Cross-border portability of online content services in the internal market

2015/0284(COD) - 09/12/2015 - Legislative proposal

PURPOSE: to ensure the cross-border portability of online content services.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with Council.

BACKGROUND: the rapid take up of online content services and increasing use of portable devices, including across borders, means that Europeans today expect to use online content services from wherever they are in the Union (cross-border portability). However, **when people travel in the EU, they frequently cannot enjoy such cross-border portability or can do so only to a limited extent**. The absence of, or problems with, cross border portability of online content services in the EU results from the licensing practices of right holders and/or the commercial practices of service providers.

Cross-border portability concerns online content services to which consumers have lawful access, or content that they purchased or rented online in their country of residence and to which they want to continue to have access when travelling in the EU. Consumer demand for the cross-border portability of online content services is substantial and expected to grow

The Digital Single Market Strategy puts forward a range of initiatives with the objective of creating an internal market for digital content and services. This proposal is among the first of the initiatives under the strategy. The Commission considers that the proposal will have positive effects on competitiveness as it will help innovation in online content services and attract more consumers to them.

IMPACT ASSESSMENT: the preferred option, in addition to establishing a mechanism ensuring portability: (i) would impose an obligation on providers of online content services to ensure cross-border portability of such services and (ii) would establish that any provisions in contracts limiting cross-border portability would be unenforceable. This option would respond to consumers' expectations and the impact on industry is expected to be marginal because the portability of online content services does not extend the range of users of the service and as such does not challenge the territorial exclusivity of licences

CONTENT: the proposed regulation introduces a **common approach** to ensuring that subscribers to online content services in the Union, which are delivered on a portable basis, **can receive these services when temporarily present in another Member State** (cross-border portability).

Definitions : the proposal contains definitions that will need to be interpreted in a uniform manner in the EU:

- **a "subscriber"** is defined as a consumer who, on the basis of a contract for the provision of an online content service, may access and use such service in the Member State of his or her residence;
- **a "consumer"** is defined as any natural person who, in contracts covered by the regulation, is acting for purposes which are outside his or her trade, business, craft or profession.

"Online content service" is covered by the proposal when: (i) the service is lawfully provided online in the Member State of residence; (ii) the service is provided on a portable basis; (iii) the service is an

audiovisual media service within the meaning of Directive 2010/13/EU of the European Parliament and of the Council or a service whose main feature is the provision of access to works, other subject matter or transmissions of broadcasting organisations.

Two scenarios are covered as regards online content services: (i) services which are provided for **payment of money (directly or indirectly);** and (ii) services which are provided **without payment** of money provided that the subscriber's Member State of residence is verified by the service provider.

- if a subscriber receives an online content service without payment of money, the provider will only be obliged to enable the subscriber to enjoy cross-border portability if the provider verifies the subscriber's Member State of residence;
- if, however, a consumer just accepts the terms and conditions of a free of charge online content service but does not register on a website of such service (and hence the provider does not verify the Member State of residence of such a consumer), the service provider will not be obliged to provide cross-border portability for such service.

Cross-border portability of online content services: the proposal requires the provider to enable a subscriber to use the online content service while the subscriber is temporarily present in another Member State. This applies to the same content, on the same range and number of devices and the same range of functionalities as offered in the Member State of residence.

However, this obligation **does not extend to any quality requirements** applicable to the delivery of such service when the service is provided in the Member State of residence. Nevertheless, if the provider expressly agrees to guarantee certain quality of delivery to subscribers while temporarily present in other Member States, the provider shall be bound by such agreement. In addition, the draft regulation will **oblige the provider to inform the subscriber of the quality of delivery** of the online content service when accessed and used in a Member State other than the Member State of residence.

Localisation: the proposal sets out a **mechanism** establishing the localisation of the service for purposes of portability: the provision as well as the access to and use of the service by a subscriber who is temporarily present in another Member State is deemed to occur solely in the Member State of residence. For the licensing of copyright and related rights, this means that the relevant copyright acts, which occur when the service is provided to consumers on a basis of crossborder portability, are **deemed to occur solely in the Member State of residence**.

Contractual provisions: the proposal renders unenforceable:

- any contractual terms contrary to the cross-border portability obligation, in particular those which limit either consumer's possibilities as to the cross-border portability of his or her online content services or service provider's ability to deliver it;
- any contractual terms contrary to the legal mechanism which enables service providers to comply with the cross-border portability obligation.

However, **right holders** may require that the service provider makes use of means in order to verify that the service is provided in conformity with the regulation.

The draft regulation also provides that: (i) the **processing of personal data** carried out within the framework of the Regulation shall be carried out in compliance with Directive 95/46/EC and Directive 2002/58/EC; (ii) the regulation shall also apply to any **contracts concluded and rights acquired** before the date of the application of the regulation if they are relevant for the provision of the service, the access to or the use of the service.