

STUDY

Requested by the CULT committee



Research for CULT Committee – Audiovisual Sector and Brexit: the Regulatory Environment



Policy Department for Structural and Cohesion Policies
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Research for CULT Committee – Audiovisual Sector and Brexit: the Regulatory Environment

Abstract

This study, commissioned by the Policy Department for Structural and Cohesion Policies at the request of the CULT Committee, provides information on and analysis of the likely impacts of various Brexit scenarios on the EU regulatory environment for the audiovisual sector. In particular, it focuses on a comprehensive EU-oriented overview of the issues related to specific provisions of the Audiovisual Media Services Directive and to the screen sector-specific copyright rules.

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LIST OF ABBREVIATIONS

AV	Audiovisual
AVMS	Audiovisual Media Services
AVMSD	Audiovisual Media Services Directive
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CMLRev.	Common Market Law Review
CMO	Collective Management Organizations
COO	Country of origin
CTT	Council of Europe Convention on Transfrontier Television
DG	Directorate General
EAO	European Audiovisual Observatory
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EFTA Court	Court of Justice of the EFTA States
ERGA	European Regulators Group for Audiovisual Media Services
ESA	EFTA Surveillance Authority
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
GATS	General Agreement on Trade Services
GATT	General Agreement on Tariffs and Trade
GTCJ	Global Trade and Customs Journal
IPO	Intellectual Property Office (UK)

- MFN** Most Favoured Nation
- MS** Member State
- NJW** Neue Juristische Wochenschrift
- NRA** National regulatory authority
- OJ** Official Journal of the EU
- SCA** Surveillance and Court Agreement
- TISA** Trade in Services Agreement
- TRIPS** Trade-Related Aspects of Intellectual Property Rights
- TwFD** Television without Frontiers Directive
- UFITA** Archiv für Medienrecht und Medienwissenschaft
- UK** United Kingdom
- VSP** Video sharing platform
- WTO** World Trade Organisation
- ZaöRV** Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

EXECUTIVE SUMMARY

The audiovisual sector is a fundamental issue in Brexit negotiations due to the importance of the UK as a player in the cultural industry. A great number of AV productions are created in the UK, which also serves as a hub for providers to disseminate their services across the Member States of the EU. Against this background, at the request of the CULT Committee the Policy Department for Structural and Cohesion Policies commissioned this study, which provides information on and analysis of the likely impacts of various post-Brexit scenarios on the EU regulatory environment for the audiovisual sector. The study mainly focuses on the country of origin principle, the promotion of European works, and the new rules concerning video sharing platforms in the AVMSD, as well as relevant rules in copyright law.

The possible post-Brexit scenarios, selected in order to show their different impacts on the EU regulatory framework, envisage the UK maintaining a close link to the EU via EEA membership, the use of comparable bilateral agreements without the UK being a member of the EEA but instead of EFTA, customs union arrangements that include free trade, or a free trade agreement with negotiable degrees of access to the respective markets. Admittedly, none of the existing agreements that can be used to illustrate these different scenarios are likely to be reproduced by future arrangements between the EU and UK, which will emerge from a purpose-built, original agreement. Nonetheless, describing the models along the variation of these existing agreements helps to identify the levels of integration of the markets in question. Since the audiovisual sector has typically been excluded from FTAs in the past, looser forms of cooperation would likely have a stronger impact on the sector than EEA membership, which would extend applicability of key elements of the EU framework.

In terms of trade rules, irrespective of the form chosen for Brexit, the GATS framework would in principle continue to be applicable to the AVMS sector due to the definition of 'services' contained therein, but only at a low level. Also, post-Brexit there would be no obligation for the EU MS to continue to treat the UK as one of them, as the GATS' most favoured nation principle would not require the application of intra-EU standards to non-EU states. This is due to the rule that GATS signatories may form integrated market areas (such as the EU Digital Single Market), the members of which may be treated more favourably. The Council of Europe Convention on Transfrontier Television – to which the UK and the majority of EU MS are party – will be of relevance. Whereas Union law takes precedence in the relationship between signatories to that Convention which are also EU MS, post-Brexit the CTT could fill the gaps left by the no longer applicable AVMSD for the UK. However, the Convention has a limited scope in terms of services covered, is still limited to TV broadcasting, and lacks an enforcement framework comparable to the Directive's.

In FTAs including recent agreements entered into by the EU, there are numerous exceptions or exclusions in relation to the AV sector. Considering those together, one may conclude that for this sector a cultural exception understanding has developed. This observation is supported by references – such as that in the CETA agreement with Canada – to the UNESCO Cultural Diversity Convention, even if the latter does not take precedence over FTAs. This means that it is unlikely that in a FTA even of extensive scope the AV sector would be fully included.

In this light, it is necessary to consider the main elements of the AVMSD as the cornerstone of EU media law. The AVMSD determines the COO principle which is not limited by the exceptional procedures foreseen under the Directive allowing MS to take measures against circumvention of their regulatory regime or to temporarily suspend the dissemination of 'incoming' content. Such procedures were introduced to ensure that the COO principle is not abused by providers. But they constitute exceptions to the rule. After the 2018 reform MS will have the possibility to apply rules on financial contribution obligations to providers of

non-linear services even if they are not subject to that MS' jurisdiction but target its market successfully. Because of the importance of the COO principle, the criteria defining jurisdiction of a MS over a provider are key when interpreting the Directive. Besides the primary criteria for providers established in a MS, the relevant provision also includes secondary criteria that allow the inclusion of non-EU-MS-established providers in the AVMSD regulatory framework if these providers use satellite technology, either relying on the place of the signal uplink or the State whose satellite capacity is being used for dissemination. The applicability of the AVMSD to UK-based providers post-Brexit will thus depend on either the applicability of the secondary criteria or on their place of establishment if this is in a MS.

The AVMSD provisions that require broadcasters to reserve a majority of airtime to European works and – to a lesser extent – the future similar obligation for on-demand providers' catalogues contribute to the goal of promoting the creation of European content. Since works originating in States party to the CTT are included in the definition of European works, UK productions can continue to be taken into account after Brexit to meet the required quota. The extension by the 2018 reform of quota rules to on-demand services as well as financial obligations potentially to external providers will lead to a further strengthening of the production of European works – which will in turn not be impacted significantly by Brexit.

The scope of application of the AVMSD is extended by the 2018 reform to video sharing platforms. As the COO provision in the AVMSD is not applicable to the latter, there is a specific jurisdiction rule which allows MS to apply their rules also to providers not established as a company within the EU, if there is some link to the territory of that MS. The VSP-related provisions are expected to have a noteworthy impact on the market and the way services are delivered in the EU, which is why it is possible that new instruments introduced by the providers to comply with the rules will be used irrespective of whether the service originates in the UK or an EU MS. Also, the company structures in the sector are of a kind that the VSP-related provisions can extend the scope to companies that may not offer the service from an establishment in the EU but out of the UK, provided that part of such a company is within the EU.

As concerns copyright, it is important to recall that the relevant framework is largely harmonized at EU level in many interlinked legal bases that will not automatically continue to apply post-Brexit. While copyright is shaped to quite some detail by treaties at international level, which in turn have been integrated in the EU *acquis*, EU copyright protection goes well beyond the conventions in the WTO and WIPO set-ups. Fundamental rules such as the principle of exhaustion or issues of mandatory collective licensing, portability of online content, rights clearance in the light of the COO principle and the use of orphan works will no longer be applicable unless specific arrangements are made. Apart from horizontal harmonisation rules for some aspects – especially the author's rights –, there are a number of legislative acts specifically applicable to the AV sector. In future, the Portability Regulation could be one of the instruments with significant practical impact allowing movement of copyrighted digital works for subscribers to services offering such content. Trying to achieve comparable results by individual negotiations for rights clearance would prove burdensome and unlikely.

For copyright, the UK's continued membership of the EEA could provide a level of protection for copyright holders approximate to that within the EU. Without an inclusion in the copyright framework the practical consequences for acquiring and clearing rights would create additional burdens, both for providers in the EU seeking to use the UK production market as well as rightsholders when agreeing on licensing conditions for dissemination or distribution in the EU MS. In addition, collective licensing schemes as well as reliance on the COO principle for satellite and cable retransmission would cease to function in the UK and for UK market participants. An agreement covering all these elements outside an EEA scenario would be

far-reaching and require an unprecedented specific legal construct regarding the overall Digital Single Market.

Whatever decision is taken in light of the analysis concerning the AVMSD and COO, the future evolution of the legal framework for the DSM should not be disregarded, in particular regarding the newest amendments on regulating online providers and platforms. This evolution needs to take place with or without the UK being part of the debate and should not be slowed down by Brexit. Also, even though some continuation of existing cooperation is possible even without specific arrangements for the AV sector and related copyright framework, ideally there is a close alignment of rules for the sector between UK domestic law and EU law, as providers will likely anyway follow EU rules for services on offer across Europe even when not based in the EU as well as concerning the service when targeted to the UK as non-EU-MS.

1. INTRODUCTION

KEY FINDINGS

- The EU legal framework for audiovisual media services, including copyright rules, has been **key in developing the sector** in the past three decades.
- **Cross-border availability** of broadcast and on-demand content was significantly **facilitated** and **driven** by the **framework** set in the **EU**.
- The form Brexit will take is especially relevant for the audiovisual sector because the **UK is quantitatively the most important hub for AVMS providers** including a very large number of 'non-domestic' services targeting foreign destinations.

In the time elapsed since a narrow majority of UK citizens voted in June 2016 for the UK to leave the European Union, followed in March 2017 by the notice of withdrawal communicated by the UK Government to the European Council, no definitive solution has been found as to the terms of '**Brexit**'. Negotiations on an agreement to regulate the relationship between the UK and the remaining 27 EU MS are ongoing, but the likely outcome is as yet unclear. The exact shape of Brexit is very relevant in sectors for which the market has been partly or completely harmonised for EU MS; the Digital Single Market for the audiovisual sector is a prime example of such harmonisation.

Audiovisual (media) services have experienced dynamic growth in recent years. Technological developments have allowed for greater quantities of content to be delivered and have given customers more control over what they want to consume, when and by which means. Consuming **audiovisual content** has **increasingly** become a **cross-border issue**, starting out with the changing technology of broadcast dissemination by satellite in the 1980s and for content distributed online being a nearly standard type of access. The EU has played a significant role in facilitating this cross-border access and dissemination for the European market, but there is also an element which reaches beyond the EU with the Council of Europe's activities. Even the aspect of trade under the WTO rules needs to be taken into consideration when discussing how audiovisual content 'travels' across borders.

This research project analyses one specific element of that phenomenon in light of future developments in the EU after Brexit. It aims at clarifying how the exit of the UK from the EU will impact the existing regulatory framework for the audiovisual media sector set by the EU. Brexit is especially relevant for this industry and the rules governing it, because of the importance the United Kingdom has long held as a leading hub for broadcasters and other content distributors as well as for content production – often referred to as 'cultural industries'. The analysis of possible impact will take into account different scenarios of Brexit as it remains unclear how the withdrawal of membership will take place. Whether Brexit will result in a kind of amicable settlement or a bitter divorce as far as the **audiovisual sector and the regulatory framework** in the EU 27 is concerned, will depend on political decisions to be taken in the coming months within both the EU bodies and the UK government. In addition, as will be shown here, the interpretation of current public international law offers guidance as to scenarios wherein no specific agreement for the audiovisual sector is reached.

There are mainly four models which seem possible for the relationship between the EU 27 and the UK after Brexit and which are also potentially relevant in the context of this report.¹ Although a 'Policy paper on the future relationship between the United Kingdom and the

¹ Cf. Carolyn E. Pepper et al., The implications of Brexit on the Entertainment and Media industry, p. 3.

European Union'² has emerged from the UK Government and a Draft Withdrawal Agreement³ published by the EU regarding the aims of negotiations, it is still far from clear which type of agreement will be found. Consequently, all likely scenarios deserve to be included and will be introduced in the next section.

Brexit negotiations concerning the audiovisual sector may be somewhat different to those carried out in relation to previous trade agreements due to the fact that the UK is a very important location for this industry. It has long been and currently still is the destination of choice for international broadcasters seeking to access the EU market: the Creative Industries Federation reports that 'of all 2,200 of the broadcasting licences granted to channels across the European Union, more than half (1,100) are granted by Ofcom in the UK, and half of these (650) are for 'nondomestic channels' that are broadcast from the UK to other countries'.⁴ UK dominance has been fostered by the EU single market in audiovisual media services, which permits any service provider that is established in a Member State and conforms to the rules of that state's national regulator to broadcast content to the other 27 Member States. This country of origin (COO) principle as laid down specifically in the AVMSD has been instrumental for the UK to achieve this standing. It is therefore not surprising that in recent UK Government statements an emphasis is put on the desire to reach some forms of mutual agreement specifically for the broadcast sector to allow a similar type of access to the EU single market in order to be able to uphold this position.⁵ Outside the EU, broadcasting and the audiovisual sector as a whole is one of the less liberalised areas in global trade because of the view in many countries that cultural services are particularly sensitive and should be treated differently than other commodities.

² UK Government, Department for Exiting the European Union, The future relationship between the United Kingdom and the European Union as of 12 July 2018.

³ European Commission, Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as of 28 February 2018.

⁴ The Creative Industries Federation, Brexit Report: the impact of leaving the EU on the UK's arts, creative industries and cultural education—and what should be done; EAO, Brexit in context: The UK in the EU28 audiovisual market.

⁵ Cf. Brexit speech of Theresa May on 02 March 2018 at Mansion House (text available at <https://www.conservatives.com/sharethefacts/2018/02/our-future-partnership>) and UK Government, Prime Minister's Office, Policy paper on Government statement following Cabinet away day at Chequers as of 6 July 2018.

2. POSSIBLE POST-BREXIT SCENARIOS

KEY FINDINGS

- Possible **post-Brexit agreements** range from a **close link to the EU via EEA** membership, **bilateral agreements** of a comparable kind without the UK being a member of the EEA but instead of **EFTA**, and **customs union arrangements**.
- The audiovisual sector has typically been **excluded from FTAs** in the past, which is why **looser forms of cooperation** would likely have a **more substantial impact** on the sector than **EEA membership** for the UK.
- **GATS** includes the **AVMS sector** in its **definition of 'services'**, but the amount of commitments made by signatories for this sector is low and the **most favoured nation principle** allows as an exception **favourable treatment** of EU MS only.
- The **Convention on Transfrontier Television** declares the **EU AVMSD** to be primarily **applicable** between EU MS. It could **fill some gaps** as the UK and most EU MS are party thereto, but is more limited and less detailed.
- Existing **FTAs** regularly include de facto '**exceptions culturelles**' with regard to the **AV sector** respecting the possibility of parties to take measures protecting cultural diversity.

2.1. Overview of the different scenarios

In the so-called **Norwegian model**, the UK would remain a member of the EEA and/or join the EFTA. In this model EU 27 service providers such as broadcasters would retain access to the UK market, whilst conversely UK-based providers would retain access to the EU single market. Yet, there would be a regulatory imbalance in favour of the EU, because the UK would be subject to current and likely future rules and standards set by the EU without its participation.⁶

In the **Swiss model**, the UK would not remain an EEA signatory and would not benefit from automatic EEA passporting rights. The UK would join EFTA and negotiate a series of bilateral agreements. These agreements would cover some but not all areas of trade. It is to be pointed out that the arrangement with Switzerland which resulted from the rejection of EEA Membership, is not regarded as a model to copy within the EU and is subject to renegotiation in many aspects. However, if it would be closely followed, audiovisual media services would be included, as they are part of the regulation with Switzerland currently.⁷

In the **Turkish model**, the UK would only form a customs union with the EU, adhering to the EU's overall trade policy. Turkey is in neither the EEA nor the EFTA and does not have access to the EU single market in terms of audiovisual services. Whether this would also be the case in the relationship between the EU 27 and the UK after Brexit depends on the legal relevance of the CTT – to which the UK is party, unlike Turkey – in the post-Brexit regulatory environment.

⁶ The UK would also be obliged to make a financial contribution in return for the continued access to the EU single market. This contribution could be used, inter alia, for the financing of media programmes of EU-27.

⁷ Cf. Annex I to the Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programme MEDIA 2007, <https://www.admin.ch/opc/de/classified-compilation/20072002/index.html>.

In the **Canadian model**, the EU 27 and the UK would sign a FTA. FTAs can feature varying levels of intensity in trade relations,⁸ and the exact content of an EU-UK FTA would be a matter for negotiation. Such an agreement is likely to include some access to the EU's internal market, but could also refer to broad exceptions for the audiovisual sector. In addition, experience has shown that these types of agreement take a significant amount of time to negotiate.⁹ It is noteworthy that in the agreements reached with third countries to date, the EU has never included very extensive access to the single market for broadcasting.¹⁰ This includes also newer multilateral agreements such as the WTO's Trade in Services Agreement (TISA).¹¹

In the different scenario models it should also be pointed out that certain WTO conditions could become applicable even if Brexit happens **without specific agreement** between UK and the EU. The following analysis does not cover aspects of tariffs.¹²

2.2. WTO aspects in case of a no-deal scenario

Both the UK and the other EU MS are members of the WTO. The Brexit declaration of the UK under Article 50 (2) TEU has not affected its membership of the WTO and therefore leaves its obligations under WTO membership unchanged even if there is no agreement for Brexit between the EU and UK. Specifically, the UK remains subject to all rights and obligations under the *Marrakesh Agreement*¹³ and its Annexes¹⁴ including the *General Agreement on Trade in Services (GATS)*¹⁵ and the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*¹⁶. The *erga omnes* obligations in these multilateral agreements will continue to apply to the UK after Brexit without the need for renegotiation or further formalities.

However, Article XX GATS (as well as Article II GATT) – see more detailed below – contains specific references to 'Schedules of Specific Commitments' (and 'Schedules of Concessions'). These Schedules contain each WTO Member's individual commitments that have been agreed upon between this and all other WTO Members. For services, these schedules include the specific commitments on the market access and national treatment obligation for specific service sectors. The commitments and exceptions applying to all EU MS are included in the

⁸ The current FTA with Canada is an intensive form expanding to many trade sectors. Similarly, association agreements such as the one with the Ukraine on a 'Deep and Comprehensive Free Trade Area' include a wide variety of trade liberalization between the parties, but also include forms of political cooperation that go beyond that. It is unlikely that one of these two examples would be followed in the form they exist, but if so, both types of agreements necessitate according to Article 218 TFEU the same form of ratification by the EP, the Council and also all EU MS as well as the Treaty's other party.

⁹ The FTA negotiations between the EU and Canada spanned over five years, concluding in 2014. There were also extra negotiations necessary for the ratification of the CETA Agreement in all EU MS.

¹⁰ Cf. UK Parliament, Digital Single Market: Audiovisual Media Services Directive, point 10.31; cf. e.g. EU-Canada FTA (CETA), Sub-section A - Copyright and related rights, Article 20.8. Broadcasting and communication to the public, where only provisions on exclusive rights and equitable remuneration are foreseen.

¹¹ The only exception is the EU-Korea FTA which granted some access for animé. There is no precedent for a third country securing Single Market-equivalent access for broadcasters. For an overview concerning bilateral relations cf. <http://ec.europa.eu/trade/policy/countries-and-regions/>.

¹² Cf., with respect to the effects of Brexit on tariffs, e.g. Häberli C., Brexit Without WTO-Problems: For the UK? The EU? Global Business? GTCJ 03/2017, pp. 87-91.

¹³ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹⁴ Cf. Article II, para. 2 of the Marrakesh Agreement.

¹⁵ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

¹⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

Schedule of the European Union.¹⁷ In a no-deal Brexit, the UK and the EU27 would not have defined terms in the WTO for their mutual trade in goods and services. The UK only has these commitments as an EU MS. And the EU27 does not have commitments negotiated within the WTO with respect to the UK. Key aspects of the EU's terms of trade could not simply be cut and pasted for the UK. Therefore, important elements would need to be negotiated.¹⁸

One of the WTO's most important achievements has been to consolidate its Dispute Settlement Body, which has the power to rule on trade disputes and to enforce its decisions. This dispute settlement mechanism works on the basis of predefined rules enabling WTO members, regardless of their political or economic power, to lodge complaints over alleged breaches of WTO rules and to seek reparation. This mechanism has led to a reduction in unilateral defence measures, to which countries previously resorted and which often provoked retaliation by the countries targeted, at times leading to fully-fledged trade wars. In the relationship between EU MS, this dispute settlement mechanism is irrelevant, which accordingly currently means also for disputes between the UK and the other EU MS. After Brexit, the situation in the relationship between these is different: for the settlement of disputes that fall within the scope of the WTO rules and are identical to EU obligations, there is no longer the obligation to have these disputes resolved by the CJEU because of Article 344 TFEU.

2.3. Relevance of EEA

2.3.1. Basic Functioning and Objectives

The EEA is a highly developed free trade area comprising the current 28 EU MS and three of the four EFTA members, namely Iceland, Liechtenstein, and Norway.¹⁹ The EEA Agreement is an association agreement according to Article 217 TFEU and therefore compliance of the EU MS with EEA law is monitored by the European Commission and reviewed by the CJEU. From the perspective of the three EFTA States, EEA law constitutes public international law that has to be implemented according to their respective constitutional requirements, rather than supranational law.²⁰ However, Protocol 35 on the Implementation of EEA Rules²¹ states that the EFTA States undertake to introduce, if necessary, a provision to the effect that rules implemented as part of the EEA system take precedence over other (national) statutory provisions. Compliance of the three EFTA States with EEA law is monitored by the EFTA Surveillance Authority (ESA) and reviewed by the EFTA Court.²²

The EEA can be characterized as an enhanced free trade area which partly resembles an internal market²³ with common policies. According to Article 3 (1) EEA Agreement, the aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the parties with equal conditions of competition. To attain this

¹⁷ These can be found at, WTO, Services: commitments – Schedules of commitments and lists of Article II exemptions, www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm; cf. Willemyns, I., Koekkoek, M., The Legal Consequences of Brexit From an International Economic Perspective, 2017, p. 5.

¹⁸ Cf. WTO News, Azevêdo addresses World Trade Symposium in London on the state of global trade, 7 June 2016, <www.wto.org/english/news_e/spra_e/spra126_e.htm>; Willemyns, I., Koekkoek, M., The Legal Consequences of Brexit From an International Economic Perspective, 2017, p. 4.

¹⁹ Not Switzerland; the agreement entered into force on 1 January 1994.

²⁰ Cf. for further background Bast J., European Economic Area, p. 907 et seq.

²¹ [1994] OJ No. L 1 p. 205.

²² Cf. Cottier T., Wermelinger G., Towards a New Neighbourhood Policy of the European Union, p. 300.

²³ The most significant difference to the internal market results from the fact that the EEA Agreement does not establish a customs union among the parties. Other EU policies outside of the scope of the EEA Agreement include agricultural policy, tax harmonization and the single currency. Cf. Müller-Graff P.-C., Free Movement of goods, p. 420.

objective, the EEA Agreement establishes principles formulated closely to the EU rules such as the 'four freedoms' or the principle of non-discrimination²⁴ as well as a system ensuring undistorted competition, which includes the enforcement of rules applicable to undertakings and monitoring of state aid.²⁵ The EEA Agreement also provides for the participation of the three EFTA States in various policies pursued under the EU's founding treaties, which results in the extension of the relevant acts of secondary law adopted by EU institutions. These include Regulations, Directives – such as the AVMSD – and Decisions enacted to give effect to the four freedoms.²⁶ These acts are then binding on the Contracting Parties and are, or are made, part of their internal legal order.²⁷

The objective of the EEA Agreement is to establish '[a dynamic and] homogenous European Economic Area' (Article 1 (1) EEA Agreement). The concept of dynamic homogeneity is closely linked to the notion of creating a level playing field for economic operators.²⁸ This involves a twofold challenge for the institutional system of the EEA: Firstly, it has to provide for a mechanism to ensure that essentially the same rules apply throughout the entire economic space. As the relevant EU legislation and policies are continuously revised and further developed, there is a need to dynamically adapt. To meet this challenge, the Contracting Parties introduced the system of 'mirror legislation' by empowering a common treaty body, the EEA Joint Committee, to amend the annexes to the EEA Agreement in order to incorporate all 'relevant' new EU legal acts, or any amendments to existing ones, into EEA law.²⁹ Ideally, timewise these decisions are made as closely as possible to the adoption by the EU of the corresponding new legislation.³⁰ This would mean for example that the EEA Joint Committee would incorporate the new AVMSD shortly after its publication in the OJ of the EU. In practice, however, there remain considerable time gaps between the adoption of the new EU legislation, the decision of the EEA Joint Committee on extension, and then its publication in the OJ.³¹ Absent a legal obligation to take over any piece of new legislation in a field governed by the EEA Agreement, it is still the rule that the Joint Committee adopts – at most with only technical adjustments or minor adaptations – the relevant EU rules³², likely because the EFTA States are consulted at early stages of the decision-making process within the EU.³³ Secondly, even identical rules may be applied differently when dealt with by different institutions. As there is no common EEA Court, the Contracting Parties established rules of uniform interpretation that assign the CJEU a guiding role also in the EFTA pillar. In essence, the SCA, the ESA and the EFTA Court 'shall pay due account to the principles laid down by the relevant rulings by the Court of Justice'.³⁴ In practice, the CJEU and the EFTA

²⁴ Cf. Bast J., *European Economic Area*, p. 907 et seq.

²⁵ In this context the EEA creates for the non-EU contracting parties 'regulation without representation' as the rules are applicable to these parties without them being able to form them, cf. Leuffen D., Rittberger B., Schimmelfennig F., *Differentiated Integration: Explaining Variation in the European Union*, p. 128.

²⁶ The main part of the EEA Agreement confines itself to stating the principles and objectives of the relevant policies, the actual legislative acts which are extended to the EFTA States are listed (or reproduced in an adapted version) in the voluminous annexes to the EEA Agreement.

²⁷ Article 7 EEA Agreement; on this Bast J., *European Economic Area*, p. 907 et seq; cf. also Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area, [1994] OJ No. L 305, p. 6.

²⁸ Cf. Forman J., *CMLRev.* 36/1999 p. 760.

²⁹ Cf. Bast J., *European Economic Area*, p. 907 et seq.

³⁰ In the words of Article 102 (1) EEA Agreement this shall be done 'with a view to permitting simultaneous application' [ie in the EU and EEA].

³¹ Cf. Forman J., *CMLRev.* 36/1999 p. 765.

³² Cf. Bast J., *European Economic Area*, p. 907 et seq.

³³ Cf. Article 99 and 100 EEA Agreement.

³⁴ Article 6 EEA Agreement for decisions predating the EEA Agreement, Article 3 (2) Surveillance and Court Agreement for later jurisprudence, whereas it seems that the EFTA Court makes no distinction and follows CJEU case law closely, cf. Ingadottir T., *The EEA Agreement and Homogenous Jurisprudence: The Two-pillar Role Given to the EFTA Court and the Court of Justice of the European Communities*, p. 199.

Court are willing to sincerely co-operate and work towards the objective of homogeneity.³⁵ It is an open question whether this would remain the case if judges from the UK were to join the EFTA Court.

2.3.2. A post-Brexit UK as member of the EEA

On the EU side of the EEA, this agreement was concluded by both the EU itself and its Member States. The EEA is a so-called mixed agreement of the EU because the scope of its provisions refers to competences of the EU as well as those of the Member States. Therefore, the UK is an independent contracting party of the EEA and Brexit under rules of public international law does not automatically end this status of the UK. A Brexit concerns three types of legal relationship with respect to the EEA:

- (a) the relationship between the EU 27 and the three EFTA Member States which are part of the EEA,
- (b) the relations between the UK and these three EFTA Member States, as well as
- (c) the relations between the EU 27 and the UK.

The EEA Agreement does not explicitly state that an EU MS will automatically leave the EEA if it loses its membership status in the EU. Although Article 126 EEA Agreement contains a provision that the Agreement applies to EEC Treaty territories (precursor to the EU), this does not necessarily mean that the Agreement applies only to today's EU Member States.

There are good reasons that the *clausula rebus sic stantibus* doctrine of public international law³⁶ is not relevant with respect to the EEA agreement in a post-Brexit situation. This doctrine is essentially an 'escape clause' to the general rule of *pacta sunt servanda*. It allows for an international treaty to become inapplicable because of a fundamental change of circumstances. The doctrine is part of customary international law and also provided for in Article 62 of the 1969 Vienna Convention on the Law of Treaties. According to this provision, a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and³⁷ the effect of the change radically transforms the extent of obligations still to be performed under the treaty. It is well arguable from this perspective that an exit of an EU MS was at least theoretically foreseeable for both the EU and its MS as well as for the three EFTA states, the division of competences between the EU and its MS under a mixed agreement was not an essential basis for the consent of the EU, its MS or the three EFTA States to the agreement and that a Brexit does not radically transform the extent of the obligations still to be performed at least in the relationship between the EU 27 and the three EFTA states. For these reasons it seems conclusive from a purely public international law perspective that *clausula rebus sic stantibus* is inapplicable for the EEA Agreement in the case of Brexit. In effect this would mean that the UK would continue to be an EEA Member State in relation to the EFTA states as well as continue to have the rights and obligations in relation to the EU 27.

³⁵ Cf. CJEU, judgment of 23 September 2003, C-452/01, Ospelt and Schlüssle Weissenberg Familienstiftung, para. 29; for the response of the EFTA Court, see judgment of 14 December 2011, Case E-8/11, Surveillance Authority v The Republic of Iceland, para. 27.

³⁶ Cf. Heintschel von Heinegg, W., *Treaties, Fundamental Change of Circumstances*, p. 1114 et seq.

³⁷ In accordance with the *pacta tertiis* rule of public international law, cf. Vukas B., *Treaties, Third-Party Effect*, p. 31 et seq.

Even if Brexit could be characterized as a fundamental change of circumstances which might justify terminating or modifying a treaty, the unilateral denunciation of a treaty would be prohibited. A formal withdrawal would be needed by the UK to clearly signal the wish not to be bound by this agreement any longer, which would also create more legal certainty. There is an opinion strongly voiced that the nature of the EEA Agreement including the above-mentioned provision concerning its territorial reach, result in its limitation to either EU MS or EFTA Members.³⁸ This position would mean that a non-EU member UK could only continue to participate in EEA, if it would explicitly join as EFTA member.³⁹ As the current political evaluation of a possible 'automatic' EEA membership is answered in the negative on both the side of the UK as well as the EU,⁴⁰ even if the more convincing arguments from a public international law perspective argue in favour of such a membership due to the unclear formulation of the treaty⁴¹, there would be no practical consequence in this direction. If no party to a treaty invokes rights or obligations resulting from it, it will rest irrelevant until a change of opinion.

2.4. Relevance of GATS

2.4.1. Basic Functioning and Main Elements

The General Agreement on Trade in Services ('GATS') is the first and so far only global agreement addressing trade in services. It is one of the agreements administered by the WTO and entered into force on 1 January 1995.⁴² GATS is binding on all 164 WTO members including the UK and all the other 27 EU MS.⁴³ There are no provisions – either in the WTO Agreement, in GATT or in GATS – which specifically address how to deal with a member state leaving a customs union, a free trade area or an internal market. There are no convincing arguments that the UK's continued membership of the WTO, of GATT or of GATS is somehow contingent on the EU 27 MS accepting a sort of re-accession application.⁴⁴

GATS is divided into six main parts and eight annexes which form the integral parts of the agreement. These annexes concern horizontal issues, such as Article II exemptions and the movement of natural persons, as well as sector-specific issues such as telecommunications and financial services. GATS applies to measures of WTO Members 'affecting trade in services' (Article I (1)). Although it does not define the term, it indicates a broad sectoral scope of application by including 'any service in any sector except services supplied in the exercise of governmental authority' (Article I (3) (b)). Hence, all services except those supplied in the

³⁸ Cf. Tynes D., Haugsdal E., *European Foreign Affairs Review* 2016, p. 753 et seq.; Hillion C. (2018), *Common Market Law Review* Vol. 55, 135 et seq.

³⁹ Cf. Baudenbacher C., *After Brexit: Is the EEA an option for the United Kingdom?*, p. 7.

⁴⁰ Cf. Jean Claude Juncker answer on behalf of the Commission on a parliamentary question (ref. E-005564/2017), available at http://www.europarl.europa.eu/doceo/document/E-8-2017-005564-ASW_EN.html?redirect; Explanatory Notes relating to the European Union (Withdrawal) Bill as introduced in the House of Commons on 13 July 2017 p. 4, available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>.

⁴¹ Cf. also Schroeter U., Nemeček H., *JZ* 14/2017, 713, 716 et seq.

⁴² It was included in Annex I B of the Marrakesh Agreement. The provisions of that Agreement, the Dispute Settlement Rules and the Trade Policy Review Mechanism therefore also apply to the GATS. Cf. for details Krajewski M., *General Agreement on Trade in Services* (1994), p. 323 et seq.

⁴³ Cf. https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. The status of the GATS in the legal order of the EU is complex and has been subject to various changes. In the Nice Treaty the scope of the EU's competence regarding trade in Services was expanded, but cultural and audiovisual services were kept within the shared competence of the EU and the MS. The Lisbon Treaty abandoned this sectoral carve-out and submitted trade in services fully to the exclusive EU competence. Cf. Krajewski M., *General Agreement on Trade in Services* (1994), p. 323 et seq.

⁴⁴ Cf. Lux M., Pickett E., *The Brexit: Implications for the WTO, Free Trade Models and Customs Procedures*, GTCJ 12/2017, p. 95 et seq.

exercise of governmental authority and certain air traffic rights⁴⁵ are covered by GATS; services providing audiovisual content are thus subject to its provisions. GATS applies to measures of central, regional, and local governments as well as non-governmental bodies exercising delegated powers, such as self-regulating bodies of professional service suppliers which can issue binding regulations (Article I (3) (a)).⁴⁶

GATS defines trade in services as the supply of a service through one of four modes of supply which can be distinguished based on the location of the Service supplier and the service consumer and includes cross-border supply including e.g. the supply of radio and television services as well as radio and television transmission services through cable, satellite or the Internet.⁴⁷ Another mode relates to the supply of a service 'by a service supplier of one Member, through commercial presence in the territory of any other Member'. This commercial presence of a foreign service supplier in the territory of a WTO Member usually involves the establishment of a branch, affiliation, or a joint venture. Mode 3 is therefore associated with foreign direct investment in services.

2.4.2. General and Specific Obligations

The general obligations and so-called disciplines of Part II GATS apply – subject to certain exceptions – to measures affecting all services sectors, whereas the obligations of Part III GATS only apply if a WTO Member specifically committed a sector to market access and national treatment in its Schedule of Specific Commitments. The most important general obligation is the most-favoured-nation (MFN) treatment (Article II GATS) which obliges Members to treat services and service suppliers of one Member no less favourably than it treats like services and service suppliers of another Member. In essence, Article II GATS prohibits discrimination against services and service suppliers from different foreign countries if they can be considered 'like'. But Members can exempt measures from this treatment if certain conditions are met including that they should in principle not exceed a period of 10 years.⁴⁸

All EU Member States have enlisted 'audiovisual services' as a sector which is exempted from MFN treatment and therefore do not need to grant full national treatment with respect, e.g. to audiovisual works covered by bi- or multilateral agreements on co-production.⁴⁹ However, the scope of the exemptions differs between MS. In Austria for example, the general exemption for AV measures does not apply to Council of Europe members or signatories of the Cultural Convention of the Council of Europe, because all of these countries are categorized as being ones with whom cultural co-operation may be desirable.⁵⁰ Therefore, to illustrate it with this example: as long as the UK belongs to the Council of Europe, Austria would have to continue to grant MFN treatment to the UK. It should also be pointed out that exemptions may not be extended later and are limited to those included at the time of entry into force of the GATS for that Member, meaning that these lists in view of the UK could not be adapted post-Brexit.

⁴⁵ Cf. Section 2 Annex on Air Transport Service

⁴⁶ In 'EC – Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body' the broad scope of the GATS has been explicitly recognized stating that there was nothing in the GATS 'to suggest a limited scope of application of the GATS' (para. 200). For co-/self-regulatory bodies cf. Article (7) AVMSD.

⁴⁷ Cf. https://www.wto.org/english/tratop_e/serv_e/audiovisual_e/audiovisual_e.htm.

⁴⁸ Some Members have, nevertheless, listed measures without time limitations.

⁴⁹ Currently, there are 143 MFN exemptions for 58 states in the audiovisual sector WTO members made under GATS. For an overview see the list of MFN exemptions in the audiovisual sector available at <https://emr-sb.de/mfn-exemptions-in-the-audiovisual-media-sector/>.

⁵⁰ Cf. for Austria https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=16575&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

Part III GATS contains the disciplines of market access (Article XVI GATS) and national treatment (Article XVII GATS). Both obligations only apply if and insofar as a WTO Member specifically committed a particular sector or subsector to these disciplines and are subject to any limitations and specifications contained in the Member's Schedule of Specific Commitments. Consequently, the Schedule of Specific Commitments determines the actual applicability of market access and national treatment in a given sector.⁵¹ Audiovisual services is one of the sectors where the number of WTO members with commitments is the lowest (39, as of 31 May 2018, and none for the EU or its MS).⁵² Therefore, Brexit cannot lead to claims of renegotiation and/or compensatory measures of third states with respect to a decreasing economic value of EU concessions in the field of audiovisual services.⁵³ Both the limited Commitments as well as the situation with MFN for the audiovisual sector mean that post-Brexit the situation will remain unchanged in that the AV market under global trade is fragmented and in relation to some States there is an inclusion of many aspects concerning AV, for others only few or a total exclusion.

In a post-Brexit-era it is relevant that the WTO system recognizes the right to depart from the MFN principle in order to grant preferential treatment to goods (GATT 1994) or service suppliers (GATS) from trading partners within a customs union or a free trade area without extending such treatment to all WTO Members. According to Article V GATS, it shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement (a) has substantial sectoral coverage and (b) provides for the absence or elimination of substantially all discrimination between or among the parties in the sectors covered. The audiovisual internal market of the EU as based on the TFEU is such a regional system which legitimates a right of the remaining EU MS to depart from the MFN principle under GATS in relation to the UK after its leaving the EU as it will then be in the same status than other GATS members which are not in this regional system.

2.4.3. GATS and cultural diversity

In 2005, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁵⁴ as an attempt to establish a legally binding counterweight at the international level to the liberalization objective of GATS. All 28 EU MS have ratified this Convention. However, since the Convention does not take precedence over GATS, it cannot resolve potential conflicts between obligations arising from GATS commitments and discriminatory or market access-restricting regulatory measures aimed at the protection of cultural diversity in a post-Brexit era.

2.5. Relevance of the European Convention on Transfrontier Television

2.5.1. Functioning and scope

The CTT is an international treaty which was originally negotiated in parallel to the first EEC Television without Frontiers Directive (TwFD) in 1989. Since then, it initially developed in

⁵¹ In addition to market access and national treatment, Members may also include 'additional Commitments' in their schedule on the basis of Article XVIII GATS, the most important of which is the Reference Paper on Telecommunications.

⁵² More information on <http://i-tip.wto.org/services/ReportResults.aspx>.

⁵³ Cf. Lux M., Pickett E., The Brexit: Implications for the WTO, Free Trade Models and Customs Procedures' GTCJ 12/2017 p. 101; De Baere, P., The impact of Brexit on EU trade relations.

⁵⁴ Convention for the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005, available at <https://en.unesco.org/creativity/convention/texts>.

parallel but in 2007 the reform creating an AVMSD with a broadened scope was not followed by an equivalent protocol to the CTT. The Convention contains a rule giving priority to relevant EU law (the AVMSD) in the relations between convention states which are also EU MS (Article 27 (1)). This so-called 'disconnection clause' ensures that EU MS apply the Directive between themselves; the Convention is thus limited to areas not covered by EU rules. Since the clause governs exclusively relations between parties which are EU MS, it is without prejudice to the application of the CTT between those (EU MS) parties and other parties that are not (or no longer) members of the EU. Accordingly, the CTT is no longer irrelevant in the relationship between the UK and the EU MS that are convention states of the CTT. Therefore, the CTT may act as a substitute for some aspects of the market access conferred by the AVMSD, but it remains an inadequate replacement for the obligations under the Directive with respect to personal and material scope, rules on advertising, and the enforcement regime.⁵⁵

Six EU MS (Denmark, Greece, Ireland, Luxembourg, the Netherlands and Sweden) are not signatories of the CTT. In addition to its above-mentioned deficiencies, legal analysis of the CTT provisions on advertising suggests that it grants signatories an effective opt-out on advertising, such that any country can deem invalid any advertising content to which it objects. Nor does the CTT currently cover on-demand audiovisual media services – which are, in contrast, dealt with under the AVMSD. An attempt to make changes to the CTT in response to the 2007 EU reform was unsuccessful because of the Commission's objection to MS ratifying international agreements in areas of the EU's exclusive external competence. For the same reason, it is highly unlikely that the CTT will apply to video-sharing platforms as is the case under the reformed AVMSD.

2.5.2. Specific aspects of advertising and enforcement

Article 16 of the CTT permits states to block commercial advertising in form of an opt-out procedure. Because advertising is a key source of revenue for most service providers, whether they are public or private broadcasters, this opt-out possibility endangers the business model of many linear broadcasters. If the latter wish to address viewers in a cross-border manner they have to conform to rules in the country of destination.⁵⁶ This further reduces the adequacy of CTT as a substitute for the AVMSD. The CTT has less far-reaching provisions; for example, questions of product placement are not included. It also does not contain an effective enforcement mechanism as it leaves this question to the national law of the signatories. In addition, other than for the AVMSD, there is no monitoring of (national) enforcement that would allow a sanctioning in case of lack of effectiveness of the national measures.

2.6. Possibilities of Free Trade Agreements and the CETA example

As mentioned above, the EU has almost always excluded broadcasting from its negotiating mandates for FTAs, including the recent EU-Canada FTA (CETA) and the WTO's Trade in Services Agreement (TiSA).

2.6.1. Audiovisual media services in CETA

CETA is a very relevant example for the possible design of a FTA with a post-Brexit UK as it was recently concluded and negotiated over a long period including the resolution of critical positions along this period. It therefore reflects the extent to which EU MS are inclined to agree on the liberalization of certain market sectors with third countries under the EU

⁵⁵ Cf. FTI Consulting, Lights, camera ... Brexit. A new episode for the UK's broadcasting sector, p. 5.

⁵⁶ Cf. UK Parliament, Digital Single Market: Audiovisual Media Services Directive, para. 10.28.

'umbrella'. The audiovisual media sector is not included as such in the CETA agreement, but is instead subject to a number of exceptions.⁵⁷ The sector is referred to as audiovisual services for the EU and cultural industries for Canada. It is important to note that although CETA also concerns the legitimacy of subsidies, any type of public support for this specific sector is explicitly excluded from its scope and rules on subsidies. This is especially relevant because it clarifies that any doubts concerning the admissibility of the rules established within the EU after enactment of CETA are unfounded. This approach in the EU foresees that each MS itself provides for the funding of public service broadcasting and can determine the amount necessary to fulfil the remit as conferred, defined and organised by the respective MS.⁵⁸

Further, the competence for the EU and Canada to regulate with effect on the sector for public interest goals is also not undermined by the Agreement. The investment rules and principle of non-discriminatory treatment do not apply to a measure with respect to audiovisual services.⁵⁹ It is reaffirmed that 'protection of cultural diversity' is a regulatory goal that can be invoked by MS.⁶⁰ This concept includes measures of EU MS in the area of licensing of media service providers as well as measures to ensure media pluralism or the protection of minors.⁶¹ This clarification strengthens the rights of EU MS to face new challenges in securing media pluralism as an essential part of cultural diversity. MS are not limited to the rules existing at the time of signature or ratification, but can add new regulations without violating CETA.⁶² This conclusion is confirmed by the following two chapters: Chapter 9 of the CETA Agreement which deals with 'cross-border trade in services' and includes services such as e.g. internet intermediaries, media agencies, video-sharing as well as other platforms or search engines, explicitly excludes the rules' application in the audiovisual sector/cultural industries. Similarly, Chapter 12 of the CETA Agreement, which deals with 'domestic regulation' (including licensing requirements and procedures) affecting cross-border supply of services or some form of cross-border element e.g. by commercial presence in the territory of the other Party, also excludes applicability in the sector, which also means that e.g. licensing procedures for providers of audiovisual media services are excluded from the scope of CETA.⁶³

These exceptions at least with regard to 'audiovisual services', which can be found *mutatis mutandis* in all FTAs of the EU, are essentially equivalent to the establishment of an *exception*

⁵⁷ Cf. Ukrow J., Ceterum censeo: CETA prohibendam esse? Audiovisuelle Medien im europäisch-kanadischen Freihandelssystem.

⁵⁸ Cf. Protocol (No. 29) of the TFEU on the System of Public Broadcasting in the Member States

⁵⁹ Cf. Chapter 8, Article 8.2 of the Agreement. There is a parallel regulation, inter alia, in the EU-Ukraine Association agreement: According to Article 87 (c) of this agreement, section 2 (establishment) applies to measures adopted or maintained by the Parties affecting establishment in respect of all economic activities with the exception of audiovisual services. The same exception exists with respect to the obligations for "Cross-Border supply of services" (Article 92 (a)) and the commitments for liberalised sectors (Article 95 (2)).

⁶⁰ For Canada, these Sections do not apply to a measure with respect to cultural industries. In Section D of this Chapter, which deals with "investment protection", Article 8.9 (1) also provides that the Parties "for the purpose of this Chapter.

⁶¹ This exclusion of limitations by CETA also applies to the CJEU case law on media pluralism as an unwritten justification for exceptions to the fundamental freedoms of the internal market, cf. e.g. CJEU 148/91, Rep. 1993, I-487, I-519 – Veronica Omroep Organisatie. For greater certainty, Article 8.9 (2) adds that the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

⁶² Cf. Ukrow J., Ceterum censeo: CETA prohibendam esse? Audiovisuelle Medien im europäisch-kanadischen Freihandelssystem.

⁶³ This result is underlined by looking at Chapter 28 (Article 28.9) and which lists under exceptions of CETA again the 'cultural derogations' - "Exceptions" of the CETA Agreement again emphasizes the cultural derogations to several of the chapters.

culturelle for FTAs, an approach that is often advocated for as being beneficial to the cultural sector.⁶⁴ This ‘cultural exception’ refers to the view, promulgated by the French and Canadian Governments during WTO GATS negotiations, that cultural services are too important to be treated as other commodities in trade. This is the reason why the audiovisual sector is one of the less liberalised sectors in terms of global trade⁶⁵ and there is no precedent for a third country securing EU Single Market-equivalent access for audiovisual media service providers: The sector is covered neither by CETA nor by the new EU-Japan FTA; the Deep and Comprehensive Free Trade Area (DCFTA), which is nested within the EU-Ukraine Association Agreement, contains certain provisions relating to the audiovisual sector, but while satellite broadcast transmission services are included in the annex on services commitments, this type of service refers only to the communication service of satellite broadcast transmission – not content services.⁶⁶

2.6.2. CETA and cultural diversity

CETA also underlines the significance of the UNESCO Cultural Diversity Convention as already discussed above in the context of GATS. The CETA parties affirm in the preamble their commitments as parties to the UNESCO Convention and recognise that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support. This preamble is not a mere, legally irrelevant lyric: it is largely undisputed in public international law that preambles to bilateral or multilateral treaties under international law have at least an important function for the interpretation of these treaties.⁶⁷

The exclusion of audiovisual services from the scope of CETA as well as the other FTAs of the EU protects the cultural sovereignty of the Member States. However, this far-reaching protection of the sector also has a potential disadvantage. The removal of the culture sector from FTAs poses risks to the promotion of a democratic culture of discussion which is very important in the age of globalization in general, and in light of the emergence of populist tendencies and new digital forms of opinion manipulation in particular. Although communication-related human rights under Article 19 of the UN International Covenant on Civil and Political Rights continue to apply also after the entry into force of FTAs such as CETA, the cultural exception clauses of these FTAs could be abused as a reference point by those who oppose the free flow of information and therefore endorse barriers to free enterprise by private media companies from other countries.

A complete isolation of the national broadcasting and media sector from the influence of companies from other countries, as would be permitted in the relationship of the EU MS and Canada under the terms of CETA and which could potentially be similar in a future EU-UK FTA, may be found acceptable in the mutual relationship between states where a high level of protection of freedom of opinion and media pluralism exists. But this may be different for the relationship with authoritarian or even totalitarian states. In this respect, in the future negotiation of FTAs, and the next would be – if such a scenario is followed – one between the EU and the UK, every effort should be made to avoid the trap that third states refer to

⁶⁴ Cf., e.g., Hahn M., Eine kulturelle Bereichsausnahme im Recht der WTO?, *ZaöRV* 1996, p. 315 et seq.; von Danwitz T., Die Kultur in der Verfassungsordnung der Europäischen Union, *NJW* 2005, p. 530; Burri M., Trade versus Culture: The Policy of Cultural Exception and the WTO, pp. 479-492.

⁶⁵ Cf. UK Parliament, Digital Single Market: Audiovisual Media Services Directive, 13 November 2017, para. 10.33.

⁶⁶ Cf. UK Parliament, Digital Single Market: Audiovisual Media Services Directive, 13 November 2017, para. 10.32.

⁶⁷ Cf. Mbengue, Preamble, p. 397 et seq. This is confirmed by a look at Article 31 Vienna Convention on the Law of Treaties, which has (also) codified customary international law in this respect. According to Article 31 (1), a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. According to 31(2), the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *inter alia* its preamble.

such clauses when defending their own rules against criticism by justifying problematic instruments which negatively affect free speech as having been designed to safeguard overriding considerations of public interest.

3. RELEVANT ELEMENTS OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

KEY FINDINGS

- The **COO** will remain the **basic principle of the AVMSD** establishing a ‘**one sto-shop**’ in regulatory matters even if in some **exceptional cases** MS can apply their rules to providers not under their **jurisdiction but targeting their market**.
- Criteria defining **jurisdiction** over providers allow the **inclusion of UK-based providers post-Brexit** in the AVMSD regulatory framework either because of **change of establishment** or when **using satellite dissemination**.
- **Quota provisions** for **European works** cover works originating in CTT-States. **UK productions** will continue to be **included** and the production of European works should **not be impacted significantly** by Brexit, but **need to ensure transparency** of real origin of works from UK as the AVMSD can no longer demand such reporting.
- **Scope** of the AVMSD **extended** by 2018 reform to **video sharing platforms** and rules allow jurisdiction over non-EU-platforms by MS if there is a relevant link to territory. Provisions will impact the way services are delivered which will likely lead to application of new instruments irrespective of origin.

3.1. The AVMSD, legislative history and 2018 reform

The AVMSD has been and remains the cornerstone of EU media law. As mentioned, it was first drafted as TwFD in parallel to the CTT. Its main goal was to establish a European TV market. Although it did not lead to a general content harmonisation in the sense that national productions were replaced by some form of European television content, it ensured that the same content may be disseminated across the EU and significantly increased the offer of content across borders. Creating legal certainty for providers by requiring only a ‘one stop shop’ regulatory regime made it first possible and then attractive to broadcast to more than the territory under whose jurisdiction the provider operates. Beyond this COO principle the Directive also contributed to the shaping of the broadcast and later video-on-demand market by giving a detailed framework for permissible advertising and other forms of commercial communication and by introducing the concept of the promotion of so-called European works. Although the Directive is dependent on national transposition and thereby gives room for MS diversity in the creation of the relevant rules, it has actually harmonised at least the broadcasting laws of the MS quite strongly.⁶⁸

Although the Directive has been reformed twice previously and in 2018 a major new amendment has been decided, it should not be forgotten that the key elements of the Directive have remained unchanged (including the conceptual underpinning of the free flow of information) and have therefore shown their effect for three decades now. When in 2007 the scope of the Directive was enlarged to non-linear services – although these types of on-demand audiovisual media services were regulated to a lesser extent than broadcasters – the change was perhaps less significant than what is to be expected from the 2018 reform.⁶⁹

⁶⁸ This is due to its level of detail in some chapters as well as likely a hesitation by many MS to implement the Directive in a stricter than necessary, manner which otherwise may have possibly led to providers shying away from that MS.

⁶⁹ The political agreement on the amending Directive was reached between EP and Council between April and June this year and although the formal votes still have to take place the text is final subject to linguistic changes, cf. at least European Parliament legislative resolution of 2 October 2018 (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)) TA/2018/0364 (<https://eur-lex.europa.eu/legal->

The scope will again be expanded, now to video-sharing platform services, although again not all rules will be applicable to this category.⁷⁰ On the other hand, the rules applicable to video-on-demand services are aligned more closely to those for broadcasters. There are further significant changes concerning enforcement (and including the institutional structures for this) and e.g. rules concerning prohibited content. The new Directive is expected to enter into force by the end of this year leaving a 21-month period for transposition. Depending on the timing and how Brexit takes place, it is already questionable whether the new obligations will be implemented in national UK law. Certainly, post-Brexit jurisdiction issues arise concerning the position of service providers within the EU MS and the UK, which cannot be resolved by UK law alone.

3.2. Impact of the country of origin principle within and beyond the European Union

3.2.1. Fundamental importance of the country of origin principle

The importance of the AVMSD results largely from the COO principle. Compared to other areas of EU law, here the principle that a provider can offer a service across the EU as long as he complies with the legal framework of one MS (his 'home jurisdiction') has been realized to the fullest extent.⁷¹ It gives providers the choice of optimal location for their business because there are only very limited exceptions to the application of the principle, ensuring a high level of legal certainty as to which rules apply. The introduction of this principle in a sector offering services was the real innovation of the original TwFD on the way to creating a single market for broadcast(er)s. However, the new possibility to introduce such a service into one of the EU MS territories, thereby making it available across the EU came with an important precondition: all MS are obliged by Article 2 (1) AVMSD to ensure legal compliance of all providers under their jurisdiction and this includes the rules which were created in transposition of the minimum harmonisation provided for by the AVMSD itself. On the other hand, according to Article 3 (1) MS are not entitled to restrict incoming transmissions or the free flow of information for reasons that fall within what has been harmonised by the AVMSD. Therefore, two points are essential for the application of the COO principle: the criteria to establish jurisdiction and exceptions to the principle as laid down by the Directive itself or result from an issue falling outside the coordinated scope.

There has been criticism that the COO principle might lead to a 'race to the bottom' by providers seeking to establish themselves under the jurisdiction of one MS although their service is mainly directed to another MS where possibly stricter rules concerning such services would apply or the monitoring by the national regulatory authority would be more intense. In order to meet this criticism, the AVMSD contains two rules⁷²: Article 3 (2)-(6) allows MS under certain conditions to (temporarily) derogate from the free flow by taking measures against reception or retransmission on their territory. Article 4 (2)-(5) on the other hand foresees a possibility for MS to react to a situation of 'circumvention' if it has imposed stricter rules for service providers under its jurisdiction and a provider has moved its location to another jurisdiction in order not to be covered by these rules. The temporary derogation is dependent on violations of important rules without this having resulted in a reaction by the

content/EN/TXT/?uri=IMMC:P8_TA(2018)0364) and for further information: Synopsis of the Institute of European Media Law, available at <https://emr-sb.de/synopsis-avms/>.

⁷⁰ Cf. for a first summary analysis Weinand J., The revised Audiovisual Media Directive 2018 - has the EU learnt the right lessons from the past, in UFITA no. 01/2018, p. 270 et seq.; in particular for video-sharing platforms cf. Cabrera Blázquez F. J. et al., The legal framework for video-sharing platforms, European Audiovisual Observatory, IRIS Plus 2018/1, p. 16-18.

⁷¹ Cole M.D., The country of origin principle – from state sovereignty under public international law to inclusion in the Audiovisual Media Services Directive of the European Union.

⁷² Harrison J., Woods L., European Broadcasting Law and Policy, p. 173 et seq.

competent MS; it further requires a complicated procedure before measures can be taken. The circumvention rule requires proof of the purpose of the provider's move to have been done for the aim of circumvention as opposed to a mere use of the right to change establishment within the Single Market. The limitations of these exceptional rules show that the COO principle is actually prevalent and can only be disregarded under narrow circumstances. Although the 2018 reform foresees noteworthy changes to both procedures that could facilitate their application and that broaden the reasons to invoke them, this will still not touch the core of the COO principle.

3.2.2. Country of origin principle applied in practice

The COO principle has certainly had a noteworthy impact over the past decades on service provider's decisions about where to locate. Although especially broadcasters tend to have some form of presence in the territory at which their content is directed – not least because of the need to be geographically close to the rightsholders for negotiations about licensing content appropriate for the relevant 'national' programme –, the legally relevant establishment could be chosen for a combination of reasons. These could range from the regulatory framework applicable in a specific MS including the administrative setting to tax reasons, the availability of trained personnel etc.⁷³ This set-up has led to certain hubs emerging where a large number of providers are located and as shown above the UK is perhaps the major location overall taking into consideration the number of licenses granted by OFCOM, the UK national regulatory authority in charge. It became standard practice for content to be disseminated in territories of MS that themselves had no direct influence on the responsible provider, but – in case of problems – were limited to contacting the MS of origin.

In actual fact, such cooperation procedures between the national regulatory authorities (NRAs) have long been taking place in formal and informal ways⁷⁴ and also, although more recently, the exceptional procedures foreseen in the AVMSD have been used: in January this year the first final decision on a 'anti-circumvention measure' (Article 4) was taken by the Commission.⁷⁵ It declared as incompatible with the Directive's standards the measures taken by Sweden against two broadcasters under UK jurisdiction who were alleged to be circumventing Swedish advertising rules. In light of CJEU jurisprudence, the Commission put the burden of proof for circumvention on the MS taking exceptional measures and declared the threshold not met in the case. This means that the AVMSD does foresee exceptional measures, but COO principle is the rule. Earlier case law of the CJEU did underline, however, that there are areas outside the coordinated fields of the AVMSD that allow MS to take action, such as for imposing consumer protection rules.⁷⁶ Concerning the use of Article 3 and temporary suspension measures against retransmission, there is more practical experience. There have been several cases in which the Commission has declared such measures to be compatible in the context of violations of the prohibition on the incitement of hatred in the programme of an incoming broadcast signal.⁷⁷

There has been some discussion as to how the COO principle will be affected by one core element of the 2018 reform of the AVMSD: together with the imposition of quotas for European works now also for on-demand service providers, MS can expand financial

⁷³ Cf. ERGA report on territorial jurisdiction in a converged environment as of 17 May 2016, p. 24-26.

⁷⁴ *Ibid.*, p. 38 et seq.

⁷⁵ Commission Decision C(2018) 532 final on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4 (5) of Directive 2010/13/EU.

⁷⁶ This was the situation as the rules were not harmonised then yet in CJEU, 9 July 1997, Joined Cases C-34/95, C-35/96 and C-36/95, no. 32 et seq.

⁷⁷ Most recently in Commission Decision C(2018) 2665 final on the compatibility of the measures adopted by Lithuania pursuant to Article 3 (2) of Directive 2010/13/EU concerning Lithuanian measures against a broadcaster under Swedish jurisdiction.

contribution obligations for the production of European works also to media service providers established in other MS if they target audiences in their own territory. There are a number of conditions for this, such as a *de minimis* rule excluding providers with small audience shares and generally an obligation to create a proportionate system. Also, the question of jurisdiction remains untouched; there is only an obligation to follow for a defined matter the rules of a state other than the 'home state'. In that sense, it can be regarded as an exception to the full effect of COO principle, but it does not change that the rule remains the COO principle and the exceptions are only for specific cases.

Therefore, the most important question in connection with the COO principle will remain the criteria establishing jurisdiction. These are laid down in Article 2 (2)-(5) AVMSD and although in the initial formulation of the criteria there were a number of disputes about which MS has competence over a broadcaster⁷⁸, the subsequent interpretation of the CJEU and amendments in the Directive itself helped clarify these. There are still situations in which NRAs regard the criteria as not being unequivocal, as there is a combination of criteria, but in most cases especially concerning broadcasters it is clear due to the establishment of the company and the license held.⁷⁹ It is more interesting in the context of this report to take a look at the so-called secondary jurisdiction criteria. These apply in cases in which there is no company establishment within the EU. Article 2 (4) AVMSD foresees that for such non-EU providers jurisdiction can still be established if a satellite uplink is used that is on the territory of a MS or if a satellite capacity is used that is assigned to a MS.⁸⁰ In other words, an external service provider can actually fall under EU law and the rules and obligations of the AVMSD without being physically present on EU territory as long as there is a 'technical' link which is considered to substitute a regular establishment such as when the provider company has a seat in the EU. There are several MS where a large number of playout centres with uplinks exist as well as a smaller number in which the major satellite communications providers are located and use capacities assigned to that MS. The AVMSD 2018 will contain rules that slightly amend the formulation of the primary establishment criteria in cases where companies have several establishments but more importantly introduce a mechanism for dispute resolution between NRAs in case of controversy as to who actually has jurisdiction (new Article 2 (5c)).

3.2.3. Country of origin principle and its reach beyond the EU

As demonstrated, the COO principle does not actually require providers to be located in the EU to profit from it, at least for the use of satellite dissemination. For UK-based broadcasters using satellite technology within the EU this could mean that the benefits and obligations of the AVMSD could continue to apply even without relocating. This potential for third-country providers to profit from COO principle by using one of the links comes with an inclusion in the obligations of the AVMSD. The AVMSD has therefore been constructed in a way that quite forcefully defends European interests. But the framework offered with the legal certainty of being able to disseminate across the whole EU by complying with one legal system is so attractive that it can be assumed that it is more important for 'outsiders' – such as UK-based providers post-Brexit – to be in than the other way round, even though the UK market is of

⁷⁸ Cf. on this and the relevant CJEU cases *Cole M.D.*, The country of origin principle – from state sovereignty under public international law to inclusion in the Audiovisual Media Services Directive of the European Union, p. 122 with further references; Weinand J., Implementing the EU Audiovisual Media Services Directive, p. 96 et seq.

⁷⁹ Cf. generally also Wagner M.A., Revisiting the Country-of-Origin Principle in the AVMS Directive, *Journal of Media Law* no. 06/2014, pp. 286-304.

⁸⁰ It is interesting to note that the order of the subsidiary criteria was changed in the 2007 reform and the uplink now comes first. The CTT which also contains the concept of COO principle and home-country jurisdiction still sticks to satellite capacity first and then uplink (and continues to have as first criterion the use of a frequency of a State).

relevance for the rest of the EU audiovisual industry. In order to be sure that a provider is covered by the AVMSD, relocation options might still be attractive especially in cases where no fallback on the secondary satellite-related jurisdiction criteria is possible. In cases where non-EU providers do not fall under the jurisdiction of a MS due to the AVMSD provisions, all MS are free to treat this type of content according to their national rules without being limited to areas not coordinated by the AVMSD. In many instances this will mean that the AVMSD rules will still be *de facto* applicable e.g. concerning the rules on commercial communication due to the way they have been transposed – often literally – in national law. For the territory of the UK the same can be assumed except in the event that the transposing acts are changed after Brexit, which does not seem likely in light of the Withdrawal Act approach.⁸¹ In effect this means that the AVMSD will continue to reach further than merely to providers within the EU, even without the Directive being binding upon non-EU states. This is true, however, on condition that no amendments will be made in future – which cannot be assumed to be certain.

3.3. Quotas and financial obligations for providers according to the AVMSD

3.3.1. Differentiation between linear/non-linear and European/independent works

3.3.1.1. Linear Broadcasting

According to Article 16 (1) AVMSD, MS shall ensure, where practicable and by appropriate means, that broadcasters reserve the majority⁸² of their transmission time for European works, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Article 1 (1) (n) defines European works. These are (i) works originating in MS; (ii) works originating in European third States party to the CTT and fulfilling the conditions of paragraph 3⁸³; (iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.⁸⁴

As long as the UK remains party to the CTT, works originating in the UK can in principle⁸⁵ be taken into account for the test whether a broadcaster under the jurisdiction of an EU MS reserves for European works a majority proportion of its transmission time. Works that are not European works within the meaning of point (n) of paragraph 1 but are produced within

⁸¹ UK parliament, European Union (Withdrawal) Act 2018, Chapter 16, available at http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf.

⁸² Where this proportion cannot be attained, it must not be lower than the average for 1988 in the concerned Member State, cf. Article 16 (2) AVMSD.

⁸³ Article 1 (3) AVMSD states that the “works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions: (i) they are made by one or more producers established in one or more of those States; (ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States; (iii) 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.”.

⁸⁴ The application of the provisions of points (n)(ii) and (iii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned; Article 1 (1) (n) (2) AVMSD.

⁸⁵ With respect to possible exceptions cf. Article 10.

the framework of bilateral co-production agreements concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Union bear the majority of the total costs of production and that the production is not controlled by one or more producers established outside the territory of the Member States.⁸⁶

According to Article 17 AVMSD, the same rule as above shall apply for European works created by producers who are independent of the relevant broadcasters. This quota, however, only extends to at least 10 % of their transmission time or alternatively, at the discretion of the MS, at least 10 % of their programming budget. Again, this proportion should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within 5 years of their production.

3.3.1.2. Non-linear services

According to Article 13 AVMSD, MS shall ensure that also on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production of and acquisition of rights in relation to European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service. There is no additional obligation comparable to the one for broadcasters concerning independent productions.

3.3.1.3. The extension of the obligations for non-linear service providers in the revised AVMSD

As a result of the trilogue procedure for the revised AVMSD, in order to support the cultural diversity of the European audiovisual sector, in future 30% of content should be European, also in the video-on-demand platforms' catalogues.

Video-on-demand providers are also asked to contribute to the development of European audiovisual productions, either through a direct investment in content or a contribution to national funds. The level of such contribution can be decided by MS and apply – as shown above – also to providers not under the establishment of a specific MS. However, in such cases this can only be done in proportion to their on-demand revenues in that targeted MS.

3.3.2. Obligations, monitoring and enforcement in practice

Every 2 years,⁸⁷ MS shall provide the Commission with a report on the application of the aforementioned Articles 16 and 17. That report shall in particular include a statistical statement on the achievement of the proportion referred to in these Articles for each of the television programmes falling within the jurisdiction of the Member State concerned, along with the reasons, in each case, for the failure to attain that proportion and the measures adopted or envisaged in order to achieve it in future.⁸⁸

After Brexit, this obligation of transparency ends for the UK. However, works from the UK can continue to be taken into account as European works. This may lead to a circumvention of the quotas of Articles 16 and 17 AVMSD because there is no sufficient monitoring system of the Commission with respect to Article 1 (1) (n) (3) AVMSD. Therefore, if there are reasonable doubts that a work originating from the UK is neither created by one or more producers established in an EU MS or a contracting party of the CTT, nor supervised and

⁸⁶ Cf. Article 1 (1) (n) (4) AVMSD.

⁸⁷ A parallel reporting system with a longer, four-years-cycle, is established with respect to the promotion of European works in non-linear services; cf. Article 13 (2) AVMSD.

⁸⁸ Cf. Article 16 (3) AVMSD.

actually controlled in the production process by one or more producers established in one or more of those States, nor controlled by one or more of such producers in case of a co-production, the EU Commission may, in its supervisory practice with regard to Articles 16 and 17, disregard such a work. The 'Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive'⁸⁹ of July 2011 are intended to help MS with the monitoring of the implementation of Articles 16 and 17. It is advisable to adapt these guidelines after Brexit with regard to the handling of UK works.

Yet, it is not likely that Brexit will endanger the overall effect of the quotas of Articles 16 and 17 AVMSD. The latest results show that the average share of European works broadcast in the EU was 64.1 % both in 2011 and 2012, with a very minor increase compared to 2009 (63.8 %), thus meeting clearly the Directive's target requiring that broadcasters reserve a majority proportion of their transmission time to such works. The UK was one of only three EU MS which did not meet the obligation under Article 16.⁹⁰ Similarly, the share of European independent works was well above the 10 % target, with an EU average proportion of 33.1 % in 2011 and 34.1 % in 2012. However, not all EU MS have put in place verification systems with respect to the data provided by broadcasters. Due to Brexit, this verification problem may grow in importance.

3.4. VSPs and content limitation obligations

3.4.1. The scope of applicability

The most innovative part of the AVMSD 2018 reform is the extension of its scope to VSPs. In order to include providers that do not have full editorial control over the content disseminated (in contrast to broadcasters and on-demand service providers) Article 1 (1) (aa) introduces VSP services as a new category. There had been intensive discussions between the institutions on how to define these exactly. In the final text, the wording of the definition intentionally stays as close as possible to that for AVMS by reiterating the same criteria as far as possible. The approach chosen clarifies that there is – in contrast to AVMS – a lack of editorial responsibility. What justifies the inclusion of VSP services into the scope of the AVMSD, however, is that the provider aims at offering a space or a technology with which any type of audiovisual content (including user-generated content) can be provided to the general public and in relation to which a certain control exists: the provider at least manages the organisation of the service or the technology that organises the platform automatically. The intention is to include providers of services which from the perspective of the consumer deliver access to content very similarly to that of existing AVMS providers. Obvious examples are platforms such as YouTube and others which enable users not only to consume but also to upload content, which is then subject to organisation by the provider. Recital (3) to the AVMSD clarifies that the interpretation of this provision can extend to certain content organisation done by VSPs making themselves AVMS which means that for such situations a much larger part of the AVMSD rules are applicable to these providers. E.g. content channels branded as one type of offer on a VSP can be regarded as AVMSD whereas the other type of content is only affected by the AVMSD through the provider of the VSP service. Social Media Services which increasingly have shared video content, such as Facebook, are further examples which can fall under the new scope of the Directive (Recitals 3a to 3c). A clarification is expected to come with a guideline by the Commission at a later point as suggested in the recitals (Recital 5).

⁸⁹ Doc CC AVMSD (2011) 2.

⁹⁰ Cf. European Commission, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 Promotion of European works in EU scheduled and on-demand audiovisual media services, COM/2012/0522 final; European Parliament, EU Legislation in Progress. Briefing - The Audiovisual Media Services Directive.

3.4.2. The new rules and extension of content limitations

In drafting the extended scope of the AVMSD, it was accepted that it was easier to dedicate to VSPs a specific section of the Directive (Articles 28a, 28b) instead of including them in the existing categories. This is due to the fact that although VSPs offer similar content to other types of audiovisual media service providers, they are organised in a very different manner. There are a number of obligations which are similar to those that apply to AVMS providers, but they are framed in a way that reflects how VSPs operate. For example, VSPs are to take measures to protect minors or the general public from certain types of content or to ensure that some of the qualitative rules concerning commercial communications are observed in the content disseminated via the VSP.⁹¹ These and other obligations shall be introduced by the MS in a way that takes into account that there is only limited direct control of the content by the VSPs in order to respect the liability privileges for information society services under the e-commerce Directive.⁹² The AVMSD lists measures that can be regarded as proportionate such as functionalities that the VSPs need to introduce that allow flagging of content and pointing to problematic content or specific provisions in the terms of service to meet the aims mentioned. Concerning the implementation of rules there is a strong reliance on including the VSPs in a self- and co-regulatory scheme.

As the COO principle for AVMS providers is not applicable, the Directive contains a separate allocation of jurisdiction rule for VSPs. Apart from regular establishment, for a MS to be competent for a VSP, other types of links of the company to that MS are regarded as sufficient: even if the service is provided by a subsidiary of a company or by a part of a group it is enough if other parts of the company – that are not the one being the VSP provider – such as the parent undertaking or another group undertaking is established in the MS. This potentially increases the number of VSPs being within the Single Market although established outside the EU and more importantly discourages attempts to leave EU MS territory in order not to be covered by the rules, as this only works if entire companies or groups leave.

Generally speaking, the inclusion of the VSPs into the scope of the AVMSD will have a strong impact as the rules limiting content available on the platforms are quite far-reaching in that they even extend to the type of commercial communications that are admissible. Even though a lot of clarification will still be required of the MS in transposing the new provisions, the minimum set of measures that VSPs will be expected to introduce are laid down in the Directive. These efforts add to the instruments chosen by the Commission so far to include online platforms generally in the attempt to stop dissemination of illegal content.⁹³

3.4.3. Future application

With the rules concerning VSPs, the new AVMSD – and its national transposition acts – step into uncharted territory. Without removing the applicability of the e-commerce Directive, VSPs are included in the circle of providers that are expected to contribute to the achievement of public interest goals due to a certain influence and control over the audiovisual content disseminated via their services. The control is less intense than in the case of AVMS providers which is why the Directive acknowledges that the measures cannot be the same as for

⁹¹ Article 28a refers to content harmful to minors, inciting to violence or hatred, 'terrorist propaganda', child pornography or racism; for commercial communications it refers to the rule of Article 9 (1) AVMSD which obliges inter alia that it is readily recognisable.

⁹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16. The relevant provisions are Article 12-15 and especially the question to what extent Article 15 contradicts rules requiring monitoring of the content and/or pre-publication checking of the content.

⁹³ European Commission, Communication on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms, COM(2017) 555 final; Proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM/2018/640 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0640:FIN>.

providers that have full editorial control before the content is disseminated. It still raises, however, the organisational requirements for platforms significantly. It is not yet clear how the measures will actually look or the extent to which codes of conduct will shape these, but possibly further details in Commission Communications or industry 'standardization' will contribute to a harmonised approach across the MS. Taking into consideration the size of the providers concerned it is not unlikely that the measures introduced by the industry will be very similar everywhere irrespective of details in the MS transpositions. This in turn means that even post-Brexit such standards could be implemented by providers regardless of the targeted territory and likely by providers based in the UK that offer services in the EU. This is even more likely to happen because many market players are indeed parts of complex company structures for which a link to an EU can be established according to the rules of Article 28b.

Regulating VSPs is one element of a more general trend to be observed both in some EU MS but also on the level of the EU in including online service providers in some parts of regulation that in the past was directed at media companies. This is a result of acknowledging the continuously increasing importance of these platforms in the information gathering and opinion-forming of people and the potential negative consequences of unregulated dissemination of content irrespective of who created it. Therefore, it is necessary to observe the implementation of the new AVMSD rules in close connection with other national laws or EU initiatives concerning online platforms or intermediaries in a broader sense.

3.5. Application of findings to Brexit scenarios

The significance of the AVMSD for the European broadcasting and video-on-demand market(s) is very high. It will increase further when the rules of the 2018 reform become applicable, especially by extending the scope to VSPs, but also by introducing new content obligations for on-demand providers such as the quota for European works. This core position of the AVMSD is unlikely to change with Brexit, whatever form it takes. Although the UK market as a base for a large share of AVMS providers that disseminate content within the EU is important, the regulatory framework for the EU MS territory is not dependent on the market shares of UK-based providers. This has mainly to do with two elements: on the one hand, being subjected to the EU regulatory framework in this area comes with relevant advantages concerning the possible target markets. On the other hand, the framework in place or comparable rules apply to a large extent even to providers without establishment in the EU, if they are active on these markets.

The advantages of being under the AVMSD rules are connected to the COO principle, which enables a facilitation of cross-border dissemination not only for broadcasters but also for video-on-demand providers. Having to rely on 'third country status' as far as the regulatory framework is concerned and thereby having to comply in detail with all the legal rules applicable in all targeted countries is a heavy burden for a provider compared to the legal certainty when jurisdiction is established and with it the necessity to only comply with the rules of that one specific MS having jurisdiction. Specifically, the jurisdiction rules of the AVMSD make it at least possible that UK-based broadcasters even in a setting without agreement would still be in a position to be included into the reach of the Single Market in the case of use of satellite dissemination. Independent of the applicability of the AVMSD there are certain obligations stemming from other legal sources that would continue to apply for UK-based broadcasters and thereby have the effect of retaining existing rules indirectly: this is the case for the scope of the CTT if the UK remains a Member of the Council of Europe and party to that convention. However, the latter convention is limited to broadcasting services and for the AVMSD the assignment of jurisdiction to a MS over a provider (in future also VSPs) alone does not determine the extent to which that MS is obliged to enforce its own rules against non-established providers under its jurisdiction. Even if one MS passports UK-

based broadcasters because of the secondary criteria for jurisdiction, it is not certain that this will not be disputed by other MS including situations where there might be several potentially competent MS. Therefore, generally speaking for providers (including on-demand service providers) that want to make sure that there is no dispute about them being able to profit from the Single Market via COO principle, an establishment within the EU will still be the safest option. This is especially true if one considers that the copyright equivalent to the AVMSD COO principle for broadcasting does not have any 'subsidiary' criteria that would allow for an inclusion of non-EU-providers into that legal regime, as will be shown below.

Membership of a post-Brexit UK of the EEA would leave the situation concerning AVMS basically unchanged as the relevant Directive is included in the Annex of texts with EEA relevance. The lack of political participation of the UK in future amendments or the passing of new legislation as equal player vis-à-vis the EU MS would not damage the further development of the Digital Single Market. On the other hand, any agreement short of EEA would either not include the audiovisual sector, thereby also excluding the reach of the AVMSD provisions, or would at least lead to a lack of formal cooperation procedures with the UK regulator. All NRAs under the reach of the AVMSD are grouped in ERGA, a body that will be enhanced by the AVMSD 2018. Although decisions will continue to be taken by national authorities or bodies and cooperation will continue to take place on fundamental issues between the MS in the Contact Committee, the exchange of best practices within ERGA has the potential to contribute to better enforcement of rules. Without the UK regulator OFCOM being present there, problematic situations concerning broadcasters with a UK licence that fall under the jurisdiction of an EU MS will have to be resolved on a bilateral level only. Due to the large number of UK-licensed providers, OFCOM has traditionally been an important regulator also in debates on the European level. But the loss of this input especially in post-Brexit scenarios with little or no inclusion of the AV sector in an agreement will not lead to a weakening of the other EU MS NRAs' role in implementing the EU rules.

Should the Brexit scenario of an advanced form of FTA be realized, it would depend on the extent of inclusion of the AVMS sector whether there would be any form of continued relevance of the rules for UK-based providers or market access (including to the content production industry) in a comparable way to the current situation for EU-based companies. With all potential difficulties in interpretation of the CTT especially concerning EU MS that are not signatories and their relationship to the UK, this Convention alone would ensure a continued connection for the AVMS industry even under a sector-neutral FTA. This would concern the inclusion of UK productions as European works. It would also uphold a minimum set of rules for broadcasters that are comparable to those of the AVMSD. Concerning video-on-demand providers the new formulations in the AVMSD 2018 ensure a broad (potential) application of levies also to non-EU-based providers which would likely extend to UK-based broadcasters. Concerning the role of quotas in safeguarding the production of European works, a situation in which providers based in the UK would escape the reach of contribution obligations is unlikely. But even in that case it would not impact the overall effect of the quota provisions for the EU 27 as the goals are bypassed already currently and the UK 'share' in this overall amount of European works is not of an extent that would endanger the efficiency of the quota system altogether.

4. COPYRIGHT RULES IMPACTING THE AUDIOVISUAL MEDIA SECTOR

KEY FINDINGS

- Copyright is largely **harmonised** at EU level and contains many **interlinked legal bases** that will no longer apply to the UK without specific agreement.
- **The principle of exhaustion** and other fundamental rules on EU copyright protection clarified and developed by CJEU will no longer be binding.
- Issues of mandatory **collective licensing**, **portability** of online content, rights clearance in the light of the **COO principle** and the use of **orphan works** will need **specific arrangements** in order to maintain current EU standards.
- The UK's continued **membership of the EEA** could provide a level of protection approximate to the EU framework.

4.1. The relevant IP *acquis* of the EU

Two specific areas of intellectual property law are particularly relevant in the context of this report: copyright on protected works, which typically entails any form of audiovisual content as discussed here, and licensing procedures for copyright-protected works and comparable content such as exclusive media rights e.g. for sports events. The European Commission also drew attention to the possible legal implications in this area of copyright relevant to the audiovisual sector in its notice to stakeholders of 28 March 2018.⁹⁴ Besides being dependent on other areas of law such as contract law – and therefore to a certain extent a matter of negotiation between private parties – copyright law is shaped by treaties at international level, which in turn have been integrated in the EU *acquis*. These factors will continue to play a role in further developments after Brexit. Both the EU and the UK are parties to a number of international treaties that will continue to govern the rights and obligations relating to copyright irrespective of UK membership of the EU. This concerns in particular the WTO-related Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WIPO-administered Copyright Treaty (WCT).⁹⁵ This level of protection will therefore be maintained in the same way for persons affected both within and outside the UK, e.g. the list of exclusive rights of authors, the duration of protection or the rules governing the enforcement on technical protection measures and rights management. It includes especially the idea of extending protection given by national law also to non-nationals on a reciprocal basis, better known as the principles of 'national treatment' and treatment in the same way as nationals of the 'most favoured nations'.

However, in the meanwhile, as part of the Digital Single Market, there is a copyright protection in the EU that goes well beyond this. Next to the core harmonisation of certain areas of copyright law in the Information Society (InfoSoc) Directive⁹⁶, there is additional

⁹⁴ European Commission, DG Communications Networks, Content and Technology, Notice to Stakeholders: withdrawal of the United Kingdom and EU rules in the field of copyright.

⁹⁵ As far as the protection of performers goes the *WIPO Performances and Phonograms Treaty (WPPT)* is also relevant, but performances in audiovisual works are excluded. These are covered by the more recent *WIPO Beijing Treaty on Audiovisual Performances* concluded in 2012 which has not yet entered into force for lack of sufficient number of ratifications.

⁹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.

protection granted via the Rental and Lending Directive⁹⁷, Satellite and Cable Directive⁹⁸ as well as – although of lesser significance in the audiovisual sector – the Artist's Resale Right Directive⁹⁹ and the Collective Management of Copyright and Related Rights Directive¹⁰⁰. The most recent addition which contributes to facilitating movement of copyrighted digital works in the single market is the Portability Regulation¹⁰¹. These Directives required transposition, whilst the Regulation is directly applicable, but both only for EU MS. This means that the framework which goes beyond the international level of protection will no longer be applicable after Brexit without an agreement to that end. It will depend on national law whether protective status would still be granted to EU citizens and vice-versa whether EU law regulates the extension of protection to works covered under UK law. This is especially relevant as the body of copyright law in the EU is currently undergoing a major reform process, which started with the Portability Regulation and the implementation of the WIPO Marrakesh VIP Treaty,¹⁰² but extends to a planned overhaul of several of the key Directives mentioned above.¹⁰³ For the future legislative acts it is unclear whether the UK would follow a similar approach; for existing Regulations there is no automatic continuation as there is no equivalence in national UK law.

4.2. Fundamental rules on copyright protection in the EU

Most importantly, the category of protected works includes – subject to certain conditions – audiovisual works with the consequence of giving exclusive rights to different types of authors involved in the creation process as well as obliging services disseminating such content to acquire the right to do so, typically by licensing. For tangible reproductions of works, e.g. in form of DVDs and comparable media, the principle of exhaustion as laid down in Article 4 (2) InfoSoc Directive is an important enabler of free movement of copyrighted works: the author's exclusive right of distribution within the EU is exhausted once the first sale (or any other first transfer of ownership) of the work has happened in any EU MS with the consent of the rightsholder. For the AV media sector the principle of exhaustion affects especially the distribution of audiovisual works e.g. on DVD.¹⁰⁴ This is a considerable facilitation for the legally compliant dissemination of works across the EU. Similarly, both the inclusion of a set of (minimum) rights for the authors as well as an enumerative list of a maximum of limitations and exceptions to these rights that MS can implement, have contributed to a

⁹⁷ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376/28.

⁹⁸ 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, OJ of the European Communities, OJ L 248, 6.10.1993, p. 15–21.

⁹⁹ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32–36.

¹⁰⁰ 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, OJ L 84, 20.3.2014, p. 72–98.

¹⁰¹ 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, OJ L 168/1.

¹⁰² Portability-Regulation (EU) 2017/1128 and the Directive implementing the Treaty of Marrakesh (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, OJ L 167, 22.6.2001, p. 10–19.

¹⁰³ Such as the Sat-Cab-Regulation, see below at 4.4.2.

¹⁰⁴ It does not impact the right to broadcasting. However, the CJEU has affirmed the applicability to computer works (judgment of 3 July 2012, C-128/11) and will have to deal with the question of the general applicability of the principle of exhaustion to electronic content in an upcoming case (Nederlands Uitgeversverbond and Groep Algemene Uitgevers, C-263/18).

harmonised framework giving more legal certainty for cross-border activity.

More importantly, this harmonised law has been further 'unified' by extensive CJEU case law,¹⁰⁵ which has become a decisive factor in the development of copyright law. Examples are the (ongoing) shaping of the 'communication to the public' criteria especially in the online context, such as in the case of catch-up and comparable services providing broadcast content.¹⁰⁶ The volume of preliminary reference procedures initiated by national courts on some of the key elements of the above-mentioned directives has led to a de facto increased level of harmonisation. With the UK's withdrawal from the EU, both the requirements of the Infosoc Directive and the interpretative guidance of the CJEU would no longer be binding. In which direction national law, which is currently aligned with these requirements, would develop is not foreseeable,¹⁰⁷ but it should be considered that in the past, UK copyright law had to adapt significantly under EU influence.¹⁰⁸ Therefore, a return to a system of its own or a gradual departure from EU law standards seem possible, e.g. by moving closer to a 'fair use' approach of copyrighted works as in US law. In any case, without an agreement, the consequence of Brexit for authors and rightsholders both in the UK and the EU would be that different rights and obligations occur in the other market, thereby hindering the cross-border dissemination of works. Interestingly, the current reform proposals at EU level include measures to enhance enforcement of copyright especially in the context of illegal online dissemination of such works, including audiovisual works.¹⁰⁹ The provisions proposed are disputed and it is not yet clear what their final wording will be, but it is quite certain that some form of additional obligations will be extended to intermediaries and without a legal obligation of the UK to foresee such measures, too, this may reduce the effectiveness of the new system¹¹⁰. It is, however, well possible that the providers would implement new instruments and measures in the same way at least across the territory of Europe rather than rolling out the services differently. Thereby, they would follow the EU requirements even for areas outside of the EU.

4.3. The (new) cross-border portability

A very important element of the EU Digital Single Market was the introduction of the EU Portability Regulation that allows subscribers to online content services to continue to access and use these services even during a temporary stay in any other EU country than where they entered the subscription. Typically, licensing for copyright protected works follows territorial restrictions by State or language area, which in effect means that a lot of audiovisual services are not accessible cross-border due to lack of clearance of rights by the

¹⁰⁵ Cf. extensive jurisprudence by the CJEU on Article 3 (1) of the InfoSoc-Directive. CJEU, 12 March 2014, C-466/12; CJEU 21 October 2014, C-348/13; CJEU, 21 October 2014, C-348/13, and later judgments.

¹⁰⁶ Cf. CJEU on Article 2 of Directive 93/83/EEC (Broadcasting right) in the judgment of 14 July 2005, C 192/04; CJEU 2 June 2005, C 89/04; CJEU 13 October 2011, Joined Cases C 431/09 and C 432/09, referring to its interpretation of parallel terms in Article 3 (1) of the InfoSoc-Directive.

¹⁰⁷ On this and the following section cf. McDonagh L., UK Patent Law and Copyright Law after Brexit: Potential Consequences, p. 179 ff.

¹⁰⁸ As an example, the (partial) substitution of the 'skill and labour' yardstick with the 'intellectual creation' criteria for assessing originality can be mentioned. For further information, especially on the problems of implementation in UK law cf. Rahmatian A., Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure, pp. 4–34.

¹⁰⁹ Cf. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593>, especially concerning the establishing of upload filters in Article 13.

¹¹⁰ The enforcement approach of the EU was to ensure that across Europe there is a guarantee for rights holders to be able to effectively protect their legal position. Hence, the absence of e.g. upload filter systems in the UK may lead to unprotected dissemination of content particularly in the light of the closeness between the European market to UK (e.g. providers and language).

provider who then takes measures to prevent access. Since April of this year this has changed concerning services that fall within the scope of the AVMSD or that give online access to works or other subject-matter or broadcast events in the subscribers' MS of residence for remuneration. Such subscriptions have become portable at least when the users are temporarily residing outside their home country in the EU. Blocking is prohibited and requesting additional costs for the portability or including contractual agreements limiting its use are not permissible. The legal instrument being a Regulation, with Brexit taking effect there would no longer be an equivalent rule in national law meaning that services cannot be taken from or to the UK under this framework. However, providers offering services in the EU would have to respect the rules irrespective of their seat, but again confined to the territory of EU MS. This results from Article 1(1) which extends the Regulation's geographical scope to any service provided legally in a MS. The actual impact of this new situation would depend largely on which companies are offering such services and how the provisions of this recent Regulation will be interpreted and implemented¹¹¹ concretely, which is not yet clear.¹¹² Although the UK took early steps to ensure cross-border compliance by providers of online content and aims for preservation of the effects of the Portability Regulation on behalf of UK consumers¹¹³, it is too early to discuss concrete impacts of Brexit. But at this stage it has to be considered that national UK law will not be able to copy the legal fiction contained in the Portability Regulation¹¹⁴ which assumes that rights clearance in one (the home) MS is sufficient, as the access from elsewhere is treated as if it were from home. In other words, UK-based subscriptions cannot be 'exported' except if the licensing of the rights allows this use. Against the background of the efforts of the EU to establish a Digital Single Market without borders in many ways¹¹⁵ – of which UK-originating content but not the UK would be part –, the treatment of these issues will have to be one of the main points in post-Brexit agreements on audiovisual measures. This is especially the case as there will no longer automatically be a regulatory consequence of the Digital Single Market.

4.4. Licensing of audiovisual content in practice

4.4.1. Background

Audiovisual media programmes contain a variety of works protected by copyright and/or related rights. Consequently, the rights to different types of works must be acquired from a large number of rightsholders which can be a complicated process; this is especially problematic if current affairs programmes or other time-critical programmes are concerned for which the clearance has to be reached fast. Because of the principle of territoriality that is still dominant in copyright law and leads to licensing bound to specific areas, service

¹¹¹ Difficulties on the practical implementation of the Regulation were shown inter alia in the letter to the attention of the competent national authorities on the application of Regulation (EU) 2017/1128 by DG for Communications Networks, Content and Technology, available at <https://ec.europa.eu/digital-single-market/en/news/portability-regulation-letter-sent-competent-national-authorities>.

¹¹² Besides the interpretation of general terms like 'temporarily present in a Member State' this affects in particular the scope of Article 4 and 7 of the Regulation. These issues will have significant influence on the future situation.

¹¹³ Cf. Consultation of IPO launched on its proposed approach to enforcement of the EU Portability Regulation in January 2018 (<https://www.gov.uk/government/news/cross-border-portability-of-online-content-services>) and corresponding responses (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/690128/DPS-007149-Cross-border-portability-of-online-content-services-response.pdf).

¹¹⁴ In its notice to stakeholders of 28 March 2018, Commission anticipates that as of the withdrawal date, a UK provider 'will need to comply with the rules of the relevant EU Member State or States where it wishes to offer services to its subscribers – including the need to clear all relevant rights for that or those Member States'.

¹¹⁵ Cf. also 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.

providers wanting to offer services across the EU must obtain the respective rights for all MS. Also, producers need this clearance before entering license agreements with third parties for the distribution and further exploitation of the work. As an example, retransmission services offer programme packages by retransmitting broadcast content which contains protected works, but have little time to acquire the necessary licences and considerable effort needs to be made to resolve rights issues. Due to this complicated system, rightsholders run the risk that their works and other protected matter are distributed and used without permission or remuneration. Therefore, within the EU a set of rules were created to facilitate this rights clearance and thereby foster the cross-border dissemination of content.

4.4.2. Rights clearance and country of origin principle

The SatCab Directive is instrumental for rights clearance in satellite and cable retransmission and was the 'copyright extension' of the original TwFD enabling cross-border dissemination in the EU. The Directive harmonised national copyright laws and safeguarded the freedom to provide services in this area by simplifying the rights acquisition process for satellite and cable network operators. It extends the COO principle for this purpose also to copyright issues. According to this, the providers are only bound by the legal provisions in their home MS and not by those in which the signals are being received and are therefore only required to acquire the necessary licenses for their MS instead of having to do so for all States which are reached by the signal. Absent an agreement, in the future, providers located in the UK would not be able to rely on the COO principle and would therefore need to obtain the authorisations for all territories in which their programmes can be received, respecting national copyright laws. It is not yet clear how this will play out in practice, but this alone could be an incentive for UK-based companies to relocate to another EU Member State to be in the scope of application of this Directive.¹¹⁶

Conversely, EU broadcasters which would also disseminate their programmes in the UK would have to ensure that rights are cleared under UK law as in any other third state that is not within the SatCab framework. It should also be noted that neither the new Portability Regulation nor the current SatCab Directive cover digital and online services of broadcasters and redistribution providers. Those services are, for example, simulcasting services (in parallel with traditional satellite, cable or terrestrial transmission e.g. by streaming), catch-up services or comparable services. To close this gap, there is the proposal for an 'extension' of the SatCab regime in a planned Regulation on online TV and radio broadcasting¹¹⁷ which was proposed by the Commission in September 2016, again in form of a Regulation. It aims at improving cross-border availability and distribution of these online services by extending the application of the COO principle but only to what is categorized as 'supplementary' online services, i.e. such services that are offered in connection with a broadcast. The proposal would follow the idea of the original SatCab in that the relationship between rightsholders and providers of further dissemination shall be organised through collecting societies. This will simplify the licensing process enormously. But the current negotiations in the legislative procedure do not yet show a clear outcome, as especially the reach of the COO principle and the obligations on rightsholders are disputed. Irrespective of the final outcome of the text, this being a Regulation, the UK would not have an equivalent framework automatically and, as above, stepping outside the territorial scope of application of the Regulation would mean that the current difficult and complicated rights clearance process would continue vis-à-vis

¹¹⁶ The UK government noted in particular Irish and Dutch individuals who are endeavouring to attract international broadcasters from the UK, into their jurisdiction, cf. UK Parliament, Digital Single Market: Audiovisual Media Services Directive, para. 10.41.

¹¹⁷ Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programs, COM/2016/0594 final - 2016/0284 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0594>.

UK rightsholders.

Another relevant albeit unclear question is how existing (contractual) agreements on the exploitation of copyrighted works would have to be treated post-Brexit, e.g. if they are referring to the distribution of works in 'the EU'. It will be necessary to see what result the interpretation of each of these contractual provisions would mean. The further enactment of such agreements would cease and comparable agreements without additional rights clearance provisions specifically for the UK context would not be possible. Potentially, the interpretation could lead to some form of retroactive effect of such provisions or the parties would have at least a right to terminate the existing agreements early. While this is mainly a problem under contract law, it poses financial and legal risks (e.g. concerning the continued validity of contracts referring to the selling of goods on the 'European market'), which may affect rightsholders throughout the EU.

4.4.3. Mandatory collective licensing regime

The idea of facilitating cross-border access to and dissemination of copyrighted works through a change to the system of collective management of rights and licensing has seen a first result, although this has a limited scope. With Directive 2014/26/EU¹¹⁸; the possibility of licensing the repertoire of one author for several (EU MS) territories through one collective management organisation led to an easier way of complying with copyright when offering respective services (as within the scope of that Directive) online. But this is restricted to the licensing of music, and therefore has limited impact for the audiovisual sector. Nonetheless, irrespective of a current national implementation in the UK, without a specific agreement, the effect of the Directive that all CMOs have to offer a multi-territory coverage will no longer extend to CMOs located in the EU for the UK territory and vice-versa.

As Directive 2014/16/EU only imposes minimum common requirements, MS can establish stricter rules for CMOs including expanding the scope of applicability also to CMOs from third states that operate in that MS. This offers the possibility of bilateral agreements on the subject-matter in the future.

4.5. Further aspects of copyright impacted by Brexit

There are many further aspects of copyright impacted by Brexit affecting (audiovisual) media providers in different ways. EU unitary rights, patent and trademark issues¹¹⁹ also seem to be in the focus of both the UK¹²⁰ and EU¹²¹ as well as the protection of databases¹²² and the copyright related improvement of conditions for blind, visually-impaired or otherwise print-disabled persons¹²³, but all of these are currently established in EU law which will no longer

¹¹⁸ Directive on collective management of copyright and related rights and the multi-territory licensing of rights to musical works for online use, OJ L 84, 20.3.2014, p. 72–98.

¹¹⁹ For more information and a short analysis of this topics: Cook T., 'BREXIT' and Intellectual Property Protection in the UK and the EU, in *Journal of Intellectual Property*, Vol. 21, pp. 355-361; Loyens & Loeff, *Brexit: what might change - Intellectual Property*; McDonagh L. (2017), *UK Patent Law and Copyright Law after Brexit: Potential Consequences*.

¹²⁰ Cf. IPO, *Facts on the future of intellectual property laws following the decision that the UK will leave the EU*.

¹²¹ Cf. European Commission, *Position paper transmitted to EU27 on Intellectual property rights*, TF50(2017) 11.

¹²² Directive 96/9/EC introduced a 'sui generis database right', which protects the rights of database producers who are nationals of an EU Member State, have their habitual residence in the EU or were established in accordance with the law of an EU Member State and have their registered office, central administration or principal place of business in the EU. In its notice to stakeholders of 28 March 2018, the Commission has announced that this will be negotiated separately.

¹²³ Directive (EU) 2017/1564 contains a mandatory exception to copyright law for the benefit of blind, visually impaired or otherwise print-disabled persons, as well as a requirement to provide copies in common formats. Regulation (EU) 2017/1563 regulates the exchange of copies in an accessible format between the EU and third

be binding for the UK. Whilst these rules affect audiovisual media either as economic companies or only indirectly, other provisions deal specifically with their role as media content providers. Directive 2012/28/EU¹²⁴ provides for the digitalisation and online availability of orphan works to the benefit of cultural institutions across the EU. The system is one of mutual recognition, and is limited to two types of works. First, it covers cinematographic or audiovisual works and phonograms contained in the collections of publicly-accessible libraries, educational establishments or museums, as well as in the collections of archives or of film or audio heritage institutions. Second, it covers cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives which are protected by copyright or related rights and which are first published in a MS or, in the absence of publication, first broadcast in a MS. With Brexit, this system of mutual recognition will be abolished and the provision of orphan works for cultural institutions in the EU and the UK will no longer be permitted.

4.6. Application of findings to Brexit scenarios

According to recognized principles of international law, the validity of existing copyrights - just as other intellectual property rights such as patents or trademarks – is not affected by subsequent changes in state sovereignty which lead to a change in the geographical scope of a treaty (Moving Treaty Frontiers Rule).¹²⁵

Should Brexit not come with a specific arrangement on copyright issues but fall back on existing free trade rules under WTO arrangements, international treaties will play a more important role. The (revised) Berne Convention has been the most important international treaty on copyright for a long time. It comprises 157 contracting states, including the UK. Numerous international conventions refer to it.¹²⁶ This means that the UK will continue to be bound by the standards established under this and other WIPO treaties as well as the relevant WTO agreements; of greatest relevance here is the TRIPS Agreement of 1995 with currently 145 members.¹²⁷ While the Berne Convention is primarily concerned with the protection of copyright, TRIPS goes beyond this by dealing also with aspects of trademark and patent law. The TRIPS Agreement aims to reduce market impediments and distortions. As regards the restriction of exclusive rights, the TRIPS Agreement, which also applies to the related rights of broadcasting organisations, regulates, *inter alia*, restrictions of exclusive rights. It sets out a three-step test (Article 13) according to which members may limit restrictions and exceptions to exclusive rights to certain special cases which must not impair the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. However, TRIPS lacks any special provisions on trade barrier rules, the portability of audiovisual content or the facilitation of rights clearance and licensing as provided for by the EU. TRIPS only contains provisions (in Section 8) aimed at controlling anti-competitive practices in contractual licensing. It does not facilitate the licensing mechanisms themselves. In 1996, the WIPO Treaties, the WIPO Copyright Treaty (WCT) for copyrights and the WIPO Performances and Phonograms Treaty (WPPT) for related rights were added to TRIPS and the Berne Convention. These provide for additional rights based on the Berne Convention. However, these Treaties do not contain any provisions which would

countries under the Marrakesh Treaty. The UK is not party to the Marrakesh Agreement, but is considering whether to join (cf. IPO, Consultation on UK's implementation of the Marrakesh Treaty).

¹²⁴ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5–12.

¹²⁵ 'Des droits privés, acquis conformément au droit en vigueur, ne deviennent point caducs à la suite d'un changement de souveraineté', Cour permanente de justice internationale, Avis consultatif, Recueil, Serie B No. 6, p. 36, so-called Chorzow-case.

¹²⁶ Cf. e.g. Article 9 TRIPS.

¹²⁷ Herrmanns C., Brexit, WTO und EU-Handelspolitik, EuZW 24/2017, pp. 962 et seq.

significantly improve the situation in the audiovisual sector. Thus, Article 10 of the WIPO Treaty contains a three-step test similar to that in TRIPS. This demonstrates that international copyright conventions only stipulate a brief list of minimum rights and oblige the contracting parties to define their own national rules. Accordingly, the degree of international harmonisation is low in this area.

The situation would be significantly different should the UK remain or become a member of the EEA.¹²⁸ First, the continued application of existing EU Directives and Regulations or their adoption into EEA law would lead to a continuation of the relationship between the EU and the UK (see 4.2 to 4.5).¹²⁹ Secondly, Protocol 28 on intellectual property and industrial property rights as part of the EEA Agreement¹³⁰ contains an exhaustion rule in Article 2 referring to the EU exhaustion rules which contracting parties shall provide. As a result, rightsholders could not prevent an exhaustion of their distribution rights for copyright-protected goods first placed on the UK market and therefore block an import into the EU on this basis. This would significantly affect trade inside and outside the UK.¹³¹

Even outside an EEA scenario, this could be regulated in a bilateral agreement between the EU and the UK, in which the UK undertakes to comply with the laws implementing the Directives containing the exhaustion rule. However, such a far-reaching and specific legal construct is unprecedented, even in the copyright sector. With regards to a bilateral agreement concerning only a few specific provisions, such as licensing mechanisms, the following must be borne in mind: simplified licensing mechanisms need to be workable in practice. In addition, licensing across borders within the EU is less risky for authors and rightsholders because the underlying copyright has been harmonised by the InfoSoc Directive. This means that authors and owners of related rights have the same or at least similar rights in all MS. Collective licensing would not weaken these rights. However, with the InfoSoc Directive ceasing to apply in the UK, this would also lead to an elimination of the binding effect of the exceptions and limitations to the exclusive rights enumerated therein. Consequently, assuming that national law (which is currently still implementing EU Directives) would be amended, in future UK law would then be limited by the rules stemming from TRIPS or the WCT system.

¹²⁸ Cf. Cook T., "BREXIT" and Intellectual Property Protection in the UK and the EU, in *Journal of Intellectual Property*, Vol. 21, pp. 355-361.; McDonagh L. (2017), *UK Patent Law and Copyright Law after Brexit: Potential Consequences*; Mimler M., 'It's Not You, It's Me': The Effect of Brexit on Trade Marks, Designs, the Doctrine of Exhaustion and the Interface with Competition Law in UK Law.

¹²⁹ For more information on applicable Directives and Regulations cf. Annex XVII of EEA agreement on Intellectual Property, available at <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex17.pdf>.

¹³⁰ EEA Agreement – Protocol No. 28 on intellectual property, available at [https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:21994A0103\(29\)](https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:21994A0103(29)).

¹³¹ Cf. Mimler M., 'It's Not You, It's Me': The Effect of Brexit on Trade Marks, Designs, the Doctrine of Exhaustion and the Interface with Competition Law in UK Law.

5. OBSERVATIONS AND IMPORTANT ISSUES TO CONSIDER IN DEFINING THE TERMS OF BREXIT

The framework for AVMS developed by the EU is not only functional, but highly attractive. The combination of legal certainty in terms of jurisdiction and compliance due to the COO principle in the AVMSD, together with the simplified copyright clearance for satellite and cable retransmissions of broadcasts in the SatCab Directive, makes 'membership' of the Digital Single Market for providers very beneficial. This observation applies also to providers that are UK-based in a post-Brexit setting. Nonetheless, as this study has shown, it is instructive to differentiate the impact of the possible Brexit scenarios on the regulatory framework of the EU depending on the extent to which the future situation will resemble the status quo. In general terms, even in the hardest of possible exit scenarios, the relevance of the Single Market for the AV industry in the UK will lead to a disadvantage for these providers rather than have an impact on the regulatory framework set by the EU.

In addition, a Brexit without agreement would not lead to chaos in the legal context: in that case, as is explicitly laid down in Article 50 TEU, the EU treaties would cease to be applicable two years after notification of the leave request, if the European Council does not prolong this period by unanimous decision in accordance with the UK. This means that every MS has a veto position against prolonging the period of time in which UK-based AV providers still have access to the Digital Single Market. Once the Treaties cease to apply, the legal bases for the creation of secondary law are also automatically removed. The UK may of course decide unilaterally to continue applying the existing rules under national law. However, this may result in the UK having to offer non-EU MS and providers from such countries the same legal positions due to the MFN principle in WTO law because there would not be an exception due to membership of a free trade area.

Analysing the situation with trade agreements, it is clear that without a Brexit agreement a fallback on WTO standards would not lead to a complete disruption compared to the current situation. Membership of the Council of Europe together with the basic trade rules under WTO would allow some continuity. However, only adding a specific free trade arrangement comparable at least to the situation under CETA with Canada, would be a solution that retains a higher level of connection between EU and UK markets in this sector. Beyond this type of agreement, full membership of the EEA would allow a close-to-existing continuation of market access and trade between the two areas.

Full membership of and participation in the COO framework allowed providers to choose a UK location (if they deemed it more advantageous due to the applicable regulatory regime, for tax or other reasons), but still have the possibility to target audiences and the markets in other MS. Without an agreement, this system will no longer be fully applicable. The secondary jurisdiction criteria for providers using satellite technology in Article 2 (4) AVMSD were not created with the idea that a huge amount of providers would be able to profit from 'entry' into the common broadcasting market by the mere use of satellite technology – and certainly not in view of a possible exit of the UK, once it had become such an important AV industry hub. Nonetheless, even though this may be regarded as an unwanted effect by some, in principle the provision is clear in that it does not require establishment in the sense of the primary criteria of Article 2 (3). Should a large number of providers use this opportunity, it is conceivable that some MS might challenge whether passporting of providers only via this provision is acceptable. Also, the provision is clear in the allocation of the right to assume jurisdiction by a MS. But whether this means full enforcement of all obligations and rights in relation to the concerned providers might be evaluated afresh should it become a standard practice. In the future, a clarification of the use of the jurisdiction criteria may be required of the Commission, e.g. in an interpretative communication. In addition, this 'side

door'-entry to the Single Market is limited to providers using satellite technology. Therefore, it is more likely that Brexit without agreement would increase the move of establishment of UK-based providers of AV services to other MS in order to be certain to be and remain within the Single Market. Again, such a move would not be due to a fear of chaos, but instead a legitimate and possible way to choose a regulatory framework apt to the providers' needs, even if such a move may require significant resources.

From the perspective of the EU, there are two points to be considered if negotiations can lead to an agreement. Including the AVMS providers from a country with such a diverse offer as the UK into the free flow of information contributes to one of the original motives for this system: to give citizens in the EU access to a broader and more diverse content offer and thereby enhance media pluralism. In addition, for EU MS-based AVMS providers the UK AV production market will remain highly relevant as it is unlikely that the creative industry would move 'en bloc' to EU MS. Although it is unlikely that the acquisition of content from UK production would cease even in a post-Brexit environment without agreement, having easier access to the market for content is preferable also for EU MS-based providers. This includes the question of whether the applicable copyright regimes are different in the State of acquisition and the State of use of works.

Copyright law is shaped in quite some detail by treaties at international level, which in turn have been integrated in the EU *acquis*. But EU copyright protection goes beyond what has been achieved at the WTO and WIPO levels with a number of relevant Directives and also the significant role of the CJEU in interpreting the law. Apart from the horizontal harmonisation of certain areas of copyright law, there are a number of legislative acts specifically applicable to the AV sector. The most recent addition which contributes to facilitating movement of copyrighted digital works in the Single Market is the Portability Regulation. Although it is too early to evaluate the impact of this Regulation and the possible repercussions of Brexit, without an agreement this new possibility of 'exporting' subscriptions for temporary stays outside the MS where the subscription is taken, would not be possible for UK-based subscriptions except if the licensing of the rights allow this use – which is subject to individual negotiation. As mentioned above, absent an agreement, in the future providers located in the UK would not be able to rely on the COO principle of the SatCab Directive. They would therefore need to obtain authorisations for all territories in which their programmes can be received respecting each national copyright law.

Without an agreement, there would be a 'fall back' to the standards of the WIPO and TRIPS agreements, which – unlike the relevant EU Directive – do not have an enumerative list of limitations and exceptions to exclusive rights but leave it to the signatories to create this in national law respecting the three-step test. The situation would be significantly different should the UK remain or become a member of the EEA. First, the continued application of existing EU directives and regulations or their adoption into EEA law would lead to a continuation of the relationship between the EU and the UK and thus lead to a relationship approximated to the current law. Secondly, Protocol 28 on intellectual property and industrial property rights as part of the EEA Agreement contains an exhaustion rule referring to the EU exhaustion provisions.

Even outside an EEA scenario, the relevant points could be dealt with in a bilateral agreement between the EU and the UK, but such a far-reaching and specific legal construct is unprecedented, even if one looks at the copyright domain separately from the overall Digital Single Market. There is another important aspect to consider in the context of Brexit: many of the main rightsholders for film and music operate from the UK and have structured (or might be increasingly doing so) their business models according to Anglo-American law. It would need to be evaluated whether the system of collecting societies under EU law is impacted negatively. The idea was to introduce competition between these collecting

societies by allowing rightsholders to exclude some or all of their repertoire from specific collecting societies. This could lead to a situation in which it is more difficult for providers in EU MS to clear rights for the content, as this would no longer be done within the EU framework, but under conditions of a third state following a different legal system.

Lastly, concerning online content dissemination, the recent amendment to the AVMSD with the inclusion of VSPs is one element in an ongoing discussion about how online providers and platforms should be regulated. The future evolution of this legislative framework can and will take place with or without the UK being part of the debate. Nonetheless, since the UK is also a very important market in this domain, the discussion might be different than it would have been with the UK in the EU – in either direction: facilitating the reaching of agreements on regulating platforms, or the inverse. The liability and responsibility of online platforms is the next important element of the development of the Digital Single Market, and should not be slowed down because of Brexit. At the same time it seems clear that a close alignment of rules for the AV sector including the copyright framework between UK national law and EU law is the best solution, considering that providers will likely tend to implement new instruments to comply with changing rules (under EU law) in a way that also the services directed at other (at least) European states including the UK will also feature these.

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This study, commissioned by the Policy Department for Structural and Cohesion Policies at the request of the CULT Committee, provides information on and analysis of the likely impacts of various Brexit scenarios on the EU regulatory environment for the audiovisual sector. In particular, it focuses on a comprehensive EU-oriented overview of the issues related to specific provisions of the Audiovisual Media Services Directive and to the screen sector-specific copyright rules.

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