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Phones 4U Ltd v EE Ltd & Ors [2025] EWCA Civ 869 (11 July 2025): Six Grounds of Appeal, No Bars of Reception. The Court Hangs Up on Collusion Claims

Phones 4U Ltd v EE Ltd & Ors [2025] EWCA Civ 869 (11 July 2025)

Date: 11 July 2025

Judges: Sir Julian Flaux, Lord Justice Phillips and Lady Justice Falk

Key Words:

Concerted practices, Anic presumption, Public distancing, Market alignment, Parallel conduct, Unilateral decision-making, Adverse inferences, Document preservation, Judicial delay, Appellate review, Causation, Rebuttable presumption, Inference from silence, Confidential information, Collusion, Competition law, Anticompetitive behaviour, Standard of proof, Findings of fact, Strategic commercial conduct

Summary

The case of Phones 4U Ltd v EE Ltd & Ors EWCA Civ 869 involved an appeal by Phones 4U Limited (P4u), which went into administration in September 2014, against a High Court decision dismissing its claim [1-3]. P4u alleged that its collapse was due to a collusive anticompetitive scheme by three major UK mobile network operators (MNOs) – EE Limited, Vodafone Limited, and Telefonica UK Ltd (O2) – and their respective parent companies [2, 7-9]. The claim sought damages for infringement of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and/or Section 2 of the Competition Act 1998, alleging that it would have been commercially irrational for the MNOs to independently cease supplies to P4u [2].

The High Court, presided over by Mr Justice Roth, dismissed P4u's claims in a judgment handed down in November 2023, following an 11-week trial [3]. Permission to appeal was granted on six grounds, all challenging the finding of no liability for breach of competition law [4]. Lady Justice Falk, delivering the leading judgment for the Court of Appeal, concluded that the appeal should be dismissed, affirming the High Court's decision that the MNOs' actions were independent commercial decisions and not the result of a collusive scheme [1-2, 5, 222-223].

Key Themes:

- ***Competition Law Application:*** *The central theme is the application and interpretation of*

Article 101(1) TFEU and Section 2 of the Competition Act 1998, particularly concerning "concerted practices" [2, 14-16].

- ***Definition of Concerted Practice:*** *The judgment thoroughly examines the elements required for a concerted practice: concertation (coordination/cooperation), subsequent conduct on the market, and a cause-and-effect relationship between the two [13c-d, 18].*
- ***"By Object" Infringements:*** *The case focuses on whether the alleged conduct constituted a "by object" infringement, meaning it was inherently harmful to competition, negating the need to prove actual anticompetitive effects [19-20].*
- ***The Anic Presumption:*** *A significant legal point was the application and rebuttal of the Anic presumption, which states that undertakings participating in concerting arrangements are presumed to take account of exchanged information in determining their market conduct [19, 100].*
- ***Market Dynamics and Strategic Decisions:*** *The judgment explores the MNOs' strategic desire to increase direct distribution and reduce reliance on indirect retailers, and the impact of significant market events like the Carphone Warehouse/Dixons merger on their commercial decisions [17 (109), 21, 60].*
- ***Evidential Burden and Inferences:*** *The case highlights the challenges of proving collusion, often relying on circumstantial evidence and the drawing of inferences, especially given the common lack of direct evidence for unlawful activities [202-204].*
- ***Judicial Review of Factual Findings:*** *The lengthy delay in the High Court judgment (15 months) introduced a specific standard of appellate review for factual findings, requiring "special care" and a tempered application of the "plainly wrong" test, as per Natwest Markets Plc v Bilta (UK) Ltd [2021] EWCA Civ 680 ("NatWest v Bilta") [3, 22, 145, 218-223].*
- ***Document Preservation and Adverse Inferences:*** *The conduct of Telefonica regarding document preservation procedures raised issues about drawing adverse inferences from missing evidence [17 (106), 23, 50, 104, 215-216, 307-313, 317].*

Background

P4u, formerly a **major independent UK supplier of mobile network connections**, entered administration in September 2014, following the non-renewal of contracts by three key MNOs: O2, Vodafone, and EE [3, 12]. The MNOs, including their parent companies, were defendants in the claim [7-9]. EE was the largest MNO with about one third of the market, followed by O2 (just under a quarter) and Vodafone (about one fifth) [7-8].

During the relevant period (2012-2014), indirect retailers like P4u and Carphone Warehouse (CPW) held a substantial share of the UK mobile connections market, a feature less common in continental Europe [9-10]. While beneficial to consumers through cheaper deals and handset subsidies, this model made the UK market less profitable for MNOs [10-11, 17(109)]. All MNOs shared a **strategic desire to increase direct distribution and reduce reliance on indirect channels** [17(109), 21, 60]. However, unilaterally exiting an indirect retailer posed a "prisoner's dilemma" – a significant risk of losing market share to competitors [17(109), 25].

P4u had agreements with O2, Vodafone, and EE, set to expire at various points between January 2013 and September 2015 [11]. O2 initiated non-renewal notifications in October 2012 and October 2013. Vodafone terminated its contract in August 2014, effective February 2015. EE informed P4u in September 2014 that it would not renew its agreement [12]. P4u entered administration shortly after EE's notification [12].

A crucial development was the **merger talks between CPW and Dixons Retail plc**, announced in February 2014 and completed in August 2014 [34]. This merger was considered a "game changer" by

EE, significantly strengthening CPW and weakening P4u, which impacted the MNOs' strategic calculations [21, 69, 98]. P4u, which had a significant debt burden by 2013, became more exposed after O2's departure as it relied on only two MNOs [52-53].

Legal Issues and Analysis

The case primarily revolves around **competition law**, specifically allegations of collusive anticompetitive behaviour infringing **Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)** and/or **section 2 of the Competition Act 1998** [2, 14]. It was common ground between the parties that there was no difference in the application of these two provisions for this case [15-16]. The focus of the claim was on the alleged existence of "concerted practices" between Mobile Network Operators (MNOs) [17].

The Court of Appeal also addressed important procedural and evidential issues regarding the **standard of appellate review for factual findings in delayed judgments** and the **drawing of adverse inferences from document preservation failures**.

Issue 1: The Concept and Elements of a “Concerted Practice”

A "concerted practice" requires three elements: **concertation, subsequent conduct on the market, and a relationship of cause and effect between the two** [13c-d, 17 (112), 18]. An infringement can occur not only where the effect distorts competition, but also where that is its **object** ("by object" infringement) [19].

The core allegation in this case involved a "Landmark lunch" between O2's CEO and EE's CEO, where O2's CEO allegedly sought to "de-risk" a provisional decision to exit Phones4u by colluding with EE [13a].

1.1 Independence and Unilateral Conduct

- **Judicial Reasoning:**
  - The requirement of independence means "each economic operator must determine independently the policy which he or she intends to adopt on the internal market" [64, 17 (105-106)].
  - This "strictly preclude[s] any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market" [17 (106), 65, 112(ii)].
  - However, economic operators are not deprived of "the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors" [17 (106), 65].
  - **Unilateral conduct** on the part of an undertaking is **not prohibited** by the Chapter I prohibition [112(iv), 69]. A "concerted practice" requires "reciprocal contacts" [69, 112(iv-v)].

1.2 "Concertation" and the Role of Passivity/Consensus

- **Judicial Reasoning:**
  - The judge concluded that "concertation" was **not present** in the Landmark lunch [23-24, 39-40].
  - While a "one-way" disclosure of intended conduct by only one party can be sufficient for concertation [69, 113-114], there must still be an "element of concertation" [89, 137-138].

- The concept of a concerted practice "implies the existence of reciprocal contacts," but this requirement "may be met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it" [69, 112(iv-v)].
- "Accepts" means "some form of tacit approval" [142, 70, 93].
- Whether the required "consensus" exists "will depend on the context" [141. "Passive behaviour will be treated as amounting to consensus," depending on the circumstances [141].
- The judge found that O2's CEO referred to O2 taking "unilateral steps" and playing "big cards," [34, 36, 128, 130, 132-133] but "this was not explained further by him and there was no reference to P4u" [36]. The judge concluded that EE's CEO "essentially did not engage and remained passive while Mr Dunne was speaking" [38, 132-133].
- The judge found that EE's CEO "did not say anything during the lunch that could have given Mr Dunne encouragement that EE would go along with what Mr Dunne was suggesting" [38, 132-133]. He "could [not] have inferred from Mr Swantee's silence any form of acquiescence or a consensus to cooperate" [39, 24, 145].
- The Court of Appeal affirmed that the judge was entitled to reach this factual conclusion, and that **"no information at all was conveyed about EE's attitude to the suggestion of reducing volume from indirect distributors"** [124-125, 77-78].

- **Comparison of Views / Coherence:**
  - The judicial reasoning consistently holds that while explicit agreement is not needed, and even one-way communication can suffice, there must be a **"consensus"** [17 (105-106), 112 (vi), 114]. The appellate court reinforced that "accepts" means "some form of tacit approval," not merely passive receipt of information.
  - This highlights a tension: on one hand, a strict reading of "independence" precludes any contact that influences or discloses intentions [17 (106), 65]. On the other, the requirement of "consensus" means mere unsolicited receipt of information without any active or passive acceptance/approval is not enough. The court clarifies that **passive behaviour can indicate consensus, but only if the context allows for such an inference** [48-49, 92, 141-142].

1.3 Specificity/Vagueness of Information

- **Judicial Reasoning:**
  - An invitation to collude "does not… [require] precision or specificity if he was conveying a message which his competitor could understand" [36, 130, 22, 79].
  - However, the information transmitted must be "sufficiently clear as to put the recipient in a favourable position in terms of removing uncertainty" [130, 81]. Ambiguity would not preclude a finding, but it is a "highly fact-specific" question [130, 132, 81, 84].
  - For a "by object" infringement, the information must be "capable of reducing uncertainty" [115, 133, 135, 86]. It must be "confidential" and "strategic" [134, 87].
  - The judge concluded that O2's CEO's comments ("unilateral steps" or "some big cards") were "wholly vague" and could not "reasonably be seen as having benefited EE by removing uncertainty as regards O2's strategy or conduct on the market" [130, 138]. The Court of Appeal upheld this factual finding [132, 88].
- **Coherence:** The doctrine appears coherent. While the precise details of an anti-competitive agreement are not required, the communication must still be sufficiently clear to actually reduce uncertainty for the recipient in a way that affects competition. Vague "soundings out"

without any clear indication of specific future conduct or a clear influence on the recipient's market behaviour may not meet the threshold for a "by object" infringement.

In Practice: Telecommunications Sector

This case highlights the particular scrutiny faced by executives in concentrated markets like telecommunications when communicating with competitors, even in informal settings. Exchanges about general market conditions, strategic intent (like reducing reliance on indirect channels), or even a competitor's contemplated future conduct, can be problematic. The line between "intelligently adapting" to market conditions and engaging in illicit concertation is fine. **Companies should ensure clear internal guidelines on discussions with competitors, document all meetings, and be prepared for robust "public distancing" if anti-competitive overtures are made**. The fact that EE's CEO felt compelled to record the conversation and consult legal counsel immediately underscores the need for clear internal protocols [40, 104, 118, 144, 149, 153-171, 29, 30].

Issue 2: The "Anic Presumption" and Rebuttal

The "Anic presumption" is the principle that "subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market" [150, 100].

2.1 Rebuttal Standard: "Public Distancing" vs. "Other Evidence"

- **Judicial Reasoning:**
  - P4u argued that where collusion occurs at a meeting, the Anic presumption can only be rebutted by **public distancing** or a report to the competition authorities [103, 153].
  - The Court of Appeal **rejected** this argument, stating that "Eturas does not provide support for the proposition, and P4u has not identified any CJEU authority that does" [154]. It would also "lack logic and would lead to unprincipled differences of approach depending on whether there had or had not been a meeting" [154].
  - The court clarified that Eturas primarily concerned the **"participation presumption"** (that an undertaking participating in meetings without manifestly opposing them is presumed to have participated in the cartel) [151, 152, 157]. It is distinct from the Anic presumption [157, 159].
  - The Court of Justice in Eturas did indeed indicate that the presumption of a causal connection could be rebutted by "other evidence... such as evidence of the systematic application of a discount exceeding the cap in question" [156, 161].
  - The standard for rebuttal is that the undertaking must "prove that the concerted action did not have any influence whatsoever on its own conduct on the market" [171] and that the proof "must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market" (citing Solvay) [171, 112(iii)].
  - The **domestic standard of proof (balance of probabilities)** applies to the rebuttal of the Anic presumption [173-174].
  - In relation to the Landmark lunch, the judge concluded the Anic presumption was engaged but **rebutted as far as EE was concerned** because **EE signed a new three-year deal with Phones4u just three weeks after the lunch and later amended it to increase volumes** [41-42, 25, 182]. This demonstrated that EE's conduct was not influenced by the alleged concertation.

- **Comparison of Views / Coherence:**
    - The appellate court clearly distinguishes between the "participation presumption" (where public distancing is crucial for showing non-participation in the collusion itself) and the "Anic presumption" (where the focus is on lack of influence on subsequent market conduct). This brings coherence to the application of presumptions in competition law by clarifying that while public distancing might be the best way to avoid participation in a cartel meeting, it is not the only way to prove that any information exchanged had no causal effect on market behaviour. The court explicitly states that "there is no principled reason why it should be impossible to rebut the Anic presumption by anything other than public distancing... however compelling the evidence is that there was in fact no causal effect" [164, 110].

2.2 Application to the Disclosing Party

- **Judicial Reasoning:**
    - The judge concluded that the Anic presumption did **not apply to O2** (the disclosing party in the Landmark lunch) because EE's CEO "made no disclosure to Mr Dunne of EE's position, nor did he offer to give any support from EE for O2's strategy" [41, 178, 156, 42]. The court affirmed that "the critical point was that Mr Swantee conveyed nothing to Mr Dunne, so that there was nothing that Mr Dunne gleaned from the meeting which could have influenced O2's conduct on the market" [178, 115].
    - However, the Court of Appeal noted that if EE's CEO "had given some indication or comfort that he was prepared to cooperate or support the move, then that would in effect have been a provision of information by Mr Swantee to Mr Dunne, with scope for the Anic presumption to apply as regards O2's conduct thereafter" [178, 115, 179].
- **Coherence:** This distinction is coherent. The Anic presumption concerns the influence of *received* information on *subsequent market conduct*. If the disclosing party receives no new information or comfort from the interaction, there's no basis for a presumption that *their* conduct was influenced by the alleged concertation.

In Practice: Risk Management in Highly Regulated Markets

For businesses operating in competitive and regulated markets like telecommunications, the emphasis is on **demonstrable independence** and **internal compliance**.

- **Contemporaneous Documentation:** Maintain clear records of all competitor interactions, including what was discussed and, crucially, what was *not* agreed or actively rejected.
- **Robust Decision-Making Records:** Ensure internal records clearly articulate the rationale for strategic decisions, demonstrating they are based on independent commercial considerations, not on information received from competitors. EE's decision to sign and then expand its contract with P4u shortly after the alleged collusion was key to rebutting the Anic presumption [41, 77].
- **Legal Counsel:** Proactive engagement with competition law experts and adherence to their advice, including "public distancing" when appropriate, is vital. EE's General Counsel's swift actions post-Landmark lunch, despite the judge's ultimate finding that public distancing did not occur, highlight the importance of internal legal vigilance [29-30, 32-33, 41].

Issue 3: Standard of Appellate Review for Factual Findings in Delayed Judgments

The judgment in this case was handed down some **15 months** after the trial concluded [3]. This significant delay impacted the standard of appellate review applied to the judge's factual findings.

3.1 Principles of Review

- **Judicial Reasoning:**
  - The general rule is that judgments should be delivered within three months, even for complex cases, to maintain confidence in the justice system and avoid "justice delayed is justice denied" [323, 218, 223-224].
  - However, delay *itself* is not a sufficient ground to overturn a judgment [218c].
  - The normal standard for appealing factual findings is that the judge must be "plainly wrong" (i.e. the decision cannot reasonably be explained or justified). This applies to primary facts, evaluations, and inferences [218c].
  - For **seriously delayed judgments**, this normal approach is tempered by an **additional test**: if the judge's recollection of evidence is at fault on a *material point* (or there's a failure to recollect/address material evidence) AND there is a "causal link" between the error and the delay, then the appellate court will order a retrial if it "cannot be satisfied that the judge came to the right conclusion" [218e, 222].
  - The ultimate question remains whether the judgment is **"safe"** [222]. This does not mean *any* unconsidered evidence is enough, but rather "whether the documents... could have made a difference to the outcome" if they were material and overlooked [223].
  - The Court highlighted the "acute danger of island hopping" (where an appellate court only looks at isolated points raised by the appellant) [327] and stressed the need to "carefully consider the judgment, and the judge's consideration of the other evidence, as a whole" [220, 224, 226, 328].

3.2 "Compartmentalised Approach"

- **Judicial Reasoning:**
  - A judge's "compartmentalised approach" (failing to consider evidence "in the round") may render a judgment unsafe [153, 229-231].
  - This problem is not necessarily linked to delay, but delay can exacerbate it [230]. The key question is whether the judgment is "rendered unsafe by a failure properly to consider findings of fact in the round" [232-233].
- **Coherence:** The principles articulated are consistent across the judgments cited (e.g. *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 *("NatWest v Bilta")*, *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, [2020] 4 WLR 55 *("Bank St Petersburg")*). They aim to balance the deference due to the trial judge's position (especially in assessing witness credibility) with the need for fairness when delay might compromise the accuracy of factual findings. The emphasis on "safety" and holistic review addresses the potential for injustice.

In Practice: Litigation Strategy

- **Post-Trial Follow-Up:** Parties should proactively monitor judgment delivery times and be prepared to raise concerns about undue delay.
- **Appellate Briefing:** When appealing a delayed judgment, appellants must meticulously demonstrate how specific factual errors or omissions are *material* and *causally linked* to the delay, rather than simply pointing to discrepancies. The "island hopping" warning means appellants need to provide sufficient context from the "whole sea" of evidence for the appellate court to assess materiality effectively [220, 327, 226-227, 147].
- **Evidentiary Rigour:** Given the higher scrutiny in delayed judgment appeals, ensuring strong, consistent, and well-documented evidence at trial is paramount for both claimant and

defendant.

Issue 4: Adverse Inferences from Document Preservation Failures

P4u alleged that Telefonica's failure to adopt appropriate document preservation measures in 2015 and for some time thereafter warranted the drawing of adverse inferences.

4.1 Principles for Drawing Inferences

- **Judicial Reasoning:**
  - Tribunals are free to draw, or decline to draw, inferences from the facts using "common sense" [309].
  - Whether to attach "positive significance" to the lack of documentation "depends entirely on the context and particular circumstances" [309].
  - The **appellate hurdle is high**: the appellant must show that "no reasonable tribunal could have reached the decision it did" [311].
  - An adverse inference "must be consistent with other evidence and factual findings" [312].
  - If the judge forms a "clear view" based on other evidence, the adverse inference cannot “require the judge to accept evidence he does not believe or to reject evidence he finds to be truthful" [312].
  - The judge acknowledged Telefonica's "arrogant disregard" and "deplorable" conduct in failing to preserve documents [23-24, 314]. However, he distinguished between a "deliberate decision" not to put preservation measures in place (knowing documents *could* be lost) and a factual allegation of "deliberate document destruction" (intending to destroy specific damaging documents) [218e)7, 314].
  - The judge did not draw an adverse inference against Telefonica, primarily because strong independent evidence (including other defendants' documents and witness testimony) led him to a "clear view" that the alleged collusion (e.g., between Mr Alierta and Mr Colao) did not occur, making the absence of Telefonica's documents immaterial [312, 218, 316-317].
- **Coherence:** The approach is coherent with the "common sense" and contextual emphasis articulated in *Efobi*. It underlines that while document failures are serious, they do not automatically lead to adverse inferences if other compelling evidence contradicts the proposition the inference is meant to support. The weight of an adverse inference is not absolute; it must be assessed against the totality of the evidence.

In Practice: Document Retention and E-Discovery

- **Proactive Preservation:** Companies must implement robust and early document preservation policies once litigation is contemplated or allegations are made. This includes all forms of communication (emails, texts, chat messages) [23, 313].
- **Accountability:** Clear accountability for document preservation is essential. Telefonica's failure here was criticised as an "arrogant disregard" [23].
- **Forensic Implications:** The absence of documents can weaken a party's case, even if an adverse inference is not formally drawn. If critical documents are missing, the court may be left to rely more heavily on other available (and potentially less favourable) evidence or draw on general probabilities.

Sectoral Implications

The provided sources do not contain information to add "In Practice" boxes tailored to construction,

finance, or employment law beyond the telecommunications context. However, the principles discussed regarding competition law (concerted practices, presumptions) and litigation practice (delayed judgments, document preservation) are broadly applicable across various commercial sectors.

Conclusion

The Court of Appeal **dismissed all six grounds of appeal**, concluding that the High Court judge made no material error of law and that his factual findings were safe [5, 321-330]. The judgment consistently found that the MNOs' decisions to cease supplying P4u were **independent commercial decisions** driven by their strategic goals (increasing direct sales, improving profitability), and significantly influenced by the attractive terms offered by Carphone Warehouse post-merger with Dixons, rather than any collusive anticompetitive scheme [21, 60-61, 98].

Key Takeaway:

*The judgment provides critical insights into the rigorous standards required to prove competition law infringements, especially "concerted practices." It highlights that courts will **not infer collusion merely from parallel conduct or even vague discussions among competitors** if there are plausible independent commercial justifications for their actions, and if there is no clear evidence of actual coordination, consensus, or reduction of market uncertainty [24, 60, 97, 124-125, 130, 218c-d]. Furthermore, it reinforces that while judicial delay is a concern, it alone is **not a sufficient basis to overturn a judgment** unless a causal link to material errors affecting the safety of the findings can be demonstrated [145, 149-150, 222-223, 226-227]. Companies should, however, maintain **robust document preservation procedures** and be aware that a judge may consider alternative explanations for circumstantial evidence, even if not explicitly argued by the parties, provided no prejudice results [133-134, 202-204, 220].*

Parting Thoughts

And so, after nearly a decade of litigation, hundreds of millions in alleged damages, one collapsed high-street giant, and enough forensic scrutiny to make MI5 blush, Phones 4U has officially run out of signal.

Despite six authorised grounds of appeal—ranging from misapplied presumptions to accusations of judicial myopia—the Court of Appeal has, with composed detachment, left the High Court's findings wholly intact. According to Lady Justice Falk and her equally unconvinced colleagues, the supposed "Landmark lunch" was less an unlawful conspiracy and more an awkward meal with all the strategic clarity of a weather forecast in haiku. Swantee said little. Dunne said much. Nothing happened. Pass the breadsticks.

The lesson? If you're going to allege a covert cartel that strangled your business, you need more than market parallelism and industry gossip. You need crisp, unequivocal evidence of actual coordination—something slightly more substantive than a CEO's cryptic musings about "big cards" and "unilateral steps" over veal.

On the Anic presumption, the court delivered a masterclass in legal nuance. The presumption is rebuttable, not sacrosanct. And no, your rebuttal needn't be shouted from the rooftops via a megaphone marked "Public Distancing." If you can point to contemporaneous commercial conduct that belies conspiracy—like EE increasing its volumes to Phones 4U—you'll do just fine.

As for the judicial delay? Yes, 15 months is long enough to launch a satellite and rethink your life choices. But unless it can be shown to have birthed material factual error, it's not enough to warrant a

retrial. Island hopping, as the Court reminds us, is not appellate advocacy—it's a short hop to losing. And Telefonica's document preservation debacle? While the court reserved a raised eyebrow (and perhaps a quiet sigh), the absence of records was not, in the end, fatal. You can behave deplorably and still escape liability—provided the remaining evidence is strong, coherent, and supports a lawful commercial rationale.

Thus, this case stands as a cautionary tale for the romantics of circumstantial inference: sometimes, strategic realignments by market actors really are just that—strategic realignments. Not every convergence of self-interest is a conspiracy. Sometimes, it's just the market doing what markets do best—moving on.

 Phones 4U may have been cut off, but collusion, it turns out, was never really on the line.

Authorities:

Case Law:

Competition Law - Concerted Practices & Information Exchange

1. Case T-342/18 Nichicon v Commission **[2021] 5 CMLR 19** *("Nichicon GC")*

- ***Legal Principle:*** *Defines that* ***economic operators must determine their market policy independently****, strictly precluding any direct or indirect contact that may influence competitors' conduct or disclose intentions where the object or effect is to create non-normal market conditions.*
- ***Legal Principle:*** *States that* ***exchange of information is liable to be incompatible with competition rules if it reduces or removes market uncertainty****, particularly regarding the timing, extent, and details of conduct modifications, as such exchanges are regarded as pursuing an anticompetitive object.*
- ***Legal Principle:*** *Sensitive business information exchanges (e.g., future pricing, supply/demand) have an anticompetitive effect by modifying undertakings' independence, thus the Commission is not obliged to prove anticompetitive effects if capable of restricting competition.*
- ***Legal Principle:*** *A concerted practice implies* ***concertation, subsequent conduct on the market, and a cause-and-effect relationship*** *between the two.*
- ***Legal Principle:*** *Presumption that undertakings in a concerted action, remaining active,* ***take account of exchanged information*** *in determining market conduct.*

2. Argos Ltd v Ltd v Office of Fair Trading **[2006] EWCA Civ 1318, [2006] UKCLR 1135** *("Argos")*

- ***Legal Principle:*** *Aims to bring within competition prohibition forms of coordination that* ***knowingly substitute practical co-operation for the risks of competition****.*
- ***Legal Principle:*** *The prohibition applies to* ***all forms of collusion****, with concerted practices distinguishable from agreements by intensity and manifestation.*
- ***Legal Principle:*** *While unilateral conduct is not prohibited,* ***reciprocity is required for a concerted practice****, which can be met where one competitor discloses future intentions and the other requests or, at the very least, accepts it.*
- ***Legal Principle:*** *The fact that* ***only one of competing undertakings reveals its intentions is not sufficient to exclude*** *the possibility of an agreement or concerted practice.*

3. Case C-204/00 P Aalborg Portland A/S v Commission [2005] 4 CMLR 4 *("Aalborg Portland")*

- ***Legal Principle:*** *It is sufficient to show that an undertaking* ***participated in meetings where anti-competitive agreements were concluded without manifestly opposing them*** *to prove participation in a cartel.*
- ***Legal Principle:*** *An undertaking's failure to publicly distance itself or report to authorities, having participated in a meeting, gives other participants the impression it subscribed to decisions, thus constituting a* ***passive mode of participation****.*

4. Case C-74/14 Eturas UAB v Lietuvos Respublikos konkurencijos taryba [2016] 4 CMLR 19 *("Eturas")*

- ***Legal Principle:*** *Participants aware of an anticompetitive practice are presumed to have* ***tacitly assented*** *to it if they do not oppose it, provided circumstances are propitious for tacit consensus.*
- ***Legal Principle:*** *The presumption of participation can be rebutted by* ***publicly distancing from the practice, reporting it to administrative authorities, or adducing other evidence****, such as systematic non-compliance.*
- ***Legal Principle: A number of coincidences and indicia, taken together, may constitute evidence of an infringement****, in the absence of another plausible explanation.*

5. Commission v Anic Partecipazioni [1999] ECR I-4125

- ***Legal Principle: The "Anic presumption" states that undertakings participating in concerting arrangements and remaining active on the market are presumed to take account of information exchanged when determining their market conduct****, subject to proof to the contrary.*

6. Sainsbury's Supermarkets Ltd v Mastercard Inc; Asda Stores Ltd v Mastercard Inc; Sainsbury's Supermarkets Ltd v Visa Europe Services LLC [2020] UKSC 24**,** [2020] 4 All ER 807 *("Sainsbury's v Visa")*

- ***Legal Principle:*** *The* ***standard of proof to rebut the Anic presumption is the usual domestic law standard, namely the balance of probabilities****.*

7. Case C-455/11P Solvay SA v Commission [2014] 4 CMLR 17*("Solvay")*

- ***Legal Principle:*** *To rebut the Anic presumption, the undertaking must prove the concerted action* ***had no influence whatsoever on its own conduct on the market****, ruling out any link between the two.*

8. Case C-298/22 Banco BPN/BIC Português SA v Autoridade da Concorrência [2024] 5 CMLR 16

- ***Legal Principle:*** *An exchange of information is liable to be incompatible with competition rules if it reduces or removes uncertainty; for this, the information exchanged must be* ***confidential and strategic****. Strategic information is data not already known which may reveal, when combined with other information, a participant's future market strategy.*

9. Case C-228/18 Budapest Bank and others EU:C:2020:265

- ***Legal Principle:*** *Certain types of coordination between undertakings are regarded as revealing a sufficient degree of harm to competition to be deemed* ***"restrictions by object," removing the need to examine their actual effect on competition****.*

10. Imperial Chemical Industries Ltd v Commission of the European Communities [***[1972] ECR 619***](#) *("Dyestuffs")*

- ***Legal Principle:*** *Parallel behaviour may amount to* ***strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of the market****.*

11. Suiker Unie and Others v Commission of the European Communities [***[1975] ECR 1663***](#)

- ***Legal Principle:*** *The requirement of independent determination of market policy* ***strictly precludes any direct or indirect contact between competing undertakings*** *aimed at influencing market conduct or disclosing future conduct.*

12. Commission v Anic Partecipazioni [***[1999] ECR I-4125***](#) *("Anic")*

- ***Legal Principle:*** *Clarifies that the concept of a concerted practice implies coordination and cooperation, representing a* ***form of collusion with the same nature as agreements*** *but distinguishable by intensity and manifestation.*

13. Bayer v Commission [***ECR II-3383***](#)

- ***Legal Principle:*** *A decision constituting* ***unilateral conduct escapes the competition prohibition****. The concept of an agreement requires a* ***concurrence of wills*** *between at least two parties.*

14. Bundesverband der Arzneimittel-Importeure eV v Bayer AG; Bayer AG v Commission of the European Communities [***ECR I-23***](#)

- ***Legal Principle:*** *Upheld the principles from Bayer v Commission regarding unilateral conduct and the definition of an agreement.*

15. Cimenteries CBR v Commission of the European Communities [***[2000] ECR II-491***](#)

- ***Legal Principle:*** *The requirement for reciprocal contacts in a concerted practice can be met where one competitor discloses its future intentions or conduct, and the other requests or accepts it. A statement of intention must* ***substantially reduce uncertainty*** *as to the other's expected conduct.*

16. Joined Cases T-202/98, T-204/98 and T-207/98 Tate & Lyle v Commission [***[2001] 5 CMLR 22***](#) *("Tate & Lyle")*

- ***Legal Principle:*** *The fact that* ***only one of a number of competing undertakings present at a meeting reveals its intentions is not sufficient to exclude*** *the possibility of an agreement or concerted practice.*

17. Case T-377/06 Comap SA v Commission [***[2011] 4 CMLR 28***](#)*("Comap")*

- ***Legal Principle:*** *Information transmitted for a concerted practice does not need to be precise,*

*as **vagueness or ambiguity would not preclude such a finding**.*

***18. Case T-105/17 HSBC Holdings plc v Commission** [2019] 5 CMLR 21 ("HSBC")*

- ***Legal Principle:** An exchange will not give rise to an infringement if it **does not provide an informational advantage sufficient to reduce uncertainty**.*

***19. Case C-286/13 P Dole Food Co Inc v Commission** [2015] 4 CMLR 16 ("Dole Food")*

- ***Legal Principle:** Illustrates that **attendance at a meeting knowing confidential information will be disclosed or exchanged** could be an obvious example of tacit approval amounting to consensus for concertation.*

***20. Case C-634/13 P Total Marketing Services v Commission** [2015] 5 CMLR 24("Total Marketing")*

- ***Legal Principle:** Public distancing or reporting to administrative authorities are **not the only means of rebutting the presumption that a company has participated in an infringement, especially if not at anticompetitive meetings**.*

***21. Case C-8/08 T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit** [2010] Bus LR 158*

- ***Legal Principle:** Discusses the evidence required to rebut the presumption of a causal link between concertation and market conduct in general terms, even when a meeting was involved.*

***22. Case C-251/22P Scania AB v Commission** [2024] 4 CMLR 24*

- ***Legal Principle:** Refers to both the "participation presumption" (presumption of participation in collusion from meeting attendance) and the "Anic presumption" (presumption of causal link between concertation and market conduct).*

***23. Deutsche Bahn AG v Morgan Advanced Materials plc** [2014] UKSC 24, [2014] 2 All ER 785*

- ***Legal Principle:** Confirms that **causation and loss are matters for domestic law**.*

Appellate Review & Judge's Conduct

***24. Natwest Markets Plc v Bilta (UK) Ltd** [2021] EWCA Civ 680 ("NatWest v Bilta")*

- ***Legal Principle:** A **serious delay in producing a judgment is an important factor in appellate review**, requiring special care in reviewing the judge's treatment of evidence, findings of fact, and reasoning.*
- ***Legal Principle:** Delay **diminishes the trial judge's advantage** in assessing evidence.*
- ***Legal Principle:** If an appellate court finds the judge's **recollection of material evidence is at fault (or failed to recollect/address), and the error is connected to the delay, a retrial will be ordered** if the court cannot be satisfied the judge came to the right conclusion. The error must be material and "could have made a difference to the outcome".*

***25. Bank St Petersburg PJSC v Arkhangelsky** [2020] EWCA Civ 408, [2020] 4 WLR 55 ("Bank*

St Petersburg")

- ***Legal Principle:*** *Judgments should generally be delivered within three months, as* ***justice delayed can lead to a loss of confidence in the justice system****.*
- ***Legal Principle:*** *A* ***compartmentalised approach to a judgment can render it unsafe****, particularly if it lacks an element of stepping back to consider the effects and implications of findings "in the round" and unfairly affects the evaluation of facts.*

26. Henderson v Foxworth Investments Ltd **[2014] UKSC 41, [2014] 1 WLR 2600**

- ***Legal Principle:*** *An appellate court will* ***only interfere with findings of fact if it concludes that the judge was "plainly wrong,"*** *meaning the decision cannot reasonably be explained or justified. This applies to findings of primary fact, evaluation, and inferences.*

27. Fage UK Ltd v Chobani UK Ltd **[2014] EWCA Civ 5, [2014] ETMR 26** *("Fage v Chobani")*

- ***Legal Principle:*** *Reaffirms that the* ***trial judge has seen the "whole sea" of evidence****, whereas an appellate court "will only be island hopping," highlighting the danger of appealing on isolated points.*

28. Bond v Dunster Properties Ltd **[2011] EWCA Civ 455**

- ***Legal Principle:*** *Outlines the* ***additional test for a seriously delayed judgment****: if the judge's recollection of material evidence is at fault (unless unconnected to delay), a retrial is ordered if the reviewing court cannot be satisfied the judge came to the right conclusion.*

29. Goose v Wilson Sandford & Co **[1998] TLR 85**

- ***Legal Principle:*** *Supports the idea that* ***serious delay diminishes the advantage*** *enjoyed by the trial judge in assessing evidence, and that* ***significant delays lead to a loss of confidence in the justice system****.*

30. Pickle Properties Ltd v Plant **[2021] UKPC 6**

- ***Legal Principle:*** *There must be a* ***basis for believing that there may have been a causal link between excessive delay and alleged errors or failings*** *in the judgment for appellate intervention based on delay.*

31. Cobham v Frett **[2001] 1 WLR 1775**

- ***Legal Principle:*** *An appellate court* ***must be satisfied that the judgment is not safe*** *and that allowing it to stand would be unfair to the complainant. Excessive delay may require a* ***very careful perusal of the judge's findings of fact and reasoning****.*

32. Smith New Court Securities v Citibank **[1997] AC 254**

- ***Legal Principle:*** *A* ***compartmentalised approach may render a judgment unsafe****, particularly in findings about witness credibility and reliability if assessed in isolation from other evidence and inherent probabilities.*

33. Moore v National Westminster Bank Plc **[2018] EWHC 1805 (TCC), [2018] BLR 586**

- ***Legal Principle:*** *A permission judgment can be* ***considered to elucidate the full reasons for a judge's decision****.*

34. Quantum Care Ltd v Modi **[2023] EWCA Civ 171**

- ***Legal Principle:*** *Affirms that a permission judgment can be used to* ***elucidate the full reasons for a judge's decision****.*

35. Kanaya Dansingani v Canara Bank **[2021] EWCA Civ 714**

- ***Legal Principle:*** *Reaffirms the principle that* ***justice delayed is justice denied****.*

Evidential Principles & Inferences

36. Efobi v Royal Mail Group Ltd **[2021] UKSC 33, [2021] 1 WLR 3863**

- ***Legal Principle:*** *Tribunals should use* ***common sense in deciding whether to draw adverse inferences*** *from the absence of a witness (or documents), considering availability, potential evidence, its significance, and other available evidence.*
- ***Legal Principle:*** *An appeal against a decision on drawing adverse inferences requires demonstrating that* ***no reasonable tribunal could have reached that decision****.*

37. Shagang Shipping Co Ltd v HNA Group Co Ltd **[2020] UKSC 34, [2020] 1 WLR 3549** *("Shagang Shipping")*

- ***Legal Principle:*** *Before drawing inferences from circumstantial evidence, the court must* ***ensure there is no equally plausible and innocent explanation*** *for the fragmentary evidence, to avoid reversing the burden of proof.*

38. Gestmin SGPS S.A. v Credit Suisse (UK) Ltd **[2013] EWHC 3560 (Comm)**

- ***Legal Principle:*** *Highlights the* ***reliability of memory and the need to focus on documentary evidence****.*

39. Armagas Ltd v Mundogas SA **[1985] I Lloyd's Rep 1**

- ***Legal Principle:*** *Points to the assistance provided by* ***considering motives and overall probabilities alongside documentary evidence****.*

40. Volpi v Volpi **[2022] EWCA Civ 464, [2022] 4 WLR 48**

- ***Legal Principle:*** *Reinforces that tribunals are free to* ***draw or decline to draw inferences from facts using common sense****, and the significance of a lack of contemporaneous documentation depends entirely on the context and particular circumstances.*

41. Malhotra v Dhawan **[1997] 8 Med LR 319**

- ***Legal Principle:*** *An* ***adverse inference must be consistent with other evidence and factual findings****. If evidence destruction was deliberate, it reflects on destroyer's credibility; if judge has clear view on truth, presumption cannot require judge to accept disbelieved evidence.*

Pleadings & Case Management

***42. Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041**

- ***Legal Principle:*** *It is* ***fundamental to the adversarial system that parties clearly identify issues for litigation****, and the judge's function is to adjudicate only on those issues. A judge cannot decide a case on an unpleaded or uncanvassed factual theory, as this leads to uncertainty and potential unfairness.*
- ***Legal Principle:*** *Departure from a pleading that causes* ***prejudice means the other party can insist on an amendment****, with allowing such a departure without amendment being impermissible.*

***43. Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287, [2021] BCC 640** *("Satyam")*

- ***Legal Principle:*** *It is* ***impermissible for a judge to decide a case on a basis that has neither been pleaded nor canvassed*** *before them, as this misunderstands the judge's function.*

***44. Ali v Dinc* [2022] EWCA Civ 34**

- ***Legal Principle:*** *Problems with unpleaded theories are concerned with the* ***interests of justice and prejudice to the losing party****. A judge can permit a departure from a formally defined case where it is just to do so, applying a pragmatic approach in line with the overriding objective.*

***45. Loveridge and Loveridge v Healey* [2004] EWCA Civ 173**

- ***Legal Principle: Pleadings mark the parameters of the case*** *and form the basis of trial preparation decisions, including evidence required.*

***46. Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345**

- ***Legal Principle:*** *An appellate court will generally* ***not permit a new point to be raised if it would necessitate new evidence or would have resulted in the trial being conducted differently*** *with regards to the evidence.*

Legislation:

Principles of Concerted Practices:

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU")

- *This Article prohibits "concerted practices" and defines them by the criteria of coordination and cooperation, emphasising that each economic operator must independently determine its market policy.*
- *It strictly precludes direct or indirect contact between competing undertakings if an undertaking may influence a competitor's market conduct or disclose its own intentions, where the object or effect is to create abnormal competition conditions.*
- *An exchange of information between competitors is incompatible with competition rules if it reduces or removes uncertainty regarding market operation, thereby restricting competition.*
- *Specifically, an exchange of information capable of removing uncertainty between participants regarding the timing, extent, and details of modifications to market conduct is considered to*

have an anticompetitive object.

- *The provision of sensitive business information (e.g., future price increases, supply, or demand information) has an anticompetitive effect by modifying the independence of undertakings. In such cases, proving actual anticompetitive effects on the relevant market is not always required if the practices are capable of restricting competition.*
- *A concerted practice requires three elements: concertation, subsequent conduct on the market (meaning remaining active on the market), and a relationship of cause and effect between the first two.*
- *The concept implies reciprocal contacts, but this requirement can be satisfied where one competitor discloses its future intentions or conduct and the other requests or, at the very least, accepts it. This requires some form of consensus, which can include tacit approval, depending on the specific context.*

Presumptions and Rebuttal in Competition Law:

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU")

- *This Article gives rise to the "Anic presumption", which states that, unless proven otherwise by the economic operators concerned, undertakings participating in concerted arrangements and remaining active on the market are presumed to take account of the information exchanged with their competitors when determining their market conduct.*
- *To rebut the Anic presumption, the undertaking must prove that the concerted action had no influence whatsoever on its own market conduct, thereby ruling out any link between the concerted action and its market behaviour. The domestic law standard of proof for rebuttal is the balance of probabilities.*
- *Where an undertaking participates in meetings where anticompetitive agreements are concluded, without manifestly opposing them, it is presumed to have participated in the cartel. This "participation presumption" requires the undertaking to provide evidence that its participation was without anticompetitive intention, by demonstrating it indicated to its competitors that its spirit was different from theirs.*
- *Tacit approval of an unlawful initiative, without publicly distancing itself from its content or reporting it to administrative authorities, encourages the continuation of the infringement and compromises its discovery, thus constituting a passive mode of participation. "Public distancing" is a term of art meaning the undertaking clearly indicates to other parties that it wishes to take no part in the anticompetitive conduct, or reports it to the authorities. It is important to note that public distancing is not required to rebut the Anic presumption.*

Core Competition Law Prohibition:

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU")

- *This Article broadly prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that may affect trade between Member States and whose object or effect is to prevent, restrict, or distort competition within the internal market.*
- *Certain types of coordination between undertakings are deemed "restrictions by object", meaning they reveal a sufficient degree of harm to competition that it is not necessary to examine their actual effect on competition.*

Section 2 of the Competition Act 1998

- *The Chapter I prohibition in Section 2 has a similar effect to Article 101(1) TFEU, but it applies to*

arrangements that may affect trade within the United Kingdom and have an anticompetitive object or effect within the UK. For the purposes of this case, claims under both Article 101(1) TFEU and Section 2 of the Competition Act 1998 stand or fall together, as their application is considered to be the same.

Domestic Law Application:

Competition Act 1998

- *Causation and loss arising from competition law infringements are matters to be determined by domestic law.*

#LegalUpdate #DDAlegal #CompetitionLaw #Antitrust #ConcertedPractices #Article101TFEU #CompetitionAct1998 #AnicPresumption #PublicDistancing #Cartel #UKLaw #CourtOfAppeal #MobileNetworks #Phones4u #EE #Vodafone #O2 #LandmarkLunch #Collusion #AnticompetitivePractices #JudicialReview

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Adjudicator Assessor and Re-Assessor for the ICE and the CIArb
Arbitrator Assessor for the CIArb
ICE DRC Member
ICE DRC CPD Committee Chairman
Adjudicator Exam Question Setter for the ICE
CIArb Adjudication Panel Member since 2006
CIArb Arbitration Panel Member since 2006
CIC Adjudication Panel Member since 2010
Law Society Panel Arbitrator
RIBA Adjudication Panel Member since 2018
RICS Adjudication Panel Member since 20067
TECSA Adjudication Panel Member since 2012
FIDIC Adjudication Panel Member since 2021
ICE Adjudication Panel Member since 2021
RICS Dispute Board Registered since 2013