



Brussels, 18 May 2016
(OR. en)

8939/16

**Interinstitutional File:
2015/0284 (COD)**

PI 57
CODEC 660
RECH 138
EDUC 140
COMPET 236
SAN 185
AUDIO 59
CULT 40
DIGIT 50

NOTE

From:	Presidency
To:	Council
No. prev. doc.:	8621/16
No. Cion doc.:	15302/15+ADD 1+ADD 2
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 - General approach

I. INTRODUCTION

The Commission presented the above proposal to the Council on 9 December 2015.

This proposal is one of the first Commission initiatives under the Digital Single Market Strategy, which has the objective of creating an internal market for digital content and services. It aims to remove barriers to cross-border portability so that users who have subscribed to or acquired online content in their Member State of residence may access the same content even when they are temporarily present in another Member State.

On 13 May 2016, following intensive work under the Netherlands Presidency, the Permanent Representatives Committee (Part 1) reached broad agreement on the latest Presidency compromise proposal, as set out in the Annex to this Note. However, there are still two outstanding issues which are not acceptable to some delegations, i.e. (i) temporary presence and (ii) verification waiver. These issues are analysed under part II below.

II. KEY OUTSTANDING ISSUES

A. Definition of "temporarily present in a Member State" (Art. 2, point (d))

It is widely acknowledged that clarity on what is meant by this term is crucial for the application of the Regulation.

For the majority of delegations, the text contained in the Presidency's compromise proposal, read in conjunction with the definition of "Member State of residence" (see point (c) of the same Article) provide sufficient clarity and legal certainty.

A number of delegations, however, have requested the addition to this definition of a temporal criterion, i.e. that the temporary presence ought to be transient and short. The proposed temporal criterion aims at avoiding possible overly broad interpretations, considered by these delegations as being tantamount to cross-border access.

B. Waiver of verification obligation (Art. 3B(5) and (6))

Providers of online content services are obliged by the Regulation to allow portability of such content. Providers of online content services are also obliged to verify the Member State of residence of their subscribers with a view to establishing when the latter are temporarily present in a different Member State.

Considering that this verification obligation is there to protect the interests of right holders or any other persons holding rights to the online content, the majority of delegations is of the opinion that the Regulation should contain a provision enabling right holders to opt out of verification in order to avoid limiting unduly right holders' freedom to authorize use of their content as they wish. Such a provision would thus introduce a waiver of verification obligations where the latter are not appropriate for the sector or type of content concerned. The Presidency compromise proposal stipulates that while right holders can permit their content to be accessed and used without verification of the Member State of residence, all other aspects of the Regulation remain applicable, the subscriber's Member State of residence being established, in such a case, by means of the agreement concluded between the online service provider and the subscriber. Furthermore, it is explicitly provided that the agreements between the online service providers and the right holders shall not be able to restrict the right holders' ability to withdraw their permission, subject to reasonable prior notice being given in order to avoid unfair disruption to a service provider's business.

A number of delegations, however, consider that the possibility of agreeing that verification need not take place might lead to abuses on the part of providers enjoying considerable market power vis-à-vis less powerful right holders and have therefore requested that this provision apply only to content made available to all online service providers in the European Union on a non-exclusive basis.

III. CONCLUSION

On the basis of the latest Presidency compromise proposal contained in the Annex to this Note, the Council is invited to resolve the outstanding issues mentioned above and to adopt a general approach on the proposed Regulation.

Presidency compromise 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 Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Seamless access to online content services by consumers throughout the Union is important for the smooth functioning of the internal market. 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 portable 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 for purposes such as holidays, travel or business trips. Therefore, barriers that hamper access and use of such online content services in such cases should be eliminated.

¹ OJ C , , p. .

- (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 Member State of residence but also when they are temporarily present in another Member State of the Union.
- (3) Consumers increasingly enter into contractual arrangements with providers for the provision of online content services. However, consumers that are temporarily present in another Member State of the Union often cannot continue accessing and using the online content services that they have acquired the right to use in their Member State of residence.
- (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 providers of online content services 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 providers of online content services 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. Also, 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 Council². 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 providers of online content services to deliver to consumers, when the latter are temporarily present in a Member State other than their Member State of residence, 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.

² 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.

- (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 Council³, Directive 2001/29/EC of the European Parliament and of the Council⁴, Directive 2006/115/EC of the European Parliament and of the Council⁵ and in Directive 2009/24 of the European Parliament and of the Council⁶.
- (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 provider of an online content service 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.

³ 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.

⁴ 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.

⁵ 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.

⁶ 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.

- (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, providers of online content services 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 provider holds the licence. These contractual restrictions imposed on 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 providers of online content services and their subscribers, which in turn reflect the territorial restriction clauses included in contracts concluded between those 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 harmonised legal framework on copyright and related rights and to provide a common approach to the provision of online content services to subscribers temporarily present in Member States other than their Member State of residence, in order to ensure that the present barriers to cross-border portability of online content services in the internal market no longer exist.
- (12a) Given that there are Union instruments adopted in the field of taxation, it is necessary to exclude the field of taxation from the scope of this Regulation. Therefore, this Regulation should not affect the application of any provision related to taxation.

- (13) This Regulation should, therefore, apply to online content services that a 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.
- (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 of their residence without being limited to a specific location, as it is not appropriate to require providers of online content services that do not offer portable services in the Member State of residence of a subscriber 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. The payment of a mandatory fee such as a broadcasting licence fee should not be regarded as a payment of money to receive an online content service.

- (17) Providers of online content services which are provided without payment of money normally do not verify the Member State of residence of their subscribers. The inclusion of such online content services in the scope of this Regulation would involve a major change to the way these services are delivered and involve disproportionate costs. On the other hand, the exclusion of these services from the scope of the Regulation would mean that these services would not be able to take advantage of the legal mechanism provided for in this Regulation and enabling providers of online content services to offer their services on a portable basis across the Union even when they decide to invest in means allowing the verification of their subscriber's Member State of residence. This is why providers of online content services which are provided without payment of money should have an option to be included in the scope of this Regulation if they so decide and provided that they comply with the requirements on the verification of the Member State of residence. If they exercise that option, they should be obliged to comply with the provisions of this Regulation in the same way as providers of online content services which are provided against payment of money. Furthermore, they should inform subscribers, the relevant holders of copyright and related rights and those holding any other rights in the content of the online content service of their decision to exercise that option. Such information could be provided on the provider's website.
- (18) In order to ensure the cross-border portability of online content services it is necessary to require providers of online content services which are provided against payment of money to 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 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 providers of online content services which are provided against payment of money and thus ultimately for subscribers. Therefore, it is not appropriate for this Regulation to require that the provider 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 guarantees certain quality of delivery to subscribers while temporarily present in other Member States, the provider shall be bound by such guarantee. The provider should provide its subscribers in advance with general information concerning the quality of delivery of an online content service in Member States other than the Member State of residence, in particular information that the quality of delivery may vary from the quality of the delivery of the online content service in the Member State of residence. Such information could be provided on the provider's website.
- (20) In order to ensure that providers of online content services which are provided against payment of money 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 providers which lawfully provide portable online content services against payment of money 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 for the purposes of this Regulation the provision of, 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. An online content service is provided lawfully if both the service and the content are provided in a lawful manner in the Member State of residence. This Regulation and in particular the legal mechanism localising the provision of, the access to and the use of an online content service in the Member State of the subscriber's residence does not prevent a provider from offering its subscriber who is temporarily present in another Member State an online content service that the provider lawfully provides in that Member State.

- (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 providers of online content service which are provided against payment of money, 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 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 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) Providers of online content services which are provided against payment of money 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 such online content services should be unenforceable. The providers and holders of rights relevant for the provision of the online content services should not be allowed to circumvent the application of this Regulation by virtue of the choice of the law of a non-member country as the law applicable to contracts between them or to contracts between providers and subscribers.

- (22a) This Regulation defines several concepts necessary for its application, including the Member State of residence. The Member State of residence should be determined taking into account the objectives of this Regulation and the necessity to ensure its uniform application in the Union. The definition of Member State of residence implies that the subscriber has actual and stable residence in the Member State to which he or she returns regularly. A provider who established the Member State of residence in accordance with this Regulation should be able to assume, for the purposes of this Regulation, that the Member State of residence as verified is the only Member State of residence of the subscriber. Providers should not be obliged to verify whether their subscribers are also subscribers to an online content service in another Member State.
- (23) This Regulation should oblige providers providing online content services which are provided against payment of money to subscribers temporarily present in a Member State other than their Member State of residence to make use of effective means in order to verify the Member State of residence of their subscribers. The use of such means should always be reasonable and should not go beyond what is necessary in order to achieve the purpose of establishing the Member State of residence. To that effect, the providers should rely on the verification means listed in this Regulation. The objective of this list is to provide legal certainty as to the verification means to be used by providers. In each case, account should be taken of the effectiveness of a particular verification means in the given Member State and for the given type of online content service. Unless the Member State of residence can be established to a sufficient degree of certainty on the basis of a single verification means, providers should rely on a combination of these means. Furthermore, this Regulation should allow agreements between providers of online content services and right holders as to which particular verification means, whether listed or not in the Regulation, should be used by providers. This should allow for flexibility as to the choice of the verification means. Such means should also be effective, reasonable and should not go beyond what is necessary in order to achieve the purpose of establishing the Member State of residence.

The provider of an online content service may request the subscriber to provide information necessary in order to sufficiently verify the subscriber's Member State of residence. If the subscriber fails to provide that information and in consequence the provider is unable to verify the Member State of residence as required under this Regulation, the provider should not provide cross-border portability of the online content service to this subscriber under this Regulation.

(23a) However, holders of copyright, related rights, or other rights in content of online content services should remain able to permit their content to be accessed and used under this Regulation without verification of the Member State of residence. This may be particularly applicable in sectors such as music and e-books. Rights holders should be able to take such decisions freely when entering into agreements with providers. Agreements between right holders and providers should not restrict the possibility for rightholders to withdraw such permission on provision of reasonable notice to the provider. In cases where the holders of copyright, related rights or other rights decide to permit their content to be accessed and used without verification of the Member State of residence, all other aspects of this Regulation should remain applicable while the agreement between the provider and the subscriber for the provision of an online content service should be sufficient to establish the latter's Member State of residence.

(23b) Verification means may include sampling or periodic checking of IP address instead of constant monitoring of location. Considering that for purposes of the verification what matters is not the precise location, but rather the subscriber's temporary presence in another Member State while 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/EC⁷ and 2002/58/EC⁸. References to Directives 95/46/EC and 2002/58/EC should be understood as references to legislation currently in force as well as to legislation that will replace it. In particular, taking into account the legal obligation under this Regulation to verify the Member State of residence, providers of online content services should ensure that any processing of personal data under this Regulation is necessary and proportionate in order to achieve the relevant purpose. The necessary technical and organisational measures should include providing transparent information to the subscribers about the methods used for the verification and its purposes as well as ensuring appropriate security measures.
- (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.

⁷ 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.

⁸ 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".

- (25a) This Regulation does not affect the application of Directive 2014/26/EU⁹ and in particular Title III of this Directive. The rules provided for in this Regulation are consistent with the objective of facilitating the lawful access to content which is protected by copyright and related rights as well as services linked thereto.
- (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 providers of online content services which are provided against payment of money 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 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.

⁹ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72-98.

- (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 providers of online content services which are provided against payment of money to make the arrangements necessary to adapt to the new situation, as well as allowing providers to amend the terms of use of their services. Changes to the terms of use of online content services offered in packages combining an electronic communications service and an online content service made strictly in order to comply with the requirements of this Regulation does not trigger for subscribers any right under national laws transposing the regulatory framework for electronic communications networks and services to withdraw contracts for the provision of such electronic communications 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 providers of online content services which are provided against payment of money to renegotiate contracts. Moreover, this Regulation does not require that the providers take 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 providers who offer online content services without payment of money and who do not exercise the option to enable the cross-border portability of their services. Therefore, it does not impose any disproportionate costs,

HAVE ADOPTED THIS REGULATION:

Article 1

Objective and scope

- (1) This Regulation introduces a common approach in the Union to ensuring that subscribers to portable online content services in their Member States of residence can access and use these services when temporarily present in another Member State.
- (2) This Regulation shall not apply to the field of taxation.

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 that service in their 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, established on the basis of Article 3B, where the subscriber has his or her actual and stable residence to which he or she returns regularly;
- (d) "Temporarily present in a Member State" means the presence of a subscriber in a Member State other than the Member State of residence for a limited period of time;

- (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 provider is lawfully providing to a subscriber in the latter's Member State of residence on agreed terms, online and on a portable basis and which is:
- (i) an audiovisual media service within the meaning of Directive 2010/13/EU, or
 - (ii) 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;
- (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 provided against payment of money 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 undertaken by the provider.
- (3) The provider shall provide the subscriber with information concerning the quality of delivery of the online content service provided in accordance with paragraph 1 prior to providing that service. The information shall be provided by means which are adequate and proportionate.

Article 3A

Option to enable cross-border portability of online content services in accordance with this Regulation

- (1) The provider of an online content service provided without payment of money may choose to enable its subscribers who are temporarily present in a Member State to access and use the online content service in accordance with this Regulation on the condition that the provider verifies the subscriber's Member State of residence in accordance with Article 3B.
- (2) The provider shall inform subscribers, the relevant holders of copyright and related rights and those holding any other rights in the content of online content service of its decision to provide the online content service in accordance with paragraph 1 prior to providing that service. The information shall be provided by means which are adequate and proportionate.
- (3) If the provider chooses to provide the online content service in accordance with paragraph 1, this Regulation shall apply to that provider.

Article 3B

Verification of the Member State of residence

- (1) The provider of an online content service provided against payment of money shall make use of effective means in order to verify the Member State of residence of its subscribers. These means shall be reasonable and shall not go beyond what is necessary in order to achieve their purpose.

- (2) In order to comply with the obligation set out in paragraph 1, the provider shall rely on the following verification means:
- (a) a declaration by the subscriber on their Member State of residence;
 - (b) an identity card or any other valid document confirming subscriber's Member State of residence;
 - (c) the billing address or the postal address of the subscriber;
 - (d) bank details such as bank account, local credit or debit card of the subscriber;
 - (e) the place of installation of a set top box or a similar device used for supply of services to the subscriber;
 - (f) the subscriber being a party to a contract for internet or telephone connection in the Member State;
 - (g) the subscriber paying a licence fee for other services provided in the Member State, such as public service broadcasting;
 - (h) sampling or periodic checking of Internet Protocol (IP) address to identify the Member State where the subscriber accesses and uses the online content service or identifying that Member State by other means of geolocation;
 - (i) registration on local electoral rolls, if publicly available; or
 - (j) the payment of local/poll taxes, if publicly available.

Unless the Member State of residence can be sufficiently established on the basis of a single verification means, the provider shall rely on a combination of such means.

The declaration of a subscriber on their Member State of residence shall only be used in combination with one or more other verification means.

- (3) The provider and the holders of copyright and related rights or those holding any other rights in the content of an online content service may agree on the use of particular means referred to in paragraph 2 or any other means in accordance with paragraph 1 to verify the Member State of residence.
- (4) The provider shall be entitled to request the subscriber to provide the information necessary for the verification of the Member State of residence. If the subscriber fails to provide that information and in consequence the provider is unable to verify the Member State of residence as required by this Regulation, the provider shall not, on the basis of this Regulation, enable this subscriber to access or use the online content service when he or she is temporarily present in a Member State.
- (5) The holders of copyright and related rights or those holding any other rights in the content of an online content service may authorise the access to and use of their content under this Regulation without the verification of the Member State of residence, but otherwise in accordance with this Regulation. In such cases, the agreement between the provider and the subscriber for the provision of an online content service shall be sufficient to establish the latter's Member State of residence.
- (6) The agreement between the provider and the holders of copyright and related rights or those holding any other rights in the content of an online content service shall not restrict the possibility for the rights holder to withdraw the authorisation referred to in paragraph 5 on provision of reasonable notice to the provider.

Article 4

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

The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of this service by that subscriber, shall be deemed to occur solely in their Member State of residence.

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 access to and the use of content in online content services and providers of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, shall be unenforceable.
- (2) The provisions of this Regulation shall apply irrespective of the law applicable to contracts concluded between providers of online content services and holders of copyright and related rights or those holding any other rights relevant for the access to and the use of content in online content services or to contracts between such providers and their subscribers.

Article 6

Protection of personal data

The processing of personal data carried out within the framework of this Regulation 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 Articles 3 and 3A after that date.

Article 7a

Evaluation

Three years after the entry into force of this Regulation, and at three-year intervals thereafter, the Commission shall assess the application of this Regulation and submit to the European Parliament and to the Council a report on the application of this Regulation. That report shall include an assessment of the verification of the Member State of residence, and, if necessary, on the need for a review. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.

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 12 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
