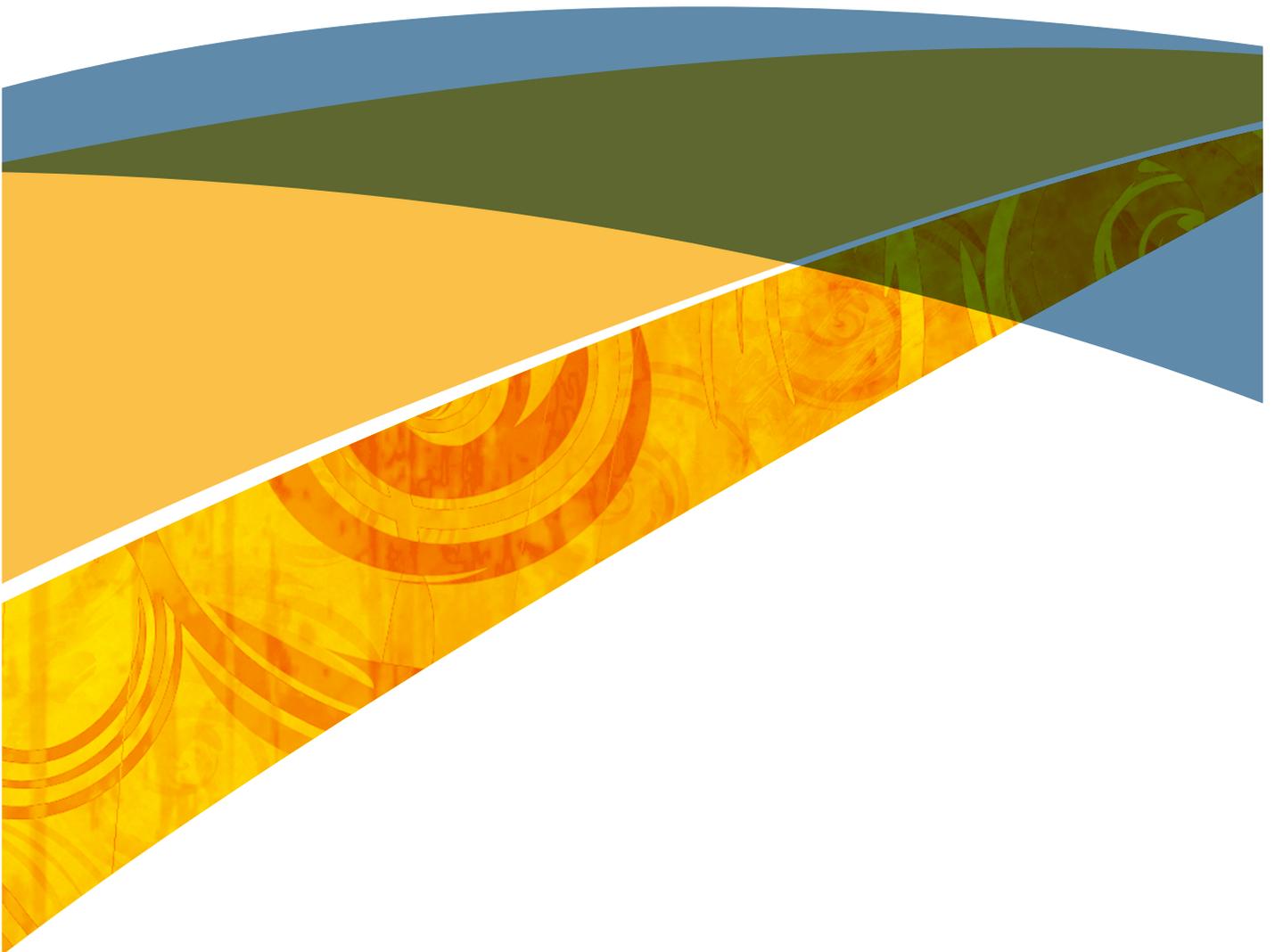




Intellectual
Property
Office

Cross-border portability of online content services: Consultation





About this consultation

Topic of this consultation

Proposed domestic enforcement of Regulation 2017/1128 of the European Parliament and of the Council on cross-border portability of online content services in the internal market (the “Portability Regulation”).

Scope of this consultation

This consultation invites comments on the proposed domestic enforcement mechanisms to enable appropriate enforcement of the Portability Regulation, when it comes into force on 1 April 2018.

Geographical scope

United Kingdom but note that the Regulation allows UK law to be deemed to apply, in certain circumstances, in other EU Member States, and vice versa.

Basic information

This consultation is aimed at:

- Online content service providers,
- Subscribers to online content services,
- Rightholders in the works provided on online content services, including creators and licensees.

Any other interested individual, organisation or business is also welcome to respond to this consultation.

Responsibility for the consultation

This consultation is being run by the Copyright and Enforcement Directorate in the Intellectual Property Office.

Duration

This consultation runs from 3 January to 31 January 2018.

Enquiries (including requests for the paper in an alternative format)

For further information about this consultation please email portability@ipo.gov.uk



How to respond

Consultation responses should be submitted by email to portability@ipo.gov.uk

Or by post to:

Portability enforcement consultation
Copyright and Enforcement Directorate
Intellectual Property Office
4 Abbey Orchard Street
London SW1P 2HT

After the consultation

A summary of the responses to the consultation, along with the responses, will be published on the Department's website.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication, release to other parties, or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide, to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.



Contents

Introduction	3
What is the portability regulation?	3
Who does the Regulation affect?	4
Subscribers to online content services	4
Online service providers	4
Rightholders	5
Guidance	5
What happens after the UK leaves the European Union?	6
Why is the Government consulting?	6
How will the Regulation be enforced?	6
Assessment and review of these regulations	8
Annex A	9
Annex B	10
Annex C	14





Introduction

What is the portability regulation?

Regulation 2017/1128 of the European Parliament and of the Council on cross-border portability of online content services in the internal market (the “Portability Regulation”) comes into force in the United Kingdom on 1 April (Article 11 of the Regulation¹). The text of the Regulation² is available on the European Commission’s website.

The Regulation is designed to make it easier for consumers who live in the European Union (EU) to access online content services they subscribe to (for example, television, film and music subscription services) when they are temporarily located in another Member State of the EU (Article 1.1). This could be, for example, when on holiday or travelling on business.

Presently, this is not always possible as some providers block access to their services outside a subscriber’s home country and this is often done in order to comply with territorial agreements on the use of copyright protected content. This is common in relation to film and video services in particular. Under the Regulation, such content services must be provided on a “portable” basis throughout the EU.

The Regulation is compulsory for “paid for” subscription services (Article 3.1), which means providers of these services must enable access on a portable basis in the EU. Free-to-access services can also choose to make their content available on a portable basis under the Regulation (Article 6), but are not obliged to do so. Under the terms of the Regulation, there must be no additional cost to subscribers for accessing their content portably when temporarily present in another EU Member State (Article 3.2). In order to protect the rights of copyright owners, portable service providers must verify the home country of their subscribers to ensure they are entitled to access the service in accordance with the Regulation.

Differences in national laws and licence agreements, in particular copyright permissions, are accommodated via a “legal fiction” where a service is deemed to have been provided, accessed and used in the subscriber’s home Member State, rather than in the Member State where they are temporarily present (Article 4).

What is a paid for subscription service?

Paid for subscription services are those provided against payment of money, whether this payment is made directly to the provider of the online content service, or to another party, such as part of a package of services (for example, Netflix, Now TV, BT Sport). This does not extend to services where consumers have to pay a mandatory fee for public broadcasting services, such as a TV Licence (for example, BBC iPlayer). It also does not extend to online content services that are not provided against payment of money from subscribers, but do generate revenue from advertising (for example, ITV Hub, All 4, My5).

¹ A reference to an Article in this document is a reference to an Article of the Portability Regulation.

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:168:FULL>

Who does the Regulation affect?

Subscribers to online content services

From 1 April 2018, subscribers will be able to access paid for online content services when they are temporarily present in another EU Member State. If free to access online content services choose to offer their content under the Regulation, subscribers to these services will also be able to access that content when in other Member States.

Under the Regulation, subscribers should have access to the service in the same manner as in their Member State of residence (including having access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities) (Article 3.1). They should not face any deliberate restrictions preventing them from using or accessing the service (for example, restrictions relating to functionality, a deliberate decrease in quality of delivery, or additional cost). Where quality is expected to vary for reasons outside the control of the service provider (for example, because of variable internet coverage), subscribers should be informed of this by the service provider (Articles 3.3 and 3.4).

Online service providers

By 1 April 2018 online service providers that offer content covered by the Portability Regulation, on a paid for basis, will need to make sure that they are ready to provide access to their services to subscribers temporarily present in another EU Member State. Online content service providers that provide access without payment of money can also offer their services to subscribers that are temporarily present in another EU Member State, but are not required to do so. Within two months of offering a portable service under the Regulation (by 2 June 2018 for paid for online content services) providers must have verified the Member State of residence of existing subscribers to their service.

Service providers covered by the Regulation will need to verify the Member State of residence of subscribers accessing portable services using up to two methods of verification from an agreed list of verification means (see Articles 5.1 and 5.2 and Annex A). This, for example, may include payment details for the online content service, or the location of an installed set-top box. The verification will have to be undertaken by service providers for each new contract with a subscriber, or upon renewal of an existing contract. Verification is crucial for ensuring that only those subscribers who are entitled to access portable services can do so. Subscribers may be asked to provide information to aid verification (Article 5.3)

Copyright owners may also authorise provision of portable services without additional verification of a subscriber's residence (Article 5.4) and may withdraw that authorisation (Article 5.5) upon provision of reasonable notice to the service provider.

The "legal fiction" underpinning the portability regulation is designed to ensure that online service providers will not have to renegotiate with rightholders in order to gain permission to provide access to copyright protected content in other Member States. However, they will need to ensure that their contract terms with rightholders and subscribers are up to date and reflect the Portability Regulation where appropriate. Any contract term which disapplies or contravenes the Regulation is unenforceable (Article 7).



Online service providers will also need to provide subscribers with information regarding the quality of delivery of the online content service before that service is provided. Information on quality of service is required to be provided by means that are adequate and proportionate (Article 3.4). For example, a service provider should indicate that the quality of a service may vary outside the subscriber's home Member State, but they do not have to investigate or provide information on the conditions in each Member State.

Rightholders

Owners of copyright and related rights should be aware that, from 1 April 2018, subscribers to paid for online content services will be able to access content, which may include copyright protected content, when they are temporarily present in another EU Member State. Furthermore, subscribers to online content services provided without payment of money will also be able to access content when temporarily present in another EU Member State if the provider chooses to provide this service. Providers of such services will be able to rely on the Regulation to provide their services on a portable basis, provided that they correctly verify that their subscribers are resident in the EU Member State which is their home residence, without further authorisation from rightholders.

Rightholders may also permit service providers to provide portable services without additional verification of the residence of their subscribers. This may be relevant when a rightholder is happy for their content to be accessed without territorial restrictions, or when the service provider also owns the rights in the content. Rightholders may withdraw this permission upon provision of reasonable notice to the service provider.

Guidance

The Government intends to publish further guidance on the Portability Regulation and what it means for businesses, rightholders and consumers, in the coming months. If you have any views on what this guidance should include, please provide details in your response to this consultation.

What happens after the UK leaves the European Union?

The Portability Regulation will enter into force before the UK leaves the EU. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

The Government is interested in hearing how businesses are preparing for the Portability Regulation to come into force. It is also interested in whether they have any views on the provision of content as per the Portability Regulation in the context of the UK's exit from the EU. 'If you would like to express your views on these issues, please do so in your response.

Why is the Government consulting?

The Portability Regulation is directly applicable in UK law, so does not need to be implemented by Parliament through legislation. The Regulation operates as if it had been enacted by the United Kingdom Parliament.

However, the various obligations outlined in the Portability Regulation need to be enforceable in UK law. In order to ensure that the Regulation is fully enforceable, appropriate enforcement mechanisms need to accompany the Portability Regulation.

To that end, the Government has considered what aspects of UK law are relevant. In particular, it has considered what powers should be used; whether any new criminal offences are required; which enforcement bodies are best placed to act; and whether certain duties should be enforceable between private parties.

This consultation seeks views on these enforcement means and also on the draft Regulations implementing them which are provided at Annex C. Note that not all enforcement mechanisms are provided in the draft Regulations. This is because some mechanisms already exist in domestic law and therefore do not need restating in the draft Regulations.

How will the Regulation be enforced?

The Government has identified six different means of enforcing the various aspects of the Portability Regulation. Some of these will be underpinned by existing legislation, others through agreements between private parties, and others through the draft Regulations provided at Annex C. The Government will not be introducing any new criminal sanctions in this area, and believes that now, and going forward, civil sanctions are the most appropriate mechanism for enforcement. The Table at Annex B sets out how enforcement works for each Article of the Portability Regulation. The explanation below refers to that Table.

a. The Portability Regulation itself

This is relevant to Articles 3.1, 3.2, 4, 5.1, 5.2, 5.4, 5.5, 6.1, 7, and 9.1.

Parties will be able to enforce breaches of the Regulation through private civil litigation. Article 7.1 states that contractual provisions between rightholders, online service providers and subscribers that are contrary to the Portability Regulation are



unenforceable. For example, this may be used in situations where an online content service provider attempts to implement an additional charge to provide portable services, or where the online content service provider insists on carrying out additional, unnecessary, verification checks to determine a subscriber's Member State of residence before providing the portable service.

b. Private, contractual enforcement for certain obligations owed by one party to another

This is relevant to Articles 3.1 and 3.3.

Private remedies are appropriate when the action is of personal, rather than public, interest. Individuals will be empowered to take civil proceedings against the other party. For example, this mechanism can be used if an online content service provider fails to provide portable content on a paid for service, or takes steps to reduce the quality of the service being offered. This is reflected in proposed regulation 4.

c. Data Protection Act 1998

This is relevant to Articles 5.1, 5.2, 6.1, 6.3 and 8.

This governs the processing of personal data and is enforced by the Information Commissioner's Office. This can be used to ensure the Regulation's data protection provisions are upheld.

d. Copyright, Designs and Patents Act (CDPA) 1988

This is relevant to Articles 5.1, 5.2 and 6.1.

Content provided by online services may be protected by certain IP rights, including copyright as laid out in the Copyright, Designs and Patents Act 1988. If effective verification of the Member State of residence of a subscriber is not carried out, an infringement of copyright may have occurred. In these cases, a rightholder is able to bring an infringement action against the online service provider.

e. Consumer Protection from Unfair Trading Regulations (CPUTR) 2008

This is relevant to Articles 3 and 6.2

These Regulations protect consumers from trading practices that are unfair or misleading, and also from misleading omissions. Breaches of the legislation, with limited exceptions, are criminal offences. This may include, for example, instances where an online content service provider gives misleading information regarding the price, quality or availability of a service. In addition, state enforcement bodies may take civil enforcement action under the Enterprise Act 2002, if the breach harms the collective interests of consumers.

f. Enterprise Act (EA) 2002

This is relevant to Articles 3, 7 and 9.2.

The CPUTR applies to situations which are unfair or misleading. However further enforcement is required where the acts or omissions are not fair or misleading and would have a detrimental effect on consumers. The EA allows for state civil enforcement of the Portability Regulation. Enforcers include the Competition and Markets Authority, Ofcom and local authorities. These enforcers may seek undertakings or orders prohibiting infringements.

This is reflected in proposed regulation 5. Through using these existing legislation and sanctions, alongside contractual enforcement for obligations between parties, the Government believes the Portability Regulation can be adequately enforced in the UK.

Questions

Has the Government identified the most appropriate means of legal enforcement?

Has the Government identified the most appropriate enforcement bodies for the Portability Regulation?

Assessment and review of these regulations

The scope of these regulations is limited to providing adequate enforcement of the Portability Regulation; the provisions of the Regulation itself are not in scope. The Government does not expect these regulations to impose significant costs on business, and will produce an internal Impact Assessment. The Government would welcome views on any potential regulatory impacts on business that can feed into this.

The draft regulations include a clause (6) committing to review these regulations every five years. The purpose of the review will be to establish whether, and to what extent, the proposed enforcement regime has achieved its objectives, if it is still the best approach, whether it is still required, and if it can be improved to reduce burdens on business and its overall costs.

Questions

Will this review provision be sufficient to allow the Government to effectively assess the proposed enforcement mechanisms?

Further comments

This consultation document sets out questions which would be of use to the Secretary of State in deciding upon the enforcement of the Portability Regulation and the accompanying policy.

In replying to this consultation, however, you are not restricted to answering these questions. We welcome any other comments that you have on the enforcement of the Portability Regulation.



Annex A

Verification means for Member State of residence (Article 5.1 of the Regulation)

Providers of an online content service provided against payment of money need to verify the Member State of residence of their subscribers using no more than two of the following means of verification:

- a. an identity card, electronic means of identification, in particular those falling under the electronic identification schemes notified in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council, or any other valid identity document confirming the subscriber's Member State of residence;
- b. payment details such as the bank account or credit or debit card number of the subscriber;
- c. the place of installation of a set top box, a decoder or a similar device used for supply of services to the subscriber;
- d. the payment by the subscriber of a licence fee for other services provided in the Member State, such as public service broadcasting;
- e. an internet or telephone service supply contract or any similar type of contract linking the subscriber to the Member State;
- f. registration on local electoral rolls, if the information concerned is publicly available;
- g. payment of local taxes, if the information concerned is publicly available;
- h. a utility bill of the subscriber linking the subscriber to the Member State;
- i. the billing address or the postal address of the subscriber;
- j. a declaration by the subscriber confirming the subscriber's address in the Member State;
- k. an internet protocol (IP) address check, to identify the Member State where the subscriber accesses the online content service.

The means of verification used must be appropriate and proportionate. The means listed under points (i) to (k) shall only be used in combination with one of the means listed under points (a) to (h), unless the postal address under point (i) is included in a publicly available official register.

Annex B

Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14th June 2017 on cross-border portability of online content services in the internal market.

Enforcement Table

2018 Domestic Regulations (“SI”) EU Regulation 2017/1128 (“Reg 2017”)

Consumer Protection from Unfair Trading Regulations 2008 (“CUPTR”)

Copyright Designs and Patents Act 1988 (“CDPA”)

Data Protection Act 1998 (“DPA”) Enterprise Act 2002 (“EA”)

Reg 2017	Enforcement	Comments
Art 1.1 – objective	N/A	No enforcement as general statement.
Art 1.2 – tax	N/A	No enforcement as no tax impact.
Art 2 – definitions	Reg 2 SI	Imports Reg 2017 definitions for consistent enforcement.
Art 3.1 – service provision in other MS	Reg 2(1)(b) SI Reg 4 SI Art 7.1 Reg 2017 Regs 5(5)(a), 5(5)(m) and 9 CPUTR Reg 5 SI, Part 8 & Sch 13 EA	Order applicable to providers. Actionable duty owed between provider and subscriber for non-provision of service as stipulated by Reg 2017. Contract term unenforceable where limits service to be provided under Reg 2017. Unfair practice re service availability/usage is misleading if average consumer takes transactional decision not otherwise have taken - criminal offence. Enforcement where unfair practice re service availability/usage harms collective interests of consumers. Failure to supply service (where no unfair practice) subject to enforcement where harm to collective interests of consumers.

Reg 2017	Enforcement	Comments
Art 3.2 – no additional charges on subscriber	<p data-bbox="802 342 1005 376">Art 7.1 Reg 2017</p> <p data-bbox="802 443 1005 499">Regs 5(4)(g) and 9 CPUTR</p> <p data-bbox="791 663 1016 696">Part 8 & Sch 13 EA</p>	<p data-bbox="1046 342 1477 405">Contract term unenforceable where imposes charge.</p> <p data-bbox="1046 443 1477 629">Unfair practice re charging is misleading as to price/manner in which price is calculated if average consumer takes transactional decision not otherwise have taken - criminal offence.</p> <p data-bbox="1046 667 1477 757">Enforcement where unfair practice re price harms collective interests of consumers.</p>
Art 3.3 – reduction in quality	<p data-bbox="852 790 956 824">Reg 4 SI</p> <p data-bbox="802 891 1005 947">Regs 5(4)(g) and 9 CPUTR</p> <p data-bbox="802 1081 1005 1137">Reg 4 SI, Part 8 & Sch 13 EA</p>	<p data-bbox="1046 790 1422 853">Actionable duty owed between provider and subscriber.</p> <p data-bbox="1046 891 1477 1043">Unfair practice re service availability/usage is misleading if average consumer takes transactional decision not otherwise have taken - criminal offence.</p> <p data-bbox="1046 1081 1477 1205">Enforcement where unfair practice re service availability or usage harms collective interests of consumers.</p> <p data-bbox="1046 1243 1477 1332">Enforcement where harm to collective interests of consumers (even where no unfair practice).</p>
Art 3.4 – providing info re quality before providing service	<p data-bbox="791 1368 1016 1424">Regs 5(5)(k), 6(3)(b) and 9 CPUTR</p> <p data-bbox="791 1592 1016 1626">Part 8 & Sch 13 EA</p>	<p data-bbox="1046 1368 1477 1554">Unfair practice re quality of delivery or omitting to fulfil a Community info requirement is misleading if average consumer takes transactional decision not otherwise have taken - criminal offence.</p> <p data-bbox="1046 1592 1477 1682">Enforcement where unfair practice re quality of delivery harms collective interests of consumers.</p>
Art 4 – MS law	<p data-bbox="802 1715 1005 1749">Art 7.1 Reg 2017</p>	<p data-bbox="1046 1715 1382 1839">Contract term contravening application of law of MS of subscriber's residence is unenforceable.</p>



Reg 2017	Enforcement	Comments
Art 5.1 – verifying MS of residence	<p>Art 7.1 Reg 2017</p> <p>ss.96 & 107 CDPA</p> <p>DPA</p>	<p>Makes unenforceable contract term requiring provider to perform checks different to those in Art 4 Reg 2017.</p> <p>Failure to verify infringes copyright actionable by rights holder against provider - also a criminal offence.</p> <p>Data protection breaches enforceable by ICO.</p>
Art 5.2 – re-verifying MS of residence	<p>Art 7.1 Reg</p> <p>ss.96 & 107 CDPA</p> <p>DPA</p>	<p>Makes unenforceable contract term requiring provider to perform different checks to those in Art 4 Reg 2017.</p> <p>Failure to verify infringes copyright actionable by rights holder against provider - also a criminal offence.</p> <p>Data protection breaches enforceable by ICO.</p>
Art 5.3 – subscriber to provide info	N/A	No duty on subscriber to comply. No duty on provider to supply service if info not received.
Art 5.4 – waiver of verification and withdrawal	<p>Art 7.1 Reg 2017</p> <p>Art 7.1 Reg 2017</p>	<p>Contract term unenforceable if negates waiver.</p> <p>Contract term unenforceable if restricts withdrawal.</p>
Art 5.5 – waiver	Art 7.1 Reg 2017	Contract term unenforceable if restricts withdrawal.
Art 6.1 – opt-in provider	<p>Art 7.1 Reg 2017</p> <p>ss.96 & 107 CDPA</p> <p>DPA</p>	<p>Contract term unenforceable if requires provider to perform different checks to those in Art 4 Reg 2017.</p> <p>Failure to verify infringes copyright actionable by rights holder against provider - also a criminal offence.</p> <p>Data protection breaches enforceable by ICO.</p>

Reg 2017	Enforcement	Comments
Art 6.2 – info provision by opt-in provider	Regs 6(3)(b) and 9 CPUTR Part 8 & Sch 13 EA	Unfair practice of omitting to fulfil Community info requirement is misleading if average consumer takes transactional decision not otherwise have taken - criminal offence. Enforcement where unfair practice harms collective interests of consumers.
Art 6.3 - duties of opt-in provider	Reg 2(1)(b) SI DPA	Order applies to opt-in provider. Data protection breaches enforceable by ICO.
Art 7.1 – terms	Art 7.1 Reg 2017 Part 8 & Sch 13 EA	Contract terms contravening Reg 2017 are unenforceable.
Art 7.2 – applicable law	Art 7.1 Reg 2017 Part 8 & Sch 13 EA	Contract term unenforceable if evades applicable law.
Art 8 – data	DPA	Data protection breaches enforceable by ICO.
Art 9.1 – application to contracts/rights	Reg 3 SI Art 7.1 Reg 2017	Application to relevant contracts and rights to ensure enforcement re those contracts and rights. Contract term excluding application is unenforceable.
Art 9.2 – verifying	Reg 5 SI, Part 8 & Sch 13 EA	Enforcement where harm to collective interests of consumers.
Art 10 – evaluation	N/A	No enforcement as duty on Commission only.
Art 11 – in force	Reg 1 SI	Regs in force when Reg 2017 directly applicable.

Annex C

STATUTORY INSTRUMENTS

2018 No. Consultation Draft

INTELLECTUAL PROPERTY CONSUMER PROTECTION

The Portability of Online Content Services Regulations 2018

<i>Made</i>	- - - -	2018
<i>Laid before Parliament</i>		2018
<i>Coming into force</i>	- -	1 st April 2018

The Secretary of State is a Minister designated⁽³⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽⁴⁾ in relation to intellectual property (including both registered and unregistered rights) and measures relating to consumer protection.

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and section 210(9) of the Enterprise Act 2002⁽⁵⁾.

Citation and commencement

- 1.—(1) These Regulations may be cited as the Portability of Online Content Services Regulations 2018.
- (2) These Regulations come into force on 1st April 2018.

Interpretation

- 2.—(1) In these Regulations—

“provider” means a person who provides an online content service and—

- (a) is required, under Regulation 2017/1128, to ensure that the service is portable; or
- (b) opts, under that Regulation, to provide a service that is portable; and

“Regulation 2017/1128” means Regulation (EU) No 2017/1128 of the European Parliament and of the Council of 14th June 2017 on cross-border portability of online content services in the internal market⁽⁶⁾.

(2) Other words and expressions in these Regulations are to be construed in accordance with Regulation 2017/1128.

⁽³⁾ SI 2006/608 and SI 1993/2661

⁽⁴⁾ 1972 c.68

⁽⁵⁾ 2002 c.40

⁽⁶⁾ OJ No L181, 30.2017, p.1

Application

3.—(1) These Regulations apply to online content contracts concluded and online content rights acquired—

- (a) on or after 1st April 2018; or
- (b) before 1st April 2018, where such contracts and rights subsist on or after 1st April 2018.

(2) In subsection (1), a reference to online content contracts and online content rights is a reference to such contracts and rights which relate to the provision of, the access to, and the use of an online content service under Regulation 2017/1128.

Actionable breach

4.—(1) A breach of an obligation by a provider to comply with Article 3.1 (obligation to provide online content service) or Article 3.3 (steps reducing quality of delivery) of Regulation 2017/1128 is a breach of a duty owed by that provider to a subscriber.

(2) Where the subscriber suffers loss or damage due to such a breach by the provider, that loss or damage is actionable by the subscriber against that provider.

Amendment to Enterprise Act 2002

5. In Schedule 13 to the Enterprise Act 2002⁽⁷⁾ (Part 2 Provisions of Directives and Regulations), after paragraph 15 insert—

“16. Articles 3, 7 and 9.2 of Regulation (EU) No 2017/1128 of the European Parliament and of the Council of 14th June 2017 on cross-border portability of online content services in the internal market.”

Review

6.—(1) The Secretary of State must carry out a review of these Regulations.

(2) In carrying out the review, the Secretary of State must have regard to how, rights and obligations corresponding to rights and obligations in this instrument, operate in other member States.

(3) The Secretary of State must set out the conclusions of the review in a report.

(4) The report must in particular—

- (a) set out the objectives intended to be achieved by these Regulations;
- (b) assess the extent to which those objectives are achieved; and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(5) The Secretary of State must—

- (a) publish the first such report before 1st April 2023; and
- (b) publish subsequent reports at intervals not exceeding five years.

2018

Name
Parliamentary Under Secretary of State
Department for Business, Energy and Industrial Strategy

⁽⁷⁾ 2002 c.40

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations relate to Regulation (EU) No 2017/1128 of the European Parliament and of the Council of 14th June 2017 on cross-border portability of online content services in the internal market (“Regulation 2017/1128”)⁽⁸⁾. Whilst the terms of Regulation 2017/1128 are directly applicable, the United Kingdom must ensure enforcement of those terms.

Regulation 2017/1128 allows subscribers, temporarily present in a member State other than the member of State of their actual and stable residence, to have access to a portable online content service in the same manner as in the member State of residence.

A reference in this Note to an Article is to that of Regulation 2017/1128.

Regulation 1 states that these Regulations come into force on 1st April 2018, which is the same day on which Regulation 2017/1128 becomes directly applicable (Article 11).

Regulation 2 sets out definitions used in these Regulations.

Regulation 2017/1128 not only obliges certain online content providers to provide this cross-border service (Article 3), but also offers other providers the possibility of opting-in to the Regulation and being bound by its terms (Article 6).

Other words and expressions in these Regulations are to be construed in accordance with Regulation 2017/1128, including the following—

- “consumer” means any natural person who, in contracts covered by Regulation 2017/1128, is acting for purposes which are outside that person’s trade, business, craft or profession;
- “Member State of residence” means the Member State, determined on the basis of Article 5 of Regulation 2017/1128, where the subscriber has his or her actual and stable residence;
- “online content service” means a service, as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, that a provider lawfully provides subscribers in their Member State of residence on agreed terms and online, which is portable and which is—
 - an audiovisual media service defined in point (a) of Article 1 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)⁽⁹⁾; or
 - a service, the main feature of which is the provision of access to, and the use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;
- “portable” means subscribers can effectively access and use the online content service in the Member State of residence without being limited to a specific location; and
- “subscriber” means any consumer who, on the basis of a contract for the provision of an online content service with a provider, whether against payment of money or without such payment, is entitled to access and use such service in the Member State of residence.

Regulation 3 provides for these Regulations to apply to contracts and rights connected with online content services relating to Regulation 2017/1128, regardless of when those contracts were entered into or those rights acquired, provided the contracts and rights apply after these Regulations come into force (Article 9.1). In relation to such contracts, any term which disapplies or contravenes Regulation 2017/1128 is unenforceable (Article 7).

⁽⁸⁾ OJ No L181, 30.2017, p.1

⁽⁹⁾ OJ No L95, 15.4.2010, p.1

However, regardless of the law applying to the contract, Regulation 2017/1128 provides that use of the portable online content service in a member State other than that of the subscriber's residence is deemed to occur according to the laws of the member State of residence (Article 4).

Regulation 4 makes specified Articles of Regulation 2017/1128 actionable where a breach of an obligation owed by a provider to a subscriber causes damage to the latter. This applies to the obligation to provide the portable service and the obligation not to take steps to reduce the quality of the delivery of the service.

The obligation to provide the portable service in the 'same manner' includes to the same content, on the same range and number of devices, for the same number of users, and with the same range of functionalities (Article 3.1). 'Same manner' does not extend to requirements relating to the quality of delivery of the service in the other member State unless otherwise agreed between the provider and subscriber (Article 3.3). The provider must not take steps to reduce the quality of delivery (Article 3.3).

The provider must not impose an additional charge on the subscriber for use of the portable online content service in a member State other than that of the subscriber's residence (Article 3.2).

Regulation 5 amends Schedule 13 of the Enterprise Act 2002⁽¹⁰⁾ enabling action, by enforcers designated under that Act, to be taken where there is harm to the collective interests of consumers in relation to Articles 3, 7 and 9.2.

The subscribers' right of access to the service under Regulation 2017/1128 is subject to verification checks by the service provider (Articles 5 and 9.2). Those checks may be waived by those who with rights in the content of the service and such waiver may be later withdrawn on the giving of reasonable notice to the service provider (Articles 5.4 and 5.5). The provider may request the subscriber to supply information to facilitate verification checks (Article 5.3).

Regulation 6 requires the Secretary of State to review the operation of these Regulations, and to publish a report on findings. The first report must be published before 1st April 2023. Reports afterwards are to be published at least once in every 5 years. This regulation relates to sections 28 to 31 of the Small Business, Enterprise and Employment Act 2015⁽¹¹⁾.

These Regulations do not contain every means of enforcement in relation to Regulation 2017/1128, as some enforcement mechanisms are in existing legislation and so are not repeated in this statutory instrument. An overview of other means of enforcement is in the enforcement transposition note.

The enforcement transposition note is available online at www.gov.uk/government/organisations/intellectual-property-office and copies can also be obtained from the Intellectual Property Office, 4 Abbey Orchard Street, London, SW1H 2HT.

⁽¹⁰⁾ 2002 c.40

⁽¹¹⁾ 2015 c.26

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000

Fax: 01633 817 777

Email: information@ipo.gov.uk

Web: www.gov.uk/ipo

Facebook: TheIPO.UK

Twitter: @The_IPO

YouTube: ipogovuk

LinkedIn: uk-ipo

For copies in alternative formats please
contact our Information Centre.

**When you no longer need this booklet,
please recycle it.**

© Crown copyright, 2018

This document is free for re-use under the terms of the
Open Government Licence.

Images within this document are licensed by Ingram Image.

Published: January 2018

DPS-005968



INVESTORS
IN PEOPLE

CUSTOMER
SERVICE
EXCELLENCE

