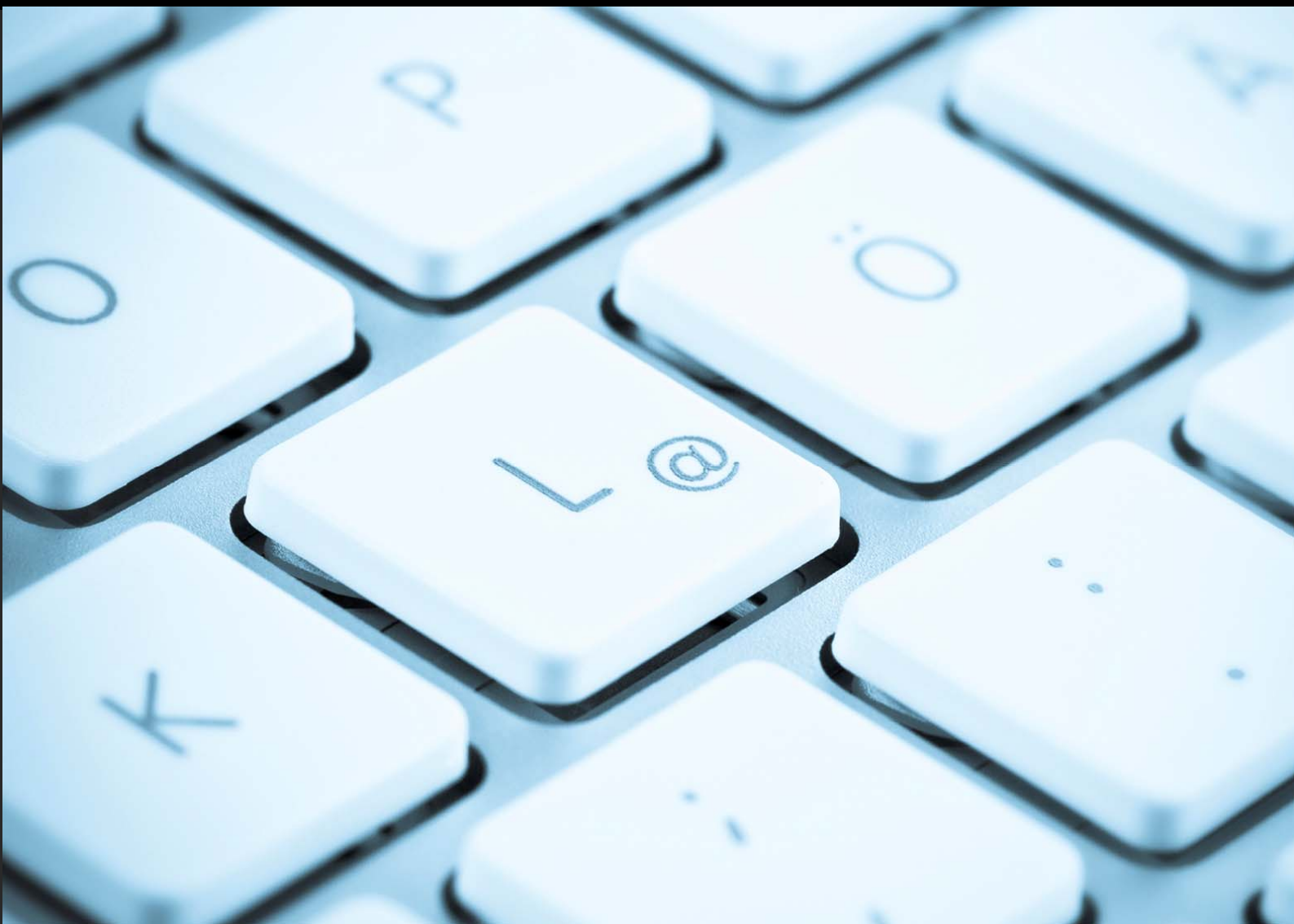
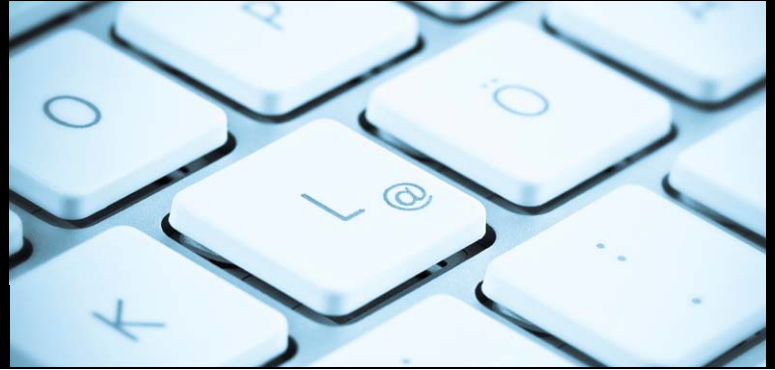


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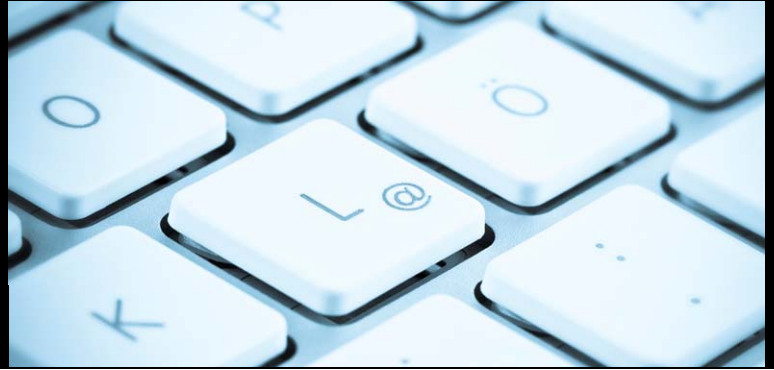
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## Digital Economy Bill published

**The Digital Economy Bill, which sets out the wide-ranging measures contained in the Digital Britain Report, was announced in the Queen's Speech and has now received its first and second readings. Whether the Bill completes its legislative journey before next year's general election remains to be seen. The key provisions are outlined below.**

The Bill, which was published on 20 November, sets out many of the measures proposed in the Government's Digital Britain report published in June. For Olswang's analysis of the report, see [http://www.olswang.com/pdfs/digitalbritain\\_jun09.pdf](http://www.olswang.com/pdfs/digitalbritain_jun09.pdf). The 54 page Bill covers 11 topics. The headline technology and telecoms issues are as follows.

### Digital infrastructure and content

The Bill would give Ofcom new duties to promote investment in communications infrastructure and public service content where this is needed, and to report formally on communications infrastructure every two years.

### Online infringement of copyright

The issue of whether (and if so how) to legislate to combat illegal downloading has been the subject of discussion and consultation ever since the 2007 Gowers Report - see our previous coverage in our February 2007 Update.

The Bill outlines a two stage process. ISPs would be subject to new duties to notify subscribers of reported copyright infringements (on receipt of a notice from the rights owner), and a duty to provide rights holders with infringement lists relating to suspected repeat offenders. Some of the detail of these "initial obligations" would be governed by an OFCOM-approved code. The second strand to the proposed approach would involve the imposition of a "technical obligation" on the ISP to limit or suspend the user's internet service or prevent access to particular material. Such technical obligations would be imposed by the Secretary of State if considered "appropriate" following assessment by OFCOM. The assessment process may include (at the Secretary of State's direction) consultation with ISPs and rights holders. These obligations, too, will be subject to a code made by OFCOM, which would address among other things subscriber appeals. The Bill proposes fines of up to £250,000 for ISPs which fail to comply with the initial obligations or technical obligations. The Bill also provides that the Secretary of State may, via the codes of practice, impose obligations on rights holders to contribute to the costs incurred by ISPs and/or OFCOM.

The Bill also seeks to give the government a wide and controversial power by secondary legislation to "future proof" the Copyright, Designs and Patents Act 1988 "for the purpose of preventing or reducing the infringement of copyright by means of the internet if it appears ... appropriate to do so having regard to technological developments that have occurred or are likely to occur".

## **Internet domain names**

The Bill seeks to give the government reserve powers to intervene in the operation of domain name registries in the event of failure or unfair practices by domain name registries which adversely affect services, networks or consumer interests in the UK.

## **Wireless spectrum - mobile and wireless broadband**

The Bill contains some enabling measures relating to the Digital Britain spectrum proposals to stimulate mobile broadband: allowing for the charging of Administered Incentive Pricing on auctioned spectrum licences and for OFCOM to levy monetary penalties for failure to meet certain licence conditions. The substantive implementation Digital Britain's spectrum proposals are contained in the recent BIS "Consultation on a Direction to Ofcom to Implement the Wireless Radio Spectrum Modernisation Programme" (<http://www.berr.gov.uk/consultations/page53062.html>) which sets out a complex package of measures. Those measures were discussed at a recent Olswang seminar "Unlocking Prime Spectrum in the UK" (see our "Recent technology events" section at the end of this Update).

The Bill does not contain measures on the proposed "broadband tax" – but this will feature instead in next year's Finance Bill, as previewed in December's Pre Budget Report.

The remainder of the Bill deals with media related issues, including:

- video games classification;
- extension of Channel 4 's remit;
- measures to strengthen independent and high quality news;
- digital radio switchover;
- licensing of "orphan works";
- extended collective licensing; and
- public lending rights.

*For more details on the impact of the technology and telecoms related aspects of the Bill please contact Rob Bratby [rob.bratby@olswang.com](mailto:rob.bratby@olswang.com)*

For comment on this year's Pre Budget Report please see The Olswang Budget Blog at <http://olswangbudgetblog.wordpress.com/>

## VAT: reversal of fortune for financial firms' outsourcing arrangements?

**From 1 January 2010, the place of supply rules for VAT purposes will change for business-to-business ("B2B") cross-border services. This change spells a greater VAT compliance burden for many businesses receiving outsourcing services from abroad; it will also result in an actual VAT cost for exempt (or partially exempt) businesses (such as banks, insurance companies and other financial services providers) that have outsourced certain administrative or management functions outside of the EU which have, until now, been outside the scope of VAT. In certain circumstances, restructuring of outsourcing arrangements may help to mitigate the impact of these changes.**

Currently, the place of supply for B2B cross-border services is generally determined for VAT purposes by reference to where the supplier is established but this will change (subject to certain exceptions) to the place where the recipient is established. Following this change, EU businesses receiving services from abroad will need to account for VAT on such services in accordance with the "reverse charge" process. This process effectively treats the recipient business as both supplier and recipient. The recipient is required to account for the VAT (as if it were the supplier) and then recover the VAT to the extent permissible (as the recipient).

While EU businesses are already required to apply the reverse charge on certain services that they receive, this will now be the case in respect of a much wider range of services, including certain administrative or management services (which up until now have been treated as supplied where the supplier was established and were therefore outside the scope of VAT when supplied from outside of the EU).

This change represents an actual cost for EU businesses that carry on a VAT exempt or partially exempt business and have outsourced such services outside of the EU since they will be unable to recover (whether fully or in part) the VAT for which they account. Banks, insurance companies and other financial services providers, as well as gambling operators, are typical exempt businesses that may be so affected.

The main implication of this change for B2B services supplied within the EU is that the recipient (rather than the supplier) will now have the VAT compliance burden and will need to adopt appropriate accounting systems. A recipient's VAT liability may also increase substantively if VAT is charged at a higher rate in the recipient's jurisdiction compared with the supplier's jurisdiction (or as a result of other discrepancies between such EU states in relation to VAT thresholds or allowances).

It may be possible to structure (or restructure) outsourcing arrangements so as to mitigate the cost of any VAT arising upon the provision of services, albeit that the opportunities are more limited as a result of this change. The services involved must be carefully considered and, if necessary, separated into their key components so as to ensure that, to the extent possible, any such services either fall within an applicable exemption from VAT (and so may be supplied without giving rise to an obligation to account for VAT) or may be directly attributed to any taxable supplies made by the recipient (and so any VAT may be recovered).

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## Outsourcing: changes to service sufficient to rule out TUPE

**The concept of a service provision change was introduced by TUPE 2006 and tribunals are likely to be keen to find that it applies to most outsourcing scenarios. However, the Employment Appeal Tribunal's recent decision in *OCS Group UK Ltd -v- Jones and others* is an example of where the activities carried out before and after the alleged transfer were sufficiently different to rule out a service provision change when a contract for the provision of catering services moved from one contractor to another.**

### **TUPE and outsourcing**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") protect certain employment rights where there is a "service provision change". Typically, a service provision change will occur in outsourcing scenarios where a particular activity or function (such as IT support services) is outsourced by a client to a third party contractor, where that activity or function is transferred from one contractor to another or where it is taken back in-house by the client. In broad terms, when a service provision change takes place, employees who are assigned to the carrying out of that activity or function enjoy the protection of certain employment rights including the automatic transfer of their employment to the new service provider on the same terms and conditions of employment and with continuity of employment preserved.

In our last edition of Technology Update (September 2009) we covered the case of *Metropolitan Resources Ltd -v- Churchill Dulwich Ltd and others* in which the EAT directed that, in order to determine whether a service provision change had taken place under TUPE, a tribunal must ask itself whether activities carried on by the new service provider after the alleged transfer are "fundamentally or essentially the same" as those carried out by the outgoing service provider before the transfer. If they are, a service provision change will have taken place and TUPE will apply. In *Churchill*, the EAT upheld a tribunal decision that the service provided by both the outgoing and incoming contractor were essentially the same and TUPE therefore applied when the contract for provision of the service changed hands.

### **The OCS decision**

In contrast, the EAT's recent decision in *OCS Group UK Ltd -v- Jones and others* illustrates an instance where the activities carried out before and after the alleged transfer were sufficiently different to rule out a service provision change when a contract for the provision of catering services moved from one contractor to another.

OCS Group UK Ltd ("OCS") provided catering services to BMW at its Cowley plant, with there being a central restaurant and deli bar and four smaller "satellite" catering facilities at other parts of the plant. At all these locations, a full canteen service was available with a range of both hot and cold meals being provided. Mrs Jones and her colleague Miss Ciliza worked as chefs/supervisors at the satellite facilities and spent "a great deal of their time" in the preparation of hot meals. In August 2007, MIS took over the contract for catering from OCS. MIS provided a reduced service selling only pre-prepared sandwiches and salads at the satellite catering facilities. Although staff still had to clean tables and arrange rotation of sandwiches, they were not involved in any hot food preparation, their roles being more akin to that of sales assistants than chefs. In deciding that no service provision change had taken place and accordingly that TUPE did not apply, the tribunal considered that MIS provided a service which was "wholly different" from

that operated by OCS. In the tribunal's view, the catering facilities at the satellites under MIS amounted to dry goods kiosks rather than the full hot and cold canteen service provided by OCS.

Before the EAT, OCS argued that the tribunal had been too narrow in its identification of the activities carried out before and after the change in contractor. It argued that, put simply, OCS and MIS both provided food for BMW staff and as that activity had not changed following the change in contractors, a service provision change had occurred. The EAT disagreed with this approach and considered that the tribunal had acted consistently with the guidance in *Churchill* which advocated a common sense and pragmatic approach to considering differences in the activities carried out before and after an alleged transfer. The EAT considered that the tribunal had been entitled to find that, following the change in contractor, the activities had changed to such a degree that no service provision change could be said to have taken place.

### **Practical advice**

The purpose of TUPE is to protect employment rights and in practice, tribunals are likely to be keen to find that it applies to most outsourcing scenarios, provided there is sufficient similarity between the activities carried out before and after the alleged transfer.

In commercial terms, to get round any uncertainty over whether TUPE may or may not apply to a particular outsourcing transaction, it is usual practice for the parties to agree where employment related liabilities will lie and for the appropriate indemnities to be included in contractual documentation.

For our recent analysis "Outsourcing and TUPE: five key issues to consider" please see our June 2009 coverage.

## Commercial contracts: the impact of dispute resolution mechanisms

**A recent ruling by the Technology and Construction Court ("TCC") highlights some important considerations for drafting dispute resolution mechanisms. These include the interplay between different types of procedure and their impact on a party's termination rights. The courts will generally give effect to clearly drafted dispute resolution mechanisms – so parties need to give careful thought to the impact such clauses will have.**

### Background

The TCC published its ruling in *Ericsson AB v EADS Defence and Security Systems Limited* in October 2009. The dispute concerned a contract under which Ericsson would develop and provide support for certain software for EADS, which in turn was providing an improved communications system for the Fire and Rescue Service in readiness for the 2012 Olympics. The contract included a two-stage dispute resolution mechanism. In the event of a dispute, the parties were to negotiate in good faith and if they failed to reach agreement within 10 working days the contract provided that "*either party may give notice of its intention to proceed to mediation... or to refer the matter to adjudication*". EADS had various termination rights, including the right to terminate on notice for material breach by Ericsson.

The project hit delays from late 2008, discussions ensued but by September 2009 the dispute had come to a head over two issues: (i) the revised date of a critical milestone for delivery of the software, and (ii) which party was to blame for the delays. The salient points in the timeline were as follows.

29 September: Ericsson gave notice of its intention to refer the dispute to mediation in accordance with the CEDR Model Mediation Procedure, in accordance with the contract.

1 October: EADS served notice to terminate the contract for Ericsson's material breach, giving Ericsson a cure period of 21 days to remedy the default. On the same day, Ericsson gave EADS notice of its intention to refer the disputed issues to adjudication under the dispute resolution clause.

2 October: EADS purported to accept Ericsson's initial referral to mediation. A few days later it challenged Ericsson's right to refer the disputes to adjudication, arguing that the relevant clause provided for referral to either mediation or adjudication.

Shortly afterwards, Ericsson applied for an injunction to prevent EADS from terminating the contract while the adjudication was pending. EADS then applied for an injunction preventing Ericsson from taking any further steps in the adjudication and declaring that any decision would be invalid. The judge had to decide, in relation to both applications, whether the requirements for an interim injunction (set out in the 1975 *American Cyanamid* case) were met. The court must: (a) be satisfied that the applicant has a real prospect of success in its claim for a permanent injunction at trial; (b) consider whether damages would be an adequate remedy if the injunction were refused; and (c) consider (if damages would not be an adequate remedy) where the "balance of convenience" lies.

### Injunction to prevent termination prior to the adjudication

The judge dismissed Ericsson's application for an injunction to prevent EADS from exercising its right to terminate. The first limb of the *Cyanamid* test was met, in that Ericsson's arguments that it was not in

material breach had some merit. However, in the particular context, damages might be capable of being an adequate remedy. The judge then considered the drafting of the contract and took the view that the clause *"did not by implication or otherwise suspend a party's rights under the contract to take whatever steps it is entitled to take....I doubt that sensible parties would agree that all their relevant or commercially significant contractual rights would be frozen pending an adjudicator's decision, at least in the absence of very clear wording to that effect"*. On the "balance of convenience" point, justice would not be served by preventing EADS from exercising its termination right because this would in effect *"require two parties who have fallen out with each other and one of whom has lost confidence in the other to continue to work together in circumstances where they have a sophisticated contract which purports to provide commercial solutions and remedies when a lawful or unlawful termination occurs"*.

### **Interplay between adjudication and mediation provisions**

The judge also refused EADS's application for an injunction to prevent Ericsson pursuing the adjudication. It was necessary to read the dispute resolution clause in its commercial context and *"in a way which would make sense to commercial parties"*. In the judge's view the wording *"either party may give notice of its intention to proceed to mediation ... or to refer the matter to adjudication"* gave the parties the flexibility to mediate or to adjudicate or to do both, or to do neither. The use of the word "may" in the clause dealing with the parties' rights to refer disputes to mediation or adjudication (see above) was distinguished from the use of "shall" in relation to the preceding obligation to negotiate in good faith. The parties could have drafted the contract so as to mandate first mediation then adjudication but they had not. Ericsson was therefore free to pursue adjudication, even though it had also invoked mediation, before opting for adjudication. Of course, the processes of mediation and adjudication can take place at the same time and the two are not mutually exclusive. The same reasoning could not be applied to adjudication and expert determination, for example.

### **Comment**

Escalation and dispute resolution clauses, which may involve several stages and different mechanisms including mediation and adjudication or expert determination, are a common feature of commercial contracts. The TCC's latest decision illustrates the established position (under the 2002 *Cable & Wireless v IBM* case) that courts are keen to give effect to the parties' schemes for resolving disputes (and thus keep them out of the courts) where possible. Where such schemes create sufficiently objective criteria to decide whether one or both parties were in compliance or breach of such provisions, they will tend to be enforced. The *Cable & Wireless* case distinguishes (on an admittedly *"slender basis"*) a reference to an enforceable mediation or escalation procedure, with the requisite certainty of obligations and participation in an agreed procedure, from a mere promise to negotiate, which is unenforceable. The Ericsson case also illustrates that, in the absence of very clear drafting to the contrary, different dispute resolution mechanisms in the contract may not be mutually exclusive, and that a party's right to terminate or exercise other rights will not be ousted by dispute resolution provisions.

## Commercial contracts: anti-suit injunction awarded in international software dispute

**Internet communications company Skype recently succeeded in obtaining an anti-suit injunction to block parallel US proceedings against it in an ongoing software dispute. The case illustrates the circumstances in which an English court will uphold an exclusive jurisdiction clause and prevent parties from "wriggling out" of their agreement in order to benefit from potential juridical advantages in other forums.**

### Background

In early November, Mr Justice Lewison granted an anti-suit injunction in favour of Skype Technologies SA ("Skype") in its long running dispute with Joltid Limited ("Joltid") over the licensing of peer-to-peer technology which is fundamental to Skype's business and its ability to exploit its product to hundreds of millions of users around the world.

The parties had entered into a License Agreement in 2003, pursuant to which Joltid granted Skype a worldwide licence to use a compiled object code form of software known as the Global Index software. Joltid subsequently alleged that Skype had acted in breach of the License Agreement by possessing, using, accessing and modifying the source code of the Global Index software (the "GI Source Code") and purported to terminate the License Agreement. In accordance with an exclusive jurisdiction clause contained in the License Agreement, Skype commenced proceedings in the English High Court, seeking a declaration, amongst other things, that Joltid's purported termination of the License Agreement was invalid on the basis that it had never been provided with the object code form of the software as envisaged by the License Agreement but had been provided with the GI Source Code instead. Joltid counterclaimed for breach by Skype of its UK and Estonian copyright, amongst other things, and the matter was listed for trial in 2010.

Following eBay Inc's announcement of the sale of a majority stake in Skype to a group of investors (the "Investors") in September, Joltid registered its copyright in the GI Source Code and a modified version of the code with the US Copyright Office and issued proceedings against Skype, eBay Inc, the Investors and various other parties in the United States District Court, Northern District of California (the "US proceedings"). The US proceedings alleged that Joltid was entitled to and did terminate the License Agreement and that Skype was only entitled to use the object code form of the Global Index software. Further, Joltid contended that Skype's use, modification and disclosure of the GI Source Code constituted a breach of copyright and accordingly sought damages (said to be amassing at a rate of \$75 million per day) and declaratory and injunctive relief for copyright infringement.

Skype applied to the English Court for an anti-suit injunction to block the US proceedings against it on the grounds that they were improperly commenced in clear breach of the exclusive jurisdiction clause in the License Agreement which provided that *"any claim arising under or relating to the Agreement shall be governed by the internal substantive laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts"*.

Having determined that the Court had jurisdiction under the EU Judgments Regulation (which recognises an express choice of governing law in disputes between one or more parties domiciled in the EU) to determine all claims between Skype and Joltid (Skype being a Luxembourg registered company), the judge held that there were two questions for the Court to consider. First, whether the US proceedings, in

so far as they concerned Skype, fell within the scope of the exclusive jurisdiction agreement. Second, if they did, did that affect the Court's willingness to grant an anti-suit injunction?

### **Scope of the exclusive jurisdiction clause**

The Court rejected Joltid's argument that the US proceedings were concerned solely with infringement of US copyright after the purported termination of the License Agreement and were predicated on the assumption that the License Agreement had been validly terminated such that the exclusive jurisdiction clause no longer applied. Accordingly the Court found that the US proceedings had been issued in breach of the exclusive jurisdiction clause. In determining whether a claim falls within an agreed jurisdiction clause, the judge stated that it is a question of interpretation to be decided according to national law. Applying the approach of the Court of Appeal and the House of Lords in the 2007 *Fiona Trust & Holding Corpn v Privalov* case, he held that there is "no distinction to be drawn between the approach to the interpretation of a clause in an agreement which confers jurisdiction on the courts of a particular territory and a clause in an agreement which confers jurisdiction on a particular tribunal" since "[b]oth types of clause represent the parties' agreement about how disputes are to be resolved". In particular he cited the judgment of Longmore LJ in the Court of Appeal: "If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect...that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen...".

The issue at the centre of the dispute between Skype and Joltid, specifically whether the License Agreement had or had not been validly terminated, was a matter for the English Court to decide. If Skype was correct and the License Agreement continued in force, then Joltid's claims against it in the US proceedings would fail. It followed that it was only if Joltid succeeded before the English Court that its claims against Skype in the US would "get off the ground".

### **Enforcing the exclusive jurisdiction clause and the Court's discretion**

The judge went on to consider whether the Court should exercise its discretion to enforce the clause by injunction. Skype submitted that there was no justification whatsoever for Joltid's decision to override the exclusive jurisdiction clause and commence duplicative proceedings in California. Contending that the US was indeed the proper forum for resolution of the claims in the US proceedings, Joltid sought to persuade the Court that, but for the exclusive jurisdiction clause, England would not be the natural forum for resolution of any of the claims between Joltid and Skype, whereas the connection between the dispute and the US was overwhelming. This argument was rejected. Applying the 2002 House of Lords decision in *Donohoe v Armco* the Court held that "the parties' contractual bargain is the starting point" and noted that the strength of the exclusive jurisdiction clause in this case was supported by a number of considerations:

- neither party had any obvious connection with England and Wales, making it a "neutral forum for the determination of their disputes";
- the licence to use the software was worldwide and therefore the parties must have contemplated that a breach of the terms of the License Agreement might occur anywhere in the world, or involve the infringement of local copyright law in any jurisdiction yet they still chose to have their disputes decided in England and Wales; and

- the parties must have contemplated that a dispute might involve witnesses and documents located anywhere in the world.

He added that "*what one might call the standard considerations that arise in arguments about forum non conveniens should be given little weight in the face of an exclusive jurisdiction clause where the parties have chosen the courts of a neutral territory in the context of an agreement with worldwide application...Indeed, the more 'neutral' the chosen forum was the less importance the parties must have placed on the convenience of the forum for any particular dispute*". In this respect, the Court was not persuaded by the strong reasons put forward by Joltid for denying Skype's application, holding that "*these factors were eminently foreseeable*" when the parties agreed the exclusive jurisdiction clause and were "*no more than the standard considerations that arise in arguments about forum non conveniens*" such that they did not "*(whether individually or collectively) amount to a strong reason for refusing to enforce the exclusive jurisdiction clause by injunction*".

The Court noted that an additional factor relevant to the exercise of its discretion is whether the outcome of the decision will enable all disputes between the parties to take place in the same forum and correspondingly whether there are other parties involved in the same or closely related disputes, who were not entitled to the benefit of the exclusive jurisdiction clause. In this case, which involved claims against several parties who were not party to the License Agreement, "*the goal of a single forum*" could not be achieved, however, granting the anti-suit injunction would at least ensure that all disputes between Joltid and Skype were decided in the same jurisdiction in England.

In a final bid to convince the Court to exercise its discretion in its favour, Joltid offered various undertakings in relation to the US proceedings to the Court. The judge rejected these, stating that they were "*no more than an attempt by Joltid to wriggle out of its contract*" and accordingly granted a final injunction against Joltid requiring it to discontinue its complaint against Skype in the US.

## **Comment**

This decision has clarified further the Court's discretion in granting an anti-suit injunction. Contracting parties who deliberately select the English courts as a neutral forum in an exclusive jurisdiction clause will not be allowed to "*wriggle out*" of their agreement, unless the party seeking to commence proceedings in an alternative forum can establish exceptional reasons, outside of ordinary "*forum non conveniens*" (*i.e. inappropriate forum*) arguments, to justify why the exclusive jurisdiction clause should be displaced.

It is worth noting that in circumstances where proceedings are issued in two or more EU Member States in breach of an exclusive jurisdiction clause, the European Court of Justice has "*set its face against the grant of anti-suit injunctions*" on the grounds that an injunction prohibiting a party from bringing or continuing proceedings before a foreign court is likely to constitute an interference with the jurisdiction of the foreign court which is incompatible with the system of the Convention (see the 2005 *Turner v Grovit* case). Accordingly, had Joltid issued parallel proceedings in an EU Member State instead, the outcome of Skype's application is likely to have been entirely different with the Court concluding that it is for each court seised to rule on its own jurisdiction to determine the dispute before it.

Since the anti-suit injunction was granted in favour of Skype, the English High Court and US proceedings have both settled, paving the way for completion of the sale of Skype by eBay Inc.

*Olswang LLP represented Skype in its anti-suit injunction application and in the English proceedings generally.*

## Reforms on data breach notification and cookies agreed by EU

**Agreement has been reached between EU institutions on the introduction of rules on, among other things, use of website cookies and reporting data security breaches. The requirements form part of the wide-ranging EU telecoms package. The cookie related requirements will apply to all websites. For now, the breach notification requirements will only apply to providers of electronic communications services, but the Commission has committed to extending the breach notification regime to all organisations which process personal data, such as online retailers and banks, as a matter of priority. We summarise the key practical changes for businesses.**

### Background

On 5 November the European Parliament and the Council of Ministers reached agreement on the new EU telecoms regulatory package and on 24 November the European Parliament formally approved it. The package concerns a wide range of reforms to the communications sector, and many of the headlines have been dominated by controversial proposals on combating illegal file sharing - but certain aspects are of wider day to day relevance to online businesses in other sectors too. Member States will have an 18 month deadline, starting from the date when the new legislation is officially published, to transpose the new requirements into domestic law.

### New security and notification rules for communications providers – in force by 2011?

The new notification rules will take the form of amendments to the 2002 Directive on Privacy and Electronic Communications ("PEC Directive"). The latest text defines "*personal data breach*" as: "*a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community*".

The key elements of the new provisions include:

- a duty to notify the relevant national regulator "*without undue delay*"; and
- a duty to also notify the affected subscriber or individual if the breach is "*likely to adversely affect*" that individual's privacy except where the provider can demonstrate it has applied "*appropriate technological protection measures*" which render the data unintelligible to unauthorised users.

The new legislation also boosts existing provisions in the PEC Directive, which already mandate "*appropriate*" technical and organisational security measures, with the certain minimum standards, including ensuring the implementation of a security policy.

### Data breach notifications for other organisations - coming (fairly) soon?

The scope of the data breach notification proposals are, by virtue of being part of the telecoms package, limited to communications service providers. During the passage of the legislation, many argued that data security breaches cause harm to individuals regardless of the sector in which they occur. The European Parliament attempted, unsuccessfully, to extend this obligation to all online service providers and the Commission responded with a formal declaration that it will present draft legislation to this effect "by the end of 2011". Unusually, therefore, the non-binding recitals in the new directive make explicit reference to the European Commission's view that mandatory notification requirements for all sectors should be

introduced "as a matter of priority". Developments on this will therefore be keenly awaited by all retailers and banks with an online presence.

### **Cookies, spyware and spam**

The new legislation will strengthen the existing legal requirements under the PEC Directive for "clear and comprehensive" information to a requirement to obtain users' informed opt in consent to the use of tracking cookies on computers and mobile/smart phones.

At one stage it was suggested that this would be further strengthened by a requirement for users' "prior consent." Although prior consent is no longer explicitly required, the non-binding recitals to the new directive state that *"it is ... of paramount importance that users are provided with clear and comprehensive information when engaging in any activity which could result in storage or gaining of access. The methods of giving information and offering the right to refuse should be made as user-friendly as possible"*.

The recitals also clarify that the exception to the obligation to provide users with clear information and the right to refuse cookies should be limited to those situations where the technical storage or access is *"strictly necessary for the purpose of enabling the use of a specific service explicitly requested by the subscriber or user"*. In practical terms, however, the user will still need to be provided with clear and comprehensive information on signing up to the service.

The current exception for cookies that are used for the *"sole purpose of carrying out the transmission of a communication over an electronic communications network"* remains in place.

The practical impact of these changes is, as yet, unclear. The guidance from the Information Commissioner on the existing "clear and comprehensive information" requirement for cookies suggests that a suitably prominent privacy policy may be sufficient. However, a policy alone is unlikely to meet the higher criteria for informed consent. Ultimately, website operators may have to be more creative in their strategies for cookie compliance.

As well as the information requirements in relation to cookies, websites are encouraged to provide information to users about available precautions to combat spyware and, where possible, to persuade users to take the necessary steps to protect their terminal equipment against viruses and spyware.

The Directive also makes some small refinements to the provisions of the PEC Directive on unsolicited marketing communications, including an explicit right for ISPs and email service providers to take legal action against persistent spammers.

*For more information on data protection issues please contact Marc Dautlich [marc.dautlich@olswang.com](mailto:marc.dautlich@olswang.com) or another member of Olswang's Data Protection Team.*

## Data protection enforcement: fines of up to £500,000 proposed; ICO gets audit powers

**Two recent developments raise the stakes for all organisations handling personal data. The Government is proposing fines of up to £500,000 for serious breaches of the Data Protection Act 1998 ("DPA"), with discretion for the Information Commissioner's Office ("ICO") to assess the actual level of fines imposed on a case by case basis. The consultation period ends on 21 December, and the new fines could be in force by April 2010. Meanwhile, new powers giving the ICO power to audit private and public sector organisations have reached the statute book.**

### **Civil monetary penalties**

The Ministry of Justice ("MoJ") has at long last published its proposals for the new civil monetary penalties which are to be introduced for serious breaches of the Data Protection Principles. These are set out in consultation paper published on 9 November entitled "Civil monetary penalties: setting the maximum penalty".

The penalties will significantly boost the Information Commissioner's (currently very limited) enforcement powers. They are being introduced in response to the seemingly endless tide of serious security breaches, which began to come to light almost two years ago with the HMRC data loss debacle.

The new powers are found in the recently added section 55A of the DPA (introduced by section 144 of the Criminal Justice and Immigration Act 2008) and will apply to serious breaches of the Act which are likely to cause substantial damage or distress, and which are committed deliberately or recklessly.

The new provisions received Royal Assent in May 2008. However, the sanction is still not "live", as the amount of the penalties will need to be set by statutory instrument. The MoJ dropped the idea of fines based on a percentage of turnover in favour of a fixed maximum fine which the ICO can then assess according to the seriousness of the breach and the resources of the data controller in question.

The consultation document poses a single question, namely whether the fine of up to £500,000 provides the ICO with a "proportionate sanction" for serious DPA contraventions. The cap seems modest when compared with fines imposed by the FSA for data breaches in the financial services sector. The MoJ and the ICO have both indicated that the plan is for the new fines to go live in April next year. The consultation document may be accessed at <http://www.justice.gov.uk/consultations/docs/civil-monetary-penalties-consultation.pdf>.

### **Assessment notices**

The ICO has recently been granted new powers to conduct compliance audits of public and private sector organisations. The relevant amendments to the DPA are contained in The Coroners and Justice Act 2009, which received Royal Assent on 12 November 2009. It is not yet clear when the powers will go live.

The amendment allows an assessment notice to be served on a data controller to require it to allow the ICO to (amongst other things) enter premises, inspect documents, and interview data processors in order to assess that data controller's compliance with data protection rules.

The ICO will only have the power to serve assessment notices on Government departments, public authorities designated by the Secretary of State or persons, i.e. private sector data controllers, of a

description designated by the Secretary of State. Designations will be made on the recommendation of the ICO; such a recommendation in turn requires the ICO and Secretary of State to be satisfied that the particular designation is necessary having regard to the nature and quantity of data under the control of such persons and the damage and distress which may be caused by any breaches of the data protection principles by them. The new legislation also provides for the ICO to issue a code of practice on the use of assessment notices.

*For more information on data protection issues please contact Marc Dautlich [marc.dautlich@olswang.com](mailto:marc.dautlich@olswang.com) or another member of Olswang's Data Protection Team.*

## Public procurement: new remedies for suppliers in force from 20 December

**The Public Contracts (Amendment) Regulations 2009 come into force on 20 December introducing two important new remedies for bidders wishing to challenge the award of public and utilities contracts. This bolstering of bidders' rights is widely expected to result in more complaints and legal challenges against public sector procurements.**

### **Background**

The 12 November 2009 saw the final version of the new procurement Remedies Regulations (the Public Contracts (Amendment) Regulations 2009) being laid before Parliament. These Regulations will come into force on 20 December 2009 just in time to implement the UK's obligations under an EU procurement directive (Directive 2007/66/EC). These changes have been brought about due to the perceived weaknesses in some of the national legal regimes where there has been a dearth of procurement challenges by aggrieved bidders before the courts. The new legislation will amend the existing procurement legislation in England and Wales - the Public Contracts Regulations 2006 (the "Regulations"). Scotland will implement separately via its own legislation. The new texts are complicated, but in essence they contain two major changes, both of which benefit the bidding community as opposed to the public purchasers.

### **Automatic suspension**

The first change concerns the immediate impact of an aggrieved bidder launching a procurement challenge in the High Court in relation to a contract award decision, namely, the mandatory suspension of the procurement process so that the public sector contract cannot be concluded. This is a reversal of the current position whereby a bidder has to apply to the court for an interim injunction to get a procurement process suspended.

It remains to be seen whether there will be widespread take-up by bidders of this automatic suspension, with it effectively becoming a common procurement tactic of the bidding community to "hold the line" on procurements. The inevitable expense of launching a claim in the High Court may still deter many would-be claimants. However, no doubt the public sector will be concerned about the delays which this development could entail as well as the time and cost which will be involved in it having to apply to court for an interim order to lift such a suspension. There is some debate as to how the High Court will decide upon the relevant test for such interim applications to remove the suspension. In particular, how will the need to ensure the effectiveness of an aggrieved bidder's remedies pre-contract conclusion be balanced against the disruption to the delivery of public contracts?

### **Contract ineffectiveness**

The second change is the concept of "contract ineffectiveness". The new legislation demands that where the High Court is faced with certain cases involving a very serious breach of the Regulations it must declare the concluded public contract ineffective and impose a civil financial penalty on the public sector purchaser. Whilst this sanction is reserved for significant breaches of the transparency rules (e.g. where a public purchaser has not advertised a contract as required by the Regulations thus depriving the bidding community of the chance to tender) or remedies provisions of the Regulations (e.g. in certain cases, breach of the standstill provisions), the potential unravelling of public contracts is a significant culture shift

for the UK. Until the 2009 Regulations are effective, after the contract has been concluded, unsuccessful bidders may only pursue a public purchaser for damages and concluded contracts are sacrosanct.

Importantly, the consequences of contract ineffectiveness are a matter for national law. The UK has chosen to limit the scope of contract cancellation to the unperformed, future contract obligations. Thus, the High Court will need to decide what restitution and compensation should be paid in relation to the past performance of a contract declared to be ineffective (although many parties may well add provisions to public contracts to cater for this possibility). What this flexibility does mean is that there will be differences across the 27 Member States and it will be more important than ever for pan-European companies to obtain local lawyers' advice when participating in public procurements.

Last but not least, the practical consequences of public sector contracts being disrupted in this manner are likely to be of interest not only to the bidders but to the public at large, especially when one considers the cost of running some of the large procurement exercises. Thus, it is likely that the new remedies legislation will result in more public and press scrutiny of public contracts, with the associated reputational risks for public purchasers and to a certain extent bidders.

The UK implementation has sought to provide some legal and commercial certainty via the transitional provisions in the 2009 Regulations which state that the new remedies provisions *will only affect procurements commenced after 20th December*. However, given that there are no such transposition provisions in the EC Directive, there is a question mark over whether such a provision is in line with EU law.

Aside from the public sector changes, the new remedies provisions will extend to the procurement of certain utilities contracts - i.e. certain contracts procured by the utilities which are subject to the Utilities Contracts Regulations 2006. The changes to the utilities remedies regime are very similar to those discussed above in relation to the public sector procurement regime. They are to be introduced via the Utilities Contracts (Amendment) Regulations 2009 (laid before Parliament on 27 November 2009) and will also come into effect on 20 December 2009.

*Olswang LLP will be hosting a seminar on the new remedies regime on 4 February 2010. We will be joined by Michael Bowsher QC to discuss the changes. To register your interest please contact our Head of Public Procurement Melanie Collier at [melanie.collier@olswang.com](mailto:melanie.collier@olswang.com).*

## EU and competition: Europe to launch the European Electronic Toll Service

**The European Commission has adopted a decision setting out the technical, procedural and legal specifications needed to launch the European Electronic Toll Service (EETS). The EETS will enable private and commercial road users to pay tolls easily throughout the European Union using only one, interoperable technical device and subscribing to only one contract with a service provider. Olswang's Berlin office advised the German Federal Government in relation to the scheme.**

### Background

Over the past ten years national, regional or local road pricing schemes have been implemented in many European countries. While formerly tolling schemes were often based on manual procedures (toll booths where the driver had to stop and pay or time-based vignettes to be bought and applied on the windscreen), more advanced electronic systems have now been developed. These use more sophisticated technology such – one example is DSRC (Dedicated Short Range Communication), a technology based on microwave communication between an onboard unit ("OBU") placed in the vehicle and roadside equipment installed alongside the tolled route. Another is GNSS/GSM technology as used in Germany, a combination of satellite-supported positioning and mobile communication, where the installed OBU communicates directly with the toll operator's back office transmitting the information needed to determine the relevant toll.

While electronic tolling schemes enhance the fluidity of road traffic as vehicles will not have to stop in order to pay the toll, the various national, regional and local electronic road toll systems are generally incompatible and can only communicate with their respective OBUs. The European Commission has stated that these non-interoperable tolling schemes hinder international road transport and represent a barrier for the internal market and therefore decided to take action.

In a first step, the so called Directive on Interoperability (2004/52/EC) was adopted in 2004 setting out the framework for what would become the European Electronic Toll Service. At this stage it was decided that future electronic tolling systems should be based on one or more of the following technologies: satellite positioning, mobile communications using GSM-GPRS standard and/or 5,8 GHz microwave technology.

### The EETS Decision

The EETS Decision (2009/750/EC) that entered into force in October now defines the essential technical specifications and requirements such as interfaces between the different stakeholders and lays down the rights and obligations of Member States, toll chargers, service providers (so called EETS providers) and users.

The EETS will be an additional service to the national tolling system. In order to provide EETS, EETS providers will, after a registration or certification process, conclude contracts with each toll charger, which will include the technical and commercial conditions for the EETS Provider to enter the toll charger's domain. Those conditions must be non-discriminatory and transparent and will be published by the relevant Member States.

According to the Decision the EETS will be available within three years for all vehicles above 3.5 tonnes or allowed to carry more than nine passengers (including the driver) and for all other vehicles within five years.

## Comment

Once the EETS is implemented, it will be hauliers, in particular, who will benefit from the opportunity of subscribing to the interoperable service. If a road user travels through Europe today, he or she needs several OBUs to pay the toll in the various domains crossed. The user will have many different contract partners (operators / concessionaires of the respective toll domains) and will get several invoices (one or more for each country). EETS will therefore help save time and money as the road user will only need one OBU which will combine all relevant technologies and will get only one invoice from the EETS provider of its choice.

European Commission Vice-President Antonio Tajani, in charge of transport, called the adoption of the EETS Decision "*the most important improvement for drivers since the abolition of border controls*". The implementation of EETS will have a major influence on existing and new road pricing schemes in the Member States and intends to create a new market for cross-border tolling services in Europe.

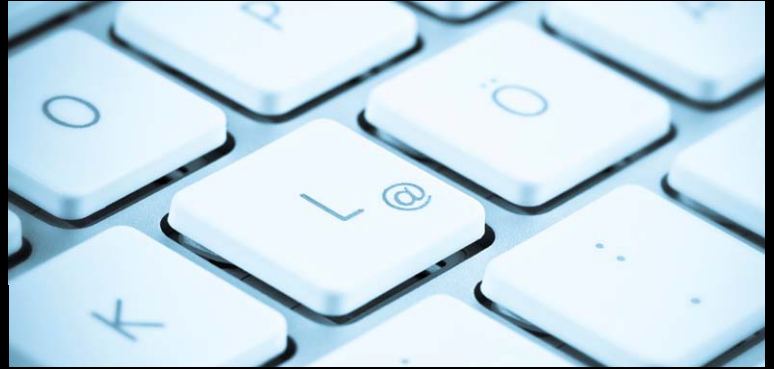
The EETS Decision does not affect the competence of Member States to establish tolling systems on their own territories. However, if they have toll domains to which the EETS Decision applies (schemes must be electronic, have a relevant size and it must be necessary to use an OBU in the vehicle) they must adapt those schemes to enable EETS providers to gain access to their toll domain and provide the service to their customer.

Implementing the EETS in line with the Decision's ambitious timetable will be a challenge to Member States and toll chargers as well as to companies that decide to become providers in the evolving EETS market. However, the EETS will be a good opportunity for suppliers and service providers to expand their business in the tolling sector. At the same time, value added services such as fleet and freight management and emergency tracking could be promoted using the new, interoperable onboard units as a platform in the respective vehicle.

The Olswang LLP office in Berlin was closely involved in the drafting of the EETS Decision as advisors to the German Federal Government and members of the interdisciplinary expert group CESARE IV, a project set up by the EC, the ASECAP (the European Association of Toll Motorways Operators) and European public road authorities to design, develop, promote and implement the EETS.

*Olswang LLP will be hosting a round table on the future of road pricing schemes in February 2010.*

*For more information please contact Petra Kocken [petra.kocken@olswang.com](mailto:petra.kocken@olswang.com).*



## Thought leadership & research

### **Convergence**

The results of Olswang's fifth annual Convergence Consumer Survey were launched on 25 November 2009. This year, the structure and analysis of our consumer survey has been informed by a series of discussions undertaken with senior executives from leading UK organisations. Over 25 executives from the full range of industries impacted by convergence - music, free and pay TV, films, newspaper, book and magazine publishing, advertising and marketing services and network operators – were kind enough to spare the time to discuss with us their own perspectives on market developments.

Read more at [www.olswang.com/convergence09](http://www.olswang.com/convergence09)

### **Online Behavioural Advertising research**

In October research from the UK industry body for digital marketing, the Internet Advertising Bureau and Olswang confirmed that consumers need more information and education about online privacy and online behavioural advertising (OBA). See our website for more details [www.olswang.com](http://www.olswang.com).

### **Olswang m-commerce survey**

For some time now, m-Commerce has been hyped as the future of retail. From a retailer's perspective, m-Commerce offers the potential to target and communicate with customers more effectively, increase its profile and sales and generate alternative sources of income. However, what does m-Commerce mean to retailers, are they or consumers ready to embrace it and do the costs of implementation outweigh the potential benefits this new channel has to offer? Olswang's retail team carried out a survey of retailers and their advisers to find out.

To view the survey results please see our website at [www.olswang.com](http://www.olswang.com).

## Future technology events

### **Network outsourcing and sharing - 21 January 2010**

Telecoms operators face the twin challenges of upgrading their networks and reducing their expenditure. Whether it is fixed operators investing in next generation IP core transport networks or fibre access, or mobile operators rolling out 3G or LTE networks, the demands to reduce capital expenditure and operating costs make it increasingly difficult for operators to justify own-build projects. Instead, partnership models where operators co-operate to share networks and/or network investments or partner up with service provider partners to outsource networks and networks operations are becoming operators' first choice.

This seminar will guide you through the process from beginning to end - starting with the business justification, we will then identify the best practice to get the deal done and conclude with a session on trouble-shooting problems.

If you are interested in participating in this event please contact Sophie Lang on 020 7067 3164 or at [sophie.lang@olswang.com](mailto:sophie.lang@olswang.com).

### **Digital Money +TECHNOLOGY - 26 January 2010**

The third +TECHNOLOGY event will be Digital Money +TECHNOLOGY.

In five years' time, you can be sure of having a few less pounds in your pocket. This is not a doomsday speech based on the current economic climate, but a technology reality check. The impact of technology on physical money is already being felt today, and will increase exponentially. Credit cards and debit cards already underpin the vast majority of our high value transactions. Fuelled by the success of eBay and Amazon, other payment services have developed across the globe to allow ecommerce to be transacted between the growing numbers of buyers and sellers, where physical presence is the exception rather than the rule. Oyster, the RFID payment system, has been a huge success across the London public transportation system and similar technologies have started to be adopted by Visa and Barclaycard for other smaller transactions.

The challenge of leveraging the value of content, whether words, music or film has yet to be resolved, but some form of cash-free system of micro payments will almost certainly be at the heart of the solution. All of this enters the convergence domain, asking which device will be at the heart of our spending experience – will we simply develop the relationship with our banks and credit card companies? Or will technology development favour the SIM at the heart of our mobile phone? Digital Money +Technology seeks to bring together interested parties from across the financial and technology spectrum to consider current trends and to discuss the changes, legislative and social, necessary to facilitate the march of progress.

To find out more about this and future +TECHNOLOGY events please visit [www.plustechnology.co.uk](http://www.plustechnology.co.uk)

## **Public procurement remedies event – 4 February 2010**

Important changes to the enforcement of the UK public procurement regime come into force on 20th December 2009. This bolstering of bidders' rights is widely expected to result in more complaints and legal challenges against public sector procurements. Olswang LLP will be hosting a seminar on the new regime on the morning of 4 February 2010. We will be joined by Michael Bowsher QC to discuss the changes, including (i) the introduction of an automatic suspension of the procurement where a contract award decision is challenged before the High Court and (ii) the possibility of overturning concluded contracts in cases where there has been a very serious breach of the procurement rules.

If you would like to attend this event, please contact our Head of Public Procurement, Melanie Collier at [melanie.collier@olswang.com](mailto:melanie.collier@olswang.com).

## **Roundtable on the future of road pricing - February 2010**

The implementation of modern, electronic road toll systems is an evolving market in Europe. Many European countries such as France, Slovenia, Poland and the Netherlands are on their way to implementing new or expanding existing tolling schemes or are exploring the possibility for transition from non-electronic systems (vignettes) to electronic schemes (based on microwave or satellite technology). There are many reasons for the increasing activities in this sector: modern tolling schemes on national, regional or local level are expected to reduce congestion and provide a means of user financing for road infrastructure that is capable of meeting the needs of increasing traffic. With the public and political debate focussing on climate change and worldwide efforts to reduce emissions, road pricing projects are also supported by the idea of making a sustained contribution to protecting the environment. Furthermore, modern tolling systems can boost new technologies (e.g. the European satellite project Galileo) and value-added services such as fleet and freight management and emergency tracking.

This round table discussion will focus on the recent developments on the European road pricing market and will give an in-depth insight on the lessons learned in the implementation of the latest tolling schemes. It will also identify potential benefits and risks for public and private stakeholders in relation to the implementation of future schemes in the UK and in other European countries.

If you are interested in participating in this event please contact Petra Kocken on 020 7067 3128 or at [petra.kocken@olswang.com](mailto:petra.kocken@olswang.com)

## Recent technology events

### **Retail +TECHNOLOGY - 13 October 2009**

Olswang's first +TECHNOLOGY event brought together more than 75 leading lights from the retail and technology sector, from purchasers, vendors and established retail groups to strategic investors operating in the sector. The event focused on how best to drive efficiencies, maximise profit, open new sales channels and leverage innovation. Keynote speaker and retail magnate Maurice Bennett CBE was in the spotlight to discuss the challenges and opportunities facing the 21st century high street.

Head of Technology Nigel Swycher says, *"Our inaugural event was a fantastic success. It attracted representatives from Amazon, Marks & Spencer, John Lewis and Net-a-Porter, as well as retail technology specialists and strategic investors. We wanted to create a forum for the retail sector to share views on the dramatic changes affecting it – the event achieved that."*

To find out more about this and future +TECHNOLOGY events please visit [www.plustechnology.co.uk](http://www.plustechnology.co.uk)

### **Advertising + TECHNOLOGY - 8 December 2009**

Guy Phillipson, CEO of the Internet Advertising Bureau (IAB), joined us as guest speaker for the second event in our +TECHNOLOGY series.

Olswang has been examining consumer attitudes to OBA technology and has, with IAB, commissioned research on a number of key questions to which more than 1,000 consumers responded. Attendees included board level representatives and deal makers from brands, agencies, investors, technology providers, publishers, media and other associated industries. See our website for more details [www.olswang.com](http://www.olswang.com).

### **Open Source Summit 2009 - 1 December 2009**

On 1 December Olswang hosted its third Open Source Summit. Much has changed since our inaugural event in 2007 – as open source has achieved universal penetration, what used to be a specialist topic is now mainstream for those involved in M&A, joint ventures and IPOs – although it is not without its traps for the unwary. The panel of speakers included representatives from Microsoft, ipVA, Olswang and the Symbian Foundation, with a keynote speech given by leading open source advocate Bruce Perens.

For more details please contact Olswang's Head of Technology Nigel Swycher at [nigel.swycher@olswang.com](mailto:nigel.swycher@olswang.com).

## **Unlocking prime spectrum in the UK - 26th November 2009**

This event discussed analysis of the legal and commercial impact of the Government's proposed implementation of its Digital Britain policy to stimulate mobile broadband through various spectrum initiatives. The recent BIS Consultation is an unprecedented piece of market intervention on a grand scale.

The seminar was co-hosted by Olswang and Plum Consulting. Rob Bratby, Colin Long, Dan Tench, Ken Pearson and Phillipa Marks addressed the legal, technical and economic ramifications of BIS's proposals to implement the spectrum aspects of Digital Britain - touching on the proposed auctions of digital dividend (800 MHz) and 2.6 GHz spectrum, refarming of the existing 2G 900 MHz spectrum, capping and surrender, and imposing access conditions on licence holders - all of which pose significant questions.

Any questions, or requests for copies of the slides, should be sent to Rob Bratby at [rob.bratby@olswang.com](mailto:rob.bratby@olswang.com)

## **TVO breakfast master class - 3 December 2009**

This month saw the latest master class at our office in central Reading. The session was an update on EU and competition law and was well attended by clients and contacts from a range of businesses in the Thames Valley area. If you are interested in participating in future events, please contact Sophie Lang on 020 7067 3164 or at [sophie.lang@olswang.com](mailto:sophie.lang@olswang.com)

## **CIO Roundtable - 13 October 2009**

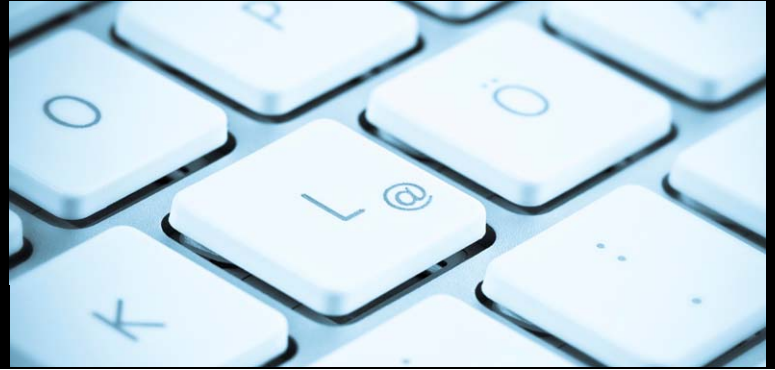
Olswang hosted a CIO Roundtable to discuss "Outsourcing in the Recession and Building Relationships that Last". The event was moderated by Martyn Hart, Chairman of the National Outsourcing Association. If you would like to participate in future events of this kind please contact Marc Dautlich at [marc.dautlich@olswang.com](mailto:marc.dautlich@olswang.com)

## **OGC and Intellect event: version 2.3 of the Model Contract - 1 October 2009**

Olswang hosted the launch party for Intellect and the Office of Government Commerce's new version of their ICT model contract, version 2.3.

Speakers from the UK government, OGC, Intellect and Partnerships UK provided an insight into the policy background behind the latest changes, introduced the "meta guidance" on the contract as well as taking delegates through the changes. The event drew approximately 80 attendees from the UK government and supplier organisations.

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# About Olswang



Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Founded in 1981, our Firm has grown to a team of over 650, including more than 100 partners, across four European offices. In addition, Olswang has a long-established best friends' network of leading independent law firms throughout the world.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was voted TMT Team of the Year 2009 for the second year running at the annual Legal Business Awards; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine, and was named Corporate Team of the Year – Mid markets at The Lawyer Awards 2008.

Resourceful drive and a climate of shared knowledge and empowerment are the hallmarks of our meritocratic, unstuffy culture. For the last five years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

Olswang is committed to being a responsible business and has developed Corporate Responsibility programmes that allow us to actively manage the social and economical impact of the Firm's activities. For example, through our Green initiative we recycle almost 90% of our waste and on the 1 May 2009 Olswang achieved CarbonNeutral® accreditation. As part of our Corporate Responsibility strategy we also encourage every member of staff to engage in lasting and meaningful pro bono and volunteering activities, both legal and non legal.

We recruit personalities with a genuine fascination and notable reputation in the sectors they focus on, which is reflected in the quality of our advice. We also understand the importance of achieving our clients' goals and ensure that our advice is, above all else, practical.

From world-class businesses to entrepreneurial startups, the rich diversity of our client base ensures a broader perspective and, as a result, deeper commercial insight. Transactional work is the most obvious feature of the role we perform. However, ongoing non-transactional support is an integral part of our business, and we focus on creating long-term relationships with our clients. We employ a range of proactive initiatives such as client care programmes, secondments, client training and feedback sessions to ensure our client relationships are strong.

At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

**The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.**

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