

## **Broadcasting and video on demand if there's no Brexit deal**

### **Summary**

How the rules for broadcasters and providers of video on demand services would change if the UK leaves the EU with no deal.

### **Detail**

If the UK leaves the EU with no deal, find out how the rules would change for broadcasters and providers of video on demand services. This would depend on factors such as the location of your:

- head office
- workforce
- satellite uplinks

A scenario in which the UK leaves the EU without agreement (a 'no deal' scenario) remains unlikely given the mutual interests of the UK and the EU in securing a negotiated outcome.

Negotiations are progressing well and both we and the EU continue to work hard to seek a positive deal. However, it's our duty as a responsible government to prepare for all eventualities, including 'no deal', until we can be certain of the outcome of those negotiations.

For two years, the government has been implementing a significant programme of work to ensure the UK will be ready from day 1 in all scenarios, including a potential 'no deal' outcome in March 2019.

It has always been the case that as we get nearer to March 2019, preparations for a no deal scenario would have to be accelerated. Such an acceleration does not reflect an increased likelihood of a 'no deal' outcome. Rather it is about ensuring our plans are in place in the unlikely scenario that they need to be relied upon.

This series of technical notices sets out information to allow businesses and citizens to understand what they would need to do in a 'no deal' scenario, so they can make informed plans and preparations.

This guidance is part of that series.

Also included is an [overarching framing notice](<https://www.gov.uk/government/publications/uk-governments-preparations-for-a-no-deal-scenario/>) explaining the government's overarching approach to preparing the UK for this outcome in order to minimise disruption and ensure a smooth and orderly exit in all scenarios.

We are working with the devolved administrations on technical notices and we will continue to do so as plans develop.

## **Purpose**

The purpose of this notice is to set out the legal status for audiovisual services that media services providers may wish to consider in the unlikely event that the UK leaves the EU in March 2019 with no agreement in place.

## **Before 29 March 2019**

The Audiovisual Media Services Directive (AVMSD) (Directive 2010/13/EU) sets out a country of origin principle, according to which audiovisual media service providers are only subject to the jurisdiction of one EU country. Providers of broadcasting channels and of video on demand services based in one country are only subject to one set of rules and regulation from this 'country of origin'. A broadcasting licence issued by Ofcom, the UK communications regulator, is valid in the whole of the EU. The provider therefore need only comply with Ofcom rules, regardless of where the licensed service is received within the EU.

A provider requires a licence from the country which has jurisdiction over it. Under the AVMSD there is a specific hierarchy of rules for determining jurisdiction (Article 2): these include rules based on the establishment of a media service provider ("establishment criteria") and technical criteria for providers broadcasting via a satellite ("technical criteria"), which apply where the establishment criteria are not met.

The establishment criteria set out a series of rules which determine when a service provider is considered established within a EU country (Article 2 (3) of AVMSD) so that that country has jurisdiction over it. In the first instance a provider is taken to be established where the head office and editorial decisions for a service are taken. If the head office is in one location but editorial decisions are taken in another EU country, establishment is based on the location of the office where a significant part of the workforce is located. If a significant part of the workforce is in multiple locations, establishment is based on the location of the head office. For example, if a service has its head office in one EU country but editorial decisions are taken in the UK, and a significant part of the workforce is in multiple EU countries, the country with the head office will have jurisdiction.

If the establishment criteria do not apply, the technical criteria may apply (Article 2(4) of AVMSD). According to the technical criteria a service provider will be deemed to be within the jurisdiction of an EU country if:

- it uses a satellite uplink situated in that EU country, or

- it uses satellite capacity relating to that EU country (this is a subsidiary criterion and will apply only if the jurisdiction of an EU country cannot be established under the “satellite uplink” criterion).

If the service is uplinked from more than one EU country, the broadcaster will fall under the jurisdiction of the EU country where the first established uplink is located. However, if the oldest uplink relates to a satellite without a footprint focused on Europe, while the more recent one relates to a satellite with a footprint which is focused on Europe, the more recent uplink will determine jurisdiction.

AVMSD is in the process of being revised and is in the later stages of the legislative process for doing so. A new version is expected to be adopted by December 2018 and implemented by EU countries by August 2020.

Alongside AVMSD the UK, along with 20 other EU countries, is a signatory to the Council of Europe Convention on Transfrontier Television (ECTT), which entered into force in 1993. EU countries that have signed and ratified the ECTT are Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

The Convention guarantees freedom of reception between the parties and sets out that parties to the Convention must not restrict the retransmission of compliant programmes within their territories.

However, ECTT provides that EU countries will continue to apply the AVMSD in their mutual relations and not ECTT. This means that even the EU countries who have signed ECTT observe only AVMSD rules inside the single market.

European Works is a content quota system for broadcasters and on demand services designed to promote domestic European production and preserve European cultural identity. It forms part of both ECTT and AVMSD. European Works classification requires a programme to originate in either an EU country or a non-EU European country which is party to the ECTT.

The UK's position as a party to the ECTT will not be affected by the UK's withdrawal from the EU. Further, the EU's 'Notice to Stakeholders' for audiovisual media services has confirmed works originating in the UK will continue to be classed as European Works after exit.

**After March 2019 if there is 'no deal'**

If there's no deal, the AVMSD and the country of origin principle will no longer apply to services under UK jurisdiction that are broadcast into the EU, as the UK would be classified as a third country.

Recital 54 of the AVMSD sets out that EU countries are free to take whatever measures they deem appropriate with regard to audiovisual media services that come from third countries, provided the measures comply with Union law and the international obligations of the Union.

However, in the absence of the AVMSD regulatory framework, the ECTT framework continues to apply and may have increased relevance. The 20 EU countries that have signed and ratified ECTT will be required to permit freedom of reception to services 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). In turn, the UK would be required to permit freedom of reception for services which originate from EU and non-EU countries that are parties to the ECTT. Details will be confirmed in due course regarding the seven EU countries that have not signed and ratified this convention.

As noted in the White Paper, in any scenario the UK is committed to ensuring continued licence-free reception for TG4, RTÉ1 and RTÉ2 to reflect and build-on the commitments in the Good Friday agreement.

If media service providers rely on the ECTT for distribution of a service in a no-deal scenario, they would need to be mindful of the fact that the ECTT does not have the same enforcement mechanisms as the AVMSD. There is a standing committee to resolve disputes, but this has not met since 2010. Article 26 of the ECTT also contains provision for arbitration.

### **What you would need to do**

The White Paper on the future relationship with the EU noted that the UK will not be part of AVMSD after exit and therefore the country of origin principle will not apply to the UK.

Before exit in March 2019, you would need to assess on a case-by-case basis whether your current licence would continue to be accepted in the EU countries where the service is made available, and seek independent local advice if necessary. It is your responsibility to take measures to ensure that you can obtain a valid licence or authorisation to ensure compliance if it is required. See the [list of media regulators in the EU](<https://ec.europa.eu/digital-single-market/en/list-eu-audiovisual-regulators>) which can be found on the European Commission's website.

You should assess if a service you provide is available in the EU. If it is a UK service, and not receivable in the EU, you would not need to take any action. The Ofcom licence would still be valid on exit.

If the service is available in the EU and only available in one or more of the 20 ECTT countries noted above, freedom of reception should be permitted in accordance with ECTT. However, you should seek local legal advice to check how national law deals with ECTT obligations to permit freedom of reception of the service and what action (if any) needs to be taken. Ofcom licences should still be recognised but the process may depend on national law.

If a service is available in the EU and available in one or more of the 7 non-ECTT countries (Belgium, Denmark, Greece, Ireland, Luxembourg, The Netherlands and Sweden) you would need to ensure that the service is correctly licensed (or authorised) on exit day. How this is done is dependent on a number of factors as there is a hierarchy of jurisdiction (noted above) in the AVMSD which determines which EU country regulates the service.

You should be aware that you may need to have two licences. You would need an Ofcom licence for services receivable in the UK. An Ofcom licence can also cover services that are receivable in other ECTT countries (because under the ECTT those countries must recognise Ofcom licences). However, Ofcom licences would not be capable of covering services receivable in EU countries that are not party to the ECTT. There are seven such countries, in which a further licence may be needed. You should consider taking local legal advice on the licensing requirements in those countries.

If you take no action, you're likely to be viewed as a third-country broadcaster broadcasting into the EU. Under AVMSD, this would mean that EU countries are free to impose through national laws further conditions on transmitting services into their territories - although subject to the provisions of the ECTT itself. As noted above, you would need to take into account that the enforcement mechanisms of the ECTT are limited.

After exit, if your company wishes to retain your head office in the UK you can do so whilst, at the same time, qualifying for jurisdiction in an EU state (and so being able to obtain an AVMSD licence via that EU state). Under AVMSD, if decisions of a provider are taken in an EU country that provider will fall under the jurisdiction of that EU country provided a significant part of its workforce is located in that EU country. This would be the case even if the head office remained in the UK. However, we advise you to seek local legal advice on the requirements in the EU country concerned.

If you do not have a significant workforce within a EU country, the technical criteria may still apply, as set out in Article 2 (4) AVMSD. In practice this means if a service is provided via an uplink in a EU country then jurisdiction would fall to that country. If there is more than one uplink, jurisdiction will fall to the EU country where the first uplink was established. If the uplink is in the UK, the jurisdiction will (however) fall to the EU country which operates the relevant satellite capacity. In most cases, this would either be Luxembourg or France, as the majority of EU broadcasting satellites are operated by these two countries. These countries have different notification systems and you should contact the local relevant regulator to ascertain the local regulatory requirements.

### **More information**

More information and instructions will be published in the coming months. We aim to give businesses and individuals as much certainty as possible as soon as we can.

As part of the 'no deal' planning the UK will make provisions in domestic legislation for the continuation of Ofcom licences from day 1 following EU exit, so that broadcasters can continue to broadcast in the UK, without having to reapply for their licence under any new framework. In addition the government will ensure that the domestic legislation in relation to audiovisual media services will continue to be operable.

It is in everyone's interests to secure a good deal for audiovisual media services for both sides, but we have a duty to plan for the alternative. The government has taken a responsible approach to prepare for all eventualities.

This notice is meant for guidance only. You should consider whether you need separate professional advice before making specific preparations.

It is part of the government's ongoing programme of planning for all possible outcomes. We expect to negotiate a successful deal with the EU.

The UK government is clear that in this scenario we must respect our unique relationship with Ireland, with whom we share a land border and who are co-signatories of the Belfast Agreement. The UK government has consistently placed upholding the Agreement and its successors at the heart of our approach. It enshrines the consent principle on which Northern Ireland's constitutional status rests. We recognise the basis it has provided for the deep economic and social cooperation on the island of Ireland. This includes North-South cooperation between Northern Ireland and Ireland, which we're committed to protecting in line with the letter and spirit of Strand two of the Agreement.

The Irish government have indicated they would need to discuss arrangements in the event of no deal with the European Commission and EU Member States. The UK would stand ready in this scenario to engage constructively to meet our commitments and act in the best interests of the people of Northern Ireland, recognising the very significant challenges that the lack of a UK-EU legal agreement would pose in this unique and highly sensitive context.

It remains, though, the responsibility of the UK government, as the sovereign government in Northern Ireland, to continue preparations for the full range of potential outcomes, including no deal. As we do, and as decisions are made, we'll take full account of the unique circumstances of Northern Ireland.