Council of the EU: Regulation on the cross-border portability of online content service

IRIS 2017-7:1/5

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On 8 June 2017, the Council of the European Union adopted a new Regulation on cross-border portability of online content services in the internal market. The Regulation ensures that EU citizens that have lawfully purchased online subscriptions for content services (e.g. Netflix, Spotify) in their member state of residence can access and use these services when they travel across the EU and are temporarily outside their member state of residence. The Regulation is part of the Digital Single Market Strategy, presented by the European Commission in 2015 (see IRIS 2015-6/3).

The Regulation will overcome territorial licensing and exclusivity, which usually characterise the provision of online content services in the EU, and remove the so-called “geo-blocking” practices by requiring providers of online content services to enable their subscribers residing in a member state to use their subscription and access the legal content they have purchased or rented, on the same range of devices and the same range of functionalities when they travel in the EU and are temporarily present in other member state. The “portability” obligation will not require a separate licence or the renegotiation of existing licences between rightsholders and service providers. Instead, a “legal fiction” will be used, through a “localisation” mechanism, according to which the service providers will be deemed to carry out the relevant act of reproduction, communication to the public, making available of works, etc. on the basis of the respective authorisations they have already received from the rightsholders for the country of residence.

The Regulation applies only to paid content services - such as audiovisual, music, and e-book services, sporting events and other TV broadcasts - that are offered online by commercial providers by way of streaming, downloading, or other lawfully provided technical means, on a portable basis - without being limited to a specific location-, and against subscription. Free-of-charge online services offered by providers who choose to introduce portable services and agree to verify their subscriber's member state of residence may also enable the portability of their services. The regulation prohibits service providers from reducing the quality of delivery of the service.

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The Regulation defines the place of residence as a place where a subscriber has “actual and stable” residence. Determining the place of actual residence is relevant for service providers who need to establish measures to verify the subscriber’s place of residence. The Regulation lists several means of verificationand allows agreements between providers and rightsholders concerning verification measures, insofar as they are consistent with the Regulation. “The effectiveness and proportionality of a particular means of verification”, including the type of service, should be taken into consideration. The Regulation introduces a list of verification measures such as subscriber’s payment details, internet protocol, telephone contacts, etc. However, any of the adopted measures should adhere to the personal data protection rules. Besides the verification measures, the definition of the term “temporarily present” refers to a presence in a member state other than the place of residence “for a limited period of time”, in a narrow approach, since the Regulation will be only applicable when EU citizens travel on holidays or business purposes.

It is worth mentioning that the Regulation will apply retroactively, i.e. cross-border portability shall be made possible in the EU by service providers as soon as the regulation will enter into force. The Regulation will therefore apply to existing contracts and acquired rights, even for contracts concluded before the entry into force of the regulation.

Regulation of the European Parliament and the Council of 24 May 2017 on cross-border portability of online content services in the internal market (2015/0284 (COD), 24 May 2017

http://data.consilium.europa.eu/doc/document/PE-9-2017-INIT/en/pdf

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