

EXPLANATORY MEMORANDUM TO

THE PORTABILITY OF ONLINE CONTENT SERVICES REGULATIONS 2018

2018 No. 249

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Intellectual Property Office, an executive agency of the Department for Business, Energy and Industrial Strategy, and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument provides enforcement mechanisms related to European Union Regulation No 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 (“EU Regulation”). This Regulation will make it easier for UK subscribers to online content services (for example, television, film or music subscriptions) to access these services when they are temporarily located in another Member State of the EU. This instrument comes into force on 1 April 2018.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This instrument sets out measures to ensure effective enforcement in the United Kingdom of the Portability Regulation.
- 4.2 This Regulation will apply in UK law by direct effect and does not require the domestic implementation of its terms.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The EU Regulation is designed to make it easier for consumers to access online content services while they are temporarily in another EU country. Presently, this is not always possible as some online content service providers (for example, Netflix or BBC iPlayer) block access to their services outside of a subscribing consumer's home country. This is often done in order to ensure compliance with territorial agreements on content protected by copyright.
- 7.2 Under the EU Regulation, it is compulsory for "paid-for" subscription services to be made portable throughout the EU. Providers who provide access to free services can choose to make their content and services available on a portable basis, but are not required to do so. There must be no additional costs imposed on subscribers for accessing content while in another EU country, and the provider is required to provide information on the quality of content available before providing this service. Providers are also required to verify the home country of their subscribers to ensure that they are entitled to access the service in accordance with the Regulation.
- 7.3 The EU Regulation was agreed on 14 June 2017, and met the UK's objective to ensure that the Regulation would deliver real benefits to consumers without placing undue burdens on copyright owners or service providers. Both the Commons and Lords EU Scrutiny Committees have released this measure from scrutiny.
- 7.4 There is general support from service providers and content creators for increased portability, and they welcome the consumer benefits it will bring.
- 7.5 The EU Regulation will enter into force in the UK and the rest of the European Union on 1 April 2018. As a Regulation, it will be directly effective, so does not require domestic implementation of its terms. However, the UK is required to ensure that directly effective Regulations can be enforced, and this instrument deals with aspects of that enforcement. Not all enforcement mechanisms are contained in the Regulation; some are in existing legislation and therefore do not need repeating.
- 7.6 The instrument provides consumers with clear options for redress should disputes arise regarding over service provision or verification. Parties will be able to enforce breaches of the Regulation through private civil litigation.
- 7.7 A review of this instrument will be carried out within five years of implementation and will do the following:
- set out the objectives intended to be achieved by the Regulations;
 - assess the extent to which those objectives have been achieved; and
 - assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved through less regulation.

Consolidation

- 7.8 Not applicable.

8. Consultation outcome

- 8.1 The EU Regulation is silent on the particular enforcement mechanisms that are to be used; therefore, a focussed consultation on the means of enforcement of the

Regulation in the UK has taken place. The consultation sought views from businesses, right holders and consumers as to whether the most appropriate means of legal enforcement, and the most appropriate enforcement bodies, had been identified.

- 8.2 The consultation ran for four weeks, from 3 to 31 January 2018, and 12 responses were received. These were from individual online content service providers, trade associations and bodies representative of both providers and right holders. The consultation paper set out the means by which the EU Regulation could be enforced and sought industry views on these means and proposed enforcement bodies. It also expressed interest in hearing views on the provision of portability following the UK's exit from the EU. Respondents were also invited to provide their views on what should be included in guidance to be published on the Regulation.
- 8.3 Whilst this instrument deals only with enforcement where there is no appropriate existing legislation, the whole range of enforcement options and legislation were explained and consulted upon. There were six different means of enforcement identified in the consultation paper, and almost all of the respondents explicitly agreed that the most appropriate means of legal enforcement and the most appropriate enforcement bodies had been identified. The five-year review provision received varying levels of agreement and disagreement, with some respondents offering alternative review periods in light of Brexit implications. All 12 respondents agreed that a reciprocal agreement between the UK and the EU upon the UK's exit would be required in order for portability to continue to legally function.
- 8.4 The summary of responses and Government response to the consultation will shortly be available at <https://www.gov.uk/government/consultations/implementation-of-the-eu-portability-regulation>.

9. Guidance

- 9.1 The Government intends to publish further guidance on the EU Regulation and what it means for businesses, right holders and consumers, in the coming months. Almost all respondents to the consultation provided areas and topics on which they wish to see further guidance. The Government will take these topics into consideration when developing this guidance.

10. Impact

- 10.1 The impact on charities or voluntary bodies is not significant. The EU Regulation will have some impact on business, as it will require them to provide an additional portable service for online content. The statutory instrument itself will have limited impact on business as it merely deals with enforcement. The likely scale of impact will depend on business compliance with the Regulation; however, it is believed that enforcement actions will be few, if any, because there is general acceptance of the need for increased portability.
- 10.2 The impact on the public sector is positive (although we cannot monetise it), as the EU Regulation makes it easier for consumers to access online content services while they are temporarily in another EU country, and the enforcement mechanisms provided for in the instrument will ensure that UK businesses are compliant with the EU Regulation.

10.3 A 'de minimis' self-certification form has been completed for this instrument, as it is estimated that the impact on the private, voluntary and public sectors falls below the £5m threshold.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 No specific action is proposed to minimise regulatory burdens on small businesses, because there is estimated to be minimal impact on businesses. For those small businesses to whom the EU Regulation will apply, it is not expected that there will be a disproportionate impact on small businesses as we do not expect the degree or scale of enforcement action required to be significant.

12. Monitoring & review

12.1 The instrument contains a clause committing to its review 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 businesses and its overall costs.

12.2 We are aware that the UK's exit from the EU may have an impact. Should the UK reach a deal with the EU on the reciprocity of portability following the UK's exit, a review of the efficacy of the enforcement procedures will be conducted.

13. Contact

13.1 Paras Junejo at the Intellectual Property Office (Telephone: 0207 034 2856 or email: paras.junejo@ipo.gov.uk) can answer any queries regarding the instrument.