



the provision of these cross-border services possible and, given the principle of territoriality of the exploitation of works protected by copyright, has introduced a *fiction iuris* pursuant to which the act of exploitation of online content is considered to have taken place in Italy, for example, even if this actually takes place in another Member State.

It seems worth noting that Recital 23 of the Portability Regulation mentions the possibility for the service provider to allow the subscriber access to content legitimately distributed in the Member State in which the subscriber is temporarily present (*"This Regulation, and in particular the legal mechanism by which the provision of, access to and use of an online content service are deemed to occur in the subscriber's Member State of residence, does not prevent a provider from enabling the subscriber to additionally access and use the content lawfully offered by the provider in the Member State where the subscriber is temporarily present"*). And this would seem to be in addition (and not alternatively) to the portability of the content under the *fiction iuris* referred to in Article 4 of the Rules. As in, Netflix could allow its Italian customers temporarily residing in Germany to access (via portability) the "Italian" Netflix and/or to directly access the "German" Netflix (consider that often the content is available in several languages or with more subtitles).

Recital 23 is of relevance for the interpretation of the Portability Regulation. In fact, it is an indication that the EU legislature aims at the so called *"useful effect"* on the consumer, regardless of the way to overcome the limits of today's system focused on the territoriality of the exploitation of works protected by copyright. This aspect is even more evident when read in conjunction with Recital 12 of the Portability Regulation, where the objective is *"to adapt the harmonised legal framework on copyright and related rights [...] without affecting the high level of protection guaranteed by copyright and related rights in the Union, without changing the existing licensing models, such as territorial licensing"*.

In light of this reconstruction, therefore, there seem to be concrete indicators to argue that with the Portability Regulation the EU legislator has not aimed so much at rewriting the rules of copyright and subverting its principles, but at placing obligations on the providers of online content services - justified in terms of consumer protection - aimed at enabling Cloud services to operate according to their actual cross-border potential, regardless of the limits of copyright.