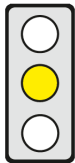


KEY ISSUES

Objective of the Regulation: Subscriptions to online content will also be available for use during temporary stays in another Member State.

Affected parties: Consumers, right holders and companies.



Pro: (1) The chosen construction ("territorial fiction") has the effect that right holders will still be able to issue national licences in the future and providers will not have to acquire licences for other Member States.

(2) The providers of free subscriptions are given the option of whether or not to offer cross-border portability.

Contra: (1) The Regulation intervenes in the freedom to conduct a business and freedom of contract. This is legally justified but breaches ordoliberal principles. The "expectations" of market players do not constitute sufficient justification. The territorial fiction, however, keeps intervention within limits.

(2) Verification costs may increase for providers because the Commission fails to specify what are "effective means" for verifying the country of residence.

CONTENT

Title

Proposal COM(2015) 627 of 9 December 2015 for a **Regulation** on ensuring the cross-border **portability of online content services in the internal market**

Brief Summary

► Context and Objective

- The number of users of online content services taking out subscriptions for online content such as films, music or sport programmes, is increasing (Recital 3).
- An "online content service" within the meaning of the Regulation exists where the service (Art. 56 and 57 TFEU) has the following characteristics:
 - It is (Art. 2 (e))
 - either an "audio-visual media service" (Art. 1 (1) (a) Directive 2010/13/EU), e.g. television programmes,
 - or another service mainly providing copyright protected content – such as films, music or radio broadcasts.
 - The service is portable, i.e. usable in any location in the subscriber's country of residence (Art. 2 (f)).
 - Provision of the service is lawful in the subscriber's country of residence (Art. 2 (e)).
- Many users of online content services "expect" to be able to use these services when they are abroad within the EU ("cross-border portability") (p. 2).
- Cross-border portability is frequently unavailable however because (p. 2, Recital 4)
 - a lot of online content is protected by copyright and similar rights ("related rights") and the holders of these rights often only grant national licences to providers or
 - the providers of online content themselves have no interest in cross-border portability.
- With this Regulation, the Commission makes it a legal requirement to enable cross-border portability for online content in the case of temporary stays in other Member States (Art.1).

► Obligation to ensure cross-border portability: Conditions

- A provider of online content services must ensure that a subscriber who is "temporarily" staying in another Member State, can access the services from there (Art. 3 (1)).
- A stay is "temporary" when the subscriber is not in his country of residence. The country of residence is the country where the subscriber is "habitually residing". (Art. 2 (c), (d))
- The obligation to provide cross-border portability only applies to online content services that fulfil the following requirements:
 - The provider of the online content service and the subscriber have concluded a contract on the provision of online content (Art. 2 (a)).
 - The online content is not used for trade or profession purposes (Art. 2 (b)).

- The subscriber pays for the online content (Art. 2 (e) No. 1, Recital 16)
 - to the provider directly or
 - to an intermediate party such as a telecommunication provider offering a package combining the internet connection and the provider's online content.
- Free subscriptions are only subject to the obligation to ensure cross-border portability where the provider verifies the details submitted to it regarding the subscriber's country of residence (Art. 2 (e) No. 2). Verification can take place by way of an existing internet or telephone connection, an IP address, proof of payment for other services provided in the country of residence – e.g. electricity bill – or "other means of authentication" (Recital 17).
- **Obligation to enable cross-border portability: Implementation**
 - Online content used during a temporary stay abroad is deemed to be provided and used in the subscriber's country of residence ("territorial fiction") (Art. 4). This allows the provider to guarantee portability without having to acquire licences for another Member State (Recital 20).
 - Contractual provisions between the provider and the subscriber, as well as between the provider and the right holder, which restrict portability, are "not enforceable" (Art. 5 (1)).
 - Protection of the subscriber's personal data must be guaranteed (Art. 6).
 - The provider does not have to deliver online content in another Member State to the same level of quality as in the country of residence if this has not been agreed. The provider must however inform the subscriber of the quality of delivery of online content in another Member State. (Art. 3 (2) and (3))
- **Verification on request of the right holder**
 - In order to prevent abuse, a provider that is under an obligation to ensure cross-border portability must, at the request of the right holder, verify the subscriber's country of residence. Verification takes place by way of "effective means" which can be specified by the right holder. (Art. 5 (2), Commission Fact Sheet)
 - A right holder may require a further verification of the country of residence where the cross-border portability is used "beyond certain duration of time" (Commission Fact Sheet).
 - The means specified by the right holder must be reasonable and necessary. This is so e.g. in the case of sampling of the subscriber's IP address but not in the case of constant monitoring of location. (Art. 5 (2) and Recital 23)
- **Application of the Regulation**
 - The Regulation also applies to contracts concluded and rights acquired prior to application of the Regulation (Art. 7). This will enable (Recital 26)
 - portability to include all existing subscriptions and
 - providers not to have to modify existing contracts which are often long-term and concluded with multiple right holders.
 - The Regulation comes into force 20 days after its publication in the Official Journal of the EU (Art. 8 (1)). It applies six months after coming into force (Art. 8 (2)). This will enable (Recital 27)
 - right holders and providers to negotiate the "necessary agreements" – e.g. relating to verification of the country of residence – and
 - the provider to adapt its services to the Regulation.

Statement on Subsidiarity by the Commission

The portability of online content is a cross-border issue. In addition, copyright and related rights have already been harmonised at EU level so only the EU can amend them. (p. 4)

Policy Context

Between December 2013 and March 2014, the Commission held a public consultation to assess European copyright legislation. In reaction to this consultation, many stakeholders – especially users – pointed out the lack of portability of online content. In May 2015, in its Digital Single Market Strategy, the Commission announced a legislative proposal to ensure cross-border portability [COM(2015) 192; see [cepPolicyBrief Digital Single Market Strategy – Pillar 1](#)].

Legislative Procedure

9 December 2015
Open

Adoption by the Commission
Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Communications Networks, Content & Technology (leading)
Committees of the European Parliament:	Internal Market and Consumer Protection (leading); Rapporteur: Marco Zullo (EFD Group, IT); Culture and Education; Legal Affairs; Civil Liberties, Justice and Home Affairs
Federal Ministries:	Justice and Consumer Protection (leading)
Committees of the German Bundestag:	Justice and Consumer Protection (leading)
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The freedom to conduct a business and freedom of contract constitute a fundamental component of the ordoliberal principles of the market economy. **The obligation to provide cross-border portability intervenes in both the freedom to conduct a business of the right holders and the providers of online services and the freedom of contract of the right holders, providers and subscribers. The Commission's reasoning – that many subscribers "expect" cross-border portability – is unconvincing: Under ordoliberal principles, the "expectations" of market players cannot justify such intervention.**

In addition, cross-border portability is already offered in the EU. This indicates that right holders and providers make cross-border portability available when subscribers expect it.

The "territorial fiction" does however keep this intervention, in the freedom to conduct a business and freedom of contract, within limits: It has the effect that in the future right holders will still be able to issue national licences and negotiate different prices for the individual Member States, and also means that providers will not have to acquire licences for other EU Member States.

Impact on Efficiency and Individual Freedom of Choice

The definition of "temporary" only relates to the "habitual residence". Thus **no time limit on the granting of cross-border portability is introduced.** So it is possible to use it over several months – during a semester abroad for example – provided the habitual residence is still in the home country. **Abuse is made more difficult by the fact that providers regularly have to verify the habitual residence at the request of the right holder.**

The possibility of releasing providers of free subscriptions from the portability obligation – where there is no verification of the subscriber's habitual residence – is appropriate because not all these providers can afford the resulting costs of cross-border portability. From the subscribers' point of view, the option is justifiable because they do not pay any fees. The fact that providers do not have to provide the same quality of delivery of online content in other EU countries as in the country of residence protects them against higher costs because they do not have to adapt their technology to the conditions in other EU countries.

The obligation on providers to verify residence details on request of the right holders is necessary because providers generally have no interest in strict verification of the residence details. This is firstly because verification gives rise to costs and, secondly, it prevents providers from gaining and keeping subscribers whose residence is abroad.

The verification costs for providers will increase because, until now, verification has principally been carried out by checking the IP address: only subscribers with a local IP address can access content. In future, this cost effective check will no longer be so easy because subscribers with an IP address from another EU country will also have to be able to gain access to the content. In addition, it will also be necessary to verify whether the subscriber is only temporarily present in another Member State. Both will increase verification costs for providers.

Finally, verification costs may increase because the Commission fails to specify what constitutes "effective means" for verifying the country of residence. This may result in a provider, who has acquired national licences from several right holders – as is the norm – having to use various "means".

For users, subscriptions may become more expensive as a result of the cross-border portability obligation. This is firstly because providers will try to pass on higher verification costs to subscribers. Secondly, as a result of the cross-border portability obligation, right holders will try to increase licence fees – at least in the case of new contracts.

The vast majority of subscribers in the EU cannot currently conclude portable, cross-border subscriptions. In future, they will only be able to conclude portable cross-border subscriptions.

Impact on Growth and Employment

Negligible.

Impact on Europe as a Business Location

None.

Legal Assessment

Legislative Competency

The Regulation is correctly based on the competency to adopt measures for the approximation of laws in the internal market (Art. 114 TFEU).

Subsidiarity

The portability of online content is cross-border in nature and therefore can only be meaningfully realised at EU level.

Proportionality with respect to Member States

The legal form of a Regulation is proportionate for ensuring a uniform obligation to provide cross-border portability.

Compatibility with EU Law in other respects

The obligation to provide cross-border portability intervenes in the freedom of contract of both the right holder and the provider, which is protected by the EU Charter of Fundamental Rights (Fundamental Right to Conduct a Business, Art. 16 Charter of Fundamental Rights of the EU): The right holder can no longer prevent access to online content from other countries within the EU even if it has only issued national licences; the provider must guarantee cross-border portability – even if he has no interest in doing so – and bear the costs involved therewith. **Both interventions are legally justified, however, on the basis of the territorial fiction:** There is a reasonable balance between the intervention in entrepreneurial decisions and the aim of enabling subscribers to use online content across borders thereby removing barriers to mobility. **The right holder can continue to issue licences limited to individual Member States and the provider will not have to acquire additional licences for other EU countries** in order to provide cross-border portability. Although the provider incurs additional costs, e.g. due to the necessary technical changes, the improved offer means he can – depending on the competitive situation – raise the price of the subscription and thus pass on the costs incurred.

Impact on German Law

Under both German and EU law, the term "habitual residence" is used in various legislative provisions without there being a standard definition for it.

Under German law, habitual residence is generally defined as being a stay which is "not just temporary" [Section 9 Tax Code (Abgabenordnung) and Section 30 (3) Social Code Book One (Sozialgesetzbuch Erstes Buch)]. This must be differentiated from the term "permanent residence" which is the place in which the person concerned permanently resides and which may be in more than one place at the same time [Section 7 (1) and (2) Civil Code (Bürgerliches Gesetzbuch)].

Under EU law, the "habitual residence" was defined by the European Court of Justice (ECJ) as "the permanent or habitual centre" of a person's "interests" which the person concerned has chosen with the intention that it should be "of lasting character" (ECJ Fernandez v. Commission Case C-452/93 P, para. 22). Under EU provisions, "habitual residence" also requires a "close and stable connection with the State concerned" [Recital 23 Succession Regulation No. 650/2012]. The European definition is decisive for the definition of "habitual residence" within the meaning of this Regulation.

Conclusion

The obligation to provide cross-border portability intervenes in both the freedom to conduct a business and freedom of contract. Intervention is legally justified but does not comply with ordoliberal principles; the "expectations" of market players cannot justify such intervention. The territorial fiction, however, keeps the intervention within limits: It has the effect that right holders will still be able to issue national licences in the future and that providers will not have to acquire licences for other Member States.

Abuse due to the lack of a time limit on the granting of cross-border portability is made more difficult by the fact that providers regularly have to verify the habitual residence at the request of the right holder. Verification costs may increase for providers because the Commission fails to specify what are "effective means" for verifying the habitual residence. This may result in providers having to deploy various "means". The possibility of releasing providers of free subscriptions from the portability obligation is appropriate because not all of these providers can afford the resulting costs.