

Your World First

C/M/S/

Law . Tax

After the Vote: What will Brexit mean for film and TV businesses operating in the UK?

June 2016

After the Vote: What will Brexit mean for film and TV businesses operating in the UK?

With the country voting 52% to 48% in favour of the United Kingdom leaving the European Union, we face a period of unprecedented commercial and legal uncertainty. We examine some of the key potential outcomes of that result for media businesses operating in or from the UK.

Practicalities

The vote to leave the EU is, at this stage, purely a domestic matter in legal terms. In announcing his resignation, David Cameron made clear that it would be for his successor to determine the timing of the formal notice to leave the EU, which will trigger the start of the official two year notice period during which the UK is required to negotiate what the FT has described as “the world’s most complex divorce”. It is conceivable that formal notice will be stayed for a considerable period to allow for negotiations with Brussels without a ticking clock, in particular because two years is a very short timescale for the UK government to put in place an alternative to the complex web of arrangements which permit free trade, and a range of other common activities, within the EU and which regulate how EU Members trade with other countries.

Brexit covers a multitude of possibilities. Broadly they comprise (a) joining the EEA which would allow the UK to access the single market but mean that it will still be subject to the majority of European law; (b) joining EFTA, which provides more limited access to the single market but means that fewer European laws have to be adopted; or (c) joining neither but perhaps a bespoke trade deal with the EU, in which case access to the single market and the laws to be adopted could be a matter for almost limitless negotiation.

During the campaign, the Brexit camp were clear that they wished to leave the single market. Whether that becomes the position of the new administration which will actually negotiate the exit terms remains to be seen.

From this point in time, it is impossible to predict how the divorce settlement will shake out; all we can do is to look at the key areas where the UK’s membership of the EU has benefited media companies and to explore some of the possible outcomes.





Free movement

Probably the defining characteristic of the EU is that it facilitates the free movement of people, goods and services.

At the production level, this means that the current free movement of cast and crew between the UK and the EU is likely to be curtailed; production companies are likely to be hampered with extra arrangements regarding travel, work visas and related tax and accounting considerations, for all of which it is likely that the UK would need to make new arrangements both with the remaining EU nations and other trading partners. In the worst case, work permits and carnets would be needed for UK crews filming in Europe or vice versa.

In terms of content distribution and exploitation, without free movement, physical goods such as DVDs might be subject to customs tariffs and other limitations on free movement between the UK and mainland Europe, although, as markets for content in physical formats diminish, more significant will be the extent to which broadcast and other audiovisual services will continue to benefit from free movement.

The Audiovisual Media Services Directive (AVMS) guarantees to service providers freedom of reception throughout the EU, in return for a common framework which ensures that all media and broadcast services are regulated under the laws of the nation where the service provider is based and subject to minimum EU-wide standards. That Directive is currently under review, as we have explored [here](#). Following the Brexit vote, the UK government has probably already lost any ability to influence how the revisions take shape, so even if the divorce negotiations allow for the continuing benefit/burden of AVMS to apply, we might find a less industry-friendly Directive than if the UK had retained a strong voice at the table.

Many broadcasters run international channels from the UK under the benefit of the relative flexibility of the Ofcom regime and even the current Secretary of State, the avowedly pro-Brexit John Whittingdale, has highlighted the benefits which accrue to the UK from free movement of broadcast services.

Some of the benefits of AVMS may also be retained through the Council of Europe 1989 "[European Convention on Transfrontier Television](#)", to which the UK is already a signatory and which applies across a large number of European countries, including many non-EU members such as Turkey, Moldova and Ukraine. That treaty is in essence the same as the original TV Without Frontiers Directive which preceded the AVMS Directive; it only applies to linear broadcasts and it imposes the sorts of restrictions on linear broadcasters that the latest revisions to AVMS are looking to loosen.

This also means that the cross-border transmission from the UK of on-demand services could be subjected to local regulation in every country in which it is receivable.

A similar analysis applies in relation to the content quotas within the EU. These provisions of AVMS guarantee a certain level of protection for "European Works" broadcast by EU television channels (and, to a lesser extent, by EU-based on-demand service providers).

The definition of European Work is quite broad and it is very likely that, however the divorce negotiations shake out, the UK would be able to retain "European Work" status for its producers so long as it remains a signatory to the Transfrontier Television Convention. In the unlikely event that UK produced programmes cease to qualify as European Works, this would impact upon their value in terms of sales to other EU broadcasters and make them harder to finance in the first place.

Copyright law

The message as regards copyright law is similar. While copyright law largely operates on a national basis, it does so within both an international framework (including conventions administered by WIPO such as the Berne Convention, as well as the TRIPs provisions of the WTO treaty) and, in the EU, within a series of harmonising measures and CJEU case-law. In the short term nothing in UK copyright law need change (nor will this likely be a priority for an administration dealing with the necessary fall-out from Brexit).

The one possible exception is the proposed Portability Regulation (which we discuss [here](#)). A Regulation has direct effect and does not need UK law to be altered to take effect. When the UK leaves the EU, at a stroke the Regulation then ceases to have effect, so UK consumers will lose the benefit of the proposed rules which would allow them to access their online video services while elsewhere in the EU (and consumers from other EU Member States will lose the same benefit while in the UK).

In order to retain the benefits of free trade with the EU, it is likely that, in negotiating the "divorce", the UK will need to agree that it will continue to recognise the European copyright acquis to a greater or lesser extent. However, as a non-Member State, the UK government will have little or no influence on how EU copyright law will evolve.

This is of course particularly sensitive given not only the proposed Portability Regulation (of which the Cameron administration has been a vocal supporter) but the longer term Commission agenda/aspiration towards cross-border licensing.

Anti-trust and soft-money

One area for the forthcoming negotiations will be whether, in the event of Brexit, the UK would be able to grant artistic subsidies wholly free of EU oversight and how far EU aid currently helping UK businesses will still be accessible under new trade deals, the latter no doubt linked to the extent to which the UK ends up continuing to contribute to EU budgets.

Currently, producers can access both direct funding through the UK National Lottery scheme as well as indirect funding through film, TV drama, animation and games tax credits. The Lottery alone has helped 1050 film productions make over 1900 claims for a total of over £1 billion since inception in 2007. This will no doubt continue after Brexit and the UK will, at least in theory, no longer be bound by EU rules prohibiting the distortion of intra-EU competition by favouring certain types of services or productions and limiting the amount of state aid that can be granted to one project. We could also see a recasting of the so-called “Cultural Test” so that it is more focused on UK, rather than EU, cultural elements and individuals. The EU will accordingly negotiate hard for the more level playing field to remain and is likely to take a hard line against any UK-based industry trying to distribute content in the EU which has been the benefit of ‘unfair’ state aid.

Similar challenges arise in respect of direct EU funding, such as the Creative Europe programme and its MEDIA predecessors as well as support for deprived regions through the European Regional Development Fund which has invested in Screen Yorkshire and, indirectly, in productions such as Game of Thrones. Although these programmes are open to certain European countries with association agreements with the EU, it is hard to see why the EU would wish to reward the UK for its exit by delivering support at anything like today’s levels. Between 2007 and 2013, funding for the UK audiovisual industry from MEDIA amounted to €100 million and, in the first two years of Creative Europe, grants totalling €44 million have been made to UK cultural organisations including the Europa Cinema network. Among the notable UK films that have received support are Amy, Brooklyn, Carol and High-Rise.

Concluding thoughts

At this stage, continuing the FT analogy, the UK has only told the EU it wants a divorce. The actual giving of notice (decree nisi?) and subsequent cessation of UK membership (decree absolute) will take a considerable amount of time – the latter taking effect 2 years after the former. During that time, there will be long and complex negotiations of the arrangements through which the UK can access the EU markets and vice versa. The UK will also need to re-establish its own arrangements with other countries, with whom it currently has arrangements via the EU.

These arrangements will fall within a range of possibilities and clients should be considering how to optimise those outcomes, as well as how to manage the risks inherent in the process.



For more information please contact:



John Enser

Partner

T +44 20 7067 3183

E john.enser@cms-cmno.com



Selina Potter

Partner

T +44 20 7067 3193

E selina.potter@cms-cmno.com



Victoria Gaskell

Partner

T +44 20 7067 3230

E victoria.gaskell@cms-cmno.com



Jacqueline Hurt

Partner

T +44 20 7067 3264

E jacqueline.hurt@cms-cmno.com



Tomos Jones

Senior Associate

T +44 20 7067 3605

E tomos.jones@cms-cmno.com



Law . Tax

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.
cms-lawnow.com



Law . Tax

Your expert legal publications online.

In-depth international legal research and insights that can be personalised.
eguides.cmslegal.com

CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335. It is a body corporate which uses the word "partner" to refer to a member, or an employee or consultant with equivalent standing and qualifications. It is authorised and regulated by the Solicitors Regulation Authority of England and Wales with SRA number 423370 and by the Law Society of Scotland with registered number 47313. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices. The associated international offices of CMS Cameron McKenna Nabarro Olswang LLP are separate and distinct from it. A list of members and their professional qualifications is open to inspection at the registered office, Cannon Place, 78 Cannon Street, London EC4N 6AF. Members are either solicitors or registered foreign lawyers. VAT registration number: 974 899 925. Further information about the firm can be found at cms.law

© CMS Cameron McKenna Nabarro Olswang LLP

CMS Cameron McKenna Nabarro Olswang LLP is a member of CMS Legal Services EEIG (CMS EEIG), a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices. Further information can be found at cms.law

1706-0020156-2