

*This is our summary of some of the key legal developments across a range of sectors for the week of 3 May 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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## General

### Commission Tenders for Creation of Financial Market for IPR in Europe

The European Commission is consulting on proposals for creating a financial market for intellectual property rights (IPR) in Europe. The Commission said "although managing and acquiring IP is perceived as playing a pivotal role in global business strategy, the inefficiencies to IP licensing have become more conspicuous as the central importance of IP to the economic growth has become more broadly recognised. The challenge today is to raise awareness, understanding and willingness to develop the financial system and products that will capture the value of this new class asset" and noted that "The creation of a financial market for IP at European level to contribute to the emergence of a single market to promote the circulation of knowledge and innovation avoiding the fragmentation between national markets ... is therefore an option that needs to be assessed". The Commission is inviting tenders for the creation of such a market - it is asking interested parties to outline how they would provide opportunities for inventors and users to meet and determine the conditions of trade in a transparent way; provide parties involved in the scheme with an opportunity to hedge against a risk; and detail how they would give the opportunity to invest in IP financial assets (eg, by using specific indexes to conduct such operations). The project is linked to the launch of the research and innovation Action Plan in 2010, which the Commission said, "underlines the key role of IPR to foster innovation". See [http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc\\_id=5754&userservice\\_id=1&request.id=0](http://ec.europa.eu/enterprise/newsroom/cf/document.cfm?action=display&doc_id=5754&userservice_id=1&request.id=0) for the Tender Specification details.

### European Parliament's Resolution on Progress Towards Digital Agenda Europe: 2010.eu Targets

The European Parliament has adopted a resolution on progress implementing the new Digital Agenda Europe: 2010.eu priorities of having 50% of EU households connected to very high-speed networks by 2015 and 100% by 2020 and ensuring all primary and secondary schools have reliable, quality Internet connections by 2013 and very high-speed Internet connections by 2015. Parliament has urged the Commission "to come forward with a proposal for an ambitious digital agenda and action plan enabling Europe to progress towards an open and prosperous digital society". In addition, the resolution said a clear legal framework laying down the rights and duties of citizens while protecting personal data is essential, as is preserving "a fair balance between the right-holders' rights and the general public's access to content and knowledge". MEPs also said digital security was important and that minors and young adults needed special protection in the area. (*European Parliament Press Release, 5 May 2010 - see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2010-0066+0+DOC+PDF+VO//EN> for Parliament's Report on the new Digital Agenda for Europe: 2010.eu*).

## Broadcasting

### Compromise Reached in Pay TV Market Appeal

BSkyB has announced that it has reached an agreement with Ofcom as to the terms of an order which they had placed before Competition Appeal Tribunal in order to resolve Sky's application for interim relief of 16 April 2010, seeking suspension of the outcome of Ofcom's Pay TV Market investigation (and see the Need to Know of 26 April 2010 for details). According to BSkyB, the terms of the proposed order result in the suspension of certain aspects of Ofcom's decision pending the outcome of BSkyB's substantive appeal - the effect of the proposed order will be that Ofcom's wholesale must offer (WMO) obligation will initially apply only in respect of BT, Top-up TV and Virgin Media on DTT and cable and each of BT, Top-up TV and Virgin Media would effectively pay the rate card price for Sky Sports 1 and/or Sky Sports 2, with the difference between that and the relevant WMO price paid into escrow. At the conclusion of the appeal, the Tribunal will determine the distribution of the monies held in escrow. Commentators have said that the deal will give viewers much greater choice of channels for the next Premier League season - BSkyB said the deal was a "sensible middle ground" and that it had included some "significant concessions compared to Ofcom's original decision". BSkyB also said however that it would continue to prepare its appeal, which must be lodged before June.

## Commission Adopts Decision on Conditions of Use of 790 - 862 MHz Frequency Band

The European Commission has announced that it has adopted a Decision establishing harmonised technical rules for Member States on the allocation of radio frequencies in the 800 MHz band that contribute to the deployment of high-speed wireless internet services by avoiding harmful interference. The Commission noted that if Member States decide to change the existing frequency allocation for broadcasting in those 800 MHz frequencies which are being freed up as part of the "digital dividend" resulting from the switchover from analogue to digital television broadcasting, they must now apply the harmonised technical rules laid down by the Decision to make these frequencies available to wireless broadband applications. The Decision states that its aim is "to harmonise the technical conditions for the availability and efficient use of the 790 - 862 MHz band (800 MHz band) for terrestrial systems capable of providing electronic communications services in the European Union". Under its terms, Member States are required to keep the use of the 800 MHz band under scrutiny and report their findings to the Commission upon request. The Decision also said that when Member States designate or make available the 800 MHz band for networks other than high-power broadcasting networks, Member States shall do so, on a non-exclusive basis, for terrestrial systems capable of providing electronic communications services in compliance with the parameters set out in the Annex to the Decision. The Decision also noted that in order to ensure the effective use of the 800 MHz band also in the longer term, administrations should "continue to study solutions that may increase efficiency and innovative use". See [http://ec.europa.eu/information\\_society/policy/ecomm/radio\\_spectrum/\\_document\\_storage/legislation/800mhz/dec800mhz\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomm/radio_spectrum/_document_storage/legislation/800mhz/dec800mhz_en.pdf) for the Decision.

### Corporate

#### GC100 Raises Concerns Over Advocate General's Opinion in *Akzo Nobel*

The GC100 group has expressed its concerns about the possibility of a ruling from the European Court of Justice, which could hamper corporate crisis management if it were to threaten the legal professional privilege which is available in English law to protect communications between executives and international lawyers. The Advocate General in the case has published an Opinion which states that at the EU level, legal privilege should not attach to companies' internal communications with their in-house lawyers. The GC100 chair said, "As is clearly recognised in the English courts, there is no fundamental distinction between the obligations that a solicitor in England and Wales owes to their client ... whether they are employed in private practice or in-house". The case in question turned on whether European Commission anti-cartel investigators had the right to seize internal documents during a 2003 raid on the Manchester premises of the Dutch chemicals group Akzo Nobel. In the course of that search, the Commission officials took photocopies of certain documents which the representatives of Akzo and Akcros regarded as being exempt from seizure because, in their view, they were covered by legal professional privilege. The GC100 said that they believe that an adverse ruling by the ECJ, if they were to follow the Opinion would create difficulties not only for companies facing investigations, but also for businesses that wanted to check with internal legal advisers if certain planned activities would comply with, for example, anti bribery rules or environmental controls. The Advocate General said in the Opinion, "Neither side in these proceedings is seriously calling into question the existence of legal professional privilege as such. However, the scope of the protection afforded by legal professional privilege is fiercely disputed. More specifically, the issue is whether and, if so, to what extent internal company or group communications with enrolled in-house lawyers are covered by the protective scope of legal professional privilege. It is the answer to this question which will ultimately determine the extent of the Commission's powers of investigation in antitrust proceedings under Article 14 of Regulation No 17 (for future cases: Articles 20 and 21 of Regulation No 1/2003)" and further, "Legal professional privilege, which sets limits on the Commission's powers of investigation, is itself based, as I have already said, on a general legal principle of EU law which is in the nature of a fundamental right. The determination of its substance and its scope is one of the essential tasks of the Court of Justice of the European Union, which has jurisdiction to ensure that in the interpretation and application of the Treaties the law is observed". (*Akzo Nobel Chemicals Ltd & Anor v European Commission*, Case C 550/07 P - see <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=&nomusuel=Akzo%20Nobel%20&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&oco> for the Opinion).

## Gambling & Betting

### Latest Quarterly Gambling Survey Shows Small Decline in Overall Participation

The Gambling Commission has released details from its latest quarterly survey on gambling participation for March 2010, which shows that during the year to March 2010, an average of 54.7% of respondents said they had participated in at least one form of gambling in the previous four weeks. This shows a very small decline when compared with 55.2% at the same time last year. According to the figures, the most popular gambling activity was the National Lottery (45.4%), followed by National Lottery scratchcards (10.5%) and society or other good cause lotteries (9.9%). Betting on horse races with a bookmaker, private betting and gaming with family and friends, and fruit or slot machine gambling were the next most popular activities (3.5%, 3.3% and 3.1% respectively). The Commission said the growth in participation in remote gambling was explained very largely by increased online participation in the National Lottery - if those only playing National Lottery products remotely were excluded, 5.7% of respondents had participated in remote gambling in the year to March 2010, compared with 5.7% in 2009. See [http://www.gamblingcommission.gov.uk/PDF/Survey\\_data\\_on\\_gambling\\_participation\\_-\\_April\\_2010.pdf](http://www.gamblingcommission.gov.uk/PDF/Survey_data_on_gambling_participation_-_April_2010.pdf) for details. (The survey data on gambling participation provides information on the participation in all gambling activities including remote forms of gambling. It sets out the findings from questions asked through an omnibus survey conducted by ICM Research and the annual data is published quarterly, based on an updated sample of 8,000 interviews).

### Commission Announces Closure of Proceedings Against Italy Following Changes to Online Gambling Laws

The European Commission has announced that it has closed a series of cases against the Italian Government concerning its online gambling laws and that as a result, Italian consumers will now have access to a wider choice of authorised on-line gambling services as a result of changes to the laws. The Commission had opened separate infringement proceedings in 2006 following complaints that Italy's restrictions on foreign service providers and measures to block access to the web sites at that time were "disproportionate". The Commission said that Italy notified it in 2009 that it had amended its laws. The Commission said it "welcomes the new Italian law that will allow for the cross border provision of services, with clear rules for the authorisation and the granting of licences to domestic and European operators" and that as a result, had decided to close the case. (*EC Press Release IP/10/504*, 5 May 2010 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/504&format=HTML&aged=0&language=EN&language=en> for details).

## Litigation

### Appeal Against Costs Order Following Compromise Agreement

The Court of Appeal has ruled on an appeal by the appellant football supporters' trust against an order for costs, which was made in the context of a derivative action that was subsequently compromised. The trust had brought proceedings seeking an injunction to restrain the second respondent director and the first respondent holding company from transferring land owned by the third respondent football club to a third party for no consideration. Discussions took place and the parties compromised the claim and entered into a Tomlin Order however the parties were unable to agree as to costs. There were three categories of costs at issue - the judge's order dealt with the first two elements of costs by introducing a cut-off date and did not deal with the third element at all. The trust appealed the introduction of the cut-off date and for an order that the second respondent pay the third category of costs. The court ruled that notwithstanding the wide ambit of discretion given to the judge, he had erred in principle in making the costs order on the basis that the trust had prolonged the litigation unnecessarily following the compromise agreement. The question that arose was how the court should deal with costs that were spent agreeing terms that the court did not consider a necessary part of any compromise. The judge took the view that once the respondents had made it clear that they would agree that any sale had to be on the professional advice as to its mode and timing, the trust should have been able to come to an agreement. However, the trust wanted further advice and was later successful on a number of points - the judge's conclusion on the imposition of the cut-off date therefore could not stand. Further, the terms of the Tomlin Order amounted to an admission that the transaction that was proposed for the sale of the land for nil consideration, to implement a personal arrangement with the third party, would have constituted a material breach of the second respondent's duty as a director. The second respondent was not entitled to the payment of his costs by the first respondent holding company and the third respondent football club. (*Carlisle and Cumbria United Independent Supported Society Ltd v CUFC Holdings & Ors* [2010] EWCA Civ 364 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/463.html> for the judgment).

## Application to Disclose Information Concerning Representation by Counsel - Grounds for Disclosure

The claimant brought a libel action against the respondent following the publication of a number of articles which accused him of dishonesty. In the course of the proceedings, the claimant sought disclosure as to "the number of matters that they instructed Mrs Justice Sharp to advise on and/or represent them prior to her appointment as a judge in January 2009 and the dates when such instructions were given because the Claimant has learned that Mrs Justice Sharp represented the Defendants in relation to 5 leading cases in 2006 to 2008 and the Claimant believes in itself gives rise to bias and/or the appearance of bias". The respondent countered that the disclosure order was unnecessary and disproportionate as the claimant had stated that he already had the information in relation to some cases in which Mrs Justice Sharp had acted. The court refused to grant the order. It said what the claimant was seeking, or so it would appear, was "an opportunity to 'fish' for further information in the hope that something more substantive may turn up, so as to enable him to argue at some stage in the future that Sharp J should recuse herself if the litigation comes before her again". The court said it was not satisfied that it had any jurisdiction to make an order of the kind proposed, whether in accordance with CPR Part 31 or CPR Part 18, or on any other basis. In any event, it said such an order seemed to be "unnecessary" and would not serve any legitimate purpose. (*Mireskandari v Associated Newspapers* [2010] EWHC 967 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/967.html> for the judgment).

## Music

### Judgment Published in *Pink Floyd Music Limited v EMI Records Ltd*

The Need to Know of the week of 8 March 2010 discussed the ruling by the High Court in the summary judgment application by Pink Floyd against their former record label EMI - the dispute between the parties related to the underpayment of royalties. The High Court ruled that EMI should account for income received by internet service providers, such as iTunes and also held that a clause prohibiting sales of the albums in question as individual tracks, also applied to online distribution. At the time the ruling was given the judgment was unavailable however it has now been published - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/533.html> for the judgment.

### Competition Commission Again Clears Ticketmaster/ Live Nation Merger

The Competition Commission has published its Final Report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc. The Commission had previously published its final report on the merger in December 2009 however, in January 2010, CTS Eventim AG lodged a Notice of Application with the Competition Appeal Tribunal, challenging the Commission's decision to clear the merger and the Tribunal ordered that the decision be quashed and the merger be referred back to the Commission for reconsideration. Prior to the merger being proposed, Live Nation had signed an agreement with Ticketmaster's largest global competitor, Eventim, as a result of which Eventim entered the UK for the first time. Under the terms of that agreement, Eventim would provide Live Nation with ticketing software and services, enabling Live Nation to sell its own tickets. Eventim would also be allocated a proportion of Live Nation's tickets to sell to consumers. After further consultation, the Commission has again cleared the merger - it has restated its findings that the merger would not result in a substantial lessening of competition in the market for live music ticket retailing or in any other market in the UK, including live music promotion and live music venues and said that it has found that the merger will make "little difference to the prospects of Eventim's success in the UK". It said it had found that, although Live Nation's incentives have changed as a result of the merger, the scope for the merged entity to affect Eventim's expansion in the UK was limited. The Commission noted "Under their agreement, Eventim will continue to receive a fee for every Live Nation ticket sold and Live Nation will continue to be obliged to allocate a minimum number of tickets to Eventim. Both parties have stressed their commitment to honouring their obligations under their agreement". (*Competition Commission News Release 18/10, 7 May 2010* - see [http://www.competition-commission.org.uk/inquiries/ref2009/ticketmaster/pdf/final\\_report.pdf](http://www.competition-commission.org.uk/inquiries/ref2009/ticketmaster/pdf/final_report.pdf) for the Commission's Final Report).

## Publishing

### OFT Clears Acquisition of Guardian Media Regional Newspaper Titles by Trinity Mirror

The Office of Fair Trading (OFT) has announced that it has formally granted clearance for the acquisition by Trinity Mirror plc of the regional newspaper titles of Guardian Media Group plc. The OFT has said that the full text of the decision will be available shortly (at the time of writing however it was still to be published). (*OFT Merger Decision ME/4434/10*).