

Frequently asked questions on broadcasting and on demand services after the UK leaves the EU

These FAQs are aimed at broadcasters and on demand providers seeking further technical information on what arrangements would apply in the event the UK leaves the European Union without a deal in place.

In December 2018, the Government laid a [statutory instrument](#) before Parliament setting out draft legislation for broadcast licensing and video on demand notification after the UK leaves the European Union, in the event there is no-deal between the UK and the EU.

This document sets out how these licensing and notification arrangements would work in practice in this event, which broadcasters and on demand providers may find useful in preparing for any changes to the UK's broadcast licensing and on demand arrangements.

Our understanding is that if the UK Government agrees an implementation period with the EU, arrangements for the broadcasting and on demand sector will remain the same as they are now for the duration of this period (currently until December 2020).

The current system and context

Currently, the EU's Audiovisual Media Services Directive (AVMSD) provides the basis for Ofcom's broadcast licensing framework and video on demand notification system. The AVMSD is based on the 'Country of Origin' principle. This enables television broadcasters and video on demand providers to transmit services across the EU, provided they comply with the rules of the country which has jurisdiction over the service. Jurisdiction is decided by a long list of factors, for example, the location of the broadcaster's head office and staff involved in providing the service.

The AVMSD also sets out content rules with which each country must comply.

If there is no-deal on the UK's withdrawal from the EU, this jurisdiction would fall away and be replaced by new criteria set out below.

The Government's amendments to broadcast licensing in the event there is no-deal between the UK and EU

In a no-deal scenario, the UK would no longer be party to the AVMSD and would be classed as a 'third country' under the AVMSD. So if your service is available in an EU Member State then you might require a licence or authorisation from an EU Member State. Further details about different scenarios are set out below.

As Ofcom's powers to license and authorise TV and video on demand services are based on the AVMSD, Ofcom's jurisdiction over those services would also change. To make the regulatory system operable outside of AVMSD in the event of a no-deal scenario, Government has laid a statutory instrument before Parliament which would give Ofcom jurisdiction over TV and video on demand services as set out below.

Jurisdiction over TV services would be based on a number of factors:

- Where your service is based, e.g. where the head office and editorial decisions are made.
- Where your service is broadcasting to, e.g. to the UK or another country.

- How your service broadcasts, e.g. through satellite or online.

In the event the UK leaves the EU in March 2019 with no agreement in place, the Government's amendments to broadcast licensing arrangements are two-fold¹:

- Country of destination licensing:** any TV channel that appears on a 'designated UK Electronic Programme Guide (EPG)' (see explanation below) would need to be licensed and regulated in the UK. The exceptions to this would be TV channels from countries party to the European Convention on Transfrontier Television (ECTT) (see explanation below), as well as the following Irish channels: TG4, RTÉ1 and RTÉ2. Online-only TV services would not need to be regulated or licensed in the UK either.
- European Convention on Transfrontier Television (ECTT and country of origin):** The ECTT is a Council of Europe treaty that is based on a similar country of origin principle to the AVMSD. Where TV channels based in the UK are broadcasting to another ECTT country (see list of countries below), they would be regulated under the provisions of the ECTT.

In addition, the Government's no-deal video on demand regulation amendments set out that if your service's head office and editorial decision-making capacity are based in the UK, you would need to give an appropriate notification to Ofcom before providing the service.

Frequently asked questions

Broadcasters and EPG providers

1. *What is the European Convention on Transfrontier Television (ECTT)*²?

This treaty which pre-dates the AVMSD allows freedom of reception of TV services between the countries that are party to it.

The ECTT does not apply to video on demand services. Please refer to question 14 for further information.

2. *Which countries are party to the ECTT?*

The following countries are party to the ECTT: Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Malta, Montenegro, Norway, Poland, Portugal, Republic of Moldova, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

The following EU Member States are not party to the ECTT: Belgium, Denmark, Greece, Ireland, Luxembourg, The Netherlands and Sweden.

¹ The statutory instrument which would make this policy into law (the "broadcasting SI") has been laid and may be found at: <http://www.legislation.gov.uk/ukdsi/2019/9780111176733/contents>. The Government's Technical Notice on broadcasting and video on demand in a no-deal can be found here:

<https://www.gov.uk/government/publications/broadcasting-and-video-on-demand-if-theres-no-brex-it-deal/broadcasting-and-video-on-demand-if-theres-no-brex-it-deal>

² <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b0d8>

3. What does 'broadcasting to' a country which is party to the ECTT mean?

The statutory instrument that has been laid before Parliament sets out that in this context 'broadcasting to' means that:

- The service can be received in all parts of the relevant ECTT country; and
- The service can be accessed through an EPG which is either licensed or otherwise regulated in the relevant state. Or alternatively, the service can be accessed through an EPG whose head office is in the relevant State (if the state doesn't regulate EPGs).

Services that are broadcasting to an ECTT country and fall under the UK's jurisdiction for the purposes of the ECTT (see below) would be required to have an Ofcom licence. This licence should allow those services to continue broadcasting into those countries on a country of origin basis, i.e. without further regulation in the country of destination.

4. How is jurisdiction determined under the ECTT?

Primary criteria

First, consider whether you are established in an EU country under the AVMSD "primary establishment criteria". These effectively decide what country you are established in for the ECTT too (see Article 5(2)(d) ECTT - the reference of the Directive mentioned should be read as a reference to Article 2(3) of AVMSD).

The AVMSD primary establishment criteria should be considered only by reference to the countries that are member states of the EU. For this purpose, the UK is a "third country". You are established in an EU member state as follows:

- If a broadcaster has its head office in that country and the editorial decisions about programme schedules are taken in that country.
- If a broadcaster has its head office in one country but editorial decisions on programme schedules are taken in another country, it will be considered to be established in the country where a significant part of the workforce operates.
- If a significant part of the workforce operates in each of those countries, the broadcaster will be considered to be established in the country where it has its head office.
- If a significant part of the workforce operates in neither the country where the editorial decisions about programme schedules are taken, nor the country where the applicant has its head office, the broadcaster will be considered to be established in the country where it first began broadcasting lawfully, provided that it maintains a stable and effective link with the economy of that country.
- If a broadcaster has its head office in a country but decisions on programme schedules are taken in a third country, or vice-versa, it will be considered to be established in the country concerned, provided that a significant part of the workforce operates in that country.

If you are established in an EU member state under the criteria above, and that country is not in the ECTT, we take the view that you fall outside the ECTT.

If you are not established in an EU member state under the criteria above, then you should consider where you are established under the remaining ECTT primary criteria (Article 5(3)(a) to

(c)). For the list of countries party to the ECTT see question 2 above. The UK will not be a “third country” for this purpose as the UK is a party to the ECTT.

The ECTT states that a broadcaster is established in a country (i.e. falls into its jurisdiction) in the following circumstances:

- If a broadcaster has its head office in that country and the editorial decisions about programme schedules are taken in that country.
- If a broadcaster has its head office in one country but editorial decisions on programme schedules are taken in another country, it will be considered to be established in the country where a significant part of the workforce operates.
- If a significant part of the workforce operates in each of those countries, the broadcaster will be considered to be established in the country where it has its head office.
- If a significant part of the workforce operates in neither the country where the editorial decisions about programme schedules are taken, nor the country where the applicant has its head office, the broadcaster will be considered to be established in the country where it first began broadcasting lawfully, provided that it maintains a stable and effective link with the economy of that country.
- If a broadcaster has its head office in a country but decisions on programme schedules are taken in a third country, or vice-versa, it will be considered to be established in the country concerned, provided that a significant part of the workforce operates in that country.

If you think you are not established in an ECTT country or an EU member state, you should consider whether your service falls to the jurisdiction of an ECTT country under the following criteria:

Subsidiary technical criteria (Article 5(4))

If the primary establishment criteria do not apply, broadcasters may still fall into the jurisdiction of an ECTT country in the following circumstances:

- If a broadcaster uses a frequency granted by that country.
- If a broadcaster uses satellite capacity relating to that country.
- If a broadcaster does not use satellite capacity relating to that country but does use a satellite uplink situated in that country. This subsidiary criterion will apply if jurisdiction of any country cannot be established under the “satellite capacity” criterion referred to above.

5. What is a ‘designated EPG’?

Broadly speaking, an Electronic Programme Guide (EPG) is a service that consists of the listing or promotion of programmes or programme services and provides access to them. (The full definition is in section 310(8) of the Communications Act 2003.)

In the event of a no-deal, any EPG being provided by a provider that holds a Television Licensable Content Service or Digital Television Additional Service licence for it immediately before exit day would be “designated” on day one after exit day.

Designated EPG providers would be required to have a licence, as would any TV channel on those EPGs (with the exception of those under the jurisdiction of another ECTT country and TG4, RTÉ1 and RTÉ2).

EPGs are 'designated' by several means:

- i. Beyond day one, if EPG providers met the criteria below, they could be designated by the Secretary of State:
 - A person who is providing a guide that is used by members of the public in the UK as a facility for obtaining access to television programme services; or
 - A person who is providing, or has informed Ofcom of an intention to provide, a guide with a view to it being used by members of the public in the UK.

6. *In the event of a no-deal will EPG providers be required to take action?*

The broadcasting SI would require Ofcom to vary the licences of EPG providers to ensure that the services on their platform (other than TG4, RTÉ1 and RTÉ2) are appropriately licensed or authorised to broadcast either by Ofcom, or a country that is party to the ECTT. Ofcom would vary the licences to add a condition reflecting this obligation.

7. *I hold an Ofcom licence and broadcast only to UK audiences. In the event of a no-deal would my existing Ofcom-issued licence be valid after the UK leaves the EU, or would I be required to re-apply for one?*

If you still required a licence under the jurisdictional criteria above, your existing Ofcom licence would remain valid. There will be no need to re-apply for a new one.

If you broadcast a linear service online only, you would no longer require your Ofcom licence. (Please refer to questions 14 and 15 below for further information about VOD services which are regulated differently to linear online services).

We would vary licences later in 2019 to reflect the new legislative framework.

8. *I am a TV broadcaster that holds an Ofcom licence and broadcasts in both the UK and in the EU. In the event of a no-deal, will I need to take action to be able to legally broadcast in the EU? Will I still need an Ofcom licence?*

You may well fall to the jurisdiction of an EU Member State under the terms of the AVMSD. We suggest you consider the jurisdictional criteria of the AVMSD and contact the media regulator in that Member State to enquire about obtaining a licence or authorisation as necessary.

In addition, if you still require an Ofcom licence under the new jurisdictional criteria set out above, your existing Ofcom licence would remain valid. There will be no need to re-apply for a new one.

9. *I have an Ofcom licence for my TV service which broadcasts outside the UK only. In the event of a no-deal will I still need my licence?*

If you fall to Ofcom's jurisdiction under the ECTT jurisdiction criteria set out above, and you are broadcasting to a country that is party to the ECTT (i.e. see question 2) then you would still be required to have a licence from us.

If you would fall to Ofcom's jurisdiction under the ECTT jurisdiction criteria set out above, but you are only broadcasting to a country that is not party to the ECTT, then you would not require a licence from us.

10. I am broadcasting a TV service to the UK but I am based in the EU and therefore hold a licence or authorisation to broadcast from one of the EU member states. In the event of a no-deal, will I need to take action?

If you are "established" (according to the primary criteria described in question 4 above), in an EU member state that is also a party to the ECTT, you do not need to do anything. Many EU countries are also party to the ECTT (see list in question 2 above).

If you are licensed or authorised in an EU member state because of the location of your satellite uplink, or due to your satellite capacity, you may still also fall to the jurisdiction of another ECTT party, and you should look at the criteria described in question 4 above.

If you are "established" in an EU state that is not in the ECTT, you would need to hold an Ofcom licence to broadcast a TV service on one of the designated EPGs in the UK.

However, after the UK leaves the EU there will be a six-month grace period before your service would be required to be licensed by Ofcom, allowing time for the application and issuing process for the new licences. **Ofcom will publish a revised application form and accompanying guidance notes as soon as possible.**

11. What if I no longer need my Ofcom licence?

If you don't need your Ofcom licence because you no longer fall under UK jurisdiction, an authorised representative of the licensee should email broadcast.licensing@ofcom.org.uk to let us know.

12. In the event of a no-deal will TG4, RTÉ1 and RTÉ2 broadcasting to the UK be required to take action?

As noted in the Government's White Paper and the broadcasting SI, TG4, RTÉ1 and RTÉ2 will be exempt from the requirement to hold Ofcom licences due to UK's commitments under the Good Friday Agreement and the European Charter on Regional and Minority Languages. Therefore, no action is required on their part.

13. Would a no-deal Brexit result in changes to the content rules broadcasters have to follow?

For licensed services based in the UK that are broadcasting to UK audiences there will be no changes to the content rules that have to be followed, as set out in the Broadcasting Code.

For licensed services based in the UK that are broadcasting to countries that are party to the ECTT, there will be some changes to the rules that these services must follow. This is because the ECTT includes some rules that are different from the current Broadcasting Code rules. These changes mostly relate to advertising scheduling. In the event of a no-deal Ofcom would consult on these changes before implementing them. Licensees would not be expected to follow these rules until they have been implemented and licences have been varied to require compliance.

Video on demand services

14. How will video on demand services be regulated in the event of a no-deal?

Ofcom's jurisdiction over VOD services derives from the AVMSD and so would disappear in the event of a no-deal if no changes are made to UK legislation. In addition, the ECTT does not apply to VOD services, so UK-based VOD services would no longer be afforded freedom of reception in the EU through this means.

There would be no 'country of destination' style regulation for VOD services and Ofcom would only regulate a service if both its head office and editorial decision-making capacity are based in the UK. VOD services not under UK jurisdiction that are currently available to UK audiences will continue to be available. For example, the UK would continue not to regulate Netflix, which is based in the Netherlands, and it would continue to be available in the UK. If issues arose with services based in other jurisdictions, the UK would cooperate with the relevant regulator.

VOD providers should seek legal advice and contact EU media regulators to check if a separate licence or authorisation would be required for their service in the EU.

15. Would a no-deal Brexit result in changes to the content rules video on demand services have to follow?

There would be no change to the content rules that apply to UK regulated VOD services. The On Demand Programme Service Rules would continue to apply³.

³ https://www.ofcom.org.uk/data/assets/pdf_file/0016/132073/Broadcast-Code-Full.pdf