

Commuting within the EU? Take your Netflix content with you!

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People within the European Union travel more than ever before for professional or personal reasons. When they do so, the four freedoms enshrined in the TFEU guarantee that they can take with them their siblings, professional qualifications, goods and money. One of the things they could not take with them, however, was their subscription to online content services such as Netflix, Spotify or any other streaming service allowing to access audio-visual content online. Due to the differences in copyright regimes in the different Member States, the diffusion of audio-visual works has traditionally been limited to one single Member State. To give a concrete example, a Belgian subscriber to Netflix would not be able to have access to his favourite Belgian TV-show available within his Belgian subscription available on Netflix when staying temporarily in the Netherlands for professional reasons during the week. That person would either have access to the Dutch content offered by Netflix or receive a message that 'this content is not available within this territory'.

In light of its Digital Single Market strategy, the Juncker Commission had wanted to do away with this kind of geo-blocking based on the (temporary) residence of the content viewer. Proposing to move forward, the Commission ventured out to ensure online content portability. Portability in that context means the ability of subscribers to online content to take their subscription with them all across the European Union and to have access to it as if they were in their home Member State. From a technical point of view, that means registering a customer in one Member State and ensuring he has access to the same content whenever he logs on to the website from anywhere within the European Union. From a copyright

point of view, it means introducing a legal fiction that access to the online content takes place in the Member State of residence of the subscriber, even when that subscriber accesses the content from another Member State.

Regulation 2017/1128, which entered into force on 20 March 2018, turns this portability proposal into legislative reality. It targets in the first place audio-visual service providers of online content (the BBC iplayer or French-speaking Belgian RTBF streaming service) or providers giving access to works, copyright-protected content or transmissions of broadcasting organisations, whether in a linear or an on-demand manner (e.g. Netflix or Spotify). Those providers can offer those services either for payment (Netflix) or for free (RTBF player) within the territory of an EU Member State. The Regulation defines a subscriber to those services as any consumer who, on the basis of a contract for the provision of an online content service with a provider, whether against payment of money or without such payment, is entitled to access and use such service in the Member State of residence.

Providers for payment are obliged to allow consumers to take their online content with them when temporarily residing in another Member State. They have to be able to access and use the online content service in the same manner as in the Member State of residence. That means that the online content provider needs to offer 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 the ones included in the home state subscription. In that case, the provider may not take action to reduce the quality of services offered and may not charge consumers more for this service. When the online content is provided without payment, content providers are not obliged to enable access in other Member States, although they may do so after having informed their subscribers. RTBF player from Belgium in that regard has indeed chosen to offer this service for its free online audio-visual content.

The right to portability only applies to situations where a subscriber stays for a limited time in an EU Member State without giving up his residency in another Member State. Residence in a third country or permanent residence in another Member State removes the benefit of the portability right. More concretely, it is only meant to apply in case of holidays, temporary work visits or individuals working in one Member State during the week and returning to another Member State for the weekend. It will fall upon content providers to verify what the state of

residence of the subscriber is on the basis of specific indications. Whenever a person is no longer resident in that first Member State, the right to portability of his content subscription will end. Per Article 7 of the Regulation, contractual provisions limiting the portability of such online content within the European Union shall be unenforceable, no matter what law is governing the contractual relationships between the parties to the subscription agreement.

The Regulation in itself is an important step forward in ensuring the movement of online content across the EU. At the same time, however, only limited attention has been devoted to its practical application and enforcement. From an enforcement point of view, the Regulation only states that contractual provisions limiting the right to online content portability are unenforceable. In so doing, the EU essentially tasks national courts to apply and enforce that provision. In addition, the Regulation does not provide for public authorities – such as consumer protection authorities – overseeing online content providers and imposing sanctions in case they do not meet their obligations. The Regulation only seems to confer a role on data protection authorities to guarantee that data regarding the residence of subscribers are only used for the purposes of verifying whether the right to portability can still be relied on.

As a consequence, it would not be unlikely that the application of the Regulation will be overseen by different authorities with different enforcement powers within different Member States. That may result in a lack of coherence in the interpretation and enforcement of its provisions, which in the mid to long run may hamper the effectiveness of the portability right. The enforcement of this Regulation therefore deserves to be taken more seriously and a more streamlined EU enforcement approach would be desirable in that regard. Although the acknowledgment of a portability right is paved with good intentions, it may very well become a road to hell for both providers and subscribers if enforcement of the regulation is not taken more seriously.

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