

The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2018 - portability of online content services

Department for Business, Energy and Industrial Strategy

RPC rating: fit for purpose

Description of proposal

The Portability of Online Content Services Regulations 2018, implemented on 1 April 2018, allow EU-based customers to access their online content services (e.g. *Netflix*) when temporarily in an EU member state other than their home state. It is a cross-border copyright mechanism, which provides reciprocal protections and benefits between EU member states; it cannot be extended to cover countries outside of the EU. Under the European Union (Withdrawal) Act, the regulations will be retained in UK law but will not be functional as they will cease to extend to the UK. In the absence of a mutual agreement to provide reciprocal portability after EU exit, the retained portability regulations would require revocation or amendment.

The impact assessment (IA) considers four options: *status quo* (option 0.1); do nothing (option 0.2); revoke the portability regulations after they are automatically retained by the Withdrawal Act (option 1); amend the retained portability regulations (option 2). Option 2 amends the retained portability regulations to unilaterally provide portability to EU consumers temporarily visiting the UK while removing obligations on service providers to provide portability for UK customers in the EU. Option 2 is ruled out as it does not appear to benefit any UK stakeholders and it may mean that UK-based services are seen as comparatively worse in value.

The Government's preferred option in the "no deal" scenario is option 1. This proposal aims to minimise disruption and costs to consumers and businesses, as well as removing regulations that are of no benefit to those in the UK. In the absence of intervention, the service provider would be faced with the decision of complying with UK law and infringing copyright in the EU; or respecting copyright in the EU and contravening the retained UK regulation.

Impacts of proposal

The Intellectual Property Office (IPO) has reviewed the impact of the portability regulations to inform the Government's policy choice. At present, there is no quantitative evidence as to the impacts of the regulations mainly due to their recent introduction. The IA, therefore, used qualitative evidence to assess the costs and benefits of the preferred policy option.

Impact of preferred option (option 1)

Benefits

The IA compares the benefits of option 1 against the *status quo* and do nothing. The UK will remove portability obligations on service providers and not provide portability for EU consumers visiting the UK. Relative to the *status quo*, the IPO suggest that this option may result in an increase of revenue from EU consumers for online service providers operating in the UK. The loss of portability for EU consumers travelling to the UK would mean that, if they wished to access content ordinarily available via online content services in their home state of residence, they could be required to pay for that content separately in the UK, which would benefit service providers in the UK and the rights holder of the content. A second benefit of this option is the administrative savings for service providers who would no longer be required to identify the home state of customers for portability access. The IPO explains, however, that the benefits, relative to the *status quo*, are not expected to be significant.

The IPO states that, in the event that the UK and EU do not provide mutual portability for online content services after the UK leaves the EU, option 1 is preferable to taking no action, as taking no action would benefit only EU consumers with no benefits for UK-based customers.

Costs

The IA identifies the main affected group of the proposal as UK-based service providers that have implemented the intra-EU portability function. The IA does not, however, provide an estimate of the number of businesses that would be affected.

The IPO compares the cost of the policy proposal against the *status quo* and finds that the proposal would impose one-off familiarisation and transition costs to UK service providers. The former is expected to be minimal as the portability regulations

have been in place only since the 1 April 2018. The transition costs that service providers may face are the administrative cost of “switching off” and removing the portability function for their users. It should amount to no more than treating the EU in the same way in which all other non-EU countries are currently treated. The IPO does not, therefore, expect the transition cost of this option to be significant.

The IA notes that this option would be likely to have an impact on EU consumers, the impact of which is discussed in the wider impacts section below. The effect of the loss of UK-EU portability on UK consumers is not considered within the IA as the Department argues that does not arise as a result of the policy option but through the UK and EU not agreeing mutual portability post-exit.

Non-UK and wider impacts

One of the primary impacts of the preferred option is the loss of portability for EU consumers visiting the UK. EU-based consumers travelling to the UK could lose access to some, or all, of their online service content except where the service provider specifically licenses the content in the UK. They may face increased costs in having to use alternative services to access copyright-restricted content. A potential risk of this is the reduction in the level of EU-to-UK travel and the associated loss of revenue for UK businesses from EU-based customers as they would no longer be able to access online content while travelling in the UK. In practice, the IPO considers that this would be unlikely to result in significant changes in the number of EU tourists travelling to the UK due to the low cost of obtaining online content access relative to the average spending of EU tourist in the UK.

Small and micro business assessment

The European Commission’s IA estimates that the creative industries in the EU are dominated by micro firms with 95 per cent having fewer than 10 employees. The IPO, therefore, expects that for the UK, small and micro business would make up a significant proportion of the market. The IA states that option 1 places the least burden on small businesses as it retains the *status quo* as far as possible by minimising familiarisation costs, which could have a disproportionate impact on small businesses. The IPO states that it is mitigating the familiarisation costs to businesses by engaging with stakeholders, publishing ‘no deal’ technical notices and holding a series of roundtable meetings with industry.

Quality of submission

The IA provides a comparison of the policy options against both the *status quo* and do nothing. This is appropriate and consistent with government guidance on appraisal of EU exit measures. The *status quo* is the appropriate baseline for the assessment of business impacts for better regulation framework purposes; the comparison against do nothing is important in demonstrating the case for the policy option. The IPO has provided a qualitative description of business and wider impacts against these counterfactuals. The IA indicates that there are both benefits, through the removal of the portability requirement, and costs, such as of familiarisation, to UK business but that these are both expected to be low. The overall net direct impact on business, therefore, seems likely to be very low. On this basis, the IPO's mainly-qualitative assessment is sufficient.

The IA could be improved by addressing the following issues:

Number of businesses affected

The IPO argues that due to a lack of quantitative data, monetisation of costs and benefits has not been possible. While the RPC understands that it may not be proportionate for the IPO to monetise the impact fully, the IA would benefit from providing at least an indication of the number of businesses affected or from greater discussion of why this is not possible or proportionate to do.

The IPO has described the costs and benefits of the proposal but has not monetised these. The IA would benefit from addressing explicitly why it considers monetisation of impacts not to be proportionate.

Monitoring and evaluation plan

The IA would benefit from including a brief outline of how the proposal would be monitored and evaluated. This would be helpful to facilitate a proportionate post-implementation review, should this be required.

Small and micro business assessment

The small and micro business assessment would be improved by providing some indication of the scale of the number of small and micro businesses affected, or explaining why it is not possible, or proportionate, to provide this. The IPO assessed the impact on small businesses by comparison with option 2 and do nothing. The IA would benefit, however, from also including a comparison against the *status quo*.

Departmental assessment

Classification	Non-qualifying provision (EU withdrawal)
Equivalent annual net direct cost to business (EANDCB)	N/A
Business net present value	N/A
Societal net present value	N/A

RPC assessment

Classification	Non-qualifying provision (EU withdrawal)
Small and micro business assessment	Sufficient

Regulatory Policy Committee