Bird & Bird

Satellite Bulletin

January 2017

The Consequences Post Referendum for the UK Satellite and Space Industry- an update

Referendum Decision

On 23 June 2016, the UK public voted to leave the EU. The Prime Minister, Theresa May, subsequently announced an intention to serve notice of withdrawal under Article 50 of the Treaty on European Union no later than March 2017. Based on Article 50, the Treaty on European Union and all other EU Treaties shall cease to apply to the UK:

- from the date of entry into force of the withdrawal agreement that the UK negotiates with the Union, acting through the Council; or
- more likely, two years after the UK has notified the European Council of its intention to withdraw, unless the European Council, in agreement with the UK, unanimously decides to extend this period.

The current expectation is that the whole of the two year period will be needed to negotiate the exit provisions, therefore, in practice the British exit (**Brexit**) date is unlikely to be before 2019, i.e. March 2019 if notice is given in March 2017.

This Bulletin discusses the effect that Brexit is likely to have on regulation related to the satellite and space industry and the potential implications for stakeholders in the industry both within and beyond the UK.

The impact of Brexit, will depend to a large degree on the model to be adopted for future relations between the UK and the EU. If the UK were to join the European Economic Area (**EEA**), it would remain in the single market and much of the existing body of EU law would still apply. However, the Prime Minister announced in a speech on 17th January 2017 that the UK Government does not seek membership of the single market, but does seek a close trading relationship with the EU, involving a free trade agreement (which the Government would aim to conclude within the two year notice period, with a phased implementation). Accordingly, for the purposes of this note, we are assuming that following Brexit the UK will be outside the single market and that a free trade agreement will be in place with the EU.

The Prime Minister also reiterated in her speech that a "Great Repeal Bill" to repeal the European Communities Act 1972 (**ECA 1972**) as from Brexit will also include provisions to convert the existing body of EU law into UK law. This can be expected to apply especially to EU Regulations which would otherwise cease to apply on Brexit, and also to statutory instruments implementing EU Directives, where the statutory instruments were adopted pursuant to the ECA 1972 and would otherwise fall away on repeal of that Act. The UK Government remains committed to supporting the UK space industry.

We will provide further updates, in the wake of Britain's decision to leave the EU, as the future relationship of the UK to the EU becomes clearer.

1. Regulation Applicable to the Satellite and Space Industry and Post Referendum Implications

a) Spectrum Management

Following Brexit, the UK will no longer be subject to Commission decisions and initiatives on the harmonisation of spectrum allocations and use across the EU. It will, however, continue to cooperate with other Member States on some of these issues through its membership of other organisations, including the European Conference of Telecommunications and Postal Administrations (**CEPT**). The UK's participation in CEPT would not be affected by a Brexit as CEPT is not an EU body.

Ofcom is currently deemed to be a thought leader in the development of EU communications and spectrum policies. This may change and that role may be assumed by another EU Member State after Brexit.

Ofcom published amended Procedures for the Management of Satellite Filings in March 2016. Those Procedures set out the relationship between the UK and the International Telecommunication Union (**ITU**) and describe the filing mechanisms both at a UK national and ITU international level. These are not likely to change substantially post referendum.

Where a licence has been awarded by Ofcom at a national level, based on a mandate from the European Commission for a licence to be awarded to a company based in an EU member state, the grant of such licence may need to be reassessed. This is, for example, the case in relation to the S-band European selection and award process where one of the conditions of selection was that a company had to be "established in the Community" (Decisions 626/2008/EC and 2009/449/EC).

In relation to planning for WRC-19, the UK may not be included in the EU process after a Brexit, but will remain at the CEPT level, unbound by the mandate of the European Commission.

b) Outer Space Act Licensing

The Outer Space Act 1986 is the legal basis for the regulation and licensing of space activities carried out by organisations or individuals in the UK, a UK Crown Dependency or Overseas Territory.

The Outer Space Act confers licensing and other powers and duties on the Secretary of State for Business, Energy & Industrial Strategy (The Rt Hon Greg Clark MP) who delegates the powers to the UK Space Agency (**UKSA**).

The Outer Space Act seeks to ensure compliance with the UK's obligations under the international space treaties, which the UK has ratified. The rules cover the use of outer space (including liability for damage caused by space objects), the registration of objects launched into outer space and the principles for remote sensing.

These obligations and the licensing procedures and conditions are unlikely to be substantially affected by Brexit. The obligations imposed by a licence granted under the Outer Space Act are primarily the implementation of international law, rather than European law. The licence conditions contain requirements for the mitigation of space debris based on the voluntary guidance of the Inter-Agency Space Debris Coordination Committee (**IADC**) and the International Organization for Standardization (**ISO**), which are unlikely to be affected by a Brexit.

It will be important, however, for the UKSA and its licensing regime to maintain its international credibility.

c) Telecommunications licensing

Satellite service providers may be required to obtain telecommunications licences in the UK, and Europe, in order to provide telecommunication services and access essential facilities.

The provision of telecommunications services in the EU is subject to a sector-specific regulatory regime established mainly by a set of EU electronic communications directives (**Directives**). These Directives collectively comprise the core regulatory framework for electronic communications in Europe (**Regulatory Framework**) and are required to be transposed and applied into the legal systems of each Member State through national legislation.

In the UK, this has mainly been done through the Communications Act 2003, although other primary legislation, including the Wireless Telegraphy Act 2006, and secondary legislation are also relevant. The Directives will continue to be relevant to the interpretation of the UK statutes where there are ambiguities in the UK legislation, insofar as the UK legislation was intended to transpose the EU Directives into national law. However, on formally ceasing to be part of the EU, the UK would be free to change laws that were originally introduced in accordance with EU Directive requirements.

The Regulatory Framework is aimed at harmonising national telecommunications regulatory rules across the EU, promoting harmonisation of telecommunications regulation, liberalisation and competitiveness of telecommunications markets and protection of customer and end-user rights. The issues addressed under the Regulatory Framework range from mandating telecommunications network access, radio spectrum management, and to data privacy, number portability and consumer access to emergency services.

In order to ensure the harmonised application of the Regulatory Framework at Member State level, national regulatory authorities are required to notify the Commission of all proposals to analyse telecommunications markets and all proposed regulatory conditions to be imposed on operators having significant market power, for prior review/consultation. Consequently, Ofcom as a Member State regulatory body in the UK is required to notify the Commission of any draft proposals that it has for regulating national electronic communications markets, such as the markets for broadband access or voice call termination, but will no longer need to do so following the UK's exit from the EU.

The Commission has also established a range of policy targets for the EU telecommunications market, including the ambitious broadband access targets set down under the Digital Agenda for Europe (e.g. 30 Mbit/s broadband availability for all by 2020). Again, these policy targets will cease to apply unless adopted into UK policy.

The UK's withdrawal from the EU will mean that the Regulatory Framework will cease to be applicable in the UK. However, this is unlikely to give rise to any immediate consequences as the Regulatory Framework has already been transposed into UK law through national legislation. This national legislation will continue to be valid and applicable following a UK exit. It is also not expected that the UK would take any action to put UK registered companies at a disadvantage compared to competitors in the rest of the EU.

In the longer term, Brexit is likely to lead to a divergence in regulation between the UK and the rest of the EU; the UK Parliament will be free to legislate for the regulation (or de-regulation) of the national telecommunications markets as it wishes. The UK will essentially have a "free hand" in market regulation, provided that it complies with World Trade Organization (**WTO**) requirements.

Examples of the impact of a UK exit from the EU on particular measures include the following:

- **Digital Single Market Measures**

Depending on the exact timing of Brexit, it is possible that the reforms currently being undertaken as part of the Digital Single Market (**DSM**) initiative will not be implemented into UK law, or if they are implemented, that they will not be maintained. One of the reforms under the DSM project is the review of and revisions to the current Regulatory Framework. In September 2016, the Commission published its proposals for a new EU Directive (the European Electronic Communications Code or ECC) that would repeal and replace the existing Directives of the Regulatory Framework. These proposals address a number of important issues, including access to network infrastructure, the regulation of new services and technologies such as over-the-top (**OTT**) services and spectrum assignment and management.

- The former EU Commissioner for the Digital Economy and Society, Gunther Oettinger, has

stated that the Commission would like to see the ECC enacted into EU law by the end of 2017. Assuming that the UK Government invokes Article 50 TEU at the end of March 2017 and Brexit takes effect in March 2019, it is uncertain whether the ECC will have been required to be implemented into national law by the time of Brexit, whether or not the UK will choose to transpose it early into UK law, and whether or not the Government will include content of the ECC at UK level in the planned "Great Repeal Bill".

- **Roaming**

Another important consequence of Brexit is that UK consumers will no longer be able to benefit from the Roaming Regulation in respect of their use of international roaming services, when travelling within the EU (EU Law provides for the phasing out of retail roaming surcharges by 15 June 2017. UK operators will also no longer be subject to regulated roaming tariffs at the wholesale level. However, as a commercial matter, we expect that any wholesale rate increase on the part of UK operators will likely be reciprocated by their counterparts elsewhere in the EU. This could prove a costly move for UK industry in the event of unfavourable tourist/traveler flows between the UK and the rest of the EU. There has been speculation that the UK might introduce legislation imposing a parallel roaming regime in the UK to that which applies in EU Member States under the Roaming Regulation.

- **Digital Agenda for Europe**

The ambitious targets of the Digital Agenda for Europe, or any other Commission policy for that matter, will no longer apply to the UK. It is unclear whether the UK will continue to apply these targets once it leaves the EU, though it might, for example, give preference to the same or better broadband speed targets for ubiquitous broadband access.

- **Net neutrality**

Following Brexit, Regulation 2015/2120 of the European Parliament and Council will no longer be directly applicable in the UK, although its content could be preserved at UK level under the planned "Great Repeal Bill". Alternatively, the UK could enact similar domestic legislation (or perhaps choose to address the issue by the way of non – binding guidelines) to take effect following Brexit. If neither of these legislative options were pursued, the principle of net neutrality would no longer be safeguarded under law in the UK.

2. International relations - implications for UK space companies

a) Relationship with the European Space Agency (ESA)

ESA is an international intergovernmental organisation which is independent of the EU. A number of the 22 member states of ESA are not members of the EU, such as Norway and Switzerland. The UK's membership of the EU does not affect its membership of ESA. There are therefore not likely to be significant changes in relation to the UK's relationship with ESA. Discussions as to the ongoing relationship between the UK and ESA are currently underway.

b) Galileo and Copernicus Programmes

If the UK were to exit the EU, UK companies may no longer comply with the regulations implementing these programmes, and UK companies could be excluded from related procurements, unless a bilateral agreement is reached, similar to those in place with Switzerland and Norway. Similar issues apply in relation to Horizon 2020 R&D funding.

The UK Treasury will underwrite payment of Horizon 2020 awards bid for competitively while the UK remains a member of the EU, even where projects continue beyond Brexit.

c) Relationship with the ITU

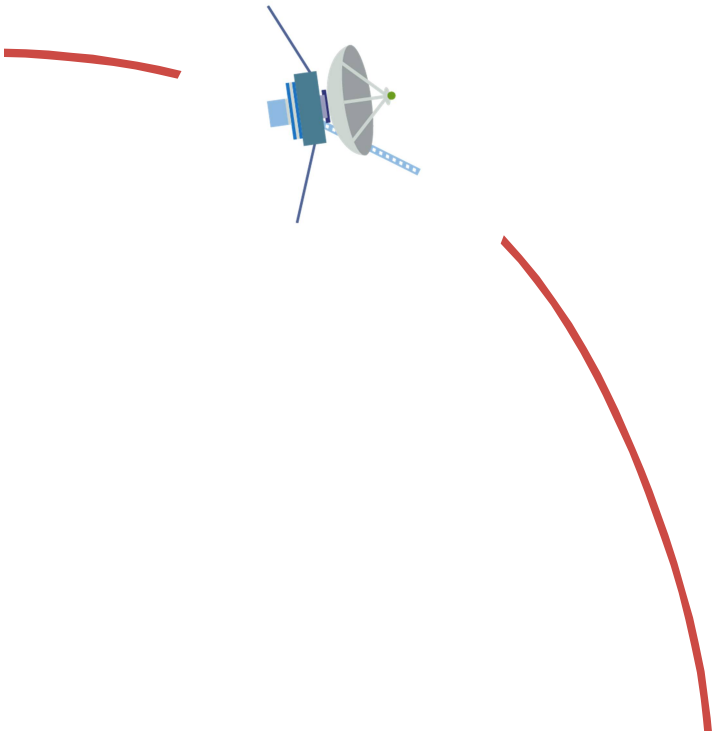
Prior to Brexit, the UK's membership of the EU takes precedence over its treaty obligations with the ITU. This will change with Brexit and the UK will be subject to the full Radio Regulations of the ITU and have direct unfettered relationship with the ITU.

d) UNCOPUOS

Attendance at the UN Committee on the Peaceful Use of Outer Space (**UNCOPUOS**) meetings will be unaffected by Brexit, as will attendance at the ESA meetings during UNCOPUOS.

e) European Defence Agency

The European Defence Agency (**EDA**) is an intergovernmental agency of the European Council. Currently, all EU Member States except Denmark are members of the EDA. As a body to the EU, the UK's membership to the EDA would cease upon Brexit unless it negotiates an "administrative arrangement". These arrangements allow non-EU members to participate in its projects and programmes. EDA has already signed a number of these with countries including Norway (2006), Switzerland (2012), Serbia (2013) and Ukraine (2015). These arrangements are approved by the European Council.



3. Practical Implications of Brexit for Satellite and Space Companies

a) UKSA Grants - International Partnerships Programme (IPP)

IPP is a £150M five-year programme which will use UK space expertise and capabilities to provide sustainable, economic or societal benefits to undeveloped nations and developing economies. Grants are awarded by the UK Space Agency to industrial and academic partners.

These grants will be unaffected by Brexit.

b) UK Companies - Freedom of Movement

UK established companies can currently avail of the rights to free movement granted under the Treaty on the Functioning of the European Union (**TFEU**), including the freedom to provide services and freedom of establishment. This means that any entity incorporated in the UK has the right to provide satellite and telecommunications services in any other Member State, assuming that it complies with the national law requirements in that Member State. Brexit will remove this right in respect of UK established companies.

Any regulatory divergence between the UK and the EU following Brexit will also have a direct impact on service providers in the UK. Divergences may, for example, arise in respect of the regulation of OTT services. The UK may take a more liberal approach towards these services than the European Commission or certain other national regulatory authorities. The UK may also favour a more pro-investment policy on regulation than certain other Member States.

c) EU companies operating in the UK - Freedom of Movement

The same logic applies for companies established in any EU Member State other than the UK. Such companies will no longer have the virtually automatic right under EU law to provide services in the UK once Britain leaves the EU.

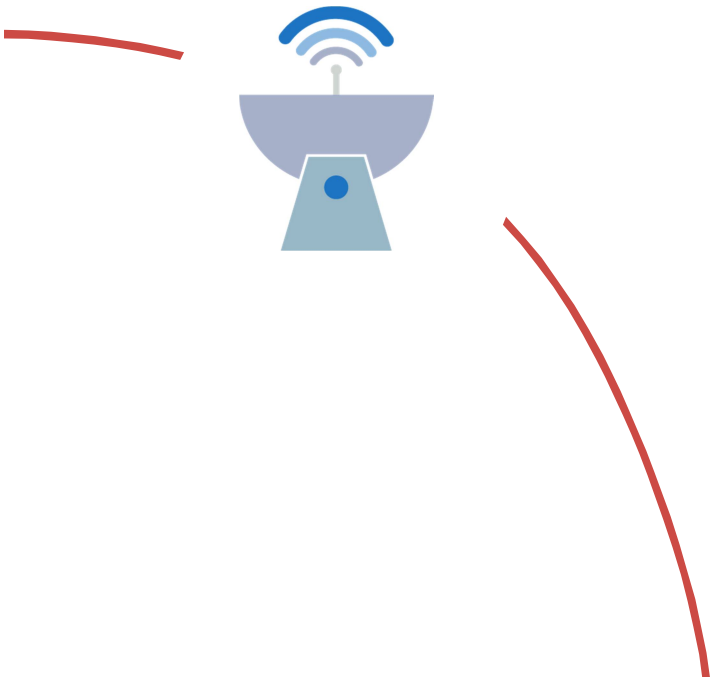
d) Non-EU companies operating in the UK - Freedom of Movement

Brexit is also likely to have a significant impact on companies from outside of the EU that are considering doing business in the UK and/or the rest of the EU. Such companies may use the UK as a stepping stone into the greater EU-wide market.

There are a number of important reasons for this including language, relative ease of doing business in the UK and the significant size of the UK domestic market.

From a compliance perspective, this strategy can be particularly effective in a regulated environment, such as the market for communications. The harmonisation of communications regulatory regimes across the EU has meant that a new market entrant in the UK will be subject to broadly similar regulatory requirements anywhere in the EU.

Brexit would undermine the rationale for using the UK as a springboard into the greater EU market. This is because of the loss of the EU "passport" to the EU internal market that has been available through establishment in the UK and compliance with EU requirements in the UK as a Member State.



e) Export control

On a global level, the fundamental international agreements covering export control (i.e. Wassenaar Arrangement, Missile Technology Control Regime, Australia Group and Nuclear Suppliers Group) will remain in force for the UK. The UK itself is a participating member of these agreements and, as such, is legally bound to uphold their terms and conditions.

On a national level, the Secretary of State in the UK has the power to enact and impose its own legal orders and export control regime in relation to goods of any description. This means that the UK can choose to maintain its current export control regime (subject to possible minor changes) or, though it seems unlikely, use Brexit as an opportunity to constitute its own export control legislative framework (in conformity with the international agreements mentioned above).

Once the UK has left the EU customs territory, the supply or transfer of dual-use items from the remaining 27 Member States to the UK will be regarded as "exports" and subject to (a new) export control licensing regime. This will also be the case for dual-use items to be exported from the UK into Europe. Depending on the outcome of the negotiations with the EU, the UK may decide to implement a more friendly export control licensing policy towards certain EU Member States which have similar (robust) views on the interpretation and enforcement of export control rules. The Commission will need to decide whether to further amend the Dual Use Regulation (No 428/2009) to add the UK to the list of seven friendly countries (Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Lichtenstein) and the USA) in view of exports covered by the Union General Export Authorisation (UGEA) EU0001. If the UK is permitted to join this group of friendly countries, the export of dual-use items from the EU to UK would be much less burdensome for businesses.

In short, businesses supply chains exporting dual-use items between the EU and the UK (and *vice versa*) will likely become subject to export control licensing upon the UK's formal exit from the EU. Businesses will therefore need to review and adapt their licensing portfolio and export compliance procedure appropriately.

f) Data protection

Domestic data protection law (which largely implements the 1995 Data Protection Directive) will continue to apply after Brexit. This is due to be replaced by the General Data Protection Regulation (which is applicable as from end May 2018): the UK approach to this is unclear.

Companies who want to be able to receive personal data from EU member states (for example, consumer data or end-user data to enable targeted services or big data analysis, or employee data for management purposes, or companies offering data centre services) will need to be able to demonstrate that a post-EU UK can offer 'adequate' protection for such data.

If the UK becomes a member of the EEA, then the UK will automatically be deemed to offer 'adequate' protection. If the UK does not become an EEA member, then data transfers will become more difficult.

The EU can recognise countries as offering 'adequate' protection: commentators are already speculating that UK rules on access to communications data will preclude an adequacy decision.

The main alternative method of dealing with data transfer (use of data transfer agreements) has been referred to the CJEU.

This uncertainty will be damaging to UK data centre providers (as it will preclude their use by other EU organisations) and to the UK's attractiveness as a European point of entry.

g) REACH Regulations

The EC Regulation 1907/2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) were adopted to improve the protection of human health and the environment from risks posed by chemicals. Companies importing chemicals and products into the EU, including for uses on board satellites, must comply with the provision of REACH. However, only companies in the EU can participate in certain aspects of REACH including registration. Companies outside the EU must use the services of third parties, including as REACH registrants, and must pay related costs.

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Bird & Bird's Satellite Group

Bird & Bird's satellite group are international specialists with a unique reputation and track record in the industry. Through many years of experience working in-house, at regulators, in international institutions (EC, ESA, ITU, UN) and in private practice, we have built an extensive footprint of expertise and knowledge. Possessing a genuine interest in the sector, our team assist clients in many areas including: regulatory advice, industry specific commercial contacts, competition, corporate, finance, dispute resolution, employment, and insurance.

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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