



Brexit: The impact on the audiovisual sector

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Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais



Foreword

For the dispassionate observer, Brexit will certainly appear as a fascinating topic. It is a unique moment in the history of both the United Kingdom and the European Union, and its development (from the referendum result to the current moment) has provided more cliffhangers than a whole season of Game of Thrones. However, those impacted by its effects, both present and future, might feel that the curse “may you live in interesting times” (wrongly attributed to the Chinese¹) may have fallen on them...

Paraphrasing Samuel Beckett, while waiting for a final withdrawal agreement that clarifies “the immense confusion”² that the Brexit conundrum has created, the European Audiovisual Observatory will continue to play its part in trying to bring facts and figures to the table without taking part in the discussion around it. Earlier this year, we started with a market publication, *Brexit in context: The UK in the EU28 audiovisual market*,³ which provides a European-eye view of the UK’s weight within the EU’s audiovisual markets. The present publication discusses the legal side of the question, and we will wrap up the whole issue with a conference this autumn, entitled *The impact of Brexit on the audiovisual industry: a European point of view*. This public conference will take place on 27 November 2018 in Brussels.⁴

While in London, Brussels and elsewhere all possible scenarios (including the most dramatic “no deal” option) are being currently discussed, in the following pages the reader may find useful information on the current key facts and figures on the weight of the UK in the European audiovisual market and on the main features of the legal framework that will cease to apply from 30 March 2019 at 00h00 CET. While looking at the most significant legal repercussions of Brexit on both the UK and the EU, including the need to ensure appropriate dispute resolution systems, the report takes stock of the positions expressed by the UK authorities and stakeholders and digs into the most recent policy papers.

Entering into such a sensitive area is of course a risky exercise, so we decided to run the draft report by the main UK institutions competent in the audiovisual field. Our

¹ See Quoteinvestigator.com, “May You Live In Interesting Times”, <https://quoteinvestigator.com/2015/12/18/live/>.

² “Yes, in the immense confusion one thing alone is clear. We are waiting for Godot to come...” (Samuel Beckett, *Waiting for Godot*).

³ “Brexit in context: The UK in the EU28 audiovisual market”, European Audiovisual Observatory, May 2018, <https://rm.coe.int/brexit-in-context/16808b868c>.

⁴ “The impact of Brexit on the audiovisual industry: a European point of view”, European Audiovisual Observatory Conference, Brussels, 27 November 2018.

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Strasbourg, October 2018

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

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Executive summary

In all respects, the United Kingdom holds a leading position in the EU film and audiovisual market, whether it is in terms of content production and film exports in cinemas and television (second EU country after France), as the country of establishment of the majority of TV channels and on-demand services (29% of EU28 television channels and 27% of EU28 on-demand services) or in terms of a qualified and mobile workforce employed in the audiovisual sector (around 206 000 people in 2017). In addition, the UK audiovisual market has had access to a range of EU funding streams, which, according to a study commissioned by the BFI, represents a total value of GBP 298.4 million for 1766 identifiable projects during the period 2007-2017. These EU funding streams can be used in combination with the considerable source of funding from UK public funds and tax incentives. **Chapter 1** details the weight of the UK in the various audiovisual sectors as well as the public funding they receive, with a description of these various EU funding streams, and the UK contingency strategy to deal with the consequences of Brexit in this regard.

Legally, the term "Brexit" corresponds to the withdrawal of the UK from the EU in accordance with the procedure provided for in Article 50 TFEU, consisting of a notification to the European Council (made on 29 March 2017) followed by a negotiation process for the conclusion of a withdrawal agreement between the UK and the EU. In theory, as a result of this agreement, and unless another date is set, all EU primary and secondary laws will cease to apply in the UK as of 30 March 2019. This will have a considerable impact on the regulatory framework applicable to the UK audiovisual sector as most of its aspects are currently governed by EU law. The first major consequence would be the loss of access to the internal market and the freedoms of movement guaranteed therein. Besides that, the various directives regulating the audiovisual sector would no longer be applicable, which might create a series of uncertainties as to the future regulatory framework in which UK audiovisual media services will be exploited, as well as the loss of the "Country of Origin" principle deriving from the AVMS Directive. The European legal framework governing the audiovisual sector and its actors at EU level is described in further detail under **Chapter 2**, along with an overview of all major legal repercussions that Brexit might have on both the UK and the EU.

At the time of publishing, the UK authorities are still working on the many concerns raised by Brexit. One of these concerns would be the need for an effective agreement on the movement of skilled workers, which is critical to the success of the British film industries and the maintenance of their overall competitiveness. **Chapter 3** presents the positions and initiatives of the UK authorities on some of the key priority issues affecting the audiovisual sector in the aftermath of Brexit, as publicly expressed at the time of this publication.



The same concerns and priority issues are also examined directly from the point of view of the audiovisual stakeholders in **Chapter 4**. They are mainly related to the mobility of skilled workers, to the different questions related to access to the EU market and to EU funding streams and co-production incentives, as well as to the question of how to guarantee and enforce copyright protection. In the same vein, audiovisual stakeholders provide evidence of the relevance of their concerns and propose a series of different measures to be implemented, during an appropriate adaptation period, which could help to resolve them. Among the proposed measures is the triple test proposed by the UK regulator Ofcom, which should be applied to decide which EU legislation in the regulated sectors should continue to apply in the UK: first of all, in accordance with the best interests of UK consumers and the general public; secondly, with regard to the promotion of competition and investment; and thirdly, in the interests of UK companies.

In addition to the positions and initiatives of the UK authorities or the measures proposed by the stakeholders, **Chapter 5** presents another source of concern which lies in the various uncertainties surrounding the way in which the UK will apply its agreement with the EU in its domestic law, and the dispute resolution system to be put in place in this perspective. The most worrying and unresolved issue being the role of the Court of Justice of the European Union (CJEU) as an interpreter of EU rules without its direct jurisdiction in the UK in this context.

Considering the current state of the art, most of the problems exposed that have been analysed in this report remain unresolved while waiting for the final agreement to come. Despite several acts and documents offering some insights into the future relations between the UK and the EU, the final agreement is still not there, and the UK authorities are also preparing for the possibility of the "no deal" scenario in which the UK leaves the EU without any agreement. With this in mind, **Chapter 6** offers some first conclusions and outlines some important issues for the audiovisual sector without aiming to provide answers or enter into the realm of speculation.

1. Brexit in context: the UK in the EU audiovisual market

1.1. Weight of the UK in the European Union's audiovisual market

1.1.1. Audiovisual market

The UK is the largest audiovisual market in the EU28: with 12% of TV households, the UK accounts for 21% of the audiovisual EU28 market revenues. It is similar in size to the German market and 45% bigger than the French market. It is specifically developed in terms of Video on demand (VoD) services, with 31% of the total EU28 market by value and 29% of EU28 Subscription Video-On-Demand (SVoD) subscribers. On average, the UK market grows slightly faster (2.1% between 2011 and 2016) than the total EU28 market (1.7%).

Media groups based in the UK account for 27% of the revenues of the EU28 top 100 audiovisual companies versus 13% for Germany and France, respectively. The UK hosts three of the top 10 EU28 groups (Sky, BBC, ITV) in addition to subsidiaries of various major US media groups.

Figure 1. EU28 TV households (end 2016, in million)

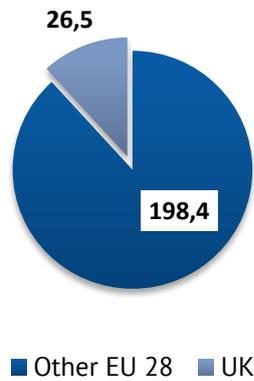
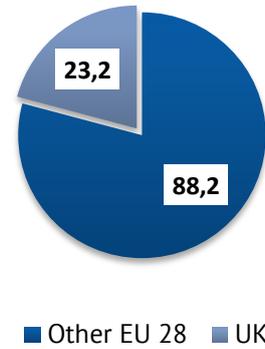


Figure 2. EU28 Audiovisual market (2016, bn EUR)



Source: European Audiovisual Observatory from WARC, Ampere Analysis and EBU/MIS data.

1.1.2. Content production

The UK is a key player in the European feature film sector. Thanks in particular to a strong domestic cinema market, it produces 16% of all EU28 films. It ranks number two (after France) in terms of cinema admissions.

The UK ranks number four in the EU28 in terms of the number of TV fiction hours produced, underpinned by a focus on high-end drama with a strong export potential.

Figure 3. Feature film production in the EU28 (average 2011-2016)

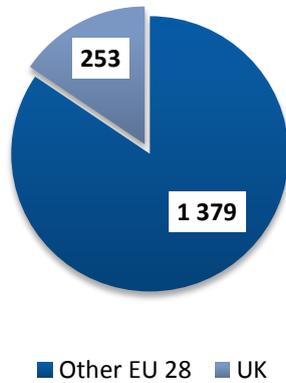
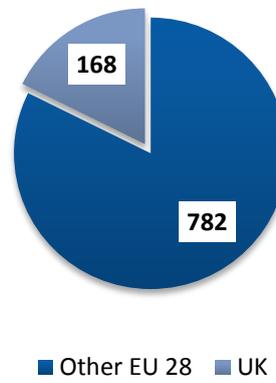


Figure 4. Cinema admissions in the EU28 (average 2011-2016, in million)



Source: European Audiovisual Observatory/LUMIERE - BFI (Not all films produced are necessarily released – UK data excludes inward US films)

1.1.3. Audiovisual media services

The UK is by far the main country of establishment (for the purposes of the AVMS Directive) in the EU28 for television channels and on-demand services: 29% of EU28 TV channels and 27% of EU28 on-demand services are established in the UK.

The UK is also the main hub in Europe for audiovisual media services. About two-fifths of TV channels established in the UK primarily target another European market, and close to 60% of all European channels serving another country are established in the UK.⁵ These channels include both general-interest channels and the various localised versions of US-based thematic channels.

⁵ Excludes local channels, includes different linguistic versions of the same channel.

Figure 5. TV channels established in the EU28 (end 2017)

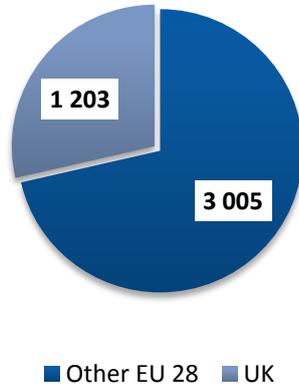
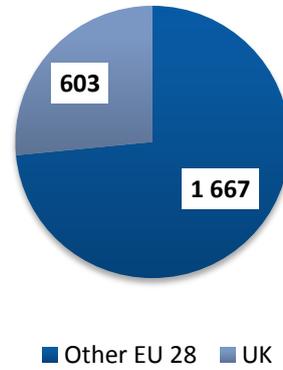


Figure 6. On-demand services established in the EU 28 (end 2017)



Source: European Audiovisual Observatory/MAVISE (Excludes local channels, includes different linguistic versions of the same channels)

1.2. Film and TV fiction co-productions and exports

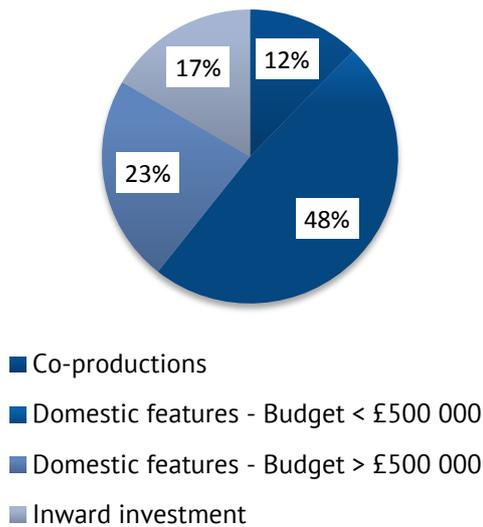
1.2.1. Co-productions

Excluding inward investment and films with a budget of under GBP 500 000, 35% of UK films are majority co-productions. The UK primarily co-produces with the EU, and uses the CoE Convention on Cinematographic Co-Production to do so. It also co-produces with non-EU territories such as Australia and South Africa.

Seven per cent of TV fiction titles produced in the UK are majority co-productions, and the UK leads 13%⁶ of TV fiction titles co-productions in the EU28. The UK co-produces mainly with the US, Scandinavian countries and France.

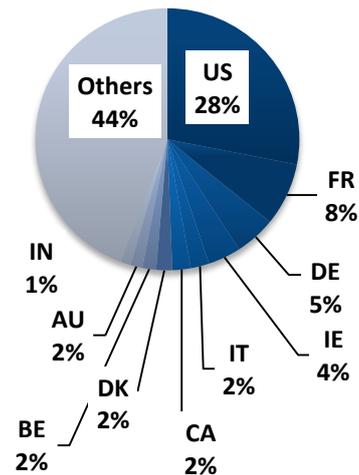
⁶ Fontaine, G. (2017). TV fiction production in the European Union. *European Audiovisual Observatory*, <https://rm.coe.int/tv-fiction-production-in-the-eu-2017/16807bb1c2>.

Figure 7. Films produced in the UK (% , average 2012-2016)



Source: British Film Institute (BFI)

Figure 8. UK interactions for film co-productions (% , cumulated 2011-2016)



Source: European Audiovisual Observatory/LUMIERE (Includes majority and minority co-productions, and inward investments)

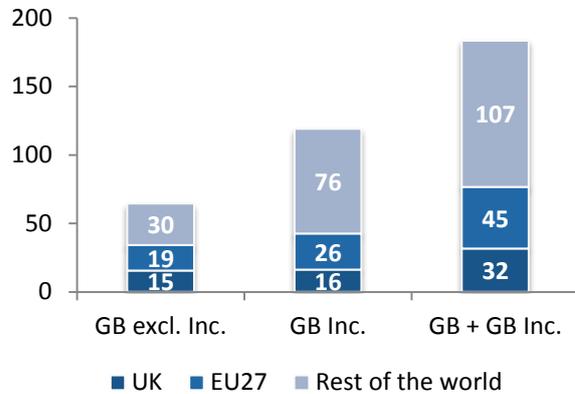
1.2.2. Exports and imports

The share of EU28 films released in the UK in cinemas, on TV and on Transactional Video-on-Demand (TVoD) is lower than in the EU28 on average. UK audiences tend to favour national films and US imports and the UK has a relatively low share of EU27 films. Conversely, the UK is a strong exporter of films to other EU countries. It ranks number two (after France) for the number of film exports in cinemas and on TV, and number one for the film exports on TVoD. UK films therefore look to the other EU countries' markets, which account for a quarter of their worldwide theatrical admissions. In turn, EU27 countries' films derive only 1,8%⁷ of their worldwide admissions⁸ from the UK theatres.

⁷ 5 million admissions of an overall of 278 million admissions. See figure 10 below.

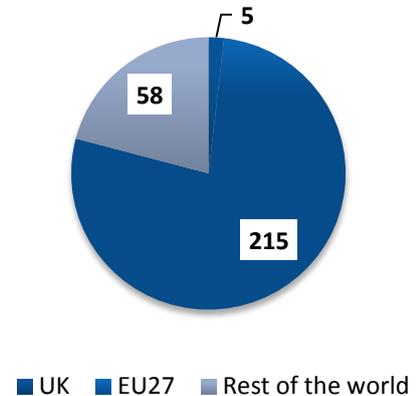
⁸ Worldwide admissions include data from 12 major non-European countries.

Figure 9. Cinema admissions to UK films (yearly average for 2011-2016, in million)*



Source: European Audiovisual Observatory/LUMIERE

Figure 10. Cinema admissions to EU27 films (yearly average for 2011-2016, in million)



Source: European Audiovisual Observatory/LUMIERE

*GB inc (incoming production) refers to films for which the main producer is a company established in the UK but under the ownership and/or control of a company registered in another country (usually the US).

1.3. Overview of the workforce in the audiovisual sector

According to the latest estimates of the UK Government’s Department for Digital, Culture, Media and Sport (DCMS),⁹ in 2017, the number of jobs in the Creative Industries¹⁰ stood at just over two millions, representing a 28.6% rise on the 2011 total. Creative industries accounted for 6.1% of the total number of jobs in the UK in 2017.

According to the same statistics, employment in the audiovisual sector alone accounted for 206 000 people in 2017, representing 0.6% of UK employment, 15 000 of which were non-UK EU nationals (7.2%). In certain specific subsectors of these industries, the proportion of non-UK EU nationals is much higher even, such as for example in the visual effects (VFX) industry where it reaches 25%.¹¹

⁹ DCMS Sectors Economic Estimates 2017: Employment, 18 July, 2018, <https://www.gov.uk/government/statistics/dcms-sectors-economic-estimates-2017-employment>.

¹⁰ The DCMS definition is a UK definition based on international industrial codes. It includes the following sub-sectors: Advertising and marketing; Architecture; Crafts; Design and designer fashion; Film, TV, video, radio and photography; IT, software and computer services; Publishing; Museums, galleries and libraries; and Music, performing and visual arts.

¹¹ Written evidence submitted by the UK Screen Association (IOB0038), The impact of Brexit on the Visual Effects industry and its ability to access the global talent pool,

According to the Exiting the EU Committee¹²'s Report of 21 December 2017 on Creative Industries,¹³ this sector is characterised by a large number of SMEs with fewer than five employees. In addition, the latest DCMS statistics¹⁴ reveal that 32.3% of workers in the audiovisual sector are self-employed.

In terms of qualifications and employment patterns, figures differ depending on the subsector concerned. For example, in the VFX industry, the non-UK EU workforce is comprised of highly-specialised, highly mobile people who help to complete projects in several countries at once, creating significant economic and cultural value for the UK, according to the UK Screen Alliance.¹⁵ In other specialist creative disciplines and technical services, employment is mainly driven by demand and consists of a large proportion of non-UK EU nationals, employed on a temporary basis. UK professionals also often find opportunities both in the EU and in the UK – for example, by working in creative or technical roles on co-productions between the UK and its EU partner – which are often posted at short notice and require speedy hiring processes.

From an economic perspective, such a mobile, freelance and highly skilled workforce constitutes an asset for a country wishing to be considered as an attractive place of production in a context where competition is fierce around the world to attract international productions to different locations. A company's ability to move around and access the right talents is as important as having access to goods and services. Considering that, according to the BFI,¹⁶ 78% of total UK production spending (GBP 1.1 billion) was accounted for by US majors-backed productions, the stakes for the UK to conclude an agreement with the EU which would allow it to retain access to this skilled workforce are fundamental to maintaining the country's ability to attract foreign (most often US) investments. In addition the ease of movement of such workers is pivotal to having access to services in the first place.

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/42167.html>. See also, Written evidence to the House of Commons by the British Film Institute (IOB0121),

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/43010.html>.

¹² The Exiting the European Union Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the UK Government's Department for Exiting the European Union and matters falling within the responsibilities of associated public bodies.

¹³ Exiting the EU Committee, Creative Industries Sector Report, 21 December 2017, paragraphs 12 and 16, <https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Sectoral%20Analyses/10-Creative-Industries-Report.pdf>.

¹⁴ See DCMS Sectors Economic Estimates 2017: Employment, 18 July, 2018, op. cit.

¹⁵ It is worth mentioning in that regard that the UK Government has recognised the specific requirements of the VFX sector, including international competition for talent, by including specific immigration rules for this sector, notably by including several posts on the Shortage Occupation List. See details at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-k-shortage-occupation-list>.

¹⁶ <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-film-other-sectors-uk-production-2015-2016-01-28.pdf>.

As far as the broadcasting sector is concerned, the DCMS estimates that 194 000 people were employed in the audiovisual sector in 2015, including 11 000 EU nationals. They account for 5.7% of the total audiovisual workforce.¹⁷

1.4. Main EU funding streams

The UK film and audiovisual industry benefits from access to a series of EU funding streams; the most evident being the Creative Europe MEDIA Sub-programme of the European Commission (and its predecessor, the MEDIA Programme). In addition, there are funding lines within the European Structural and Investment Funds (ESIF), namely through the European Regional Development Fund (ERDF) and the European Social Fund (ESF), from which the UK film and audiovisual industry is also a beneficiary. Moreover, the sector has also benefited from the research and innovation programme Horizon 2020 (as well as its predecessor FP7) and from the education and training programme Erasmus+.

According to a study commissioned by the British Film Institute (BFI) to track EU funding received by the UK screen sector over the period 2007-2017,¹⁸ 1766 identifiable projects benefited the sector with a total value of GBP 298.4 million.¹⁹ Over this 11-year period, Creative Europe (GBP 36 million) along with its predecessor, the MEDIA Programme (GBP 84.3 million), account for the lion's share of the overall EU spend on UK screen industries. In addition, it was estimated that the ERDF and FP7 accounted for additional GBP 79.6 million and GBP 71.4 million respectively.²⁰

According to the same source, the funding would have been allocated to the following sectors as follows: GBP 161 million for the film industry, GBP 98 million for the digital industry, GBP 71 million for research on screen industries, GBP 65 million for the video games industry and GBP 47 million for the TV industry. In addition, it is worth noting that *"since 2013, the value of ERDF and Horizon 2020 (FP7's replacement) to the UK screen sectors has fallen considerably"*,²¹ with Creative Europe becoming the largest EU funding contributor to the UK screen industries. In turn, some of the key British film funds such as Northern Ireland Screen Commission (GBP 36.4 million), Northern Film and Media (GBP 7.5 million), Screen Yorkshire (GBP 7.5 million), Creative Skillset (GBP 2.6 million) or Film London (GBP 2.3 million) appear as some of the largest beneficiaries of European funds devoted to the screen sector over the period 2007-2017. Some research institutions, such as Bangor University, Swansea University or the University of Surrey are also among

¹⁷ DCMS Economic Estimates – DCMS 2017, <https://bit.ly/2Jnq0US>.

¹⁸ SQW, "Mapping Study of EU Funding of the UK Screen Sectors 2007 – 2017, A Report for the British Film Institute", March 2018, <http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-mapping-study-eu-funding-uk-screen-sectors-2007-2017-v2.pdf>.

¹⁹ GBP 154.3 million received directly by UK beneficiaries, GBP 92.4 million received by projects in which a UK beneficiary is either the lead or a partner and further GBP 51.8 million received by European film distribution companies to support the release of British films

²⁰ Indicative figures.

²¹ SQW, "Mapping Study of EU Funding of the UK Screen Sectors 2007 – 2017, A Report for the British Film Institute", March 2018, <http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-mapping-study-eu-funding-uk-screen-sectors-2007-2017-v2.pdf>.

the top beneficiaries by overall value of the funds granted. When it comes to the number of projects funded, distribution companies benefit the most - Artificial Eye, Soda Pictures, Curzon Film World, Metrodome Distribution or Hanway Films, thanks to MEDIA support to the distribution of non-national European films in the UK.

1.4.1. MEDIA Sub-programme

The current Creative Europe Programme,²² for the period 2014-2020, is established by Regulation No 1295/2013 of the European Parliament and of the Council on 11 December 2013.²³ When it comes to the MEDIA sub-programme, its activities focus on two pillars: reinforcing the capacity of the European audiovisual sector to operate transnationally and promoting the transnational circulation of film and audiovisual works (article 9). The MEDIA sub-programme supports financially the development, distribution and promotion of EU film and audiovisual works; the calls for proposals are managed by the Education, Audiovisual and Culture Executive Agency of the European Commission (EACEA). In order to ensure the visibility of the Programme and provide on-the-ground assistance to potential applicants, the Regulation takes into account the co-financing, along with domestic institutions, of the CULTURE and MEDIA Desks in the member countries of the Programme (article 16). The Programme has a budget of EUR 1.46 billion over the period 2014-2020. As already mentioned, the BFI estimated that GBP 36 million had been invested by Creative Europe on British screen industries between 2014 and 2017²⁴ (this includes the funding of the distribution of British films in non-national European markets). According to the same source, British applicants benefited from an investment of GBP 6.4 million in the country by Creative Europe during fiscal year 2015-16.²⁵

When it comes to the access to the Creative Europe Programme, according to article 8(3), the Programme should be open to the participation to certain non-EU member states in accordance with the corresponding agreements, namely:

- Acceding countries, candidate countries and potential candidate countries benefiting from a pre-accession strategy,
- EFTA countries that are party to the EEA Agreement,²⁶
- The Swiss Confederation, on the basis of a bilateral agreement with that country and
- Countries covered by the European Neighbourhood Policy.²⁷

²² European Commission's Creative Europe Programme, <https://ec.europa.eu/programmes/creative-europe>.

²³ Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1295&qid=1528968434405&from=EN>.

²⁴ SQW, "Mapping Study of EU Funding of the UK Screen Sectors 2007 – 2017, A Report for the British Film Institute", March 2018, <http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-mapping-study-eu-funding-uk-screen-sectors-2007-2017-v2.pdf>

²⁵ BFI Statistical Yearbook 2017, <https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-statistical-yearbook-2017.pdf> (p. 229).

²⁶ Iceland, Liechtenstein and Norway.

According to the EACEA,²⁸ the following non-EU countries are part of the MEDIA sub-programme as of 22 March 2018: Albania, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Norway and Serbia. In addition, Georgia, Moldova, Tunisia and Ukraine participate in four of the schemes of the programme (training, festivals, film education and access to market). Once the UK has withdrawn from the EU, the country will not fall under any of the current abovementioned categories. However, it seems the EU and the UK are working on the possibility of enabling UK participation in EU programmes beyond the UK's withdrawal from the EU, until the end of the current Multiannual Financial Framework (MFF) by the end of 2020. Although amendments to the Regulation could be envisaged and an eventual bilateral agreement (as the one with the Swiss Confederation) could be set for future extensions of the Programme, there are only two options under the current legislation for the UK to remain attached to the MEDIA sub-programme; article 8(5) of the Regulation establishes the possibility of bilateral or multilateral cooperation actions targeted at selected countries or regions on the basis of additional appropriations paid by the latter. In addition, the programme is open to joint actions with non-participating countries on the basis of joint contributions (article 8(6)).

When it comes to the Creative Europe Desk and its Antennae, the UK currently has a MEDIA Desk hosted by the British Film Institute in London and three other MEDIA offices, one in Glasgow, hosted by Creative Scotland, one in Cardiff, hosted by the Welsh Government and one in Belfast, hosted by the British Council. Once the UK ceases to be member of the Programme, its Desk and offices would cease to receive funding from the Programme; however, this does not necessarily mean that these outreach and information offices would disappear, as the domestic partners could decide to take over the Commission's contribution. In fact, precedent was created in Switzerland, when the negotiations to participate in the Creative Europe Programme (2014-2020) were suspended in 2014. From that point on, the MEDIA Desk Switzerland continued its operations, although it became fully financed by the Federal Office for Culture (OFC/BAK). According to their own website,²⁹ "the political objective of Switzerland remains to become member of Creative Europe as soon as possible". Therefore this should be understood as a temporary solution, as the Swiss Government aims for reaccessions to the Programme. Any closure of the Creative Europe MEDIA Desk UK and offices may depend on the intentions of the British authorities to remain in the Programme or aim at re-joining in the short term.³⁰

²⁷ Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldova, Morocco, Syria, Palestine (this designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of the EU member states on this issue), Tunisia and Ukraine.

²⁸ European Commission, "Eligibility of organisations from non-EU countries", https://eacea.ec.europa.eu/sites/eacea-site/files/22032018-eligible-countries_en.pdf.

²⁹ MEDIA Desk Suisse, <https://www.mediadesk.ch/a-propos-die-schweiz-und-media>

³⁰ See further details in Chapter 3, Section 3.4. of this publication.

1.4.1.1. Cultural and Creative Sector Guarantee Facility

Within the budget of the Creative Europe Programme (2014-2020), EUR 121 million were earmarked to put in place a financial mechanism acting as insurance to financial intermediaries (e.g. banks) offering financing to small and medium-sized enterprises (SMEs) in the cultural and creative sectors of all EU member states, Iceland and Norway. According to the Programme itself, the mechanism is expected to generate EUR 600 million in loans and other financial products through a catalyst effect. Moreover, in view to the lack of knowledge of the needs and peculiarities of the cultural and creative sectors in Europe, it is also predicted to provide training to financial intermediaries so as to increase their engagement with these sectors.

Since it was launched in June 2016, the European Investment Fund³¹ (EIF), which in turn is part of the European Investment Bank Group³² (EIB), took care of the management of the Guarantee Facility scheme on behalf of the European Commission. Based in Luxembourg, the EIF is specialised in providing risk finance to SMEs all over Europe. A call for expression of interest of financial intermediaries wishing to apply to the Cultural and Creative Sectors Guarantee Facility is open until September 2020. At the time of publication, three EU investment institutions (from Spain, France and Romania) had signed agreements with the EIF to operate under the framework of the guarantee facility.

1.4.1.2. Europa Cinemas

Created in 1992, Europa Cinemas³³ is to date a network of 1121 cinema theatres with 2808 screens distributed around 44 countries. Its main goal is to provide financial support to cinemas in order to foster the theatrical exhibition of non-national European films. Most of the funding of the network comes from the MEDIA sub-programme of Creative Europe, with support for cinema theatres in member states ranging from a maximum of EUR 15,500 per year for a single-screen cinema to EUR 45,500 for cinemas with 15 or more screens. 46 British theatres (99 screens) received financial support in 2017.

Additional contributions from Eurimages³⁴ and the French Ministry of Foreign Affairs have allowed opening the network to cinema theatres located in Eurimages member states which do not have access to the MEDIA Programme (potentially, Armenia, Canada, the Russian Federation, Switzerland and Turkey).³⁵ Since the UK withdrew from Eurimages in 1996, just three years after joining it, the Eurimages scheme would not be an alternative for those British cinema theatres currently receiving support through the Europa Cinemas' MEDIA scheme.

³¹ European Investment Fund, <http://www.eif.org>.

³² European Investment Bank, <http://www.eib.org>.

³³ Europa Cinemas, <https://www.europa-cinemas.org/en>.

³⁴ Eurimages is the cultural support fund of the Council of Europe: it is endowed with an annual budget of EUR 25 million and currently numbers 37 of the 47 Member States of the Strasbourg-based Organisation, with Canada as associate member.

³⁵ Eurimages, Council of Europe, 2018 Guide, Support for cinemas, Strasbourg 15 December 2017, https://www.europa-cinemas.org/uploads/Activit%C3%A9s/Guide_Eurimages_2018_EN.pdf.

1.4.2. Cohesion Policy

About EUR 460 billion of EU funding (a total of EUR 646.7 billion including the national contributions) over the 2014-2020³⁶ period is allocated to member states and implemented through nationally co-financed programmes through the European Structural and Investment Funds (ESI Funds). These funds are regulated by Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013³⁷ and include five separate EU funds: the European Regional Development Fund (ERDF), the Cohesion Fund (CF), the European Social Fund (ESF), the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF).

Cohesion policy is the main EU investment policy in the Union with EUR 351.8 billion³⁸ (circa one third of the EU budget) set aside for funding for regional and cohesion policy over the period 2014-2020. EU cohesion policy is delivered through the ERDF, the CF and the ESF. The allocation of funds is done using Eurostat's NUTS (French acronym for *nomenclature of territorial units for statistics*) system,³⁹ which divides the EU member states into smaller administrative regions for statistical purposes. To this end the locations are separated based on the share of GDP of the EU average into less developed regions (below 75%), transition regions (between 75% and 90%) and more developed regions (more than 90%). Although most of the funding concentrates at less developed regions, all EU regions can benefit from these funds. In the UK, only West Wales and The Valleys and Cornwall and Isles of Scilly fall under the category of less developed regions.⁴⁰

1.4.2.1. European Regional Development Fund

The ERDF has an overall budget of EUR 281 billion for the period 2014-2020⁴¹ (EUR 199 billion contributed by the EU and the remaining by the member states). It aims to strengthen economic and social cohesion in the EU by correcting imbalances between its regions and has a strong focus on four key priority areas: research and innovation, digital economy, SME competitiveness, and low carbon economy. EUR 10.36 billion were earmarked to the UK through this fund for the period 2014-2020 – of which EUR 4 billion were contributed by the UK.⁴²

According to the BFI, GBP 79 million was allocated to the British screen industry through this fund over the period 2007-2017. An example of the projects and schemes supported through the ERDF would be the Yorkshire Content Fund,⁴³ aiming at investing

³⁶ <https://cohesiondata.ec.europa.eu/overview>.

³⁷ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1303&from=es>.

³⁸ http://ec.europa.eu/regional_policy/en/funding/available-budget.

³⁹ http://ec.europa.eu/regional_policy/en/policy/what/glossary/n/nuts/.

⁴⁰ United Kingdom, Structural Funds (ERDF and ESF) eligibility 2014 – 2020, http://ec.europa.eu/regional_policy/sources/images/map/eligible2014/uk.pdf.

⁴¹ <https://cohesiondata.ec.europa.eu/funds/erdf>.

⁴² <https://cohesiondata.ec.europa.eu/countries/UK>.

⁴³ Department for Communities and Local Government, Yorkshire and the Humber competitiveness and employment programme 2007-13, Annual implementation report 2014, June 2015,

in the production of content (i.e.: film, TV and video games), endowed with GBP 15 million over the period 2012-2015 - half of which coming from the ERDF, and managed by Screen Yorkshire. In addition, Screen West Midlands also implemented some actions partially funded by the ERDF, including its Advantage Media Production Fund (GBP 5.7 million)⁴⁵ to promote feature film and high-end TV production in the West Midlands over the period 2007-2013. Other national and regional film agencies in the UK such as Film London, Northern Ireland Screen, Northern Film & Media and the now-defunct Screen West Midlands, have also benefited from ERDF income.⁴⁶

1.4.2.2. European Social Fund

The European Social Fund (ESF) is the funding arm of the employment pillar of the EU cohesion policy. Its main aims are to support training and employment via training opportunities, vocational training, career development, transition from school to work, lifelong learning, etc., to create businesses and to support social inclusion of disadvantaged groups; it also aims at improving education and making public services more efficient. It has an overall budget of EUR 121 billion over the period 2014-2020⁴⁷ (of which EUR 83.9 billion are contributed by the EU), with EUR 8.75 billion earmarked to the UK (EUR 4.75 billion of which contributed by the EU, the remaining amount by the UK).⁴⁸

According to the BFI, GBP 9.9 million were received by British screen sector beneficiaries through this fund over the period 2007-2017. The Skills for the Digital Economy project⁴⁹ (2011-2015) is an example of ESF contribution to the UK screen industry; managed by Creative Skillset,⁵⁰ the project delivered training to almost 1000 people in West Wales, the Valleys, and North West Wales. Endowed with GBP 4.2 million (GBP 2.6 million contributed by the ESF), it focused on areas such as film and audiovisual production, international markets or shooting and editing.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/483326/YH_AIR_2014_Final_revised_22.7.15_.pdf.

⁴⁴ Screen Yorkshire – European Union, GBER State Aid Scheme – The Yorkshire Content Fund, <https://www.screenyorkshire.co.uk/wp-content/uploads/2015/04/GBER-State-Aid-Scheme.doc>.

⁴⁵ Beneficiaries under the West Midlands 2007 to 2013 ERDF Programme, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/479593/West_Midlands_List_of_Beneficiary_Nov_2015.pdf.

⁴⁶ Newman-Baudais, S. (2011), Public Funding for Film and Audiovisual Works in Europe, *European Audiovisual Observatory*, <https://rm.coe.int/1680783617> (p. 120).

⁴⁷ <https://cohesiondata.ec.europa.eu/funds/esf>.

⁴⁸ <https://cohesiondata.ec.europa.eu/countries/UK>.

⁴⁹ European Social Fund, <http://ec.europa.eu/esf/main.jsp?catId=46&langId=en&projectId=4>.

⁵⁰ Creative Skillset, “Skills for the Digital Economy training”, http://creativeskillset.org/nations/wales/skills_for_the_digital_economy/skills_for_the_digital_economy_training.

1.4.3. Horizon 2020

Horizon 2020 (formerly FP7) is the EU Framework Programme for Research and Innovation. It was established by Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013⁵¹ with a budget of EUR 77 billion for the period 2014-2020. By August 2018, Horizon 2020 had allocated EUR 4.73 billion⁵² to UK beneficiaries under this programme; that is 14.3% of the EUR 33.2 billion disbursed overall, with the UK being the second largest recipient after Germany.

Under certain conditions, some countries outside the EU can join the programme; article 7 of the Regulation opens Horizon 2020 to the following states:

- Acceding countries,
- Candidate countries,
- Potential candidates,
- European Free Trade Association (EFTA) members,⁵³
- Countries or territories covered by the European Neighbourhood Policy⁵⁴ or
- Countries or territories associated to the Seventh Framework Programme (FP7).

Currently, 16 non-EU countries are associated to Horizon 2020.⁵⁵

According to the BFI, around GBP 71 million were allocated to screen industry-related projects with UK involvement over the period 2007-2017, mostly through the FP7 programme. The project *Games research opportunities and research excellence in Cornwall and the EU*⁵⁶ would be an example of the type of research conducted which benefited the UK screen industry. Its aim was to build digital games research capacity at Falmouth University, and it was granted EUR 2.9 million (80% of which was contributed by the FP7 EU budget).

⁵¹ Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC,

https://ec.europa.eu/research/participants/data/ref/h2020/legal_basis/fp/h2020-eu-establact_en.pdf.

⁵² H2020 online projects summary, <https://webgate.ec.europa.eu/dashboard/sense/app/e8a41234-20b4-4e7e-80ef-335dd9e6ae36/sheet/941d3afe-da24-4c2e-99eb-b7fcbd8529ee/state/analysis>, accessed on 17th August 2018 (hover over UK map)

⁵³ Iceland, Liechtenstein, Norway and Switzerland.

⁵⁴ Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldova, Morocco, Syria, Palestine (This designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of the Member States on this issue), Tunisia and Ukraine.

⁵⁵ Associated countries for Horizon 2020,

http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/3cp/h2020-hi-list-ac_en.pdf.

⁵⁶ Games research opportunities and research excellence in Cornwall and the EU,

https://cordis.europa.eu/result/rcn/175042_en.html.

1.4.4. Erasmus+

Erasmus+ (previously the Lifelong Learning Programme) was established by Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013⁵⁷ to support education and training in a lifelong learning approach over the period 2014-2020. Endowed with EUR 14.8 billion, it includes actions in the fields of school education (Comenius), higher education (Erasmus), international higher education (Erasmus Mundus), vocational education and training (Leonardo da Vinci) and adult learning (Grundtvig), youth and sport.

By the end of 2017, UK applications had been awarded a total of EUR 507 million.⁵⁸ According to the BFI, the UK screen industries projects (with the UK as lead or as partner) benefited with GBP 4.47 million through the Erasmus+ scheme over the period 2007-2017.

1.4.5. UK contingency strategy

As soon as August 2016, the Chancellor of the Exchequer assured stakeholders in a statement that the Treasury would guarantee all EU structural and investment fund projects even beyond the departure of the UK from the EU. Moreover, it committed to underwrite payments of awards received by British applicants to EU funded projects while the UK is still a member of the EU, even when these projects continue beyond the UK's departure from the EU up until the end of the MFF in 2020.⁵⁹ This commitment was extended in July 2018 to include payments agreed after the UK leaves the EU up until the end of the MFF.⁶⁰

In view of the eventual withdrawal from the EU cohesion policy funding streams, each of the main UK political parties hastily proposed their solutions in this regard in their respective political manifestos for the UK general election 2017. The Labour Party put the case that there would not be a drop in EU structural funding until the end of the current funding round in 2020.⁶¹ In a similar line, the Liberal Democrats were in favour of underwriting funding for British partners in projects funded by the EU.⁶² In turn, the Conservative Party proposed the establishment of a *UK Shared Prosperity Fund*⁶³ aimed at

⁵⁷ Regulation (EU) No 1288/2013 of the European Parliament and of the Council of 11 December 2013, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1288&from=EN>.

⁵⁸ Erasmus Plus UK, Results and Statistics, <https://www.erasmusplus.org.uk/results-and-statistics>.

⁵⁹ <https://www.gov.uk/government/news/chancellor-philip-hammond-guarantees-eu-funding-beyond-date-uk-leaves-the-eu>.

⁶⁰ <https://www.gov.uk/government/news/funding-from-eu-programmes-guaranteed-until-the-end-of-2020>.

⁶¹ The Labour Party Manifesto 2017, <https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf> (p. 27).

⁶² Liberal Democrats Manifesto 2017, <https://d3n8a8pro7vhmx.cloudfront.net/themes/5909d4366ad575794c000000/attachments/original/1495020157/Manifesto-Final.pdf?1495020157> (p. 35 and 41).

⁶³ Conservatives Manifesto 2017, <https://www.conservatives.com/manifesto> (p. 35).

replacing or compensating for EU structural funds. In April 2018, the British Government issued a *Position Paper on the Future of Cohesion Policy*⁶⁴ acknowledging the benefits of cohesion policy on the EU's prosperity and the need for a post-2020 UK cohesion policy to reduce inequalities between the British nations based on the reflections on 40 years of implementation of EU cohesion policy programmes in the UK. The creation of the *UK Shared Prosperity Fund* is currently being led by the Department for Communities and Local Government (DCLG).⁶⁵

In a Joint Report from the negotiators of the European Union and United Kingdom government⁶⁶ on the UK withdrawal from the EU, released in December 2017, both parties stated that “following withdrawal from the Union, the UK will continue to participate in the Union programmes financed by the MFF⁶⁷ [Multiannual Financial Framework] 2014-2020 until their closure [...] Entities located in the UK will be entitled to participate in such programmes. Participation in Union programmes will require the UK and UK beneficiaries to respect all relevant Union legal provisions including co-financing.” Therefore, it seems that the EU and the UK intend that the latter remains part of the EU programmes and funds until the end of the current MFF by the end of 2020. In addition, “[t]he UK states that it may wish to participate in some Union budgetary programmes of the new MFF post-2020 as a non-member state”.

Although officially not a reaction to the Brexit, in March 2018 the UK government unveiled a GBP 150 million Sector Deal⁶⁸ between the government and the industry aimed at boosting the broader UK creative industries (film, TV, music, fashion and design, arts, architecture, publishing, advertising, video games and crafts) over the next two years, including the rollout of a Cultural Development Fund endowed with GBP 20 million. In addition, GBP 2 million will be earmarked for training to support industry-led Creative Industries Careers Programme. GBP 1.5 million have been allocated to extend the existing UK Games Fund, while GBP 2 million are foreseen to continue supporting the Get It Right campaign to educate consumers on the dangers of copyright infringement and theft.

⁶⁴ UK Government, Department for Business, Energy & Industrial Strategy, “Future of cohesion policy – position paper”, 11 April 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699106/UK_position_paper_on_future_of_cohesion_policy.pdf.

⁶⁵ Corporate report by the Ministry of Housing, Communities and Local Government single departmental plan (Updated 23 May 2018), <https://www.gov.uk/government/publications/department-for-communities-and-local-government-single-departmental-plan/ministry-of-housing-communities-and-local-government-single-departmental-plan>.

⁶⁶ Joint report from the negotiators of the European Union and the United Kingdom government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, 8 December 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf.

⁶⁷ The MFF establishes the spending ceilings for each EU broad expending category over a period of several years, allocating the amounts for all EU programmes and funds.

⁶⁸ Industrial Strategy. Creative Industries Sector Deal, HM Government, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695097/creative-industries-sector-deal-print.pdf.

This Sector Deal has an important research and development component, envisaging a public-private investment of GBP 58 million in immersive technologies through the newly created Industrial Strategy Challenge Fund (ISCF). Under this deal, an additional GBP 64 million will be allocated through the Arts and Humanities Research Council to create partnerships between universities and creative businesses across the UK.

1.5. State aid

Although there are no figures on the average level of public support to individual film and audiovisual productions in Europe, the financial contribution from public funds and fiscal incentives represents a fundamental source of financing for most EU film and audiovisual productions.

Public funding, be it in the form of governmental contributions, taxes, levies on industry stakeholders or Lottery funding, represents by far the main - and in many cases, the only source of income of public funds in the EU. Just a small share of the income of some funds is self-generated (through copyright, organisation of events and activities, etc.) A study conducted by the European Audiovisual Observatory⁶⁹ found out that EU film and audiovisual funds comprised, on average, EUR 2.2 billion per year over the period 2010-2014, with British national and regional funds accounting for circa 8.7% of it (EUR 191.1 million). On average, 91% of the income for film and audiovisual funds in Europe came from public sources, including levies on stakeholders (broadcasters, home video industry and VoD services), taxes on cinema tickets, lottery proceeds and contributions from the national, federal and regional governments; the figure goes down to 74% when it comes to the UK.

Fiscal incentives are usually managed by the Treasury department of a country's government, and can be divided into two broad categories: tax shelters for companies in order to reduce their tax liabilities in the country by investing in the screen industries and rebates/tax credits for film and audiovisual production companies in order to deduct a given share of the eligible production spending in the country from their tax liabilities. Although the concept is not new, it is true that fiscal incentives have flourished all around Europe in recent years, going from 12 schemes operating by 2008, to 26 by 2014, to the current situation where there are just a handful of EU countries without a fiscal incentive in place. However, in most cases the governments are trialling and studying such schemes.

The UK is one of the EU countries with more fiscal incentives targeting a broader scope of activities, with more than GBP 700 million invested in the screen industries

⁶⁹ Talavera Milla, J., Fontaine, G. and Kanzler, M. (2016). Public Financing for film and television content. The state of soft money in Europe. *European Audiovisual Observatory*, <https://rm.coe.int/public-financing-for-film-and-television-content-the-state-of-soft-mon/16808b6dee>.

through these mechanisms during the fiscal year 2016-2017.⁷⁰ To date, there are five fiscal incentive schemes in place devoted to feature film production, high-end television production, animation, children's television programmes and video games.

Public service broadcasters in the EU generated a volume of revenues of EUR 33.1 billion in 2016,⁷¹ of which, 77.7% was public funding, normally in the form of licence fees or allocations from the State or regional budgets. After Germany, the UK is the second largest country by revenues generated by public service broadcasters, with EUR 7.4 billion – that is, 22% of the overall EU revenues. In addition, the share of revenues coming from public funding (68.2%) is slightly lower than the EU average. Data for the UK include the three main public service broadcasters in the country (BBC, Channel 4 and S4C). Since ITV is a private broadcaster with a public service mandate, it was not included in the equation. In turn, public-owned Channel 4 is mainly commercially self-financed; therefore, it gets no income from public funding. Last, since the comparative size in terms of volume of revenues of S4C is quite small, in the end, the data concerning the public funding contribution to PSBs in the UK mostly refer to the contribution to the BBC, with a volume of revenues of EUR 6.1 billion in 2016 (81% of which coming from public funding).

⁷⁰ Fiscal incentives for screen industries in the UK, by sector and year, UK Government, 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630141/Combined_Creatives_Tables_July_2017.xlsx.

⁷¹ European Audiovisual Observatory's Yearbook 2017, <http://yearbook.obs.coe.int>.

2. European legal framework

Article 50 of the Treaty on European Union (TEU)⁷² states the procedure for a member state's withdrawal from the EU. First of all, the decision must be taken in accordance with the member state's own constitutional requirements. In the case of the UK, a non-binding referendum took place on 23 June 2016 which resulted in a simple majority of 51.9% of people voting in favour of leaving the EU. As the government had promised to implement the result of the referendum, it decided to initiate the official EU withdrawal process after a parliamentary vote.⁷³

A member state's decision to withdraw must be notified to the European Council.⁷⁴ The UK did this on 29 March 2017 by way of a letter sent by the UK's Prime Minister to the President of the European Council.⁷⁵ After such notification, a negotiation process for the conclusion of a withdrawal agreement was initiated between the EU and the UK. The EU Treaties shall cease to apply to the UK from the date of entry into force of this withdrawal agreement or, failing that, two years after the withdrawal notification (that is, the 30 March 2019 at 00h00 CET), unless the European Council, in agreement with the UK, unanimously decides to extend this period.

The main consequence of Brexit⁷⁶ will be that, unless a ratified withdrawal agreement establishes another date, all EU primary and secondary law will cease to apply to the UK from 30 March 2019, 00:00h (CET) ('the withdrawal date'). The UK will then become a "third country", that is, a country that is not a member of the EU.

Following an agreement by both Houses, the European Union (Withdrawal) Act became law by Royal Assent on 26 June 2018.⁷⁷ The principal purpose of the Act is to provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after Brexit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes. The Act will perform the following functions:

⁷² Consolidated version of the Treaty on European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

⁷³ <https://www.bbc.co.uk/news/uk-politics-38833883>.

⁷⁴ The European Council is made up of the heads of state or government of the 28 EU countries.

⁷⁵ Letter from Prime Minister Theresa May invoking Article 50 TUE, https://upload.wikimedia.org/wikipedia/commons/0/0f/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

⁷⁶ For simplicity's sake, throughout this publication we will use the term "Brexit" when referring to the UK's withdrawal from the EU.

⁷⁷ European Union (Withdrawal) Act 2018, <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted/data.htm>

- It will repeal the European Communities Act 1972 (ECA)⁷⁸ on the day the UK leaves the EU.
- The Act will end the supremacy of EU law in UK law, convert EU law as it stands at the moment of Brexit into domestic law, and preserve laws made in the UK to implement EU obligations. It will also create temporary powers to draft secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act will furthermore enable domestic law to reflect the content of a withdrawal agreement under Article 50 of the TEU once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal.⁷⁹

This chapter describes the main regulatory frameworks concerning the audiovisual sector at EU level in light of possible repercussions that Brexit might have on both the UK and the EU. As a basis for this description, we have used among other sources the Brexit Preparedness Notices published by the European Commission.⁸⁰ These notices, which aim at preparing citizens and stakeholders for the withdrawal of the UK, set out the consequences in a range of policy areas.

2.1. The EU single market

According to Article 26(2) of the Treaty on the Functioning of the European Union (TFEU),⁸¹ the EU internal market comprises “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. This freedom of movement is declined as follows:

- A customs union which involves “the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries”. (Article 28 TFEU);
- The removal of quantitative restrictions on trade and all measures having equivalent effect (Article 34-35 TFEU);
- The free movement of workers (Article 45 TFEU);
- The freedom of establishment (Article 49 TFEU);
- The free movement of services (Article 56 TFEU).

⁷⁸ European Communities Act 1972, <https://www.legislation.gov.uk/ukpga/1972/68/contents>.

⁷⁹ European Union (Withdrawal) Act 2018 (c. 16), Explanatory Notes, http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf. For a short explanation see e.g. Elliott M., “1,000 words / The European Union (Withdrawal) Act 2018”, <https://publiclawforeveryone.com/2018/06/28/1000-words-the-european-union-withdrawal-act-2018/>.

⁸⁰ All Brexit preparedness notices are available here: https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices_en.

⁸¹ Consolidated version of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

2.2. Audiovisual media services⁸²

2.2.1. Introduction

Television broadcasters and VoD services are services as defined by Articles 56 and 57 TFEU. The main regulatory instrument for such services at EU level is the Audiovisual Media Services Directive (AVMSD).⁸³ The AVMSD relies on the so-called "Country of Origin" principle, that is, AVMS providers are, as a general rule, subject only to the law and the jurisdiction of the EU member state where they are established (as determined in the Directive).

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, AVMS providers currently under the jurisdiction of the UK authorities may fall under the jurisdiction of one of the EU27 member states if the jurisdiction criteria laid down in Article 2 AVMSD are fulfilled. Moreover, EU27 member states will be free to take whatever measures they will deem appropriate with regard to audiovisual media services coming from the UK as a third country and not satisfying the conditions laid down in Article 2 AVMSD, provided that they comply with EU law and the international obligations of the EU and, where applicable, within the limits of the European Convention on Transfrontier Television (ECTT)⁸⁴ (recital 54 AVMSD).

After Brexit, UK audiovisual media services received or retransmitted in the EU will no longer benefit from the freedom of reception and retransmission laid down in Article 3 AVMSD. Therefore, EU27 member states will be entitled, based on their own national law and, where applicable, within the limits of the European Convention on Transfrontier Television, to restrict reception and retransmission of audiovisual media services originating from the UK.

⁸² See Notice to stakeholders - withdrawal of the United Kingdom and EU rules in the field of audiovisual media services, <https://ec.europa.eu/digital-single-market/en/news/notice-stakeholders-withdrawal-united-kingdom-and-eu-rules-field-audiovisual-media-services>.

⁸³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>.

⁸⁴ European Convention on Transfrontier Television, Strasbourg, 5 May 1989 (text amended according to the provisions of the Protocol (ETS No. 171)), <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007b0d8>.

2.2.2. Back to the ECTT?

The ECTT provides a legal framework for the free circulation of transfrontier television programmes in Europe, through minimum common rules, in fields such as programming, advertising, sponsorship and the protection of certain individual rights. Transmitting states must ensure that television programme services originating therefrom comply with its provisions, while freedom of reception of programme services is guaranteed as well as the retransmission of the programme services that are ascribable to the jurisdiction of other signatories to the ECTT and which comply with the minimum rules of the Convention. The Convention applies to all transfrontier programmes, regardless of the technical means of transmission used (satellite, cable, terrestrial transmitters, etc.) but does not apply to on-demand services. A Standing Committee composed of representatives of each party is responsible for monitoring the application of this Convention. Proceedings of conciliation and arbitration are also provided for.

The revision of the Convention has been blocked for many years, mostly because of the position of the European Commission with regard to the draft second amended protocol to the ECTT. The European Commission recalls that the EU has exclusive competence for the issues covered by the draft revised Convention and that EU member states are not allowed to become party to the Convention on their own.⁸⁵ The European Commission has made clear that the EU does not intend to become a party to the Convention as this would constrain the speed and scope of any future policy response in the areas covered. For its part, the Committee of Ministers of the Council of Europe has decided to discontinue any work on transfrontier television matters following the termination of the negotiations of the Convention.⁸⁶

After Brexit, the UK will be able to fall back on the ECTT to retain a degree of access to the EU market; however the ECTT is limited in a number of respects:⁸⁷

- Non-participation of some member states (Belgium, Denmark, and Ireland did not sign the ECTT, and Greece, Luxembourg, the Netherlands and Sweden did not ratify it);⁸⁸

⁸⁵ The reply by the EU Commissioner Ms Neelie Kroes of 1 December 2010 stated that “the matters covered by the draft revised Council of Europe Convention on transfrontier television are largely covered by the Audiovisual Media Services Directive, which coordinates certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services. For those matters the Union thus has acquired exclusive competence to enter into international agreements. As a consequence, even if the substance of the Convention would not conflict with Union Law – which is not the case here – EU member states may not become party to the Convention on their own”, see <https://www.mtitc.government.bg/en/category/44/information-note-revision-european-convention-transfrontier-television>.

⁸⁶ See “Transfrontier television: the revision of the Convention discontinued”, 04 February 2011, <https://www.coe.int/en/web/freedom-expression/standing-committee-on-transfrontier-television-t-tt>. For more information on this topic see “Information note on the Revision of the European Convention on Transfrontier Television (ECTT)”, CDMSI(2017)004, 03 March 2017, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680707a83.

⁸⁷ European Scrutiny Committee- House of Commons. Documents considered by the Committee on 13 November 2017 - 10. Digital Single Market: Audiovisual Media Services Directive, <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-i/30113.htm>.

- On-demand services are excluded from its scope;
- No enforcement mechanism is in place.⁸⁹

One solution would be to amend the ECTT in light of technological changes and in order to align it with the AVMSD. Some member states of the Council of Europe have expressed the general need to revise the ECTT.⁹⁰ Among them, some consider that Brexit makes this revision all the more important. Iceland sees the need for ensuring that “countries outside the EU also have a basic set of rules for the provision of audio-visual media services in a transfrontier context”. Bosnia and Herzegovina states that the ECTT’s usefulness “might be on the rise with Brexit, given the number of channels licenced in the UK and intended for other audiences”, a position also held by Lithuania. Bulgaria explained that “[a]fter BREXIT, the Audiovisual Media Services Directive will not be mandatory for transposition by UK, and this leads to a number of risks for the other EU Member states to weaken the possibilities for cooperation, more complicated procedures for detected violations or for getting insufficiently controlled media content. In view of the tendency to extend the scope of the Directive to video-sharing and social networking platforms, this leads to risks even on a much wider scale”.

The UK’s position was also clearly in favour of revising the ECTT:

We would, in particular, be open to extending the scope of the Convention to include on demand services as at present the Convention only applies to linear television - and to update the regulations to reflect technological developments. If the cooperation aspects of the Convention were updated there would be potential value to find a solution to difficulties encountered when dealing with audiovisual media services that are available across borders. There are aspects of the Convention which have been interpreted differently by the parties, and there could be more clarity about the relationship between AVMSD and the Convention, as well as better clarity in relation to the differences in jurisdiction criteria between the two instruments.

Regarding the steps that EU member states have undertaken to engage in dialogue with the European Commission to overcome the current situation, there were different views on this matter. Latvia attempted to raise this question with the European Commission in light of the UK leaving the EU but with no luck:

[Latvia has] regularly reminded the Commission that there are over 850 TV channels under UK jurisdiction targeting EU Member states. Even if the UK were to transpose the revised Audiovisual Media Directive, there is no dispute resolution mechanism. As Prime Minister

⁸⁸ See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/132/signatures>.

⁸⁹ According to an unreleased analysis of the Commercial Broadcasters Association (COBA), the ECTT permits countries to block commercial advertising, which is central to the business model of most linear broadcasters that does not conform to rules in the country of destination. This would further reduce its adequacy as a substitute.

⁹⁰ Revised summary of the responses received from the members of the Steering Committee on Media and Information Society (“CDMSI”) on the questionnaire regarding possible revision of the Convention on Transfrontier Television (“the Convention”), Strasbourg, 23 May 2018, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016808aef0e



Origin of the work	Conditions concerning the work
Co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries	Fulfil the conditions defined in each of those agreements.
Co-produced within the framework of bilateral co-production agreements concluded between Member States and third countries	Co-producers from the Union supply a majority share of the total cost of production. Production is not controlled by one or more producers established outside the territory of the Member States.

2.3. Copyright⁹¹

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of copyright will no longer apply to the UK. This means that the main international copyright treaties, to which both the UK and EU are contracting parties, will apply to the EU-UK relationship in the field of copyright. This will include:

- the protection of copyright and related rights (for example, exclusive rights of reproduction, distribution, rental, communication and making available for authors and, where applicable, also for holders of related rights, such as phonogram producers, performers and broadcasting organisations);
- the term of protection of copyright and certain related rights;
- obligations concerning technological protection measures and rights management information;
- databases;
- computer programs;
- semiconductor topographies;
- the enforcement of copyright (as one of the intellectual property rights in part 3 of TRIPS), including border measures.

According to the British Copyright Council,⁹² Brexit will not require the UK to change its copyright law, but it might choose to do so once it is no longer bound by the parameters of EU law. The UK will have to maintain a high level of protection for copyright works

⁹¹ See Notice to stakeholders - withdrawal of the United Kingdom and EU rules in the field of copyright”, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50768. For a critical view on this notice see Edwards S., “European Union: Brexit And Copyright Law”, <http://www.mondaq.com/uk/x/697926/Copyright/Brexit+And+Copyright+Law>.

⁹² British Copyright Council, “Impact of Brexit on UK copyright law”, http://www.britishcopyright.org/files/8514/9148/0121/Impact_of_Brexit_on_UK_copyright_law.pdf.

through its membership of international treaties.⁹³ However, without the requirement to adhere to the EU copyright framework, it will be possible for the UK to change certain provisions.

The following table explains the consequences for UK and EU stakeholders that the withdrawal of the UK will have in the field of copyright and related rights:

Table 2. Consequences of Brexit in the field of copyright and related rights

Legal instrument	Current rules	Consequence of Brexit for stakeholders
SatCab Directive 93/83/EEC ⁹⁴	Art. 1(2)(b): Satellite broadcast amounts to communication to the public only in the country where the uplink of the programme-carrying signal occurs. Accordingly, broadcasters only have to clear rights in the member state where the signal is introduced.	UK broadcasters will no longer benefit from this mechanism when providing cross-border satellite broadcasting services to EU customers and they will have to clear rights in all member states where the signal reaches and vice versa.
Directive on collective management of copyright 2014/26/EU ⁹⁵	Article 30: Obligation on a collective management organisation to represent another collective management organisation for multi-territorial licensing (for the online rights in musical works) in certain cases.	UK collective management organisations will not be subject to the obligation to represent collective management organisations based in the EU for multi-territorial licensing and vice versa.
Directive on orphan works 2012/28/EU ⁹⁶	Article 4: The system of mutual recognition allows certain cultural institutions to digitise and make a work available online in all member states once it is recognised as an orphan work in one member state.	The uses of orphan works from the UK allowed under the Directive, notably as regards making them available online, will no longer be allowed for cultural institutions in the EU and vice versa.

⁹³ WIPO Internet Treaties, WTO (TRIPS) and Berne and Rome Conventions.

⁹⁴ 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, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:31993L0083>

⁹⁵ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0026>.

⁹⁶ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0028>.

Legal instrument	Current rules	Consequence of Brexit for stakeholders
<p>Directive for the benefit of persons who are blind, visually impaired or otherwise print-disabled (EU) 2017/1564⁹⁷</p>	<p>Article 3: Mandatory exception for the benefit of persons who are blind, visually impaired or otherwise print-disabled and authorised entities operating on behalf of these persons.</p> <p>Article 4: Authorised entities may rely on the exception for a beneficiary person or another authorised entity in other member states and that beneficiary persons and authorised entities may have access to accessible format copies from an authorised entity established in any member state.</p>	<p>Persons in the UK will no longer be able to obtain accessible format copies from authorised entities in the EU and vice versa.⁹⁸</p>
<p>Regulation on cross-border portability (EU) 2017/1128^{99,100}</p>	<p>Article 3: The provision of an online content service to a subscriber who is temporarily present in a member state, as well as the access to and the use of that service by the subscriber, is deemed to occur solely in the subscriber's member state of residence.</p>	<p>Persons residing in the UK will no longer benefit from their digital content subscriptions when travelling to the EU; and a provider of online content services established in the UK 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</p>

⁹⁷ 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 <https://eur-lex.europa.eu/eli/dir/2017/1564/oj>.

⁹⁸ The exchange of accessible format copies between the EU and third countries that have ratified the Marrakesh Treaty is governed by Regulation (EU) 2017/1563. In this context it is important to note, that the UK is, as of 12 June 2018, not a party to the Marrakesh Treaty. See Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.242.01.0001.01.ENG.

⁹⁹ 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.168.01.0001.01.ENG.

¹⁰⁰ The geo-blocking regulation does not however apply to audiovisual services, including services the principle purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses. See 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 (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2018.060.01.0001.01.ENG>.

Legal instrument	Current rules	Consequence of Brexit for stakeholders
		clear all relevant rights for that or those member states. And vice versa.
Directive on the legal protection of databases 96/9/EC ¹⁰¹	Articles 7-11 Makers of databases (or rights holders) in the EU member states are protected under certain conditions ('sui generis database right').	UK nationals (unless they have their habitual residence in the EU) and companies/firms formed in accordance with UK law will no longer be entitled to maintain or obtain a sui generis database right in respect of databases in the EU and vice versa.

2.4. E-commerce and net neutrality¹⁰²

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, EU legislation in the field of the provision of information society services, in particular Directive 2000/31/EC (Directive on electronic commerce - ECD)¹⁰³ and Regulation (EU) 2015/2120 on open internet,¹⁰⁴ will no longer apply to the UK.

¹⁰¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009>.

¹⁰² See Notice to stakeholders - withdrawal of the United Kingdom and EU legislation in the field of electronic commerce and net neutrality, https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_e_commerce_final.pdf.

¹⁰³ 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 ('Directive on electronic commerce'), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0031>.

¹⁰⁴ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>.

Table 3. Consequences of Brexit in the field of e-commerce and net neutrality

Legal instrument	Current rules	Consequence of Brexit for stakeholders
Directive 2000/31/EC (Directive on electronic commerce) ¹⁰⁵	Article 3 Providers of Information Society services (ISS) are subject to the law of the EU member state in which it is established (COO principle)	ISS providers established in the UK and providing ISS into the EU will no longer be able to rely on the COO principle
	Article 4 Prohibition of prior authorisation schemes and similar requirements which apply specifically to ISS providers.	ISS providers established in the UK and providing ISS into the EU will no longer be able to rely on the rule precluding prior authorisation schemes.
	Articles 5-11 Basic requirements on information to be provided to users, online contracting and online commercial communications	The basic information requirements set out in the Directive on electronic commerce no longer apply to ISS providers established in the UK and providing ISS into the EU.
	Articles 12-14 Limitation of liability for “mere conduit”, “caching” and hosting	The limitations of liability set out in the Directive on electronic commerce no longer apply to intermediary service providers established in the UK.
Regulation (EU) 2015/2120 on open internet	Common rules on equal and non-discriminatory treatment of traffic in the provision of Internet access services and related end-users' rights.	These rules will not apply to the UK but they will continue to govern the provision of Internet access services into the EU27, no matter where the ISS provider is established.

2.5. State aid

As detailed in Chapter 1 of this publication, several countries support the production and distribution of audiovisual works through direct public funding and fiscal incentives. They also intervene in the audiovisual sector by providing financing to public service broadcasters. Both cases are considered to be state aid and regulated according to national rules on competition. However, the EU has exclusive competence¹⁰⁶ in establishing the competition rules necessary for the functioning of the internal market,

¹⁰⁵ Op. cit.

¹⁰⁶ See Article 3(1)(b) TFEU.

including those concerning state aid (Articles 107-109 TFEU). Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of state aid will no longer apply to the UK. These rules are described hereunder.

2.5.1. State aid for films and audiovisual works

Article 107 TFEU (ex Article 87 TEC) declares incompatible with the common market “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States”. However, there are exceptions to this rule, the most relevant for the audiovisual sector being Article 107.3(c) and (d) TFEU. According to these paragraphs, two types of aid may be considered to be compatible with the common market:

- Article 107.3(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- Article 107.3(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

According to Article 108(3) TFEU, the Commission has to be notified, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.¹⁰⁷ In the case of aid concerning audiovisual works (including cinematographic works), the Commission assesses whether the aid scheme respects the “general legality” principle, that is, whether or not the scheme contains clauses that would be contrary to the provisions of the EU Treaty in fields other than state aid (including its fiscal provisions). It then assesses the compatibility of the support scheme with the provisions of the TFEU dealing with state aid. The Commission’s assessment of state aid for audiovisual works is based on the rules indicated in the 2013 Cinema Communication.¹⁰⁸

¹⁰⁷ When the total amount of the aid granted per member state for one undertaking does not exceed 200,000 euros over any period of three fiscal years, this aid measure is exempted from the notification requirement in Article 108(3) TFEU. See Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (Text with EEA relevance), 18 December 2013, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1407>

¹⁰⁸ Communication from the Commission on State aid for films and other audiovisual works (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013XC1115%2801%29>. For more information on the Cinema Communication see Cabrera Blázquez F.J., Lepinard A., “The New Cinema Communication: All’s Well that Ends Well?” in Nikoltchev S. (ed.), *The new Cinema Communication*, IRIS plus 2014-1, European Audiovisual Observatory, Strasbourg, 2014, <https://rm.coe.int/1680783dab>.

In 2014, the revised General Block Exemption Regulation (GBER)¹⁰⁹ considerably extended the scope of exemptions from prior notification of state aid granted to companies.¹¹⁰

2.5.2. State aid for public service broadcasting

Article 106(2) TFEU (ex-Article 86(2) TEC) provides a derogation from the ban on state aid for undertakings operating a service of general economic interest. To benefit from this exemption, the following conditions apply:

- the service in question must clearly be defined as a service of general economic interest by the EU member state concerned;
- the undertaking in question must be explicitly entrusted by the EU member state with the provision of that service;
- the rules contained in the Treaties, in particular the rules on competition, apply to the service in question in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to it. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Concerning public service broadcasting, a Protocol was added in 1997 to the Treaty of Amsterdam¹¹¹ allowing member states to provide for the funding of public service broadcasting. This funding was conditioned to it being granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each member state, and not affecting trading conditions and competition in the EU to an extent which would be contrary to the common interest, while taking into account the realisation of the remit of that public service.

The European Commission assesses the application of State aid rules to public service broadcasting through the guidelines stated in its Communication from 2009.¹¹²

¹⁰⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance), <http://eur-lex.europa.eu/eli/reg/2014/651/oj/eng>.

¹¹⁰ See Cabrera Blázquez F.J., *Notification obligations for state aid concerning audiovisual works in the EU*, European Audiovisual Observatory, Strasbourg, 2018, <https://rm.coe.int/notification-obligations-for-state-aid-concerning-audiovisual-works-in/16808aa941>.

¹¹¹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on the system of public broadcasting in the member states, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FPRO%2F09>

¹¹² Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC1027\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009XC1027(01)).

2.6. Film and audiovisual co-production

In general terms, a co-production is the production of an audiovisual work by more than one producer. This joint adventure is agreed upon via a co-production contract, which can take different legal forms. Very importantly, each co-producer co-owns the work. This means that a company that merely participates in the financing of the work (without getting the status of co-owner through the co-production contract) is not a co-producer.

There are many ways of co-producing a film or an audiovisual work, but probably the most convenient way is doing a so-called “official” co-production. This is an international co-production which follows the rules of a co-production agreement (be it bilateral or multilateral) or the rules of the European Convention on Cinematographic Co-production.¹¹³ In all cases, the policy aim of an official co-production is that the resulting work will be considered “national” in all countries involved in the co-production and therefore be eligible for public funding in all those countries. In the case of a co-production with EU countries, the resulting work will also be considered European, so that it may profit from the broadcasting and VoD quotas of the AVMSD.

Many countries have signed bilateral or multilateral agreements with other countries concerning the regulation of international co-productions and the acquisition of “national” status. These agreements list the requirements (financial, artistic and technical) for a co-production to be considered as “national”. The co-production must be approved by the authorities representing each signatory to the agreement (normally ministry of culture or national film agency).

Concerning the European Convention on Cinematographic Co-production, this instrument aims at promoting the development of European multilateral cinematographic co-production, to safeguard creation and freedom of expression and defend the cultural diversity of the various European countries. The Convention was revised¹¹⁴ on 29 June 2016 and opened for signature on 30 January 2017 in order to provide new flexibility in constructing co-productions and to reflect technological change and evolving industry practice. In particular, the revised Convention is now open for accession by non-European countries.

Despite its revision, the original Convention remains in force and will exist side by side with the revised one.¹¹⁵ At the time of writing of this publication, the UK was party to the original Convention¹¹⁶ but had not yet signed the revised Convention.¹¹⁷

¹¹³ European Convention on Cinematographic Co-production, 2 October 1992, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007bd2d>.

¹¹⁴ Council of Europe Convention on Cinematographic Co-production (revised), 30 January 2017, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168069309e>.

¹¹⁵ Macnab G., “How the revised European co-pro treaty can benefit producers”, <https://www.screendaily.com/features/how-the-revised-european-co-pro-treaty-can-benefit-producers/5114776.article>.

¹¹⁶ Chart of signatures and ratifications of Treaty 147, European Convention on Cinematographic Co-Production (status as of 06/08/2018), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/147/signatures?p_auth=f9t2WnO4.

3. Priority issues in the audiovisual sector

3.1. Relationship between EU and UK law after Brexit

As a result of the referendum of 23 June 2016 supporting the view that the UK should end its membership of the EU - British exit or “Brexit” - the UK government began the formal process of withdrawal from the EU on 29 March 2017 by notifying the European Council pursuant to Article 50(2) of the TEU. Within this context, the UK adopted in June 2018 the European Union (Withdrawal) Act 2018, which will repeal the European Communities Act 1972 (ECA) on the day the UK leaves the EU and restate in UK law all enactments previously in force under EU law.¹¹⁸

In practical terms, the Act converts all existing EU-derived law into domestic law, allowing the UK to decide over time which laws it wishes to retain. The Act thus gives wide-ranging powers to the UK government to correct or remove laws that would otherwise not function properly after Brexit – although the government has sought to stress that the powers will not be used to create “new policy”. This approach is intended to avoid the significant gaps and consequent uncertainty if all EU-derived law were repealed without replacement. The Act addresses the status of existing regulations, although, in many cases, amendments are likely to be needed to take into account the UK’s new relationship with the EU.¹¹⁹ For example, from a commercial perspective, even if

¹¹⁷ Chart of signatures and ratifications of Treaty 220, Council of Europe Convention on Cinematographic Co-Production (revised), (status as of 06/08/2018), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/220/signatures?p_auth=f9t2WnQ4.

¹¹⁸ In practice, EU laws have been incorporated into UK law since the enactment of the ECA, which provides for the supremacy of EU law. As of the “exit” date, the ECA will need to be repealed in order for Brexit to take effect. However, repealing the ECA will bring an end to the constitutional relationship that exists between EU and UK law, and the vast amounts of secondary legislation that have been passed with the objective and justification of implementing EU law would have to be considered by the government. See also further details on the European Union (Withdrawal) Act in Chapter 2 of this publication.

¹¹⁹ In practice, the Treaty principles and EU Regulations, which rely on the principle of direct applicability, will automatically cease to apply to the UK, unless the UK Government legislates to the contrary. In other words, following Brexit, there may be gaps in UK law which were previously filled by the Treaty principles and EU Regulations unless the government passes legislation to fill those gaps. There may also be gaps in UK legislation as a result of references to EU legislation, regulatory frameworks and/or bodies that no longer apply to the UK. On the other hand, national legislation which has implemented EU Directives will remain in force following Brexit unless the government decides to replace, amend or repeal any such legislation. This creates the task for the UK government of deciding whether to embark on a process of reviewing Acts of

the UK decided not to retain any EU law, UK companies looking to trade in the EU would, nevertheless, still be required to comply with EU laws such as EU competition rules, regulations and standards. In addition, the UK will need to address EU provisions which regulate the relationship between EU member states themselves or are based on reciprocity. Moreover, the Court of Justice of the European Union (CJEU) will cease to have a direct impact on UK law after Brexit, as clearly stated by the Prime Minister in her first speech setting out the UK Government's priorities for Brexit on 17 January 2017. However, depending on the form Brexit takes, the UK courts might still be required to follow the lead of the CJEU in some instances, as the final arbiter on questions of the interpretation of EU law.

The exact nature of the future legal relationship between the UK and the EU is not yet known at the time of publication. The UK government has indicated that the UK does not intend to remain a member of the European Economic Area (EEA) or the EU Customs Union after Brexit. In its "White Paper",¹²⁰ the UK government has clarified that it intends to seek a "phased process of implementation" to move from EU membership to a new relationship with the EU. In practice, this is likely to mean a transitional period following the UK's withdrawal during which at least some aspects of the current arrangements will continue. As far as creative industries and cultural policy are concerned, it is worth noting that aspects of policies are devolved matters in the UK, that is to say, areas where decision-making has been delegated by the Parliament to devolved institutions such as the Scottish Parliament, the Assemblies of Wales, Northern Ireland and London or to local authorities. However, certain specific fields, such as the regulation of broadcasting and advertising; tax and international treaties; intellectual property (IP) policy; creative content fiscal incentives; and co-production treaties are regulated at UK level. Funding for the sector is also largely devolved, although there is UK-wide funding available from the British Film Institute (BFI), principally from the National Lottery, as the UK's lead agency for film. This Chapter will present the position of the UK authorities on some of the key priority issues for the audiovisual sector, as publicly expressed at the time of publication.

3.2. Free movement of persons and access to a skilled EU workforce

One of the first concerns raised by the House of Commons Committee on Digital, Culture, Media and Sport (DCMS) regarding the possible impact of Brexit on the creative industries

Parliament and statutory instruments with a view to ascertaining whether or not to maintain, replace or repeal each piece of legislation. See also Chapter 6 of this publication.

¹²⁰ The United Kingdom's exit from and new partnership with the European Union White Paper, last updated 15 May 2017, <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>.

concerns freedom of movement, the access to a skilled EU workforce, and the future ability of UK industry to be flexible in recruiting and deploying staff.¹²¹

Freedom of movement has been crucial to the success of the creative industries and covers as many aspects as visa-free travel arrangements between the EU and the UK; reciprocal rights for UK workers to move and work freely for short-term projects, such as performances and shoots; the ability to provide access to talent on an extremely rapid turnaround; the establishment of youth mobility schemes with the EU; the access to low-skilled workers and freelance talents, without additional costs and administration, etc.¹²²

The use of highly skilled professionals has been facilitated so far in the UK by minimal immigration controls designed to provide a speedy service adapted to the specificities of the screen industries, where productions are often set up at short notice. In particular, the film and TV industries have an agreement with the UK Home Office that permits short-term visas for senior talents and their creative teams. This system, negotiated by the British Film Commission and the BECTU Trade Union (for media and entertainment) alongside the Home Office under Tier 5 of the Points Based System (for creative workers),¹²³ has allowed the UK film industries to attract talents and maintain global competitiveness.

In the absence of an effective agreement to address movement of workers (as well as other immigration rules for international trainees and students in the film sector), the outcome of the Brexit negotiations or the introduction of a visa regime between the UK and the EU might affect the ability of highly qualified UK-based staff to seize opportunities in a timely manner and of UK productions to attract foreign talents. In these particular circumstances, many international productions would also become more difficult to set up in the UK for cost and operational reasons, especially in a sector largely composed by SMEs, as previously mentioned. An excess of bureaucracy may also become a major impediment when it comes to attracting US studios' investments. This could result in a loss of employment and investment in the UK economy. However, at the time of publication it was too early to say whether or not a solution could be found which would prevent such an outcome.

The UK Government has announced that it was working closely with the Creative Industries Council (CIC) and Creative Industries Federation (CIF) to understand the impact and opportunities of Brexit for the creative industries. It has committed to ensuring that

¹²¹ Digital, Culture, Media and Sport Committee, House of Commons, "The potential impact of Brexit on UK Creative industries, tourism and the Single Digital Market inquiry", Second Report of Session 2017-19, 25.01.2018,

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/inquiries/parliament-2017/brexit1719/>.

¹²² See Creative Industries Federation, Global Talent Report, Why the UK's world-leading creative industries need international workers and how to attract them,

https://www.creativeindustriesfederation.com/sites/default/files/2017-10/GlobalTalent_v10.pdf.

¹²³ Home Office, Tier 5 (Temporary Worker) of the points-based system, 5 January 2017,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/581596/Tier-5-Temporary-Worker-v18.pdf.

the UK can access the best talent to meet the needs of the industry and to maintain its reputation as a world leader.¹²⁴

3.3. Free movement of goods and services and access to audiovisual markets

3.3.1. Possible impact of Brexit on the “Country of Origin” principle

As explained in Chapter 2 of this publication,¹²⁵ the central principle that underpins the EU Single Market for audiovisual media services is the “Country of Origin” (COO) principle under the AVMSD, according to which AVMS providers are, as a general rule, subject only to the law and the jurisdiction of the EU member state where they are established. Under this principle, it is up to each national competent body (Ofcom in the UK) to ensure that AVMS providers comply with the national legislation implementing the rules set out in the AVMSD (for example, the prohibition of harmful content, the regulation of advertising content or the promotion of European works). The AVMSD was implemented in the UK by a series of regulations which primarily amended broadcasting legislation (the Communications Act 2003¹²⁶ and the Broadcasting Acts 1990 and 1996).¹²⁷

The COO principle has played a key role in making the UK an attractive location for the European headquarters of global broadcasters that use the pool of qualified production and broadcasting staff to distribute their services throughout Europe. In fact, as highlighted in Chapter 1 of this publication, the UK is the main country of establishment in the EU28 for television channels and on-demand services and a major hub in Europe for audiovisual services.¹²⁸ According to a survey published in 2014 by the Commercial Broadcasters Association (COBA), over eight out of ten multi-territory commercial broadcasters surveyed stated that London was their European or global headquarters.¹²⁹ About two-fifths of TV channels established in the UK primarily serve

¹²⁴ Written evidence submitted by the Department for Culture, Media and Sport (DCMS) (IOB0122), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/43820.html>.

¹²⁵ See Chapter 2, Section 2.2.1. of this publication.

¹²⁶ Communications Act 2003, <https://www.legislation.gov.uk/ukpga/2003/21/contents>.

¹²⁷ Broadcasting Acts 1990 and 1996, <https://www.legislation.gov.uk/ukpga/1996/55/contents>.

¹²⁸ See also the Broadcasting Sector Report for the House of Commons Committee on Exiting the European Union, Department for Digital, Culture, Media and Sport, <https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Sectoral%20Analyses/6-Sectoral-Analyses-Broadcasting%20.pdf>.

¹²⁹ Building a Global TV Hub, Multichannel broadcasters and the UK’s global competitiveness, <http://static1.1.sqspcdn.com/static/f/1321365/23977462/1385631686847/Building+A+Global+TV+Hub.pdf?token=JbUvOoNJM3fZkutoANV1ZE0kthc%3D>.

another market and about 60% of all European channels targeting another country are established in the UK.¹³⁰ In the absence of the COO principle, UK-based companies would face new barriers when broadcasting to Europe and could choose to relocate their headquarters to another member state,¹³¹ with the consequent direct negative effects on employment in the UK, and additional indirect losses for the UK creative economy, which thrives on clusters and network effects.

The UK government has well acknowledged the importance of the COO principle for the UK broadcasting industry. It has recently announced in its July 2018 White Paper on “the future relationship between the United Kingdom and the European Union” that the COO principle would no longer apply but that it would be seeking the best possible arrangements for the sector.¹³² However, no concrete solution has been mentioned so far as to how to ensure such principle can be retained. Indeed, the COO principle cannot remain merely by virtue of existing UK law. It will continue to apply only if the remaining 27 member states continue to allow UK-based companies to broadcast to their markets under UK rules and if the UK allows EU-based companies to broadcast in the UK under EU rules. This could be achieved under an EEA or bilateral agreement between the EU and the UK. However, by leaving the Digital Single Market (DSM), the UK will also lose voting rights for DSM legislation within the Council of Ministers and the European Parliament, which means that the country will no longer have direct influence over these rules, a state of affairs which might complicate the practical implementation of any agreement reached in this field. In any case, the loss of influence over DSM should not affect the legal status of any arrangement reached over COO-type arrangement in any UK-EU bilateral agreement.

The House of Commons Digital Culture, Media and Sport Select Committee has assumed that negotiations on audiovisual media services aimed at keeping the UK within the COO rules would take place outside of the general negotiations on an EU-UK trade agreement, because of the “cultural exception” that, until now, has largely excluded audiovisual services from the main text of EU Free Trade Agreements.¹³³ On the basis of this assumption, keeping the UK within the scope of the COO rules would therefore require a separate agreement, “but this is far from assured”, according to the House of Commons Select Committee. The European Scrutiny Committee noted that there “is no precedent for a third country securing Single Market-equivalent access for broadcasters.”¹³⁴

As to the possibility of using the COO principle provided under the European Convention on Transfrontier Television (ECTT),¹³⁵ the House of Commons European

¹³⁰ See details in Chapter 1, Section 1.1.3. of this publication.

¹³¹ See Ofcom’s written evidence, op. cit..

¹³² See Chapter 6, Section 6.1. of this publication.

¹³³ In particular, the House of Commons’ European Scrutiny Committee reported that: “*Broadcasting is one of the least liberalised sectors in global trade, in terms of both World Trade Organisation (WTO) commitments and Free Trade Agreements (FTAs). It is because most countries insist that the particular nature and importance of culture means that it should not be treated like other commodities (‘l’exception culturelle’.*”

¹³⁴ See House of Commons, Second Report, op. cit.

¹³⁵ For more details on the ECCT and the position of the UK government in relation to a revision of the Convention, see Chapter 2, Section 2.2.2. of this publication.

Scrutiny Committee considered that this would not be a viable alternative to the COO rules because the ECTT is deficient in a number of respects, not least because it only applies to traditional “linear” broadcasts and not to on-demand services. The Committee concluded that the Convention “is severely limited and perhaps most significantly, it lacks any form of enforcement mechanism.”¹³⁶

The Digital, Culture, Media and Sport Select Committee asked the government to set out the steps it is taking to avoid the cessation of the COO principle after Brexit and to explain its negotiation objectives, as well as the timescale for such negotiations. It has also asked the government to confirm as soon as possible that it intends for the UK to remain a member of the European Single Market, and under the terms of the current COO rules, for a transitional period after Brexit, until the end of 2020.

3.3.2. Possible impact of Brexit on trade in audiovisual goods and services

According to the Independent Film and Television Alliance (IFTA), the EU is currently the second most important outlet for UK exports after the US.¹³⁷ Over the period 2010 to 2014, UK export earnings in film services and royalties from EU markets represented over 38% of total film export earnings.¹³⁸ UK government economic estimates indicate that the EU is the most significant market for the UK’s audiovisual sector,¹³⁹ with exports of UK audiovisual services to the EU totalling GBP3 billion in 2015. Furthermore, according to the IFTA, the EU market is a more dependable outlet for a whole range of independent films than the US, as the exports to the US are principally made up of large-scale US studio blockbuster films that are shot in UK studios and locations, acquiring British nationality in the process. IFTA thus considers that the UK film industry as a whole, and the independent sector in particular could suffer important economic consequences if access to this strategic market were to be substantially more difficult or more onerous under a new set of trading rules after Brexit.

The UK Government stated in its Broadcasting Sector Report¹⁴⁰ that “it is seeking pragmatic and innovative solutions to issues related to the future deep and special partnership that [the UK] wants with the EU.” The report lists existing agreements between countries as precedents, such as the WTO’s General Agreement on Trade in

¹³⁶ House of Commons European Scrutiny Committee, HC71-xxxvii, Fortieth Report of Session 2016-2017, 25 April 2017, para. 10.5, <https://publications.parliament.uk/pa/cm201617/cmselect/cmeuleg/71-xxxvii/71-xxxvii.pdf>.

¹³⁷ See also figures on UK’s exports and imports in Chapter 1, Section 1.2.2. of this publication.

¹³⁸ See Written evidence submitted by the Independent Film and Television Alliance (IOB0098), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42361.html>.

¹³⁹ Ibid.

¹⁴⁰ Op. cit.

Services (GATS)¹⁴¹ or the North American Free Trade Agreement (NAFTA). However, as previously mentioned, both agreements either contain an exception for audiovisual (or cultural) services or they simply exclude them from their scope, and the EU does not have a precedent for including commercial commitments on cross-border broadcasting with third countries.

Yet, the report also highlights some measures that provide for cooperation in the broadcasting or audiovisual fields, such as the Deep and Comprehensive Free Trade Agreement between the Ukraine and the EU (DCFTA) (in view of gradual alignment with the EU acquis);¹⁴² the EU-Korean agreement (Protocol on Cultural Co-operation); and the CARIFORUM-EU Economic Partnership Agreement.¹⁴³ In addition, the government recalls that the UK has a series of bilateral audiovisual coproduction agreements with non-EU countries, including China, Brazil and South Africa, that could also serve as examples of cooperation.¹⁴⁴

3.3.3. Possible impact of Brexit on quotas of European works

Although, based on the UK's Government's stated position, it is assumed that adherence to AVMSD will not be mandatory for British broadcasters and VOD services after Brexit, it is important for UK (co)-produced content to continue to qualify as "European works". Ceasing to qualify as European works would indeed mean that works originated in the UK would be excluded from the national quotas in favour of EU-produced content in TV channels and VoD catalogues.

This issue was not directly raised by the House of Commons in its Report from 25 January 2018. However, the UK government addressed this question in its Broadcasting Sector Report of June 2017, building on the ECTT, as follows:

*The provisions in the Audiovisual Media Services Directive relating to European works apply not only to works originating in Member States but to works originating in countries that have signed and ratified the Convention [...].*¹⁴⁵

This interpretation has been recently confirmed in the July 2018 Policy Paper of the UK government, which explains that works originating in the UK would continue to qualify as European works, due to the UK's position as a party to the ECTT.¹⁴⁶

¹⁴¹ The UK is a member of the WTO in its own right, but its current commitments are listed in wider EU schedules. The DCMS has informed that the Department for International Trade is leading a process to create UK-only schedules – reflecting the current UK level of openness.

¹⁴² EU-Ukraine Deep and Comprehensive Free Trade Area, https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf.

¹⁴³ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf.

¹⁴⁴ See details in Chapter 2 of this publication.

¹⁴⁵ Op. cit.

It is also worth mentioning the possibility for UK co-productions to be considered “national” in all the EU countries involved in the co-production and thus become eligible for the broadcasting and VoD quotas of the AVMSD (as well as for public funding). As explained in Chapter 2 of this publication,¹⁴⁷ such possibility applies to the so-called “official” co-productions, within the framework of bilateral or multilateral co-production agreements between the UK and the concerned countries. It can also exist within the framework of the Council of Europe Convention on Cinematographic Co-production. However, although the UK signed and ratified the first Convention of the Council of Europe in 1992 and 1993, the UK left Eurimages in 1996. Like a number of other CoE Member States, the UK has, as yet, not signed and ratified the revised Convention, which was adopted on 29 June 2016 and opened for signatures on 30 January 2017. Separately, the UK Government has said “there are no current plans to re-join Eurimages following the UK’s departure in 1995 [sic]. We will continue to keep under review how such programmes can support British film.”¹⁴⁸

3.4. Ensuring access to EU funding streams after Brexit

3.4.1. Main aspects of UK access to EU funding

As indicated in Chapter 1 of this publication,¹⁴⁹ the UK film and audiovisual industry receives funding from a range of EU funding streams such as the Creative Europe MEDIA Sub-programme, the European Regional Development Fund (ERDF), the European Social Fund (ESF) and Horizon 2020.¹⁵⁰ Some of these funding programmes are paid out by local investment organisations (for instance, Creative England in the case of ERDF funds) and they in turn provide investment, advice and training for local companies; others are financed by the European Commission directly (for example, Creative Europe and Horizon 2020).

Based on Creative Europe Desk UK data, between 2014 and 2016, Creative Europe supported 283 UK cultural and creative organisations and audiovisual companies, as well as the cinema distribution of 115 UK films in other European countries, with grants totalling EUR 57 million (11% of the entire EUR 520 million Creative Europe budget allocated in this period). Within this, the MEDIA sub-programme invested about EUR 40 million in the UK screen industries between 2014 and 2017.¹⁵¹

¹⁴⁶ See details on the Position Paper of the UK government in Chapter 6, Section 6.1. of this publication.

¹⁴⁷ See in particular Section 2.6.

¹⁴⁸ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-07-10/3819/>.

¹⁴⁹ See more details in Chapter 1, Section 1.3 of this publication.

¹⁵⁰ This particularly concerns SMES outside of London.

¹⁵¹ See also, Written evidence submitted by Creative Europe Desk UK to the Culture, Media and Sport Committee Inquiry,

In terms of economic impact, Creative Europe funding is reported as having a significant leverage effect for UK beneficiaries in securing additional funding. In terms of audience, MEDIA has had a huge impact on the export of UK films to other European countries, as MEDIA-supported films have generated more admissions in the EU than films without MEDIA support.¹⁵² It has also had an impact as regards internationalisation (namely, the creation of new partnerships and access to markets); innovation and skills (for example through an increase in the skills of beneficiaries); and prosperity and influence for the UK.¹⁵³

3.4.2. Future arrangements after Brexit

The House of Commons DCMS Committee's report of 18 January 2018 has highlighted the potentially negative impact of the UK losing access to EU funding sources after Brexit; it urged the government to retain membership of Creative Europe, stressing the fact that EU membership is not a pre-requisite for participating in Creative Europe. The report cites the example of Iceland and Norway as nations outside the EU who have remained members of Creative Europe. However, it also acknowledges the fact that there had been limitations to the extent of participation in Creative Europe for some nations outside the EU, such as Switzerland.¹⁵⁴

The government has announced that it was looking carefully at the areas in which it is important for the UK to continue its membership, but did not commit to continued membership or a timeframe for a decision. According to the House of Commons' DCMS Committee, there is, however, good reason to believe that the UK will seek to participate in Creative Europe after Brexit. The ability to utilise Creative Europe to secure additional sources of funding, combined with the freedom it gives to UK organisations to lead projects with partners from across the EU (and outside the EU), are among the main incentives for the UK Government to maintain its participation in the programme.

Concerning the other sources of EU funding that are relevant to the development of local infrastructures, such as the ERDF and the ESF, the Government has already expressed its intention to create a new "UK Shared Prosperity Fund" to replace these structural funds and reduce inequalities across the UK after Brexit. In view of the potential challenges raised by Brexit in relation to access to EU funding, the House of Commons has asked the government to publish a mapping of all EU funding streams that

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/impact-of-brex-it-on-uk-creative-industries-tourism-and-the-single-digital-market/written/72411.html>

¹⁵² According to an analysis by Creative Europe Desk on 448 independent UK films produced between 2013 and 2016, 247 of them had cinema admissions in other European countries. All of these 247 films generated just over 81 million cinema admissions. Nearly half of these films (108) had support from Creative Europe. These films generated 53 million admissions (65% of all admissions), considerably more than the 139 films which weren't supported, which generated 29 million admissions (35% of all admissions).

¹⁵³ See Bigger Picture Research, Creative Europe, Value and Impact In the UK, Mid-term Survey, January 2017, http://www.creativeeuropeuk.eu/sites/default/files/CEDUK_MidTermSurvey_V3.pdf.

¹⁵⁴ See also Chapter 1, Section 1.3.1. of this publication.

support tourism and creative projects. In this context, the BFI has commissioned a mapping study of the EU funding of the UK screen sectors from 2007 to 2017. According to the report that was released in March 2018,¹⁵⁵ EU investment has been a critical part of the mix of private and public investment which characterises the UK screen sector (namely, the BFI's investment of National Lottery funding in skills development, the support for production through the Film Fund, and tax reliefs to the creative sector) and has fostered the UK's reputation as a major production hub. The report indicates that Creative Europe funding has become increasingly important over recent years, accounting for a growing proportion of all EU funding received by the UK screen sector.

3.5. State aids and fiscal incentives after Brexit

As mentioned in Chapter 1,¹⁵⁶ UK screen industries depend to a large extent on public support and fiscal incentives. Chapter 2 of this publication¹⁵⁷ also explained how State aid rules restrict the member states' ability to provide public support for commercial undertakings, including in the domestic creative industries sector. Depending on the arrangement with the EU after Brexit, the rules surrounding the existing fiscal incentives in the audiovisual sector and the restrictions on selective state aid could, from a UK perspective, be "eased" in the future. However, one could imagine that any request to access the Digital Single Market would require a certain degree of regulatory equivalence under which the EU rules would continue to apply. Similarly, even if the UK were completely free from EU constraints, the issue of state aids for the cultural sector would be likely to feature in negotiations over bilateral free trade agreements (where there is a constant demand from the US that there should be no cultural exception).¹⁵⁸

3.6. Ensuring a supportive copyright and enforcement regime after Brexit

Copyright in the UK is primarily based on the Copyright, Design and Patent Act 1988 (CDPA).¹⁵⁹ As explained in Chapter 2 of this publication, copyright has been harmonised throughout the EU through various EU directives and regulations, including the InfoSoc Directive, the Orphan Works Directive, the Rental and Lending Directive, the Resale Right Directive, the IPRED, etc.¹⁶⁰ Some of these EU laws are implemented in the UK through the CDPA, and others by way of separate statutory instruments.

¹⁵⁵ Mapping study of EU Funding of the UK Screen sectors 2007-2017, op. cit.

¹⁵⁶ See more details on State aids in Chapter 1, Section 1.4. of this publication.

¹⁵⁷ See more details on State aids in Chapter 2, Section 2.5. of this publication.

¹⁵⁸ See also Chapter 6, Section 6.1. of this publication.

¹⁵⁹ Copyright, Design and Patent Act 1988, <https://www.legislation.gov.uk/ukpga/1988/48/contents>.

¹⁶⁰ For more details, see Chapter 2 of this publication.

Although copyright harmonisation in the EU is far from complete, with significant differences still existing between member states in their copyright law and their application of the harmonised aspects of copyright law, EU directives reflect the member states' international obligations, including those of the UK, under, *inter alia*, the Berne Convention, the Rome Convention and the World Trade Organisation TRIPS Agreement. As such, one could expect the UK to keep the EU directives already implemented in the UK after Brexit, or implement transitional provisions that are consistent with the EU copyright framework. Outside the EU and its Single Market, the UK would probably still remain fairly closely harmonised with the EU copyright framework as a result of its international treaty obligations, though some inevitable judicial divergence is likely to arise over time. According to the UK Intellectual Property Office (IPO),¹⁶¹ as the UK is a member of a number of international treaties and agreements, UK copyright works (such as music, films, books and photographs) are protected around the world and will remain protected after Brexit. The IPO also stated that “the position on copyright and enforcement remains the same until the exit negotiations are concluded.”

However, it is not clear what will happen after that date, as the continued effect of EU directives and regulations will depend on the terms of the future EU-UK relationship. The UK Department for Culture, Media and Sport (DCMS) acknowledged in its Written evidence submitted to the House of Commons¹⁶² that “most stakeholders appear to feel that the current copyright framework is effective.” It also detailed that, wherever practical, the European Union “Withdrawal” Act would convert existing EU law into domestic law and that copyright law in the UK would thus remain broadly unchanged after Brexit. In addition, the government also relies on international treaties to ensure that copyright works from the UK will continue to be protected in the EU after Brexit. However, it also recognised that “in a small number of areas, EU copyright law has a cross-border effect, and consideration will need to be given to whether and how to retain this effect following the UK’s exit from the EU.” The DCMS indicated that the IPO was engaging with stakeholders on these issues to find a mutually beneficial solution.

Concerning enforcement issues, the IPO insisted on the role of the UK “as a world leader in enforcement and industry”. Until the negotiations on Brexit are concluded, the UK’s enforcement framework will remain unchanged and the UK will continue to play a part at the EU Observatory on Infringement of Intellectual Property Rights (EUIPO) and in bodies like Europol. The process for intercepting counterfeits and other infringing goods at the border will remain unchanged, as well as the role played by the UK in reviewing the Enforcement Directive and the European Commission’s work on tackling commercial-scale infringement.

¹⁶¹ See Intellectual Property Office, “Facts on the future of intellectual property laws following the decision that the UK will leave the EU”, 26 April 2018, <https://www.gov.uk/government/news/ip-and-brex-it-the-facts>. See also British Copyright Council, Written evidence, <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42079.html>.

¹⁶² Written evidence submitted by Department for Culture, Media and Sport (DCMS) (IOB0122), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/43820.html>.

4. Main concerns raised by Brexit for audiovisual industry stakeholders

4.1. Keeping access to EU talents

Ensuring the freedom of movement for workers and keeping access to EU talent and skills were highlighted across all sectors of the creative industries at the top of the priority list for Brexit negotiations. Creative industries are international and mobile by nature and their success depends significantly on the ease of movement of its people and assets. The free movement of workers also directly contributes to the sectors' flow of ideas, creativity and talent, according to most industry stakeholders.

As highlighted by the House of Commons Digital, Culture, Media and Sport Committee in its Report,¹⁶³ stakeholders in the screen industry are concerned that if restrictions such as migration quotas, punitive visa costs or excessive salary qualification thresholds were to be imposed after Brexit, this would be a major administrative burden on creative activity, particularly for smaller organisations that would not be able to absorb new operation costs and would become unsustainable (BFI). It would also have a serious impact on the competitiveness of the UK screen industry in certain specific sectors such as the visual effects (VFX) sector (UK Screen Association), and on the ability of the UK to attract international productions from US studios (Motion Picture Association, MPA).¹⁶⁴ The independent cinema sector also points out to the ability of the UK to attract international productions as well as the potential impact on the organisation of cinema and film festivals and events which bring together professionals from across borders and add value to the cinema experience of consumers (Independent Cinema Office, ICO).¹⁶⁵

¹⁶³ The Committee's report examines the potential impact of changes to three key areas: the workforce, funding and the regulatory environment. In producing this report, which was issued on January 2018, the Committee has sought to identify areas of concern that need to be addressed as part of the Brexit process. Written and Oral evidence was submitted to the Committee between November 2016 and April 2017 as part of the consultation process and can be viewed on the Committee's website at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2015/impact-of-brexit-16-17/publications/>.

¹⁶⁴ Written evidence submitted by Motion Picture Association (IOB0091), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42351.html>.

¹⁶⁵ Written evidence by the Independent Cinema Office (IOB0086), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42337.html>. See also, Watershed / Europa Cinema, Written

The majority of organisations from the creative industries that submitted written evidence to the House of Commons advised EU and UK leaders to negotiate a post-Brexit agreement that would not inhibit their vital ease of movement, but rather, seek to enhance and facilitate it.

Some solutions are also proposed, such as, for example:

- Ensuring free travel in the EU for workers in the cultural sector (Federation of Entertainment Union, FEU);¹⁶⁶
- Ensuring a post-Brexit deal which would allow British production workers to travel to EU countries without the need to apply for workers' visas and to obtain *cartes* for gear and equipment. Similar flexibility should apply to skilled workers from the EU working on British-based productions requiring their temporary presence in the UK (Independent Film & Television Alliance, IFTA);¹⁶⁷
- Ensuring that UK production crews can work in the EU and vice-versa (Motion Picture Association (MPA), PACT, representing UK independent content);¹⁶⁸
- If necessary, introducing "cultural and educational permits" that would enable people and assets operating in these sectors to continue moving with ease between the UK and other EU countries (British Council)¹⁶⁹ and introducing a short-term easy access visa for creative workers (for example, directors travelling for Q&A events) (Independent Cinema Office, ICO);
- Safeguarding the Home Office's current agreements that permit short-term visas for senior talent and their creative teams in order to continue attracting talents and to remain attractive in the film sector (BFI, Directors UK).
- Introducing a pragmatic migration and visa regime that properly recognises and responds to the distinctive characteristics of the creative industries, such as short-term projects and non UK-talent (British Screen Advisory Council, BSAC).
- Not imposing the Immigration Skills Charge¹⁷⁰ on migrants filling the 17 VFX roles on the Shortage Occupation List who enable the creation of significant value for the UK economy (UK Screen Association)

These measures should be low cost, rapid-to-process and be applied for adequate periods to encourage continued collaboration and partnership.

evidence of a potential loss of Creative Europe and Freedom of Movement for Workers and Goods on Europa Cinema, their communities and the wide sector,

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/42141.html>.

¹⁶⁶ Written evidence submitted by the Federation of Entertainment Unions (IOB 0135),

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/44808.html>.

¹⁶⁷ See Written evidence submitted by Independent Film & Television Alliance, op. cit.

¹⁶⁸ Written evidence submitted by PACT (IOB0070),

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/42284.html>.

¹⁶⁹ Written evidence submitted by the British Council: "Our shared European future",

https://www.britishcouncil.org/sites/default/files/our_shared_european_future_-_communique_-_03_july_0.pdf.

¹⁷⁰ From April 2017, Tier 2 Visas are subject to the Immigration Skills Charge of GBP 1000 per visa per year.

Interestingly, Brexit is also viewed by some stakeholders as an opportunity to point out the shortage of key skills in the UK and the need for the UK Government to develop new policies to meet the skills needs of the sector over the longer term (FEU, BFI, BSAC, Directors UK, UK Screen Association, etc). Among the desired outcomes of the process are closer links with the creative industries in the education sector, including the training of young talent and the development of courses that better meet the needs of the industry; a training and skills development system that meets the specific needs of the creative industries; the development of creative clusters and regional hubs to unleash talent in nations and regions (BSAC);¹⁷¹ and the careful calibration of the new “Apprenticeship-levy” recently introduced by the government (Directors UK, UK Screen Association).¹⁷²

4.2. Ensuring access to the EU market and beyond

4.2.1. Global support from the industry for the “Country of Origin” principle

Stakeholders in the broadcasting and screen industries generally agree on the importance of maintaining the COO principle after Brexit and on the risk to employment and the UK economy if the UK loses its position as an EU broadcasting hub due to the potential massive relocation of foreign broadcasters to other EU countries after Brexit.

Leading operators in the broadcasting sector, such as Sky, point out that in the absence of Single Market membership or bilateral agreements between the UK and the EU, it is unlikely that broadcasters will be able to rely on their Ofcom licenses to broadcast or deliver audiovisual content over the Internet to European markets, depriving them of the legal certainty necessary to operate on a cross-border basis.¹⁷³ Satellite services such as Satellite Information Services Ltd (SIS) consider that the absence of continued access to the Single Market on current terms could lead to different scenarios such as applying for an uplink licence in another member state or continuing to supply decoders to its customers in the EU to enable them to receive its service. Both options are seen as costly solutions that would not provide legal certainty for operators and users.¹⁷⁴

¹⁷¹ British Screen Advisory Council (BSAC): “Bringing the audiovisual industries together”, Priorities for a Sector Deal: supporting continued growth in the UK audiovisual and interactive entertainment sector (2.08.2017), <http://www.bsac.uk.com/wp-content/uploads/2017/08/BSAC-Industrial-Strategy-Sector-Deal-FINAL.pdf>.

¹⁷² Written evidence submitted by Directors UK (IOB0069), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42282.html>.

¹⁷³ Written evidence submitted by Sky (IOB0041), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42171.html>.

¹⁷⁴ Written evidence submitted by Satellite Information Services Limited (IOB0080),

Stakeholders in the screen industries point out the risk for the production side, since many of these broadcasters who would potentially relocate outside of the UK have been reliable, strategic sources of content commissioning and the acquisition of independent film and TV in the UK market; relocation would thus dissipate some of the huge development and production capital currently available to the local content industry.¹⁷⁵

As regards concrete solutions on how to maintain the COO principle after Brexit, industry stakeholders generally leave it to the UK Government and EU negotiators to seek the right agreement. Some stakeholders refer to a broader reciprocal and mutually beneficial trade agreement for the audiovisual sector that would include continued recognition of the COO principle;¹⁷⁶ others refer to the ECTT, which includes the COO principle in its provisions, as a possible solution.¹⁷⁷ However, they are also aware that the ECTT does not encompass non-linear audiovisual media services. The IFTA considers in this regard that:

*“(T)his should be a concern in the long run, as much of traditional broadcasters’ core audiences continue to migrate towards non-linear services such as the increasingly popular ‘TV catch-up’ services. This may be an opportunity for the UK, who would have the freedom to try to initiate a process of reviewing and modernising this Convention and bringing its regulatory provisions up to date with technological developments in the broadcast and digital communication services’ marketplace”.*¹⁷⁸

The UK regulator, Ofcom, has proposed that a triple test be applied when deciding on which EU laws in the regulated sectors should continue to apply in the UK, based on: the priority interests of UK consumers and the wider public; the promotion of competition and investment; and the interests of UK companies. This filter would be used for retaining what works in the EU framework; improving the framework where it may be deficient; and “avoiding making things worse, by inadvertently weakening powers or protections.”¹⁷⁹ The COO principle is part of what Ofcom considers as “the best of the EU framework” on the regulatory side that should be kept, so that UK-based media companies do not feel compelled to move their operations to another member state. Ofcom, however, points out that retaining this principle after Brexit would demand constructive discussions with the EU, especially given the fact that the UK would no longer be able to shape the future EU framework and regulatory obligations applicable to broadcasters after Brexit.

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture.%20Media%20and%20Sport/Impact%20of%20Brexit/written/42313.html>.

¹⁷⁵ See IFTA written submission, op. cit.

¹⁷⁶ See for example MPA and BSAC written submissions, op. cit.

¹⁷⁷ For more details, see Chapter 2 of this publication.

¹⁷⁸ See IFTA, op. cit.

¹⁷⁹ See Ofcom’s written submission op. cit.

4.2.2. Opening up new opportunities for trade

Beyond maintaining the COO principle and reaching an agreement that guarantees reciprocal market access to the EU market for UK companies, some industry representatives argue in favour of developing an ambitious trade policy in new markets outside the EU.¹⁸⁰ It is interesting to note that Brexit is perceived by certain sectors of the industry as an opportunity to develop the presence of British audiovisual companies in non-European markets around the world and to improve the export performance of films and television programmes in other international markets.¹⁸¹ Some industry stakeholders call on the government to implement an “evidence-based international trade policy that works with the sector to identify key target countries, any genuine barriers and creative ways to navigate access for business”.¹⁸² This could include undertaking research into key non-EU countries identified by the industry as growing audiovisual markets (for example, India, China and Nigeria) in order to provide market intelligence, identify any genuine barriers, as well as to reach agreement on co-production treaties covering cinema and TV.

Interestingly too, the IFTA analyses the impact of Brexit on domestic UK film incentives. In particular, the film and television industry is concerned to ensure that the creative sector tax relief regimes that are seen as particularly successful to buffer the competitiveness of the UK film content production sector in both film and television should not be damaged in any way by a post-Brexit trade agreement with the EU. It is unlikely, according to IFTA, that the UK will have complete freedom to set its own policy on production incentives without potential repercussions on its trading relationship with the EU. The IFTA recalls in that regard that all existing FTAs between the EU and third parties currently contain competition clauses that empower the EU regulator to intervene if it deems that the nature and intensity of the third party’s aid is such as to affect competition within the EU market. The IFTA calls on the UK Government for more legal certainty about what it will be able to do realistically with film incentives without creating unintended negative impacts on its relationship with the EU and attendant consequences on the UK film industry.¹⁸³

4.2.3. Keeping the status of “European works” for UK works after Brexit

Many organisations in the UK screen industry consider it essential that after Brexit, UK content continues to qualify as European works for the purposes of all current or proposed relevant quotas applicable in EU member states.¹⁸⁴ Indeed, although the UK has historically opposed some quotas for independent and EU-produced content contained in

¹⁸⁰ See for example MPA and BSAC’s written submissions op. cit.

¹⁸¹ See BSAC and Directors UK op. cit.

¹⁸² See BSAC op. cit.

¹⁸³ See IFTA’s Written evidence, op. cit.

¹⁸⁴ See written submissions of BFI, BSAC, Directors UK, IFTA, FEU.

the AVMSD, industry stakeholders now agree that these quotas play an important role in the distribution of a significant amount of content produced in the UK. Some stakeholders even consider that in countries where quotas have been implemented as a regulatory priority, there is evidence that they have had a positive impact and have led to the broadcasting of more European works on broadcasting channels.¹⁸⁵

Screen industry representatives in the UK fear that if UK audiovisual content were to become non-European for the purpose of meeting EU quotas, this outcome could have a measurable and detrimental impact on the options available for financing UK film and TV production, particularly for high-end series, given that EU secondary sales have been an important element in the export performance of UK audiovisual content. In particular, given that European works must account for at least 50% of all works broadcast on EU channels, ceasing to be eligible would mean that UK-based channels would move from a competitive situation of up to 100% of a channel's schedule to a maximum of 50%. In this respect, being qualified as European works increases the exportation of UK programmes to the EU and beyond and underpins investment in UK content by companies based in the UK and across the EU.¹⁸⁶ Moreover, if British content is qualified as European works, it is not subject to trade barriers such as tariffs.

Some stakeholders¹⁸⁷ stress that as long as the UK remains a signatory to the ECTT and as long as the AVMSD continues to recognise that programmes made in ECTT countries are "European works" for the purpose of its quotas, works produced in the UK will continue to be considered as European works.

A separate but related issue is the UK's future participation in Creative Europe. If the UK does not secure continued participation in the programme, UK films will not be considered European for the purposes of the Creative Europe programme and therefore European distributors, for example, will not be able to apply for grants to distribute them in participating countries. It is expected that this will affect the prices and reduce demand, in particular, in less commercial UK films. These films will continue to qualify as "European" for AVMSD quota purposes under the CoE Convention on Transfrontier Television.

4.3. Ensuring access to EU financing streams and co-production incentives

Continuing to participate in EU programmes such as Creative Europe, Horizon 2020, the ESF, the ERDF, etc. is part of the Brexit red lines for all creative industries, which see these programmes as essential for facilitating partnerships and providing investment, both of which have enabled UK creative industries to innovate and prosper.¹⁸⁸ For the BFI,

¹⁸⁵ See Directors UK's written submission, *op. cit.*

¹⁸⁶ See BSAC's written submission, *op. cit.*

¹⁸⁷ See BSAC *op. cit.*

¹⁸⁸ Creative Industries Federation: "Our red lines on Brexit",

the loss of EU funding “will leave a significant gap, which will need to be replaced in order to ensure that the sector continues to flourish and as a result the communities across the UK continue to appreciate a rich and diverse international cultural product, which will have a positive impact on wellbeing and social cohesion.”¹⁸⁹

BSAC considers that “given the range of benefits provided, it would be difficult to secure equivalent benefits from other international schemes, and any attempt at putting in place a new stand-alone scheme would bear higher administrative costs.” BSAC also emphasises the intense innovation experienced at production, distribution and platforms levels through the development of new kinds of cross-industry hybrid services, and recommends that synergies between the creative industries and other sectors be exploited as far as funding is concerned.¹⁹⁰

As for the ICO (Independent Cinema Office),¹⁹¹ it considers that re-joining Creative Europe following Brexit should be a priority in order to benefit from the level of inward investment in cinema in the UK and from the networking involved in this scheme. It considers that serious consideration should be given to a new capital funding scheme to replace the ERDF. According to ICO, leaving the EU is also likely to have a significant impact on the cinema’s ability to grow skills in the UK sector, to make use of skills from international candidates and to host talents for events, considering the huge impact EU funding has had on training professionals in the cinema sector. The same views are shared by representatives of Directors UK, who consider that, failing access to EU funding streams, the government must put in place mitigating measures at UK level to ensure that the screen sectors are prioritised in national and local investment plans.¹⁹²

From the producers’ standpoint, the MPA points out that UK film producers (including MPA members based in and/or running production in the UK) often rely on partnerships with European producers to make their films and TV content. Having access to EU co-production incentives and financing mechanisms is often particularly important to independent producers and is also of significance to MPA members.¹⁹³

The IFTA considers that as a third country, the UK could conceivably access Creative Europe funds, as precedential agreements with other third countries such as Norway (EEA) or Switzerland indicate. In order to remain partnered with Creative Europe, an independent UK would have to contribute to its core budget and to live by the rules set by the EU member states on funding principles and overall strategic directions. IFTA considers that “Creative Europe is of strategic importance enough for the UK creative sector to deserve special attention from the government in the course of its post-exit

<https://www.creativeindustriesfederation.com/sites/default/files/2017-06/Creative%20Industries%20Federation%20-%20Our%20Red%20Lines%20on%20Brexit.pdf>.

¹⁸⁹ British Film Institute, Written evidence submitted by BFI,

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/43010.html>.

¹⁹⁰ Building our industrial strategy: response to HM government green paper (17.04.2017), BSAC,

<http://www.bsac.uk.com/wp-content/uploads/2017/04/BSAC-Response-to-BEIS-Industrial-Strategy-Green-Paper-FINAL.pdf>.

¹⁹¹ Op. cit.

¹⁹² See Directors UK’s written evidence op. cit.

¹⁹³ See MPA’s Written evidence op. cit.

negotiations on trade and subsidy.” It is of the view that open access to Creative Europe should be maintained so that British companies can continue to benefit from a mechanism that has facilitated the development of successful creative and commercial relationships with partners in the rest of Europe. It also recommends that, in the long term, the UK Treasury commits to securing alternative funding in the event that a future trade agreement with the EU does not allow the UK to remain a member of Creative Europe. The measure would support the competitiveness and diversity of the UK marketplace for film, though it would not, in their views, replace “the loss of the EU-wide knowledge network that is a strategic premium of Creative Europe membership.”¹⁹⁴

4.4. Ensuring high standards of copyright protection and enforcement

The UK legal framework for copyright and enforcement regimes, as derived from international treaties and EU law implementation, is globally considered by the audiovisual industry as working well and striking a good balance between the needs of the audiovisual and technology sectors. Stakeholders from the creative industries call on the government to maintain this strong level of protection for copyright, technical protection measures and contractual freedom in order to provide legal certainty for UK creators, performers and rightsholders and to guarantee that the law is strictly enforced after Brexit. They need reassurances that the established standards of copyright protection will not be reduced and stress that any limitation to the protection would put UK creative business at a competitive disadvantage in relation to its European and international competitors.

There is indeed uncertainty within the industry at the moment as to the interplay between UK and EU copyright law and the application of secondary legislation implementing European directives after Brexit. Stakeholders have asked the government for clarification on how it intends to deal with UK copyright law derived from European directives and regulations.

Some stakeholders are also concerned that membership of the EEA would bind the UK to EU copyright law with only limited say in its formation, and speculation is unclear as to what “customised” options the UK could pursue outside of the EEA.¹⁹⁵ Others, like the Alliance for Intellectual Property, argue that, where the government may look to change UK law derived from the EU, it is essential that the consultation be carried out using an “item by item” approach in order to assess the full implications and impact for the sector.

Moreover, there is general concern among rightsholders’ representatives that the government may be tempted to move towards the US copyright concept of “fair use”,

¹⁹⁴ See IFTA’s Written evidence op. cit.

¹⁹⁵ Written evidence of the Authors’ Licensing and Collecting Societies (ALCS), <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Culture,%20Media%20and%20Sport/Impact%20of%20Brexit/written/42094.html>.

considered as weakening intellectual property rights protections,¹⁹⁶ and to review the existing territorial and exclusive copyright licensing.

The industry would also like to see a strong level of law enforcement ensured in the UK after Brexit to support the copyright system. Best practices and collaborative efforts between the EU and the UK are called for, for example in relation to initiatives related to commercial-scale infringement (“follow-the-money” approach),¹⁹⁷ cross-border enforcement and actions to ensure that the UK’s physical borders are adequately protecting the creative industries from the threat of counterfeit and infringing goods.

¹⁹⁶ For more details, see for example BSAC proposals, “developing intellectual property”, 26.5.2017, <http://www.bsac.uk.com/wp-content/uploads/2017/05/BSAC-Bazalgette-Review-Paper-B-FINAL.pdf>.

¹⁹⁷ See also Cabrera Blázquez F., Cappello M., Grece C., Valais, S., *Copyright enforcement online: policies and mechanisms*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, <https://rm.coe.int/1680783480>.

5. Enforcement and dispute resolution

5.1. The issues at stake

The UK Government has made clear on many occasions that Brexit will be the end of the Court of Justice of the European Union's (CJEU) direct jurisdiction in the UK. The government aims at maximising certainty for individuals and businesses, ensuring that they can effectively enforce their rights in a timely way, respecting the autonomy of EU law and UK legal systems while taking control of its own laws and continuing to respect the UK's international obligations. In this regard, the UK will take steps to implement and enforce its agreements with the EU within its domestic legal context. This will include providing for the appropriate means by which individuals and businesses can rely on and enforce rights contained in any agreements. This will be underpinned by the creation of international law obligations which will flow from the UK's agreements with the EU.¹⁹⁸

5.2. The House of Lords' report

A report by the House of Lords' European Union Committee¹⁹⁹ discusses three distinct issues that will have to be settled:

- The enforcement of the Withdrawal Agreement concluded under Article 50 of the TEU;
- Arrangements during the proposed transition period; and,
- The dispute resolution system that is implemented under any separate agreement that is reached on the future relationship between the EU and the UK.

First, the report highlights that liabilities and obligations under the Withdrawal Agreement may arise for many years after the UK has left the EU. Leaving the interpretation of the entirety of this agreement to the CJEU would be biased towards the EU (or at least it could be perceived in this way). Despite this, only the CJEU can have the

¹⁹⁸ Enforcement and dispute resolution: a future partnership paper, 23 August 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf

¹⁹⁹ "Dispute resolution and enforcement after Brexit", House of Lords, European Union Committee, 15th Report of Session 2017–19, 3 May 2018, <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/130/130.pdf>.

final say on the interpretation of EU law, and, *inter alia*, the Withdrawal Agreement may be referred to the CJEU to determine whether it is legally compatible with the EU Treaties. During the transition period, the UK would continue to be bound by the jurisdiction of the CJEU but the report advises that this continued jurisdiction of the CJEU “should be for a reasonable, time-limited, period; and, it is important for legal certainty that there is a longstop period for any claims that arise during the transition”. Finally, the future relationship will depend on the closeness of the partnership between the UK and the EU, but its formal structure “is likely to be composite in nature and there may be different levels of integration in different spheres. This may allow the UK to restrict CJEU jurisdiction to specified and limited areas, such as those involving direct co-operation with EU agencies, or within the field of justice and home affairs”.

5.3. The UK proposal of July 2018

In its policy paper entitled “The future relationship between the United Kingdom and the European Union”,²⁰⁰ the UK Government advances a detailed proposal for “a principled and practical Brexit”. The paper proposes, amongst other things, “joint institutional arrangements that provide for proper democratic accountability, allow for the relationship to develop over time, mean cooperation can be managed effectively and enable the UK and the EU to address issues as they arise”. These arrangements should reflect, amongst other things, that the CJEU “will no longer have the power to make laws for the UK and the principles of direct effect and of the supremacy of EU law will no longer apply in the UK”. Such arrangements would include “robust and appropriate means for the resolution of disputes, including through a Joint Committee and in many areas through binding independent arbitration – accommodating through a joint reference procedure the role of the CJEU as the interpreter of EU rules, but founded on the principle that the court of one party cannot resolve disputes between the two”. The arrangements would include “a commitment that UK courts would pay due regard to EU case law in only those areas where the UK continued to apply a common rulebook”.

The paper explains that consistent interpretation of the agreements in the UK and the EU is needed “in order to ensure that businesses and citizens have confidence in the rules and regulations that affect them”. Courts in the UK or the EU could take into account the relevant case law of the courts of the other party when they interpret provisions of national legislation intended to give effect to the agreements. Dialogue between both parties is deemed necessary to encourage and facilitate dialogue between the judiciaries of the UK and the EU. The Joint Committee should also keep under review the relevant case law of both the senior courts of the UK and the CJEU. In case of significant divergences between the respective courts’ interpretation of the agreements, the Joint

²⁰⁰ Policy paper - The future relationship between the United Kingdom and the European Union, Published 12 July 2018, Last updated 17 July 2018, <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>.

Committee “could be empowered to act to preserve the consistent interpretation of the agreements”.

In cases where the UK would agree to retain a common rulebook with the EU, UK courts would pay due regard to the case law of the CJEU but would not be able to make preliminary references to the CJEU. In cases of interpretation disputes, the UK recognises that only the CJEU can bind the EU on the interpretation of EU law, and therefore in these instances, a referral to the CJEU for an interpretation would be an option. The CJEU would only have a role in relation to the interpretation of those EU rules to which the UK had agreed to adhere as a matter of international law. The Joint Committee or arbitration panel would have to resolve the dispute in a way consistent with this interpretation.

5.4. The Commission’s position

In its Brexit Communication of 19 July 2018,²⁰¹ the Commission simply explains that issues surrounding the governance of the Withdrawal Agreement, including the role of the CJEU, remain unresolved.

²⁰¹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank - Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019, COM(2018) 556 final, 19 July 2018, <https://ec.europa.eu/info/sites/info/files/communication-preparing-withdrawal-brexit-preparedness.pdf>.

6. Waiting for an agreement

As explained in chapter 2 of this publication, the main consequence of Brexit will be that all European Union primary and secondary law will cease to apply to the United Kingdom from the withdrawal date. The United Kingdom will then become a “third country”, that is, a country that is not a member of the European Union.

Of course, this is just in theory. In practice, the future relationship between the UK and the EU will fundamentally depend on the final agreement that both parties are supposed to adopt before the withdrawal date. So far, the main issues discussed in the previous chapters of this publication remain unsettled. Among discussions about a “soft” or a “hard” Brexit²⁰² (or even about a second referendum), it is difficult to anticipate what is really going to happen, or what impact a final agreement will have on both parties.

This final chapter outlines certain issues that are important for the audiovisual sector without aiming to provide answers or enter into the speculation arena.

6.1. The UK’s “Policy Paper”

On 12 July 2018, the UK Government published its Policy Paper on the future relationship between the United Kingdom and the European Union.²⁰³ The Policy Paper presents the UK Government’s determination to build a new relationship that works for both the UK and the EU in which the UK would leave the Single Market. This new relationship would need to be broader in scope than any other that exists between the EU and a third country, and it would be structured around both an economic and a security partnership.

Concerning the economic partnership, the UK Government proposes new arrangements for services and digital, “providing regulatory freedom where it matters most for the UK’s services-based economy, and so ensuring the UK is best placed to capitalise on the industries of the future in line with the modern Industrial Strategy, while recognising that the UK and the EU will not have current levels of access to each other’s markets”.

²⁰² <https://www.independent.co.uk/news/uk/politics/brexit-hard-soft-what-is-the-difference-uk-eu-single-market-freedom-movement-theresa-may-a7342591.html>.

²⁰³ Policy paper “The future relationship between the United Kingdom and the European Union”, published on 12 July 2018 (last updated on 17 July 2018), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

The levels of access to each other's markets are obviously a key component of the UK Government's proposal. It acknowledges that the UK will not be a part of the EU's Digital Single Market. Nevertheless, the UK wants to develop an ambitious policy on digital trade with the EU, as well as globally. The UK therefore proposes a digital relationship that covers:

- digital trade and e-commerce;
- telecommunications and digital infrastructure;
- digital technology; and
- broadcasting.

In the broadcasting field, the UK Government announced that the "country of origin" principle would no longer apply. Despite this, the UK will be seeking the best possible arrangements for this sector. The Policy Paper also explains that works originating in the UK would continue to qualify as European works. The UK's position as a party to the ECTT would not be affected by the UK's withdrawal from the EU, and therefore the UK would continue to be able to treat audiovisual works originating in the EU as European works.

Concerning competition law, the UK aims at maintaining rules on subsidies and anti-competitive practices. The UK's proposals include, amongst other things:

- committing to a common rulebook on state aid, to be enforced and supervised in the UK by the national Competition and Markets Authority (CMA);
- maintaining current antitrust prohibitions and the merger control system with rigorous UK enforcement of competition law alongside strong cooperation with EU authorities;
- committing to high levels of consumer protection.

The Commercial Broadcasters Association (COBA), the UK industry body for digital, cable and satellite broadcasters and on-demand services, reacted²⁰⁴ to the Policy Paper, stating that it "provides little detail on the type of arrangements the UK is seeking in its negotiations with the EU on broadcasting." Without an arrangement that achieves mutual recognition of broadcasting licences, "broadcasters would reluctantly be forced to restructure their European businesses in order to obtain a licence in a remaining EU Member State". COBA expressed its concern that this forced restructuring might happen "within the next few months, and possibly within weeks for some companies ... so they have sufficient time to manage the process." It asked for a "status quo transition period" that would be "in the interests of both the UK and the EU. It would enable broadcasters to continue investing in local content and new services in the UK and across Europe without the significant disruption of having to restructure their businesses, at least until the long-term future relationship between the UK and the EU is clear."²⁰⁵

²⁰⁴ COBA: Brexit White Paper provides little clarity for £1 billion sector, July 2018, http://www.coba.org.uk/coba_latest/coba-brexite-white-paper-provides-little-clarity-for-1-billion-sector/.

²⁰⁵ Mann C., "UK broadcasters demand Brexit clarity", <https://advanced-television.com/2018/07/09/uk-broadcasters-call-for-brexite-clarity/>.

6.2. “Reciprocity gaps”

As explained in chapter 2, the European Union (Withdrawal) Act will convert EU law as it stands at the moment of Brexit into domestic law, and preserve laws made in the UK to implement EU obligations. One important problem concerning the conversion of EU law into UK law is that “reciprocity gaps” may appear in regulatory fields that depend on mutual or reciprocal recognition between EU member states. While UK law will, to a certain extent, reflect EU rules, EU member states will treat the UK as a “third country”.

The following “reciprocity gaps” could appear:²⁰⁶

- Broadcasting regulation: under the AVMSD, broadcasters obtain broadcasting licences in their country of origin in the EU and cannot (with a few exceptions) be subject to more stringent regulation elsewhere. A simple legislative conversion would force UK headquartered broadcasters to either relocate or select a second “home” territory within the EU, but allow broadcasters in the remaining EU member states to continue to benefit from AVMS protection in the UK.
- Multi-territory online music licensing: the regime in Title 3 of the Collective Rights Management Directive allows one EU collective management society to mandate another EU collective management society to represent its repertoire in relation to online multi-territory music licensing. Post-Brexit, PRS for Music (the UK collective management society affected) could be required to represent the repertoire of a smaller EU society without it having the ability to rely on the protections of the Directive (or indeed the reciprocal right to mandate an EU-based society).
- Cable TV: the mandatory collective licensing provisions applicable to cable retransmission in the SatCab Directive will continue to benefit EU broadcasters, whereas retransmissions of UK originated content will need to be cleared individually (potentially on a territory-by-territory basis).
- Satellite TV: the single point of clearance for satellite broadcasts based on the ‘place of uplink’ rule will cease to apply to UK satellite broadcasters (potentially forcing them to uplink from a remaining EU state), whereas EU originated broadcasts will continue to be treated as cleared for the UK.
- Digital Single Market reforms: a number of current legislative proposals from the Digital Single Market reforms incorporate similar forms of mutuality-based systems, including the Portability Regulation and the Proposal for a regulation laying down rules on the exercise of copyright and related rights applicable to

²⁰⁶ See Sherrell Ph., “UPDATED: Brexit and the Reciprocity Gap”, <http://www.mediawrites.law/brexit-and-the-reciprocity-gap/>.

certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.²⁰⁷

- **Exhaustion of rights:** at present, the UK treats any sale of a copyright-protected work with the rightsholder's consent in the EEA as exhausting the distribution right. If, as is the government's intention,²⁰⁸ the UK does not become part of the EEA post-Brexit, then an amendment to the Copyright Designs and Patents Act will be required; without it, sales in the UK would not be treated by the EEA states as relevant for exhaustion purposes, but sales in the EEA would exhaust rights for the UK.

6.3. Opportunities in times of Brexit

Changes certainly imply challenges, but can also pave the way for new opportunities, depending on how you see the glass, whether half full or half empty. This may also be the case for Brexit.

With regard to the regulation of Internet platforms, the UK would be free from the liability regime included in the Directive on electronic commerce.²⁰⁹ The UK's Culture Secretary has argued²¹⁰ that the UK could “write really forward-looking legislation that supports the innovation and the freedom that these social media platforms bring but also ensures they mitigate better against the harms”. Leaving the EU would be “an opportunity to write a set of laws that are absolutely right for the modern times that allow us to get this balance right at the same time. At the moment, without changing the e-commerce directive, you can't do that”. The minister suggested introducing new rules for platforms that would place social media between a pure hosting provider and an editor of content. And concerning the so-called “fake news” phenomenon, he did not rule out “legislative options to insist on the transparency of platforms in this area”.²¹¹

In the field of copyright, the UK could, in theory, introduce copyright exceptions such as a private copying exception without fair compensation or a more general

²⁰⁷ 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 programmes,
[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0284\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0284(COD)&l=en).

²⁰⁸ See, for example, Heffer G., “EU Withdrawal Bill: MPs reject EEA membership after Brexit in key vote”, 14 June 2018,
<https://news.sky.com/story/eu-withdrawal-bill-mps-reject-eea-membership-after-brexit-in-key-vote-11404084>.

²⁰⁹ See Chapter 2.

²¹⁰ Hern A., “UK could rethink social media laws after Brexit, says minister”, The Guardian, 14 March 2018,
<https://www.theguardian.com/media/2018/mar/14/uk-could-rethink-social-media-laws-after-brexit-says-minister>.

²¹¹ For more information on the regulation of video-sharing platforms see Cabrera Blázquez F.J., Cappello M., Fontaine G., Rabie I., Valais S., *The legal framework for video-sharing platforms*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2018,
<https://rm.coe.int/the-legal-framework-for-video-sharing-platforms/16808b05ee>

copyright exception of fair use. However, according to the British Copyright Council, this is unlikely given the number of copyright reviews in recent years followed by substantial changes in 2014.²¹² Regarding the Portability Regulation, it is now in force in the UK but would no longer be effective after Brexit. However, broadcasters (and even rightsholders) might not find it convenient to take this right away from consumers.²¹³

6.4. The “no deal” scenario

“A scenario in which the UK leaves the EU without agreement (a “no deal” scenario) remains unlikely given the mutual interests of the UK and the EU in securing a negotiated outcome”: this is the opening statement of a set of Guidances issued by the UK Government in September 2018, six months ahead of the exit day, namely 30 March 2019 at 00.00 CET.

The purpose of such Guidances, two of which are particularly relevant for the purposes of this publication – “Broadcasting and video on demand if there’s no Brexit deal”²¹⁴ and “Copyright if there’s no Brexit deal”²¹⁵ – is “to set out the legal status for audiovisual services that media services providers may wish to consider in the unlikely event that the UK leaves the EU in March 2019 with no agreement in place” and to find out how a “no deal” scenario would affect cross-border copyright.

The fact that media and copyright have a different regulatory background is of relevance in this respect.

6.4.1. Copyright rules

Since the UK and the other EU member states are all parties to the main international treaties on copyright and related rights, copyright protection for works originating in or made by nationals of the signatories does not depend on the UK’s membership of the EU. What is at stake are the cross-border mechanisms, which are unique to the EU and provide reciprocal protections and benefits between EU member states. These apply only insofar

²¹² British Copyright Council, “Impact of Brexit on UK copyright law”, http://www.britishcopyright.org/files/8514/9148/0121/Impact_of_Brexit_on_UK_copyright_law.pdf.

²¹³ See MediaWrites - by Bird & Bird, “Brexit & The Media Sector: Part 3”, <https://youtu.be/V08UPgUHz1Q?t=3m57s>.

²¹⁴ UK Department for Digital, Culture, Media & Sport, Guidance, “Broadcasting and video on demand if there’s no Brexit deal. How the rules for broadcasters and providers of video on demand services would change if the UK leaves the EU with no deal.”, 13 September 2018, <https://www.gov.uk/government/publications/broadcasting-and-video-on-demand-if-theres-no-brexit-deal/broadcasting-and-video-on-demand-if-theres-no-brexit-deal>.

²¹⁵ UK Department for Digital, Culture, Media & Sport, Guidance, “Copyright if there’s no Brexit deal. How cross-border copyright would be affected if the UK leaves the EU in March 2019 with no deal.”, 24 September 2018, <https://www.gov.uk/government/publications/copyright-if-theres-no-brexit-deal/copyright-if-theres-no-brexit-deal>.

as the UK is a member of the EU, which means that after March 2019, the reciprocity gaps described in 6.1.2. will kick in.

6.4.2. Audiovisual media services

In contrast to copyright rules, the media field has not been subject to intense regulation under international law, except for the European Convention on Transfrontier Television (ECTT) of the Council of Europe.²¹⁶ What is determining for the regulation of broadcasting and VOD services is the “country of origin” principle, the cornerstone of the AVMSD, which has so far allowed every kind of audiovisual media service authorised in one member state to be freely retransmitted in the other 27 member states without the need for a second licence/authorisation/any appropriate arrangement. In the case of a “no deal” scenario, this principle would no longer apply to services under UK jurisdiction that are broadcast into the EU, as the UK would be considered as a third country. This implies that the EU-27 may take any measure they deem appropriate in order to prevent retransmission on UK territory, provided that these measures are compliant with European Union law.

More specifically, the effect of the ECTT will be to allow for free circulation among the 20 ratifying EU member states,²¹⁷ both for UK-based services made available in one or more of the 20 ECTT ratifying countries, and for services based in one of the 20 ECTT ratifying countries that are retransmitted to the UK. A new licence/authorisation will probably be necessary for UK services made available in one of the 7 non-ECTT countries (Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands and Sweden); as far as services from the 7 non-ECTT countries are concerned, the UK’s plans are not yet clear. An exception is made for the Irish channels TG4, RTÉ1 and RTÉ2, where the UK has committed itself to ensuring continued licence-free reception, as recalled in the White Paper described in section 6.1.1., in order to reflect and build on the commitments set out in the Good Friday (Belfast) Agreement.²¹⁸

Apart from this geographical misalignment, which can also make reciprocity gaps emerge with regard to the establishment criteria for determining jurisdiction, there are further aspects that might raise some interpretative issues in a “no deal” scenario.

Firstly, the material scope of these two legal instruments is as follows: while the AVMSD, as last revised and soon to be adopted,²¹⁹ covers broadcasting, VOD and, to a

²¹⁶ European Convention on Transfrontier Television, ETS no. 132 as amended by ETS no. 171 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/132>. See section 2.2.

²¹⁷ The EU countries that have signed and ratified the ECTT are Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/171/signatures?p_auth=IYEMqzJJ.

²¹⁸ <https://www.gov.uk/government/publications/the-belfast-agreement>.

²¹⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States

certain extent, video sharing platforms, the ECTT has remained in its original form since 1998, hence applying only to broadcasting services. This particularly reflects on the set of obligations applicable to on-demand service and can lead to a complex situation when it comes to the provisions on the promotion of European works: in this case, since the definition of European works contained in the AVMSD refers to the ECTT,²²⁰ in case of a “no deal” scenario, audiovisual works produced in the UK would qualify as European works, without the UK being obliged to abide by the quotas applicable to VOD catalogues,²²¹ since these services are not included in the material scope of the ECTT.

A second kind of misalignment concerns the jurisdiction criteria itself. The AVMSD gives precedence to satellite up-links in order to establish which member state is competent; only when this is not applicable does it refer to satellite capacity.²²² The ECTT refers in the first place to the use of satellite capacity, and only when this is not applicable, to satellite up-links. In a “no-deal” scenario, this could lead to a situation whereby UK-based channels using the satellite capacity of one of the 20 ECTT ratifying countries could potentially fall under the jurisdiction of an EU member state and thus benefit from free retransmission without the need for a further licence. And lastly, there is the misalignment of enforcement mechanisms, as the Standing Committee set up by the

concerning the provision of audiovisual media services in view of changing market realities - Outcome of the European Parliament's first reading, (Strasbourg, 1 to 4 October 2018), ST 12689 2018 INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:ST_12689_2018_INIT.

concerning the provision of audiovisual media services in view of changing market realities - Outcome of the European Parliament's first reading, (Strasbourg, 1 to 4 October 2018), ST 12689 2018 INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:ST_12689_2018_INIT.

²²⁰ Article 1 of the revised AVMSD:

(1)(n) ‘European works’ means the following:

- (i) works originating in Member States;
- (ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;
- (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.”

2. (...)

3. 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.”

²²¹ Article 13 of the revised AVMSD:

(1) Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of these works.

²²² Art. 2(4) of the revised AVMSD:

Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

- (a) they use a satellite up-link situated in that Member State;
- (b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

ECTT has not been operational since 2010,²²³ and the Contact Committee set up by the AVMSD has no competence on third countries. This means that in case of conflicts, as in the example of a dispute where a channel breaching rules on hate speech is transmitting from the UK and is received in one of the 20 ECTT countries, the only applicable tools would be those deriving from public international law.

As the Romans said, *pacta sunt servanda* (agreements must be kept); but only *rebus sic stantibus* (things thus standing). Should Brexit entail a “fundamental change of circumstances” as defined by the Vienna Convention on the Law of Treaties,²²⁴ this might lead to an escape clause from the international agreement in question and make the ECTT inapplicable. But this is pure speculation, and escapes the scope of this report.

²²³ See section 2.2.2..

²²⁴ Article 62 of the 1969 Vienna Convention on the Law of Treaties:

1. 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:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

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