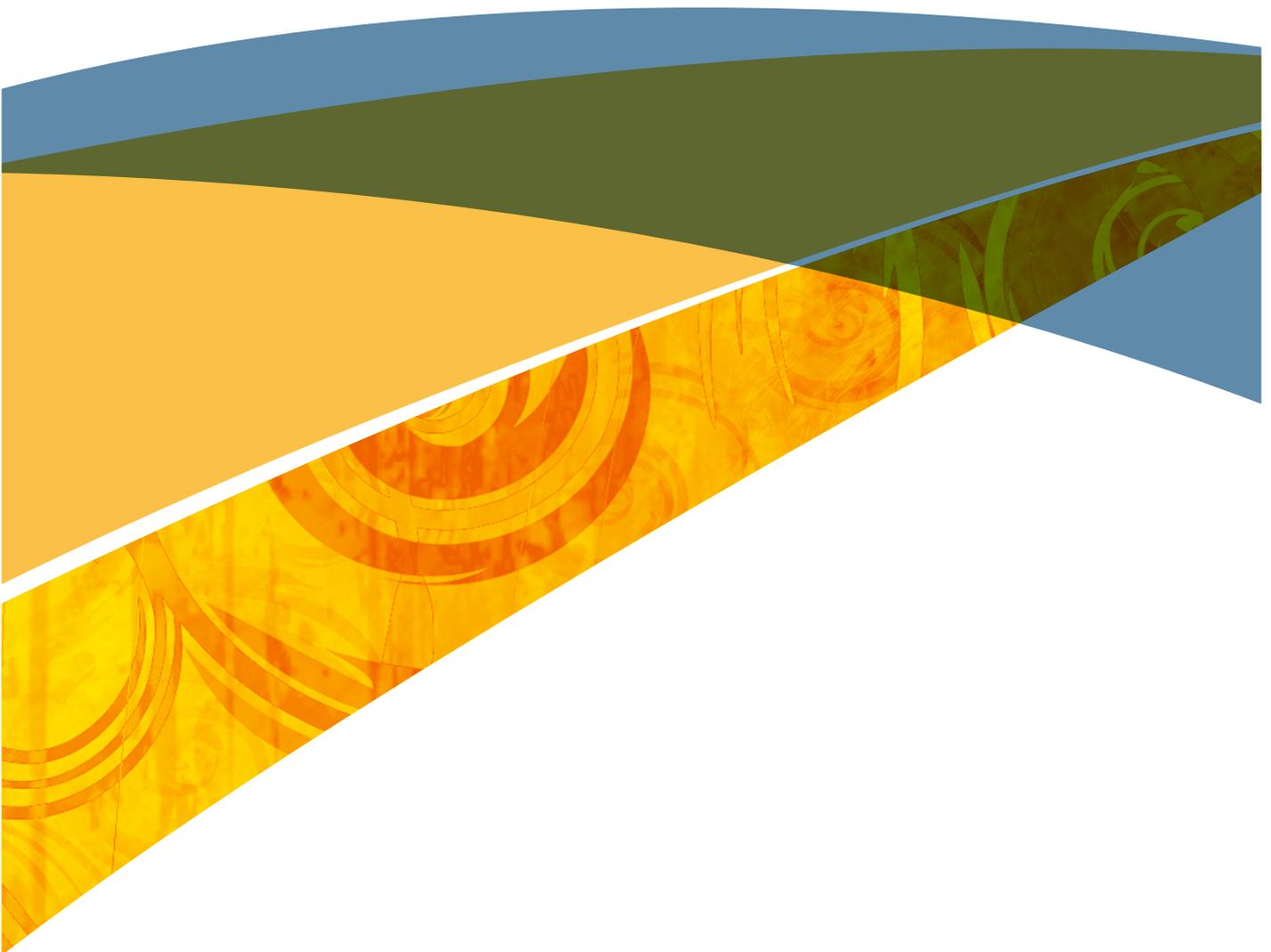




Intellectual
Property
Office

Cross-border portability of online content services: Response





Introduction

1. On 1 April 2018, EU Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (the EU Portability Regulation) will apply. This Regulation will make it easier for subscribers based in an EU Member State to access their online content services (for example, television, film or music subscriptions) when they are temporarily located in another Member State.
2. The EU Portability Regulation will apply in the UK and the rest of the EU on 1 April 2018. From 3 to 31 January 2018, the Government consulted on the means by which the EU Portability Regulation could be enforced in the UK and proposed enforcement bodies. The Government also proposed using existing legislation and bodies as far as possible, with further options set out in the Portability of Online Content Services Regulations 2018 (the UK Regulations). The UK Regulations provide consumers with options for redress should disputes arise over service provision and verification. They enable parties to enforce breaches of the EU Regulation through private civil litigation. The UK Regulations do not create any new criminal offences, but rather rely on current legislation as a means of enforcing the various obligations.
3. The consultation paper also expressed interest in hearing industry views on the provision of portability following the UK's exit from the EU. The Government also invited respondents to provide their views on what should be included in guidance to be published on the EU Regulation.
4. There were a total of 12 responses to the consultation, received from individual online content service providers and their trade associations and representative bodies, as well as organisations representing copyright owners. Respondents addressed some or all of the questions set out in the consultation paper.
5. This document provides a summary of the responses and sets out the Government's response.



Summary of consultation responses

Brexit implications

6. In the consultation paper, the Government asked for views on the provision of content as per the EU Portability Regulation in the context of the UK's exit from the EU.
7. All 12 respondents addressed this in their response, and all agreed that in the absence of a reciprocal agreement between the UK and the EU, it would not be possible for them to continue to provide portable services once the UK leaves the EU. All respondents asked for clarification on the Government's position and plans for securing a reciprocal agreement with the EU.
8. Some respondents stated that they had begun to prepare their systems for implementation of portability and noted that there were costs involved in doing this – costs which would be increased if the portability service were to be reversed as a result of UK exit. A number of respondents also stated that consumers would be dissatisfied if the portability service ceased to operate so soon after its implementation.
9. These respondents asked that a reciprocal agreement is reached between the UK and the EU so that portable services can continue to be provided on a similar basis as set out in the EU Regulation. Such an agreement would require consideration of not just copyright law, but also other regulatory arrangements.

Enforcement mechanisms

10. In the consultation paper, the Government identified six different means of enforcing the EU Portability Regulation, most of which are based in existing legislation.

Question 1: Has the Government identified the most appropriate means of legal enforcement?

Question 2: Has the Government identified the most appropriate enforcement bodies for the Portability Regulation?

11. Seven of the respondents explicitly agreed that the most appropriate means of legal enforcement and the most appropriate enforcement bodies had been identified. Comments from these respondents included agreement that civil procedures and remedies are appropriate. One respondent suggested that there be flexibility in the enforcement mechanisms to ensure that the obligation to provide portability of content services does not continue should it not legally be possible to do so following the UK's departure from the EU.
12. One of the remaining five respondents stated that the Government should show that what it proposed in respect of enforcement mechanisms is proportionate given the implications of UK exit. Another respondent suggested that infringements under the Copyright, Designs and Patents Act 1988 could be applied more widely; for example, there is no specific obligation for service providers to inform right holders of portability of content, and this could be addressed by copyright law.

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13. It was generally noted in responses that enforcement should be guided by the principle of the minimum required for compliance with the EU Regulation.
 14. There were no objections to the means of legal enforcement and the enforcement bodies identified by the Government.

Question 3: Will this [five-year] review provision be sufficient to allow the Government to effectively assess the proposed enforcement mechanisms?

15. Four of the respondents explicitly agreed that the review provision is sufficient; four stated that it was not, and offered alternative review periods. Four respondents did not provide a response to this question.
16. The alternative review periods offered were:
 - Shortly after the EU Regulation comes into force;
 - Shortly after the UK leaves the EU;
 - Before the European Commission's own review of the EU Regulation in March 2021;
 - Coinciding with the outcome of Brexit negotiations.

Guidance

17. In the consultation paper, the Government asked respondents to provide views on what should be included in published guidance on the EU Regulation.
18. Almost all respondents provided areas and topics on which they wish to see further guidance from the Government. These include, but are not limited to:
 - The enforceability of contract terms under article 7 of the EU Regulation;
 - The verification process of a subscriber's Member State of residence under article 5 of the EU Regulation;
 - Clarification of the definitions and scope of "temporarily present", "learning mobility", "service provider", "subscriber".

Government response

The Government welcomes the responses received and the overall support and approval for enabling portability of online content services.

Brexit implications

19. The Government acknowledges the concerns raised by respondents about how portability will function once the UK leaves the EU. We agree that the continued provision of portable content services by UK-based providers will rely on reciprocal arrangements with the EU. The Government welcomes continued engagement with affected stakeholders and will ensure that UK legislation is amended as appropriate to reflect the UK's future relationship with the EU.
20. The Government thanks respondents for their suggestions of an alternative to the five-year review period set out in the UK Regulations. The review as currently envisaged will assess the effectiveness of the enforcement mechanism in UK law. The rules on portability will need to be in place for a sufficient period of time to maximise the data gathering opportunities. We recognise that the review as set out is only relevant while the EU Portability Regulation continues to have effect in the UK. The Government will ensure that UK law is amended as appropriate to reflect the new legal environment following the UK's departure from the EU, and that any new legislation is subject to proper review.

Enforcement mechanisms

21. The Government agrees that the enforcement mechanisms that are put in place should be proportionate, and intends to take a light-touch approach to ensure that we do not impose unnecessary burdens on those affected by the EU Regulation. In view of this, we have chosen to make Article 9.2 of the EU Regulation – the requirement for service providers to verify their subscribers' Member States of residence by 21 May 2018 – an actionable breach by a subscriber, rather than enforceable under the Enterprise Act 2002, as stated in regulation 5 of the UK Regulations (consultation draft of the SI).
22. We also agree that the Copyright, Designs and Patents Act 1988 may have wider application than was identified in the consultation document, as suggested by one respondent – the EU Portability Regulation specifies not only that verification but also notification requirements must be met between right holders and providers.
23. We will also review the efficacy of the enforcement procedure once negotiations with EU conclude.
24. Arrangements will be made to ensure that the Portability of Online Content Services Regulations 2018 come into force on 1 April 2018.

Guidance

25. The Government thanks respondents for their various suggestions for topics to be included in further guidance on the EU Regulation. We will take these topics into consideration when developing this guidance.

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