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# Frequently asked questions on linear television services and video on demand services after Brexit

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## Overview

These FAQs are aimed at linear television (TV) service providers and video on demand providers seeking further information on what arrangements apply after Brexit.

The UK Government has made changes to the law that applies to broadcasting in and to the UK. The changes are made by the [Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#) ('the regulations') which came into force at 11pm on 31 December 2020.

## The previous system and context

Previously, the Audiovisual Media Services Directive (AVMSD) provided the basis for Ofcom's broadcast licensing framework and video on demand notification system. The AVMSD is a piece of European legislation based on the 'Country of Origin' principle. This enables linear TV service providers 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 service provider's head office and staff involved in providing the service.

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

This jurisdiction has now been replaced by new criteria set out below.

## The current system and context

The UK is no longer a party to the AVMSD and is 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.

Ofcom's jurisdiction over services has changed.

Ofcom now has jurisdiction over TV and video on demand services as set out below.

Jurisdiction over linear TV services is based on a number of factors:

- Where your service is based, e.g. where the head office and editorial decisions on programme schedules are made.
- Where your service is broadcasting to, e.g. to the UK or another country.
- How your service broadcasts, e.g. through cable, satellite or online.

Broadcast licensing arrangements are two-fold:

**Country of destination licensing:** any TV service that appears on a 'regulated UK Electronic Programme Guide (EPG)' (see explanation below) needs to be licensed and regulated in the UK. The exceptions to this are TV services from countries party to the European Convention on Transfrontier Television (ECTT) (see explanation below), as well as the following Irish services: TG4, RTÉ1 and RTÉ2.

**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 services based in the UK are broadcasting to another ECTT country (see list of countries below), they are regulated under the provisions of the ECTT. Where TV services broadcasting to the UK are based in an ECTT country, they do not need a licence from the UK but will be regulated to the standards required by the ECTT by that country.

For video on demand, the regulations set out that if your service's head office and editorial decision-making capacity are based in the UK, you will need to give an appropriate notification to Ofcom before providing the service. Where the provider wishes to demonstrate that its services are not available to members of the public in a given region, it will need to secure that the technical and commercial arrangements in place do effectively secure that. We note that the regulations do not change the statutory definition of the "public" to whom a service must be available in order to fall within Ofcom's jurisdiction. We therefore take the view that it will continue to mean services available in AVMSD countries (see Section 2 of the EU Withdrawal Act 2018.)

## Frequently asked questions

### Linear TV service providers and EPG providers

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

This [treaty](#), which pre-dates the AVMSD, allows freedom of reception of broadcast 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, North 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.

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

Where the service is distributed by satellite, the Broadcasting (Amendment) (EU Exit) Regulations 2019 define it as being receivable in an ECTT country when:

- The service can be received in all parts of the relevant ECTT country; and

- The service can be accessed through an EPG which is 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) are 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 is the same as 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. You may still need a UK licence (see below).

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 is not 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 'regulated 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.

Any EPG being provided by a provider that held a Television Licensable Content Service or Digital Television Additional Service licence for it immediately before the end of the transition period is now 'regulated'.

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

Other EPGs can be regulated in future if the provider is designated by the Secretary of State, or if they fall within a description prescribed by the Secretary of State. A provider may only be designated by the Secretary of State if they are:

- 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. Have EPG providers been required to take action?**

Ofcom has varied the licences of EPG providers of which it is aware 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.

## **7. I hold an Ofcom licence and provide my service only to UK audiences. Is my existing Ofcom-issued licence still valid, or do I need to re-apply for one?**

If you still require a licence under the jurisdictional criteria above, your existing Ofcom licence remains valid. There is no need to re-apply.

If you broadcast a linear TV service online only, you will need to consider whether your service is accessible via a regulated EPG in the UK. If your service is not accessible via a regulated EPG in the UK (i.e. and when it is not available in an ECTT country as set out in question three), it is likely that you will no longer require your Ofcom licence. (Please refer to questions 14 and 15 below for further information about video on demand services which are regulated differently from linear online services).

## **8. I hold an Ofcom licence and my service is available in both the UK and in the EU. Do I need to take action to be able to legally provide my service in the EU? Do I still need an Ofcom licence?**

If all of the EU Member States in which your service is available are also party to the ECTT, you may be able to rely on the ECTT. However, because satellite signals cross territorial boundaries, this may be hard to achieve in practice. 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 the ECTT combined 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 remains valid. There is no need to re-apply for a new one.

## **9. I have an Ofcom licence for my TV service which is only available outside the UK. Do I still need my licence?**

Cable and satellite services are caught by the ECTT. 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 are still required to have a licence from us.

If you 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 will not require a licence from us. We do not consider that online-only services are caught by the ECTT, so these will only require a licence if they appear on a UK-regulated EPG service.

Please refer to questions 14 and 15 below for further information about video on demand services, which are regulated differently from linear online services.

## **10. I am providing a TV service to the UK but I am based in the EU and therefore hold a licence or authorisation to do so from one of the EU Member States. Do I need to take any 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 Member State that is not in the ECTT, you will need to hold an Ofcom licence to provide a TV service on one of the regulated EPGs in the UK. The regulations provide for you to have a six-month grace period from the end of the transition period (that is, from 11pm on 31 December 2020) before your service is required to be licensed by Ofcom, allowing time for the application and issuing process for the new licences.

## **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](mailto:broadcast.licensing@ofcom.org.uk) to let us know.

## **12. Are TG4, RTÉ1 and RTÉ2 required to take action?**

As noted in the Broadcasting (Amendment) (EU Exit) Regulations 2019, TG4, RTÉ1 and RTÉ2 are exempt from the requirement to hold Ofcom licences due to the 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. Are there changes to the content rules broadcasters have to follow?**

For licensed services based in the UK that are provided only to UK audiences there are no changes as a result of the UK leaving the European Union.

For licensed services based in the UK that are broadcasting to countries that are party to the ECTT, there are 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. Ofcom has amended the Broadcasting Code and Code on the Scheduling of Television Advertising to reflect these changes, and changes introduced by the Audiovisual Media Services Regulations – a UK piece of legislation that came into force on 1 November 2020.

## **Video on demand services**

### **14. How are video on demand services now regulated?**

The ECTT does not apply to video on demand services, so UK-based video on demand services are no longer afforded freedom of reception in the EU.

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

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

### **15. Are there changes to the content rules video on demand services have to follow?**

There are no changes to the content rules that have to be followed due to the UK leaving the European Union. However, there are some changes introduced by the Audiovisual Media Services Regulations – a UK piece of legislation that came into force on 1 November 2020. Ofcom has updated its [Rules and Guidance and How to Notify documents](#) to reflect these changes.

## **Radio services**

### **16. Do these changes affect radio services licensed by Ofcom?**

There are no changes to the licensing framework for radio services.