

Bird & Bird Satellite Bulletin

August 2016



Consequences of Brexit

There are opportunities and risks for all companies in relation to the UK's future relationship with the EU. This Bulletin covers, in brief, a range of implications for the space/satellite industry, but equally would apply in general to the technology industry in general. The table below summaries certain key issues and maps them to alternate models of UK's future relationship with the EU post Brexit:

- Joining the European Economic Area (EEA)
- World Trade Organisation (WTO) Membership
- Bilateral Treaties

Issues	EEA	WTO	Bilateral Treaties (Free trade agreements)
Tariffs on goods	<ul style="list-style-type: none"> • Free movement of goods 	<ul style="list-style-type: none"> • Tariff reduction coupled with most favoured nation principle 	<ul style="list-style-type: none"> • Free movement of goods possible although not common
Barriers to services	<ul style="list-style-type: none"> • Free movement of services 	<ul style="list-style-type: none"> • UK companies will lose the EU "passport" and free movement of services will not apply. • Companies in other EU Member States will not have the right to provide services in the UK 	<ul style="list-style-type: none"> • Free movement of services possible although not common
Free movement of persons	<ul style="list-style-type: none"> • Free movement of persons 	<ul style="list-style-type: none"> • No free movement 	<ul style="list-style-type: none"> • Free movement of persons possible although not common
Data Protection	<ul style="list-style-type: none"> • UK automatically deemed to offer "adequate protection" • Data transfers reasonably straight forward 	<ul style="list-style-type: none"> • Domestic data protection law will continue (largely implements 1995 Data Protection Directive) • Companies who want to be able to receive personal data from EU Member States will need to demonstrate that a post-EU UK can offer "adequate" protection for such data • Data transfers difficult 	<ul style="list-style-type: none"> • Require treaty with EU to ensure EU will recognise the UK as offering "adequate protection"

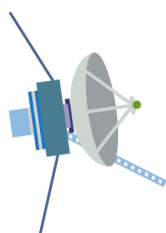
Issues	EEA	WTO	Bilateral Treaties (Free trade agreements)
Competition Policy	<ul style="list-style-type: none"> • Harmonised EU/EEA competition law regime exists alongside national competition laws 	<ul style="list-style-type: none"> • National competition laws 	<ul style="list-style-type: none"> • Competition law would remain applicable to UK companies to the extent that the behaviour of those companies has an effect in the EU/EEA
Spectrum Management	<ul style="list-style-type: none"> • UK's membership of ITU not secondary to EU membership • Harmonised spectrum allocation/use framework • Parallel memberships of international bodies such as CEPT 	<ul style="list-style-type: none"> • UK's membership of ITU not secondary to EU membership • EU initiatives to harmonise spectrum management / allocation in EU not apply • Importance of memberships of international bodies such as CEPT 	
Telecoms Regulation	<ul style="list-style-type: none"> • Directives of Regulatory Framework will continue to apply 	<ul style="list-style-type: none"> • Core Directives of 2002 Regulatory Framework already transposed into UK law • UK legislator now free to amend / repeal national laws transposing Directives • Depending on timing of Brexit, revised EU Regulatory Framework may not be applicable in the UK • EU Regulations (directly applicable) will cease to apply • Likely gradual divergence between UK/EU regulation • Ofcom will be free to define markets, undertake SMP assessments and impose ex-ante remedies 	
Digital Single Market (DSM) Measures	<ul style="list-style-type: none"> • DSM measures will apply 	<ul style="list-style-type: none"> • Regulations to be adopted under DSM will cease to apply in the UK • Directives expected under the DSM will not be binding on the UK if the date on which implementation is required is later than the UK exit: revisions to regulatory framework, and AVMS Directive. However, even if a Brexit occurs after the deadline for implementation, it is very unlikely that the directives will be implemented in the UK 	
Roaming	<ul style="list-style-type: none"> • Harmonised roaming regime applies 	<ul style="list-style-type: none"> • UK consumers may no longer be able to benefit from the Roaming Regulation when travelling within the EU if parallel legislation is not enacted in the UK or if some other arrangement is not reached with the EU 	

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<p>R&D Funding UK Treasury will underwrite payment of Horizon 2020 awards bid for competitively while UK remains a member of the EU, even where projects continue beyond a Brexit</p>	<ul style="list-style-type: none"> • EU R&D funding is generally only available to EU member states and so may not be available 	<ul style="list-style-type: none"> • EU R&D funding is generally only available to EU member states and so would not be available 	<ul style="list-style-type: none"> • EU R&D funding is generally only available to EU member states and so would not be available
<p>Export Control</p>	<ul style="list-style-type: none"> • International Agreements covering export control (Wassenaar Arrangement, Missile Technology Control Regime, Australia Group and Nuclear Suppliers Group) will remain in force in UK • EEA is not a customs union nor a part of the EU customs territory. This means that supply of dual-use items from UK to EU will be regarded as an "export" being subject to export control licensing (with all the costs and administration attached to this), and this may be particularly difficult for SMEs and education and science bodies • The same will apply to dual-use items to be exported from EU to UK 	<ul style="list-style-type: none"> • This would involve a complete exit from the EU (and its freedoms) and EU customs territory. Supply of dual-use items from UK to EU will be regarded as an "export" being subject to export control licensing (with all the costs and administration attached to this), and this may be particularly difficult for SMEs and education and science bodies • The same will apply to dual-use items to be exported from EU to UK 	<ul style="list-style-type: none"> • A bilateral agreement covering and establishing a customs union between UK and EU may be negotiated including specific common trade provisions. In that regard, establishing such a customs union will not result into UK being part of the EU customs territory meaning that supply of dual-use items from EU to UK (and <i>vice versa</i>) will still be regarded as an actual "export". The export control licensing requirements, forms and authorisations between EU and UK, however, might be negotiated and simplified in the bilateral agreement. • If such a customs union is not established by the bilateral agreement, fact remains that supply of dual-use items from UK to EU (and <i>vice versa</i>) will still be regarded as an actual "export" subject to standard export control licensing requirements, forms and authorisations in UK and EU.

Issues	EEA	WTO	Bilateral Treaties (Free trade agreements)
Standards	<ul style="list-style-type: none"> There will likely be little regulatory change for products and the UK will continue to be bound by all areas of EU product law. The UK would only have limited rights to participate formally in EU legislative processes, with its influence on policy and the direction of product related developments much reduced. 	<ul style="list-style-type: none"> UK goods exporters into EU need to adhere to EU products standard and regulations but cannot influence standard setting 	<ul style="list-style-type: none"> A bilateral agreement might require the UK to follow EU product laws in certain areas. Such an agreement is likely to ensure that a product that is placed on the EU market could also be placed on the UK market harmonising the product standards between the two markets.
Trade Marks	<ul style="list-style-type: none"> EU trade marks will no longer have effect in the UK, although it is expected that a mechanism will be put in place to create a separate national UK trade mark corresponding to the existing EUTM. 	<ul style="list-style-type: none"> If the UK leaves the EEA, in theory UK trade marks could be used to prevent imports into the UK from the EEA, depending on how the UK frames its rules on "exhaustion" of rights. 	
Legislation	<ul style="list-style-type: none"> UK to interpret UK law consistently with EEA rules 	<ul style="list-style-type: none"> The UK will no longer be able to challenge acts or decisions of EU institutions before Court of Justice of EU Interpretation of UK law in accordance with EU law will still be appropriate following a Brexit where the law was introduced to implement an EU directive and that law continues to remain in force 	
Financial Contribution	<ul style="list-style-type: none"> UK to contribute financially to EU through EEA Grant 	<ul style="list-style-type: none"> UK cease to make contribution to EU budget and cease to benefit from EU funding 	<ul style="list-style-type: none"> UK continue to contribute financially
Broadcasting	<ul style="list-style-type: none"> The Audiovisual Media Services Directive may still apply to the UK 	<ul style="list-style-type: none"> The Audiovisual Media Services Directive will not apply to the UK European funding and co-production investments would no longer be available. Country of Origin rule will no longer apply (unless opt-in/white list status obtained) – implications for pan-European/international broadcasters currently licensed by Ofcom. May need licences in more than one MS if transmission includes the UK. 	

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<p>Patents</p>	<ul style="list-style-type: none"> • It is currently unlikely that the UK will be able to participate in the Unified Patent Court (UPC), as the UPC agreement (in its current form) accepts the primacy of EU law and thus will only apply to participating EU member states • It is possible that the EEA Agreement may be renegotiated to include amendments to the UPC Agreement that would allow the UK to remain a Contracting Member State • It is too early to fully assess what the impact of Brexit will be on the UPC and the outcome will largely depend on the political decisions of the next few months 	<ul style="list-style-type: none"> • The UK will still be a signatory to the European Patent Convention (EPC) and a UK patent could still be obtained by the EPC system • The UK will still be a part of the Paris Convention and the Patent Cooperation Treaty (PCT) system 	
<p>National Security and Defence</p> <p>Article 346 TFEU in any event states:</p> <p>1. The provisions of the Treaties shall not preclude the application of the following rules:</p> <p>(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security</p> <p>Key EU programmes including Galileo and Copernicus have operational impacts for national security and defence in that exclusion from them could reduce the delivery of key services (e.g. PRS). UK also needs to be engaged in EU Govsatcom, although the scope of that programme is unclear. BREXIT potentially gives the UK the choice to benefit from both EU and other international programmes and relationships.</p>	<ul style="list-style-type: none"> • European Personal Security Clearance – the UK Government should seek to ensure that the requirements of this clearance will remain in place to ensure that UK personnel will still be deemed to be cleared to an equivalent level post Brexit. • The UK's own vetting system will not be affected by Brexit. • The UK may be able to participate in certain programmes as when it was a member of the EU. • The UK should remain closely engaged with any Space Situational Awareness activity both across the EU and internationally as this is fundamental to safe and effective space operations which impacts all individuals and government activity. • The defence procurement regime is likely to remain the same and to continue to evolve with the EU regime. 	<ul style="list-style-type: none"> • The UK may be excluded from participating in certain defence programmes. • The UK may repeal the Defence Procurement Regulations under the Government Procurement Agreement thus removing the requirement for open competition in defence and allowing the UK to "buy British". 	<ul style="list-style-type: none"> • Withdrawal from the EEA and the WTO would mean that it was no longer bound by any existing procurement rules other than those enforced by trade agreements. For public policy reasons it is likely that some form of procurement control will remain for the purposes of transparency and anti-corruption. • The UK may wish to retain sovereign services whilst making use of new technology or business approaches in a wider EU programme.

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<p>Galileo Programme</p> <p>Similar issues apply to the Copernicus Programme and other on going programmes covering space debris and space weather etc.</p>			<p>When undertaking procurements, the European Global Navigation Satellite Systems Agency (GSA) is required to comply with the Financial Regulation (Regulation 966/2012). The Financial Regulation generally permits participation of anyone who is established in a country which is a signatory of the Government Procurement Agreement in procurements. However, Regulation 18 of the GNSS Regulation (Regulation 1285/2013) permits a carve out for "measures required to protect the essential interests of the security of the Union or public security".</p> <ul style="list-style-type: none"> a The GSA and ESA are relying on that carve out in order to incorporate a condition in procurement procedures for Galileo / EGNOS. It requires (in summary) that: b the bidder is formed under the law of an EU Member State and has its central administration/registered office/principal place of business in an EU Member State; c its decision making centres, including the ultimate controlling person, also comply with condition (i); and d the facilities used for the contract are located in the EU. <p>If the UK were to exit the EU then UK companies would no longer comply with at least conditions (i) and (ii) and possibly also condition (iii). The conditions state that it is possible to gain a waiver from (ii) and (iii) however the procurement documents specify that no waiver is available from (i). As such UK companies would automatically be excluded from all procurements. More worryingly, the procurement documents and contract require ongoing compliance with the condition, and failure to do so can result in termination of the contract at any point in its lifetime. This is a significant risk for UK companies.</p> <p>For example, Switzerland (Spectratime-RAFS) and Norway (Kongsberg – FGUU & SART), which hosts three ground stations, work on Galileo through bi-lateral EU agreements.</p>



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Other Contractual Considerations	<ul style="list-style-type: none"> • The UK needs to engagement in any further drafting of an EO policy at European level. • The UK needs to continue to engage in EO programmes to ensure that it is not sidelined. • The UK to continue engagement on GOVSATCOM (with ESA, EC and EDA) to ensure involvement in delivering “assured services” for government operating across key areas across emergency response, national resilience, security and defence. • The UK may wish to retain sovereign services (under the Skynet 5 replacement programme) while making use of new technology or business approaches in a wider EU programme. <p>The UK should remain closely engaged with Space Situational Awareness activities both across the EU and internationally.</p>		

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Bird & Bird's Satellite Group

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Our international team offers clients a one-stop shop to address the issues they face, with expert lawyers across Europe, the Middle East, Asia, and strong experience in Africa.

Our satellite group fits neatly within Bird & Bird's world leading Tech & Comms sector group, which offers advice in related sectors such as: energy and utilities, life sciences, transport and maritime, aerospace, defence and security, aviation, financial services, and healthcare. Bird & Bird also house a team focused on SMEs and the needs of start-ups.

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