

This is our summary of some of the key legal developments across a range of sectors for the week of 30 March 2009. It is intended for reference purposes only and does not constitute definitive advice. Links to the original source materials are included where there are no restrictions in terms of access. References may also be made to sources that require separate registration or subscription. A link to a source does not necessarily imply endorsement of the source or the material provided through the link.

For further information on any of the matters discussed in the summary please contact our Professional Support Lawyer, [Sarah Kirkness](#). If you have any comments, queries or suggestions please contact us at [comments](#). All suggestions and comments are most welcome. If you do not wish to receive this summary you can contact us at [unsubscribe](#).

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General

DCMS Publishes Responses to Interim Digital Britain Report

The DCMS has published the non-confidential responses it received to its short consultation on the Interim Digital Britain Report. Over 100 responses were received from a wide range of individuals and organisations - see http://www.culture.gov.uk/what_we_do/broadcasting/5952.aspx for access to the various responses. The publication of the Final Digital Britain Report will take place in the early summer.

Review of Merger Decisions Under Enterprise Act 2002

The Competition Commission has published a report prepared by Deloitte reviewing eight merger decisions under the Enterprise Act 2002 made between 2004 and 2008. The report looked at the Competition Commission and the OFT's decisions and reasons for the decisions and the key developments in the relevant market since the decisions were made and assessed whether the concerns outlined by the authorities had been correctly assessed or evaluated and whether the remedies required were effective and appropriate. One of the mergers reviewed was the William Hill/Stanley Leisure plc merger, which brought together the second and fourth largest licensed betting offices in the UK (by shop number) and which was given conditional clearance. See http://www.competition-commission.org.uk/our_role/analysis/review_merger_decisions.pdf for the report.

OFT Guidance on Business Protection from Misleading Marketing Regulations

The Office of Fair trading (OFT) has published practical guidance in the form of an overview of the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276, which implement the Directive 2006/114/EC on misleading and comparative advertising. The Regulations prohibit businesses from advertising products in a way that misleads traders and set out conditions under which comparative advertising is permitted. The guidance contains practical examples of how the Regulations would be applied to sample advertising - see http://www.oft.gov.uk/shared_of/business_leaflets/general/oft1056.pdf for details.

No Decision Yet on "Three Strikes" Measures

Despite the fact that the European Commission has reached agreement on a number of the telecoms reforms, there is still no decision on the controversial three strikes proposals and indications are that there will be no decision before May this year as no compromise has been reached on the amendment in question (Amendment 46). To date however, the European Parliament has resisted the three strikes proposal. However, on the telecoms proposals, according to reports, the Commission, Parliament and Council have agreed new regulatory powers for the Commission in the event that Member States regulatory bodies do not implement their recommendations and the Commission will also share veto powers with a new Body of European Regulators of Electronic Communications (BEREC) over remedies national regulators propose to solve practices deemed anti-competitive. The Commission had wanted incumbent national telecoms networks to separate their infrastructure and other divisions however, national carriers will only be required to do so as an "extraordinary measure".

DBERR Publishes Response to Proposals to Amend EC Roaming Regulation

The DBERR has published the Government's response to the consultation on the European Commission's proposals to amend Roaming Regulation 717/2007/EC. The responses had already been taken into account during the Telecoms Council on 27 November 2008 for the agreement of a common position on price caps for voice calls, billing procedures, the extension of regulation to SMS and data services and measures to avoid "bill shocks". Discussions with the European Parliament are now underway, with the intention of agreeing the final text with the Council before the European

elections in June 2009. Implementation at the national level is anticipated by July 2009. See <http://www.berr.gov.uk/files/file50541.pdf> for details.

Commission Warns on Online Collection of Personal Data for Commercial Purposes

The European Consumer Commissioner has spoken about growing concerns about the tendency of commercial organisations to apply what she described as the "new generation of practices and business models built on the ability to profile consumers and then use their profile to target them for commercial purposes". She said "Tools must now be developed that balance the interests of business with that of the consumers. This means two things: the respect of users' right to control their public exposure; and the obligation to protect them against abusive and risky practices targeted at them". She acknowledged that the Commission does have well-established consumer policy principles, and that what was needed was a debate on how these are applied in the digital world, particularly the activity of collecting consumers' personal data for the purpose of commercially targeting them. The point was made that the current situation with regards to privacy, profiling and targeting was "not satisfactory" and that regulatory action would be an option if consumer concerns were not addressed. See <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/156&format=HTML&aged=0&language=EN&quillanguage=en> for details.

ICO Guidance on Data Protection "Myths and Realities"

Still on the subject of data protection, the Information Commissioner's Office has published guidance on what it describes as the myths surrounding the application of certain areas of the Data Protection Act 1998 - despite the fact that the guidance makes the point that data protection law reinforce common sense rules of information handling, the ICO acknowledges that some organisations "understandably err on the side of caution and do not release information when they could do so". The guidance illustrates this with a number of examples of high profile misapplications of the Act, which have resulted in adverse publicity for the organisations involved and refers to practical guidance on particular points, such as the photographing children or the release of customer information to third parties - see http://www.ico.gov.uk/upload/documents/library/data_protection/introductory/data_protection_myths_and_realities.pdf for the guidance.

Commission Reduces Trademark Application Fees

The European Commission has announced that it has reduced the fees payable to the Community agency responsible for granting EU-wide trademark rights, OHIM (Office for the Harmonization in the Internal Market), and simplified the registration procedure. With effect from 1 May 2009, the application fee will be €1,050 (or €900 if filed electronically). Further, the individual fee for international trademark applications and registrations designating the European Community under the Madrid Protocol has been reduced to €870. (*EC Press Release IP/09/506, 31 March 2009*).

"Progress" on Use of Mobile Phones While Flying ...

The European Commission has announced that following the introduction of rules to harmonise conditions for mobile phone services on aircraft across the EU, 27 European aircraft have installed equipment to allow the secure use of standard GSM handsets while flying in European airspace. For peace and quiet, the airlines to avoid are Ryanair (Ireland), TAP (Portugal) and bmi (United Kingdom) as the Commission reports that the number of aircrafts enabled for in-flight use of mobile phones is expected to double by the end of the year. (*EC Press Release IP/09/526, 2 April 2009 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/526&format=HTML&aged=0&language=EN&quillanguage=en> for details*).

Article - Disclosure of Information in the Public Interest

The latest New Law Journal looks at the recent decision of the Court of Appeal, which upheld part of an appeal by Ofcom of the Information Tribunal's decision that it should disclose the national database of information on 2G/3G masts as being in the public interest under the Environmental Information Regulations 2004. The article notes that as a result of the decision, public authorities should consider the public interest in the round rather than on a narrow basis; not just when considering exceptions under the regulations but also the application of exemptions under Freedom of Information Act 2000. (*"Freedom of Information: Public Interest Boundaries" (2009) 159 NLJ 463; this article is available via LexisNexis and see the Need to Know of 23 February 2009 for further details about the case*).

Broadcasting

Ofcom's Content Sanctions Committee Fines Broadcaster for Unsuitable Free-to-Air Material

Following an investigation into seven programmes broadcast by Playboy TV UK/Benelux Ltd between September 2007 and December 2007, Ofcom's Content Sanctions Committee has imposed a fine of £25,000 on the licensee for breaches of

Rules 1.24 ("adult-sex" material broadcast not under encryption), 2.1 (generally accepted standards) and 2.3 (material which may cause offence must be justified by the context) for broadcasting material which was unacceptable and unsuitable for free-to-air broadcast. Ofcom noted that the breaches were serious because of the nature of the content and the potential harm to viewers which could result from the unencrypted transmission; further, Ofcom had previously warned broadcasters about compliance with Rule 1.24 and the licensee had confirmed that they understood this and would take it into account and ensure that their services complied with the Broadcasting Code. Ofcom said, "To contravene the Code repeatedly as in this case ... clearly compounds the seriousness of the compliance failure". See http://www.ofcom.org.uk/tv/obb/ocsc_adjud/playboytv.pdf for the adjudication.

BBC Fined for Serious and Repeated Breaches of the Broadcasting Code

The Sanctions Committee has also imposed a fine of £150,000 on the BBC for the Radio 2 broadcasts of Jonathon Ross and Russell Brand in which offensive messages were left on a gentleman's answering machine - the total fine comprised a fine of £80,000 for the breaches of Rule 8.1 of the Broadcasting Code (privacy) and £70,000 for the breaches of Rules 2.1 (generally accepted standards) and 2.3 (material which may cause offence must be justified by the context). In addition, the Committee ordered the BBC to broadcast a statement of Ofcom's findings on its Radio 2 service at a time to be agreed. The BBC had accepted that the broadcasts were "unacceptable and demonstrably failed to meet the BBC's editorial standards. In relation to Rules 2.1 and 2.3 of the Code, the BBC admitted the breaches and said that it did not consider that generally accepted standards had been applied in the programmes in question. The Committee said it "recognises the paramount importance that is attached to freedom of expression in the broadcasting environment". It said, "broadcasters must be permitted to enjoy the creative freedom to explore issues and ideas without undue interference. Comedy in particular has a tradition of challenging and even deliberately flouting boundaries of taste. Whilst such programming must have room for innovation and creativity, it does not have unlimited licence". In the circumstances, the breaches of the Code were serious and revealed what Ofcom described as "weaknesses in the BBC's compliance arrangements". In particular, the Committee said it was "deeply concerned by the failure or ineffectiveness of the BBC's compliance, risk management and management procedures". In setting the fine the Committee took into account that the BBC's significant and numerous compliance failures in this case had resulted in breaches of the Code that were "serious and repeated". It also took into account the Committee's belief that in this case the contraventions of the privacy standard set out in Rule 8.1 was more serious than the contraventions of Rules 2.1 and 2.3. See http://www.ofcom.org.uk/tv/obb/ocsc_adjud/BBCRadio2TheRussellBrandShow.pdf for the adjudication.

Ofcom Opens Own Investigation into Communications Providers' Additional Charges

Ofcom has opened an own-investigation into compliance with the Unfair Terms in Consumer Contracts Regulations 1999 in relation to additional charges, following its publication of guidance on the law in relation to such charges and an investigation into the inclusion of these charges in contracts for communications services (eg, non direct debit and early termination charges). The investigation will look at communications providers offering fixed line telephony, mobile, broadband or Pay TV services to consumers. Ofcom has said it may take appropriate enforcement action and/or may initiate separate investigations of named providers, which will be announced via its Competition and Consumer Enforcement Bulletin. See http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_01019/ for details.

Corporate

Government Response to Consultation on Limited Partnership Act Proposals

The DBERR has published the Government's response to its August 2008 consultation on a Legislative Reform Order to repeal and replace the Limited Partnership Act 1907. The proposals related to the establishment, registration and de-registration of a limited partnership, the liability of limited partners to third parties and the rights and obligations of general and limited partners in a limited partnership. As a result of the responses received, the Government has decided that it is not in a position to proceed with the draft Legislative Reform Order in its current form, despite "broad support for many of the key proposals". Further consultation will now take place. See <http://www.berr.gov.uk/files/file50705.pdf> for details.

Construction of Articles of Association - Privy Council Construes by Reference to Extrinsic Facts

The Privy Council has ruled on the construction of the articles of association of Belize Telecommunications Ltd, about which there had been a disagreement as to their interpretation in the lower courts. While the case turned on the articles in question, the implications of the decision are worth noting - although decisions of the Privy Council are merely highly persuasive and not binding, if it were followed in England, then articles of association would be able to be construed by reference to extrinsic facts if they were facts that any reader (or, possibly, any prospective purchaser of the company's shares) would reasonably be supposed to know. Facts known only to some of those involved in the formation of the company would remain inadmissible. The dispute related to the appointment of two directors - the Privy Council held unanimously that the articles should be read as providing by implication that the two special C directors ceased to hold office when the special shareholder no longer had the 37.5% holding which enabled him to appoint and remove the

special C directors. (*Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)* [2009] UKPC 11 -see <http://www.bailii.org/uk/cases/UKPC/2009/11.html> for the judgment and see <http://corporate.practicallaw.com/4-385-5164> for PLC's commentary on the implications of the judgment).

APB Revises ISA on Auditing Standards

The Auditing Practices Board (APB) has published a revised International Standard on Auditing, which aims to facilitate the production of a more concise auditor's report. With effect from 5 April 2009, UK companies with accounting periods that end on or after that date will be subject to the Revised ISA (UK and Ireland) 700, "The Auditor's Report on Financial Statements"; as part of the two-stage implementation process for other UK entities the effective date will be for periods ending on or after 15 December 2010 - the ISA takes account of the changes brought about by the Companies Act 2006 (which were the subject of a consultation by the APB in 2007) and should enable the reports to be shorter and more informative. See http://www.frc.org.uk/images/uploaded/documents/ISA_700_Web_Optimized2.pdf for the revised ISA. At the same time, the Professional Oversight Board, part of the Financial Reporting Council, has published a description of those entities whose audits will be deemed to be "major audits" for the purposes of audit inspections from 1 April 2009 to 31 March 2010 - the list includes AIM or Plus-quoted companies incorporated in the UK with a market capitalisation in excess of £50 million and unquoted companies, groups of companies, limited liability partnerships or industrial and provident societies in the UK which have either group turnover in excess of £500 million or group long term debt in excess of £250 million and turnover in excess of £100 million. See http://www.frc.org.uk/images/uploaded/documents/AIU_Scope_2009-10.pdf for details.

Gambling

Gambling Commission's Policy Paper on Betting Integrity

The Gambling Commission has published a policy paper in response to its earlier position paper on integrity in sports betting, which summarises its work to date and its policy on betting integrity. The paper is primarily concerned with sports betting, but also covers betting on non-sporting events and reflects various ongoing developments and work with sports governing bodies and operators and sports governing bodies' rules. The paper notes that although the Commission's focus is on integrity directly related to betting, specifically where the outcome of an event has been influenced with the intention of benefiting through betting on it, or where inside information is used improperly or unfairly in placing a bet, a "key component of the Commission's work on betting integrity is the imposition of a licence condition (15.1), which requires betting operators to share information on suspicious transactions with the Commission and sports governing bodies". The Commission stated that since September 2007, it has received reports of some 50 instances of suspicious betting activity, the majority of which were notified by licence holders (as required by licence condition 15.1), but some of which came through other sources, for example sports governing bodies, the media or the public. The Commission has said it will make the effective working of licence condition 15.1 one of its compliance priorities over the coming months. It also said it will explore the scope for promoting integrity and deterring corruption by using information and publicity on which sporting events or types of bets are relatively low or high risk and consider the scope for using employment terms and betting contract terms and conditions to make it easier to establish whether an offence has been committed and securing deterrent sanctions. Although the Commission is not convinced that there is a sufficient case for restricting types of bets or dictating sporting bodies' rules in relation to betting at this time, it has said it plans to monitor closely the effectiveness of the various actions it is taking, together with the industry and sporting bodies and will consider further regulatory measures if they appear warranted. See http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Betting_integrity_policy_position_statement_-_March_2009.pdf for details.

Gambling Commission's Policy Paper on In-Running Betting

At the same time, the Commission has also published a policy paper on in-running (in-play) betting, in which it updates its previous paper, published in May 2008, to take account of responses to that paper and developments since it was published. In-running betting, which is predominantly an online activity that takes place mainly, but not exclusively, on sporting events, occurs while the event to which the bet relates is actually taking place - the Commission gives the example of placing a bet on a horserace while the race is being run. The Commission has identified two main concerns relating to the activity - the integrity of the betting and the subject of the betting and issues that relate to the fairness and openness of the betting. It said it will continue to monitor the fairness and openness of in-running betting as part of its overall betting compliance programme and take its particular characteristics into account in its wider work on integrity in sports (and other) betting. The Commission said "Despite some assertions to the contrary, what limited evidence we have seen to date indicates that the market for in-running betting is likely to be made up predominantly of knowledgeable and skilled betting customers". Further, "The feedback ... from the 2008 consultation suggests that further warnings are not necessary as customers are aware of the risks involved in betting in-running and the nature of such markets. However we do not rule out taking further action to ensure a level playing field in the future should any further evidence emerge suggesting this is required". The Commission did consider the issue of inequality between in-running betting customers when it comes to the availability of information and technology, which is manifested in three related areas: sources of information and time delays; availability of high-speed broadband; and computer software packages

that are specifically designed to assist in-running betting customers. It said however that it would "not take action against technological advances per se unless the risk to the licensing objectives were proven or probable". The Commission concluded that the current regulatory regime for in-running betting is sufficient and does not need further controls at this time. However it will continue to monitor in-running betting as part of its compliance programme. See [http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/In-running_betting_position_paper - March 2009.pdf](http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/In-running_betting_position_paper_-_March_2009.pdf) for details.

Commission Clears Online Game Acquisition

The European Commission has granted clearance under the EU Merger Regulation for the acquisition of control of Fun Technologies, Inc (FUN) of Canada by Game Show Network, LLC (GSN) of the US, which is jointly controlled by Liberty Media Corporation and Sony Pictures Entertainment, both of the US. GSN supplies the Game Show Network television channel to TV operators in the US and operates the website GSN.com, which offers online services. FUN publishes and distributes skill-based online games to be played on its own websites and certain third-party websites. The acquisition was examined under the simplified merger review procedure. (*EC Press Release EXME09, 29 March 2009*).

Litigation

Award of Costs on Indemnity Basis After Discontinuation of Defamation Action

The court was required to determine whether costs should be awarded on an indemnity basis against the claimant following the discontinuation of libel and slander proceedings against the defendant. The claimant had alleged that the defendant had made a number of defamatory statements in a letter circulated amongst the members of the West Wirral Conservative Association. The matter proceeded to trial however, during the course of the trial the claimant decided not to proceed. There was no dispute that the claimant had to pay the defendant's costs of the action, but there was an issue as to the basis on which those costs were to be assessed if they could not be agreed. The defendant sought an order for indemnity costs, which the claimant resisted. The court noted that indemnity costs are no longer limited to cases where it wishes to express disapproval of the way in which litigation has been conducted and said an order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation. In any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts. If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs. In this case, the defendant was entitled to the costs of defending the discontinued defamation action on an indemnity basis having regard to the unreasonable pre-trial conduct of the claimant and the misguided basis upon which the claim had been brought. The claimant's unreasonable pre-trial conduct was, on its own, sufficient to justify an order in the defendant's favour for indemnity costs. The defendant had been eminently fair and reasonable; his offers to settle or dispose of the claim would, if accepted, have put the claimant in precisely the same position he was in now, or, a better position. (*Noorani v Calver (No 2/Costs) [2009] EWHC 592 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/592.html> for the judgment).

Music

The Law Might Work, but for How Long?

This is almost a statement of the blindingly obvious but according to reports from traffic monitoring firm Netnod, Internet traffic in Sweden fell by one-third on the day the Intellectual Property Rights Enforcement Directive (IPRED) legislation took effect. The legislation allows rights holder to force ISPs to reveal details of Internet users who illegally share files. Questions are being asked however as to how long this will last - the example is given of the position in the United States, which has similar rules related to identity, where users appear to have shown little regard for enforcement threats. (*MusicWeek, 3 April 2009*).

Publishing

ECHR Orders Publisher to Hand Over Material Identifying Journalist's Source

The European Court of Human Rights (ECHR) has held that there was no infringement of a magazine publisher's Article 10 rights following the Dutch police's successful summons for the handing over of a CD-Rom which contained certain photographs that had been taken by a photographer during an illegal street event - the photographs had been taken with the promise of anonymity and it was argued that handing them over could compromise a journalist's source. The ECHR said that it "does not dispute that a compulsory handover of journalistic material may have a chilling effect on the exercise of journalistic freedom of expression". However, it said that it "does not follow per se that the authorities are in all such cases prevented from demanding such handover; whether this is the case will depend on the facts of the case. In particular, the domestic authorities are not prevented from balancing the conflicting interests served by prosecuting the crimes concerned against those served by the protection of journalistic privilege; relevant considerations will include the nature and seriousness of the crimes in question, the precise nature and content of the information demanded, the

existence of alternative possibilities to obtain the necessary information, and any restraints on the authorities' intention and use of the materials concerned". In this instance, it was satisfied that the information was relevant to the serious crimes that had been committed, and that there was no alternative means of identifying the perpetrators. See <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=848808&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> for the judgment.

Technology

Commission Reports on Consumer Usage of Internet

The European Commission has released figures showing that in 2008, 32% of individuals aged between 16 and 74 in the EU27 had bought or ordered goods or services for private use over the Internet at least once in the last 12 months. In Denmark, the UK, the Netherlands, Germany, Sweden and Finland that figure increased to over 50%; however Bulgaria (3%), Romania (4%), Lithuania (6%), Greece and Cyprus (both 9%) showed the lowest usage levels. The most popular types of goods and services purchased over the Internet were travel and holiday accommodation (14%), clothes and sports goods (13%), books and magazines (12%), household goods and tickets for events (both 11%), film and music (9%) and electronic equipment (8%). (EC Press Release Stat/09/43, 27 March 2009 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=STAT/09/43&format=HTML&aged=0&language=EN&guiLanguage=en> for details, including a breakdown by Member State).

Consultations & Reports

Ofcom Statement - Annual Plan 2009/10 - http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0910/annplan0910/annplan0910.pdf (details Ofcom's planned work programme for the 12 months from April 2009 to March 2010; the Annual Plan was published in conjunction with the programme of work for 2009/10 - for details about each separate project see http://www.ofcom.org.uk/about/accoun/reports_plans/annual_plan0910/projects/ - the budget is 4% lower in real terms than for 2008/9 and 21% lower in real terms than Ofcom's original budget set in 2004/5 and represents a cumulative saving of £117 million over five years)

Ofcom Research - Media Literacy - Digital Lifestyles - Hesitants, Resistors and Economisers - http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/digital_lifestyles/digital_lifestyles.pdf (report follows on from Ofcom's 2008 Media Literacy Audit research and considers in details three of the five identified types of users and the effect that their usage style will have on their ability to make full use of the opportunities presented by both traditional and new communications services)

PhonepayPlus 2009 - 10 Annual Plan and Budget - http://www.phonepayplus.org.uk/pdfs_consult/20090331-Business-Plan-Statement-2009_2010.pdf (annual business plan and budget for 2009/10 published following consultation details the organisation's focus on being a well resourced and active regulator of phone-paid services, but with an emphasis on cost savings and intelligence-led monitoring of high-risk services)