

# EU REGULATION: CROSS-BORDER PORTABILITY

## » TECHNICAL SPECIFICATION SHEET FOR AV PROFESSIONALS

### Background

On 9 December 2016 the European Commission adopted a Proposal for a Regulation on cross-border portability to ensure that subscribers of European online content service which are delivered on a portable basis, can receive these services when temporarily present in another Member State of the European Union. The Regulation was adopted by the European Parliament and the Council on 14 June 2017 and published in the Official Journal on 30 June 2017.

### Application to existing contracts

This Regulation will apply to contracts concluded and rights acquired before the date of its application.

### Application: End of Q1 2018

The rules will start to apply at the end of the second quarter of 2018 and more specifically on **1 April 2018**. It will then have a general application, be binding in its entirety and **directly applicable** in all European Union Member States. On that date Pay-TV service providers will have an obligation to provide cross-border portability to the subscribers of their portable online services. FTA service providers will have the option to do the same from that date on.

### Legal text & references

The full text of the adopted Regulation is available **here**. The European Commission has also posted a Q&A available in all EU official languages **here**.

## » CONDITIONS

### Scope

- ▶ Providers of (locally) portable online content subscription services **against payment of money** will be obliged to enable their subscribers to access and use their portable online content services which are lawfully provided in their Member State of residence when they are temporarily present in another Member State of the European Union. The right to use an online content service should be regarded as acquired against payment of money, whether such payment is made directly to the provider of the online content service, or to another party such as a provider offering a package combining an electronic communications service and an online content service operated by another provider.
- ▶ Providers of portable online content subscription services provided **without payment of money** can choose whether or not to provide cross-border portability to their subscribers. The provider shall inform the subscribers, the relevant right holders of its decision to provide cross-border portability prior to providing that service. The information shall be provided by means which are adequate and proportionate (can be on the provider's website).
- ▶ Services that are not locally "portable" (meaning that subscribers can effectively access and use the online content service in their Member State of residence without being limited to a specific location) or not "subscription-based" (meaning that there is a contract in place between the provider and the user for the delivery of the service) are outside the scope of the Regulation.

## Mandatory service level

- ▶ Providers need to allow cross-border portable 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, as is the case in the Member State of residence, without imposing any additional charges on the subscriber.

## Quality of service

- ▶ Providers are not required to ensure the same quality of delivery for cross-border portability as for local portability (unless expressly agreed). On the other hand, providers cannot take any action to reduce the quality of delivery to avoid the normal use of cross-border portability. Providers are obliged, on the basis of the information in their possession, to inform the subscriber on the quality of delivery of cross-border portability prior to providing it by means which are adequate and proportionate. To this end, mentioning on the providers' [websites](#) that the quality of delivery for cross-border portability could differ from that applicable in the Member State of residence may be sufficient. Providers are not under any obligation to actively seek information on the quality of delivery of a service in Member States other than the subscribers' Member State of residence.

## Duration

- ▶ Subscribers can enjoy cross-border portability as long as they are only temporarily present (for instance, holidays, business trips or limited student stays) in a Member State other than the Member State of residence in which they subscribed. Cross-border portability **cannot be limited to a specific time period by contract**. However, when the verification of Member State of residence (see below) (a) fails; or, (b) indicates that the subscriber is no longer a resident in the Member State of subscription, cross-border portability ceases to apply.

## Legal fiction

- ▶ To ensure that providers of online content services covered by this Regulation comply with the obligation to provide cross-border portability of their services, without acquiring the relevant rights in another Member State, the Regulation introduces a legal fiction that the provision of, access to and use of such online content services should be deemed to occur in the subscribers' Member State of residence.

## » HOW TO AVOID ABUSE - VERIFICATION OF MEMBER STATE OF RESIDENCE

### Rationale

- ▶ The concept of cross-border portability should be distinguished from that of cross-border access; i.e., access to online content services provided in a Member State other than the subscribers' Member State of residence. To avoid cross-border access, Pay-TV (and FTA services that opt-in) services are obliged to verify the Member State of residence of their subscribers.

### When

- ▶ The verification obligation applies **at the conclusion and upon renewal of a contract**. With regards to existing subscribers, Pay-TV service providers will have to fulfil their verification obligations by **2 June 2018**. FTA services that opt-in have two months after they start providing a service that is portable across borders to comply with the verification obligation for existing consumers. In cases where the provider has **reasonable doubts** concerning the subscriber's Member State of residence, the provider is allowed to repeat the verification.

### Closed list of verification means

- ▶ Verifying where the subscriber has his or her actual and stable residence should be established using the criteria listed below, namely:
  - (A) an identity card, electronic means of identification**, in particular those falling under the electronic identification schemes notified in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council, or any other valid identity document confirming the subscriber's Member State of residence;
  - (B) payment details** such as the bank account or credit or debit card number of the subscriber;
  - (C) the place of installation of a set top box, a decoder or a similar device** used for supply of services to the subscriber;
  - (D) the payment by the subscriber of a licence fee for other services** provided in the Member State, such as public service broadcasting;
  - (E) an internet or telephone service supply contract** or any similar type of contract linking the subscriber to the Member State;
  - (F) registration on local electoral rolls**, if the information concerned is publicly available;
  - (G) payment of local taxes**, if the information concerned is publicly available;
  - (H) a utility bill of the subscriber** linking the subscriber to the Member State;
  - (I) the billing address or the postal address** of the subscriber;
  - (J) a declaration by the subscriber confirming the subscriber's address in the Member State**;
  - (K) an internet protocol (IP) address check**, to identify the Member State where the subscriber accesses the online content service.

## How to obtain the means of verification

- ▶ The provider of an online content service should rely, if possible, on information which is in its possession, such as billing information. The provider is however also entitled to request the information from the subscriber. If the subscriber fails to provide the necessary information – resulting in the provider being unable to verify Member State of residence – the provider shall neither be allowed nor obliged to offer the subscriber cross-border portability under this Regulation.

## Number and combination of means

- ▶ Unless the subscriber's Member State of residence can be verified with sufficient certainty on the basis of a single means of verification, providers should rely on (maximum) two means of verification.
- ▶ The means of verification under points (i) to (k) shall only be used in combination with one of the means of verification under points (a) to (h), unless the postal address under point (i) is included in a publicly available official register. In case of repeated verification due to reasonable doubts on the subscriber's Member State of residence the means under point (k) – IP checks – can be used as a sole means. Data resulting from IP checks shall be collected in binary format only; i.e. in or out of Member State of residence.

## Who decides on which means to use

- ▶ In principle, the provider can choose from the list, as long as the means are reasonable, proportionate and effective. This does not preclude agreements between providers and rightholders on which means of the list will have to be used.

## Data collection & storage

- ▶ Data collected pursuant to the verification obligation shall be used solely for the purpose of verifying the subscriber's Member State of residence. They shall not be communicated, transferred, shared, licensed or otherwise transmitted or disclosed to holders of copyright or related rights or to those holding any other rights in the content of online content services, or to any other third parties. They shall not be stored by the provider of an online content service longer than necessary to complete a verification of a subscriber's Member State of residence. On completion of each verification, the data shall be immediately and irreversibly destroyed.

## Exception to verification obligation

- ▶ The obligation to verify does not apply in cases where all the rightholders in the content used by the provider decide to authorise their content to be provided, accessed and used without verification. The authorisation can be withdrawn by giving reasonable notice.

## ➤ LIMITS TO CONTRACTUAL FREEDOM

### No contractual override of the Regulation

- ▶ Parties cannot agree on anything that is contrary to the Regulation. Unenforceable clauses include for example:
  - » clauses/measures that neutralise the legal fiction;
  - » clauses/measures that prohibit cross-border portability; and/or
  - » clauses/measures that limit cross-border portability to a specific time period.

### Applicable law

- ▶ The Regulation shall apply irrespective of the law applicable to contracts concluded 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, or to contracts concluded between such providers and their subscribers.