *Bank St Petersburg* because the judge had carefully re-read all the transcripts.)

232. In summary therefore, the key question, as with delay, is whether a judgment has been rendered unsafe, but in the context of compartmentalisation the question is whether it is rendered unsafe by a failure properly to consider findings of fact in the round, so that the implications of other findings and evidence are properly evaluated.

233. In the discussion that follows, references to "*NatWest v Bilta* delay" and to "compartmentalisation" should be read as shorthand references to the situations where the principles I have just discussed are engaged, such that the court will not allow a judgment to stand unless it can be satisfied that the judge's decision is safe.

Ground 4a): the discussion at the Landmark lunch

234. The challenge under this part of ground 4 is that the judge disregarded three items of material evidence in reaching his factual conclusions about the Landmark lunch. These are part of a manuscript note of the initial conversation that Mr Blendis had with Mr Rowe of Slaughter and May on 17 October 2012 (see [33] above), an alleged EE concern reflected in the cross-examination of Mr Blendis that O2 might approach the competition authorities and blame EE, and part of the cross-examination of Mr Swantee. I will deal with these in turn, although I note that (as already discussed) the existence of collusion is in any event firmly countered by EE's rebuttal of the *Anic* presumption through the new agreement that EE reached with P4u, and amended to increase volume, in October and December 2012.

235. The manuscript note is brief. There are some bullet points that obviously summarise Mr Rowe's initial advice. The judge refers to one of these at [176], namely the "need to document our take", i.e. that EE needed to record its version of what had happened, but P4u argues that the judge wrongly failed to address another, which reads: "Risk that RD [Mr Dunne] has gone back and taken the conversation as a green light". In contrast, in his cross-examination Mr Swantee had referred to Mr Dunne not taking Mr Swantee's reaction at the lunch "as a green light", a choice of words which P4u says was not coincidental and contradicted the note. Although the judge explained the omission in the permission judgment on the basis that, as a solicitor's view of possible risks, it was not relevant, the note was a contemporaneous document and recorded an informed factual assessment based on the recording and transcript, which were not available (see [30] above).

236. I do not consider that there is anything in this point. Read as a whole, the note is clearly based on a preliminary conversation without full details being provided. The first bullet point, which appears immediately before the green light reference, is "What did Olaf [Swantee] say in response to recent phone calls", indicating that details had not as yet

been provided. Although the reference here is to phone calls rather than a lunch meeting, the only relevant discussion with Mr Dunne at the time was that lunch, and other parts of the note also clearly refer to the lunch. If, as P4u maintain is the case, the "green light" reference is to the lunch then the context strongly indicates that the first bullet point extends to the lunch as well.

237. As the judge found, Mr Blendis took further advice from Mr Rowe in relation to the 25 October email and "script" he prepared. If Mr Rowe had believed that either of these conflicted with what he had previously understood, he would surely have said so. The judge also found that the email reflected both the transcript and the account Mr Swantee had given Mr Blendis shortly after the lunch.

238. Further, an initial response from a competition specialist that there was a "risk" is hardly surprising. It is fully consistent with the advice reflected in the 25 October email, which refers to risks being "contained and moderated", not non-existent. But as the judge said, this is irrelevant.

239. The second piece of evidence is said to illustrate a concern on the part of EE that O2 might approach the competition authorities. P4u relies on responses by Mr Blendis to a question as to whether it would have been easiest to clarify non-engagement by sending a letter of protest. After saying that he was not sure he agreed, because "we didn't really know what Mr Dunne was trying to say", Mr Blendis added, "And the response… could have been to escalate and disagree with the − the direction of that information sharing". When later asked what this meant, Mr Blendis said, "it would have been easy for Mr Dunne to have said that he didn't share anything and it was Mr Swantee that was imparting information to him". Given that EE actually had a recording of the discussion at the time, this is said to provide strong evidence that the recording showed that Mr Swantee's response was sufficient to give Mr Dunne some encouragement, since otherwise there could be no basis for the concern.

240. I disagree that this is material evidence that the judge was required specifically to address. It was clear from the evidence that at the time there was a general concern, discussed with Slaughter and May, that a proactive response to any of O2, Vodafone and CPW could provoke a defensive report to the competition authorities (see for example the antepenultimate paragraph of the 25 October email set out at [34] above). Such a concern would be a legitimate one even if, ultimately, it could be shown that EE had done nothing wrong. Further, as far as O2 and the Landmark lunch was concerned the iPad recording was incomplete and unclear.

241. In contrast, at [185] the judge records powerful evidence of a note taken by Mr Blendis of a conversation with Mr Smith, O2's General Counsel, in December 2012, following the decision in November to escalate EE's response ([35] above). The note records Mr Smith as saying:

> "[Mr Dunne] doesn't accept he said anything that terrible but acknowledges he asked some questions & posed some scenarios and Olaf didn't respond. It won't happen again, and they appreciate the way we've dealt with it." (Emphasis supplied.)

Albeit that it is of a later date, this is also consistent with the reference in Mr Whiting's email dated 31 January 2014 to Mr Swantee being "not inclined to discuss EE distribution plans" ([46] above), an email the accuracy of which is positively relied on by P4u.

242. The third item is part of Mr Swantee's cross-examination, where he accepted that in hindsight it would have been better if he had been clearer, or "even clearer", with Mr Dunne to avoid a risk of him being encouraged that he could rely on EE not to take up volume with the indirect retailers if O2 exited, but reiterated that he did not think that Mr Dunne had actually got any comfort. P4u relies on this as recognition by Mr Swantee that there was a risk that Mr Dunne might have taken encouragement, and says that this is inconsistent with other parts of his evidence.

243. Again, there is nothing in this point. Mr Swantee gave his evidence "very frankly" ([36] above). It is both obvious that Mr Swantee could have actively rejected Mr Dunne's overture and (given the dispute that has arisen) natural for Mr Swantee to observe with the benefit of hindsight that it would have been better if he had taken that course. However, as he reconfirmed in this part of his evidence he did not believe that he had in fact provided any comfort.

Ground 4b) and 5: the Dunne/Laurence allegation

244. P4u maintains that, in failing to find that Mr Dunne and Mr Laurence had a collusive conversation about indirect retailers in 2012 (see [43] above), the judge ignored two crucial documents. These were a slide in the presentation for O2's off-site meeting on 12 and 13 September 2012 ([26] above) and the text message from Mr Evans dated 2 January 2013 set out at [37] above.

245. The heading in the relevant slide referred to "events coming up that could create the opportunity to break the current indirect model". It set out a timeline to 2014 which covered the launch of EE's 4G offering, expiry dates for O2's contracts with P4u and references to possible changes to CPW's then joint venture structure. Stated assumptions included that if O2 withdrew from an indirect retailer then another MNO would follow. The main text in the slide, under the heading "Business Impact", referred to uncertainties over the impact of 4G, O2's then proposal for a short-term deal with P4u (see [28] above), the possible opportunity created by a change to CPW's structure and O2's "handset solution" (a handset financing proposal that would be available only to direct customers of O2, judgment at [130]). The final point reads as follows:

> "O2 UK withdraw from P4U in January 2014 from both upgrades and gross as adequate volumes are being achieved through the direct channels allowing for greater bargaining power with remaining direct (assumes Vodafone follows suit) and existing P4U assets could be purchased for lower MV than current price."

246. P4u relies on the fact that this refers only to Vodafone as indicating that O2 knew enough to consider that its most likely response to an O2 exit would be to follow suit. In contrast, in relation to the text message, P4u relies on the absence of any reference to Vodafone, the implication being that (unlike Mr Swantee at EE) Vodafone was already on board in its "resolve against the Indirects".

247. Mr MacLean stressed that not only had the judge disregarded this evidence, on which it was clear that P4u placed significant reliance, but the significance of these documents was all the greater because the inherent probabilities all pointed one way. Mr Dunne was obviously prepared to collude, he had a much friendlier relationship with Mr Laurence than with Mr Swantee, and he had the same incentive to "de-risk" O2's position with Vodafone as with EE.

248. Further (and a point on which ground 5 was also engaged) 4G pricing was, Mr MacLean submitted, a closely related topic. The problematic conversation at the Landmark lunch started with 4G pricing and identified the particular risk of discounting by indirect retailers: it was a composite concern. The judge had failed properly to take account of the relevance of the coordination that he had found to exist between Mr Dunne and Mr Laurence over 4G pricing. Rather, he considered that they were distinct topics.

249. Although P4u clearly placed reliance on them at trial, I am not persuaded that the slide and text render unsafe the judge's conclusion that there was insufficient evidence to find that there was collusion between Mr Dunne and Mr Laurence over indirect retailers. The text message obviously provides no positive evidence of collusion with Vodafone, since it is not mentioned. The slide is part of a lengthy presentation to which the judge referred in some detail in describing O2's decision-making at [129]-[131]. The assumption referred to is just that, and could have been made for a variety of reasons (about which there was speculation in cross-examination) other than that it reflected information from Vodafone. Further, the presentation actually recommended a further one year contract with P4u, rather than the provisional decision to exit that emerged from the meeting. In addition, to the extent – as appears to be the case – that P4u is suggesting that Mr Dunne and Mr Laurence colluded about indirect retailers after that decision was reached with a view to "de-risking" it (for example, at their meeting on 10 October), the presentation predated both events.

250. Further, while I accept that a challenge on grounds of *NatWest v Bilta* delay is not precluded simply because the judge has referred to the evidence in another context, it is not irrelevant that the judge turned his mind to both documents in addressing the closely-related question of whether Mr Dunne colluded with Mr Swantee. That calls into question whether the judge's failure to address them explicitly in the context of the allegation of collusion between Mr Dunne and Mr Laurence was anything to do with the delay in producing the judgment, rather than a decision not to lengthen it further and instead to address the point more generally with his comment at [241] that there was a "wholly insufficient basis on the evidence to support such a finding" ([43] above).

251. In addition, and critically, the judge found that Vodafone had developed no strategy regarding either P4u or CPW in September 2012 (the date of the slide), and further that it only started developing its strategy from November 2013, following which there were detailed negotiations with P4u for an extension to their agreement and, later, discussions for a new deal with CPW (see [50], [55], [56] and [58] above). This is wholly inconsistent with any plan to "follow suit" or having "resolve against the Indirects" (if that meant withdrawing or reducing volume rather than anything else) in September 2012 and January 2013. On a proper analysis, therefore, the slide and text do not provide material evidence that calls into question the judge's conclusion.

252. As regards ground 5, I do not consider that there is any real risk of compartmentalisation. The judge was well aware of how the conversation at the Landmark lunch developed

from 4G pricing to the position of indirect retailers, and made careful findings about it, rejecting Mr Dunne's evidence that he did not seek to influence EE's pricing strategy and explicitly finding that he had said that discounting was likely to be led by the indirect retailers (judgment at [195]). But the judge was also well aware of the separate approaches made shortly afterwards to Mr Swantee by Mr Laurence and Mr Harrison of CPW, and Mr Dunne's involvement in that. Indeed (and for what it is worth), he dealt with those approaches as part of the same discussion as the Landmark lunch, in section G of the judgment, and the specific allegation about Mr Dunne and Mr Laurence in the immediately following section. Those later approaches to Mr Swantee were specifically about 4G pricing and, as Mr Harrison's involvement rather emphasises, did not encompass steps against indirect retailers. The two topics were not therefore necessarily linked. This is nothing like the compartmentalisation found in *Bank St Petersburg*.

Ground 4c): the Humm/Castillo meeting

253. P4u maintains that, in concluding that there was no forward-looking discussion between Mr Humm and Ms Castillo in September 2013 ([49] above), the judge omitted to deal with an email that was at the centre of its case and featured heavily in its closing submissions. This was an internal email sent by Ms Rose of Vodafone on 4 November 2013 to, among others, Mr Laurence and Mr Hoencamp. After a reference to P4u claiming to be in negotiations with O2 "to either bring them fully back in or to fully kick them out" Ms Rose added:

> "Our intel suggests that O2 is more likely to align with CPW and come out of P4U completely".

254. Mr MacLean submitted that this demonstrates that Ms Castillo did provide forward-looking information at the meeting a few weeks before, contrary to the judge's conclusion. Further, even though Vodafone only reached its own decision to exit P4u later (and after O2's own exit), understanding O2's attitude remained material for it due to the risk that O2 would re-enter a relationship with P4u.

255. Mr MacLean also referred to Ms Rose's statement in cross-examination that she prided herself on her integrity, and submitted that the judge should have considered that alongside the fact that she was involved in the subterfuge aimed at discouraging P4u from pursuing an alternative strategy with BT (see [61] above). He submitted that this made clear that she was prepared to deceive, and in the present context the judge should have drawn the obvious conclusion that the information came from Ms Castillo and was passed on by Mr Humm.

256. P4u also maintains that, relevant to the judge's reliance on the reciprocity of any exchange (see [48] and [51] above), two further pieces of evidence undermine the suggestions that Mr Humm disclosed nothing to Ms Castillo and that Ms Castillo would be unwilling to participate in any unilateral disclosure. The first is evidence suggesting that O2 may have received information about Vodafone's contract with CPW, which it is said could have been provided as part of a reciprocal exchange at the meeting. It is a manuscript note by a different Telefonica executive which reads "VOD-CPWH → no tail". The second relates, in essence, to Ms Castillo's probity and the judge's findings about a lax attitude of senior executives to competition law (see [24] above). P4u relies on some brief notes of a call on 7 October 2013 between Ms Castillo and Ms Claudia Nemat, DT's representative on the EE board, recording (in translation) "BT – we do it in

reasonable conditions". This is said to relate to an agreement that EE was in negotiation with BT about, for BT to use EE's network infrastructure. Ms Castillo could not explain the note.

257. It is important to focus on the judge's actual findings. He concluded that Ms Castillo had not been briefed to discuss the topic and that what Mr Humm actually asked was how Ms Castillo felt that O2 was doing. Further, Mr Humm could not give any commitment or comfort because at the time Vodafone had not even begun to address its own position with indirect retailers. And Telefonica had at that stage also not yet been convinced that O2 should exit P4u.

258. The suggestion that a reciprocal exchange was supported by O2 receiving from Mr Humm a small piece of information about Vodafone's contract with CPW (which was not developed by Mr MacLean in oral submissions before us and which I understand was not put to Mr Humm in cross-examination at the trial) is wholly speculative and cannot realistically be regarded as a material omission. The executive who made the note, a Mr Valera Sanchez, whom the judge found to be a frank and honest witness (judgment [122]), was cross-examined on the document and, in response to a question from the judge, suggested that he would expect this sort of information to come from discussions with indirect retailers.

259. I also cannot see anything in the exchange with Ms Nemat, even assuming that the (rather anodyne) information regarding BT was confidential. The judge's findings were not based on Ms Castillo's attitude to competition law or her willingness to receive confidential information from a competitor. Rather, the judge found that as a "highly accomplished business person" Ms Castillo would not have given a commitment to a competitor as to O2's future conduct or disclosed its internal strategy (judgment at [291]). Further, although O2 had by 9 September decided that it should exit P4u that was not approved by Telefonica until late October ([45] above). In that context, the suggestion now made that Ms Castillo went even further and gave comfort that O2 did not intend to re-enter a relationship with P4u lacks reality, quite apart from the fact that even if she had been in a position to do so Mr Humm had nothing of substance to give in return.

260. That leaves Ms Rose's email. As Mr Williams recognised, it would certainly have been preferable if the judge had addressed it. It was obviously raised in closing submissions, which (based on references in both the judgment and permission judgment) the judge must have re-read. It seems highly unlikely that the judge then forgot about it when making his decision about the meeting between Mr Humm and Ms Castillo. This is reinforced by the permission judgment, which states that the email was not taken into account because it was "not relevant", since the change in Vodafone's thinking about P4u occurred much later, and after O2's exit. If that is right, then P4u's criticism of that approach is to no avail. That is because the omission would have nothing to do with delay (so that the relevant test on appeal is confined to whether the judge was plainly wrong in his approach, see above), but more pertinently the issue would fall outside the grounds of appeal altogether given that ground 4 (delay) is the only relevant ground.

261. I have reservations about relying only on what the judge said in his permission judgment, albeit that I have no reason to doubt its accuracy. A permission judgment can be considered in order to elucidate the full reasons for a judge's decision: see [122] above. But there is a natural risk of there being at least a perception that a statement about why

something was omitted from a judgment is an *ex post facto* explanation, rather than part of the judge's actual reasoning at the time.

262. However, in this case there are other considerations. First, it is in fact unlikely that the judge did omit consideration of the email given its prominence, and also the obvious care he took. That care is obvious from the judgment and also from the fact that, as he explained in the permission judgment at [39], he re-read all the documents referred to during the course of the trial (in addition to many additional documents footnoted in closing submissions). That would have included the email from Ms Rose.

263. Secondly, it was clearly correct that Mr Humm had no substantive information to convey about Vodafone's position and that O2's position was not settled. I have also concluded that the judge's finding that Ms Castillo would not in any event have volunteered information by way of a one-way exchange cannot be impugned. The existence of Ms Rose's email cannot affect those important points, which make collusion inherently unlikely.

264. Thirdly, a careful consideration of the email as a whole helps to put the comment on which P4u relies in context. Rather than indicating collusion between O2 and Vodafone over exit from P4u, it raises two options for Vodafone doing continued business with P4u. These were, first, a longer term "tied model" proposal (which I understand would have involved Vodafone taking a minority equity stake in P4u) or, secondly, a two year extension to the existing contract which would "lock in P4U now" while Vodafone's longer term direct distribution strategy was executed and also do what P4u required from Vodafone to "kick O2 out completely". These alternatives and references are hardly indicative of collusion, rather the opposite.

265. Fourthly, although Ms Rose's reference to "intel" does have the flavour of something going beyond pure market information or press speculation, there is obviously no indication as to its source. The fact that it may not have been directly from O2 is rather illustrated by a comment in the email, immediately after the words on which P4u relies, that "I think P4U know this".

266. Fifthly, the email provides no support at all for the argument that the significance of the exchange between Ms Castillo and Mr Humm was that it went beyond indicating that O2 would exit P4u (a matter that became public well before Vodafone's own decision, see above) and provided any degree of comfort to Vodafone that O2 would not re-enter a relationship with P4u. Vodafone's continued uncertainty about O2's position for many months after the meeting is evident from the documentary evidence, contrary to the suggestion that it was materially reduced.

267. Sixthly, I do not consider that the challenge to Ms Rose's integrity is material. The email can be assessed for what it says, not by reference to Ms Rose's evidence.

268. Finally, the judge concluded that even if there had been a relevant exchange of information then the *Anic* presumption was rebutted by Vodafone's later conduct, including signing an overlay agreement with P4u: see [49] above.

269. In its supplementary skeleton argument P4u claimed that the judge's conclusion at [292] that the *Anic* presumption was rebutted related to his finding that Ms Castillo had not shed light on future strategy rather than to the alternative that, contrary to his finding, she

had done so. However, that is not the correct reading of that paragraph, the relevant part of which reads:

> "However, since this does not involve disclosure of future strategy I do not think it supports even the most general allegation of anti-competitive conduct pleaded at para 131(b)(iv). But even if that occurred (and I emphasise that I make no finding since that would be pure speculation) [i.e. even if future strategy was disclosed, which is what para 131(b)(iv) concerned], I consider that such unilateral passing of information by Telefónica Europe to Vodafone could have no causative effect on O2's own conduct. And I find that any presumption that it had an effect on Vodafone's conduct is rebutted by the fact that Vodafone UK's decision to leave P4u was not reached until many months later, in mid-2014, after significant developments in the UK market and extensive and detailed negotiation between Vodafone UK and P4u." (emphasis supplied).

270. Ultimately, therefore, any challenge based on Ms Rose's email can go nowhere.

Ground 4d) and 5: what Mr Dunne told Mr Whiting

271. This challenge relates to the email from Mr Whiting set out at [46] above, in which Mr Whiting recorded what he said he had been told by Mr Dunne on 27 January 2014. P4u claims that, when deciding that Mr Dunne had made up the "commitments" given to Mr Colao and Mr Humm, the judge had disregarded two important pieces of evidence. The first was that what Mr Dunne said about Mr Swantee was true, and the second was the extraordinary coincidence of the reference to Ms Castillo and Mr Humm, given that the subject of O2's exit had come up at their only meeting. These points should have led the judge to consider whether his conclusion that Mr Dunne was lying was improbable.

272. I do not consider that these points are properly within the scope of the complaints about either *NatWest v Bilta* delay under ground 4 or compartmentalisation under ground 5. The judge clearly did not fail to recall or address what was said about Mr Swantee; indeed he relied on it at [307d)] in deciding that Mr Dunne did say what was attributed to him. He also dealt with the meeting between Ms Castillo and Mr Humm, along with the allegation of collusion between Mr Alierta and Mr Colao, in the very section of the judgment that addressed the email from Mr Whiting. I do not consider that the judge can fairly be said to have failed to consider both the email and other evidence of collusion between those individuals in the round. Indeed, he explicitly did so at [305] and [311]. As he said at [311]:

> "I have considered carefully what impact my finding that the conversation indeed took place has on the assessment of whether what Mr Dunne said was true. In my judgment, it does not affect that determination. All the reasons remain for holding that the alleged collusion between O2/Telefónica and Vodafone is most unlikely; and, as Mr Lloyd pointed out at the time, it is just as curious that Mr Dunne should have made these remarks if they were true as if they were not."

(The reference to Mr Lloyd, P4u's Chief Legal Officer, is to his evidence that it had been difficult to believe that Mr Dunne would have made the statements had they been true; it would be "like robbing a bank and telling everyone you have done it": judgment at [308].)

273. Mr Williams also relied on the fact that the allegation of a commitment to Mr Colao was clearly false, weakening P4u's reliance on the truth of what was said about Mr Swantee as indicative of all Mr Dunne's statements to Mr Whiting being true. That allegation had not been put to Mr Colao in cross-examination, had "virtually collapsed" by the end of the trial and was not challenged on appeal. Mr MacLean disagreed that P4u had dropped the allegation, but nevertheless the strength of the judge's findings about the absence of collusion between Mr Alierta and Mr Colao (and therefore the falsity of one part of what Mr Dunne said) weakens P4u's reliance on the truth of the comment about Mr Swantee.

Ground 4e) and 4f) and 5: alleged Vodafone/EE collusion in 2014

274. P4u maintains that there are three key areas in which the judge disregarded or mis-recollected important evidence in concluding that there was no collusion between Vodafone and EE in 2014, namely 1) his conclusion that the topic Mr Scheen wished to raise with Mr Humm was a joint acquisition; 2) his finding that the change in EE's modelling did not reflect a new view that P4u would go out of business; and 3) his finding that the failure to minute the relevant discussion at EE's May 2014 BRM was not suspicious. In relation to the missing minutes, P4u also makes a compartmentalisation challenge about Mr Harris's involvement in misleading Ofcom.

Scheen/Humm

275. In concluding that the topic Mr Scheen wished to raise was a joint acquisition, the judge took account of Mr Scheen's evidence that, despite being concerned about the cost, he had thought that a joint acquisition was "worthy of further investigation" (judgment at [465] and [573]). Mr MacLean submitted that the judge wrongly disregarded other parts of Mr Scheen's evidence which made his scepticism about that idea clear, an email sent to Mr Scheen two days before the call with Mr Humm by Mr Naulleau (also of Orange) and witness evidence from Mr Naulleau and from Mr Thomas Dannenfeldt, DT's CFO and a member of EE's board. That evidence pointed to an overwhelming likelihood that the topic that Mr Scheen had wished to raise, and did raise, was exiting P4u. Further, just raising that topic, even at a very high level, would fall foul of Article 101, so it was no answer that the conversation was brief.

276. Ms Demetriou submitted that there was an ample basis for the judge's conclusion. Not only was a joint acquisition under active consideration at the time but neither EE nor Vodafone had reached their own decision as to whether to stay with or leave P4u. The judge found at [574] that other EE directors were not told about the discussion, EE's modelling continued on the premise that Vodafone would remain in P4u and, at the May 2014 BRM, there was both no firm decision to leave P4u and the idea of an acquisition also resurfaced. Further, P4u mischaracterised the evidence, which was also taken into account by the judge alongside other evidence.

277. I have carefully reviewed the evidence relied on by P4u and do not consider that it materially supports P4u's case.

278. It is true that Mr Scheen expressed scepticism about an acquisition (because in his experience such transactions were expensive, time consuming and risky) but it does not follow that he would not have considered it at all, alongside other possibilities. Indeed, unless an acquisition was clearly a non-starter a failure to consider it would hardly be consistent with sound business decision-making. But it was obviously not a non-starter.

The idea was being promoted by EE and was to be discussed again at the BRM on 10 April (see [70] above). The shareholders had also agreed at the March BRM that their own mergers and acquisitions teams should consider the possibility of an acquisition, which duly occurred (judgment at [452] and following). That possibility was then duly discussed again at the April BRM and was not ruled out. Although the minutes of the March BRM also record Mr Scheen as commenting that "if [the CPW/Dixons] merger goes ahead, may make sense to exit P4U" (a comment which was noted by the judge at [449]), that is a statement that is obviously in highly conditional terms.

279. The witness evidence of Mr Naulleau and Mr Dannenfeldt reflects what was at the very least a distinct lack of enthusiasm for an acquisition on the part of Orange in particular, and notably Ms Lambert's strong opposition, but that opposition was recorded by the judge at [463]. Mr Scheen's own reservations are recorded at [465]. Again, the evidence does not detract from the fact that the idea of an acquisition was nevertheless under active consideration.

280. As to the email to Mr Scheen from Mr Naulleau, this forwarded an earlier email from Mr Naulleau to Mr Gervais Pellissier, Orange's CFO, which contained a briefing for a call that Mr Pellissier was to have with Mr Dannenfeldt. The judge referred to the forwarded email at [464] and [467], so he had clearly considered it. That email referred to the "unique opportunity" offered by the announcement of the CPW/Dixons merger "to break EE's extreme reliance on UK indirect distribution", and then made a series of points. It noted that EE had a "window and lever" depending on whether or not it chose to support the merger. One "scenario for EE to explore" was to negotiate support for the merger in exchange for an end to RMS (meaning revenue margin share, an ongoing monthly payment by MNOs to indirect retailers: judgment at [432]) and withdrawing from P4u. But EE was "more inclined to analyse" an acquisition of P4u. The email also noted that Mr Dannenfeldt's position was "first and foremost to do everything to weaken the excessive weight of indirect distribution in the UK" and that Ms Lambert did not support the acquisition scenario and favoured moving forward on a "costed analysis of our more breakaway scenario of stopping RMS with CPWH and withdrawing [P4u]".

281. The content of this email is best understood in the light of the fact that, as Ms Demetriou confirmed based on Mr Naulleau's first witness statement, EE's contract with CPW had a change of control clause. The engagement of that clause on a merger, with the effect that EE would have been entitled to terminate the contract early, provided EE with the opportunity to renegotiate and improve the financial terms it had previously agreed with CPW. If EE could achieve that then its contract with P4u would obviously be correspondingly less attractive. (It is worth noting that even the apparently implacably opposed Ms Lambert linked withdrawing from P4u with managing to get improved terms from CPW, which at this stage would have been far from assured since the merger terms were not even agreed: see [53] above.)

282. Thus, the "opportunity" was the one provided by the CPW/Dixons merger. That gave rise to options that included leaving P4u if improved terms could be agreed with CPW, or acquiring it. As Mr Naulleau also explained in cross-examination and is reflected in an email of 9 April summarised by the judge at [469], another alternative would have been to use the "game changer" of the merger to insist on improved terms from a comparatively weakened P4u. Mr Naulleau's email is simply not consistent with the "opportunity" Mr Scheen raised with Mr Humm being more likely to be one of leaving P4u rather than anything else.

283. The judge summarised his assessment of the attitude of EE's shareholders to a joint acquisition at [475]. Based on the evidence we were shown that assessment seems to me to be entirely fair. I am not persuaded that there was any mis-recollection or failure to address material evidence such as to amount to *Natwest v Bilta* delay.

284. That conclusion makes it strictly unnecessary to deal with a further argument by Ms Demetriou and Mr Williams that, in any event (and beyond referring to the potential for change in the UK market created by the proposed merger), the judge found that no conversation of substance – whether about a joint acquisition or otherwise – took place: see [89] above. In brief, however, there is real strength in that point, which is also reflected in the permission judgment. The 5 minute call on which P4u relies was on an open line (indeed, in cross-examination Mr Humm explained that he was in a public space, at an airport) between individuals who did not know each other, unlike the "secured" call that Mr Scheen then wanted to arrange.

285. Further, and as Mr Williams submitted, the reference in one of the texts to a "joint opportunity" ([87] above) is consistent with the topic being a joint acquisition. And even if that is not right it is, at the least, consistent with the fact that the "opportunity" that had arisen was the one that was created by the CPW/Dixons merger, as discussed in Mr Naulleau's email.

286. Mr MacLean made something of the fact that the discussion of the exchanges between Mr Scheen and Mr Humm is in a separate section of the judgment, rather than in the judge's chronological account. To the extent that is a complaint about compartmentalisation, I do not consider that there is anything in the point, and it also fails to reflect other critical, relevant, findings. It was up to the judge to decide how to structure his judgment, and the level of cross-referencing shows that the judge had all the relevant issues well in mind.

287. First, the earlier discussion about Vodafone's decision-making has a specific section about Mr Humm which cross-refers to the judge's consideration of the exchanges between Mr Scheen and Mr Humm (see [66] above). Further, in that discussion the judge made clear that if P4u was right then Mr Humm must have kept the information he obtained from Mr Scheen to himself for months rather than sharing it with Vodafone UK, as he said he would have done. That is highly improbable.

288. Secondly, the section of the judgment dealing with exchanges between Mr Scheen and Mr Humm cross-refers at [576] to the earlier findings that, at that stage, neither Vodafone nor EE had agreed their strategy, and that EE continued to assume that Vodafone UK would remain with P4u: see [89] above. These are further, powerful, pointers away from any collusion in the conversation on 2 April.

EE's modelling

289. P4u relies on EE's modelling of what it expected to happen if it left P4u as having changed dramatically on 5 May 2014. Mr Eyre went from assuming that EE would retain only 25% of its P4u volumes to an absorption rate of 60-70%, and also assumed handset cost efficiencies of £34m, an assumption that had previously been made in relation to a scenario in which P4u was acquired. (The absorption rate was the percentage of sales volume through the retailer assumed to be retained if EE ceased to deal with it. "Handset cost efficiencies" is a euphemism for higher margins through lower handset subsidies.)

290. P4u's case was that these changes followed Mr Eyre's discussions with Mr Milsom and Mr Allera on 28 and 29 April ([71] above), and further that in concluding that the 5 May slides did not assume that P4u would collapse the judge disregarded Mr Eyre's witness statement. Mr Eyre's evidence was that the assumption about handset cost efficiencies reflected a view that P4u was likely to represent at least a significantly reduced presence in the market and that the increased absorption rate also assumed that P4u was more likely to cease trading following EE's withdrawal. Further, in cross-examination Mr Eyre had confirmed that at this point in the modelling process he had started to assume that P4u would "materially exit the market". The judge had not addressed why these assumptions were adopted on 5 May, and if he had he would have had to agree that it was very likely to have been his discussions with Mr Milsom and Mr Allera. Instead the judge wrongly attributed the assumption that P4u would collapse to Mr Eyre's later analysis of P4u's cash position ([76] above).

291. Mr Eyre's witness statement makes a number of points. These include the iterative nature of the modelling process as EE's thinking evolved, with interim updates not necessarily being fully thought through. It makes clear that Mr Eyre could not recall the precise rationale for each change in assumptions. As to the 5 May version, the witness statement refers to it being possible that the absorption rate in those slides reflected a provisional view that P4u "were more likely to cease trading following a withdrawal by EE than to continue trading", a view which would not have been a particularly considered one at that stage. As to the handset cost efficiencies, Mr Eyre could not recall but it might have reflected a provisional view that P4u was likely to "represent a significantly reduced presence in the market following a withdrawal by EE (because EE could not otherwise, in my view, have realised handset cost efficiencies of this scale)". These observations do not fit well with P4u's depiction of a dramatic change in approach on 5 May. It is also clear that Mr Eyre did not have a clear recollection of each iteration. As the judge recorded at [519], Mr Eyre was "doing his best to reconstruct his thinking from the contemporary documents". The judge was obviously entitled to form his own view of the documentary evidence.

292. Leaving both this point and the question of whether this is properly a challenge based on *NatWest v Bilta* delay to one side, there is in any event both a straightforward and a slightly more involved answer to P4u's complaint about the modelling. The straightforward answer is that the modelling does not support any allegation of collusion with Vodafone over exiting P4u because it consistently assumed that Vodafone would remain with P4u <u>past</u> the expiry of its own contract in October 2014, and indeed after EE's own exit in September 2015. So even if it could be linked to delay (which I consider to be very doubtful) the alleged failure by the judge to address Mr Eyre's evidence is immaterial.

293. The more involved answer is really an embellishment of this. As always, it is important to consider the judgment carefully. The judge conducted an in-depth analysis of the modelling. He recorded P4u's argument about the change in the assumptions reflected in the 5 May version at [495] but also said that both Mr Eyre and Mrs Derbyshire had been told that changes in absorption rates reflected what was under discussion with CPW (the option in question assumed an enlarged contract with CPW alongside exit from P4u). However, the slides still showed that that option was relatively unattractive and, importantly, it assumed that EE pulled out of P4u at the end of its contract, in September

2015. As the judge observed, therefore, an early collapse of P4u was certainly not assumed.

294. The slides produced for 7 May contained similar assumptions. The judge found at [498] that the 30% of new acquisitions and 40% of upgrades that it was (conversely) assumed would not be absorbed were assumed to go to competitors, and that those assumptions "were made on the basis that P4u would survive and be able to divert that volume to others". The judge noted an express statement in a slide in relation to new acquisitions that it was assumed that P4u would be "able to connect the remaining 30% on another MNO". On this basis the judge was clearly entitled to conclude, as he did at [499], that rather than assuming that P4u would go out of business if EE left, the modelling assumed the opposite. The judge also found that further material changes were made to the assumptions thereafter, including (by 12 May) that, via a combination of a revised deal with CPW and EE's direct sales channel, 70% of new connections would be absorbed as early as the third quarter of 2016 (a point emphasised by the judge at [506]). These changes had a substantial positive impact on the relative financial attractiveness of leaving P4u.

295. Mr Eyre's analysis of P4u's likely cash position followed direction from shareholder representatives at the workshop on 7 May ([75] above). This showed that P4u would run out of cash in mid-2016 if it failed to find a "second player" following EE's withdrawal (judgment at [503], quoting the covering email sent by Mr Eyre on 8 May with his analysis of P4u's cash position, emphasis supplied). This necessarily assumes that Vodafone remained with P4u when EE exited. The point was that P4u would need to replace EE, not both EE and Vodafone. This is further emphasised by the analysis attached to the email, which states as one of its assumptions: "Additional volume from Voda at only 300…". The judge found at [503] that this was an assumption that Vodafone UK would take an additional 10% of new connections secured by P4u.

296. The judge gave detailed reasons at [522] to support his conclusion that EE's modelling did not reflect an assumption that Vodafone UK was likely to pull out of P4u at around the same time as EE, reflecting his earlier findings. These included that the cash flow analysis assumed that Vodafone UK both remained with P4u and increased volumes following EE's exit, and the contemplation that P4u could survive if it attracted a replacement for EE. In addition, the handset cost efficiencies calculation assumed that for the first 18 months after departure from P4u in September 2015 EE would need to increase its subsidy before later reducing it. As the judge said at [522d)]:

> "I regard this projection as inconsistent with an exit by Vodafone UK as well as EE from P4u in 2015, which would obviously have precipitated an immediate collapse of P4u (as indeed occurred)."

297. The judge was obviously aware of the fact that the assumptions changed in the 5 May version of the slides. But it was only when further work was done after the workshop that Mr Eyre focused on the impact of EE's exit on P4u's cash position. This is hardly surprising given the iterative nature of the process, the narrowing of options being considered and the express request to consider what would happen to P4u, a question that had been raised but left for further consideration in the 7 May version of the slides ([74] above). But the critical point is that there is nothing that supports any suggestion of a coordinated exit by EE and Vodafone.

298. Further points could be added to this. For example, the email Mr Eyre sent to his team on 28 April after his discussions with Mr Milsom and Mr Allera referred to a focus on two scenarios, one in which P4u stopped trading and one in which it continued. That is not easy to reconcile with P4u's case as to what was said in those discussions. The gradual development of Mr Eyre's thinking is also illustrated by a further email he sent to Mr Allera on 3 May, in which he observed that he kept coming back to some questions, one of which was "How long do we believe P4U will survive if we pull out", but attached a slide deck which referred to it being likely to survive (judgment at [520]). However, these additional points do not detract from the key point, which was that, even if EE did pull out, Vodafone was assumed to remain with P4u.

299. Last but by no means least, the challenge in relation to EE's modelling was that the judge failed to deal with Mr Eyre's evidence, such as to engage *NatWest v Bilta*. I am entirely unpersuaded that the judge did fail properly to address that evidence.

The May 2014 BRM minutes

300. P4u claims that, in deciding that there was no deliberate decision to avoid recording a discussion ([91] above), the judge wrongly failed to address evidence as to past practice in completing Board minutes and "similar-fact-pattern" evidence in relation to Mr Harris. Neither Mr Harris nor Mr Milsom had been able to recall any other failure to complete minutes. Further, in relation to the March BRM Mr Harris had emailed colleagues to say he was checking the minutes with Mr Blendis (who had not been there) because he was being "extra cautious" given the "topic above". The email was entitled "indirect, next steps". In cross-examination Mr Harris speculated that he may well have asked Mr Blendis whether "there was a point that had been inappropriately captured from a competition law point of view".

301. P4u also maintains that the judge took a compartmentalised approach in relation to EE's contact with Ofcom, pointing to the judge's conclusion that it did not lead him to change the conclusion he had "otherwise reached". Mr Harris's willingness to mislead EE's regulator must have a bearing on his motivation for taking a more modest step of not minuting a discussion.

302. The judge addressed P4u's submission that there was a deliberate omission from the minutes. He noted Mr Harris's normal practice in producing and circulating draft minutes and that he could not explain the omission, but also that there was no record of him being chased for them (judgment at [591] and [592]). As noted at [79] above the judge relied on two other contemporaneous documents to make his findings about what had happened, a note by Mr Deloison and an email from Mr Allera to Mr Harris. The judge found at [594] that the email from Mr Allera, which started "As promised" and set out Mr Allera's understanding of what was agreed, would not have been requested if Mr Harris had been able to take a clear note. I would add to this that it would be surprising if that request had been made if Mr Harris had concluded that he should not minute the discussion at all.

303. The judge also commented that if there were aspects that there was a preference to avoid minuting it would not be the case that the entire item would be left blank (alongside, here, the AOB section, a heading under which there was also significant discussion) (judgment at [595]). Further Mr Deloison's note recorded acceptable discussion, except for one

reference to "be careful with VOD (anti trust risk)" which the judge found to relate to the joint acquisition possibility ([596]).

304. I agree that, if Mr Harris had been concerned about not minuting an inappropriate discussion, he would in all likelihood have included something selective and suitably anodyne under that item of the minutes, rather than leaving them obviously blank in a way that only invites suspicion. Mr Allera's summary could have done that job. The fact that he had obviously requested Mr Allera's email also suggests that Mr Harris had planned to include something in the minutes.

305. The judge was not obliged to deal with every item of evidence. The failure to recollect other occasions is far less remarkable than the oddity of a deliberate decision to leave whole sections blank. The judge addressed Mr Harris's normal practice and was clearly entitled to conclude that something had gone awry on this occasion. Further, Mr Harris's care in checking with Mr Blendis on a previous occasion would also be far more consistent with including something inoffensive in the minutes rather than nothing at all. I am far from persuaded that any failure to deal with the evidence on which P4u relies is linked to delay, but in any event it is immaterial.

306. In relation to Ofcom, EE pointed to the fact that Mr Harris had asked colleagues to check the March 2014 date that was wrongly given to Ofcom as the time when the strategy of having CPW as the principal partner was first agreed (rather than May 2014 which the judge found was the correct date). Further, and importantly, I agree with EE that the judge's choice of words about the conclusion he "otherwise reached" does not indicate compartmentalisation, rather the reverse. The judge explicitly asked himself whether the incident with Ofcom affected his conclusion.

Ground 7: Telefonica's failure to preserve documents

307. Ground 7 relates to an alleged error in the judge's approach to Telefonica's failure to adopt appropriate document preservation measures in 2015, when the allegations were first made, or for some time thereafter. As summarised at [23] and [50] above, the judge applied the approach in *Efobi* but failed to draw an adverse inference. This was relevant to the allegation of collusion between Mr Alierta and Mr Colao, but this ground of appeal is not limited to that.

308. At the hearing of the appeal Mr Draper, who made submissions for P4u on this ground, accepted that although Lord Leggatt's comments in *Efobi* concerned absent witnesses, it is also correct to apply them to an absence of documentary evidence, as Lewison LJ recognised in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48.

309. What Lewison LJ said in *Volpi v Volpi* was this:

> "5. Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Whether any positive significance should be attached to the fact that a person has not given evidence, or to the lack of contemporaneous documentation, depends entirely on the context and particular circumstances: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33; [2021] 1 WLR 3863."

310. This summarised the approach taken by Lord Leggatt in *Efobi* at [41]. There Lord Leggatt emphasised the risk of "making overly legal and technical what really is or ought to be just a matter of ordinary rationality", and said that so far as possible tribunals should be free to use their common sense in deciding whether or not to draw inferences from the facts "without the need to consult law books". Specifically in relation to absent witnesses, the tribunal's approach would depend entirely on the context and circumstances. Relevant considerations would include whether the witness was available, what relevant evidence they might have given, its significance and other relevant evidence that was available.

311. It follows that an appeal on the ground that an adverse inference should (or should not) have been drawn will generally require the appellant to demonstrate that no reasonable tribunal could have reached the decision it did (*Efobi* at [42]). That is a high hurdle.

312. A further point worth stressing relates to other relevant evidence. As Morritt LJ observed in *Malhotra v Dhawan* [1997] 8 Med LR 319, 323, an adverse inference must be consistent with other evidence and factual findings. Earlier, at p.322, he had described limits on the application of the principle as follows:

> "First, if it is found that the destruction of the evidence was carried out deliberately so to as hinder the proof of the plaintiff's claim, then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the Court to disregard the evidence of the destroyer in the application of the principle...
>
> Second, if the Court has difficulty in deciding which party's evidence to accept, then it would be legitimate to resolve that doubt by the application of the presumption. But, thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, I do not accept that the application of the presumption can require the judge to accept evidence he does not believe or to reject evidence he finds to be truthful."

All of these points are relevant here, but the third makes a particularly pertinent point about the significance of other evidence.

313. Mr Draper stressed that the failure to adopt document preservation measures was the result of a deliberate decision on the part of Telefonica. The only explanation given was its view that the claim was unmeritorious, such that it was disproportionate and unnecessary to spend time preserving documents for a claim that was highly unlikely to proceed. Telefonica had called no witness who could be cross-examined about that. By proceeding with reference to the personal position of Mr Alierta (who it seems was only informed of the claim much later) the judge wrongly treated the failure as an innocent one, rather than a deliberate decision by the relevant corporate defendants which allowed potentially damaging documents to be lost. Mr Draper also stressed that in cases involving collusion documentary evidence is likely to be sparse and fragmentary, making preservation of whatever documents there are potentially all the more important. Further, the very marked difference in the level of disclosure by Telefonica relative to other defendants showed that there must have been a significant loss of documents. And the judge's reliance at [303] on the fact that communications by Mr Alierta with O2 or Vodafone would have been captured in those defendants' disclosure exercises did not

take account of the potential significance of internal communications. The judge should have drawn adverse inferences, or as a minimum not permitted Telefonica to rely on an absence of inculpatory documents.

314. However, the criticisms made of the judge under this ground do not take full account of his reasoning. The judge was obviously well aware of what Telefonica had failed to do, including that specific preservation measures were not taken in respect of Mr Alierta until early 2020, and that there was no proper excuse or explanation (judgment at [57] and [303]). P4u also now accepts that the judge was correct to apply the approach in *Efobi*, so there was no error of principle. The judge considered the factual position in some detail and made strong criticisms of Telefonica's approach. He was entitled to accept Mr Alierta's own statement that he had not knowingly destroyed relevant documents, while recognising that relevant documents might nonetheless have been destroyed. Mr Draper submits that the judge was wrong to label such destruction as "innocent" and to reject P4u's allegation of deliberate document destruction (judgment at [58] and [59]), but that imports too much close legal analysis into an area where common sense should prevail. Of course the judge knew that, by choosing not to put in place preservation measures, documents could be lost and so in that sense there was a deliberate decision, but the judge was answering a straightforward factual allegation of deliberate document destruction.

315. Further, the judge clearly had regard to the witness evidence of Ms Nicola Bridge, a partner at Telefonica's solicitors Mishcon de Reya (judgment at [59]). In relation to Ms Castillo, that evidence confirms among other things that all her files, including emails, were backed up weekly and retained. As regards Mr Alierta, around 78,000 emails were retrieved, but it was also confirmed that he relied on his personal assistant for most electronic communication and did not have a smartphone.

316. More significantly in relation to Mr Alierta, P4u cannot escape from the strength of the judge's findings that there was no collusion between him and Mr Colao, supported not only by Mr Colao's witness evidence but by documentary evidence, including as to Vodafone's then position: see [50] and [273] above.

317. Overall, I can see no error of approach by the judge in relation to Telefonica's failure to adopt document preservation measures when it should have done. In particular, the judge considered whether to draw an adverse inference in relation to Mr Alierta's position but decided not to do so. That decision was open to him.

318. As to the complaint that the judge should at least not have allowed Telefonica to rely on an absence of documents, Mr Draper referred to an instance of this at [133] and [138] of the judgment. This related to a discussion that Mr Dunne and Mr Evans of O2 had with Ms Castillo on 3 October 2012 in preparation for a wider meeting between O2 and Telefonica on 9 October. One of the points raised in a follow up exchange between Mr Evans and another colleague at O2, Mr Phil Maple, was entitled "Regional engagement and support to [sic] our move to exit an Indirect". Mr Maple suggested "presumably the Region can guide us as to whether there is a broader appetite for change?" After considering the 9 October meeting the judge concluded at [138] that Mr Maple (who did not attend that meeting) may have hoped to gain some reassurance from Telefonica as to the likely market reaction to O2's decision, but his comment did not bear the weight that P4u sought to place on it. The judge commented that there was no support in any subsequent internal documents for the suggestion that Telefonica had provided any

information about the position of other MNOs at the 9 October meeting, and that the allegation was not put to Mr Dunne or Mr Evans.

319. Again, in my view the judge was entitled to refer to the absence of documentation. There was documentary evidence about the 9 October meeting, in particular an internal O2 email reporting "main takeaways" from it, which contains no hint of support for P4u's allegation. If anything had been said by Telefonica then that might well have been expected to be picked up somewhere in O2's own internal documents, given its importance to O2. Indeed, my reading of this part of the judgment is that it was O2's documents, not Telefonica's, that the judge likely had in mind.

320. I would therefore dismiss ground 7.

Conclusion and closing remarks

321. In conclusion, I would dismiss each ground of appeal. The judge made no material error of law and, in respect of challenges based on delay or compartmentalisation, I am satisfied that the judgment is safe.

322. In closing, I wish to say something further about delay in producing judgments. As already noted, in *Bank St Petersburg* the Chancellor referred at [78] and [84] to an unwritten rule that judgments should be delivered within three months of the hearing, and confirmed that this principle applied even in long and complex cases.

323. There are sound reasons for the existence of a principle of this kind. As the Chancellor said, justice delayed is justice denied, and significant delays lead to a loss of confidence in the justice system (see also *Kanaya Dansingani v Canara Bank* [2021] EWCA Civ 714 at [86], per Arnold LJ, citing *Goose v Wilson Sandford & Co* [1998] TLR 85 at [112]).

324. Nonetheless, three months cannot be an inviolable deadline in all cases. Whether a delay is excessive in a particular case will depend on a multiplicity of factors which will include not only the length of the delay but the length and nature of the hearing, the number and complexity of the issues, and the extent of the documentary and oral evidence to be grappled with. Further, while extrinsic matters such as the personal circumstances of the judge and the pressure of other work cannot detract from the effect of the delay on the parties to the case (albeit that they may well be mitigating factors in relation to the judge's own position), the same does not apply to delay attributable to the need for the judge to take an appropriate level of care in producing his or her judgment. An inadequate, rushed, judgment may well also deny justice.

325. I have already noted, at [262] above, that the level of care taken by the judge in this case is obvious from his judgment and also from the fact that he re-read all the documents referred to during the course of the trial (in addition to many additional documents footnoted in closing submissions). This would have been an enormous task, but it can hardly be criticised given that the judge was deciding a complex, hard-fought case which involved levying a number of very serious allegations against senior executives of the defendant MNOs, allegations which, as the judge also observed in the permission judgment, would ordinarily be the subject of an investigation by a team of officials at a competition authority. And it was that level of care which has, in turn, enabled this court to conclude that the judge did not err.

326. I do not make these points in order to excuse a 15 month delay. Rather, I have set them out in order to emphasise that there is a wide variety of cases, and the extent to which a delay is prejudicial will depend on the circumstances.

327. This leads me to my next, and final, point, which is to reemphasise what I have said above (at [220] and [224] in particular) about the acute danger of island hopping and the court's response to that risk. As Lewison LJ said in *Fage v Chobani*, the trial judge will have had regard to the "whole sea" of evidence presented to him, whereas an appellate court "will only be island hopping". That risk is further increased when an appellate court is invited to apply an additional level of scrutiny to a delayed judgment.

328. It is critical that the additional level of scrutiny required of a delayed judgment is not permitted to become a means of enabling disappointed litigants to benefit from a focus on specific points that they wish to challenge, without a proper regard to the judge's findings on all of the evidence. The court must therefore carefully consider the judgment, and the judge's consideration of the other evidence, as a whole. And the parties should, of course, appropriately assist the court in that task, as indeed occurred in this case. Any other approach would not allow the true materiality (or otherwise) of the evidence on which the appellant relies, and thus the potential for injustice, to be determined.

Lord Justice Phillips:

329. I agree.

Chancellor of the High Court:

330. I also agree.