

Brexit:
implications
for the TMT
sector



If the UK votes to exit the European Union (Brexit) following the referendum on 23 June 2016, the legal consequences for businesses in the UK will be significant.

Lawyers from a wide range of disciplines within Simmons & Simmons have identified the key potential issues that would impact upon business activities in the UK in the event of an out vote and continue to monitor events closely as they unfold. We can advise on the legal implications of a Brexit and the procedures that it would entail. We can also flag for clients the legal issues that would affect the way that the UK does business and how the different options for the UK's future trading relationships could provide or limit opportunities. We are therefore in a position to advise on the major issues that the TMT sector would face, and would need to plan for in the event of an out vote, both during the withdrawal negotiations and in the run up to an exit in order to be ready to do business in a possible post-EU environment.

This briefing note describes some of the potential issues for the TMT sector to consider at this stage.

Issues for the TMT sector

EU Legislative Framework

The EU, in an attempt to create a "Single Digital Market", has created legislation which covers fixed and wireless telecoms, internet, broadcasting and transmission services (the "Framework"). The 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.

If a Brexit were to occur, the UK legislation which has implemented the Directives that make up the Framework will likely remain in place until such time as it is deemed appropriate to amend them by the UK. There will no doubt be difficulties in complying with some of the requirements of these pieces of UK legislation without the infrastructure and internal agreements of the EU. This will largely depend on the relationship of the UK with the EU after a Brexit.

Telecom Regulation

The Framework plays a major role in the General Conditions, Significant Market Power Conditions and Universal Service Conditions which regulate telecoms companies and how Ofcom, as the national regulatory authority, deals with telephone companies in the UK. It also generally imposes obligations on Ofcom to promote competition, develop the internal market in the EU and promote the interests of European citizens. If a Brexit were to occur there will undoubtedly be a shift in focus to promote the interests of the UK and UK citizens.

The Communications Act 2003 is the main Act of Parliament which implemented various parts of the Directives which make up the Framework and sets out the duties and obligations of Ofcom. Whilst it is possible that the UK may decide to amend

some of these provisions, the Communications Act is likely to remain in force "as is" until such time as the UK decides to amend it. In the short term it seems therefore likely that the telecoms authorisation regime and associated conditions for UK operators would continue in its current form. Over time, however, the UK Government and Ofcom could choose to amend the regulatory environment to reflect the UK market and deal with UK consumer issues. This could lead to UK telecoms regulation diverging from EU telecoms regulation over time.

Infrastructure

EU law prohibits using taxpayer-funded resources to provide assistance to 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 the broadband infrastructure in the UK. The UK could potentially remove this prohibition if a Brexit did occur. As a result the UK could offer Government backed financial assistance to companies to help them boost their copper and fibre networks in the UK. However it is also important to bear in mind that in the negotiations for the new arrangements for Britain's relationship with the EU, the EU may insist on the incorporation of controls on Government subsidies and financial aid to companies.

Roaming Charges

Unlike the Directives that make up the Framework (implemented in the UK by the Communications Act), the EU provisions on roaming charges will be implemented by Regulation (which is directly effective in EU member states). In June 2007, a Regulation came into force which put a mandatory cap on the charges that can be applied for roaming (i.e. use of a mobile outside one's home market) within the EU. Under the 2015 EU Roaming and Open Internet Regulation (the "2015 Regulation"), roaming charges are due to be abolished for all end-users from June 2017. Fair use provisions will still be applied to prevent permanent roaming.

Brexit could lead to UK telecoms regulation diverging from EU telecoms regulation over time.

Brexit could lead to the need for companies to comply with both EU competition law and a separate UK competition law regime.

In a Brexit scenario, UK based digital companies may not be able to benefit from the EU Digital Single Market Strategy.

Brexit would give the UK Government and Ofcom greater freedom to pursue a different approach to media regulation.

If the UK were to leave the EU it would not necessarily be able to benefit from this new regime and higher roaming charges could be applied to UK mobile users using their mobiles in the EU. Conversely, UK mobile operators would be able to apply roaming charges to EU mobile users in the UK. However, a Brexit would likely occur after the 2015 Regulation came into force which means that the mobile telephone companies would likely already have any necessary roaming deals in place and it is unclear whether such deals would survive a Brexit.

Net Neutrality

The 2015 Regulation also contains provisions on net neutrality. Net neutrality is the concept that the internet should be open and free and there should be no discrimination by internet service providers (ISPs) between traffic. The UK has adopted a market led approach coupled with a voluntary code of practice. Under the net neutrality provisions of the 2015 Regulation, which will come into effect on 30 April 2016, the blocking or throttling of traffic by ISPs will be prohibited. However, the new EU rules will allow reasonable traffic management provided that it is (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).

The new EU rules will come into effect before any Brexit could take place and therefore it is unclear whether they would be preserved in the event of a Brexit. In some Brexit scenarios, the new EU rules could cease to apply, in which case the UK may choose to adopt different rules on net neutrality. The UK government has shown greater interest in recent years in blocking access to certain sites and may make further moves 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 parallel cartel

investigations (and fines), parallel merger control notifications in some circumstances, and the importance of antitrust compliance in general.

E-commerce

The Electronic Commerce Directive (the "E-Commerce Directive") was adopted by the European Commission and the European Parliament in 2000. It created 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 EU borders. In 2002, the Directive was implemented into the law of the UK via the E-Commerce Regulations. The impact of a Brexit on e-commerce in the UK would depend largely on the exit terms negotiated. The UK Government may amend or repeal the E-Commerce Regulations, but UK based companies would likely still be required to adhere to the standards set out in the Directive to continue to trade with Member States.

Digital Single Market

On 06 May 2015, the Commission announced a Digital Single Market Strategy for the EU, including initiatives to establish a digital single market and to encourage the development of e-commerce within the EU. The Commission intends for the Digital Single Market Strategy to remove obstacles to the development of cross-border e-commerce within the EU. Digital Single Market infrastructures are expected to receive around €21.4bn in investments and support from the European Structural and Investment Funds. If the UK was to leave the EU, depending on the nature of the exit, UK based digital companies may not be able to benefit from the greater ease with which e-commerce should be conducted across the EU.

Broadcasting Regulation

Again UK broadcasting regulation is rooted in EU law. As with other areas of regulation it is likely that the UK would preserve the existing regime in the short to medium term. However, a Brexit would give the UK Government and Ofcom greater freedom to pursue a different approach to media regulation. For example, the current harmonised approach across the EU is that television broadcast services are subject to a greater level of regulation than 'over the top' (OTT) services such as video-on-demand (VOD) services, and a Brexit could enable the UK (should it deem it necessary or desirable) to choose to increase the level of regulation

surrounding VOD services. This is not necessarily a likely outcome but illustrates the point that the UK broadcasting regulatory regime could adapt to address UK market and consumer issues potentially in a manner that could diverge from the EU approach.

Passporting

In the event of a Brexit, UK broadcasters would lose the benefit of the “country of origin” principle, whereby if they are licensed and regulated in one member state, broadcasters are permitted to transmit within others without additional licenses. This principle is set out in the Audiovisual Media Services Directive. Whilst certain other international agreements would remain, this would

likely challenge the activities of those broadcasters making their content available across the EU and increase the regulatory burden on UK broadcasters.

Licences

The use of pan-EU content licences for digital content, particularly in the context of online music services, has grown considerably in recent times. In the event of a Brexit, the treatment of the UK and the definition of terms such as “European Union” 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.

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