



Post-Brexit rules for the European audiovisual sector

NOTE

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Francisco Javier Cabrera Blázquez



Foreword

From 1 January 2021 the relations between the UK and the European Union are governed by a Trade and Cooperation Agreement, as a result of the deal that was reached in the very last days of 2020. These new rules will affect every economic sector, including the audiovisual.

Founding member of the Council of Europe and of the European Audiovisual Observatory, of which it holds the rotating Presidency in 2021, the role of the UK in the European audiovisual landscape remains nevertheless of great relevance despite Brexit. This note aims to present an initial overview of the main legal changes that the new relationship between the UK and the EU will introduce to the audiovisual sectors in the United Kingdom and in the European Union. It covers guidance provided by various official British sources, such as the British Film Institute (BFI),¹ the Department for Digital, Culture, Media and Sport (DCMS),² the audiovisual regulator Ofcom,³ and the Intellectual Property Office (IPO).⁴ It also draws on information from European Union institutions, from previous publications of the European Audiovisual Observatory, and from other sources.

The note is provided for information purposes only and cannot be understood as guidance from the European Audiovisual Observatory or the Council of Europe. It will be updated as soon as further details are made available by the Parties.

The note benefits from the precious feedback provided by Maria Donde (Ofcom), Amit Thapar and Patrick McMahon (DCMS) and Neil Watson, Agnieszka Moody and Jack Powell (BFI), with my warmest thanks.

Strasbourg, February 2021

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¹ British Film Institute, “EU exit, the end of the transition period and the UK-EU Trade and Cooperation Agreement: Answering questions from the screen sectors”, 1 January 2021, <https://www.bfi.org.uk/strategy-policy/policy-statements/eu-exit-end-transition-period-uk-eu-trade-cooperation-agreement-answering-questions-from-screen-sectors>. The advice in this Q&A refers to the situation as it applies from 1 January 2021 when the Trade and Cooperation Agreement took effect. This Q&A will be updated as further detail becomes clear, including around mobility, subsidy (State aid), data transfers and intellectual property.

² DCMS, “Guidance - Broadcasting and video on-demand services between the UK and EU - Rules for UK and EU broadcasters and video on-demand services”, 31 December 2020, <https://www.gov.uk/guidance/broadcasting-and-video-on-demand-services-between-the-uk-and-eu#about-avmsd-and-ectt>.

³ Ofcom, “Frequently asked questions on linear television services and video on demand services after Brexit”, 6 January 2021, https://www.ofcom.org.uk/_data/assets/pdf_file/0019/190342/faq-television-on-demand-services-after-brexit.pdf.

⁴ Intellectual Property Office, “Guidance - Changes to copyright law from 1 January 2021”, published 30 January 2020, last updated 4 January 2021, <https://www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period>

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1. Introduction

1.1. The transition period

On 31 January 2020, the UK left the European Union and entered a ‘transition period’ while the UK and the EU negotiated their future relationship.⁵ Almost a year later, on 24 December 2020, the European Commission and the United Kingdom reached a deal on an EU-UK Trade and Cooperation Agreement (TCA),⁶ which defines the terms of their future cooperation.⁷

On 29 December 2020, the Council of the European Union adopted by written procedure the decision on the signing of the deal and its provisional application as of 1 January 2021 until 28 February 2021, pending the consent of the European Parliament and the conclusion of the legislative procedure by the Council decision in 2021. The UK Parliament passed the European Union (Future Relationship) Act 2020 on 30 December 2020.⁸ On the same day, the President of the European Council and the President of the European Commission signed the TCA on behalf of the European Union, and the text was signed by Prime Minister Boris Johnson in the United Kingdom.

1.2. The TCA

On 31 December 2020, the UK left the EU Single Market and Customs Union, as well as all EU policies and international agreements signed by the EU. The trading relationship

⁵ For information about the Brexit process up to 2018 and its possible impact on the audiovisual sector, see Cabrera Blázquez F.J., Cappello M., Fontaine G., Talavera Milla J., Valais S., *Brexit: The impact on the audiovisual sector*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/brexit-the-impact-on-the-audiovisual-sector/16808f064f>.

⁶ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, for the other part, 24 December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG.

⁷ See European Commission, “The EU-UK Trade and Cooperation Agreement”, https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en. See also the summary explainer provided by the UK government, <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union/summary-explainer>.

⁸ European Union (Future Relationship) Act 2020, c. 29, <https://www.legislation.gov.uk/ukpga/2020/29>.



between the UK and the EU is now governed by the application of the TCA and by the Northern Ireland Protocol.⁹ The TCA consists of three main pillars:

- a Free Trade Agreement;
- a partnership for security;
- a horizontal agreement on governance.

Foreign policy, external security and defence cooperation are not covered by the agreement.

The TCA has important implications for the audiovisual sector. From 1 January 2021, the EU state aid regime¹⁰ no longer applies to the UK, save for specific exceptions concerning Northern Ireland,¹¹ and the TCA chapter on subsidy control explicitly excludes subsidies related to the audiovisual sector from its scope.¹² Audiovisual services are excluded from the sections on Services and Investment¹³ and on Digital Trade¹⁴ in the TCA. With regard to intellectual property, Title V of the TCA states that it “shall complement and further specify the rights and obligations of each Party under the TRIPS Agreement and other international treaties in the field of intellectual property to which they are parties”, but it “does not preclude either Party from introducing more extensive protection and enforcement of intellectual property rights than required.” Concerning copyright and related rights, the TCA introduces minimum standards that the parties must adhere to.¹⁵

⁹ See <https://www.gov.uk/government/publications/the-northern-ireland-protocol> and https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en.

¹⁰ For more information on the EU state aid regime concerning cinematographic and audiovisual works see Cabrera Blázquez F.J., *Notification obligations for state aid concerning audiovisual works in the EU*, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/notification-obligations-for-state-aid-concerning-audiovisual-works-in/16808aa941>. See also Nikoltchev S. (ed.), *The new Cinema Communication*, IRIS plus 2014-1, European Audiovisual Observatory, Strasbourg, 2014, <https://rm.coe.int/1680783dab>.

¹¹ According to the UK Government, “EU state aid rules will apply in certain cases where this is relevant to trade between Northern Ireland and the EU. However this does not mean that state aid rules will apply to Northern Ireland as they do today: it is limited in scope to the movement of goods and wholesale electricity markets, and concerns only measures that ‘affect trade’ between Northern Ireland and the EU.” See The UK’s Approach to the Northern Ireland Protocol, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887532/The_UK_s_Approach_to_NI_Protocol_Web_Accessible.pdf.

¹² Title XI, Chapter 3, Article 3.2(6) TCA.

¹³ Title II, Chapter 1, Article SERVIN. 1.1.(5)(b) TCA.

¹⁴ Title III, Chapter 1, Article DIGIT. 2(2) TCA.

¹⁵ See Title V, Chapter 2, Section 1 TCA.

2. The new rules

2.1. Movement of people and goods

2.1.1. People

2.1.1.1. Short-term visits

According to the TCA, both parties provide for visa-free travel for short-term visits in respect of their nationals, in accordance with their domestic law.¹⁶ This provision will not apply to future EU member states, unless the UK agrees. EU citizens are considered non-visa nationals for the purposes of tourism and holidays, meaning they can come to the UK as visitors for six months without the need to obtain a visa. The EU now applies its existing rules on visa-free short-term visits to UK nationals travelling to and within the Schengen area. UK nationals do not need a visa when travelling to and within the Schengen area for short stays of up to 90 days in a rolling 180-day period, when travelling for purposes such as tourism, to visit friends or family or to conduct a limited variety of business trips, including attending meetings, conferences and trade fairs.¹⁷

2.1.1.2. Longer-term stays

2.1.1.2.1. UK nationals

New rules apply to the provision of services and travelling for business to the EU, Switzerland, Norway, Iceland and Liechtenstein.¹⁸ For stays of longer than 90 days in the Schengen area, UK nationals are required to hold a residence permit or relevant visa issued by national authorities, under national or EU rules, with separate rules applying to non-Schengen countries Bulgaria,¹⁹ Croatia,²⁰ Cyprus²¹ and Romania.²² Visits to other EU or Schengen countries do not count towards the 90-day limit in these four countries, as they

¹⁶ TCA, Heading Four, Title II.

¹⁷ These rules are subject to any additional restrictions put in place by a member state as a consequence of the COVID-19 pandemic.

¹⁸ The UK government has published information for UK businesses providing services and travelling for business to the EU, Switzerland, Norway, Iceland and Liechtenstein, see <https://www.gov.uk/government/collections/providing-services-to-eea-and-efta-countries-after-eu-exit>.

¹⁹ <https://www.gov.uk/foreign-travel-advice/bulgaria/entry-requirements>.

²⁰ <https://www.gov.uk/foreign-travel-advice/croatia/entry-requirements>.

²¹ <https://www.gov.uk/foreign-travel-advice/cyprus/entry-requirements>.

²² <https://www.gov.uk/foreign-travel-advice/romania/entry-requirements>.



are not in the Schengen area. Visits to these countries do not count towards the 90-day visa-free limit in the Schengen area.

2.1.1.2.2. EU nationals

Creative workers (for example actors, dancers, musicians or film crew members) moving from the EU to the UK for temporary work must now adhere to the tier 5 (creative and sporting) visa system²³, which previously applied only to non-EEA nationals. It requires a certificate of sponsorship from a licensed employer beforehand, and the work in question must relate to the sponsor organisation's activities.

2.1.2. UK-Ireland Common Travel Area

The UK and Irish governments have kept the Common Travel Area (CTA) beyond 1 January 2021, as it pre-dates both British and Irish membership of the EU and is not dependent on it. British and Irish citizens can move freely and reside in either UK or Ireland, and enjoy associated rights and privileges, including the right to work, study and vote in certain elections, as well as to access social welfare benefits and health services.²⁴

2.1.2.1. Immigration

2.1.2.1.1. EEA nationals in the UK

A points-based immigration system applies to both EEA nationals (excluding Irish nationals, who enjoy free movement through the CTA) and non-EEA nationals. There are two main types of visas:

- Skilled worker visa:²⁵
 - The UK employer must have been approved by the Home Office.
 - A certificate of sponsorship from the employer is required, with information about the role offered to the worker in the UK;
 - The job in question must be on the list of eligible occupations.
 - The worker must be paid the minimum salary or the 'going rate' for the type of work they will be doing - whichever is higher, which in turn depends on the type of work in question.²⁶
 - The worker must have knowledge of English.

²³ For more information on the Temporary Worker - Creative and Sporting visa (T5) see:

<https://www.gov.uk/temporary-worker-creative-and-sporting-visa>.

²⁴ Memorandum of Understanding between the UK and Ireland on the CTA,

<https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-ireland-on-the-cta>.

²⁵ <https://www.gov.uk/skilled-worker-visa>.

²⁶ There are exceptions to this rule, see: <https://www.gov.uk/skilled-worker-visa/when-you-can-be-paid-less>.



- Global talent visa:²⁷ A special visa for leaders or potential leaders in one of the following fields:
 - Academia or research.
 - Arts and culture.
 - Digital technology.

Under the Withdrawal Agreement, EU citizens living in the UK who have lived there for five years or more by 31 December 2020 can apply for 'settled status', allowing them to stay in the UK permanently. Those who do not fulfil the requisite of five years may apply for pre-settled status, allowing them to remain in the UK until they have reached the five years required to apply for settled status.²⁸

2.1.2.1.2. UK nationals in the EU

The EU and its member states share competence in the area of immigration.²⁹ This means that immigration rules are not identical in different EU countries but that the countries have agreed on EU-wide immigration and visa rules valid across the EU,³⁰ with the exception of Denmark and Ireland.³¹ These include:

- Rules that allow citizens of countries outside the EU to work or study in an EU country. They cover specifically individuals who are:
 - Highly-qualified workers
 - Researchers
 - Students
 - Trainees, school pupils or volunteers
 - Intra-corporate transferees
 - Seasonal workers
- Rules that allow citizens of countries outside the EU who are staying legally in an EU country to bring their non-EU family members to live with them and to become long-term residents.³²

Each EU country decides:

- The total number of migrants who can be admitted to the country to look for work.
- All final decisions on migrant applications.

²⁷ <https://www.gov.uk/global-talent>.

²⁸ <https://www.gov.uk/settled-status-eu-citizens-families>.

²⁹ https://ec.europa.eu/immigration/general-information/who-does-what_en.

³⁰ See Title V, Chapter 2 of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>.

³¹ Denmark does not apply EU-wide rules which relate to immigration, visa and asylum policies. Ireland chooses, on a case-by-case basis, whether or not to adopt EU rules on immigration, visa and asylum policies.

³² For more information on EU immigration policies see: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration_en.



- Conditions to obtain residence and work permits when no EU-wide rules have been adopted.³³

UK nationals and their family members who were living in an EU country by 31 December 2020 are covered by the Withdrawal Agreement, provided they meet one of the residence conditions:

- They are a worker or self-employed person in the country where they are living.
- They are a student able to prove they have sufficient funds to live on, and have comprehensive sickness insurance.
- They are a self-sufficient person able to prove they have sufficient funds to live on, and have comprehensive sickness insurance.
- They already have the right of permanent residence.

After living continuously in an EU country for five years, UK nationals are able to obtain permanent residence. Those who do not fulfil the five-year requisite are able to stay for as long as they meet one of the residence conditions.³⁴

2.1.3. Professional equipment

According to the TCA,³⁵ the following items will be granted temporary admission to the territory of either party, with total conditional relief from import duties and taxes and without application of import restrictions or prohibitions of economic character, as provided for in laws and regulations:

- Professional equipment (equipment for the press, for sound or television broadcasting which is necessary for representatives of the press, of broadcasting or television organisations visiting the territory of another country for purposes of reporting, in order to transmit or record material for specified programmes.
- Cinematographic equipment necessary for a person visiting the territory of another country in order to make a specified film or films.
- Any other equipment necessary for the exercise of the calling, trade or profession of a person visiting the territory of another country to perform a specified task, insofar as it is not to be used for the industrial manufacture or packaging of goods or (except in the case of hand tools) for the exploitation of natural resources, for the construction, repair or maintenance of buildings or for earth moving and like projects; ancillary apparatus for the equipment mentioned above, and accessories

³³ For more information on each of the 27 EU countries regarding their national institutional framework, i.e. the competent authorities for immigration, key legal texts, policy plans and statistical studies, see: https://ec.europa.eu/immigration/what-do-member-states-do_en.

³⁴ <https://www.gov.uk/guidance/the-withdrawal-agreement-what-uk-nationals-need-to-know-about-citizens-rights>.

³⁵ Article CUSTMS.16(2)(b) TCA.



therefore); component parts imported for repair of professional equipment can be temporarily admitted.

Under the Ireland/Northern Ireland Protocol,³⁶ the movement of goods between Northern Ireland and Great Britain, in both directions, is subject to new sets of rules after the end of the transition period.

2.2. Public support

2.2.1. State aid

From 1 January 2021, the EU state aid regime³⁷ no longer applies to the UK, save for specific exceptions concerning Northern Ireland.³⁸ The TCA chapter on subsidy control (which aims at ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the parties) explicitly excludes subsidies related to the audiovisual sector from its scope.³⁹ The UK follows World Trade Organisation (WTO) subsidy rules and adheres to other international commitments.⁴⁰ The WTO agreement on subsidies and countervailing measures will remain relevant in the UK.⁴¹

At the time of publication, the UK Government is consulting on the best way to design a bespoke approach to subsidy control.⁴²

³⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf.

³⁷ For more information on the EU state aid regime concerning cinematographic and audiovisual works see Cabrera Blázquez F.J., *Notification obligations for state aid concerning audiovisual works in the EU*, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/notification-obligations-for-state-aid-concerning-audiovisual-works-in/16808aa941>. See also Nikoltchev S. (ed.), *The new Cinema Communication*, IRIS plus 2014-1, European Audiovisual Observatory, Strasbourg, 2014, <https://rm.coe.int/1680783dab>.

³⁸ According to the UK Government, “EU state aid rules will apply in certain cases where this is relevant to trade between Northern Ireland and the EU. However this does not mean that state aid rules will apply to Northern Ireland as they do today: it is limited in scope to the movement of goods and wholesale electricity markets, and concerns only measures that ‘affect trade’ between Northern Ireland and the EU.” See The UK’s Approach to the Northern Ireland Protocol, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887532/The_UK_s_Approach_to_NI_Protocol_Web_Accessible.pdf.

³⁹ Title XI, Chapter 3, Article 3.2(6) TCA.

⁴⁰<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>.

⁴¹ https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

⁴² <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>.



2.2.2. UK Tax reliefs

The UK's Creative Sector Tax Reliefs⁴³ are not affected by Brexit. These tax reliefs are a group of fiscal incentives that allow qualifying companies to increase their amount of allowable expenditure, which can reduce the amount of corporation tax the company needs to pay. A company can claim creative industry tax reliefs if it is liable for UK corporation tax, is directly involved in the production and development of among other things films, high-end television,⁴⁴ children's television, animation television, and video games. To qualify for creative industry tax reliefs, all films, animation and television programmes or video games must be certified as British. They must pass a cultural test or qualify through an internationally agreed co-production treaty. The BFI manages certification and qualification on behalf of the Department for Digital, Culture, Media and Sport (DCMS).⁴⁵ Creative sector cultural tests continue to recognise EEA content and personnel.

Whether UK nationals qualify for incentives in EU member states now varies territory by territory. This is because UK nationals no longer have EEA status – and are thus not able to qualify for some member states' cultural tests or count as qualifying production spend under incentive schemes in some member states.

The BFI continues to be able to issue European Certificates of British Nationality,⁴⁶ which help UK productions qualify for Audiovisual Media Services Directive (AVMSD) quotas (see below).

2.2.3. UK participation in the Creative Europe and other European programmes

The UK's participation in direct access to Creative Europe funding ended at the end of 2020. Projects funded under the 2014-20 Creative Europe programme will continue to receive funding for the duration of the project, even if they have not concluded before 1st January 2021. However, many international training courses and industry initiatives funded by the programme will remain open to UK participants under the new programme from 2021 to 2027. Moreover, UK films will still be eligible for awards made to European distributors and sales agents under the calls published as part of the current programme. To support independent British screen content the UK Government has confirmed ⁴⁷ that it will fund

⁴³ <https://www.gov.uk/guidance/corporation-tax-creative-industry-tax-reliefs>.

⁴⁴ A company can claim high-end television tax relief for a programme if it is certified as British by the British Film Institute (BFI), is intended for broadcast to the general public (including streaming online), and is a drama, comedy or documentary. At least 10% of the total core costs must relate to activities in the United Kingdom, the average core expenditure must be at least GBP 1 million per hour of slot length, and the slot length in relation to the programme must be greater than 30 minutes. See <https://www.gov.uk/guidance/claiming-high-end-television-tax-relief-for-corporation-tax>.

⁴⁵ <https://www.bfi.org.uk/apply-british-certification-tax-relief/about-uk-creative-industry-tax-reliefs>.

⁴⁶ <https://www.bfi.org.uk/film-industry/british-certification-tax-relief/european-certificate-british-nationality>.

⁴⁷ <https://www.independent.co.uk/uk-announces-global-screen-fund-to-replace-creative-europes-media-funding/>.



the delivery of a Global Screen Fund, worth GBP 7m in 2021/22.⁴⁸ By boosting the international profile of UK content, the fund's intent is to grow the revenue and sustainability of domestic independent screen businesses, whilst deepening cultural and commercial ties to the UK's international partners.

Under the TCA, the UK will participate in the EU's Horizon Europe programme, as well as its research and innovation framework programme (2021-2027), which includes a strand supporting "Culture, Creativity and Inclusive Society".⁴⁹

2.2.4. Co-production

Brexit will have no impact on co-production⁵⁰ agreements signed by the UK including the bi-lateral treaties signed with Australia, Brazil, Canada, China, France, India, Israel, Jamaica, Morocco, New Zealand, the Occupied Palestinian Territories and South Africa. Moreover, the UK will continue to be party to the Council of Europe's European Convention on Cinematographic Co-Production.⁵¹ On 7 February 2019 UK officially signed the revised convention but at the time of drafting of this note, it had not ratified it.⁵²

2.3. Audiovisual media services

The main regulatory instrument for broadcasting and video on demand services at the EU level is the Audiovisual Media Services Directive (AVMSD).⁵³ The AVMSD relies on the so-called "country of origin" principle, according to which AVMS providers are, as a general rule, subject only to the law and jurisdiction of the EU member state where they are established (as determined in the directive).

⁴⁸ Further detail is to be announced. A process of industry consultation is currently being undertaken on how the fund can best support the sector.

⁴⁹ Further guidance is awaited on the terms of the UK's participation.

⁵⁰ For more information on legal issues regarding co-productions see Cabrera Blázquez F.J., Cappello M., Enrich E., Talavera Milla J., Valais S., *The legal framework for international co-productions*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/iris-plus-2018-3-the-legal-framework-for-international-co-productions/168090369b>.

⁵¹ European Convention on Cinematographic Co-Production, ETS No. 147, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/147>.

⁵² Council of Europe Convention on Cinematographic Co-Production (revised), CETS No.220, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/220>.

⁵³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>. Revised through Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.



AVMS providers under the jurisdiction of the UK authorities may fall under the jurisdiction of one of the EU27 member states if the jurisdiction criteria laid down in Article 2 AMVSD are fulfilled. Moreover, EU27 member states are free to take measures they deem appropriate with regard to audiovisual media services originating from the UK as a third country, and not satisfying the conditions laid down in Article 2 AVMSD. These measures will have to comply with EU law and the international obligations of the EU and, where applicable, must be within the limits of the European Convention on Transfrontier Television (ECTT)⁵⁴ (see recital 54 AVMSD).

UK audiovisual media services received or retransmitted in the EU no longer operate according to the rules governing the freedom of reception and retransmission laid down in Article 3 AVMSD. Therefore, EU27 member states will be entitled, based on their own national law and, where applicable, the limits of the European Convention on Transfrontier Television, to restrict reception and retransmission of audiovisual media services originating from the UK.

The Broadcasting (Amendment) (EU Exit) Regulations 2019⁵⁵ (‘the Broadcasting Regulations’) introduced changes to the law that apply to broadcasting in, and to, the UK and came into force at 23.00 GMT on 31 December 2020. Furthermore, the Audiovisual Media Services Regulations 2020⁵⁶ (‘the AVMS Regulations’) implemented the revised AVMSD in the UK.

2.3.1. Jurisdiction and licensing

The 22 EEA countries party to the ECTT⁵⁷ must allow freedom of reception for services under UK jurisdiction. How this right is given effect to in each country may depend on national law and on how the ECTT has been implemented locally. Reciprocally, the UK must also permit freedom of reception for services that originate from all countries party to the ECTT.

⁵⁴ European Convention on Transfrontier Television, Strasbourg, 5 May 1989 (text amended according to the provisions of the Protocol [ETS No. 171]),

<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b0d8>.

⁵⁵ The Broadcasting (Amendment) (EU Exit) Regulations 2019, 12 February 2019,

<https://www.legislation.gov.uk/ukxi/2019/224/contents/made>.

⁵⁶ The Audiovisual Media Services Regulations 2020, 30 September 2020,

<https://www.legislation.gov.uk/ukxi/2020/1062/introduction/made>.

⁵⁷ EEA countries that have signed and ratified the ECTT are Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/132/signatures?p_auth=Vkx16RVk.

2.3.1.1. UK services in the EEA

2.3.1.1.1. Broadcasting services

UK broadcasting services available in the EEA may need two types of licences:

- An Ofcom licence for services receivable in the UK and in other ECTT countries (this includes the 22 EEA countries that have signed and ratified the ECTT)⁵⁸.
- Licences covering services receivable in EEA countries not party to the ECTT.

According to the Broadcasting Regulations, services distributed by satellite are defined as being receivable in an ECTT country when:

- The service can be received in all parts of that particular ECTT country.
- The service can be accessed through an Electronic Programming Guide (EPG) licensed or otherwise regulated in the relevant member state, or, alternatively, the service can be accessed through an EPG for which the head office is in the relevant state (if the state does not regulate EPGs).

Services broadcasting to an ECTT country and falling under the UK's jurisdiction for the purposes of the ECTT are required to have an Ofcom licence. This licence should allow such services to continue broadcasting into those countries on a country of origin basis, that is to say without further regulation in the country of destination.

For UK services broadcasting to countries party to the ECTT, Ofcom has introduced some changes to the Broadcasting Code⁵⁹ and to the Code on the Scheduling of Television Advertising⁶⁰, notably with regard to advertising scheduling. These changes reflect both the fact that the ECTT includes some rules that are different from the previous Broadcasting Code rules, and also changes introduced by the AVMS regulations.

2.3.1.1.2. Video on demand services

Video on demand (VOD) services are not covered by the scope of the ECTT, therefore UK providers will need to comply with AVMSD jurisdiction rules if they provide VOD services in an EEA country.

⁵⁸ See Section 2.1 of the Broadcasting Regulations.

⁵⁹ The Ofcom Broadcasting Code (with the Cross-promotion Code and the On Demand Programme Service Rules),

<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code>.

⁶⁰ Code on the scheduling of television advertising,

<https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/code-tv-advertising>.



2.3.1.2. EU services in the UK

2.3.1.2.1. Broadcasting services

EU broadcasting services available in the UK from one of the seven EU countries that have not signed and ratified the ECTT (Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands and Sweden) will need a licence from Ofcom to ensure they can be received in the UK. However, TG4, RTÉ1 and RTÉ2 will continue to enjoy licence-free reception in the UK due to the latter's commitments under the Good Friday Agreement⁶¹ and the European Charter on Regional and Minority Languages.⁶²

Ofcom's new broadcast licensing arrangements are as follows:

- Country of destination licensing: Any TV service that appears in a "regulated UK Electronic Programme Guide (EPG)"⁶³ needs to be licensed and regulated in the UK.
- European Convention on Transfrontier Television (ECTT and country of origin): Where TV services broadcast to the UK are based in an ECTT country, they do not need a licence from the UK but will be regulated to the standards required by the ECTT, by that country.

2.3.1.2.2. Video on demand services

According to the Broadcasting Regulations, if a VOD service's head office and editorial decision-making capacity are based in the UK, the provider must notify this to Ofcom before providing the service. Otherwise, there is no 'country of destination'-style regulation for VOD services in the UK, and so VOD services not under UK jurisdiction will continue to be available to UK audiences. If issues arise with services based in other jurisdictions, the UK will cooperate with the relevant regulator. Since VOD services are not covered by the ECTT, they have to be dealt with on a bilateral basis with each concerned country.

⁶¹ Northern Ireland Peace Agreement (The Good Friday Agreement), 10 April 1998, <https://peacemaker.un.org/uk-ireland-good-friday>.

⁶² European Charter for Regional or Minority Languages, ETS No. 148, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148>.

⁶³ A "regulated UK Electronic Programme Guide (EPG)" is any EPG provided by a provider holding a Television Licensable Content Service or Digital Television Additional Service licence for it immediately before the end of the now-regulated transition period. Regulated EPG providers are required to have a licence, as are any TV services in the above-described EPGs (with the exception of those under the jurisdiction of another ECTT country, and TG4, RTÉ1 and RTÉ2).



Table 1. Rules concerning licensing and jurisdiction

	UK services in the EEA		EEA services in the UK	
	Destination	Requirement	Origin	Requirement
Broadcasting services	UK only	Ofcom licence	ECTT	Licence-free
	UK + ECTT	Ofcom licence	IE <i>TG4, RTÉ1 and RTÉ2</i>	Licence-free
	ECTT (Under UK jurisdiction)	Ofcom licence	Non-ECTT	Ofcom licence
	Non-ECTT	Licences covering each of those countries		
VOD services	UK+EEA	Compliance with AVMSD jurisdiction rules	UK <i>Head office and editorial decision-making capacity based in the UK</i>	
			Other countries	Regulated by country of origin

Source: European Audiovisual Observatory elaborations based on Ofcom information.

2.3.2. European works

The EU promotes European works on TV and VOD through the quota provisions of the AVMSD (Articles 13, 16 and 17 AVMSD). These envisage:

- A majority proportion of broadcasting time for European works (excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping).
- A 10% broadcasting time wedge, or, alternatively, at the discretion of the member state, at least 10% of the state’s programming budget dedicated to independent European producers (excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping).
- A 30% share of European works in VOD catalogues and prominence of those works. Where member states require AVMS providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require AVMS providers targeting audiences in their territories, but established in other member states, to make such financial contributions, which shall be proportionate and non-



discriminatory. In such cases, the financial contribution shall be based only on the revenues earned in the targeted member states. If the member state where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted member states. Any financial contribution shall comply with European Union law, in particular with state aid rules.

It remains a condition of broadcast licences issued by Ofcom that the quotas set out in Articles 16 and 17 of the Audiovisual Media Services Directive are complied with where practicable.⁶⁴ Moreover, the UK has implemented the quota rules for VoD services of the revised Article 13(1) AVMSD into national law through the AVMS Regulations. Therefore, VoD services under UK jurisdiction will have to secure that, each year, on average at least 30% of the programmes included in the service are European works and ensure the prominence of European works in the service.⁶⁵ According to the AVMS Regulations, the term “European works” has the same meaning as in the Audiovisual Media Services Directive (see Article 1(1)(n), (2) and (3) of that Directive) and includes works deemed to be European works by Article 1(4) of that Directive.

Works originating in the UK will still be considered European works since the definition laid down in Article 1(n) AVMSD includes works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe, to which the UK is a party.

The following table provides an overview of the AVMSD rules concerning the definition of European works:⁶⁶

⁶⁴ See Ofcom, “Audiovisual Media Services Directive – Guidance on compliance with Articles 16 and 17”, https://www.ofcom.org.uk/_data/assets/pdf_file/0018/12942/av-media-services.pdf.

⁶⁵ See Ofcom, “Rules and Guidance - Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS)”, https://www.ofcom.org.uk/_data/assets/pdf_file/0018/208206/odps-rules-and-guidance.pdf.

⁶⁶ See also BFI, “European works and Brexit”, <https://core-cms.bfi.org.uk/media/1725/download>.



Table 2. Rules concerning the definition of a “European work”

Origin of the work	Conditions concerning the work
<p>EU member state</p> <p>European third states party to the European Convention on Transfrontier Television of the Council of Europe</p>	<p>Mainly made with authors and workers residing in one or more of the states referred to, provided that they comply with one of the following three conditions:</p> <ul style="list-style-type: none"> ■ They are made by one or more producers established in one or more of those states. ■ Production of the works is supervised and actually controlled by one or more producers established in one or more of those states. ■ The contribution of co-producers of those states to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those states.
<p>Co-produced within the framework of agreements related to the audiovisual sector concluded between the European Union and third countries</p>	<p>Fulfil the conditions defined in each of the agreements related to the audiovisual sector concluded between the European Union and third countries.</p>
<p>Co-produced within the framework of bilateral co-production agreements concluded between EU member states and third countries</p>	<p>Co-producers from the European Union supply a majority share of the total cost of production.</p> <p>Production is not controlled by one or more producers established outside the territory of the member states.</p>

Source: European Audiovisual Observatory elaborations.

2.4. Intellectual property

The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (“IP Regulations”) introduced amendments to existing copyright and database legislation which govern copyright and database protection after Brexit.⁶⁷ This means that the main international copyright treaties, to which both the UK and EU are contracting parties, will apply to the EU-UK relationship in the field of copyright. These include the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The United Kingdom is furthermore a party to the Berne Convention for the Protection of Literary and Artistic

⁶⁷ The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, 19 March 2019, <https://www.legislation.gov.uk/ukxi/2019/605/made>.



Works; the European Union is not. However, the European Union is required pursuant to Article 1(4) WCT to apply Article 1-21 and the Appendix of the Berne Convention.

These treaties will apply with regard to the following issues:

- The protection of copyright and related rights (for example, exclusive rights of reproduction, distribution, rental, communication and the making available for authors and, where applicable, also for holders of related rights, such as phonogram producers, performers and broadcasting organisations).
- The term of protection of copyright and certain related rights.
- Obligations concerning technological protection measures and rights management information.
- Databases.
- Computer programmes.
- Semiconductor topographies.
- The enforcement of copyright (as one of the intellectual property rights in part 3 of TRIPS), including border measures.

EU copyright law provides, however, for a higher level of protection than the international legal instruments mentioned above, including certain forms of *lex specialis* or particular cross-border measures for the benefit of rightsholders or users in the internal market and/or the management of rights.

2.4.1. Term of protection

The term of protection for copyrighted works in the UK for works from the UK, EEA, or other countries has not changed from 1 January 2021, as the UK has kept the relevant provisions in its domestic legislation.⁶⁸

2.4.2. Cable retransmission

2.4.2.1. Retransmission in the EEA

EU rules on cable retransmissions of broadcasts included in the SatCab Directive⁶⁹ do not apply to broadcasts originating in the UK. Rightsholders whose works are broadcast from the UK and retransmitted via cable in the EEA:

- may need to negotiate licences with the cable operator directly;

⁶⁸ See Title V, Chapter 2, Article IP. 12 TCA and Sections 4-8 of the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁶⁹ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (consolidated text), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01993L0083-20190606>.



- could see statutory licensing terms imposed on the cable retransmission of their works in certain EEA states.

2.4.2.2. Retransmission in the UK

UK legislation will continue to apply existing rules to cable retransmissions of broadcasts originating in an EEA member state.⁷⁰

2.4.3. Satellite broadcasting

2.4.3.1. UK satellite broadcasters

Depending on how the domestic legislation of each EEA member state treats broadcasts originating from non-EEA countries, UK broadcasters may no longer benefit from the SatCab Directive's country-of-origin principle for broadcasts into the EEA from 1 January 2021 and may need to obtain additional rightsholder permissions covering the EEA states.

2.4.3.2. Broadcast of works transmitted into the UK

The country-of-origin principle will continue to be applied in the UK to broadcasts from any country, and these will not need specific rightsholder permission for the UK, except in cases where the broadcast is commissioned or uplinked to a satellite in the UK, and it originates from a country that provides lower levels of copyright protection.⁷¹

2.4.4. Satellite decoders

From 1 January 2021, it is again an offence in the UK to use satellite broadcast decoder devices intended for EU audiences, to access a programme included in a broadcast made from the UK with the intent of avoiding a charge associated with the programme. This provision from Section 297 of the Copyright, Designs and Patents Act 1988 (CDPA)⁷² had been made inapplicable by the Court of Justice of the European Union in its *Premier League* judgment.⁷³

⁷⁰ See Section 13 of the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁷¹ See Section 3 of the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁷² Copyright, Designs and Patents Act 1988, <https://www.legislation.gov.uk/ukpga/1988/48/contents>.

⁷³ Judgment of the Court of Justice of the European Union (Grand Chamber) of 4 October 2011, *FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services*, Joined Cases C-403/08 and C-



2.4.5. Cross-border portability of online content services

The EU Portability Regulation⁷⁴ ceased to apply to UK-EEA travel from 1 January 2021.⁷⁵ In the UK, the regulation has been revoked under the IP Regulations. The EU Geo-blocking Regulation⁷⁶ currently does not apply to the audiovisual sector, and any possible amendment would in any case not apply in the UK.⁷⁷

2.4.6. Orphan works

The EU orphan works exception⁷⁸ no longer applies to UK-based institutions; it was repealed from UK law on 1 January 2021.⁷⁹ The UK's orphan works licensing scheme⁸⁰ continues to apply in the UK; the only change is that licensees will no longer need to consult the EUIPO orphan works database as part of the diligent search.⁸¹

429/08,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=EF5C0BF194B3E2473806A5F30A74019B?text=&docid=110361&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=23053524>.

⁷⁴ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Text with EEA relevance) (consolidated text), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017R1128-20170630>.

⁷⁵ See Sections 34 and 37 of the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁷⁶ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.060.01.0001.01.ENG&toc=OJ:L:2018:060:TOC>.

⁷⁷ See European Commission, "Commission publishes its short-term review of the Geo-blocking Regulation", 30 November 2020, <https://ec.europa.eu/digital-single-market/en/news/commission-publishes-its-short-term-review-geo-blocking-regulation>.

⁷⁸ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0028>.

⁷⁹ See Sections 11, 12, 23 and 31 of the the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁸⁰ The scheme allows orphan works to be licensed in the UK for commercial and non-commercial uses, subject to the user paying application and licence fees and completing a diligent search for the right holder. See Intellectual Property Office, "Guidance - Copyright: orphan works", <https://www.gov.uk/guidance/copyright-orphan-works>.

⁸¹ See Article 3(6) of Directive 2012/28/EU.



2.4.7. Access to copyright works for visually impaired people

The Marrakesh Treaty⁸² is an international agreement which aims to improve the access of visually impaired people to copyright works. The EU is party to the treaty and implemented it via Directive (EU) 2017/1564⁸³ and Regulation (EU) 2017/1563.⁸⁴

The UK transposed the directive via the Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018,⁸⁵ and both the EU regulation and the UK's implementation of the directive were retained in UK law from 1 January 2021.⁸⁶ This means that people with visual impairment or authorised bodies in the UK are still able to make and distribute accessible format copies of copyrighted works, but the cross-border exchange of accessible format copies of works may still be affected.

The UK ratified the Marrakesh Treaty in its own right on 1 October 2020, and it came into force on 1 January 2021.⁸⁷

2.4.8. Collective rights management

2.4.8.1. CMOs based in the EEA

From 1 January 2021, EEA collective management organisations (CMOs) are no longer required under the directive on collective management⁸⁸ to represent UK rightsholders or to represent the catalogues of UK CMOs for online licensing of musical rights. UK

⁸² Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted on 27 June 2013, <https://www.wipo.int/treaties/en/ip/marrakesh/>.

⁸³ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, <https://eur-lex.europa.eu/eli/dir/2017/1564/oj>.

⁸⁴ Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1570801036325&uri=CELEX:32017R1563>.

⁸⁵ The Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018, <https://www.legislation.gov.uk/ukxi/2018/995/contents/made>.

⁸⁶ See Sections 35 and 36 of the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁸⁷ Marrakesh Notification No. 75 - Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled - Ratification by the United Kingdom of Great Britain and Northern Ireland, https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_75.html.

⁸⁸ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026>.



rightsholders and CMOs are still able to request representation, but EEA CMOs may still be free to refuse those requests depending on the law in individual member states.

2.4.8.2. CMOS based in the UK

Existing obligations with regard to UK CMOs continue to apply after 1 January 2021, including those specific to multi-territorial licensing of musical works for online services.⁸⁹

2.4.9. Trade Specialised Committee on Intellectual Property

The EU-UK Partnership Council (PC)⁹⁰ oversees the attainment of the objectives of the TCA and any supplementing agreement and supervises and facilitate their implementation and application. Each Party may refer to the PC any issue relating to the implementation, application and interpretation of the TCA or of any supplementing agreement.

For matters concerning intellectual property, the Parties undertake to cooperate with a view to supporting the implementation of the commitments and obligations undertaken under Title V and will, either directly or through the Trade Specialised Committee on Intellectual Property,⁹¹ maintain contact on all matters related to the implementation and functioning of this Title.⁹²

⁸⁹ See Section 32 of the Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁹⁰ See Title III, Article INST. 1 TCA.

⁹¹ See Title III, Article INST. 2(1)(g) TCA.

⁹² See Title V, Chapter 4, Article IP. 55 TCA.

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