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COMMISSION STAFF WORKING DOCUMENT

**Report on the application of Regulation (EU) 2017/1128 on cross-border portability of
online content services in the internal market**

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1. Introduction

Article 10 of Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market (the ‘Portability Regulation’ or ‘the Regulation’)¹ requires the Commission to assess the application of the Regulation in the light of legal, technological and economic developments and submit a report to the European Parliament and to the Council setting out its findings. This staff working document meets this requirement.

This report is based on information from various sources available to the Commission services, including (i) a study conducted for the Commission to gather evidence on the application and impacts of the Portability Regulation (‘the study’)²; (ii) a Flash Eurobarometer survey on cross-border portability of online content services (‘the Eurobarometer survey’)³; (iii) a report from the European Audiovisual Observatory on the implementation of the Portability Regulation by free online video services (‘the European Audiovisual Observatory report’)⁴, (iv) exchanges between the Commission and stakeholders and (v) feed-back and queries received from the public.

Building on this evidence, the Commission’s services assessed the application of the Portability Regulation in light of legal, technological and economic developments, taking into account the elements stipulated in the review clause (Article 10 of the Regulation), in particular the impacts on SMEs and the protection of personal data. This staff working document presents the main findings of this assessment, building on consumers’ experience (Section 2) and reporting on the practical application of the Regulation by online content service providers (Sections 3 and 4), the impacts of the new rules on rightholders (Section 5) and the existing enforcement mechanisms (Section 6).

This report will be submitted to the European Parliament and the Council.

* * *

The Portability Regulation was adopted on 14 June 2017 and has been applicable since 1 April 2018 in the EU and since 1 August 2019 in the EEA⁵. It requires providers of paid online content services to enable a subscriber who is temporarily present in another Member State to access and use their services in the same manner as in the Member State of residence (Article 3(1) of the Regulation). The Regulation also introduces, to underpin the obligation set

¹ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

² European Commission, Directorate-General for Communications Networks, Content and Technology, Study on the Portability Regulation - Final report, 2022 (SMART 2019/0024). This study was carried out for the European Commission by Visionary Analytics with support from Kantar Public and external experts.

³ Flash Eurobarometer 477a, Accessing Content Online, Cross-border Portability of Online Content Services and Intra-EU Calls, April 2019

⁴ European Audiovisual Observatory, First feedback from the implementation of the Portability Regulation by free online video services, July 2019

⁵ The European Economic Area (EEA) consists of the EU Member States and three countries in the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway)

out in Article 3, a legal fiction according to which the provision of, access to and use of the online content service by a subscriber who is temporarily present in another Member State is deemed to occur only in the subscriber's Member State of residence (Article 4 of the Regulation). This means that, when providing portability, online content services do not need to acquire licences for the other territories in the internal market in which their subscribers are temporarily staying.

Under Article 5 of the Regulation, in order to provide cross-border portability, online content service providers have to verify the subscribers' Member State of residence at the conclusion and renewal of the contract and in case of reasonable doubt. To do so, service providers have to use the verification means exhaustively listed in Article 5(1)⁶; they cannot use more than two means of verification. They may use certain means, i.e. the billing address or the postal address of the subscriber; a declaration by the subscriber confirming the subscriber's address in the Member State; or an internet protocol (IP) address check to identify the Member State where the subscriber is accessing the online content service, only in combination with one of the others listed. Article 5(4) of the Regulation permits rightholders to waive the obligation to verify the Member State of residence.

Pursuant to Article 6 of the Regulation, providers of online content services that are provided without payment of money are not obliged to offer portability to their subscribers. If they decide to do so, they are required to verify the subscriber's Member State of residence. Additionally, those providers of online content services have to inform subscribers and rightholders of this decision prior to providing the service by adequate and proportionate means, for example, on the providers' websites⁷.

Article 7(1) of the Regulation provides that contractual provisions (between rightholders and service providers and between service providers and consumers), which are contrary to the Regulation are unenforceable, including those limiting portability to a specific time-period. Article 8 of the Regulation includes provisions relevant to the protection of personal data.

* * *

⁶ Article 5(1) lists these means of verification: an identity card, electronic means of identification, in particular those falling under the electronic identification schemes notified in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council (12), or any other valid identity document confirming the subscriber's Member State of residence; payment details such as the bank account or credit or debit card number of the subscriber; the place of installation of a set top box, a decoder or a similar device used for supply of services to the subscriber; the payment by the subscriber of a licence fee for other services provided in the Member State, such as public service broadcasting; an internet or telephone service supply contract or any similar type of contract linking the subscriber to the Member State; registration on local electoral rolls, if the information concerned is publicly available; payment of local taxes, if the information concerned is publicly available; a utility bill of the subscriber linking the subscriber to the Member State; the billing address or the postal address of the subscriber; a declaration by the subscriber confirming the subscriber's address in the Member State; an internet protocol (IP) address check, to identify the Member State where the subscriber accesses the online content service.

⁷ Article 6(2) of the Regulation (EU) 2017/1128.

Following the entry into force of the Regulation, the services of the Commission have regularly monitored its application, through several data gathering exercises, as described further in this report.

In June 2018, DG CNECT sent a letter to national competent authorities⁸ regarding certain issues it had identified in the initial weeks that the Regulation was applicable, which may prevent consumers from enjoying portability.

These issues included service providers limiting portability to a specific period of time; requests for information going beyond those required to verify the Member State of residence; checks of IP addresses to monitor consumers' whereabouts on a regular basis; limitation of the range of devices on which portability is available. DG CNECT encouraged the national competent authorities to consider these issues when monitoring the correct application of the Regulation.

The Commission's services conducted a Flash Eurobarometer survey⁹ in order to assess public awareness of and experience with the new portability rules. This survey took place in February 2019. The results reflected an overall good awareness of citizens of the portability rules and good functioning of the Regulation in practice (see Section 2 below).

In addition, at the Commission's services request, the European Audiovisual Observatory¹⁰ prepared a report, that was published in July 2019. This presented “first feedback from the implementation of the Portability Regulation by free online video services”¹¹. This report covers the specific situation for services that are provided without payment of money, which are not obliged to provide portability but can nevertheless choose to, provided that they verify subscribers' Member State of residence and apply other relevant rules (see Section 4).

More recently, to support the preparation of this report, the Commission's services tasked external contractors with carrying out a study on the application of the Regulation¹². The Commission's services asked the contractors to take into account the criteria set out in the reporting obligation under Article 10 and in particular to (i) gather evidence regarding the practical application of the portability rules by online content service providers, (ii) assess consumers' experience with the cross-border portability of online content services and (iii) assess the impacts of the Portability Regulation on service providers (in particular SMEs) and rightholders (content producers and distributors). The study, which is published alongside this report, focuses principally on the application of the Regulation by online content services provided against payment (subscription services or transactional services).

⁸ Portability regulation – Letter sent to competent national authorities by Director General of DG CONNECT, July 2018

⁹ Flash Eurobarometer 477a, Accessing Content Online, Cross-border Portability of Online Content Services and Intra-EU Calls, April 2019

¹⁰ The European Audiovisual Observatory ('EAO') is part of the Council of Europe. Its main goal is to provide information on the various audiovisual markets in Europe and their financing. It also analyses and reports on the legal issues affecting the different sectors of the audiovisual industry.

¹¹ European Audiovisual Observatory, First feedback from the implementation of the Portability Regulation by free online video services, July 2019

¹² European Commission, Directorate-General for Communications Networks, Content and Technology, Study on the Portability Regulation - Final report, 2022 (SMART 2019/0024)..

2. Consumers' experience with the Portability Regulation

Since the entry into force of the Regulation, cross-border portability has become increasingly relevant in light of the recent economic and technological developments, in particular the steady growth of the digital content market in the audiovisual, music, gaming and e-books sectors. According to 2020 Eurostat data, 74% of Europeans aged 16-74 use the internet to stream TV or videos, 61% to listen to music and 36% to play or download games¹³.

Portability rules are particularly relevant for subscription-based services, which are becoming the prevailing business model in the digital content market. For example, paid subscriptions for audio streaming in Europe are estimated to constitute 78.9% of all music streaming revenue¹⁴. Similarly, revenues from subscription video on demand services accounted for 84% of the video on demand revenues in 2020¹⁵. According to the Flash Eurobarometer survey, 41% of internet users in the EU have a subscription to online services providing audiovisual content (excluding sports), and 26% to online music services¹⁶.

Consumers increasingly access online content through mobile devices, either in their Member State of residence or cross-border. This has been facilitated by the development of cloud-based solutions, which facilitate access to all types of content remotely. For example, cloud gaming via portable devices is currently the strongest growth driver in the gaming industry¹⁷. Content delivery networks and adaptive bitrate streaming rate also help improve the quality of content services across borders and over mobile networks.

In order to enjoy the benefits of online content portability and take advantage of these developments, consumers need to be informed about their rights as provided by the Regulation. As far as consumer awareness is concerned, the Eurobarometer survey indicates that the majority of EU consumers know that they can access paid subscriptions to online content services while travelling or staying temporarily in another EU country¹⁸. One third of the consumer protection organisations interviewed in the context of the study considered, however, that the Portability Regulation did not receive sufficient publicity¹⁹.

Since April 2018, when the Regulation became applicable in the EU, many Europeans have enjoyed cross-border portability of their online content services. The Flash Eurobarometer survey found that about a third of EU subscribers (32%) had tried to access their online content services at least once while being temporarily in another Member State than their Member State of residence, and most of them did not face problems. When considering only

¹³ Eurostat, How you entertained yourself online in 2020, available on <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210826-1>

¹⁴ Study, page 63.

¹⁵ European Audiovisual Observatory, Trends in the VOD market in EU28, January 2021.

¹⁶ Flash Eurobarometer 477a, pages 6 and 22.

¹⁷ Study, page 65.

¹⁸ According to the 2019 Eurobarometer survey, 52% of respondents know about the cross-border portability of online content services. Over two thirds of respondents (68%) in the 15-24-year-old age group say they are aware they can access paid subscriptions for online content services while travelling in other EU countries, compared with just four in ten of those aged over 55 years (40%). Flash Eurobarometer 477a, pages 37-38.

¹⁹ Study, page 93.

those subscribers that did travel within the EU, this proportion increases to around half of respondents (49%) who had tried to access online content services while temporarily abroad²⁰. This shows that quite a significant share of Europeans uses cross-border portability, although for many service providers these consumers comprise only a small proportion of their subscribers (less than 5% according to the study)²¹. The travel restrictions linked to the COVID-19 pandemic in the last two years may have nevertheless temporarily affected the use of cross-border portability.

The findings of the study, based on the survey conducted with service providers, in line with the Flash Eurobarometer results²², also show that the large majority of users take advantage of cross-border portability for relatively short periods of time and with a limited frequency: for a maximum period of 3 weeks and not more than five times a year²³.

Consumer satisfaction is an important indicator of whether the Regulation is being properly applied. Overall, European consumers are pleased with cross-border portability. The Flash Eurobarometer indicates that, 1 year after the entry into force of the Regulation 58% of consumers were satisfied with the functioning of cross-border portability²⁴. This data appears to be confirmed by the findings of the study, according to which over 80% of the surveyed service providers had not received any complaints related to cross-border portability. Where complaints were received, it appears that they were mostly received in the early stages of the application of the Regulation and service providers did not report significant difficulties in addressing them²⁵.

Similarly, the study shows that consumer protection organisations and authorities received very few or no complaints²⁶. The few organisations and authorities that received complaints mentioned issues related to the unavailability of certain content or features of the service when used in another Member State than the Member State of residence, unavailability of the service when staying in another Member State than the Member State of residence after a certain period of time and verification of the Member State of residence²⁷. The very limited number of complaints suggests that there have not been major problems with the application of the Regulation. This finding seems to be confirmed by the fact that the Commission's services have only received a limited number of questions or complaints from the public on this subject.

In many cases consumers complaining to the Commission about portability in fact raised concerns related to geo-blocking by online content service providers which prevented them from accessing content offered in other Member States than their Member State of

²⁰ Flash Eurobarometer 477a, page 41.

²¹ Study, page 84.

²² According to the Eurobarometer survey, 33% of respondents have used their subscription during a stay in another EU country for up to a week, 24% between one and two weeks, 21% for one or two days, 12% between two and four weeks and 8% for more than a month. (Flash Eurobarometer 477a, page 47).

²³ Study, page 84.

²⁴ Flash Eurobarometer 477a, page 50.

²⁵ Study, page 77.

²⁶ Study, pages 93 and 95.

²⁷ Study, pages 96 and 97.

residence²⁸. The study also shows that, beyond portability, users continue to be interested in accessing content from other Member States, and sometimes confuse portability with cross-border access to content²⁹. While portability (under the rules of the Regulation) allows consumers to continue accessing the online content services that they subscribed to in their Member State of residence, when they are temporarily in a different Member State, it does not allow them to access content that is only available in a Member State other than their Member State of residence³⁰. Furthermore, the provisions in the Geo-blocking Regulation prohibiting service providers from applying different conditions of access depending on their customers' place of residence do not apply to services whose main feature is providing access to and use of copyright protected works or other protected subject matter³¹.

3. Application of the Regulation by providers of paid online content services

The study covered a large sample of service providers, through carrying out a survey and interviews covering all types of service providers, including SMEs, and a mystery shopping exercise focusing on the most relevant service providers for the majority of Europeans³². 73 online content service providers, covering both free and paid services in 5 different sectors (audiovisual, music/podcast, games, e-books/audiobooks, sport), were involved in the survey and/or interviews³³. The mystery shopping exercise was carried out on a sample of 39 service providers, covering the 5 sectors, in 12 Member States³⁴ and in Norway³⁵.

3.1. Challenges for service providers related to implementing of the Portability Regulation

The study found that service providers, in particular SMEs³⁶, faced some challenges when applying the Regulation. These challenges seem to vary to some degree depending on the sector in which the service providers operate (audiovisual and sports versus music, games and

²⁸ Flash Eurobarometer 477a, page 38; almost one-fifth (19%) of people who answered that they knew about cross-border portability did not know exactly what the portability entails; Study page 100: several consumer protection organisations and authorities reported receiving complaints regarding cross-border access to online content services; the Commission has also received complaints of similar nature.

²⁹ Study, page 100.

³⁰ Recital (12) of the Portability Regulation clarifies that “the concept of cross-border portability of online content services should be distinguished from that of cross-border access by consumers to online content services provided in a Member State other than their Member State of residence, which is not covered by this Regulation.”

³¹ Article 4 of the Geo-blocking Regulation (which prohibits discriminating against customers based on their nationality, place of residence or establishment, in the provision of the services or sale of goods) does not apply to electronically supplied services whose main feature is providing access to and use of copyright protected works. However, electronically supplied services other than audiovisual services (which are excluded from the scope of the Geo-blocking Regulation) remain subject to all other provisions in the Regulation, including the prohibition on blocking or limiting access to online interfaces on the basis of the customer's nationality, residence or establishment and discrimination against some electronic payment methods based solely on the national origin of these payment methods.

³² Study, page 139.

³³ See the breakdown by type of service providers in the study, pages 34-35.

³⁴ The mystery shopping exercise was carried out in Poland, Belgium, Sweden, Germany, Czech Republic, Lithuania, Croatia, France, Spain, Lithuania, Hungary and Greece.

³⁵ Study page 141-142.

³⁶ As explained below, SMEs reported that verifying the Member State of residence and ensuring compliance with data protection rules was challenging.

e-books), their size (SMEs versus large companies) and their geographical coverage (global and/or pan-European service providers versus service providers that are active in only one or a small number of Member States)³⁷.

Most online content service providers in the e-books, games and music sectors already offered cross-border portability before the Regulation entered into force. The findings of the study³⁸, in line with the conclusions of the Commission's impact assessment that accompanied the proposal for a Regulation³⁹, confirmed that the relevant stakeholders in these sectors, due to their long established multi-territorial licensing and commercial practices, have not encountered any significant difficulties resulting from the Regulation.

By contrast, online content services in the audiovisual and sport sector, in particular those who offer their services in one or in a small number of Member States, had to adapt the verification means and the technological infrastructure they used in order to comply with the Regulation⁴⁰. In particular, the study shows that more than two thirds of service providers in the audiovisual and sport sectors had to introduce mechanisms or adjust existing mechanisms to verify users' Member State of residence. It appears that, overall, these adaptations have not led to significant additional costs. However, more than half of the SMEs surveyed in the audiovisual and sport sector explained that verifying a user's residence in a Member State was challenging or very challenging⁴¹. In particular, they highlighted the need to ensure compliance with data protection rules while verifying the Member State of residence (e.g. not collecting more data than necessary⁴², collecting IP data only in binary format⁴³).

In some cases, the application of the Regulation also triggered adjustments to the service's technical infrastructure or adaptation of the contracts with subscribers and rightholders, which did not prove to be significantly costly⁴⁴. Only a very small minority of the SMEs surveyed implemented these types of changes in their contracts with subscribers or rightholders⁴⁵.

³⁷ Note that different combinations are possible, e.g. large company offering services only in one EU Member State or SMEs offering their services in several EU Member States.

³⁸ Study, pages 8, 14, 16, 68, 80, 85, 87, 91, 102, 103, 104, 105, 109.

³⁹ Impact Assessment accompanying the document "Proposal for a Regulation of the European Parliament and of the Council to ensure the cross-border portability of online content services in the internal market" [SWD (2015) 270 final], pages 10, 15, 21, 22, 27, 28, 30, 31, 34, 35, 40, 46.

⁴⁰ Study, pages 85 and 87: "Service providers offering services in one or more EU countries were the ones that usually had to install or adjust the verification means (79% of them compared to 21% of service providers offering services in all EU countries)." and page 87: "While in the audiovisual and sports sectors 35% of service providers (33% of service providers offering services in one or more EU countries and 43% of service providers offering services in all EU countries) did not make investments into the technical infrastructure. The remaining audiovisual and sports sector service providers needed to install a new infrastructure (18% of respondents), update their existing infrastructure (45% of respondents) or invest in additional services from third parties (10% of respondents)".

⁴¹ Study, page. 86.

⁴² Article 8 of the Portability Regulation includes specific rules on the protection of personal data; see section 6. Recital 28 provides that data on the subscriber's precise location or any other personal data should not be collected nor processed for the purpose of verifying the Member State of residence.

⁴³ Article 5(2) of the Portability Regulation provides that data resulting from IP addresses check shall be collected in binary format only.

⁴⁴ Study, pages 14 and 85-90.

⁴⁵ With regard to revising contracts with customers, more of the large companies (45%) reported changing their contracts with consumers, while only 5% of SMEs did the same, probably because of the costs required. More details regarding the revision of contracts with rightholders are set out in Section 5. Source: Study page 87-88. Concerning the contracts revision with

The study also revealed that a large majority of the surveyed service providers did not find it to be a challenge providing services of the same quality and with the same functionalities in another Member State than the Member State of Residence (see below under 3.2).

3.2 Compliance with specific requirements of the Portability Regulation

This section presents the issues related to the application of the Regulation that have been identified in the study or through other sources of information.

While the overwhelming majority of paid online service providers allow their users to continue accessing their services when staying temporarily in another Member States than their Member State of Residence, the information gathered in the context of the study suggests that certain small service providers are not always aware of the Portability Regulation and may not apply it, which would be a clear breach of the Regulation. Furthermore, the Commission's services identified some compliance issues, related to the provision of information on the quality of delivery of services, the application of the verification means and limitations on temporary presence in another Member State. The Commission's services will further investigate on these cases of non-compliance with the Regulation, which may prevent consumers from enjoying the full benefits of cross-border portability.

3.2.1 Information about quality of delivery of the online content services

The Regulation requires service providers, on the basis of the information in their possession, to inform their subscribers about the quality of the delivery of the online content service when provided under cross-border portability⁴⁶. However, it does not introduce an obligation for service providers to ensure the same quality across borders⁴⁷, or to actively seek information on the quality of delivery of the service in Member States other than the subscriber's Member State of residence⁴⁸. Half of the service providers interviewed in the context of the study informed their users about possible differences in the quality of their service when used under cross-border portability⁴⁹. They explained that potential quality differences are typically the result of the different technological infrastructure in the country where portability is used and not of different quality standards.

Available technologies generally allow online content services to provide a good quality of services across the EU. In particular, Content Delivery Network services help ensure the same level of quality for services offered across several countries. Adaptive bitrate streaming technology also allows the quality of delivery of streaming services on mobile devices to be

customers it was reported that more of the large companies (45%) changed contracts with consumers while only 5% of the SMEs proceeded with the same procedure, probably because of the costs required. Concerning the revision of contracts with rightholders, see more details under section 5. Source: Study page 87-88.

⁴⁶ Article 3(4) of the Portability Regulation.

⁴⁷ Article 3(3) of the Portability Regulation.

⁴⁸ Recital 22 of the Portability Regulation.

⁴⁹ 8 out of 16 service providers who answered this question in the interviews. Study, page 83.

optimised, while eliminating the difficulties of providing services across different geographical areas⁵⁰.

Although this is not required by the Regulation (except for online services provided without payment of money choosing to implement portability), the study shows that the majority (65%) of service providers, regardless of their size, informed their subscribers about their right to content portability. This was mainly done by publishing information on their websites or updating their terms and conditions or contracts⁵¹.

3.2.2 Verification of the Member State of residence

In order to enable cross-border portability, Article 5 of the Regulation requires that online content service providers verify the Member State of residence of their subscribers, at the conclusion and upon the renewal of a contract. The service providers may repeat the verification if they have reasonable doubt about the subscriber's Member State of residence⁵². The Regulation sets out a detailed and exhaustive list of 11 verification means⁵³ the application of which is framed by specific rules to avoid a disproportionate interference in privacy and data protection. In particular, the Regulation provides that service providers may not use more than two verification means from the list, and that certain means (billing address, declaration, IP address check) can only be used in combination with one of the other means of verification (e.g. identity card, payment details, utility bill). The Regulation also encourages services to use information, which is already in their possession (such as billing information)⁵⁴. IP address checks must be carried out⁵⁵ in accordance with the General Data Protection Regulation⁵⁶ and the ePrivacy Directive⁵⁷.

Most of the service providers surveyed were generally satisfied with the range of verification means set out in the Regulation⁵⁸. The findings of the study show that while some of the means of verification are more frequently used than others (and some of them are not used at all), they provide a practical mix of methods, which fit well with the current development trends in identification/verification technology. Most of the online content service providers surveyed use two means to verify their subscribers' Member State of residence. The most frequently used verification means are the IP addresses and the payment details (e.g. bank account or credit or debit card number of the subscriber), which are most frequently used together⁵⁹.

⁵⁰ Study, pages 12 and 53.

⁵¹ Study, page 82.

⁵² Article 5(1) and 5(2) of the Regulation.

⁵³ See footnote 6.

⁵⁴ See Recital 27 of the Regulation.

⁵⁵ See Recital 28 of the Regulation.

⁵⁶ Regulation 2016/679 (EU) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁵⁷ Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

⁵⁸ Study, page 73.

⁵⁹ According to the survey of service providers carried out in the context of the study, 62% of service providers use IP checks to verify the Member State of residence and 54% use payment information. Study, page 72.

The study did not identify any shortcomings in the appropriate application of data protection rules⁶⁰.

Service providers use different methods to verify the Member State of residence of the subscriber. According to the findings of the study, they sometimes customise the verification means for each consumer, depending on the information they already have. Most of the surveyed service providers used existing information such as the payment details, collected and used when the consumer subscribed and so did not have to gather additional data to verify their customers' Member State of residence of their subscribers⁶¹.

However, the study reported that two consumer organisations received complaints in relation to paid online service providers using more than two means to verify the Member State of residence, and requiring consumers to provide extensive information, such as a full address, name, residency permit, documented evidence that they live in a specific Member State, or rental contracts⁶². These practices do not appear to be in line with the requirements in the Regulation, and in particular with the obligation for online content service providers to ensure that the verification means used are reasonable, proportionate and effective. The Commission's services will monitor this issue, which could create obstacles or administrative burden for consumers who wish to access their online content services from another Member State than their Member State of residence. Only one third of the surveyed service providers reported abuses and circumvention attempts, in very low numbers. Repeated verification, which is allowed by the Regulation if there is reasonable doubt about the subscriber's Member State of residence⁶³, is mainly carried out by service providers in the audiovisual and sports sector who are not active in all the Member States and only in a few very specific cases⁶⁴, typically linked to changes in the subscribers' contact details and means of payment, or when subscribers have not used the service in their Member State of residence for a certain period of time.

In line with the review clause in the Regulation⁶⁵, the assessment also took into account technological developments that are relevant to verifying of the Member State of residence. In particular, national electronic identification (eID) solutions provided to facilitate users' authentication and identification to access online services were further used (on the condition of their prior notification) cross-border to identify and authenticate users' access to online public services in other Member States than their Member State of residence within the framework of the Regulation on electronic identification and trust services for electronic transactions in the internal market ("eIDAS Regulation")⁶⁶. The framework set out in the

⁶⁰ Study, pages 70-76.

⁶¹ Study, page 70-72.

⁶² Study, page 97.

⁶³ According to the first sentence of Article 5(2) of the Regulation "if the provider has reasonable doubts about the subscriber's Member State of residence in the course of the duration of the contract for provision of an online content service, the provider may repeat the verification of the Member State of residence of the subscriber, in accordance with paragraph 1."

⁶⁴ Study, page 73.

⁶⁵ Article 10 of the Regulation.

⁶⁶ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. In June 2021 the Commission published a report outlining the results of an evaluation of the eIDAS Regulation, alongside a legislative

eIDAS Regulation enables public sector relying parties to use electronic identification to identify and authenticate users of online public services using eIDs issued in other Member States. In 17 Member States, government eIDs can already be used by private parties at national level and an additional four Member States are planning for hist. The study found that these solutions are generally considered a trustworthy verification means. This means of verification was used by 17% of the survey respondents⁶⁷. The study also identified emerging technologies, which can facilitate users' identification and verification of the Member State of residence, for example decentralised identity networks based on blockchain technology. However the use of these identification means has been found to be at a low level from the surveyed and interviewed service providers for the moment being⁶⁸.

3.2.3 Temporary presence in another Member State than the Member State of residence

The notion of 'temporary presence in a Member State' is a key concept in the Regulation. Article 1(3) defines it as "being present in a Member State other than the Member State of residence for a limited period of time". Determining whether a subscriber is temporary present in another Member States requires a case-by-case assessment. A variety of situations may constitute temporary presence. Recital 1 of the Regulation mentions for example, temporary stays for purposes such as leisure, travel, business trips or learning mobility. The Regulation's intention is to allow portability for all forms of temporary presence in other Member States than the Member State of residence. In the Commission's services view, this would include situations in which the absence from the Member State of residence is longer than would typically be the case for routine business trips or travel. 'Learning mobility', for example under the Erasmus programme, can include cases where students are abroad for an extended period of time.

As a result, service providers cannot limit the benefit of cross-border portability based on the number of days that their subscribers spend abroad. Under Article 7(1), contractual provisions limiting portability to any pre-defined time period, are contrary to the Regulation and are therefore unenforceable⁶⁹.

The study found that the majority of service providers do not apply any such time limitations. The mystery shopping exercise did not identify any cases of time limitations after testing the cross-border portability of 39 online content services for 9 weeks⁷⁰.

However, the survey and interviews carried out in the context of the study also revealed practices that give cause for concern: at least 10 service providers in the audiovisual, sport and music sector limited or planned to limit temporary presence in another Member State, by setting an upper time limit for portability. In those cases, typically, subscribers are required to log in from their Member State of residence after a specific time period, or they cannot continue to access the service from another Member State. The study includes a case study

initiative aimed at revising the *eIDAS* framework (Proposal for a Regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity).

⁶⁷ Study, pages 48 and 50.

⁶⁸ Study, page 12.

⁶⁹ Article 7(1) of the Regulation.

⁷⁰ The duration of the mystery shopping was determined by the constraints of the study.

setting out the practices of these service providers, limiting cross-border portability to different periods (e.g. 14 days for services provided without payment of money, and 30 days, 60 days, three months, four months, or 1 year for paid services)⁷¹. These practices will need to be further examined, as they may prevent certain consumers present in another Member State for a limited period of time from enjoying the benefits of cross-border portability. The Commission's services will remind service providers that the Portability Regulation does not allow them to limit cross-border portability to a specific period of time. If service providers have reasonable doubt about the subscriber's Member State of residence, they may repeat the verification of the Member State of residence.

The study found that 2 of the 30 consumer protection organisations interviewed had received complaints about the unavailability of an online content service in another Member State than the Member State of residence after a certain period of time⁷².

3.2.4 Other issues

The mystery shopping exercise also tested whether the same content was available as in the Member State of residence. Discrepancies were identified in only a very limited number of cases, entirely in relation to services provided without payment of money⁷³. For paid services, the study found no differences in terms of the functionalities (e.g. subtitles, languages, formats available) and the quality of the service in the Member State of residence and the other Member States under cross-border portability arrangements⁷⁴.

The study also examined how cross-border portability is ensured when content is offered via third-party services, for example when content services are bought in a bundle with other services, such as an internet connection or the subscription to a pay-tv service. According to the study, about 20% of the service providers surveyed (except for online games) offer their content through the service of a third party (e.g. telecom operator, pay-TV operator), relying on three different models⁷⁵, none of which hinders the application of the Regulation.

4. Application of the Regulation by online content services provided without payment of money

As noted above, the Regulation⁷⁶ does not require providers of services provided without payment of money to offer cross-border portability to their subscribers but allows them to do so. If these services opt-to offer cross-border portability, they become subject to the same provisions of the Regulation that apply to paid services, in particular regarding the verification of the Member State of residence of their subscribers.

⁷¹ Study pages 76-78. Case study presented in Box 6, page 78.

⁷² Study, page 97.

⁷³ Study, page 79, only 18 cases of unavailability of content.

⁷⁴ Study, page 79.

⁷⁵ Study, page 83; The Study identified three models for third-party service provision: (1) generating a link from a third party service to register for a content service directly, (2) allowing customers to buy a service provider's content from a TV set box and (3) selling licences for the use of their content so that this content can be offered inside a website or by the application of a third party. Note that in case 2) the TV set is not considered as a portable device under the Regulation.

⁷⁶ Free-of-charge service providers are covered by Article 6 of the Regulation.

The report by the European Audiovisual Observatory on the application of the Regulation by free online video services highlighted opportunities and challenges for these services which may influence their decision on whether to offer portability. Applying the Regulation may allow these services to offer a better user experience and to align their offer with those from paid services. However, opting to offer portability may sometimes mean introducing additional identification measures that could make accessing to these services more complex, and therefore could negatively impact the use of the service⁷⁷.

The European Audiovisual Observatory report concluded that the implementation of portability by free online video services was still at an early stage, with only a few public broadcasters providing cross-border portability for their users⁷⁸. Those service providers, who have opted in to implement portability reported positive feedback from their users⁷⁹. However, several of the providers of services provided without payment of money raised concerns about the technical aspects and potential costs, should they decide to offer portability. Technical issues linked to registering users to access the service and verifying the Member State of residence were flagged as important elements in the decision whether to offer portability⁸⁰.

The study found that portability of services provided without payment of money is also not yet common⁸¹. In line with the European Audiovisual Observatory's report, the study suggests that this may be due to technical constraints related to the service's infrastructure and verification means. Moreover, in some cases, the content offered by free online services is already accessible across the entire EU, so applying cross border portability would not have any practical added value for users⁸².

5. Impacts of the Regulation on rightholders

The study found that most of the interviewed rightholders' organisations were positive about the introduction of the Regulation and agreed with its objective. They considered that it was a logical step to further develop the digital single market and met consumers' expectations. Some rightholders in the audiovisual sector pointed out that even without the Regulation the

⁷⁷ European Audiovisual Observatory report on First feedback from the implementation of the Portability Regulation by free online video services, page 1.

⁷⁸ The European Audiovisual Observatory report on First feedback from the implementation of the Portability Regulation by free online video services (see page 7) indicates that 13 out of 52 free online video service providers surveyed had either already implemented portability (4 service providers), were working on implementation (2 service providers) or were considering adopting the Portability Regulation (7 service providers).

⁷⁹ European Audiovisual Observatory report on First feedback from the implementation of the Portability Regulation by free online video services, page 15.

⁸⁰ European Audiovisual Observatory report on First feedback from the implementation of the Portability Regulation by free online video services, pages 20-23.

⁸¹ 6 out of the 11 free service providers included in the survey applied or considered applying the Regulation.

⁸² Study, page 81.

market would have taken similar steps towards online content portability via commercial practices⁸³.

Rightholders are rarely involved in deciding on the verification means used by service providers, except in some cases in the sports sector. Some of the stakeholders interviewed suggested that service providers should apply more robust verification means⁸⁴.

Some rightholders from the audiovisual and sports sectors voiced concerns regarding differences in the interpretation and therefore application of the notion of ‘temporarily present in another Member State’⁸⁵. They expressed concerns about the fact that some service providers may not check whether the stay in another Member State is temporary or not, leading to long term access to the service. As set out above, service providers cannot limit cross-border portability to any pre-defined period of time. They can however repeat the verification of the Member State of residence if they have reasonable doubt about consumer’s residence.

Overall, the study’s findings suggest that the Regulation had only minor – if any – impact on rightholders. The impact of the Regulation on copyright licencing practices (introducing cross-border portability clauses into their existing agreements) was very marginal and did not lead to any significant costs. One third of the services providers surveyed (all in the audiovisual or sport sector) decided to revise their contracts with right holders. However, the percentage of the SMEs that chose to do so was significantly lower (13%) compared to large audiovisual service providers (56%). The study did not identify any significant impact on rightholders’ overall revenues as a consequence of the Regulation. Some rightholders suggested that this limited impact may be due to the relatively short application period since the Regulation was adopted, as well as constraints on cross-border travel due to the pandemic⁸⁶.

6. Enforcement mechanisms

The Commission examined the available mechanisms to enforce the Portability Regulation, taking account recent legal developments, in particular in the area of consumer law. The Portability Regulation introduces directly applicable rights and obligations for providers of online content services and their users/subscribers. It does not provide any specific rules on the enforcement of those rights and obligations. In particular, the Regulation does not require Member States to appoint specific enforcement authorities.

The consumer rights established under the Portability Regulation can be enforced under specific EU-level instruments for the private and public enforcement of EU consumer law⁸⁷.

⁸³ Study, page 102.

⁸⁴ Study page 104.

⁸⁵ See also sections 3.1 and 3.2.3 of this report.

⁸⁶ Study, page 103.

⁸⁷ For an indicative overview of this ‘EU enforcement toolbox for consumer law’ see the annex to the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, COM/2019/425 final.

In particular, consumer rights established under the Portability Regulation are enforceable under the specific cross-border public enforcement mechanism established by the Consumer Protection Cooperation (CPC) Regulation⁸⁸, which lists the Portability Regulation among the “Union laws that protect consumers’ interests” to which it applies.

The Portability Regulation is also listed in the annex to the Representative Actions Directive⁸⁹, which applies to representative actions brought against infringements by traders of a number of provisions of EU law⁹⁰ which harm or may harm the collective interest of consumers. Consequently, consumer rights established under the Portability Regulation will also be enforceable in accordance with the Representative Action Directive, which provides means of collective redress where a number of consumers have been affected by the same practice.

Finally, consumer rights established under the Portability Regulation can also be privately enforced in contractual consumer-to-business disputes that have been submitted to a consumer alternative dispute resolution body set up under the Consumer Alternative Dispute Resolution Directive 2013/11/EU⁹¹.

The study looked at the available enforcement mechanisms and tried to collect evidence on how the right to cross-border portability is enforced in practice. To this end, an online survey and interviews with consumer organisations, consumer protection and data protection authorities were carried out⁹².

Most of the consumer organisations (including consumer authorities surveyed which are members of the Consumer Protection Cooperation Network⁹³) consider that the Consumer Protection Cooperation Network is an important mechanism for enforcing consumers’ right to cross-border portability effectively. The recently revised Consumer Protection Cooperation Regulation creates a strengthened cooperation framework between national enforcement authorities for addressing cross-border infringements of consumer law. It also equips national consumer protection authorities with stronger investigation and enforcement powers. For example, where there are widespread infringements⁹⁴, competent authorities can invite traders

⁸⁸ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

⁸⁹ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

⁹⁰ Article 2(1) and Annex I of Directive (EU) 2020/1828.

⁹¹ Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

⁹² 40 responses were received to the online survey (30 from consumer protection organisations and authorities from 22 EU Member States and 10 from data protection authorities). In addition, 11 interviews were conducted with consumer organisations, covering 10 EU Member States. Source: Study; page 93.

⁹³ Nearly 70% (19 out of 28) of the survey respondents are part of the CPC Network; Study, page 98.

⁹⁴ The CPC Regulation could be triggered for ‘widespread infringements’, if service providers cause harm to the collective interests of consumers that reside in at least two different Member States. This could cover infringements to the Portability Regulation carried out by service providers that have subscribers in at least two Member States other than the one where they are established. As regards ‘widespread infringements with a Union dimension’, this concerns pan-European services when there is harm to the collective interests of consumers in at least two-thirds of the Member States, that together, account for at least two-thirds of the EU population.

to commit to ceasing the infringements, or take enforcement measures, including imposing penalties. The Consumer Protection Cooperation Regulation also empowers the Commission to notify the relevant competent authorities and single liaison offices of any reasonable suspicion of infringement covered by the Consumer Protection Cooperation Regulation (Article 26). A relevant alert by the Commission can lead competent CPC authorities to launch a coordinated action against the trader(s) concerned. Competent authorities are required to launch a coordinated action if their investigations reveal that a widespread infringement with a Union dimension might be taking place (Article 17 of the Consumer Protection Cooperation Regulation).

However, consumer authorities' experience in enforcing the Portability Regulation is limited: none of them had to take action in relation to portability by the time the study was completed⁹⁵. In addition, the majority of consumer protection organisations and authorities surveyed⁹⁶ had not received any complaints regarding the Portability Regulation.

Other relevant EU consumer instruments are the Representative Actions Directive (mentioned above) and the Digital Content Contracts Directive⁹⁷. As the measures provided for in these directives apply from January 2022 (Digital Content Contracts Directive) and June 2023 (Representative Actions Directive), it is not yet possible to measure their practical impacts on cross-border portability.

Finally, the Portability Regulation includes provisions on protecting personal data, in particular as regards the processing of personal data carried out for the purpose of verifying the subscribers' Member State of residence. Article 8 of the Regulation requires service providers to process personal data in compliance with Directives 95/46/EC (repealed by the General Data Protection Regulation) and 2002/58/EC (Directive on privacy and electronic communications). It also includes specific provisions on the use and storage of the data collected to verify the Member State of residence⁹⁸. National data protection authorities can therefore play a role in enforcing the provisions of the Regulation related to the protection of personal data. However, the study found that most of national data protection authorities have not been involved in dealing with issues related to the Portability Regulation⁹⁹. The study also shows that the majority of national data protection authorities surveyed in the context of the study have not received any complaints regarding the Regulation¹⁰⁰.

⁹⁵ Study, page 40.

⁹⁶ 23 out of the 32 surveyed consumer protection organisations and authorities did not receive complaints regarding the Portability Regulation, Study, page 96.

⁹⁷ Directive (EU) 2019/770 adopted in May 2019. It includes rules on the compliance of digital content or digital service with the contract.

⁹⁸ Article 8 provides that the use of the means of verification and any processing of personal data must be limited to what is necessary and proportionate in order to achieve the purpose of verifying of the subscriber's Member State of residence and must only be used for this specific purpose. Furthermore, data collected pursuant to Article 5 shall not be stored by the provider of an online content service longer than necessary to complete the verification of a subscriber's Member State of residence and upon the completion of each verification, the data must be immediately and irreversibly destroyed.

⁹⁹ Study, page 93.

¹⁰⁰ Study, page 95.

7. Conclusion

With the growing consumption of online content services combined with the growing importance of cloud-based solutions and the wider use of portable and smart devices, the Portability Regulation has come at the right moment providing consumers with seamless access throughout the EU to the services they subscribe to in their Member State of residence. After 4 years in force, the Regulation has proven to function well overall for all parties involved.

All the relevant stakeholders (service providers, consumers and rightholders) agree that the implementation of the obligation to enable cross-border portability against payment has not proved particularly challenging, although the implementation of some provisions have raised some challenges for SMEs. A large number of rightholders – organisations and consumer protection organisations interviewed for the study¹⁰¹ highlighted the Regulation's contribution to the digital single market.

The legal fiction set out in Article 4 of the Regulation, has allowed the territorial constraints of copyright and related rights to be overcome without any significant revenue loss for rightholders being reported. The provisions in Article 4 mean that the provision of an online content service to a subscriber who is temporarily present in another Member State than the Member State of residence, as well as the access to and the use of that service by the subscriber, are deemed to occur solely in the subscriber's Member State of residence¹⁰². The means of verification used by service providers to verify the Member State of residence of the consumer have proved able to provide practical, easily applicable and future proof mechanisms that take account of the interests of both service providers and subscribers and the requirements of personal data protection. The very low number of complaints 4 years after the entry into force of the Regulation, even taking into account the effects of the COVID-19 pandemic, is a further indication of the success of the portability of cross-border online content in the EU.

Although consumers' awareness with regard to their rights to cross-border portability is generally satisfactory, consumer protection organisations considered that this could be further improved. Service providers could therefore be more active in informing their subscribers about the possibility of accessing their content when they are temporarily present in a Member State other than their Member State of residence.

In light of the findings in this report, the Commission services will address the specific non-compliance issues highlighted in section 3.2., in particular the cases where small service providers do not provide cross-border portability to their subscribers, or where service providers limit portability to a specific period of time, or use more than two means to verify the Member State of residence of their subscribers.

¹⁰¹ European Commission, Directorate-General for Communications Networks, Content and Technology, Study on the Portability Regulation - Final report, 2022 (SMART 2019/0024), carried out by Visionary Analytics with support from Kantar Public and external experts, page 109.

¹⁰² See Article 4 of the Regulation.

The limitation of portability to a specific period of time is particularly problematic, as it may deprive consumers of their right to access their online content services from another Member State. The Commission's services will contact service providers to raise this issue and further examine their practices in this regard drawing attention to the fact that the Regulation does not allow contractual provisions limiting portability to any specific period of time.

While the Portability Regulation does not provide any specific rules on enforcement, there are currently no indicators of any shortcomings of its public enforcement at Member State level. The Consumer Protection Cooperation Regulation provides for an adequate public enforcement framework in cross-border cases for consumer rights created by under the Portability Regulation. This is further complemented by the enforceability of those consumer rights under the Representative Actions Directive and the Alternative Dispute Resolution Directive.

When receiving queries or complaints about the Regulation, the services of the Commission will continue to direct consumers to the national competent authorities, which are part of the Consumer Protection Cooperation Network. The services of the Commission will inform the national competent authorities of the findings in this report and will work closely with them in the context of the Consumer Protection Cooperation Network to address the specific issues identified in this report and to ensure the Portability Regulation is being correctly applied.