

**PHONES 4U LIMITED (In Administration)**

**Claimant**

- and -

**(1) EE LIMITED**  
**(2) DEUTSCHE TELEKOM AG**  
**(3) ORANGE SA**  
**(4) VODAFONE LIMITED**  
**(5) VODAFONE GROUP PUBLIC LIMITED COMPANY**  
**(6) TELEFÓNICA UK LIMITED**  
**(7) TELEFÓNICA, S.A.**  
**(8) TELEFÓNICA O2 HOLDINGS LIMITED**

**Defendants**

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**SECOND DEFENDANT'S SUBMISSIONS  
ON A SPLIT TRIAL**

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**I. INTRODUCTION**

1. These are the written submissions of the Second Defendant, Deutsche Telekom AG ("DT"), on the question as to whether a split trial should be ordered, lodged pursuant to the direction of the Court made on 3 July 2020.
2. DT submits (as it has in the two CMCs) that there are real advantages in a split trial, with the first dealing with liability and causation, and the second with quantum.

**II. LEGAL PRINCIPLES**

3. The Court has power to order a split trial under CPR rule 3.1(2)(i):

“(2) Except where these Rules provide otherwise, the court may:

(i) direct a separate trial of any issue;”

4. As with any case management power under the CPR, the power to direct a split trial must be exercised in accordance with the overriding objective under CPR 1. Hildyard J in *Electrical Waste Recycling v Philips Electronics* [2012] EWHC 38 (Ch) explained

as follows:

- a) The approach called for is “essentially pragmatic” (para 5);
- b) There are various relevant factors (which may be competing), and which call for a “pragmatic balancing exercise” (paras 5, 7);
- c) The relevant (and possibly competing) factors include (para 5):
  - i. whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;
  - ii. the advantages and disadvantages in terms of trial preparation and management;
  - iii. whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;
  - iv. whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case;
  - v. whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);
  - vi. whether there are difficulties of defining an appropriate split or whether a clean split is possible;
  - vii. what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process;
  - viii. generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
- d) If a split trial is ordered, it is important to ensure a demarcation of the boundary between the two in terms of the issues to be dealt with at each stage (para 9).
- e) Each case falls to be determined on its own facts, features and peculiarities

(para 8).

**III. SUBMISSIONS**

5. DT submits that there are compelling reasons favouring a split trial, and for the issues in the first trial to encompass the issue of liability, comprising:
  - a) The alleged breaches of duty in tort and contract; and
  - b) The question as to whether those alleged breaches caused loss to P4U.
6. The second trial would then only consider questions of quantum.
7. Under this division, the first trial would determine the following issues in the Agreed List of Issues [**B/2**]:
  - a) Breach of statutory duty (competition law claims): paras 14-19;
  - b) Breach of contract, procurement of breach of contract, and conspiracy: paras 26-32; and
  - c) Causation: paras 20 and 33.
8. The issues listed at paras 21 and 34 would then be determined at the second trial.
9. DT proposes a split trial on this basis for the following reasons.
10. **First**, determining breach and causation separately from quantum could lead to the determination of the claim without the need for a trial on issues of quantum. Significant cost savings would follow:
  - a) DT anticipates that a trial on quantum issues would take up to 4 weeks in itself. If the claim fails on the issues of either breach or causation, a trial on questions of quantum could be avoided entirely, leading to substantial savings;
  - b) If the claim succeeds against certain defendants on issues of breach or causation but not against others, those defendants would be spared the expense of attending a second trial and the scope of that second trial would likely be narrowed for the remaining parties and the Court (since participation by fewer parties is likely to reduce the volume of evidence and submissions to some degree);

- c) There is also a realistic possibility that if P4U succeeded on liability and causation, settlement on quantum could be achieved, thus avoiding a second trial altogether.
11. The importance of cost savings is particularly pertinent given P4U's insolvent status and the very limited funds that it has to meet the claims of creditors (including the Defendants in the event of an adverse costs order).
  12. **Second**, the issues raised in the proceedings are complex and a split trial, reserving issues of quantum to the second stage, would reduce the significant burden on the Court (and parties) of dealing with all issues in a single trial.
  13. **Third**, it would be logical to include issues as to causation in the first trial as there is a clear division between: (1) breach and causation; and (2) quantum. In particular, for the reasons developed below, including causation in the first trial would ensure a clear and workable demarcation to ensure consistency of outcome, and to avoid the Court having to look at the same issues twice or witnesses having to attend to give evidence twice.
  14. In assessing questions of breach of duty (in contract and tort), the Court will have to assess evidence from the relevant individuals on the Defendants' side as to why they took certain steps. For example, P4U's case on breach of competition law is based on an inference drawn from the assertion that the MNOs had no rational legitimate reason to cease trading with it: PoC, para 124. Similarly, P4U's case on breach of contract (and the associated torts) is based on an allegation of ulterior motives on the part of EE, DT and Orange: PoC, para 156. These allegations are, of course, highly contested by the Defendants, who maintain that they ceased (or decided against extending) trading with P4U for lawful commercial reasons: see e.g. EE Defence, paras 13-14; DT Defence, paras 2(j)-(l); Orange Defence, para 4(3); Vodafone Defence, para 5.5; Telefonica Defence, paras 4.2-4.4. To assess these questions of breach, the Court will need to consider the Defendants' reasons for these decisions and hear factual evidence as to the actions that they actually took and would have taken in the absence of the alleged collusion. This is the same question, and hence involves the same evidence, as arises in assessing causation and the counterfactual (assuming that breach were established).
  15. Moreover, to form an assessment of the steps that the Defendants would have taken in the absence of any alleged collusion, it is also necessary to consider the broader

commercial context. This includes, importantly, the position of P4U and its attractiveness as an intermediary at the relevant time. In broad terms, it is the Defendants' case that P4U's viability and attractiveness had significantly declined for other market reasons, and that this fact was a substantial reason for their decisions not to continue trading with P4U, thus rebutting P4U's allegation of collusion: see e.g., EE's Defence, para 14(b); DT Defence, para 2(h)(ii) and (m); Orange Defence, para 4(7) and (13). Thus, evidence on P4U's viability and its position in the market will have to be considered in any trial that considers the question of breach of duty. There is then a very substantial overlap between these issues, and the question as to the causes of P4U entering into insolvency and losing the value of its business (which are encompassed by issues 20(b) and (c)). The evidence on these issues – from both the Claimant and the Defendants – would likewise overlap.

16. A simple and appropriate demarcation of issues would therefore separate quantum from liability (encompassing breach and causation).

#### **IV. CONCLUSION**

17. DT accordingly proposes a split trial, dealing with issues of liability (breach and causation) in the first trial, and questions of quantum in the second.

**ROBERT O'DONOGHUE QC**  
**HUGO LEITH**  
***Brick Court Chambers***

*17 July 2020*