MOBILE NETWORK OPERATORS DEFEAT COLLUSION CLAIM IN LANDMARK RULING

This briefing covers an important recent decision in which the English High Court scrutinised multiple contacts between senior executives at commercial competitors (**here**). While the defendants were successful, the judgment offers important lessons about the risks of interacting with competitors and the high threshold required for a company to distance from anti-competitive approaches. Senior executives and in-house counsel will want to revisit their own policies and practices in dealing with the sensitive topic of contact with competitors.

In a 208-page judgment, Mr Justice Roth rejected *on all grounds* the collusion and breach of contract claims brought by the administrators of Phones 4u ("**P4U**") against leading mobile network operators EE[1] (together with its former joint venture parents, Deutsche Telekom and Orange), Vodafone and Telefonica (trading in the UK as O2) (the "**Defendant MNOs**"). It is not yet clear whether the administrators will appeal.

The judgment follows a ten-week trial in the summer of 2022, including evidence from 41 witnesses of fact and four expert witnesses, in one of the largest standalone competition claims to go to trial before the English courts. It also offers guidance on other hot litigation topics before the English courts including (1) relational contracts, (2) document preservation, and (3) witness familiarisation.

The collusion claim

On 15 September 2014, P4U went into administration having previously been (along with Carphone Warehouse) one of the two main indirect retailers of mobile network connections in the UK. P4U's administration followed decisions taken by O2, Vodafone and EE to terminate (or not to renew) their indirect distribution agreements with P4U.

P4U's claim alleged that these decisions were not taken purely independently, but were the result of collusion between the Defendant MNOs in breach of Chapter I of the UK Competition Act 1998 and/or Article 101(1) of the Treaty on the Functioning of the EU.

As is typical in standalone competition claims, prior to disclosure, P4U's case was largely based on inference and economic theory alleging that no Defendant MNO acting rationally would choose to unilaterally cease dealing with P4U, because in doing so they would lose substantial market share. P4U also sought to rely on coincidences in timing in relation to the Defendant MNOs' decisions to leave P4U.

Key takeaways

- The court rejected on all grounds the claim for collusion and breach of contract, but the judgment offers an important reminder of the risks of interacting with competitors.
- In order to breach competition law, information exchange must be sufficiently clear and in this case much of the information was vague and unclear.
- Where commercially confidential information is received, companies should 'publicly distance' themselves from any anti-competitive approaches. Distancing must be clear and unambiguous and conveying this through body language/ demeanour alone is insufficient.
- The court found that while the agreement between P4U and EE had some features of a relational contract, the agreement expressly addressed the question of good faith and defined its scope, and this precluded the implication of a more general duty of good faith.
- The judgment also offers important guidance on parental liability for competition breaches and other topics such as the importance of compliance and record keeping as well as document preservation.

1 Clifford Chance acted for EE in its successful defence of the claim.

Following disclosure, the core of P4U's case centred around whether evidence of somewhat cryptic discussions or exchanges between competitors met the threshold for an anti-competitive 'concerted practice' under UK and/or EU competition law. The court analysed each example relied on by P4U in its wider context and, ultimately, concluded in every case that the threshold had not been met.

Allegedly collusive exchanges in 2012

The key exchanges in 2012 included:

- A lunch at the Landmark Hotel in September 2012 during which O2's CEO was alleged to have shared commercially sensitive information with EE's CEO regarding O2's intention to reduce its supply of connections to indirect retailers.
- A call in November 2012 from O2's CEO to EE's CEO regarding an alleged strategy to coordinate their contractual negotiations with a common supplier.
- A meeting between EE's General Counsel and O2's General Counsel in December 2012 in which EE sought to distance itself from these approaches.

P4U argued that these interactions gave rise to a concerted practice and that EE had not effectively distanced itself from the information which it had received from O2. In rejecting this argument, the court found the following:

- A concerted practice requires three elements to be established: (1) two or more undertakings concerting together, (2) conduct on the market pursuant to those collusive practices, and (3) a relationship of cause and effect between the two (Case C-49/92P *Commission v Anic*).
- A concerted practice requires an element of concertation and O2 could not have inferred from EE's passive stance any form of acquiescence or consensus to cooperate. EE gave no indication of any intention to give or receive information.
- Furthermore, the information transmitted must be sufficiently clear as to put the recipient in a favourable position. In this case the court found that O2's references to taking various steps in the market were wholly vague and could not reasonably be seen as having benefitted EE by removing uncertainty as regards O2's strategy or conduct on the market.
- Where commercially confidential information is conveyed by one competitor to another, it is presumed that the recipient will take it into account. However, in this case EE was able to rebut that presumption, because it signed a new three-year deal with P4U just weeks after the approach from O2 in September 2012. The judge also found that, even if that approach had given rise to a concerted practice, it did not materially influence O2's subsequent decision to exit P4U.
- Although it was unnecessary to do so (given that no concerted practice was established), Roth J went on to consider the extent to which EE 'publicly distanced' itself from O2's anti-competitive approach. Public distancing is a term of art meaning that a party makes clear that it wishes to take no part in the actual or proposed unlawful conduct, or alternatively reports that conduct to the relevant authority. While EE sought to rely on the fact that its CEO was shocked by the approach and showed (via body language) that EE would not participate, this was found to be insufficient. Roth J concluded that body language or demeanour would be an unworkable criterion on which to determine participation in a concerted practice.

- The subsequent meeting between the General Counsels of EE and O2 was insufficient to establish public distancing because Roth J found that the conversation was essentially forward-looking. O2's General Counsel understood the thrust of EE's message as seeking an assurance that there would be no more approaches from O2. Further, the court found that this 'distancing' meeting between the GCs came too late, because O2's decision not to renew its agreement with P4U was communicated to P4U prior to the meeting.

Allegedly collusive exchanges in 2013 to 2014

P4U also sought to rely on a number of communications or meetings which took place between 2013 and 2014. These included:

- A meeting in Madrid between the CEOs of Telefonica (O2's parent) and Vodafone Europe in September 2013, in relation to which a handwritten note allegedly indicated that the CEO of Vodafone Europe was intending to ask Telefonica about O2's partial (but not yet complete) exit from P4U earlier that year.
- A text message sent in October 2013 by the CEO of Telefonica to the CEO of its subsidiary O2, indicating that Telefonica had some information to share regarding O2's competitors.
- A private breakfast meeting in Venice in July 2014 between the CEOs of Telefonica, Vodafone and Orange, before a more formal industry trade association meeting.
- A text message sent by a senior Orange executive to a senior Vodafone executive in April 2014, proposing that they discuss a topic for the UK market via a 'secured' call using prepaid numbers. The Vodafone executive responded by expressing his discomfort and suggesting that any call should include a competition lawyer.

The court found that these and other examples relied on by P4U did not establish (or justify an inference of) collusion. They did not involve the disclosure of future strategy or were too slender a basis for an inference that confidential information was being exchanged. The court also found it unlikely that the CEOs of multinational companies would have discussed the detailed distribution strategies of their UK subsidiaries. In relation to the proposed call using prepaid numbers, while such a discussion would potentially have involved the exchange of confidential information, the Vodafone executive recognised that his counterpart was seeking to enter legally sensitive territory and deliberately pulled away.

The breach of contract claim

P4U also claimed that its collapse into administration was caused by a breach of contract on the part of EE, and that Deutsche Telekom and Orange (as EE's joint venture parents at the time) procured or induced that breach.

In particular, P4U alleged that by sending a letter on 12 September 2014 (shortly after Vodafone's decision to exit P4U became public) informing P4U that EE would not be renewing its agreement, EE (in breach of express and implied good faith obligations) deliberately sought to deny P4U the chance to form any other deals to ensure its survival, thereby forcing P4U into administration a few days later.

P4U contended that its agreement with EE was a relational contract, and therefore gave rise to a general duty of good faith (*Yam Seng Pte Ltd v International Trade*

Corp Ltd [2013] EWHC 111(QB)). The court found that while the agreement had some features of a relational contract, it expressly addressed the question of good faith and defined its scope, and that this precluded the implication of a more general duty of good faith.

Further, the court found that even if there had been a general duty of good faith, EE would not have breached that duty on the facts of this case. The alleged lack of good faith came down to an allegation that EE should not have told P4U on 12 September 2014 that it had concluded an exclusive agreement with CPW, but should have kept that fact secret for several months to allow P4U to find a replacement for Vodafone. Given that a key example of bad faith was the deliberate omission to disclose relevant information, it would be paradoxical to say that it was bad faith for EE to have disclosed relevant information.

Parental liability – it cuts both ways

If, contrary to the judgment, EE had breached competition law, the court found that Deutsche Telekom and Orange would also have been liable for the infringement. The court took this opportunity to summarise the key propositions in this area, as they apply to JVs/parent companies. In particular, where two companies each hold 50% of the shares of a JV, they may be considered a single economic unit if it is shown that they, in fact, exercised decisive influence over the JV. There is no requirement to show that a parent company was directly involved in or aware of the offending conduct. Furthermore, two companies, each holding 50% of the shares of a JV, may *both* be regarded as exercising decisive influence. Where the contract requires the JV's conduct to be determined jointly by its parent companies, the parents must be regarded as exercising decisive influence, unless there is evidence that decisions were actually taken by other procedures.

Other key takeaways

- **Good compliance and record keeping:** The judgment provides helpful guidance on the steps companies should (realistically) take when meeting with competitors. The court acknowledged that it was unrealistic for busy executives to prepare full agendas in advance or to record minutes. However, it emphasised that making clear the purpose/topics to be discussed in advance, and making at least a brief note afterwards, would have been in keeping with their internal guidance. On the facts the court found that a number of very senior executives did not have sufficient regard for these precautions and that if they had, at least some of the accusations in the case may have been avoided. None of this was, however, unlawful.
- **The importance of document preservation:** Criticism was made of one of the defendants in relation to document preservation after receiving a detailed letter before action. The court regarded the explanation (that P4U's claim was unmeritorious and it was therefore unnecessary to spend management time and incur business costs in relation to it) as inadequate. However, the court did not consider it would have been justified to infer that incriminating documents had been destroyed.

- **Witnesses and familiarisation:** There were various suggestions made by the parties that witnesses had been dishonest in their evidence. Roth J emphasised that the witnesses were giving evidence in relation to events that took place 8 to 10 years before trial, that many struggled to explain what emails/text messages meant, and that their explanations were often speculative and coloured by the case they wished to support. In light of that, the judge focused on the contemporary documents, their context, and the inherent plausibility or otherwise of the evidence. There was also an implicit criticism of the fact that most of the factual witnesses had received witness familiarisation training, and Roth J was cautious about placing any weight on the 'demeanour' of witnesses as a result.
- **Guidance on calling witnesses:** Roth J rejected P4U's suggestion that adverse inferences should be drawn from the absence of certain witnesses. The Defendant MNOs were all large organisations, the relevant agreements were commercially very significant, and unsurprisingly many people were involved at various stages over a period of many months or more. While it is almost always possible to identify additional potential witnesses, Roth J rejected P4U's criticism and saw no justification for any adverse inferences. This judgment may bring some comfort to large multinationals faced with wide-ranging claims, that there is a limit on how much the courts may expect by way of witness evidence.

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