Impact of Brexit on the media, sport and entertainment industries

On 1 January 2021, the Brexit transition period came to an end and the UK is now no longer subject to the rules of the EU. In this article, we take a look at the key issues of Brexit on the media, sport and entertainment industries and what the EU-UK Trade and Cooperation Agreement (TCA) means in respect of these sectors. This article will specifically explore these issues in relation to broadcasting, territorial licensing, state aid and competition, entertainment industry and immigration, copyright and trade marks, sport, advertising and content and data.

Broadcasting

The TCA does not contain any major surprises for broadcasters – audio-visual services were never expected to form part of the deal and have been expressly excluded from the limited provisions on services.

The principal impact of the exclusion is that broadcasters and other audio-visual service providers regulated in the UK can no longer benefit from "passporting" their UK licences and permissions under the country of origin rule via the Audio-visual Media Services Directive. This had previously allowed UK-based broadcasters to operate television channels and on-demand services throughout the EEA, based on an Ofcom licence or authorisation.

It also meant that broadcasters based in other Member States were able to broadcast in the UK based on licences in their home state, although historically UK broadcasters (in particular, the European operations of major US broadcasters) have taken the greatest advantage of the Directive.

To continue broadcasting in the EEA, UK-based broadcasters will need either to rely on the separate (but more limited) European Convention on Transfrontier Television (where possible), or obtain new licences in an EEA state, often involving the movement of some functions outside the UK. Similarly, the few broadcasters relying on licences from regulators outside the UK to broadcast in the UK will need to obtain a licence from Ofcom (under the new regime recently introduced for the post-Brexit period) to continue broadcasting in the UK.

The industry has known about this impact for several years, so the majority of affected broadcasters are likely to have taken the necessary steps far in advance. The net result of this change is an increased regulatory burden for those who broadcast in Ireland alongside the UK, as well as pan-European broadcasters who broadcast in the UK alongside countries in the EEA, but there is little direct impact on broadcasters in the UK and Europe who broadcast only in their home country.

Territorial licensing

Exclusive territorial licensing is an important part of the global media value chain, enabling rights holders to maximise the value of their rights (and broadcasters and distributors to protect their investments) by ensuring content may only be accessed by viewers in the territory in which it is licensed. In recent years, the principle that content owners can license their rights on an exclusive territorial basis has been affected by the EU institutions applying EU single market rules to content licensing practices. EU initiatives in this area include the Portability Regulation, which allows consumers to access audio-visual services they have subscribed to at home, when travelling outside their home country within the EEA.

Brexit and the TCA mean the disapplication of the "free movement of services" between the UK and the EEA, and the disapplication of most EU competition law. The UK had already passed laws which disapplied the principle of free movement of services and EU legislation based on it from 1 January 2021, including the Portability Regulation and the Geo-Blocking Regulation.

The upshot of this is that, as the law now stands, audio-visual rights granted in the UK will not be subject to current or future EU legislation requiring cross-border access to services, thus protecting the value of exclusive licences of rights. This is likely to be broadly welcomed by rights holders and broadcasters globally, who have traditionally viewed application of the single market rules as a threat to the content value chain and the cultural diversity of services within Europe.

State aid and competition

EU state aid law prohibits the distortion of trade and competition within the EU by state support that is selective in the sense that it favours particular persons or types of production. Under the TCA, the UK has committed to introducing a subsidy control law that contains similar features to EU state aid law. However, the subsidy control law provision specifically states that it "does not apply to subsidies related to the audio-visual sector." This means that the UK will now have greater flexibility to structure funding support and tax incentives and reliefs for the production of UK content.

As far as merger control and competition law are concerned, at the end of the transition period, the UK Competition and Markets Authority took responsibility for larger and more complex merger, cartel and competition enforcement cases that were previously reserved for the European Commission and will now be fully responsible for the enforcement of those laws in the UK. However, the European Commission will continue to be responsible for the application of cartel and competition law to the extent that it may affect trade and competition in the EU. Merger control is split between the EU and its Member States depending on the turnover of the parties to a particular deal. Audio-visual businesses will be subject to potential further costs, regulatory burdens and uncertainty arising from the need to comply with separate UK and EU competition law regimes (which may diverge in the future) if their activities may have an impact in both the UK and the EU.

Although there are no immediate changes to the substance of competition law and merger control, changes are being made to allow the CMA to tackle the challenges of larger digital businesses with "Strategic Market Status" and the European Commission is making parallel changes through its Digital Services Act.

Entertainment industry and immigration

The entertainment industries, and more particularly the film, television and performance-based industries, are highly dependent on the principle of free movement. The efficient movement of artists and their crew (eg for touring, modelling or film-making on different locations) is crucial to the activities of these industries and preserves the cultural exchange of creative talent.

At 11 pm on 31 December 2020 freedom of movement between the UK and the EU came to an end. Upon reading the TCA, it contains no specific mobility provision within the agreement. There were however some minor provisions made with regard to standardising EU-wide permitted business visitor activities as well as provisions for contract service suppliers and independent professionals providing services within Europe and the UK. The list of permitted business activities has been very welcome to companies who frequently visit the EU, but unfortunately it does not provide any specific concessions for those engaged in the performing arts or entertainment industries. Furthermore, the contract service supplier and independent professional routes are restricted to certain specific industries; the performing arts and entertainment sectors are not featured. Those wishing to carry out entertainment-related activities who previously relied on free movement must now look to the individual destination country's domestic immigration system to identify if a specific provision exists to enable them to visit or stay.

From a UK immigration perspective, those who arrived in the UK before 11 pm on 31 December 2020 are able to continue to reside in the UK, providing they secure pre-settled or settled status under the EU Settlement Scheme. For EU nationals who now wish to visit or relocate to the UK, they will be treated as third-country nationals for UK immigration purposes, much like a US or Canadian national. Given the UK's global position in entertainment and the arts, there are several potential viable options for EU nationals, depending on the duration of visit and the activity being pursued. For professional artists who are required to visit the UK for a short period of time to carry out an activity directly relating to their profession, they may do this under the permitted paid engagements route which is covered

within the list of UK business visitor activities. This does not require a specific visa or work permit but such activities must be limited to a duration of one month. For those wishing to come to the UK for a longer period of time or to carry out activities outside the permitted paid engagements, there are three potential immigration routes:

T5 Creative and Sporting route – a temporary visa which can be issued for up to 12 months, with the option to extend for a further 12-month period.

- Global Talent Visa – a self-sponsored work visa, enabling recognised talented individuals to relocate to the UK for up to five years. Individuals under this route can convert their visa to a permanent status after a period of time.
- Skilled Worker visa – a sponsored work visa, tied to a UK-sponsor. This visa enables the individual to live and work in the UK and can also be converted to a permanent status after five years.

Each visa category does have minimum qualifying criteria along with specific applicable government fees. In most (but not all) instances, individuals must apply for their visa before arriving in the UK, although EU nationals do benefit from "virtual" processing, enabling them to apply via their mobile phone rather than visiting a visa processing centre.

For British citizens who wish to visit or relocate to Europe, the situation is arguably more complex. Given the TCA did not specifically address entertainment-related activities, British citizens are now faced with navigating the immigration systems of 30 different EU and EFTA countries. The only country where "freedom of movement" remains in place is the Republic of Ireland. Each EU country has their own set of domestic immigration rules which can widely differ from country to country. Another potential issue facing creatives, particularly those in the performing arts who may wish to tour multiple different European countries, is the Schengen Area agreement. This area covers 26 EU and EFTA member states and enables borderless travel between those countries but also restricts individuals to 90 days in the whole of the Schengen Area in any rolling 180-day period. This is problematic for individuals who may not stay in one Schengen Area country for very long but will visit multiple countries, thereby quickly reaching the 90-day permitted period.

Unfortunately Brexit will result in many challenges with a mind-shift for many individuals, particularly in the first few years while adapting to the end of freedom of movement. For many companies, this will be inconvenient and potentially expensive but where expert advice is taken, issues and obstacles may be avoided or reduced. Perhaps the biggest casualties will be those at the start of their careers, who may lose out on critical work experience due to complicated domestic immigration laws. In due course, we may see a loosening of restrictions, with some EU countries offering wider immigration routes for those in the creative and performing arts industries. In the interim, it will be essential for companies and individuals to seek professional immigration advice to understand their options and comply with the immigration rules for the countries they wish to visit.

Copyright and trade marks

The TCA is not radical in terms of its impact on UK and EU copyright holders. It establishes common standards of IP protection that the UK and the EU will continue to abide by. To a large extent, these are uncontroversial, as they reflect existing law in the UK/EU, and in large part reflect both parties' pre-existing international obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), the World Intellectual Property Organization (WIPO) treaties, and the Berne Convention. The TCA will however be important to anyone wishing to lobby for future change to UK copyright law, or for IP provisions in UK trade agreements with other countries, as it sets the baseline for which elements of UK law could be changed, and which cannot.

While the TCA does not present any major changes for copyright holders, the UK and EU copyright law will deviate significantly in the near future. The UK decided not to implement the Digital Single Market Directive 2019/790, which EU Member States must implement by 7 June 2021. This includes two particular consequences for the media and creative industries. Firstly, under UK law, there will be no specific new obligation for news aggregators to remunerate publishers or newspapers for online use of their publications. Secondly, online content-sharing platforms in the UK will not be subject to the new liability regime and monitoring and filtering obligations for such platforms, imposed by Article 17 of the Directive.

An interesting potential early divergence from EU copyright law could be the introduction of a statutory damages regime for IP claims in the UK. The UK IPO included such a proposal in its consultation on the UK's IP enforcement framework which closed on 9 November 2020. Pre-Brexit, the introduction of a statutory damages regime within the UK might have been blocked by the EU Enforcement Directive. However, post-Brexit, this would no longer pose a hurdle. A statutory damages regime, which operates through fixed damages per infringement, would enable copyright holders to claim a significantly higher amount of damages than is currently the case. The IPO's report on this consultation is awaited, so it remains to be seen if and when the UK will introduce this.

As to trade marks, the TCA does not affect the post-2020 status of EU trade marks in the UK, which essentially remains as set out in our earlier client update here, with equivalent UK trade marks having been automatically created on 1 January 2021 for each EU trademark.

Sport

As of 1 January 2021, UK professional sports clubs and teams can no longer freely sign European sportspeople. Instead, non-UK/Irish nationals must qualify for a governing body endorsement (GBE) in order to be eligible to represent a UK sporting organisation. Those who meet the criteria (approved by the Home Office) receive a "certificate of sponsorship" which entitles them to apply for a UK visa.

While established sportspeople are unlikely to be affected by these changes, this will impact the signing of new professional players who are EU nationals (other than Irish nationals). As well as the individual needing to qualify according to the criteria set for each sport, there will be an increased administrative burden, as already applied to international transfers from non-EEA countries. Consideration will now need to be given to GBE-compliance during the early scouting phases which had previously not been a factor when signing EU nationals.

The adoption of a uniform approach to overseas talent could offer see UK clubs casting the net wider – looking more seriously at signing players from previously untapped territories outside the EU, who would previously have been disregarded due to the administrative burden (compared to European players) associated with recruiting them. The criteria for each sport are not set in stone – for example, the criteria for football were updated in late 2020 – and we can expect sports organisations to propose changes in future if needed in order to ensure that UK professional sport remains able to attract the best international talent.

Advertising and content

Beyond the specific impact on broadcast and audio-visual services referred to above, Brexit and the TCA generally have limited impact on the specific law and regulation of advertising and editorial material given that these are areas where harmonisation among EU Member States remains relatively limited or, where there was a harmonised regime, there is no immediate intention for UK law implementing that regime to change (eg unfair commercial practices law underpinning advertising protection for consumers).

The UK Advertising Standards Authority has recognised that its Broadcast and Non-Broadcast Codes include many rules which seek to reflect significant pieces of EU law or UK law implementing EU law but that such law and the applicable rules will remain in force unless and until expressly amended. Changes to the Codes may be made as necessary in line with any received "further information from government" and specific changes may be needed to reflect the obligation for Northern Ireland to remain aligned with specific EU rules, including those in areas such as the technical regulations of goods – relevant, for example, to the advertising of food or medicine.

Substantive law in the UK relating to defamation, the tort of misuse of private information, contempt and other potential areas of content liability are not directly affected (although some rules of jurisdiction have had to be varied due to Brexit) nor will the UK's obligations under the European Convention of Human Rights (ECHR) upholding certain fundamental rights, including the key media concerns of the right to freedom of expression and the right to respect for a person's private and family life, home and correspondence. The UK signed the ECHR in 1950 before EU membership, and the UK Human Rights Act which enables people to bring cases in UK courts to uphold their ECHR rights is unaffected by Brexit (though it has been subject to separate political challenge). In contrast to the ECHR, the European Charter of Fundamental Rights is part of EU law and it has ceased to apply in the UK on leaving the EU.

It should be noted that key pre-existing UK proposals for a television watershed and total online advertising prohibition in respect of HFSS products as well as the proposed UK regulatory framework to tackle a range of online harms through the introduction of a statutory duty of care for internet companies, including social media platforms (on which the UK government published its consultation response on 15 December suggesting a draft bill will appear in 2021) were both national rather than EU-based initiatives.

There are specific provisions relating to unsolicited direct marketing communications in the TCA, separate to data protection rules, which while something of a paraphrasing of existing rules, seem intended to replicate existing interpretation of the UK/EU ePrivacy regime.

Data

As with most other sectors, data has great value and importance in media, sports and entertainment. Brexit and the TCA has an impact on all the key elements of data ownership, data access and data protection.

Unlike copyright (see above) the TCA does not prescribe an approach which must be adopted by the UK for the protection of databases and related *sui generis* rights. Indeed with the end of EU membership, UK citizens, residents and businesses are no longer able to benefit from the EU database right regime – with relevant UK law adapted to provide a UK-specific database right – in respect of databases created on or after 1 January 2021 (although the previous Withdrawal Agreement safeguards rights in respect of existing databases). To the extent that copyright protection extends to databases, there is no immediate change in law subject to the wider considerations in copyright policy discussed above. It is worth noting, however, that database protection is an area where UK law diverged from many European jurisdictions until harmonisation in the late 1990s and now in theory is free to do so again.

The TCA expressly recognises the importance of access to data in a digital economy and requires that cross-border data flows must not be restricted, preventing any UK or EU law which would either require or prohibit the storage or processing of databases in either territory or require relevant servers or networks to be located or approved in either territory. These provisions are to be subject to regular review, with either side able to propose amendments at any time. There is also a commitment to the provision and use of open public data: maintaining existing EU and UK policy in respect of open publishing standards (eg in relation to Crown copyright and the OGL or the EC adoption of creative commons licensing (CC BY 4.0 and CC0)).

In terms of data protection, although there was no adequacy decision announced for the UK, there is a separate political declaration alongside the TCA noting an intention to "work closely to that end" and, more substantively, an interim provision or what the UK government is calling a "bridging mechanism" allowing data to continue to flow into the UK from the EU (the UK having previously confirmed no restriction will apply to UK to EU personal data flows) for a period of four months (six months if extended) from the entry into force of the TCA or until an adequacy decision is actually granted, if earlier. There is, however, no other interconnection of UK and EU regulation so the UK GDPR and the EU GDPR will continue side-by-side (eg with separate supervisory authorities and the need for separate local representatives). For more information on the data protection rules, please click here.

For more information or advice on any of the above issues, please feel free to get in touch with any of the contributors listed below.

The key to navigating the impacts of the new Brexit Deal is informed analysis and accurate forecasting of where risks and new opportunities arise.

DLA Piper's Brexit Working Group includes lawyers with extensive government affairs, policy, regulatory and sectoral experience located in the UK, Brussels, across mainland Europe and in the United States.

We are advising clients on the legal and commercial impact of the Brexit Deal and on how to mitigate or capitalise on the consequences.

If you need any advice or assistance in dealing with the challenges and opportunities presented by Brexit, or more broadly around government affairs, please email brexit@dlapiper.com to be put in touch with a member of our team.

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