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PROPOSAL

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| Subject: | 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 |

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2015/0284 (COD)

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

(Text with EEA relevance)

{SWD(2015) 270 final}

{SWD(2015) 271 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The internet has become a key content distribution channel. In 2014, 49 % of European internet users accessed music, video and games online¹ and this is expected to grow in the future. Tablets and smartphones further facilitate such uses with 51% of individuals in the EU using a mobile device to connect to the internet².

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. One of the key objectives of the Commission's Digital Single Market strategy³ is to allow for wider online access to works by users across the EU.

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 grow⁴. 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.

This proposal aims to remove barriers to cross-border portability so that the needs of users can be met more effectively as well as promoting innovation for the benefit of consumers, service providers and right holders. The proposal introduces a common approach in the Union while maintaining a high level of protection for right holders. In doing so, it contributes to the functioning of the internal market as an area without internal borders, where the freedom to provide and to receive services shall be ensured.

- **Consistency with existing policy provisions in the policy area**

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. It will be followed by other initiatives in the areas identified in the Strategy, including in the domain of copyright. Removing the obstacles to cross-border portability is a first significant step that addresses a specific obstacle to cross-border access to content which is important for consumers. A targeted early intervention in this area is also

¹ Eurostat, 'Community survey on ICT usage in households and by individuals', 2014.

² Eurostat, 'Information society statistics - households and individuals'.

³ COM(2015) 192 final.

⁴ In a recent survey, 33 % of respondents (a figure rising to 65 % in the 15-24 age bracket) who do not currently have a paying subscription for accessing content said that if they were to take up such a subscription they would find it important to be able access it while travelling or staying temporarily in another Member State ('Flash Eurobarometer 411 — Cross-border access to online content', August 2015).

timely given that consumers are nearing the date where there will be an end to roaming charges for travelers within the EU⁵.

This proposal aims to establish where, for the purposes of cross-border portability within the scope of this proposal, the act of exploitation of works and other protected subject matter takes place for the purposes of Directive 96/9/EC⁶, Directive 2001/29/EC⁷, Directive 2006/115/EC⁸ and Directive 2009/24/EC⁹.

The proposal complements Directive 2006/123/EC on services in the internal market¹⁰ and Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market¹¹.

This proposal also contributes to the improvement of the cross-border reach of audiovisual media services and hence complements Directive 2010/13/EU¹².

- **Consistency with other Union policies**

According to Article 167 of the Treaty on the Functioning of the European Union (TFEU), the Union shall take cultural aspects into account in its action under the Treaties. This proposal would enhance access to cultural content as it would allow consumers to have a better experience of the content through easier access while travelling in the EU.

This proposal contributes to promoting the interests of consumers and thus is consistent with the EU policies in the field of consumer protection and Article 169 TFEU.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal is based on Article 114 TFEU. This Article confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market. This includes the freedom to provide and to receive services.

The online content services within the scope of the proposal predominantly rely on copyright and related rights that have been harmonised at Union level. The EU has harmonised the area of copyright as regards the rights which are relevant for online dissemination of works and other protected subject matter (notably the rights of reproduction, communication to the public and making available).

The present initiative concerns the exercise of these harmonised rights across borders as concerns cross-border portability of online content services. As this would affect the rights

⁵ http://europa.eu/rapid/press-release_IP-15-5265_en.htm

⁶ Directive 96/9/EC on the legal protection of databases, OJ L 077, 27.03.1996, p. 20-28.

⁷ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10-19.

⁸ Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28-35.

⁹ Directive 2009/24/EC on the legal protection of computer programs, OJ L 111, 5.5.2009, p. 16-22.

¹⁰ OJ L 376, 27.12.2006, p. 36-68.

¹¹ OJ L 178, 17.07.2000, p. 1-16.

¹² OJ L 95, 15.4.2010, p. 1-24.

harmonised by the EU copyright framework, it would have to rely on Article 114 TFEU as a legal base where the proposed instrument is a regulation.

Certain elements of online content services, such as sporting events, news and political debate, are not necessarily protected by copyright. However, when such content is included in transmissions by any means including by broadcasting organisations, right holders can invoke related rights harmonised at EU level such as the right of reproduction or the right of making available. Moreover, transmissions of sporting events, news and current events are often accompanied by copyright-protected elements such as opening or closing video sequences or accompanying music. Such elements fall under the EU harmonised framework. Also, certain aspects of such transmissions relating to events of major importance for society or of high interest to the public have been harmonised by Directive 2010/13/EU. In order to fully deliver to consumers the benefits of cross-border portability it is important to include all elements of such transmissions in the proposal.

- **Subsidiarity (for non-exclusive competence)**

The portability of online content services is in its essence an issue of a cross-border nature. Moreover, as copyright and rights related to copyright have been harmonised at EU level, it is only the Union that can amend the legal framework. Member States, therefore, cannot intervene by legislation in order to ensure cross-border portability. Therefore, such action can only be taken at EU level.

In terms of effectiveness, only an EU intervention can ensure that conditions for consumers' access to online content services do not vary across the European Union. EU action will also produce clear benefits to right holders and service providers by creating uniform conditions for the provision of cross-border portability of online content services across Europe. It will ensure greater legal certainty and would do away with the need to renegotiate the whole network of existing licences for the purposes of cross-border portability.

- **Proportionality**

The proposal aims to facilitate the provision of the cross-border portability of the online content service (a provision localising the place of provision as well as the access to and use of the service) and imposes an obligation, under certain conditions, on the service provider to enable the cross-border portability. It does not extend beyond what is necessary to solve the identified problems. It does not substantially affect the licensing of rights and therefore has a limited effect on the business models of right holders and service providers. The proposal will not oblige right holders and service providers to renegotiate contracts as it will make unenforceable any provisions in contracts contrary to the obligation to provide for cross-border portability.

Moreover, the proposal does not impose on service providers any disproportionate cost. The proposal would not require that the provider of online content services takes any measures to ensure the quality of delivery of such services outside the Member State of residence of the subscriber. Also, the proposal would not oblige service providers that offer services free of charge to provide for cross-border portability where they do not verify the subscriber's Member State of residence as such requirement would involve a major change to the way they deliver their services and could involve disproportionate costs.

- **Choice of the instrument**

A regulation would be directly applicable in Member States and would enter into force at the same time. This instrument would be the best to achieve the objective of ensuring the portability of online content across the EU. It would allow a uniform application of the portability rules across Member States and would guarantee that right holders and online service providers from different Member States are subject to the exact same rules.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable.

- **Stakeholder consultations**

A large public consultation on the review of EU copyright rules was conducted from December 2013 to March 2014. In the replies to the questions related to the territoriality of copyright, different groups of stakeholders explicitly raised the issue of cross-border portability. In 2013, the Commission conducted a stakeholder dialogue "Licences for Europe"¹³. One working group focused specifically on the issue of cross-border portability.

In the first ten months of 2015, the Commission had extensive discussions with stakeholders (consumers, right holders, sports organisations, broadcasters, online service providers), including through specific stakeholders workshops, to assess the impact of a possible EU intervention in this area, including discussing the available options.

To summarise the views of the affected stakeholders concerning the proposal, consumers are generally in favour of improving cross-border access to online content, including the cross-border portability of online services; the content industry, representatives of right holders and service providers are not against cross-border portability of online content services but are usually in favour of industry-led solutions and soft law instruments as opposed to legal obligations in this area.

While a non-binding instrument such as a recommendation encouraging cross-border portability could support market developments in this area, the effectiveness of such instrument could be very limited. It would depend on the commercial decisions taken by the different market players. Thus it would not lead to homogeneous implementation and it would not be sufficient to ensure that EU consumers are offered the same conditions as regards the portability of online content services across the Union.

The proposal takes on board a number of concerns signalled by stakeholders, in particular: not imposing a duty to provide portability on those service providers that deliver services free of charge and without authentication of the consumer's Member State of residence; not obliging service providers to deliver the service across borders with the same quality in the delivery as in the Member State of residence; leaving for the parties to agree on the conditions for ensuring that the service is provided in accordance with the Regulation.

¹³ See <https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site>

- **Collection and use of expertise**

Legal¹⁴ and economic¹⁵ studies have been conducted in recent years on various aspects of the existing copyright rules, including as regards the territoriality of EU copyright rules as applied to online transmissions.

Further studies have been conducted on the impacts of digitisation on the production and distribution of content, as well as on the cross-border access to content¹⁶. Studies have also been carried out concerning sports¹⁷.

- **Impact assessment**

An impact assessment was carried out for this proposal¹⁸. On 30 October 2015, the Regulatory Scrutiny Board gave a positive opinion to the impact assessment, on condition that certain elements of the report were improved. The final Impact Assessment takes these comments on board.

The final impact assessment examines the baseline scenario (no policy intervention) and three policy options. Option 1 consisted in guidance to stakeholders by the Commission encouraging online content service providers to provide for cross-border portability of their services across the EU. Option 2 entailed an EU intervention which would establish that the provision, access and use of an online content service in a cross-border portability mode would be deemed to occur in the consumer's Member State of residence. Option 3, in addition to the above mechanism, (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 shall be unenforceable.

From the perspective of consumers, right holders and service providers, Option 3 would be the most effective in meeting the identified objective. Under the baseline scenario and Option 1, right holders in the audiovisual sector and, to a lesser extent, for premium sports content are likely to be reluctant to allow for the portability of their content. Under the baseline scenario, Options 1 and 2, service providers would continue to be able to restrict cross-border portability and many of them would continue to encounter problems (contractual restrictions) when wanting to offer it. Both right holders and service providers would have higher transaction costs to renegotiate their network of licensing agreements. Under these options, the transition to the cross-border portability would take longer. Also, these options would not ensure homogeneous services to consumers. Only Option 3 would effectively ensure that the cross-border portability feature is offered and the demand of consumers is met. Therefore, Option 3 was considered the best policy choice.

The preferred option would respond to consumers' expectations. Service providers would benefit from the mechanism establishing the localisation of the service for purposes of portability and be able to better respond to their customers' needs. As concerns content industries, the most affected, in terms of how the content is licensed, would be the audiovisual

¹⁴ http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

¹⁵ http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf

¹⁶ <http://is.jrc.ec.europa.eu/pages/ISG/DigEcocopyrights.html>;

¹⁷ http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf

¹⁸ <http://ec.europa.eu/sport/library/studies/study-contribution-spors-economic-growth-final-rpt.pdf>

¹⁸ SWD(2015) 271, SEC(2015) 484

and premium sports content sectors. However, 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, the impact on the industry is expected to be marginal.

Potential costs can be divided between those costs directly related to the intervention, i.e. service providers' costs of authentication of subscribers' Member State of residence, and costs which may arise but are only indirectly related to the intervention, i.e. costs of adapting licences to the new rules and service providers' costs related to adapting the technical infrastructure. Such technical costs directly linked to the intervention are not expected to be significant and could be absorbed in the routine software maintenance costs of service providers. It is difficult to estimate costs linked to contractual arrangements. However, the proposal will not require renegotiating the contracts. The proposal does not set requirements with regard to the quality of delivery of the service in a cross-border portability mode so it does not impose any costs in that respect (service providers remain free to do so voluntary or commit to it in contracts with consumers or right holders).

- **Regulatory fitness and simplification**

The proposal applies equally to all enterprises, including micro-enterprises and SMEs. All enterprises can benefit from the mechanism establishing the localisation of the service for purposes of portability set out by the proposal. Exempting SMEs from the rules could undermine the efficiency of the measure, as many online service providers are SMEs. As the proposal does not entail any substantial costs, there is no need to minimise compliance costs for micro-enterprises or SMEs.

The proposal will have positive effects on competitiveness as it will help innovation in online content services and attract more consumers to them. The proposal will not have any impact on international trade.

The proposal will promote online use of content services. It concerns the online environment, because this is where the demand for portability predominantly arises. The proposal will promote innovation and progress in the market because it applies to all online content services, independently of the devices or technologies used. Therefore, the proposal takes account of new technological developments and is "digital and internet ready".

- **Fundamental rights**

The proposal will have a limited impact on copyright as property right or on the freedom to conduct a business, as recognised in the European Charter of Fundamental Rights (Articles 16 and 17). The measure would be justified in view of the Treaty fundamental freedom to provide and receive services across borders. Restricting the above-mentioned freedoms (through the mechanism establishing the localisation of the service for purposes of portability, the obligation to offer cross-border portability as well as by rendering unenforceable any contractual provisions contrary to this obligation) would be justified in light of the objective of ensuring cross-border portability of online content services in the internal market.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the European Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The process of monitoring the impacts of the proposal will consist of two phases.

The first phase will start right after the adoption of the legislative act and continue until the start of its application. It will focus on how the Regulation is put in place in the Member States by the market participants in order to ensure a consistent approach. The Commission will organise meetings with Member States representatives and the relevant stakeholders to see how to help the transition to the new rules.

The second phase would start from the date of the application of the Regulation and would focus on effects of the rules. This monitoring will pay particular attention to the impacts on SMEs and consumers.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 specifies the objective and the scope of the proposal. The proposal will introduce 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).

Article 2 contains definitions. These definitions will need to be interpreted in a uniform manner in the EU. It defines a "subscriber", i.e. 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 this Regulation, is acting for purposes which are outside his or her trade, business, craft or profession.

Article 2 also provides for the definitions of a "Member State of residence", "temporarily present", "online content service" and "portable". A "Member State of residence" is the Member State in which the subscriber habitually resides. "Temporarily present" means that a subscriber is present in a Member State other than his or her Member State of residence. An "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 Council¹⁹ or a service whose main feature is the provision of access to works, other subject matter or transmissions of broadcasting organisations. For the purpose of this Regulation "portable" means that subscribers can effectively access and use the online content service in the Member State of residence without a limitation to a specific location. 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. An example of indirect payment is when a subscriber pays for a package of services which combines a telecommunications service and an online content service provided by another service provider. If a subscriber receives an online content

¹⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services OJ L 95, 15.4.2010, p. 1–24.

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. Therefore, if, for example, 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.

Article 3 establishes the obligation for 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. In cross-border portability scenarios, the provider shall not be liable if the quality of delivery of the service is lower, for instance due to limited internet connection. 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. Also, this Regulation will oblige the provider to inform the subscriber on the quality of delivery of the online content service when accessed and used in a Member State other than the Member State of residence.

Article 4 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 cross-border portability, are deemed to occur solely in the Member State of residence. This provision applies for all other purposes linked to the provision of as well as the access to and use of the service in a cross-border portability mode.

Further, Article 5 sets out that 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, shall be unenforceable. Further, any contractual terms contrary to the legal mechanism which enables service providers to comply with the cross-border portability obligation shall also be unenforceable. This applies to all contractual arrangements, including between right holders and service providers as well as between service providers and their customers. 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 proposal sets out a safeguard that such required means shall be reasonable and shall not go beyond what is necessary in order to achieve their purpose.

Article 6 provides that 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.

Article 7 sets out that 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.

Article 8 sets out that the Regulation shall apply six months after its publication in the Official Journal.

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²⁰,

Having regard to the opinion of the Committee of the Regions²¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Since the internal market comprises an area without internal frontiers relying, *inter alia*, on the free movement of services and persons, it is necessary to provide that consumers can use online content services which offer access to content such as music, games, films or sporting events not only in their Member State of residence but also when they are temporarily present in other Member States of the Union. Therefore, barriers that hamper access and use of such online content services cross border should be eliminated.
- (2) The technological development leading to a proliferation of portable devices such as tablets and smartphones increasingly facilitates the use of online content services by providing access to them regardless of the consumers' location. There is a rapidly growing demand on the part of consumers for access to content and innovative online services not only in their home country but also when they are temporarily present in another Member State of the Union.
- (3) Consumers increasingly enter into contractual arrangements with service providers for the provision of online content services. However, consumers that are temporarily

²⁰ OJ C , , p. .

²¹ OJ C , , p. .

present in another Member State of the Union often cannot access and use the online content services that they have acquired the right to use in their home country.

- (4) There are a number of barriers which hinder the provision of these services to consumers temporarily present in another Member State. Certain online services include content such as music, games or films which are protected by copyright and/or related rights under Union law. In particular, the obstacles to cross-border portability of online content services stem from the fact that the rights for the transmission of content protected by copyright and/or related rights such as audiovisual works are often licensed on a territorial basis as well as from the fact that online service providers may choose to serve specific markets only.
- (5) The same applies to other content such as sporting events which is not protected by copyright and/or related rights under Union law but which may be protected by copyright, related rights or by virtue of other specific legislation under national law and which is often also licensed by organisers of such events or offered by online service providers on a territorial basis. Transmissions of such content by broadcasting organisations would be protected by related rights which have been harmonised at Union level. In addition, transmissions of such content often include copyright-protected elements such as music, opening or closing video sequences or graphics. In addition, certain aspects of such transmissions relating to events of major importance for society or events of high interest to the public for the purpose of short news reports, have been harmonised by Directive 2010/13/EU of the European Parliament and of the Council²². Finally, audiovisual media services within the meaning of Directive 2010/13/EU include services which provide access to content such as sporting events, news or current events.
- (6) Therefore, increasingly, online content services are marketed in a package in which content which is not protected by copyright and/or related rights is not separable from content which is protected by copyright and/or related rights without substantially lessening the value of the service provided to consumers. This is especially the case with premium content such as sporting or other events of significant interest to consumers. In order to enable service providers to deliver to consumers full access to their online content services, it is indispensable that this Regulation also covers such content used by online content services and therefore that it applies to audiovisual media services in the meaning of Directive 2010/13/EU as well as to transmissions of broadcasting organisations in their entirety.
- (7) The rights in works and other protected subject matter are harmonised, *inter alia*, in Directive 96/9/EC of the European Parliament and of the Council²³, Directive 2001/29/EC of the European Parliament and of the Council²⁴, Directive 2006/115/EC

²² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services OJ L 95, 15.4.2010, p. 1–24.

²³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 077, 27.03.1996, p. 20-28.

²⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

of the European Parliament and of the Council²⁵ and in Directive 2009/24 of the European Parliament and of the Council²⁶.

- (8) Therefore, providers of online content services that make use of works or other protected subject-matter, such as books, audiovisual works, recorded music or broadcasts must have the rights to use such content for the relevant territories.
- (9) The transmission by the online service provider of content that is protected by copyright and related rights requires the authorisation of the relevant right holders such as authors, performers, producers or broadcasting organisations for the content that would be included in the transmission. This is equally true when such transmission takes place for the purpose of allowing a consumer to carry out a download in order to use an online content service.
- (10) The acquisition of a licence for the relevant rights is not always possible, notably when rights in content are licensed on an exclusive basis. In order to ensure the territorial exclusivity, online service providers often undertake, in their licence contracts with right holders, including broadcasting organisations or events organisers, to prevent their subscribers from accessing and using their service outside the territory for which the service provider holds the licence. These contractual restrictions imposed on service providers require providers to take measures such as disallowing access to their services from IP addresses located outside the territory concerned. Therefore, one of the obstacles to the cross-border portability of online content services is to be found in the contracts concluded between the online service providers and their subscribers, which in turn reflect the territorial restriction clauses included in contracts concluded between those service providers and right holders.
- (11) In addition, the Court held in Joined cases C-403/08 and C-429/08, *Football Association Premier League and Others*, EU:C:2011:631, that certain restrictions to the provision of services cannot be justified in light of the objective of protecting intellectual property rights.
- (12) Therefore, the objective of this Regulation is to adapt the legal framework in order to ensure that the licensing of rights no longer presents barriers to cross-border portability of online content services in the Union and that the cross-border portability can be ensured.
- (13) This Regulation should, therefore, apply to online content services that a service provider, after having obtained the relevant rights from right holders in a given territory, provides to its subscribers on the basis of a contract, by any means including streaming, downloading or any other technique which allows use of that content. A registration to receive content alerts or a mere acceptance of HTML cookies should not be regarded as a contract for the provision of online content service for the purposes of this Regulation.

²⁵ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 376, 27.12.2006, p. 28–35.

²⁶ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111, 5.5.2009, p. 16–22.

- (14) An online service which is not an audiovisual media service within the meaning of Directive 2010/13/EU and which uses works, other subject matter or transmissions of broadcasting organisations in a merely ancillary manner should not be covered by this Regulation. Such services include websites that use works or other protected subject matter only in an ancillary manner such as graphical elements or music used as background, where the main purpose of such websites is, for example, the sale of goods.
- (15) This Regulation should apply only to online content services which subscribers can effectively access and use in the Member State in which they habitually reside without being limited to a specific location, as it is not appropriate to require service providers that do not offer portable services in their home country to do so across borders.
- (16) This Regulation should apply to online content services which are provided against payment of money. Providers of such services are in a position to verify the Member State of residence of their subscribers. 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 a telecommunications service and an online content service operated by another provider.
- (17) Online content services which are provided without payment of money are also included in the scope of this Regulation to the extent that providers verify the Member State of residence of their subscribers. Online content services which are provided without the payment of money and whose providers do not verify the Member State of residence of their subscribers should be outside the scope of this Regulation as their inclusion would involve a major change to the way these services are delivered and involve disproportionate costs. As concerns verification of the subscriber's Member State of residence, information such as a payment of a licence fee for other services provided in the Member State of residence, the existence of a contract for internet or telephone connection, IP address or other means of authentication, should be relied upon, if they enable the provider to have reasonable indicators as to the Member State of residence of its subscribers.
- (18) In order to ensure the cross-border portability of online content services it is necessary to require that online service providers enable their subscribers to use the service in the Member State of their temporary presence by providing them 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 those offered in their Member State of residence. This obligation is mandatory and therefore the parties may not exclude it, derogate from it or vary its effect. Any action by a service provider which would prevent the subscriber from accessing or using the service while temporarily present in a Member State, for example restrictions to the functionalities of the service or to the quality of its delivery, would amount to a circumvention of the obligation to enable cross-border portability of online content services and therefore would be contrary to this Regulation.
- (19) Requiring that the delivery of online content services to subscribers temporarily present in Member States other than their Member State of residence be of the same quality as in the Member State of residence could result in high costs for service providers and thus ultimately for subscribers. Therefore, it is not appropriate for this

Regulation to require that the provider of an online content service take measures to ensure quality of delivery of such services beyond the quality available via the local online access chosen by a subscriber while temporarily present in another Member State. In such cases the provider shall not be liable if the quality of delivery of the service is lower. 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.

- (20) In order to ensure that providers of online content services comply with the obligation to provide cross-border portability of their services without acquiring the relevant rights in another Member State, it is necessary to stipulate that those service providers which lawfully provide portable online content services in the Member State of residence of subscribers are always entitled to provide such services to those subscribers when they are temporarily present in another Member State. This should be achieved by establishing that the provision, the access to and the use of such online content service should be deemed to occur in the Member State of the subscriber's residence.
- (21) For the licensing of copyright and related rights, this means that relevant acts of reproduction, communication to the public and making available of works and other protected subject-matter, as well as the acts of extraction or re-utilization in relation to databases protected by *sui generis* rights, which occur when the service is provided to subscribers when they are temporarily present in a Member State other than their Member State of residence, should be deemed to occur in the subscribers' Member State of residence. The service providers, therefore, should be deemed to carry out such acts on the basis of the respective authorisations from the right holders concerned for the Member State of residence of these subscribers. Whenever service providers can carry out acts of communication to the public or reproduction in the Member State of the subscriber on the basis of an authorisation from the right holders concerned, a subscriber who is temporarily present in a Member State other than his Member State of residence should be able to access and use the service and where necessary carry out any relevant acts of reproduction such as downloading which he would be entitled to do in his own Member State of residence. The provision of an online content service by a service provider to a subscriber temporarily present in a Member State other than his or her Member State of residence and the use of the service by such a subscriber in accordance with this Regulation should not constitute a breach of copyright and related rights or any other rights relevant for the use of the content in the service.
- (22) Service providers should not be liable for breach of any contractual provisions contrary to the obligation to enable their subscribers to use the service in the Member State of their temporary presence. Therefore clauses in contracts designed to prohibit or limit the cross-border portability of online content services should be unenforceable.
- (23) Service providers should ensure that their subscribers are properly informed about the conditions of enjoyment of online content services in Member States other than the Member State of residence of the subscribers. The Regulation enables right holders to require that the service provider make use of effective means in order to verify that the online content service is provided in conformity with this Regulation. It is necessary, however, to ensure that the required means are reasonable and do not go beyond what is necessary in order to achieve this purpose. Examples of the necessary technical and

organisational measures may include sampling of IP address instead of constant monitoring of location, transparent information to the individuals about the methods used for the verification and its purposes, and appropriate security measures. Considering that for purposes of the verification what matters is not the location, but rather, in which Member State the subscriber is accessing the service, precise location data should not be collected and processed for this purpose. Similarly, where authentication of a subscriber is sufficient in order to deliver the service provided, identification of the subscriber should not be required.

- (24) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles, in particular the right to respect for private and family life, the right to protection of personal data, the freedom of expression and the freedom to conduct a business. Any processing of personal data under this Regulation should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directives 95/46/EC²⁷ and 2002/58/EC²⁸. In particular, service providers must ensure that any processing of personal data under this Regulation must be necessary and proportionate in order to achieve the relevant purpose.
- (25) This Regulation should not affect the application of the rules of competition, and in particular Articles 101 and 102 of the Treaty. The rules provided for in this Regulation should not be used to restrict competition in a manner contrary to the Treaty.
- (26) Contracts under which content is licensed are usually concluded for a relatively long duration. Consequently, and in order to ensure that all consumers residing in the Union can enjoy the cross-border portability feature of online content services on an equal basis in time and without any undue delay, this Regulation should also apply to contracts concluded and rights acquired before the date of its application if they are relevant for the cross-border portability of an online content service provided after that date. This is also necessary in order to ensure a level playing field for service providers operating in the internal market, by enabling providers who concluded contracts with right holders for a long duration to offer cross-border portability to their subscribers, independently of the provider's possibility to renegotiate such contracts. Moreover, this provision should ensure that when service providers make arrangements necessary for the cross-border portability of their services, they will be able to offer such portability with regard to the entirety of their online content. Finally, it should also allow right holders not having to renegotiate their existing licensing contracts in order to enable the offering of the cross-border portability of services by providers.

²⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31–50.

²⁸ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.07.2002, p 37), called, as amended by Directives 2006/24/EC and 2009/136/EC, the "e-Privacy Directive".

- (27) As the Regulation will therefore apply to some contracts and rights acquired before the date of its application, it is also appropriate to provide for a reasonable period between the date of entry into force of this Regulation and the date of its application allowing right holders and service providers to make the arrangements necessary to adapt to the new situation, as well as allowing service providers to amend the terms of use of their services.
- (28) In order to achieve the objective of ensuring cross-border portability of online content services in the Union, it is appropriate to adopt a regulation, which directly applies in Member States. This is necessary in order to guarantee a uniform application of the cross-border portability rules across Member States and their entering into force at the same time with regard to all online content services. Only a regulation ensures the degree of legal certainty which is necessary in order to enable consumers to fully benefit from cross-border portability across the Union.
- (29) Since the objective of this Regulation, namely the adaptation of the legal framework so that cross-border portability of online content services is provided in the Union, cannot be sufficiently achieved by Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objective. Therefore, this Regulation does not substantially affect the way the rights are licensed and does not oblige right holders and service providers to renegotiate contracts. Moreover, this Regulation does not require that the provider takes measures to ensure the quality of delivery of online content services outside the Member State of residence of the subscriber. Finally, this Regulation does not apply to service providers who offer services without payment of money and who do not verify the subscriber's Member State of residence. Therefore, it does not impose any disproportionate costs,

HAVE ADOPTED THIS REGULATION:

Article 1
Objective and scope

This Regulation introduces a common approach to ensuring that subscribers to online content services in the Union, when temporarily present in a Member State, can access and use these services.

Article 2
Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) "Subscriber" means any consumer who, on the basis of a contract for the provision of an online content service with a provider, may access and use such service in the Member State of residence;
- (b) "Consumer" means any natural person who, in contracts covered by this Regulation, is acting for purposes which are outside his or her trade, business, craft or profession;

- (c) "Member State of residence" means the Member State where the subscriber is habitually residing;
- (d) "Temporarily present" means a presence of a subscriber in a Member State other than the Member State of residence;
- (e) "Online content service" means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union that a service provider is lawfully providing online in the Member State of residence on a portable basis and which is an audiovisual media service within the meaning of Directive 2010/13/EU or a service the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner,

which is provided to a subscriber on agreed terms either:
 - (1) against payment of money; or
 - (2) without payment of money provided that the subscriber's Member State of residence is verified by the provider;
- (f) "Portable" means that subscribers can effectively access and use the online content service in the Member State of residence without being limited to a specific location.

Article 3

Obligation to enable cross-border portability of online content services

- (1) The provider of an online content service shall enable a subscriber who is temporarily present in a Member State to access and use the online content service.
- (2) The obligation set out in paragraph 1 shall not extend to any quality requirements applicable to the delivery of an online content service that the provider is subject to when providing this service in the Member State of residence, unless otherwise expressly agreed by the provider.
- (3) The provider of an online content service shall inform the subscriber of the quality of delivery of the online content service provided in accordance with paragraph 1.

Article 4

Localisation of the provision, the access to and the use of online content services

The provision of an online content service to, as well as the access to and the use of this service by, a subscriber, in accordance with Article 3(1), shall be deemed to occur solely in the Member State of residence including for the purposes of Directive 96/9/EC, Directive 2001/29/EC, Directive 2006/115/EC, Directive 2009/24 and Directive 2010/13/EU.

Article 5
Contractual provisions

- (1) Any contractual provisions including those between holders of copyright and related rights, those holding any other rights relevant for the use of content in online content services and service providers, as well as between service providers and subscribers which are contrary to Articles 3(1) and 4 shall be unenforceable.
- (2) Notwithstanding paragraph 1, holders of copyright and related rights or those holding any other rights in the content of online content services may require that the service provider make use of effective means in order to verify that the online content service is provided in conformity with Article 3(1), provided that the required means are reasonable and do not go beyond what is necessary in order to achieve their purpose.

Article 6
Protection of personal data

The processing of personal data carried out within the framework of this Regulation including, in particular, for purposes of verification under Article 5(2), shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC.

Article 7
Application to existing contracts and rights acquired

This Regulation shall apply also to contracts concluded and rights acquired before the date of its application if they are relevant for the provision, the access to and the use of an online content service in accordance with Article 3 after that date.

Article 8
Final provisions

- (1) This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
- (2) It shall apply from [date: 6 months following the day of its publication].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President