

EU Regulation 2017/1128/EU on the cross-border portability of online content services: a first analysis

Kluwer Copyright Blog

December 7, 2017

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Please refer tot his post as: Gianluca Campus, 'EU Regulation 2017/1128/EU on the cross-border portability of online content services: a first analysis', Kluwer Copyright Blog, December 7 2017, <http://copyrightblog.kluweriplaw.com/2017/12/07/eu-regulation-20171128eu-cross-border-portability-online-content-services-first-analysis/>



1.

Introduction

On 30th June 2017, the EU approved Regulation 2017/1128/EU on the cross-border portability of online content services (OJEU 30.6.17 **L168**) (the “**Regulation**”). The new Regulation introduces to the EU copyright framework the right for users to access portable services to which they have subscribed in one Member State when they are temporarily resident in another Member State. The Regulation entered into force on 20th July 2017, but its provisions will apply from **1st April 2018** (as a result of the Corrigendum to the Regulation available [here](#)). This means that in the

next few months online content service providers will need to implement all the necessary technical, contractual and organisational measures to allow cross-border portability of their services.

2. Articles of the Regulation

2.1 Scope

According to **Article 1**, the scope of the Regulation is the introduction of a common approach in the European Union to the cross-border portability of online content services. This explains why the EU has adopted a Regulation, instead of a Directive (see also Recital 35), and why the Regulation stresses the fact that core definitions necessitate uniform application in the EU (see Recital 14).

The Regulation also clarifies that its main aim and objective is to “*provide consumers with an additional means of accessing online content lawfully*” (Recital 12). Such an aim should be achieved without impacting on the existing licensing models, such as territorial licensing, and without affecting the existing financing mechanisms. Furthermore, the cross-border portability should remain differentiated from cross-border access to copyright content by consumers via online content services provided in a Member State other than their Member State of residence, which is outside the scope of the Regulation. The balance between the introduction of a new right to portability and the confirmation of the territorial licensing is reached by a legal mechanism called *fictio iuris*, according to which relevant acts of reproduction, communication to the public and making available of works that 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.

2.2 Definitions

Article 2 of the Regulation introduces, among others, the definitions of Subscriber, Member State of residence, Temporary presence, Online content service and Portability. “Online content service(s)” are audiovisual media services or other services the main feature of which is the provision of access to copyright works. “Portable” means a feature of an online content service whereby subscribers can effectively access and use the online content service in their Member State of residence without being limited to a specific location. “Subscriber” is a consumer who, on the basis of a contract for the provision of online content services with a

provider, whether against payment of money or without such payment, is entitled to access such services in the Member State of residence.

Recital 16 clarifies that only audiovisual media services within the meaning of Directive 2010/13/EU are included; this means that the Regulation does not impact e-marketplaces that use works or other protected subject-matter (such as graphical elements or music used as background) in an ancillary manner. Relevant among the audiovisual media services are those services which are provided against payment of money, since such services usually imply verification of the Member State of residence of their subscribers. The payment can be also indirect, where the subscriber acquires bundled packages combining an electronic communication and an audiovisual media service (Recital 18).

Providers of online content services which are provided without payment of money are also able to opt to be included in the scope of the Regulation, provided that they comply with the requirements on the verification of the Member State of residence of their subscribers (Recital 20).

Only effectively portable online content services are eligible for portability (Recital 17); this means that in cases where subscribers are not allowed to use certain services outside specific locations in their Member States, they cannot enjoy the portability of such services when temporarily present in another Member State. Such clarification makes sense for online content services that, due to their technical nature, are not usually portable (e.g. IPTV services) but provides no clarity on whether the limitation to a specific location is a matter of technical or contractual limitation, in the latter case opening the possibility for exclusion of the right to portability with an high degree of discretion on the providers' side.

On the other hand, Recital 21 clarifies that subscribers should have access to online content services offering 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.

2.3 Providers' obligations

Article 3 regulates providers' obligations to allow portability of their services to subscribers, which means allowing access to the same service available in the Member State of residence of the subscriber without any additional charge. With regards to the quality/charges for portable services, the Regulation does not

require the online content providers to ensure a certain level of quality for the delivery of the services, beyond the quality available via the local online access chosen by a subscriber while temporarily present in another Member State (Recital 22), but obliges the providers not to impose any additional charge for the provision of cross-border portability of online content services in accordance with the Regulation (Recital 19). Consumers temporarily present in another Member State could be subject to fees payable to operators of electronic communications networks used to access such services, but from 15th June 2017 the new EU roaming rules have entered into force and, under the new rules, people who travel periodically pay domestic prices for mobile Internet, subject to fair use, irrespective of where they are travelling in the EU.

2.4 Fictio iuris and Member State of residence

Articles 4 and 5, respectively, deal with: (I) the so called *fictio iuris*, according to which the reception of the portable services in another Member State of temporary residence is deemed to have occurred in the Member State in which the consumer is authorised to receive the services, and (II) the Member State of residence and its verification by providers. Article 4 has been described by the European Commission as a “*mini country of origin principle*”. This means that while accessing in Germany via portability an online content service authorised by right-holders in Italy, the subscriber shall be considered to be accessing that content service in Italy. The result of introducing the *fictio iuris* is that the territoriality approach of the current content licensing system should be preserved, even if derogated to the limited extent of allowing the portability of online content services.

The derogation is linked to the temporary presence in another Member State, which is defined as presence in a Member State other than the Member State of residence for a limited period of time. It is not clear what can be considered a “limited period of time” for the purpose of this Regulation but, according to Recital 1, temporary presence in another Member State for purposes such as leisure, travel, business trips or learning mobility should be taken into consideration. The temporary presence has to be verified by the providers via the combination of no more than two means indicated in Article 5, save in cases where right-holders waive such verification. The objective of the list is to provide legal certainty as to the means of verification to be used by providers as well as to limit interference with subscribers’ privacy (Recital 26). Where the Member State of residence

cannot be verified, because of a fault by consumers in providing relevant information, the provider shall not enable the consumer to access or use the online content service via portability.

2.5 Portability and agreements

Articles 7 and 9 regulate the impact of portability on contractual relationships between online content providers, right-holders and consumers. Pursuant to Article 7, any contractual provision contrary to EU portability shall be unenforceable, irrespective of the law applicable to the contract (which basically means that parties cannot avoid the Regulation applying to their agreements by specifying a non-EU contractual law). Pursuant to Article 9, the Regulation should also apply to contracts concluded before the date of its application, if those contracts and rights are relevant for the cross-border portability of an online content service provided after that date.

2.6 Entry into force

The remaining **Articles 8, 10 and 11** regulate privacy issues (under Article 8, the data collected for verifying temporary residence should not be used beyond that scope), the review of the Regulation (under Article 10, by 2nd April 2021 the Commission shall assess the application of the Regulation in the light of legal, technological and economic developments) and its entry into force (under Article 11, the Regulation shall apply from 1st April 2018, so as to allow right-holders and providers to make the arrangements necessary to adapt to the new situation, as well as to allow providers to amend the terms of use of their services).

3. The Regulation and the EU legislative process

The Regulation has gone through a structured legislative process (see [here](#)) during which all the European decision-making and advisory bodies involved have expressed their views and opinions, not always with the same focus (a summary of such opinions is available [here](#) on this Blog). The final result seems to be that the Regulation is presented as much more coherent with the current copyright regime, a certain emphasis is placed on the possibility for right-holders to authorise business models that achieve the same goals as portability and a certain balance has been introduced between consumers' interest in not being additionally charged for portability and providers' interest in not being obliged to warrant a certain level of quality for the portable services. The substance of the

Commission's proposal has remained largely unchanged and the Commission has probably achieved its main goal of inserting for the first time in the European copyright framework a *fictio iuris* that *de facto* overcomes the principle of territoriality.