



## **UK Coalition for Cultural Diversity**

**UKCCD BRIEFING, September 2020**

### **FREE TRADE AGREEMENTS WITH THE EUROPEAN UNION AND THE UNITED STATES**

#### **THE UK CULTURAL AND AUDIO-VISUAL SECTORS**

The economic significance of the creative industries is equal to that of the financial sector in the UK in its contribution to GDP. It also has one of the fastest growth rates of employment in the country. In 2019, a report by the European Audio-Visual Observatory, a Council of Europe body, showed that the United Kingdom is the largest audio-visual market across Europe as a whole. It alone gives employment to 144,000 people, just fourteen thousand less than those employed by the automobile industry.

However, the significance of creative industries goes far beyond economic considerations. Creative industries are vital to the identity, autonomy and social cohesion of our country. This has been consistently recognised in the development of European directives in which the UK has so far participated. Crucially, these regulations have been revised in order to underpin local production, particularly in the audiovisual sector, and to keep up with the rapid development of business models for the digital and Internet environment.

These are policies intended to safeguard cultural values for the long-term future, and essential to our cultural sovereignty. It is therefore of the utmost importance that the UK prioritises the needs of its creative and audio-visual industries as the country moves forward with Brexit, setting new terms for future trade with the European Union, the USA and other countries through the Trade Bill and other bi-lateral agreements.

*The UKCCD gives 4 recommendations to achieve this and the context below.*

#### **RECOMMENDATIONS**

##### **1 UK: EU Audio-Visual agreement**

There should be an audio-visual agreement between UK and EU, of mutual benefit, which should be based on the AVMS provisions.

The UKCCD supports the government's indication that OFCOM will give guidance and provide a bi-annual report on European works as regards quotas and prominence, taking the text from the AVMSD on a copy-out basis and amending the Communications Act.

However, the AVMSD also provides for levies on services which are not based in countries' jurisdiction but target national audiences, such as SVODs. This would support local production but the government is not intending to implement this option, but keeping this under review. We would recommend that the government urgently consider the benefits of this provision as implemented in other countries.

## **2 UK:EU Trade Agreement**

Audio-visual services should be excluded from any UK/EU free trade agreement in order to allow the supremely successful UK audio-visual sector to receive the public support it currently receives, and to thrive.

## **3 UK:US Free Trade Agreement**

Cultural and audio-visual services should not be included in the scope of any future UK/US trade agreement.

It is important to draw lessons from the relevant clauses related to cultural industries in the NAFTA/USMCA agreement between US:Canada:Mexico<sup>1</sup> where 'non-conformist measures' have been introduced. These effectively prevent one party from making public policy changes that would alter the market status quo from the date of the agreement unless there is mutual agreement.

## **4. Implementation of 2019 Copyright Directive**

This Directive should be transposed into UK law. If we want authors, performers, publishers and other creators to continue creating cultural works and promoting cultural diversity, they must be compensated fairly for their use. Failure to reward creators fairly limits creative industry revenues, holding back growth and the ability to generate new jobs. Newspapers and publishers will also benefit from the Directive.

Failing transposition, there should be UK legislation on the main aspects of the Copyright Directive which are not currently covered by UK copyright and intellectual property law.

## **BACKGROUND TO CURRENT SITUATION**

### **1. The Cultural Exception**

---

<sup>1</sup> <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>

The agreement went into force on July 1, 2020. The provision relating to cultural industries is Article 32.6, which can be found at this link:

<https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/r-cusma-32.pdf>

Since the adoption of the General Agreement on Tariffs and Trades, (GATT), it is commonly accepted that audiovisual services are not services like others. They have a cultural and democratic nature, reflecting our stories, values and identity, which need to be fostered and made visible as widely as possible. This was reinforced by the UK's adoption of the 2005 UNESCO Convention on the Protection and the Promotion of Cultural Diversity of Expressions.

Creative industries thrive through a legal framework protecting the rights of creators and their intellectual property, allowing for industries to be built from the works of thousands of contributors. It is well established that public policies are needed to support the diverse forms of creativity at the heart of the cultural and creative industry sectors and to address the many new challenges posed by digitization.

In order to ensure that countries are able to use the public policy toolkit of support, subsidy and other rules, audiovisual products and services are excluded from the scope of application of any EU trade agreements. This is known as the 'cultural exemption'. Without the cultural exemption, many of the measures which currently support the creation and dissemination of local works would never have seen the light of day.

## **2. Audio Visual Media Services Directive**

The 2018 AVMS Directive regulates both linear and online platforms such as subscription video on demand, (SVODs), and other services. Linear broadcasting channels are asked to carry 51% local production wherever possible. All public service channels, (PSBs), achieve this. The AVMS Directive is particularly important in regulating online streaming services within the audio-visual framework to ensure fair competition, protection of minors and proportionate investment in, and promotion of, local programming. Streaming services are required to include 30% of their catalogue from national/EU programmes/films and to give them due prominence.

The Directive provides for over 450 television channels licensed in the UK to continue broadcasting without hindrance to the rest of the European Union. This is possible because this revised AVMS Directive contains a strengthened Country of Origin Principle giving clarity on which Member State's rules apply, and giving aligned derogation procedures, for both TV broadcasters and on-demand service providers.

Rules of origin are vitally important in legislating on quotas for local works and ensuring cultural diversity. They are an important part of all trade agreements, not just those associated with the cultural sector.

It would not have been possible to ensure that companies that derive revenue from local cultural content, such as Netflix, contribute to the funding of national/EU works, without the 2018 Audio-visual Media Services Directive.

Furthermore, the strength of the audio-visual sector will be harmed by the Government's decision not to seek membership of the EU Creative Europe

programme which includes access to benefits of the audio-visual MEDIA programme.

Without the instruments for protecting and promoting national/EU audio-visual content contained in the AVMS Directive, the UK film and television industry would never have enjoyed the dynamism and excellence that it continues to have both at home and abroad, and the UK would not have thrived as Europe's leading creative hub. To sustain the UK's prime position internationally, it is important for Britain to transpose these instruments fully, post-Brexit, into UK law.

### **3 The Audio-Visual sector and the UK:EU FTA**

The European Commission has asked that audio-visual matters should not be included in the Trade Agreement with the UK. On the 17<sup>th</sup> February 2020, the EU Commission Mandate for negotiations between the UK and the EU expressly excludes any audio-visual services as follows:

*18. The envisaged partnership should recognise that ensuring sustainable development is an overarching objective of the Parties. The economic partnership should ensure that the Parties retain their autonomy and the ability to regulate economic activity according to the levels of protection each deems appropriate in order to achieve legitimate public policy objectives such as.. promotion and protection of cultural diversity..... **Audiovisual services should be excluded from the scope of the economic partnership. (UKCCD highlighting)***

The British government, on the contrary, has sought to include audio-visual services in the scope of future trading arrangements.

Post Brexit, the UK will remain part of a broader European context as a party to the relevant Council of Europe Conventions. This could allow British productions, as defined by mutually agreed specifications, to be included as European in the EU's systems of quotas for audio-visual products. It should be remembered, however, that the EU Commission gives greater importance to the AVMS directive than the Council of Europe Convention on Television as this instrument is now out of date: it does not cover online services and has no enforcement mechanism. It is not yet known how this will affect any future audio-visual discussions between the EU and UK.

### **4 UK:USA Free Trade Deal**

A UK/US Free Trade Agreement (FTA) would not of itself prevent the UK from concluding a trade agreement with the EU, although it would impact on its terms.

Canada and Mexico, together with the USA, formed the United States-Mexico-American FTA, NAFTA/USMCA. This has not precluded the EU from concluding a comprehensive FTA with Canada (CETA) and upgrading its trade relations with Mexico where agreement has been reached on the FTA part of the relationship.

However, the USA is bound to want to include audio-visual, digital services and intellectual property in its demands in any FTA negotiations with the UK. However, this could have a detrimental effect on Britain's audio-visual cultural diversity. It would probably preclude the UK from enacting any new special measures/funds to support the UK TV/film industry. It could open to challenge the 30% national audio-visual works quota as provided for in the 2018 AVMS Directive which could impact independent UK production. It might also prevent any imposition of a levy on SVOD providers to go into a national drama/film fund. These are already established in other European countries and go some way to redress unequal competition between large SVOD platforms and national PSB channels.

Furthermore, the US Administration is keen to have US "safe harbour" rules exempting Internet platforms from liability in any free trade agreement with the UK. If these were included in an FTA it would prevent any UK government attempting to persuade Internet platforms to change their modus operandi. For instance, the British Government's planned Online Harms Bill would be restricted in its scope and application under the safe harbour provisions. UK sovereignty would be compromised.

To substantiate this it is necessary to consult the text of the Canada-United States-Mexico Agreement (CUSMA) which can be found at this link:

<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>

While the term "audio-visual services" is not used, the definition of "cultural industry" in Article 32.6 is broad enough to embrace them.

For example, any Canadian measure in place on July 1, 2020 is grandfathered by Article 32.6, Paragraph 2, except for two items which relate to CRTC<sup>2</sup> decisions that are inconsequential to Canada's cultural policies.

However, while Canada can introduce new measures that relate to cultural industries, the US is entitled to retaliate if the measure would otherwise breach the agreement. This is set out in Article 32.6, Paragraph 4, which reads as follows:

Notwithstanding any other provision of this Agreement, a Party may take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement but for paragraph 2...

So if such a clause were to be included in a UK:US trade agreement, the US would have the right to challenge any new public policy measures in the field of cultural industries.<sup>3</sup>

---

<sup>2</sup> Canadian Radio Television/Telecommunications Council

<sup>3</sup> For further information on how the US is still trying to limit protection for local culture through its bilateral trade agreements please consult Gilbert Gagné's book, "The Trade and Culture Debate: Evidence from U.S. Trade Agreements".

This could have the effect of undermining the UK's position in the sector and indirectly advantage US works to the detriment of British works, both inside and beyond the UK. It could prevent measures to support British filmmakers' ability to produce more local programmes/films than now and to export to their biggest market, the EU. 37% of UK creative industry exports are to the EU.

This would represent an infringement of national cultural sovereignty and would likely impinge on measures the UK may wish to put in place to enhance cultural diversity of expression.

This serves to underline why cultural and audio-visual services should not be included in the scope of the EU/US trade agreement.

Therefore, as recognised by the EU, including audio-visual services in an FTA between UK and the US would be a major threat to the independence and viability of both British filmmakers and creative industries. It would also impact adversely on British AV cultural diversity.

## **5 EU Copyright Directive 2019**

The UK government agreed to the 2019 EU copyright directive in the Council of Ministers yet it has not yet committed to transposing this Directive into UK law. The deadline for transposition is June next year.

The 2019 Copyright Directive is a ground-breaking piece of legislation which allows for proportionate remuneration for creators by those who profit from exploiting their work online. Under the Directive, rights holders can negotiate with Google and other platforms to ensure that proper royalties are paid so that creators can be fairly remunerated.

The Directive also includes a new neighbouring right for press publishers so that they will be fairly remunerated for their journalism when copy is uploaded on to third party sites such as Apple News. This is vital to sustain a diversity of players in the sector.

UK Coalition for Cultural Diversity  
Email: [ukccd1@gmail.com](mailto:ukccd1@gmail.com)  
59 Oakfield Road  
London N4 4LD  
[www.ukccd.org](http://www.ukccd.org)

## **ANNEX ONE**

### **This briefing is written by the UK Coalition for Cultural Diversity of Expression (UKCCD)**

The UKCCD is a not for profit organisation dedicated to implementing the objectives of the 2005 UNESCO Convention on the Protection and Promotion of Cultural Diversity of Expressions.

We recognise the centrality of the audio-visual sector to the creative industries and culture as a whole, and this means supporting public policy which is designed to achieve the following objectives:

- To foster the visibility of local audio-visual works online and offline
- To facilitate the production and dissemination of UK audio-visual works
- To develop and maintain a diverse and sustainable film culture

## **ANNEX TWO**

### **Glossary of Terms**

**Rules of Origin** = In order to continue to freely trade with the EU we need to observe mutually agreed rules of origin. For those specific to film in defining what is a British film see here....

<https://www.bfi.org.uk/film-industry/british-certification-tax-relief/european-certificate-british-nationality>

**PSB** = Public Service Broadcasting

**SVOD** = Subscription Video on Demand

**Linear Broadcasting** = One broadcaster to many viewers

**Country of Origin in the AVMS directive** =

Rules defining productions are currently the 7 criteria of the British Film Institute (BFI) which define what a film/programme has to fulfil to be counted as a British film and thus able to be exported to the EU.

**MEDIA programme** = The MEDIA sub-programme of the EU Creative Europe programme provides financial support to the audio-visual sector for the development, distribution and promotion of its work. It helps launch projects with a European dimension and stimulates the exploitation of new technologies; it allows European films and audio-visual products to penetrate markets beyond national and European borders, in particular feature films, television films, documentaries and new media. Support for training and film development is also offered.

**GATT** = General Agreement on Tariffs and Trade

**NAFTA/USMCA** = North American Free Trade Agreement revised in July 2020 to the US-Mexico-Canada Agreement. Amongst other changes, the USMCA gives rights to the USA for retaliation against governments.