Brexit: implications for the TMT sector

We regularly advise on the legal implications of Brexit facing the TMT sector whether the UK’s exit is based on a negotiated withdrawal agreement or there is a “no deal” Brexit, and how the different options for the UK’s future trading relationship with the EU27 could provide or limit opportunities.

Whilst it has not caught headlines in the manner of financial services and concerns about the end of associated “passporting” rights, the impact of Brexit on the TMT sector still could be profound. Commentary on the impact in certain key areas is set out below. For further information on the impact of a “no deal” Brexit on the TMT sector, including tax aspects, see our separate article here.

General Legislative Framework

- In an attempt to create a “Digital Single Market”, the EU has introduced legislation covering fixed and wireless telecoms, internet services, broadcasting and transmission services. That legislative framework covers transmission systems which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, electricity cable systems, networks used for radio and television broadcasting and cable television networks, irrespective of the type of information conveyed. The element introduced most recently is the Directive on the European Electronic Communications Code, adopted by the EU institutions in December 2018.

Under the European Union (Withdrawal) Act 2018, UK legislation implementing the EU legislative framework will remain in place until such time as the UK deems it appropriate to make amendments. There will no doubt be difficulties in complying with some of the requirements of this UK legislation without the infrastructure and internal agreements of the EU. This will largely depend on the trading relationship agreed between the UK and the EU27 after Brexit.

Telecoms Regulation

- The Communications Act 2003 (Communications Act) is the main Act of Parliament which implements various parts of relevant EU Directives and sets out the duties and obligations of Ofcom, the UK’s national regulatory authority. Through the Communications Act, the UK has implemented “General Conditions”, “Significant Market Power Conditions” and “Universal Service Conditions” for the regulation of telecoms companies and Ofcom has general obligations to promote competition, develop the internal market in the EU and promote the interests of European citizens.

With Brexit, whilst the principles of encouraging competition and promoting consumer rights will remain, there will undoubtedly be a shift in focus and corresponding changes to the regulatory environment to promote the interests of the UK market and UK citizens, which could include changes to the telecoms authorisation regime and associated conditions for UK operators. This would lead to UK telecoms regulation diverging from EU telecoms.
Infrastructure

- EU law prohibits using taxpayer-funded resources to assist one or more organisations in a way that gives an advantage over others, except in strictly specified circumstances. This concept, known as “State Aid”, restricts the UK’s ability to invest directly in broadband infrastructure in the UK, amongst other areas. The UK could potentially seek to relax restrictions on State Aid following Brexit, enabling the offer of Government-backed financial assistance to companies to help them boost their copper and fibre networks in the UK. In the negotiations for the new trading arrangements between the UK and the EU27, however, the EU may insist on the incorporation of controls on Government subsidies and financial aid to companies, or the continued jurisdiction of the European Court of Justice to oversee the application of State Aid rules.

Roaming

- Unlike the Directives that were implemented in the UK by the Communications Act, the EU provisions on roaming charges are implemented through regulations which are directly effective in EU Member States without the need for separate implementing legislation. Since June 2017, these Roaming Regulations have allowed UK citizens and other EU citizens to travel in the EU with guaranteed surcharge-free roaming, and there have been requirements for mobile operators to apply a default financial limits for mobile data (applicable anywhere in the world, not only the EU).

If the UK and EU reach a deal on Brexit, it is likely that surcharge-free roaming would continue to be guaranteed during the likely transition period (until the end of 2020). Following this period, the arrangements for roaming, including surcharges, would depend on the outcome of negotiations concerning the future economic partnership between the UK and the EU. If the UK were to leave the EU without a deal, the costs that EU mobile operators would be able to charge UK operators for providing roaming services would no longer be regulated after March 2019. UK mobile operators would also be able to apply roaming charges to EU mobile users in the UK.

Net Neutrality

- The Roaming Regulations also contains provisions on “net neutrality”, the concept that the Internet should be open and free and there should be no discrimination by internet service providers (ISPs) between traffic. The blocking or throttling of traffic by ISPs is generally prohibited, although reasonable traffic management practices are permitted provided they are (i) transparent, (ii) non-discriminatory, (iii) proportionate, and (iv) based on objectively different technical quality of service requirements of specific categories of traffic (rather than commercial considerations).

It is unclear whether the EU rules on net neutrality will be preserved after Brexit. The UK Government has tended to prefer a market-led approach and voluntary arrangements and may make further moves in this direction if it is not constrained by EU legislation and the EU Courts.

Competition
• The effect of Brexit on UK competition law will depend on how the UK defines its post-Brexit relationship with the EU. Whatever the outcome, additional costs, regulatory burdens and uncertainty are likely to result from the need for telecoms companies and other companies in the sector to comply with both EU competition law and a separate (and in due course, potentially divergent) UK competition law regime. Businesses operating in the UK and the EU will need to be aware of the risk of differing authorisation regimes, parallel cartel investigations (and fines), parallel merger control notifications in some circumstances, and the importance of antitrust compliance in general.

E-Commerce

• The EU Electronic Commerce Directive (E-Commerce Directive), implemented in the UK in 2002 through the E-Commerce Regulations, establishes an EU internal market framework for e-commerce, ensuring greater legal certainty for businesses and consumers and greater ease of supply of e-commerce services across the EU. The UK Government has indicated that it intends in large part to maintain the approach of the E-Commerce Directive after Brexit. If there is a “no deal” Brexit, however, UK-based companies will lose the benefit of the “country-of-origin” principle under the E-Commerce Directive, requiring those companies to comply with the rules (and any divergences in application of the E-Commerce Directive) in each EU Member State in which they wish to trade.

Depending on the terms of the future trading relationship between the UK and the EU27, UK-based digital companies and consumers may not be able to benefit from other initiatives to ease the conduct of e-commerce under the European Commission’s Digital Single Market Strategy. A case in point is geo-blocking: the Unjustified Geo-blocking Regulation (Geo-blocking Regulation), which prohibits traders in one EU Member State from blocking or limiting access to their online interfaces by users from other EU Member States, will not apply in the UK if there is a “no deal” Brexit. Without further agreement, a UK business could discriminate between its UK and EU customers in the ways prohibited by the Geo-blocking Regulation, which would continue to apply to UK businesses trading in the EU after Brexit.

Broadcasting

• The EU’s Audiovisual Media Services Directive (AMS Directive) establishes a “country of origin” principle, such that providers of audiovisual media services can operate across the EU by obtaining a licence from a regulator in a single EU Member State (in the case of the UK, Ofcom) and be subject to the rules and regulations of that country only. Ofcom is the chosen regulator for many providers established outside the EU wishing to be authorised to broadcast within the EU. If there is a “no deal” Brexit, the AMS Directive and its country of origin principle will not apply, and UK providers may be regarded as providing services from a “third country” into the EU. Depending on the application of certain related legislation, EU Member States will be free to impose restrictions on services from those UK providers.

More broadly, Brexit will give the UK Government and Ofcom greater freedom to pursue a different approach to media regulation. A new Directive amending the AMS, including by widening its application to video-sharing platforms and introducing new protections for children, was approved by the EU at the end of 2018 and will be implemented by the EU27 over the next couple of years; the implementation of the new Directive is rendered uncertain by Brexit.

Content Licensing
The use of pan-EU content licences for digital content, particularly in the context of online music services, has grown considerably in recent years. Once the UK has exited the EU, the interpretation of the geographical scope and other concepts under these licence agreements may become uncertain. This could lead to disputes and litigation, as well as making it more complex and costly to negotiate new licences.

For further information, please refer to Brexit: the legal implications.

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