Neutral Citation Number: [2023] EWHC 2826 (Ch)

Case No: CP-2018-000038

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10/11/2023

Before:

THE HONOURABLE MR JUSTICE ROTH

- -

Between:

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

- and -

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

- -
- -

Kenneth MacLean KC, Owain Draper, Gideon Cohen and Stephanie Wood (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Meredith Pickford KC, Laura John KC, David Gregory and Daniel Schwennicke (instructed by **Clifford Chance LLP**) for the **First Defendant**

Robert O'Donoghue KC and Hugo Leith (instructed by **Covington & Burling LLP**) for the **Second Defendant**
Marie Demetriou KC, David Scannell KC and David Heaton (instructed by **Norton Rose Fulbright LLP**) for the **Third Defendant**
Ewan McQuater KC, Rob Williams KC, Adam Kramer KC and Hannah Glover (instructed by **Hogan Lovells International LLP**) for the **Fourth and Fifth Defendants**
Mark Hoskins KC, Sarah Abram KC, Matthew Kennedy and Aarushi Sahore (instructed by **Mishcon de Reya LLP and Linklaters LLP**) for the **Sixth, Seventh and Eighth Defendants**

Hearing dates: 16-20 May, 23-26 May, 7-10 June, 13-16 June, 20-23 June, 27-30 June, 4-7 July, 11-12 July and 25-28 July 2022

- -

Approved Judgment

This judgment was handed down remotely at 2.00pm on 10/11/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives. A copy of the judgment in final form as handed down should be available on The National Archives website shortly thereafter.

A short summary of the judgment is available from the Judicial Office. That summary does not form part of this judgment.

....

MR JUSTICE ROTH

CONTENTS

	Paragraph
A. INTRODUCTION	1
B. THE UK MOBILE MARKET	10
C. THE P4U-MNO AGREEMENTS	29
D. THE PROCEEDINGS	35
Witnesses of fact	40
Expert evidence	49
Evidence not available	51
E. THE COMPETITION LAW CLAIMS	63
O2/ Telefónica and Vodafone	66
EE and O2/Vodafone	69
The law	73
Standard of proof and evidence required	87
F. THE CULTURE AND ATTITUDE OF THE MNOs	84
G. 2012: THE O2 DECISION – ALLEGED COLLUSION WITH EE	104
The Landmark Lunch and subsequent exchanges	147
Analysis	202
H. 2012: THE O2 DECISION – ALLEGED COLLUSION WITH VODAFONE	236
I. 2013: O2/ TELEFÓNICA AND VODAFONE	246
The 27 January 2014 meeting: part 1	273
(a) Ms Castillo – Mr Humm	287
(b) Mr Alierta – Mr Colao	296
The 27 January 2014 meeting: part 2	305

J. THE FINANCIAL POSITION OF P4u 312

K. 2014:VODAFONE AND EE 328

L. THE VODAFONE DECISION

Background 329
Vodafone UK’s early negotiations with P4u 333
Vodafone UK’s negotiations with CPW 352

Parallel discussions with P4u and CPW 361

The decision 375

17 June – 29 August 2014 384

Termination with P4u 392

The allegations against Vodafone 399

The potential acquisition 412

Mr Humm 415

Two investment banks 418

Alleged collusion with O2 421

The aftermath of the Vodafone decision 423

M. THE EE DECISION

Background 426

September 2013 – February 2014 438

The Dixons/CPW merger and the 20 March 2014 BRM 445

Potential acquisition of P4u 452

The 10 April 2014 BRM 473

EE’s financial modelling 476

The shareholders’ Bonn strategy meeting 481

Late April – early May 2014 486

The 6-7 May drill-down workshop 496
The lead-up to the 21 May 2014 BRM 500

The allegations about the modelling assumptions 517

The 21 May 2014 BRM 527

Further consideration of acquisition of P4u 535

The continuing negotiations with P4u 540

Negotiation of the CPW Agreement 551

The collapse of P4u 557

A Series of unfortunate events:

(1) The Scheen – Humm conversation: 2 April 2014 562

(2) The remarks at the drill-down workshop: 7 May 2014 577

(3) The minutes of the 21 May 2014 BRM 590

(4) Mrs Derbyshire's email: 10 August 2014 599

(5) The meeting with Ofcom: 4 September 2014 609

Alleged collusion with Vodafone UK 616

N. THE EXPERT EVIDENCE 620

O. LIABILITY OF ORANGE AND DT FOR THE CONDUCT OF EE 636

Legal principles 639

The present case 641

P. BREACH OF CONTRACT BY EE 647

The contractual terms relied on 648

The events of 29 August to 10 September 2014 669

The BRM of 11 September and EE's letter of 12 September 2014 693

The alleged bad faith 698

(a) The CPW-EE Agreement 699

(b) The decision to leave P4u 706

(c) The letter of 12 September 2014 710

Was there a lack of good faith? 722

Q. THE TORT CLAIMS AGAINST DT AND ORANGE 726

R. CONCLUSION 728

Mr Justice Roth :

A. INTRODUCTION

1. On 15 September 2014, Phones 4U Ltd ("P4u") went into administration. It had previously been one of the two main independent (i.e. independent of the mobile network operators or "MNOs") suppliers of consumer connections to mobile networks in the UK. At the time of its collapse, P4u had over 700 retail outlets around the country and about 5,600 employees. This action is brought by the administrators of P4u against three of the four main MNOs at the time and their parent companies. P4u alleges that its financial collapse was caused by unlawful conduct on the part of the defendants or for which they are liable.

2. P4u was the principal trading entity in the P4u group, which at the time was owned by BC Partners, a private equity group which had acquired it in March 2011. BC Partners' ownership was through an intermediate holding company, Phosphorus Jersey Ltd ("Phosphorus").

3. The first defendant, EE Ltd ("EE"), was formed in 2010 as a 50:50 joint venture ("JV") between the second defendant ("DT") and the third defendant ("Orange"), both of which had previously operated independent networks in the UK (DT's business trading as "T-Mobile").

4. The fourth defendant, Vodafone Ltd ("Vodafone UK") was the UK operating arm of the Vodafone group and a wholly owned subsidiary of the fifth defendant, Vodafone Group PLC ("Vodafone Group"). For convenience, I will refer to these two defendants together, where it is unnecessary to distinguish between them, as "Vodafone", which is also the name of the UK network operated by Vodafone UK.

5. The sixth to eighth defendants were all part of the Telefónica group. The sixth defendant, Telefonica UK Ltd, was the group's UK operating arm and traded under the name "O2". I will refer to it, and its network, as such in this judgment. The seventh defendant, Telefónica SA, is a Spanish company and was the ultimate holding company of the Telefónica group. It had overall responsibility for the strategic direction of the Telefónica group. The eighth defendant, Telefonica O2 Holdings Ltd ("Telefónica Europe"), is a parent company of O2 and a subsidiary of Telefónica SA. Its role was to oversee the management, strategy and budget of each of the group's operating entities in Europe. At the relevant time, Telefónica Europe therefore had primary responsibility for approving important decisions made by O2. Where it is unnecessary to distinguish between them, I will refer to the seventh and eight defendants together as "Telefónica".

6. EE, Vodafone UK and O2 are and were MNOs and they will be referred to collectively as the "MNO defendants". The fourth MNO operating in the UK was Hutchison 3G UK Ltd, trading as "3", which I will refer to as "Three". Three was the latest entrant to the UK market, having launched its operations in 2003, and at all material times it had a significantly smaller market share than the MNO defendants.

7. In essence, P4u claims that the defendants engaged in anti-competitive collusion which resulted in its going into administration, or that some of the defendants did so and that the others are liable also for that violation of competition law. Further or alternatively, P4u claims that its collapse was caused by a breach of contract on the part of EE, and it brings attendant tort claims against DT and Orange for procuring or inducing that breach and/or common law conspiracy to cause damage by unlawful means.

8. This case is concerned with events which took place in 2012-2014 ("the relevant period").

9. On 9 October 2020, the Court ordered a split trial of the action, with the first trial addressing liability for the alleged breach of competition law and/or contract and the alleged effect of any collusion on the MNO defendants' conduct, and the economic tort claims. Questions concerning the causation of P4u's collapse and quantum of damage were reserved for a later trial. This judgment is given after that first trial.

B. THE UK MOBILE MARKET

10. The following account of the UK consumer market describes the position over the relevant period; there have of course been changes since.

11. Network services in the UK are supplied by the MNOs and so-called mobile virtual network operators ("MVNOs"). While MVNOs offer their own terms for the supply of network services to consumers, with their own customer and support services, they do not operate or own the network infrastructure such as data spectrum, broadcasting masts and satellites. An MVNO has a wholesale agreement with an MNO to use its network infrastructure but markets the network services under its own brand.

12. There were a significant number of MVNOs, including Life Mobile, owned by P4U, which was launched in March 2013 and used the EE network. Among the leading MVNOs were Virgin Mobile (which used the EE network) and Tesco Mobile (which used the O2 network).

13. The MNOs and MVNOs do (which used the EE network) not produce handsets. Handsets are made by specialist manufacturers which do not themselves offer network services. The leading handset manufacturers included Apple, Blackberry, HTC, LG, Nokia, Samsung and Sony.

14. The bulk of consumer demand for mobile phone products was for handsets connected via "SIM" cards to network services, such as voice calls, texts and data. While the terminology used was not always consistent, the supply of access to network services is generally referred to as a "connection". Although handsets and network services were generally supplied together ("handset-linked connections"), there was limited consumer demand for

handsets or network services separately. Handsets could be purchased at general or specialist retailers. The supply of access to the network without a handset is termed a "SIM-only" or "SIMO" connection.

15. The operation of a mobile network requires a licence under the applicable telecommunications legislation. When the first two MNOs in the UK, Vodafone and Telecom Securicor Cellular Services Ltd ("Cellnet"), launched their networks in 1985, the terms of their licences prohibited them from selling airtime direct to the public but required them to sell to retail intermediaries, known as "service providers". This regime was intended to encourage the emergence of competing airtime retailers independent of the MNOs. The regulatory regime retained that restriction until the early 1990s, when new MNOs entered the market and new licences were granted to Vodafone and Cellnet. However, the effect of that initial regulatory approach was that independent retailers came to assume a very significant role in the UK consumer market, in contrast with the situation in most continental European countries. Although by the relevant period all the MNOs were actively involved in selling directly to consumers, so-called "indirect" retailers or intermediaries (often referred to in the industry as "indirects") held a substantial share of the market. In the relevant period, there were a large number of indirect retailers that would provide connections to a network as agent for the MNOs. Much the largest indirect retailers were P4u and Carphone Warehouse Ltd ("CPW").

16. The indirect retailers were both competitors of the MNOs in the sale of connections to the public and, effectively, agents or distributors for the MNOs since they were dependent on an agreement with an MNO to enable them to sell connections to that MNO's network. For each sale through an indirect retailer, the MNO would have to pay the indirect a commission according to the terms of the MNO-retailer agreement.

17. The broad character of the UK market was summarised by Mr Mark Evans, the chief financial officer ("CFO") of O2 from 2012 to 2016, and subsequently its chief executive officer ("CEO"), in his evidence as follows:

> "The UK mobile telecommunications market is one of the biggest in Europe. All of the European operators have shown an interest in participating. By way of comparison, in the United States there are three MNOs competing for a market of 300 million customers, whereas in the UK, there are four MNOs competing for a market of 60 million customers. Notably, the UK has more MVNOs than other markets around the world. Also, the UK has historically had a strong indirect sales presence, whereas in other markets, MNOs typically sell directly to customers, generally do not distribute through any indirect sales channels, and therefore do not have to share value with third party sellers. As a consequence of all of this, customers in the UK have benefitted; they have more choice and that choice has driven competition. That is, competition for the customer relationship for connectivity. The UK has one of the lowest costs of connectivity in the world."

All the economic experts called by the parties similarly agreed that the UK mobile market at the time was effectively competitive. Moreover, for the defendants with mobile

businesses elsewhere in Europe, the UK was the least profitable of the major European markets.

18. There are two categories of connections which are sold to customers on the consumer market:

a) "Post-pay" connections, which are also sometimes called "contract" or "pay monthly" connections. The customer agrees to pay a monthly fee in arrears for a minimum term contract, typically for 18 or 24 months. For a handset-linked post-pay connection, the customer is provided with a handset at the point of sale, and the price of the handset is generally spread over the duration of the contract. The monthly fee therefore reflected the two separate components: the handset and the tariff for access to the network services, and the customer received a specified quota of minutes, texts and data. The handset might be supplied at a significant discount or in some cases "free". Post-pay connections took two forms:

i) New connections: where the customer entered into a contract with an MNO with which the customer did not have an existing contract; and

ii) Upgrades: where the customer entered into a new contract replacing or renewing their existing one on the same network and upgraded their handset to a new device.

b) "Pre-pay" connections, also called "Pay-as-you-go" connections, where the customer purchases a handset and a SIM card which they can then "top-up" periodically by purchasing credit for voice, text and data services. This form of connection therefore involves no contractual monthly payment or contract term. As with post-pay connections, a pre-pay connection may be handset-linked or SIM-only.

19. The tariff for access to the network services was set by the MNO/MVNO, but the indirect retailer was free to determine the price of the handset and therefore the cost of the overall connection package. The indirect retailers used the commissions paid to them by MNOs to subsidise the packages they offered and make them more attractive to customers. Mr Evans states that as a result the "indirect sellers could offer combined handset and airtime package prices that were lower than equivalent packages offered by the MNO."

20. Pre-pay connections were generally cheaper than post-pay connections and did not require a credit check. They were also much less profitable for the MNOs. Moreover, in the relevant period the number of pre-pay connections was in steady decline while the number of post-pay connections was increasing.[1] Most of the internal financial modelling carried out by the MNOs, of which a substantial amount was in evidence, focussed only on post-pay connections. Within that category, new connections were more profitable for MNOs than upgrades.

---

[1] Figures produced by Ofcom showed that in the period 2010-2014, stocks of post-pay subscriptions increased by about 8.7% p.a., while pre-pay connections decreased by about 6.5% p.a.

21. While the sale of SIM-only connections was slowly increasing, some 80-82% of the post-pay connections sold over the relevant period were handset-linked.

22. Customers could purchase connections either at physical stores, on-line or over the telephone ("telesales"). All the MNOs operated a chain of physical stores as well as selling on-line and through telesales. However, just over half the sales of handset-linked post-pay connections were made in physical stores as many consumers liked to see and compare the different handsets on offer.[2] The economic expert called by the first three defendants analysed data showing that the MNOs were continuing to invest in expanding their direct store networks with the total number of direct MNO stores being higher after 2010 (and increasing), despite the merger of DT and Orange's operations into EE which led to a reduction in the aggregate count of stores previously operated by them. P4u (as noted at the outset) and CPW both operated an extensive chain of stores, and made only a small minority of sales on-line. A few other indirect retailers operated only on-line, of which the most prominent was A1 Comms.

23. In mid-2012, Three terminated its agreement with P4u pursuant to which P4u had sold connections on the Three network; and in late 2013 Three similarly exited from dealing with CPW. Although it is hard to produce precise figures and different sources yield slightly different figures, it is clear that while the majority of sales of all post-pay connections were made by the MNOs directly, a substantial minority (30-35%) was sold by the indirect retailers in 2012 and, significantly, their proportion of total post-pay connection sales was not declining but, on the contrary, appears to have been slowly increasing.[3] However, the indirect retailers were less significant in sales of post-pay SIM only contracts (c. 20-25%) and therefore correspondingly more significant in sale of post-pay handset-linked connections. This reflects the fact that one of the attractions for consumers of the indirect retailers was the very competitive deals they offered on packages including handsets, as referred to by Mr Evans.

24. By the start of the relevant period, the UK consumer mobile market was relatively mature, since the majority of adults already owned a mobile phone. Ofcom found that the total number of mobile subscriptions increased by only 0.3% over the relevant period. There were of course new customers entering the market each year, as children grew up to the point of acquiring a mobile phone and some older customers acquired a mobile phone for the first time. But in terms of competition between the MNOs, those aspects were significantly outweighed by the potential to take existing customers from each other. The focus of much competitive effort was accordingly on attracting customers from another network (new connections) and conversely retaining existing customers (upgrades) so that they did not switch to another network. A key metric used by an MNO to assess performance was "net additions", meaning the number of customers added to its network less the number who left, over a specific period.

---

[2] Mr Reynolds (called on behalf of EE, DT and Orange) found that if pre-pay connections are included, over 60% of sales were made in-store.

[3] Dr Niels (called on behalf of the Telefónica defendants) found that the indirects' share of *pre-pay* connections was considerably higher, at around two thirds.

25. In the passage quoted above, Mr Evans noted that indirect retailers were often able to offer cheaper deals to customers because of the handset subsidies. Another selling point of the indirect retailers was that they could offer their customers contracts with different networks whereas an MNO store (or online channel) would of course supply only connections to that network. P4u also positioned its brand to appeal to younger customers and the experts agreed that its customers were typically younger than those acquired through CPW and the MNOs' direct channels. An internal O2 presentation in July 2012 stated: "Phones 4u have unique access to volume at the 16-24 segment." That was perceived as a benefit, since younger customers, as well as including new entrants to the market, were generally higher users of, in particular, data and therefore had higher than average spend. As Mr Allera of EE said in his evidence:

> "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."

However, younger customers often preferred pre-pay to post-pay contracts, and it was also suggested that they accounted for a disproportionate share of what in the industry is termed "fraud" but in fact refers to contractual default by non-payment.

26. Altogether, while the sale of an individual connection to its network through an indirect retailer was less profitable for the MNO than a direct sale, the indirect retailers, through the extent of their retail presence and ability to attract different customer segments, were a significant sales channel which the MNOs could not ignore.

27. Some of the MNOs/MVNOs also sought to target particular sectors of the market, and developed their strategy accordingly. O2, for example, regarded itself as a premium offering, making available benefits in kind and seeking to promote a high level of customer service, whereas some of the MVNOs adopted a marketing strategy as 'no-frills' operators.

28. In the overall UK market for post-pay handset-linked connections,[4] the largest of the four networks in terms of volumes of post-pay new connections and upgrades (whether sold directly or indirectly) was EE, which had about a third of the market. O2 was the next largest, with just under a quarter of the market. Vodafone UK had about a 20% market share and Three was much the smallest with about 10%. The balance was held by all the MVNOs together. The market shares of the MNOs did not materially change over the relevant period (save that Three's share had been a little higher in 2012-2013[5]).

[4] If shares are calculated in terms of all subscribers and not limited to sales of post-pay handset-linked connections, the overall picture appears broadly the same, with EE's share a little lower and O2's slightly higher.

[5] However, if all subscribers are considered, not just sales of post-pay handset-linked connections, Three's share had started lower and had slightly increased to reach 10% in 2014.

C. THE P4U-MNO AGREEMENTS

29. As explained above, the supply by an indirect retailer to its customers of connections was dependent on its agreement with an MNO or MVNO. As at 2012, P4u was supplying connections on the O2, Vodafone and EE networks pursuant to the following agreements:

- with O2: an agreement dated 9 March 2009 (as amended), for the period from 1 January 2009 to 31 January 2013 for new connections and to 31 January 2014 for upgrades and SIM-only connections ("the O2 Agreement");
- with Vodafone UK: an agreement dated 16 August 2011 for a minimum term from 1 July 2011 to 31 October 2014, and continuing thereafter unless terminated by 6 months' notice ("the Vodafone Agreement");
- with EE: an agreement dated 10 October 2012, for a three-year term from 1 October 2012 expiring on 30 September 2015 ("the EE Agreement").

30. As might be expected, these are lengthy and detailed contracts which governed the relationship between P4u and each MNO, including the rates and method of computing the payments P4u would receive for selling connections of different kinds and the volumes of connections it would sell for particular periods. The above agreements replaced previous agreements which P4u had had with the three MNO defendants. The key terms of each agreement were obviously of great importance to both the MNO and P4u, and each agreement was concluded after a protracted period of negotiation.

31. On 16 October 2012, Mr Timothy Whiting, the CEO of the P4u group, was told by O2 that it would cease dealing with P4u for the sale of new connections on the expiry of the O2 Agreement in that regard on 31 January 2013. On 10 October 2013, O2 told P4u that it would also not be renewing the agreement as regards upgrades (and SIM-only connections), and the sale by P4u of O2 connections accordingly ceased on 31 January 2014.

32. On 7 August 2014, Vodafone UK gave P4u written notice terminating the Vodafone Agreement with effect from 9 February 2015.

33. On 12 September 2014, EE informed P4u by letter that it had made a "final decision" that it would not replace or extend the EE Agreement when it expired on 30 September 2015.

34. It was three days after receiving that letter from EE that P4u went into administration and ceased trading.

D. THE PROCEEDINGS

35. By these proceedings, P4u contends, in summary, that the decisions that each of the three MNO defendants would cease trading with P4u were not taken purely independently by the individual defendant or defendant group, but were the result of collusion between them, either through a series of bilateral arrangements or, potentially, multilaterally.

36. As regards EE, there is a distinct claim that its conduct in September 2014 resulting in its letter of 12 September 2014 (para 33 above) at a time when the EE Agreement still had a year to run was a breach of express or implied terms of the EE Agreement; and P4u alleges that DT and Orange procured that breach or that DT and Orange together conspired to injure P4u by unlawful means.

37. The proceedings were commenced on 18 December 2018. As could be expected for claims of this nature, there was very extensive disclosure from virtually all the defendants covering the period leading up to the decisions of the three MNOs to exit from P4u and P4u's entry into administration. All the parties agreed that given the nature of the allegations and the factual circumstances, standard disclosure was appropriate in this case. There was significant dispute as to the extent of disclosure to be provided by some of the defendants, including personal data of individual executives, which was resolved largely in P4u's favour by a reserved judgment on 17 July 2020: [2020] EWHC 1921 (Ch), and an appeal against part of that decision was substantively dismissed: [2021] EWCA Civ 116. A further ruling was given on 18 October 2021 regarding contested disclosure sought by P4u from DT: [2021] EWHC 2818 (Ch).

38. Following the main round of disclosure from the defendants, P4u served Amended Particulars of Claim, adding details of communications and meetings between representatives of various defendants and giving more particulars of its allegations. The pleading was strongly criticised by the defendants as taking too broad and all-embracing an approach, and the allegations pursued were appreciably narrower, in particular as regards the identified individuals, by the end of the trial.

39. At trial, the Court had in evidence a vast array of documents (provided through an electronic documents management system) and received evidence from 41 witnesses of fact and four expert witnesses.

Witnesses of fact

40. The parties adduced evidence from the following witnesses:

Phones4u

Mr Timothy Whiting: As noted above, he was the CEO of P4u Group, a position he held from early 2004 until July 2014, and a director from November 2005. He was also CEO of P4u to November 2013.

Mr David Kassler: Mr Whiting's successor as CEO of P4u from November 2013 and CEO of P4u Group from 31 July 2014 until 15 September 2014.

Mr Philip Dobson: Deputy CEO of P4u Group from January 2012 until December 2013 and a non-executive director of P4u Group from January 2014.

Mr Steven Lloyd: the Chief Legal Officer/Legal Director and Company Secretary of P4u Group from September 2006 to November 2014.

Mr John Whittle: the Chief Commercial Officer ("CCO") of P4u from November 2013 to 15 September 2014. Prior to that he had been Director of Commercial of P4u from May 2012 to November 2013.

EE

Mr Olaf Swantee: CEO of EE between September 2011 and January 2016 and a member of the EE Board of Directors.

Mr Neal Milsom: CFO of EE between September 2011 and January 2016 and a member of the EE Board of Directors.

Mr Stephen Harris: Chief Corporate and Strategy Officer at EE between 2011 and December 2015. Prior to that, he had been Chief of Staff to Mr Swantee since the formation of EE in 2010.

Mr Marc Allera: Chief Commercial Officer of EE from January 2014 who reported directly to Mr Swantee, EE's CEO. He was previously Chief Sales Officer from December 2011.

Mr James Blendis: EE's General Counsel and Company Secretary from July 2010 to January 2018.

Mr Roger Eyre: EE's Sales Finance Director from July 2013, and previously Head of Sales Finance at EE. He reported to Mr Allera and Mr Milsom.

Mrs Nicola Derbyshire: Head of Indirect Sales (Finance) at EE from December 2013. She reported to Mr Eyre.

Ms Angela Thomas: Head of Legal (Sales, Retail and Distribution) at EE between January 2011 and July 2017.

DT

Mr Timotheus Höttges: CEO of DT since January 2014. He was a member of DT's Group Board of Management from 2009 to 2014 and was on EE's Board of Directors between April 2010 and January 2014.

Mr Thomas Dannenfeldt: CFO of DT between January 2014 and December 2018. He was a member of EE's Board of Directors from February 2014 until January 2016.

Mr Markus Goeddertz: Vice President, Services Headquarters, Investor Relations, from January 2012 to December 2014.

Mr Wolfgang Kniese: Vice-President, Area Management UK from April 2013 to August 2014.

Ms Claudia Nemat: a member of the DT Board for European Business from October 2011 to December 2016. She was on EE's Board of Directors between October 2011 and January 2014.

Mr Joerg Weber: Vice-President, Mergers & Acquisitions ("M&A"), between 2012 and 2016, and now Senior Vice-President and head of M&A.

Mr Michael Wilkens: Senior Vice President in Group Controlling from October 2013 to May 2022.

Orange

Mr Gervais Pellissier: CFO from 2006 until September 2014 and from November 2011 to September 2014 the Delegate CEO in charge of Finances and Orange's JV in the UK (i.e. EE). He was a member of EE's Board of Directors from April 2010 to January 2016. He was also a member of Orange's Executive Committee.

Mr Christophe Naulleau: Executive Vice President of UK Operations from October 2010 until January 2016.

Mr Benoit Scheen: Senior Executive Vice President - Europe Region from September 2011 to 31 August 2014. As such, he was a member of Orange's Executive Committee and in charge of its European Division, reporting to Mr Richard, the CEO of Orange. He was a member of EE's Board of Directors from September 2011 until 1 September 2014.

Mr Gilles Deloison: Appointed as the Country Controller and Project Owner for EE in the UK following the merger that created EE in 2010. He remained in this role during the relevant period.

Mr Jerome Berger: Head of Orange Group Financing and Treasury from June 2012 until October 2014.

Mr Olivier Froissart: Senior Vice President, M&A, from 2002 to December 2016.

Vodafone

Mr Vittorio Colao: CEO of Vodafone Group between July 2008 and September 2018.

Mr Philipp Humm: Regional CEO for Europe at Vodafone Group from October 2012 until October 2015.

Mr Jeroen Hoencamp: CEO of Vodafone UK between October 2013 and August 2016. Previously he had been Enterprise Director at Vodafone UK between January and September 2013.

Ms Cindy Rose: Consumer Director at Vodafone UK between September 2013 and 30 April 2016, reporting to Mr Hoencamp.

Ms Sara Perry: Senior Commercial Finance Manager for Consumer Channels and Acquisition and Retention Spend at Vodafone UK between March 2010 and February 2015.

Mr Philip Roberson: Head of Indirect Distribution at Vodafone UK between January 2014 and April 2017, reporting to Ms Rose.

Ms Justine Campbell, General Counsel and External Affairs Director at Vodafone UK between July 2009 and November 2013.

O2

Mr Ronan Dunne: CEO of O2 between January 2008 and July 2016 and a member of Telefónica Europe's Board, and of Telefónica Europe's Executive Committee and Project Approvals Committee.

Mr Mark Evans: CFO between 1 January 2012 and 1 August 2016, and a Member of O2's Board.

Mr Phil Maple: Head of Commercial Sales and Service between March 2011 and April 2013. He was then General Manager of Consumer Business between May 2013 and September 2016 and also chaired O2's P4U Deal Committee.

Mr Edward Smith: General Counsel between November 2011 until July 2021. He was also a member of the O2 Board and of the P4U Deal Committee.

Mr Timothy Fox: a member of the Data, Insights and Analytics team since September 2011.

Telefónica

Mr César Alierta Izuel: Chairman and CEO of Telefónica SA between July 2000 and April 2016.

Ms Eva Castillo Sanz: Chair and CEO of Telefónica Europe between September 2012 and February 2014.

Mr Ivan Varela Sanchez: Director of Corporate Strategy at Telefónica Europe between April 2012 and April 2014.

41. Each of these witnesses was cross-examined, some of them extensively, except for Ms Campbell, the then General Counsel at Vodafone UK, whose evidence was unchallenged, and Mr Alierta Izuel. Mr Alierta had been due to give his evidence by video-link from Spain but then became unwell and was unable to give evidence. His witness statement was therefore admitted on that basis, but as a result P4u was unable to cross-examine him.

42. Given the large number of witnesses, some of whose evidence was much more significant than others, I will not comment on them individually but rather as I think appropriate when

I consider aspects of their evidence. However, as a general matter, it is important to appreciate that they were giving evidence on events that took place in 2012-2014 and therefore some 8-10 years before the trial. That included evidence regarding what was said in meetings or one-to-one conversations.

43. In a number of respects, it was submitted by one party or another that particular witnesses were being dishonest in their evidence. The witnesses had reviewed the relevant contemporary documents but otherwise they were reliant on their memory, and there is clearly a danger, without dishonesty, of their evidence being self-serving or becoming self-confirmatory.

44. In an oft-cited passage, in *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), Leggatt J (as he then was) remarked on the unreliability of human memory when it comes to recollection of events several years before. He observed, at [16]:

> "Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate."

And after referring to the effect on witness memory of the preparation process for trial, he said, at [22]:

> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

The warning articulated in *Gestmin* is now reflected in the Appendix to Practice Direction 57AC (Trial Witness Statements in the Business and Property Courts), noting that the courts recognise that human memory "is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration" (para 1.3(3)).

45. In *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680, the Court of Appeal observed:

> "50. … it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. … Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented. The CarbonDesk dinner is a good example. Whilst there are documents from which inferences might be drawn about what was or was not said at that dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.
>
> 51. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."

46. Those observations are pertinent to the present case, where there are some conversations or discussions for which there is no direct record and in respect of which the surrounding contemporary documents are sparse or sketchy. However, as regards judicial assessment of the witnesses, Robert Goff LJ (as he then was) remarked over 25 years ago in *Armagas Ltd v Mundogas SA* [1985] I Lloyd's Rep 1 at 57:

> "It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

47. I will seek to follow the guidance provided by these judicial observations, looking in particular at the contemporary documents, the context in which exchanges or communications took place, and the inherent plausibility or otherwise of the evidence. In addition, there were some instances where a witness appeared evasive in their responses to questions. But beyond that, the dicta set out above indicate how cautious a judge should be before placing any weight on the "demeanour" of the witness. That caution seems to me all the more relevant in a case where almost all the defendants' witnesses who gave substantial evidence had undergone witness training with either Bond Solon or Assurety, and in one case with both. By way of example, Mr Ronan Dunne was described, independently, by both Mr Whiting and Mr Swantee as being very talkative and effusive.

I have no reason to doubt their characterisation as accurate. However, that was very far from the impression which Mr Dunne gave in the witness box; but before giving his evidence, he had received two sessions of witness training, amounting to about 4-4½ hours in total.

48. Further, as regards the contemporary documents, the written communications between people within each corporate group were made by email or text message. Some of those are very short and allusive. I think that is not in the least surprising: no doubt their meaning was clear to the individuals at the time. But read now, they are open to very different interpretations. I found that the witnesses cross-examined about such exchanges which they sent or received so many years ago and which they did not specifically remember often struggled to explain what they meant. It seemed clear to me that their explanations were frequently speculative and coloured by the case that they wished to support. In many cases, I consider that the obscurity of the text means that it does not provide a reliable basis for any inferences to be drawn. The same observation applies to some contemporary manuscript notes made by Mr Varela Sanchez of Telefónica Europe which were disclosed in the course of the trial, although I should add that I found that Mr Varela Sanchez was doing his best to assist in interpreting his notes and declined to speculate when he could not remember.

Expert evidence

49. Permission was granted on the rather late application of P4u, opposed at the time by the defendants, to adduce evidence from an expert economist, but the expert evidence was limited to certain specified issues: see the judgment of 28 October 2021, [2021] EWHC 2879 (Ch). As a result, four expert economists submitted reports and gave oral evidence:

- Mr David Thomas, the managing partner of DT Economics and a former director of Ofcom, instructed on behalf of P4u;

- Mr Paul Reynolds, a senior vice-president of Compass Lexecon, instructed on behalf of EE, DT and Orange;

- Mr Simon Bishop, a founding partner of RBB Economics, instructed on behalf of Vodafone; and

- Dr Gunnar Niels, managing partner at Oxera Consulting, instructed on behalf of O2 and the Telefónica defendants.

50. At the Court's direction, the experts jointly produced a schedule of issues on which they were agreed or did not agree. Their oral evidence was in part heard concurrently in a so-called 'hot tub', and there was a large measure of agreement between them concerning some points raised in the pleadings which enabled those matters to be disposed of much more rapidly. The concurrent evidence was supplemented by limited cross-examination by counsel. The experts were, as one would expect, entirely honest, professional and transparent in their evidence, which was very helpful in some respects, in particular as regards the accumulation and presentation of data concerning the market and the

calculation of retention assumptions. However, this is not a case where the critical issues which the Court has to decide turn on close analysis of the expert evidence.

Evidence not available

51. A number of potential witnesses were not called to give evidence. In their closing submissions, counsel for P4u identified a number of individuals who they submitted various defendants could and should have called to give evidence. It was submitted that their unexplained absence was significant, such that an adverse inference might be drawn from the failure to call them. However, none of those identified individuals was named in the Re-Amended Particulars of Claim, where a large number of people are identified as being involved or relevant to the anti-competitive conduct alleged. Those particulars were added after disclosure, through which P4u would have seen all the documents that identify the individuals now being singled out.

52. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, Lord Leggatt (with whom the other members of the Supreme Court agreed) considered the proper approach to the drawing of adverse inferences from a witness's absence. He said, at [41]:

> "So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

53. Here, the defendants are all large organisations, the MNO agreements with P4u were commercially very significant, and unsurprisingly many people were involved in the various stages, over a period of many months or more, that led to the ultimate decision by each MNO regarding its future dealing with P4u. In such a case, it is almost always possible to identify additional potential witnesses who could have been called. As set out above, a large number of factual witnesses were called and I do not consider that the Court suffered from a dearth of evidence from the defendants. I reject the criticism of the defendants in this regard and see no justification here for any adverse inference.

54. However, as Vodafone recognised, Mr Guy Laurence is in a different category. He was the CEO of Vodafone UK before Mr Hoencamp succeeded him on 31 October 2013, and is identified in P4u's pleading as having been personally involved in potentially anti-competitive conversations. It is clear that he would have been a very relevant witness.

55. The absence of Mr Laurence as a witness was the subject of exchanges between the solicitors to P4u and Vodafone. P4u accepts that for personal reasons, which are confidential, Vodafone could not call Mr Laurence to give evidence at trial. But it invites the Court to draw an adverse inference from the failure to take a witness statement from him at an earlier time, when that would have been possible, and which could have been adduced as evidence under CPR rule 33.2. I shall address the implications of this, and whether any adverse inference should be drawn, when considering the specific incidents involved.

56. A further criticism made by P4u concerns preservation of documents. In particular, on 19 November 2014 P4u's solicitors wrote to O2 notifying it that they were investigating potential legal claims arising out of the non-renewal or termination of P4u's agreements with the MNOs and requesting O2 not only to preserve all relevant documents but that it should take reasonable steps to ensure that members of the Telefónica group take equivalent measures. On 15 December 2014, O2's solicitors wrote to say that O2 was liaising with other members of its corporate group, "including its Spanish parent", to seek compliance with those preservation requests. On 30 April 2015, P4u's solicitors wrote a detailed pre-action letter to both Telefónica SA and Telefónica Europe particularising allegations of anti-competitive collusion and expressly referring to alleged commitments given by Mr Alierta and Ms Castillo Sanz to individuals at Vodafone. That letter referred to the earlier request addressed to O2 and stated:

> "Please confirm by return that Telefónica has taken all reasonable steps to preserve documents which are relevant to the matters raised in this letter before claim."

For reasons which it is not necessary to go into, it appears that these letters did not reach those companies until mid-June 2015.

57. Nonetheless, it seems that no attempt was made to search and collect Mr Alierta's emails until February 2019, and Mr Alierta was not instructed that he should not destroy any documents relating to P4u until early March 2020 (he had retired as CEO of Telefónica SA in April 2016); and it was only then that a 'legal hold' (a preservation direction) was placed on his emails. The only explanation for this delay, given in a letter from Telefónica's solicitors of 11 February 2020 (which recognised that Mr Alierta was a relevant custodian), is the following:

> "… 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. Tef SA considered it highly unlikely that a claim would be issued, which view was sustained by the fact that over three and a half years elapsed between the date of the letter before action and the commencement of proceedings"

58. Given that allegations concerning, specifically, Mr Alierta were made in the letter before action, and that the original Particulars of Claim repeating those allegations was served in December 2018, I regard this explanation as wholly inadequate. Mr Alierta says in his

witness statement that he has "not knowingly or deliberately destroyed any document related to the facts and circumstances alleged in the claim". I accept that, but it does not mean that relevant documents may not have been destroyed innocently. It is not unusual for the personal correspondence of an individual to be discarded when they leave their position, as Mr Alierta did in April 2016, and it is wholly unclear when Mr Alierta was informed of the claim.

59. I consider that the conduct in this respect by Telefónica showed an arrogant disregard of the seriousness of the allegations being made. It means that some of the documentation which may well have existed is missing for one particular aspect of the claim. However, I think that the approach set out in *Efobi* applies equally to the circumstances of missing documents and, having regard to the witness statement by Ms Nicola Bridge of Telefónica's then solicitors, I do not consider that in all the circumstances I would be justified in inferring that incriminating documents were destroyed and I reject the submission by P4u that "at least part of the document destruction was deliberate."

60. I should record that the two Telefónica defendants formally apologised to the Court through their counsel for not adopting broader document preservation measures at an earlier stage.

61. The other aspect of document destruction relied on by P4u concerns the notebooks kept by Mr Hoencamp. It was his practice at the time to keep a notebook in which he wrote 'to do lists' and action points, and occasional notes preparing for and during meetings. He kept his notebooks from 2013-2014 in a locked cupboard in Vodafone UK's offices. Those documents were potentially relevant (indeed, a Telefónica witness, Mr Varela Sanchez, also kept notebooks which came to light only during the trial and were of some assistance).

62. However, when Mr Hoencamp ceased his role at Vodafone UK at the end of August 2016 and moved to the Netherlands, he threw out those notebooks, along with many other personal papers which he had kept at his office, as he did not want to take them with him. Having been told previously by Vodafone's solicitors to preserve potentially relevant documents, an instruction which he did not now remember, he clearly should not have thrown them away. I reject the contention in the closing submissions for P4u that Mr Hoencamp has given inconsistent explanations for the loss of his notebooks. Properly understood, the explanations have been entirely consistent. And I accept as true his statement that the loss of his notebooks was inadvertent. This is unfortunate, and one will never know whether those notebooks would contain anything relevant regarding various critical meetings which Mr Hoencamp attended. But in my judgment it would be quite inappropriate to draw any adverse inference that the notebooks would contain information supportive of P4u's case.

E. THE COMPETITION LAW CLAIMS

63. P4u alleges that the defendants breached art 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), which applied in the UK at the relevant time, and the Chapter I prohibition in s. 2 of the Competition Act 1998 ("CA 1998"). The essential competition law claim advanced by P4u is pleaded at para 122 of the Particulars of Claim:

> "… each Defendant undertaking was, and/or it is to be inferred was, party to an agreement and/or decision[[6]] and/or concerted practice which had the object or effect of preventing and/or restricting and/or distorting competition in the market for Connections in the UK. In particular, each Defendant undertaking was party to direct or indirect contact(s), the object or effect of which was to influence the conduct on the market of each of the other Defendant undertakings as actual or potential competitors, or to disclose to each of the other Defendant undertakings the course of conduct on which each Defendant undertaking had decided to adopt or was contemplating adopting on the market for Connections in the UK. The object and/or effect of such contact and communication was the restriction of competition in the UK."

64. P4u further alleges that such agreement or concerted practice was capable of creating appreciable effects on trade between EU Member States or within the UK.

65. This overall allegation is developed in subsequent sections of the pleading.

O2/ Telefónica and Vodafone

66. Specifically, at para 131 of the Amended Particulars of Claim, P4u alleges as against O2/ Telefónica and Vodafone that "on a date unknown to P4U but before 27 January 2014 (and, it is to be inferred, on or around 19 September 2012)", one or more of Telefónica SA and/or Telefónica Europe and/or O2:

> "(a) Unlawfully colluded with and/or made unlawful commitments to Vodafone Group that prevented renewal of the O2 Agreement. P4U is unable to identify the precise content of the commitments but avers that such commitments must logically have involved one or more of the following elements:
>
> (i) A commitment to cease or reduce supplies to P4U (alternatively, supplies to both or at least one of P4U and CPW).
>
> (ii) A commitment not to extend, renew or replace O2's commercial relationship with P4U (alternatively, with both or at least one of P4U and CPW).
>
> (iii) A commitment to move towards supplying at most one of P4U and CPW.
>
> (iv) A commitment to reduce or eliminate O2's reliance on retail intermediaries in the UK.

---

6 The inclusion of the words "and/or decision" appears an irrelevant reference to the statutory concept of a decision of an association of undertakings, which does not in fact form any part of P4u's case.

> (b) Unlawfully disclosed to Vodafone Group their future intentions in relation to one or more of the following aspects of their commercial conduct on the market (in competition with Vodafone Group):
>
> (i) The extension, renewal or replacement of O2's commercial relationship with P4U.
>
> (ii) The extension, renewal or replacement of O2's commercial relationship with retail intermediaries in the UK generally and/or P4U and/or CPW specifically.
>
> (iii) The choice between trading with both or only one of the major retail intermediaries in the UK (i.e. P4U and CPW).
>
> (iv) The reduction or elimination of reliance on retail intermediaries in the UK."

67. P4u contends that O2's termination or decision not to renew the O2 Agreement was caused or at least influenced by these unlawful commitments and/or unlawful disclosure of commercial plans.

68. And as regards Vodafone, P4u alleges at para 133:

> "… it is to be inferred that at a date unknown to P4U but before 27 January 2014 (and, it is to be inferred, on or around 19 September 2012), Vodafone Group and/or Vodafone UK also gave to Telefónica and/or Telefónica Europe and/or O2 unlawful commitments and/or disclosure of confidential and commercially sensitive information as to its intended commercial policy in relation to some or all of the same subject matter as to the commitments and/or disclosures identified in paragraph 131 above."

EE and O2/Vodafone

69. P4u alleges, at para 136 of the Re-Amended Particulars of Claim, that:

> "… on 19 September 2012, O2 informed EE that O2 wished to reduce volume from indirect retailers, and sought to reduce the risk of EE taking up that volume. EE did not publicly distance itself from that collusive approach"

and that EE thereby participated in an unlawful agreement and/or concerted practice.

70. As regards Vodafone, P4u alleges at para 138A:

> "… it is to be inferred that, in 2014, Vodafone UK and/or Vodafone Group coordinated, with EE and/or [DT] and/or Orange, their decisions to discontinue their relationships with P4U, and in that respect disclosed to one another confidential and commercially sensitive information as to their intended commercial policy in relation to some or all of the same subject matter as the disclosures identified in paragraph 131 above, *mutatis mutandis*."

71. On that basis it is contended that EE and/or O2 and/or Vodafone UK did not act unilaterally or independently but collusively in their respective decisions to cease supplies to P4u and/or their decision to enter into exclusive arrangements with CPW.

72. As regards DT and Orange, P4u advances a direct allegation of collusion or alternatively contends that they both exercised decisive influence over EE such that if EE violated competition law, DT and Orange will also be liable for that breach on the basis that they were for this purpose part of the same undertaking. I shall refer to that as "indirect liability".

The law

73. Art 101(1) of the TFEU states, insofar as relevant:

> "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market,…"

74. The Chapter I prohibition in s. 2 CA 1998 is to the same effect save that it concerns arrangements which may affect trade within the United Kingdom and which have an anti-competitive object or effect within the United Kingdom.

75. An arrangement that falls within the prohibition in art 101(1) may be exempted if it meets the conditions of art 101(3), and there is equivalent provision for exemption from the Chapter I prohibition in s. 9 CA 1998. The burden of proof in establishing exemption rests on the party that would otherwise be committing the infringement. Very properly, the defendants here do not suggest that if the alleged violations of art 101(1)/the Chapter I prohibition were to be established, they could qualify for exemption.

76. Pursuant to s. 60A CA 1998, the Chapter I prohibition is to be interpreted so as to ensure consistency with art 101(1) and any decisions made by the EU Courts before the date of completion of the implementation period following the UK's withdrawal from the EU, i.e. 31 December 2020. It was common ground between all parties that there was no difference between the application of art 101(1) and the Chapter I prohibition in the present case, and the legal argument on competition law was conducted largely on the basis of EU jurisprudence.[7] Further, it was not submitted in argument that if the anti-competitive arrangements alleged were established, they would not have affected trade between EU Member States, perhaps because they covered the whole of the United Kingdom (which was of course a Member State at the time). Accordingly, the claims under EU and UK competition law stood or fell together.

77. It is axiomatic that the expression "agreements between undertakings" in art 101(1) does not require a binding, legal agreement but will cover an informal arrangement between at

[7] Insofar as EU Court judgments post-31 December 2020 were cited, there was no suggestion that these had changed the law.

least two undertakings that involves a concurrence of wills between them expressing their joint intention. Moreover, the terms "agreements between undertakings" and "concerted practices" may overlap. The meaning of concerted practices and the applicable principles have been set out and developed in a number of judgments of the EU Courts. They were helpfully summarised in a series of propositions by the Court of Appeal in *Argos Ltd v Office of Fair Trading* [2006] EWCA Cv 1318 at [21]:

> "i) The object of the inclusion of concerted practices in the prohibition is to bring within Article [101] a form of coordination between undertakings which, short of the conclusion of an agreement properly so-called, knowingly substitutes practical co-operation between the undertakings for the risks of competition. A concerted practice does not have all the elements of an agreement but may arise out of co-ordination which becomes apparent from the behaviour of the participants. Parallel behaviour may amount to strong evidence of a concerted practice if it leads to conditions of competition which do not correspond to the normal conditions of the market: *ICI v Commission* [1972] ECR 619 ("*Dyestuffs*").
>
> ii) The requirement of independent determination of policy on the market on the part of competitors strictly precludes any direct or indirect contacts between competing undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which the undertaking has decided to adopt or contemplates adopting on the market: *Suiker Unie v Commission* [1975] ECR 1663.
>
> iii) The prohibition on concerted practices applies to all collusion between undertakings whatever the form it takes. An agreement arises from the expression by the participating undertakings of their joint intention to conduct themselves in a specific way. Concerted practices include forms of collusion having the same nature as agreements which are distinguishable from agreements by their intensity and the forms in which they manifest themselves: *Commission v Anic Partecipazioni* [1999] ECR I-4125.
>
> iv) A decision on the part of a manufacturer which constitutes unilateral conduct of that undertaking escapes the Chapter I prohibition (though if the undertaking has a dominant position, it might be caught by the Chapter II prohibition). The concept of an agreement centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention: *Bayer v Commission* [2000] ECR II-3383, upheld by the European Court of Justice, Joined Cases C-2 and 3/01P, 6 January 2004.
>
> v) Although the concept of a concerted practice implies the existence of reciprocal contacts, that requirement may be met where one competitor discloses its future intentions or conduct on the market to another when

> the latter requests it or, at the very least, accepts it: *Cimenteries v Commission* [2000] ECR II-491.
>
> vi) The fact that only one of a number of competing undertakings present at a meeting reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice: *Tate & Lyle v Commission* [2001] ECR II-2035."

78. It is worth adding two quotations from one of the EU judgments there cited, Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174. The Court of Justice of the EU ("CJEU") explained (at para 26) that the concept of a concerted practice refers to:

> "a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market."

And just before the passage forming the basis of the second proposition formulated by the Court of Appeal, the CJEU stated, at para 173:

> "The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells."

79. In Case C-49/92P *Commission v Anic*, EU:C:1999:356, the CJEU noted, at para 118, that a concerted practice involves three elements: two or more undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two. However, the Court proceeded to hold that:

> "subject to proof to the contrary, which it is for the economic operators to adduce, there must be a presumption that 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 the market, particularly when they concert together on a regular basis over a long period" (para 121).

This is sometimes referred to as the "*Anic* presumption." The Court proceeded to state that, in accordance with the wording of art 101(1), concerted practices are prohibited regardless of their effect when they have an anti-competitive object.

80. P4u further relied on Case C-8/08 *T-Mobile Netherlands BV*, EU:C:2009:343. That was a reference from the Dutch court following a finding by the Dutch competition authority that some of the MNOs in the Netherlands (including the national operating companies that

were or became part of the Vodafone, Telefónica, Orange and DT groups) had engaged in a concerted practice through participation in a single meeting where they exchanged information regarding the possible reductions in the remuneration paid to independent dealers for post-paid subscriptions. The CJEU held that the *Anic* presumption applied although the concerted action alleged was confined to a single meeting. The CJEU stated:

> "60. … the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.
>
> 61. In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical co-operation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called on to adduce evidence that that concerted action did not have any effect on their conduct on the market in question."

81. In *Argos*, the Court of Appeal noted that concerted practices can take many forms and that the courts have been careful not to define or limit what may amount to a concerted practice. However, there are two broad forms of concerted practice: collusive conduct and exchange of information. The law as regards an information exchange was summarised in the judgment of the General Court on an appeal from the Commission's decision concerning the aluminium capacitator cartel, Case T-342/18 *Nichicon v Commission*, EU:T:2021:635, at paras 107-111[8]. After referring to the *Anic* presumption, the Court stated, at para 112:

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

[8] Further appeal dismissed: Case C-757/21P, EU:C:2023:575. It was common ground before the CJEU that para 112 of the General Court's judgment correctly stated the law: CJEU judgment at para 57.

> concerted practice having as its object the restriction of competition, within the meaning of art.101(1) TFEU."

82. I shall address further aspects of the law on concerted practices when discussing the particular allegations on the facts of this case. Similarly, I will consider the law concerning the indirect liability of joint venture parent companies in section O below.

The standard of proof and evidence required

83. The standard of proof of allegations of breach of art 101(1) and/or the Chapter I prohibition in a private law damages case is the ordinary civil standard, i.e. the balance of probabilities. At one stage, some of the defendants appeared to suggest that some higher standard applied because of the seriousness of the allegations, but that is not correct: see *In re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, per Lord Hoffmann at [13]; Lady Hale at [64]-[72]. The position is, as counsel for P4u put it in their closing submissions, that there remains "the common-sense proposition that the Court has regard to the inherent probabilities when assessing the evidence and determining whether the standard of proof is met."

84. When undertakings are parties to an unlawful agreement or concerted practice, they are in general unlikely to make a clear and full record of what they are doing. In its landmark judgment in Cases C-204/00P etc *Aalborg Portland v Commission ("Cement")*, EU:C:2004:6, the CJEU observed:

> "55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.
>
> 56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.
>
> 57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."

85. *Cement* concerned a hard-core cartel, but the same approach was directed as regards a looser form of concerted practice in Case C-74/14 *Eturas v Lietuvos Respublikos konkutencijos taryba*, EU:C:2016:42, where the CJEU stated:

> "36. … it must be recalled that, according to the case law of the Court, in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together,

> may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see, to that effect, judgment in *Total Marketing Services SA v European Commission* (C-634/13 P) EU:C:2015:614 at para 26 and the case law cited).
>
> 37. Consequently, the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent."

See also per Kokott AG in *T-Mobile Netherlands* at paras 87-89, stating that it would be incompatible with the EU principle of effectiveness for national courts to impose on competition authorities or private litigants criteria for proof of an infringement of art 101 or 102 "that are so onerous as to render such proof impossible in practice or excessively difficult."

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

F. THE CULTURE AND ATTITUDE OF THE MNOs

87. For P4u, it was submitted that the defendant MNOs had a culture that paid little regard to the requirements of competition law. In their opening submissions, counsel for P4u alleged that senior executives "appear to have been relaxed about contemplating or participating in breaches of competition law".

88. In that regard, virtually all the defendant companies or groups had competition law compliance programmes and provided training for their executives.

89. Vodafone had "Guidelines for Contact with Competitors", which stated in respect of "Informal one-to-one" meetings: "**Avoid.** Always speak to Legal. A lawyer may need to attend." And in a section headed "Managing contact with competitors responsibly", the guidelines warned that all contacts with competitors should be regarded as "always potentially sensitive" and specified that you should "Agree an agenda in advance and stick to it"; and further prescribed: "**Afterwards**: Do keep an accurate record."

90. Telefónica disclosed a document entitled "Competition Guidelines on the Behaviour of Telefónica Representatives in Associations" which was specifically addressing participation in industry associations but stated that it applied also to any formal or informal contact with competitors. Ms Castillo confirmed that she understood that it would apply to informal dealings with competitors and that she understood the importance of keeping a record. Those guidelines recommended that meeting agendas should be prepared in advance, setting out the topics to be discussed. Telefónica's 12-page "Guide to Competition Law" similarly contained recommendations on relations with competitors and participation in sectoral meetings, stating:

> "In all regions in which competitors are present, minutes should be drawn up outlining the discussions held. In this way, what takes place at the meeting is duly recorded for future consultation, avoiding undue speculation over what had been discussed…. Do not forget that a lack of rigour in recording information or meetings in documents may give rise to significant risks for Telefónica, even in the absence of any infringement of the law."

91. O2 had a separate competition law compliance programme, which included on-line training programmes. It disclosed an additional document briefing participants at trade association meetings, which emphasised the importance of obtaining an agenda for each meeting in advance. Mr Dunne, the CEO of O2, distinguished that situation from an informal commercial meeting with a competitor, where there would not necessarily be an agenda when a single, specific item was to be discussed.

92. DT had a 13-page "Group Policy on Antitrust Law" which was issued to its employees and applied to all of them, and the senior executives received specific competition law training. Mr Höttges, the CEO of DT, agreed that it was good practice when meeting with competitors informally to have an agenda and stick to it. He explained that:

> "Every meeting which I have had [with a competitor] were, you know, pre-discussed or was, let's say, planned: there was a topic behind that. Sometimes it might have not been, you know, exactly documented, but most of the topics were following a clear agenda, pre-discussed, and then discussing the topic in that group."

And he said that for informal meetings, he would expect that there would have been an agenda agreed beforehand, by which I do not think he meant a specific document headed "Agenda" but an exchange prior to the meeting specifying what the meeting would discuss.

93. I did not see the on-line training materials but, as one would expect, there was a broad similarity between the guidelines of the various defendants, which summarised in practical terms what is prohibited by competition law and the precautions to be taken. As regards informal contacts, I think Mr Höttges expressed the position very well. It is unrealistic to expect anything approaching minutes to be made of such meetings between busy executives or even that a full agenda would be prepared. In contrast, advance communication making clear the purpose and topics to be discussed at a meeting and at least a brief note afterwards would have been in keeping with the thrust of many of the compliance guidelines. That seems to me particularly important in an industry where there were a number of legitimate, and indeed necessary, grounds for the MNO competitors to meet. For example, there were proposed and actual network sharing arrangements, concerns about cyber security, a number of joint ventures (which were cleared by the relevant competition authorities) and the need for industry response to policy and political initiatives, in particular from the European Commission, in the area of telecommunications.

94. It became apparent on the evidence that a number of very senior executives in various defendants paid scant regard to some of the recommended precautions. Mr Dunne had meetings with Mr Swantee of EE and with Mr Laurence of Vodafone, for which there was

no prior written communication as to the subjects to be discussed nor any proper record. Ms Nemat of DT had at least one conversation with Ms Castillo of Telefónica Europe, of which the subject-matter is not reflected in any document, either before or afterwards. And Mr Alierta, the chairman and CEO of Telefónica SA, appears to have communicated with his counterparts at the other MNO groups on a number of occasions (as he could not be cross-examined, the extent of this was not clarified) without either a clear statement setting out the scope of the discussion in advance or a subsequent record. When Mr Alierta, Mr Colao, the CEO of Vodafone Group, and Mr Richard, the CEO of Orange, met for an informal breakfast meeting in Venice on 8 July 2014 (which Mr Alierta had proposed as an opportunity to "discuss some of the important issues that are happening in our industry"), the 'agenda' which was then produced set out the topics for discussion in very general terms, including the "general situation of the sector;" and no note was produced by anyone afterwards.

95. The explanation for senior executives conducting themselves in this way was perhaps revealed by the explanation given by Ms Castillo in respect of her meeting with Mr Humm of Vodafone Group in Madrid on 20 September 2013. When it was put to her in cross-examination that the absence of any 'agenda' for that meeting meant that anything could have been raised, Ms Castillo resisted this suggestion, stating:

> "… we're both senior people and we know what we can and cannot discuss with competitors.
>
> So he was a very serious man and I take things very seriously so I wouldn't have conversations lightly."

Mr Humm for his part said that he felt comfortable addressing different topics without, in effect, trespassing into any competition law issues. He said, when asked in respect of another conversation with a competitor why no attempt was made to specify what would be discussed:

> "… typically the people I interacted with knew what was and what was not allowed to be said."

I think that encapsulates what was a prevailing attitude among many of the senior executives that since they were responsible people who knew well what they cannot talk about with each other, any recommendations to set out the topics for discussion in advance and make some record afterwards were not really important for them.

96. I regard that attitude as mistaken and regrettable. If instead a more prudent approach had been followed, at least some of the accusations levelled in this case might have been avoided. However, it is important to distinguish between those aspects of guidelines which summarise the law and those which state good or sensible practice. It may be unfortunate if no 'agenda' or note of a meeting or substantive telephone conversation was made, but that is not in any way unlawful. In my view, it is therefore wrong to say that the evidence showed a general culture among the defendants of disregard for the requirements of competition law. At the same time, P4u can point to some instances, as described below, apart from the occasions relied on as the foundation for the present claims, where it appears

that certain individuals engaged in anti-competitive exchanges. I accept that this is relevant in looking at the overall picture. Nonetheless, the fact that an individual engaged in unlawful conduct on one occasion regarding one aspect of the business does not in itself establish that he, let alone someone else from the same company, did so on another occasion regarding another aspect of the business.

97. It is clear that the defendants did not like the strength of the indirect retailers in the UK market. As noted above, the UK was the least profitable of the major markets in Europe for the MNO groups. As Mr Höttges confirmed, one of the main contributors to the poor margins of DT (trading as T-Mobile) and subsequently of EE was the presence of powerful indirect retail channels, through which the MNOs made a significant proportion of their sales. Mr Hoencamp of Vodafone UK said: "direct channels delivered significantly higher value than indirect channels, but Vodafone UK did lower numbers of sales in direct channels." And Mr Dunne of O2 said:

> "… the distribution model in the UK was substantially different from other markets in which Telefónica operated. The Spanish model of distribution (and that which was very largely replicated in the markets of its other subsidiaries) was almost exclusively direct sales with very little, if any, role for indirect distributors and/or no handset subsidies. As a result, the margin achieved by Tef SA and its other subsidiaries was significantly higher than the margin TUK could achieve in the UK market, where (as noted above) indirect channels played a substantial role in the distribution model. This was because Tef SA and its subsidiaries in other markets did not have to make substantial commission payments to indirect channels, whereas TUK did, which had a significant impact on its profitability."

98. Moreover, the MNOs were unhappy about the lack of product differentiation between networks which characterised the sales by the indirect retailers, who focused instead on the choice between handsets, whereas each MNO sought understandably to promote its particular network. As Ms Rose of Vodafone UK explained:

> "… the worst possible thing to happen to a network is to be commoditised. So if we're – if people view network connectivity like they view water or gas, it becomes very difficult to differentiate and build customer brand loyalty and customer lifetime value."

99. As the quotation above from Mr Dunne's evidence illustrates, the foreign parents of the UK MNOs – Telefónica in the case of O2 and the two JV partners, Orange and DT in the case of EE – had particular experience of continental European markets. Vodafone Group also had operations in many European countries. The MNO groups unsurprisingly felt that their UK business should seek to achieve more of the continental pattern of distribution, with a balance in favour of direct distribution.

100. None of this is in dispute. All of it is entirely rational in commercial terms. And the fact that senior executives at the various defendants felt the same way is unsurprising. These views applied with regard to CPW as much as to P4u. This means that the defendants had

a common interest to reduce their reliance on indirect distribution. But that does not remotely suggest that they engaged in collusive conduct to achieve that objective.

101. For an MNO to reduce its reliance on either P4u or CPW was problematic. As set out above, the large indirect retailers drew a significant proportion of customers into their stores, attracted by the offers of discounted handsets, and if one MNO ceased to deal with an indirect retailer, that retailer would naturally offer its customers connections with the other MNOs (and MVNOs). Since the UK was a mature not an expanding market, there was accordingly a significant risk for the MNO which ceased to supply the indirect retailer that it would lose market share. This problem was identified in an internal O2 draft presentation in October 2012:

> "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"

102. The reality of such a potential loss of volume of connections by a departing MNO was supported by the experience of Vodafone UK which had exited CPW (and gone exclusive with P4u) in 2006, and of O2 which had exited P4u in 2006 (and gone exclusive with CPW). Their respective aims had been to increase the volume of connections sold directly. However, by 2009 both those MNOs had abandoned that strategy and returned to the indirect retailer they had left.

103. P4u relied strongly in argument on this 'prisoner's dilemma', contending that an individual MNO would not cease supplying P4u in the absence of coordination with the other MNOs. Having heard the evidence of Mr Whiting and Mr Dobson of P4u, I think that they genuinely believed that it would have been commercially irrational for any of O2, Vodafone UK or EE to exit from P4u unilaterally. However, a dilemma of this kind is not a preclusion. It means that for an MNO to adopt the course of unilateral exit involved significant risk, but businesses do take risks in pursuit of eventual commercial gain and there are lawful as well as unlawful means of mitigating such risks. The question in this case is whether unlawful means were used by any of the defendants.

G. 2012: THE O2 DECISION - ALLEGED COLLUSION WITH EE

104. As mentioned above, O2's dealing with P4u was governed by the O2 Agreement, which had been entered into on 9 March 2009 (and amended on 28 May 2010). This appointed P4u on a non-exclusive basis to market and procure connections to the O2 network, for the period to 31 January 2013 for new post-pay voice connections, and pre-pay voice, mobile broadband and voice broadband connections; and to 31 January 2014 for upgrades to post-pay voice connections and SIM-only connections.

105. Much of the decision-making at O2 was taken by the "Leadership Team", largely through the O2 Executive Committee, known as "ExComm", which usually met once a month. The members of ExComm included Mr Dunne and (from 1 January 2012) Mr Evans. The Leadership Team had a slightly wider membership than ExComm and held meetings ("LTMs") about once a week.

106. However, more significant decisions that required approval by Telefónica Europe would be considered at Telefónica Europe's monthly review meeting devoted to the UK. Those meetings were attended by the leading O2 executives (primarily Mr Dunne and Mr Evans) and a small team from Telefónica Europe, including its CEO. Only very major decisions needed final approval by Telefónica SA, including O2's annual budget and strategic plan (prepared on a forward-looking 3-year basis), and those matters would first have been discussed and agreed on with Telefónica Europe. Therefore senior executives from O2 met several times a year with the key individuals at Telefónica Europe, which was based in Madrid, as part of the strategic planning process, which typically took place in early summer.

107. Towards the end of 2011, O2 began a review of the distribution market. This review was a drawn out process, taking place over several months and involving a succession of presentations and discussions. Those discussions considered a range of options, and the analysis of different options was developed and refined over time. Around the start of this process, on 15 December 2011, Mr Philip Maple, then O2's Head of Commercial Sales and Service, made a slide presentation to an ExComm meeting on "Distribution Game Changers". The theme of the presentation was that O2 needed to "create Game Changers in the postpay market". This remained a theme of these presentations over the following months. The 15 December 2011 presentation stated at the outset:

> "• Choices do not exist today — Create over next 24mths
>
> • Customers choose Indirects for reach, brand, choice and perception of independence
>
> • They will always be part of O2's mix as long as customers choose to shop with them and the economic return is optimised for O2
>
> • We need Indirects today! They deliver 40% of our new business in Pay Monthly"

108. The presentation proceeded to set out 14 "strawman" distribution options for debate, including "Revisit deals with indirects" and "Exit indirects", stating that O2 needs "to debate the radical options to ensure we focus on the right Game Changers". About half the options were then discounted, but those two were said to "require further consideration and scenario planning".

109. In an update of this presentation which Mr Maple made at the end of January 2012, the "core principles" were expressed as follows:

> "1. Direct is still our first choice every time, we need to maximise every opportunity for acquisition
>
> 2. Accept Indirect is part of the industry mix, there will always be customers who chose to shop in the indirect channel, but choose profitable partners and seek over time to reduce volumes going to CPW & P4U in particular

> 3. Any additional distribution we create must be cost-effective and flexible and we will look for ways to optimise existing distribution against these criteria"

In that presentation, the option of withdrawing from or significantly reducing volumes with the indirects was dismissed on the basis that that capacity would be taken up by a competitor and that 40% of O2's post-pay acquisitions were provided through the indirects, which was too much for O2 currently to absorb through its direct channels. There was no distinct consideration at this time of the possibility of exiting from one of the two major indirects.

110. The ongoing evaluation of distribution strategy was conducted in a context where O2 was concerned about its profitability. The first quarter results for 2012 showed around a 30% decline in profitability and O2's revenue was falling. When Mr Evans joined O2 as CFO of the business at the start of 2012, he saw this as a key issue which needed to be addressed. As he put it in his evidence:

> "The business was going backwards from a revenue and profitability perspective and, clearly, O2 was not as relevant in the market as it needed to be. We needed to make significant changes to the operation of the business in order to increase O2's relevance in the market and to increase TUK's profitability."

Among other costs savings, O2 was therefore concerned to reduce its distribution costs. And the day before the ExComm presentation described above, another internal presentation on "Consumer Postpay Profitability" reported that direct channels were twice as profitable as the indirect channels.

111. In the spring of 2012, negotiations got under way with P4u concerning a new deal for post-pay connections to take effect once the existing O2 Agreement expired on 31 January 2013. O2 formed a P4u Deal Committee, chaired by Mr Maple, to be responsible for the negotiations and consider proposed terms. On 14 June 2012, P4u put forward headline terms for a deal. The internal view in O2 was that the terms were unattractive. One member of the Deal Committee (Mr Fynn, O2's then Head of Mass Retail who dealt primarily with the indirect retailers) commented in an email to Mr Maple that day:

> "1. Can we agree the proposal? No, as it would be heavily loss making business
>
> a. O2's gross profit is around 70% as for every £10 we bill the customer we incur around £3 of Interconnect costs. P4U propose paying them 80% of New customer billed revenues (70% for Upgrade customers) so at a high level we would lose money. As we then went down the P&L and incurred costs for Voice and Network, the loss would further increase
>
> b. Broadly speaking P4U customers currently make us £100 as do CPW. The proposal would turn this profit into a very rough £100 loss per customer.

c. Finally compared to our latest "market rate deal" agreed recently with CPW, the deal looks expensive. We pay CPW £85 at point of connection and then 50% revenue share. If you move the £85 fixed amount into the revenue share the outcome would be broadly 60%. P4U are asking for 80% for New……..

2. 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. So what is our counter proposal? The CPW deal "streamlined" is a reasonable response and would pay slightly more than current deal

a. So our counter proposal tomorrow should be £85 fixed fee plus 50% revenue share over life of contract

i. CPW enjoy revenue shares after customer contract 24m term expires AND the right to Upgrade data. Neither of these elements would be offered to P4U. We would improve upon the opening £85 + 50% to reflect these benefits if discussions are entered into so outcome maybe say £100 + 55% revenue share

b. We wish to pay slightly more than now as we recognise P4U are committing to give us a higher market share and we wish to stay at the deal table

c. Profit if this deal is agreed would be c.£60 per customer and over multiple customer cycles be broadly equal to CPW

3. What happens if the counter proposal is rejected out of hand? This would mean we would lose a large amount of the 240k Gross delivered by P4U so we would supercharge other channels to protect our overall market share

a. Accept a low level of P4U share — say 10%. +100k

b. + Invest in Direct operations such as O2 Retail Franchise stores, O2 Online and O2 Retail stores. +50k

c. + Increase market share purchased in CPW from say 25% to 30%. +50k

d. + Do a deal with Other partners such as Al Comm's. +50k

e. In event any of these options don't deliver to required level, purchase of up to 100k via Tesco would be a (painful) fall back option"

112. In my view, this shows that, from the outset, although at least some in O2 thought it was very desirable to trade with P4u, they were not prepared to do so on adverse terms and were considering the steps O2 could take to replace connection volumes if it had to exit from, or at least dramatically reduce its reliance on, P4u.

113. On 15 June 2012, Mr Dunne had a conversation with Mr Whiting, the CEO of P4u. Although Mr Dunne left the detailed negotiations to the O2 team and was briefed by them, the two CEOs discussed the basis for a potential agreement. Mr Whiting summarised their conversation in an email to Mr Dunne:

> "Although you can not at this stage agree with the proposal we sent across yesterday as more work is needed we have agreed the following:
>
> O2 are looking for a deal that reflects their natural market share (30 %)
>
> Both parties will put whatever resource required to get to an agreement within the next two weeks
>
> On value we agree that the base value is that paid for the deferred deal in place for the first half of 2012. O2 recognize that an increment is required to get to the volume/value required.
>
> P4u recognize that approval from Telefónica will take longer although it is targeted to achieve this during July."

114. Mr Dunne responded, saying:

> "I confirm we are looking to conclude a deal to secure our natural market share, on terms consistent with a) both sides making an appropriate return, b) maintaining (and growing) the value of the market and c) giving you value consistent with our current contract (i.e. a deal not predicated on improving our value just at your expense). We are open to reflect volume / value mix opportunities in the value share / market share in the agreement. In that context 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 in line with the formal authorisation process."

Mr Dunne explained in his evidence that he was saying that O2 would ensure that the new terms would not result in P4u being worse off in total commission than under that current arrangement, if they delivered greater volumes to O2. And he said this about the reference to Madrid:

> "I cannot now recall whether my reference in that email to requiring formal authorisation from Madrid was an explanation of our governance model or a negotiating tactic. In fact, both explanations hold true. I did not have delegated authority to sign any renewal contract, as the contract value quantum would have been above the limit of my authority. At the same time, in these situations, the pressure would have been different if P4U believed the local team had absolute authority versus thinking that we still needed authority from Madrid. I would have used this sort of positioning in order to retain flexibility."

115. Largely under the impetus of P4u, which had indicated that it was in parallel discussions with another MNO and needed to know how much "share" O2 required (a reference to the

minimum volume of connections to be supplied, which was typically specified in the agreements), there was accordingly pressure on the negotiating teams to come to an agreement by the end of June. It is unnecessary to give an account of the various exchanges which took place in the second half of June. The outcome was that on 5 July 2012, heads of terms were agreed but with some key provisions still blank, including the percentage revenue share which O2 would pay for new post-pay connections and upgrades.

116. In a slide presentation to the meeting of O2's ExComm on 17 July 2012, the context for a new deal with P4u was summarised as follows:

> "• O2 potentially approaches a critical point in the evolution of the consumer marketplace, with risks coming from new sources such as LTE driven change and customer handset subsidy reductions. These risks are exacerbated by pressure on customers revenues, fierce MNO competition and increasing economic influence of key handset providers
>
> We have multiple options available to mitigate these market risks such as securing market share with key Indirect partners such as Phones 4u over the medium term, exiting from one (or more) Indirect partners to encourage wider market changes or attempting to extend existing contracts to address specific key market risks such as LTE [i.e. 4G]"

The slides outlined the key elements of the proposed new deal, stating:

> "This new deal gives T.UK and Phones 4u stronger risk alignment vs. today and meets medium term requirements against the intense market pressures we are expecting to face including LTE and customer revenue declines
>
> • Revenue share aligns both parties in keeping customers longer and growing spend
>
> • Customer Handset investment share means both benefit from reductions in customer subsidy encouraging strategic market value improvement"

However, unlike an earlier draft, the final presentation did not positively recommend signing a new deal based on the agreed heads of terms but set out also alternative options of exiting P4u, attempting to reach a more favourable contract, or exploring a JV to with another MNO to purchase P4u.

117. Mr Maple's view was, as he put it in an email on 28 June 2012, that O2 should "reluctantly" sign a deal with P4u. His role was to deliver and grow O2's market share in terms of connections. P4u provided about 200,000 new post-pay connections each year for O2 and Mr Maple was concerned about the likely loss of volume if O2 exited from P4u, particularly ahead of the roll-out of the 4G network, and he felt it made little sense to walk away without a back-up plan. He was aware that O2's attempt to lead a move away from the indirect retailers six years earlier had not worked out and he said that he was less focussed than others on the impact on O2's profitability, although he certainly appreciated the continuing

desire to reduce the role of the indirect segment. In any event, he expressed his reasoning pithily at the time in that email:

> "… we should try and break the model from a position of strength but we are not there now = deal"

However, the O2 team assessed the proposed new deal from P4u as unlikely to provide more value than the existing agreement and as considerably less valuable than O2's agreement with CPW.[9]

118. At its meeting on 17 July 2012, the ExComm noted that O2 was expected to present proposals to Telefónica Europe in September for structural change as part of its strategic 3 Year Plan ("3YP"), and "recognised the need for structural change in the UK market." ExComm determined that O2 should not sign with P4u on the terms then on offer. It decided that O2 should continue negotiating with P4u for a new deal "whilst alternative strategic options for market change are explored." The two action points agreed on were:

   a) to produce a briefing on the structure of the UK distribution market for Mr Alvarez-Pallete (the then chair and CEO of Telefónica Europe); and

   b) to "determine the 4-5 terms that need to change in the latest P4U negotiations to make a new deal acceptable."

119. The references to Telefónica Europe and Mr Alvarez-Pallete are significant. In late spring, the O2 Leadership Team had started to engage with Telefónica Europe concerning the preparation of its 3YP. At their meeting with Mr Alvarez-Pallete and his colleagues at Telefónica Europe on 4 July 2012, O2's presentation of its 3YP had included an objective of enhancing the role of franchisees as a form of direct distribution but expressly rejected the idea of exit from the indirects as too high a risk "as historically mobile operators have not followed". However, as set out in Mr Dunne's report afterwards to Mr Evans, Telefónica Europe had been very critical of the proposed plan. Mr Dunne said in his email of 5 July 2012:

> "- they believe execution risk in current plan too high for the proposed outcome
>
> - they believe the strategy (we and others adopt) is flawed and is a big factor in the declining market
>
> - they want a plan to break the downward spiral in the market and believe, despite past experience, that others will follow."

And he added:

---

[9] The question whether O2's assessment in July of P4u's then current offer showed that it was materially worse or better than the existing agreement was disputed at the trial and depends on the correct interpretation of financial schedules to the contemporary slide presentation to ExComm. In the event, I do not regard this as relevant to any decision I have to reach.

> "Based on the sentiment yesterday, the following are components:-
>
> - differentiating retention from acquisition
>
> - changing direct / indirect mix
>
> - ability to raise prices across the board
>
> - handset accounting and handset financing"

As Mr Dunne expressed it in his evidence:

> "Spain had thrown [the draft 3 Year Plan] out and said you need to think again, you are not being bold enough in the decisions you are making."

I consider that this weighed heavily with the executives of O2 at their meeting shortly afterwards, on 17 July 2012.

120. That was doubtless also the context in which Mr Dobson of P4u learnt from O2 that their 3YP had been rejected by Telefónica. And although P4u was otherwise not informed about the discussions O2 had with Telefónica Europe, it is notable that Mr Whiting recalls that from July 2012 it became clear to P4u that O2 were delaying the conclusion of a deal.

121. The reaction of the team at Telefónica Europe to O2's initial proposal for its 3YP was explained by Mr Ivan Varela Sanchez, then the Strategic Priorities Director at Telefónica Europe who, as his title suggests, was involved in discussion of strategic issues and the 3YP process with the various national operating businesses that reported to Madrid. He confirmed that, as at 2012, Telefónica SA was under significant financial pressure due to its high level of debt, and that operating income (before depreciation and amortisation) and cash flow were the key metrics analysed by central management. The management was under pressure to keep cash flow to Telefónica SA to support their high level of dividends. The strategy team in general sought to push the national operating businesses to take a longer term view, and as regards the UK in particular they noted that the margins of the UK business were significantly lower than in their other European markets. Although Mr Varela Sanchez understandably did not recall the detailed discussion at specific meetings, he explained that he thought at the time that if O2 took a bold move as regards the indirects, then other MNOs would probably follow and he felt that O2's management were being too risk averse and conservative. He said:

> "I believe that at the time the profitability of the UK market made other MNOs more willing to potentially take the risk, and –– and we thought that the profitability for them of the indirect channel would probably be also low, as it was for us. Therefore, the incentive for them to follow was bigger, and the risk for us [if] we could move volume to these new channels was lower.
>
> So it's not that I was thinking this is definitely going to work, but the balance between the risk and the –– and the value may be worth it."

122. Mr Varela Sanchez also saw great potential in the on-line channel and regarded that as an important way that volumes would be recovered, since he considered that there were too many stores in the UK. As best he recalled, the O2 management were less optimistic than he was as regards the likelihood that other MNOs would follow O2 in any withdrawal. As he put it, opinion in the back and forth discussions which took place was not "monolithic". But his view was also that if withdrawal did not work out – and he was made aware of what had happened in 2006 – then O2 could go back in with the indirects, as it and Vodafone UK had done after their previous withdrawals had proved unsuccessful. Moreover, this option would be obvious, so he felt that while another MNO might choose to take short-term advantage of O2's withdrawal to gain extra volume, if O2 then went back into indirects then everyone would go back to where they were, which was not very profitable. And Mr Varela Sanchez said that this was the general view among the corporate team involved at Telefónica Europe. I found Mr Varela Sanchez to be a very frank and honest witness and I accept his evidence.

123. As a result, O2 did further work internally and on 7 August 2012, Mr Evans sent a draft revised 3YP proposal, in the form of a 27-page slide pack, to Telefónica Europe. The executive summary of the revisions included the following:

> "**Game Changing Options**:
>
> • We've assessed 2 bold commercial moves: Distribution change and a major Price increase/Subsidy removal
>
> • For distribution, we've been able to clarify the implications for 2013 and beyond. Despite the lack of a positive short-term financial benefit we remain confident that distribution is an area to address strategically
>
> • For pricing/subsidy, we've reviewed the option of further price increases although must be mindful that competitors have shown no sign of following our strategy. In fact quite the reverse"

124. As regards distribution, the "bold move" was analysed as including the alternatives of selling only directly, exiting from both indirects, and exiting from only one indirect. It was noted that it would be prohibitively expensive to withdraw from CPW (as O2 had very recently signed a new agreement with them) and proceeded to model the effect of exit from P4u on the alternative bases that the market did and did not follow. The effect on operating income was clearly less unfavourable where the market followed, but the plan noted:

> "Even when market follows there isn't a significant financial benefit in the short-term. However we remain focussed that Distribution must be addressed strategically"

125. The other "bold move" involved price and financing. Significant price increases or removal of the handset subsidy were ruled out on the basis that competitors would not follow. Therefore the proposal stated that "the only solution to drive long-term value creation" was a financing option, whereby the customers in O2's direct outlets would sign two contracts, one for airtime and the other for the handset, such that the handset contracts could be financed by a third party: i.e., O2 could 'sell' the sums due from the customer to

a financial institution and thus recover straight away the cost of the handset (which O2 paid to the manufacturer).

126. The 3YP proposal expressed its conclusion on the "bold commercial moves" as follows:

> "• A distribution shift would be financially negligible in 2013 but does have strategic benefit in subsequent years
>
> • A major price increase/subsidy removal would represent a significant financial opportunity in the short-term but would jeopardise TUK in the long-term
>
> • We therefore recommend to implement the handset financing proposition and consider the Indirect Distribution move"

127. Although Mr Evans said that he did not himself think that the financial benefit of exit from P4u was so limited and believed that it could be improved, he made no such reservation when submitting this proposal to Spain, only noting that Mr Dunne had not approved it since he was on holiday. I think this very full and detailed slide pack, undertaken in response to the criticism from Telefónica Europe, represented the considered approach of the O2 team at the time.

128. Negotiations with P4u had paused during August, but the financial team at O2 supporting the Deal Committee continued to work on modelling the impact of various alternatives as regards P4u in terms of a new deal or withdrawal. That work culminated in a presentation that Mr Maple made to ExComm at an "off-site" meeting held in the Syon Park Hilton Hotel on 12-13 September 2012. Prior to this meeting, Mr Maple summarised his views in a note to himself entitled "The Dilemma", which he articulated as:

> "1) A need to demonstrate ambition to Group [i.e. Telefónica Europe / Telefónica SA] 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 and recent events in Spain has shown that success is hard to achieve across the market.
>
> 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."

The reference to the challenge on LTE (i.e. 4G) concerned the fact that it was known that EE was about to introduce a 4G network offering whereas O2 would only be able to offer 4G later in 2013.

129. That was the context of Mr Maple's slide presentation, again entitled: "Distribution game changers". In summary, he there put forward the view that exiting from both indirects was

not realistic and suggested that O2 should sign a one year deal with P4u for new connections, to align that with the position on upgrades. Mr Maple said in his evidence that he was putting this forward as a compromise solution as he realised that it would be difficult to persuade the senior executives to sign off on a long term deal with P4u given their view of the terms being offered. A one-year arrangement would take O2 through the challenge of 2013 and enable it to consider a strategic withdrawal from P4u at the end of 2013. As to such a withdrawal, the presentation included the observation:

> "O2 UK strategy – is volume required if handset solution successful? Likelihood other operators will follow."

130. The "handset solution" was a reference to the handset financing proposal outlined in the 3 August draft 3YP which O2 was developing and became known as "Project Refresh". As well as the financing benefit for O2, it was seen as attractive to customers since having separate arrangements for the handset and airtime meant that once the customer had paid off the price of the handset, his or her monthly payments would then reduce as they covered only airtime. This arrangement was to be offered only to direct customers and it was launched in April 2013. O2 saw it as a unique selling point with considerable potential, as it differentiated O2 from the other MNOs.

131. The overall message in Mr Maple's presentation was expressed as follows:

> "To make any strategic move in the indirect channel viable there must exist certain conditions...
>
> 1. We must have financial strength as a company
>
> 2. There must exist an economic need in the market place that would incentivise other operators to follow
>
> 3. To avoid negative share implications other MNO's must pursue the same strategy
>
> 4. The option needs to be economically viable with full understanding of short term effects on trading positions
>
> 5. We need to have a unique and compelling proposition that truly differentiates from [sic] our competitors"

132. However, the ExComm did not decide at its 12-13 September 2012 meeting to seek a one year deal with P4u. Instead, it took what Mr Dunne described as a "decision in principle" or "conditional decision" to exit from P4u. That reflected the view of Mr Evans who remembered arguing at the meeting the case for not agreeing a deal with P4u on the terms then on offer since they were not sufficiently profitable to O2, and that exit from P4u was the better option if the volume of connections which P4u provided could be replaced. There is no formal note of this decision but it was encapsulated in an email the day after the meeting sent by Mr Maple to Mr Felim Mackle, the UK Sales and Service Director:

> "1) Agreement from the Board not to renew our gross connections contract with P4U when it expires 31 January 2013
>
> 2) Agreement to continue to trade with P4U on upgrades as per the existing contract until January 2014
>
> 3) Above actions subject to the degree of confidence to find substitute volumes to cover a significant amount of the 200k gross shortfall resulting from the above decision"

The 200,000 shortfall referred to post-pay connections which, as noted above, was the focus of most MNO planning and evaluation.

133. On 3 October 2012, Mr Dunne and Mr Evans had a "review" discussion with Ms Castillo, who had succeeded Mr Alvarez-Pallete as chair and CEO of Telefónica Europe. Since Ms Castillo had taken over only on 17 September 2012, and Mr Dunne and Mr Evans then had a meeting with her in Spain on 9 October, it would appear that this was probably a preparatory discussion prior to their meeting. In any event, that discussion led to a request by Mr Evans to Mr Maple and his colleagues to "address two points" in, as I understand it, the slide presentation they were preparing for the meeting the following week. The first of those points was expressed as "Regional engagement and support to [sic] our move to exit an Indirect". And one of the bullet points under that head was:

> "… how we intend to address the volume currently delivered through P4U and how critical the proposed Handset Solution is within this (to drive consistent and attractive Direct offers)"

Mr Evans' request added:

> "The above to be used to ensure the region is fully aware of our current position and engaged/supportive of any final decision we take"

Mr Maple's brief email acknowledgment included the remark:

> "One issue which I don't wish to lose sight of is that this is currently a unilateral move – presumably the Region can guide us as to whether there is a broader appetite for change?"

134. The meeting on 9 October 2012 was attended by Mr Dunne, Mr Evans and Mr Meacham, the Head of Sales and Service Finance, from O2 and, along with Ms Castillo, her colleague Ms Pilar Lopez from Telefónica Europe. The day before, O2 sent over a slide-deck presentation entitled: "Game Changing Indirect Distribution". In that presentation, O2 set out the significant role which the indirect retailers, and in particular CPW and P4u, played in the UK market ("a key part of the UK's mobile landscape taking 40% share") while pointing out the ways they lowered O2's margin. The presentation noted that:

> "Due to [the indirects'] size of market share, any unilateral moves by MNOs carry a degree of risk, hence the lack of structural change in recent times"[10]

135. However, one slide stated: "Phones 4u have been historically important to T.UK but we can exit and replace their volume", suggesting how this would be done through a combination of sales through CPW, A1 Comms, and, to the largest extent, an increase in direct sales which the presentation claimed would be achieved through Project Refresh and "channel trading efficiencies". Another slide was headed:

> "**Now is the right time to exit Phones 4U**
>
> It's fundamentally the right thing to do and the timing is right given potential market changing trigger points in the next 2 years…"

The text below included the following:

> "**It is the first step in effecting long-term market change**
>
> <u>Externally</u>
> - Bold step ahead of potential competitor contract break points and LTE launches
> - Create instability in Indirect space
> - Allow great commercial negotiation with other Indirects
>
> <u>Internally</u>
> - Build direct trading capability across 2013 in preparation for a further step up in direct mix in 2014
> - Force focus on direct channel trading capability
> - Focus on long-term profitability"

136. I think the presentation was to an extent aspirational and that the O2 executives would have realised that it was ambitious. The additional volume from CPW had not yet been secured. But I see no reason to doubt that this was the way the plans of O2 had evolved and that the O2 management team recognised they had to develop their strategy this way to secure Telefónica Europe's approval, while at the same time they wished to ensure that Telefónica Europe was aware of the risk.

137. Mr Meacham reported in an email the "main takeaways" from the meeting with Telefónica Europe as follows:

---

[10] An earlier draft of this presentation, prepared on 5 October, expressed this bullet point as follows:

> "Due to [the indirects'] size of market share they create a 'prisoner's dilemma' for MNOs meaning any unilateral move carries a high degree of risk, hence the lack of structural change in recent times"

The revision from "high degree of risk" to "degree of risk" was not explored in evidence, but Mr Evans said that his view was that only a pull-out from *all* indirects carried a "high degree of risk".

"• Agreed to 'reject' P4U new agreement which left 2 main options :

> o Pull out
>
> o Put an offer on the table which was at least as profitable as CPW
>
> o We agree that O2 would pursue both routes and chose [sic] the most favourable one

• Ronan had spoken to P4U. They offered the new deal at less volume. This was not recommended.

• Discussed the importance of Project 76 [i.e. Project Refresh] in combination of moving more volume to our direct channels

• Discussed the rising importance of Al and the potential risk if they were bought (e.g. by P4U)

• Discussed this as being an opportunity to start a change in the industry distribution models"

138. P4u sought to rely on Mr Maple's email preceding this meeting and his question about "broader appetite for change" (para 133 above) as indicating that O2 was expecting Telefónica Europe to have information as to whether competing MNOs were likely to follow O2 in leaving P4u. Mr Maple resisted that interpretation, but he said he could not recall this email and he was clearly speculating as to what he might have meant at the time. (Mr Evans, when shown this email in the witness box, said he did not know what Mr Maple had meant.) I think Mr Maple may indeed have been hoping that there might be some reassurance from Telefónica Europe as to the likely market reaction. But this reaction from one executive within O2, who was not one of those attending the meeting, cannot in my view bear the weight P4u sought to place upon it. There is no support in any of the subsequent internal documents for the suggestion that Telefónica Europe did provide any such information at the meeting, and indeed such an allegation was not put to Mr Evans or Mr Dunne in cross-examination.[11]

139. Following the "conditional" decision regarding P4u, Mr Maple and his team concentrated on trying to secure additional connections through other channels to make good this expected loss from P4u. O2 began discussions with CPW and by October they had made a provisional offer to provide an additional 76,000 connections. The discussions with A1 Comms were more protracted and O2 considered other sources, such as its venture with Tesco through their MVNO. As Mr Maple put it in his evidence, "there were lots of moving parts at this stage." On 15 October 2012 he reported to Mr Dunne that:

> "Confidence is high that we can find c 150k out of 200k P4u shortfall"

---

[11] When asked about this email, Mr Evans said he did not believe at the time that Telefónica Europe had such information.

140. On 16 October 2012, Mr Dunne spoke to Mr Whiting on the telephone, having been briefed by O2 management as to the points he should make. He told Mr Whiting that O2 did not intend to renew the agreement for new connections on the basis previously discussed, explaining that it was more concerned about value than volume. Nonetheless, it seems clear they agreed, either in that conversation or perhaps when they spoke again a few days later, that they should keep communications open and that P4u and O2 should re-engage to see if there might be a deal structure that could work for both parties. From O2's perspective that was important since agreement for additional volumes with CPW had not yet been secured, and of course O2 would be continuing to deal with P4u as regards upgrades until the end of January 2014.

141. This was accordingly the approach adopted by the O2 executives involved in the renewed discussions, which in the period October-December 2012 were principally led by Mr Evans for O2 and Mr Dobson for P4u. Mr Evans' focus was on improving O2's profitability and in that context he was "agnostic" as to whether O2 continued trading with P4u. He was therefore prepared to consider an offer from P4u on terms that O2 found acceptable, in particular as regards margin share and cash benefits, but he had little appetite to negotiate an agreement on less favourable terms. The internal O2 emails indicate that if P4u had given way on the revenue split, O2 would still have signed a new agreement.

142. However, although Mr Dobson sent proposals in late November, and there were extensive exchanges between him and Mr Evans towards the end of that month, the two sides were far apart and, as Mr Dobson explained, the terms which O2 indicated it could accept would have been unprofitable for P4u. Mr Dobson believes that O2 must have realised this. Whether or not that is correct, I find that the development in O2's approach, in particular in response to pressure from Telefónica Europe, meant that O2 was by now reconciled to not achieving a deal with P4u. Notwithstanding the risk, O2 saw an exit from P4u as presenting a potential longer term opportunity. In that context, the management at O2 were unimpressed by the revised proposals put forward by P4u in November and early December 2012.

143. On 3 December 2012, Mr Evans wrote to Ms Pilar Lopez at Telefónica Europe with a general update on the UK situation, telling her that O2 was assuming that it would not reach agreement with P4u and that it was therefore critical to achieve an appropriate extension to its agreement with CPW.

144. On 5 December 2012, Mr Evans sent Mr Dobson an email setting out the key terms which O2 would consider acceptable for a renewed agreement. He wrote:

> "We recognise that these represent a reduction from the existing agreement although would bring P4u closer into line with other distribution channels we use.
>
> As I'm sure you're aware we have already bypassed the time by which a contract extension was due to be completed. The Telefónica Group approved our revised distribution plans recognising that we failed to achieve mutually acceptable terms for extending our relationship with you.

> The UK 2013 Budget will be finally approved in Madrid on Wednesday 12th with the Chairman. If you decide these terms are acceptable to you, we would need to seek Group approval to amend accordingly. If the terms are unacceptable, I suggest we recognise that we're not able to find a mutually acceptable solution. Hope this provides the clarity you were looking for."

145. Mr Dobson responded the next day, explaining that he could not understand how CPW could profitably trade on the terms that O2 were putting forward and asking for clarification. And his email stated:

> "Based on the numbers I have this proposal would produce a G[ross] P[rofit] per connection of £40 and as a result it [sic] something that we cannot accept. This amount would not pay for the variable costs in store."

Mr Dobson explained in his evidence that this level of gross profit would not have covered P4u's overhead costs.

146. While there were some further telephone calls between Mr Dobson and Mr Evans, this was effectively the end of the road as regards a further agreement for new connections. The existing contract for new post-pay connections duly expired on 31 January 2013.

The Landmark Lunch and subsequent exchanges

147. The account above of the approach of O2, the involvement of Telefónica Europe, and the negotiations between O2 and P4u provide the essential context for consideration of the discussion between Mr Dunne and Mr Swantee, the CEO of EE, at their lunch in the Landmark Hotel in London on 19 September 2012 ("the Landmark Lunch"), which was a key part of P4u's allegations of collusion.

148. The background to the lunch was the impending launch by EE of its 4G network. In October 2011, Ofcom had announced that the auction of 800 MHz and 2.6 GHz spectrum would not take place before at least the fourth quarter of 2012, which meant that it was unlikely that any 4G network could launch on this spectrum until late 2013. In an effort to find a way around this delay, EE realised that it would be possible, through a technique known as "re-farming", to repurpose some of its existing 1,800 MHz spectrum used to operate EE's 3G network to enable it to handle 4G. EE had access to a huge 1,800 MHz spectrum because the JV between Orange and DT had combined Orange and T-Mobile's spectrum allocations. This meant that EE could afford to re-farm some of this 1,800 MHz spectrum to launch its 4G network, unlike its competitor MNOs who could not spare enough existing spectrum to do the same but had to wait for the auction. EE worked with the major handset manufacturers to ensure that 4G compatible handset devices would be available, while keeping its plans secret. In November 2011, EE applied to Ofcom for permission to use its existing 1,800 MHz spectrum to launch the UK's first 4G mobile network and on 21 August 2012, Ofcom granted that permission. Mr Swantee understandably saw this as a major achievement by EE that gave it a very significant commercial opportunity.

149. As Mr Swantee explained, once they discovered what was happening, this provoked a furious reaction from both O2 and Vodafone since if EE was successful it would have a substantial head start over them on 4G. They had hard to block the move, first by lobbying the Government and Ofcom, and then O2 commenced legal proceedings against Ofcom challenging its decision. EE also lobbied the Government which, together with Ofcom, in effect brokered what was called a "Standstill Agreement" between EE and the other MNOs in early September 2012. Under this agreement, the parties agreed to a four week suspension of the announcement by EE of its 4G launch on the one hand and of the challenge by the other MNOs on the other hand, while they sought to negotiate an agreed timetable for the launch of 4G. This proved successful in that, at or about the beginning of October, an earlier date was agreed for the auction of 4G spectrum, EE said it would launch at the end of that month and the other MNOs dropped their objections. The EE 4G network was duly launched on 30 October 2012.

150. O2 had been at the forefront of the challenge to EE over 4G, and Mr Dunne had been directly involved in negotiation of the Standstill Agreement. He was therefore indignant to receive a marketing email from EE on 12 September 2012 telling him that "this morning we launched the UK's first 4G network". He wrote at once to Mr Swantee, forwarding that email and stating:

> "… I think there is a real danger that loose language, coupled with aggressive poaching communications, means that your organisation is not living up to the spirit, or even the letter, of our agreement."

151. Mr Swantee replied that day, accepting that the email from EE did not comply with the Standstill Agreement, apologising for what had happened and stating that he had taken steps to avoid repetition of what he said appeared to be an isolated incident. However, Mr Swantee had little doubt that Mr Dunne was very annoyed. As a result of these developments, Mr Dunne characterised his relationship with Mr Swantee before the lunch as "cold and somewhat fractious at best."

152. Neither Mr Swantee nor Mr Dunne could recall at whose initiative the lunch was arranged and I do not think this matters. It seems that it was set up following the above exchange. There was no agenda for the lunch but Mr Swantee was briefed by one of his staff beforehand, on the basis that the main topic was likely to be the Government arrangements for 4G spectrum. His intention was, as he put it, to "de-escalate the situation" with O2, after the fractious relations of the previous months and then the unfortunate incident of the 12 September email.

153. The lunch took place on 19 September 2012 in the Winter Garden restaurant in the large atrium of the Landmark Hotel, which was not far from EE's head office. No one else was present apart from Mr Dunne and Mr Swantee.

154. As Mr Swantee recalled, they first talked about the marketing email which Mr Dunne had received, and then turned to the 4G spectrum issue, where Mr Swantee sought to assuage O2 by offering reassurance that EE would not seek to delay the auction but on the contrary would support access for the industry to new 4G spectrum as early as possible. Then, at

some point in the conversation, Mr Dunne started to talk about pricing strategy for 4G. Mr Swantee described this in his witness statement as follows:

> "To the best of my recollection, Mr Dunne explained his concern that because EE would be launching 4G well in advance of O2 and the other MNOs, EE had the power to determine the price premium for 4G across the market. If we priced 4G aggressively, the other MNOs would have to follow suit, or else they would struggle to make any impact on the market because they would always lose out on price.
>
> Mr Dunne was worried that if EE offered 4G at a small premium, this would result in the cannibalisation of the 3G market. 4G was a far superior product, and if it only cost customers a small amount extra (e.g. £5 per month), a significant proportion of 3G customers would want to upgrade to 4G (and, therefore, at that time, move to EE)."

155. Mr Swantee said that as Mr Dunne started talking in this vein he became nervous and uncomfortable. He explained that he was uncomfortable because he felt it was not appropriate for him to discuss with Mr Dunne EE's launch strategy and because, after O2 had previously tried to prevent EE from launching 4G at this time, Mr Dunne was now raising the issue of potential pricing on this product line. Mr Swantee said further:

> "… I was nervous because it –– it felt like that it –– it wasn't –– it was not okay. And secondly, I was nervous, as I said before, because I wasn't really sure about what he wanted, what the details was. And I wasn't really sure about, you know, if –– if this was inappropriate or appropriate."

156. It appears that around this point in the conversation Mr Dunne left the table for a short while (Mr Swantee thought he may have gone to the toilet)[12]. While he was away, Mr Swantee pressed the record button on the iPad he had with him. Accordingly, he recorded the rest of the conversation, but he did not tell Mr Dunne that he was doing so. Mr Swantee said that he had never done this for a private conversation before, and he did it because he felt so concerned at what Mr Dunne appeared to be saying.

157. As a result, the rest of the conversation was recorded. After Mr Swantee's return to EE's offices, he called EE's General Counsel, Mr James Blendis, to come to his office to tell him what had happened and explain his concern, as he put it, as to whether "having been part of a conversation with a CEO of a competitor where they had raised inappropriate topics, even if I had not engaged with them at all, exposed EE to risk." He gave Mr Blendis his iPad to take away to listen to the recording. Mr Blendis listened to it in his own office and tried to make a full transcript of what he heard, although it was not always very clear and he could not catch every word so his transcript had some blanks. He then returned the iPad to Mr Swantee. Mr Blendis recalled that Mr Stephen Harris, who worked closely with Mr Swantee, was also told about what had occurred.

---

[12] Mr Stephen Harris recalled that Mr Swantee told him after the lunch that a waiter had accidentally tipped spaghetti down Mr Dunne's shirt. That would explain his going to the washroom in the middle of the conversation.

158. Mr Blendis sent Mr Swantee an email on 25 October 2012, copied to Mr Harris, which included the following:

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

159. Mr Blendis said that he wrote this based on his recollection of his discussion with Mr Swantee shortly after the lunch and his note of the iPad recording.

160. Mr Swantee said that the conversation moved on to another matter, namely whether it might be possible for the MNOs to establish a joint venture similar to "Project Oscar" [13] to acquire some form of ownership of an indirect channel. Mr Swantee responded by saying that he would speak to EE's legal and regulatory teams to get their views on the feasibility of such an arrangement. Mr Swantee accordingly mentioned this also to Mr Blendis when he spoke to him after the meeting, and asked him to look into it.

161. On 21 September 2012, Mr Blendis emailed the lawyer in EE's legal department who specialised in competition and regulatory law, Ms Robyn Durie, to ask her opinion on this idea of joint ownership of a distribution channel. She responded to the effect that this would excite opposition from the Office of Fair Trading and might involve EE having to

[13] "Project Oscar" was the codename for an industry collaboration between O2, Vodafone UK and EE to increase advertising revenue by creating a single mobile wallet platform that could reach, broadly, the whole market. The project received clearance from the European Commission on 4 September 2012.

divest itself of stores, but that they needed more details to consider it further. Mr Blendis reported back to Mr Swantee accordingly.

162. On 29 September, Mr Swantee sent an email to Mr Dunne, which stated as follows:

> "Good to see you last week, as far as I can recall the only outstanding action was for me to talk to my regulatory team about a possible retail / distribution "Oscar", or some other form of ownership in that indirect distribution space, see whether they think that would be possible and what that would look like from a competition law perspective.
>
> The initial reaction was that there would be significant regulatory/competition law hurdles to that, but that if they understood in more detail what was being proposed then they can take it away and come back with a more considered response. Not sure how you want to do that, whether you could send us something in writing (if your regulatory team was comfortable with that), or otherwise set up a meeting with the relevant parties (I would guess with some of the regulatory lawyers as well).
>
> Let me know how you want to take that forward."

Mr Dunne responded with a brief message on 1 October:

> "Thanks for your note. Leave it with me for a few days and I will pull together some proposed [n]ext steps."

163. Then on 3 October, Mr Dunne sent Mr Swantee the following text message:

> "Good luck for your launch and thanks for your contribution in these past 4 weeks. When you have fully announced your launch plan etc. I suggest we catch up for a coffee to follow up our lunch"

Mr Swantee accepted in cross-examination that the reference to "your contribution" was probably to his input into the negotiation of the Standstill Agreement and resolution of the spectrum dispute between EE and O2.

164. About a week later, on 10 and 12 October 2012, Mr Swantee received telephone calls from, first, Mr Guy Laurence, the CEO of Vodafone UK, and next from Mr Andrew Harrison, the CEO of CPW. Both concerned EE's 4G pricing.

165. Mr Swantee said that he remembered the conversation with Mr Laurence quite well, because it was short and the message that Mr Laurence sought to convey was very clear. He set it out as follows:

> "Mr Laurence explained 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. My assumption, although I do not recall that Mr Laurence said this explicitly, was that he 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."

Mr Swantee said that he did not engage at all with this suggestion, and made it clear to Mr Laurence that he was not comfortable discussing anything to do with 4G pricing.

166. Mr Swantee said that he also remembers the call from Mr Harrison quite well, for the same reasons and further because he was struck by how similar it was to the call from Mr Laurence just two days before. He says that Mr Harrison also suggested that £10 a month was the appropriate premium for 4G rather than EE's proposed premium of £5 a month. Again, Mr Swantee said that he did not engage at all with what Mr Harrison was suggesting and made it clear that he was not comfortable discussing this topic.

167. Mr Swantee said, and I accept, that he was both surprised and angry about these calls. He was angry that Vodafone UK, which had only recently been trying to prevent EE launching on 4G, should be trying to influence EE's commercial strategy. And as the price at which EE was intending to launch was confidential from his competitors, he thinks that Vodafone UK probably had learnt this from CPW who, as EE's retail partner, had been told the price ahead of the 4G launch but were supposed to keep it confidential. Moreover, Mr Swantee was annoyed that Mr Harrison, with whom he did not have any real working relationship, was also now calling him "out of the blue" to have this sort of inappropriate conversation.

168. Mr Swantee contacted Mr Blendis soon afterwards to inform him of both these calls. The substance, as set out above, is recorded in Mr Blendis' email of 25 October from which I have quoted an earlier passage at para 158 above.

169. I accept Mr Swantee's evidence and account of both these conversations. Since Vodafone did not adduce evidence from Mr Laurence, they realistically accept that they are in no position to contest Mr Swantee's account of this call, which had not been admitted in their Re-Amended Defence. And there is no evidence at all from CPW. Moreover, Mr Swantee considered that these calls were probably co-ordinated. Given their timing and close similarity, I agree.

170. There was no follow-up lunch with Mr Dunne as suggested in his text message of 3 October, or any further contact in the following weeks. However, in November 2012 (Mr Swantee cannot recall the exact date but it does not matter), Mr Swantee received a telephone call from Mr Dunne. He remembers that he was in his car with his driver when he took the call and that Mr Dunne wanted to speak about Apple. Mr Swantee explained (and this was not contested) that Apple commanded a lot of influence in the handset market and generally offered more onerous terms to mobile retailers (therefore including the MNOs' direct outlets than the other manufacturers. However, Mr Swantee was satisfied overall with the relationship which EE had with Apple, with whom it was at this time in the process of negotiating new terms of supply. In his witness statement, Mr Swantee's evidence of this conversation with Mr Dunne was as follows:

> "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…."

171. Mr Swantee called Mr Blendis almost straight away after this call to tell him what had happened and Mr Blendis made a note of that in his notebook. His note indicates that Mr Dunne said that O2 were in the process of reviewing their supply agreement with Apple and that he suspected that EE and Vodafone UK will be doing the same soon. Mr Blendis' note (as clarified by him in his evidence) states:

"(a) Mr Dunne explained that he was "wanting to build price sustainability" and that Apple was a "key part of that", but 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"; and

(c) Mr Swantee explained that he was "uncomfortable to talk about it", and that EE "don't want to comment on [the] contract with Apple" ."

172. In cross-examination, Mr Swantee said that he had no doubt that he heard Mr Dunne clearly and felt he could understand what Mr Dunne was proposing. But having read Mr Dunne's account of that call, Mr Swantee accepted that it is possible that Mr Dunne did not suggest that the different MNOs should coordinate their negotiation with Apple but that they should each seek to negotiate with Apple at parent group level rather than having separate contracts negotiated for each country market.

173. Mr Dunne made his own, very brief contemporary note of the call, recording that he raised with Mr Swantee the subject of "device vendors", noting in that regard: "local or group negotiated". He said that at the time Telefónica had decided that it should start to negotiate with Apple centrally, at group level, and that the purpose of his call was "simply to inquire" whether EE was taking the same approach. He noted that Mr Swantee refused to give him any information. However, it is clear from his note (and Mr Dunne accepted) that he had also contacted Mr Laurence on the same topic, and that Mr Laurence told him that Vodafone UK had transferred responsibility for the Apple contract to Vodafone Group level.

174. I accept on the evidence that Mr Dunne was not proposing a coordinated negotiation with Apple by the MNOs, and I think that Mr Swantee had misremembered the position when he made his witness statement. But I consider that Mr Dunne, in calling both Mr Laurence and Mr Swantee, was going further than making a "simple inquiry". Mr Swantee was clearly very concerned at the time by the approach Mr Dunne made to him. I consider that Mr Dunne was seeking, as both his and Mr Blendis' contemporary notes indicate, to encourage the MNOs to adopt the same strategy towards Apple by each conducting their negotiation at group rather than individual country (i.e. national operating company) level.

175. As mentioned above, Mr Swantee consulted Mr Blendis after the Landmark Lunch and again following the calls from Mr Laurence and Mr Harrison. Unsurprisingly, Mr Blendis became concerned at this succession of what appeared to be wholly inappropriate approaches. As Mr Blendis is not himself a competition lawyer, Mr Swantee agreed that he should seek specialist advice. Mr Blendis contacted EE's relationship partner at Slaughter and May, Mr Peter Joliffe, who put him in touch with a competition law partner, Mr Michael Rowe. EE has waived privilege on the resulting communications with Slaughter and May.

176. Mr Blendis first spoke to Mr Rowe on the telephone on 17 October 2012, and his contemporary note of the call indicates that Mr Rowe, as one would expect, asked him to provide more information on what was said and advised that EE should "document our take" on what had happened. Mr Blendis' evidence, consistently with the contemporary documents which he used when preparing his statement, is that this led him to prepare an account in the form of an email to Mr Swantee, from which I have quoted above. Mr Blendis went to see Mr Rowe at Slaughter and May's offices on the morning of 23 October and believes he would have discussed a draft of that email with Mr Rowe.

177. Mr Rowe gave advice regarding the conversations, on the basis set out in Mr Blendis' account of the facts, and as to various options open to EE. That is reflected (expressed in part as coming from Mr Blendis) in the second section of Mr Blendis' email of 25 October 2012 to Mr Swantee. This merits quotation in full:

> "I have said that in broad terms these conversations raise the prospect of collusion, and anti-competitive agreements between you, which is extremely serious. While you have made it clear you have no intention of taking direction from these conversations, nor did you believe you gave or implied any complicity or agreement to those propositions, and indeed that you purposely avoided any impression that you were open to coordination of behaviour, we have since considered whether you should have taken further steps to rebut those proposals, and whether we should now do so, informally or formally.
>
> The options we discussed were;
>
> (a) An informal conversation with all parties, to express your concerns in retrospect at the possible intentions of the communications, and to firmly rebut any notion of complicity or agreement with those proposals;

> (b) A more formal meeting, possibly with lawyers, to present the same feedback and clarify our position, and also warn that further dialogue or communication in that vein would inevitably force us to make a more formal disclosure to the competition authorities; or
>
> (c) A disclosure of some form directly to the competition authorities; or
>
> (d) Document these conversations, monitor their behaviour going forward, and prepare a more robust response should any such conversations occur again in the future.
>
> I have since spoken to external competition legal experts, at Slaughter & May, and in conclusion of those discussions my advice is that on the basis of the discussions as reported, it would be acceptable to adopt option (d).
>
> Option (c) would mean that we would have to make admissions to the competition authorities of unlawful behaviour, and I do not believe that is appropriate given the conversations and circumstances.
>
> Option (a) and (b) are something we could think about going forward, but the risk is that this causes a protective response from those parties, possibly even some form of whistleblowing process themselves, which would put us in a more difficult position (having not taken that initiative ourselves).
>
> Given that no indication has been given to the parties involved that we were in any way intending to follow up on their suggestions or approaches, and in fact have not done so (clearly with the published pricing this week not reflecting any agreement with those proposals), the risks of any action being warranted against you or EE for your part in those discussions is contained and moderated. To the extent that you have flagged them to me, you have adopted the right course of action, and the record of that, and our agreed plan going forward, is sufficient for the time being.
>
> I will follow up with a high level script for you to review, which can form the basis of your response for any future similar calls or meetings. I would also suggest that you avoid any scenarios where this is more likely to occur, in particular one to one meetings without other colleague involvement or legal participation."

178. The email is somewhat contrived in that, as I understand it, the discussion of the options took place with Slaughter and May and were only set out for Mr Swantee in this email subsequently. But nothing turns on that and Mr Swantee concurred in going forward on the basis of option (d). With input from Mr Rowe, Mr Blendis prepared the "script" referred to, in the form of various responses Mr Swantee could give if this were to happen again.

179. After Mr Swantee received the further call from Mr Dunne regarding Apple (para 170 above), Mr Blendis consulted Mr Rowe again. They agreed that it had become necessary for EE to escalate its response, and move from option (d) to a form of option (b), whereby Mr Blendis should meet with his counterparts as General Counsel at O2 and Vodafone UK

in order, as Mr Blendis put it, "to protest the approaches and publicly distance EE from them."

180. Mr Swantee agreed with that strategy. Accordingly, Mr Blendis proceeded to arrange one-to-one meetings with Mr Edward Smith, then General Counsel of O2, and Ms Justine Campbell, then General Counsel of Vodafone UK. In preparation for those meetings, Mr Blendis drafted a script of what he should say, which he sent to Mr Rowe on 30 November 2012. The revised draft (following Mr Rowe's comments) was sent by Mr Blendis to Mr Swantee and copied to Mr Harris. The approach of the script was to raise EE's concerns and make clear that EE rejected any attempt to influence its market behaviour and would not be a party to any collusive activity. The draft script had a section headed "Specific Detail and Evidence", which comprised a series of bullet points. One of those states:

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

181. In advance of the meetings, on 11 December, Mr Swantee wrote a short email to Mr Blendis telling him: "Be super diplomatic."

182. Finding dates for the meetings proved a little difficult but Mr Blendis finally met Ms Campbell on 12 December 2012. There is some uncertainty around the date of Mr Blendis' meeting with Mr Smith since several planned meetings were cancelled, but it appears most likely that it took place on 14 December 2012. Both meetings took place at EE's offices. Mr Blendis said that he did not speak in the meetings directly from his script but used it as the basis for what he described was "a more fluid discussion".

183. As regards the meeting with Ms Campbell (whom he knew from previous dealings), Mr Blendis said that she was quite responsive and saw the potential problem with what Mr Laurence was said to have done. She agreed to discuss the matter with Mr Laurence, and then follow up with Mr Blendis. Mr Blendis had a brief note that Ms Campbell duly called him afterwards but there is scant record of what she said and it does not take matters further.

184. Ms Campbell in her evidence said that she could not recollect any detail of the conversation at her meeting with Mr Blendis but had some recollection of its overall tenor. She said that it was "relatively low key" but that she believes that Mr Blendis mentioned a potentially inappropriate telephone conversation between Mr Laurence and Mr Swantee. She said:

> "… 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."

She felt that "super diplomatic" was a fair characterisation of Mr Blendis' approach. Although she now cannot remember doing so, she said that she would have spoken to Mr

Laurence about this afterwards and she accepted that she may have had a follow-up telephone call with Mr Blendis, as stated in his evidence, but had no recollection of that.

185. The meeting with Mr Smith was a bit different, perhaps partly because Mr Blendis had never met him before. Mr Blendis also gained the impression that Mr Smith had spoken in advance to Mr Dunne about his approaches to Mr Swantee. However, Mr Smith said that was not the case and that he was not aware prior to the meeting of the substance of what Mr Blendis was going to say. Mr Blendis has a contemporary note in his notebook dated 18 December 2012 that records Mr Smith as saying:

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

186. Since it appears from an internal O2 document that the meeting took place on 14 December 2012 (and not on 18 December as Mr Blendis stated in his witness statement) it seems that this note reflects a telephone call from Mr Smith a few days after the meeting, once Mr Smith had the opportunity to raise the matter with Mr Dunne. On that basis, Mr Smith would have been more in 'listening mode' during the meeting, and he said that he realised that this was a serious issue which he would have to raise with Mr Dunne. Indeed he said that he then sought external legal advice from SJ Berwin. Mr Blendis was therefore mistaken in asserting in his witness statement that there was no follow-up from Mr Smith and that his note referred to what Mr Smith said at the meeting. He was similarly mistaken in reporting that this is what happened in an email that he sent to Mr Rowe at Slaughter and May on 13 February 2013.

187. Mr Blendis did not make any notes following either meeting as to what had been said. I should mention that there is a slight dispute on the evidence as to how specifically he put to Mr Smith the substance of Mr Swantee's account of what Mr Dunne had said to him. Mr Smith did not make notes during the meeting but he said he recalled the points that Mr Blendis made since they were obviously important: he remembered that Mr Blendis said that Mr Dunne had held two conversations with Mr Swantee which Mr Swantee regarded as inappropriate, one seeking to discuss distribution in the UK and the other asking whether EE negotiated with Apple on a group or per operating business basis. He said that Mr Blendis did not go into particular detail but that he wanted an assurance that Mr Dunne would not seek to have any more conversations of that kind. Insofar as there is an inconsistency with Mr Blendis' evidence as to the degree to which Mr Blendis recounted to Mr Smith what Mr Dunne had said, I doubt it is material but I prefer the evidence of Mr Smith. I found him to be a careful and clear witness and, as mentioned above, Mr Blendis was mistaken, even much closer to the time, regarding what was said in the meeting.

188. Mr Dunne's evidence concerning the Landmark Lunch was very different, although he said that his recollection of it is "limited". He said in his second witness statement:

> "The primary purpose of this lunch meeting was to settle the dust after the spectrum dispute. I also took the opportunity, after clearing the air, to float a possible idea to improve distribution efficiency

> …. in the course of our conversation I explained to Mr Swantee that I thought the time could be right to consider some sort of initiative to improve the efficiency of distribution in the market. To my mind, we had an opportunity to work across the industry, as we had done with Project Oscar, and I floated this idea with Mr Swantee. I cannot recall whether or not I expressly said this to Mr Swantee during the course of the lunch but I believed that the market generally was struggling with excess distribution leading to significant inefficiencies and the launch of 4G could magnify that problem, not least because of the increased handset costs and the resultant extended contract life….
>
> 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."

189. In response to Mr Swantee's written evidence, Mr Dunne said that he did not discuss any commercially sensitive information of O2 or Telefónica more generally, did not communicate that O2 envisaged reducing sales through indirect channels, did not ask that EE refrain from taking up volume, did not suggest that if EE priced 4G aggressively other MNOs would have to follow suit and did not say that he was worried about the level of premium of EE's 4G offering. He said that he is only unsure whether he may have spoken more generally about his view that 4G could be priced at a premium over 3G.

190. Mr Dunne said that he is unsure whether he mentioned the possibility of the indirects leading the way in discounting 3G products but stated that if he said this it would have been in the context of discussing a "Project Oscar type" initiative.

191. In the unusual circumstances where part of the discussion at the Landmark Lunch was recorded, and where a transcript had been made by a solicitor of that recording, one would have thought that the stark clash of evidence between Mr Swantee and Mr Dunne could be relatively easy to resolve. However, Mr Swantee's iPad on which he made the recording has not been found. Mr Swantee explained that it was a personal iPad and that while he was CEO of EE he would receive a new iPad from Apple whenever a new model came out. On doing so, he either gave the old one to an employee at EE or recycled it, after wiping its memory. He assumes he must have done either of those things with this iPad and at that time he did not save such materials from his iPad onto the Cloud.

192. More surprisingly, the transcription which Mr Blendis made of the recording has also gone missing. He made his note on loose pages, not in his notebook, and said that he kept them in a folder "together with other documents relating to P4u". He kept this folder in a tray on his desk in EE's head office in Paddington, and subsequently, following the acquisition of EE by British Telecommunications ("BT") in 2016, in his office at BT Group's head office in St Paul's to which he moved in about 2017. Mr Blendis left EE in January 2018 and recalls that he put this folder into a filing cabinet in his office with other papers relating to P4u. However, all efforts to find the document have been unsuccessful so it seems that it may have been thrown out. Mr Blendis also thought, although he said his recollection of this was "hazy", that a copy of the recording had been made onto a CD by Mr Swantee's

secretary, that was then kept in a safe in Mr Swantee's office. If that is correct, then this CD has also been lost.

193. As set out above, Mr Blendis had gone to consult Mr Rowe at Slaughter and May about this conversation at the time, and he is fairly sure that he would have told Mr Rowe that part of the conversation had been recorded and that he had made a transcript of the recording. Although he has no specific recollection of this, Mr Blendis agreed, in response to a question from me, that Mr Rowe would have asked for a copy of the transcript, which Mr Blendis would have given to him. However, there is no copy in the client file at Slaughter and May, which was searched again during the course of the trial at my request.

194. Accordingly, the nearest to a contemporary account of the Landmark Lunch conversation is the email from Mr Blendis of 25 October 2012 and then his further 'script' drafted on 30 November 2012 in preparation for his meetings with the general counsel to O2 and Vodafone UK: para 158 and 180 above. Both Mr Swantee and Mr Dunne were cross-examined in detail about the Landmark Lunch and Mr Blendis was questioned regarding these two documents.

195. I reject Mr Dunne's evidence that in this conversation he did not refer to EE's pricing strategy for 4G and seek to influence that strategy. It is true that Mr Dunne (unlike Mr Laurence and Mr Harrison in the telephone calls a few weeks later) did not mention a specific price. But I find that he expressed concern that 4G should be priced at a premium and sought to persuade Mr Swantee by suggesting that if it was not so priced, that would cause discounting of 3G (which of course remained part of EE's offering). And I find that he said that such discounting is likely to be led by the indirect retailers. This accords closely with the passages in Mr Blendis' email of 25 October ("RD raised… concerns about…. He believed the risk of this…") which I consider was written on the basis of Mr Blendis' transcript of the recording and which is the closest to a contemporary document. Even if the recording was not always clear, this email also reflected the account Mr Swantee gave to Mr Blendis shortly afterwards and Mr Swantee could have no incentive to distort what Mr Dunne said. Mr Dunne, by contrast, had no record at all of the meeting (nor had he made any note in preparation). As Mr Swantee pointed out in answer to a question from me, while Mr Dunne may not have referred expressly to the pricing strategy *of EE*, it was clear that this is what he was talking about since EE was about to launch its 4G network (but had not yet announced the price) whereas O2 was far away from having a 4G offering. Although Mr Dunne suggested that any reference to discounting by indirects was in the context of discussion of a "Project Oscar-type" initiative, Mr Swantee was clear that such an initiative was raised only at a later stage in their discussion, and indeed that he had moved the conversation on to that topic to get away from what he felt were inappropriate topics.

196. However, potential collusion or an attempt at collusion over 4G pricing is not the allegation in this case. The critical question is whether Mr Dunne indicated to Mr Swantee that O2 was contemplating a withdrawal from one or more indirect retailers, or from P4u in particular, and sought to gain comfort that this would not lead to the volume (of connections through P4u) being taken up by EE. I have no doubt that he did refer to O2 taking some "unilateral steps" and playing some "big cards": those words appear in quotation marks in

Mr Blendis' email, and Mr Hoskins KC, appearing for O2, did not seek to suggest otherwise. Mr Swantee, in response to Mr Hoskins' questions, accepted that Mr Dunne did not say what those "steps" or "cards" were, and that he (Mr Swantee) did not ask him. Mr Swantee said that Mr Dunne did not specifically mention P4u. He also accepted that the reference in Mr Blendis' account in the 25 October email to his concern that "the implication [of Mr Dunne's remarks] might have been to suggest that [O2] were willing to pull some volume from the indirect channels … but wanted to de-risk that volume being taken up by EE" was probably Mr Swantee's interpretation of what Mr Dunne was saying rather than something that Mr Dunne expressly stated. Mr Swantee also said that Mr Dunne was "very wordy" and that it was difficult to follow everything that he was saying.

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

198. That conclusion is in my view supported by the surrounding circumstances:

a) the Landmark Lunch came a few days after the O2 off-site meeting of 12-13 September 2012 at which O2 took what Mr Dunne described as the "conditional decision" to exit from P4u for new connections. Although that would please Telefónica Europe, Mr Dunne was well aware of the concern expressed internally of the potential adverse effect on O2 of such an exit if the other MNOs took up all the volume. If he had been able to "de-risk" (as Mr Swantee notably saw it at the time) that eventuality, it would have given a valuable boost to this strategy;

b) both the attempt to influence EE's strategy regarding 4G pricing (as I have found it to be) and my finding regarding Mr Dunne's subsequent call to Mr Swantee concerning negotiations with Apple show that Mr Dunne had a rather cavalier attitude to competition law compliance;

c) on 2 January 2013, Mr Evans sent a text message to Mr Dunne stating:

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

O2 accepted that the "impending move" was a reference to O2's non-renewal of its contract for new connections with P4u. Mr Evans said this was "a poor thought", that he is now somewhat embarrassed that he had sent this message, and he stressed that O2 never acted on it. I accept all that, but I think it is nonetheless significant

that he sent a text in those terms, mentioning specifically Mr Swantee as the person to be reassured (something that Mr Evans could not explain). Although Mr Evans thought that he may have been aware in advance that Mr Dunne was going to meet Mr Swantee in September 2012, he said that Mr Dunne did not tell him anything afterwards about that meeting. I have to say that I find that incredible. As the CFO of O2, Mr Evans was closely involved at the helm of O2 in developing O2's strategy and 3YP. The EE launch of its 4G network was hugely significant (Mr Dunne even described the importance of the Standstill Agreement as "mission critical") and the level at which EE's new 4G connections were priced would have material implications on the pricing of 3G (as Mr Dunne pointed out to Mr Swantee) and therefore for O2's profit margins. Having raised that issue with Mr Swantee, it would have been extraordinary if Mr Dunne did not tell Mr Evans what transpired. Furthermore, the "Project Oscar-type" venture, which Mr Swantee agreed to go away and consider, would also have been a matter of direct interest to O2's CFO. If, as I consider likely, Mr Evans did know something of the conversation which Mr Dunne had had with Mr Swantee, his reference to "reassuring Olaf" and strengthening the "resolve against the Indirects" is consistent with Mr Dunne's effort to persuade Mr Swantee to support O2 in an impending move regarding indirect distribution. I also note that while Mr Dunne said in evidence that he had regarded Mr Evans' text as an inappropriate suggestion, it is relatively clear that he did not say that to Mr Evans at the time.

199. I should add that in his cross-examination of Mr Swantee, Mr Hoskins suggested that "unilateral steps" and "big cards" could refer to a range of different things, for example the purchase by O2 of P4u or of CPW. No doubt they could, but I find that is not what Mr Dunne meant at the time. He was, in my judgment, referring to the decision in principle to exit from P4u which O2's ExComm had taken a few days before. And although Mr Swantee could not tell to what degree O2 might reduce volume through the indirect channel, and whether that would involve P4u or CPW or both, he had correctly understood the thrust of Mr Dunne's remarks.

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

201. For completeness, I should add that I reject the allegation, made in P4u's pleaded case but not pursued at trial, that the failure to preserve Mr Swantee's iPad or Mr Blendis' note of

the conversation at the Landmark Lunch (paras 191-192 above) was deliberate as they would have implicated EE in anti-competitive activity.

Analysis

202. Does this give rise to an infringement of competition law? P4u alleged that it constituted a concerted practice in the form of an exchange of confidential information amounting to an infringement "by object." It submits, in essence, that:

a) Mr Dunne was communicating information about O2's future strategy regarding the indirect retailers which was commercially sensitive;

b) such unilateral provision of confidential information to a competitor is sufficient to give rise to a concerted practice;

c) Mr Swantee did not object or protest to Mr Dunne at the time and EE did not subsequently publicly distance itself from the exchange so as to preclude its participation;

d) the *Anic* presumption applies since both O2 and EE continued to trade in this market and neither EE nor O2 rebutted the presumption that it was influenced by the "exchange".

203. I accept that for an infringement of Art 101(1) and the Chapter I prohibition, the exchange of information does not need to be reciprocal. That proposition is set out in the summary quoted at para 77 above from *Argos*, on the basis of Cases T-202/98 etc *Tate & Lyle plc v Commission*, EU:T:2001:185, a judgment on which Mr MacLean directly relied. There, British Sugar, one of the two leading suppliers of sugar in the UK, held meetings with two sugar merchants who were also its competitors at which it gave them information about its future pricing. British Sugar and one of the merchants (Napier Brown) challenged the Commission's decision finding a concerted practice, inter alia on the ground that only British Sugar gave information as to its pricing policy whereas no pricing information was given by the merchants. The Court of First Instance ("CFI") stated, at para 54:

> "… the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice."

204. Further, in Case T-377/06 *Comap SA v Commission* EU:T:2011:108,[14] the applicant contended that there was no anti-competitive infringement where its representative had merely received vague information in discussion at a trade fair with a representative of its competitor about that competitor's pricing policy, with no indication of the percentage increase or date when that would be announced, and had given no information in return. The General Court dismissed that argument, stating at para 70:

[14] Further appeal dismissed: Case C-290/11P, EU:C:2012:271.

> "… the argument that that exchange was not anti-competitive owing to the lack of reciprocity or the fact that the applicant itself had already decided to increase prices is not relevant. According to the case-law, an exchange of information does not have to be reciprocal for the principle of autonomous conduct on the market to be undermined. It follows from the case-law that the disclosure of sensitive information removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information …."

205. However, the information transmitted must nonetheless be sufficiently clear as to put the recipient in a favourable position. In their written closing submissions, counsel for P4u contended that the fact that the disclosure of commercially sensitive information aimed at eliciting cooperation is ambiguous as to the precise conduct that the disclosing party is contemplating or requesting from its competitors does not preclude such conduct from forming the basis of a concerted practice. As they put it:

> "A collusive approach expressed with circumspection may well be sufficient to facilitate the substitution of practical cooperation for the risks of competition. It is a question of substance whether the information is capable of removing or reducing uncertainty and facilitating practical cooperation."

I accept that: as pointed out in Whish and Bailey on *Competition Law* (10th edn, 2021) at p. 120, a finding of concerted practice is "highly fact-specific". It is a question of fact whether the information disclosed is sufficient in all the circumstances to put the recipient in a favourable position in terms of removing uncertainty regarding the discloser's conduct on the market.

206. Hence, in Case T-105/17 *HSBC Holdings plc v Commission* EU:T:2019:675, where the applicant sought to annul the decision finding an infringement by object through exchanges between traders in Euribor interest derivatives, although the General Court largely upheld the decision it found that the Commission had been wrong to find that one particular discussion between rival traders gave rise to a violation. The Court stated, at paras 187-191:

> "187. The traders did indeed discuss the composition of their portfolios and in doing so exchanged confidential information, outside of the context of a potential transaction.
>
> 188. However, contrary to what is claimed by the Commission, that institution does not establish to the requisite legal standard that that discussion gave the traders an informational advantage that may have allowed them to adjust their trading strategies as a result.
>
> 189. First, the impression that emerges from that conversation is that the HSBC trader is boasting to the Deutsche Bank trader about a good trade that he made and the latter is congratulating him. The information provided, which is neither precise nor detailed, does not make it possible to read into that conversation the explanation of a 'strategy' which, as it was known by the Deutsche Bank trader in isolation, placed him in such a

> favourable situation as against his competitors that the Commission was able to infer that the object of that conversation was to restrict competition.
>
> 190. Second, as the applicants note, without being contradicted by the Commission, the pieces of information provided by the traders on their portfolios do not cover the interest rate tenors concerned or the extent of the positions concerned.
>
> 191. In the absence of more precise information of that order, it cannot be concluded that that discussion reduced or removed the degree of uncertainty on the market in such a way that the Commission could infer therefrom an impact on the normal course of pricing components in the EIRD sector without having to examine its effects."

207. In *Tate & Lyle,* it was not disputed that British Sugar revealed to Napier Brown its future pricing policy on the British sugar market. In *Comap*, the representative of the applicant was told by a competing producer of copper fittings that it planned a price increase at the end of the month. In Case T-342/18 *Nichicon Corp v Commission* EU:T:2021:635, on which Mr MacLean also relied, the General Court expressly rejected the argument that the disclosure made to the applicant by its competitor at a meeting was merely a general comment regarding pricing levels and therefore could not constitute confidential information. The Court stated, at para 133:

> "… contrary to the applicant's assertions, that information does not constitute a general comment regarding price levels or the expression of a general rule based on experience. Even though no precise figures are given in the minutes, that information nevertheless discloses to the other participants the content of the negotiations in which NCC was engaged with its customers for the following year and its decision or intention concerning its own conduct on the European market with regard to pricing …."

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

209. Moreover, although the disclosure of confidential information may be only unilateral, a concerted practice still requires an element of concertation. In *Tate & Lyle,* the impugned disclosure took place in the context of a series of 18 meetings between British Sugar and the sugar merchants. As the Court observed (at para 67):

> "By participating at one of those meetings, each participant knew that during the following meetings its most important competitor, the leader in the industry concerned, would reveal its future price intentions. Independently of any other reason for participating in those meetings, there was always one at least which was to eliminate in advance the uncertainty concerning the future conduct of competitors."

210. In *Comap*, the confidential information was given to Comap in response to a specific request by its representative for information about changes to the pricing policy of its competitor.

211. Mr MacLean relied in particular on the statement by the General Court in *Nichicon*, at para 157[15]:

> "… it is necessary to reject the argument that the minutes of the meeting do not refer to any reaction by the applicant to the information shared, so that no objectionable conduct can be imputed to it. Indeed, as is apparent from the case-law referred to in paragraphs 105 to 111 above, the mere disclosure of sensitive business information to competitors amounts to a prohibited practice, since it removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information."

212. However, in *Nichicon* the meeting where the particular disclosure in respect of which this observation was made was one of the regular multilateral meetings of suppliers of electrolytic capacitators at which confidential information was disclosed, and, in my view, para 157 of the judgment must be understood in that context. That is consistent with *Tate & Lyle, Comap* and the authority expressly relied on by the General Court for this statement (as cited at paras 105-111 of the judgment), the decision of the CJEU in Case C-286/13P *Dole Food Co v Commission*, EU:C:2015:184 (concerning a cartel where the three main suppliers of bananas each week discussed factors relevant to the setting of their quotation prices for the following week or gave indications of their price quotations*)*.

213. The importance of a close examination of the context was also made clear by another case on which Mr MacLean sought to rely, the judgment of the CJEU in Case C-74/14 *Eturas UAB v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42.

214. *Eturas* concerned a common online travel booking system used by travel agents in Lithuania. Each participating travel agent had an electronic account in the system and, on 27 August 2009, the administrator of the system sent them a message informing them that the maximum possible discount which could be granted for bookings via the system had been reduced to 3%. Technical modifications were then made to the system which made it more difficult for the travel agencies to grant discounts in excess of that amount, although technically it was still possible to do so. The Lithuanian competition authority held that those travel agents using the system at the relevant time which had expressed no objection to the change participated in an anti-competitive concerted practice. In response to a reference from the Lithuanian court, the CJEU noted that the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. After referring to those three elements, the Court continued:

> "43. …it must be pointed out that the case at issue in the main proceedings, as presented by the referring court, is characterised by the

[15] This aspect of the judgment was not challenged before the CJEU on the further appeal: n. 8 above.

> fact that the administrator of the information system at issue sent a message concerning a common anticompetitive action to the travel agencies participating in that system, a message which could only be consulted in the 'Notices' section of the information system in question and to which those agencies did not expressly respond. Following the dispatch of that message, a technical restriction was implemented which limited the discounts that could be applied to bookings made via that system to 3%. Although that restriction did not prevent the travel agencies concerned from granting discounts greater than 3% to their customers, it nevertheless required them to take additional technical steps in order to do so.
>
> 44. Those circumstances are capable of justifying a finding of a concertation between the travel agencies which were aware of the content of the message at issue in the main proceedings, which could be regarded as having tacitly assented to a common anticompetitive practice, provided that the two other elements constituting a concerted practice, noted in paragraph 42 above, are also present. Depending on the referring court's assessment of the evidence, a travel agency may be presumed to have participated in that concertation if it was aware of the content of that message."

215. However, in *Eturas*, the system was used by a number of competitors, the change made to the system, as announced in the notice, meant that when any participating travel agent offered a discount greater than 3%, the system would automatically reduce it to 3%, and each participating travel agent who saw the notice would know that the same approach was being applied to its competitors. In those particular circumstances, it is understandable that this gave rise to implicit coordination on pricing among those travel agents who read the notice and made no express objection. The importance of context for analysis of such unilateral communication was explained by the Advocate General in his opinion. Szpunar AG said, at paras 46-49:

> "46. In my opinion also, the concept of a concerted practice does imply reciprocity. A concerted action is necessarily the result of a consensus. However, the level of formalisation of that consensus should not be subject to overly rigid requirements, since this would undermine the versatility inherent in the concept of a concerted practice.
>
> 47. In particular, reciprocity should equally encompass tacit approval.
>
> 48. However, the possibility of inferring tacit approval, and therefore of establishing the existence of a consensus to cooperate rather than compete, depends on the context of the communication.
>
> 49. First, where an undertaking receives information relating to an illicit initiative and does not oppose it, its acquiescence in that initiative may be inferred from the absence of response, provided that the circumstances are propitious to the formation of a tacit consensus. The lack of opposition to an illicit communication is reprehensible because, under certain circumstances, mere lack of reaction from the addressee will

> lead the other party or parties to believe that the addressee subscribes to the illicit initiative and will comply with it. Therefore, in order to infer knowing participation of the addressee in a concerted practice, the context of interaction must be such that the addressee may be deemed to appreciate that the competitor will consider its silence as an approval and will rely on mutual action, even in the absence of response."

216. As the Court of Appeal stated in *Argos*, immediately after summarising the propositions on concerted practices derived from the case-law which I have quoted at para 77 above:

> "22. Counsel for all the Appellants submitted that many of the observations in the cases from which these propositions are drawn need to be understood in the light of the particular facts. They pointed out that it is just as essential to a concerted practice as it is to an agreement that there be a consensus between the two or more undertakings said to be parties to the agreement or concerted practice. *That is true*, but concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for this purpose." [emphasis added]

217. In my view, the circumstances of the isolated discussion between Mr Dunne and Mr Swantee were far removed from the situation in *Eturas* where a group of competitors are all being informed that they will each be subject to an automatic cap on price discounts through a system in which each knows that the others participate, or disclosures at regular meetings of a group of competitors as in *Nichicon*. Relations between O2 and EE were distinctly frosty before Mr Dunne and Mr Swantee met for the Landmark Lunch because of the dispute over EE's proposed launch of 4G services. Although I have found that Mr Dunne's remarks implied that O2 may seek by a 'big move' to reduce its reliance on the indirect channel and implied that he sought reassurance or support from EE, I have concluded that the remarks were too vague to remove uncertainty in EE as to O2's future conduct and I do not think that the circumstances were such that Mr Dunne could have inferred from Mr Swantee's silence any form of acquiescence or a consensus to cooperate.

218. Accordingly, I find that the first of the three elements necessary to constitute a concerted practice is absent. On that basis, it is unnecessary to consider whether Mr Swantee directly, or EE subsequently, "publicly distanced" itself from O2's anticompetitive approach so as to avoid being a participant in a concerted practice. But in case I am wrong and as it was fully argued, I proceed to address that aspect.

219. The scope and rationale of that principle was summarised by the CJEU in its judgment in the *Cement* case, as follows (citations omitted):

> "81. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive

> intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs….
>
> 82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.
>
> 83. The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk….
>
> 84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.
>
> 85. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting ….”

220. The expression “public distancing” is a term of art and somewhat misleading since the response does not have to be made publicly in the usual sense of the word. It means that the undertaking makes clear to the other party or parties involved that it wishes to take no part in the actual or proposed unlawful conduct or alternatively that it reports that conduct to the relevant authority, usually a national competition authority or the Commission. Save in the latter case, it is the understanding of the other participants that is crucial. Hence in Case C-510/06P *Archer Daniel Midland Co v Commission*, EU:C:2009:166, concerning a price-fixing cartel on the sodium glucomate market, the CJEU rejected the appellant’s argument that the withdrawal of its representative from a cartel meeting showed that it had ceased to participate in the cartel. After referring to the above passage from *Cement*, the CJEU stated, at para 120:

> “… it is indeed the understanding which the other participants in a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement. Accordingly, the Court of First Instance was fully entitled, in paragraph 247 of the judgment under appeal, to rule that the mere fact that the appellant had left the meeting of 4

> October 1994 could not, in itself, be regarded as a public distancing from the cartel at issue and that it was for ADM to provide evidence that the members of the cartel considered that ADM was ending its participation."

221. Similarly, in *Comap*, the General Court noted at para 75 that "the notion of public distancing as a means of excluding liability must be interpreted narrowly." The Court continued, at para 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…."

222. Here, O2 and EE sought to rely, first, on Mr Swantee's reaction in the meeting. It is said that he was shocked and showed by his body language that EE would not participate in any anticompetitive arrangement. Mr Swantee said in evidence:

> "… Ronan would not have left the lunch and taken my, you know, feedback/discussion as a green light. As I've said before, I'm convinced that what I said, the tone of voice I used and —— and, you know, the way I —— I acted that he was not believing that I was going to look at his pricing or any proposal from the competition. I would not take any —— any follow–up or activity from that. Zero."

223. Secondly, EE relied on the email sent by Mr Swantee to Mr Dunne on 29 September 2012, where he wrote that "the only outstanding action" following the lunch on EE's part was to investigate the 'Oscar-type' project that they had discussed: para 162 above. The word "only" was said to show that EE would have nothing to do with any anti-competitive discussion or exchange.

224. However, in my view, either individually or considered together, those matters cannot satisfy the requirement for public distancing as a matter of law. Although Mr Swantee was clearly taken aback by what Mr Dunne was saying, and so concerned that he started secretly to record the conversation, he did not suggest that he made any express protest or objection. Had he done so, it would doubtless have been recorded in Mr Blendis' note. Unsurprisingly, counsel could cite no authority where an individual's "body language" or demeanour was accepted as amounting to sufficient objection or distancing from an anti-competitive approach, and I consider that this would not constitute a "firm and unambiguous" expression of intention. I think it would also be an unworkable criterion on which to determine such a serious matter as participation in a concerted arrangement, and therefore be contrary to the principle of effectiveness. As for the email, that was at best ambiguous.

225. Moreover, it does not appear that Mr Dunne was left with the impression that EE was objecting or wholly uninterested. If he had felt that Mr Swantee was clearly opposed to any kind of anticompetitive exchange, Mr Dunne would hardly have called him some weeks later seeking to exchange confidential information regarding their companies' negotiations with Apple: paras 170-171 above. It would also be inconsistent with Mr Evans' text

message to Mr Dunne of 2 January 2013 suggesting that they should reassure Mr Swantee as part of strengthening "the resolve against the indirects": para 198.c) above.

226. Thirdly, EE relies on the meeting between Mr Blendis and O2's general counsel, Mr Smith: paras 180-187 above. I accept that more was said in the meeting than was recorded in Mr Blendis' note, as the meeting lasted for about 45 minutes. However, I think the problem as regards that meeting in the context of 'public distancing' is that the conversation was essentially forward-looking. Although Mr Blendis referred both to Mr Dunne's attempt to discuss UK distribution and to the call about negotiation with Apple, Mr Smith understood the thrust of Mr Blendis' message as seeking an assurance that there would be no more such approaches from O2. It is notable that in *Comap*, the Court rejected the applicant's assertion that it publicly distanced itself from an anti-competitive exchange at a meeting by means of a subsequent letter from its president to the president of the trade body at whose meeting the exchange had occurred. The Court stated, at para 77:

> "… it must be observed that the wording used by the applicant's President in his letter to the President of FNAS is too general to amount to a public distancing. The letter merely expresses concern in relation to the discussions on prices that might have taken place between the participants and contains a reminder of the applicant's internal policy in respect of competition law and, in that context, requests the President of FNAS to take steps to avoid such an anti-competitive practice; it does not, however, state that such a practice had actually occurred or that that letter was linked to the fact that its representative had initiated the concerted action in relation to pricing."

In my view, the position was analogous in the present case. Mr Blendis had been told by Mr Swantee to be "super-diplomatic" in his meeting with the general counsel of O2 and I think that is exactly what he sought to do.

227. Indeed, it became clear to me on the evidence that Mr Swantee's primary concern at the time was to do nothing which might disturb the forthcoming launch of EE's 4G offering, and therefore to avoid any action which might have escalated the situation and risked antagonising Mr Dunne, since O2 had been at the forefront of the litigation to stifle the launch. Although Mr Swantee turned to Mr Blendis for advice following the Landmark Lunch, Mr Blendis is not a competition lawyer but he had on his legal team a lawyer who is a competition specialist, Ms Robyn Durie. Mr Blendis agreed that the natural step would have been for him to consult her for advice as to what EE should do. He said that he did not do so because he was expressly instructed by Mr Swantee not to tell anyone else on his team about this (although he could and did consult Ms Durie about Mr Dunne's suggestion of an Oscar-type JV). Even when, following the telephone calls in October from Mr Laurence and Mr Harrison, Mr Blendis was authorised to instruct Slaughter and May in October 2012 (para 175 above), that was kept confidential from EE's head of corporate governance, Mr Colin Caldwell, who had regular contact with Slaughter and May on the company's behalf, and Mr Blendis specifically asked EE's relationship partner at Slaughter and May not to mention the matter to him.

228. Furthermore, although Mr Blendis agreed that it would have been appropriate to report the anti-competitive advance from Mr Dunne to the Board of EE and thought (although he could not clearly remember) that he would have done so, albeit in more general terms, I find that no such report was made. There is nothing about this in the Board minutes, and the Board directors at the time from DT, Mr Höttges, Mr Dannenfeldt and Ms Nemat, were all absolutely clear that they had not been made aware of this incident and had no doubt that, if they had been informed, it would be something that would have stuck in their memory.

229. Altogether, while I consider that Mr Swantee was genuinely shocked by what Mr Dunne was saying and absolutely opposed to any anti-competitive advance or approach from O2, I conclude that he was careful not to communicate that directly to O2, or to escalate the situation, out of concern that it might sour their already strained relations at a time when he was concerned not to antagonise them.

230. As regards O2, even if what Mr Blendis said to Mr Smith at their meeting had met the standard for 'public distancing', I think it came too late. The decision by O2 not to renew its agreement with P4u for new connections was communicated by Mr Dunne to Mr Whiting on 16 October 2012: para 140 above. Even though that decision was provisional in the sense that further negotiations took place, as summarised above, the critical acceptance by the O2 management that it could operate successfully without P4u had then occurred. I do not consider that the fact that the O2-P4u agreement did not actually expire until 31 January 2013 makes a difference. It was clear from Mr Evans' evidence that when P4u did not respond positively to his email of 5 December 2012 negotiations were effectively over. The meeting between Mr Blendis and Mr Smith did not take place until 14 December 2012.

231. The third element of concerted practice is a causal effect on the parties' conduct. As explained above, it is in that context that the *Anic* presumption applies. In circumstances where commercially confidential information is conveyed by one competitor to another, the presumption operates to found a conclusion that the recipient of the information will have taken it into account in determining its conduct on the market: see the EU Commission's Horizontal Cooperation Guidelines at para 62, on which counsel for P4u relied. On the basis that Mr Dunne gave such information to Mr Swantee, I accept that the presumption is engaged. However, it is only a presumption. Here, I consider that EE has clearly rebutted the presumption on the facts. Far from refusing to take up additional connections available from P4u as a result of O2's withdrawal, EE signed a new three-year trading agreement with P4u on 10 October 2012, just three weeks after the Landmark Lunch, and that agreement was amended in December 2012 to increase the volume that EE sold through P4u. Indeed, I do not think that P4u really suggested that the exchange between Mr Dunne and Mr Swantee influenced EE's conduct on the market.

232. I therefore conclude that EE was not party to a concerted practice in violation of competition law by reason of the Landmark Lunch and its aftermath. Since a concerted practice, by definition, must involve more than one party, that effectively means that O2 also was not party to a concerted practice by reason of these matters. In any event, the presumption of reliance on commercially confidential information as affecting conduct on

the market obviously does not apply to the party disclosing the information. And as I have found that Mr Swantee made no disclosure to Mr Dunne of EE's position, nor did he offer to give any support from EE for O2's strategy, I do not see any scope for the *Anic* presumption to apply as regards O2.

233. Furthermore, even if (contrary to my conclusion) these events gave rise to a concerted practice as a matter of competition law, that is distinct from the question of whether *in fact* O2's decision as regards P4u was causatively influenced by EE. As counsel for P4u correctly stated in their closing submissions, an anticompetitive disclosure of information (or indeed a concerted practice as to the terms of dealing with customers) is a 'by object' infringement under competition law: to establish the infringement it is unnecessary to show an anticompetitive effect. Accordingly, an allegation that the infringement had a causative effect has to be proved on the evidence.[16]

234. In that regard, I recognise that the Landmark Lunch occurred at a crucial time in the negotiations between O2 and P4u. It took place just a week after O2's ExComm "off-site" meeting and just over a fortnight later Mr Dunne told Mr Whiting that O2 would not renew its agreement for new connections. Nonetheless, given the fact that Mr Swantee remained passive during this part of the discussion, I do not see that Mr Dunne could possibly have regarded that as indicating that EE would support O2 if it exited from an indirect retailer in general, or from P4u in particular. Mr Dunne self-evidently did not approach matters according to the legal presumptions but as a matter of commercial reality. The fact that he did not take comfort from this meeting is supported by what he said to Mr Whiting many months later, when he told him that Mr Swantee was not inclined to discuss EE's distribution plans: see at paras 276 and 307 below. Moreover, for EE to refrain from seeking additional volume of available connections from an indirect channel would be a significant restraint on EE's commercial strategy, and Mr Dunne would have appreciated that this would be something that Mr Swantee would have had to discuss with his management colleagues even if personally he had been inclined to support such an initiative.

235. Accordingly, even if, contrary to my conclusion, the Landmark Lunch did give rise to an infringement of competition law, I find that this infringement did not materially influence O2's decision-making.

H. 2012: THE O2 DECISION - ALLEGED COLLUSION WITH VODAFONE

236. Mr Dunne acknowledged that before his call to Mr Swantee in November 2012 to ask about EE's negotiation with Apple, he had made a similar call to Mr Laurence of Vodafone UK who, he said, had shared with him information that Vodafone UK had transferred negotiation with Apple to be conducted at Vodafone Group level: para 170 above.

237. The documentary disclosure revealed that on the morning of 10 October 2012, Mr Dunne had a meeting with Mr Laurence, diarised for 45 minutes as a "catch-up". Mr Dunne had no note of that meeting, and he said (and I accept) that he could not remember what was

[16] This is issue 18 in the List of Issues directed for determination at this trial: Order of 9 October 2020.

discussed. But it was later that same day that Mr Laurence called Mr Swantee to raise the subject of EE's 4G pricing: para 165 above. This was also less than two weeks after the Landmark Lunch, where Mr Dunne had similarly raised the issue of EE's 4G pricing with Mr Swantee. And two days later, Mr Harrison of CPW called Mr Swantee on this subject: paras 164 and 166 above.

238. Mr Dunne accepted that he had a good relationship with Mr Laurence. For the other MNOs on the UK market, EE's imminent launch of its 4G service was a prominent concern at this time. I have found above that the phone calls by Mr Laurence and then Mr Harrison to Mr Swantee were coordinated. In these circumstances, it was submitted for P4u that it is highly likely that Mr Dunne and Mr Laurence discussed in their conversation early on 10 October the phone call which Mr Laurence was to make to Mr Swantee later that day. I agree.

239. However, the subject of those phone calls was EE's 4G pricing. The relevant question for present purposes is whether Mr Dunne had a similar conversation with Mr Laurence to the conversation he had with Mr Swantee regarding indirect retailers, which might potentially give rise to a concerted practice between O2 and Vodafone UK in that respect. In support of that allegation, P4u contended that:

a) Since Mr Dunne had sought to 'derisk' O2's position as regards EE, it would have been equally relevant to seek to do so with the other MNO for which P4u obtained connections;

b) While Mr Dunne's relations with Mr Swantee at the time were frosty, he had much better relations with Mr Laurence; so if he was prepared to make such an advance to Mr Swantee, he would have had no hesitation in doing so towards Mr Laurence; and

c) Mr Laurence showed both by his telephone call to Mr Swantee regarding 4G pricing and his exchange of information with Mr Dunne regarding negotiations with Apple that he was prepared to engage in anticompetitive, or potentially anticompetitive conduct.

240. Mr Dunne denied that he ever had any such conversation with Mr Laurence. As noted above, there was no evidence from Mr Laurence.

241. I accept for the reasons advanced by P4u that it is possible that Mr Dunne made a similar approach to Mr Laurence to the one that he made to Mr Swantee during the Landmark Lunch. But this is speculative, and I find that there is a wholly insufficient basis on the evidence to support such a finding on the balance of probabilities. P4u invited the Court to draw an adverse inference from the failure to put in a witness statement from Mr Laurence. As mentioned above, there are personal reasons, which are confidential, why Vodafone did not call Mr Laurence to testify and which I consider satisfactorily explain the decision not to call him. The main thrust of P4u's submission in this regard is that Vodafone should have obtained a witness statement from Mr Laurence prior to 10 December 2021, the date when witness statements were exchanged. They submit that although good reason for not calling Mr Laurence may have emerged subsequently, his written statement could then have been adduced pursuant to the CPR. Since no witness

statement from Mr Laurence was furnished along with the other witness statements served by Vodafone, it is apparent that Vodafone had decided not to adduce any evidence from him and P4u submit that it should be inferred that Mr Laurence would have been unable to deny evidence of collusive conduct.

242. However, the position on the pleadings is as follows. The original Particulars of Claim contained no allegations regarding Mr Laurence. The Amended Particulars of Claim served in October 2021 introduced (at para 50U) the allegations regarding the telephone call by Mr Laurence to Mr Swantee regarding 4G pricing and that Mr Laurence and Mr Dunne would have discussed a coordinated approach to 4G pricing in their discussion on the morning of 10 October 2012. In fact, the first of those allegations emerged from EE's Defence and was adopted and relied on as against Vodafone in P4u's Reply to Vodafone's Defence in October 2019. I have upheld those allegations on the evidence in any event, as set out above, and I accept that my finding is reinforced by the fact that Vodafone did not adduce evidence from Mr Laurence to rebut them. But the distinct allegations that Mr Dunne approached Mr Laurence to tell him that O2 proposed to reduce volume from the indirect retailers and sought to reduce the risk of Vodafone UK taking up that volume, and that Vodafone UK engaged with that approach, were introduced only on re-amendment of the Particulars of Claim formally made on 24 February 2022 and served in draft the month before. I consider, on the confidential evidence I have seen, that by that point Vodafone was justified in not approaching Mr Laurence on those matters. I therefore do not regard this as an appropriate case in which to draw an adverse inference from the failure to put in a statement from Mr Laurence addressing these specific allegations.

243. P4u also sought to rely on a passage in Mr Blendis' preparatory notes for his meeting with Mr Smith, which he sent in advance to Mr Swantee. In the part of that note where he set out details of the anticompetitive advances which he was only going to provide if pushed to do so, one bullet reads:

> "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…."

Counsel for P4u submitted that the word "often" "must have reflected a contemporaneous understanding that Mr Dunne had, on <u>multiple</u> occasions, referred to coordination in this way." However, there was in fact only one inappropriate <u>call</u> from Mr Dunne (regarding Apple), as opposed to the in-person discussion at the Landmark Lunch. The two other calls came from Mr Laurence and Mr Harrison. This note was not drafted like a legal document and I do not see that it can sensibly be regarded as a basis for finding that Mr Dunne must have referred to Vodafone on another occasion as well as in the phone call about Apple.

244. I should add that reliance was also placed on Mr Evans' email of 10 January 2013, commenting on the text of a presentation O2 was preparing for Telefónica Europe, where reference was made to the other operators recognising that "the distribution landscape must change" and that O2 is "supporting the move to rebalance negotiation strength to the operators and away from distribution channels." Mr Evans could not remember this email or explain its context, but that is hardly surprising after so many years. It was of course

sent after O2's decision not to renew the main agreement with P4u had been taken. It makes no express reference to Vodafone. And those phrases have to be read in context of the paragraph as a whole, which speaks of highlighting "the commercial risk of withdrawal from Phones 4U" and concludes:

> "A unilateral move will NOT create a change in UK distribution. If others follow, the change will come about."

I regard this as no more than a general report by O2 to Telefónica Europe, summarising the overall picture at a time when all the UK MNOs were known to be concerned about the strength of indirect retailers, and it does not in my view advance the matters at issue one way or the other.

245. Accordingly, I reject the allegation of infringement by collusion between O2 and Vodafone UK in 2012.

I. 2013: O2/TELEFÓNICA AND VODAFONE

246. As stated above, the O2-P4u agreement for new connections duly expired on 31 January 2013. That left the separate agreement for upgrades and SIM-only connections which had a further year to run.

247. On 10 October 2013, Mr Mackle from O2 told Mr Dobson that O2 would not seek to renew this agreement. Mr Dobson's email reporting on this conversation the following day recorded that O2 had explained this in terms of their overall strategy to place a greater proportion of business in their direct channel and to focus on one indirect retailer who could be a strategic partner from whom they could maximise their profitability.

248. In around November 2013, P4u approached O2 about taking an equity stake in P4u in return for an exclusive arrangement to sell through P4u on substantially improved terms. O2 examined the proposal internally and in around December 2013 rejected the proposal as not in its interests. I note that at about the same time, and it seems as a result of O2's indication that it was pulling out, P4u approached Vodafone UK and EE with an offer that each should take a 15% equity stake in return for a renewed long-term contract. P4u saw this as a means of cementing their long-term relationship with the MNOs.

249. The O2 witnesses referred to the decision not to renew an agreement with P4u on upgrades as the almost inevitable consequence of the earlier and much more significant decision to leave P4u for new connections. Only 10-15% of upgrades came to O2 through the indirect retailers (as compared to about 50% of new post-pay connections), and as O2 already had a contractual relationship with upgrading customers it would be able to approach them to secure an upgrade directly. Mr Dunne said that P4u had a commercial incentive to seek to churn a customer seeking an upgrade to another network (since the commission it earned on new connections was higher than on upgrades) and that:

> "it logically followed, given our position in 2013, that it made sense to get out of P4U altogether, so that the O2 logo was removed from above the door at P4U and customers realised that they needed to go to an O2 store

> to connect to our network and we had a chance to sell to them directly. Just hanging in with P4U purely for upgrades was commercially untenable for us in the longer term. Similarly, the volume of SIM only sales was sufficiently low to be immaterial to our exit decision and P4U sales of SIM only connections could not have supported a deal alone."

Mr Evans said that an exit from P4u for upgrade and SIM-only sales "was logical and straightforward" once O2 had decided to exit for post-pay new connections.

250. Mr Whiting by contrast said that the decision was surprising since:

> "O2 was potentially surrendering a very profitable cohort of customers – the proportion of P4u's customers who were already connected to O2's network and who might buy an upgrade connection when they visited a P4u store."

And he pointed out that late 2013 was a time when O2 was rolling out its 4G network across the UK, which would lead to a high demand for 4G upgrades. Mr Dobson similarly said that the decision did not make commercial sense to him.

251. In my view, the reality was somewhere between these two positions. Mr Dobson explained that P4u did not have a commercial incentive to churn a returning customer to a new connection on another network; apart from anything else, that involved more work in terms of credit checks, etc.; and Mr Whiting pointed out that P4u looked at the lifetime value of the customer, not simply at the commission for a new connection. In any event, I do not see that from O2's perspective this changed as a result of O2's terminating P4u's right to sell new connections on their own network: the benefit to P4u of churning a customer to another MNO would remain the same. However, the logic of O2 terminating with P4u on upgrades derives from the more basic strategy that O2 was developing of enhancing its direct channel and reducing its dependence on the indirect retailers. I think that emerges from the internal O2 documents.

252. A detailed slide presentation entitled "Distribution strategy update", dated 14 June 2013, sought to provide an update on progress with the distribution strategy and outline the future options available. After summarising the financial pressures in the UK market, the presentation set out O2's three objectives:

> "1. Increase the volume traded in our most profitable channels, i.e. Direct and within that enable online growth
>
> 2. Maximise the profitability of our Indirect distribution through sound commercial agreements
>
> 3. Seek opportunities to change TUK distribution model to increase profitability allowing us to invest in new products and services"

253. One of the subsequent slides stated:

> "Last year we agreed to start the journey to exit P4U. There was little value in the deal being offered and the timing was right given other events that were going to happen through 2013 and 2014 [referencing the roll-out of 4G, the Refresh project and the expiry of the upgrades contract with P4u in January 2014] … It was the first step in effecting long-term change to TUK distribution model"

254. Under the third heading, some of the slides looked at "Future scenarios for the Indirect market". Those included: "Significant MNO leaving P4U" with the possible consequence that "Phones4U could go under"; and "Significant MNO leaving CPW" with the possible consequence that "CPW could go under".

255. The subsequent slides looked first at "Exit P4U" and after setting out risks and benefits concluded with the recommendations to exit P4U for upgrades in January 2014, and then also for prepay. A further slide examined the potential to "Exit CPW", a topic on which the presentation said that O2 would "continue to work with Bain on the analysis being conducted in this area." That is a reference to the well-known management consultancy, Bain & Co ("Bain"), who had apparently been instructed by Telefónica Europe to assist on strategic modelling and planning, including for the national operating businesses.

256. Hence a slide presentation dated 20 June 2013 and apparently presented by Bain at a meeting with Ms Castillo entitled "Telefónica Europe: Operating model transformation plan", considered steps that could transform the Telefónica Europe distribution model across various national operating businesses, including the UK. And consideration of the UK included various scenarios involving exit from CPW, including where other MNOs follow O2 or where O2 follows others. Although not explored with the witnesses, it seems clear that Telefónica Europe were analysing and 'war-gaming' strategy for distribution, with the assistance of outside consultants, for the group's main European businesses.

257. In this same period, O2 was going through the process of presenting its 3YP to Telefónica Europe. The presentation which it made on 17 June 2013 emphasised its objective of "delivering a leaner business with digital at its heart". Distribution was only one aspect of this plan, and in that regard the presentation referred to the moves O2 had made to "disrupt" the market model, through the exit from P4u, the introduction of the Refresh project and a further project that involved franchising stores. The presentation stated that O2 was "actively evaluating further opportunities" in distribution, specifying:

> "- A complete withdrawal of P4U business for SIMO and Upgrades in January 2014. The 3 year plan assumes this to be the case
>
> - Working with Bain to model scenarios that could drive further change in the UK distribution space, such as a Carphone Warehouse exit at the end of the contract (end of 2014)"

258. I think that sets the context for an email Mr Evans sent to Ms Lopez at Telefónica Europe on 27 June 2013, stating:

> "After our call this morning I listed all the transformation activity the UK business has undertaken in the past 6 quarters. My understanding is that

all of these are aligned to your thinking. At times you have voiced your concern that we don't deliver. Yet the past 6 quarters have demonstrated we are changing and following through with action:

[Listing various steps O2 had taken, including]

Phones4U exit (the only operator to make this move)

…

I am far from comfortable with UK profitability. That's why we're analysing further options for shaping the Indirect Market. I'm confident we'll get to a position whereby we exit from A1, Tesco and potentially CPW. This latter option must be one that Ronan and others in UK support. Our analysis will frame the opportunity and enable a robust discussion to take place.

Let's pick it up next Thursday. What I'd welcome is your view of what action you would take IF you do not support the proposals from the UK team."

259. That was effectively Mr Evans' preface for the full presentation which O2 made to Telefónica Europe on Thursday, 4 July 2013, entitled "TUK follow-up discussion on Distribution and 4G Pricing". The forward strategy there outlined was to drive more business "through TUK Direct channels". One slide listed the "TUK decision points for its indirect partner relationships" as follows:

"- Exit P4U on gross

- Exit Tesco
- Exit A1 Comms
- Exit Phones4U for Postpay Upgrades & SIMO
- Maximise value of CPW contract
- Exit CPW if TUK direct performance is appropriate"

260. And the presentation concluded:

"● Indirects have a strong foothold in the UK market and are TUK's least profitable channel

- Our primary focus is on driving more business to our most profitable channels i.e. Direct
- TUK has a clear set of objectives for addressing these challenges. We've already made some bold moves (Refresh direct only, P4U exit) and we have an appetite to do more

- We've concluded our analysis with Bain on further radical moves
  - The outcome for TUK is dependant [sic] on other MNOs' moves in distribution
  - If other MNOs adopt similar strategies there is substantial upside (although OIBDA dilutive in the 3YP)
- Our recommendation is to remain one step ahead of the other MNOs (i.e. option A); taking the actions within our control that would move us towards option Al
  - Complete P4U exit
  - Continue to pull the levers that maximise our direct performance
- If another MNO makes a radical distribution move we will reassess risk and reward of further TUK moves"

261. It seems that Mr Dunne did not attend the meeting on 4 July since he was on holiday. From a written update prepared for his return, it seems that Telefónica Europe agreed that O2 should move ahead with the steps of exiting from Tesco and A1 Comms. The briefing continued:

> "The subsequent step of complete exit from P4U was more contentious with Pilar [Lopez] wanting to understand what that would mean in terms of volumes (for us and the market) before committing. Mark [Evans] made the point that we are currently half-pregnant with P4U (worst possible long-term state) and that therefore we either need to follow through with a complete exit or potentially reverse our previous decision to exit gross, and that whilst there's a risk, we have to walk away from P4U if we want to have a chance of not going back to square one. Following a positive decision on P4U, we can then talk to CPW about commercials whilst also keeping options open for an exit from them at end 2014.
>
> It was accepted that given the commercial terms (payment in advance), for any exit from P4U in Jan 2014 we need to make a decision by October…. Pilar was keen that we also look at alternatives which we said we'd be happy to look at subject of course to compliance with competition law. She also indicated she is open to remain with indirects but on the basis that the commercial terms are strengthened in our favour. Hence the review at end of July will explore all permutations and seek a collective view of the risks, rewards and preferred outcome."

262. O2 duly prepared a further presentation slide-pack dated 31 July 2013 considering the business impact of stopping trading with P4u and various potential scenarios.

263. At the O2 leadership team meeting on 9 September 2013, it was agreed that O2 would fully exit from P4u when the contract expired. That followed the recommendation in an internal

slide deck prepared for the meeting, which analysed the arguments and impact, and noted that since the cessation of trading with P4u on new connections at the start of the year,

> "The Phones 4u relationship has remained professional throughout this period".

264. As noted above, Mr Dobson was told about this decision on 10 October 2013. However, it seems that at that point this was only an internal O2 decision that still required approval from the Project Approvals Committee ("PAC") at Telefónica Europe, which received a presentation on the subject from Mr Dunne on 25 October 2013. Mr Dunne explained that there would be discussion before that meeting to seek alignment of views with the key personnel in Madrid and it would be considered at one of the regular Monthly Review Meetings ("MRM").

265. Although Mr Dunne suggested that this was something of a formality, it appears that as regards this particular decision it was not a foregone conclusion. On 18 October 2013, Ms Pilar Lopez had expressed concern about O2 becoming over-dependent on CPW for its volumes on leaving P4u, making any later exit from CPW much more difficult. One of the questions she put was relayed to the O2 team as:

> "What if we did not exit P4U, can we negotiate with P4U harder to get more favourable terms (similar or better than CPW) so the indirect volumes can be shared between the two vendors? I.e. so we have more strength in negotiations with CPW in 2014?"

266. Three days later, Ms Lopez wrote again to Mr Evans, re-emphasising her points and concluding:

> "The decision to exit [P4u]? It is not clear that customers will come more to our shops vs today scenario. I would rather get to the end of 2014 with two indirects than with one."

267. When these communications were put to Ms Castillo, she was reluctant to acknowledge that Ms Lopez was being sceptical about O2's proposal to withdraw fully from P4u and said that Ms Lopez was just seeking more clarification and analysis to test the proposal from the UK management. But Ms Castillo was essentially speculating: she had no direct recollection of the discussions at the time, still less of these emails (which is of course unsurprising as she was not copied in on them) and although Ms Castillo knew Ms Lopez well, in the absence of evidence from Ms Lopez herself I see no basis to find that Ms Lopez's emails to Mr Evans did not mean what they said. The strategy was to push more O2 volume into its direct channel but Ms Lopez was concerned whether a full withdrawal at this point from P4u would in fact advance that strategy. That is consistent also with the evidence of Mr Varela Sanchez, whose recollection was assisted by some brief contemporary notes, who said that from Telefónica Europe's perspective the goal was for O2 to reduce its dependence on the indirect channel generally, so that if complete withdrawal from P4u meant greater reliance on CPW, there was concern as to whether this

would promote that objective. And Ms Castillo said, which I accept, that Ms Lopez would have briefed her on their thinking at the time.

268. The frustration which Telefónica Europe's attitude caused to O2 emerges from the comment from one of Mr Evans' team in response to the repeated questioning from Madrid: "These questions feel like we are going backwards." And they prompted a long email (blind copied to Mr Dunne) which Mr Evans sent to Ms Lopez on 23 October 2013, the day before the MRM and two days before the PAC meeting, on the subject: "Distribution/Phones4U decision". Mr Evans summarised O2's distribution strategy that involved strengthening direct distribution and potentially moving to a franchise model in certain "less than key" cities. As regards the indirect retailers, his email stated:

> "the key is to ensure that any future Indirect Channel relationship with Operators rebalances the economics. The worst example we had was with Phones4U who commanded the majority of the economic value of a customer, leaving Telefónica UK with far less than 50% yet still with the requirement to run the network and IT platforms.This in our opinion was weighted too much in their favour and needed to change. Hence over the last year, we jointly agreed to try to reduce the power of the Indirects, starting with withdrawing the gross additions business for postpay customers from Phones4U.
>
> So if the above is the UK distribution strategy, the next question is what further steps can we take to move us in this direction, remembering that ultimately we're not focused on a specific distribution outcome but one which delivers a more efficient economic model.
>
> In October 2013, we have a decision to make. Do we:
>
> A) Exit Phones4U business entirely, removing Postpay upgrades, sim only connections and prepay?
> B) Stay at present with Postpay Upgrades, Sim only and Prepay marketed through Phones4U but not reentering for Postpay gross additions?
> C) Re-enter Phones4U for Postpay gross additions?"

Mr Evans proceeded to dismiss the third option as unattractive in view of the terms that P4u had offered, and described the second as:

> "sub-optimal as Phones4U are able to use our brand which ultimately gives the impression that they continue to offer all network operator services yet Telefónica UK receive only a very small proposition of their custom (at highly unattractive rates). Hence we're putting forward that a full withdrawal is both in our economic benefit short-term and creates momentum (hopefully for others to follow) for longer-term changes in the UK distribution model."

And Mr Evans attached further financial modelling for each option, which he said supported the full withdrawal from P4u. That is the same modelling which O2 had prepared for the MRM to be held on 24 October and the PAC on the following day.

269. It seems that this must have finally persuaded Ms Lopez to support the proposal. Although there was no evidence of further communications from her, Telefónica Europe approved the proposal at the PAC on 25 October 2013 and Ms Castillo was clear that this would have been a collective decision on the part of her team. The minutes of the PAC significantly state:

> "RD presents the paper. T.UK proposed to stop trading with P4U (SIMO, upgrades and P&G). This move is framed in the LTP debate of the distribution channel strategy. P4U shows the lowest profitability and by exiting this channel T.UK will make visible to others in the market what our channel strategy is.
>
> EC remarks that this step is aligned with the strategic objective, the challenge is not to increase dependency on CPW and leverage on our own channel.
>
> **Action:**
>
> T.UK. to migrate to direct as many P4U volumes as possible so to try to avoid further dependency on CPW."

270. I have set out these exchanges in somewhat exhaustive detail because I think that what occurred and when is significant for two issues that I have to decide: the first relates to the meeting between Mr Dunne and Mr Whiting on 27 January 2014; and the second to the meeting between Ms Castillo and Mr Philipp Humm, the Regional CEO for Europe at Vodafone Group, on 20 September 2013. Although the Castillo-Humm meeting came first, I will consider them in reverse order.

271. As noted above, Mr Dobson was told on 10 October 2013 that O2 would not be renewing the agreement on upgrades. On 22 October 2013, Mr Whiting wrote a friendly email to Mr Dunne, in which he said:

> "Clearly we were disappointed with the news from your team last week but not altogether surprised."

272. He sought a meeting with Mr Dunne to discuss various matters. Mr Dobson said that he continued to have discussions with representatives of O2 in respect of the parties' commercial relationship in the period between October 2013 and January 2014, and of course there could always be hope on P4u's part that O2 might reconsider its decisions. The O2 witnesses also confirmed that they continued dialogue and engagement with P4u. I think it is clear that relations between the personnel in the two companies remained good. But there were no serious negotiations about any new agreement.

The 27 January 2014 meeting: part 1

273. On 27 January 2014, a meeting was held in O2's offices in Slough, attended by Mr Whiting and Mr Dobson from P4u and by Mr Dunne, Mr Evans and Mr Mackle from O2. It appears that it was O2 that requested the meeting. Mr Whiting said that P4u's objective was either to get O2 to change its mind or to get them to agree a short extension to the upgrades

agreement that was about to expire, to give space for further negotiation. Mr Dunne said he understood that the purpose was to talk through the rationale of O2's decision (and also O2's decision to reject P4u's offer of equity). He said in his witness statement:

> "As far as I was concerned the 27 January 2014 meeting was not going to change any of that but it was agreed by me as a matter of professional courtesy, bearing in mind that TUK had had a long and perfectly cordial relationship with P4U to that point, and as we continually kept our distribution model under review, we may have wanted to re-establish that relationship at some point in the future. I envisaged that P4U would continue to do business and I was keen to ensure that we retained the option to trade with them again. "

274. In the discussion, it became clear that an extension of the upgrade agreement was not on the cards. Mr Dunne and Mr Whiting then had a private discussion between just the two of them in Mr Dunne's office. Mr Whiting said that it was not unusual for them to speak together independently of the wider teams.

275. Mr Whiting pressed Mr Dunne on an extension to the agreement on upgrades, stressing that the termination of P4u's right to sell upgrades would mean that when O2 customers returned to a P4u store, P4u would switch them to another network so that O2 would lose the majority of those customers to the other MNOs which had agreements with P4u. Mr Whiting's evidence was that Mr Dunne recognised that O2 would lose some customers, but believed it would be nothing like the proportion Mr Whiting suggested since O2 would be contacting its customers early, before their existing contracts expired, to offer them an upgrade directly. Mr Dunne said that he explained to Mr Whiting the commercial rationale in terms of reducing O2's reliance on indirect channels and driving more business through its direct channel, which it expected to do by differentiating its direct channel with products like Project Refresh. Mr Dunne told Mr Whiting that the decision on upgrades, which would take effect a few days later, was final and that he would not be reopening the question. As I understood it, the evidence as to this part of the conversation was not disputed.

276. Mr Whiting's account of what happened next was summarised in an email he sent on 31 January 2014 to Mr Stephen Lloyd, the Chief Legal Officer and Company Secretary of P4u, which I should quote in full:

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

277. Mr Whiting said that he had a notebook with him at the time and made notes during the meeting, including the names of the specific executives to whom Mr Dunne referred. He said he knew of Mr Colao and Mr Humm but did not recognise Cesar Alierta Izuel or Eva Castillo Sanz's names and that he looked them up on Telefónica's website afterwards to see who they were and how their names were spelt.

278. Both Mr Whiting and Mr Dobson said that after they left O2's offices they discussed the meeting in the car-park. Their evidence was that Mr Whiting then told Mr Dobson that Mr Dunne had said that one of the reasons O2 could not revisit its decision to end the relationship with P4u was because of commitments given between senior Telefónica and senior Vodafone Group executives.

279. Mr Whiting said that he discussed the conversation either the next day or shortly afterwards in his office with Mr Lloyd, and Mr Dobson was also present. Mr Lloyd told them that any such discussions might well be illegal and anticompetitive. But all three were puzzled as to why Mr Dunne had said this and whether it was true. After a full discussion, they decided not to escalate the matter with Vodafone or anyone else, since that might damage the very good relationship they felt they had with Vodafone at the time and there was no suggestion that it intended to exit P4u. Mr Lloyd said that they also did not wish to alienate O2: although O2 had terminated its relationship with P4u, it might seek to come back if its strategy changed or was not successful.

280. However, Mr Lloyd told Mr Whiting to prepare a note of what Mr Dunne had said in the form of an email to him. Hence the email quoted at para 276 above.

281. That conversation is the foundation for the pleaded allegation at para 131 of the Re-Amended Particulars of Claim:

> "… one or more of Telefónica and/or Telefónica Europe and/or O2:
>
> (a) Unlawfully colluded with and/or made unlawful commitments to Vodafone Group that prevented renewal of the O2 agreement. P4U is unable to identify the precise content of the commitments but avers that such commitments must logically have involved one or more of the following elements:
>
> i. A commitment to cease or reduce supplies to P4U (alternatively, supplies to both or at least one of P4U and CPW)
>
> ii. A commitment not to extend, renew or replace O2's commercial relationship with P4U (alternatively, with both or at least one of P4U and CPW)
>
> iii. A commitment to move towards supplying at most one of P4U and CPW.
>
> iv. A commitment to reduce or eliminate O2's reliance on retail intermediaries in the UK.
>
> (b) Unlawfully disclosed to Vodafone Group their future intentions in relation to one or more of the following aspects of their commercial conduct on the market (in

competition with Vodafone Group):

i. The extension, renewal or replacement of O2's commercial relationship with P4U.

ii. The extension, renewal or replacement of O2's commercial relationship with retail intermediaries in the UK generally and /or P4u and/or CPW specifically.

iii. The choice between trading with both or only one of the major retail intermediaries in the UK (i.e. P4U and CPW).

iv. The reduction or elimination of reliance on retail intermediaries in the UK"

282. And at para 133 P4u pleaded:

> "…, it is to be inferred in the circumstance pleaded above that the commitments and/or disclosures of information were not unilateral but were provided in return for equivalent commitments or disclosures from Vodafone Group and/or Vodafone UK. Without prejudice to the generality of the foregoing, it is inherently unlikely that an undertaking would provide a competitor with confidential and commercially sensitive information and/or a commitment as to its future conduct on the market unless it had received and/or expected to receive corresponding information and/or commitments in return."

283. The allegation of commitments to Vodafone Group was only pursued as regards Telefónica SA and/or Telefónica Europe, not O2. While P4u alleges that it is to be inferred that the alleged commitments/disclosure as between Mr Alierta and Mr Colao were given around September 2012, it alleges that the commitments/disclosure between Ms Castillo and Mr Humm were given around September 2013.

284. Mr Dunne emphatically denied that he said anything of the sort to Mr Whiting. He rejected the allegation as "nonsense."

285. Both O2/Telefónica and P4u submitted that the Court has to decide which version of the conversation to believe. Their respective counsel set out a series of factors as to why the evidence of Mr Dunne or, conversely, of Mr Whiting should be preferred.

286. However, although I will return to this question below and set out my finding, I do not think that it is in fact necessary to reach a firm view. The critical question is not what Mr Dunne may have said to Mr Whiting on 27 January 2014, but whether in fact any such commitments were given or such information exchanged between Telefónica and Vodafone regarding O2's exit from P4u. As to that, I find that no such anti-competitive exchange has been established. I address separately the two instances identified in Mr Whiting's account of the conversation.

(a) Ms Castillo — Mr Humm

287. As the Regional CEO for Europe at Vodafone Group, Mr Humm was in effect Ms Castillo's opposite number at Vodafone. Although they both assumed their roles in the autumn of 2012, the evidence was that Ms Castillo first had an introductory telephone call with Mr Humm in early September 2013, which Mr Humm had sought to discuss a problem over a Vodafone-Telefónica network JV in the Czech Republic. That led to their first meeting, which took place in Madrid in mid-September 2013. P4u focussed intensively on that meeting.

288. As I have observed above, there was no agreed agenda for that meeting or proper note of what was discussed. Ms Castillo, understandably, had no real recollection of the meeting (other than that it took place) but she was sure that no commitments of any kind were given nor, she said, that there was any discussion of P4u. Mr Humm also had little recollection of the discussion, but he had a notebook containing manuscript notes. They are very much abbreviated notes – a sort of aide-mémoire of particular points. There is an item in that notebook which relates to this meeting, and it seems that it covered a number of key markets, including Spain and Germany as well as the Czech Republic. Under the heading "UK" Mr Humm had written: "out distribution".

289. Much was made in cross-examination of Mr Humm of whether Mr Humm's note "out distribution" was made *during* the meeting, as a headline reference to the topics discussed, or (as Mr Humm maintained) *shortly before* the meeting as a list of topics he intended to discuss. I do not think this matters, since I reject the evidence of Mr Humm that although he had intended to discuss this topic with Ms Castillo they then did not do so. Mr Humm said that he cannot recall much about the discussion (which again is not surprising after so many years) and I do not see how he can be so sure that they did not reach this topic. This was a meeting planned, according to Ms Castillo's diary, to last for 90 minutes, although they both said it did not last that long. The diary arrangements for Mr Humm's arrival and departure indicate that it lasted about an hour, which in my view left scope for a broad ranging discussion. Ms Castillo and Mr Humm were both responsible for markets across Europe, and the UK was an important national market for both groups. If Mr Humm had intended to bring up the UK in their discussion, I think in all probability he would have done so; and then it is likely that he would have raised the topics set out in his notebook.

290. Mr Humm explained the note "out distribution" as follows:

> "I think that I was interested to gain a sense of whether Telefónica felt good about having exited P4U.".

Accordingly, I consider that Mr Humm wanted to find out how Ms Castillo felt the UK arm of Telefónica was doing, having reduced its reliance on indirect distribution in the UK, and that he raised this with Ms Castillo.

291. However, although I find on the balance of probabilities that this matter was raised, that is a very different thing from Ms Castillo making a commitment to Mr Humm that O2 would fully exit P4u. Ms Castillo had not come to the meeting expecting to talk about UK distribution: it does not feature in the detailed briefing notes her team had prepared for her. Mr Humm, for his part, was in no position to give any commitment in return from

Vodafone, or even to disclose any details of what Vodafone's UK business was contemplating, since Vodafone UK had not begun to address this matter. As set out below, at the start of 2014 Vodafone UK was fully expecting to sign a new deal with P4u once their current contract expired. It is notable that P4u recognised in its pleading that it is "inherently unlikely" that an undertaking would provide either a commitment or commercially confidential information to a competitor without receiving a corresponding commitment or information in return: para 282 above. In those circumstances, for Ms Castillo to have given any commitment to a competitor as to O2's future conduct or to disclose its internal commercial strategy would have been an extraordinary thing to do and I find that, as a highly accomplished business person, she would not have done so. Moreover, the chronology of the discussions between O2 and Telefónica Europe set out above shows that at the time of this meeting, Telefónica Europe had not yet been convinced by O2's wish to cease dealing with P4u for upgrades, so Ms Castillo did not know how that would be resolved.

292. I consider that, at most, Ms Castillo told Mr Humm that O2 was doing fine and that its move to reduce reliance on an indirect retailer in the UK market had not caused problems. This falls far short of any commitment, as alleged by P4u at para 131(a) of the Particulars of Claim. I accept that, while very vague, this may cross the boundary of anti-competitive exchange of information, and that may be why Mr Humm was so insistent in his oral evidence that he had not raised the topic at all. However, since this does not involve disclosure of future strategy I do not think it supports even the most general allegation of anti-competitive conduct pleaded at para 131(b)(iv). But even if that occurred (and I emphasise that I make no finding since that would be pure speculation), I consider that such unilateral passing of information by Telefónica Europe to Vodafone could have no causative effect on O2's own conduct. And I find that any presumption that it had an effect on Vodafone's conduct is rebutted by the fact that Vodafone UK's decision to leave P4u was not reached until many months later, in mid-2014, after significant developments in the UK market and extensive and detailed negotiation between Vodafone UK and P4u. By that stage, the fact that O2 had exited from P4u had long become public knowledge. Indeed, Mr Whiting had told Vodafone UK in confidence in November 2013, as part of the discussion about a possible equity stake and deeper partnership (see para 248 above), that P4u was likely to separate from O2. And it was in November 2013, a few months after Mr Humm met Ms Castillo, that Vodafone UK signed an Overlay Agreement with P4u by which it agreed to take extra volumes of connections above those specified in the Vodafone Agreement.

293. I should add that I do not think that the text messages which Ms Castillo and Mr Humm exchanged on 2 October 2013, which do not relate to the UK, take the matter any further.

294. It is necessary to address also a text message sent by Ms Castillo to Mr Dunne on 25 October 2013, which said:

> "I had a conversation with JMAP yesterday. He gave me info re some of your competitors. I will call you later. Eva"

"JMAP" refers to Mr Alvarez-Pallete, Ms Castillo's predecessor as CEO of Telefónica Europe and by this point the Chief Operating Officer of Telefónica SA.

295. Ms Castillo said she did not remember this text message, and while she accepted that she presumably would then have called Mr Dunne, she had no recollection at all of what the information was. She put forward some suggestions which I found implausible, but in any event were pure speculation. I do not think that Ms Castillo can be criticised for failing to recall this. It occurred over nine years previously, and she will have had innumerable communications with the heads of Telefónica's various European operating businesses. The difficulty is that there are a wide range of possibilities: there is always gossip in an industry and snippets of information come out. I do not think any reliable inference can be drawn from the fact that Ms Castillo did not set out the information in an email. In my view, this message is much too slender a basis for an inference that commercially confidential information was being exchanged between Telefónica and its competitor defendants to this action.

(b) Mr Alierta – Mr Colao

296. Mr Alierta Izuel, who was chairman and CEO of Telefónica SA during the relevant period, had been due to give evidence, but for unfortunate health reasons was then unable to do so. His witness statement was accordingly admitted under CPR 32.5(1). Mr Colao did give evidence and was cross-examined. He was asked whether he had heard the expression "market repair" used with regard to the UK market, which he said was probably by value of assets the fifth most significant national market for the Vodafone Group at this time (after the United States, Germany, Italy and South Africa). He replied that he had heard it many times and explained it as follows:

> "The understanding of "market repair" is basically, in this context, in the UK context -- it could be many different things in other markets -- but used in this context, it was really the dominance of indirect and the inability of operators to manage their own customers, and the consequences in terms of churn, profitability, loyalty and so on. So it was the uniqueness of the UK situation.
>
> …
>
> The solution -- the -- on my side, I can speak for myself, I cannot speak for the others. My side, I was comparing the number of direct stores that we had in Germany, in Italy, divided by population, and UK was under-indexing. Therefore, the solution was to have even more directly owned stores, or franchisees, which was discussed at the time, to improve the ability to communicate, to distribute, to give to customers and have a relationship with customers. As a consequence of that, that would have required reducing the number of indirect stores back to the observation that his Lordship made before, or having one of the two getting out. But it's a matter of total numbers of stores. You can have two smaller indirects or only one."

297. Mr Colao met Mr Alierta in Venice on 8 July 2014. That was the occasion of an industry trade association meeting and before the formal meeting he had a private breakfast meeting with Mr Alierta and Mr Stéphane Richard, the CEO of Orange. The meeting was proposed by Mr Alierta to "discuss some of the important issues that are happening in our industry". A few days before, Mr Alierta sent a list of topics to be discussed, of which the first was: "General situation of the sector". Mr Colao explained that they would all have understood that this referred to the major trends in the sector. Altogether, the CEOs were concerned about potential changes to the EU telecommunications regime, and this was a time when a new EU Commission was being formed, so this was something that they discussed. The fourth item, "Cooperation model of the sector" referred to joint efforts in lobbying the Commission and other politicians on matters of common interest. Mr Colao said that there was no discussion of market repair in the UK at this meeting, or particular discussion of the UK market at all.

298. The Venice meeting in any event took place long after Mr Dunne met Mr Whiting and allegedly referred to commitments. Mr Colao readily accepted that he had met Mr Alierta previously from time to time, both in the context of meetings of trade and industry bodies and, occasionally, on a one-to-one basis. Mr Alierta said much the same in his witness statement. I found Mr Colao a very impressive witness who answered questions directly (and it seems he was the only defence witness who had not received witness training). He was very clear about the prohibitions imposed by competition law (on which he had received repeated compliance training) concerning matters that may be discussed with competitors. He said, and I accept, that he was unaware before reading material for this trial that Mr Laurence of Vodafone UK had had the conversation with Mr Swantee about 4G pricing and that if he had been asked he would have told him not do it.

299. Mr Colao firmly denied that he ever discussed with Mr Alierta Vodafone's strategy towards the indirect retailers in the UK. Moreover, when the proposal for Vodafone UK to withdraw from P4u was put by the UK management to Mr Colao later in 2014, he was very sceptical that this was the correct course of action: see paras 377 and 382 below. That does not sit well with the allegation that he had been engaged in discussion about reduction in reliance on P4u or a large UK indirect retailer with Mr Alierta prior to 27 January 2014, or indeed prior to October 2012 when the decision that O2 should withdraw from P4u for new connections was taken.

300. Furthermore, I find it unlikely that the CEOs of these multinational companies, with the manifold considerations involved in running a global telecommunications group, would have discussed the strategy to be adopted by their relevant subsidiary towards indirect retailers in the UK market. That does not mean that they may not have occasionally talked in general terms about the UK as a difficult market because of the weakness there of direct distribution channels and the strength of indirect retailing, but that was the subject of extensive public comment in the industry and far from confidential. Moreover, having found that they would not have exchanged information on future strategy, I am clearly of the view that Mr Colao never gave Mr Alierta any commitment as to Vodafone's future conduct towards P4u or its confidential strategy regarding exit from indirect retailers, or received any commitments in return. P4u notably allege that this occurred around mid-September 2012, no doubt to sustain their case that it influenced O2's decision to cease

dealing with P4u for new connections. But at that time, Vodafone had not developed any such strategy regarding either P4u or CPW.

301. It was put to Mr Colao that in the discussions with his competitors in Venice he would have talked about achieving 'market repair' in the UK but he rejected that as unlikely. When it was suggested that he had had such discussions with Mr Alierta when they met on previous occasions, he responded that he did not remember any such discussion. I regard that as an honest response and do not accept the suggestion in the closing submissions for P4u that this was an equivocal "non-denial". The entire tenor of Mr Colao's evidence was to the effect that he would never have such discussions and I think that in his answers he was merely stating that he did not recall what he specifically discussed with Mr Alierta at their previous, occasional meetings.

302. As regards the allegation that Mr Colao received from Mr Alierta a commitment that O2 would exit either an indirect retailer or specifically P4u, or that he gave such a commitment to Mr Alierta in return, I think it would have been appropriate to put that directly to him in cross-examination if such a serious finding of unlawful conduct was to be made against him personally: see now the judgment of the Court of Appeal in *Ras al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349 at [84]-[96] and the cases there discussed. However, Mr Colao was aware of this allegation from the pleadings and denied it specifically in his witness statement. I therefore do not think that there was real unfairness to him, and I do not rest my conclusion on that ground.

303. As regards Mr Alierta, in his witness statement he firmly denied the allegations against him, although I of course accept that the weight of that evidence alone is reduced by the fact that he could not be subjected to cross-examination. Further, he was not subject to an instruction to preserve documents until much later: see para 57 above. As I have stated, I consider that no proper excuse or explanation of that failure on the part of Telefónica SA has been given. But if there were relevant emails between Mr Alierta and Mr Colao, they would have been captured in the disclosure by Vodafone. And if there were relevant written communications from Mr Alierta to the senior personnel at O2, they would have been captured in the disclosure by O2. Therefore, I do not think it is appropriate to draw any adverse inference from this failure in the present case. I also do not consider that the fact that Telefónica had been found to have infringed EU competition law in respect of wholly unrelated matters is relevant to Mr Alierta's credibility.[17]

304. Accordingly, I reject the allegation as regards any form of collusion between Mr Alierta and Mr Colao.

The 27 January 2014 meeting: part 2

[17] P4u referred in closing submissions, inter alia, to the Commission decision of 23 January 2013 *Telefónica /Portugal Telecom* COMP 39.839. That concerned a non-compete clause in a share purchase agreement made in 2010, which was held to constitute market-sharing in breach of Art 101. (The fine of almost €67 million was annulled on appeal but subsequently re-imposed, in 2022.)

305. Where does that leave the conversation between Mr Dunne and Mr Whiting at their 27 January 2014 meeting? In deciding where the truth lies, on the balance of probabilities, I think that Mr Whiting's account is to be preferred.

306. For O2/ Telefónica, Mr Hoskins relied on the fact that Mr Whiting said that he wrote this down in his notebook during the meeting, but then the relevant notebook was subsequently thrown away. Mr Hoskins submitted that this was extraordinary as Mr Lloyd as a lawyer would surely have asked for the direct, contemporaneous evidence to be preserved. He emphasised the fact that Mr Whiting did not ask Mr Dunne for more details or make any protestation to him. And he submitted that Mr Whiting invented the whole account to explain and excuse his failure to secure a deal with O2, for which he was strongly criticised by Mr Stefan Quadrio Curzio of BC Partners, the then chair of Phosphorus. Mr Curzio said in a private email to David Kassler on 19 January 2014 that the decision in early 2013 not to accept O2's terms "was the most disastrous, value destroying decision one could possible [sic] have made." And although Mr Curzio may not have expressed it in quite such forthright terms to Mr Whiting, he made his disappointment clear and it was doubtless voiced at the Phosphorus Board meeting on 20 January 2014.

307. However, I prefer Mr Whiting's evidence of the conversation for several reasons:

a) His email of 31 January 2014 (which it is accepted was a genuine document of that date) is the closest to a contemporaneous record of the meeting.

b) There was no suggestion that Mr Lloyd (who is a solicitor) was lying in his account of the discussion he had with Mr Whiting a day or two after the meeting with Mr Dunne. Mr Whiting there reported these remarks and they had a long discussion as to how Mr Dunne's remarks should be interpreted and what they should do about it.

c) The only alternative is that either Mr Whiting very quickly invented this account so as to report it to Mr Dobson in the car-park immediately afterwards, or that Mr Whiting and Mr Dobson together concocted this story to share it with P4u's general counsel a day or two later, although they then decided not to take any action upon it and Mr Whiting could not possibly have imagined that over four years later P4u would be bringing a major competition claim in court. I find that wholly implausible.

d) If as Mr Hoskins submitted, Mr Whiting fabricated this account to excuse his inability to reach agreement on behalf of P4u with O2, I find it extraordinary that he would have included the fact that Mr Dunne said that he was "less sure of the intentions of EE with respect to independent distribution because Olaf Swantee was not inclined to discuss EE distribution plans." That was completely irrelevant if this was Mr Whiting's motivation, but something that Mr Dunne could fairly have said given his experience with Mr Swantee as discussed above.

e) Having heard Mr Lloyd give evidence, I do not find it surprising that he did not advise Mr Whiting to keep his notebook, although that would have been a prudent course to take.

f) If, as suggested, Mr Whiting had invented this story as 'cover' to deflect the criticism for failing to secure a deal with O2, one would have expected him to relay it to Mr Curzio. But there is no suggestion that he did so.

g) It is striking that Mr Whiting drew on this account (but without mentioning Mr Dunne) when protesting to Vodafone UK seven months later after learning that Vodafone UK would not be renewing their agreement with P4u, making clear that he was not suggesting that anything had occurred at UK level but that this was something that had been done by executives at group level: see para 395.a) below.

308. That leaves the question of why Mr Dunne would have said this. Messrs Whiting, Dobson and Lloyd themselves puzzled over this in talking it over afterwards. As Mr Lloyd said in his statement:

> "It was difficult to believe that Mr Dunne would have made the statements he did had they been true. That would risk frustrating the very scheme whose existence he had purported to disclose – it would be like robbing a bank and telling everyone you have done it. I queried whether Mr Dunne was playing mind games with us, seeking to undermine the trust between P4u and Vodafone UK in order to try to damage that relationship."

309. I note that when first discussing the conversation in the car-park, Mr Whiting and Mr Dobson wondered whether it was "just a very odd strategy of Mr Dunne to avoid taking responsibility for the decision to exit P4u, and dealing with the consequence of that decision." Pressed on this in cross-examination, Mr Whiting said that he had a friendly relationship with Mr Dunne whom he had known for many years. He said that the discussion was very amicable but he was pressing Mr Dunne on why O2 was going to withdraw from upgrades with P4u, which Mr Whiting told Mr Dunne was a "daft decision"; and Mr Dunne responded with a series of reasons why the consequences for O2 would not be bad and then said there had been these exchanges at Telefónica group level which effectively meant that the decision was out of his hands. As Mr Whiting put it in his evidence:

> "[Mr Dunne's] whole demeanour at the time was very much: sorry, guys, there's nothing I can do about it."

310. This explanation, i.e. that Mr Dunne made it up to give the impression that the decision was out of his hands, was adopted by Vodafone in their counsel's closing submissions if the Court should find (contrary to Vodafone's primary argument), that Mr Dunne did say this. Human motivation is sometimes complex and not easy to discern. But in my judgment, that is indeed the most likely explanation.

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

J. THE FINANCIAL POSITION OF P4u

312. In 2012, P4u's turnover was over £1 billon and its EBITDA[18] was £132 million. In 2013, the turnover had increased by 4.6% but the EBITDA was reduced to £100.3 million. Of those earnings, £10.4 million was contributed by Lifestyle Services Group ("LSG"), a distinct insurance administration business which the group sold in late 2013. However, the 2013 EBITDA also took into account a loss of £15.1 million on LIFE Mobile, a MVNO which P4u set up in the course of that year: this figure essentially reflected the customer acquisition costs for that new venture.

313. The P4u group had been acquired by BC Partners, a private equity business, in 2011. In connection with the acquisition, P4u's immediate parent issued £430 million in 7 year secured notes on the Irish Stock Exchange. The annual interest on those notes was a little under £41 million. Then, on 25 September 2013, P4u's ultimate parent company, Phosphorus, raised £205 million by issuing 10/10.75% Senior Payment-in-Kind Toggle Notes ("PIK Notes"), which were due in 2019. The proceeds were used to fund a substantial dividend to the shareholders of £223 million, of which the overwhelming majority went to BC Partners, enabling them to recover their initial investment in the business. The PIK Notes carried interest at 10% but after two years the monthly interest could be "toggled" to substitute interest at 10.75% payable only on the Notes' maturity. Therefore until at least 25 September 2015, P4u had additional debt payments of £20.5 million p.a., taking its annual interest burden to around £65 million. The P4u group was accordingly quite highly leveraged.

314. The 2013 Annual Report of P4u group identified as one of the "key areas of risk to the business":

> "Maintaining strong relationships with key business partners (both networks and key suppliers). These relationships are monitored and controlled at Board level."

Given the nature of P4u's business, this is hardly surprising. The key suppliers included the handset manufacturers, such as Apple, Samsung and Motorola.

315. According to P4u's annual operating plan, as revised in February 2014, the withdrawal by O2 of its upgrades contract was estimated to cause a £11.9 million reduction in the forecast EBITDA, producing a revised forecast for the year of £90.5 million. This forecast reflected discussion within P4u as to the proportion of the volume of new connections, previously placed through O2, that P4u could retain by placing the business with EE or Vodafone UK. The internal P4u estimates varied between 30% and 50%. But Mr Whiting said he considered these were cautious estimates and he was more optimistic. O2 had accounted for about 8% of P4u's new connections, and Mr Whiting fairly pointed out that it was a far less important network to P4u than either EE or Vodafone. And he stressed that most customers coming to P4u stores were much more interested in choice of handset and overall price than access to a particular network. As regards network choice, P4u also sold connections through Virgin Mobile and its own MVNO, LIFE. Although there was some

[18] Earnings before interest, taxes, depreciation and amortisation.

debate about this among the experts, the evidence from the MNOs themselves recognised this "network agnosticism" among customers of the indirect retailers. For example, Mr Pellissier of Orange said:

> "Customers visiting a P4U or CPW store were, as I saw it, more likely to have decided on a handset, but not on an MNO…. [I]n indirect distribution, the choice of network operator came second to the handset or accessory…."

316. Although it was suggested by some of the defendants that the loss of O2 significantly weakened P4u, and as noted above Mr Quadrio Curzio expressed dismay at this development, I do not think that is how this was perceived by the other MNOs at the time, which is the important aspect for the purpose of this case. As mentioned above, in about November 2013, Vodafone UK signed an "overlay" agreement with P4u to take additional connections, over and above the provision under the Vodafone Agreement.

317. It is notable that P4u did not appear to lose market share in the aftermath of O2's exit. However, the loss of O2 did leave P4u more exposed in that it had become dependent on two MNOs. I think that it was clear that if either of those should exit then that would have serious implications for P4u. Mr Kassler, who joined as CEO of P4u in November 2013 and whom I found an impressive witness, accepted that, following the exit of O2, the loss of either Vodafone or EE would present a threat to P4u, although he thought it would have been able to survive as a smaller, restructured business.

318. As at the end of 2013, P4u had 717 retail stores. That included 160 "stores-within-stores" ("SIS"): P4u outlets operated as concessions within retail premises operated by Dixons Retail plc ("Dixons"). The Dixons SIS contributed about 10% of P4u revenue and 8% of its EBITDA.

319. Early in 2013, Mr Quadrio Curzio told the P4u board that he knew Mr Sebastian James, the CEO of Dixons, very well and during that year he engaged in discussions with Mr James with a view to creating a closer relationship between P4u and Dixons, whether by outright sale or a deeper operational tie-up. However, on 24 February 2014, it became public that Dixons was in merger talks with CPW. The formal announcement of the Dixons/CPW merger was made on 15 May 2014, subject to shareholder and regulatory approval. The merger was cleared by the European Commission under the EU Merger Regulation[19] on 25 June 2014 and completed on 7 August 2014.

320. The news of the Dixons/CPW merger talks came as a complete surprise and deep disappointment to P4u. In an email sent to Messrs Whiting and Kassler after the news broke, Mr Quadrio Curzio referred to CPW having "check-mated us", a view with which Mr Kassler agreed at the time. In cross-examination, Mr Kassler accepted that the Dixons/CPW deal was "definitely a short-term blow". Indeed P4u tried unsuccessfully, with the assistance of Rothschilds, to get Dixons to consider the alternative of a tie-up with P4u, and at the same time Mr Whiting spoke to senior executives at both Vodafone UK

---

[19] The merger had an impact on markets in Sweden and Ireland as well as the UK: Decn COMP/M.7259.

and EE, who were also opposed to the merger, urging them to do what they could to stop it.

321. Mr Kassler and Mr Whiting sought to present the Dixons/CPW merger as not so serious in the longer term, on the basis that the P4u SIS in Dixons generated less than half the revenue per store of a free-standing P4u store and that P4u would then be free to explore potentially more productive opportunities with other retail chains (which it could not have done before as the Dixons-P4u arrangement was exclusive). Mr Kassler said this:

> "My feeling was that with the retail options that we had, actually we could outcompete them, ultimately with the range -- we were talking to Samsung, obviously a big handset manufacturer, with a goal of investing significantly in the UK; with AO.com, which was Dixons' biggest online competitor; obviously with Argos, with Shop Direct, which was another online player. So we felt we could have a portfolio of relationships that together would be much, much stronger than – than Dixons, which was obviously struggling in its own core market with Amazon and other -- other -- other online entrants. So -- so, again, a short term challenge. Medium to long term, actually, I thought we could outcompete them."

322. I think that underplays the very significant implications of the merger. The direct consequences were:

   a) CPW was greatly strengthened relative to P4u. In mid-2014, P4u had 720 stores (including the SIS) compared to CPW's 800. After the merger was completed and when the P4u-Dixons agreement expired in May 2015, closure of P4u's SIS meant that its retail footprint would reduce to 560 stores. Conversely, the expected conversion of those SIS to CPW meant that CPW's footprint would rise to around 950 stores.

   b) It was announced that the merged entity planned to open a CPW outlet in all 552 UK Dixons stores. Although Mr Kassler doubted that they would find it productive to proceed with such a plan (on the basis of P4u's experience with its SIS), there was clearly the potential further to increase CPW's presence in Dixons.

323. Although Mr Kassler said that the MNOs would be aware of the reality of the market in the same way as P4u and knew how unproductive were the P4u SIS in Dixons, the merger meant that significant revenue would pass in 2015 from P4u to its main rival, whereas replacement arrangements with another retailer would take P4u a long time to arrange. Mr Kassler frankly accepted that the merged entity could be a "formidable" competitor to P4u. And I note that Ms Cindy Rose, the Consumer Director of Vodafone UK, said in an email to a colleague at the time:

> "You seem to be assuming that P4U survives the merger unharmed, not sure I agree."

324. An indirect consequence of the merger relates to the concept of what was referred to as "convergence": i.e. increasing connectivity between smartphones and household devices (e.g. PCs, fridges, televisions, washing machines, etc). On that basis, there was scope in

the longer term for synergy in the supply of connected devices. This was a view held, in particular, by EE and its joint owner, DT. It is notable that Mr Swantee of EE, who preferred P4u to CPW and was very hostile to the Dixons/CPW deal, described the merger as "a strategic masterstroke by Sir Charles Dunstone[20] and CPW".

325. The financial market reaction was also very negative as regards the implications for P4u of the merger and Bank of America Merrill Lynch downgraded their rating of the PIK Notes. And in May 2014, it was reported that BC Partners themselves had written down their stake in P4u by more than 80%. Although this may have resulted from an automatic computation based on EBITDA and debt levels compared to those of P4u's competitors and did not represent BC Partners' real assessment of long-term value, Mr Kassler acknowledged that it did not send out a good message: it appeared to indicate to the market "a lack of confidence by BCP[artners]" in P4u.

326. P4u encountered difficult trading conditions in the second quarter of 2014, but when it was put to Mr Kassler in cross-examination that the company was in a precarious situation, he responded:

> "No, I don't agree with that, my Lord. I think it was precarious relative to the trading results. So, were we going to hit our budget? You know, that's what I was worried about in that sense. Was it precarious from a strategic perspective? No, it was -- it was a great retailer, you know, and -- and had a lot of potential."

327. I agree that the Dixons/CPW merger did not place P4u in an untenable position. Nonetheless, it was very significant for the indirect retail market in the UK and materially altered the balance in that market as between CPW and P4u. Although downplayed by P4u in these proceedings, the implications of the merger featured in the thinking of both Vodafone UK and EE, and influenced their approach to their respective negotiations with P4u which took place in 2014.

K. 2014: VODAFONE AND EE

328. The negotiations by P4u with Vodafone and with EE took place largely in parallel. However, for clarity of exposition I shall address them separately, although inevitably that involves some overlap and cross-reference between the next two sections of this judgment.

L. THE VODAFONE DECISION

Background

329. On 14 November 2013, Vodafone Group publicly launched a strategic investment plan called "Project Spring" with a budget of £7 billion. This was a group-wide initiative across all the national operating companies, using the substantial proceeds of the sale of Vodafone's stake in Verizon. The strategy had three pillars: (i) upgrading networks; (ii) modifying and simplifying IT systems; and (iii) strengthening Vodafone's presence in

[20] Founder and chairman of CPW.

direct distribution. Within that overall strategy, decisions on where to focus their efforts were largely delegated to the national operating companies, which would request Project Spring funding from the group.

330. In his public announcement of Project Spring, Mr Colao, the group CEO, said:

> "We see there is a turning point where customers are getting very used to smartphones and they need to get more service and more assistance. We want to take that back. It's not about reducing share, it's about being in control of customers. It's hard to give a customer a Vodafone experience when someone walks into a shop where there is no Vodafone branding or staff trained by Vodafone. We want to bring the customer experience back into our hands."

331. Shortly before the Project Spring announcement, at the end of October 2013, Mr Laurence left as CEO of Vodafone UK, to be succeeded by Mr Jeroen Hoencamp. The previous month, Ms Cindy Rose had joined the company as Consumer Director, reporting directly to the CEO. In January 2014, Mr Phil Roberson arrived as Head of Indirect Distribution. Mr Hoencamp said that on becoming CEO one of his main objectives was to rebalance Vodafone UK's distribution by increasing the emphasis on direct distribution. The company was doing more than half of its distribution through indirect retailers and he wished to reduce that proportion with more focus on own store and online sales. At the same time, Mr Hoencamp had no expectation of exiting either P4u or CPW in the immediate future but he sought to improve the return on investment ("ROI") for Vodafone UK under its arrangements with the two big indirect retailers.

332. The internal strategy at Vodafone UK for these objectives was called "Project Hunter". Among its aims were to increase the number of stores and the strength of Vodafone's branding. Implementation of Project Hunter was undertaken within the company by steering committees ("Steercos"), and as regards the indirect retailers there was an Indirect Steerco which considered the modelling of different scenarios. That modelling was prepared, under the direction of Mr Roberson, by a team led by Ms Sara Perry.

Vodafone UK's early negotiation with P4u

333. Vodafone UK announced that under Project Spring it planned to open 150 new stores. Although some trade press reports suggested that Project Spring meant that Vodafone UK would be looking to review its relationships with CPW and P4u, and Mr Hoencamp stated publicly (on 3 April 2014) that he envisaged that Vodafone UK would have "fewer indirect partners", Mr Whiting said that in his conversations with Vodafone UK at the time he was assured that they wanted to maintain a strong relationship with P4u. That was not disputed by Vodafone UK. On 17 December 2013, Ms Rose wrote to Mr Whiting, telling him:

> "As we've discussed, our Project Spring investment is intended to accelerate and enhance our Vodafone branded presence on the high street both through direct and indirect distribution channels. I want to reassure you that P4U is an important part of our overall distribution strategy and

> we remain committed to accelerating the renegotiation of our terms of trade."

At the same time, Ms Rose said that Vodafone UK was unlikely to wish to extend the Vodafone Agreement on the existing terms. That agreement was due to expire on 31 October 2014.

334. Following some preliminary discussions in late 2013, negotiations regarding an extension of the Vodafone Agreement got under way in early 2014. There was a high-level 'kick-off' meeting on 29 January 2014, where the attendees included Mr Whiting, Mr Kassler, Mr Dobson and Mr John Whittle from P4u, and Ms Rose, Mr Roberson and Mr Kevin Tubb from Vodafone UK. The parties confirmed that their objective was to work towards a 45% volume share for Vodafone UK and a five year extension to the agreement; but from the Vodafone UK side it was made clear that the commercial terms needed significant change.

335. There followed a series of meetings in February 2014 between the two parties' negotiating teams, including Mr Whittle from P4u and Messrs Roberson and Tubb from Vodafone UK, which explored the parties' different positions. In particular, Vodafone UK made clear that they were keen to move away from a large up-front contribution to the subsidies given on handsets towards a balanced share of revenue over the customer lifetime. P4u for its part did not want a deal that was detrimental for it in cash terms. But the atmosphere in the meetings was constructive and covered a wide range of detailed issues.

336. While the negotiating teams were engaged in detailed discussions, on 26 February 2014, the two CEOs, Mr Whiting and Mr Hoencamp, had a high-level conversation. Mr Hoencamp told Ms Rose afterwards that he had made the following points to Mr Whiting, as set out in her briefing note:

> "• We set the goal of getting new terms agreed by end of March and we remain committed to this path
>
> • I understand many creative proposals have been made by your team and we are looking hard at these to see if we can find a way to make them work for us
>
> …
>
> • Our investment is Spring puts us back on road to growth over time (network, distribution, newco, brand) and we want to continue to partner selectively with like minded organisations committed to driving value back into the market, we regard P4U as one of those select partners
>
> • However, given our EBITDA challenge, we cannot continue to support an arrangement with the current commercials, it doesn't work for us"

Mr Hoencamp told Mr Whiting that the negotiating teams should continue working and that Vodafone UK would table a proposal within two weeks for further discussion, suggesting that they should meet again once P4u had had an opportunity to digest it.

337. That led to the setting up of a full day meeting on 11 March 2014 held at Vodafone UK's offices in Newbury. It was clearly an important meeting, for which both sides prepared carefully beforehand. A Vodafone UK internal slide presentation entitled "Phones 4U renegotiation decisions", considered at a Hunter Indirect Steerco meeting on 10 March, referred to the option of terminating with P4u as "a tactic or fallback"; but that was not the focus of the briefing, which concentrated on the better terms that should be sought from P4u. The recommendation in that briefing, which Mr Roberson said was accepted in the Steerco, was "to target a better ROI and accept consequences on P4U's market position." Mr Roberson explained that this meant taking a reduced volume from P4u in return for better ROI which would likely lead to P4u shrinking in size and/or restructuring.

338. At the start of the meeting on 11 March 2014, Vodafone UK tabled its proposal for a new agreement. The proposal noted the position reached in the negotiations so far:

> "• Progress to date has focused on closing a 45% share/5 year deal with Phones 4U by April 1st
>
> • However P4U cash requirements (via a variety of mechanics) have been explored and are not commercially viable for VF
>
> • Levers to improve ROI of the P4U channel have also been explored and it is clear that more profitable pricing is the underlying opportunity to unlock ROI"

In that context, the proposal included a 71:29 margin share in favour of Vodafone UK and a commitment from P4u to give Vodafone a baseline volume share of 30% with additional increments. The negotiating teams discussed this in the morning, and in the afternoon the meeting was joined by the more senior executives, including Mr Whiting and Mr Dobson from P4u and Mr Hoencamp and Ms Rose from Vodafone UK.

339. Mr Whiting made clear that a deal on the basis outlined by Vodafone UK could not work for P4u. Asked about this in the witness box, Mr Whiting summarised what he had said, as follows:

> " … I remember in this meeting, describing and asking them, had they modelled the impact of this deal on the Phones 4u business? Because if we had given -- they would have known, if we had given them everything that they were asking for, that we could not deliver the volume that they were asking us to deliver. It just wasn't possible.
>
> …
>
> I drew on the whiteboard and ... What I would have said is: you are offering me this, the deal in the marketplace is this, the handset will cost this, you are now leaving me with a zero contribution, even to the cost of running my stores and my people, let alone my

head office. So how can I operate? And that's even
before I go down to, you know, irrespective of my
financing structure, I -- you know, because these are
bright people, that I cannot operate my business on what
you are asking me to do.

Q. But you did get into Phones 4u's finances, didn't you?

A. Yes, I would have gone all the way down the stack and
one of the things we would have said was: this is -- we
can't operate at this level, let alone going down into
the -- into our debt structure.

Q … I'm putting it to you that in drawing the box, you included
details of Phones 4u's finances, including debt servicing obligations
and capital expenditure and –

A. Yes, it would have been -- I would have -- I would have
included the entire story, yes.

Q. And one of the points -- or the point of doing that was
to show that there were serious financial limits as to
how far you could go in the negotiations?

A. The whole point of showing that was that I could not
sign the contract, because I could not deliver on the
contract, because they were asking me to sign a contract
at the gross margin level that -- absolutely impossible
to deliver the volume that they were asking for, before
financing. If you then put financing on top of that, it
added another level of constraint."

340. Accordingly, the next day, 12 March, P4u sent Vodafone UK a counter-proposal. It is not necessary to summarise all the terms, but they included exclusivity for P4u (a concept which P4u saw might help to thwart the Dixons/CPW deal); a guaranteed minimum improvement in margin for Vodafone UK of £12 per connection; and a baseline margin share starting at the existing 59.59% and progressively increasing as customer lifetime value ("CLV")[21] increased. The final slide in P4u's proposal, headed "Q&A", included the following:

"Why can we not change base terms?

- A change in base terms would result in Phones 4u having to refinance,
there are material penalties in place which prevent this.

- Also, Phones 4u current EBITDA just covers interest and capex"

---

[21] i.e. the total value of a customer acquired by P4u over the duration of their relationship with the MNO.

341. Whether or not capital expenditure should fairly be regarded as coming out of EBITDA (a point raised by Mr Whiting in his evidence), it is nonetheless clear from the contemporary documents, which reflect the exchanges over the following weeks, that the terms which Vodafone UK was seeking were impossible for P4u not only because they would have provided an inadequate margin on connections but also because of P4u's financial situation. Vodafone UK was not interested in giving exclusivity, which it regarded as particularly risky when CPW would be strengthened by the merger with Dixons. The senior team at Vodafone UK recognised, as already envisaged prior to the 11 March meeting, that the only way that P4u might be able to provide acceptable terms was by restructuring, but it appeared that this was not something that P4u would contemplate. Although Vodafone UK had started negotiations with P4u before engaging with CPW regarding its agreement with them, I think that its perception of a significant gulf with P4u inevitably led it to consider its alternative options with CPW.

342. On 23 March 2014, Ms Rose sent an email to Mr Hoencamp and other colleagues, saying:

> "1 We are not going to get any further with P4U, the deal they have put on the table is now a "take it or leave it", Tim [Whiting] made this crystal clear on Friday. This is effectively he [sic] deal they put on the table a week ago minus the exclusivity. We need to decide whether these are terms we can live with, or not. If not, then we continue to trade under the terms of our existing deal until Nov. P4U category share now at 60k per month which [*sic*] the loss of O2 and if Dixons goes, that will be another 7-9k per month.
>
> 2 In parallel, CPW are now super keen to accelerate reneg from July 2015 to now. However we may feel about CPW, I would strongly recommend that we explore this option so we understand fully what our alternatives look like. We'll take you through initial thoughts on this on Monday and propose some next steps.
>
> Interesting times...!"

343. That was the prelude to an internal Vodafone UK briefing the following day, which noted that they now "[h]ave a greater understanding of Phones 4u financial position". The briefing summarised the P4u proposal and, significantly, proceeded to consider two "key scenarios in play": a deal with P4u and the situation without a deal, where Vodafone UK would pick up some of the volume (helped by its increased roll-out of direct stores) and "Look elsewhere for Phones 4u Volume Gap." That included the potential for an enhanced agreement with CPW, increasing Vodafone's volume share from CPW and securing a better margin share in return for potential exclusivity.

344. Accordingly, I think that it is clear that when Vodafone UK realised the obstacles to concluding what it regarded as a commercially satisfactory new agreement with P4u, it began modelling an alternative way of moving forward. That did not lead Vodafone UK to cease talking to P4u and exploring what might be possible. But I find that there was thenceforth a difference in perception between Mr Whiting and his colleagues at P4u, on the one hand, and the senior executives at Vodafone UK, on the other. In his evidence, Mr

Whiting accepted that P4u had told Vodafone UK that it could not go any further and had effectively drawn a line in the sand, but he added that this often gets said in negotiations whereas nonetheless the parties eventually reach agreement. However, Mr Whiting had gone into considerable detail at the meeting on 11 March to explain why the kind of commercial terms Vodafone UK were seeking were simply impossible financially for P4u, and he did not suggest in his evidence that this had not been a fair presentation of the financial implications for P4u of the Vodafone UK proposal. I think he considered at the time that Vodafone UK would eventually soften its requirements and come much closer to P4u's position. But that was not an approach which Mr Hoencamp and Ms Rose were contemplating, or at least it was not for them an attractive option.

345. Once Vodafone UK considered that P4u was not in a position substantially to modify its stance on the key commercial terms, Vodafone UK began actively to explore the alternatives. Although, as Mr Hoencamp said in his evidence, historically there was a preference in Vodafone UK to work with P4u, with which it had enjoyed better relations than with CPW, that gave way to what it saw as the harsh commercial reality. The witnesses from Vodafone UK highlighted the significance for them of "Tim's box", a reference to the box Mr Whiting drew on the whiteboard in their office during the 11 March 2014 meeting to show the financial constraints on P4u: see para 339 above. I do not consider that this testimony was a construct for the purpose of this case: on the contrary, I think it reflected their reaction at the time and their belief that there was limited scope for any improvement in a deal with P4u. Indeed, it was a message that Mr Whiting continued to convey in his comments on that proposal, e.g. in an email to Mr Hoencamp of 8 April 2014.

346. Nonetheless, the parties continued to explore the potential for an agreement. Indeed, on the P4u side, I did not see evidence that at this stage there was real contemplation of a business without Vodafone, although Mr Whiting referred to the need for such a plan in an internal email in early April. In my view, the P4u leadership team realised that this was going to be an even tougher negotiation than they had anticipated. But there remained the expectation that, one way or another, there would eventually be a deal, and P4u was keen to keep the conversation going. Vodafone and EE were now its only MNOs, and Vodafone accounted for about 40% of its volume. As Mr Whiting acknowledged, Vodafone UK was in a strong negotiating position. P4u did not know to what extent it could replace Vodafone, and Mr Whiting said that P4u was not in a position to go out to try to supply such a large volume of connections to someone else while it was committed to Vodafone UK.

347. On 31 March 2014, Mr Whiting went to see Mr Hoencamp and Ms Rose, and their subsequent exchange of emails shows a recognition that they had not bridged the gap on the key point of value share/cash transfer with regard to connections. P4u was therefore keen to explore other options and put forward an offer to transfer 100 stores or operate franchised stores for Vodafone UK in the context of an exclusive arrangement. Mr Hoencamp's response on 7 April, while reiterating that Vodafone UK's 11 March proposal was still open, said:

> "Your subsequent counter proposal, which you detail below in your mail, has been discussed on a number of occasions. As you point out, while it

> was well received as a positive step in the right direction, it is not currently a deal we are in a position to accept because it does not deliver the necessary step change in return on investment.
>
> Following our meeting last week, I agree that it's important we continue the conversation to see if we can get to a point of agreement and I appreciate your offer to consider the movement of 100 stores across to the Vodafone brand.
>
> In order to respond formally to this offer, we'll need to spend some time working thru the detail but initial thoughts are that an exclusive distribution arrangement remains a challenge in the same way it was in your proposal earlier in March. However, I suggest we take a week to review the opportunity and then regroup to discuss as quickly as possible."

348. I think Mr Whiting felt frustrated by what he saw as the lack of flexibility on the part of the new leadership of Vodafone UK, who were proposing financial terms which he genuinely regarded as unreasonable and which P4u could not accept. In late April 2014, he attempted to reach out to Mr Colao, having arranged to be at his table at an event at Claridges hotel in London where Mr Colao was speaking. However, Mr Colao essentially referred Mr Whiting to Mr Hoencamp and Mr Humm for any further discussion, while simply noting Vodafone's "discomfort" with being 'debranded' and 'commoditised' and stating:

> "… we will have to have a retail presence (direct and indirect) more distinctive and branded than today in the UK."

349. Informed of this discussion by Mr Colao, Mr Humm responded to tell him that Mr Hoencamp was keeping him updated on the discussions. Mr Humm notably summarised the situation as at 27 April 2014 as follows:

> "Jeroen and Tim are in talks on how to structure our future partnership with the aim to improving branding and efficiency. I understand the respective proposals are still quite apart."

At that stage, the gap on customer margin share was that Vodafone UK had revised its proposal to 67:33 in its favour, whereas P4u said they could not move beyond 60:40. The Vodafone UK proposal involved a reduction in P4u's margin share, and a corresponding transfer in value to Vodafone, of £31 per connection.

350. P4u sought to focus on CLV[22] as a metric that could be used to deliver greater margin over time to Vodafone UK. P4u would not go beyond an initial transfer of £15 per connection but offered to provide a further £16 subsequently once CLV reached a certain level, so as to achieve the £31 which Vodafone UK was seeking. That negotiation was conducted by Mr Whittle, who sent a revised P4u proposal to Vodafone UK on 1 May 2014. Discussions

[22] See n. 21 above

between him and Mr Roberson and Mr Martin Spink (head of finance for the Consumer Division at Vodafone UK) continued over the following weeks.

351. Mr Whittle said that from around this time, compared to the situation back in March, discussions seemed to get easier and that "it felt like we were on a runway to getting a deal done." However, the perspective of Vodafone UK was very different. It did not regard an increase in share based on future CLV as attractive since that was not guaranteed. P4u had been offering this since early in the negotiation but Mr Roberson regarded it as "jam tomorrow", and said that if P4u was confident of increasing CLV it would offer the higher amount in any event. P4u was also asking for a five year term, which Vodafone UK regarded as unacceptably long. The parties were therefore still significantly apart. On 16 May 2014, Mr Roberson wrote to his colleagues after a meeting with Mr Whittle, summarising the position and stating: "I think we have gone as far as we are going to get with them on the commercials."

Vodfone UK's negotiations with CPW

352. Unsurprisingly, and as P4u appreciated, Vodafone UK was also by this stage engaged in discussions with CPW. Its developing approach to P4u and CPW was set out in a slide deck prepared for its monthly in-country review ("ICR") meeting with Mr Humm on 16 April 2014. The "Executive Summary & Recommendation" from that presentation are instructive:

> "**Executive Summary**
>
> • Recap: Our distribution strategy includes a number of activities, all aimed at strengthening direct channels to reduce our reliance on indirect, improving ROI and mix profitability
>
> • Indirects have role to play in sourcing customers and primary connections from areas of market not reached by VF directly — objective is to maintain some level of indirect volumes while improving ROI
>
> • Negotiations with P4U show they have limited flexibility to improve VF's ROI — no obvious deal acceptable with P4U that meets our objectives, deal expires Oct 31, 2014
>
> • Merger talks between CPW & Dixons has created new scenarios to consider. CPW is looking for deal support — has offered to renegotiate July 2015 contract early— potential opportunity for VF
>
> • Re: P4U, assuming deal is NOT reached, P4U *may* exit the market — potential 'acquisition' opportunity to VF
>
> **Recommendation:**
>
> 1. Proceed with negotiations with CPW to test potential of meeting VF's indirect objectives. Look for heads of terms in next 4 weeks

> 2. Maintain negotiation position with P4U, consider their latest proposal to transfer 100 of their stores to Vodafone
>
> 3. Prepare for P4U Plan B, e.g. acquiring prime retail assets to accelerate Hunter"

353. Following that recommendation, it appears that Mr Humm agreed that Vodafone UK could proceed to table a proposal with CPW. As Mr Roberson wrote to Ms Rose and Mr Martin Spink on 17 April 2014, "we need to get cracking".

354. Mr Roberson's evidence was that he and Mr Kevin Tubb were at the outset much more inclined to contemplate an exclusive deal with CPW than some of their colleagues, whose prior experience of dealing with CPW had not been so good (in particular regarding differences concerning a MVNO that Vodafone UK supplied for CPW called "TalkMobile"). It seems that around early April 2014, Mr Aman Bhachu, a commercial director at CPW who reported to its CEO, came to see Mr Roberson to suggest that Vodafone UK should do a deal with CPW and cut P4u out, but Mr Roberson himself raised the potential for an exclusive deal with CPW in return for greater volume and improved terms. The two had a number of discussions in the first half of April, and Mr Roberson's email to Ms Rose of 17 April summarised the key points, including significantly:

> "- They remain concerned that us pulling out may not immediately be the end of P4u — either EE prop them up or they do a deal with BT
>
> - As a result a lot of the time was spent discussing the stages to improved volume and ROI
>
> - Amans view is that the order to do this is to firstly stabilise volume and then place in a contractual trigger to improve ROI once P4u have exited
>
> …
>
> - He agrees that the current contract in pretty good shape and is not proposing any major changes. Also PAYG contract very close to long form signature so I suggested we reference that in PAYM deal rather than re open PAYG (any new commercials will go into this PAYG agreement)
>
> - With increased volume, cash is an issue for them. He knows the deal P4u has and was pushing to have some of the cash benefits we would recognise transfer to him — another lever for us potentially"

355. Consistent with the outcome of the ICR meeting, Mr Roberson and Mr Bhachu agreed to meet the following week for more detailed negotiations; and Ms Rose, Mr Roberson and others in their team began to consider the key terms for a deal with CPW.

356. Vodafone UK started modelling potential terms for an agreement with CPW around late April 2014 and this continued through the following months. Ms Sara Perry, who led the team providing this financial modelling, said that they modelled a large number of different scenarios with respect to CPW, P4u and the direct channel, with regular input from the

team who were running the negotiations. She explained that their modelling included identification of the assumptions which would have the biggest impact on the outcomes and that they sought to ensure that plausible worst case scenarios were covered.

357. Mr Roberson said in his evidence (and this was not challenged) that the offer of exclusivity "was the key that unlocked a new deal with CPW":

> "CPW would see it as a significant change for Vodafone UK to walk away from P4U, and whether we did so was dependent on what CPW were willing to offer commercially to make this happen. … In my view, exclusivity was a high value proposition for CPW because it gave them the opportunity to gain a significant advantage over their main competitors and to hurt P4U financially, particularly given the likely negative impact of the CPW/Dixons merger on P4U."

358. However, negotiations with CPW were not immediately fruitful. On 26 April 2014, Ms Rose suggested that to achieve progress with CPW, Vodafone UK should stop talking about a "new" deal and instead position this as amended terms:

> "Let's avoid creating the perception that we're going to rip up the current contract and start over because we'll still be here negotiating in 2015 if that's the plan!"

359. On 28 April 2014, Mr Colao spoke to Sir Charles Dunstone, the chairman of CPW, and the briefing to him from Mr Hoencamp for that conversation was that Vodafone UK remained firmly opposed to the Dixons merger, but that as regards its contract with CPW its ambition was to drive a higher market share at an improved ROI from increasing Vodafone UK's margin share; and that to achieve this "we are considering not renewing our distribution agreement with P4u". Mr Colao was not asked about this meeting and it is unclear what he actually said to the CPW chairman.

360. On 29 April 2014, Mr Parbutt reported to Mr Humm on the initial negotiations with CPW and the state of negotiations with P4u. He said that Vodafone UK's aim was to close a deal with CPW by the end of May. Accordingly, I find that by the start of May 2014, if not before, this had become the preference of the executive team at Vodafone UK, provided of course that suitable terms with CPW could be agreed.

Parallel discussions with P4u and CPW

361. At the same time, since it was not clear that they would secure a satisfactory deal with CPW, the Vodafone UK management realised that they needed to keep discussions with P4u open. The way Vodafone UK was preserving both options is demonstrated by the fact that on 7 May 2014 Mr Roberson and Ms Rose had a dinner with Mr Graham Stapleton and Mr Aman Bhachu of CPW at Vodafone UK's offices, whereas the next day, 8 May, Ms Rose together with Mr Hoencamp had dinner with Mr Whiting and Mr Kassler at a restaurant in Chiswick. The slide deck prepared by way of briefing for those two meetings stated that the "Latest P4U offer still proposes minimal value shift" and considered the implications of exiting from P4u (with an assumption that P4u would cease to trade in

November 2014), and how it might be possible to move to improved ROI under a deal with CPW in stages.

362. The dinner meeting with CPW on 7 May went well. It seems clear that Vodafone UK discussed what CPW would offer, in terms of both volume and finance, on the basis that it left P4u and went exclusive with CPW, having regard to the overall net loss in volume which it would suffer as a result. Ms Rose reported to Mr Hoencamp:

> "… had a great dinner with Graham Stapleton last night. They are totally up for doing something big and transformational. I said we had no appetite for protracted negotiation, window is tight and it's a one off opportunity. I sense a lot of commitment there and we will be all over it."

And Mr Stapleton sent a text to Ms Rose saying:

> "Cindy it was a great evening and I am looking forward to moving things forward quickly in the next couple of weeks."

Ms Rose forwarded this to Mr Hoencamp who commented:

> "Let's move quickly, do a deal and then tell the other one to go away …."

363. The 8 May dinner of the four senior Vodafone UK and P4u executives apparently also had a positive atmosphere. Mr Whiting and Mr Kassler felt that there was recognition from Mr Hoencamp and Ms Rose of the benefit to both sides of the ongoing relationship. Mr Kassler recalled that the dinner felt like a celebration of their continuing partnership. I have no reason to doubt that evidence: I found Mr Kassler to be a very honest witness and he had significant commercial experience. There was no suggestion from either Mr Hoencamp or Ms Rose that they sought to give a different impression. Indeed, Ms Rose wrote to Mr Whiting the following week thanking him for the dinner and saying, as regards P4u's recent proposal of revised terms:

> "Phil [Roberson] and John [Whittle] have had a number of discussions this week on the subject, and they are meeting again tomorrow. We are keen to explore whether there is an option that bridges the gap between your position and ours, which I don't think is insurmountable at this point."

364. Further discussions between Vodafone UK and CPW followed, and at the same time John Whittle from P4u continued negotiation with Mr Roberson and Mr Tubb. Throughout this period, Vodafone UK was holding discussions in parallel with the two major indirect retailers.

365. At Mr Whiting's invitation, Mr Hoencamp and Ms Rose came to P4u's head office on 28 May 2014. Just before the visit, Mr Whittle sent Mr Roberson a proposed term sheet for an agreement, highlighting the two areas which remained outstanding following their negotiation: the contract term (i.e. duration) and volume KPIs for handset customers. Mr Kassler said in his second witness statement:

> "For the Vodafone UK CEO and the next most senior Vodafone person directly involved in the extension negotiations to come up to Stoke-on-Trent for a day and go through all the consumer research, our shared plans about what we were discussing doing with our stores and the commercial terms of the deal is a huge commitment."

366. I have no doubt that this is genuinely the way the senior P4u team saw it at the time and that they believed that, despite the difficulties in the negotiation, they were on a path towards a successful resolution. The communications they had received from Ms Rose doubtless gave them encouragement, and Ms Rose accepted that Vodafone UK did not indicate to P4u in their long meeting on 28 May at P4u's offices that the gap was now insurmountable.

367. However, the perspective among the senior Vodafone UK management was very different. In briefing Mr Hoencamp and Ms Rose for that meeting, Mr Roberson said that Vodafone UK had "got as far as we can on value transfer" and suggested that any commercial discussion should focus on contract length. He pointed out that he and his team from Vodafone UK were meeting that same day with CPW "with a view to getting to a decision point at the end of this week on how we progress indirects." The briefing paper said that of the three options ("all in" with P4u, both P4u and CPW, and exclusive with CPW) "effectively the only ROI improvements are likely to come from an exclusive deal with CPW". Although that option had risks, the briefing paper noted that those risks were only serious if Vodafone UK's plans to expand its direct distribution did not succeed.

368. On 30 May 2014, following his meetings with CPW on 28 and 29 May, Mr Roberson sent Mr Hoencamp, Ms Rose and the senior Vodafone UK executives a memorandum updating them on the position. This noted that:

> "Negotiations on core terms are complete and two options are now on the table."

The memorandum provided a detailed comparison of the P4u and CPW proposals, noting the advantages and risks of what had become two alternatives: "exclusive with CPW" or "partner with both CPW & P4u". The executive summary in that memorandum stated:

> "There are few compelling reasons to continue to trade with P4u beyond the end of their current contract — an exclusive deal with CPW provides:
>
> - Improved direct volumes
> - Higher ROI
> - Improved cash terms
> - Short term EBITDA upsides
> - Guaranteed inflow volume above L[ong] R[ange] P[lan]
>
> Reasons to continue with P4u include:

- To guarantee 2014/15 inflow share (a risk we believe can be mitigated)
- To provide competition to CPW
- To drive inflow share beyond 400k min from CPW
- Protection of the existing base acquired by P4u

> Not contracting with CPW runs the risk of being out flanked by EE, leaving us with no leverage at contract renegotiation next July"

The memorandum summarised the financial impacts and recommended:

> "Sign CPW as exclusive partner @ 30% share and a cap of reduced 500k"

The memorandum was discussed in a conference call at 4.30 pm that day.

369. As noted in that memorandum and emphasised by the Vodafone UK executives in their evidence, a concern of Vodafone UK was that if it did not enter a new deal with CPW, EE might agree an exclusive deal with CPW, leaving Vodafone UK very exposed when its contract with them came up for renewal in July 2015 while placing P4u in severe difficulty as EE accounted for 60-70% of P4u's volume. As Mr Hoencamp put it:

> "An indirect partner like P4U ultimately cannot survive with only one MNO, because of lack of sufficient volume, the inability to offer a choice of major MNOs to customers, and the inability to rotate customers from one network to another"

370. On 2 June 2014, a slide deck was circulated for the Hunter Indirect Steerco. The headline on the first slide was:

> "Regardless of how much indirect inflow VF require, it is difficult to see benefit of VF continuing with P4U"

The summary stated that the best way to achieve a smaller proportion of indirect sales in Vodafone's volumes and avoid being "outflanked" by EE was through a deal with CPW, and that to achieve improved ROI that deal would have to be exclusive. The slides noted the financial benefits of the terms so far agreed with CPW and the issues still to be resolved. The summary slide stated:

> "However, we must have agreed all significant elements of the deal with CPW before serving notice on P4U so as not to weaken position"

The final slide considered "EE options if VF go exclusive with CPW". It summarised the three alternatives: exclusive with P4u; exclusive with CPW and staying with both. And it concluded:

> "In summary — EE response will likely depend on future inflow requirement from indirect channel & relative commercials with CPW & P4U"

371. Mr Tubb (in Mr Roberson's absence) continued to negotiate on those issues with CPW in the early weeks of June.

372. Nonetheless, Vodafone UK continued engagement with P4u. I do not think that is at all surprising. As Mr Hoencamp said in the witness box:

> "… you don't stop negotiating having conversations with both parties until one is actually completed. And "completed" means legal documents have been signed. So that's the moment where there is no way back and you have made your decision, in this case to go with Carphone exclusively.
>
> Q. All right . So is it your evidence that until you'd signed a deal with Carphone Warehouse, you hadn't given up on the idea of signing a contract with Phones 4u? Is that your evidence?
>
> A. I've −−I've learned over the years that it's always important to keep your options open and to expect the unexpected. So anything could have happened during that process. So indeed, nothing is done until it's signed. So yes, until −−until that point, we would be working with both parties."

And Ms Rose said in her evidence:

> "… until the deal was done with Carphone, the deal wasn't done, and we needed a plan B as well. Phones 4u was our Plan B,"

373. No doubt this was a difficult balancing act for those involved in dealing with P4u, especially as P4u had offered some further flexibility in the discussions in early June. As Mr Tubb, who was dealing directly with Mr Whittle at P4u, remarked to his colleagues on 10 June:

> "I have kept conversations live & as sincere as possible as agreed with Cindy, but it's quite difficult now."

Mr Tubb was sending sufficiently positive responses such that by 11 June, Mr Whittle felt that they were close to a final agreement. Indeed, Mr Tubb told Ms Rose in an email that day:

> "There's no stalling P4U now Cindy, they've agreed with everything I tried to stall them with (tightening landing strip, capping volumes, making break point unconditional, they aren't even charging us for branding)!"

374. Ms Rose was also encouraging Mr Whiting and Mr Kassler to think that the two sides were now aligned, so that the matter now depended on securing approval from Vodafone Group. On 10 June she sent an email to Mr Whiting and Mr Kassler, blaming governance issues in the Group for the delay and saying:

> "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."

Ms Rose also spoke to Mr Kassler the following day, when Mr Kassler said (and I accept) that Ms Rose told him that she was very supportive of a deal.

The decision

375. A decision to conclude a new agreement with CPW and to leave P4u could not be taken by Vodafone UK alone. The UK management initially believed that it required approval by the Vodafone Group board, but it emerged that approval by Mr Colao and Mr Nick Reed (the group CFO) was sufficient. The key figure was Mr Colao, the group CEO. Moreover, it was essential for Vodafone UK to have the support of Mr Humm as the Regional CEO for Europe. Without his endorsement, any recommendation from Vodafone UK was most unlikely to be accepted.

376. On 1 June 2014, Mr Hoencamp set out in an email to Mr Humm the summary and recommendations from the memorandum of 30 May (para 368 above), saying that he would like to discuss it with him and get his "guidance and decision". Mr Humm's initial reaction was expressed in an email to his regional CFO, Mr Emanuele Tournon:

> "I would tend to go exclusive with cpw. Could reduce indirect footprint and give us stores."

377. It appears that Mr Hoencamp discussed the proposal of an exclusive deal with Mr Colao at some length on 9 June 2014, but Mr Colao was sceptical and very concerned about the effect of reinforcing CPW as a more powerful indirect retailer. Mr Hoencamp reported on that conversation in detail to Mr Rose, who relayed that feedback to her colleagues. Her report significantly included the following:

> "• Vittorio's view is we are creating a monster in CPW, what contractual protections are we putting in place to ensure they don't screw us over the period of the deal (for FAQs)
>
> • Vittorio does not buy into the assumption that P4U will fall over, can we please pull together a 1 page overview of their financials and volumes by operator (ask Nick P/Cindy V for help with the P4U financials)
>
> • If P4U does fall over, where do the volumes go? What have we assumed and why? What is the basis for our assumption? In fact we ought to lay out in some detail all of our assumptions.
>
> • Does this deal undermine our distribution strategy? Why not? Why shouldn't the Board take away our Spring/Hunter money?
>
> …
>
> • We need to do a side by side comparison of the CPW deal today vs new CPW deal, then P4u deal today vs new deal with P4U

…

• Vittorio is going to push on the P4U exclusive scenario, have we modelled this? I assume this scenario means we do the new deal with P4U on the new deal terms and we trade with CPW until July 2015 at which point we don't extend CPW and we become at that point exclusive to P4U."

378. The same day, 9 June 2014, Vodafone UK sent Mr Humm a five-page memorandum setting out what was proposed. This summarised the changing character of the UK distribution market, the likely impact of the CPW/Dixons merger, and the financially weaker position of P4u. The memorandum stressed how the expansion of Vodafone UK's direct presence through Project Hunter gave an opportunity to be less reliant on indirect channels; summarised the state of the negotiations with P4u (stating that they seemed to be unable to offer a significantly improved ROI as a result of their bond interest commitments); set out the benefits of the improved terms agreed so far in the negotiations with CPW; and considered the risks involved in leaving P4u (including the possibility that they might attract BT as a powerful entrant into the market). The memorandum came down firmly in favour of agreeing an exclusive deal with CPW with effect from 1 January 2015. My impression is that this was prepared following discussion with Mr Humm over the previous few days, with a view to obtaining his guidance as to how best to present the proposal to Vodafone Group. I have little doubt that Mr Hoencamp would have told Mr Humm that Mr Colao was sceptical and needed convincing.

379. That was the prelude for the slide deck that Vodafone UK prepared over the following week for the presentation which Mr Hoencamp, Ms Rose and Mr Spink made on behalf of Vodafone UK to Mr Colao and other group executives on 17 June 2014, seeking approval for this move.

380. The slide deck set out the "three options for consideration": 1) to continue to trade with both P4u and CPW; 2) to trade only with P4u from July 2015 (at 40% share); and 3) to trade only with CPW from January 2015 (at 35% share). The headline evaluation of those options was presented on the alternative basis of P4u continuing to trade or P4u ceasing to trade. On either scenario, a downside of continuing with both indirect retailers was shown as the exposure of Vodafone UK to an "EE first move", i.e. the risk that EE would might go exclusive with CPW; whereas a benefit of an exclusive deal with CPW was the avoidance of that risk. The slide deck comprised a detailed presentation of the financial effect of the three options, and came out with the recommendation to agree a new five-year deal with CPW and exit from P4u.

381. The financial part of the slide deck was the latest iteration of the modelling of various financial scenarios. It showed clearly that an exclusive deal with P4u was not an attractive option. But as regards the option of maintaining both CPW and P4u, one of the slides presented scenarios comparing the existing terms with the latest terms on offer from CPW for an exclusive deal. The figures for the scenario of going with both P4u and CPW therefore failed to reflect the latest improved P4u offer, which would in turn have improved the NPV (net present value) of that scenario going forward. To that extent, it seems to me that the presentation can be criticised, and Ms Perry could not now explain how that came

about. But I think the significant aspect for present purposes is that the benefit of the exclusive deal with CPW was not shown as being dependent on P4u ceasing to trade, and indeed the cash impact for the first two years was shown as superior if P4u continued trading (but either way, it was shown as better for Vodafone UK under the CPW exclusive deal). For several of the Vodafone executives, one of the key financial metrics was the ROI, and slide 17 showed that over three customer lives this was 0.37 under P4u's new offer compared to 0.42 in CPW's new deal.[23] The "High level overview" comparing the two new proposals in slide 7 showed that CPW was offering new terms for the hardware loss subsidy (i.e. the MNO's contribution to the subsidy on handsets supplied to customers) which Vodafone UK would pay for each new connection on a much improved basis, which meant that Vodafone UK's effective margin share for each new connection was significantly superior to that under the P4u proposals. I accordingly reject P4u's submission that Vodafone (whether Vodafone UK or Vodafone Group) considered that a decision to exit from P4u would be profitable, or commercially attractive, <u>only</u> if P4u ceased trading.

382. Following that presentation, Mr Colao gave Vodafone UK conditional approval to proceed with an exclusive deal with CPW. It is clear to me, on the basis not only of Mr Hoencamp's and Mr Humm's evidence but on the contemporary documents, that Mr Colao expressed considerable concern as regards both the consequent strengthening of CPW and the risk that Vodafone UK might not do enough direct business to compensate for the loss of volume from P4u, and that he challenged Vodafone UK's business case. I find that it was Vodafone UK that persuaded him to accept the proposal and that the suggestion to go exclusive with CPW certainly did not come from Mr Colao. Nothing could be clearer than Mr Hoencamp's email to his colleagues in the days leading up to the critical meeting with Mr Colao:

> "This is it, we have a unique opportunity to change the game from a distribution point of view, which is the biggest commercial driver of our ten point plan. This and the network plan will take us back to growth. So, the next ten days are crucial to close this deal, so please prioritise and work together so we are fully aligned and 100% behind this plan.
>
> The only way to get this past Vittorio is to show conviction, belief in the plan. If he does not see or feel that, he will not approve it. If however, he feels the commitment he may still not like the plan but will give us the approval.
>
> He challenged us to change the game, change the pace, be ambitious, this is our chance to do just that."

383. I do not accept the criticism made by counsel for P4u that there were no minutes of the 17 June meeting. The UK executives were in effect making a presentation to a few of the most senior executives at Group level, and there was no particular need for formal minutes. This was not a board meeting or a formal Group Executive Committee meeting. I therefore reject

---

[23] i.e. Vodafone UK return divided by (handset cost subsidy + commission paid to P4u/CPW)

the submission advanced for P4u that a decision was taken deliberately not to make a record of this meeting.

17 June – 29 August 2014

384. Once they had received the go-ahead from Mr Colao on 17 June 2014, final negotiations proceeded rapidly with CPW to settle the final terms of a full agreement. On 7 July, there were still some commercial differences, as highlighted in a Hunter Steerco presentation which recommended compromise proposals to resolve the matter. By this stage, a draft contract document was being exchanged between CPW and Vodafone UK. The outstanding differences were duly resolved and the formal agreement, a detailed 145 page document, was signed on 17 July 2014. It provided for Vodafone UK to supply CPW on an exclusive basis as from February 2015.

385. Those events explains the tenor of a meeting held some days before, on 2 July, between Ms Rose and Mr Roberson on the one hand and Mr Kassler and Mr Whittle on the other, when the Vodafone UK representatives told P4u that they were working up a slightly different proposal from P4u based around hitting the targeted ROI. Mr Roberson reported this to his colleagues, stating:

> "Fundamentally their new proposal doesn't shift the dial on the commercials but we want to keep them in play just in case we do not close out CPW."

386. Mr Hoencamp sounded a cautionary note in a telephone conversation with Mr Whiting on 3 July, before the latter went into hospital for surgery. However, in the first week of July, Mr Whittle was given to understand by Mr Roberson that Vodafone UK was preparing a presentation to Vodafone Group in relation to the extension of its agreement with P4u, and he sent Mr Roberson some information for use in that presentation. On 8 July 2014, Vodafone UK sent Mr Whittle what they said was the presentation prepared for that purpose. It was entitled "Phones 4u – partner of choice" and summarised the terms of a new deal with P4u, with further slides setting out various reasons why Vodafone UK favoured P4u. As Mr Whittle explained, he understood from this that the key deal terms were now agreed in principle and that Vodafone UK was proceeding to seek approval from the Group board.

387. The "Partner of Choice" presentation was circulated to the senior P4u management. Unsurprisingly, they similarly understood that Vodafone UK was putting forward these key terms of a new agreement for approval by Vodafone Group. On 25 July 2014, Mr Kassler spoke to Ms Rose on the telephone when she told him that the matter had been delayed because of the conversations between Mr Giampaolo and Vodafone Group about a potential acquisition by Vodafone of P4u (either on its own or jointly with EE): see paras 412-413 below. Mr Kassler's email that day reporting that conversation to Mr Whiting and his other colleagues said:

> "I caught up with Cindy by phone this afternoon. She confirmed that everything has been on hold because of strategic conversations between Group and BCP/David Giampaolo. They share our concern that the supply

> deal could get caught up and delayed by this - she is meeting Philip Hum next Wednesday and will be pushing to sign anyway and let the other conversation take care of itself. Very supportive conversation, but it's out of the UK's hands at the moment..."

Vodafone did not challenge Mr Kassler's account of that conversation.

388. Mr Whiting's evidence was to similar effect. He said that at this time he was dealing with Ms Rose and:

> "… she absolutely was saying that she was recommending the deal that we had now documented in the Partner of Choice agreement to the board for approval."

389. Mr Kassler spoke again to Ms Rose on Friday, 1 August 2014, when she told him that the Group's evaluation of the strategic option of acquiring P4u was almost complete, but that it appeared that the idea of a joint acquisition with EE had been abandoned for both commercial and competition law reasons. She indicated to Mr Kassler that Vodafone Group were therefore considering the extension deal with P4u.

390. Ms Rose was plainly embarrassed when asked about the "Partner of choice" presentation. She said that the wording was "regrettable". I consider that it goes beyond that: the entire document was a subterfuge. Following the decision of 17 June, Vodafone UK's chosen partner was CPW, and by 8 July it was on the point of concluding an exclusive agreement with CPW. The "Partner of Choice" slide deck never was presented to Vodafone Group, nor was it prepared with that intention.

391. The deception of P4u continued after the contract with CPW had been signed, in the conversations just described. Ms Rose referred to July 2014 as an "awkward" period and said that Vodafone UK was seeking to keep P4u "warm" until the final deal with CPW had been signed. However, in my view, its conduct went further, and I accept P4u's submission that Vodafone UK was seeking to discourage P4u from pursuing any alternative strategy, since if P4u had realised that Vodafone UK might be pulling out, it could have sought to engage with BT with a view to the latter entering the mobile market through P4u. However, although deliberately misleading a long-term commercial partner in this way may be distasteful or even disreputable, this is a court of law not of business ethics. Such conduct does not infringe competition law or support any allegation of collusion with EE.

Termination with P4u

392. On the evening of Wednesday 6 August 2014, Ms Rose called Mr Kassler and told him that Vodafone UK would not be entering a new contract with P4u but would instead terminate their existing agreement. Mr Kassler said that he had a clear memory of the conversation: Ms Rose was calling from Florida, where she was on holiday, and Mr Kassler said that unlike their previous friendly conversations he had the impression that she was reading from a script. Unsurprisingly, Mr Kassler was very shocked. He immediately called Mr Whiting and Mr Lloyd, and he sent a letter to Ms Rose by email the next day, requesting a meeting as soon as she returned from holiday to discuss this in person to

explore alternative options before any termination notice was served, and asking that the matter be kept confidential. Ms Rose responded, agreeing to a meeting on her return and saying that they were open to discussing "short term options" but that a letter giving the contractual six months' notice of termination was going out. She also agreed to embargo any announcement.

393. P4u was also very concerned that a formal termination would have to be notified to the Irish Stock Exchange because of the terms of the PIK Notes, and in response to a call from Mr Whiting, Ms Rose agreed that they would see if they could help in that regard. Mr Whiting and Mr Kassler wondered whether Vodafone UK's conduct might be a negotiating tactic to apply maximum pressure for further concessions, given the tenor of their previous discussions.

394. Two meetings were held by Mr Kassler and Mr Whiting with Mr Hoencamp and Ms Rose at Vodafone's offices on 27 and 29 August 2014. At the first meeting, Mr Hoencamp and Ms Rose insisted that the decision had been made by Vodafone UK not by Vodafone Group, which Mr Whiting and Mr Kassler said they could not understand in light of the "Partner of choice" presentation. When Mr Whiting and Mr Kassler said that they might be able to offer better terms than had previously been on the table, they were told that it was too late. Pressed for an explanation of the decision, Mr Hoencamp and Ms Rose did not mention the deal reached with CPW, although in the second meeting they did say that Vodafone had made "other commitments". In their evidence to this Court, they said that they were unable to disclose their agreement with CPW since under its terms that agreement had to be kept confidential until it was publicly announced.

395. There was considerable evidence at trial from the four participants about the discussions at these meetings. It is clear that the meetings were very uncomfortable for all concerned. However, I do not consider it necessary to discuss them in detail since they followed the critical decision and do not, in my judgment, shed light on what had occurred. I mention only four points, which emerge from detailed notes made by Mr Kassler (immediately after the first meeting and during the second meeting) that I accept as accurate:[24]

a) In the first meeting, on 27 August, Mr Whiting questioned whether Vodafone UK was acting alone and suggested that the decision had been made in conjunction with other MNOs, an allegation which visibly angered Mr Hoencamp and Ms Rose who forcefully rejected it. Ms Rose reiterated a firm refutation of that suggestion when she spoke to Mr Kassler on the telephone that evening. Mr Whiting repeated the allegation of collusion in the second meeting, saying that this was something that had been reported to him but that what he had heard did not involve any individuals at Vodafone UK but persons at Group level. Mr Hoencamp and Ms Rose said that they

[24] I rely also on a brief report which Mr Kassler sent to Mr Giampaolo after the first meeting. I prefer Mr Kassler's account to that of Ms Rose, which relied on an email report she finalised on 30 August 2014, stated to be of the meeting on 29 August but which I consider was a conflation of what she recalled had occurred at the two meetings and which I regard as somewhat self-serving.

.

had been personally offended by those allegations. They also passed on the allegations to Mr Humm.

b) Mr Hoencamp and Ms Rose were taken aback to be told at the first meeting that P4u would have to notify the bondholders of the termination and that this might mean that P4u would go into administration within 24 hours (and Ms Rose repeated her surprise when she spoke to Mr Kassler that evening). They then agreed that they would consider a new proposal from P4u, which should include reducing volume commitments, be for a shorter term, and potentially include a transfer of stores.

c) On 28 August, P4u sent Vodafone UK a revised proposal for a new, shorter term agreement (a minimum 12 months term), which the P4u executives considered offered all the key terms which Vodafone UK had been seeking in the previous negotiations, and the option to transfer 50 P4u stores to Vodafone UK in its Project Spring target locations.

d) The second meeting on 29 August was shorter. Mr Hoencamp and Ms Rose said that they could not accept the new proposal from P4u. They said that there was nothing that P4u could offer which would make them change their decision: Vodafone UK was committed to that path.

396. I consider that the reason Mr Whiting and Mr Kassler levelled the allegation that the decision was imposed on Vodafone UK by the Group as a result of collusion was because of what occurred in the immediately preceding period. They believed that Vodafone UK had been negotiating with them in good faith in July: the companies had been business partners for some 15 years, and at a personal level Mr Kassler, in particular, had developed a good working relationship with Ms Rose. Since Mr Kassler and Mr Whiting believed that the "Partner of choice" presentation had been made by Vodafone UK to the Group and that the UK company was seeking approval for a deal, they could not imagine that in reality it was a charade and that Vodafone UK was by then planning to leave P4u altogether. Therefore, a direction from Group level seemed to be the only explanation for what they saw as a volte-face. Since it appeared unusual for the strong desire of the UK company to be overruled at Group level, that brought to mind for Mr Whiting what he had been told by Mr Dunne long before: see paras 276 (and 305) above. However, for the reasons that I have set out, Mr Whiting and Mr Kassler's assumption about the decision-making process was mistaken.

397. I should add that although the announcement of the Vodafone decision provoked a strongly critical reaction from investors in P4u of its management, I reject the suggestion that Messrs Whiting and Kassler came up with the allegation that P4u was a victim of unlawful collusion in order to deflect criticism of their conduct of the business.

398. In the light of the above, it is necessary to analyse the allegations advanced in these proceedings.

The allegations against Vodafone

399. The question in this case is not whether the financial modelling by Vodafone UK, which played a crucial role in its decision-making, was sound. No doubt aspects of it can be criticised. But P4u does not suggest that it was a sham, and it is clear to me that Ms Perry and her team were making a genuine effort to model the financial outcomes of alternative scenarios, and that they were asked to consider the position in the scenario of an exclusive deal by Vodafone UK with CPW, on the alternative assumptions that P4u continued to trade and that it ceased trading. Clearly, the withdrawal of a major MNO from P4u, which had already lost O2, would present P4u with a major challenge, especially as it was significantly leveraged. Subsequent events bore this out. I consider that it was entirely reasonable, indeed sensible, for Vodafone UK to include this scenario.

400. P4u submitted that Vodafone's decision to exit was predicated on the expectation that P4u would eventually cease trading, and that this is what Vodafone wanted. The Vodafone witnesses strongly resisted those suggestions.

401. In my view, there was some support for both aspects of that submission. As the written closing submissions by Vodafone's counsel note, even before the Dixons/CPW merger, Vodafone UK thought that P4u was in a financially vulnerable position, as recorded in its slide analysis of P4u cash flow for the purpose of distribution strategy in June 2013. However, at that stage, Vodafone UK was not deterred from seeking to negotiate a new deal with P4u, as set out above. On 17 April 2014, in Mr Roberson's report of his conversation with Mr Bhachu of CPW, it is clear that the potential of P4u collapsing if Vodafone UK left was a matter that they discussed. On 28 April 2014, as the difficulties in negotiation with P4u became clearer, Ms Rose wrote to Mr Hoencamp:[25]

> "P4U are "dead man walking", it's just a question if time... So while we build strength in our direct channels and sort out our new arrangement with CPW, why not be opportunistic and take some additional share in P4U? … Why don't we get what we need from them while they're still around and while we still have a deal with them until we sort out our own house and a have a better indirect alternative to go to?"

402. Mr Hoencamp said that this was not his view at the time. However, as the discussions with CPW for an exclusive arrangement progressed, I think he realised that if Vodafone UK pulled out of P4u this was the likely consequence if P4u did not radically restructure. Already on 29 April 2014, in a summary sent to Mr Humm, this was set out as a probable outcome. In early June 2014, when Mr Humm passed Vodafone UK's proposal for such a CPW deal to his regional CFO (Mr Emanuele Tournon), Mr Tournon's initial reaction was to highlight the risk that "if P4U does not die for whatever reason they will be a dangerous weapon in the hands of a competitor" as they would seek to churn existing Vodafone customers to that other MNO. On 11 June, as Vodafone UK started preparing its presentation for Mr Colao and the Group Executive Committee, Mr Humm suggested that

---

[25] Ms Rose was very defensive about this email, and suggested that she had meant that if P4u did not have a plan B then it could not survive. I reject that explanation and consider that the email meant what it said. Nonetheless, "time" is an expansive concept. I think that if P4u had been able to move more substantially on commercial terms in the negotiations over the following weeks, the contemporary documents suggest that Vodafone UK may well have signed a new agreement with them.

it should build into the document the expectation that P4u would exit as EE could not afford to keep P4u up alone. The same suggestion was made by another member of Vodafone Group in an email to Mr Hoencamp, which he forwarded to Ms Rose with the comment: "good point to bring out". On 15 June, Mr Humm remarked to Mr Hoencamp:

> "Vittorio [Colao] still does not buy the argument that they would go bust."

403. Although Mr Hoencamp would not accept that their preferred scenario was that P4u would cease trading and said that this was just a real possibility, I consider that his view at the time was that this was likely. In preparing for the important meeting with Mr Colao and the Group ExCo on 17 June, he significantly wrote to his colleagues:

> "I just spoke to Warren.[26] He is … supportive. The one challenge he has is our assumption p4u will cease trading. His view is that the banks will take over and run it for cash as long as they can. Not sure how to model this but that would be a case (slightly?) worse than our preferred scenario."

404. It was submitted that the fact that Mr Hoencamp and Ms Rose in their evidence equivocated about their thinking at the time regarding P4u's prospects, and sought to 'explain away' what they had said about P4u's future, sometimes with a marked reluctance to accept the obvious meaning of a document, shows that they were seeking to conceal information which they had about EE's intentions. I do not accept that submission. They were of course aware of the allegations in this case. Although I have rejected some of their evidence regarding what they had expected or hoped for, I think that this testimony was motivated by a desire to avoid any implication that they took a negative view of P4u's prospects since they believed that might impair Vodafone's defence. I consider that a surer guide to their knowledge and beliefs at the time is found in the contemporary documents, which I have therefore analysed in detail. I consider that the views there expressed were a rational reaction to the circumstances in the market, which had dramatically changed following the Dixons/CPW merger, and do not support a finding of 'inside information' as to EE's actual intentions.

405. Mr Humm explained his own view on the basis that if P4u was selling only on the EE network, it would be like an own retail channel and likely become loss-making. That would require EE to support them financially, which he thought would be unlikely. He also considered that if exit by Vodafone UK did not cause P4u to fold, at the very least it would have radically to restructure and raise capital by disposing of stores, which would create the opportunity for Vodafone UK to acquire them on better terms.

406. It was submitted that Mr Colao decided to approve Vodafone UK's proposal at the meeting on 17 June 2014 after his earlier scepticism because he was there persuaded that P4u was likely to fail. In that regard, P4u relied on the cryptic way in which Ms Rose reported to her colleagues on the outcome of the 17 June meeting, something which I found she could not really explain.

[26] Mr Warren Finegold: a member of the Group Executive Committee.

407. However, I do not think it is necessary to decide whether that inference should be drawn. It may be that views within Vodafone (for example as between Mr Humm and Mr Colao) differed on this point, or that Mr Colao was in the end persuaded that failure by P4u was more likely. But the critical question for this case is not whether Vodafone wanted or expected P4u to fail, but whether Vodafone knew what EE (or O2) intended to do because it was sharing or receiving such information with or from them.

408. P4u sought to advance a case that in mid-April 2014, Vodafone UK thought that if it left P4u, the latter would survive, retaining EE and potentially attracting another MVNO or, possibly, BT; whereas by early June 2014, Vodafone UK concluded that P4u would not survive as it was convinced that EE would leave. It was submitted that this new-found confidence that P4u would not survive showed that Vodafone had been party to an exchange of information with EE about their respective intentions, and thus confidential commercial strategy.

409. However, there is no hint in any of the contemporary Vodafone documents that Vodafone, at either Group or UK level, had such information about EE, and much that is inconsistent with it:

a) In the 2 June 2014 Hunter Steerco slide deck (para 370 above), one slide addressed the "EE options if VF go exclusive with CPW", considering various alternative possibilities. I consider that it is clear from that slide that Vodafone UK was trying to analyse its competitor's position without any inside knowledge, and the slide concluded:

> "EE response will likely depend on future inflow requirement from indirect channel & relative commercials with CPW & P4U"

b) On 6 June 2014, Vodafone UK heard from a journalist a rumour (which featured in a press article the next day) that a major MNO may be leaving CPW, which Ms Rose thought must refer to EE. She emailed her colleagues next day voicing her concern:

> "We need to think thru whether we would still recommend doing this deal in a scenario in which EE stays with P4U on an exclusive basis (which is how I read the rumour)."

Her colleague, Mr Martin Spink, thought that it might perhaps refer to O2, although that was less likely, and in her response Ms Rose agreed that it seemed unlikely that O2 could manage without both CPW and P4u. She continued:

> "Two scenarios that scare me the most are now "last man standing" (EE goes CPW only before we do) and P4U 2 operator model (with EE and BT)"

Ms Rose explained that the "2 operator model" was a reference to P4u doing a deal with BT (which all the MNOs considered was a potentially powerful entrant into the mobile market) and that she assumed that this was P4u's 'plan B' in case the negotiation with Vodafone UK did not succeed, i.e. so that P4u would then maintain

its position as an indirect retailer with two significant MNOs. The fact that she had such concerns demonstrates her lack of knowledge regarding EE's intentions.

c) Although Ms Rose said in her evidence that she was really much less worried about this '2 operator model', she emphasised her concern about the first possibility:

> "Well, certainly what scared me the most was the first scenario, because EE had twice as much volume in Phones 4u as we did. We were about a third of their volume, EE was about two–thirds of their volume. And if EE had pulled out of Phones 4u before we did, we would have been the last operator trading in Phones 4u, and they would have been very wounded at that stage and struggling, and we would have had little to no negotiating leverage with Carphone Warehouse. So that scenario, for us, would have been disastrous. Which is why we were so intent on moving quickly and seizing first mover advantage."

410. This concern that EE might conclude an exclusive agreement with CPW, leaving Vodafone UK as the 'last man standing' with P4u, was emphasised by all the senior executives from Vodafone UK. They said that they felt it was important to gain the 'first mover advantage' with CPW. If Vodafone UK was the first to leave P4u and offer exclusivity to CPW, it was in a good position to secure favourable terms; conversely, if EE did that first, Vodafone UK would be left partially dependent on a weakened P4u and would have little leverage in negotiation with CPW. I find this was a genuine concern at the time and a strong influence on the final decision, as shown by some of the key contemporary documents:

a) The 9 June 2014 memorandum to Mr Humm, recommending that Vodafone UK should seek an exclusive agreement with CPW, stated:

> "VF cannot be exposed to EE's distribution strategy which carries large risk to VF's inflow and ROI should EE move exclusively to CPW and stop supporting P4U. Therefore we are recommending a proactive stance that puts EE under pressure in P4U and secures our share with the strongest retailer on improved profitability, by signing the CPW deal and exiting P4U."

Before summarising the commercial terms so far agreed in the negotiation with CPW, the memorandum stated:

> "We believe time is of the essence to lock our position ahead of EE."

b) Another memorandum was finalised the same day addressed to the Vodafone Group Board[27] that similarly highlighted, as a risk if Vodafone UK did not proceed with an exclusive contract with CPW:

---

[27] It appears that this was prepared in case the decision required Group Board approval, but in the event that did not prove necessary so it seems this memorandum was never sent to the Board.

> "EE does a new, exclusive deal with CPW before Vodafone does, and Vodafone is left as the only mobile operator in a commercially unviable P4U. EE's exit would lead to the almost certain disappearance of P4U in its current form and lead Vodafone into a defensive and potentially costly negotiation to extend our current deal with CPW."

c) In her presentation on 11 June 2014 to the consumer division team, Ms Rose referred to the press rumours suggesting that EE may exit from either CPW or P4u, or possibly both.

d) The 17 June 2017 slide deck presented to Mr Colao, contained the headline:

> " 'Wait & See' is not a viable option because the risk of others taking first mover advantage and shutting us out is too great … we need to act"

That is clearly a reference to EE. One of the "guiding principles" for the negotiations set out another of the other slides was:

> "Mitigate risk of being locked out by EE moving first"

411. I find this inconsistent with any desire or attempt by Vodafone UK to disclose their plans to their larger rival. In my judgment, it is the very antithesis of the alleged collusion with EE, i.e. that Vodafone UK and/or Vodafone Group coordinated with EE its decision to discontinue its relationship with P4u; or disclosed confidential information to EE as to its intended conduct and/or had received information from EE as to what EE was planning to do.

The potential acquisition

412. At the same time as these negotiations were proceeding, there was a suggestion that Vodafone UK might purchase P4u. The suggestion came from Mr David Giampaolo, a well-connected investor in the technology and communications industry who was close to BC Partners. He first proposed this to Mr Colao in around April 2014, and then returned to it in June 2014, first writing to Mr Colao on 2 June 2014, making a case for Vodafone UK to buy P4u alone; and then when he met Mr Colao on 12 June 2014 at a "Founders' Forum" event at a hotel outside London, he suggested that Vodafone could carry out an acquisition jointly with EE. Mr Swantee was also at the event, and he and Mr Colao then spoke about this privately while walking in the hotel grounds, but not in any detail: most of their conversation concerned an attempt by Mr Colao to interest Mr Swantee in moving to a very senior position in the Vodafone Group. Mr Colao and Mr Swantee nonetheless agreed that the companies' respective lawyers should look into the possibility of a joint acquisition, since any joint acquisition was likely to raise regulatory and antitrust issues.

413. In fact, Mr Blendis of EE had already had a preliminary discussion with his counterpart at Vodafone UK (by now, Ms Helen Lamprell) about this the month before. Following the Founders' Forum discussion with Mr Swantee, Mr Colao informed Mr Hoencamp and Mr

Humm. They saw this as a distraction from the exit plan they were putting forward and of which Mr Colao had not yet been convinced. But they necessarily asked their lawyers to look at it again. As a result, a meeting was arranged between Vodafone UK and EE's external solicitors (Linklaters and Clifford Chance), which took place on 26 June 2014. A follow-up meeting, attended also by the in-house counsel teams, was held on 15 July 2014. Those discussions never progressed beyond a preliminary stage and, shortly afterwards, Mr Hoencamp told Ms Lamprell that Vodafone UK did not want to pursue this approach, referring to the legal advice they had received. Mr Blendis says that he received this message from Ms Lamprell in "late July", although I suspect it may have been closer to the middle of the month.

414. It was not suggested that anything untoward was said in any of those discussions. It will be necessary to return to this episode in the context of EE. But as regards Vodafone, I consider that this episode is of only marginal relevance in that the prospect of an acquisition was used by Ms Rose as a pretext to explain the delay in securing Vodafone Group approval for a new deal with P4u: see para 387 above. Moreover, it does not appear that Mr Blendis engaged in that meeting on 15 July on the basis that Vodafone UK was intending to exit from P4u, which reinforces my conclusion that Vodafone had not communicated its plans to EE.

Mr Humm

415. P4u's case that Mr Humm knew about EE's intentions, which he communicated in about June 2014 to Mr Colao, and potentially to the Vodafone UK executives, sought to draw support from his exchange with Mr Scheen of Orange on 2 April 2014. I discuss that fully below and conclude that Mr Humm gained no such information: see at para 576.

416. Moreover, the date of those exchanges does not support the alleged inference. It was put to Mr Humm that he would have shared with the UK management any information he had about the UK market that would be of interest to them, and he agreed. But if Mr Humm had learnt in early April that if Vodafone UK left P4u then EE intended to follow, this would mean that he kept this to himself for several months, while Vodafone UK continued to evaluate its strategy based on uncertainty about EE's intentions. Vodafone UK was actively considering scenarios based on a fear that EE might move first, or alternatively the risk that once Vodafone UK left, P4u might be able to retain EE and restore its position by a new arrangement with BT, one of the options that scared Ms Rose at the time: see para 409.b) above. Indeed, in the memorandum prepared for the Vodafone Board of 9 June 2014, Mr Hoencamp acknowledged that one possibility (although a lesser risk than EE leaving P4u first to go exclusive with CPW), was:

> " EE does a new, exclusive deal with P4U and thereby enhances the likelihood that P4U can trade through their current financial constraints. If Vodafone is committed to CPW on the terms summarised above, in this scenario we would be precluded from trading in P4U."

417. Its internal documents show that one of its concerns was managing the six months run-off period until the existing contract expired, since P4u had many customers on the Vodafone network and Vodafone UK realised that P4u might over that period seek to "churn" those

customers to another network. Since P4u's only other network at the time was EE, and it was unlikely to survive if EE left as well, that also seems to me inconsistent with any knowledge of EE's intentions.

Two investment banks

418. It is necessary to address briefly the allegation that Vodafone indirectly conveyed its strategic intentions through conversations with investment banks. That derives from an email sent on 15 January 2014 by Mr Neal Milsom to Mr Marc Allera of EE, reporting that he had recently met with two individuals from Lazards and Morgan Stanley and saying:

> "Both expressed the view that Vodafone would swiftly follow any action we took in indirect. Clearly someone at Voda is clearly and consistently conveying this message."

419. As best he could recall, Mr Milsom said that the context for the meetings was the interest by the banks at the time regarding a possible IPO by EE. Mr Milsom said that he was struck by the fact that they were, independently, saying the same thing, which suggested to him that someone at Vodafone must have spoken to them.

420. However, whatever the investment bankers may have thought, I do not see how anyone at Vodafone UK or Vodafone Group would have conveyed such a specific message back in January 2014. That was a time when Vodafone UK's discussions with P4u about a new contract were just starting and when its agreement with CPW had a considerable time to run. I should add that the Vodafone UK witnesses said that they had no contact with these banks and the Vodafone Group witnesses were clear that they never passed on such information. I consider that there is no substance to this allegation.

Alleged collusion with O2

421. P4u's pleaded case alleges that before 27 January 2014, either Vodafone Group or Vodafone UK had colluded with or given commitments to O2 or Telefónica that it would either cease or reduce its supplies to P4u, or that it would do so as regards one of the two large indirect retailers. The date of 27 January 2014 derives from the conversation between Mr Dunne and Mr Whiting: para 273 above. It is further alleged that such collusion or commitments were probably given in September 2012 (by Mr Laurence) and/or in September 2013 (at the meeting between Mr Humm and Ms Castillo).

422. I have addressed the allegations concerning Mr Laurence and Mr Humm's meeting with Ms Castillo above at, respectively, paras 236-245 and 287-292. It is clear from the account of the development of Vodafone UK's strategy that as at January 2014 Vodafone UK was not seriously contemplating an end to its arrangements with either P4u or CPW. It was seeking to reduce its reliance on the indirect retailers and to strengthen sales through its direct outlets, but that was well-known to be the objective of all the MNOs. However, the decision by Vodafone UK to seek an exclusive supply agreement with CPW and exit from P4u came several months later in 2014, in the circumstances described above. And if Vodafone did not disclose such information to O2/Telefónica, I do not consider that O2/ Telefónica would have disclosed its confidential commercial strategy to Vodafone. It is

appropriate to repeat the quotation from P4u's Re-Amended Particulars of Claim, with which I agree:

> "… it is inherently unlikely that an undertaking would provide a competitor with confidential and commercially sensitive information and/or a commitment as to its future conduct on the market unless it had received and/or expected to receive corresponding information and/or commitments in return."

The aftermath of the Vodafone decision

423. At 7 a.m. on Monday, 1 September 2014, P4u announced Vodafone UK's decision to the Irish Stock Exchange.

424. Mr Whiting had informed EE's senior executives about Vodafone UK's decision shortly after the meeting on 29 August. I consider below the exchanges which followed as between P4u and EE, and the series of communications and discussions within EE over the following days. The upshot was that EE declined to provide support to P4u, and on 12 September 2014 it formally notified P4u that it would not replace or extend the EE Agreement with P4u when that agreement expired on 30 September 2015.

425. Three days later, on 15 September 2014, P4u went into administration. Although Vodafone UK may have hoped that its departure would lead P4u to fail, I think that it certainly did not expect that notification of its decision to P4u would have such an immediate catastrophic effect.

M. THE EE DECISION

Background

426. EE was established in April 2010, originally under the name "Everything Everywhere" before its rebranding. As noted at the outset, it was a 50:50 JV between DT and Orange, which at first continued to operate the Orange and T-Mobile brands alongside the new EE brand but then moved to single branding as "EE". EE sold connections both through direct channels (i.e., its physical stores, telesales operations and online platform) and indirect retailers, of which P4u and CPW were much the largest. It also sold through a number of smaller indirect retailers and several MVNOs, including Virgin Mobile.

427. The EE Board at the material time comprised Mr Swantee as CEO and Mr Milsom, the CFO, and four non-executive directors, of whom two were nominated by DT and two by Orange. Those non-executive directors of EE were, however, executives in the shareholder companies, and one of them would act as chairman of the EE Board, rotating between a DT-nominated director and an Orange-nominated director on an annual basis. The DT directors changed during the course of the relevant period. Until 1 February 2014, they were Mr Timotheus Höttges and Ms Claudia Nemat; thereafter they were Mr Michael Tsamaz and Mr Thomas Dannenfeldt (although Mr Dannenfeldt attended Board meetings some months before his formal appointment). The two Orange directors were Mr Gervais Pellissier (who was Orange's CFO until 1 September 2014) and Mr Benoit Scheen (who

was in charge of Orange's Europe division, excluding France), save that at the very end of the relevant period, on 1 September 2014, Mr Scheen was succeeded by Ms Delphine Ernotte Cunci.

428. In addition to the shareholder representatives on the EE Board, a senior executive from each of the shareholders was responsible for coordination of their oversight of EE. In the case of DT, this role was carried out until August 2014 by Mr Wolfgang Kniese, whose title was Vice-President, Area Management UK, and in the case of Orange by Mr Christophe Naulleau, whose title was Executive Vice President of UK Operations. They took the lead in liaison between the shareholders and EE, and would advise the respective EE directors from their own company and prepare briefings for them in advance of EE Board meetings. They were known informally as the shareholders' "front doors" into EE[28] and were frequently in touch with each other, seeking wherever possible to align the shareholders' views. Each of them had, in turn, what Mr Naulleau called a "controlling team" and Mr Kniese referred to as "Area Management UK" that helped them to analyse proposals coming from EE and to prepare their briefings for their respective EE directors. Mr Naulleau explained that he reported formally to Mr Pellissier and had less direct contact with Mr Scheen. In August 2014, Mr Kniese was succeeded by Mr Daniel Daub. A main contact at EE for the two "front doors" was Mr Stephen Harris, the chief corporate and strategy officer at EE. Mr Harris and EE's General Counsel, Mr Blendis, regularly attended EE Board meetings, as did Mr Naulleau and Mr Kniese.

429. The EE Board met every other month, but more in-depth Business Review Meetings ("BRMs") between EE executives and representatives of the shareholders were generally held monthly; and there would usually be a BRM immediately before a Board meeting. Mr Naulleau and Mr Kniese attended and fully participated in the BRMs, which the DT and Orange directors generally also attended. Occasionally members of the Orange or DT teams supporting the "front doors" also attended. As their name suggests, BRMs were the forum for detailed review and consideration with the shareholders of EE's business, whereas Board meetings were shorter and more formal.

430. In addition, EE held detailed quarterly "controlling" meetings with representatives of its shareholders. For Orange, those were attended by Ms Marie-Christine Lambert, the head of Orange's controlling team, along with Mr Gilles Deloison, Mr Arnaud Perrin-André and Mr Naulleau, whereas for DT the lead representative was Mr Michael Wilkens, accompanied by Mr Kniese and Mr Joachim Neubauer. The controlling meetings were primarily devoted to full scrutiny of EE's financial performance but they might also involve what the participants referred to as a "deep dive" into a particular strategic topic.

431. A lot of preparation by EE went into both the Board meetings and the BRMs, in the form of slide packs sent to the shareholders. In addition, the shareholder directors would receive internal briefings prior to those meetings from their respective representatives (i.e. Mr Naulleau and Mr Kniese) and they would often be in communication, or have their own meetings, in advance to try to align their positions on the agenda. As a result of all this,

[28] Within EE, they were sometimes referred to as "the twins".

there is a wealth of contemporary documentation, from within DT and Orange as well as EE, on the evolving strategy and decision-making of EE.

432. As noted above, the foreign parents of the UK MNOs came from a background where indirect distribution was much less significant than in the UK. That perspective was reflected in the views of the German and French executives involved with EE and their concern at the extent to which revenue was shared with the indirect retailers. For example, Mr Naulleau, who had worked for Orange since 1997, said that not only were indirect customer acquisition costs in the UK much higher than the equivalent fees which Orange paid in other European markets, but that he had never encountered elsewhere the UK practice where the MNO paid to the indirect retailer an ongoing monthly payment related to the tariff charge or billed revenue received from customers acquired through that retailer (known as "revenue margin share" or "RMS"). Mr Höttges commented in one meeting that the UK was the "worst market in [the] world." Mr Dannenfeldt thought that was a bit extreme, but he also considered that the UK was not a good market and that the key question for DT was how to bring margins in the UK up to the European level. However, although they may not have liked it, DT and Orange nonetheless recognised the particular role which indirect distribution played in the UK consumer market.

433. Within the EE management, although Mr Swantee was involved in any significant strategic issues, the primary interface between EE and the indirect channels was Mr Marc Allera, whose position at EE was, first, Chief Sales Officer, and then from January 2014, Chief Commercial Officer, although he explained that his actual role did not significantly change as a result of this change of title. Accordingly, it was common for Mr Swantee to discuss issues concerning indirect distribution with Mr Allera as well as Mr Milsom, before they were raised at a BRM or Board meeting.

434. As explained above, a critical aspect of EE's strategy in 2012 was the launch of its 4G network, which it achieved in the autumn of 2012, nearly a year before its competitors O2 and Vodafone UK launched their 4G networks. Mr Swantee was understandably proud of this achievement. He said:

> "Making 4G a success was absolutely crucial for EE, and if we were not able to do so, I felt I would have failed as a CEO."

435. Like all the MNOs, the senior management of EE were keen to reduce its reliance on indirect distribution and wished to expand EE's direct channels, including its online platform. At the same time, EE wished to grow its overall volume of connections. They recognised that this might involve increasing the volume sold through particular indirect retailers while reducing volumes elsewhere. As Mr Swantee explained, this "would result in EE being more closely and strategically aligned with a smaller number of indirect retailers". Mr Swantee was also aware of what had happened to Vodafone UK between 2006 and 2009 when it reduced its indirect volumes quickly by leaving P4u (see para 102 above), which he regarded as "a cautionary tale." He described the approach that he adopted in seeking to rebalance EE's reliance on direct and indirect channels as evolutionary rather than revolutionary, since he recognised that the indirect channel would continue to play a significant role in EE's distribution.

436. It was against that background that EE signed the EE Agreement with P4u in October 2012 for a term of three years, pursuant to which P4u was committed to providing EE with 35-45% of new connections that it procured each quarter. EE also signed a new agreement with CPW in December 2012, also for a term of three years. Although the commercial terms of the CPW agreement were better for EE, because they involved a significantly lower up-front "prepayment" by EE for each connection, Mr Swantee said that at the time he felt that EE's relationship with P4u "was more strategically important than its relationship with CPW." He explained:

> "P4U had been more willing than CPW to support EE's vision and our efforts to differentiate ourselves from the competition, and were aligned with EE's desire to push 4G hard at that time.... I always thought that P4U would eventually be able to improve their commercial terms to something closer to CPW's, which, combined with their focus on 4G, would have made them a much more attractive indirect retailer than CPW."

Mr Allera also considered that EE had a better working relationship with P4u than CPW, which was more focused on 3G connections.

437. In December 2012, EE and P4u amended the EE Agreement to allow P4u to sell higher volumes of connections through EE, increasing the maximum proportion to 60% from January 2013. P4u had that increased volume available because of the end of its arrangement with O2. However, the contract gave EE the option subsequently to reduce its volumes over time, and in June 2013 EE reduced the maximum volume by 5%. At the same time, the EE Agreement was amended to set up a bill of exchange mechanism which mitigated the cash flow consequences by delaying part of the upfront payments which EE had to make to P4u.

September 2013 – February 2014

438. In the autumn of 2013, EE commenced a review of its strategy for indirect distribution. EE generally took a 3-5 year view in its business planning, and indeed the management presented a 5 Year Plan to the Board in late 2013. Moreover, although EE's agreements with P4u and CPW did not expire for another two years, terms for new or extended agreements generally took long to negotiate so it was important for EE first to consider its strategic options. EE was also aware that BC Partners had bought P4u in March 2011 and that private equity investors often sought a profitable exit after 3-5 years, which meant that P4u might be up for sale in the next year. Mr Swantee was concerned at the time that P4u might be acquired by CPW (which would have created a very strong indirect retailer) or by one of EE's competitors, neither of which would have been an attractive outcome for EE.

439. Around the same time, in September 2013, Mr Rui Pereira, EE's Vice-President of Capital Markets and Corporate Finance, met Mr Whiting at his request to discuss the possibility of EE acquiring an equity stake in P4u. From that discussion, the EE management learnt that P4u was keen to explore various possibilities and also sought early renegotiation of the EE Agreement to extend its term beyond September 2015. Following that meeting, on 25 October 2013, Mr Whiting sent Mr Swantee and Mr Allera a more detailed proposal for

EE to purchase a 15% share of P4u while also extending the existing EE Agreement by seven years. Although Mr Swantee regarded P4u as his preferred indirect retailer, he did not think such an equity investment made sense at that time, since this would put EE in a difficult position because of P4u's relationship with other MNOs, and P4u as an indirect retailer had a fundamentally different business model from an MNO.

440. Although the 5 Year Plan prepared in late 2013 included, as an alternative, that EE pulls out of either CPW or P4u, it listed various reasons against this course; and the more worked example of a pull-out from CPW showed a short-term negative cash impact for EE in the first three years. Mr Swantee said he agreed with those reasons, and in addition would have been concerned about EE becoming wholly dependent for its indirect distribution on a single, powerful retailer. Similarly, the Plan included the option of acquiring a minority stake in P4u, and set out reasons against adopting that course.

441. EE's 5 Year Plan was discussed at a strategy day in Paris on 20 November 2013, where the shareholder directors pushed the EE management to consider what could be done about indirect distribution to improve EE's profitability. Mr Höttges asked how much value EE would lose if it exited from the indirect market, and how far margins would improve. But while probing and questioning, the DT and Orange directors seem to have been satisfied that Mr Swantee's proposed evolutionary strategy was the best option. A Business Plan reflecting the financial projections of the 5 Year Plan was formally approved at a Board meeting on 18 December 2013.

442. Mr Allera was principally leading the initial negotiations with P4u and at the same time he started initial negotiations with CPW. His objective was to secure improved terms from P4u, closer to the terms of the existing arrangement with CPW, whereas with CPW he sought an arrangement which would incentivise them to sell more 4G connections. In the early meetings with CPW there was also discussion about CPW switching the MVNO which they operated from Vodafone UK to EE. But Mr Allera said he found it difficult to make progress with CPW because of what he described as "commercial and philosophical differences" about how to address the discrepancy between 3G and 4G connections offered by CPW.

443. P4u agreed with EE to split off consideration of EE acquiring an equity stake from discussions about extension to the EE Agreement. In January 2014, in discussions between Mr Allera and Mr Whiting, P4u proposed detailed terms for a new agreement with increased volumes, as a result of O2's withdrawal from P4u. At a meeting in late January, which Mr Swantee also attended, Mr Whiting said that he was keen to reach agreement soon, so that he could announce this to counter any negative reaction to the withdrawal of O2. However, EE analysed the terms being offered and considered that they were not a sufficient improvement, and that it was not to its advantage to rush into an early agreement with P4u as opposed to continuing the negotiation.

444. Following the lack of progress in those early discussions, on 31 January 2014 EE announced plans to carry out a review of its consumer distribution strategy. The press release included a quotation from Mr Allera, saying:

> "We expect the outcome to follow our preference for fewer, deeper, longer term relationships with key partners who are prepared to share our network and service goals, while focussing on value"

In reality, EE already had its 5 Year Plan which had been approved. Mr Allera explained that this announcement was for EE in part a negotiating tactic, off the back of the announcement that O2 were withdrawing from P4u, "to negotiate the best possible terms from our existing indirect retailers, including P4u." Mr Swantee sent a copy of the press release to Messrs Pellissier, Dannenfeldt, Scheen, Naulleau and Kniese, telling them that he and Marc Allera were starting a process of selecting "fewer indirect partners with better terms." And in his evidence, Mr Swantee said that, as at the start of 2014, and in line with his evolutionary approach,

> "we had a plan set up to continue with Phones4u, improve the terms and conditions [with them] and … stay in Carphone Warehouse potentially but wind it down potentially over time…."

The Dixons – CPW merger and the 20 March 2014 BRM

445. Not long afterwards, on 24 February 2014, CPW and Dixons announced that they were in discussions about a merger. For EE, this was a complete surprise, especially as Mr Whiting had previously told Mr Swantee that P4u had a fantastic relationship with Dixons with which it was looking to do a tie-up. Strategically, EE saw the merger as very bad news: it had a much better relationship with P4u than with CPW, but this development made the prospect of exiting CPW in the future much more difficult, if not untenable, since CPW would now become a much larger indirect retailer. Moreover, with its entry into 4G, EE saw a developing opportunity in "convergence"[29]: EE could provide the 4G capacity whereas Dixons sold many of the devices and appliances which in future might communicate via 4G. Indeed, Mr Swantee and Mr Allera had held meetings with the CEO of Dixons in December 2013 to explore how they might develop a relationship along those lines, taking advantage of P4u's outlets in Dixons' stores, but those discussions had not been fruitful. DT was also excited by the opportunities presented by convergence, which it felt EE should exploit. EE would have much preferred a Dixons/P4u merger, but now it was clear that P4u would lose its SIS in Dixons, to be replaced by CPW. Mr Swantee said that news of the Dixons-CPW deal was "a real game changer", and several other EE witnesses said much the same.

446. The views of EE management about the implications of the merger emerge from the slide deck prepared for the BRM on 20 March 2014. One slide highlighted the implications of the merger for EE:

> "A combined DSG / CPW will create a retailing giant with over 1,000 UK stores that offer a unique platform for vendors to showcase a broad range of connected and non-connected devices. The buying power of the merged entity across multiple categories will deliver price leadership vs. single category retailers, challenging the business models and driving down

[29] See para 324 above.

margins for the remaining stand alone indirect channels (particularly P4U)”

447. And regarding the implications for P4u and EE’s consequent concerns, another slide included these bullet points:

> “— O2's exit from P4U and the proposed DSG-CPW merger has raised question marks about P4U's ability to survive in the UK market.
>
> — EE is keen for P4U to remain in the UK market to maintain competition in the indirect channels and prevent a combined DSG-CPW from dominating the sector
>
> — EE believes that P4U's survival is conditional on it maintaining at least 2 network partners (currently EE & Vodafone)
>
> — EE has investigated several potential options to mitigate the risk of a P4U market exit. These include:
>
> — Acquisition by EE: unlikely to be economically viable
>
> — Acquisition by EE and another operator: acquisition not viable beyond £600m valuation”

448. The slide pack also considered the implications for CPW if EE and Vodafone UK were simultaneously to exit from CPW. There was no consideration of such simultaneous exit from P4u.

449. The merger was accordingly discussed at the BRM. Mr Kniese there asked why EE could not exit from P4u. And Mr Scheen said that if the merger went ahead (the deal had not yet been concluded and in any event required regulatory approval), it “may make sense to exit P4u”. But the EE management argued against this, pointing out that they (i.e. EE and P4u) were aligned on value. Mr Milsom said that there were strong MVNOs who could step in and replace MNOs, taking EE’s volume from P4u; and Mr Allera pointed out that since the EE Agreement had 18 months to run, P4u would have sufficient time to find such replacements. Mr Swantee said in his evidence that he did not share their view and thought this was unlikely, but it seems he did not express that different opinion at the meeting.

450. Mr Naulleau recalled, after reviewing the documents, that there was no consensus between EE, Orange and DT as to how to proceed in the light of the merger, and that various possibilities were discussed. He felt that EE’s management was reluctant to contemplate a future without P4u after their successful association.

451. Although the minutes are obviously not a complete record of the discussion, it does not appear that the possibility of simultaneous exit by EE and Vodafone UK from CPW received much, if any, consideration. None of the participants who gave evidence could recall that, and that scenario did not feature thereafter.

Potential acquisition of P4u

452. In contrast, active consideration was given to the potential of acquiring P4u, with another MNO (probably Vodafone UK) with a view to breaking it up and absorbing its retail estate as a boost to their direct channels. That idea was strongly promoted by the EE management. On 17 March 2014, a few days before the BRM, Mr Pereira asked Mr Eyre to model a potential acquisition, after discussion with Mr Milsom who agreed that this proposition "could have legs". At the BRM it was agreed that the merger and acquisitions ("M&A") teams at DT and Orange should consider the possibilities.

453. Mr Harris and Mr Milsom followed this up with Mr Naulleau and Mr Kniese. Mr Naulleau put Mr Milsom in touch with Mr Olivier Froissart, who at the time was a Senior Vice-President, M&A, at Orange, and it appears that Mr Kniese similarly brought in Mr Joerg Weber, the Vice-President, M&A, at DT. Mr Froissart and Mr Weber knew each other as they had been in contact when M&A matters regarding EE had previously arisen.

454. Matters moved swiftly. On 24 March 2014, Mr Harris wrote to Messrs Naulleau and Kniese to tell them that Clifford Chance had been "primed" by EE to act and contact any other MNO's lawyers if they decided to initiate discussions about a possible joint acquisition, but he said that instructing investment bankers should await an assessment by the Orange and DT M&A teams as to "whether there is shareholder appetite/support for any form of acquisition." The same day, Mr Pereira sent Mr Swantee an outline plan, noting that Vodafone UK would be the most suitable acquisition partner and that it was better not to involve Three.

455. On 25 March, Mr Pereira sent Messrs Naulleau, Kniese, Froissart and Weber a short slide pack for discussion in a call scheduled for later that day. The slides outlined the 'pros and cons' with initial projections for two alternative acquisition scenarios: a joint acquisition by EE with another MNO to maintain trading; and a "joint break-up approach" with another MNO. The other MNO here suggested was Vodafone UK. The slide pack also noted that EE should be prepared for the potential of others seeking to acquire P4u. One of those considered in that regard was BT, on the basis that:

> "BT may convert P4U to a direct channel, forcing EE and Voda out of channel and making competition for share in CPW more intensive"

The suggested defence against that risk was to "Lock in CPW terms for the long term".

456. P4u sought to place some emphasis on the email sent by Mr Froissart to Mr Naulleau on 25 March 2014, reporting on an initial conversation which he had held with his opposite number at DT, Mr Weber. Mr Froissart wrote:

> "On est OK qu'il peut y avoir une occasion historique de faire la peau à la distribution indirecte, mais tricky car nécessite coopération de Vodafone et pb [problème] potentiel de droit concurrence. Cela vaut donc d'être étudié."

There was some controversy between the parties as to whether the best translation of "faire la peau" is "to strike a blow" or "to inflict harm" or "to wipe out" or "to kill". In my view,

it does not matter: this was simply Mr Froissart's reaction, in idiomatic language, that an acquisition of P4u had the potential significantly to damage the model of indirect distribution in the UK, which Orange had never found attractive. Moreover, I consider it is correct, as Mr Froissart explained, that his reference to the necessity for cooperation with Vodafone was because the proposal for an acquisition was being put forward as something that, in terms of cost, EE would have to do together with another network, for which Vodafone was the only realistic option. He immediately appreciated from his M&A experience that such joint ownership by two of the main competing MNOs would raise difficult issues of competition law. Mr Froissart was accordingly referring to the cooperation necessary for a joint acquisition, and Mr Naulleau said that this is how he would have understood the email (he expressed himself in those terms since he had no direct recollection of the email after all this time). I accept that evidence.

457. EE's management continued to promote the strategy of an acquisition of P4u, with a view to this being tabled at the next BRM, to be held on 10 April 2014. On 7 April, Mr Harris sent a draft slide deck entitled "Project November Update" prepared for the forthcoming BRM to Mr Naulleau and Mr Kniese for comment. That set out and modelled five alternative scenarios:

1) EE acquires P4u, jointly with another MNO, and re-signs an agreement with CPW;

2) EE acquires P4u, jointly with another MNO; EE (and potentially both) pulls out of CPW;

3) EE pulls out of CPW, potentially followed by another MNO;

4) EE pulls out of P4u;

5) Vodafone UK acquires P4u.

458. Of those scenarios, only (1) was shown as having a positive NPV and achieving "structural transformation". Scenario (4) showed a negative effect on EBITDA of c. £58 million p.a. That figure was arrived at on the assumption that EE would retain only 25% of the volume of new connections and 25% of the upgrades which it otherwise would obtain through P4u, and that improved terms which could be negotiated with CPW would be worth an additional £5 million p.a. The recommendation was: "begin exploratory discussions with other MNO and appoint bank". Moreover, the presentation stressed the urgency for a decision, commenting that:

> "BC Partners, owners of P4U, are likely to have approached DSG, CPW, VOD and potentially others (e.g. BT, Tesco). They have approached EE in November about a minority stake in P4U"

459. In response, Mr Naulleau and Mr Kniese requested the detailed models underlying the various scenarios. They also pressed EE to undertake further analysis of the acquisition scenario and the exit scenario, on the basis of securing improved terms with CPW.

460. It seems that as a result this presentation was substantially revised over the few days before the BRM. The final slide deck presented at the BRM set out only three alternatives:

1) EE + 1 buy P4u "and absorb", while securing improved terms with CPW;

2) Trade with both [P4u and CPW] on improved terms;

3) EE pulls out of P4u, while securing improved terms with CPW.

461. Of those, option (1) was shown as having a positive NPV of c. £401 million (assuming that EE bore only half of the purchase price and restructuring costs); option (2) was estimated at a positive NPV of £132 million (by way of improved earnings); whereas option (3) was shown as having a negative NPV of £264 million. As regards option (3), the assumptions were that Vodafone UK would remain with P4u and that P4u could replace EE's volumes with other providers, such as BT, Virgin, O2, Three and Vodafone UK. The calculation had also revised the expected annual negative effect on EBITDA to £33 million (due to an increase in the assumed benefit of a deal with CPW from £5 million to £50 million).

462. The key questions posed for the Board were:

> "• Does the Board believe now is the time/opportunity to make a significant move in distribution to improve EBITDA?
>
> • If so, does the BoD concur a joint acquisition of P4U with a 3rd Party is the best scenario?
>
> • If a joint acquisition of P4U with a 3rd Party is the best scenario, then can we agree approach? "

And after noting the recent developments in the market, including Vodafone UK's announcement of its Project Spring investment (paras 329-330 above) and a rumour that Vodafone UK was itself looking into acquiring P4u, the presentation highlighted:

> "Opportunity for structural change may not be available at a later stage. Also, EE is currently negotiating with P4U and CPW about improved terms and contract extensions. EE's strategic choice directly impacts its optimal approach to these negotiations and needs to be made now"

463. The reaction of the shareholders was as follows. On the Orange side, already on 28 March Ms Lambert had expressed herself strongly opposed to the acquisition of P4u. On the contrary, she favoured negotiating better terms with CPW to reduce the share it obtained of customer revenue, in return for exclusivity (i.e. a commitment to leave P4u); and that in the light of the Dixons/CPW merger, which was not yet final, there was an opportunity for leverage since Dixons would be keen to ensure the support of EE for the merger and confirmation that it would retain EE connections. Mr Naulleau recalled that he discussed this with Mr Deloison and Ms Lambert, and that he and Mr Deloison were also very sceptical about an acquisition whereas it was the EE management that was pushing that idea. Indeed, Mr Deloison said that he felt that an acquisition of P4u "was something of a 'dream' for the management of EE, as they wanted to run a bigger company."

464. Mr Naulleau set out their views in an email for Mr Pellissier on 30 March where he wrote that the approach of offering CPW support for the Dixons merger in return for exclusivity

was a scenario which should be explored. Mr Pellissier said that he was not generally in favour of acquiring P4u, in particular as a joint defensive acquisition would have involved closing many stores. He explained that he did not want Orange to be associated with the burden and social implications of closing down a business, that an acquisition would involve investing more money in a market that he considered one of the worst performing in Europe in terms of EBITDA margin, and that a joint acquisition with another MNO would have given rise to significant governance issues and be subject to conditions imposed by the competition authority. But he said that he left open the potential for EE to analyse the option and make a persuasive case to its two shareholders.

465. Mr Scheen said that, as best he recalled, he would not have been in favour of acquiring P4u in order to break it up:

> "It would not have made commercial sense for EE to spend a large amount of money to buy P4U and then close most of its stores. A joint acquisition between EE and another MNO, which involved keeping the P4U business running, as envisaged by slide 14 of the *"Distribution Strategic Update"* would have seemed more commercially viable to me, and something worthy of further investigation by EE. "

Nonetheless, Mr Scheen said that he would have been concerned about the cost of an acquisition.

466. On the DT side, Mr Kniese said that although DT was not really attracted by the idea of an acquisition, they "did not want to be too dismissive upfront towards the EE management team," which was keen on this idea. Mr Dannenfeldt recalled that DT was less strongly opposed to the idea of acquisition than Orange, but was also doubtful about it. I think that Mr Kniese was more immediately hostile to the suggestion of an acquisition than the DT directors, but overall, DT's priority was to reduce what it regarded as the excessive reliance on indirect distribution in the UK market. DT was highly indebted at this point and therefore, as Mr Kniese explained, it would have needed a convincing case to inject more money into EE as opposed, for example, to investing more in the US, which was its second biggest market after Germany.

467. On 31 March 2014, Mr Dannenfeldt spoke on the telephone with Mr Pellissier about EE. Although neither could recall the conversation (which is hardly surprising), from Mr Naulleau's briefing note to Mr Pellissier for that call it appears that Mr Pellissier would have told Mr Dannenfeldt that Orange was very sceptical about an acquisition.

468. In the week prior to the 10 April BRM, there were internal discussions within Orange and DT regarding EE's proposal of an acquisition and the preferred way forward, and the Orange and DT executives were also in contact with Mr Harris and Mr Milsom at EE. It was as a result of their feedback and requests that EE's final presentation for the 10 April BRM incorporated significant changes from the previous draft: see paras 459-460 above.

469. There were a number of further conversations between DT and Orange, which led to an email sent on 9 April 2014 by Mr Naulleau and Mr Kniese jointly to Messrs Harris, Milsom and Allera, summarising the shareholders' views. They noted that a move by EE as regards

indirect distribution was necessary following what they described as "several key triggers", including the Dixons/CPW merger and the extent of EE revenue share with the indirect distributors (which had reached 38%, a figure both Orange and DT found alarming). They referred to the two broad scenarios EE had prepared, on which they commented as follows:

> "1) "acquisition" of one distributor, while improving terms with the other, (=project November)[30]
>
> 2) "improve":
>
> - improve terms with one, using their request to receive support for their merger with D, = EE to describe how they use the merger to improve their terms with CPW,
>
> - and either exit from the other one or condition the renewal with them to significantly improved terms,
>
> During meeting and calls, EE shows preference for acquisition scenario while Orange and DT requested a detailed study of the "improve" scenario as pre-requisite benchmark and would like to have a full understanding of the negotiations which took place with these 2 distributors."

They also pointed out that neither Ms Lambert nor Mr Wilkens supported a "defensive acquisition" which involved closing many stores.

470. Although some of the Orange and DT witnesses were questioned about their discussions, I do not think they take matters further in any way relevant to the issues which the Court has to decide. Mr Weber of DT made rough notes of some of the points arising in discussions in which he was involved, and as regards a call with EE on 7 April his note indicated that a joint acquisition of P4u was discussed as potentially involving an 70:30 split of the equity value as between EE and Vodafone, which he now believes was based on their estimated share of P4u customers. His note indicates that the alternatives discussed were to either optimise the terms with CPW and P4u or a disruptive move, which he explained meant an exit from one of the indirect retailers or an acquisition. His note concluded: "Need VOD back-up case in any circumstances."

471. Although reliance was placed on this by P4u, I think it reflects the fact that Vodafone UK was then the only other MNO which had an agreement with P4u so that any strategic move by EE therefore should take account of possible moves which Vodafone UK might make. That included that possibility that Vodafone UK might independently seek to acquire P4u: see para 462 above. DT was aware of the rumour that BC Partners were interested in selling P4u. I do not think any weight should be placed on the fact that Mr Weber did not here use the word "reaction" as he had in reference to CPW. This was a scribbled note made in the course of a telephone conference call and so is likely to put down the words that different speakers were using, and they would not all express themselves the same

[30] The code-name "Project November" is somewhat confusing as it was originally used by EE to refer to its strategy of considering various alternative scenarios for distribution, which began in November 2013, but later appears to have been confined to the scenario of an acquisition of P4u.

way. Altogether, I do not think that this note supports an inference that either DT or EE felt they needed to cooperate with Vodafone UK, other than in the context of exploring a joint acquisition.

472. Further, in advance of the BRM Mr Kniese briefed the two DT directors. As was customary, that comprised a written briefing paper followed by an oral briefing. The written briefing, sent on 7 April, enclosed and provided a commentary on EE's Trading and Finance Update slide pack, which DT had received from Mr Harris on 4 April. Mr Harris sent EE's separate 'Project November' presentation on indirect distribution subsequently, on 7 April, and he followed that up with a call to Mr Kniese and Mr Naulleau, in order "to aid your briefings". In sending his written briefing to the DT directors on 7 April, Mr Kniese told them that he would cover indirect distribution "only verbally". I reject P4u's suggestion that there was something sinister or suspicious about that. In all probability, I think Mr Kniese did this because, as he said in his oral evidence after reviewing the documents, he had received the EE presentation only on that day, it continued to be the subject of telephone calls with Mr Harris and, as noted above, EE agreed in the calls to make significant revisions (with the final version being produced only just before 10 April) so that Mr Kniese and his team did not have time to incorporate a commentary on it in their written document.

The 10 April 2014 BRM

473. At the BRM on 10 April 2014, there was a lengthy discussion of the appropriate strategy for EE as regards the indirect retailers, in light of the projected Dixons/CPW merger. Various alternative suggestions were canvassed but no specific decision was reached. The minutes record that Mr Swantee referred to the resulting new, large entity as "the gorilla", noting that theory suggested that EE would have to remain with it, and he also put forward a scenario of EE acquiring P4u with a view to converting some of its stores to the EE brand and selling others to another MNO. But it seems clear that the formal minutes do not, as is often the case, convey a full flavour of the discussion. Mr Naulleau reported the next day to his colleagues that Mr Swantee had been "très pushy" on the proposal for an acquisition, whereas Mr Pellissier and Mr Dannenfeldt remained very sceptical.[31] The shareholder representatives pressed the EE executives to do more in-depth analysis of alternative scenarios going forward. They all agreed that it would be sensible to hold a form of workshop to discuss these.

474. Such a workshop duly took place by conference call on 16 April 2014, with representatives from the Orange and DT controlling teams. From Mr Deloison's note reporting on the workshop, it appears that Orange was more vocal in the discussion than DT. It is clear that the Orange representatives in particular were not impressed by the rationale for an acquisition of P4u, and both shareholders were critical of the modelling and analysis produced by EE. As Mr Naulleau summarised it:

> "I was concerned at this time that EE's valuation of P4U was questionable, that EE's analysis did not account for SIMO trends, and that the rationale

---

[31] The minutes of the BRM record that Mr Scheen was present but that is an error. He was away on holiday and had given a power of attorney to Mr Pellissier for the meeting, which Mr Naulleau had organised.

> for an acquisition in which EE and another MNO would acquire P4U's 500 stores with a view to keeping only 100 was unclear."

And Mr Deloison considered EE's analysis was very basic and that EE had failed to consider the potential gains from investment of the savings from the non-renewal of its contract with P4u and the securing of improved terms with CPW. Mr Eyre sent the participants an additional slide pack, projecting figures over 10 years for alternative scenarios: (a) where EE together with another MNO acquired P4u, and (b) where EE pulled out of P4u. It seems that this "Additional Indirect Information" was sent following the conference call, later that day. The shareholders also offered that their controlling teams could work with Mr Eyre to "drill down the basic distribution data" which they felt was missing or unclear.

475. Both Orange and DT are very large companies with significant central resources. Altogether, I consider that they felt that EE was promoting the acquisition scenario without sufficient modelling and evaluation, but at the same time they wished to appear supportive of EE's management. Therefore they did not dismiss this option out of hand but pushed EE's management to present a thorough evaluation of the alternatives. Their primary objective was to increase EE's profitability and realise the full benefits intended for their JV. That involved lowering the customer investment costs faced by EE, and in particular the RMS which resulted from the existing terms of EE's agreements with the indirect retailers: para 432 above. Therefore in considering the Dixons/CPW merger, the focus of DT and Orange was on how that might present an opportunity to achieve better terms from the indirect retailers and/or reducing EE's dependence on those retailers.

EE's financial modelling

476. EE's analysis of the financial implications of the various scenarios and options was conducted by Mr Roger Eyre, the Sales Finance Director, and his team, which, as regards the indirect channels, was headed by Ms Nicola Talbot (as she then was; now Mrs Nicola Derbyshire). The sales finance team would often be directed to model a range of scenarios, which they did by assessment of the likely financial impact of each scenario, usually over a period of years.

477. Mrs Derbyshire explained in her evidence the way the modelling was carried out:

> "These models necessarily relied on various assumptions. Where possible, these assumptions were derived from historic data (e.g. the average profitability to EE of connections obtained via different channels); where such data was not available, we would develop a reasonable estimate based on other relevant information – for instance, if looking at "absorption rates" (i.e. the percentage of sales volumes currently obtained through an indirect retailer that EE was likely to be able to keep if it did not renew its agreement with that retailer), we would consider information such as our retail footprint and telesales capacity.
>
> Once a model had been put together, we would discuss with the rest of the indirect team whether we thought particular assumptions were realistic. If ongoing developments, such as live commercial negotiations, were

> relevant to the assumptions, this information would be incorporated. For instance, if we thought that we could negotiate more sales volumes with a particular indirect retailer, this would be factored into any assumptions. This was an iterative process, and these assumptions would often be revised several times over the lifetime of a model.
>
> As they were dependent on a number of factors, the assumptions carried a certain degree of risk. Further, each assumption did not exist in isolation. For instance, the percentage of customers obtained through an indirect retailer that EE could expect to retain[32] if it withdrew from that indirect retailer depended, in part, on (i) the extent to which EE could negotiate increased volume commitments with other indirect retailers and (ii) how much EE was willing to invest in promotional offers to acquire new customers, and retain existing customers, via its direct channels. This is also why the assumptions were regularly adjusted; we would fine tune them as we thought about each point and how they related to each other in more detail, and this helped us refine the model over time so that the final version was sufficiently robust. Separately, we would also test the "sensitivity" of the model's output to particular assumptions, to understand how much a change in the value of those assumptions would affect the model's output. Through this, we would be able to understand how much the output could change if those assumptions were not ultimately borne out. ”

478. Mr Eyre highlighted the way the predicted financial outcome was dependent on the assumptions:

> “This sort of modelling analysis was highly sensitive to the assumptions we made – for instance, assumptions as to the cost of purchasing P4U; as to the percentage of acquisition and upgrade Connections previously obtained via P4U that EE could expect to retain if EE (i) acquired P4U or (ii) withdrew from P4U; as to the improvement in contractual terms that EE was likely to be able to negotiate with CPW and P4U; and as to the handset cost efficiencies that EE was likely to benefit from in different scenarios. By way of illustration, in a scenario involving EE pulling out of P4U, a decrease in the assumed percentage of acquisition and upgrade Connections previously obtained via P4U that EE could expect to retain would, all else being equal, result in the modelling predicting a less profitable outcome for EE.”

479. There is no suggestion that EE’s modelling was not carried out in good faith or that it was not genuine. Mr Eyre said that in its modelling EE was seeking to be realistic and set out the most likely outcome under various scenarios. I accept his evidence that he was not seeking to be pessimistic or optimistic in the figures presented. He readily acknowledged that the figures could turn out to be wrong. But P4u alleges that the development of the assumptions used in the modelling shows that EE had information as to what Vodafone UK was planning, and more particularly that Vodafone UK was intending to exit from P4u.

---

[32] For the meaning of “retention” in this context, see further at para 517 below.

480. It will therefore be necessary to scrutinise the evolution of the modelling in some detail. The outcome of the modelling was generally presented in the form of a slide deck. In the particularly intense period of evaluation, a succession of draft slide decks, and revised draft slide decks, were prepared, sometimes over a matter of days, and a large number of slide decks were referred to in the course of the trial. Often the title page of successive revisions bore the same formal date, and unsurprisingly the witnesses were generally dependent on there being a covering email to reconstruct the sequence of these documents. Even then, this was sometimes less than clear.

The shareholders' Bonn strategy meeting

481. On 23 April 2014, DT and Orange held a strategic review meeting regarding EE in Bonn. Mr Dannenfeldt attended for DT along with Mr Thorsten Langheim and Mr Wilkens; Mr Pellissier came for Orange, along with Ms Lambert and Mr Jérôme Berger. No one from EE attended the meeting and Mr Swantee said that they were not aware it was taking place. From the slide pack prepared by DT for this meeting, I think it is evident that the parents of the JV were considering their vision for the future of EE, and whether, over a two-three year timeline, their strategy should be to seek an early sale or to develop EE further by long-term investment. That, in turn, depended on their view as to the likely developments in the UK market, and their focus was on what was referred to as "FMC", i.e. fixed-mobile convergence, on which the UK was regarded as lagging behind some other European markets. In that regard, the slides considered likely moves by BT and Sky, and reflected the fact that involvement in FMC may require EE to partner with another operator. Although the position on indirect distribution was a part of this picture, I accept the evidence of Mr Dannenfeldt (who was the only witness who said he had a fairly good recollection of this meeting) that it did not feature prominently in the discussion.

482. In the slide pack, the slide headed "Indirect" is blank. I do not think it is surprising, after all this time and with the multitude of meetings which everyone involved has attended, that no one could explain why that was so; and as there are so many possible explanations for this I do not consider that any conclusion or inference can be drawn. More significantly, there is a contemporary record of the meeting which has survived, in the form of a 'bullet-point' report made by Mr Berger some days later. No formal notes of the meeting were taken, and if anyone else made an informal note it was not preserved.

483. At the time, Mr Berger was Head of Orange Group Financing and Treasury, the department under the Group CFO that was in charge of ensuring the financing of the Orange group. Mr Berger had no involvement in the operational matters concerning EE, and he explained that he attended the Bonn meeting since his role included overseeing EE's financial needs and the potential implications for Orange of any change in its shareholding in EE.[33] Mr Berger's report was prepared at the request of Mr Pellissier for the rest of the Orange team, detailing what further work would be required on the different items. Under the sub-heading "P4U/Distribution", Mr Berger's report stated (in translation from the French):

[33] E.g. an asset swap with DT of Orange's 50% shareholding in EE in return for a share in DT's US venture was one of the matters discussed.

> "a. EE must review its presentation, in conjunction with DT/Orange Management Control
>
> b. Strategic aspects of the distribution market (CarphoneW / Dixons consolidation, discussions with Vodafone) to be analysed by EE in conjunction with DT/Orange Management Control, with support from M&A (Olivier Froissart) as required
>
> c. Preparation of an informal BoD on distribution strategy 2nd half of May"

484. Mr Berger was cross-examined about this document, but he had no real recollection now of preparing it or of the meeting itself and so could only speculate. Mr Dannenfeldt did not recall any reference to "discussions with Vodafone". I think it is clear from Mr Berger's contemporaneous report that such reference was made, but what did this mean? In my view, this was a reference to the option of a joint acquisition of P4u, which had been discussed at the BRM two weeks before and was to be addressed again at the next BRM in May. Although both DT and Orange were very dubious about this proposal, it was still being promoted by EE management and had not been ruled out. Indeed, the shareholders were pressing EE to produce more robust analysis of this scenario along with potential alternatives. I reach this conclusion for several reasons:

a) The report said that this was to be analysed in conjunction with the controlling teams of DT and Orange, and with any necessary support from Mr Froissart. As noted above, Mr Froissart's role was in Orange's M&A team. That points clearly to the reference being to a potential acquisition, which it had been recognised would almost certainly have to be a joint purchase with Vodafone and therefore would require such discussions.

b) If, in contrast, the reference had been to discussions with Vodafone outside the context of a joint bid, that would obviously have given rise to competition law concerns, which someone like Mr Berger would have readily appreciated. I think it would be extraordinary for him then to have suggested that the controlling teams of DT and Orange should be involved in analysis of such discussions.

c) I was impressed by Mr Dannenfeldt as a witness who I felt was being frank in his evidence (although at times he was unreliable regarding the chronology of events). I accept his testimony that if someone had said at this meeting that there had been such potentially anti-competitive discussions, because of the legal implications this is something which would have stuck in his memory.

485. Accordingly, I find that nothing turns on the Bonn strategy meeting.

Late April -early May 2014

486. All the parties involved appreciated that because of the Dixons/CPW merger, and then Vodafone UK's announcement that it planned to open 150 new stores in the next year, the situation was urgent and after all their recent discussions the parties expected that important

decisions would have to be made at the next BRM in May. This was therefore an intense period for EE, both in its discussions with the shareholders and its internal evaluation and financial modelling, which fed into those discussions.

487. The frustration felt by the shareholders about obtaining sufficient and rigorous analysis of options from EE emerges from the email sent on behalf of Mr Naulleau and Mr Kniese jointly to Mr Harris on 25 April 2014. They wrote:

> "We know that the final preparation of the documents for the distribution business need some time. To avoid further delays and any disappointment on the shareholder's side on the details that will be delivered we recommend that the controlling/M&A teams of EE, Orange and DT should meet beginning of next week to define the content and format of the underlying business cases that are needed for the board document. This will enable Orange and DT to evaluate the business on their standard tools.
>
> As 1st May is a bank holiday in France, Germany and 5th May is a bank holiday in the UK we should already start on Tuesday and/or Wednesday. Otherwise we will lose another week"

488. And their email incorporated the text of previous emails from Mr Naulleau of 15 April and Mr Weber of 21 April setting out a series of specific and detailed questions and criticisms which EE was to address. They sought financial statements and the calculation used by EE to justify the value it placed on P4u, and commented that the restructuring charges assessed for P4u on an acquisition seem "a little light" given that this involved shutting down an entire company and closing a significant number of stores. The questions probed EE's modelling of all the various scenarios. For example, on the scenario of exiting from P4u while securing an enlarged deal with CPW, one of the questions from Mr Weber was: "What can we realistically achieve?" Mr Eyre said that he interpreted this as directed at the likely absorption/retention rates of EE's volumes currently obtained through P4u. His reaction at the time, which he typed into the email was:

> "There is a chance that P4U will not survive without us but its [sic] still risky. I will do some scenairos [sic] to demonstrate this."

Mr Eyre accepted that he here had in mind that the absorption assumptions used in the modelling would be significantly affected by whether or not P4u survived, should EE exit.

489. On 29 April 2014, there was an internal meeting between Mr Eyre and Mr Allera (and perhaps others within EE). From the slide deck which Mr Eyre's team prepared for that meeting, it seems that they discussed the scenario of an acquisition of P4u so as to absorb some of its stores into EE's direct business and close others, and at the same time conclude an enlarged deal with CPW. By contrast, the slides noted that if EE simply pulled out of P4u (or CPW), its business would be likely to continue and the indirect retailer would "sell the volumes" to another MNO or MVNO. The slides set out the negative implications for EE of simply exiting from P4u and why an acquisition and absorption of P4u's business, converting 100 of its stores, would be much more beneficial.

490. EE at first proposed that the alternative scenarios could be discussed in a call with the shareholders. On 2 May 2014, Mr Harris sent the DT and Orange teams two slide packs, one on the "Distribution Landscape" and the second, entitled "Indirect Distribution Questions", setting out EE's initial response to the series of questions and observations addressed to it (see para 488 above), while explaining that more work needed to be done. As regards the scenario of exit from P4u, the second pack noted the sensitivity of the analysis to different absorption rates; one slide indeed modelled the effect if all EE's former volume was split between EE's competitors. The second pack concluded with a slide setting out seven options that EE could pursue:

> "1. Pull out of P4U and sign enlarged CPW contract
>
> 2. Purchase pf P4U of consolidate into our estate and sign an enlarged CPW contract
>
> 3. Purchase of P4U and run it as it a going concern with a CPW contract
>
> 4. Purchase of P4U and run it as it a going concern without a CPW contract
>
> 5. Purchase the rev share base [of P4u] and the[n] reinvest the saving into stores/Brand/offer
>
> 6. Pull out of P4U and reinvest the saving into stores/Brand/offer
>
> 7. Negotiate better terms with both P4U and CPW"

Option 2 corresponded to the scenario considered in the slides discussed between Mr Allera and Mr Eyre on 29 April.

491. In a preliminary call with EE on 2 May, shortly after receiving these documents, it seems that Orange and DT said that they did not regard the information they were receiving as adequate and considered that much more was required. Accordingly, the parties all agreed to hold a 'drill-down' workshop at EE's Paddington offices on 6-7 May, for which Mr Naulleau and Mr Kniese along with members of the Controlling Teams at Orange and DT would come to London, with a view to getting all the information needed for the presentation to the Board/BRM later that month.

492. It is clear to me that these discussions were causing frustration on the EE side as well as to Orange and DT, although that was downplayed in the witness evidence at trial. Commenting on the reactions from the shareholders, Mr Harris wrote to his colleagues on 4 May:

> "… very infuriating …. we move from threat of armies being deployed on us before even concluded assessment ourselves to complete withdrawal – not helpful and wastes time"

493. On Sunday, 4 May, Mr Harris sent his colleagues a draft 28 page slide deck prepared for use at the 7 May meeting. That recorded that the negotiations with CPW were proving "incredibly challenging" and set out the seven options (see para 490 above) with

comments. As regards option 1, the comment was "Not recommended?", for option 7 the comment was: "Short-term recommended; long-term less attractive", whereas for option 2 the comment was: "Strongest recommendation." That draft deck did not include any financial breakdown of the impact of the different options.

494. The next day, 5 May, Mr Eyre sent Mr Allera a draft slide deck summarising the financial effect of the seven options. The position is not very clear but from the cover slide it may well be that this was prepared to be incorporated with the slides circulated the previous day (which Mr Eyre had not prepared), to provide the financial modelling of the different scenarios. Mr Eyre's covering email stressed that the figures were a 'work in progress' which would be refined during the week.

495. This draft slide deck was relied on by P4u because it indicates the evolving assessment by Mr Eyre's team. It incorporates a change in the assumptions as to the absorption rates of EE volumes under option 1 (i.e. exit from P4u and an enlarged deal with CPW): these were now assumed to be 70% of acquisitions all through CPW and none in EE's direct channel, and 60% of upgrades, split equally between CPW and EE's direct channel. Mr Eyre said that the change in the absorption rates reflected what he was told was under discussion in the negotiations with CPW (in which he was not involved).[34] But the churn of acquisitions remained at 30% and the five-year EBITDA effect (non-discounted) of option 1 was shown as only £5 million, compared to £75 million for option 7 (remaining with both P4u and CPW). I note that the elaboration of option 1 is expressed as:

- "Sign a larger deal with CPW *and then pull out of P4U in September 2015 at the end of P4U contract* [emphasis added]

- Aim to get £50m improvement in terms to help offset risk of losing volume"

Accordingly, the modelling certainly did not assume an early collapse of P4u. The alternative options involving acquisition of P4u showed significant improvement (a positive effect of £379 million for option 2). Mr Eyre accordingly commented on this analysis in his covering email:

> "It does again start to show that without investing a large amount upfront then just getting better terms is the best option from the numbers perspective."

The 6-7 May drill-down workshop

496. Mr Naulleau set out the background to this meeting in an email to the two Orange directors, Mr Pellissier and Mr Scheen, on 6 May:

> "Following various calls and meetings with EE and their difficulty since 4 weeks (...) to provide and present the necessary basic distribution data to get a clear and simple picture of their distribution situation in the UK

---

[34] This was confirmed by Mrs Derbyshire, who prepared the underlying modelling on the basis of volumes under discussion with CPW.

> moving landscape, and in view of the discussions vs CPWH/Dixons and P4Y [sic], Neal [Milsom] has accepted last Friday, Marie-Christine [Lambert]'s offer that we spend 2 days in London with EE controlling and distribution teams in order to drill down EE distribution data in the UK market, and then assess on the basis of key figures and trends the various possible scenarii for EE.
>
> As mentioned to EE, we (at Orange) DO NOT NEED ADDITIONAL SLIDES but we propose to work with EE teams on EE basic data…
>
> … the spirit of the session is a CONSTRUCTIVE one, in order for us to understand very clearly all EE distribution details and build a robust appropriate modelling together."

497. The drill-down workshop duly took place on 6-7 May, attended by Mr Milsom, Mr Allera, Mr Harris and Mr Eyre[35] for EE (Mr Swantee did not participate). Notwithstanding the draft slide decks discussed within EE over the previous two days, it does not appear that any presentation was in fact circulated to the participants (perhaps because of Mr Naulleau's view set out above). However, the participants did consider the seven scenarios which EE had set out, possibly on the basis of what they had been sent on 2 May: see para 490 above. I will return below to the question of what some of the EE executives said at this meeting. But it was agreed that the seven scenarios should be simplified and reduced in number. The DT and Orange representatives made clear that they were not at all attracted by any of the P4u acquisition scenarios, and Mr Kniese said that if EE wished to promote this option, "they need to take it to the smallest details to convince the shareholders."[36] EE was asked to set out some variations of the scenario of exiting from P4u.

498. On the second day of the workshop, before the start of the session, Mr Eyre circulated a 24 page slide deck, incorporating some amended slides from the 5 May draft but further reflecting the state of the negotiation with CPW and the implications of leaving P4u under various outcomes. This deck notably does not include enumeration of the seven options. On the contrary, the financial modelling in this deck addressed the expected effect only of what had been option 1, i.e. entering into an enlarged new deal with CPW and leaving P4u at the end of the current contract. The express assumptions for this analysis were similar to the 5 May draft slides: if EE left P4u, it was again assumed that 70% of EE's P4u volume of new acquisitions would be "absorbed" through CPW with nothing coming to EE direct; and that 60% of EE's P4u volumes of upgrades would be absorbed (half through CPW and half directly). The express assumptions were that the balance, i.e. 30% of EE's volume of new acquisitions through P4u, and 40% of its volume of upgrades, would go to competitors. In my view, that indicates that these assumptions were made on the basis that P4u would survive and be able to divert that volume to others: indeed, the slide which estimated the effect on EE's market share in new acquisitions expressly states: "Assuming P4U are able to connect the remaining 30% on another MNO". As a result, the overall effect on EE's

---

[35] Mr Eyre may have attended only on 7 May but he was briefed by the other EE executives on what happened the day before.

[36] As recorded in Mr Deloison's report of the meeting: see further para 577 below.

EBITDA was not significant and the slides noted that, on the figures there set out, as regards this option the "Current Business case is marginal." One of the slides indicated that P4u would survive EE's exit with a reduced market share. And the presentation expressed at the outset the alternative possibility of an acquisition of P4u "singularly or jointly" with a "repurposing [of] stores to increase EE Direct". But the slides concluded by suggesting as among the areas for further investigation were:

> "• Is P4U still in business?
>
> • What are the legal and accounting implications if P4U cease to be a going concern?
>
> • Are P4U Still a going concern, even with EE business?"

499. I do not think these questions at the end indicate that EE had come to the view by 7 May 2014 that if it were to leave P4u then P4u would go out of business. On the contrary, as I have explained, the modelling assumed the opposite. Therefore I consider that these questions only show that EE was concerned about P4u's financial position generally, presumably because of what was known about its indebtedness and the impact of the enlargement of CPW through its merger with Dixons.

The lead-up to the 21 May 2014 BRM

500. Mr Eyre's list of action points following the drill-down workshop noted that EE was to focus on three scenarios: (1) the base case, assuming that it stayed with both CPW and P4u; (2) pulling out of P4u with a deal for larger volumes in CPW; and (3) a "Direct only" strategy: i.e. a scenario of exiting both P4u (in September 2015, when the EE Agreement expired) and CPW (in December 2015, when EE's agreement with CPW expired) to invest heavily in EE's direct channels. Further, one of the matters EE was tasked to address was:

> "What do we believe happens to P4U if we pull out and how quickly does it happen"

Mr Eyre explained in cross-examination that the shareholders were effectively telling EE:

> "time's of the essence, you've got to finish off your modelling, please focus on the ones that aren't purchases"

And he said that it was from this point that his team stopped modelling a scenario of acquiring P4u.

501. As recorded in Mr Eyre's action points, it was agreed that EE would proceed to assemble and complete the thorough analysis necessary for preparation of the slide deck for the Board, to be circulated by 16 May.

502. It appears that one of the requests by the shareholders at the drill-down workshop was for EE to produce a summary analysis of the position of the other key players in the market as regards direct and indirect distribution. That request was relayed to Mr Richard Reeves of

the EE strategy team, and on 8 May Mr Reeves duly produced a one-page slide. The overall heading of that slide is:

> "Operators focussing on direct channel performance - indirect disruption likely to be led by Vodafone"

And under the summary analysis of Vodafone UK's position, one bullet reads:

> "• KEY RISK: Vodafone acquisition or withdrawal from P4U will detrimentally impact EE's trading"

A revision of this slide was incorporated into the deck for the 21 May 2014 BRM, and I return to it in that context below: see at para 524.

503. Also on 8 May, Mr Eyre prepared and sent to Mr Allera and Mr Milsom analyses of the likely effect of a withdrawal by EE on P4u's cash position. His analysis showed that on the assumptions that Vodafone UK took an additional 10% of the new connections secured by P4u, and that no 'second player' that was able to pay cash upfront came into P4u to replace EE, then P4u would run out of cash some eight months after EE's withdrawal. Since the EE Agreement ran to September 2015, this meant that P4u would run out by mid-2016; or put another way, that it would have eight months in which to find such a 'second player'.

504. On 12 May 2014, Mr Eyre and his team, along with the EE strategy team headed by Mr Reeves[37] produced a first draft slide pack to be used in preparing the presentation for the BRM. The pack included the slide summarising competitor strategies, prepared by Mr Reeves. After a section presenting a review of the distribution market, the slides set out and proceeded to analyse three alternative scenarios, corresponding to those set out in Mr Eyre's action points after the 6/7 May workshop:

> "1) Re-sign with CPW and P4U on improved terms
>
> 2) Sign enlarged CPW contract and run P4U contract down during 14/15 and exit in Sep 15
>
> 3) Run down both P4U contract (exit Sep 15) and CPW contract (exit Dec 15), offset by investment in direct channels"

505. For option 1, the slides noted that a new deal with P4u had the advantage that it "[p]otentially locks in volume, thus reducing risk"; but as disadvantages that it would mean that there is "[n]o fundamental shift in distribution strategy" and it "[r]emoves benefit of handset repair in the market." The slides highlighted as a risk that: "P4U Collapses or is bought by a competitor, leaving EE without a strong indirect presence".

506. For option 2, the presentation assumed that EE would still be paying revenue margin share to P4u (i.e. under the terms of the EE Agreement) for its former customers upgrading

[37] The first part of the slide deck concerning market developments (as opposed to the financial modelling of scenarios) was prepared by Mr Reeves's strategy team.

through EE's direct channels but that P4u would cease trading nine months after the expiry of the EE Agreement, i.e. in June 2016. The modelling significantly changed the absorption assumptions: it now assumed that of the volume currently acquired through P4u, *by the end of the third quarter in 2016*, 70% of the new connections volume would be absorbed under the enlarged deal with CPW and 12% through EE's direct channel (i.e. an 82% retention rate), and 40% of upgrades would be absorbed through CPW and 50% through EE's direct channel (i.e. a 90% retention rate).

507. As regards the financial effect on EE, over a five year forward projection the modelling showed an accumulated negative effect on EBITDA plus capital expenditure, under option 3 of £419 million, compared to an aggregate positive effect of £172 million under option 2 and £60 million under option 1. The £172 million calculation incorporated an aggregate handset "cost efficiency" benefit of £32 million and, significantly, a CPW contract improvement worth, over the five years, £106 million. From the slides, the increase in the latter figure over the previous assumptions reflected EE's view of where the negotiations with CPW would end up. Mrs Derbyshire, who was on Mr Eyre's team and worked on the modelling, was also heavily involved at the time in the negotiations with CPW.

508. Mr Allera and Mr Milsom reviewed this and asked that the absorption rate assumptions be reduced to 75% under both heads. But they also instructed the team that they favoured a further 'hybrid' scenario, which was to pull out of P4u, achieve an enlarged contract with CPW and *in addition* expand the direct channel by creating 150 new stores.

509. Mr Eyre rapidly produced a revised draft which reduced the absorption rates for option 2 and introduced the hybrid scenario as option 4, identified as the recommended option. The first change had the effect of reducing the positive outcome under option 2 to £79 million[38] while increasing the negative effect of option 3 to £538 million. I observe that this highlights the extent to which the financial outcome was subject to the assumptions. Option 1 was unaffected. But the new option 4 was shown to produce an aggregate positive benefit over five years of £177 million (£202 million increase in EBITDA, less £25 million in capital expenditure for the investment in new stores). That benefit resulted from the assumption that through the significant expansion of its retail estate, EE would achieve the same total volume of connections and upgrades as would have been expected when trading through P4u.[39] However the improvement in trading revenue was achieved in 2018 and 2019; for each of the years 2015-2017, the EBITDA plus capital expenditure was negative, and even without accounting for capital expenditure the EBITDA showed little improvement over the existing 5 Year Plan. (The assumption as to handset cost efficiency was slightly increased for option 4 to £36 million; the assumption as to improved CPW contract terms was unchanged.)

510. The revised draft also expanded some of the bullet points setting out positive and negative comments on the different scenarios. Thus for option 2 (exit from P4u and enlarged deal with CPW), a negative consideration was listed as: "Risk that other networks take

[38] The loss of volume changed an estimated accumulated trading profit of £49 million to an estimated aggregate loss of £46 million. The handset cost efficiency was also very slightly reduced to £31 million.
[39] Specifically, it assumed that for new connections, 34% would be absorbed into EE's new direct stores in addition to 10% absorbed into its current stores; for upgrades, the corresponding assumptions were 42% in addition to 40%.

advantage of the situation and go back into P4u at a reduced rate." (There was no similar set of bullet points regarding the new option 4.)

511. Mr Eyre sent this revised draft slide pack to the DT and Orange teams on 13 May 2014, explaining that it was still a working draft which he wanted to discuss with them. There followed a long conference call with Mr Deloison, Mr Kniese, and their respective Orange and DT teams, on 14 May. The shareholder representatives noted that the acquisition scenario had been dropped and made various observations, including the criticism that they regarded the assumed absorption rates by EE were unduly pessimistic. Mr Eyre reported this to Mr Milsom, who responded:

> "We are not going to dress up the plan just to get to a better number that will not be achievable."

512. Taking account of some other comments from DT and Orange, the draft slides were finalised into a slimmed down presentation pack that was sent to the Board members and their supporting teams on 16 May 2014, in preparation for the 21 May 2014 BRM and Board meetings. The final presentation was effectively in two parts: first, a review of the distribution market; and secondly, the consideration of EE's distribution options going forward. The market review expressed four bullet point conclusions:

> "1. Indirect distribution channels will continue to have a major influence in UK market for the foreseeable future.
>
> 2. EE has to have a major presence in CPW/DSG merger to maintain market leadership position.
>
> 3. Phones 4U situation is precarious and gives EE options with risk (1m connections p.a).
>
> 4. Phones 4U will attempt to strengthen their position by signing BT or Three/O2 back or finding a retail partner e.g. Argos to form a JV."

513. The presentation then set out the four revised distribution options:

> "1) Remain in CPW and 4U - rebalance volumes from 4U to CPW.
>
> 2) Exit 4U, move 4U volume to CPW.
>
> 3) Exit 4U and CPW - move all volume to EE Direct channels.
>
> 4) Exit 4U, spread 4U volume between CPW and EE Direct channels."

The headline financial summary comparing the options showed the overall effect on a five year forward basis, as compared to EE's 5 Year Strategic Plan. Option 1 had been slightly revised, it seems as a result of the progress in negotiations with CPW, to a positive effect of £62 million.

514. Significantly, the presentation included a new slide setting out five "Key risks in Distribution assumptions", as follows:

> "1. Phones 4 U sign partnerships with O2, Three, Virgin, SKY or BT.
>
> 2. Phones 4 U sign partnership with another retailer e.g. Argos.
>
> 3. Direct channels don't absorb the connections the rate assumed.
>
> 4. Absorption rate sensitivity of 4U customer base.
>
> 5. CPW/DSG execute merger badly and don't deliver EE committed volumes."

515. As regards the first of these risks, Mr Allera explained that he was less concerned about Three and O2, which had only recently withdrawn from P4u, but wary of MVNOs such as Virgin that were hungry for growth, and of BT, for whom withdrawal by EE might create an opportunity to accelerate their plans. If another operator had come in, that would have made it more difficult for EE to achieve the absorption rate of P4u volumes which underlay the modelling, and therefore put its commercial plan "at risk."

516. The recommendation to the Board from EE's management was set out in the slide pack as:

> "1. Sign an enlarged and improved CPW contract - June.
>
> 2. Do not sign extension with 4U - continue negotiations.
>
> 3. Consider 2 options with 4U
>
> - Remain present with better terms, smaller volume.
>
> - Continue to explore options to exit Sep 15 with less risk and work to improve financial picture."

The allegations about the modelling assumptions

517. EE accepted that the modelling for the slide pack was based on the assumption that P4u would cease trading in about mid-2016 (or possibly survive only in much reduced form). The assessment of "absorption rates" and of the "handset cost efficiency" both rested on that assumption. It is appropriate to explain those two concepts. As regards absorption rates, Mr Eyre said:

> "EE's modelling (at least insofar as it concerned absorption via CPW or as a result of additional investment in EE's direct channels) did not rely on EE absorbing the specific customers that EE would otherwise have obtained via P4U; rather, the absorption assumptions were a means of quantifying, more generally, the percentage of volumes lost in one channel that was likely to be captured in other channels. In the context of Scenario Four, the absorption assumptions therefore represented the total number of customers that EE expected to gain through CPW and its existing and new direct

> channels, expressed as a percentage of the number of customers that EE expected to forgo from ceasing to supply P4U beyond September 2015."

518. "Handset cost efficiencies" referred to a saving in customer acquisition costs which would be achieved through reduction in the subsidies for handsets. Mr Eyre explained that his modelling was:

> "based on the assumption that, for the first 18 months following a withdrawal from P4U, EE would need to increase its A&R spend by £10 per Connection in order to maintain its customer base; EE would then be able to reduce its A&R spend to current levels for nine months; and, thereafter, EE would be able to reduce its A&R costs by £10 per Connection in 2018 and 2019, because by that point P4U's exit from the market (or its significantly reduced market presence) should result in less aggressive discounting of handsets generally."

519. P4u submitted that the change in Mr Eyre's modelling in this regard followed his discussions with Mr Allera and Mr Milsom on 29 April. While I found that Mr Eyre was doing his best to reconstruct his thinking from the contemporary documents, he readily acknowledged that he had no particular recollection of what specifically happened when, over what had been for him a very busy time. Given the intense work being done and the multitude of slide decks being produced and revised, on almost a daily basis, this is hardly surprising. After being shown some of those slide decks and various emails, Mr Eyre emphasised that although at some point his view changed as to whether P4u would still "exist on the high street" (if EE withdrew) or at least exist only at a materially reduced size, he could not identify when that was.

520. Although Mr Eyre said in cross-examination that he thought that he reached the view that withdrawal by EE from P4u would eventually put P4u out of business following his discussions with Mr Allera on 28-29 April 2014, that was speculation on his part and certainly not a direct recollection. It is inconsistent with an email he sent Mr Allera on 3 May, enclosing an updated version of the slide deck of 29 April (which had compared the benefit of acquisition as against exit) but retaining the slide which stated:

> "If we exit it is likely that they [P4u] survive and we would force them into value destructive actions within the market…
>
> We believe that they would find another partner."

Mr Eyre said that by "destructive actions" he meant discounting on price. In his covering email, Mr Eyre observed that in modelling scenarios he kept coming back to a number of questions, including: "How long do we believe P4u will survive if we pull out." I think that, as EE submitted, Mr Eyre was clearly alert to that question but he did not have a clear view as to the answer.

521. In my view, Mr Eyre's change in assumptions about P4u's future prospects emerged in the draft slide deck produced on 12 May 2014: paras 504-507 above. Those are the slides which dramatically increased the absorption assumptions, and significantly showed that increase as achieved by the end of the third quarter of 2016. And those slides were prepared

after Mr Eyre's assessment of the effect of withdrawal on P4u's cash position, which he made on 8 May: para 503 above. I consider that, on the balance of probabilities, it was that assessment of P4u's finances, carried out under pressure from the shareholders, which led Mr Eyre to revise his approach, which then fed into the final presentation for the 21 May BRM.

522. Mr Eyre also acknowledged that he recognised that if EE left P4u, there was a possibility that Vodafone UK would do the same, but he said that he had no such expectation. In support of its case that EE indeed had such an expectation, P4u sought to rely on the change in assumptions in its modelling. Therefore, a relevant question is whether EE's modelling was based on, or reflected, an assumption that Vodafone UK was likely to pull out of P4u around the same time as EE, leading to the likely collapse of P4u well before the EE Agreement expired in September 2015. In my judgment, it was clearly not so based:

a) Mr Eyre's calculation of P4u's cash flow had been conducted on the basis of Vodafone UK remaining with P4u and indeed increasing the volumes which it took;

b) The financial modelling of options 2-4 was all based on the assumption that P4u would continue to trade for nine months after the end of the EE contract (i.e. from September 2015), consistent with (a);

c) The enumeration of risks expressly acknowledged that P4u might survive by attracting another major MNO or retailer in place of EE. That was clearly on the assumption that P4u would have retained Vodafone UK.

d) The calculation of the aggregate handset "cost efficiency" over the five years was as follows:

2015 £'m	*2016 £'m*	*2017 £'m*	*2018 £'m*	*2019 £'m*	*Total £'m*
(£10)	(£45)	(£12)	£51	£51	£36

As summarised in the slide pack, and elaborated by Mr Eyre in his evidence, this assumed that for the first 18 months from withdrawal from P4u in September 2015, EE would need to increase its expenditure on handset subsidies by £10 per connection to maintain its customer base; could then reduce those costs to existing levels for the next nine months; and thereafter would reduce its costs by £10 per connection in 2018-2019 to reflect the effect of P4u's exit in reducing competition on the market by way of handset subsidies (what Mr Eyre referred to as "less aggressive discounting of handsets"). I regard this projection as inconsistent with an exit by Vodafone UK as well as EE from P4u in 2015, which would obviously have precipitated an immediate collapse of P4u (as indeed occurred).

523. P4u also submitted that this presentation for the 21 May 2014 BRM showed a dramatic change in the modelling compared to the presentation for the BRM on 10 April 2014 as regards the option of signing an enlarged deal with CPW and leaving P4u. However, option

3 in the slide deck prepared for the 10 April BRM, which showed a negative NPV of £264 million (paras 460-461 above), does not correspond to option 4 in the slide deck for the 21 May 2014, which estimated a net benefit for EBITDA of £177 million (paras 508-509 above). The whole point of the new option 4 was that it incorporated the proposition of a very substantial expansion of EE's own "direct" stores (with corresponding additional capital expenditure). P4u also relied on the change in EE's absorption assumptions, emphasising that in the presentation for the 21 May 2014 BRM the modelling assumed that, on pulling out of P4u, EE "would not on a net basis, abandon any volume to other MNOs such as Vodafone". However, that assumption was in turn expressly based on the assumption that 39% of EE's new acquisitions and 42% of its upgrades would be absorbed into its *new* direct outlets.[40] And among the key risks highlighted in that presentation were that this absorption rate might not be achieved, because P4u might sign a partnership with another MNO or BT to replace EE, and/or that direct channels simply would not absorb the connection rate assumed: para 514 above. In short, I consider that the contrast between the financial modelling in these two presentations does not give rise to the inference urged by P4u, i.e. that by 21 May 2014 EE knew that Vodafone UK intended to withdraw from P4u and that in consequence P4u was likely to collapse.

524. This conclusion is not, in my view, affected by the statement about Vodafone in a slide that appears in the market review section of the presentation. That was a slightly amended version of the slide which Mr Reeves had prepared on 8 May, summarising the competitors' positions and strategies regarding indirect distribution: see para 502 above. EE there set out summary analyses of the strategies of competitor channels, specifically O2, Vodafone, Three and BT, with a brief mention of Virgin. The overall headline stated:

> "Operators focussing on direct channel performance – indirect disruption likely to be led by Vodafone"

525. In my view, that was no more than a pithy reflection of what emerged from the more detailed points set out as regards each operator. O2 was noted to be heavily reliant on CPW; Three was largely dependent on direct sales, had withdrawn from both CPW and P4u, and EE stated that there was limited likelihood of its return to "indirect" as its focus was cost optimisation; and as for BT, EE thought that it was unlikely to make a major investment in its own-brand retail and that its focus would be on cross-selling through its base (in fixed line). By contrast, it was noted that Vodafone UK had a lower share through direct sales than O2 or Three, was investing a further £100 million in its retail operation, and the slide quoted from a recent statement by Mr Hoencamp, reported in the press, that Vodafone UK wanted to focus on "fewer indirect partners".[41] Accordingly, it was a reasonable assumption that of the large operators, if any was prepared to pursue a strategy to disrupt the indirect retail landscape it would be Vodafone UK. But that does not, in my opinion, suggest that EE had any information that this was now Vodafone UK's strategy, still less how such a strategy might be pursued as regards the two main indirect retailers.

---

[40] Indeed, the assumption as to absorption rates through CPW was here reduced from the previous modelling on 7 May to 53% for new acquisitions and 19% for upgrades.

[41] See para 333 above.

526. I have considered in some detail the evolution and preparation of the slide pack presented to the BRM for its meeting on 21 May 2014, because that is, in my opinion, the key document on which the discussion at the BRM was based. A lot of other slides and modelling were produced within EE previously before the position was refined to the four options taken forward to the BRM. However, I do not think it is necessary to consider those further. As I have explained, the shareholder representatives were not particularly impressed by the earlier modelling presented to them, and pressed EE hard to produce a more detailed and robust analysis. In my opinion, those other analyses and modelling do not assist on the matters I have to decide. For example, EE did some internal work, in its strategy team, on the potential scenario of pulling out of CPW and produced an analysis in mid-March 2014 of the effect on CPW if EE pulled out alone or if both EE and Vodafone UK pulled out at the end of 2015. However, I do not think that those earlier documents take matters any further.

The 21 May 2014 BRM

527. On 15 May 2014, Dixons and CPW announced that terms for their merger had been agreed. Subject to shareholder and regulatory approval, it was clear that the merger would therefore proceed. Two days later, it was announced that they planned to roll out further CPW store-in-store concessions in Currys/PC World megastores across the UK. Those would be in addition to the 150 P4u stores-in-stores, which it was assumed CPW would take over once Dixons' contract with P4u ended in May 2015.

528. The BRM took place in London on 21 May. It was attended by the two DT directors, Mr Dannenfeldt and Mr Tsamaz, supported by Mr Kniese and Mr Wilkens; the two Orange directors, Mr Pellissier and Mr Scheen, supported by Mr Naulleau and Ms Lambert; and from EE, Messrs Swantee, Harris, Milsom and Allera. In the days before the meeting, the two DT directors and the two Orange directors were, as usual, provided with detailed, internal written briefings on the items to be discussed from, respectively, Mr Kniese and Mr Naulleau, which incorporated comments from other members of the 'controlling' teams.

529. One might have thought that it would be relatively easy to ascertain the outcome of the meeting as regards indirect distribution. However, this was the third item on the agenda, albeit a very significant one, and the minutes of the meeting, of which only a draft exists, are blank beyond items 1-2. I return to consider that particular point below. But as a result, there is no formal record of the discussion. Mr Naulleau said that he believes the Board (i.e. the Board members at the BRM; this was not a formal Board meeting) approved EE's option 4, "with some flexibility as [to] exactly what should happen with P4U and when". Mr Pellissier thinks that the shareholders supported EE's recommendation, without any formal decision. Mr Swantee said that the shareholders adopted "the recommendation that EE pursue Scenario Four". Mr Allera said that the meeting overran on the first two items, leaving insufficient time for discussion of EE's distribution strategy in detail before the shareholders had to leave, after "briefly indicating their approval (or at least not objecting)" on EE's recommended strategy. Mr Harris said that he had no independent recollection of

the discussion[42] and so could only rely now on an email which he received subsequently from Mr Allera. Mr Scheen thought that there was agreement that EE should enter into a new contract with CPW/Dixons and to increase its presence in the direct channel but that no final decision was made about P4u. Mr Dannenfeldt said:

> "As I recall the meeting, no decision was made and all options remained under consideration. There were too many question marks at the time to be able to reach a view on which option to pursue. Exiting P4U was an option being considered and all options remained on the table after that meeting …."

530. I think it is hardly surprising that there is a divergence in the evidence as to what happened at this meeting and that some witnesses said they could not particularly remember it at all. I do not consider that this suggests anything suspicious. Not only was this a long time ago, but the participants were involved in a whole series of meetings which had discussed EE's distribution arrangements, and of course they were individuals who attended a multitude of meetings in the course of their work.

531. In my judgment, the outcome of the 21 May 2014 BRM was that EE's management was given a green light to negotiate an enlarged deal with CPW/Dixons but that no firm decision was taken about withdrawal from P4u. While the Board members approved the recommendation in the slide presentation (para 516 above), the possibility of an acquisition of P4u, which of course was not one of the four options, resurfaced and remained open. I think that Mr Dannenfeldt's statement in his written evidence that "all options remained open" should be qualified by effectively excluding option 3, i.e. withdrawal from *both* CPW and P4u. EE's modelling, even if it might be criticised, nonetheless showed that this was a non-starter, and it was never raised thereafter. Mr Dannenfeldt effectively accepted that in his oral evidence.

532. I reach this conclusion for several reasons:

a) Although the minutes are blank, there are two contemporary documents concerning the meeting and both indicate that no final decision was made to adopt option 4:

i) On 22 May, the day after the meeting, Mr Deloison wrote a summary note of the discussion. He had not been at the meeting, but he said he wrote this from a briefing he was given by Mr Naulleau, who would have had some notes from the meeting (which have not survived). Mr Deloison's note said, as regards this item:

> "o Scenario 4 presented but, by OS's own admission: not very encouraging.
>
> o OS: "We are giving ourselves time to think and possibly talk again about 4PU acquisition in Sept'15"

[42] Mr Milsom similarly said that he had no recollection of the discussion.

> o => S4 Ok in the short term it seems: EE authorised to sign contract extension with CPW but acquisition scenario not completely abandoned
>
> …
>
> o TD: "Direct must be reinforced"
>
> o TD: "be careful with VOD (anti trust risk)"

ii) On 23 May, Mr Allera sent an email to Mr Harris, stating:

> "As promised here's my take on what was agreed
>
> 1) Agreement that option 4 is right strategic direction for EE
>
> 2) Agreement to pursue completion of signed CPW contract to deliver re-balance between 4U and CPW volume
>
> 3) Agreement not to extend 4U deal
>
> 4) Agreement to continue exploring options with 4U including acquisition
>
> 5) Agreement to proceed with creating an implementation plan to mitigate the risk in scenario 4 — particularly around volume assumptions — to focus on base/base marketing and loyalty propositions to minimise churn"

Although Mr Allera's email refers to option 4 being "the right strategic direction", that is not, in my view, a firm decision. Moreover, since option 4 involved an exit from P4u, it is inconsistent with exploring options with P4u by continuing negotiations, and of course with a potential acquisition. I see no reason to doubt the accuracy of Mr Deloison's note, and if option 4 was seen as "not very encouraging", I think the shareholders would have been very unlikely to give it whole-hearted support.

b) The recommendation by EE management in the slide pack was not in the sharp terms of option 4, which specified an exit from P4u. It was more flexible and qualified: not to sign with P4u now, but to "continue negotiations" and explore options, one of which was to remain with P4u with smaller volume and better terms.

c) Under three weeks after the meeting, after Mr Pellissier was quoted in the press as saying, "I would like to get rid of both [CPW and P4u] if it was my choice", Mr Swantee protested to him, saying that EE was working to the plan in accordance with the discussion at the BRM, which he set out in terms of the recommendation by EE's management to the BRM.

d) The negotiations with CPW were still ongoing and it was not clear what terms EE could secure from them. Until EE could be confident that CPW would agree to give sufficiently larger volumes on improved terms, I do not see how the directors could conclude that EE's best course was to exit from P4u.

533. Acknowledgment by the shareholders that EE could revisit the question of acquisition is borne out by what happened over the following weeks. In my view, the comment attributed in Mr Deloison's note to Mr Dannenfeldt, "be careful with VOD (anti trust risk)", was made in that context. Since taking forward an acquisition scenario would involve an approach to Vodafone UK about a joint bid, and he said that he recalled that Mr Swantee mentioned that EE should make such an approach, he was warning about the care needed over such communications. I accept his evidence to that effect, and I think this is indeed logical. I do not, therefore, see anything 'sinister' in this remark or that it indicates that the meeting was informed about other, illegitimate contacts.

534. I should add that Mr Swantee explained in evidence his attitude to option 4, as expressed in Mr Deloison's note. He said that he had hitherto always regarded P4u as a key strategic partner, no doubt in part because they had been supportive in promoting EE's initiative in 4G. However:

> "increasingly it was also my view that Carphone/Dixons was going to be a key for our long-term success. Maybe the words "not very encouraging" must have related to the fact that it was a difficult scenario. I mean, we didn't have -- you know, we didn't have the terms and conditions from Carphone Warehouse, we had a situation where Carphone Warehouse was very big with O2, we were not in the so-called strategic tent with them,
>
> ...
>
> So maybe that's why. Because I do remember that I was, you know, concerned that it was a very difficult scenario to execute for us."

Further consideration of acquisition of P4u

535. On 23 May 2014, just two days after the BRM, Mr Harris sent an email to Mr Eyre, as follows:

> "… Olaf is in Germany on Tuesday and before this he and Thomas Dannedfeldt (DT CFO) want a view (headline) on the following:
>
> 1. Latest view of purchase price of P4U (assuming we bought outright)
> 2. What the potential value of Vodafone's backbook would be (assumption similar deal to EE) ie. if they wanted to settle this liability, what would the cash price be to settle?
> 3. In other words what would our net cost be
> 4. Additionally, an estimate of how many shops and at what price they might buy from us (given their intention to increase Direct stores to 150)

> The other question is at what price would it make sense for EE to buy P4U outright irrespective of whether Vodafone bought themselves out of their back-book liability or not.
>
> If there's any way of getting an estimate to the above today would be much appreciated…..[sic] DT may then just help convince the French."

536. That reflects the fact that the strongest opposition to an acquisition had come from Orange, and, significantly, it shows that Mr Swantee was still hoping that the shareholders might be persuaded to back this option.

537. Mr Blendis recalled that "at some time in May" he was asked by Mr Swantee to contact his counterpart at Vodafone UK (who by this stage was Ms Helen Lamprell) to initiate discussions about a possible joint acquisition of P4u. I think this would have been just after the BRM.[43]

538. I have referred at paras 412-413 above to the discussion which Mr Swantee had with Mr Colao at the Founders' Forum event of 12 June 2014, and the subsequent lawyers' meetings later in June and early July to discuss a potential joint acquisition. It seems evident that EE would not have instructed Mr Blendis to arrange and attend those meetings if it had already ruled out the idea of a joint acquisition on commercial grounds. According to Mr Blendis' evidence, which was not challenged, those discussions ceased when he was told by Ms Lamprell, at some point after 15 July, that Vodafone UK did not wish to take the matter further.

539. I should add that, also following the 21 May BRM, Mr Eyre was asked to consider further the financial position of P4u. He wrote to his colleagues on 3 June 2014 that they need to assess the financial implications of two possible scenarios, so that EE could move quickly if either were to happen:

> "1) Voda buys P4U
>
> 2) Voda pulls out of P4U"

He added his initial view:

> "I think in the first one we join in the purchase and the second we may pull out as well."

The continuing negotiation with P4u

540. At the same time as EE was reviewing its strategic options, as discussed above, it was engaged in continuing negotiations with P4u. On the EE side, those were principally conducted by Mr Allera and Mr Noel Hamill, supported by Ms Angela Thomas from EE's in-house legal department.

---

[43] From Mr Blendis' notebook entry of their conversation, it appears that they spoke in late May or early June.

541. On 18 March 2014, P4u's chief legal officer, Mr Lloyd, sent Ms Thomas detailed heads of terms for a new agreement, which he said "caters for the changes which the guys have discussed". There was a meeting between the two sides the following day, and during the second half of March there were further exchanges between them, addressing in particular an improvement in EE's share of the CLV,[44] which was an important point for EE.

542. Both Mr Whiting and Mr Kassler said that by the end of March 2014, they felt that P4u had reached a point where the key commercial points for an extension of the EE Agreement had been agreed. While I think that is an over-statement, I consider that P4u were justified in thinking that there did not appear to be any major obstacles to the negotiations concluding successfully. I do not think that the two companies' lawyers, Ms Thomas and Mr Lloyd, would have been exchanging draft contracts in March-April if the parties were far apart.

543. On 25 April 2014, Mr Lloyd emailed Ms Thomas, after leaving her a voice message, saying:

> "I am being told by Tim [Whiting] that he has had a further chat with Mark [Marc Allera] and the expectation is for us to have an agreed form document by the end of next week. If that is in line with your instructions, can we catch up on Monday to make sure that we can try and conclude all the outstanding points to meet that time horizon."

On 12 May 2014, Mr Whiting spoke to Mr Swantee in advance of EE's BRM scheduled for 21 May, and reported to his colleagues that Mr Swantee had "confirmed things should be ok on the deal". And on 21 May, Mr Lloyd responded to a query from Mr Quadrio Curzio regarding the date when P4u might enter into a new agreement with EE:

> "Timings as agreed today are that they would receive board approval (or not as the case may be) by the end of May and then we could finalise 5 working days thereafter. Timings have slipped before so would not see that as set in stone so clearly room for delays/extensions if required."

544. However, as Ms Thomas acknowledged in her written evidence:

> "EE's negotiation strategy at this time was to delay the progress of negotiations with P4U while it was seeking to advance its negotiations with CPW to see what terms it could get from CPW."

And she added in her oral evidence:

> "My instructions from the EE board members[45] … was to effectively stall [the negotiations]."

545. EE was therefore deliberately 'dragging out' the negotiations with P4u. That coloured the exchanges of draft agreements, and comments on the drafts, which took place between Ms

---

[44] See n. 21 above.

[45] She clarified that in fact she was referring to Mr Milsom and Mr Allera.

Thomas and Mr Lloyd in the first half of June 2014. I therefore do not think it relevant to consider the detail of those negotiations. By that point, I think discussions between EE and P4u on the key financial points of the agreement had concluded. I accept that EE may have been less than happy with some of those provisions. But it is notable that after Ms Thomas sent Mr Lloyd a revised draft of the agreement on 17 June, his calls to EE to discuss finalising the document were not returned. I find that EE's focus was then on determining if it could secure a more satisfactory overall outcome through a significantly enlarged arrangement with CPW, in accordance with the approach determined at its 21 May BRM.

546. On 23 June 2014, Messrs Swantee and Allera had a lunch with Mr Whiting and Mr Kassler which was very amicable and constructive. They discussed the way the two companies could cooperate going forward, and in general terms the status of negotiation of the new agreement. Mr Kassler recalled Mr Swantee saying that they were putting the proposed new agreement with P4u to EE's shareholders, and that neither Mr Swantee nor Mr Allera suggested that EE's management had any misgivings about the deal. I accept that evidence and note that Messrs Whiting and Kassler offered to meet DT and Orange to explain the strategy. Mr Allera responded on 26 June:

> "We will follow up on requests to meet our Shareholders … and keep you posted."

And in a follow-up email on 1 July, Mr Whiting wrote to Mr Swantee:

> "I understand the level of shareholder approval you need to go through and the number of other priorities you currently have in the business but would appreciate any support you can give to get to a decision so we can move on and focus on the areas of value creation."

547. Referring to the lunch, Mr Swantee said in his witness statement:

> "I remember feeling quite awkward and uncomfortable about this meeting, as I could tell that P4U were anxious to get the contract extension signed. At the same time, we were in a difficult position as we had not yet reached any agreement with CPW. It was in EE's best interests, therefore, to keep these negotiations with P4U alive until the new deal with CPW was over the line."

548. In my view, the position was that by this point EE was not raising serious objection to the terms as accepted by P4u but, as Mr Swantee effectively acknowledged, used the fact that the deal needed shareholder approval as a pretext to explain the delay. Thus in late July 2014, Mr Allera told Mr Whiting that, because of the holiday season, the EE executives would not be able to get "buy-in from our shareholders" until September. Accordingly, I do not consider it is necessary to decide whether Mr Allera said during the lunch that an extension to the P4u agreement was "a done deal", as Messrs Whiting and Kassler alleged but Messrs Allera and Swantee denied. I find that P4u was never told that there was a barrier to reaching a deal but I think that the EE executives emphasised that both DT and Orange had to review and approve the agreement and that in view of the financial terms their approval was not a foregone conclusion.369

549. Given this lack of progress, on 31 July 2014 Mr Whiting wrote to Mr Swantee:

> "I understand from Marc that we still have made little progress in getting shareholder approval at your end for our deal extension and as we are now in the holiday period this not imminent. We are disappointed and frustrated by this as we have for some time believed it to be the key to unlocking significant value for both businesses.
>
> Rather than leaving the current deal on the table we think it is best to withdraw it and leave the ball in your court as to when you are in a position to take these discussions forward."

Mr Whiting said that he wrote this out of frustration with the failure to get a decision from EE's shareholders (as he understood it) on the proposed agreement. He said that this was a negotiating tactic with the aim of putting some pressure on EE to reach a firm resolution when the discussions revived; and that in no way was he indicating a reluctance to reach an agreement. I accept that and I consider that it would have been seen that way by EE's management at the time. I reject Mr Swantee's characterisation of the email as indicating that P4u "now were withdrawing from the negotiations completely". On the contrary, from P4u's perspective the direct negotiations with the EE team had concluded successfully and the lack of progress was due to EE's shareholders. Mr Whiting made clear in the text following that quoted above that P4u "see EE as a key strategic partner for the long term and believe that both businesses would benefit from clarity and the ability to plan for the future"; and that P4u wished to have further "conversations on contract extensions".

550. However, the effect of this email, with the onset of the summer holidays, was that further discussion with P4u was effectively 'on hold'. I think that suited EE very well and enabled it to complete its negotiations with CPW.

Negotiation of the CPW Agreement

551. For EE, the negotiations with CPW were led by Mr Allera, and Mrs Derbyshire and Mr Milsom were also heavily involved. Mrs Derbyshire said that in April-May 2014 she was spending much of her time on those negotiations.

552. There was relatively little evidence at trial about those negotiations. It appears that the early stages of those discussions were difficult: on 2 May 2014, Mr Harris told Messrs Kniese and Naulleau that "CPW are being completely inflexible on [sic] negotiations". Following the 21 May 2014 BRM, Mr Allera said that he tried to move quickly to secure an enlarged new agreement with CPW, in particular because he was concerned, following the CPW-Dixons merger, that another MNO might seek to secure an agreement with CPW to take higher volumes, which might preclude EE securing a significant share.

553. By early July 2014, EE had agreed the key aspects of the deal such that Mr Harris could summarise those in a slide deck which he circulated on 7 July, seeking the approval of the EE Board for the deal. The slides presented the deal as being for a new five year term and with very significantly greater volumes and brand licence fees than under the EE's existing agreement with CPW, as follows:

	Current	*Proposed new*
Acquisitions	240k	583k
Upgrades	285k	442k[46]

As a result, the slides projected that over a five-year term the benefit of the deal would be an increase in EBITDA after capital expenditure of £191 million, which was an improvement over the £177 million projected for option 4 at the 21 May 2014 BRM:[47] see paras 509 and 513 above. The slide presentation noted:

> "£238m lost through not absorbing all customers currently in P4U is made up through growth in direct and improved terms in CPW"

554. CPW had been pressing EE to sign the agreement by 15 July 2014 and ahead of completion of the CPW/Dixons merger. The key terms were accordingly considered at an extraordinary EE Board meeting held by teleconference on 8 July 2014. The Board adopted a formal resolution approving the terms, subject however to an instruction to EE's management to "make best efforts" to secure three improvements in the final agreement (i) to introduce flexibility into the fixed term, (ii) to provide for adequate working capital constraints, and (iii) to include adequate liquidated damages provision for CPW's volume commitments.

555. Accordingly, further negotiations took place with CPW after this Board meeting. At that point, CPW also made further demands, in particular for significantly increased working capital support, to which EE in the end agreed.

556. Mr Allera and Mr Eyre said that the negotiations with CPW went "down to the wire" until late on 7 August 2014 when, "subject to shareholder approval", a contract was finally agreed ("the CPW-EE Agreement"). Mr Allera sent a slide presentation summarising the terms to the shareholder representatives on 8 August and held a conference call with them to explain the deal later that day.

557. However, DT and Orange then wanted EE to revisit a number of specific points with CPW, much to the frustration of Mr Swantee and his colleagues. On 13 August, Mr Harris wrote to the two "front doors" (Mr Naulleau and, now, Mr Daniel Daub), Mr Wilkens and Ms Lambert, stressing that:

> "The deal negotiated is best and final … there is no further opportunity to revise/negotiate … It is now either 'take it or leave it' … In addition, any delay would expose EE to the risk of other operators taking a larger share at EE's cost."

558. On 14 August, Mr Harris sent the shareholders' representatives an updated slide deck entitled "Board of Directors – CPW Deal approval". The revised figures showed an increase in EBITDA after capital expenditure on a five-year forward projection of £161

[46] In fact, it seems that this was only the target volume for upgrades; as EE's expert noted in his report, the volume of upgrades to which CPW would be committed was 408,850. But nothing turns on this discrepancy.
[47] The assumptions for handset cost efficiency and capital expenditure were unchanged.

million. The EE value per transaction was shown as £230 for acquisitions and £338 for upgrades, compared to £185 and £211 respectively on the final terms reached with P4u.

559. The same day, Mr Charles Mowat, the Head of Company Secretariat at EE, sent all the directors for their signature a written board resolution approving the CPW-EE Agreement along with a Board Paper summarising the deal and appending the same slide deck. A revised version of the Board Paper was circulated by Mr Mowat on 20 August 2014. Approval of all the DT and Orange directors, by their returning signed copies of the resolution, was finally obtained in late August and the CPW-EE Agreement became unconditional on 29 August 2014.

The collapse of P4u

560. Following the meeting with Vodafone UK on Friday, 29 August 2014 (para 394 above), it was clear to the P4u executives that the survival of P4u was dependent on support from EE. P4u immediately approached EE with a request for such assistance. After several days of communications between the two companies, both formal and informal, and internal deliberation at EE, EE wrote on 12 September 2014 to P4u stating that it had made a final decision not to replace or extend the terms of the EE Agreement, which would therefore terminate on 30 September 2015.

561. It will be necessary to consider the events of the two weeks preceding that letter in some detail in the context of P4u's claim in contract against EE. That is addressed separately below. For present purposes, it is sufficient to state that, since P4u would have to disclose this development to the market, it was the end of the road for P4u. As stated at the outset of this judgment, three days later, on 15 September 2014, P4u went into administration.

A SERIES OF UNFORTUNATE EVENTS

(1) The Scheen – Humm conversation: 2 April 2014

562. On 2 April 2014, Mr Scheen of Orange sent a text message to Mr Humm of Vodafone, as follows:

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

563. Mr Scheen said that prior to this message, he had met Mr Humm only once, earlier that year, when they had a meeting in London to discuss existing Radio Access Network ("RAN") sharing agreements between Vodafone and Orange in Spain and Romania. He said they had no contact thereafter before he sent this message.

564. Mr Humm responded to the text with a message that they could speak after 3 pm that day, to which Mr Scheen replied asking Mr Humm to call him on the number used for his text message.

565. The telephone records show that Mr Humm duly called Mr Scheen and they had a conversation of just under 5 minutes.

566. In the afternoon of the next day, 3 April, Mr Scheen sent the following text to Mr Humm:

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

567. On the morning of 4 April, there was the following further exchange:

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

568. Mr Scheen and Mr Humm both said that they had no further contact thereafter,[48] and there is no evidence to suggest the contrary.

569. Both Mr Scheen and Mr Humm were cross-examined intensively about this exchange. Each of them said that he had no recollection of this exchange. I found that somewhat surprising, given the nature of the communication, the fact that they had only once been in contact before, and since Mr Scheen said it was "very, very unusual" for him to contact a competitor.

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

[48] Save only that Mr Humm said that sometime later he bumped into Mr Scheen at an airport.

suggesting instead that they should set up a "secured call" on a dedicated telephone (sometimes referred to as a 'burner phone').

571. Mr Scheen suggested in his written evidence in chief that he may have been wanting to discuss with Mr Humm a potential network-sharing project in the UK, and he adhered to this view under cross-examination. That was pure speculation on Mr Scheen's part, and I reject it as extremely unlikely. There were no "decisions" which EE had to take urgently about network-sharing, and if that had been the suggestion, it would have been followed up. Mr Scheen never discussed the idea of a RAN-sharing agreement at this time with the relevant individual within EE, nor would this have been so supremely confidential as to justify the elaborate arrangements which Mr Scheen proposed for the follow-up phone call. Altogether, I found Mr Scheen's evidence about this exchange evasive and unsatisfactory.

572. Although it is possible that Mr Scheen only said to Mr Humm that an interesting "joint opportunity" for their two companies had arisen in the UK, I think it is likely that Mr Scheen went further and referred to the potential for change in the UK market following the announcement of the Dixons/CPW merger discussions. Mr MacLean stressed that the conversation lasted almost five minutes. Nonetheless, I do not accept that a more substantive conversation took place. In my view, the initial telephone call was a prelude to what Mr Scheen proposed to pursue by a full discussion, to be held either in person, if he could come across to London, and then on the secure phone once he realised that his other commitments prevented him from travelling in time.

573. I think it is important to consider this exchange in context. At the BRM on 20 March 2014, the EE directors discussed the implications of the recently announced merger discussions between Dixons and CPW, and the potential for the acquisition, with another MNO, of P4u. The MNO identified as the most likely partner for such a move was Vodafone UK: see para 452 above. No consensus was reached but a further BRM was to be held on 10 April, when this would be discussed: para 457 above. Although within Orange Ms Lambert was strongly opposed to such an acquisition, Mr Scheen in his evidence said that he thought that a joint acquisition was worth investigation: para 465 above. And as Mr Scheen was on holiday for the week of 6 April and therefore could not attend the BRM, if he had any further input regarding a potential acquisition, he would have needed to convey that to his colleagues by the end of Friday, 4 April.

574. In all probability, I consider that what Mr Scheen therefore wished to discuss was whether Vodafone would be interested in a joint acquisition of P4u, and to ascertain Vodafone's reaction to the idea in advance of EE's 10 April 2014 BRM. That was a "joint opportunity" for the two companies, such a proposal was clearly highly confidential, and the question was urgent. (Although Mr Scheen said that he did not think that his message suggested any urgency, I think that is incorrect.) On the balance of probabilities, I consider that any such discussion would have potentially involved the exchange of confidential information as to each MNO's strategic thinking regarding the opportunities and the risk which the merger presented. When shown this exchange, Mr Dannenfeldt said in his evidence that he regarded it as "borderline behaviour", of which he was wholly unaware at the time. I accept that Mr Dannenfeldt and, indeed, the other EE directors, were not told by Mr Scheen

of his approach to Mr Humm. But I think that Mr Dannenfeldt's characterisation of what Mr Scheen was about is an understatement.

575. However, I find that Mr Humm realised that Mr Scheen was seeking to enter legally sensitive and potentially forbidden territory, and he deliberately pulled away. His reference to the presence of a competition lawyer is significant. It may be that Mr Humm's final text message was strategically worded and that he knew a little more about the proposed topic. And it may well be that he was therefore being less than entirely frank in his evidence, as I found was similarly the case as regards his meeting with Ms Castillo (para 289 above). But ultimately, that does not matter. I find that no exchange of confidential information actually occurred; and in particular, since neither the secure phone call nor the in-person meeting took place, that there was no discussion about a potential withdrawal of either MNO from P4u.

576. It follows that I find also that neither Mr Humm nor Mr Scheen gave any commitment, or even indication, as to their respective company's future conduct regarding P4u. Indeed, while Vodafone UK at this point realised that there might be problems reaching an acceptable deal with P4u, it had not yet finalised its strategy in that regard: see paras 343-347 above. Mr Scheen was obviously in no position to indicate EE's forward strategy since that had not yet been decided. As P4u pleads at para 133 of its Re-Amended Particulars of Claim:

> "it is inherently unlikely that an undertaking would provide a competitor with confidential and commercially sensitive information and/or a commitment as to its future conduct on the market unless it had received and/or expected to receive corresponding information and/or commitments in return."

I agree, and I therefore reject P4u's case that Mr Scheen received some comfort or reassurance from Mr Humm. Moreover, in the slide presentation discussed at the 10 April BRM, EE's express assumption was that if EE were to pull out of P4u, Vodafone UK would remain and may indeed be one of the MNOs that might take up EE's volumes: para 461 above. As P4u pointed out, in a different context, Mr Harris sent this presentation on 15 April to the shareholder representatives participating in the workshop the next day. So that remained EE's assumption two weeks after the Scheen-Humm exchange.

(2) The remarks at the EE drill-down workshop: 7 May 2014

577. The background to this workshop and the nature and outcome of the discussion is considered at paras 496-498 above. Mr Deloison from the Orange controlling team was one of the participants and he made 'bullet point' notes of the meeting, which he subsequently emailed to Mr Naulleau. Mr Deloison said that he believed he typed these notes 'live' during the meeting and completed them in a taxi on the way to St Pancras International (presumably to catch the Eurostar).

578. In those notes, he records that on the second day of the meeting (i.e. 7 May), the participants considered a slide deck presented by Mr Eyre and various potential strategic scenarios for EE. Mr Deloison's note was made in French but it includes quotations in English which he said he wrote down as it was easier to repeat the actual words used than to seek to

paraphrase in French. Among the points were the following (save for the quoted phrases, the English is here a translation):

> "Marc Allera (MA): reports that BT would have sent CPW and 4PU their proposed terms for the distribution of their mobile offerings
>
> o Neal Milsom (NM)/MA: BT and others could not fill EE and VOD activity leaving P4U simultaneously => "then, 4PU will starve"
>
> MA: VOD would wait for EE to announce something: "they will follow EE"; NM: their strategy is a bit difficult to follow
>
> o [to be verified later by CN] : MA [would recruit/is said to be recruiting][49] the "Head of Indirect Strategy" of VOD (information mentioned at the session)"

579. Mr Allera and Mr Milsom were both cross-examined about these observations which Mr Deloison attributed to them.

580. Mr Allera accepted that he may have said that BT was preparing to go into indirect distribution of mobile connections but that he did not say anything about simultaneous exit with Vodafone UK, or that P4u would "starve", nor did he recall Mr Milsom saying that, nor did he think he said that Vodafone UK would "wait" for EE. And he was "100% sure" that he did not say that he would be trying to recruit the head of indirect strategy from Vodafone UK.

581. Mr Milsom said that he did not remember this specific workshop, and he did not think it ever crossed his mind that EE and Vodafone UK would leave P4u simultaneously.

582. I reject EE's attempt in its closing submissions to cast doubt on Mr Deloison's note. There is no conceivable reason why Mr Deloison, taking notes during the meeting, would not seek to record matters correctly, and it is notable that he put some of the phrases in quotation marks. As Mr Deloison explained, he sought to capture the words being used. The fact that Mr Deloison's note was not shown to the EE attendees after the workshop is in my view irrelevant.

583. It is clear that, in the light of the slide deck which Mr Eyre presented on the second day of the workshop, the participants discussed the attitude of the other players in the market, and indeed the shareholders asked EE to prepare an analysis of their likely strategies: para 502 above. It may be that Mr Allera said that he thought that Vodafone UK would wait for EE to act, and then follow EE. Or it may be, as EE suggested in its submissions, that he was saying that Vodafone UK would not sign a new agreement with P4u before EE's strategy was clear, a view that he had expressed internally to Mr Eyre a few days before. When Mr Milsom said that Vodafone UK's strategy "is a bit difficult to follow", I think that either meant that he did not think that Vodafone UK's position was so clear, or that if it was waiting for EE to announce its position before doing anything, such a strategy was hard to

---

[49] The original French text is: "*recruterait*". The alternative translations were put forward on behalf of P4u and on behalf of EE.

understand. I accept that in making these observations they may well have been responding to questions from the participants in the workshop from Orange and DT, who were evidently keen to get a sense of the reactions of others in the market. But, in my view, these remarks do not indicate that either Mr Allera or Mr Milsom, at this point, had any inside information about Vodafone UK's strategy.

584. My view is supported by the fact that, in reality, by early May Vodafone UK was heavily engaged in negotiations with CPW and, far from waiting for EE to move first, it was seeking, if possible, to conclude an agreement by the end of that month, potentially on an exclusive basis: see paras 354-360 above.

585. My conclusion that Messrs Milsom and Allera were purely speculating, without any direct information from Vodafone UK, is borne out by the further comment by Mr Milsom, quoted in Mr Deloison's notes:

> "NM: "my theory is that CPW wants to secure 2 big accounts in the merge [sic] (O2 and EE, relations with VOD being deteriorated); then they'll put pressure on the others"

In fact, CPW was at this time very interested in securing all the indirect business of Vodafone UK: para 354 above.

586. Mr Deloison described that discussion at the workshop as "war gaming" and I think that fairly reflects the tenor of the meeting. When EE's management, after the workshop and at the shareholders' request, gave further thought to their competitors' likely strategies, their view was set out in the slide prepared by Mr Reeves which said that indirect disruption was "likely to be *led* by Vodafone" (my emphasis): para 502 above. That is directly contrary to the view that Vodafone UK would wait to see what EE was doing.

587. As for the point that if both EE and Vodafone UK left P4u simultaneously, then it would "starve", I think that was stating the obvious: it does not suggest that Mr Milsom knew that such a move by Vodafone UK was likely. As noted above, EE's subsequent modelling of the scenario of its departure from P4u assumed that P4u would continue to trade for eight months after the EE Agreement expired in September 2015.

588. There remains the remark about recruitment of Vodafone's "head of indirect strategy." In closing submissions, P4u emphasised this element of the note, and submitted that "it must be overwhelmingly likely that what was happening was, at the very least, an attempt to elicit information relevant to indirect distribution."

589. From the notes, it seems that Mr Deloison was not sure that he captured this correctly since he asked Mr Naulleau, who was of course in regular contact with EE's management, to check. Mr Naulleau never did so, and Mr Deloison never followed this up. In fact, Vodafone UK did not have a post with that title, although it did have a Head of Strategy (Mr Parbutt) and a Head of Indirect Distribution (Mr Roberson). However, there was no evidence that EE sought to recruit either of them; all the relevant witnesses denied that any such attempt was made; and given that any such approach would have required internal approval at EE, I think that if this had occurred it would have emerged in the extensive

disclosure. Mr Eyre would also have been aware of it, and I consider he was being honest when he said that he had no knowledge of any such recruitment and did not recall this remark from the meeting. EE submitted in closing that "[a]t most this was a throwaway remark, potentially even a sarcastic comment which was misinterpreted or lost in translation, which led nowhere." I do not think that the fact that Mr Naulleau did not follow it up is suspicious, as P4u contended. It indicates to me that the remark was not seen as of any real significance and I do not think that this remark, in whatever spirit or precise wording it was made, advances matters.

(3) The minutes of the 21 May 2014 BRM

590. This was the meeting at which the EE directors authorised EE's management to seek an enlarged agreement with CPW and approved their strategy for indirect distribution: see para 531 above. Therefore it is obviously unfortunate that the minutes of that entire part of the discussion are blank: para 529 above.

591. Mr Harris was responsible for producing the minutes of the EE BRMs and he could not offer any explanation as to why in these minutes this item was blank. He said the minutes of a BRM were prepared from near verbatim notes that he took during the meeting, but his notebook with the notes of this meeting was discarded long ago. Either he or his secretary would type up the minutes from his notes and he could not recall which of them had produced the minutes of this particular meeting.

592. Mr Harris' practice was to send the minutes in draft to the two "front doors" for any correction, and he assumed he would have done that on this occasion. Mr Kniese did not recall either the meeting or these minutes, but said he was sure that he would have raised the matter with Mr Naulleau so that one of them would have asked Mr Harris to provide complete minutes. Although that is a reasonable assumption, I think that here it is mistaken. There is no record in the numerous emails over this period from DT and Orange to Mr Harris of his ever being chased for the minutes. Looking back at it, Mr Harris agreed that this was surprising.

593. However, I reject P4u's submission that the blank minutes under this item was a deliberate omission so as to avoid recording actual or intended discussion on strategy and coordination with Vodafone UK. Contrary to P4u's contention, I do not regard Mr Harris' answers under cross-examination by Mr MacLean, when fairly read, as supporting this allegation. Mr Harris said clearly that he was "never aware of any such conversation or discussion".

594. It is notable, in my view, that two days after the meeting, and evidently in response to Mr Harris' request, Mr Allera sent him an email setting out "my take on what was agreed" at the meeting. Mr Allera proceeded to set out in five points what had been agreed: para 532.a)ii) above. I think that Mr Harris would hardly have made such a request to Mr Allera if he had been able to take a clear note of the discussion. That strongly indicates that this was, as Mr Harris surmised in his evidence, a fast-moving conversation which he had been unable to note properly.

595. If there had been reference in the discussion to collusion or anti-competitive exchange with a competitor, which the participants did not wish to record, then far from having the entire discussion as a blank minute, I consider that other aspects of that discussion would appear in the minutes with only this aspect omitted. That is the obvious, and in my view likely, course which is adopted when a highly confidential matter is ventilated or a particularly sensitive remark is made. I do not see that this could explain the entire item of "indirect distribution" being blank, in particular when Mr Allera's email shows that there were a number of significant matters discussed and resolved which could have been minuted. Moreover, there is a fourth item in the minutes, "AOB", which is also blank. Mr Deloison's note (para 532.a)i) above) shows that there was some significant discussion under this head which Mr Harris' minutes also fail to record.

596. Mr Deloison's note is a contemporaneous document reporting on this meeting, made the following day as a result of his debrief by Mr Naulleau. That includes the comment by Mr Dannenfeldt, "be careful with VOD (anti trust risk)": para 532.a)i) above. I have found that this remark related to potential discussions with Vodafone UK regarding a joint acquisition, a proposition which, contrary to P4u's submissions, I find was still on the table after the 21 May 2014 BRM: paras 535-538 above. Mr Deloison's private note, prepared for his colleagues in the controlling group at Orange, otherwise records acceptable discussion of EE's option 4 and the need to strengthen its direct channel, with no indication of any information about the conduct of Vodafone UK.

597. I think it is impossible now to establish why the final two items in the minutes are blank. Mr Allera said that the discussions on the earlier items had over-run, so that, to his frustration, discussion on indirect distribution on which he sought a clear direction from the directors, was held in a rush as the shareholder directors prepared to leave for their travel home. I do not find it necessary to decide whether that is correct or an attempt many years later to come up with some explanation. It may be simply that under pressure of daily events, Mr Harris never got round to completing the typing of the minutes. But whatever the true explanation, I find, for the reasons set out above, that the blank in the minutes does not give rise to an inference which supports P4u's case in these proceedings.

598. I should also make clear that I reject the alternative allegation in P4u's pleaded case that a more complete iteration of these minutes existed which evidenced anti-competitive or collusive contacts and was then deliberately destroyed. That allegation was not pursued with any of the witnesses.

(4) Mrs Derbyshire's email of 10 August 2014

599. Mr Eyre was away on holiday in early August, and on Sunday, 10 August 2014, Mrs Derbyshire sent him an email updating him on what had happened during his absence. She reported that the CPW-EE Agreement had been signed, subject to shareholder approval, and summarised key points in the final deal, noting that on some EE had failed in its final attempt to secure better terms. She told Mr Eyre that the shareholders were not happy about some of the terms and that EE had to prepare a slide deck presentation for them, updating the previous slide deck. Her email concluded:

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

600. Mrs Derbyshire said that she had no recollection of this email. She could not remember whether the comment about Vodafone UK pulling out came from Mr Milsom or someone else. She could only say that she did not think it came from a call with the shareholders, as most of her discussions with the shareholders were to explain some of the modelling. I found Mrs Derbyshire to be a straightforward witness, seeking to be helpful in her answers, and I accept this evidence.

601. Asked about this email, Mr Milsom said that he was surprised when it was shown to him in the course of preparation for this trial. He said he did not tell Mrs Derbyshire that Vodafone UK was expected to leave P4u and that he had no idea that Vodafone UK was about to pull out. He said that at this time he was just keen to consider the financial impact on EE going forward once the EE Agreement expired in September 2015.

602. Mr Milsom had been reluctant to give evidence in this trial at all (EE had issued a subpoena and served a witness summary pursuant to CPR r 32.9), although he later made a witness statement and gave his evidence voluntarily. But I found him to be very defensive in some of his answers and, in my judgment, he was being less than frank in part of his testimony. As it is apparent from this email that by the end of the first week of August 2014, there was at least some expectation in Mr Milsom’s team at EE that Vodafone UK would shortly leave P4u, I consider, on the balance of probabilities, that this information came from Mr Milsom, although I think that he may have learnt this from Mr Allera.

603. However, I do not think it can be inferred that any such information about what Vodafone UK would do came to anyone at EE from Vodafone UK itself, through contact between the two MNOs. The CPW-Vodafone Agreement had been signed several weeks before, on 17 July 2014. There is no reason why Vodafone UK would have wished to disclose that fact, which was still confidential, to its commercial rival. In my view, there is another equally plausible, indeed more plausible, explanation. Mr Allera had spent much of his time in July working on the negotiations with CPW, which intensified in the days before the two sides reached final agreement late on 7 August 2014. It seems that Mr Allera was aware that CPW had been negotiating also with Vodafone UK. Writing to the shareholders on 11 August, recommending the agreement, Mr Harris emphasised that:

> “• The deal secures a healthy volume in the UK's largest Indirect Retailer on enhanced terms versus the current contract
>
> • As Marc [Allera] advised [on] Friday, timing is critical — allowing Vodafone to take this volume could have disastrous consequences for EE”

604. It seems to me that in pressing EE to conclude the agreement, CPW may well have sought to ‘play them off’ against Vodafone UK; and to have indicated that Vodafone UK was also seeking to enter into an exclusive agreement. I note that P4u, when in negotiation with O2, had also sought to apply pressure by referring to its discussions with another (in that case

unidentified) MNO: para 115 above. It is unnecessary to speculate on whether CPW might have gone further and told EE that Vodafone UK had actually concluded such an agreement. Communication of this nature to EE, it seems to me, would have been in CPW's commercial interest: it was obviously keen to attract EE away from P4u. CPW had everything to gain from the demise of its main competitor and, indeed, that appears to have been its objective. Already in mid-April 2014, Mr Roberson of Vodafone UK in summarising to Ms Rose his discussions with CPW, reported that:

> "They remain concerned that us pulling out may not immediately be the end of P4u — either EE prop them up or they do a deal with BT"

605. I recognise that this possibility was not suggested in the course of the trial. That is not surprising: this would hardly have been put to the EE witnesses on behalf of P4u, since it was directly contrary to P4u's case that EE was obtaining information from Vodafone. And since Mr Milsom and Mr Allera denied that they had such knowledge at all, such evidence would not have been offered by them. Furthermore, I should stress that I am not making a positive finding that such information was supplied by CPW. But in addressing the issue whether, on the balance of probabilities, Mrs Derbyshire's email gives rise to an inference that there was an exchange of confidential information between Vodafone and EE, in my view it is relevant and appropriate to consider the surrounding circumstances against which that issue is to be determined, and whether there is another realistic possibility: cp *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] UKSC 34 at [96]-[99].

606. Moreover, I do not consider that the information was very specific in terms of exactly when Vodafone UK would exit from P4u. It is notable that even in late August, when Mr Sahota from Mrs Derbyshire's team did some modelling on the financial implications for EE of P4u "going bust", one of the alternative assumptions on which the modelling was based was that this might be on 31 October 2015. Mr Eyre said in his evidence:

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

And he explained that he had regarded this as just one among several possibilities. Indeed, EE had throughout considered a potential scenario where Vodafone UK exited from, or sought to acquire, P4u.

607. I accept that evidence, which was not directly challenged. And there is no indication that the expectation referred to in Mrs Derbyshire's email was conveyed to the Board members or that it played any part in their decision to approve the CPW-EE Agreement. The slide deck presented to the Board members for their 8 July meeting (para 553 above) set out the handset "cost efficiency" saving on the basis that this would be realised only in late 2017-2018, i.e. on the assumption that P4u would stay trading until at least September 2015: see

para 522.d) above. When the slide deck was revised and sent to the directors on 14 August 2014 to reflect the final CPW-EE Agreement, for which Board approval was sought, while various figures were updated in light of the final terms, the figures for the handset "efficiency" were unchanged.

608. Although P4u's claim, which was extensively amended following disclosure, refers to Mrs Derbyshire's email, as I understand it that is to support the allegation of earlier collusion; it is not alleged that unlawful exchange of information between Vodafone and EE took place in August 2014. In any event, not only do I conclude that no such exchange took place, but I find that insofar as EE gained information in early August as to Vodafone UK's intention as regards P4u, this had no material effect on its own decision to reach an exclusive agreement with CPW.

(5) The meeting with Ofcom: 4 September 2014

609. On 4 September 2014, Mr Harris, Mr Blendis and EE's director of public policy, Mr Kip Meek, went to see the chief executive of Ofcom (Mr Ed Richards). The meeting was attended also by Ofcom's general counsel (Ms Polly Weizman). It appears that none of the executives from EE attending the meeting took any notes.

610. The meeting was set up at EE's request, at the suggestion of Mr Swantee, after the announcement that Vodafone UK was withdrawing from P4u. Mr Harris said that EE was concerned that, as it had itself just entered into the CPW-EE Agreement, "the sequence of events could be perceived the wrong way". He explained this further under cross-examination:

> "Q. ... Why did you think Ofcom might perceive the sequence of events in the wrong way?
>
> A. From memory, we simply wanted to lay out with Mr Richards, the then director general of Ofcom, the sequence of events, because EE signing its contract with Carphone Warehouse was —— appeared to be in a very similar time frame to Vodafone confirming their exit from Phones 4u.
>
> Q. You were concerned, weren't you, that Ofcom might get the impression from the sequence of events that there had been some sort of coordination between EE and Vodafone; is that right?
>
> A. Yes, that was in part of the thinking, I would say."

611. EE accordingly told Ofcom that it had entered into an agreement with CPW and intended to withdraw from P4u after their existing agreement expired. EE presented a slide to Ofcom that purported to set out the chronology of events so far as EE was concerned. It was entitled: "Timeline of decision process". On 2 September, Mr Harris sent a draft of this slide to colleagues to check. A subsequent version of that slide disclosed by EE incorporated a few changes, and it appears that this was the text of the document placed before Ofcom. Mr Harris did not suggest otherwise. The timeline in that slide includes the following:

"**March 2014**

• EE Business Review / EE Executive[50] approve strategy in principle of CPW/DSG as a principal partner

• Commence negotiations with CPW to explore long-term contract extension options

…

June 2014

• Final position of EE and P4U re contract extension tabled

July 2014

• [P4U withdrew commercial contract extension offer][51]

August 2014

• Conclude contractual negotiations with CPW subject to Board ratification"

612. However, it is quite clear from the documents discussed above that neither EE's executives nor an EE BRM approved a strategy of having CPW/DSG in principle as its main partner in March 2014, as Mr Harris was constrained to accept. At that time, many options were being considered, including withdrawal from CPW altogether: paras 447-448 above. That strategy was not adopted until two months later, at the 21 May 2014 BRM. And, while it was formally correct that P4u withdrew the proposal for a contract extension at the very end of July 2014, that was only because of frustration at what it was told was the delay in getting the deal approved by EE's shareholders and Mr Whiting at the time made clear that he wished to resume discussion on a contract extension after the summer; but by that point EE was in the final stages of agreeing terms with CPW: para 553 above.

613. Accordingly, the timeline presented to Ofcom was in my view very misleading. EE was far from being "completely transparent with Ofcom", which is the approach that Mr Harris claimed he had sought to adopt.

614. However, I do not think that this in itself shows that EE had something to hide. It is unclear whether the misleading impression given to Ofcom was deliberate or just grossly negligent[52]. And as everyday experience in the criminal courts shows, people will give even a deliberately false account for various reasons, so that giving such an account does

[50] Two versions of this slide, both prepared on the morning of 4 September 2013, were disclosed, with these alternatives: it is unclear which was shown to Ofcom at the meeting.

[51] This wording appears in only one version of the slide.

[52] A cursory examination of the Minutes of the 20 March BRM and the slide deck presented by EE management for that meeting would have shown that no such strategy was adopted but that, on the contrary, EE's executive management at that stage was keen to support P4u as a counterweight to Dixons/CPW, and put forward the strategy of an acquisition.

not in itself establish guilt. No business welcomes a regulatory investigation, with all the burden and disruption that this brings. Here, realising that the concurrence of events might invite suspicion, I think that EE understandably wished to avoid a regulatory investigation. The same point emerges from one of the slides in the pack presented to the directors on 31 August 2014, considering whether in response to the news of Vodafone UK's decision EE should state that it had decided not to extend its agreement with P4u:

> "Important to avoid any supposition EE knew and link to signing CPW/DSG (even though such supposition is mistaken it could trigger enquires/investigation)"

I think that this was a legitimate concern on EE's part. Moreover, I do not consider that the statement in brackets that any such supposition would be mistaken was a contrived observation included in the slides either to disguise matters from the shareholders or for the ulterior purpose of a potential subsequent investigation. But that would effectively be the implication of a finding that there had been such knowledge.

615. Although I consider that EE's resulting conduct as regards Ofcom was deplorable, it does not lead me to change the conclusion I have otherwise reached that its decision in effect to go exclusively with CPW did not follow any collusion or unlawful exchange of information with Vodafone UK.

The alleged collusion with Vodafone UK: summary

616. The allegations advanced against EE and its shareholders, DT and Orange, as regards anti-competitive conduct with Vodafone, are advanced in P4u's pleaded case on the basis that there was coordinated conduct as regards the respective decisions of Vodafone UK and EE to discontinue their relationship with P4u and that they exchanged commercially sensitive information as to their intended policy in relation to the renewal or extension of their relationship with P4u and/or CPW and/or indirect retailers in general: para 138A read with para 131 of the Re-Amended Particulars of Claim. The particulars given in P4u's pleading, extensively amended after disclosure, allege that this had occurred by the time of the 21 May 2014 BRM (although some of the documents which are relied on to support this allegation are of a later date, but that is not a criticism): ibid, paras 68A-68M.

617. However, as set out above, in my judgment, careful scrutiny of all EE's contemporaneous documents and the various internal meetings of EE and within and between its shareholders, considered in context and against the surrounding circumstances, does not support these allegations. In that regard, I have considered also matters after 21 May 2014 that are relied on by P4u, but they also do not, in my view, indicate that there was any collusion.

618. The reality was, in summary, that although EE executive management had previously felt a constructive commercial alignment with P4u, the announcement of the CPW/Dixons merger was seen as a real "game changer". Not only did that new entity appear to have advantages in terms of size and the potential to advance "convergence", which DT in particular saw as a significant way forward for MNOs, but this unexpected development

was seen as an opportunity to change the pattern of retail distribution in the UK, which had been a strategic goal of EE and was in particular urged by the shareholders. While some of EE's management, including Mr Swantee, had strongly favoured an acquisition of P4u, probably jointly with Vodafone UK, that option did not command the support of the shareholders. Attention then shifted to seeking an enlarged deal with CPW and the development of EE's direct sales, while ceasing EE's existing relationship with P4u.

619. In the course of EE's decision-making, many scenarios were modelled, revised, and extensively discussed. Analysis of the development in that modelling up to the 21 May 2014 BRM, and beyond, does not in my view show that it came to incorporate an assumption that Vodafone UK had also decided to withdraw from P4u. Once EE had considered the financial position of P4u (para 503 above), its modelling did incorporate an assumption that P4u would either cease doing business or shrink dramatically some eight months after the EE Agreement expired in September 2015: para 521 above. But that was on the basis that P4u was unlikely to find a replacement for EE, an expectation which EE recognised might not be realised. Irrespective of whether or not that expectation was sound, it did not rest on any 'inside' knowledge of the strategy of Vodafone UK. EE recognised that once it withdrew from P4u then, unless P4u attracted an effective substitute, Vodafone UK would probably also decide to leave, or possibly would seek to acquire P4u. But that did not involve any knowledge of Vodafone UK's confidential commercial strategy. As Mr Allera observed:

> "being the only major supplier of what was supposed to be a multi-network retailer offering choice and perceived "independence" on the high street would be unattractive for Vodafone (just as it would be unattractive for EE)."

N. EXPERT EVIDENCE

620. In its Particulars of Claim, P4u advanced what came to be known as its "economic case". As set out para 124 of its pleading, this was as follows:

> "…, it was only by an unlawful collusive agreement and/or concerted practice resulting in a refusal by all the MNO Defendants to supply Connections to P4U that each of the MNO Defendants could rationally and/or without intolerable commercial risk cease to supply P4U. No MNO Defendant acting rationally and/or in its own commercial interests would choose unilaterally to cease dealing with P4U in circumstances where P4U was likely to have one or more continuing commercial relationships with other competitor MNO Defendants (or another major MNO), because to do so would cause such MNO Defendant to lose significant market share of Connections to other MNO Defendants. An MNO Defendant that unilaterally ceased to deal with P4U could not have had sufficient confidence that its competitors would also to cease dealing with P4U and so cause P4U to cease trading (which, it is averred, was necessary in order for the decision to cease supplying to result in a net benefit to the MNO)."

621. To support this contention, P4u relied on expert economic evidence from Mr David Thomas, and each of the three defendant groups adduced evidence from an expert economist in response. However, the pertinent question is not whether, objectively viewed,

the decision to cease trading through P4u was a rational strategy for each of the three MNOs. If those running the business at the time considered, independently, having regard to their assessment of the circumstances, that this was a sensible commercial strategy, the fact that a professional economist scrutinising the matter ex post takes a different view is irrelevant. An expert economist may use a different approach in his or her analysis, which might indeed seem more sophisticated or more rigorous than the analysis made by the MNO, but that does not assist. Such economic analysis can only support the alleged collusion if it shows that a decision to leave P4u, without the security or comfort that the other MNO(s) was or were also going to do so, could have made no business sense whatever at the time, such that no rational business person would have adopted this course.

622. Here, I have set out above in detail how each of O2, Vodafone UK and EE arrived at their decisions, and then the basis on which it was approved as necessary by their parent company or (in the case of EE) shareholders. And I have found that the data, evaluation and decision-making did not depend on knowledge of commercially sensitive information from one or other of their competitors, but supported their own strategic desire to reduce their reliance on the indirect retailers and strengthen the role of their direct channels. That this was the aspiration of all the MNOs was well known. I therefore will not prolong this already lengthy judgment by a detailed assessment of all the expert evidence.

623. I would only note that fundamental to Mr Thomas' analysis is the question, for each MNO, of what would happen to the volume of customers which it previously obtained through P4u: i.e. the expected absorption or retention rate. That was at the heart of what Mr MacLean for P4u stressed was the "prisoner's dilemma" reflected in an internal O2 draft presentation from October 2012 (para 101 above): that while all MNOs might independently wish to leave P4u, whichever left first would see its volume of connections diverted by P4u to the others, and so would lose significant market share and therefore revenue, unless the other MNOs also left P4u. As I have observed above, each of O2, Vodafone UK and EE were alert to this issue, and made assumptions about retentions in their internal analyses.

624. Mr Thomas' analysis suggested that each of O2, Vodafone UK and EE could expect to retain well under 50% of their existing volume of customers obtained through P4u, if P4u had remained in the market. On that basis, calculating the NPV of the average customer, the decision to leave P4u would not be profitable. However, his analysis was expressly made on a static basis, i.e. that in all other respects, nothing changed. That contrasts with the approach at the time of the MNOs in two important respects.

625. First, for Vodafone UK and EE, it leaves out of account the terms of the new agreement with CPW which the MNO had negotiated. CPW was offering both substantially increased volumes over their previous agreements and substantially improved financial terms. The volumes to which CPW was ready to commit (supported by a liquidated damages clause) were fundamental to Vodafone UK and EE's modelling. And the financial terms of course materially improved the customer NPV. It was only when Vodafone UK and EE had secured a satisfactory deal with CPW that they felt able to exit from P4u.

626. Secondly, Mr Thomas focused his assessment of commercial rationality on the effect on NPV. Although NPV is an important metric, there are others and Vodafone UK in particular focused as much on ROI, for which the new terms negotiated with CPW were particularly beneficial: para 381 above.

627. Thirdly, Mr Thomas left out of account the plans which the MNOs made to expand their direct sales. That was also a key part of their strategy and approach. Hence O2 saw the departure from P4u as aligned with its "Refresh" project to increase its direct business and attract customers also from other competing MNOs. Vodafone UK had its Project Spring that involved a dramatic increase in the number of stores and online sales over the next few years. And for EE, of the four options considered at the 21 May 2014 BRM, the key distinction between option 4, which the directors decided to pursue, and option 2, was not departure from P4u in favour of CPW but the strategy of expanding the direct business by opening 150 new EE stores and significant extra expenditure on investment and marketing. Mr Evans of O2 stressed that its decision to leave P4u was accompanied by a calculated mitigation strategy. For upgrades, where O2 had the customers' names and numbers and knew when their existing contracts would expire, that involved a targeted initiative to contact them before their contracts came to an end. As regards new connections, that was bound up with the introduction and promotion of the Refresh offering, available only from O2 directly.

628. P4u may say that this expectation of additional volume through extraneous developments was unrealistic. It stressed that many of its customers were "network agnostic" and it prided itself on attracting a younger segment of the market which the MNOs found harder to reach. However, as Ms Abram KC submitted, even if P4u's customers were attracted to P4u more by the choice of handset (and the potential implication of that for their monthly payments), a choice of networks was a distinct selling point for indirect retailers, such that when the number of networks available through P4u reduced some customers would be likely to favour CPW. Mr Thomas accepted this, but observed that it was impossible to know how significant this cohort would be.

629. As regards EE's decision, there was the additional factor that EE's modelling estimated that P4u would exit the market, not immediately but some 8-9 months after the EE Agreement expired in September 2015. That was because EE calculated, without any assumption that Vodafone UK would withdraw, that P4u would struggle to attract a replacement for EE and was therefore likely to run out of cash.

630. Altogether, whether each MNO's expectation as to retention rates was likely to be fulfilled seems to me a matter on which different views could reasonably be held. Vodafone UK indeed based its final modelling on the assumption that, as regard new connections, all the volume which it had previously acquired through P4u would be 'churned' by P4u to its competitors (an assumption which the experts agreed was very conservative), and that its expansion of direct sales would come at the expense of sales made by the other MNOs. Of course, the assumptions about retention and growth of the direct channel involved risks, as many of the presentations and discussions within each MNO acknowledged. But as I observed above, businesses do take risks for potential commercial gain, and different businesses have different appetites for risk. Indeed, sometimes different individuals within

the same business have a different approach to risk. Given the speculative nature of the exercise and the lack of data, I do not think that the views on this reached by the MNOs operating in the market can be described as irrational (or regarded as rational only on the assumption of the disappearance of P4u).

631. Moreover, in light of the evidence, I do not think that the decision-making is to be viewed only in terms of potential lost volume and the direct financial consequence. For all three MNOs, in their different ways, I think it became part of a wider commercial strategy to strengthen their direct channel and reduce their reliance on indirect retailers. Hence O2, which left P4u in 2012, well before Vodafone UK and EE, subsequently left A1 Comms and Tesco as outlets in 2013; and although in the short-term it had become more reliant on CPW, it exited from CPW in March 2020, which Mr Evans described as "the completion of the core strategy".

632. By mid-2014, when Vodafone UK and EE were in negotiation with P4u, it was known that CPW was going to merge with Dixons. Perhaps because P4u was still a successful and profitable business, I think that Mr Whiting and those running P4u significantly underestimated the impact which the news of this merger had on the perception of the MNOs. It reduced the size of the P4u estate through the inevitable loss of its stores-in-stores within Dixons, would lead to an expansion of the number of CPW stores, and, since it was not realistic for either Vodafone UK or EE to operate at this stage free of all indirect retailing, it made CPW an inescapable indirect retail partner.

633. As Mr Thomas' report recognises, even under the terms of the existing agreements the financial benefit of a customer obtained by Vodafone UK or EE through CPW was materially better than the benefit of a customer obtained through P4u. The possibility of making CPW the MNO's sole large indirect retail outlet (i.e. to the exclusion of P4u) gave the prospect of still better terms. Furthermore, once Vodafone UK and EE were the only MNOs in P4u, there was what might be regarded as the converse of a prisoner's dilemma. In this very concentrated market, each MNO was alert to the impact of its competitors' commercial strategy. Vodafone UK and EE's internal documents show that each was concerned that the other might decide to exit from P4u, with the implications of being left as "the last man standing". That would not only leave them in a weaker P4u but significantly impair their negotiating position towards CPW. In my view, this concern, which did not depend on any "inside information", was entirely rational.

634. Accordingly, I consider that P4u's allegations are not supported by its economic case.

635. I should briefly refer to one matter on which the experts were of assistance. The Defence of the Vodafone defendants contended that the MNOs' case that an indirect retailer was dispensible was supported by the example of Three, which had terminated its arrangement with P4u in April 2012. Since there is no suggestion of Three being involved in any collusion, that was said to demonstrate the commercial rationality of such a decision. However, the experts agreed that, as P4u pleaded in its Reply to Vodafone's Defence, Three was in a materially different position from O2, Vodafone UK and EE. It was much the smallest of the four MNOs and had been much less reliant on indirect retailers for either market share or profitability. Indeed, its share of P4u's new connections and upgrades was

only 1% in its final year. Accordingly, when Three decided to withdraw from P4u it would have had little concern about losing its volume of connections to another MNO as there was so little volume to lose. Three also ceased trading with CPW in 2013. I note that Vodafone did not pursue this point in its closing submissions.

O. LIABILITY OF ORANGE AND DT FOR CONDUCT OF EE

636. In its claim, P4u alleges that EE together with Orange and DT, the two shareholders in the JV, were for the purpose of competition law a single undertaking, and that Orange and DT exercised decisive influence over EE's commercial policy. P4u contends that Orange and DT are therefore directly liable for the anti-competitive agreements and/or concerted practice allegedly entered into by EE in breach of competition law.

637. EE accepted that in relation to its exit from P4u, its two parent companies would be jointly and severally liable if an infringement by EE was found. Orange and DT, however, disputed that proposition on the basis that they were not a single undertaking with EE and did not exercise decisive influence in material respects.

638. This constituted issues 16 and 17 in the agreed List of Issues for this trial. Since I have concluded that EE did not breach EU or UK competition law as alleged, this issue does not arise. But as I heard full submissions upon it, I shall address it briefly.

The legal principles

639. The relevant legal principles are established by a series of decisions of the EU Courts, in particular: Case C-172/12P *EI du Pont de Nemours & Co v Commission,* EU:C:2013:601; Case C-179/12P *Dow Chemical Co v Commission*, EU:C:2013:605; Case T-92/13 *Koninklijke Philips Electronics NV v Commission*, EU:T:2015:605; and Case T-104/13 *Toshiba Corp v Commission*, EU:T:2015:610 ("*Toshiba GC"*), on appeal Case C-623/15P, EU:C:2017:21 ("*Toshiba CJ*").

640. Those authorities establish the following propositions:

a) Where two companies each hold 50% of the shares of a JV company which committed an infringement of competition law, they may be considered to form a single economic unit and therefore a single undertaking for the purpose of establishing liability for that infringement, insofar as it is shown that both parent companies did in fact exercise decisive influence over the JV: *EI du Pont de Nemours* at para 47;

b) However, there is no requirement, in order to impute liability to the parent for the acts of the JV, to show that the parent was directly involved in, or even aware of, the offending conduct: *EI Du Pont de Nemours* at para 76; *Philips* at para 67;

c) Two parent companies, each holding 50% of the shares of a JV company, may both be regarded as exercising decisive influence over the JV, insofar as such influence is demonstrated by factual evidence: *Dow Chemical* at para 58;

d) The fact that the JV is classified as a "full function joint venture" as a matter of EU law does not exclude the possibility that its parent companies exercised decisive influence for the purpose of attribution of liability: *Philips* at para 39;

e) The presence on the supervisory board of the JV of several persons who simultaneously carried out functions within the parent company is evidence of the decisive influence exercised by the parent over the JV's commercial policy: *Philips* at para 52;

f) Where it follows from the contractual provisions governing the JV that its conduct on the market is determined jointly by its parent companies, the parent companies must be regarded as having exercised decisive influence over the JV, unless there is concrete evidence showing that decisions in relation to its conduct were actually taken by other procedures: *Toshiba CJ* at para 52;

g) Where both parent companies have veto rights with respect to matters of strategic importance which were essential to the pursuit of the JV's activities, that will establish the exercise of joint control over the JV: *Toshiba GC* at para 106; *Toshiba CJ* at para 56;

h) Such matters of strategic importance may include decisions as to approval of the budget, business plan, major investments or the appointment of senior management; and a decision as to the development plan for the business may be sufficient to constitute a matter of strategic importance for this purpose: *Toshiba CJ* at para 56 read with *Toshiba GC* at paras 107 and 109;

i) The mere fact that the parent company never exercised its right of veto over certain decisions of the JV does not mean that it did not exercise decisive influence over the conduct of the JV: *Toshiba CJ* at para 73.

The present case

641. Here, DT and Orange merged their existing MNO businesses in the UK, respectively T-Mobile UK and Orange UK, when they formed the EE JV in 2010. The structure of the JV is governed by their Joint Venture Agreement ("JVA") dated 1 April 2010. By clause 6.2 of the JVA, the Board was to comprise two non-executive directors appointed by DT, two non-executive directors appointed by Orange, and two executive directors serving as the CEO and CFO of the JV. The quorum for any meeting of the Board was one DT director and one Orange director: clause 6.13.

642. Pursuant to clause 12.2.1 of the JVA, the approval of all the DT directors and the Orange directors present and entitled to vote was required for, inter alia, the JV's business plan and annual budget, and for any permission to deviate from that plan or budget. In other words, the DT directors and the Orange directors each had a veto power in respect of such matters, which are indeed classified in the JVA as "Veto Board Matters".

643. Furthermore, the DT and Orange appointed directors at the same time held very senior management positions in DT and Orange. For DT, while Mr Höttges was a director of EE

until the end of January 2014 he was also a member of DT's Group Board of Management (and indeed in 2012 it was announced that he would be the new CEO of DT and he spent much of 2013 transitioning to that role). Mr Dannenfeldt, who succeeded Mr Höttges on the EE Board, was at the same time the CFO of DT. Ms Nemat, the other DT appointed director until 31 January 2014, was at the same time the board member for European Business at DT. She was succeeded on the EE board by Mr Tsamaz, who at the time was Chairman and CEO of Cosmote (an MNO in Greece) and Chairman of OTE group.[53] For Orange, Mr Pellissier was, during the period with which this case is concerned, the CFO of Orange and Orange's Delegate CEO[54] in charge of Finances. Mr Scheen was Orange's Senior Executive Vice-President, European Region, and therefore in charge of Orange's European division, and a member of Orange's executive committee, until he left Orange and resigned as director of EE with effect on 1 September 2014. He was succeeded by Ms Ernotte Cunci, who was also the CEO of Orange France.

644. In addition, apart from formal Board meetings, there were as explained above monthly BRMs attended by the shareholder directors, where detailed discussion took place of key aspects of EE's business and strategy. As the account earlier in this judgment of the discussions about EE's strategy regarding indirect retailers shows, the shareholder directors were closely involved and EE's executive management had to propose to them their desired strategic direction and seek their approval. Moreover, while the account in this judgment focuses on their discussion regarding indirect retailers, that was only a part of the agenda for the BRMs, which considered also, for example, EE's strategy towards SIMO connections and convergence. Apart from the BRMs, the two "front doors", full-time employees of DT and Orange working largely on EE, engaged regularly with EE's management regarding their strategies, and as described above the parent companies' controlling teams were involved in advising on, and criticising, EE's financial modelling. While the day-to-day management of EE was carried out by Mr Swantee and his executive team, as Mr Swantee explained:

> "Both Orange and DT were established in the telecommunications sector and they did not treat EE as a financial investment, but rather as a strategic partnership. They wanted to be actively involved in developing and executing EE's commercial strategy, and to support and add value to their investment wherever possible."

645. Although both DT and Orange had the opportunity to cross-examine Mr Swantee, that evidence was not challenged and I think it accurately encapsulated the position.

646. Altogether, I am clearly satisfied, having regard to the applicable principles set out above, that DT and Orange as the JV parents exercised decisive influence over EE for the purpose of constituting a single undertaking. If, contrary to my finding above, EE had violated competition law, on that basis DT and Orange would also be liable for the infringement.

[53] A large telecommunications company in Greece in which DT held a significant shareholding, and which was treated as part of DT Group.

[54] "Delegate CEO" is a translation of the French term, Directeur Général Délégué and represents a position where certain powers in respect of a particular issue or issues are delegated by the board of a company to an individual.

P. BREACH OF CONTRACT BY EE

647. P4u alleges that EE was in breach of the EE Agreement by sending the letter of 12 September 2014 informing P4u that it would not seek to extend or renew the EE Agreement on its expiry, on the basis that this was designed, or had as its predominant purpose, to cause P4u to go into administration and so enable EE to terminate the EE Agreement and/or avoid EE having to make further revenue share payments to P4u. P4u contends that EE "had no legitimate commercial reason" to send that letter. In that context, P4u also relies on three other letters sent by EE shortly beforehand, on 2, 4 and 9 September. The essence of P4u's case, as expressed in its opening submissions, is that in sending the 12 September letter, "EE chose to act cynically, hoping to deny P4u the chance to form any other deals to ensure its survival."

The contractual terms relied on

648. The actions of EE are alleged to have breached both express and implied terms of the EE Agreement. The express terms relied on are clauses 13.2 and 13.11, which are as follows:

> "13.2 EE hereby undertakes and agrees that it will in good faith observe and perform the terms and conditions of this Agreement and in particular EE shall, and shall procure that its employees, agents and subcontractors will:
>
> 13.2.1 comply with all legislation and regulations, …
>
> 13.2.2 supply to P4U from time to time such amount of the then current technical brochures, …
>
> 13.2.3 arrange and make available to P4U, should P4U so request, sales and technical training courses ….
>
> 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."

649. The EE Agreement is a detailed and comprehensive contract running to 47 pages of principal provisions, followed by 13 schedules. Clause 13 is headed "Warranties and Undertakings" and sets out a series of express warranties on the part of P4u and EE.

650. P4u contends that these terms are to be construed in the light of the nature of the EE Agreement as a "relational contract", and therefore as giving rise to a general duty of good faith, relying on the seminal judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) and the authorities which followed.

651. The general principles of contractual construction are not in doubt. They have been summarised recently by Lord Hodge in his judgment (with which all the other members of

the Supreme Court agreed) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [10]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

652. Here, I consider that clause 13.2 is clear. The good faith obligation which it imposes is specifically in terms of the performance of the terms and conditions set out in the EE Agreement. Those conditions included the obligation on EE to make "Revenue Share Payments" (a term defined by the EE Agreement) to P4u. But it is not here alleged that EE failed to make any payments that were due.

653. As regards clause 13.11, P4u contends that it effectively comprises distinct, though related, obligations: first, a general obligation of good faith, and second, a more particular obligation to avoid any activity designed to reduce or avoid the making of revenue share payments. Aside from any question regarding a relational contract, I reject that construction. I appreciate that, literally read, the clause could be seen as disjunctive, imposing a general and then a more particular obligation. However, this was a professionally drafted and very full contract between sophisticated parties. If they had intended to impose a general obligation of good faith, I consider that they would have done so. And if there were to be such an express, general good faith obligation on EE, I regard it as inconceivable that the contract would not also have imposed the same obligation on P4u. But while there is a corresponding obligation to clause 13.2 on P4u in clause 13.1, there is no equivalent to clause 13.11. Moreover, clause 13.11 follows clauses 13.8 to 13.10 which all relate to matters affecting the occasioning of Revenue Share Payments. Accordingly, in my view, clause 13.11 is to be interpreted as applying the requirement of good faith to "activity designed to reduce or avoid" the liability under the agreement to make Revenue Share Payments and not more generally.

654. That takes me to the question whether the EE Agreement is a relational contract and whether that affects the construction of either of these provisions or, although I am not entirely clear that this was P4u's submission, results in an independently implied term of good faith.

655. The concept of a relational contract, which I think first found judicial expression in the speech of Lord Steyn in *Total Gas Marketing Ltd v Arco British Ltd* [1998] UKHL 22, was developed by Leggatt J (as he then was) in the *Yam Seng* case. There he noted that there is no general duty of good faith in English contract law, by contrast to many continental civil law systems, but held that such a duty may be implied into a commercial contract based on the presumed intention of the parties (see at [131]). He proceeded to hold that such an implication may arise where the contract involves "a longer-term relationship

between the parties to which they make a substantial commitment": [142]. And he continued:

> "Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements."

656. Leggatt LJ developed this concept in his judgment at first instance in *Sheikh Tahnoon Bin Saeed Bin Shakboot Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167]:

> "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 by 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 cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith."

657. *Sheikh Tahnoon v Kent* concerned a JV between two individuals who intended that it would provide a long-term business collaboration. As described by the judge (at [173]):

> "Their collaboration was formed and conducted on the basis of a personal friendship and involved much greater mutual trust than is inherent in an ordinary contractual bargain between shareholders in a company. Although day to day management of the businesses was left to Mr Kent, strategic decisions which would involve further capital investment, such as whether to purchase a hotel or the decision to acquire the majority stake in YouTravel, were (of necessity) taken jointly and could only be reached by consensus between them. The pursuit of the venture therefore required a high degree of co-operation between the two participants. They did not attempt to formalise the basis of their cooperation in any written contract but were content to deal with each other entirely informally on the basis of their mutual trust and confidence that they would each pursue their common project in good faith."

Leggatt LJ proceeded to hold that this was "a classic instance of a relational contract" in which the implication of a duty of good faith was "essential to give effect to the parties' reasonable expectations and satisfies the business necessity test": [174].

658. In *Bates v Post Office Ltd* (*No 3*) [2019] EWHC 606 (QB), Fraser J observed at [724] that "it is the circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, that … decides whether a contract is relational or not". He helpfully proceeded, at [725], to set out a series of factors that are relevant to determine whether a contract was a relational one, while stressing that none except the first is determinative:

> "1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
>
> 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
>
> 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
>
> 4. The parties will be committed to collaborating with one another in the performance of the contract.
>
> 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
>
> 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
>
> 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
>
> 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
>
> 9. Exclusivity of the relationship may also be present."

659. I think, with respect, that the first of those criteria goes less to the question of whether the contract is relational than to the question whether a duty of good faith should be implied. As Leggatt J said in *Yam Seng* at [149], since implication of the term is based on the presumed intention of the parties, it is open to them to modify the scope of the duty by the express terms of their contract, or to exclude it altogether.

660. I accept that the EE Agreement has some features of a relational contract, in that it is a moderately long-term arrangement (it had a term of three years) with the potential for renewal, and in turn had replaced a previous agreement; and further that EE and P4u had to collaborate with one another extensively in the performance of the contract. However, I respectfully agree with the observations of Fancourt J in *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [202]:

> "If by "relational contract" it is clear that one means a relational contract of the kind described by Leggatt LJ in *Sheikh Tahnoon* and not all relational contracts in a broader sense, then there is no difficulty and the characteristics identified by Fraser J may assist to identify such a contract. But there is a danger in using the term "relational contract" that one is not clear about what exactly is meant by it. There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as "relational contracts" may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith."

661. Here, the details of the parties' collaboration are spelt out in considerable detail in the written agreement, and in every respect this was very far from the kind of contract and relationship which Leggatt LJ was addressing in *Sheikh Tahnoon v Kent*. In *Yam Seng*, the contract was a short document of only eight clauses, prepared by the business people themselves, without the assistance of lawyers (see at [26]). Here, the contract does address the question of good faith, and expressly defines its scope in the language of clauses 13.1, 13.2 and 13.11. I consider that precludes the implication of a more general duty of good faith.

662. Furthermore, although *Yam Seng* concerned a commercial distribution agreement of only one year's duration, I think there is a significant difference between the nature of the relationship between the parties in that case and here. *Yam Seng* involved an exclusive distribution agreement. It is a striking feature of the present case that EE was not only enabling P4u to supply connections to its network but was in competition with P4u in seeking to supply such connections to customers directly. Indeed, it was EE's desire to expand its direct retailing and reduce its reliance on indirect retailers that drove its decision underlying this case. I respectfully agree with Fraser J that exclusivity is a supporting indication, not a necessary condition, for a relational contract, and I consider that being in direct competition is a strong factor pointing the other way. At the very least, it would substantially affect what is required by any duty of good faith.

663. Accordingly, I incline to the view that this was not a relational contract. But even if it was, in the end I think it does not matter. That is because, first, as stated above I find that no general duty of good faith is to be implied. And secondly, even if I may be wrong on that score, I consider that there was no breach of good faith by EE, as alleged, on the facts of this case.

664. I address the second aspect below. Before doing so, I note that P4u also relies on two other implied terms. First, it invokes a so-called *Stirling v Maitland* implied term: i.e. that each party would refrain from taking steps that would inhibit the other party from complying with its obligations under or by virtue of the contract. The implication of that term is not

disputed by EE. But I agree with EE that it has no application in the circumstances. As EE put it:

> "A Stirling v Maitland term concerns non-compliance with a term of a contract by one party (here putatively P4U) which has been brought about by the alleged wrongful action(s) of the other. A Stirling v Maitland term is simply of no application in the present case, as P4U was not in breach of, nor was it prevented from complying with, any term of the EE Agreement."

665. In any event, it is accepted by P4u that a breach of a *Stirling v Maitland* term must be independently wrongful. P4u contends that this requirement was met because EE's actions were in breach of the obligations in clauses 13.2 and 13.11. On that basis, this implied term adds nothing to the case advanced by P4u under the express terms.

666. Secondly, P4u alleges that there was implied a "necessary cooperation term", expressed as follows:

> "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"

667. I think it well arguable that such a term is also to be implied, but it is unnecessary to reach a concluded view since, again, I find that such a term is not engaged by the allegations which P4u advances. As Cooke J explained in *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17]:

> "A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself."

668. Here, P4u does not allege that there was any express obligation of P4u under the EE Agreement which it could not fulfil because of conduct on the part of EE.

The events of 29 August to 10 September 2014

669. The fortnight following the meeting on Friday, 29 August 2014, between P4u and Vodafone UK, at which Vodafone UK confirmed that it would be exiting from P4u (para 395.d) above) was a period of intense activity in both P4u and EE.

670. Shortly after the meeting with Vodafone UK, Mr Whiting sought to contact Mr Swantee by telephone and, as he was out of London, Mr Whiting went to see Mr Allera at EE's head office and explained the situation to him. He told Mr Allera that P4u would announce Vodafone UK's decision not to renew its agreement with P4u at 7 am the following Monday, and that there was a risk that without support P4u would go into administration. He also said that BC Partners would consider selling P4u to EE to save the company. He said that it would be helpful to hear back from EE over the weekend.

671. After seeing Mr Whiting, Mr Allera informed Mr Swantee by telephone of the situation. Mr Swantee was travelling back to London by train with Mr Harris and they discussed the implications. Both Mr Harris and Mr Swantee said in their evidence that they were shocked by the news. Mr Harris continued:

> "We thought that there was a real risk that P4U might go into administration and that this may have significant consequences for EE. Our business plan projected EE trading with P4U positively up until at least the end of the current contract, which was due to expire in September 2015. This meant that sales of EE contracts through P4U were still a significant part of our future profit projections. If P4U went into administration, it would mean that EE would effectively lose a third of its retail presence overnight. In addition, in view of the cash prepayment mechanism in the P4U contract, we were conscious that we had to consider the consequences for our cash exposure going forwards."

672. Mr Whiting followed up his discussion with Mr Allera with an email in the evening of 29 August, outlining the potential support he had in mind. For the short-term, he suggested an exclusive six-week agreement to enable EE to decide if it wished to purchase the business, which EE would announce on Monday morning at the same time as the announcement of the Vodafone decision. Secondly, in the event that P4u's credit insurers withdrew cover, he asked for support as regards the purchase of stock by allowing P4u to purchase its stock requirements through EE. For the longer term, he said that P4u needed significant "further connections and/or cash support" from January 2015 (i.e. when the trading with Vodafone UK would cease), possibly by EE taking an additional 150,000 connections a year through P4u (an increase to 85% of P4u's volume from the existing 55%).

673. The point about credit insurance was this. A key aspect of P4u's business was the provision of a handset to its customers. P4u obtained those handsets from some of the leading handset manufacturers, such as Sony and Samsung, on credit terms, as the customers paid only part of the cost up-front, with the balance spread over the term of their subscription. Accordingly, the handset manufacturers held insurance against their credit risk regarding P4u. P4u was very concerned that those insurers might withdraw cover, in which case the

manufacturers[55] would cease supplying P4u with handsets on credit terms, causing an almost immediate collapse of its business. P4u therefore immediately approached the two insurers involved to determine whether they would maintain cover. Those discussions with the credit insurers were conducted by P4u's CFO, Mr John Morris.

674. Mr Allera forwarded the email to his colleagues. They discussed EE's position over the weekend and contacted the shareholders. As well as the question of how to respond to P4u's request, one matter they considered was whether they should say anything, either publicly or to P4u, about the outcome of their indirect strategy review, i.e. that EE would also not be renewing its relationship with P4u.

675. On the evening of Sunday, 31 August 2014, there was a conference call between Messrs Swantee, Harris, Milsom and Allera from EE's management and Mr Pellissier and Mr Dannenfeldt. The slide deck which Mr Harris sent to the other participants in the call set out Mr Whiting's request for assistance, outlined the number and share of acquisitions and upgrades which EE obtained from P4u and the contractual position, noting that on insolvency EE may terminate without notice. The slides set out the alternative options for EE, recommending that EE should remain neutral. The relevant slide stated: "EE does not want to create further financial exposure and increase P4U line of credit". An identified option that was not recommended was to announce the "conclusion of Indirect strategy" (i.e. that EE had decided to enter into an exclusive agreement with CPW). I have quoted from that slide above in a different context but it is appropriate to repeat it here:

> "• Important to avoid any supposition EE knew and link to signing CPW/DSG (even though such supposition is mistaken it could trigger enquires/investigation)"

It was agreed on the call to follow the recommendation of EE's management: i.e. to remain neutral and issue only a reactive press statement.

676. Following that call, Mr Swantee telephoned Mr Whiting and told him that EE had decided not to offer immediate assistance to P4u but would have further meetings the next day. Although Mr Swantee does not remember that call, he did not dispute Mr Whiting's account of it and I have no reason to doubt Mr Whiting's evidence.

677. At 7 am on Monday, 1 September 2014, P4u disclosed Vodafone UK's termination to the Irish Stock Exchange, where the PIK Notes were listed. P4u also scheduled a meeting with EE for 3 September.

678. Inevitably, this announcement triggered intense interest and concern from investors. P4u held a conference call with investors and analysts that day, for which its senior executives were present. In response to a question about the position regarding EE, specifically asking P4u to confirm that its agreement with EE would expire in December 2015 and whether there was a basis on which EE could terminate earlier, Mr Lloyd replied that the EE Agreement expired in September 2015 (and explained that if P4u failed to achieve a specified percentage of its total number of connections then EE could terminate earlier).

---

[55] This did not include Apple, who supplied iPhones to P4u under different arrangements.

This was picked up in a Reuters news report. However, this information about termination was confidential and should not have been disclosed. It was commercially sensitive as it could be useful for competitors of EE. Mr Lloyd accepted in cross-examination that this was clearly an error on his part, which he said was not premeditated but was made under the pressure of events when P4u was "trying to reassure the market that we still had stability."

679. On 2 September 2014, Mr Blendis, as general counsel at EE, sent Mr Lloyd by email (cc to Ms Thomas) a letter complaining about the disclosure, saying that EE was "surprised and disappointed" and expressly reserving its rights in relation to this breach of the EE Agreement. Mr Lloyd said that he was shocked by the "aggressive and legalistic" nature of the letter, which he said was wholly out of character with EE's usual manner of dealing with P4u. He forwarded it to his senior colleagues, who were similarly surprised by the way EE had reacted.

680. In the meantime, EE put a team together to plan for the possibility of P4u going into administration and how EE should best deal with various potential scenarios. Both Deloitte and McKinsey were engaged to advise on what EE termed "Project Blue". And the shareholders gave the EE management support from resources within their respective companies that could assist in evaluating the options, and also executives from other companies in their respective groups which had experience of dealing with the insolvency of a trading partner. One of EE's Project Blue documents referred to it setting up a "War Room" to provide "rigorous management of EE's operational readiness across 12 workstreams in case P4U goes into administration".

681. On 3 September, Messrs Whiting, Kassler and Dobson from P4u met Messrs Swantee, Milsom, Allera and Mr Noel Hamill from EE at EE's Paddington offices. Mr Whiting reiterated that P4u and its owners, BC Partners, were open to a potential acquisition by EE. He said that if P4u's credit insurers should withdraw cover, then P4u's survival depended on support from EE. According to a note made by Ms Thomas from Mr Milsom's briefing following the meeting, P4u asked for a confidential letter from EE, which it could show to its credit insurers, stating that EE wants an exclusive four week period to look into buying the trading business, and that EE will take 85% of their business capacity from February 2015, while explaining that P4u would not actually have to give EE 85% of its business but that this would buy P4u time to find alternatives. Mr Dobson explained P4u's debt and financing structure in some detail and sought to persuade EE that a deal between P4u and EE would be beneficial for EE as well as P4u. The response from the EE side was non-committal. Mr Kassler said, in evidence that was not challenged:

> "I found EE's response and manner at the meeting to be incredibly formal and standoffish, which was entirely inconsistent with the prior engagements I had personally had with EE's Senior Management Team. I remember it feeling like a really cold and strange meeting. We left without any resolution of anything."

682. At this meeting, EE asked if a "draw stop event" under the EE Agreement had occurred, and P4u replied that it had not. That is a reference to the bill of exchange mechanism which was introduced by amendment of the EE Agreement in 2013 to ameliorate EE's cash

position as regards the prepayments for connections, by deferring part of those payments on the basis that P4u would borrow those amounts under a facility agreement with Barclays against the security of a bill of exchange issued by EE. A bill of exchange for £13 million was due to be issued by EE under this mechanism in the next few days, and given P4u's precarious position Mr Milsom said that he was concerned. If P4u went out of business, EE would lose the collateral which it had put up in respect of any amounts drawn down by P4u, so a draw stop event (which was defined in terms of P4u being or becoming insolvent) would prevent this and gave EE contractual protection.

683. The following day, 4 September, Mr Milsom wrote formally to P4u, referring to the discussion at the meeting and requesting formal confirmation in writing that no draw stop event had occurred.

684. On 5 September, Mr Lloyd called Ms Thomas, with whom he had been engaged in negotiating the final provisions of the proposed new agreement earlier in the year and whom he knew quite well, and referred to Mr Blendis' letter. Mr Lloyd told her that if any issues arose in the future she should call him first, as she had done in the past, so that he could investigate and address them. He also stressed to Ms Thomas the opportunity that now existed for EE to purchase P4u cheaply and also save jobs.

685. Later the same day, Mr Lloyd wrote on behalf of P4u in reply to Mr Milsom, confirming that no draw stop event had occurred, on which he said P4u had taken advice from external counsel. Following that confirmation, EE released the bill of exchange. In answer to questions from Ms John KC, Mr Lloyd accepted that in all the circumstances there was nothing to complain about in the letter of 4 September.

686. In what was evidently a frantic week for the P4u executives, they reached out to a number of third parties to see if they were willing to cover all or part of Vodafone UK's share of P4u's business, including BT Group and Three. However, none were prepared to make any clear commitment. P4u also considered the possibility of restructuring to become a much smaller company. Rothschilds were appointed to advise on that potential strategy and to explore the sale of the business. P4u continued to raise its request for assistance with EE, and Messrs Whiting and Dobson held a conference call with Messrs Milsom and Allera on 4 September following up on the meeting the previous day: the P4u representatives told EE that without short term support to reassure the credit insurers, P4u may go into administration within days. They said, as recorded in Ms Thomas' note of the call, that "they want to buy time to allow renegotiation with EE which may include putting the two businesses together". But the EE executives remained in "listening mode" and declined to engage with P4u's requests.

687. By 4 September, Mr Swantee was reporting to the DT and Orange directors that EE had concluded that there was a risk that P4u may collapse. The next morning, EE discussed with its shareholders the potential for acquiring various assets from P4u in the event that it went into administration. On 5 September, Mr Harris set out EE's preliminary view of the potential assets that could be purchased (including the stores, P4u's most valuable asset) with an estimated cost. He commented:

> "Even if we were to account for much higher competitive bidding (notably on stores), it would appear more favourable to purchase assets rather than a full acquisition."

688. On 7 September, Mr Kassler wrote a personal email to Mr Swantee saying that he was "personally ready and willing to devote all my time and energy to making a new partnership between our two companies work effectively under whatever scenario you decide to choose …." He continued:

> "I do believe there is an opportunity for a smaller and restructured phones4U to come out of this situation in a way that is economically beneficial to EE, whether it is owned inside or outside your group."

Mr Swantee did not reply. He said in his evidence that he could not recall receiving this email.

689. On 8 September, Mr Morris told his colleagues at P4u that the handset credit insurers would not be withdrawing cover. That offered P4u some welcome respite. Mr Dobson duly called Mr Milsom at EE to tell him that P4u did not require support in that regard and that it had secured handset supply for a further 3-4 months. He said that P4u now had some space to consider how to restructure its business and was urgently considering various options. EE's note of the call records that: "in summary, they have secured handset supply for the next 3-4 months."

690. On 9 September, EE sent a further formal letter to P4u, this time from Mr Allera. The letter referred to two distinct obligations under the EE Agreement: (a) the provisions requiring P4u to ensure that the volume of EE connections which it provided did not exceed the specified maximum key performance indicator ("KPI"), which under an amendment to the agreement was 55%; and (b) the provision prohibiting P4u from engaging in "Restricted Marketing Activities" (i.e. contacting customers directly) with a view to enticing them to terminate their contracts or make an upgrade earlier, without EE's agreement in writing. As regards (a), the letter asserted that EE had reason to believe that P4u will be in breach of the maximum KPI for the quarter ending 30 September 2014, in which case it will be liable for liquidated damages; and the letter stated that this KPI "is of fundamental importance to EE" so that it relied on para 2.2 of Schedule 8 to the agreement preserving its other rights and remedies "including the right to terminate the contract at common law." As regards (b), the letter stated:

> "In relation to the Restricted Marketing Activities, please confirm that you will immediately take such steps as are necessary to comply with your contractual obligations on an ongoing basis, and explain by return what steps you have taken and will take to ensure compliance."

691. Mr Lloyd said that he found the tone of this letter notably more aggressive and threatening than those which had come before. He responded by letter the next day, saying that P4u was aware of its obligations under the EE Agreement as regards the KPIs and stating:

> "As you are aware we have internal processes in place to ensure that we monitor and comply with our obligation under clause 11.1 of the

> Agreement to maintain the Key Performance Indicators. 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. Had you done so you would have been reassured that we are monitoring the position closely and that we are confident that we will not be in breach of the Maximum Volume KPI for the quarter ending 30 September 2014. Please let us know why these concerns were not raised through the usual channels."

He added for completeness that under the terms of the EE Agreement, liquidated damages appear to be the only remedy for breach of a maximum KPI. As regards point (b) in Mr Allera's letter, Mr Lloyd wrote:

> "With regard to the points you make in relation to Restricted Marketing Activities we note that you do not set out any details of the concerns that you have. In order to enable us to respond on this point it would be helpful if you could provide us with such details as soon as possible."

692. Mr Lloyd said that he called Ms Thomas after receiving the letter of 9 September. Ms Thomas said that she had no recollection of that call but that he called her after sending his letter of 10 September. It makes no difference who is correct as to this. There is no note of this call but Ms Thomas recalled that Mr Lloyd was unhappy that EE had sent another formal reservation of rights letter. Mr Lloyd recalled that Ms Thomas' tone was "very measured and artificial". Ms Thomas said that she was "mostly in listening mode" during the call. In that regard, I think there is no real difference between them regarding the nature of the call.

The BRM of 11 September and EE's letter of 12 September 2014

693. EE management was in virtually daily contact with DT and Orange to keep them abreast of developments concerning P4u. A BRM was scheduled for 11 September 2014, and that morning Mr Harris circulated a slide deck in support of the discussion they would have on Project Blue.

694. The slides presented an update on the position regarding P4u, concluding:

> "P4U are less likely to enter Administration imminently than previously understood
>
> Main P4U trading challenge will be when Vodafone volume ceases
>
> It should be remembered Vodafone and EE will both be trading as normal in P4U until January 2015"

695. After setting out the financial implications and opportunities for EE, the slides summarised the relevant considerations for EE's two alternative strategic options: either to communicate to P4u its long-term strategy (i.e. that it would not be renewing its contract);

or to “remain neutral”. I think it is appropriate to quote in full what EE recorded as the potential consequences of each alternative:

> “**1) Communicate outcome of Indirect strategic review**
>
> Potential consequences
> - Provides transparency; removes any risk of misrepresentation
> - May trigger insolvency & EE not being able to trade with P4U as per current budget
>
> **2) Remain neutral**
>
> Potential consequences
> - Withholding of critical information for P4U business/restructure creates a difficult environment and the risk of misrepresentation inadvertently increases
> - Risk increases over time of Dixon/CPW contract agreement leaking
> - P4U reforms and BT enters the Indirect market possibly with a quad-play offer”

At the BRM on 11 September, Mr Swantee told the participants that EE had remained neutral publicly. However, the minutes record him as saying:

> “EE needs to be aware of risk of misrepresentation with Bondholders and Handset manufacturers”

The participants at the BRM discussed the situation for EE if P4u went into administration, including as regards financial liabilities and the potential for asset purchases. Mr Swantee told them:

> “If P4u enters administration tomorrow, we are prepared.”

Although, somewhat curiously, this is not recorded in the minutes, it seems clear that it was agreed that EE should follow the first alternative set out in the slides: EE would write to tell P4u that it would not be renewing the EE Agreement.

696. Accordingly, the next day, 12 September 2014, Mr Allera wrote a formal letter to P4u informing it that the Board had made “a final decision” not to replace or extend the terms of the EE Agreement. Mr Lloyd telephoned Ms Thomas at EE shortly after receipt of the letter. He told her that its effect would be to cause P4u to go into administration, and he asked EE to withdraw the letter. After taking instructions, Ms Thomas emailed Mr Lloyd informing him that EE would not withdraw the letter.

697. On 14 September 2014, Mr Swantee wrote to the DT and Orange directors, simply informing them of these actions, and noting that “as of writing” no administration had occurred.

The alleged bad faith

698. The allegation the EE did not act with good faith, as I understood it, is dependent on three propositions:

a) that EE was still able to renew or extend its agreement with P4u notwithstanding the CPW-EE Agreement;

b) that no decision had been taken by EE not to renew or enter a new agreement with P4u before 11 September 2014; and

c) that the motive for sending the letter of 12 September 2014 was to cause P4u to collapse.

I shall consider these in turn.

(a) The CPW-EE Agreement

699. As set out above, EE signed its agreement with CPW late on 7 August 2014 but it was subject to shareholder approval and only became unconditional late when the final shareholder director gave his approval on 29 August 2014. But it is not suggested that the CPW-EE Agreement was concluded after EE was informed by Mr Whiting of Vodafone UK's decision to withdraw from P4u.

700. Although a full and detailed contract, the CPW-EE Agreement was structured as an amendment to the prior agreement which EE had with CPW dated 24 December 2012. The CPW-EE Agreement, by clause 16.1, thus added a new clause 13.3A into the earlier agreement. Clause 13.3A.1 defined a "Large Consumer Specialist Retailer" as, in essence, a large specialist mobile telephony retailer (excluding EE owned stores) which owns or operates more than 150 retail stores or sales outlets run through concessions. It is clear that as at the time of the agreement, the only retailer to fall within this definition apart from CPW was P4u.

701. By clause 2.3.2, the "Event Date" was defined as 1 October 2015, "or such other date as may be agreed between the parties pursuant to clause 13.3A." 1 October 2015 was of course the day after the EE Agreement with P4u expired.

702. The other material provisions of clause 13.3A are as follows:

> "13.3A.2 The parties acknowledge and agree that, save as provided in Clause 13.3A.5, on the Event Date EE shall:
>
> (a) appoint CPW to be EE's sole Large Consumer Specialist Retailer in the UK; and
>
> (b) cease to procure any PAYM Connections and Upgrade Connections from a Large Consumer Specialist Retailer (via any routes to market of such Large Consumer Specialist Retailer in the Territory) other than CPW.

13.3A.3 For the avoidance of doubt, Clause 13.3A.2 shall not preclude EE from upgrading customers previously transacting via other Large Consumer Specialist Retailer's in EE Direct.

…

13.3A.5 The parties shall review their respective readiness to trade in accordance with the terms of this Agreement from the Event Date not later than six (6) months prior to the Event Date and no earlier than 1 December 2014 (the "Readiness Review"). In the event that during or prior to the Readiness Review EE provides to CPW notification that it has reasonable, clear and objective evidence that CPW is reasonably likely to be unable to accommodate the additional Connections and/or Upgrade Connections as provided for in this Agreement from the Event Date (the "Evidence"), EE shall provide such Evidence to CPW. Where EE has provided the Evidence the parties shall within 7 days of the date of receipt by CPW of the Evidence enter into good faith discussions to agree whether or not CPW is reasonably likely to be unable to accommodate such volume. If the parties are unable to agree a course of action within 10 Working Days either party may refer the matter to an independent arbitrator (the "Arbitrator") in accordance with Clause 13.3A.6.

13.3A.6 An Arbitrator to whom the matters set out in Clause 13.3A.5 are referred shall be appointed by the agreement of the parties within 5 Working Days or, failing agreement, by The President of the International Court of Arbitration. Each party shall provide or procure the provision of access to the Arbitrator of such information as is reasonably necessary and shall be entitled to make written representations to such Arbitrator concerning the matter. Any determination by the Arbitrator shall, save in the event of manifest error, be conclusive and binding on the parties. The Arbitrator shall make its determination within 30 days of having been appointed. Where the Arbitrator agrees with EE's findings, EE may (in its discretion) choose not to appoint CPW as its sole Large Specialist Retailer until such a date (i) the parties agree or (ii) that CPW can evidence to the Arbitrator that the Evidence has ceased to apply (and such date shall be deemed to be the Event Date)."

703. In my view, the effect of these provisions was that EE had effectively appointed CPW as its exclusive "Large Comsumer Specialist Retailer" from 1 October 2015, subject only to the rather elaborate qualification in clauses 13.3A.5-13.3A.6. If, between 1 December 2014 and 1 April 2015, EE notified CPW that it had "reasonable, clear and objective evidence" that CPW is "reasonably likely" to be unable to provide the volume of additional connections specified in the agreement from 1 October 2015, the parties would then enter into discussions to see whether they agreed that this was reasonably likely, in which case

they could agree a substitute start date for exclusivity, or if they could not agree then the matter was referred to binding arbitration: if the arbitrator agreed with EE, then EE could choose to postpone the start of exclusivity until such date as the parties agreed or the date for which CPW could satisfy the arbitrator that it was likely to be able to supply the specified volumes.

704. I agree, as P4u submitted, that this provision was included to protect EE's position so that if CPW was not going to meet its enlarged volume commitments, EE could then still trade with P4u. But I think this was in effect a long-stop provision. The clear expectation of the parties to the agreement was that CPW would supply the specified minimum volumes. As regards EE, that is demonstrated by the slide deck, "Board of Directors – CPW Deal approval", circulated to the directors on 14 August 2014 with the Board paper seeking their formal approval of the CPW-EE Agreement, which stated in the executive summary:

> - "EE has successfully concluded contract negotiations with CPW subject to shareholder approval for CPW to become EE sole large specialist in the UK market
>
> …
>
> - The CPW deal is the first part of the indirect strategy "Scenario 4", EE commit to coming back to the board on the P4U run off and direct growth and reducing our indirect volumes"

Further, the revised Board paper on the CPW-EE Agreement, circulated on 20 August 2014, stated in the Executive Summary:

> "The Company has concluded a contract with CPW, subject to shareholder approval, whereby CPW will become the Company's sole large specialist retailer in the UK for a period of 5 years. The contract covers both CPW's current routes to market and those which will form the CPW/DSG group following the merger of Carphone Warehouse Group plc and Dixons Retail plc."

And the internal briefing prepared by Mr Naulleau for the two Orange directors for the 11 September 2014 BRM summarised the position simply:

> "EE signed a renewal with CPW, to give exclusivity to CPW from Oct 2015 (when contract with P4U ends)"

And as regards CPW, that is demonstrated by the significant liquidated damages provisions in schedule 8, as amended pursuant to clause 22.5 of the CPW-EE Agreement. Moreover, notwithstanding clause 13.3A.5, the evidence in this trial indicated that EE regarded the CPW-EE Agreement at the time as exclusive with CPW, in the sense of excluding P4u from 1 October 2015[56]. Accordingly, I do not accept the characterisation of this provision

[56] I note that Mr Dannenfeldt expressed a different view in his evidence, stating: "I also did not understand the CPW deal to prevent a potential renewal of P4U." However, he did not explain how he reconciled that with the terms of the CPW-EE Agreement, and that was not the basis on which that agreement was put forward to the Board.

in P4u's closing submissions to the effect that "[i]n commercial terms, EE's position was that if P4U survived, it wanted to retain the right to do business with P4u." Indeed, I note that in its Re-Amended Particulars of Claim, P4u pleads at para 94:

> "On or around 6 August 2014, EE also agreed to enter into an exclusive agreement with CPW which had the effect of precluding EE from selling Connections through P4U upon the expiry of the EE Agreement."

705. P4u's submission to the contrary in their closing submissions sought to rely on the responses of Mr Harris of EE in cross-examination, but read in context I do not think they give any support to the suggestion that EE had in contemplation, soon after entering into the CPW-EE Agreement, that it might still be able to renew its agreement with P4u. In fact, Mr Harris made clear that he was not familiar with clause 13.3A.5 of the agreement and its implications, and that the relevant people at EE who would have been involved were Mr Allera and Mr Milsom. But this point was never put to either of those witnesses (and Mr Allera gave evidence after Mr Harris), or indeed to the DT or Orange directors. On the contrary, Mr Allera referred to the exclusivity aspect of the CPW-EE Agreement in his evidence as follows:

> "Exclusivity was also something that was negotiated with CPW until quite late on. We were not prepared to grant total exclusivity to CPW, so the negotiation came down to exactly what profile of indirect retailer EE would still be allowed to supply alongside CPW. Whilst CPW were keen on restricting EE's ability to deal with other indirect channels as much as possible – as this would help CPW to deliver the increased volumes that they would be required to deliver to EE under the new contract – we were keen to maintain as much room for manoeuvre as we were able to negotiate.
>
> Ultimately, we agreed with CPW that from 1 October 2015, EE would not sell Connections via any other specialist indirect mobile phone retailer with more than 150 physical stores in the UK. This would mean that EE could not supply P4U in its current form, as P4U had significantly more than 150 new stores at that time …."

This evidence, in which Mr Allera expressed his view of the agreement, was not challenged. I consider that this was the basis on which the directors considered EE's options at the 11 September 2014 BRM.

(b) The decision to leave P4u

706. In the letter to P4u of 12 September 2014, Mr Allera stated:

> "We wish to inform you that our Board 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."

707. P4u submits that in fact no final decision to that effect had been taken by the Board, and that "it may well be that no decision of this type had been taken at all". It contends that the only decision taken by EE was the decision to send this letter, and that this was done with a view to precipitating the collapse of P4u.

708. I address the reason for sending the letter below. But I reject the submission that no decision had been taken to leave P4u. While P4u seeks to rely on the evidence of Mr Dannenfeldt and some answers given in cross-examination by Mr Pellissier, I find that in fact, and understandably, neither had a clear recollection of the exact chronology of events and that they were seeking to reconstruct matters as best they could. As I observed near the outset of this judgment, I prefer to base my findings, where possible, on the contemporary documents, considered as a whole, and of course clarified as appropriate by the witness evidence. In my judgment, the position was as follows:

a) The 21 May 2014 BRM adopted the recommendation of EE's management to adopt the strategy of seeking an enlarged agreement with CPW, with one option being to exit from P4u: paras 516 and 531 above. However, at that stage there was no decision not to renew the agreement with P4u. EE could not then take such a decision since it was not clear that satisfactory terms with CPW would be agreed, and indeed it took over two months of sometimes intense negotiation with CPW to arrive at agreed terms. So in the meantime, the possibility of a new agreement with P4u remained open and the recommendation accordingly provided that EE should continue negotiations with P4u.

b) On 7 July 2014, the key terms concluded with CPW were presented to the Board for approval. That approval was formally given by resolution at the Board meeting on 8 July, but subject to EE's executive management "making best efforts to ensure" certain specific improvements to the terms which the shareholder directors suggested: para 554 above.

c) The EE executives duly sought to achieve these changes, but with little success, and indeed CPW made some further changes to the terms to the disadvantage of EE. On 7 August 2014, the CPW-EE Agreement was signed, conditional on approval by EE's shareholders. While the shareholders again asked the EE executives to try to revisit certain terms, that was impracticable. The final terms were presented formally to the directors in writing in mid-August, and by 29 August all the directors had signed a Board resolution approving the agreement: para 559 above.

d) Conclusion of the CPW-EE Agreement was regarded as the implementation of the first stage of the option 4 strategy for indirect distribution discussed at the 21 May 2014 BRM. It was seen as appointing CPW as EE's exclusive large indirect retailer from 1 October 2015, and therefore as involving the exit of EE from P4u once the EE Agreement expired on 30 September 2015: paras 704-705 above. That was why Mr Swantee had felt "awkward and uncomfortable" at the lunch with Mr Whiting and Mr Kassler on 23 June 2014 when the negotiations with CPW were entering their final phase: para 547 above. And by the time Mr Whiting sent his email to Mr Swantee on 31 July 2014, withdrawing the proposed deal which he understood the

parties had arrived at subject to approval by EE's shareholders but on the basis that P4u should resume discussions with EE after the summer regarding a new agreement (para 549 above), it was clear to EE that there would be no such negotiations since it had Board approval for the deal with CPW.

709. Significantly, the minutes of the Board meeting of 8 July 2014 record discussion of the effect on P4u of the CPW-EE Agreement:

> "The meeting discussed the possible reaction scenarios of P4U to the CPW Contract, including the *potential* disappearance of P4U from the mobile market *in the medium term*. Olaf Swantee stated that the reaction would depend in part on the control and timing of the communications around the CPW Contract and asked all to keep the CPW Contract negotiations highly confidential." [emphasis added]

(c) The letter of 12 September 2014

710. It follows from the conclusions above, that at the BRM on 11 September 2014, what the EE directors decided was not whether EE should withdraw from P4u, since that had already been effectively determined, but that EE should inform P4u of the position.

711. P4u's case, as summarised in its written closing is that the 12 September letter "was sent with the intention of forcing P4U into administration and bringing the EE Agreement to a premature end, …"

712. I accept that EE recognised that the consequence of sending the letter may well be to cause P4u to go into administration. The discussions between the senior EE and P4u executives over the previous two weeks had made clear the precarious position of P4u, and learning that its only remaining MNO would not remain with P4u would clearly be a very significant blow.

713. Although Mr Swantee and some of the EE executives said that they had no wish for P4u to go into administration, because of the risk that posed for EE's fourth quarter revenues for 2014, and since that would remove a counterweight to CPW/DSG, I find that the shareholders, who had long wanted to reduce the hold of indirect distribution on the UK market, considered that once EE had resolved to leave P4u, the collapse of P4u was a better outcome than its survival with a new partner in place of Vodafone UK. Furthermore, I consider that by 11 September EE's internal management had come to share this view.

714. Mr Dannenfeldt frankly acknowledged that, despite the commercial risk for EE in terms of its customer base, he agreed with an email sent to him by Mr Weber on 8 September, stating:

> "From our perspective, an insolvency would be the best solution for the market."

Mr Dannenfeldt explained that it made little sense for P4u to continue as a 'one brand' intermediary:

> "Therefore, with Vodafone exiting, P4U was bound to fail unless O2 or Hutchinson (or another operator) stepped in as a "white knight", which could have hurt EE commercially. So, P4U failing was better for EE than the only alternative possible."

In his oral evidence, Mr Dannenfeldt said that the real concern at the time was rather the prospect of BT coming into P4u, and suggested that he did not think that the situation was so clear. But in the end he accepted that he had thought at the time that it was probably best for DT if P4u did not survive.

715. On 8 September, Mr Swantee wrote to Messrs Dannenfeldt and Pellissier, setting out the negative response EE was proposing to make to Mr Whiting's specific requests and adding:

> "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."

716. On 9 September, the day after he heard that P4u's immediate concern as regards credit insurance had been resolved, Mr Milsom, along with a member of EE's legal department, attended a meeting with the advisors from Deloitte. Contemporary manuscript bullet point notes from the meeting record the following being said:

> "- ease of access for BT … quick action → close door.
> - restructure much smaller business w/ EE as anchor.
> - we need to announce…sooner or later.
> Sooner
> • PR → Voda/BC
> • Geared up for admin role
> • No time/effort
> • Voda equally disadvantaged by drop
> <u>But</u> – have we got killer blow?"

717. When cross-examined, Mr Milsom was very defensive about this note. It was not made by him and he did not accept that it was correct. However, he said he did not remember this meeting and I have no reason to think that the note, which I infer is by the lawyer from EE, is inaccurate. On the contrary, I find that it appears to have been made during the meeting and in all probability is a fair reflection of what was said. Mr Milsom accepted that the note recorded a concern, which he agreed must have come from the EE side, that BT might come into P4u to 'hoover up' the volume of connections that previously went to Vodafone UK. He agreed that the note also recorded the observation that, sooner or later, EE would have to announce its new deal with CPW. As for the final remark recorded in the quotation above, Mr Milsom finally accepted that he "maybe could have expressed the view" that EE might not have a "killer blow" as regards P4u. In my view, that is very unlikely to have been said by the participant from Deloitte: I find that in all probability it came from Mr Milsom.

718. As the note also records, and was indeed self-evident, CPW and EE would eventually have to announce their agreement. Following the announcement that Vodafone UK would not remain with P4u, there was speculation in the trade and mainstream media about P4u's

future, in the knowledge that EE was carrying out a strategic review. For example, on 1 September 2014, after the news became public, a report in *The Financial Times* said:

> "The decision will leave the retailer with only EE as a full mobile network operator partner, although the future of that contract is also in question given a review taking place at the telecoms group."

719. The slide deck for the 11 September 2014 BRM expressly highlighted the risk of withholding critical information, if EE were not to communicate the outcome of its strategic review: para 695 above. By 11 September, with the handset insurance position resolved, it seemed very possible that P4u would be able to continue trading at least for some time, given that the Vodafone Agreement expired only in January 2015, and in that time P4u would be actively seeking a new partner. In a market sensitive situation, with P4u endeavouring to restructure its business, I think that there was genuine concern that if EE remained silent and did not tell P4u that it had taken a decision not to renew its contract, it might be strongly criticised. The information was at the least very relevant to bond-holders, and probably also to handset manufacturers, as well as to the wider market.

720. At the same time, as Mr Dannenfeldt explained, there was a feeling among at least some of the participants at the BRM that, from a commercial perspective, it would probably be better for EE if P4u ceased trading than if BT (or another MNO) came in to rescue it, so that P4u's entry into administration would be to EE's advantage (and it might also provide the opportunity to acquire some of P4u's assets, in particular retail premises). As Mr Dannenfeldt put it, there were these "two dimensions."

721. Accordingly, I think there was no single motivation in the decision to send the 12 September letter. Some directors of EE may have been more interested in the potential to remove P4u from the market whereas others may have been more concerned about the risk of non-disclosure; and for many, both factors affected their decision. Unless the position is very clear, it is in my view unrealistic to attribute a single, overriding motive to a collective decision of a group of individuals.

Was there a lack of good faith?

722. It is obviously not suggested that any obligation of good faith required EE to renew or extend the EE Agreement. Nor is it suggested that any such obligation obliged EE to respond positively to P4u's requests for assistance when it was in difficulty following the decision of Vodafone UK. Given my findings regarding the time when EE took its decision to exit from P4u, the alleged lack of good faith comes down to an allegation that EE should not have told P4u on 12 September 2014 that it had concluded an agreement to make CPW its exclusive large indirect retailer and therefore would not be resuming negotiations with P4u for a new agreement. Instead, it should have kept those facts secret from P4u, at least for several months to facilitate P4u's efforts to find a replacement for Vodafone UK.

723. In *Yam Seng*, Leggatt J instanced as a possible example of bad faith the deliberate omission to disclose relevant information: judgment at [142]. I think it would be paradoxical to say

that it was bad faith for EE to have disclosed relevant information. In *Sheikh Tahnoon v Kent* at [175], Leggatt LJ referred to the summary of the meaning of good faith in the judgment of Allsop CJ in the Federal Court of Australia:

> "an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people: …"

And Leggatt LJ added and adopted a further point made by Allsop CJ:

> "The standard of fair dealing or reasonableness that is to be expected in any given case must recognise the nature of the contract or relationship, the different interests of the parties and the lack of necessity for parties to subordinate their own interests to those of the counterparty…."

724. In my judgment, even if, contrary to my view, a general obligation of good faith were to be implied in the EE Agreement, it was not breached by EE's decision to send the letter of 12 September 2014. Nor was there any breach of the narrower obligations of good faith in the express terms related to Revenue Share Payments: it was not suggested (nor could it be) that the reason for the 12 September letter was to avoid EE having to make Revenue Share Payments. EE could have offered greater support or cooperation to P4u if it had so wished, but it was entitled to give priority to its own interests and concerns. In all the circumstances, I do not consider that its decision to send the letter would be regarded as commercially unacceptable by reasonable and honest people.

725. I should add that this conclusion is not affected by the previous letters sent by EE, in particular the letters of 2 and 9 September 2014: paras 679 and 690 above. The manner of dealing with P4u in the 2 September letter, with an express reservation of rights, may have been unusually formal, but EE was entitled to adopt a formal position if it so wished. The 9 September letter is more surprising, and I think it is possible, as P4u submitted, that EE was by that stage looking to see if there were grounds to terminate the EE Agreement for breach. However, EE did not pursue that matter any further. And Mr Allera gave an explanation for the 9 September letter in his witness statement in terms of the risk of P4u overtrading in the sale of connections on EE by shifting volume from Vodafone UK, and his concern to ensure that P4u did not pro-actively contact its EE customers. As EE points out, that evidence was not challenged.

Q. THE TORT CLAIMS AGAINST DT AND ORANGE

726. The claims in tort against DT and Orange are for inducing a breach of contract by EE and for unlawful means conspiracy[57] where the alleged unlawful means was the decision to send the letter of 12 September 2014 in breach of the EE Agreement.

727. Since I have concluded that there was no breach of the EE Agreement, these claims fall away.

R. CONCLUSION

728. For the reasons set out above, I conclude that:

a) none of the Defendants was in breach of either UK or EU competition law;

b) if, contrary to (a), O2 and EE infringed competition law by reason of the discussion between Mr Dunne and Mr Swantee on 19 September 2012, that infringement did not affect the conduct of either O2 or EE as regards P4u;

c) if, contrary to (a), EE infringed competition law, DT and Orange would be jointly and severally liable with EE for that breach because they constituted for this purpose part of the same undertaking;

d) EE was not in breach of the EE Agreement with P4u;

e) neither DT nor Orange is liable to P4u in tort.

729. Finally, I wish to express my appreciation to all Counsel and the large teams of solicitors working with them for the industry and efficiency with which they marshalled and presented the complex and voluminous evidence in this case, which was of great assistance to the Court.

---

[57] Although para 160 of the Particulars of Claim pleads the conspiracy allegation also as against EE, it is clear from the prayer at (3) and from the Claim Form that this is claimed only as against DT and Orange. See also the opening submissions for P4u at para 235.