



## **SKY UK'S RESPONSE TO THE GOVERNMENT'S CONSULTATION ON "CROSS-BORDER PORTABILITY OF ONLINE CONTENT SERVICES"**

- 1.1 Sky welcomes the opportunity to respond to the IPO's consultation on the implementation of the EU Portability Regulation. Sky is Europe's leading entertainment company, serving 23 million customers across seven countries in Europe. As one of the most popular pay television and content providers in Europe, portability is a significant change to our business. While the consultation focuses on enforcement in the UK, for the Government the most pressing concern with the implementation of the Regulation should be the risk that the UK leaves the EU without an agreement on portability.
- 1.2 Portability will be a significant benefit to UK consumers. We know our customers want the ability to watch the content they subscribe to in the UK while they are temporarily located in another Member State of the EU. Clearly, once we begin to provide this service for our customers we want to continue to provide it for them and customers will expect this to happen. For this reason we are concerned that the Government has not set out how it will ensure that UK citizens will be able to continue to enjoy the benefits of portability after the UK has left the EU.

### **Portability will not be possible after Brexit unless there is a specific deal that recreates the 'legal fiction' underpinning the Regulation**

- 1.3 Cross border portability will allow UK consumers to access online content services when they are in Europe. However, this will require UK content service providers to be subject to, and benefit from, the provisions in the Portability Regulation. This will enable UK content service providers to deliver portability while the UK remains in the EU; however, after the UK leaves, providers will not be able to deliver portability without being in breach of copyright in multiple EU Member States.
- 1.4 The EU introduced the Regulation specifically because it recognised that agreeing portability between rights holders and content service providers through a patchwork of hundreds, if not thousands, of commercial agreements was practically impossible. This continues to be true now. To give each content service provider in the UK the right to make its online content service(s) available on a portable basis in each of the 26 Member States in the EU and to give each content service provider in the same such Member State a reciprocal right to make its online content service(s) available in the UK involves a complex set of negotiations between each rights holder and its licensees in each and every Member State to extend the grant of rights to allow portability and to waive any restrictions such as holdbacks and geo-filtering obligations. In most cases a further set of negotiations will be required between the relevant licensees and the platforms on which their services are distributed in those Member States. This is not feasible.
- 1.5 The 'legal fiction' in Article 4 of the Regulation sets out that a subscriber is considered to be resident in their home Member State for the purpose of access and use of an online content service. Article 4 guarantees that an online service provider will not breach copyright or related rights in another EU Member State by providing its online content service to a customer who is temporarily located in another Member State.
- 1.6 The purpose of the Regulation was to ensure a consistent and uniform application of the legal fiction, which guarantees that mandatory requirements to offer portable access will

come into force at the same time for all content service providers. Upon exit from the EU, the only way to achieve this is for the UK and the EU to agree that the legal fiction should continue to apply as if the UK was still subject to the Regulation. However, the Regulation does not currently apply to any countries that are third party to the EU, so there is no precedent for this kind of agreement.

- 1.7 Negotiations between the UK and the EU must ensure that the 'legal fiction' in the Regulation continues to apply to UK content service providers following the UK's exit from the EU. If it does not, UK consumers will no longer be able to access this content when travelling to Europe, withdrawing a key consumer benefit that customers will have become accustomed to.
- 1.8 If there is no agreement on portability between the EU and UK, Sky's services will not be covered by the protections offered by the Regulation. This would mean Sky would breach copyright and related rights across Member States in the EU. Equally any EU citizens travelling to the UK would be using a service in breach of UK copyright law. This is a significant legal risk, meaning Sky will have no choice but to make the decision to turn off portability for its subscribers.

**If enforcement mechanisms continue to apply after the UK leaves the EU, the UK Government would effectively be compelling content service providers to break the law across the EU**

- 1.9 Sky understands that under proposals in the European Union (Withdrawal) Bill 2017-19, currently being debated in the UK Parliament, the European *acquis* will be brought into UK law including regulations such as the Portability Regulation. The Government must ensure that it has sufficient flexibility in the enforcement mechanisms it is consulting on so that content providers are not compelled to offer portability when it is not legally possible for them to do so.
- 1.10 Sky emphasises that while the proposed enforcement mechanisms are appropriate in 2018, when the UK leaves the EU these provisions will compel companies to offer a portable service that they are unable to legally provide in Member States across the EU. It is important that these provisions are not applicable in the event that the UK leaves the EU without a trade deal that creates an equivalent legal fiction enforceable both in the UK and in EU Member States. For example, individuals should not be empowered to take civil proceedings if companies are unable to rely on the legal fiction underpinning the Regulation.
- 1.11 It is important the Government has contingency solutions so that content providers are not left in a paradoxical situation where they are compelled by UK law to offer portability to their customers, but they have no legal basis by which to offer that portability. The Government should consider inserting sunset clauses within the enforcement mechanisms so that it is clear that they do not apply in the event that the UK leaves the EU. This would give providers more legal certainty.
- 1.12 Given the uncertainty surrounding portability after Brexit, a five year review does not seem to be sufficient to allow the Government to effectively assess the proposed enforcement mechanisms. The Government will need to review the enforcement mechanisms whenever it is clear what arrangements have been made both for the transition from leaving the EU and the final exit agreement.

**The Government's guidance should make it clear to consumers what portability will mean in practice and in particular the risk that it could be discontinued after Brexit**

- 1.13 In the consultation the Government invites respondents to provide any input on what would be suitable to include in the proposed guidance that will be published along with the legislative amendments. We have set out below Sky's perspective on what the guidance should contain.
- 1.14 Under the Regulation content service providers will be obliged to provide information regarding the quality of delivery whilst abroad. Providers will not be allowed to take steps to reduce the quality of the service, in terms of picture and buffering speed for example. For Sky's services a customer will be able to view all content as they would in their home territory, subject to having a decent enough data connection when streaming. We therefore would like the guidance to clarify for consumers that while the provider's intention is for the consumer to be able to stream the service to the same quality as they would at home, the quality might vary due to the internet connection differing from the one they normally use. The guidance should make it clear that this is out of control of the content provider and therefore is not their responsibility to resolve.
- 1.15 The guidance should also make it clear that portability depends on the UK's membership of the EU or a trade deal that includes an agreement on portability. From the outset of the Regulation coming into force the Government should make consumers aware that it may not be possible for content service providers to offer portability after the UK has left the EU.

**Sky**

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