

EU Council's approach to cross-border portability of online content services

At the end of May 2016 the Council of the European Union agreed a “general approach” to the proposed draft Regulation on ensuring cross-border portability of online content services in the internal market. The Council has confirmed the main principles of the proposed Regulation and has attempted to fill the gaps in the European Commission's rather light original proposal, which was published in late 2015.

A key purpose of the proposed Regulation is to allow consumers to take their online content, to which they have lawfully subscribed in their Member State, with them when travelling to another EU Member State. The Council has introduced a mechanism by which service providers must verify a subscriber's “Member State of residence”, while allowing holders of the rights in the content to derogate from this and to authorise portability of their content without verification. Further, the Council has provided clearer definitions of “temporarily present” and “Member State of residence”, as the Commission's draft left too much scope for a wide interpretation.

Background

In December 2015 the European Commission published its draft Regulation on the cross-border portability of online content services. The draft Regulation was one of the first initiatives under its Digital Single Market Strategy.

With advances in technology, more people access audiovisual content online on the move. The proposal was aimed at enabling users of online content services, such as Netflix, Spotify, Sky Movies and Sky Sports, to access their services when temporarily travelling to another country within the EU. Currently, EU citizens travelling to another Member State may be unable to access online services providing films, sports broadcasts, music, ebooks or games that they have paid for in their home Member State. The Commission sought to address these restrictions to allow EU residents to travel with the digital content that they have purchased or subscribed to at home.

In reviewing the Commission's draft, the Council has adopted a general approach, essentially agreeing on the main principles of the proposed Regulation based on a compromise proposal drawn up by the EU Presidency. This enables the Council to start negotiations with the European Parliament, which is expected to deliver a report later this year.

The general approach

Scope issues

The Regulation introduces a common approach to ensuring that subscribers to online content services in the EU, which are delivered on a portable basis, can receive those services when “temporarily present in another Member State”.

Most significantly, the Council's general approach introduces a distinction between the payment for services and the payment of a licence fee. The Council's approach restricts the scope of the portability obligation to online content services that are provided against payment of money. For these purposes, Recital 16 makes it clear that the “payment of fees, in particular television or other broadcasting licence fees, should not be regarded as a payment of money for the purposes of this Regulation”. However, public service broadcasters that provide their online content services without payment of money will be able to benefit from the Regulation. As such, free-to-air services will have an option to be included within the scope of the Regulation, provided that they verify the country of residence of their subscribers.

The Regulation aims to ensure that subscribers should be granted the same access to their online content as they have in their home Member State, without limitations on the functionality or devices used. The Council's proposal provides that, to the extent that audiovisual content quality is beyond a service provider's control (such as because of inadequate infrastructure), then the provider shall not be liable. While acknowledging that there may be differences in infrastructure throughout the EU, in its new draft Article 6(A), the Council expressly states that "the commitment given by the Member States fully to achieve the targets to minimum download speeds of 30 Mbps by 2020 is crucial in order to meet the conditions relating to high connectivity for all".

Verification obligation

To avoid abuse of the system, a sufficient authentication process is required. The Regulation provides for a requirement for online content services within scope to verify the Member State of residence of their subscribers with a view to establishing when those are temporarily present in a different Member State. The Council's compromise text requires service providers, for payment of money, to make use of "effective means in order to verify the Member State of residence of its subscribers". The effective means expressly include, for example, identity cards, billing addresses, proof of electoral register or provision of local bank account details. Also included is a declaration by the subscriber on their Member State of residence, although that alone is not sufficient and must be used in combination with at least two other verification means.

The sticking point for the Council in relation to verification was whether the holders of rights in the content of an online content service should be able to authorise the access to and use of their content under the Regulation without verifying the subscriber's Member State of residence. The compromise text, at Article 3B(5), provides for this, allowing the agreement between the provider and the subscriber to serve to establish the subscriber's Member State of residence. It also stipulates that the agreements between the online service providers and the rights-holders shall not be able to restrict the rights-holders' ability to withdraw their permission, subject to giving reasonable prior notice to avoid unfair disruption to a service provider's business.

Meaning of "temporarily present"

The Council recognised that the definition of "temporarily present in another Member State" is critical for the application of the Regulation and the definition included in the European Commission's draft Regulation was clearly not sufficient, leaving the definition open to a very wide interpretation.

The compromise text now includes a fuller definition, with "temporarily present" now meaning "the presence of a subscriber in a Member State other than the Member State of residence for a limited period of time". The Council did not think it reasonable to limit the duration of the stay to a specific number of days or weeks: that would undermine the purpose of the proposed Regulations and would require continuous IP tracking for all users, which would not be practicable. The revised definition of "temporarily present" is reinforced by a fuller definition of "Member State of residence", which now means the Member State "where the subscriber has his or her actual and stable residence to which he or she returns regularly".

Comment

The compromise text and the Council's general approach are a considerable improvement on the Commission's original draft, which set out an insufficient definition of "temporarily present", defining it as merely "a presence of a subscriber in a Member State other than the Member State of residence". How the Regulation would work in practice remains to be seen; a temporal criterion to avoid

excessively broad interpretations may yet find its way into the Regulation in order to strengthen the revised definitions of “temporarily present” and “Member State of residence”.

Traditionally, territorial licensing is the basis on which the creative sector ensures sustainability of its financing. Removing such territorial restrictions could cause smaller content providers to be pushed out of the market, as only the largest providers have the resources to afford EU-wide licences. No doubt the cross-border portability of online content will have an effect on broadcasters, producers and distributors. Both rights-holders and service providers will need to ensure that, going forward, geo-blocking restrictions in licensing agreements do not affect or exclude mandatory cross-border portability. Further, content providers need to ensure that an effective mechanism is implemented to verify subscribers’ Member State of residence.

For consumers, who have an increasing demand for access to content, not only when home but also when travelling, this will be a welcome change. The Regulation will eliminate the territorial barriers and will enable consumers to access music, films, sports and games when travelling just like when they are at home. The proposed Regulation strikes a balance; cross-border portability would neither weaken nor remove the traditional territorial principle, but would ensure that consumers can access their legally purchased content while travelling to other Member States on a temporary basis.

The Regulation may come into effect as early as 2017, depending on the length of negotiations. Once in force, it will apply to any licensing agreements concluded before the Regulation comes into effect. So any geo-blocking restrictions that might affect cross-border portability contained in licensing agreements entered into before the Regulation would be unenforceable.

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