



European Economic and Social Committee

INT/781
**Portability of online content
services**

Brussels, 27 April 2016

OPINION

of the

European Economic and Social Committee on the

Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market

COM(2015) 627 final – 2015/0284 (COD)

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On 8 and 21 January 2016 respectively the Council and the European Parliament decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the

Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market
COM(2015) 627 final - 2015/0284 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 13 April 2016.

At its 516th plenary session, held on 27 and 28 April 2016 (meeting of 27 April), the European Economic and Social Committee adopted the following opinion by 162 votes to 6 with 1 abstention.

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1. Conclusions and recommendations

- 1.1 The EESC welcomes the Commission's initiative to address "cross-border portability". Cross-border portability basically involves enabling users and consumers of audiovisual online content services, which they access legally in their country of residence, to continue to use these services when they are temporarily present in another EU Member State.
- 1.2 The Committee also agrees that a regulation is needed to address portability since it is a cross-border activity. It also makes sense to establish a period of *vacatio legis* after which clauses restricting portability in existing contracts would cease to apply. For this purpose, six months would be a reasonable period for the service providers concerned to adapt their delivery systems to the new situation.
- 1.3 The EESC considers it necessary for a subscriber's "Member State of residence" to be clearly defined in order to ensure that the other Member States can be identified by default as countries where the subscriber is temporarily present. The simple reference in Article 2 to the "Member State where the subscriber is habitually residing" may not be enough, and it could prove necessary to assess other criteria on temporary status, living environment, etc., by providing a non-exhaustive list of indicators to establish the time-related link based on residence. In any event, the Committee considers that where users qualify as customers or subscribers to a service and are shown to be linked to a Member State and identified by their IP address or internet connection or other equivalent indicator, this should ensure cross-border portability.

- 1.4 Regarding the nature and conditions of portable services, it is clear that the proposal covers these services, whether paid for or free of charge, although in the latter case, always provided that the Member State is "verified". With particular regard to free services, the EESC believes that the portability of these services should be guaranteed if the Member State is "verifiable", in other words, provided that it can be verified without incurring additional costs for the provider.
- 1.5 The legal provisions should explicitly state that any loss or deterioration in delivery affecting the range of services available, accessibility on devices and the number of users would constitute non-compliance. Minimum quality of access should also be ensured, and should at least be the same as the base or benchmark standard for local lines in the Member State where the user is staying, in order to avoid promoting unfair practices and conditions involving surcharges such as guaranteed "premium" access. Merely informing users about the standard of quality to expect cannot be considered sufficient. These obligations should also be explicitly mentioned in the legal provisions, and not only in the recitals of the regulation.

2. Introduction

- 2.1 The second priority of the European Commission's political guidelines of 15 July 2014 was the development of a "Connected Digital Single Market". This was the basis for adopting the Communication on *A Digital Single Market Strategy for Europe*¹. The EESC issued an opinion supporting this priority² because it believed that it could give new impetus to digital policy in the European Union.
- 2.2 Essentially, the Commission was advocating "preventing unjustified geo-blocking" so that EU consumers and businesses can take full advantage of the single market in terms of choice and lower prices.
- 2.3 The United Nations Conference on Trade and Development (UNCTAD) recently decided to adopt revised guidelines for consumer protection (UNGCP) in order to update them in light of recent technological developments, including e-commerce and "digital consumption". These are areas where greater protection for online privacy is needed and the principle of fair consumer protection must be incorporated.
- 2.4 With a view to developing the above-mentioned digital single market strategy, the Commission has also adopted a communication on the modernisation of copyright rules and on digital sales contracts and the supply of digital content, on which the EESC will set out its views.

¹ COM(2015) 192 final.

² [OJ C 71, 24.2.2016, p. 65.](#)

- 2.5 The proposal for a regulation on cross-border portability also fits into this framework. It consists in enabling the users of online content services in a given EU Member State to access the same content while temporarily present in another Member State. Portability is seen as an important step towards providing users with broader access to audiovisual content. This is something which the Commission considers to be a key objective for developing the digital single market strategy.
- 2.6 EU subscribers to these types of services are currently finding them difficult or impossible to access while abroad, even if they are still in the EU, not for technological reasons but because of something quite different: the problem of geo-blocking, based on the licensing practices of right holders or the commercial practices of service providers. Cross-border portability is also hindered by the high roaming costs which European consumers and users are being charged and which will soon be a thing of the past thanks to the Commission's proposal.

3. Gist of the proposal

- 3.1 The purpose of the proposed regulation under consideration, as set out in Article 1, is to ensure the cross-border portability of online content services in the internal market. In other words, any user in the Union who receives online content legally in their country of residence should also be able to access this content while temporarily present in another Member State.
- 3.2 Article 2 sets out various definitions concerning the nature of the service and parties involved: "*subscriber*", "*consumer*", "*Member State of residence*", "*temporarily present*", "*online content service*" and "*portable*". Online content services are defined as audiovisual media services or services that give access to works, other protected subject matter or transmissions of broadcasting organisations. Provision of these services may be linear or on-demand, and either against payment or free of charge.
- 3.3 Article 3 of the proposal indicates that the requirement for providers of a portable service to enable portability in other States does not mean that they have to maintain the same quality standards provided in the Member State of residence, unless the provider expressly undertakes to guarantee them. The provider must, however, inform subscribers of the quality of the service delivered.
- 3.4 According to Article 4, the provision of a service, as well as access to and use of the service by a subscriber, is deemed to occur in the Member State of residence for the purposes of legislation on audiovisual media services, intellectual property and the protection of databases.
- 3.5 Article 5 establishes that contractual provisions between right holders and service providers and between service providers and subscribers that are contrary to existing requirements concerning cross-border portability shall be unenforceable. Right holders may require the

service provider to make use of effective means to verify that the service is being provided in conformity with the regulation, provided that the means are reasonable and proportionate.

- 3.6 Article 6 specifies that subscribers' personal data must be processed in compliance with the applicable EU legislation in this area ([Directive 95/46/EC](#) and [Directive 2002/58/EC](#))³.
- 3.7 According to Article 7, the regulation will apply not only to contracts concluded after its entry into force, but also retroactively to contracts concluded and rights acquired before the date of its application if they are relevant to the provision of, access to or use of the service.
- 3.8 Article 8 sets the date from which the regulation will apply, namely six months following its publication.

4. General comments

- 4.1 The Committee welcomes the Commission's initiative to address "cross-border portability", which basically involves enabling users and consumers to access audiovisual online content services registered in one EU Member State when they are temporarily present in another.
- 4.2 The EESC believes that this measure is an important aspect of the Commission's strategy to establish a digital single market since it removes barriers to the free provision of services and free competition between businesses. Furthermore, since it covers commercial aspects, it can strengthen economic, social and territorial cohesion by facilitating the integration of different groups of organised civil society.
- 4.3 The proposal for a regulation published by the Commission on 9 December 2015 therefore seeks to remove obstacles to cross-border portability by requiring providers to allow this for services that are legally rendered and are portable within their domestic market.
- 4.4 The choice of legal instrument (a regulation) is justified by the supranational dimension of the activity to be regulated and the need for equivalent and simultaneous implementation across all Member States. The proposal is consistent with Article 56 TFEU, which provides that "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended".
- 4.5 The EESC agrees that the internal market (Article 114 TFEU) is the appropriate legal basis due to the scope and inherently cross-border nature of the services under consideration in the proposal for a regulation and the need for consistency with other EU policies, in particular with regard to the cultural aspects (Article 167 TFEU) and promoting consumer interests (Article 169 TFEU). It is important for the proposal to be interpreted in accordance with the

³ [OJ L 281, 23.11.1995, p. 31](#) and [OJ L 201, 31.7.2002, p. 37](#).

right to respect for private and family life, and the rights to protection of personal data, freedom of expression and freedom to conduct a business.

- 4.6 The proposal covers content that is: distributed by broadcasting organisations or information society service providers; linear or on-demand; downloaded, streamed or delivered by other means; provided by large companies or by SMEs; against payment (subscription) or free of charge. In this last instance, the registered user's state of residence has to be verified (for example, via the IP address or internet connection). Cross-border transactions of other goods and services are not covered by the regulation where the strictly audiovisual content is merely incidental.
- 4.7 The objective of the proposal for a regulation is to meet public needs and expectations concerning the digital environment more effectively as it will enable EU consumers to use audiovisual content which they are entitled to access when travelling between EU countries. It thus develops the market in audiovisual content whilst maintaining a high level of protection for right holders (of copyright and related rights), as well as facilitating the transmission of major events and information.
- 4.8 The Commission stresses the benefits that the initiative can provide in this respect for consumers and, in the long term, for suppliers. The preamble to the proposed regulation states that cross-border portability does not merely contribute to promoting the interests of consumers. It also has a number of advantages for the holders of creative and performance rights and of rights pertaining to reproduction, communication to the public and making audiovisual content available, by providing holders with greater legal certainty and enabling them to respond better to users' expectations.
- 4.9 In any event, the Commission places particular emphasis – undoubtedly in response to concerns raised by providers and right holders during the public consultation – on their rights and activities. To this end, it points out that: the proposal does not substantially affect the licensing of rights or business models; since contracts that are contrary to the obligation to provide for cross-border portability will be unenforceable, right holders and service providers will not be obliged to renegotiate contracts; and (with regard to premium audiovisual and sports content) portability does not extend the range of service users and as such does not challenge the territorial exclusivity of licences.
- 4.10 The legal provisions, and more particularly Article 5(2), should specify that in addition to being reasonable and not beyond what is necessary to achieve their purpose, the "effective means" used to ensure the adequate delivery of online content services must also comply with or be consistent with the rights and principles enshrined in the Charter of Fundamental Rights of the European Union, which should be explicitly mentioned.
- 4.11 The delivery of services through cross-border portability is put on the same footing as delivery in the country of residence. This would be a "legal fiction" for the purposes of

copyright and related rights, reproduction, communication to the public, making content available or re-using it, content catalogue, range of devices, number of users permitted and range of functionalities. It should be specified that this must always be achieved with due regard to the principle of technological neutrality. The scope of application and the definitions set out in the proposal for a regulation also need to be clarified, especially with regard to defining its subjective scope. This must in any event be based on clear and identifiable criteria, which are necessary to ensure legal certainty and the predictability of the rules.

4.11.1 However:

- the obligation is restricted or subject to certain conditions of proportionality when this could involve disproportionate costs for service providers. This means that services providers are not obliged to provide for portability where the subscriber's country of residence is not verified;
- the obligation to ensure compliance with right holders' rights is also restricted; and
- above all, service providers do not need to take any measures to guarantee a similar quality of content delivery as in the country of residence unless they have explicitly undertaken to do so, but quality must not be below the standard of online access available in the country where the user is staying. The reason for this is that a quality guarantee could entail disproportionate additional costs for service providers arising from differences between the Member States' telecommunications capacity and infrastructure.

4.12 On this last point, the derogation from the obligation to ensure a certain standard of quality combined with the possibility of offering premium services that do guarantee this standard against payment of a surcharge could encourage service providers to adopt unfair practices. This would devalue or undermine the quality of the basic service, virtually transforming the content into a commodity whereas the profit is linked to charges for the service. The legal provisions of the regulation should at least explicitly mention that the quality provided must under no circumstance be below the standard of online access available in the country where the user is staying.

4.13 Finally, it should be noted that the Commission intends the regulation to be applied retroactively. This means that any terms and conditions in previously negotiated commitments that prevent or restrict portability will cease to apply. In addition, agreements between these parties to ensure the application of the principle of cross-border portability are encouraged.

4.14 The EESC proposes a new definition of "partially portable" service which should be applied to quality-sensitive online services in cases when low quality of local internet makes online

content service unusable for subscribers in particular areas. A similar application of this term has been presented on page 8 of the Impact Assessment⁴.

Brussels, 27 April 2016

The President
of the
European Economic and Social Committee

Georges Dassis

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SWD(2015) 270 final.