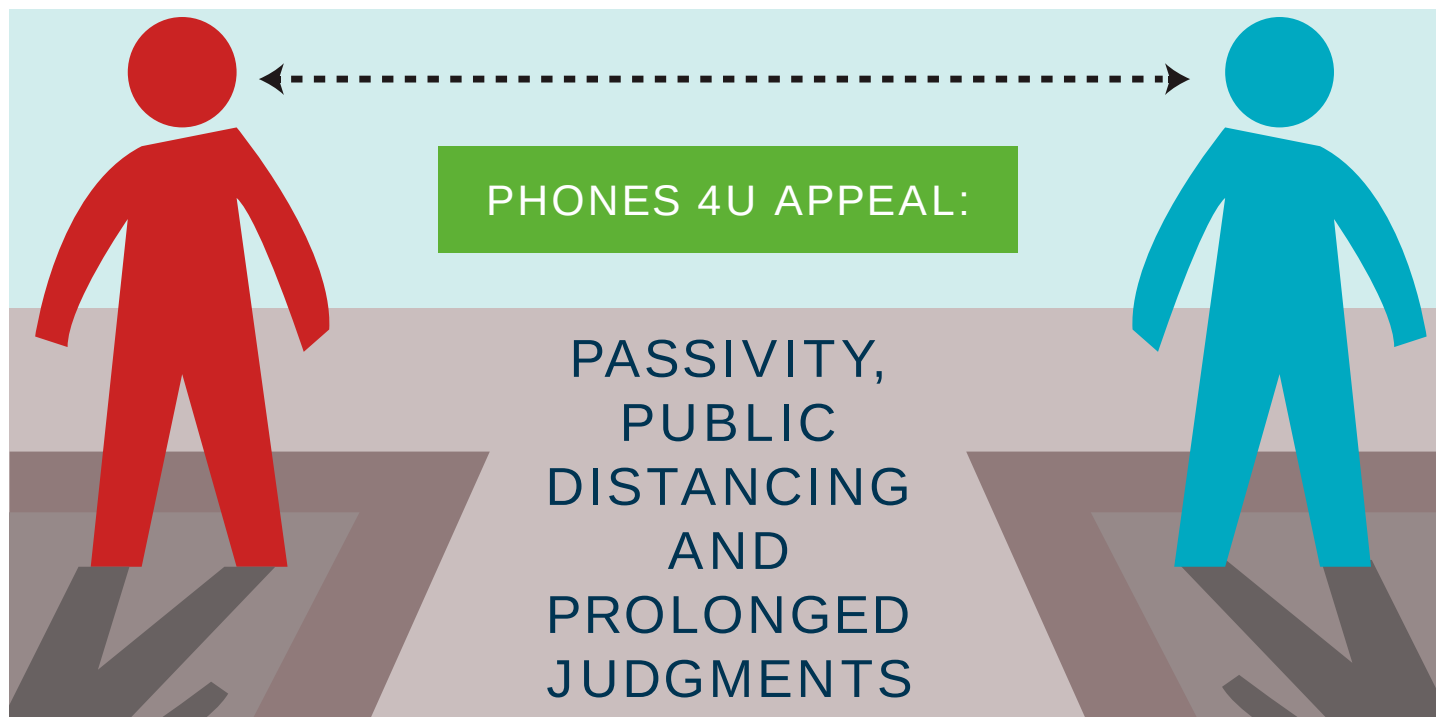




Authored by: Emma Hogwood (Special Counsel) & Vasiliki Katsarou (Associate) - Milbank

On 11 July 2025, the Court of Appeal dealt a further blow to Phones 4u (in administration) (“P4u”) by unanimously dismissing its appeal in its longstanding dispute with three of the UK’s mobile network operators (“MNOs”), EE Limited, Vodafone Limited and Telefonica UK Ltd (O2) (the “Judgment”).¹



The claim concerns allegations that, in breach of English and EU competition law, the MNOs engaged in collusive behaviour to end their respective contracts with P4u for the indirect retail supply of connections in the UK mobile phone market, leading to P4u’s collapse shortly thereafter. In a lengthy judgment handed down some 15 months after trial, P4u’s claims were dismissed in their entirety, with the Judge concluding that the MNOs had individual incentives to reduce their reliance on indirect supply channels and that the evidence demonstrated a lack of coordination.

P4u sought permission to appeal on eight separate grounds involving challenges of both law and fact, with permission ultimately being granted in relation to six of those grounds.



Ground 1: Concertation and consensus

P4u’s first ground arose out of the Judge’s findings concerning a discussion that took place between two executives of O2 and EE around pricing strategy for the impending launch of the 4G network. Despite the EE executive not actively engaging in the discussion – and becoming so nervous that he started recording the conversation – P4u alleged that this passivity conveyed valuable confidential information which reduced uncertainty for O2, sufficient for a finding of concertation.

The Court noted that disclosure of intended conduct by one party can give

rise to concertation, but a consensus of some form is necessary, as is a reduction in uncertainty as to the expected conduct of the competitor. Applying those principles, there was no error in the Judge’s application of the law and the Court upheld the findings that O2 received no encouragement that EE would accede to its proposed strategy, nor could it have inferred from EE’s silence any consensus or acquiescence.²

However, the Court went on to consider two related questions:

- **Can vague information be enough for concertation?** The Court held that some level of specificity in the information conveyed is required for there to be a finding of concertation. The information must also be of a strategic nature and quality, capable of reducing uncertainty. Whilst the Court had some difficulty with certain of the Judge’s factual conclusions in this regard, it did not find any errors of law in his approach.³
- **Does consensus require something beyond a passive reaction?** Whilst concertation requires some form of coordination, the question of whether passive behaviour amounts to consensus depends on the context. If the recipient of a unilateral disclosure of information “requests or at least accepts” it, that can be

¹ The claims were brought against the three MNOs and their parent companies.

² Judgment/§§113-125.

³ Judgment/§§126-136.

sufficient.⁴ Having concluded that the Judge made no error in law, the Court upheld his findings that EE's passive response did not amount to any consensus to cooperate with O2's strategy.⁵

Ground 2: The 'Anic' presumption

At the heart of Ground 2 was the presumption established in *Commission v Anic*⁶ that undertakings participating in concerted behaviour take account of the information exchanged with competitors when determining their own conduct on the market. The question before the Court was whether the Judge had erred in his assessment of the scope and effect of the Anic presumption by finding that it had been rebutted by the events which followed O2's unilateral disclosure of information to EE and Vodafone.⁷



P4u argued that the Anic presumption could not be rebutted by anything other than 'public distancing' or a report to competition authorities (steps which neither EE nor Vodafone had taken). P4u relied on the CJEU's decision in *Eturas*⁸ as authority for the proposition that public distancing was required, together with what P4u claimed was an endorsement of this principle by the Supreme Court in *Sainsbury's*.⁹ P4u also submitted that, if evidence other than public distancing could be relied on, the Judge had failed to apply the higher standard of proof established in EU case law.¹⁰

Those arguments were rejected by the Court:

- Neither *Eturas* nor *Sainsbury's* provides support for the proposition that public distancing was required to rebut the Anic presumption. That proposition lacked logic and there is no principled reason why it should be impossible to rebut the presumption by anything other than public distancing.¹¹
- The standard of proof in respect of the Anic presumption is a matter of domestic law (i.e., the balance of probabilities), and not the higher test relied on by P4u.¹²
- Applying that standard, there was no basis to reverse the Judge's finding that the Anic presumption had been rebutted and so Ground 2 was dismissed.¹³



Ground 3: New case theory

Ground 3 concerned the Judge's reliance on a factual theory which had not been canvassed at trial, namely whether Vodafone had been the source of certain information found in EE's internal documents. Whilst the Court recognised that judges are not generally permitted to decide cases on theories that have been neither pleaded nor argued at trial (and cautioned judges against raising new theories without allowing the parties an opportunity to address them), the key issue was whether any prejudice had been suffered because of the Judge's approach.¹⁴

The Court found the Judge's conclusion that Vodafone was not the source of the confidential information to be grounded in the pleadings. The fact that the Judge went beyond this to posit a "more plausible" source for the information was immaterial to his conclusion that EE and Vodafone did not collude. Dismissing Ground 3, the Court found that the Judge's approach did not prejudice P4u.¹⁵



Grounds 4 and 5: Delay and compartmentalisation

Grounds 4 and 5 concerned several of the Judge's findings of fact which P4u challenged due to the delay in judgment being delivered; and/or the Judge's compartmentalised approach to the treatment of evidence. The Court dealt with the grounds together, providing the following guidance:

- Judgments should generally be delivered within three months of a hearing, with the Court recognising that "an inadequate, rushed, judgment may well also deny justice".¹⁶ However, delay will not itself be a sufficient ground to challenge a decision, and an appellate court will only interfere with findings of fact if it concludes the judge was "plainly wrong".¹⁷
- Where there is serious delay, the court must decide whether the decision is safe, having regard to both the judgment and the judge's consideration of the evidence as a whole. There is no "uninhibited ability" to challenge factual findings due to delay; there must be a causal link between the delay and the alleged errors.¹⁸

4 Judgment/§142, citing *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2006] EWCA Civ 1318, at §21(v).

5 Judgment/§§137-147.

6 [2001] 4 CMLR 17.

7 It was alleged that, at around the same time as the O2/EE discussion, O2 engaged in collusive discussions with Vodafone concerning its future strategy with indirect retailers, with further collusion taking place in 2013 and 2014.

8 *Eturas UAB v Lietuvos Respublikos konkurencijos taryba* [2016] 4 CMLR 19.

9 *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, at §113.

10 Case C-455/11P *Solvay SA v Commission* [2014] 4 CMLR 17. See Judgment/§171.

11 Judgment/§§154, 163 to 164.

12 Judgment/§174; *Sainsbury's v Visa* at §§115 to 116.

13 Judgment/§§172 to 181.

14 Judgment/§§194 to 197. See also *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 and *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287.

15 Judgment §§198 to 215.

16 Judgment/§324.

17 Judgment/§218.

18 Judgment/§§218 to 224.

- The extent to which a compartmentalised approach renders a judgment unsafe will depend on whether it affected the judge's evaluation of the facts.¹⁹



Applying those principles, the Court was satisfied that the Judge had considered the evidence P4u claimed had been ignored, and that the omission of certain evidence was not caused by delay. The Judge had re-read the evidence presented at trial in preparing his judgment, and there was insufficient compartmentalisation to render the Judgment unsafe.²⁰



Ground 7: Document preservation

The final ground addressed whether the Judge had erred by not drawing adverse inferences from Telefonica's failure to implement appropriate document preservation measures. The Court noted that such an appeal raises a high bar, requiring the appellant to demonstrate that

“no reasonable tribunal could have reached”

the same decision as the lower court.²¹ It found that the Judge had carefully considered the factual record and heavily criticised Telefonica's failures in respect of document preservation. He was entitled, however, to accept the evidence that Telefonica had not knowingly destroyed relevant documents.²²

Conclusion

The Judgment provides important clarification on the law on concerted practices and the proper approach to the consideration of passive responses to potentially anticompetitive conduct. It also contains useful guidance on the prejudicial effect of judges relying on new (un-pleaded) case theories, and the circumstances in which justice delayed can amount to justice denied.

L



¹⁹ Judgment/§§229 to 232.

²⁰ Judgment/§§234 to 306.

²¹ Judgment/§311, applying *Efobi v Royal Mail Group* [2021] UKSC 33.

²² Judgment/§§314 to 317.