

EXPLANATORY MEMORANDUM TO
THE BROADCASTING (AMENDMENT) (EU EXIT) REGULATIONS 2019
2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Digital, Culture, Media and Sport and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018 in order to remedy deficiencies in retained EU law arising from the withdrawal of the United Kingdom from the European Union. This instrument is also being made under the Communications Act 2003 to give directions to the Office of Communications (Ofcom) for international purposes in respect of broadcasting functions.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Audiovisual Media Services Directive (AVMSD) governs EU-wide coordination of national legislation on all audiovisual media, both traditional television broadcasts and on-demand services. It provides the main framework creating a single market for broadcasting, and setting out standards on a minimum harmonisation basis. The AVMSD was implemented in the UK by a number of pieces of legislation relating to broadcasting including the Broadcasting Acts 1990 and 1996 and the Communications Act 2003

Why is it being changed?

- 2.3 AVMSD provides for the freedom of reception and transmission of television (and other audiovisual) services. Services which are licensed or otherwise authorised in the country they originate from can be broadcast into any other Member State without needing any further authorisation and only observe the rules of that country – this is known as the country of origin principle. AVMSD also provides for minimum content standards for audiovisual services which are enforced by a system of mutual cooperation between the regulators of Member States. If the UK leaves the EU without a deal, AVMSD will no longer apply and these reciprocal arrangements will no longer exist.

What will it now do?

- 2.4 The above deficiencies will be remedied by amending retained EU law relating to broadcasting to ensure that broadcasts available in the UK continue to be regulated effectively and audiences are protected from harmful content. This will be achieved in two ways. First, by moving to a country of destination system of regulation requiring television services available in the UK to be licensed and regulated by Ofcom. Secondly, by implementing the European Convention on Transfrontier Television to continue a system of freedom of reception and transmission, minimum content

standards and mutual cooperation between Parties to the Convention. In addition, Irish language services will continue to be received in Northern Ireland in order to respect our commitments under the Good Friday Agreement.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European (Withdrawal) Act 2018 and section 411 of the Communications Act 2003) and the territorial application of this instrument is not limited either by those Acts or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the whole of the United Kingdom.

4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

5.1 The Secretary of State for Digital, Culture, Media and Sport has made the following statement regarding Human Rights:

“In my view the provisions of the Broadcasting (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 The Broadcasting Acts 1990 and 1996 and the Communications Act 2003 make provision for the regulation of broadcasting in the UK including the implementation of the AVMSD.

6.2 Section 211 of the Communication Act 2003 gives Ofcom the power to regulate television services that are provided by broadcasters within the jurisdiction of the UK for the purposes of the AVMSD e.g. where the broadcaster has its head office and takes editorial decisions about the service in the UK. Television services provided from the jurisdiction of another Member States do not require a licence from Ofcom to broadcast in the UK. The broadcaster will be regulated by that Member State. This implements the requirement in AVMSD to ensure freedom of reception and transmission of television services from other Member States.

6.3 AVMSD is a minimum harmonisation directive requiring broadcasters to comply with minimum content standards (e.g. protection of minors from harmful content, restrictions on advertising and product placement). These standards are set in the Ofcom Broadcasting Code made under section 319 of the Communications Act 2003. All broadcasting licences issued by Ofcom include conditions requiring broadcasters to meet those standards. Ofcom is required to cooperate with other Member States to ensure that broadcasters licensed in the UK comply with the standards. In the same way, Ofcom will seek the assistance of another Member State to deal with a complaint

that a broadcaster from that country is transmitting programmes breaching content standards.

- 6.4 Taken together this legislation ensures that the regulation of television services in the EU is governed by the country of origin principle.
- 6.5 The Communications Act 2003 also makes provision for the regulation of electronic communications. This instrument remedies deficiencies so far as they relate to broadcasting; deficiencies which relate to electronic communications fall to be addressed in a separate instrument.

7. Policy background

What is being done and why?

- 7.1 Following the withdrawal of the UK from the EU, the policy objectives are: first, to ensure that television services available in the UK are regulated properly and that the public continue to be effectively protected from harmful content after exit day; and, secondly, wherever practicable, the same laws and rules that are currently in place in the UK continue to apply providing continuity and certainty. In particular, the freedom of reception and transmission of television services within Europe should be preserved and the existing content standards for such services deriving from AVMSD should be retained. In addition, the UK's commitments under the Good Friday Agreement to make Irish language television services available in Northern Ireland should be respected.

Licensing

- 7.2 In the event of the UK exiting the EU without a deal, the 'country of origin' system of licensing would be deficient. AVMSD provides that services licensed in one Member State are able to broadcast freely to other Member States and need only observe the rules of that country of origin. These reciprocal arrangements created by AVMSD would no longer exist. Without the amendments carried out through this instrument, television services originating in EU27 States would still be allowed to be broadcast in the UK without a licence but services originating and licensed in the UK would not be allowed to be broadcast in other countries. Ofcom would remain under a duty to cooperate and seek assistance from EU27 regulators but those regulators would no longer be under a reciprocal obligation to respond to requests of assistance from the UK nor seek assistance from the UK. This would mean that there would be no mechanism for the UK to seek assistance in relation to a complaint about content standards of television services originating from another Member State - and therefore no way to regulate the content of such services and protect UK viewers from harmful content.
- 7.3 This instrument remedies this deficiency by amending section 211 of the Communications Act 2003 to require that any television service that is available in the UK, whatever its country of origin, is required to be licensed by Ofcom. The licensing of television services would be now governed by the 'country of destination' principle. This is achieved by requiring any service that can be accessed via a regulated electronic programme guide to have a broadcasting licence under the Broadcasting Acts 1990 or 1996. New section 211A defines a 'regulated electronic programme guide' as the EPGs provided under existing broadcasting licences (i.e. [Freeview, Freesat, YouView, EE, TalkTalk, BT, Virgin, Sky and LebaraPlay]) and gives Ministers the power to amend this list.

- 7.4 There are, however, two exceptions to this country of destination approach. The Council of Europe's European Convention on Transfrontier Television (ECTT) is a multilateral international agreement making provision very similar to AVMSD in that it provides for freedom of reception and transmission of television services across borders, minimum content standards for cross-border services and a system of mutual cooperation to enforce the standards. All but seven of the EU27 countries are parties to the ECTT. The implementation of the ECTT would mean that a system of country of origin regulation very similar to the system under AVMSD could be retained with countries party to the ECTT providing a degree of continuity. This instrument therefore implements the freedom of reception and transmission required by the ECTT by exempting television services provided by broadcasters in those countries from needing a licence from Ofcom.
- 7.5 The country of destination principle would also not apply to certain Irish language television services originating in the Republic of Ireland (which is not a party to the ECTT). The UK made commitments in the Good Friday Agreement, and later by ratifying the European Charter on Regional and Minority languages, to make such services available in Northern Ireland. This instrument therefore provides that the services provided by RTÉ and TG4 that include Irish language content do not require a licence in the UK and the existing bilateral arrangements between the UK and Ireland will ensure that content standards are met.
- 7.6 The Instrument makes a number of amendments consequential to the change of licensing system and the implementation of the ECTT to broadcasting legislation (the Broadcasting Acts 1990 and 1996, the Communications Act 2003, the Broadcasting (Original Productions) Order 2004 and the Wireless Telegraphy Act 2006)..
- 7.7 Regulation 5 of this instrument provides for transitional arrangements. Any television service originating in an EEA State, which is not a party to the ECTT (and therefore currently not required to have a licence), is treated as an exempt foreign service for 6 months after exit day. This provides the provider of the service a transitional period in which to obtain the necessary broadcasting licence from Ofcom.

Content standards

- 7.8 The Ofcom Broadcasting Code sets the standards which all services licensed by Ofcom must comply with as a condition of their licences. The Code is made under section 319 of the Communications Act 2003 and is the means by which the minimum standards required by AVMSD are implemented (e.g. protection of minors from harmful content, restrictions on advertising).
- 7.9 Following exit, these standards will be retained to ensure continuity and this can be achieved by Ofcom's existing powers under section 319. There is one exception: section 319(2)(i) provides that the Broadcasting Code must ensure that the international obligations of the UK with respect to advertising are complied with (i.e. the advertising requirements in AVMSD as well as requirements in other EU Directives e.g. the ban on tobacco advertising). After exit, these requirements will no longer be international obligations on the UK so this instrument amends section 319 to ensure that the requirements in these EU directives continue to have effect.
- 7.10 The requirement to meet the minimum standards in the ECTT will be implemented by a notification under section 319(7) of the 2003 Act which will have the effect of requiring Ofcom to take into account these standards when setting standards in the Broadcasting Code. These standards are very similar to those in AVMSD; the main

difference is that the ECTT standards contain stricter rules on the scheduling of advertising. These stricter standards, however, only apply to services which are transfrontier in nature i.e. services originating in the UK and which can be received, directly or indirectly, in another ECCT country. Regulation 7 requires Ofcom to treat a service as being received in another country only if it can be received throughout the country and if it can be accessed via an electronic programme guide regulated in that country (or where the head office is located if such guides are not regulated in that country). This will ensure that services that are only available in an ECTT country because of satellite overspill into part of that country are not treated as transfrontier services.

European works quotas

- 7.11 Article 16 to 18 of AVMSD require broadcasters to reserve a proportion of their transmission time to European works. That is, works originating in a Member State or made under an agreement between the European Union and a third country. In addition, a work originating in an ECTT country are also European works for the purpose of AVMSD. This means that works originating in the UK after exit will continue to be European works and able to meet the quota for such works throughout the European Union. These requirements are implemented via conditions on broadcasting licences issued by Ofcom under section 335 of the Communications Act 2003.
- 7.12 Following exit, the European works quotas will be retained to ensure continuity. This instrument amends section 335 of the 2003 Act to provide that Articles 16 to 18 continue to be treated as international obligations. A notification will be made under that section to require Ofcom to maintain conditions in broadcasting licences to secure that the European works quotas are met.

Listed events

- 7.13 Part 4 of the Broadcasting Act 1996 make provision for a listed events regime to ensure major events of national importance (e.g. the Olympics) are available on free-to-air television services. Article 14 of AVMSD states that Member States may produce a list of events that should be reserved for free to air services, and if they do, then other States need regulatory provisions to ensure that services under their jurisdiction do not purchase the exclusive rights to broadcast such events in a way that deprives a substantial proportion of the public in the original state from watching the coverage on free to air TV.
- 7.14 Following exit, this regime will be retained to ensure continuity. This instrument makes a number of consequential amendments to reflect the changes made the licensing of television services by other parts of this instrument. This instrument also extends the listed events regime to apply to ECTT countries (which are not EEA States) in accordance with Article 9bis of the ECTT. EEA States which are also ECTT countries will continue to be subject to the existing regime.

On-demand programme services

- 7.15 AVMSD also makes provision for the regulation of on-demand programme services (video on demand). This is implemented by Part 4A of the Communications Act 2003. Following exit, this system of regulation will be retained. This instrument amends Part 4A of the 2003 Act to ensure that it continues to operate effectively after exit. In particular, the definition of an on-demand programme service is amended to limit to where the head office and editorial decisions are taken in the United Kingdom. This

will ensure that services are not subject to dual regulation in the UK and a EU27 Member State.

Conditional access

- 7.16 Section 75 of the Communication Act 2003 applies to conditional access systems: television platforms which require end-users to pay to access content (e.g Sky). Providers of such systems must comply with access-related conditions (fair, reasonable, non-discriminatory) as required by the Access Directive (Directive 2002/19/EC). Following exit, this requirement will continue to apply. This is achieved by amending section 75 to ensure that the relevant part of the Directive continues to have effect in UK law.

Unauthorised decoders

- 7.17 The Conditional Access Directive (Directive 98/84/EC) requires Member States to prohibit the manufacture, distribution, installation, use etc. of illicit devices which can be used to give unauthorised access to a protected service. For example, such devices can be used to decode the encryption to access services provided on platforms such as Sky. The Directive is implemented by sections 297A and 298 of the Copyright, Designs and Patents Act 1988 which make it an offence to make, distribute etc. an unauthorised decoder and confer various rights and remedies on the provider of conditional access services.
- 7.18 Following exit, these provisions will still apply to services originating in EU27 Member States. The equivalent provisions in those countries will, however, not apply to services originating from the UK or providers in the UK. The reciprocal arrangements would no longer exist and there would be one-sided obligations on the UK. Therefore this deficiency is remedied by amending sections 297A and 298 so that these provisions only apply to transmissions and services originating in the UK.

Gambling Act 2005

- 7.19 Sections 328 and 333 of the Gambling Act 2005 enable the Secretary of State to impose restrictions on the broadcast advertising of gambling services. This power is limited for television services by section 333(5) to broadcasters under the jurisdiction of the UK for AVMSD purposes or not under the jurisdiction of an EEA state other than the UK. This instrument amends these provisions, as a consequence of the changes to the licensing system set out above, to apply to any broadcaster who falls to be regulated by Ofcom under revised section 211 of the Communications Act 2003.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.
- 8.2 Alongside the European Union (Withdrawal) Act 2018 powers the instrument is also being made under section 23 of the Communications Act 2003.

9. Consolidation

9.1 There are no plans for consolidation.

10. Consultation outcome

10.1 Ofcom, as the audiovisual regulator, were consulted in drafting this instrument.

11. Guidance

11.1 Ofcom will issue guidance for broadcasters following their usual process once this instrument has been made.

12. Impact

12.1 The impact on business, charities or voluntary bodies is that broadcasters with services available in the UK will need to familiarise themselves with new licensing system and guidance as provided by Ofcom.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the instrument will maintain the status quo as far as possible. A *de minimis assessment* has been carried out and has concluded that the equivalent annual costs to businesses would be c. £0.46m, mainly due to familiarisation costs.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that the need for robust regulatory framework to protect UK audiences from harmful content outweighs the potential impact on small businesses. We also estimate that the vast majority of audiovisual service providers are not categorised as small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that the Department for Digital, Culture, Media and Sport will continue to work closely with Ofcom and address any concerns appropriately if any arise.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required. No review clause is required for regulation 7, made under section 23 of the Communications Act 2003, as that provision is not regulatory provision for the purposes of the Small Business, Enterprise and Employment Act 2015.

15. Contact

15.1 Kathleen Stewart at the Department for Digital, Culture, Media and Sport. Telephone: 0207 211 2161 or email: kathleen.stewart@culture.gov.uk can be contacted with any queries regarding the instrument.

15.2 Ben Dean, Deputy Director for Media Policy, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Margot James, Minister for Digital and Creative Industries can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister for Digital and Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Broadcasting (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because of the reasons detailed in paragraphs 7.1 to 7.19 of the Explanatory Memorandum.

2. Good reasons

- 2.1 The Minister for Digital and Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 These are detailed in paragraphs 7.1 to 7.19 of the Explanatory Memorandum.

3. Equalities

- 3.1 The Minister for Digital and Creative Industries, Margot James has made the following statement(s):

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 3.2 The Minister for Digital and Creative Industries, Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Margot James, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.