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BREXIT & TELECOMS, MEDIA AND TECHNOLOGY

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HOW BREXIT WILL AFFECT THE TELECOMS, MEDIA & TECHNOLOGY SECTOR

The UK's vote on June 23rd to leave the European Union is likely to have a significant impact on the Telecoms, Media & Technology (TMT) sector in Europe and in particular in the UK.

The complexity of the various rules and regulations that make up the sector's legislative environment in the European Union, coupled with the nature of the sector itself, will create uncertainty and challenges but also opportunities in the years ahead, for TMT businesses.

In today's globalised world, the European market – whether 500 million consumers or 440 million without the UK – will remain a prize.

As the dust settles after the referendum vote, and although confusion will remain on the timing and direction of any Brexit negotiation, tech companies and policy makers will simply get on with their work achieving their business objectives.

This briefing, prepared with the assistance of external advisers, seeks to provide an initial overview of how various TMT services subsectors might be affected by Brexit, the daunting domestic legislative challenge the UK will face on exiting the EU and the wider impact of Brexit on the EU agenda for TMT services. It represents best efforts at predicting the situation in the first weeks of July 2016.

MARKETS ARE LIKELY TO DIVERGE

The TMT sector in Europe currently relies on a legislative framework that covers fixed and wireless telecoms, internet, broadcasting and transmission services. EU Directives are the primary source of this legislation and will most likely remain in place until the UK Government decides on whether it wishes to diverge from it or stay closely aligned with those laws.

EU legislation plays a significant role in regulating the interaction between the UK regulatory authority, Ofcom, and telephone companies in the UK. It imposes obligations on promoting competition, developing the internal market, and promoting the interests of EU citizens. In the short term it is likely that this framework will remain unchanged, but in the longer term there may be changes and a divergence from EU rules and practice.

This is the general trend: in the short-term, the UK and the EU will effectively operate in parallel, with the same or similar rules covering TMT issues. In time, however, it is likely that the markets will diverge as the UK either amends, repeals or replaces legislation and the EU continues to advance its flagship Digital Single Market (DSM) initiative. The UK, as one of the driving member states behind the Digital Single Market, will need to consider this position carefully. Indeed, the nature of the DSM itself may change without the involvement of the UK and its lighter-touch and more liberal regulatory instinct in this area.

UK businesses in the TMT sector will continue to have to comply with EU legislation if they provide services, content or goods into that market. As such, the regulatory burden is likely to increase as those businesses will be affected by EU legislative developments, particularly those with a large market in EU Member States, as well as have to comply with UK-specific legislation and regulation.

EMPLOYMENT

Currently the availability of diverse skills and workers to the TMT sector is a valuable asset for UK-based TMT businesses. In the event that the UK becomes more restrictive in allowing free movement of labour, a number of leading companies in the TMT sector have already indicated that it would have an impact on their ability to conduct business in the UK.

The free movement of labour will be a key area for discussion between the UK and the EU in negotiations on the exit of the UK and in any subsequent trade agreements. In the UK, the tech and creative start-up sectors have already indicated that an adequate replacement for freedom of movement of workers would be critical to continued growth of the sector in the UK.

Meanwhile other European start-up hubs are already vying for those businesses. Britain’s leadership in fintech is already under threat with other European capitals, led by Berlin, already excited by the opportunity to attract fintech startups and investments. While fintech companies that don’t operate in a regulated space can probably do without securing passporting rights into the EU for their services, very few of them would prosper without being able to operate across the rest of the EU bloc and without access to the EU talent pool.

BREXIT CASTS DOUBT ON DATA PROTECTION

The Brexit decision casts doubt and uncertainty on the future of the data protection framework for businesses in the UK, particularly as the new EU General Data Protection Regulation (GDPR) is set to come into force.

Until such time as the UK formally leaves the EU, the GDP Regulation will be directly applicable in the UK but will cease to apply following Brexit unless the UK Government provides an alternative – whether through the terms of the exit agreement or via comparable UK legislation.

In the long-term, there is a real prospect of different data protection regimes emerging in the UK and the EU.

In reality, the GDPR will set the global standard in data protection, and will apply to all companies when offering services to European consumers regardless of the location of the physical server that is processing data. So, whether the UK is in or out of the EU, UK companies will have to respect the GDPR.

If the UK does not formally adopt the GDPR it could mean that UK businesses may operate in a less burdensome regulatory environment. On the flip side, businesses would then have to deal with two different regimes. The UK would also lose the advantage of the 'one-stop-shop' being introduced by the GDPR, whereby companies will have to only deal with a single data protection authority in the event of a complaint.

Potentially more critical is the issue of cross-border data flows.

After the UK exit, companies will still conduct trade with other EU Member States, and data flows will continue between the UK and EU. There is no barrier to such flows of data amongst EU members or members of the European Economic Area (EEA – which became known as the Norway model in the UK Referendum debate).

Outside of the EU or EEA, the UK would be required to provide 'adequate protections' as a condition of the transfer of personal data to the UK. This opens up various questions about what 'adequate protections' looks like (as Model Clauses, Binding Corporate Rules, or a Consent Based Model).

This may well give rise to a situation where firms operating in the UK will need to establish and store European customers'/clients' data in data centres based in the EU. For instance, a London-based bank would not be in a position to process the personal data of a customer in Germany, unless the data is stored in a country within the EU.

It is worth noting also the efforts currently being made between the US and the EU to put in place a 'Privacy Shield' agreement to allow for the transfer of data to the US.

Such a mechanism could also be open to the UK and potentially could be addressed in the exit negotiations with the EU.

BROADCASTERS – THE COUNTRY OF ORIGIN PRINCIPLE

Another part of the TMT sector that may be directly affected by the likely UK exit, is broadcasting. Brexit would give the UK and Ofcom the opportunity to pursue a different approach to broadcast legislation. Of particular note is the 'country of origin' principle under the Audio Visual Media Services Directive.

This rule allows content licensed in one Member State to be broadcast in another without additional licenses. Brexit would challenge the operation of this rule and increase the regulatory burden on UK broadcasters who would be forced to re-license content in another EU member state before it can be broadcast in the EU.

THE DIGITAL SINGLE MARKET

In May 2015 the European Commission launched the Digital Single Market strategy for the EU in an attempt to realise the full potential of the digital market in Europe. The strategy seeks to remove obstacles to the development of cross-border e-commerce within the EU. In addition to new regulations and rules, Digital Single Market infrastructure in Europe is expected to receive around €21.4bn in investment in the coming years.

The UK is a leader in e-commerce and would have stood to benefit significantly from this initiative. Now there is a question of participation, with UK-based digital companies possibly having to sit outside of the Digital Single Market and not benefitting from the greater ease with which e-commerce will be conducted across the EU.

The impact on e-commerce will ultimately depend on the outcome of the negotiations between the UK and the EU. Companies selling goods and services into the EU will have to comply with the requirements of the EU Digital Single Market regulatory framework.

Furthermore, without the UK's input, realisation of the DSM might slow down because achieving the ambitious and balanced [pro-business] DSM envisaged may be more difficult in the absence of the UK's generally pro-business and pragmatic voice in negotiations – whether in the Commission, in the Council or among MEPs in the European Parliament.

Uncertainty also applies to the forthcoming proposal by the European Commission to simplify VAT rules, including for e-commerce, at the end of 2016. This proposal may enjoy a smoother passage without the UK, which has been a strong opponent of this EU tax initiative.

ROAMING CHARGES

EU rules on roaming charges are regulated by the Roaming and Open Internet Regulation 2015. It caps charges that can be applied to mobile phone users. Roaming charges within the EU are due to be abolished for all end-users by June 2017. If the UK exits the EU and the EEA, it may not be able to benefit from these provisions and higher roaming charges could be applied to UK mobile users when travelling in the EU. UK networks will also be entitled to apply roaming charges for EU citizens roaming in the UK.

NET NEUTRALITY

The Roaming and Open Internet Regulation 2015 included provisions on net neutrality – the concept that the internet should be open and free and that there should be no discrimination between traffic by internet service providers (ISP). Under the 2015 Regulation the blocking or throttling of traffic by ISPs is prohibited. The Regulation also allows for reasonable traffic management. If this Regulation was to cease to apply as a result of Brexit, the UK may choose to apply different rules on net neutrality. The UK Government has shown interest in blocking access to certain sites and may make further moves in this area if outside of the scope of the EU legislation.

RESEARCH AND DEVELOPMENT

Innovation is a necessary requirement for all technology and telecommunications companies. The exit of Britain from the EU will undoubtedly hurt Europe-wide collaboration. It may result in the UK and their higher education institutions being excluded from such funding programmes as the €80 billion Horizon 2020. The UK is one of the biggest beneficiaries from European research funding and the impact of reduced funding levels may negatively affect highly lucrative sectors such as pharmaceuticals and biotechnology in Britain for years to come.

The UK has been implementing a patent box to provide companies with tax incentives for research and development investment in the country since 2009. The current rate allows for qualifying activities to be declared at a reduced corporate tax rate of 10%. While the UK has brought in recent measures to make their regime compliant with the OECD Base Erosion and Profit Shifting action plan, it is likely that it will try to compete even harder on this front over the coming years.

If the UK no longer has to worry about falling foul of the EU's competition watchdog, this is an area where Britain may seek to gain a competitive advantage, in particular over Ireland which has both a lower corporate tax and lower patent box tax rate.

WHAT NEXT?

Now is the time to identify opportunities and risks from this situation in collaboration with BDO TMT experts.

The regulatory and public policy team at the BDO Global Office, in conjunction with external consultants, prepared this short paper to help you begin to understand the impact of Brexit on the TMT sector in the short, medium and long term.

The political situation is of course very fluid at the time of writing and doubtless there will be further developments and clarity as the months go on.

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