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The EU cross border portability Regulation: another piece in the jigsaw of a unified Digital Single Market

EU Regulation 2017/1128 on cross border portability of online content services ('the Regulation') is set to apply from 1 April 2018, and aims to better enable those who lawfully subscribe to portable online content services provided in their Member State of residence to access and use such services when temporarily present in another Member State. In the UK, the Government has been consulting on the enforceability of the Regulation since early January this year, to garner comment on, for example, the operation of the enforcement mechanisms. Simon Miles, Partner and Head of Intellectual Property at Edwin Coe, outlines and comments upon the workings of the Regulation and the UK Government's consultation.

The Regulation was published in June 2017, shall apply from 1 April 2018 and is primarily designed to make it easier for those who lawfully subscribe to portable online content services provided in their Member State of residence to access and use such services when temporarily present in another Member State. Providers of online content services are obliged to enable subscribers 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' and are precluded from levying additional charges against subscribers to allow them to facilitate such rights. So the obvious point is that there should be no additional cost for subscribers although whether subtle cost increases for many will result remains to be seen.

An online content service or paid for subscription service is a service '[...]' provided against payment of money [...]' whether directly to the providers of

the online content service or another party, '[...]' such as part of a package of services (for example, Netflix, Now TV, BT Sport).' The scope of the Regulation does not extend to services such as BBC iPlayer for which a mandatory fee in the form of a TV licence is payable or other online content services such as ITV Hub that do not require any form of payment. However, under Article 6, providers of free online content services such as ITV Hub have the freedom to decide whether to make

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their content available on a portable basis provided they comply with the conditions outlined within the Regulation.

The Regulation shall apply to future contracts as well as existing contracts and rights acquired before the date of its application if they are relevant to the provision/use of an online content service. The Regulation facilitates the access to services by imposing a 'legal fiction,' which is a key element of the Regulation and means that access to and subsequent use of an online content service whilst temporarily in another Member State shall be deemed to occur solely in the subscriber's Member State of residence. This ensures that service providers and rightsholders will not have to renegotiate to gain permission to provide access to copyright protected content in other Member States.

Any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to the Regulation, including those which prohibit cross border portability of online content services or limit such portability to a specific time period, shall be unenforceable. The recitals to the Regulation specifically state that competition rules are not affected, and should not be used to affect, for example, Articles 101 and 102 of the Treaty of the Functioning of the European Union ('TFEU'). However, a particular concern must be that the new rules could serve to support larger entities that are better able to leverage their cross border strength to the detriment of smaller entities, and thus have the undesirable effect of actually reducing competition.

The obvious consequence of the rules contained within the Regulation is that a service provider of online content services is going to be obliged to verify the Member State of residence of its subscribers. The Regulation obliges providers to make use of reasonable, proportionate and

effective means in order to carry out the verification but it is clear that providers will stray further into the realms of data protection laws in order to be compliant. Accordingly, the Regulation seeks to minimise interference with subscribers' privacy by setting out the means of verification to be used.

The verification criteria must be used by the service provider either when a new contract is formed or upon the renewal of an existing contract for the provision of a paid-for online content service. The provider will also have to verify the Member State of residence of all existing subscribers within two months of offering a portable service. The Regulation makes direct reference to the Data Protection Directive (95/46/EC) and to the Privacy and Electronic Communications Directive (2002/58/EC) but providers should have in mind the stricter rules contained in the General Data Protection Regulation ('GDPR') which will apply from May this year. The Regulation stipulates that not more than two of the eleven listed means of verification are to be used in conjunction with each other and these include, for example, an identity card, payment details such as the bank account or credit/debit card number of the subscriber, registration on local electoral rolls (if the information concerned is publicly available) and a utility bill of the subscriber confirming the subscriber's address in the Member State.

UK consultation

On 3 January 2018, the UK Government, through the UK Intellectual Property Office ('UKIPO'), launched a consultation on the Regulation, inviting feedback on a number of matters. Although the Regulation is directly applicable in the UK and all other EU Member States, the Regulation must have accompanying enforcement mechanisms under UK law and comments are invited on the proposed mechanisms that will enforce the Regulation in the UK. 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.

At present, the Government has identified six different ways in which various aspects of the Regulation can be enforced. The UKIPO consultation paper discusses this, stating that 'some of these will be underpinned by existing legislation, others through agreements between private parties, and others through draft Regulations [...]' which are annexed to the consultation. A table, also annexed to the consultation, outlines how each article of the Regulation will be enforced. Furthermore, by virtue of the Government's belief that civil sanctions are the most appropriate enforcement mechanism, no new criminal sanctions are being introduced.

A concern is that the choice to implement the Regulation through the use of six distinct enforcement mechanisms, for example incorporating relevant provisions into existing domestic legislation, may prove problematic for smaller or independent content providers because of the additional complexity. Consequently, they would have to seek independent legal advice in circumstances where there are allegations of infringement of the rules, an outcome that will potentially result in large online content providers with in-house legal resources obtaining a competitive advantage.

Providing consumers with the right to access their paid-for subscription services whilst travelling within the EU is undoubtedly going to prove popular with subscribers. It is also another step towards the European Commission's Digital Single Market because many providers currently operate geoblocking restrictions, making it difficult for users to access the service outside of their home country. An interesting question is how the enforcement mechanisms proposed by the UK Government will operate in practice and what exactly can be done prior to 1 April 2018. The outcome of the consultation, which closed on 31 January 2018, should help to shed some light on the practicalities.