



Telecommunications and Media

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Primary legislation – telecoms and media regulatory frameworks

The regulatory framework for telecoms networks and services in the UK is primarily established under the Communications Act 2003. This piece of primary legislation gives effect to a number of EU Directives originally adopted to establish a framework for the regulation of communications-related activities across Europe.

In the media sector, regulation of television services also derives, in part, from applicable European law, in particular from the Audiovisual Media Services Directive ('**AVMS Directive**') which was implemented into law in the UK by the Broadcasting Acts 1990 and 1996 and the Communications Act 2003.

Post-Brexit, these primary pieces of legislation should remain in force at least for the short-term, therefore retaining the regulatory status quo. In such highly regulated and complex sectors, this would certainly be preferable to any repeal of the legislation. However, the UK Government would have the scope to repeal or amend these laws over time without being limited by the requirements of the European Directives, subject to any other international commitments.

Digital single market reforms

Telecoms regulatory reform: The regulatory framework for telecoms networks and service is, however, in the process of undergoing

reform at the European level to improve internet connectivity, promote roll-out of 5G and other next generation network technologies throughout Europe and strengthen consumer protection in electronic communications. This includes: (i) a directive establishing a European Electronic Communications Code ('**Code**') to replace the existing four key telecommunications directives; and (ii) a Regulation to increase the power designated to the Body of European Regulators ('**BEREC**') including to contribute to the consistent application of measures laid down by the Code, both of these entered into force on 20 December 2018 and member states have two years to implement the directive into national legislation.

The draft Withdrawal Agreement agreed with EU negotiators in November 2018 included a transition period through to 31 December 2020, during which EU law will continue to apply in and to the UK. If the draft Withdrawal Agreement is finalised and approved before the UK leaves the EU, the UK Government will still be required to implement the directive setting out the Code into national legislation within the same timeframe (ie prior to the end of the Brexit transition period).

The UK Government suggested in its telecoms no-deal Brexit technical note that if the Code is adopted before exit day but with a transposition date post-exit, it would still be minded to implement the Code's substantive provisions in a similar timetable, on the basis

The section is part of our
Brexit Legal Guide.

No deal

- If the [Withdrawal Agreement](#) endorsed by the EU Council on 25 November 2018 or the [Political Declaration](#), or some version of both, are not approved by 31 October 2019 and there is no change to the exit date, the UK will cease to be a member state on that date without any transitional period
- The body of EU law in force at that time will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments – this is called 'retained EU law'
- Some secondary legislation has already been made or published in draft, refer to "Key Telecommunications or Media Brexit Statutory Instruments enacted under the Withdrawal Agreement 2018" in this section

that it would support the UK's domestic policy objectives. This approach remains consistent with a [consultation](#) launched by the Department for Digital, Culture, Media and Sport in July 2019 regarding implementing the Code in the UK. Whilst the consultation itself does not provide specific guidance or direction on implementing the Code in the face of a no-deal Brexit, it does re-iterate the UK Government's expectation to implement the Code into UK law by December 2020 and adopts a "copy out" approach to the implementation, cross referring to the Code with minimal amendment.

The consultation also notes the parts of the UK electronic communications regulatory framework that would require rectification to operate appropriately post-Brexit (or, if a withdrawal agreement is reached, after any transition period) – for example removal of the current requirement placed on Ofcom to notify certain matters to the European Commission. Whilst the Broadband Stakeholder Group ('BSG') has suggested that the existing oversight of Ofcom by the Commission be replicated by a third party body post-Brexit (such as the Competition Market Authority), this position was not adopted by the UK Government in [The Electronic Communications and Wireless Telegraphy \(Amendment etc.\) \(EU Exit\) Regulations 2019](#). Whilst in the accompanying explanatory note the UK Government sought to justify this decision by referring to the Commission's current role as ensuring the standardised application of regulatory approaches across EU member states and that replicating this role would be "unnecessary", the BSG has continued to recommend the need for oversight to allow for proper scrutiny of regulatory decisions.

Media regulatory reform: The AVMS Directive is also in the process of undergoing European reform to take account of significant market developments and fast paced technological advances since its inception. The updating directive entered into force on 19 December 2018 and member states have 21 months to implement it into national legislation. The extent to which the changes will apply in the UK remains uncertain – this will depend on whether the UK Government is able to reach a Brexit deal with EU negotiators and, in turn, any autonomy the Government has in implementing the changes into UK law (see below).

In June 2019 the UK Government issued a related [consultation document](#). Whilst the consultation acknowledges this potential uncertainty, it nonetheless sets out a proposed approach to implementing the updating directive, suggesting that either way these

modifications are likely to be implemented at least in part. This is unsurprising given that the amendments enable a modern legislative framework that is more in line with our digital age and help provide consistency of regulatory requirements for media service providers operating across an EU footprint (including the UK). The consultation document also recognises that if there is a no-deal and the UK Government is entitled to determine whether to align domestically with the AVMS Directive, "*further analytical work will be required to identify these areas and the best way forward*". The UK's ability to "cherry pick" more UK-centric amendments in a no-deal scenario, or overtime following a departure from the EU, may therefore turn on the outcome of stakeholder responses to the consultation.

Broadcasting: the country of origin principle

The AVMS Directive also enshrined the so-called "country of origin" principle which allows broadcasters licensed and regulated in one member state, to freely transmit into other member states without the need for additional licences or compliance with additional regulation. Coupled with the UK also having a stable and supportive regulatory regime, a developed creative sector, a large domestic broadcasting market, access to highly skilled workers in the industry and being English speaking, among other reasons, it is unsurprising that many non-domestic multinational broadcasters have traditionally based their European operations here and the UK regulator, Ofcom, licenses more than half of the 2,200 channels broadcast across the EU.

If the UK leaves the EU **without a deal (or after any transition period in the event of a deal)**, the UK will no longer be regarded as a member state for the purpose of the AVMS Directive and broadcasters will lose the benefit of this principle under the directive. This consequence is clearly set out in the UK Government's [no-deal notice on broadcasting and video-on-demand](#) and the [European Commission's notice to stakeholders](#).

This could mean that:

- **UK licensed broadcasters** will no longer be guaranteed freedom of retransmission in other member states and in order to continue to broadcast into Europe they may be required to also obtain a separate broadcast licence, and comply with additional regulation, in another member state in which they are (i) 'established' (eg where the head office/editorial decisions regarding the services are taken); or (ii) certain technical criteria is satisfied for providers broadcasting via a satellite (which

- Means:
 - in respect of European reforms of the telecoms and media regulatory frameworks under the digital single market initiative, the UK Government:
 - has suggested it would be minded to implement the substantive provisions of the new European Electronic Communications Code in a similar timetable to that imposed on member states (ie by December 2020), on the basis that it would support the UK's domestic policy objectives – an approach consistent with a related consultation launched by the DCMS in July 2019 regarding this implementation
 - could have autonomy to determine the extent to which it implements the revised AVMS Directive into UK law, however, a related consultation launched by the DCMS in June 2019 suggests that the modifications are likely to be implemented at least in part
 - issues arising due to the UK no longer forming party of the Digital Single Market, such as lack of reciprocal recognition, are likely to prove challenging for organisations operating in the media and telecoms sector. In particular:
 - **Roaming:** the absence of caps on wholesale roaming charges means that surcharge-free roaming could no longer be guaranteed for UK mobile phone customers across the EU. UK mobile phone customers travelling to the EU could be subject to additional retail roaming charges (and vice versa), as the regime will instead depend on individual roaming agreements that are commercially negotiated between mobile operators, rather than being mandated by wholesale regulation

apply where the establishment criteria are not met); and

- **EU licensed broadcasters:** may need a UK licence to broadcast into the UK, depending on factors such as the jurisdiction in which the broadcaster is currently licensed – see below;

unless one of the alternatives to the country of origin principle can be relied on. Whilst the UK Government and many EU member states will still be bound by their other international commitments, **there are, however, a number of misgivings meaning that the alternatives to the country of origin principle are unlikely to be an adequate substitute for the single market access under the AVMS Directive, see below;**

Alternatives to the country of origin principle:

(a) European Convention on Transfrontier Television (ECTT, the Convention)

- In particular, the European Convention on Transfrontier Television is founded on broadly the same country of origin principle as that which went on to be enshrined in the Television Without Frontiers Directive and now the AVMS Directive, meaning that media service providers would still only need one licence from a regulatory body in their jurisdiction to broadcast throughout Europe. However, it is questionable whether the Convention on its own is likely to be enough to prevent broadcasters from relocating elsewhere in the EU.
- The Convention excludes seven EU member states (including Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands and Sweden), lacks an effective enforcement mechanism and does not cover on demand services. In addition, relying on the Convention could mean that those EU countries that are signatories to the Convention would be following the AVMSD rules whilst the UK would be following the Convention rules, so working out how cross-border relationships between UK and EU media businesses work in practice could prove challenging.
- The current status of the Convention is also unclear; following adoption of the AVMS Directive, the Council of Europe proposed to amend the Convention to bring it in line with the Directive and extend the scope to cover on-demand services. However, following intervention from the European Commission the revisions to the Convention were eventually discontinued and there is no longer a Convention Standing Committee.

- The UK Government acknowledges these potential challenges with the Convention in its no-deal notice and **suggests that audio-visual media providers seek local legal advice on how individual member states deal with their Convention obligations to permit freedom of reception and what action (if any) needs to be taken.**
- In addition, the Department for Digital, Culture, Media and Sport issued a [draft statutory instrument](#) under the EU (Withdrawal) Act 2018 to come into force on exit day if there is a no deal. The corresponding [Explanatory Memorandum](#) suggests that the statutory instrument seeks to “remedy deficiencies in retained EU law” arising from Brexit – in two key ways:
 - **implementing the Convention**, to continue a system of freedom of reception and transmission, minimum content standards and mutual co-operation between parties to the Convention; and
 - moving to a **country of destination system of regulation** which requires television services in the UK to be licensed and regulated by Ofcom. This is subject to two exceptions:
 - television services provided by broadcasters in countries **that are party to the Convention do not need a licence from Ofcom**; and
 - certain Irish language television services originating in the Republic of Ireland (not party to the Convention) **do not need a licence from Ofcom**, this is to honour commitments made in the Good Friday Agreement.
- Any television service originating in an **EEA state which is not party to the Convention** (and therefore not currently required to have a licence in the UK), is treated as an “exempt foreign service” for **6 months** after exit day, effectively providing a **transitional period** to obtain the necessary broadcasting licence from Ofcom.

Neither the memorandum nor the statutory instrument address the misgivings with relying on the Convention.

It is also worth noting that Ofcom is consulting on [draft television broadcasting licences for use in a no-deal Brexit](#), as well as a separate document setting out [what broadcasters need to do in a no-deal scenario](#).

(b) Deal: Free trade agreement?

The reciprocal rights and obligations afforded by the country of origin principle rely on single market access which the UK cannot unilaterally preserve in domestic legislation alone without the consent of member states or agreement

- **Country of origin principle:** the country-of-origin principle under the AVMS Directive will no longer apply in the UK. This could mean that UK licensed broadcasters will no longer be guaranteed freedom of retransmission in other member states and in order to continue to broadcast into Europe they may be required to re-structure their European operations and obtain a separate broadcast licence, and comply with additional regulation, in another member state
- **Content portability:** UK citizens will no longer be able to make full use of their paid online content services wherever they are in the EU (and vice versa in respect of EU citizens travelling to the UK). Whilst service providers could commercially negotiate content portability rights into licence agreements to provide such functionality post-Brexit, this could be administratively burdensome and costly. If no such rights were secured, a service provider would simply need to cease portability functionality or risk infringing the rights of licensors

- The UK Government has published a series of over 100 practical no-deal notes with advice for companies, including in respect of: [what telecoms businesses should do](#), [mobile roaming](#) and [broadcasting and video-on-demand](#)

with the EU through a free trade agreement.

This scenario seems unlikely for a number of reasons: in particular, there is currently limited precedent for a third country securing single market-equivalent access for broadcasters and, according to the European Scrutiny Committee, audio visual media services are generally excluded from EU free-trade agreements due to “cultural sensitivities”. This is a sentiment re-iterated earlier in the year when French President, Emmanuel Macron, [confirmed that France would ensure the audio-visual media sector is excluded from any free trade agreement between the UK and the EU in a letter responding to written concerns expressed by lobby group, French Coalition for Cultural Diversity](#).

If the other EU member states are not minded to grant reciprocal alignment, then many well-known media companies based in the UK will inevitably be tempted to restructure their European operations. The industry association for commercial broadcasters warned in 2018 that losing EU-wide broadcast rights could jeopardise £1 billion in annual investment from these international operators. Ireland, Germany, the Netherlands and France are proving to be popular relocation destinations and, in light of the current uncertainty, we have seen a number of multi-national media service providers who have a UK Ofcom broadcasting licence, applying for a separate broadcasting licence in one of these alternative jurisdictions, in an effort to continue to take advantage of the country of origin principle across the EU post-Brexit.

Directly applicable legislation – roaming and content portability examples

Both sectors are also subject to directly applicable EU Regulations in a couple of key areas; in particular being roaming and net neutrality in respect of the telecoms sector, and cross-border content portability in respect of the media sector.

Mobile roaming

The 2015 Roaming and Open Internet Regulation codified the principle of net neutrality (subject to reasonable traffic management), abolished retail roaming charges from June 2017, and set maximum wholesale roaming charges between mobile operators. The Roaming Regulation applies to countries in the EEA and the effect of Brexit on the Regulation will depend in part on the future relationship between the UK and the EU. If the UK is no longer part of the EEA, the Roaming Regulation will fall away subject to its

application during any Brexit transitional period.

In June 2017, the House of Commons Library published a Briefing Paper covering the impact of Brexit on the abolition of mobile roaming charges. Whilst the paper initially suggested that the ban on retail roaming charges could be retained in domestic law (by the [EU \(Withdrawal\) Act 2018](#) (**‘Withdrawal Act’**)), this is not something the UK Government has subsequently committed to because retaining the caps on wholesale charges would require a reciprocal agreement with the EU instead. The UK could continue to participate directly in the Roaming Regulations if it became a non-EU member of the EEA or mobile roaming provisions could be included in any future relationship agreement negotiated between the UK and the EU. However, there may be challenges with this approach given that to date neither the proposed Withdrawal Agreement nor any Free Trade Agreement with a third country includes provisions on mobile roaming.

If the Roaming Regulation falls away and is not addressed through either of these options, the UK Government acknowledged in its [no-deal Brexit technical note on mobile roaming that “surcharge-free roaming when you travel to the EU could no longer be guaranteed”](#); UK mobile phone customers travelling to Europe could therefore be subject to additional retail roaming charges (and vice versa) as the regime will instead depend on individual roaming agreements that are commercially negotiated between mobile operators, rather than being mandated by wholesale regulation. Any unregulated, commercially agreed wholesale rate increase by UK operators is likely to be reciprocated by their counterparts elsewhere in the EU, which in turn is likely to be passed on by operators charging their customers for retail roaming in those jurisdictions. Retail roaming charges may therefore also not continue to be standard across each mobile phone package, with the potential for roaming to be offered on different terms and conditions depending on a user’s mobile operator. This is an area that mobile phone users ought to consider carefully when selecting new mobile phone packages or switching mobile phone operators. The UK Government’s note [“Mobile roaming if there’s no Brexit deal”](#) provides further practical steps to consider in this scenario. There have also been [calls for the Government to seek binding commitments from mobile operators](#) to continue to offer surcharge-free roaming.

Such a scenario, however, would not seem to align with the Government’s intention in its 2017 White Paper to focus on ensuring that “UK telecoms companies can continue to

Deal/transitional period

- If approved by the UK Parliament, the Withdrawal Agreement, or some version of it, will set out arrangements for the UK’s withdrawal from the EU – when the UK will cease to be a member state
- A transition period will follow the date of the UK’s EU exit up till at least the end of 2020, possibly the end of 2021 or 2022
- During transition, EU law will continue to apply in and to the UK and the UK will continue to trade as part of the Single Market
- The Withdrawal Agreement will be accompanied by the Political Declaration on the future relationship between the UK and the EU. This will comment on the future trading relationship between the EU and the UK
- Means:
 - directly applicable EU legislation such as the Roaming Regulation and the Portability Regulation, will continue to apply in the UK until at least 31 December 2020
 - the Government will still be required to implement into national legislation reformed EU legislation under digital single market initiatives with an implementation deadline prior to the end of the transition period, for example:
 - the new European Electronic Communications Code by December 2020; and
 - the updates to the AVMS Directive by September 2020
 - there will not be any immediate changes to, for example, the Communications Act 2003 on 31 October 2019

trade as freely and competitively as possible with the EU and let European companies do the same in the UK". Whilst a number of the UK mobile operators have suggested that they [will continue to offer surcharge-free roaming for UK customers across the EU](#) (including in a [recent statement](#) in April 2019), in October 2018 the House of Commons EU Scrutiny Committee suggested that in practice this may not be sustainable in the long term if EU networks increase the wholesale roaming charges they apply to UK networks. The Committee also suggests that the absence of caps on wholesale roaming could be disruptive for some operators and have competition-distorting effects, with mobile virtual network operators ('MVNOs') and operators that are not part of a large European group, being the most impacted.

The UK Government has published the [Mobile Roaming \(EU Exit\) Regulations 2019](#) which would come into force on exit day and remove the current requirement for UK mobile operators to provide surcharge-free roaming in the EEA. Other consumer protection provisions contained in EU regulations but not contingent on EU membership to be operable, will, however, be implemented and continue to apply in UK law, such as a default financial limit on mobile data usage abroad (set at £45) and requirements for mobile operators to inform customers when 80% and 100% of their data usage has been reached, will continue to apply in UK law (and apply to UK customers, roaming worldwide). The [Explanatory Memorandum](#) to the regulations provides further detail.

At a time when regulation is moving towards greater harmonisation at the European level, with proposals such as the Digital Single Market seeking to remove any obstacles to a single European digital market, any such change at a UK level will lead to uncertainty for operators as to how they will be regulated across Europe. This in turn could have a big impact on consumers at the retail level, something which it is likely the UK Government and the EU will be keen to avoid.

Content Portability Regulation

The media sector is also subject to limited directly applicable EU regulations, for example, the Regulation on cross-border portability of online content services ('**Portability Regulation**'). The Portability Regulation enables citizens to make full use of their paid online content services wherever they are in the EU. It came into effect on 1 April 2018. As is the case for the Roaming Regulation, if the UK is no longer part of the EEA and subject to any Brexit transitional arrangements, the Portability Regulation will fall away on exit. The

Portability Regulation also relies on reciprocal rights between member states. The UK cannot unilaterally preserve the other side of such frameworks in domestic legislation alone without the consent of member states or agreement with the EU through a Free Trade Agreement. If no such agreement is reached, service providers could commercially negotiate portability rights into licence agreements to provide this functionality post-Brexit, however, this could be more administratively burdensome and costly. If no such rights were secured, a service provider would simply need to cease portability functionality or risk infringing the rights of licensors. Whilst potentially welcomed by media rights holders, this is unlikely to be welcomed by consumers and users of online content alike.

The [Intellectual Property \(Copyright and Related Rights\) \(Amendment\) \(EU Exit\) Regulations 2019](#) was made in October 2018. In the event of a no-deal Brexit, among addressing other intellectual property related issues, the legislation revokes the Content Portability Regulation and the related UK regulations from the body of retained EU law enacted under the Withdrawal Act 2018 meaning that EU citizens will also not be able to take advantage of cross-border content portability if travelling to the UK. The regulation is now the subject of an "affirmative" process meaning that it will be debated in the House of Lords and the House of Commons. This means that online service providers in the EU will not be required from a regulatory perspective to offer cross-border content access to UK consumers, who may see restrictions to their online content services when they visit the EU, unless they are able to do so under the commercial terms negotiated in their content licence agreements.

- issues relating to reciprocal recognition (such as surcharge-free roaming, the country of origin principle and content portability) may be dealt with in any future relationship agreement between the UK and the EU27, however, there is very limited precedent for a third country securing single market-equivalent access so the prospect of these issues being resolved in this way currently appears unlikely.

"At a time when regulation is moving towards greater harmonisation at the European level, with proposals such as the Digital Single Market seeking to remove any obstacles to a single European digital market, any such change at a UK level could lead to uncertainty for operators and service providers as to how they will be regulated across Europe."

HAYLEY BRADY

Key Telecommunications Brexit Statutory Instruments enacted under the Withdrawal Act 2018

- In March 2019, [The Mobile Roaming \(EU Exit\) Regulations 2019](#) were published to ensure that legislation in relation to mobile roaming can continue to operate effectively after Brexit. In particular, the Regulations modify the Mobile Roaming (European Communities) Regulations 2007 (as amended) and the EU Roaming Regulation (Regulation 531/2012 as amended) to remove requirements on UK mobile operators to guarantee surcharge-free roaming for EU customers. However, they provide for retention in UK law of various provisions of the EU Roaming Regulation that are not dependent on membership of the EU regulatory framework in order to operate effectively.
- [The Electronic Communications and Wireless Telegraphy \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) were made in February 2019 and published and amend the electronic communications legislation to ensure it is operable post-Brexit, including the implementation in the UK of the EU framework for electronic communications and wireless telegraphy. Schedule 1 amends primary legislation, in particular the Communications Act 2003, the Telecommunications Act 1984 and the Wireless Telegraphy Act 2006; Schedule 2 amends subordinate legislation, in particular the Electronic Communications and Wireless Telegraphy Regulations 2011 and the Communications (Access to Infrastructure) Regulations 2016; and Schedule 3 amends or revokes various retained direct EU legislation.

- In October 2018 [The Draft Open Internet Access \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) were published by the UK Government to amend UK legislation on open internet access on the UK's departure from the EU. This regulation established common rules that EU member states must apply to protect net neutrality (the principle that internet service providers should treat all internet traffic in a non-discriminatory and equal manner).

Key Media Brexit Statutory Instruments enacted under the Withdrawal Act 2018

- The [Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#) were made in February 2019 and contain amendments to primary and secondary legislation. In particular, the regulations: (i) implement the European Convention on Transfrontier Television to continue a system of freedom of reception and transmission, minimum content standards and mutual co-operation between parties to the Convention; and (ii) move to a country of destination system of regulation which requires television services in the UK to be licensed and regulated by Ofcom. This is subject to two exceptions (ie foreign exempt services), namely:
 - television services provided by broadcasters in countries that are party to the Convention do not need a licence from Ofcom; and
 - certain Irish language television services originating in the Republic of Ireland (not party to the Convention) that do not need a licence from Ofcom.

Any television service originating in an EEA state which is not party to the Convention (and therefore not currently required to have a licence in the UK), is treated as an "exempt foreign service" for 6 months after exit day, effectively providing a transitional period to obtain the necessary broadcasting licence from Ofcom.

- A draft version of the [Cultural Tests \(Films, Television Programmes and Video Games\) \(Amendment\) \(EU Exit\) Regulations 2018](#) was published on 4 July 2018 by the UK Government. The regulations will amend the cultural test applied to determine whether television, video games and film productions are entitled to tax relief post-Brexit. The changes are required as qualification for tax relief depends on a sufficient connection with the EEA (which would exclude the UK following Brexit).
- [The Intellectual Property \(Copyright and Related Rights\) \(Amendment\) \(EU Exit\) Regulations 2019](#) were published in October 2018. In the event of a no-deal Brexit, among addressing other intellectual property related issues, the legislation revokes the Content Portability Regulation and the related UK regulations from the body of retained EU law enacted under the Withdrawal Act 2018. This means that EU citizens will also not be able to take advantage of cross-border content portability if travelling to the UK. The regulations are now the subject of an "affirmative" process meaning that it will be debated in the House of Lords and the House of Commons.

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