Claim No. CP-2018-000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMPETITION LIST (ChD)
BETWEEN:-

PHONES 4U LIMITED (In Administration)

Claimant

-and-

(1) EE LIMITED
(2) DEUTSCHE TELEKOM A.G.
(3) ORANGE S.A.
(4) VODAFONE LIMITED
(5) VODAFONE GROUP PLC
(6) TELEFONICA UK LIMITED
(7) TELEFÓNICA S.A.
(8) TELEFONICA O2 HOLDINGS LIMITED

Defendants

CLAIMANT'S WRITTEN OPENING SUBMISSIONS

PART I: INTRODUCTION

1. Even before disclosure, this case presented striking and suspicious coincidences. Three MNOs were supplying Phones 4u ("**P4U**") at the beginning of 2014. By September all of them had pulled out, supposedly unilaterally, and P4U had gone into administration. Ds were acutely aware of how this looked, and anticipated questions which the media[1] and Ofcom[2] had not yet asked.

2. But that was only the beginning. The more material has emerged (notwithstanding very extensive document destruction), the more the evidence of unlawful collusion has deepened.

3. The Ds want the Court to believe the following:

[1] Goeddertz1 ¶13 {D3/3/5}.
[2] Harris1 ¶82: "*we were concerned that the sequence of events could be perceived in the wrong way*" {D2/1/20}.

(1) D6 ("**O2**") identified, as essential preconditions for an exit from P4U, that its competitors had to be committed to behave in particular ways – but then decided to exit anyway with no assurance that they would.

(2) O2 believed that "*Big plays by MNOs to change industry's dynamic have failed due to opportunistic responses by competitors*" – but then made no attempts to diminish the likelihood of such opportunistic responses.

(3) Mr Dunne made innocent approaches to Mr Swantee, which Mr Swantee somehow misunderstood as anti-competitive.

(4) Although Mr Swantee/ Mr Blendis recorded that Mr Dunne said he had made similar approaches to an executive or executives at Vodafone, no such approaches occurred.

(5) Mr Whiting fabricated the note of what Mr Dunne said to him, and either lied to the other P4U personnel he told about it, or persuaded them to lie alongside him; alternatively, Mr Dunne made the whole thing up without any basis in fact.

(6) Whilst Mr Humm planned to ask Ms Castillo about O2's thinking on P4U in mid-September 2013, for an unspecified reason he did not do so.

(7) Several weeks later, on 1 November 2013, Ms Rose of D4 ("**Vodafone UK**"; together with D5 ("**Vodafone Group**"), "**Vodafone**") said that "*Our intel suggests that O2 is more likely to…come out of P4U completely*". This was actually a reference not to any intelligence which Vodafone had obtained, but to publicly available information.

(8) D1 ("**EE**") considered that, in order to pull out of a major indirect retailer, one would have to believe that "*Volume typically sold through indirect channel not taken up by other MNOs*" {G6/375/27}. It then changed its mind and decided to exit P4U with no assurance that its volume would not be taken up by other MNOs.

(9) When D2 and D3 ("**DT**" and "**Orange**") discussed a joint opportunity to, in cooperation with Vodafone, "*faire la peau*" to indirect distribution, this referred solely to proposed discussions with Vodafone of a lawful joint acquisition of P4U (which discussions never happened).

(10) When, in late March 2014, Orange and DT discussed an opportunity to break EE's dependence on indirect distribution, that referred solely to the possibility of a joint acquisition. It was also completely unrelated to the call Mr Scheen, a senior Orange

executive, had several days later on "*a topic for the UK market*" with Mr Humm, a senior Vodafone executive (the content of which they both say they have forgotten, and which Mr Scheen sought to follow up with a further call on 'burner phones').

(11) When it was said, in late April 2014, that EE needed to analyse the "*discussions with Vodafone*" about "*Strategic aspects of the distribution market*", that referred to discussions which (a) had not happened yet, (b) never in fact happened, and (c) if they had happened, would have related solely to a proposed joint acquisition.

(12) Vodafone discussed with Carphone Warehouse ("**CPW**") a concern that, if Vodafone exited P4U, EE would "*prop* [it] *up*", but did not try to discover whether EE would in fact do so.

(13) EE executives considered that, if EE and Vodafone could exit P4U simultaneously, P4U "*will starve*" – but did nothing to bring about this desired outcome.

(14) EE confidently predicted that Vodafone would shortly exit P4U – based solely on material in the public domain.

(15) In April 2014, EE believed that P4U would survive an EE pull-out (and that it would cost EE £58 million). In May 2014, it believed that P4U would not survive (and that a pull-out would gain EE £177m). But this change was not based on any knowledge of what Vodafone's plans were.

(16) Vodafone expected that P4U would survive a Vodafone exit. It then apparently changed its mind, and decided to exit P4U despite its analysis showing that would make financial sense only if P4U did not survive. That change was not based on any knowledge of what EE's plans were.

(17) Senior executives at all MNOs disregarded proper competition law protocols, and in some cases their own compliance rules, by meeting competitors without agendas, minutes, or lawyers. They did this not for any illicit reason, but (presumably) because they were lazy or careless.

(18) When EE/DT/Orange and Vodafone repeatedly avoided creating written records of discussions about indirect distribution, that was for solely innocent reasons, and did not reflect any desire to avoid documenting unlawful activity.

(19) D7 and D8 (together, "**Telefonica**") allowed extensive document destruction to occur after being notified of the instant claim – but not because of any desire to get rid of evidence of unlawful behaviour.

(20) Nobody at Telefonica took advantage of the opportunity to delete documents which would have revealed unlawful behaviour.

4. The Court will have to decide, on the balance of probabilities, whether each of these propositions is more likely to be true or false. If, on the balance of probabilities, a single one of these propositions is false, it follows that competition law was infringed. P4U will submit that each and every one of these propositions is implausible, and the idea they are all true is as brazen as it is absurd.

5. That is all before coming to the good faith claim against EE and its (then) owners, to which there is no cogent answer. Numerous authorities have confirmed that, when parties explicitly agree to good faith obligations, those obligations should be given content. With a year left of the EE/P4U contract, EE sent a letter stating that it had reached a final decision as to what it would do, in a year's time, when the contract expired. It did this with the sole or predominant purpose of forcing P4U into administration. Whatever content the good faith obligation has, it must cover a case in which one counterparty deliberately brings about the other counterparty's bankruptcy as a means to escape its own contractual obligations.

6. Against this, it appears that we will hear much from Ds as to why they really were keen to leave P4U, and as to how their analysis showed this would be profitable. No doubt they were, and no doubt it did. The question is whether this was all premised on other MNOs behaving in helpful ways. The evidence shows it was, and that absent such helpful competitor behaviour, each MNO expected an exit from P4U to be a financial disaster.

7. We will also hear much about how each MNO would have preferred its proposed deal with P4U to have been improved. Again, no doubt that is true. It would be surprising, in any high-stakes commercial negotiation, if one side got everything it wanted. But the evidence clearly shows that each MNO had got to the point where a deal was there to be done. It was not the supposed defects in the deals which prevented their acceptance. Each MNO made a strategic decision not to do a deal with P4U, because each MNO chose instead to participate in the coordinated diminishment, and then destruction, of P4U.

8. It is effectively not in dispute that, if Ds acted as alleged, that (a) constituted an infringement of Article 101 TFEU, which (b) was capable of creating appreciable effects on trade between Member States and/or in the UK.[3]

9. This skeleton argument is in four main parts:

   (1) Key background and context: the incentives and constraints which operated on the MNOs; the MNOs' broader patterns of behaviour as to competition law protocols; and the evidence which has been withheld from the Court.

   (2) The unlawful contacts: Mr Dunne's discussions with EE and Vodafone in 2012; O2/ Telefonica and Vodafone's contacts up to January 2014, including the Humm/Castillo meeting in September 2013; and the EE/Vodafone communications in 2014.

   (3) DT/Orange's liability for EE as part of a single undertaking.

   (4) The good faith claim against EE, DT and Orange.

PART II: CONTEXT

THE MOTIVE

Changing the UK market

10. All of the operators saw an urgent need to 'correct' or 'repair' the UK market's low profitability. This low profitability was seen as being due, at least in part, to the strength of the indirect sector. See, by way of example only:

   (1) Mr Dannenfeldt (of DT): "*the UK mobile telecommunications market was known as one of the least profitable big markets across Europe in terms of profit margins*" (Dannenfeldt1 ¶19 {D3/6/7}), in part because of the "*strong presence of independent retail chains, which had a lot more prominence compared to other European countries, with the exception of the Netherlands*" (¶21 {D3/6/8}).

[3] See EE Re-amended Defence ("**D**") ¶¶122-123 (focusing on whether the alleged conduct occurred) {B/3/63}; DT D ¶¶82-83 (no legal argument on infringement; on appreciable effects admission for the UK, denial for the EU) {B/4/46}; Orange D ¶¶55-56 (focusing on whether the alleged conduct occurred) {B/5/49}; Vodafone D ¶108 (focusing on whether the alleged conduct occurred) {B/6/61}; Telefonica/O2 D, ¶¶125-126 (no legal argument on infringement, admission of appreciable effects) {B/7/80}.

(2) Mr Höttges (referred to as "*TH*") (of DT), at an EE Business Review Meeting ("**BRM**") on 15 October 2013, said that indirect had "*been a big cost to the industry*" {G5/141/8}.

(3) Mr Allera (of EE): "*The MNOs' EBITDA margins were under pressure and were lower than those of equivalent European operators, in part because of the relative strength of indirect retailers in the UK*" (Allera1 ¶23 {D2/4/5}).

(4) Ms Castillo (of Telefonica): "*I was aware that TUK had low profitability compared to the other Operating Businesses. I remember that as part of TUK's strategy and priority they wanted to increase sales in their direct distribution channels.*" (Castillo1 ¶¶29-30 {D7/3/9})

(5) Mr Evans (of O2): "*The high cost of distribution was a problem we needed to solve*" (Evans1 ¶55 {D6/1/16}).

(6) Mr Dunne (of O2): "*The perception in Spain was that the UK market was a less profitable one, at least in part due to reliance on indirect distribution*" (Dunne1 ¶22 {D6/3/12}).

(7) Mr Hoencamp (of Vodafone UK): "*direct channels delivered significantly higher value than indirect channels, but Vodafone UK did lower numbers of sales in direct channels*" (Hoencamp1 ¶35 {D5/1/10}).

11. This gave rise to an understandable desire to curb the indirect sector.

Cutting out the middleman

12. The MNOs considered that there were two specific reasons why reducing indirect distribution would be likely to boost profits. First, it would cut out a 'middleman'. As Mr Dannenfeldt put it, "*Like any "middle man", intermediaries consume profit margins, and this obviously happens to a greater extent the larger the intermediaries are*" (Dannenfeldt1 ¶21 {D3/6/8}). The same point is made at Pellissier1 ¶62.1 {D4/3/13}; Swantee1 ¶21 {D2/6/5}; Allera1 ¶23 {D2/4/5}; Eyre1 ¶13 {D2/7/3}; Blendis1 ¶80 {D2/3/19}; Dunne1 ¶23 {D6/3/12}; and Evans1 ¶40 {D6/1/12}.

13. It is also clearly formulated in Vodafone D ¶109.6: "*where sales of Vodafone connections were made through an indirect sales channel, Vodafone UK shared its profits with the indirect supplier…in those circumstances, the Vodafone Defendants were incentivised and wished to maximise direct sales and to minimise their reliance on indirect sales*

channels including P4U" {B/6/63}. Vodafone's Mr Tubb put it more colourfully at the time: "*I think indirects are murdering the direct market.*" {G7/207/1}

Reducing price competition

14. The second major benefit MNOs thought would follow from curbing indirect distribution was reduced price competition. Oddly, the expert witnesses instructed by Ds argue (some more firmly than others) that P4U did not push down prices.[4] The MNOs' executives took a very different view. They considered that the indirect retailers brought prices down, and that getting rid of P4U would enable them to charge higher prices.

15. Taking each MNO in turn:

    (1) As to O2, Mr Evans' evidence is that "*indirect sellers used the commissions paid to them by the MNOs to subsidise the packages they offered…The offers made by the indirect sellers were very price competitive as a result*" (Evans1 ¶50 {D6/1/15}). He also cites the UK's "*strong indirect sales presence*" as one factor explaining the UK's low cost of connectivity (¶40 {D6/1/12}).

    (2) EE identified removing P4U from the market as a catalyst for raising prices:

        (a) In June 2013, EE considered that if CPW purchased P4U, there could be less pressure on prices {G5/130/10}.

        (b) In May 2014, EE's analysis was that purchasing P4U would result in "*handset efficiency*" savings {G12/90/41}. As Mr Eyre explains, this meant that "*P4U's exit from the market should result in less aggressive discounting of handsets*", i.e. would allow prices to rise (Eyre1 ¶68 {D2/7/22}).

    (3) Mr Roberson of Vodafone believed that "*we were subsidising P4U to undercut our own stores*" (Roberson1 ¶41 {D5/4/9}). Reducing that phenomenon would presumably boost margins.

INCONVENIENT TRUTHS

16. Thus, reducing the amount of business done through indirect retailers was a tempting way for MNOs to swallow the indirects' margin; and curbing indirect power promised to diminish price competition. Unfortunately for the MNOs, though, these opportunities could not easily be capitalised upon.

[4] Joint Expert Statement at matters 1r-1u {E5/1/18}.

17. The core problem was identified in an October 2012 O2 presentation: "*Due to* [the indirect retailers'] *size of share they create* ***a prisoner's dilemma*** *for MNOs meaning any unilateral move carries a high degree of risk, hence a lack of structural change in recent times*" (emphasis added) {G2/495/2}. This was also referred to, in an April 2012 O2 presentation, as an "*Inconvenient Truth*", which was that "*Exiting an indirect is* ***not an option*** *if we want to maintain the current trading momentum and share in the market*" {G1/224/6} (emphasis added). This is of a piece with DT's Mr Kniese's frustration in 2014 that there was no simple way to change the structure in favour of MNOs {G10/78T/1}. Why were the indirects so strong?

Indirect sector's grip on customers

18. Most straightforwardly, MNOs had to stick with indirect retailers as long as customers continued to want to use them. As O2 noted in July 2012, "*Insight shows us due to independence consumers actively choose to shop in Phones 4u and CPW rather than MNO stores. Indirect's reach of this segment is huge…*" {G2/165/3}. As Mr Harris of EE accepts, "*there was a strong public perception that the indirect retailers were independent and consumer friendly*" (Harris1 ¶43 {D2/1/10}).

19. P4U had particular strength in the crucial youth demographic (a key source of new customers in an otherwise saturated market). Dr Niels (instructed by Telefonica/O2) agrees "*P4U's customers were typically younger and had a higher spend*" (Niels1 ¶1.34 {E4/1/13}; ¶3.2 {E4/1/46}; see also Mr Bishop (instructed by Vodafone: Bishop1 ¶25 {E3/1/8}, ¶92 {E3/1/27}).

20. That was presumably part of what O2's Mr Maple was referring to when he said, in June 2012, "*We need to be in P4U as they provide access to a unique customer segment and are likely to become the no.1 Indirect player medium term*" {G1/406/1}. It was made more explicit in O2's SWOT analysis, which, in July 2012, described P4U as "*Leaders in the youth market 45% of 16-24 year olds*" (and also as having "*Strongest ARPU vs Market place*") {G2/136/20}. And O2's presentation recommending the proposed P4U deal emphasised that "*Phones 4u maintains momentum in the youth market, whilst attacking CPW*['*s market share*"; and "*Phones 4u have unique access to volume at the 16-24 segment*" {G1/165/5}.

21. The other MNOs were also well aware that indirect retailers were a key driver of youth customers. See Vodafone's analysis at {G11/132/89}. And, for EE, see:

(1) Mr Allera's evidence: "*P4U attracted a younger demographic than EE. P4U's marketing strategy was skewed towards young adults, and they were quite pioneering in digital marketing and social media, so tended to attract younger, high-spending customers*" (Allera1 ¶33 {D2/4/7}).

(2) EE's Distribution Landscape paper in April 2014 identified, as one of the "*Drivers of indirect ascendancy*", that "*CPW and P4U reach some audiences that MNOs struggle to capture e.g. youth*" {G12/57/11}. In May 2014, EE needed to analyse "*how to address unique customer base of P4U (young, male, high smartphone adoption, high ARPU) with other channels in case of exit/run-down*". Mr Eyre thought this was a good (and difficult) question {G12/390/1}.

Network agnosticism

22. Conversely, P4U's customers were, in general, 'network agnostic'; that is, they were <u>not</u> loyal to any particular MNO. Their interest was in the choice between handsets, and the perceived value for money of specific packages that were available. Whether that package was with O2, EE or Vodafone was largely irrelevant. This meant that the MNOs had no reservoir of loyalty to draw on in seeking to attract customers away from P4U.

23. Mr Bishop agrees that new P4U customers were generally network agnostic (Bishop1 ¶25 {E3/1/8}; ¶94 {E3/1/28}). Dr Niels' evidence is somewhat confused. He asserts that "*high network agnosticism does not equate to high loyalty to P4U*" (Niels1 ¶3.10 {E4/1/48}). That might be true as a general proposition. But it ignores the fact that we are concerned here with prospective customers looking to buy through P4U. And the point is that such customers will not be pre-committed to any particular MNO.

24. We know that, in the real world, P4U could easily shift customers between MNOs. As Mr Hoencamp accepts, "*The indirect entities were able to manage volume very quickly, and would need only a few days to instruct or incentivise their sales staff to push a given MNO's connections*" (Hoencamp1 ¶30 {D5/1/9}).

25. Mr Dobson explained how this worked at Dobson1 ¶¶70-72 {D1/5/16}:

> "*in October 2013 P4u had been procuring approximately 35% of its new Contract Connections on behalf of Vodafone UK…Vodafone UK then informed P4u that from November 2013 onwards it wished to receive an increased volume of Connections from P4u. A short-term overlay agreement (i.e. an agreement amending a particular term of the main agreement) was reached between P4u and Vodafone UK, which provided for P4u to receive increased commissions should P4u sell a higher volume of new Contract Connections to Vodafone UK's network.*

Following the overlay agreement being entered into, my recollection is that Vodafone UK's share of P4u's quarterly level of new Contract Connections increased quite substantially. For example, Vodafone UK's share of P4u's quarterly new Contract Connections increased to 43.5% in December 2013 [Claimant-P4U-0012366]. P4u was able to deliver this additional volume to Vodafone UK primarily by instructing and incentivising its sales staff to persuade customers to purchase Connections with Vodafone UK (by paying higher commissions and bonuses for sales of Vodafone UK connections) and offering additional incentives to customers (e.g. free games consoles).

The overlay agreement expired at the end of March 2014…Following the expiration of the overlay agreement, P4u engineered a significant reduction in Vodafone UK's share of P4u's quarterly Contract Connections. P4u purposefully directed the additional volume that it had been procuring for Vodafone to EE instead, because EE had indicated that it wanted additional volume."

26. Crucially, every MNO recognised that, due to network agnosticism, if it left P4U it would likely see its volume hoovered up by its competitors. In January 2012, O2 said that reducing indirect volume would just lead to that volume going to another MNO {G1/149/5}. It expected to lose 75% of its P4U volume if it exited {G1/265/18}.

27. Vodafone identified as a risk of a pull-out that others would take its share in P4U {G9/273/6}. As late as June 2014, senior Vodafone executives were concerned that "*if P4U does not die for whatever reason they will be a dangerous weapon in the hands of a competitor which will try to rotate VF CUSTOMERS in the channel to the supporting competitor*" {G13/309/1}.

28. As for EE, DT's Mr Höttges lamented that "*if we leave* [indirect distribution] *someone else will come in and take over the distribution area*" {G6/358T/1}. Similarly, in April 2014 EE was concerned that "*P4U can replace EE's volumes with other providers*" {G11/58/2}.

Uncoordinated MNOs

29. The final piece of this problematic puzzle was as follows. If the MNOs all reduced indirect volume in tandem, they would collectively benefit (gaining margin without losing volume to one another). More ambitiously, if the MNOs combined to destroy an indirect retailer, they would also benefit from reduced price competition. But, crucially, there was no – lawful – way to achieve this coordination.

30. This was expressed in particularly vivid terms by O2 executives:

    (1) Distribution Game Changers presentation (30.1.12): "*Operator fear of losing overall market share to a rival – drives imperfect market economics*" {G1/149/4}.

(2) Mr Dunne's email to Mr Evans (29.5.12): "*unilateral changes on indirects will be value destructive*" but "*multilateral movement extremely difficult*" {G1/330/1}.

(3) O2 3-year plan presentation (4.7.12): "*Despite all operators* [sic] *interests being aligned, every time anyone has made a move the market has not followed e.g. Voda exited CPW Q3 '06*" {G2/117/28}.

(4) O2 presentation recommending agreeing proposed deal with P4U (16.7.12): "*Big plays by MNOs to change industry's dynamics have failed due to opportunistic responses by competitors*" {G2/165/3}.

31. The MNOs had relatively recent experience of how uncoordinated MNO withdrawals would fail. In 2006, Vodafone exited CPW (and went exclusive with P4U), whilst O2 exited P4U (and went exclusive with CPW). By 2009, both MNOs abandoned these moves, and each went back into the indirect retailer it had exited. Mr Laurence, Vodafone's CEO, told The Guardian that "*It was a decision we took…in the hope that it would provide some kind of changes in the overall distribution pattern in the UK. That did not happen*" {G1/19/2}.

32. It was suggested in Ds' pleadings that the market was structurally different in the 2006-2009 period, such that the earlier failed experiments no longer held any relevant lessons by 2012-2014. In particular, Vodafone said (D ¶31.4 {B/6/18}) that by 2014, the indirect distribution model was in decline; and more specifically that indirect distribution had been weakened by factors including the trend towards a SIM-only model and increased direct sales to consumers.

33. We do not need to focus on the detail of these arguments, because they appear to have been abandoned in the light of the expert evidence. Mr Bishop, Vodafone's expert, says:

> "*The Thomas Expert Report concludes that the trends asserted in the first part of the relevant extract from Vodafone's Amended Defence to support the argument that the indirect business model was in decline in 2014 are not correct. On this question, based on the data available to me, I do not dispute the conclusions of the Thomas Expert Report. I am not aware of other data which would support the claims made by Vodafone in its pleadings.*" (Bishop1 ¶34 {E3/1/10}; see also ¶243 {E3/1/66}[5])

34. And, importantly, key players actually recognised the relevance of the failed experiments. Mr Swantee's evidence is that, "*I felt that what happened to Vodafone between 2006 and 2009 was a cautionary tale… Although that was a long time ago in a market that moves*

[5] He focuses instead on a non-structural factor, i.e. the fact that other MNOs had left P4U.

as rapidly as mobile telephony, I could not ignore the fact that as a result of this move, Vodafone had lost 5-10% of its market share in the space of a few years (most of which was absorbed by Orange), and never really recovered" (Swantee1 ¶107 {D2/6/23}).

35. As to Vodafone itself, on 31 July 2014 Mr Anthony Hamilton (a Vodafone executive) foresaw that people might ask "*Isn't this a similar strategy to 2006 when you put all your eggs in one basket (P4U) and were eventually forced to go back to CPW? What will be different this time?*". He was initially told that the difference was that market conditions had changed. But, on being pressed, the only difference in market conditions Mr Tubb could identify was that Vodafone planned to expand its direct offering {G16/197.1}. That was not a change in market conditions. Mr Tubb, and the other key executives involved in Vodafone's decision-making, were clearly aware that there had not been a relevant change in market conditions which could explain why exiting an indirect had been a bad decision in 2006, but had become a good decision by 2014.

36. As to O2, Mr Maple succinctly summarised matters with his rhetorical question in June 2012: "*We took a leadership position before and exited the channel – no change – why would it be different this time*" {G2/25/1}. O2 also cited Vodafone's earlier failed experiment: "*The capacity a TEF UK* [O2] *reduction in volume creates will ultimately be taken up by a competitor to drive their market share, revenue & OIBDA; Vodafone's withdrawal from CPW is proof of this behaviour*" {G1/149/5}. See also: {G2/71/3}; {G2/117/28}; {G2/165/3}.

CULTURE OF IMPUNITY

37. So the MNOs found themselves in the following position. They had a massive incentive to reduce the volume of business done through indirect retailers, and, if possible, to take an indirect retailer off the market. But they could not achieve these goals unilaterally. It would only happen if the MNOs cooperated. And that was unlawful.

38. That left the MNOs in a bind. They each had to decide whether to take unlawful steps to get out of that bind. Importantly, those decisions did not take place in a vacuum. The context was a corporate culture which appears to have been at best indifferent, and at worst hostile, to abiding by competition law.

Uninterested in boundary between lawful and unlawful

39. Even setting aside the core allegations in this case, senior executives appear to have been relaxed about contemplating or participating in breaches of competition law.

40. Some important examples will be examined further in cross-examination, whilst others cannot be (because key potential witnesses, most notably Mr Laurence, have not come to give evidence, despite the serious allegations against them). But just as a tasting menu:

(1) In its business plan update of 12 June 2013, O2 identified as one "*distribution opportunit*[y]" forming a consortium of MNOs to buy an indirect retailer's UK assets; if it refused to sell, they would (presumably in tandem) "*deliver credible threat of lowering volumes*" or pulling out altogether {G5/63/37}. Concerted action of this type could not possibly be lawful.

(2) On 25 October 2013, Ms Castillo texted Mr Dunne, stating "*I had a conversation with JMAP* [Jose Maria Alvarez Pallete, a senior Telefonica executive] *yesterday. He gave me info re some of your competitors. I will call you later*" {G6/207/1}. To call this suspicious would be an understatement.

(3) On 12 August 2013, one EE executive (Mr Dan Perlet) emailed another (Mr Rui Pereira), under the subject heading "*Indirect channel signalling*" {G5/272/1}. He forwarded an article about EE cutting the commissions it was paying to dealers, and also said "*We have contacted IDC and Enders about the indirect commissions and they are putting questions to Vodafone…We'll let you know if we hear back from IDC or Enders*". Nobody apparently saw any problem with using these companies as intermediaries to extract confidential information from Vodafone.

(4) On 11 March 2014, Mr Eyre emailed Mr Robbie Sahota of EE, stating: "*Marc* [presumably, Allera] *told me today that Voda is pulling out of A1coms (in confidence as not been announced so please share no further)…one to be aware of when we next talk terms for A1coms.*" {G9/318/1} It is very difficult to see how this information could have been obtained innocently.

(5) Mr Froissart of Orange envisaged a scenario in which Vodafone and EE would agree to acquire P4U, "*potentially coupled with a joint exit of the acquirers from CPW*" (Froissart1 ¶37 {D4/5/10}). It does not seem to have occurred to Mr Froissart that, on his own case, he was planning to agree a coordinated, and therefore unlawful, exit from an indirect retailer (CPW).

(6) On 6 June 2014, Mr Sears of EE complained that a journalist would not tell him what Vodafone's position was on indirect {G13/439/4}. He was comfortable prodding an intermediary to divulge confidential information about a competitor.

Inappropriate meetings and calls

41. In that context, it is hardly surprising that all of the MNOs had a scandalously lax attitude to competition law protocols.

42. Responsible executives take seriously the need to document the content of a meeting with a competitor, and to take legal advice as required. The Office of Fair Trading's guidance on competition law compliance notes that a business, "*might decide…that its risk of cartel activity is high due to its sales staff having frequent contact with competitors at trade association meetings or through involvement in other industry bodies*" (4.2 {J3/255/21}). Some "*illustrative examples*" of the measures a business could take include "*ensuring that there are procedures in place to allow for competition law advice to be obtained where any competition law questions arise*"; and "*requiring employees to alert their managers before attending trade association events and to provide the agenda or other materials for the event*" (5.12 {J3/255/29}). The same concern must apply, *a fortiori*, to entirely informal meetings not even under the aegis of a trade association.

43. Added in to this picture were Ds' own compliance manuals and policies. In respect of some MNOs, the position regarding policies is amazingly inadequate – for example EE, having conducted full disclosure searches, has been unable to locate any policy at all which was in place prior to June 2014 (see {J5/109/1-2}, Consent Order at {C/40.5}).

44. Others had substantive compliance policies (which they ignored). For example, O2's Guidance for Participants at Trade Association Meetings stated, "*Ensure you obtain an agenda for each meeting in advance…On receipt of the agenda for a proposed meeting, check that there are no commercially sensitive items on the agenda.*" {G5/17.1/5} A Telefonica Manual on Competition Law admonishes its readers to "*not forget that a lack of rigour in recording information or meetings in documents may give rise to significant risks for Telefónica*" {J5/90/40}.

45. Vodafone's Guidelines for Contact with Competitors states the following, in respect of "*Informal one-to-one*" communications: "***Avoid**. Always speak to Legal. A lawyer may need to attend.*" (emphasis in original) It also stated that executives should "*Agree an agenda in advance*" of any meeting/ communication, and "*stick to it*"; and that they should "*keep an accurate record*" of the meeting/ communication {G2/320.1/1-2}.

46. More broadly, we see that MNOs well understood the need for guardrails to prevent improper behaviour. For example, in December 2013 Ms Lamprell of Vodafone said the

following to Mr Meek of EE, about a proposed joint initiative on combatting fraud {G7/318/2}:

> "*Olaf* [Swantee] *suggested we should discuss ways of combating fraud in the industry. He did not go into details as he was concerned not to create any competition law issues but suggested I get in touch with you. We would be very happy to work together on this issue where appropriate, so please let me know how you would like to take this forward. We would be happy to get a team together in the new year either in your office in Paddington or ours. Given our Dutch colleagues managed to get this wrong and were fined accordingly I will ask one of my lawyers to attend as well as the fraud team.*"

47. The reference appears to have been to a fine imposed by the Dutch competition authority on the three major mobile operators in the Netherlands (Vodafone, KPN and T-Mobile) for operating a cartel in which they exchanged information about the compensation they paid to resellers of mobile phone subscriptions (see {G1/19.02/1}).

48. If they needed any further reminder, the MNOs also had other recent experience of the problems which could affect even meetings where precautions were taken. As reported by Reuters in March 2012, EU competition authorities questioned Vodafone, France Telecom, Telecom Italia, Deutsche Telekom and Telefonica about meetings they had held on strategy and technical co-operation. This was despite the meetings having been attended by lawyers, and a written account of each meeting having been sent to the regulatory authorities.[6] *A fortiori*, meetings which failed to take any such precautions were highly problematic.

49. Unfortunately, despite knowing very well that inter-MNO meetings should include an agenda, have what was said recorded in writing, and, if necessary, be attended by lawyers, the MNOs' executives decided to dispense with any such proper protocols.

50. Disclosure has fortuitously revealed an extraordinary number of informal, unminuted meetings and calls between senior executives at competing MNOs. A (partial) list (with 28 items) is annexed to these submissions. We cannot know what they discussed. We do know that, to the extent there was any attempt to establish the purpose of a meeting in advance, it could be remarkably vague. For example, in July 2014 Mr Alierta (of Telefonica), Mr Colao (of Vodafone) and Mr Stephane Richard (of Orange) arranged to meet {G15/184/1}. Mr Alierta proposed conversation topics such as "*General situation*

[6] https://www.nytimes.com/2012/03/15/technology/european-antitrust-regulators-question-phone-operators.html {G1/193.1}

of the sector" and "*Cooperation model of the sector*". Those topics were obviously ripe to be discussed in improper ways. Apparently, none of the attendees was concerned.

51. The list in the Annex also does not include meetings which were not apparent from disclosure (generally because they were even more informal). For example, Mr Dunne casually mentions that he "*met Mr Laurence perhaps half a dozen times in person over the course of 2011 and 2012*" (Dunne1 ¶107 {D6/3/34}). Even assuming the number to be accurate, that does not include phone calls, or meetings at which other participants were also present.

52. Mr Swantee is similarly casual:

> "*I met and had conversations with my counterparts from the other MNOs from time to time. This included meetings in a formal or public setting (such as joint meetings with Ofcom or at an industry conference), meetings in an informal setting (such as a coffee, lunch or dinner), and occasional telephone conversations*" (Swantee1 ¶37 {D2/6/8})

53. Mr Colao had a range of "*bilateral and multilateral meetings*" with his "*counterparts at the other MNOs*", scheduled around "*industry events*". He says these meetings were to "*discuss topics of joint interest*" (of which he lists some, non-exhaustive, examples). He also says that a lawyer would "*usually*" attend meetings of multiple CEOs (but apparently not the bilateral meetings) (Colao1 ¶47 {D5/3/11}).

54. All of this, and more, will have to be probed in cross-examination. It forms a very important backdrop to this claim. Ds did not just have the motive to collude. Crucially, they had the opportunity to take advantage of a culture of impunity in order to make, and conceal, the relevant collusive communications.

DEFENDANTS' EFFORTS TO CONCEAL AND OBSCURE

55. The final key piece of context is closely related to this last point. Ds have made significant efforts to obscure, have failed to preserve, or have destroyed, relevant material. As it happens, they have not succeeded in preventing direct evidence of their wrongdoing from coming to light. But one ought to have well in mind (a) the sheer fortuity by which this direct evidence has come to light, and (b) concomitantly, that the full scope of the wrongdoing will probably never be known.

56. The Court will become very familiar with EE's 21 May 2014 Minutes, Ms Rose's email accompanying instructions to speak offline with a smiley emoticon, and Mr Swantee's iPad. But that evidence sits in a much larger category of instances where participants

either deliberately did not create records or failed to preserve/destroyed evidence. For discussion of the deliberate non-creation of records, see para. 180 below.

57. Where relevant documents did come into existence, their chances of survival were doubtful. EE's custodians either could not locate their mobile phones, or could not access their data, from the relevant period: {H2/21/6-10}. Orange "*inadvertently omitted*" to preserve documents on key custodians' iPads and mobile phones {H2/4/7}. In response to the pre-action preservation letters Vodafone Group preserved mobile phone and email data on a hard drive – which it has since lost (Woods1 ¶¶12-14 {H3/35/3}; ¶32 {H3/35/6}).[7] Individuals were similarly lax: for example, Mr Hoencamp threw away his notebooks upon moving to the Netherlands (Hoencamp1 ¶96 {D5/1/25}), and Ms Castillo gave away her tablet ("*I do not recall when or to who*" (Castillo1 ¶68 {D7/3/17})).

58. More sweepingly, Telefonica was guilty of failing to preserve/ destroying potentially vast swathes of evidence. On 19 November 2014, Quinn Emanuel wrote to O2 to request that it and members of its corporate group preserve relevant documents {J0/3}. On 15 December 2014, O2's solicitors said it would cooperate, and would liaise with the other members of its corporate group {J0/18}. On 30 April 2015, Quinn Emanuel sent letters before action directly to both Telefonica entities, which reiterated the document preservation requests {J0/43/15} {J0/43.1/15}.

59. Telefonica took no preservation steps whatsoever until July 2015. We do not have direct evidence of what happened then. Ms Bridge says she has been instructed that some searches, the precise scope of which she does not know, were carried out against documents held by three executives (not including Mr Alierta), and responsive documents were printed (Bridge1 ¶20 {H3/33/6}). As to that:

    (1) No measures are said to have been taken from November 2014 to July 2015.

    (2) There is no direct evidence that what Ms Bridge has been told is true.

    (3) Ms Bridge has not even been told the exact parameters of the alleged searches.

60. Even on the most generous possible interpretation of what happened in July 2015, it was disgracefully inadequate. What came afterwards was not better. According to Ms Bridge's instructions, some data was collected in February 2019 (¶40(a) {H3/33/12}), but no legal

[7] Some of Mr Humm's mobile phones were re-imaged (Woods1 ¶35 {H3/35/7}) and certain text message and call data between specified executives were transcribed in a spreadsheet (Woods1 ¶¶23-28 {H3/35/5}), but the data were otherwise lost.

hold was placed on any custodian's inbox until May 2019 (¶40(c) {H3/33/13}) (which legal hold was subsequently deactivated for a further period of time: Telefonica/O2 D ¶32F.3(a)(ix) {B/7/20}). For most custodians, no hold at all was put in place until March 2020 (Bridge1 ¶41(a) {H3/33/14}).

61. In a letter from Ms Bridge's firm dated 11 February 2020, it was stated that the decision not to put in place fuller document preservation measures "*was taken because Tef SA was of the view that the Claimant's claim was unmeritorious and that, therefore, it was unnecessary and disproportionate to spend management time and incur business costs in order to preserve documents in respect of a claim that would not withstand scrutiny.*" {J1/226/6} (para.36) Similarly, Ms Bridge was "*instructed that the view of a number of individuals at Tef SA, including the then General Counsel, Ramiro Sanchez, was that the claims threatened in the LBAs were entirely spurious and without merit.*" (Bridge1 ¶19 {H3/33/5})

62. The inherent likelihood is precisely the opposite: defendants allow documents to be destroyed not because they think the claim is weak, but because they are concerned that it is strong. In any event, the decision was clearly deliberate. The relevant executives gave themselves an extraordinary licence; they believed the rules just did not apply to them.[8] They were presumably informed of their obligations to preserve documents: see CPR PD 31B, para. 7. But they decided to do just the opposite.

63. There are two ways in which this could have led to very significant document destruction. First, documents could have been destroyed indiscriminately (i.e. relevant and irrelevant documents alike), because when employees departed Telefonica in the relevant period, their mobile phones and computers were 'wiped', and all data stored therein was irretrievably destroyed (Bridge1 ¶31 {H3/33/10}). Secondly, individuals were free to delete (and irretrievably destroy) inculpatory emails, in the period up to 31 May 2019 (at the earliest), and (in respect of most relevant custodians) in the period up to March 2020 (Telefonica/O2 D ¶32H.4(c) {B/7/23}).

64. Telefonica's response is to assert that, in the period from March 2019 to February 2020, various executives were instructed (presumably by other, unspecified, executives) not to

[8] It is also noteworthy that, despite his prominent place in Ms Bridge's narrative, Mr Ramiro Sanchez has not given evidence to explain why he, the senior lawyer at Telefonica, apparently saw fit to allow this document destruction to occur. The culture of impunity seemingly embraced even senior lawyers.

destroy documents (Telefonica/O2 D ¶32F.3(a) {B/7/18}), and that they have complied with that instruction. This cannot possibly assist Telefonica, for the following reasons:

(1) The instructions, assuming they happened, occurred far too late.

(2) Telefonica's pleading is very concerning: it says that the relevant executives did not deliberately destroy relevant documents since becoming aware of this claim (Telefonica/O2 D ¶32F.3(a) {B/7/18}). That carefully leaves open the possibility (or likelihood) that these individuals destroyed relevant documents at an earlier time.

(3) For certain executives, even this cautious formulation was not used. Telefonica was unable to plead, even in a limited way, that they had not destroyed documents. The executives are Ms Patricia Cobian Gonzalez (Telefonica/O2 D ¶32F.3(a)(vi) {B/7/19}) and the relevant members of Telefonica's Executive Committee) (Telefonica/O2 D ¶32F.3(a)(vii) {B/7/20}). The latter are not identified in Telefonica's Defence, but appear, from Ms Bridge's evidence, to be Mr Vilá, Mr Navarro, Mr Ansaldo, Mr Linares and Mr de Paz (Bridge1 ¶41(h) {H3/33/16}).

(4) Despite naming, in its pleading, Mr Álvarez-Pallete, Mr Ledesma, and Mr Medina as executives who did not deliberately destroy documents, none of these individuals has supported these assertions by giving a witness statement. In those circumstances, no weight can be placed on the assertions made (in pleading, or in Ms Bridge's evidence) as to what those executives did or did not do.

65. We cannot now know how many relevant documents have been destroyed or lost. The indications are that it may have been a very significant number. Telefonica disclosed only 389 emails (of the approximately 73,700 disclosed by the Ds overall).

66. There might possibly be some reason why, document destruction aside, there are very few relevant emails from Telefonica. But we can only speculate – because the documents that may have been relevant have been destroyed. Telefonica cannot shelter behind arguments as to why destroyed documents might not have been relevant, having deliberately decided to allow those documents to be destroyed in the face of their potential relevance. It is to be inferred that incriminating documents were destroyed, and that at least part of the document destruction was deliberate.

PART III: THE UNLAWFUL CONTACTS

SEQUENCE OF OVERLAPPING COMMUNICATIONS

67. Despite Ds' best efforts, a considerable amount of their unlawful collusion has come to light. The documentary record shows unlawful contacts in each of 2012, 2013 and 2014. Unsurprisingly, in an industry riddled with inappropriate and unlawful behaviour, there were multiple contacts, at different times, between MNO personnel at different levels of their respective organisations.

68. In broad outline:

    (1) In 2012, Mr Dunne contacted Mr Swantee, and also Mr Laurence, with a view to reducing the volume of business done through indirect retailers. EE gave a non-committal response, which Mr Dunne and O2 are likely to have taken as a 'green light'. Vodafone did not distance itself, but rather has sought to keep its part in these discussions secret, and the only possible inference is that it must have given a much more explicit 'green light'.

    (2) In the period from 2012 to 2014, Telefonica executives and Vodafone executives had contacts of the type recorded in Mr Whiting's January 2014 note. On one specific occasion in September 2013, Mr Humm met with Ms Castillo. Consistently with what is recorded in the Whiting note, Mr Humm says he planned to ask Ms Castillo about O2's attitude to P4U. It is to be inferred that he did so.

    (3) In 2014, EE and Vodafone each became confident that the other would exit P4U. The full detail of their communications remains hidden, but they included a telephone call between Mr Humm and Mr Scheen (which both men claim they cannot remember). Assured that P4U would not survive, Vodafone gave notice of termination, and EE engineered a means to put P4U out of business.

69. Each of those episodes will be explored in turn.

MR DUNNE'S APPROACHES TO EE AND VODAFONE

O2 initially in favour of doing P4U deal

70. In 2012, under the agreement in place between P4U and O2, P4U was authorised (in broad summary) to sell new Connections (this part of the contract was up for renewal on 31 January 2013) and upgrade Connections (up for renewal on 31 January 2014).

71. From April to July 2012, it appeared steady progress was being made towards renewal:

(1) In April 2012, O2's internal Game Changing Distribution document expressed concern that O2 was under-indexing with indirect retailers, and in that context identified the renewal of the P4U deal as an opportunity {G1/224/16}.

(2) On 27 April, O2's 3-year strategic plan stressed that indirect retailers were important, and that O2 needed to maintain optionality in them (G1/265/17}. It specifically categorised leaving P4U as an option which was not recommended {G1/265/22}.

(3) In May, O2 circulated draft Commercial Principles for a deal with P4U, which P4U then marked up in early June {G1/313} {G1/353}.

(4) On 14 June, Mr Fynn emailed Mr Maple and others, stating that they should not accept P4U's proposal, but should instead make a counter-offer: "*We need to be in P4U as they provide access to a unique customer segment and are likely to become the no.1 Indirect player medium term*" {G1/406/1}. He said that, if P4U rejected the counter-offer, O2 should still stay in P4U at a reduced level of volume.

(5) On 15 June, Mr Dunne and Mr Whiting discussed their shared aspiration for a deal "*with similar economics to current agreement*", at 30% of P4U's volume. {G1/436/1-3}. Mr Dunne wrote: "*we are committed to driving to agreement between the teams in the next 2 weeks so that a deal with a UK board recommendation can be table* [sic] *in Madrid during July*" {G1/443/1}.

(6) By 5 July, O2 was sending back marked-up Heads of Terms with what was described as "*just one minor amendment*" {G2/128/1}.

(7) On 11 July, P4U circulated a draft of a detailed agreement to O2 {G2/150/1}.

(8) On or around 16 July 2012, O2 circulated an internal presentation on "*Phones 4u New Deal*" {G2/165/1}. It noted "*Heads of Terms have been agreed*" {G2/165/2}, and its conclusion was "*Recommendation: Sign new contract based on the proposed Heads of Terms framework. This mitigates any trading risks medium term and delivers strategic alignment when compared to the alternatives*" {G2/165/14}.

Enticing possibilities

72. However, in June/ July 2012, various personnel at O2 identified that exiting P4U could – if other MNOs played their part – lead to significant benefits.

73. As at 28 June, Mr Maple's view was that walking away from P4U was an option, but that it required an "*industry wide approach and not a random let's hope everyone follows*" {G2/51/1}.

74. A coordinated approach, with other MNOs following, could take different forms. Most ambitiously, if other MNOs also eventually exited P4U entirely, P4U could be driven out of the market:

    (1) On 4 July 2012, an O2 presentation asked "*How could we structurally improve our margin?*", and one component of the answer was "*Indirect consolidation from 2 major independents to 1*" {G2/121/2}.

    (2) Similarly, on 7 July 2012, an O2 paper asked "*What are the implications of bold moves to other players?*", and said that for indirect retailers, "*One MNO pull-out sustainable, two potentially fatal*" {G2/136/10}. It also asked "*What end-game in the distribution model would support a more sustainable UK market?*", and identified as one possible end-game: "*One indirect due to consolidation or exit*" {G2/136/13}.

75. In the shorter term, even without any assurance that other MNOs would ultimately pull out, an O2 exit could still work if the other MNOs did not take steps to hoover up the volume which O2 would be abandoning, i.e. they 'followed' O2 in the more limited sense of not taking up its volume, accommodating a direction of travel away from indirects.

76. O2's executives recognised this (other MNOs not taking volume) as the crucial variable:

    (1) On 15 June 2012, Mr Meacham said that O2 had relatively little leverage in negotiations with P4U. O2 could "*threaten to pull out*", but was "[n]*ot in a position of strength* ***if EE are willing to take big chunk of our share***" {G1/435/1} (emphasis added).

    (2) On 28 June 2012, Mr Maple said whether O2 should do the deal in part "*depends on the strength of our belief that the loss of share to another operator is real!*" {G2/16/2}.

    (3) On 7 July 2012, an O2 presentation stated that O2 was "*Highly exposed to drop in volumes if others didn't follow*" {G2/136/10}. It also asked "*What would you need to believe for a bold move to improve overall economics for TEF UK?*" – one item

is that "*Other large MNOs need to see a better opportunity to* ***follow rather than take share***" (emphasis in original) {G2/136/15}.

77. The problem was that other MNOs had never shown this degree of altruism before, and there was no reason to believe that they would now. The conviction that "*Big plays by MNOs to change industry's dynamics have failed due to opportunistic responses by competitors*" (29 June 2012) {G2/71/3}, and that "*every time anyone has made a move the market has not followed*" (4 July 2012) {G2/117/28}, formed the context for:

    (1) Mr Maple's view that "*to unilaterally exit the P4U channel ahead of LTE* [4G] *will significantly destroy value for Tef O2 UK in the short and medium term*" (10 July 2012) {G2/146/1}.

    (2) The ultimate O2 recommendation, on 11 July 2012, to sign a new contract with P4U based on the agreed Heads of Terms {G2/165/14}.

Europe pushes back

78. That was O2's view. But Telefonica disagreed. The basis of its disagreement was that it had not only hope, but confidence, that market change could be achieved because other MNOs would (contrary to experience) behave in a manner helpful to O2.

79. Already, on 5 July 2012, Europe was pushing Mr Dunne to "*break the downward spiral in the market and believe, despite past experience, that others will follow*" {G2/125/1}.

80. That was the context in which the Excomm, on 17 July, "*recognised*" a "*need for structural change in the UK market*" {G2/201/2}. Accordingly, the Excomm decided "*not to sign the new P4U deal on the current terms offered but to continue negotiations with P4U for a new distribution deal whilst alternative strategic options for structural market change are explored.*" (emphasis in original) {G2/201/3}

81. P4U's reaction to the decision not to finalise a deal in the summer of 2012 reflected accurately what had happened: P4U had shaken hands on a deal with O2, which had then been rejected by Europe {G2/214/8}.[9]

[9] Similarly, when faced, later in the year, with more detailed objections from O2 to the proposed deal, Mr Dobson said that he thought they had a deal with O2 which was rejected by Spain; and that they were only now (22 November 2012) being told of detailed objections {G3/330}.

Analysing potential structural change

82. Having been told by Europe to delay a deal with P4U in order to explore options for "*structural change*", O2's analysis still showed exiting P4U as a binary proposition – if other MNOs played ball, it would be a profitable decision; if they did not, it would not.

83. On 25 July 2012, O2 modelled exiting P4U {G2/208/8}. If the "*market follows*", the forecast was positive OIBDA of £50 million (over 3 years). If the market did not follow, the forecast was negative £57 million. The presentation also said the following:

    (1) If the market did not follow, O2 would reverse back into P4U in January 2014.

    (2) If the market did follow, the result would be "*P4U go bust*". Notably, this wording was changed, nine days later, to "*Structural Market change as a result*" {G2/271/18}. As well as demonstrating O2's desire to obscure what it really aimed to achieve, this shows that "*Structural Market change*" and "*P4U go bust*" were synonymous. That removes any doubt as to what the Excomm meant when it enjoined O2 to explore "*structural market change*" instead of doing a deal with P4U.

84. On 7 August 2012, Mr Evans emailed a number of European executives {G2/264/1}. Having been requested, along with Mr Dunne, to consider "*Game Changing options*", including changes to distribution, he attached a paper analysing various options. On P4U, the forecast had not changed (£57 million 3-year negative impact if the market did not follow, £50 million positive impact if it did). Even if the market followed, the paper noted that there would be minimal short-term benefits, but added: "*However we remain focussed that Distribution must be addressed strategically*" {G2/265/18}. The paper ultimately hedged its bets, just recommending that the "*Indirect Distribution move*" should be considered {G2/265/24}.

85. In a paper prepared as a pre-read for the 'offsite' meeting on 10 September, O2 noted that:

    (1) EE will have first mover advantage on 4G, and can use it to shape the distribution market. "*LTE* [4G] *launch has the potential to change the distribution dynamics dependent on other operator behaviour*" {G2/355/9}.

    (2) "*There are events coming up that could create the opportunity to break the current indirect model*" {G2/355/13}.

    (3) "*To make any strategic move in the indirect channel viable there must exist certain conditions*", including: "*To avoid negative share implications* ***other MNO's must***

pursue the same strategy" (emphasis in original) {G2/355/15}. (In an earlier version of the presentation, circulated on 7 September, one condition was "[t]*here needs to be* ***operator alignment*****"** (emphasis in original) {G2/344/14}.)

(4) "*Pulling out of P4U we assume that the other MNO's would follow leaving P4U unable to continue as a going concern*" {G2/355/25}.

(5) "*This assumes other MNO's to follow our lead if we were to withdraw from P4U otherwise we would need to re-invest which would ultimately cost more to the business*" (ibid).

Conditional decision to pull out

86. But O2 was still not confident that other MNOs would 'follow'. The recommendation in the pre-read for the 10 September 'offsite' was to sign a short-term deal with P4U, and look to exit in January 2014 if O2 had achieved "*oversupply in our distribution*" {G2/355/31}.

87. Mr Maple expressed the continuing dilemma in a note to himself on 10 September 2012 (appositely headed "*The Dilemma*") {G2/346/1}:

(1) "*A need to demonstrate ambition to Group that we will change the market*"

(2) "*Realistically the conditions are not present in our market place for the industry or individual operators to coerce change in the indirect market. In addition we have a poor track record as an industry in the UK…*"

(3) "*Pragmatically we still need strong distribution in the short term as we face a challenging 12-18 months given our position on LTE. A heroic withdrawal from the indirect market would damage our business in the short term.*"

(4) He identified "*The conditions for success*", which included "*Industry wide desire to change* ***collaboratively***" (emphasis added).

(5) "*Arguably these conditions are not present in the UK market today and therefore until* ***we can create these conditions*** *or trigger points exist in the market we have to tread a fine line between optimising our spend, delivering volume and putting ourselves in a position to effect or react to change.*" (emphasis added)

(6) He identified the "*Strategic Approach*" as agreeing terms with P4U, "*plan for a clear exit from p4u in Jan 2014 and* ***stimulate conditions*** *for change.*" (emphasis added)

88. Very oddly, no formal record of the Board's decision has been disclosed, but the contemporaneous documents {G2/371/1} indicate that it was taken on 13 September 2012. It was decided that O2 would leave P4U, but that decision was conditional: it would only be executed if O2 could be confident of making up a substantial amount of the resulting volume shortfall. It was noted that Mr Maple was to report back on making up the volume shortfall within 10 days. The necessary "*conditions*" had not been created yet, but the opportunity was there.

89. Part of what then happened was that Mr Maple tried to secure some additional volume from other indirect retailers. Nothing was achieved within the 10-day deadline. On 2 October 2012, Mr Maple reported (to Messrs Dunne and Evans) that he thought he could secure a bit more volume from CPW (but only enough to get "*halfway there*" to "*closing down the 200k pay monthly volume*") {G2/467/1}. On 8 October, Mr Meacham circulated a paper which indicated that (a) only 76k was likely to be available from CPW, and (b) they had identified the potential for another small increment in volume (44k) from A1 Comms (another indirect retailer), but this was apparently currently on worse terms than O2 had with P4U (they were hoping to "*revise commercials to bring A1 Comms variable margin at least in line with Phones 4U*") {G3/26/3-4}.

90. But even if the plan to pick up more volume had been going to plan (which it was not), that still left the more fundamental question which had been preoccupying O2 since (at least) June: What would other MNOs do? As O2's internal analysis had consistently stressed, the key variable, the essential pre-condition, was that other MNOs would 'follow' an O2 exit. At a minimum, this meant not taking up O2's abandoned volume.

91. The best O2 can do to explain its sudden internal silence on this point is the evidence of Mr Varela, Telefonica's Strategic Priorities Director. He says there were:

> "*discussions about what other MNOs might do in response to TUK's decision not to renew its distribution contract with P4U…I recall discussing that, acting rationally and with a view to the longer term, other MNOs ought to favour increasing their proportion of sales through cheaper direct channels not through the more expensive indirect channels.*" (Varela1 ¶30 {D7/4/8})

92. That is illogical and inconsistent with O2's internal documents, in which the default expectation was that other MNOs would, as they had in the past, act 'unilaterally', or 'opportunistically' to take up volume vacated by O2. Mr Dunne's evidence is that this

would be the normal response to be expected from a competitor: Dunne1 ¶104 {D6/3/33}.[10]

93. O2/ Telefonica's position appears to be that they abandoned the default expectation and decided that other MNOs were likely to (for the first time) respond to a competitor giving up volume in a helpful, or 'multilateral', way, (a) without this generating a documentary record, and (b) without the benefit of any non-public information. That is implausible. In reality, reassurance as to 'multilateral' behaviour came from another quarter.

Dunne / Swantee lunch meeting

94. On 19 September 2012, Mr Dunne and Mr Swantee met alone together for lunch.

95. The starting point in establishing what was said at the meeting should be Mr Swantee's iPad recording, or failing that the copy of that recording Mr Blendis believes was burned onto a CD (Blendis1 ¶37), or even failing that the transcript which Mr Blendis thinks he took of the recording (Blendis1 ¶38) {D2/3/8}. But we have none of these. All have been lost or destroyed (and apparently copies were not given to Slaughter and May when their advice was sought). The only contemporaneous material available is Mr Blendis's note, which he took after listening to the recording {G3/135/1}. The key section is:

> "*RD* [Mr Dunne] *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.*"

96. Mr Swantee reiterates this account at Swantee1 ¶¶53-57 {D2/6/11}. He recalls that Mr Dunne expressed a specific concern that P4U and CPW were likely to heavily discount non-4G Connections (in accordance with their "*established track record of offering*

[10] He says it would have been illogical to have "*flagged to a competitor that there might be an opportunity coming up for them to pick up additional market share*". (That much is true; unless one was hopeful of persuading the competitor to act multilaterally, rather than unilaterally.)

attractive discounts on Connections"), and then either expressly or implicitly indicated that O2 was "*proposing to reduce volume to the indirect channels and wanted EE not to take up the volume that would be given up by O2*". The linkage of the introduction of 4G and the need for MNOs to act in tandem forms a striking continuity with O2's analysis in September, i.e. that "*LTE* [4G] *launch has the potential to change the distribution dynamics dependent on other operator behaviour*": see para. 85 above.

97. Dunne1 edged towards suggesting that Mr Swantee's understanding had been influenced by a "*cold and somewhat fractious*" relationship between them (¶100 {D6/3/32}). But, as of Dunne2, Mr Dunne puts all his eggs in the basket of Mr Swantee having made an innocent mistake. He says this mistake must have related to their discussion of a new cross-industry initiative to develop a common distribution platform (similar to Project Oscar, which related to mobile marketing):

> "*It appears from Mr Swantee's statement that he was confused as to what I said at our meeting at the Landmark Hotel in September 2012, but any impression he was left with that I was trying to influence EE's 4G pricing strategy or indicate TUK's intention in respect of sales through indirect retailers was wrong and can only have arisen out of this confusion. Mr Swantee appears to have misunderstood the conversation and, as a result, (doubtless inadvertently) mischaracterised my explanation as to why, in my view, the time was right to consider some sort of cross-industry initiative (akin to Project Oscar) to improve the efficiency of distribution in the telecoms market.*" (Dunne2 ¶7 {D6/7/3})
>
> "*It appears Mr Swantee's confusion and misunderstanding have stemmed from my suggestion that the timing of the launch of 4G might offer a good opportunity to consider a Project Oscar type distribution initiative.*" (Dunne2 ¶15 {D6/7/5})

98. There are at least six reasons to reject this unlikely explanation.

99. First, Mr Swantee was very conscious of the distinction between (a) Mr Dunne's 'inappropriate' suggestions about reducing volume to P4U/CPW, on the one hand, and (b) discussion of a Project Oscar type initiative, on the other hand. We can see that from Swantee1 ¶¶75-76 {D2/6/15}, and from:

    (1) Mr Blendis's note of the conversation with Slaughter and May. It states that, in response to Mr Dunne's inappropriate approach, Mr Swantee "*Moved conversation onto Project Oscar*" {G3/67/1}. He saw Project Oscar as a lawful 'safe harbour'.

    (2) Mr Swantee's post-meeting email to Mr Dunne. He specifically followed up on Project Oscar {G2/462/1}, and was clearly not discomfited by that part of the conversation. Mr Blendis says the focus on Project Oscar was intended to "*reiterate to Mr Dunne that* [Mr Swantee] *would not action or follow-up on any of the points*

Mr Dunne had raised regarding 4G pricing and indirect distribution" (Blendis1 ¶46 {D2/3/10}).

100. Secondly, Mr Blendis's contemporaneous note of his discussion with Mr Smith (O2's General Counsel), records that Mr Smith said Mr Dunne, "*Doesn't accept that he said anything that terrible but acknowledges he asked some questions + posed some scenarios and Olaf didn't respond*", and "*It won't happen again*" {G4/76/1}. Whatever exactly that means, it is inconsistent with Mr Dunne believing he did nothing wrong and was simply misunderstood.

101. Thirdly, Mr Blendis's note of what he heard on the iPad[11] says that Mr Dunne "*talked about making some 'unilateral steps', and talked about playing some 'big cards'*". There is no reason, on Mr Dunne's account, for why he would have used these words.

102. Fourthly, Mr Swantee understood, from Mr Dunne, that O2 wanted to reduce its indirect volume. That was not public knowledge at the time. Mr Dunne cannot have told Mr Swantee this as part of any even potentially lawful Project Oscar type discussion.

103. Fifthly, on 2 January 2013 Mr Evans texted Mr Dunne, to say that "[r]*eassuring Olaf* [Swantee]" might be "*helpful*", given "*our impending move*", in order "*to strengthen the Operators resolve against the Indirects*" {G4/124/1}. It is common ground that the "*impending move*" was the partial expiry of O2's P4U contract (Telefonica/O2 D ¶81W {B/7/62}). The text message is entirely consistent with Mr Evans knowing that Mr Dunne had made the approach described by Mr Swantee. If all that had happened was an innocent discussion about Project Oscar, the message would make no sense.

104. Sixthly, this was not the only approach made by Mr Dunne in this period. About a month later, Mr Dunne telephoned Mr Swantee (Swantee1 ¶92 {D2/6/19}). As Mr Blendis's note to Mr Swantee records, this conversation involved Mr Dunne "*clearly trying to discuss the current operators negotiations with Apple for new distribution deals, and referring overtly to the possible position of the operators in those negotiations*" {G3/466/2}.

105. Mr Blendis also took a more detailed contemporaneous note {G20/238/1}, which he summarises at Blendis1 ¶64 {D2/3/15}:

[11] See Mr Swantee: "*I assume from the fact that they are set out in Mr Blendis' email that the iPad recording must have captured Mr Dunne saying this*" (Swantee1 ¶71 {D2/6/15}).

"*a. Mr Dunne explained that…he wanted to explore ways in which the MNOs could "*try to restrict the market impact of Apple in saturated markets*";*

*b. Mr Dunne said that he was sharing this view with Mr Swantee and Mr Laurence to form a "*broad view*" across the "*big operators*" about the need to "*rebalance [the] influence of that one handset manufacturer [Apple] in the market overall*"*"

106. Mr Swantee's evidence is that:

"*From what I can recall, Mr Dunne was concerned that Apple was taking advantage of its position in the market to exert pressure on the MNOs to accept unreasonably restrictive terms. His view was that one way to address this issue was for the MNOs to coordinate and use their collective bargaining power in some way to redress the balance between Apple and the individual MNOs.*

I was immediately concerned that, again, what Mr Dunne was trying to discuss, and what he appeared to be proposing, was not appropriate. I recall that I told him specifically that I was not comfortable to discuss EE's negotiations with Apple, and that I tried to move the conversation onto another topic as quickly as possible. I remember feeling really annoyed that Mr Dunne was trying to have this sort of conversation with me again. It was unbelievable." (Swantee1 ¶¶93-94 {D2/6/20})

107. This was not a man who was innocently misunderstood about his intentions vis-à-vis P4U.

Parallel communications with Vodafone

108. From EE's late disclosure, it is now clear that, alongside Mr Dunne's conversation with Mr Swantee, he had a parallel conversation with a Vodafone executive, almost certainly Mr Laurence. Mr Blendis noted ahead of his meeting with O2's General Counsel {G3/466} that he has, "*been made aware by Olaf that he has been on the end of a number of approaches and calls from Ronan Dunne (RD) over the last few months that he has become increasingly concerned about*" {G3/466/1}, and that "*There is an indication that some discussions have been co-ordinated with other parties such as Vodafone. Calls were often referenced by indications such as, 'I've spoken to x, and now I'm speaking to you…'.*" {G3/466/2}

109. Unless there are other incidents that have not been admitted or revealed by disclosure, Mr Dunne approached Mr Swantee twice: once about reducing volume to indirect retailers, and once about Apple. Mr Blendis's contemporaneous note clearly states that Mr Dunne used the *"I've spoken to x, and now I'm speaking to you*" formulation on multiple occasions. This must include therefore include both the approach relating to indirect retail and the approach aimed at coordination vis-à-vis Apple. As Mr Blendis's note indicates, the "*x*" in this formulation was (and could only logically have been) someone at Vodafone.

110. It is entirely unsurprising that Mr Dunne would have approached Mr Laurence:

(1) Vodafone was the other MNO supplying P4U. If Mr Dunne was to approach Mr Swantee (as he did), he had every reason also to approach Vodafone (specifically Mr Laurence, who was Mr Dunne's – and Mr Swantee's – opposite number as CEO).

(2) Mr Swantee's evidence (Swantee1 ¶82 {D2/6/17}) is that Mr Laurence made a further collusive approach on 10 October 2012, conveying the "*very clear*" message that "*he understood that EE was proposing to charge a £5 per month premium for 4G, and that he believed a £10 per month premium was more appropriate.*" Mr Swantee assumed that Mr Laurence "*had the same concerns as Mr Dunne, namely that if EE led the way with an aggressively priced 4G product, that would exert downwards pressure on the 3G market, and may also undermine the other MNOs plans to launch 4G at a higher price point in the future.*" This was the same broad subject-matter that triggered Mr Dunne's anti-competitive approach of 19 September. Any suggestion that Messrs Dunne and Laurence separately made anti-competitive approaches to Mr Swantee on related subjects, without discussing those matters between themselves, is unreal.

(3) There was ample opportunity for communications between Mr Dunne and Mr Laurence to occur. Mr Dunne's own evidence is that he met Mr Laurence "*perhaps half a dozen times in person over the course of 2011 and 2012*" (not including telephone calls) (Dunne1 ¶107 {D6/3/34}). No agendas or minutes for these meetings (or calls) have been disclosed. Mr Dunne and Mr Laurence even met in the morning of 10 October 2012 (the very day on which Mr Laurence later approached Mr Swantee) {G3/3/1}.

111. It is difficult to imagine any evidence Mr Laurence could possibly give to rebut (a) the contemporaneous documents and (b) the inherent probabilities. But in the event, he has not given evidence on these very serious allegations. That gives rise to a clear adverse inference, which further buttresses the case against Vodafone.

112. Consistently with the evidence of a Dunne/Laurence conversation, in this period O2 gained confidence as to Vodafone's attitude to the indirect market. In particular:

(1) In the September paper ahead of O2's 'offsite', its analysis was that "*O2 UK withdraw from P4U in January 2014 from both upgrades and gross as adequate volumes are*

*being achieved through the direct channels…**(assumes Vodafone follows suit)***" (emphasis added) {G2/355/13}. The assumption was not explained.

(2) In early January 2013, Mr Evans wanted to reassure Mr Swantee in order "*to strengthen the Operators resolve against the Indirects*" {G4/124/1}. He apparently did not believe that Vodafone's resolve was in need of strengthening. See also para. 118(3) below.

EE's complicity

113. Mr Swantee was unhappy that Mr Dunne had made the key anti-competitive approach. But that unhappiness does not relieve EE of legal liability. What matters, as a matter of law, is whether EE publicly distanced itself from the approach. It did not.

114. Mr Swantee should have rebuffed Mr Dunne at the time of the meeting. EE, whether through Mr Blendis or otherwise, should have followed up swiftly and forcefully to denounce what had happened and distance EE from it. It is plain that Mr Swantee did not rebuff Mr Dunne. EE, knowing this, waited months (until further approaches had been made) to do anything, and then followed up in a way which was wholly inadequate, not least because EE was more concerned to avoid triggering an approach by O2 to the regulators than it was to distance itself effectively from collusion.

115. As to how Mr Swantee responded to Mr Dunne, if he had said anything exculpatory, EE would have made great efforts to retain the iPad, or the CD into which Mr Blendis believes the recording was burned, or the transcript note which Mr Blendis took of the recording. In any event, though, the contemporaneous notes of what Mr Swantee said tell the story with sufficient clarity. Mr Swantee did not say he rebuffed Mr Dunne, merely that he was, "*careful not to respond on those points, other than to talk in general about* [his] *public strategy for EE*", and "*did not agree with any of his suggestions or take up the point in any way so as to suggest agreement*" {G3/135/1}. At best, he was passive.

116. Mr Blendis, who listened to the iPad recording, does not say Mr Swantee rebuffed the approach. He says only, "***Mr Swantee felt** that he had made his and EE's position clear by not engaging with or indicating any agreement to Mr Dunne's proposals*" (Blendis1 ¶47 {D2/3/10}, emphasis added). If Mr Swantee felt that, it was not based in reality. This was laid bare when Slaughter and May asked if Mr Swantee "*disabused suggestions that he was open to coordination of behaviour*" {G3/112/2}. Nobody said he had. Presumably

partly because of this, Slaughter and May disagreed that the risk of action against EE was low {G3/112/3}.

117. As mentioned above, after the meeting Mr Swantee emailed Mr Dunne about Project Oscar. This may have been an attempt to take forward the potentially lawful part of their conversation. But it cannot fairly be characterised, *pace* Mr Blendis, as an attempt to "*reiterate to Mr Dunne that he would not action or follow-up on any of the points Mr Dunne had raised regarding 4G pricing and indirect distribution*" (Blendis1 ¶46 {D2/3/10}). Mr Swantee and Mr Blendis specifically decided not to take "*further*" – or any – "*steps to rebut*" Mr Dunne (or the approaches made by Vodafone/CPW, discussed further below), concerned that proper protests could lead to the others whistle-blowing and alleging wrongdoing against EE {G3/135/2}.

118. In those circumstances, Slaughter and May had good reason to advise that there was a "*Risk that RD* [Mr Dunne] *has gone back and taken the conversation as a green light*" {G3/67/1}. While that is not a necessary ingredient of EE's liability, it does appear that Mr Dunne had received adequate (although imperfect) assurance as to EE's attitude:

    (1) Whatever was said or not said left Mr Dunne feeling comfortable that he could make a further anti-competitive approach to Mr Swantee a couple of months later.

    (2) Mr Evans' later suggestion that it would be a good idea to reassure Mr Swantee, in order "*to strengthen the Operators resolve against the Indirects*" {G4/124/1}, shows that he believed that EE was already at least somewhat resolved to take a stand against the indirect retailers. The source of that belief was presumably Mr Dunne.

    (3) On 10 January 2013, Mr Ledesma of Telefonica provided comments on a draft presentation to, *inter alios*, Mr Evans. Responding to Mr Ledesma's comments, Mr Evans said he would: "*Highlight what took place in 2006 although circumstances have changed. This time all operators have lost further margin* ***and recognise the distribution landscape must change****...*" (emphasis added) {G4/141/2}. There was no publicly available information to the effect that all MNOs (relevantly, Vodafone and EE) recognised a need to change the indirect distribution landscape.

119. Ultimately, EE's case rests on the submission that it can escape liability, because Mr Blendis "*publicly and unequivocally distance*[d]" EE from the approach in his meeting with O2's General Counsel, Mr Smith (EE D ¶146B(c) {B/3/84}; see also ¶74(e) {B/3/30}).

120. There are two fundamental problems with that submission. First, Mr Blendis's supposed protest came far too late. It occurred in December 2012 (Blendis1 ¶68 {D2/3/16}). This was more than three months after Mr Dunne's lunch with Mr Swantee, and long after O2 was all-but-committed to leave P4U. The failure to protest had generated effects in the market.

121. Secondly, what Mr Blendis said to Mr Smith did not meet the test for public distancing.

122. The authorities set out a strict test:

(1) Case T-342/18 Nichicon Corp v Commission [2021] 5 C.M.L.R. 19 (29.9.2021), at ¶398: "*It is for the undertaking to prove its firm and unambiguous disapproval of the cartel by distancing itself from it publicly and, given that it is a means of excluding liability, that notion must be interpreted narrowly.*" See also ¶399: "*It is the understanding which the other members of a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement*".

(2) Case C-634/13 P Total Marketing Services SA v Commission [2015] 5 C.M.L.R. 24 (17.9.2015), at ¶21: "*The Court has also held that an undertaking's participation in an anti-competitive meeting creates a presumption of the illegality of its participation, which that undertaking must rebut through evidence of public distancing, which must be perceived as such by the other parties to the cartel*".

(3) Case T-377/06 Comap SA v Commission [2011] 4 C.M.L.R. 28 (24.3.2011), at ¶76: "*It is apparent from the case-law that the communication that is intended to constitute a public distancing from an anti-competitive practice must be expressed firmly and unambiguously, so that the other participants in the cartel fully understand the intention of the undertaking concerned*".

123. In this case, Slaughter and May toned down the script containing Mr Blendis's proposed comments to O2, to avoid him saying that the conversations were unlawful {G4/5/2}. This was "*motivated by a desire to avoid backing them into a corner where they feel they have no option but to make an approach to the authorities*". Mr Swantee then urged Mr Blendis to be "*super diplomatic*" {G4/58/1}.

124. That is consistent with both Mr Smith and Ms Campbell's (Vodafone's General Counsel) evidence about their meetings with Mr Blendis. Although – surprisingly – no meeting participants appear to have taken notes, Mr Smith says as follows:

> "*At the meeting on 14 December 2012, Mr Blendis made two points. First, Mr Blendis said he was concerned that Mr Dunne had asked Mr Swantee whether or not EE negotiated with Apple on a group or on a per operating business basis. Second, Mr Blendis said that Mr Dunne had asked Mr Swantee whether he would discuss distribution in the UK. Mr Blendis told me that Mr Swantee had been uncomfortable in relation to both questions. These issues were not put to me in any more detail by Mr Blendis.*" (Smith1 ¶19 {D6/5/5})

125. Similarly, Ms Campbell says she has:

> "…*some recollection of the overall tenor of the meeting. As far as I can recall, the meeting was relatively low key but I believe that Mr Blendis mentioned a potentially inappropriate telephone conversation between Mr Laurence and Mr Swantee. However, as far as I can recall, the discussion was more preventative and forward-looking than it was about the past – i.e. Mr Blendis expressing his concern and reinforcing that inappropriate discussions should not happen in the future… I note from Mr Swantee's statement that he asked Mr Blendis to be "super diplomatic" when he spoke to me. This would accord with my recollection of the tone of the meeting.*" (Campbell1 ¶¶16-17 {D5/7/3})

126. In its concern to avoid triggering whistle-blowing by O2 or Vodafone, EE erred much too far on the side of 'diplomacy' and failed to achieve public distancing.

127. Notably, applying the test in the authorities ("*public distancing, **which must be perceived as such by the other parties to the cartel***"; "*must be expressed firmly and unambiguously, **so that the other participants in the cartel fully understand the intention of the undertaking concerned***" (emphases added)), O2 still understood in January (<u>after</u> Mr Blendis met Mr Smith) that it had EE's 'green light': see para. 118(2) and (3) above.

128. Mr Swantee appears himself to have understood that the steps taken were inadequate:

(1) In its Particulars of Claim, P4U alleged that Mr Swantee told Mr Whiting, in broad terms, about his conversation with Mr Dunne, "*claimed to have rebuffed the approach*", and "*claimed that EE had prepared a letter to be sent to Telefónica protesting at O2's approach*" (¶56 {B/2/34}).

(2) EE admitted, presumably on Mr Swantee's instructions, that Mr Swantee said these things to Mr Whiting, and pleaded that Mr Swantee was mistaken in his belief that a letter had been prepared (EE D ¶74(g) and (h) {B/3/30}).

(3) Mr Swantee now says something completely different. Without unequivocally denying what he said to Mr Whiting, he avers, "*I do not remember telling Mr Whiting about these approaches, and it seems completely illogical to me that I would have done so*". He also says he has "*no recollection of having said*" that "*EE had prepared a letter to O2 protesting against Mr Dunne's approach*" (Swantee1 ¶¶28-29 {D2/6/6}).

129. It is obvious that Mr Swantee is uncomfortable about having said these things to Mr Whiting. It is also obvious why. He told Mr Whiting that proper steps had been taken to

publicly distance EE from Mr Dunne's approach, because he knew that was what should have happened. And it did not.

130. The overall picture against EE is damning. It was not the prime villain or the instigator of the unlawful activity in September 2012. But there is a test as to what the recipient of an approach has to do in order to avoid liability, and EE signally failed to meet that test.

Vodafone's complicity

131. Mr Dunne had a collusive conversation with a Vodafone executive (presumably Mr Laurence), similar to that he had with Mr Swantee: see paras 108 to 112 above.

132. As already noted, this was part of a larger pattern of Mr Laurence's (and Vodafone's) unlawful behaviour. In particular, Mr Laurence brazenly pushed EE to charge a £10/month premium for 4G (rather than £5): see para. 110(2) above. This was apparently coordinated as between Vodafone and CPW (and was followed up by a near-identical approach to Mr Swantee by CPW's CEO): Swantee1 ¶84 {D2/6/17}, ¶87 {D2/6/18}. This was the culture of anti-competitive behaviour within which these senior executives were operating.

133. Once it is accepted that the conversation between Mr Dunne and Mr Laurence happened, Vodafone do not have any case on public distancing, and accordingly no way to defeat liability. Indeed, the inference from Vodafone's silence is that they engaged with Mr Dunne. Were it not for Mr Swantee's discomfort and the disclosable documents to which it gave rise, the whole episode would not have come to light.

THE WHITING NOTE

134. On 27 January 2014, Mr Whiting and Mr Dunne participated in a meeting. On 31 January 2014, Mr Whiting wrote the following note by email to Mr Lloyd:

> "*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 César Alierta Izuel (CEO, Telefonica) had given commitments to Vettorio Colao* [sic] *(CEO, Vodafone) and Eva Castillo Sanz (CEO, Telefonica 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.*" {G8/121/1}

135. Messrs Dobson and Lloyd (along with Mr Whiting) say that Mr Whiting told them what Mr Dunne had said: Whiting1 ¶¶38-42 {D1/3/10}; Dobson1 ¶¶129-132 {D1/5/28}; Lloyd1 ¶¶31-35 {D1/2/9}.

136. Two questions arise: first, did Mr Dunne say what he is recorded as having said; and secondly, was it true? The questions are closely related. If Mr Dunne made the recorded statement, it must be overwhelmingly likely that it, or some version of it, was true.[12] And, conversely, the more other evidence tends to confirm the truth of what Mr Dunne is recorded as having said, the more likely that he did indeed say it.

137. As to what Mr Dunne said, Mr Whiting's account has the ring of truth:

> "*I was careful to write down the names of the specific executives at Telefónica and Vodafone to whom Mr Dunne referred. Some of those names were unfamiliar to me. I knew that Vittorio Colao was the CEO of Vodafone Group and Philip Humm the head of Vodafone Europe, but I did not recognise César Alierta Izuel's or Eva Castillo Sanz's names, although I understood from the context that they were senior Telefónica executives. I probably spelt their names wrong when I wrote them down, as I recall after the meeting looking up their names on Telefónica's website to work out how to spell their names and who Mr Dunne was speaking about.*" (Whiting1 ¶36 {D1/3/9})

138. On the other side of the dispute, Mr Dunne's denials are no more plausible than his similar denials of his conversations with Mr Swantee (or Mr Laurence).

139. That is reinforced by strong evidence confirming the truth of at least significant parts of the note. What Mr Dunne said about the approach to Mr Swantee (and the latter's relative reticence) is wholly consistent with what we now know. And the supporting evidence is similarly compelling for what Mr Dunne said about the Telefonica/Vodafone conversations.

Off-the-record communications

140. The starting point is the opportunity which the relevant executives gave themselves to collude, through inappropriate off-the-record meetings and calls. Mr Alierta says he met Mr Colao "*several times in the Relevant Period*" (Alierta1 ¶16), although he does "*not now recall the detail of discussions at each meeting*" (Alierta1 ¶17) {D7/2/6}. Mr Colao says that he and Mr Alierta, "*came across each other in the contexts I have described: at industry events or when our businesses worked together on joint collaboration*

[12] Although this is no party's case, Mr Dunne could in principle, deliberately or accidentally, have got a detail wrong. However, the evidence supports the accuracy of what he said, and it is inconceivable that Mr Dunne, whatever his propensity for untruths, made the statement up out of whole cloth.

projects…" (Colao1 ¶48 {D5/3/11}). There is no attempt to comprehensively identify the meetings and calls in question; given their apparently informal nature, that is unsurprising.

141. Informal chats between major competitors were in flagrant breach of both companies' compliance policies: see paras. 44 to 45 above. Applying the balance of probabilities test, Messrs Alierta and Colao cannot claim the benefit of any doubt as to the content of meetings they say they have forgotten (even before taking account of Mr Alierta having disclosed virtually no documents following Telefonica's document destruction: see para. 65 above).

Humm / Castillo

142. As to Mr Humm and Ms Castillo, on 3 September 2013 Mr Humm obtained Ms Castillo's telephone number from Mr Colao {G5/325/1} (despite the latter saying that he had no relationship with Ms Castillo and does not believe he ever spoke to her on a one-to-one basis: Colao1 ¶50 {D5/3/12}). Ms Castillo then telephoned Mr Humm {G5/329/1}. We do not know what they spoke about, but Mr Humm then emailed: "*It was great talking to you. I will ask Natalie or Sheryl to set up a meeting for us asap.*" {G5/347/1}. Absent Mr Dunne's comments, Mr Whiting would have no way to have known about the call or the meeting.

143. As to the content of the September 2013 meeting, once again there was no proper agenda or minutes, and no lawyers were present. Ms Castillo's evidence is that "*I no longer recall what we discussed but I believe it would have been normal business networking*" (Castillo1 ¶48 {D7/3/13}) and "*I do not recall what was discussed at this meeting (which occurred over eight years ago) and so I do not recall discussing TUK's exit from P4U or the indirect channels more generally*" (Castillo2 ¶6 {D7/5/2}). She has not disclosed any documents directly evidencing what was said at the meeting, but even if a record had been created (unlikely), it would probably have been subsequently destroyed: see para. 65 above. For Ms Castillo to profess no idea as to what was discussed is lamentably inadequate.

144. Mr Humm, on the other hand, has a surviving document to explain away: his manuscript notes at {G5/16/1}. He therefore has to be a little more forthcoming. His explanation of his note on "*out distribution*" is that "*I think that I was interested to gain a sense of whether Telefonica felt good about having exited P4U.*" (Humm1 ¶50(e)(iii) {D5/2/11}). Although Mr Humm appears not to realise it, that is a remarkable confession. Ms Castillo

is constrained to say that she, "*would not have considered that sort of commercially sensitive information to have been an appropriate matter for discussion with Mr Humm or any competitor*" (Castillo2 ¶7 {D7/5/2}). It very plainly was not.

145. Mr Humm did not have an idle interest in O2's sentiments. He and Vodafone were interested in O2's views on its partial exit from P4U because of the obvious bearing on (a) how likely O2 was to fully exit P4U in January 2014, (b) how likely O2 was to re-enter P4U in the future, and possibly also (c) to see if O2's experience with P4U held any lessons for Vodafone.

146. Conveniently, Mr Humm says that he does "*not believe that I actually addressed this topic at the meeting.*" (Humm1 ¶50(e)(iii) {D5/2/11}). That is very unlikely to be true. First, Mr Humm's evidence that these notes were made in advance of the meeting (Humm1 ¶49 {D5/2/10}) is dubious; their content is more consistent with note-taking in the course of the meeting. But even if that evidence were correct, he does not explain why a topic which he (on his own account) thought worth raising, would have been dropped. As to Ms Castillo's reply to being asked "*whether Telefonica felt good about having exited P4U*", she says rather limply, "*I do not believe that I would have answered such a question*" (Castillo2 ¶7 {D7/5/2}). That too is unconvincing.

147. It is also unlikely that the broad words "*out distribution*" refer to a conversation limited to Mr Humm asking about O2's attitude to P4U, as opposed to a wider discussion also covering Vodafone's own intent to reduce indirect distribution. But even if the conversation focused only on O2, the parties would still have learned a great deal (a) on O2's side, from the fact that Vodafone was even asking the question, and (b) on Vodafone's side, from the answer (presumably that O2 was happy with the exit and, expressly or implicitly, was unlikely to change course or reverse the decision).

Vodafone's 'intel'

148. On Vodafone's side, there is striking evidence as to what they learned from Ms Castillo's answer to Mr Humm's question. On 1 November 2013, Ms Rose reported that, although P4U claimed to be in negotiations with O2, with the prospect of possibly bringing them back in, "***Our intel** suggests that O2 is more likely to align with CPW and come out of P4U completely*" {G6/315/1} (emphasis added). This intelligence was explicitly presented as something obtained by Vodafone, as opposed to being in the public domain.

149. It is also revealing to see how the Castillo/Humm meeting fits into the chronology of O2's decision-making:

(1) On 2 November 2012, Mr Dunne, having informed P4U that O2 would not be supplying new Connections from January 2013, told Mr Whiting that O2 would review the rest of the relationship in good faith {G3/167/2}. He apparently did not consider it obvious that O2 would be fully pulling out of P4U in January 2014. We know that O2's internal analysis was that if other MNOs did not follow it would seek do a new deal with P4U in January 2014: see para. 83(1) above.

(2) As to market perception, in June 2013 Vodafone assumed a strong likelihood that O2 would to some extent stay in P4U {G9/80/5}. Both EE (in January 2014 {G7/373/2}) and Vodafone (in July 2013 {G5/223/7}) also thought it possible that O2 would fully re-enter P4U.

(3) Ms Castillo's evidence is that the decision to fully exit in January 2014 was only made "*following a lot of thinking, debate and planning by the TUK team*" (Castillo1 ¶40 {D7/3/11}). It was not a foregone conclusion.

(4) In July 2013, Ms Pilar Lopez Alvarez reported to Ms Castillo that she was sceptical about the merits of O2 leaving P4U {G5/189T/1}. The final decision was to be taken by October, with input from Ms Alvarez and Ms Castillo {G5/201/2}.

(5) In mid-September 2013, Ms Castillo met Mr Humm. This is addressed above.

(6) In October 2013, O2 circulated a paper recommending exit from P4U, whilst reiterating the significance of competitor behaviour: "*All options for future changes to distribution approach/partners remain. We will constantly monitor…competitor behaviour and market dynamics and will respond accordingly*" {G5/291/6}.

(7) On 15 October 2013, an internal O2 email asked questions including "*Do we expect any retaliations in this channel by other operators?*" {G6/85/2} Presumably the answer, informed by the Castillo / Humm conversation, was 'No'.

150. In this context, any indication of competitor behaviour received from Mr Humm would clearly have been potentially significant in getting the key O2/Telefonica decision-makers sufficiently comfortable with the decision to fully pull out of P4U.

VODAFONE / EE GROUP CONTACTS IN 2014

151. The final set of anti-competitive communications was between EE and Vodafone in 2014.

EE: Progress to a deal

152. In the period leading in to the summer of 2014, EE expressed enthusiasm for a deal with P4U, and that deal appeared to be progressing, slowly but steadily, to completion:

(1) In September 2013, an EE paper asked "*How can EE better utilise access to underweight segments through P4U & CPW?*" {G5/484/33}

(2) In November 2013, EE's analysis was that the likelihood of maintaining the *status quo* was "*High*" {G6/409/1}. In early December, EE's goal was to have agreed Heads of Terms for P4U by the end of the year {G7/89/6}.

(3) On 28 January 2014, Messrs Harris, Swantee and Allera were apparently all keen to verbally confirm a P4U contract extension by the end of January {G8/1/1} {G8/8/1}.

(4) By 18 March 2014, Mr Lloyd was sending Ms Thomas of EE detailed terms {G9/469/1} {G9/470}. As Mr Kassler has explained, "*From P4u's standpoint, we would not have got Mr Lloyd heavily involved in drafting the actual variations to the EE Agreement until the key commercial deal points were substantially agreed. There is not much point in trying to paper a deal unless it is substantially agreed between the parties.*" (Kassler2 ¶8 {D1/6/3})

(5) On 25 March 2014, Mr Whittle's understanding was that the EE deal was awaiting Board approval, which was expected in the week commencing 1 April {G10/150/1} {G10/151/1}. The next day Ms Thomas was corresponding with Mr Lloyd, and negotiations appeared to be proceeding steadily {G10/176/1}.

(6) On 25 April 2014, Mr Lloyd relayed to Ms Thomas that Mr Whiting had spoken to Mr Allera, and that the expectation was that there would be an agreed document by the end of the following week {G11/380/1}.

(7) On 12 May 2014, Mr Whiting spoke to Mr Swantee, who "[c]*onfirmed things should be ok on the deal*" {G12/267/1}.

(8) On 14 May 2014, Mr Allera told Mr Whiting that he had asked Mr Noel Hamill of EE to contact Mr Whittle, to organise a meeting "*to try and resolve the few outstanding issues we have*" {G12/336/1}.

(9) On 28 May 2014, Mr Jason Mitchell of P4U wrote to Mr Eyre, saying that his understanding was that the two sides were getting close (and listing the outstanding items) {G13/145/1}.

(10) On 10-12 June 2014, Ms Thomas sent an amended draft agreement to Mr Lloyd {G14/57/1}, who sought to set up a call to finalise the agreement {G14/177/1}.

(11) On 17 June 2014, Ms Thomas circulated the next draft of the agreement, which appeared close to final {G14/327/1} {G14/328}.

Vodafone: progress to a deal

153. Similarly, there was slow but steady progress towards a deal with Vodafone:

(1) In February 2014, Vodafone's goal was to consolidate P4U share at 45% {G9/136/1}. Per Mr Roberson, "*During the early stages of the negotiations I don't recall thinking that walking away from P4U was really an option.*" (Roberson1 ¶68 {D5/4/15}).

(2) On 10 February 2014, Mr Roberson sent Mr Whittle what he understood to be agreed deal principles {G8/286/1}. On 13 February 2014, P4U set out ideas on how to achieve certain of the agreed deal principles {G8/362/1} {G8/363}.

(3) On 1 May 2014, P4U sent across a proposal {G12/24/1} {G12/25}.

(4) On 26 May 2014 Mr Whittle wrote to Mr Roberson, summarising what he understood to be points of agreement and the remaining issues to be agreed {G13/120/1}. And on 27 May 2014, Mr Roberson said that two issues remained to be progressed with P4U: contract length and volume {G13/133/1}.

154. At least ostensibly, progress continued:

(1) On 10 June 2014, Ms Rose emailed Messrs Whiting and Kassler {G14/19/1}:

> "*I just wanted to check in and apologise for the time its* [sic] *taking to finalise our discussions. As a relative newcomer to Vodafone, I am learning as I go about the various governance and approvals policies and procedures we have, particularly given the total value of this contract. Jeroen and I are with Philipp Humm and Vittorio this Friday (for several hours) going through things and I am hoping we come out of that session with the full support to proceed.*"

(2) On 10-11 June 2014, Mr Whittle and Mr Tubb appeared to be making good progress on the deal {G14/106}.

(3) On 25 July 2014, Mr Kassler's understanding was that Ms Rose was going to meet Mr Humm and press for the deal to be signed: "*Very supportive conversation, but it's out of the UK's hands at the moment*" {G16/124/1}.

Chance to remove P4U from the market

155. However, and as set out at paras 10 to 15 above, the MNOs were keen to disrupt the *status quo* and effect structural market change, if they could (a crucial caveat). And in this period, they thought there might be an opportunity to do just that.

156. On 30 March 2014, Mr Naulleau identified a "*unique opportunity to break EE's extreme reliance on UK indirect distribution*", and understood Mr Dannenfeldt's position to be "*first and foremost to do everything to weaken the excess weight of indirect distribution in the UK*" {G10/230T/1}. As at 7 May 2014, EE had a goal (which might or might not be achievable) of P4U volumes going down, "*potentially to zero*" {G12/164/11}.

157. Vodafone also thought there was "*a unique opportunity to make structural changes to the Indirect Market*" {G7/459/3}. In the June 2014 Board recommendation to exit P4U, this was called "*a one-time opportunity to transform indirect distribution*" {G14/97/3}.

158. The key question was how likely a withdrawal of supply was to destroy P4U, and thereby achieve structural change. Neither EE nor Vodafone thought that it could do it alone. But both thought that a combined exit would make P4U's demise (at least) highly likely.

159. Vodafone's analysis in July 2013 was that its exit alone would not put P4U out of business {G5/223/9}. Conversely, if EE exited, Vodafone thought P4U would not survive. Nine months later, in April 2014, a key market participant (CPW) expressed to Vodafone the same concern that, if Vodafone left, EE would "*prop* [P4U] *up*" {G11/224/1}.

160. EE also did not believe that its exit alone would succeed in destroying P4U: see Messrs Milsom and Allera's analysis at the March 2014 BRM {G10/276/3}. Mr Eyre continued to have that concern even at the end of April; he thought that after an EE exit P4U "*would be likely to still exist on the high street*" {G11/465/1} {G11/466/18}.

161. The answer to this problem was straightforward, and in one revealing moment, it was spoken aloud and permanently recorded. On 7 May 2014, Mr Deloison wrote to Mr Naulleau, reporting on EE's discussions regarding distribution {G12/171/2}. Mr Milsom and Mr Allera were quoted as saying that other operators could not keep P4U afloat if EE and Vodafone left P4U simultaneously ("*quittant simultanément P4U*"): "***then, 4PU*** [sic] ***will starve***" (emphasis added). The same point is implicit in Vodafone's analysis. Their

concern was that EE would stay in P4U. If EE left, and did not "*prop…up*" P4U, the 'risk' of P4U surviving would clearly be much diminished.[13]

Becoming confident as to what the other MNO would do

162. The crucial variable in analysing a prospective exit from P4U, then, was how likely it was, for each of Vodafone and EE, that the other would also leave P4U (and, preferably, do so at or around the same time). Over time, there was increased confidence, from both EE and Vodafone, on this key point. That was expressed in both direct and indirect ways.

163. Directly, it was expressed with a series of internal EE statements that they had obtained knowledge of what Vodafone was going to do. This began in January 2014, when Mr Milsom was told, by two investment banks, that "*Vodafone would swiftly follow any action we took in indirect*" {G7/328/1}. He understood from this that "*someone at Voda is clearly and consistently conveying this message*". This was the same understanding which, in early May 2014, Mr Deloison quoted Mr Allera as saying: "*VOD attendrait que EE annonce quelque chose: they will follow EE*" {G12/171/2}.

164. There followed a remarkable adjustment in EE's internal view of what Vodafone was likely to do. By the time EE circulated a paper in advance of the 21 May BRM, its view was that "*indirect disruption likely to be* ***led by Vodafone***" (emphasis added) {G12/487/73}. Exactly the same view was later attributed to Mr Milsom: "*The expectation is that Voda are about to pull out*" (10 August 2014) {G16/384/1}. And it is exactly what then happened. There is no plausible, let alone likely, innocent explanation for how EE could have obtained, and then substantially adjusted, a confident view of what Vodafone was going to do.

165. EE and Vodafone's modelling / decision-making, over the period April-June 2014, also reflected sudden confidence that P4U would be driven out of business (which, for both Vodafone and EE, was premised on a belief that the other would also leave P4U).

166. EE's modelling on 4/9 April 2014 assumed that if EE pulled out of P4U it would only retain 25% of the acquisition and upgrade volumes which it would otherwise have obtained via P4U (Eyre1 ¶49(a) {D2/7/10}; ¶51(c)(i)(A) {D2/7/12}). At this time, EE assumed that Vodafone would stay in P4U – see, for example, EE's Project November Update dated 4 April 2014 {G10/478/64}. EE also assumed that P4U would remain in

[13] Even if a small risk remained that P4U could confound the odds and form a life-saving partnership with some other player, such as BT (see Vodafone/CPW at {G11/224/1}, and EE at {G18/440/2}).

business: see, for example, the lack of assumed 'handset cost efficiencies' in EE's modelling of 4/9 April 2014 ('efficiencies' which would follow from P4U wholly or partly exiting the market (Eyre1 ¶51(c)(i)(B) {D2/7/13}; ¶58(c)(iv) {D2/7/17})).

167. In those circumstances, EE's modelling showed that pulling out of P4U would cost a lot of money (in the 4 April modelling, £58m per annum {G10/431/2}), and that "*negotiating improved terms with CPW whilst also acquiring P4U (with Vodafone) could potentially generate the best outcome for EE*" (Eyre1 ¶53 {D2/7/13}). That was the context in which Mr Eyre says the following:

> "*…on 16 April 2014 I attended a conference call to discuss EE's indirect distribution options...I recall that during this call, the shareholders – and, in particular, the Orange representatives – made it clear to us that they were not keen on the idea of buying P4U…*
>
> *On 24 April 2014, given that the shareholders were clearly not in favour of purchasing P4U, I emailed Ms Talbot asking her to reconsider the modelling in relation to a scenario of negotiating improved terms with CPW and pulling out of P4U. As things stood, our modelling suggested that this scenario would produce a worse outcome for EE than simply securing improved deals with both CPW and P4U.*" (Eyre1 ¶¶53-54 {D2/7/13})

168. For his part, Mr Eyre remained confused as to why EE was contemplating pulling out of P4U when this looked like a financially disastrous decision (see his email of 24 April 2014 expressing the concern that "*what we are doing at the moment is the wrong thing and we should be looking to do a deal with both and not doing a big CPW deal and then pull out of P4U*" {G11/316/1}). But, dutifully, he radically changed the assumptions.

169. By 5 May 2014, Mr Eyre had gone from assuming 25% absorption across the board, to 70% absorption of acquisition volumes, and 60% of upgrade volumes (Eyre1 ¶58(a) {D2/7/15}). This obviously at least partially reflected, as Mr Eyre somewhat begrudgingly accepts, the view now being taken that P4U was likely to go out of business following an EE withdrawal (Eyre1 ¶58(a)(iv) {D2/7/16}). The modelling also assumed, for the first time, that EE would benefit from "*handset cost efficiencies*" (i.e. reduced price competition leading to lower handset subsidies and higher margins) of £34m per annum. Again, Mr Eyre accepts that 'efficiencies' of this scale would have reflected the assumption that P4U would become "*a significantly reduced presence in the market*" (Eyre1 ¶58(c)(iv) {D2/7/17}) (or, more plausibly, no presence at all). He says his views on this point would have followed "*discussions with Mr Allera and Mr Milsom*".

170. These figures were adjusted upwards again in further modelling on 12 May (Eyre1 ¶63 {D2/7/18}), and then dramatically shifted again, when Mr Eyre assumed that further investments could drive absorption of 110% of the acquisition volumes which EE would otherwise have obtained via P4U, and 108% of the upgrade volumes (Eyre1 ¶65(d)(i) {D2/7/21}). This was obviously dependent on P4U largely or wholly exiting the market (Eyre1 ¶68 {D2/7/22}).

171. This was the modelling which was used to justify exiting P4U. It was predicated on P4U's demise, which in turn was necessarily predicated on Vodafone also exiting P4U.

172. As to Vodafone, on its case the key modelling document was {G14/291}. This is the "*UK Indirects*" presentation which was "*presented to Vodafone Group on 17 June 2014*", and which used the modelling work from Ms Perry and her team to provide executives with, in her words, "*the information which they would have needed to understand the logic behind the decision to do a new, exclusive deal with CPW*" (Perry1 ¶¶61-62 {D5/6/16}).

173. {G14/291/10} provided an overview of different financial scenarios. It suggested that the profitability of a decision to exit P4U would depend entirely on whether P4U went out of business. If P4U stayed in business, the decision to leave would, in NPV terms, cost £39m. If P4U went out of business, it would gain at least £114m.[14]

174. On the face of this key document, whether a decision to leave would be profitable depended entirely on whether P4U would stay in business. Moreover, if Vodafone was going to leave, it was heavily incentivized (to the tune of a £153m spread in NPV) to see P4U go out of business.

175. The decision-makers took these forecasts on board, and decided to exit P4U. One might have expected them to conduct and document a careful weighing up of the likelihood of P4U's demise, given that this would determine whether it was a good decision to exit. But no analysis of that type has been disclosed. Apparently, it was not necessary. The Vodafone decision-makers had a sufficient degree of confidence that P4U would go bust; which must have meant they had had a sufficient degree of confidence that EE would exit.

176. That does not necessarily mean that all relevant Vodafone executives were certain about what would happen. As noted above,[15] there was a concern that P4U might have some

[14] The presentation also looked at ROI analysis, which favoured sticking with the Long Range Plan rather than exiting P4U.
[15] Footnote 13.

slim chance of surviving even with neither Vodafone nor EE. But, by mid-June 2014, two key decision-makers, Messrs Humm and Hoencamp, appeared to be sufficiently confident that P4U would "*go bust*". Even Mr Colao, identified by Mr Humm as the executive who still harboured doubts, thought that P4U would face a choice between bankruptcy and restructuring (and so, if it survived at all, would presumably do so in a considerably diminished state): {G14/265/2-3}. This was a long way from Vodafone's previous assumption that P4U would survive a pull-out {G5/223/9}. Based on Vodafone's new – opposite – assumption, the decision to exit made perfect sense.

177. There is only one way to explain EE and Vodafone's newfound confidence that P4U would not survive. EE knew that "*indirect disruption* [was] *likely to be led by Vodafone*" {G12/487/73}, and that "*Voda are about to pull out*" {G16/384/1}. And Vodafone had equivalent knowledge about EE's intentions.

How the information was conveyed

178. In order to find an infringement, the Court need not determine precisely how the information was conveyed between EE and Vodafone (in most cases, the Court focuses instead on the coincidences and indicia which show <u>that</u> – but not <u>how</u> – relevant information was conveyed: see <u>P4U v EE *et al*</u> [2021] EWHC 2816 (Ch) at ¶¶15-16).

179. We do not have a comprehensive view, either of the relevant communications between EE and Vodafone, or of the internal meetings in which those communications were discussed. The full picture has been withheld from the Court by Ds' culture of impunity, saturated with unminuted, informal, meetings and calls (and supplemented by the convenient loss of documents and devices).

180. In particular, there is a subset of internal meetings/calls which we know <u>did</u> include discussion of indirect distribution – but where either no record was taken of what was said, or if a record was taken it was deleted/destroyed:

    (1) On 31 March 2014, there was a call between Mr Pellissier and/or Mr Thibault Bonneton of Orange, and Mr Dannenfeldt of DT. In an email sent in advance, Mr Naulleau told Messrs Pellissier and Bonneton that there was a "*unique opportunity to break EE's extreme reliance on UK indirect distribution*", and that Mr Naulleau understood from Mr Kniese that Mr Dannenfeldt wanted, "*first and foremost to do everything to weaken the excess weight of indirect distribution in the UK*" {G10/230T/1}. No note of the call has been disclosed.

(2) There were (apparently two) calls on 7 April 2014. Mr Weber says that the first call was between him, EE executive(s) and Mr Kniese (Weber1 ¶15 {D3/2/5}), and the second was a briefing led by Mr Kniese (at which the content of the earlier call was recapped (¶19) {D3/2/7}). Ahead of the second call, Mr Kniese emailed Messrs Dannenfeldt, Tsamaz, Wilkens, and Weber a briefing paper, and said "*I will cover the indirect point only verbally*" {G10/477/1}. Mr Kniese's explanation for this (i.e. it reflected a concern over insider trading, and possibly also a desire not to confuse people (Kniese1 ¶¶29-30) {D3/1/9})) is deeply implausible. Mr Weber made some very short and scrappy handwritten notes of the two calls (at {G10/436}, {G10/437}, {G10/485}). These notes, inadequate though they are, offer tantalising titbits as to what we might have seen if Mr Kniese had committed his thoughts to writing in advance, or if there was a proper record of what was said on these calls. Mr Weber's note asks "*Can MVNOs fill the shelf*[?]" (presumably, at P4U), and states that one option is a "*Disruptive move*", which is one of the circumstances in which EE would "*Need VOD back-up case*" {G10/436/1}.

(3) On 8 April 2014, there was a call attended by DT and Orange executives. In the briefing ahead of this call the "*Indirect*" slide was left blank {G11/9/7}. Again, Mr Weber's scrappy note hints at a revealing discussion: he lists point 1 as "*Weaken indirect*", says an acquisition of P4U would not be supported, and quotes Marie-Christine (Lambert) asking "*How do we exploit power today?*" {G10/485/1}.

(4) On 7 May, according to Mr Deloison's email note of an indirect distribution workshop between EE, DT and Orange, it was mentioned that Mr Allera "*is said to be recruiting*" (the French verb is "*recruiterait*") Vodafone's Head of Indirect Strategy (Mr Roberson) {G12/171T/2} (Orange translation). The context of Mr Deloison's observation is suggestive, but more striking is that neither Mr Allera nor Mr Roberson has disclosed any documents, or provided any evidence, as to any intended and/or attempted recruitment.

(5) On 21 May, EE held a BRM, with the usual DT and Orange attendees {G15/19/1}:

(a) According to EE D ¶¶13-15 {B/3/6} this was the meeting at which the decision was taken to exit P4U.[16]

[16] Although oddly, EE D (¶16 {B/3/7}) also says that "*EE had not ruled out continuing to trade smaller volumes with P4U on better terms.*"

(b) The section of the minutes of this meeting dealing with indirect distribution has a series of bullet points with no corresponding text.

(c) The metadata of this document shows that it was saved at least 38 times over a period of three weeks following the meeting {G15/19M}. Clearly, a deliberate decision was taken either not to minute what was said about indirect distribution, or to delete the relevant part of the minutes.

(d) The only real defence of this which has been offered comes from DT, which submits that it is "*inherently unlikely*" that the record-keeper would have concealed this discussion by leaving the section dealing with it blank, and thereby "*draw*[ing] *attention to its absence*" (DT D ¶7B {B/4/11}). In other words, the minutes are so obviously incriminating that they must be innocent. That Alice-in-Wonderland submission need only be stated to be dismissed.

(e) Again, we have a belatedly disclosed scrappy note of some of what was discussed, this time from Mr Deloison. Again, it strongly hints at the revelation of unlawful behaviour which full and accurate minutes could have documented. It includes the attribution to Mr Dannenfeldt of the curious juxtaposed comments that "*Direct must be reinforced*"; and "*be careful with VOD (anti trust risk)*" {G13/105/3}. The concern with anti-trust risk in the context of reinforcing direct distribution gives a glimpse into the nature of the discussion which they otherwise either were careful not to record or deleted.

(6) Vodafone had a similar proclivity not to write things down. On 15 May 2014, a Mr Patrick Chomet sent an email to, *inter alios*, Ms Rose, asking about "*what happens to P4U*", and saying "*we can talk about it rather than emails*" {G12/368/1}. In her reply, Ms Rose noted that Vodafone was "*deeply engaged in renegotiations for other reasons best discussed offline ☺*".

(7) On 9 June 2014, in response to an email commenting that a press article suggesting that EE might end its relationship with CPW (rather than P4U), was "*interesting if true*", Ms Rose wrote "*Yes indeed ☺ Happy to discuss off line*…." {G13/468/1}.

(8) On 31 July 2014, Mr Simon Gordon of Vodafone had a series of questions for Mr Tubb, culminating in the sceptical query as to whether a pull-out from P4U would leave Vodafone just having "*parity*" with those MNOs which only sold through CPW, whereas "*EE can claim greater high-street presence by being in both*"

{G16/197.1/1}. Mr Tubb did not dispute the *prima facie* accuracy of Mr Gordon's analysis, but revealingly said "*Will call you in a bit.*"

181. Nonetheless, and despite these efforts, there is some fairly extraordinary documentary evidence showing at least part of how information was passed between EE and Vodafone.

182. On 25 March 2014, Messrs Froissart and Weber arranged to speak ahead of a conference call with EE. They wanted to "*align views on the indirect channel topic on Orange/ DT M&A level ahead of the call*" {G10/128/1}. That was not a discussion of some specific M&A proposal. It was a broader discussion about "*the indirect channel topic*", which would presumably have included matters such as which indirect retailers might be vulnerable to a takeover, what the price of such a takeover might be, and (relatedly) what the fate of said retailers might be in the absence of a takeover. That discussion gave rise to the email from Mr Froissart to Mr Naulleau, in which he said that he and Mr Weber had identified an "*historic opportunity to* ***wipe out*** ["*faire la peau*"] *indirect distribution, but tricky as it requires cooperation from Vodafone and potential competition law issues*" (emphasis added) {G10/141T/1} (Orange translation). Mr Naulleau replied that it should be followed up on {G10/141T2/1}.

183. A few days later, on 31 March 2014, there was the DT/ Orange call about the unique opportunity to weaken indirect distribution: see para. 180(1) above.

184. A couple of days after that, on 2 April, a text message exchange between Mr Scheen of Orange and Mr Humm of Vodafone commenced. Mr Scheen wrote: "*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 tommorrow)* [sic]*? Thanks, Benoit Scheen (Orange Europe)*" {G10/298/1}. Mr Humm responded to set up a call that afternoon {G10/299/1}. He was apparently unconcerned as to a one-to-one discussion between competitors, where the only indication as to content was that it would concern a "*topic for the UK market*".

185. They spoke that day, for 4 minutes 56 seconds (approximately the time Mr Scheen had said he needed) {G11/175/6}. They both claim not to remember the conversation: Humm1 ¶63 {D5/2/13}; Scheen1 ¶47 {D4/1/13}. Conveniently, Mr Scheen's emails and mobile phone have not been located for disclosure.

186. On 3 April 2014, Mr Scheen sent Mr Humm a further text message, seeking to arrange a "*'secured' call with both of us using a new prepaid number* [i.e. a so-called 'burner' phone]. *If we are both using a new prepaid number, the call will be secured.*"

{G10/358/1} This call was plainly intended as a follow-up to the initial discussion. On 4 April 2014, Mr Humm (who says he was with a competition lawyer when Mr Scheen's text came through – Humm1 ¶64 {D5/2/13}) replied that he was not comfortable with the proposed arrangement, and suggested a competition lawyer should join any call {G10/394/1}. Mr Scheen responded that he had intended for the conversation (dealing with "*a potential interesting joint opportunity on the UK market*") to be "*informal*", and that he did not think the "*presence of a lawyer would be suitable*" {G10/395/1}. Without Mr Humm's mobile phone records, this astonishing exchange would never have come to light.

187. Mr Humm assumes the second call was intended to be a discussion about Vodafone and EE combining to acquire an indirect retailer (Humm1 ¶65 {D5/2/14}). Putting to one side whether the discussion could plausibly have been about a joint acquisition (which it could not), Mr Humm could only have derived this assumption from the first call, in which the two men must have discussed the indirect market. It is inherently unlikely that Mr Scheen would have broached one "*topic for the UK market*" in one conversation, and would have then followed up on a completely unrelated "*opportunity on the UK market*".

188. It is therefore almost certain that the first conversation related to what we know was EE/ DT/ Orange's preoccupation at the time: how to remove P4U from the market, and thereby strike a blow against indirect distribution. This was something which, regardless of how it was pursued, would require a "*VOD back-up case*" (which meant, at a minimum, that EE needed to "*anticipate and factor in what action Vodafone might take in response to any move EE might make*" (Weber1 ¶17) {D3/2/6})). The idea that, in those circumstances, Messrs Scheen and Humm did not discuss their respective companies' attitudes to P4U, and seek to determine how each company might act in response to (or in anticipation of) the other's withdrawal from P4U, is unreal.

189. There was then a clear reference back to these (and possibly other) discussions several weeks later, in a note following a 23 April workshop which was attended by various senior DT and Orange executives {G12/139/2}. It is noted that EE would have to analyse various "*Strategic aspects of the distribution market (CarphoneW / Dixons consolidation, **discussions with Vodafone**)*" (emphasis added) {G12/139T2/2}.

190. Ds' position on this 'smoking gun' is garbled. They say that the discussions with Vodafone which EE had to analyse were discussions about a joint acquisition of P4U, but

that those discussions (a) had not yet happened, and (b) never in fact happened (Orange D ¶31N(2)(d) {B/5/38}). That is risible.

191. First, the reference was obviously to discussions which had already happened (just like the developments with CPW / Dixons, which were the other matter it was said EE would have to analyse). It would make no logical sense to say that EE had to analyse discussions which had not yet happened.

192. Secondly, the DT and Orange executives say they were always staunchly opposed to a joint acquisition of P4U. See, for example, Dannenfeldt1 ¶49 ("*in March 2014, EE gave some consideration to joining with Vodafone to acquire P4U. However, I and the rest of the EE Board quickly dismissed this possibility*") {D3/6/20}; and Weber1 ¶23 ("*it quite quickly became apparent that this* [the joint acquisition proposal] *would not go anywhere*") {D3/2/9}. Orange's pleaded case is that, as at the date of a 16 April EE workshop, DT and Orange both opposed the suggestion that there should be a discussion between EE and Vodafone about a possible joint acquisition of P4U (Orange D ¶31N(2)(d) {B/5/38}). It is implausible that DT / Orange executives would, a week later, have changed their minds about the utility of having (let alone analysing) such discussions.

193. Thirdly, if the reference was to a single discussion, which had not yet happened, relating solely to a possible joint acquisition of P4U, the language used would reflect this. Instead, the reference is to "*discussions*" (plural) which were relevant to the broad subject matter of "*Strategic aspects of the distribution market*", not a joint acquisition.

194. Fourthly, joint acquisition discussions, if they occurred, would themselves have been (in the absence of careful legal supervision) near-impossible to keep in lawful bounds:

    (1) Any discussion about a possible acquisition would (absent strict safeguards) have involved consideration of what would happen to P4U if it was <u>not</u> acquired. Apart from anything else, the price worth paying for P4U would depend heavily on whether, in the non-acquisition scenario, P4U had a viable business. That in turn depended almost entirely on whether EE and Vodafone intended to exit.

    (2) This was something EE and Vodafone well understood. It is why we see Mr Colao saying, following discussions about a possible acquisition with Mr Swantee in June 2014, that "*if the alternative is bankruptcy or a restructuring*", then the price of an acquisition "*should be less than full debt value*" {G14/265/3}. Consideration of a

purchase was never likely to be (and clearly was not) siloed from discussion of how to use either the threat or the actuality of ceasing supply as a way to achieve the same goals more cheaply.

(3) This may explain Ds' ever-changing case on what, if any, joint acquisition discussions occurred. The Court will recall that, having advanced a pleaded case which, as the Learned Judge observed in the case of DT, "*To put it mildly…does not fit very well with the suggestion that any discussions involving DT and concerning Vodafone and the claimant in April/May 2014 were part of consideration of a joint bid*",[17] it was then argued at the October 2021 CMC that "*there were discussions with Vodafone that took place and may indeed have been reported to DT concerning the possibility of a joint bid*".[18] Now they have reversed course again, and appear to say that no such discussions in fact occurred. This is presumably because they recognise that admitting such discussions gives rise to the obvious inference that EE (directly, or through its owners) and Vodafone must also have had the almost inevitably concomitant discussions about what their intentions were in respect of P4U if they did <u>not</u> acquire it.

195. Insofar as there was any discussion of a joint acquisition (as, apparently, between Messrs Colao and Swantee in June 2014) it will be explored in evidence what the bounds of those discussions were. It is already clear, from Mr Colao's reference to bankruptcy/ restructuring, that such discussions did go beyond the lawful. The key point for current purposes is that discussions of a joint acquisition, even if anyone was now saying they had actually occurred by April 2014, cannot possibly supply a lawful explanation for the "*discussions with Vodafone*" which it was said EE had to analyse.

<u>CAUSING OR INFLUENCING THE DECISIONS TO EXIT P4U</u>

196. It does not appear to be in dispute that, if collusion occurred, it caused or influenced the relevant exit decisions (pursuant to the Split Trial Order (5 October 2020) {C/28}, causation of P4U's losses is not in issue in this trial). On this point, Ds effectively just reiterate their denials that the unlawful acts occurred: Telefonica/O2 D ¶138 {B/7/87}; Vodafone D ¶116 {B/6/66}, ¶¶120-122 {B/6/69}, ¶123B {B/6/70}; EE D ¶135, 135B {B/3/76}.

[17] [2021] EWHC 2816, ¶33
[18] ibid, ¶31.

197. That is not surprising. It would be rather ambitious for Ds to submit that they colluded but for no purpose or to no effect. Any such submission would also have to grapple with the 'Anic presumption',[19] that the participants in the concerted practice/ unlawful exchange of information will be presumed to have made use of that information, and thereby infringed Article 101, and that it is for Ds to rebut that presumption. No such attempt has been made, let alone supported by evidence.

198. It further appears to be common ground that O2's decision to exit influenced EE and Vodafone's thinking in 2014: see Bishop1 ¶¶35-36 {E3/1/10}; and Mr Reynolds (EE/DT/Orange's expert), Reynolds1 ¶¶2.40-2.41 {E2/1/14}. It follows that, if O2's decision was influenced by collusion, the causal consequences of that extended to EE/Vodafone's decisions in 2014.

199. It is also Mr Dannenfeldt's evidence that Vodafone's departure from P4U influenced or even dictated EE's decision to exit (Dannenfeldt1 ¶75 {D3/6/29}). If so, then, if Vodafone's decision was influenced by collusion, its causal consequences extended also to EE's decision.

PART IV: PARENTAL LIABILITY

200. It is not in dispute that D4-5, and D6-8, each comprised a single undertaking: List of Issues, 12 {L1/22/3}. That is in dispute for D1-3: List of Issues, 16-17 {L1/22/5}.

201. DT and Orange asserted effective control over EE's commercial strategy, both generally and in relation to indirect distribution (including the decision on P4U). Accordingly, all three entities formed a single undertaking, and DT and Orange are liable for EE's actions.

LEGAL PRINCIPLES

202. The concept of an undertaking in Article 101 and the Chapter I Prohibition, "*must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal*": see Case 170/83 Hydrotherm v Compact [1984] E.C.R. 2999 at ¶11.[20]

203. Identifying the legal entities comprising a single "*economic unit*" requires an assessment of the degree of influence exercised by one entity (typically, a parent company) over another (typically, a subsidiary). Aside from the situation where a parent company wholly

[19] C-49/92 P Commission v Anic Partecipazioni SpA [1999] E.C.R.I-4125; [2001] 4 C.M.L.R. 17, ¶121.
[20] See also Case C-882/19 Sumal v Mercedes Benz [2021] Bus LR 1755, at ¶¶41-48.

owns a subsidiary, this turns on a consideration of the "*economic, organisational and legal links*" between the entities: Case C-97/08P Akzo Nobel v Commission [2009] E.C.R. I-8237 at ¶58. A parent company exercising decisive influence is liable without proof of its "*personal involvement*" in infringing conduct: *ibid* at ¶59.

204. In Case C-172/12 P El du Pont de Nemours v Commission [2014] 4 C.M.L.R. 7, El du Pont de Nemours ("**El DuPont**") and Dow Chemical Company ("**Dow**") were liable for the conduct of a joint venture company ("**DDE**") in the period when they each owned 50% of DDE's shares, on the basis that they formed a single undertaking, because they "*did in fact exercise decisive influence over the joint venture*" (see ¶47).

205. At ¶¶49-54, CJEU rejected a challenge to the conclusion of the General Court ("**GC**") that El DuPont exercised decisive influence over DDE. The GC[21] reasoned that it was unnecessary to show that DDE's conduct had been determined through "*specific instructions, guidelines or rights of co-determination*" relating to the subject matter of the infringement. In fact, "*a single commercial policy within a group may also be inferred indirectly from the totality of the economic and legal links between the parent company and its subsidiaries*": see ¶62. Relevant factors included the following:

    (1) Under the JV agreement, the parents had set up a Members' Committee to, "*supervise the business of DDE and to approve certain matters pertaining to* [its] *strategic direction*". This included setting DDE's "*overall policy and vision*" and approving its "*business and strategic plans and operating plans*" and capital expenditure and borrowing above certain levels. The JV partners had equal voting rights, such that each could block strategic decisions: see ¶66.

    (2) El DuPont and Dow each transferred to DDE technology and other assets that allowed it to replace its parents on the market, leaving them present "*only through their joint venture*" and eliminating competition between them on that market (¶67); DDE sold products under a trade name belonging to El DuPont (ibid); and the top managers of DDE had been appointed from high management levels within the parent companies (¶70).

[21] Case T-76/08 El du Pont de Nemours v Commission [2012] 4 C.M.L.R. 18, Judgment of the Seventh Chamber, 2 February 2012.

206. The GC made clear that decisive influence over the subsidiary's conduct can be inferred indirectly from general economic, organisational and legal links and/or demonstrated directly through evidence of influence over particular decisions.

CONTROL/ DECISIVE INFLUENCE OVER EE IN GENERAL

207. The JVA granted DT and Orange decisive influence over EE's commercial strategy:

(1) Each of DT and Orange was to appoint two of the JV company's board members (of a total of 6, the others being "*Executive Directors*"): clauses 5.3 {G1/28/16} and 6.2 (p.17).[22] A meeting of the board would be quorate with one director from each of DT and Orange: clause 6.13 (p.18). Each of DT and Orange (acting by their directors on the board) could remove the Executive Directors: clause 6.15 (p.18). In practice, DT and Orange's representatives on the board were drawn from the senior management of their respective corporate groups (as in El DuPont).

(2) EE required the written consent of each of DT and Orange for various "*Shareholder Reserved Matters*",[23] which included "*any change to the nature, scope or scale of the Business*": clause 12.1 {G1/28/30}.

(3) Each of DT and Orange could (through their appointees on EE's board) veto certain strategic business decisions, referred to as "*Veto Board Matters*", including the approval of the business plan[24] and annual budget, the appointment or removal of "*Executive Directors*", and "*any transaction…that…could involve the payment by* [EE and/or its subsidiaries]…*of amounts in excess of £15 million, in the aggregate in any 12 month period, and/or any termination or material amendment of any such transaction*": clause 12.2 {G1/28/30}.

(4) As in the El DuPont case, the joint venture required that the parents each exit and remain out of the market (clauses 11.3 {G1/28/30} and 15 (p.36)), save for their presence through the JV company, each contributing to the JV their intellectual

[22] DT and Orange enjoyed a similar level of control over the *"Technical Advisory Committee"* and the *"Roaming Advisory Committee"* set up under clauses 6.20 and 6.21 {G1/29/20}.
[23] Where deadlock resulted, DT and Orange were to seek resolve the deadlock, including through mandatory reference to senior executives of their corporate groups and ultimately to their CEOs: JVA, clause 18.1 {G1/28/43}.
[24] DT and Orange were to be provided with extensive financial and operational information to this end, and they promised to procure that EE follow the business plan: JVA, clauses 10.3-10.8 {G1/28/29}.

property rights. EE continued to operate the T-Mobile and Orange brands until February 2015.[25]

208. More broadly, there were extensive economic and organisational links between EE and each of its parent companies. DT/Orange installed representatives to work closely with senior EE employees and act as the "*interface*" (see Kniese1 ¶6 {D3/1/3}) or "*front door*" (see Naulleau1 ¶42 {D4/2/14}) between EE and the shareholders; these representatives produced detailed reports on strategic issues in the UK market, and (along with directors) participated heavily in the monthly BRMs that were "*the forum for detailed review and consideration of EE's business and commercial strategy with its shareholders*" (Swantee1 ¶¶14-17 {D2/6/4}). DT and Orange also exercised substantial influence through the various advisory committees put in place under the JVA and subsequently.[26]

209. Unsurprisingly in this context, EE acted on the basis that strategic decisions could not be taken without consensus between DT and Orange,[27] and the shareholders sought first to "*align* [their] *views and positions*" before presenting to EE (Naulleau1 ¶44 {D4/2/14}).

CONTROL/ DECISIVE INFLUENCE IN RELATION TO INDIRECT DISTRIBUTION

210. From the outset, one of the main objectives of the joint venture was "*reducing EE's reliance on indirect distributors*" (Naulleau1 ¶¶25.3-26 {D4/2/9}). The minutes of BRMs show consistent shareholder pressure to reduce EE's reliance on indirect distribution.[28]

211. From April 2014, DT and Orange took effective conduct of EE's distribution strategy or, at a minimum, exercised effective veto control (without needing expressly to invoke the provisions of the JVA). The shareholders settled on a common position and communicated this to EE through workshops, meetings and calls. It was made clear to EE which strategic options were and were not acceptable.[29] By the time of the 21 May 2014 BRM, EE recognised that DT and Orange had taken charge, ultimately "*leaving it up to shareholders' preferences whether to continue "business as usual"*" or to pursue

[25] https://www.mobilenewscwp.co.uk/News/article/orange-and-t-mobile-connections-to-be-scrapped {G20/153.1}

[26] See, e.g., the various committees identified by Orange in a document titled "Orange & EE interaction in a nutshell" dated 20 September 2013, at p.5 {G10/158/5}.

[27] See, e.g., Naulleau1 ¶39: "*Mr Swantee did not generally allow matters to come to the board unless there was consensus*" {D4/2/13}.

[28] See, e.g., BRMs on 4 October 2012 {G3/77}, 16 January 2013 {G4/203} (p.3), 15 October 2013 {G6/311} (pp.7-8), 20 November 2013 {G7/183} (pp.2-3), 20 March 2014 {G10/316} (pp.3-4) and 10 April 2014 {G12/407} (pp.4-5).

[29] See, e.g., Mr Eyre's email of 17 April 2014, reporting that "*buying is off the table*" following a meeting with the shareholders {G11/210/1}.

Scenario 4 {G12/487/16}. Tellingly, when a press article attributed EE's exit from P4U to its "*French masters*", Mr Naulleau objected to the headline but commented that it had for once been shown that the Orange shareholder makes the right decisions.[30]

PART V: GOOD FAITH CLAIM

212. The 'killer blow' that definitively put paid to P4U as a going concern was delivered, intentionally, by EE. On 12 September 2014, EE sent P4U a letter stating that it had already made a final decision not to renew the EE Agreement when it was due to expire (in September 2015). EE's aim in sending that letter was not to enlighten P4U as to its supposed position . The purpose of the letter (and its effect) was to force P4U's directors to place P4U in administration. EE considered it to be in its commercial interests for P4U to go bankrupt, and it had no contractual mechanism by which it could accomplish that. Instead, in a stark breach of its good faith obligations, it employed extra-contractual means to force its long-time trading partner into administration.

EE'S DUTIES UNDER THE EE AGREEMENT

213. The EE Agreement contained the following express terms:

> Clauses 13.2: "*EE hereby undertakes and agrees that it will in good faith observe and perform the terms and conditions of this Agreement…*"
>
> Clause 13.11: "*EE hereby undertakes and agrees with P4U that it will act in good faith and not carry out any activity designed to reduce or avoid the making of any Revenue Share Payment(s) to P4U as contemplated by this Agreement.*"

214. The first of these requires EE generally to act in good faith in relation to the performance of its obligations under the EE Agreement. The second expresses the good faith obligation even more broadly, and then applies it specifically to an obligation not to carry out any activity designed to reduce or avoid Revenue Share Payment(s).

215. These obligations are reiterated, and their content is defined, by the nature of the EE Agreement as a "*relational contract*" in the sense used by Leggatt J (as he then was) in Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] 1 All E.R. (Comm) 1321, and again (as Leggatt LJ) in Sheikh Al Nehayan v Kent [2018] EWHC 333 (Comm) at ¶167:

> "*I have previously suggested in Yam Seng Pte Ltd v International Trade Corp [2013] EWHC 111 (QB), at para 142, that it is a mistake to draw a simple*

[30] "*Pour une fois qu'il est démontré que l'actionnaire Orange fait prendre de judicieuses decisions*" {G19/465/1}.

dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long-term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination of one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of co-operation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith."

216. In Bates v Post Office [2019] EWHC 606 (QB) at ¶725, Fraser J identified various characteristics relevant to identifying a relational contract. Applying Leggatt LJ's definition along with Fraser J's list of indicia, the EE Agreement, as a long-term sale and distribution agreement, was clearly a relational contract. It had a 3-year term but formed part of a trading relationship between the parties which began with EE's predecessors, Orange UK and T-Mobile UK, at the latest in 1999. The management of this long-term relationship inherently required a high degree of co-operation and communication, in addition to relationship-specific investment.

217. The content of the duty of good faith (*per* Yam Seng (at ¶¶138-144) and Sheikh Al Nehayan v Kent (at ¶175)) in this case must include obligations to act (a) honestly, (b) with fidelity to the parties' bargain (not acting to undermine the bargain or the substance of the contractual benefit bargained for) and (c) with fair dealing, refraining from conduct which would be regarded as commercially unacceptable by reasonable and honest people.

218. Further, the EE Agreement contained two implied terms, as a matter of business necessity:

    (1) The Stirling v Maitland Term: Each party would refrain from taking steps that would inhibit or prevent the other party from complying with its obligations under or by virtue of the contract. This term is common ground (EE D ¶151a. {B/3/86}).

    (2) The Necessary Cooperation Term: Each party would provide the other with such reasonable cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract: see Lewison, ***The Interpretation of Contracts***, Ch 6, section 15; Mackay v Dick (1881) 6 App. Cas 251, 263.

EE'S BREACH OF DUTY

219. On 29 August 2014, P4U informed EE that Vodafone had given notice to terminate, and asked for EE's support (Whiting1 ¶101 {D1/3/24}, Allera1 ¶133 {D2/4/27},

{G17/291/1}). EE held an emergency board meeting on 31 August 2014 to consider the request (although no minutes of the meeting appear to have been created and/or retained) ({G17/432} and {G17/433}). EE decided not to provide any support to P4U (Swantee1 ¶201 {D2/6/43}, Harris1 ¶77 {D2/1/19}, Allera1 ¶138 {D2/4/28}).

220. Contrary to some of the evidence now being given,[31] EE, Orange and DT regarded P4U's administration as a desirable outcome:

(1) By 3 September, EE had already identified what assets it would acquire in a P4U administration {G18/320.2/10}. By 7 September, EE together with DT and Orange had concluded that EE could buy the desired assets in a P4U administration for significantly less than it would cost to purchase P4U as a going concern ({G18/372/2} and {G18/402/1}).

(2) On 8 September, Mr Weber wrote to Messrs Dannenfeldt and Langheim that P4U "*Will likely need to file for insolvency if they can't get another long term contract…From our perspective, an insolvency would be the best solution for the market.*" {G18/431/1}

(3) On 9 September, Mr Reynolds of EE sent Mr Milsom slides entitled "*P4U August Position*". Slide 4 of the presentation set out "*Cash and P&L savings from cessation of trade with P4U*". It stated that ceasing trading with P4U from 31 August would have "*P&L saving of £72m (pre BoE)*" and "*Cash upside £170m (pre BoE)*" {G18/452.01/1} {G18/452.02/5}.

221. For as long as P4U seemed to be sliding inexorably towards administration, EE, DT, and Orange were of the view that it was neither necessary nor in their interests to reveal EE's intention to cease trading with P4U. However, from around 8 September, EE became aware/concerned that P4U might survive Vodafone's exit:

(1) Mr Swantee updated Messrs Dannenfeldt and Pellissier on 8 September: "*The appointment of Rothschild suggests there is a possibility of restructure. In this scenario, my concern is that BT could move to take a significant share of P4U volume…*" {G18/440.1/2}.

[31] Allera1 ¶¶133 {D2/4/27}, 140(c) {D2/4/29}, 158 {D2/4/32}; Swantee1 ¶197 {D2/6/42}; Harris1 ¶¶74 {D2/1/19}, 95 {D2/1/23}; Dannenfeldt1 ¶78 {D3/6/30}; Naulleau1 ¶263 {D4/2/59}.

(2) On the evening of 8 September, Mr Dobson told Mr Milsom P4U had "…*secured handset supply for the next 3-4 months.*" {G18/464/1} Mr Harris says EE thought "*P4U must have found another player to take up some or all of Vodafone's volume. This would have explained why P4U no longer required urgent support from EE…*" (Harris1 ¶88 {D2/1/22}).

(3) On 9 September, Mr Harris wrote to Messrs Dannenfeldt and Pellissier that:

> "*Late last night P4U verbally advised they no longer required (effectively withdrawing) their requests of 29th August* [for support]*...Their Chief Operating Officer told Neal they have the support of device manufacturers and the Credit Insurers for the time being and they are working on restructuring plans…*" {G18/467.1/1}

(4) The slide presentation for the 11 September BRM shows that EE believed that P4U was unlikely to enter administration in the immediate term {G19/30/3}.

222. Having identified P4U's administration as the best outcome, EE, DT and Orange saw its likelihood fade. They decided to act to make sure that P4U was unable to take advantage of any prospect of restructuring or finding a new partner.

THE INITIAL LETTERS: FISHING FOR A BREACH

223. EE sent a letter to P4U on 2 September, in which it alleged that P4U had breached confidentiality provisions in the EE Agreement by disclosing certain of its terms to investors {G18/169}. The letter was sent without any prior communication. EE's witnesses now say their concern was that the information could be used against EE by its competitors (Allera1 ¶141 {D2/4/29}; Harris1 ¶80 {D2/1/20}), but this concern was not expressed contemporaneously ({G18/88}, {G18/117.1}, {G18/98.1}). It appears that EE's interest was, if at all possible, in using the alleged breach to terminate the agreement. When updating Messrs Dannenfeldt and Pellissier, Mr Harris cautioned that "*We have sent a letter reserving our legal rights but unlikely to be able to claim material breach and thus reason to give notice*".[32]

224. On 4 September, EE sent another letter, this time asking the P4U directors to confirm that no Draw Stop Event had occurred {G18/283/1} (despite having already received verbal confirmation on this point from Messrs Kassler, Dobson and Whiting at a meeting the previous day {G18/224.1/1}).

[32] {G18/195/1}. In fact, Mr Harris apparently concluded in September 2014 that P4U's disclosure may have benefited EE, as it would distance EE from association with P4U's insolvency: {G18/400.1/1}.

225. On 9 September 2014, EE sent another letter to P4U {G18/443}, this time stating (without explanation) that EE had "*reason to believe that* [P4U] *will be in breach of the Maximum Volume KPI in the Quarter ending 30 September 2014.*" Ms Thomas suggests (Thomas1 ¶57 {D2/2/18}) that this letter arose out of P4U's request to increase its volume of EE connections to 85% (as part of its wider request for support) on 29 August 2014. However, as Ms Thomas acknowledges, that request had already been withdrawn by the time of this letter. In addition, the request had been to sell additional EE connections from January 2015. It could not have led to P4U over-selling EE connections in September 2014. In responding, P4U noted that, "*Given the established lines of communication between us in relation to the KPI's we are surprised that you have chosen to send a formal reservation of rights letter without raising your concerns first through the usual channels*." {G19/5/1}

12 SEPTEMBER LETTER

226. EE's attempts to find a pretext to terminate were not succeeding, and its thinking began to move on. On 9 September various EE executives (including Mr Milsom) held a meeting with Deloitte (which had been appointed to advise on options regarding P4U). Notes of this meeting recorded, in respect of the possibility of making a rapid announcement (presumably as to non-renewal of EE's P4U contract), the telling question: "*have we got the killer blow?*" {G18/445/1}

227. EE held a BRM on 11 September {G19/19}. In the context of P4U's improved prospects, EE considered the "*strategic option*" of informing P4U that EE would not renew the EE Agreement in September 2015 {G19/30/26}.

228. The "*potential consequences*" of this were said to be: "*Provides transparency; removes any risk of misrepresentation*" and "*May trigger insolvency & EE not being able to trade with P4U as per current budget*". The alternative, "*Remain neutral*", potentially could mean "*Withholding of critical information for P4U business/restructure creates a difficult environment and the risk of misrepresentation inadvertently increases*", "*Risk increases over time of Dixons/CPW contract agreement leaking"* and "*P4U reforms and BT enters the Indirect market possibly with a quad-play offer*".

229. The dichotomy between the two options is stark: if EE informed P4U of its decision not to renew, it "*may trigger insolvency*", whereas if EE did not, P4U may reform and survive (potentially with a deal with BT). EE chose to act cynically, hoping to deny P4U the chance to form any other deals to ensure its survival.

230. The supposed risk of misrepresentation to P4U and its investors had no genuine or rational basis. Both P4U and its investors believed and were operating on the basis that the EE Agreement was to run until September 2015. That was true. As to the market or P4U being misled as to the possibility of an extension, there was no active negotiation ({G16/198/1}), so it is difficult to understand why EE would think it was making any representation at all to P4U (let alone its investors) as to the likelihood of an extension.

231. EE, DT, and Orange decided on 11 September to communicate an intention no longer to trade with P4U (Allera1 ¶159 {D2/4/33}). Tellingly, neither the decision nor the reasons for it are recorded in the minutes of the BRM {G19/19} – yet another example of EE failing to prepare or retain full minutes for meetings regarding P4U and its indirect strategy.

232. On 12 September, EE sent P4U a letter signed by Mr Allera informing P4U that it, "*has concluded that we will not be recommencing commercial negotiations with you as we have made a final decision not to replace or extend the terms of the Retail Agreement*." {G19/101/1} EE refused to withdraw the letter, despite P4U informing EE that it would cause P4U to go into administration within hours: {G20/110/1}, {G19/64/1} and {G19/108/1}.

233. By deliberately forcing P4U into administration (which in turn enabled EE to terminate the contract early), EE breached its duty of good faith under clauses 13.2 and 13.11: it did not act with fidelity to the agreement but undermined it; it deprived P4U of the benefit of the remaining term of the agreement; and reasonable and honest people would regard this conduct as commercially unacceptable.

234. Further, in breach of its duty under clause 13.11, EE's actions were designed to avoid the making of Revenue Share Payment(s). Mr Harris specifically identified as an advantage of a possible P4U administration that it "*May allow reduced RMS* [Revenue Margin Share] *settlement/write-off*" ({G17/305} and {G17/306/2}). In fact, following P4U's entry into administration EE did withhold Revenue Share Payments, forcing P4U to bring a claim in the High Court for them. Furthermore, by preventing P4U from being able to comply with its contractual obligations, EE breached the Stirling v Maitland Term and the Necessary Cooperation Term.

DT AND ORANGE'S LIABILITY IN ECONOMIC TORT

235. DT and Orange are liable for inducing EE's breach of contract because they (a) procured that EE take the relevant steps, and (b) intended that EE breach the contract.[33] DT and Orange are also liable in conspiracy because they combined with EE to act in breach of contract intending to cause damage to P4U (**Clerk & Lindsell on Torts**, 23-105).

236. Orange and DT determined or agreed with EE the above course of conduct:

    (1) Representatives for DT and Orange attended the 11 September BRM: Messrs Dannenfeldt, Daub and Tsamaz for DT, and Messrs Pellissier and Naulleau, and Ms Ernott for Orange {G19/19/1}. They agreed to send the 12 September letter, which Messrs Pellissier and Naulleau were sent in draft: {G19/405} and {G19/406}.

    (2) Representatives of DT and Orange also attended several other meetings in this period with EE to discuss P4U,[34] as well as receiving very regular updates from Mr Harris and Mr Swantee.[35] This is unsurprising given that DT and Orange had taken effective conduct of (or had decisive influence over) EE's distribution strategy (as outlined in Part IV of these submissions).

    (3) DT and Orange were then involved in the analysis of purchasing P4U as a going concern versus purchasing its assets in administration: {G18/372/1} and {G18/402/1}.

    (4) It was Mr Weber of DT who identified P4U's insolvency as the "*best solution*": see para. 220(2) above.

    (5) In September 2014, Mr Naulleau put EE into contact with associates of his who had "*managed the end*" of distributors in France and Belgium (respectively), so that EE could "*contact them…directly for your EE – P4U action plan*" {G19/15.1/3}.[36]

237. Orange's witnesses say they were unaware of the relevant terms of the EE contract.[37] Even were that true (unlikely, particularly given the prominence of good faith obligations in civil law systems), they are experienced business people and would have appreciated that cynically forcing a major trading partner into administration would be inconsistent

[33] See Lord Hoffmann on the elements of the tort in OBG v Allan [2008] 1 A.C. 1, ¶¶39-44.
[34] E.g. {G17/432}, {G18/184.1/1}, {G18/494.1/1}.
[35] E.g. {G18/195}, {G18/300.1}, {G18/402}, {G18/440.1}, {G18/467.1}, {G19/166}.
[36] See similarly {G18/318.1}
[37] Scheen 1 ¶¶67-68 {D4/1/18}; Naulleau 1 ¶¶285-289 {D4/2/64} and Pellissier 1 ¶144 {D4/3/34}.

with the duties owed under a long-term distribution agreement. This would not require knowledge of precise contractual terms. DT and Orange's actions were obviously taken with the intention of causing harm to P4U. Putting P4U out of business was the goal.

PART VI: CONCLUSION

238. This trial is concerned with liability (the consequences of Ds' unlawful acts, and the appropriateness of exemplary damages, being matters for another day). Even pending trial, it is already clear (on any view, and certainly on the balance of probabilities), that:

(1) Mr Dunne made collusive approaches to both EE and Vodafone in 2012. EE failed publicly to distance itself, and Vodafone positively engaged.

(2) Telefonica/O2 and Vodafone had collusive contacts of the type described in the Whiting note. Although all of the occasions on which these contacts occurred are not known, they included a meeting between Mr Humm and Ms Castillo in September 2013.

(3) EE and Vodafone had collusive contacts in 2014. Although, again, all of the occasions on which these contacts occurred are not known, they included a telephone call between Mr Scheen and Mr Humm in April 2014.

(4) The collusive contacts caused or influenced each MNO's decision to exit P4U.

(5) Each of D1-3, D4-5 and D6-8 formed a single undertaking, and are liable accordingly.

(6) By a series of actions culminating in the 12 September 2014 letter, EE deliberately pushed P4U into administration. It did this because it did not want to continue to fulfil its contractual obligations (or to allow P4U to do the same). That constituted a breach of its contractual duty of good faith.

(7) DT and Orange are liable in the economic torts for EE's breach of its good faith obligation.

KENNETH MacLEAN QC

OWAIN DRAPER

GIDEON COHEN

STEPHANIE WOOD

ANNEX: PARTIAL CHRONOLOGY OF UNMINUTED INTER-MNO MEETINGS AND DISCUSSIONS

No	Date	Participants	Bundle reference
1.	24 July 2012	Olaf Swantee (EE) Guy Laurence (Vodafone)	**{G2/192/1}**
2.	10 October 2012	Ronan Dunne (O2) Guy Laurence (Vodafone)	**{G3/4/1}**
3.	16 October 2012	Philipp Humm (Vodafone) Jose Alvarez-Pallete (Telefónica)	**{G3/173/1}**
4.	23 October 2012	Philip Humm (Vodafone) Olaf Swantee (EE)	**{G3/98/1}**
5.	24 April 2013	Philipp Humm (Vodafone) Jose Alvarez-Pallete (Telefónica)	**{G4/446/2}**
6.	26 April 2013	Timotheus Höttges (DT) Ángel Vilá Boix (Telefónica)	**{G4/428/2}**
7.	3 May 2013	Timotheus Höttges (DT) Ángel Vilá Boix (Telefónica)	**{G4/438/1}**
8.	c.27 May 2013	Timotheus Höttges (DT) Ángel Vilá Boix (Telefónica)	**{G5/5.01/1}**
9.	11 June 2013	Claudia Nemat (DT) Eva Castillo Sanz (Telefónica).	**{G5/60/1}**
10.	3 September 2013	Philip Humm (Vodafone) Eva Castillo Sanz (Telefónica)	**{G5/324.1/1}**
11.	9 September 2013	Guy Laurence (Vodafone) Ronan Dunne (O2)	**{G5/281/1}**
12.	Mid-September 2013	Philip Humm (Vodafone) Eva Castillo Sanz (Telefónica)	**{G5/324.1/1}** **{G5/16/1}**
13.	7 October 2013	Claudia Nemat (DT) Eva Castillo Sanz (Telefónica)	**{G6/40/1}**
14.	1 November 2013	Jeroen Hoencamp (Vodafone) Guy Laurence (Vodafone)	**{G6/249/1}**

		Olaf Swantee (EE)	
15.	4 November 2013	Philip Humm (Vodafone) Olaf Swantee (EE)	**{G6/298/1}**
16.	4 November 2013	Ronan Dunne (O2) Guy Laurence (Vodafone) Jeroen Hoencamp (Vodafone)	**{G6/169/1}**
17.	20 November 2013	Vittorio Colao (Vodafone) Jose Maria Alvarez Pallete Lopez (Telefónica)	**{G6/421/1}**
18.	22 November 2013	Vittorio Colao, (Vodafone) Stéphane Richard (Orange)	**{G6/256/1}**
19.	2 December 2013	Philip Humm (Vodafone) Max von Trotha (EE)	**{G7/23/1}**
20.	25 February 2014	Timotheus Höttges, Wolfgang Kopf (DT) César Alierta (Telefónica)	**{G8/21}**
21.	2 April 2014	Philip Humm (Vodafone) Benoit Scheen (Orange)	**{G20/288}**
22.	16 May 2014	Timotheus Höttges (DT) Vittorio Colao (Vodafone)	**{G12/202/1}**
23.	c.18 June 2014	Gervais Pellissier (Orange) José María Álvarez- Pallete (Telefónica)	**{G15/127/1}**
24.	23 June 2014	Roland Doll, Wolfgang Kopf (DT) Enrique Medina Malo (Telefónica)	**{G14/432/1}**
25.	26 June 2014	Mark Stansfeld (Telefónica) Mark Allera (EE)	**{G14/386/1}**
26.	8 July 2014	Vittorio Colao (Vodafone) Stéphane Richard (Orange) César Alierta (Telefónica)	**{G15/249/1}** **{G15/184/1}**
27.	14 August 2014	Mark Evans (O2) Kevin Salvadori (Vodafone)	**{G16/421/1}**

28.	21 August 2014	Ronan Dunne (O2) Jeroen Hoencamp (Vodafone)	**{G17/28/1}**