



# Telecommunications and Media

OCTOBER 2020

The UK formally left the EU on 31 January 2020 and the transition period established under the Withdrawal Agreement (called the “implementation period” in UK legislation) is due to end on 31 December 2020. This section of our Beyond Brexit Legal Guide considers the position both during and after transition in relation to telecommunications and media regulations.

## Primary legislation - telecoms and media regulatory frameworks

### Telecoms

The immediate effect on telecoms providers of the UK formally leaving the EU on 31 January 2020 has not been dramatic during the transition period which runs until 11 pm on 31 December 2020 as, following agreement with the EU on transitional arrangements, provisions in the [European Union \(Withdrawal\) Act 2018 \(“Withdrawal Act”\)](#) as amended by the [European Union \(Withdrawal Agreement\) Act 2020 \(“Withdrawal Agreement Act”\)](#) retain most existing EU law in UK law up until this date. This legislation retains the effect of those parts of the European Communities Act 1972 which give continuing effect to the supervisory, judiciary and enforcement mechanisms of the EU until the end of the transition period. The UK will therefore remain in line with the continuing EU until the end of transition on 31 December 2020. This will also include the application of both new and amended EU law during this time.

The regulatory framework for telecoms networks and services in the UK is primarily established under the [Communications Act 2003](#). This piece of primary legislation transposes into UK law a number of EU Directives originally adopted to establish a framework for the regulation of communications-related activities across Europe.

Following the end of the transition period, however, regulation that limits what certain mobile providers can charge operators from EU Member States for connecting their customers or from passing on wholesale roaming charges they incur to their own customers will cease to apply to UK operators. This will mean UK customers are likely to see increases in voice and data roaming charges when they are abroad in the EU after this time unless commercial agreements are made by mobile operators which contain these charges. The same may apply to customers of EU operators travelling in the UK.

The section is part of our  
Brexit Legal Guide.

### Withdrawal Agreement/ transition period

- The Withdrawal Act and Withdrawal Agreement Act in combination set out arrangements for the UK’s withdrawal from the EU – during the transition period provided for in the Withdrawal Agreement between the UK and the EU (called the “implementation period” in UK legislation) from the date of the UK’s exit from the EU at 11 pm on 31 January 2020 up till 11 pm on the 31 December 2020 when the UK will cease to be bound by EU law. NOTE that the UK ceased to be a Member State back in January, although it continues to be treated as if it were one during transition.
- During the transition period, EU law will continue to apply in and to the UK and the UK will continue to trade as part of the Single Market.

## Broadcasting

In the media sector, regulation of television services 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 in addition to the Communications Act 2003. Following the end of the transition period, certain parts of the AVMS Directive which rely on reciprocity between Member States will no longer apply (notably affecting the country of origin principle), however, the Government is likely to implement legislation (see below regarding the [Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#))) to ensure continued freedom of reception and transmission of broadcasting services.

Additionally, revisions to the AVMS Directive were adopted in 2018 and certain aspects of the revised AVMS Directive, as detailed in the Government’s [response](#) to two consultations run over the course of 2019, will be implemented in the UK by 19 September 2020. This will form part of the body of retained EU law at the end of the transition period.

## Digital Single Market reforms

**Telecoms regulatory reform:** The regulatory framework for telecoms networks and services is, currently in the process of undergoing reform at the European level to improve internet connectivity, promote the roll-out of 5G and other next generation network technologies throughout Europe and strengthen consumer protection in electronic communications. This includes:

- a directive establishing a **European Electronic Communications Code** (“**Code**”) to replace the existing four key telecommunications directives; and
- 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 the Code and the Regulation to increase the power of BEREC entered into force on 20 December 2018 and EU Member States have two years to implement the directive into national legislation.

As EU law will continue to apply in and to the UK during the transition period which will end on 31 December 2020, the UK Government will still be required to implement the directive setting out the Code into national legislation within the same timeframe, ie by December 2020.

Separately, a consultation launched by the Department for Digital, Culture, Media and

Sport regarding implementation of the Code in the UK has identified those parts of the UK electronic communications regulatory framework that would require rectification to operate appropriately after the 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 is replicated by a third party body post the end of the transition period (such as the Competition and Markets 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 of Ofcom to allow for proper scrutiny of regulatory decisions following the end of the transition period.

**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. Notably, this includes a new 30% quota for European works in respect of video-on-demand services and extends the regulatory regime under the original AVMS Directive to video-sharing platforms (such as YouTube). This 30% quota will, in principle, be retained EU law so will apply after the transition period unless amended by the UK Government (note that UK productions will continue to qualify as “European works” under the revised AVMS Directive for the purposes of quotas, including following expiry of the transition period). EU Member States had until 19 September 2020 to implement the revised AVMS Directive into national law.

In June 2019, prior to the signing of the Withdrawal Agreement, the UK Government issued a consultation document setting out its proposed approach to implementing the revised AVMS Directive. Whilst the consultation acknowledged potential uncertainty surrounding the UK’s withdrawal from the EU, it nonetheless suggested that either way the modifications under the revised AVMS Directive would be likely to be implemented at least in part. This was unsurprising given that the amendments enable a modern legislative framework that is more in line with the digital age and help provide consistency of regulatory requirements for media service providers operating across a

- For telecoms, broadcasting and media providers this means:
  - directly applicable EU legislation such as the Roaming Regulation and the Portability Regulation, will continue to apply in the UK until 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 revised AVMS Directive by September 2020; and
    - the new European Electronic Communications Code by December 2020; and
  - Media and broadcasting issues relating to reciprocal recognition (such as content portability) are not considered in the draft FTAs put forward by the UK and the EU and there is no attempt in either draft FTA to replace the “country of origin” principle. The position of the draft UK FTA is for audio-visual services to be regulated in accordance with domestic regulations which affect cross-border trade in services, whereas the EU FTA is silent on the matter. The lack of any provisions which seek to preserve the benefits of the EU media and broadcasting regulatory framework for the UK is not surprising as there is very limited precedent for a third country securing Single Market-equivalent access (particularly when it comes to the media/broadcasting sector) and therefore the prospect of these issues being resolved in this way currently appears unlikely. In relation to the telecoms sector, the draft text of the UK and EU agreements are broadly aligned and the intention appears to be to maintain the status quo for telecom services. For example, the agreements contain

European footprint (including the UK). In February 2020, the [UK Government published its response](#) to the consultation (which ran from May to August 2019) and the follow-up consultation (which ran from July to September 2019) which sets out the Government’s approach to implementation of the amendments. The Government has taken the view that some elements of the revised AVMS Directive will not need to be implemented. For example, provisions relating to the establishment of an independent national regulator (existing UK legislation already provides for the independence of Ofcom as the national regulator) and other provisions whose implementation is left to the discretion of the relevant Member State. On the 15 June 2020 the UK notified its [draft implementing regulations](#) to the European Commission. These draft regulations are yet to be enacted by Parliament, meaning the UK has missed the 19 September 2020 deadline.

## Broadcasting: the country of origin principle

The original AVMS Directive enshrined in EU law 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 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 in the UK and that Ofcom licenses more than half of the 2,200 channels broadcast across the EU.

After the end of the transition period, the AVMS Directive and the country of origin principle will no longer apply to services falling under UK jurisdiction which are broadcast into the EU. However, the European Convention on Transfrontier Television (“**ECTT**”) framework will still apply. This means that the 20 EU countries that have signed up to ECTT must allow freedom of reception to services falling under UK jurisdiction. How this right is given effect in each country may depend on national law and how the ECTT has been implemented locally. The UK must also permit freedom of reception within the UK for services that originate from all countries that are party to the ECTT. To reflect this, the UK has therefore implemented legislation covering two broad principles:

- a continued country-of-origin principle that will operate under the ECTT, but which does not cover Video on Demand (VOD) services

and does not include seven EU Member States; and

- a new country-of-destination principle for broadcast services originating from countries that are not parties to the ECTT, but can be accessed by means of a regulated UK electronic programme guide.

Video-on-demand services accessible in the UK will only need to notify Ofcom, if their head office and editorial decision-making capacity are UK-based.

## Directly applicable legislation - roaming and content portability examples

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

## Mobile roaming

The [Roaming and Open Internet Regulation 2015](#) (“**Roaming 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, but as a consequence of the UK leaving the EU on 31 January 2020, the Roaming Regulation will no longer apply to the UK following the end of the transition 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 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. Provisions aimed at reducing or abolishing mobile roaming charges could be included in any future relationship agreement negotiated between the UK and the EU. The draft FTA being considered by the EU does not contain any provision of this sort and although the draft FTA being considered by the UK does reference roaming charges, it does not go as far as to abolish them. Rather, the text states that the Parties “shall cooperate on promoting transparent and reasonable rates”. When the Roaming Regulation falls away and is not addressed through a free trade agreement, as the UK Government acknowledged in its [no-deal Brexit technical note on mobile](#)

provisions aimed at minimising formalities, enabling bilateral access to UK and EU public telecoms networks and essential facilities and ensuring the independence of the UK and EU telecoms regulators. Roaming charges still remain a grey area, however. The EU draft FTA is silent on the subject, whereas the UK FTA mentions roaming, but does not go so far as to abolish them and instead states that the parties should cooperate on promoting transparent and reasonable rates.

## Following the end of the transition period

- Pursuant to the Withdrawal Act, the body of directly effective EU law in force in the UK on IP completion day (the end of the transition period on 31 December 2020) will (with necessary amendments) be imported into UK law. UK legislation which was made to implement EU law will be retained, with suitable amendments - all these types of law go under the umbrella name of “retained EU law”.
- Some secondary legislation has already been made or published in draft; please refer to “Key Telecommunications or Media Brexit Statutory Instruments enacted under the Withdrawal Agreement 2018” in this section.
- In respect of European reforms of the telecoms and media regulatory frameworks under the Digital Single Market initiative, the UK Government:
  - has said that it intends to implement the substantive provisions of the new European Electronic Communications Code in a similar timetable to that imposed on EU 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; and

roaming “surcharge-free roaming when you travel to the EU will 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 will need 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 trade as freely and competitively as possible with the EU and let European companies do the same in the UK”. Whilst the four major UK mobile operators (Three, EE, O2 and Vodafone) have stated that they [will continue to offer surcharge-free roaming for UK customers across the EU](#) (both in April 2019 and [reconfirmed in July 2020](#)), 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 has also suggested 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 published the [Mobile Roaming \(EU Exit\) Regulations 2019](#) which will come into force at the end of transition. These remove the previous requirement for UK mobile operators to provide surcharge-free roaming in the EEA. The Regulations also provide for retention in UK law of various provisions of the EU Roaming Regulations that are not contingent on membership of the EU

regulatory framework to be operable and will continue to apply in UK law after the end of the transition period, 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. 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, such change at a UK level will lead to uncertainty for UK mobile operators as to how they will be regulated across Europe as well as for EU broadcasters broadcasting in the UK. This in turn could have a big impact on consumers at the retail level, something which is likely the UK Government and the EU should be keen to avoid, but may nevertheless fail to control. In a February 2020 [statement](#), Ofcom confirmed that it has no intention to open a consultation on this issue.

### Content Portability Regulation

The [EU Portability Regulation](#) allows consumers across the EEA to access their online content services (for example, video-on-demand streaming services, such as Netflix and Amazon Prime) as if they are at home when they travel within the EEA. This means that an online service provider is required to provide content ordinarily available in the UK to a UK customer temporarily present in any Member State. The same is true for EEA customers temporarily visiting the UK. The regulation applies only to travel between EEA Member States.

The EU Portability Regulation will cease to apply to UK-EEA travel after the end of the transition period. In the UK, the regulation will be revoked, meaning that online content service providers will no longer be required under the regulation to provide cross-border portability between the UK and the EEA as standard. This will not prevent service providers offering cross-border portability to their customers on a voluntary basis, but to do so they will need to ensure that they have obtained the relevant rights to do so from the owners of the content available via their services.

Following the end of the transition period, this may mean that UK customers visiting the EEA and EEA customers visiting the UK see restrictions to certain content ordinarily available to them when in their home state. This will depend on the terms of their services and the licences in place between service providers and content rights holders.

- has indicated the extent to which it will implement the revised AVMS Directive into UK law, however, draft legislation is still awaited.
- 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 will 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.
  - **Country of origin principle:** the country-of-origin principle under the AVMS Directive will no longer apply in the UK. However the European Convention on Transfrontier Television (ECTT) framework will still apply meaning that the 20 EU signatories must allow freedom of reception to services from the UK and vice versa. For those seven countries not covered by the ECCT (Belgium, Denmark, Greece, Ireland, Luxembourg, The Netherlands and Sweden), a separate broadcast licence will be required along with compliance with any national regulations in the relevant 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

### Key Telecommunications Brexit Statutory Instruments enacted under the EUWA

- 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 the end of the transition period. 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 after the end of the transition period, 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.
- [The Open Internet Access \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) were made in November 2018 to amend UK legislation on open internet access after the end of the transition period. 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 will be required to have a licence in the UK) is treated as an “exempt foreign service” for 6 months after 31 December 2020, effectively providing a transitional period to obtain the necessary broadcasting licence from Ofcom. Under Paragraph 1, Schedule 5 of the Withdrawal Agreement Act, commencement of the regulation has been deferred, however it is likely that this will be enacted at the end of the transition period in a similar form.

- 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. These regulations will amend the cultural test applied to determine whether television, video games and film productions are entitled to tax relief after the end of the transition period. The changes are required as qualification for tax relief depends on a sufficient connection with the EEA (which would exclude the UK following the end of the transition period).
- [The Intellectual Property \(Copyright and Related Rights\) \(Amendment\) \(EU Exit\) Regulations 2019](#) were made in February 2019. After the end of the transition period, in addition to addressing other intellectual property related issues, the legislation will revoke the Content Portability Regulation and the related UK regulations from the body of retained EU law enacted under the EUWA. This means that, unless commercial agreements are made to the contrary, EU and UK citizens will not be able to take advantage of cross-border content portability when travelling between UK and EEA countries.

content portability rights into licence agreements to provide such functionality following the end of the transition period, this could be administratively burdensome and costly. If no such rights are secured, however, a service provider would need to cease portability functionality or risk infringing the rights of its licensors.

- The EU has published a series of notes to help businesses prepare for the end of the transition period, including in respect of [audiovisual media services](#), [electronic communications \(including roaming\)](#) and [geoblocking](#).

“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, the change brought about by the UK leaving the EU could lead to uncertainty for operators and service providers as to how they will be regulated across Europe in the future.”

### HAYLEY BRADY

#### Key contacts



**Hayley Brady**  
Partner  
Head of Media and Digital, UK  
T +44 20 7466 2079  
[hayley.brady@hsf.com](mailto:hayley.brady@hsf.com)



**James Balfour**  
Senior Associate  
Media and Digital  
T +44 20 7466 7582  
[james.balfour@hsf.com](mailto:james.balfour@hsf.com)



**Aaron White**  
Partner  
Digital TMT, Sourcing and Data  
T +44 20 7466 2188  
[aaron.white@hsf.com](mailto:aaron.white@hsf.com)



**Claire Wiseman**  
Senior Associate and  
Professional Support Lawyer  
Digital TMT, Sourcing and Data  
T +44 20 7466 2267  
[claire.wiseman@hsf.com](mailto:claire.wiseman@hsf.com)