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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 (Abridged Version)

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

Phones 4U Ltd (P4u), in administration since 2014, appealed the High Court's dismissal of its claim against EE, Vodafone, and O2 for allegedly collusive anticompetitive conduct. P4u alleged that the MNOs' refusal to renew contracts was not commercially rational unless coordinated [2, 7-9]. The Court of Appeal dismissed the appeal, affirming Roth J's ruling that each MNO acted independently [1-2, 5, 222-223].

Key Themes:

- **Competition Law Application:** Focused on Article 101(1) TFEU and Section 2 Competition Act 1998 [2, 14-16].
- **Concerted Practice Definition:** Requires concertation, market conduct, and a causal link [13c-d, 18].
- **By Object Infringements:** The appeal centred on alleged inherent anti-competitive conduct [19-20].
- **Anic Presumption:** Rebuttable presumption of influence from shared information [19, 100].
- **Market Strategy:** MNOs wanted to expand direct sales and saw CPW/Dixons merger as transformative [17(109), 21, 60].
- **Evidence & Inferences:** Courts rely on inferences due to scarce direct evidence in collusion

cases [202-204].

- **Judicial Delay:** High Court delay (15 months) required tempered appellate review under *NatWest v Bilta* [2021] EWCA Civ 680 [3, 22, 145, 218-223].
- **Adverse Inferences:** Telefonica's document handling criticised but no inference drawn [23, 50, 104, 215-216, 307-313, 317].

Background

P4u lost all three MNO contracts by September 2014, triggering administration [3, 12]. Indirect sales were profitable for retailers but squeezed MNO margins [10-11]. MNOs were incentivised to shift to direct distribution [17(109), 21, 60], but such exits posed a "prisoner's dilemma" [25].

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. Concerted Practice

1.1 Independence:

- Economic operators must act independently [64, 17(105-106)].
- Mere adaptation to market trends is lawful [65].
- Concerted practices require reciprocal contacts [69, 112(iv-v)].

1.2 Concertation and Consensus:

- Passive receipt isn't necessarily consensus [112(iv-v), 141-142].
- The Landmark lunch did not establish concertation. EE's CEO was passive; no consensus arose [24, 145, 132-133].

1.3 Specificity:

- Disclosure must reduce uncertainty to breach Article 101(1) "by object" [130, 81-87].
- O2's statements were too vague to provide strategic value [130, 138].

Issue 2. The Anic Presumption

2.1 Rebuttal Standard:

- Rebuttal doesn't require public distancing. "Other evidence" suffices [154, 161].
- EE rebutted the presumption by signing and expanding a deal with P4u post-lunch [25, 41-42, 182].

2.2 Application to Disclosing Party:

- O2 (as discloser) received no actionable information from EE, so the presumption didn't apply to its conduct [41, 178, 115].

Issue 3. Appellate Review of Delayed Judgments

- Delays require "special care" but don't reverse judgments by default [218c, 222].
- Judgment is unsafe only if delay caused material error [223].
- "Island hopping" appellate arguments discouraged [220, 224, 226, 327].

Issue 4. Adverse Inferences from Document Preservation Failures

- Telefonica's failures criticised as "arrogant disregard" [23-24, 314].
- No inference drawn due to other clear evidence contradicting collusion [312, 316-317].

Sectoral Implications

Although sector-specific "In Practice" guidance was only provided for telecoms, the principles—on competition law, delay, and document retention—apply across commercial disputes.

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 Court reaffirmed that independent commercial rationale defeats inferences of collusion. Parallel behaviour alone isn't enough—specific, consensus-based information exchanges are required to breach Article 101(1) [24, 60, 124-125, 130]. Judicial delay doesn't undermine a judgment unless it causes material error [145, 149-150, 222-223]. Companies should document decisions clearly, maintain robust preservation policies, and manage competitor communications with legal oversight [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 2006
TECSA Adjudication Panel Member since 2012
FIDIC Adjudication Panel Member since 2021
ICE Adjudication Panel Member since 2021
RICS Dispute Board Registered since 2013

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