

This is our summary of some of the key legal developments across a range of sectors for the week of 1 June 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

PhonepayPlus Commissioned Research into 087 Numbers - Calls for Greater Transparency

PhonepayPlus have published a report they commissioned to look at the use of 0871 numbers ahead of their taking responsibility for them on 1 August 2009. PhonepayPlus says the research revealed a "lack of understanding around charges for 087 numbers amongst consumers, and supports the need for introduction of new regulation to boost consumer confidence". The report said that the 0871 market is estimated to be worth £85 million per annum, with total call volumes in excess of 700 million minutes but is on a downwards trajectory. It found that 40% of call revenue was from calls originating on mobile phones, with transport/tourism related calls making up 27% of total revenue and by ticket lines 14%. Banking lines received the highest volume of calls per 0871 user, reflecting the ongoing need to access the services. However, despite the high proportion of mobile call revenue, the mobile phone element accounted for only 13% of the total minutes - this reflected the "significant premium" for calling from a mobile line. The proportion of 0871 users reporting either to have issues with or to have actually made a complaint about an 0871 service in the past six months was very high (at 44%). The report said although there was considerable confusion around the cost of calling of 0871 number, it was not a major cause for complaint - the main cause for complaint being kept on hold for too long. See http://www.phonepayplus.org.uk/upload/PhonepayPlusAM0871based_phone_services.pdf for the report.

Review of CAP and BCAP Codes to Consider Effects of Findings on Alcohol Pricing and Promotion Study

The Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) have published an addendum to each of the CAP and BCAP Code Review consultations following a request by the Secretary of State for Culture, Media and Sport. The Secretary of State asked CAP and BCAP to take into account the recent findings of the Independent Review of the Effects of Alcohol Pricing and Promotion - see <http://www.cap.org.uk/NR/rdonlyres/985FA511-57FE-4C51-AFDE-009ADC7AE590/0/SchHARRCAPAddendum.pdf> for the CAP addenda, which states that CAP considers that the evidence contained in the Independent Review is not sufficiently strong as to suggest that the scenarios it outlines, such as a ban on alcohol advertising or tightening existing restrictions on the placement of alcohol advertisements, are merited; see also <http://www.cap.org.uk/NR/rdonlyres/B0922AE1-CA84-46D7-89DE-7FF1EA975B20/0/SchHARRBCAPAddendum.pdf> for the BCAP addenda, which makes the same point.

ECJ Rule Single Meeting Could be "Concerted Practice" for Anti-Competitive Behaviour

The ECJ has warned against the dangers of even a single meeting in the context of what constitutes "concerted practice" when it recently considered whether a single meeting was sufficient or whether concerted action on a regular basis over a long period was necessary. The question arose in the context of proceedings between T Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV and the Netherlands Competition Authority over fines that the Authority had imposed for breach of Article 81 EC and Article 6(1) of the law on competition. Representatives of the parties had met once and discussed, amongst other things, the reduction of standard dealer remunerations for postpaid subscriptions. Confidential information was also discussed between the participants at the meeting. The ECJ said it was "not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings" and that "In so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion". (*T-Mobile Netherlands BV & Ors v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, 4 June 2009 - see <http://curia.europa.eu/jurisp/cgi-bin/Form.pl?lang=EN&Submit=rechercher&numaff=C-8/08> for the judgment).

Commission Invites Views on Carphone Warehouse/Tiscali Proposed Acquisition

The European Commission has published notice in OJEC of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which The Carphone Warehouse, via its wholly owned UK subsidiary TalkTalk Group Limited, would acquire control of the whole of Tiscali UK Limited and its UK subsidiaries by way of a share purchase. Carphone Warehouse sells mobile handsets and mobile connections in the UK and eight other European countries and also supplies broadband and narrowband Internet access, and fixed-line and mobile telecommunications services in the UK. Tiscali UK is a fully owned subsidiary of the Italian undertaking Tiscali SpA, and provides broadband and narrowband Internet access, fixed-line telecommunications services and IPTV services in the UK. The Commission said that on a preliminary examination it found that the notified transaction could fall within the scope of Regulation (EC) No 139/2004 however, it reserved the final decision on this point and invited views. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:122:0026:0026:EN:PDF> for the OJEC notice.

Broadcasting

The Regulator's Role in Sustaining Competition and Promoting Investment

Ofcom's Chief Executive has given a speech at the recent Bank of America Merrill Lynch Global TMT Conference on the economics of the broadcasting industry, the implications for investment in content and infrastructure and Ofcom's changing approach to regulation. The future of free-to-air broadcasting and pay-TV were considered in the context of a

changing regulatory and economic environment and the point was made that the content of the future, "on-demand, multi-streamed, high-definition and feature-rich", will require an infrastructure backbone capable of supporting significantly higher speeds than at present. Ofcom's main focus over the past six years has been to promote competition as the most effective means of driving innovation in the UK's communications markets and it was made clear that this focus would no longer be sufficient. Of interest also were the comments about the potential role Ofcom might have in the creation of a new rights and distribution regime, which was identified as an important focus of the Government's Digital Britain project (and comments in the press have indicated that Communications Minister intends to give Ofcom "powers to apply technical measures"). Ofcom's current role in facilitating the Memorandum of Understanding between content rights holders and ISPs over the last six months was referred to and the soon to be published Final Report is being anticipated as a source of clear guidance for all the parties. (*Ofcom Speeches and Presentations, 2 June 2009* - see <http://www.ofcom.org.uk/media/speeches/2009/june/sustaining> for the speech and <http://www.ofcom.org.uk/media/speeches/2009/june/slides.pdf> for the accompanying presentation).

Corporate

Government Response to Consultation on Application of Companies Act 2006 to LLPs

The Government's response to the consultation on the draft regulations for applying the remaining provisions of the Companies Act 2006 to limited liability partnerships (LLPs) has been published. It suggested a broad approach, which is to apply provisions that mirror those of the Companies Act 1985 already applied to LLPs as well as some provisions that are advantageous to LLPs. The response follows the publication of the revised draft of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (and see the Need to Know of 25 May 2009 for details). See <http://www.berr.gov.uk/files/file51585.pdf> for details.

FRC Update Directors' Guidance on Going Concern and Liquidity Risks

The Financial Reporting Council (FRC) has published its Exposure Draft guidance for directors on going concerns and liquidity risks. The FRC last published guidance on this issue in 1994. However, it said "recent events have resulted in requests for the FRC to publish guidance that could be applied by directors across the full spectrum of UK companies. This Exposure Draft seeks to achieve this objective and addresses the issue of going concern for companies of all sizes including smaller companies that adopt the Financial Reporting Standard for Smaller Entities". The Guidance set out in the Exposure Draft will remain in place for a "number of years". The FRC said it had been developed to take account of a range of economic environments in which a going concern assessment might be made and that it incorporated the lessons that have been learnt during the recent period of economic difficulties. See [http://www.frc.org.uk/images/uploaded/documents/Exposure Draft Going Concern and Liquidity Risk \(May 2009\).pdf](http://www.frc.org.uk/images/uploaded/documents/Exposure_Draft_Going_Concern_and_Liquidity_Risk_(May_2009).pdf) for details.

Draft Legislation - Legislative Reform (Limited Partnerships) Order 2009

The draft Legislative Reform (Limited Partnerships) Order 2009 has been published. The draft Order applies only to limited partnerships and clarifies the process for registration of limited partnerships by the registrar of companies and provides that the certificate of registration will be conclusive evidence of the existence and registration of a limited partnership, which will come into existence on the date of registration. It also requires new limited partnerships to include in their name an indication of their status by including "Limited Partnership" or "LP" or the equivalent. See http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsj_9780111480014_en.pdf for details.

Film & TV

Film Finance and Availability of Tax Relief - Appeal Against Special Commissioners' Decisions

The High Court has heard two appeals, brought by the Commissioners for Her Majesty's Revenue and Customs (HMRC) against two decisions of Special Commissioners relating to film finance and the availability of tax relief, in the context of an assessment of the meaning and effect of complex documentation entered into for the purposes of the overall transaction in question and the meaning and effect of applicable, or potentially applicable, statutory provisions and whether HMRC had rightly disallowed claims to make deductions under section 42 of the Finance (No 2) Act 1992 and section 48 of the Finance (No 2) Act 1997. Micro-Fusion had entered into a distribution and commissioning agreement with a production company under which it transferred the master negative of the film and the distribution and IP rights to enable the exploitation of a film for 21 years. The Commissioners disallowed Micro-Fusion's claim. The Special Commissioners allowed the appeal, holding that Micro-Fusion was carrying on a trade or business which consisted of or included the exploitation of films for the purposes of section 42(1) of the 1992 Act and that the film had not been sold and did not constitute trading stock within section 100(2) of the Income and Corporation Taxes Act 1988; leaving open a jurisdictional question as to whether the appellant commissioners could rely on section 60 of the Finance Act 2005, the Special Commissioners found that it did not apply. The issue in the appeal in the case of Halcyon was whether, by reason of section 101 of the Finance Act 2002, which restricted relief for successive acquisitions of the same film, Halcyon was precluded not only from claiming relief under section 48 but also from claiming relief under section 42. The court held

that contrary to the view of the Special Commissioners, "the exploitation of films", for the purposes of section 42, could not be taken as extending to dealings solely with IP rights in a film and the turning of them to account. The exploitation of a film contemplated by section 42(1) of the 1992 Act was designed to extend to a master negative. That accorded both with the language of the 1992 Act and with the description of "film" in the Films Act 1985. Therefore, the Special Commissioners were wrong to find that Micro-Fusion was capable of carrying on a trade or business that consisted of the exploitation of the film even if it held no interest or right in the master negative. An asset sold in a one-off transaction could constitute "trading stock" and that was the position here. On the Halcyon question the court said section 101 did not, where its terms were otherwise fulfilled, have the effect of precluding the taxpayer from reverting to reliance on the (less generous) relief provisions of section 42 of the 1992 Act taken on their own. The Micro-Fusion appeal was allowed and the Halcyon appeal was dismissed. (*HMRC v Micro-Fusion 2004-1 LLP; HMRC v Halcyon Films LLP [2009] EWHC 1082 (Ch)* - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1082.html> for the judgment).

Publishing

Statement in Open Court - False Allegations in Article About Claimant's Involvement in Political Smear Campaign

The claimant, a Cabinet Office Minister, brought libel proceedings against the defendant, the publisher of the Mail on Sunday, following the publication of an article which alleged that he had been involved in the leaking of certain emails which were proposing a course of action (in the form of a smear campaign) against Conservative MPs and not only had failed to act to prevent their release but had actively encouraged the proposed activities. The claimant denied any involvement and defendant apologised, undertook not to repeat the allegations and agreed to pay a substantial sum in damages, as well as legal costs. (*Watson v Associated Newspapers Limited, Unreported, QBD, 20 May 2009*).

Statement in Open Court - Erroneous Allegations on Website Based on Third Party Website

The claimants brought an action against the defendant, a tax consultant who wrote articles for his own website, following the publication of an article on the website which questioned whether the claimants were engaged in the provision of banking services for the purposes of tax evasion and money laundering and criminal activity. The claimants denied any such involvement - the defendant said that he had based the article on an article sourced from a third party but had not verified any of the claims. The third party website had not in fact made any of the claims. The defendant accepted that the allegations were false, apologised and removed the articles and undertook not to repeat the claims. He made a substantial donation to charity and paid the claimants' legal costs. (*Lord Ashcroft & Ors V Murphy, Unreported, QBD, 22 May 2009*).

PCC Adjudicate on Inaccuracies in Published Articles

A woman complained to the PCC that two articles published in the Sunday World were inaccurate in breach of Clause 1 of the Editors' Code of Practice. The articles had stated that she was the daughter of a British army general with links to links to the intelligence services and concerned a relationship the complainant had had with a Sinn Fein MLA and the effect of the relationship on her partner's marriage. The paper stood by the accuracy of the story however the PCC upheld the complaint - it said although the complainant had not denied the relationship, she had denied two significant elements in the article: the claim that her partner had left his wife for her, and the assertion that her father had been a general in the British army who worked in the intelligence services. Neither of these points had been satisfactorily corroborated, and the paper had not offered to publish a correction. Her complaint about a breach of Clause 3 (privacy) was not upheld as the articles referred to a relationship that was already public but did not contain any private details. See <http://www.pcc.org.uk/cases/adjudicated.html?article=NTc0Nw==?oxid=dddbea61d8a1ec1edc1d129fe2a8571c> for the adjudication.

ECHR Ruling on Interference with Article 10 Rights of Newspaper

The ECHR has adjudicated on an application against the Republic of Austria by the owner of a daily newspaper, *Der Standard*. The paper had published an article about the relationship of the "departing presidential couple" which suggested they were to separate. The couple brought proceedings against the applicant, claiming that the article reported on their marriage and family life and thus interfered with the strictly personal sphere of their lives. The Vienna Regional Criminal Court ordered the applicant to pay the couple compensation and the applicant appealed. The Court of Appeal upheld the Regional Court's ruling and said the Regional Court had rightly found that the publication at issue was not directly related to public life. The applicant complained that its Article 10 rights had been infringed. The ECHR said "while reporting on true facts about a politician's or other public person's private life may be admissible in certain circumstances, even persons known to the public have a legitimate expectation of protection of and respect for their private life ... However, even public figures may legitimately expect to be protected against the propagation of unfounded rumours relating to intimate aspects of their private life". The ECHR (by a 5-2 majority) ruled that the domestic courts did not transgress their margin of appreciation when interfering with the applicant company's right to freedom of expression and that there had been no violation of the applicant's Article 10 rights. (*Standard Verlags GmbH v Austria (No 2), ECHR Application no 21277/05, 4 June 2009* - see <http://www.bailii.org/eu/cases/ECHR/2009/853.html> for the judgment).

Select Committee Investigation on Press Standards, Privacy and Libel Focus on Legal Issues

The evidence of Sir Anthony Clarke, Master of the Rolls, Lord Justice Sir Rupert Jackson, Court of Appeal Judge and the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor before the House of Commons Select Committee as part of its investigation into press standards, privacy and libel has just been published. The Committee's focus this time was on "the making and implementation of the law". This brought about discussion of topical issues such as the use of CFAs and their "chilling" effect, success fees, ATE insurance, law firms touting for libel and defamation business, cost capping, forum shopping, balancing Articles 8 and 10, the use of injunctions, the dual nature of the UK press, and the forthcoming publication of a consultation on defamation and the Internet, which will apparently deal with the liability of ISPs. See <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomeds/uc275-x/uc27502.htm> for a transcript of the evidence. (The possibility of a consultation on defamation and the Internet was raised after the ECHR ruling in *The Times Newspapers Limited (Nos 1 & 2)* - see the Need to Know of 9 March 2009 for details - according to the Secretary of State for Justice, this is due to be published before the summer recess).

Sport

Premier League Debt Level Concerns?

Concerns about the level of debt being carried by the Premier League have been the subject of much debate recently however a recent article in The Guardian is sure to generate further debate. The article states "England's 20 Premier League clubs owe a total of £3.1 billion in bank overdrafts, loans and other borrowings, according to the latest published financial information. The accounts for the clubs, mostly documenting the year to May, June or July 2008, show that the FA Chairman, Lord Triesman, significantly underestimated football's indebtedness when he cautioned last October that debts in the sport as a whole, including the Football League and the FA itself, were at £3 billion". It further says "the 20 clubs' accounts show that despite booming incomes, which include the first season of a record £2.7 billion TV deal which runs from 2007 - 10, Premier League clubs increasingly rely on subsidies from the billionaires who now mostly own the clubs". (*The Guardian*, 2 June 2009; at the same time however reports indicate that Manchester United (in debt by £699 million, has signed the highest ever shirt sponsorship deal for £80 million (£20 million per annum), with Chicago-based financial services company, Aon Corporation. Their current deal of £14 million with AIG expires in June next year - see *The Times*, 3 June 2009 (Aon Limited, the UK arm was fined £5.25 million by the FSA earlier in the year after being reported to SOCA for making 66 suspicious payments to win or retain business from overseas clients, particularly in high risk jurisdictions such as Bahrain, Bangladesh, Bulgaria, Burma, Indonesia and Vietnam amounting to \$2.5 million and €3.4 million - see <http://www.fsa.gov.uk/pubs/final/aon.pdf> for the FSA Final Notice - the FSA described the activities as having been "particularly serious" as the involvement of UK financial institutions in corrupt or potentially corrupt practices overseas undermines the integrity of the UK financial services sector and one of the largest insurance and Aon Limited was one of the largest reinsurance brokerage and risk management firms in the UK. The FSA said it "has a leading competitive position in the market and the firm's practices set an example which is seen by other market practitioners and customers").

Consultations & Reports

The Office of the Adjudicator (CRR) - Annual Report 2009 - <http://www.adjudicator-crr.org.uk/pr200904.pdf> (annual report to Ofcom and the OFT setting out the Adjudicator's dispute determinations, views about the operation of the Undertakings, the CRR scheme and CRR rules and any recommendations, views about the performance of Carlton and Granada (ITV plc) in complying with the Undertakings)

Ofcom Statement - Television Channels Required to Provide Television Access Services in 2010 - http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/tv_access_statement10/tv_access_statement.pdf (lists the broadcasters that will be required to provide Television Access Services (in the form of subtitling, sign language and audio description) in 2010, as required by sections 303 to 305 of the Communications Act 2003)

European Regulators Group Consultation - International Roaming Regulation - ERG Guidelines (Draft) - http://www.erg.eu.int/doc/publications/erg_09_24_draft_roaming_guidelines_public_consultation_final_090602.pdf (consultation inviting comment on the working draft of revised ERG Guidelines, which have been revised to take account of amendments to the EC Roaming Regulation that are expected to come into force on 1 July 2009 - the consultation deals with a range of retail issues such as transfers between tariffs, bundling regulated and unregulated tariffs, information-provision obligations, transparency measures and new provisions for limiting data-roaming consumption)