

This is our summary of some of the key legal developments across a range of sectors for the week of 22 February 2010. 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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Practical Guidelines for Producers on Data Protection and Security

Pact and the public service broadcasters, BBC, ITV, Five and Channel 4 have published details about a new set of data security guidelines which have been agreed for use by the production industry. In announcing the guidelines Pact said they were "designed to help producers comply with their obligations under the Data Protection Act, which provides that production companies are responsible for ensuring they manage and protect personal data properly and in accordance with legislation. They cover all aspects of data security including collection of and access to personal and sensitive data, policies, exemptions, subject access requests and action to take in the event of a loss of data". See http://www.bbc.co.uk/commissioning/tv/network/pdf/dataprotection_producer.pdf for details.

MoJ Publishes Guidance on Main Provisions of Rome I

The Ministry of Justice (MoJ) has published guidance on main provisions of the law applicable to contractual obligations (Rome I), which enables Member States' national courts within the EU to apply a single set of rules to select the national laws that are appropriate to determine international cases that have a cross-border dimension. The MoJ said that the guidance is intended to provide a brief summary of the most important provisions in the Regulation, which itself is "a substantial and complex instrument in a technical area of law". The key provisions identified by the MoJ are Article 3 - Freedom to choose a particular law; Article 4 - Applicable law in the absence of choice; Article 5 - Contracts of carriage; Article 6 - Consumer contracts; Article 7 - Insurance contracts; Article 9 - Overriding mandatory provisions; Article 14 - Voluntary assignment and contractual subrogation; Article 19 - Habitual residence (which the MoJ described as being "central" to the operation of the Regulation); Article 22 - States with more than one legal system (England and Wales, Scotland, and Northern Ireland); Article 27 - the Review clause (which commits the European Commission to undertake a number of reviews and, if appropriate, produce proposals to amend Rome I); and Article 28 - Application in time (to contracts concluded after the date the Regulation came into operation on 17 December 2009). See <http://www.justice.gov.uk/about/docs/guidance-law-contractual-obligations-romei.pdf> for details.

EDPS' Concerns Over ACTA's Compatibility with EU Data Protection Regime

The European Data Protection Supervisor (EDPS) has adopted an Opinion on current negotiations by the European Union, which are aimed at adopting a new multilateral agreement to strengthen the enforcement of intellectual property rights and to combat counterfeiting and piracy (Anti-Counterfeiting Trade Agreement - ACTA). EDPS has warned that the agreement is potentially incompatible with the EU data protection regime. According to the European Commission, ACTA will create a legal framework to fight piracy in the digital environment. This framework is intended to establish the conditions under which ISPs and other on-line intermediaries may be held liable as a result of infringing copyright material running through their facilities. The framework may also provide for measures and remedies to be imposed upon Internet users as a result of uploading or downloading infringing copyright material. The EDPS said there are "concerns as regards a potential incompatibility between envisaged measures and data protection requirements. This would apply in particular to the legal framework that would be put in place to fight piracy on the Internet and which could include large scale monitoring of Internet users and the imposition of obligations on Internet Services Providers to adopt 'three strikes Internet disconnection policies' - also referred to as 'graduated response' schemes" (which typically involve disconnection of Internet access after prior warnings for illegal sharing or downloading of copyright protected material). The EDPS called on the Commission to "conclude the agreement, to strike a right balance between demands for the protection of intellectual property rights and the privacy and data protection rights of individuals" and warned that "any agreement reached by the European Union on ACTA must comply with the legal obligations imposed on the EU with respect to privacy and data protection law, as notably set forth in Directive 95/46/EC5, in Directive 2002/58/EC6 and in the jurisprudence of the European Court of Human Rights and of the Court of Justice". See http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf for the EDPS' Opinion.

Competition Commission Review Recommends Changes to Remedies in Market Investigations

The Competition Commission has published its recommendations, which resulted from the review of its approach to remedies in market investigations that was started late last year. The review looked at the way in which the Commission assessed the effectiveness, timeliness and proportionality of remedies in market investigations and how the its reasoning was expressed in its reports. See http://www.competition-commission.org.uk/our_role/analysis/remedies_review_prop_cc_action.pdf for a summary of the recommendations, which according to the Commission, will be implemented and tested in its current review of the UK local bus market.

Betting & Gaming

Norwegian Government Legislates to Prohibit Transfer of Funds from Unauthorised Online Gaming Operators

The Norwegian Government has approved legislation prohibiting credit card companies and online payment processors from transferring funds between Norwegian citizens and online gaming operators. The new law requires payment transactors to verify any online casino payments are processed only for operators licensed in Norway. Under the Act if gambling is conducted without a Norwegian license will amount to "accessory involvement" in unlawful gambling and any financial institution that is found participating in the transfer of payments from players in Norway will be treated as having committed an offence. The passing of the Payment Act has already been described as raising the prospect of legal action against the ban being brought by the European Free Trade Association and according to reports, the new legislation will go into effect on 1 June 2010, which coincidentally the same day America's Unlawful Internet Gambling Enforcement Act (UIGEA) payment ban is also scheduled to be implemented.

Advocate Generals' Opinions on Compatibility of Member States Gaming Legislation with Community Laws

The ECJ has published two Advocate Generals' Opinions on the compatibility of national legislation from Austria and Sweden relating to their gaming markets with Commission legislation. The Austrian legislation established a "State monopoly" over games of chance and provided that the right to organise and operate games of chance is in principle reserved to the State - a German national operated two gaming establishments in Austria without having previously sought a licence to organise games of chance from the Austrian authorities and without being the holder of a lawful authorisation issued by the competent authorities of another Member State and was found guilty of unlawfully organising games of chance in Austrian territory in order to obtain a pecuniary advantage. The Landesgericht Linz (Regional Court, Linz, Austria), before which an appeal had been brought, referred three questions to the ECJ for a preliminary ruling on the compatibility of the Austrian legislation on games of chance with freedom of establishment and freedom to provide services. According to Advocate General Mazák, "a Member State which reserves the operation of casinos exclusively to companies which have their seat in its territory is acting in a way which is incompatible with European Union Law". Furthermore, he considered that in order to assess the consistency of a national policy of restricting games of chance, it was necessary to make an analysis which takes account only of the gaming sector concerned - see <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-02/cp100010en.pdf> for a summary of the ruling in *Staatsanwaltschaft Linz v Ernst Engelmann*, Case C-64/08 -. In the second Opinion, which concerned Swedish legislation which prohibited the promotion of gambling over the Internet by companies established in other Member States, Advocate General Bot said the legislation in question complied with Community law however, Community law precluded provisions of national law which penalised the promotion of lotteries organised in Sweden without a licence differently from lotteries organised outside Sweden. This case arose as a result of the actions of two editors-in-chief and publishers of the Expressen and Aftonbladet newspapers. Between November 2003 and August 2004, they had published on the sports pages of their newspapers, aimed at the Swedish public, advertisements for lotteries offered on the Internet sites of the companies Expekt, Unibet, Ladbrokes and Centrebet, established in Malta and the United Kingdom. On the basis of those facts, they were found to have infringed Swedish law on betting and were each sentenced to 50 daily fines of SEK 1,000 (approximately €100). Both subsequently appealed their convictions. The Advocate General said the prohibition on promoting Internet gaming offered by companies established in other Member States could be regarded as being justified by the objective of the fight against fraud and criminality. See <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-02/cp100011en.pdf> for a summary of the ruling in Joined Cases C-447/08 and C-448/08, *Otto Sjöberg v Åklagaren* and *Anders Gerdin v Åklagaren*. Neither Opinion is available in English at this stage. The ECJ has yet to rule in both cases and the Advocate General's Opinion is persuasive but not binding on the court.

French Senate Approves Draft Online Gaming Regulations

The French Senate has voted to approve the draft Online Gaming Regulations, passing the draft bill which had been the subject of considerable debate and amendment by 180 votes in favour and 139 against. The second reading by the National Assembly has been scheduled for the end of March and the Budget Minister Eric Woerth has said that the bill should come into effect by 1 June 2010. However, the bill will still need to be approved by the European Union, and France's Conseil d'Etat (Supreme Court) and Conseil Constitutionnel (Constitutional Council).

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.3 (children must be protected by appropriate scheduling), 1.14 (the most offensive language must not be broadcast pre-watershed), 1.24 (adult sex material restricted to overnight services with mandatory PIN protection), 2.1 (generally accepted standards), 2.3 (material which may cause offence must be justified by context), 9.1 (news and current affairs may not be sponsored) and 9.13 (sponsorship must be clearly separate from advertising) of the Broadcasting Code. Ofcom also recorded a breach of Licence Condition 11 (retention and production of recordings). A number of the rules of the Code had been breached by one licensee on numerous occasions and Ofcom published a note warning them about repeat "serious breaches", which may result in statutory sanctions. Ofcom also reminded broadcasters that they offer only general guidance on the Code in advance of programme transmission and that any guidance given will not affect any subsequent exercise of its responsibilities. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb152/Issue152.pdf for details.

New Legislation - Audiovisual Media Services Regulations

The Audiovisual Media Services Regulations 2010, SI 2010/419 come into force on 18 March 2010. The Regulations complete the arrangements for the regulatory system for regulating on-demand programme services and ensuring that they adhere to the standards set out in the AVMS Directive by inserting into the Communications Act 2003 and the Wireless Telegraphy Act 2006 provisions which amend and supplement the provisions previously inserted by the earlier Audiovisual Media Regulations 2009, SI 2009/2979. The Regulations require businesses to notify the regulatory authorities if they are providing, or intend to provide, an on-demand programme service; they allow the regulatory authorities to levy fees on providers of on-demand programme services in order to cover the cost of regulation; they require providers of on-demand programme services to retain copies of programmes for at least 42 days; and they enable Ofcom to require a provider of a satellite uplink service to cease or suspend uplinking of an on-demand programme service, where such a service has not been notified to the regulatory authorities. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100419_en.pdf for details.

Corporate

Whether Director Appointed Under Article 95 of 1948 Table A Remained Director Despite No Re-election

A question about the time when a director who had been appointed under Article 95 of the 1948 version of Table A as incorporated, ceased to be a director has come before the court. Article 95 provides for a director so appointed to "hold office only until the next following annual general meeting" and then to be eligible for re-election. It was common ground between the parties that the first defendant's had been the sole director of the company before 18 December 2008. The claimants contended that his appointment as a director came to an end when an annual general meeting of the company was held on that date. In contrast, the first defendant argued that his son remained a director of the company. The company's affairs had been conducted "very informally" with no more than "a few" formal board meetings being held. The court held, on the facts, the director in question had not been appointed informally by the shareholders and the principle in *Re Duomatic* applied - further, Article 95 had not been modified and there was no evidence that anyone assumed the company's articles to be in terms different from their actual terms. Further, there was no evidence that anyone intended to dispense with the provision in article 95 of Table A to the effect that an appointment under that article should continue, in the first instance, only until the next annual general meeting. The court said, "In short, this is a case where the articles were not always followed, not one where they were modified or disapplied". Accordingly the court ruled that the first director's son had held office after he was appointed until the next general meeting of the company. Since he was not re-elected at that general meeting, he had ceased to be a director of the company, and the company now had no directors. (*Rolfe & Anor v Rolfe & Anor* [2010] EWHC 244 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/244.html> for the judgment).

OECD Report on Emerging Good Practices on Corporate Governance and the Financial Crisis

The OECD has published a report by its Steering Group on Corporate Governance, which sets out the Group's conclusions and emerging good practices relating to corporate governance and the financial crisis. The report is the third in a series by the Group - the first two reports found that "corporate governance weaknesses in remuneration, risk management, board practices and the exercise of shareholder rights had played an important role in the development of the financial crisis and that such weaknesses extended to companies more generally". The Group found that the OECD Principles of Corporate Governance provided a good basis to adequately address the key concerns that had been raised by the financial crisis and that there was no urgent need for them to be revised however this third report provides a set of comments and information on emerging good practices relating to five key areas - improving the corporate governance framework, including procedures to encourage more effective implementation by national authorities; governance of remuneration and incentives; governance of risk management; improving board practices, including board composition, independence and competence; and the exercise of shareholder rights, in particular by institutional investors. See <http://www.oecd.org/dataoecd/53/62/44679170.pdf> for details.

Publishing

Culture, Media and Sport Committee's Report on Press Standards, Privacy and Libel

The House of Commons Culture, Media and Sport Committee have published their much-anticipated report on press standards, privacy and libel. The Committee said the report was "primarily prompted by the persistent libelling by the UK press of the McCann family and others" and the limited intervention of the PCC and its failure to launch an inquiry into the industry's failings in the case and concerns that the operation of libel laws in England and Wales and the impact of costs were stifling press freedom in the UK. In addition, it also looked at the balance between personal privacy and press freedom. The report is wide ranging in its scope and recommendations - it examined in detail issues relating to privacy and breach of confidence, including the operation of the Human Rights Act, which incorporates the European Convention on Human Rights in UK law, the operation of mandatory pre-notification (which it ruled out) and the use of super-injunctions in the light of recent events; the operation of libel law in England and Wales and its impact on press reporting; the costs of mounting and defending libel actions, and the "chilling effect" this may have on press freedom; press standards and the level of public confidence in the press (on the basis of two specific examples - Madeleine McCann's disappearance; and the suicides in and around Bridgend in 2008) and the impact of recent revelations about the practices of phone-hacking and blagging - in this context the issue of self-regulation came under intense scrutiny and is the subject of severe and damning criticism; and finally the future viability of self-regulation of the press. See <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf> for the Report, which the Committee described as being "the product of the longest, most complex and wide-ranging inquiry" it has undertaken. The Committee also made the point that "Each time ... we sought to draw this enquiry to a close, fresh developments occurred which warranted examination and inclusion" (and often not in a good way). The report has already generated significant comment and is likely to continue to do so, particularly given some of its criticisms and recommendations which called for the review and restructuring of overhaul of libel laws, press standards and the PCC's powers.

PCC Adjudicates on Complaint About Level of Detail in Suicide Report

The Press Complaints Commission (PCC) upheld a complaint by the mother of the deceased against The News (Portsmouth) for publishing an article containing excessive detail about the way that the woman's daughter had taken her own life, in breach of Clause 5 (Intrusion into grief or shock) of the Editors' Code of Practice. The paper had initially defended the level of detail included although the editor later agreed that the inclusion of the specific number of pills, which were missing from the daughter's medication, was "excessive". The editor agreed to amend the online version of the story and circulated information to all staff about the requirements of Clause 5 (Intrusion into grief or shock) of the Code. The PCC said that newspapers were "quite entitled to report inquests but when doing so they must take account of the requirements of the Editors' Code" but that in this case, the article "contained the name of the anti-depressant, the number of pills missing from the packet and the post-mortem result showing the level of drugs in the deceased's system". Taken together this was sufficient information to spell out to readers the precise method of death. The Commission therefore concluded that this level of detail was excessive and had led to an "avoidable" breach of Clause 5 (ii). The PCC Director said the adjudication "builds on the Commission's case law in this area and sets out the high standards the PCC expects of editors when reporting such a sensitive subject". (*A Woman v The News (Portsmouth), Report 80 Adjudication issued 28/01/10 - see <http://www.pcc.org.uk/news/index.html?article=NjI0MQ==> for the adjudication*).

Article - Tax and the International Sportsman (or Sportswoman)

The latest Tax Journal looks at the issue of the current UK tax regime and considers whether it makes competing in UK events unattractive to non-resident sportspeople. The article notes that HMRC is seeking to tax sportspeople on both their UK earnings and a proportion of their global endorsement income and that following their success in the Agassi case (and see *Agassi v Robinson (Inspector of Taxes)* [2006] UKHL 23 - <http://www.bailii.org/uk/cases/UKHL/2006/23.html> for the judgment), they are taking an increasingly hard line in calculating the attribution of this income to the UK. It notes that only the US seeks to tax sportspeople on a proportion of their global endorsement income, and suggests that the move to a 50% top rate of income tax will make competing in the UK undesirable for many top sportspeople. (*"Taxation of Sportspeople in the UK"* Tax Journal 2010, Issue 1017, 14 - the article is available via LexisNexis).

Technology**Committee Report on Broadband Criticises Government Focus on NGA and Levy Proposal**

The House of Commons Business, Innovation and Skills Committee have published their report on broadband in the context of the Government's reviewed the proposals in the Digital Britain final report in relation to broadband access and investment. The Committee said they "strongly support the Government's focus on the digital economy" having noted that "the United Kingdom's competitiveness is, to a significant effect, dependent on its telecommunications network" and also said they agreed with the Government's proposals for a Universal Service Commitment of 2Mbps. However, the Committee went on to say "the Government's proposals to intervene more widely in the Next Generation Access markets are unwise at this stage. Early Government intervention runs a significant risk of distorting the market and will not allow time for technological solutions to extend the market's reach across the country. Furthermore, there is little evidence to suggest a pent-up demand for this enhanced service with consumers currently unwilling to pay the premium for such services". The Committee said they also disagreed with the Government over its proposal to fund its intervention in the Next Generation Access market with the proceeds of a 50 pence levy on fixed telecommunications lines and said such a levy would be both "regressive and poorly targeted". They said, "In times of great stringency in public expenditure, digital inclusion not Next Generation Access should be the priority for expenditure. The market can be helped to deliver greater levels of high speed access without significant increases in public expenditure". See <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmbis/72/72.pdf> for the Report.

Italian Court Convicts Google Executives for Privacy Breach Over Internet Video Posting

A court in Milan has convicted three of the four Google executives of "violating privacy" by allowing a video of an Italian schoolboy being physically and verbally abused to be posted online. The complaint was brought by an advocacy group for people with Down's syndrome, following the hosting of the video clip in 2006 - the clip was eventually removed however the prosecution argued that Google had been too slow in responding to complaints. Google Italy said it removed the footage "as soon as it was notified" and had co-operated fully with the investigation which subsequently followed. The court sentenced the three Google executives, its senior vice president and chief legal officer, its former chief financial officer and its global privacy counsel, each to a six-month suspended sentence but acquitted them of defamation charges. Google's senior product marketing manager was acquitted. The prosecution had accepted that none of the executives were involved in either the production of the video or its uploading, but said that the video should have been taken down immediately - according to the prosecution, before being removed, the video was listed in Google's "funniest videos" category for almost two months, reaching 5,500 views and that there had been posted requests for it to be removed. Google has said it would appeal the conviction, which it said, "poses a crucial question for the freedom on which the Internet is built". The US Embassy in Italy said "While we recognise the reprehensible nature of the material, we disagree that Internet service providers are responsible prior to posting for the content uploaded by users".

Commission Statement on Complaints About Google Search Rankings

The European Commission has issued a statement confirming that it has received complaints against Google from three companies - UK price comparison site, Foundem, French legal search engine called ejustice.fr, and Microsoft's Ciao! from Bing. The complaints related to the rankings that the companies' ads were given by Google, which the companies said were unfavourable. The Commission said it has not opened a formal investigation for the time being but that it has informed Google about the complaints and asked for comment - Google has said it will be "providing feedback and additional information on these complaints" and that they were "confident that our business operates in the interests of users and partners, as well as in line with European competition law". (EC Press Release Memo/10/47, 24 February 2010).

Consultations & Reports

Ofcom Document - Procedures for Determination of Disputes under Ofcom's Rules on Party Political and Referendum Broadcasts - <http://www.ofcom.org.uk/tv/ifi/guidance/disputes/disputes.pdf> (Ofcom's revised rules on party political and referendum broadcasts and on the determination of disputes under those rules, together with a statement on the responses to the consultation which took place in September 2009).