



EU Regulation on Cross-Border Portability

What?

With the intention of facilitating access to online content services throughout the EU, the European Commission adopted a Proposal for a Regulation on cross-border portability on 9 December 2016. The regulation was put in place to ensure that subscribers of European online content services would be able to access lawfully provided content from their Member State of residence when temporarily present in another EU Member State.

The Regulation was then adopted by the European Parliament and the European Council on 14 June 2017 and published in the official journal on 30 June 2017.*

When?

The Regulation has come into force on the 1 April 2018.** For existing contracts, online service providers will have until 21 May 2018 to verify the Member State of residence of subscribers that concluded contracts prior to this date.

A review of this Regulation, in the form of an assessment and report, will be provided by the European Commission to the European Parliament and the European Council, will be provided by the 2 April 2021.

Why?

The Regulation has been put in place in response to growing consumer demand for access to content and online services not only in their Member State of residence, but when "temporarily present" in another Member State, be it for leisure, travel, business trips or learning mobility.

Key Terms

Member State of residence – the Member State in which a subscriber has his or her stable residence

Temporarily present – a subscriber being present in another Member State than that of his or her Member State of residence for a limited period of time (for instance holidays, business trips or limited student stays).

Portable – a feature of an online service which allows subscribers to access and use said service in their Member State of residence without being limited to a specific location

* 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 30 June 2017

** Date of adoption corrected in Corrigendum to 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 (OJ L 168, 30.6.2017) on 28 July 2017.

What you need to know:

- The Regulation applies to online content services that are provided against payment of money. Mandatory fees for public broadcasting services are not considered as a payment and providers of free online content services are free to choose whether or not they offer cross-border portability. If providers of free online content services decide to make use of the new portability rules, they are required to inform their subscribers about this decision prior to providing the service. Such information could, for example, be announced on the providers' website (free online content of broadcasters for example)
- Online service providers must provide the same offer to subscribers that are temporarily present in another Member State as they would receive in their Member State of residence
- The Regulation will also apply to contracts concluded and rights acquired before the date of its application, if relevant for the cross-border portability of an online content service provided after that date
- The Regulation stipulates that the cross-border portability of content is mandatory, however, it does not require providers to give guarantees in terms of the quality of content when a subscriber is temporarily present in another Member State
- No extra charges should be imposed by providers on subscribers for cross-border portability, however, subscribers may be subject to extra fees imposed by electronic communications networks when accessing content in another Member State than that of their residence
- The Regulation states that "cross-border portability" of content should be distinguished from "cross border access," which refers to the possibility to access content that is offered in another Member State from your home country and is not covered by the Regulation
- In order to avoid this Regulation being in opposition to the territoriality of the rights, the principle of "legal fiction" provides that access to and use of paid online content services will be deemed to occur solely in the Member State of the subscriber's residence and not in the place where it physically occurs (the Member State where the consumer is "temporarily" present). This means that the authorisations given to the providers by the rightholders will cover every portable use of the concerned content which occurs in the Member State where the subscriber is temporarily present.
- Verifying subscribers' Member State of residence is the responsibility of the provider, based on information in their possession, including:***
 - a) An ID card, an electronic form of ID or any other valid ID document confirming the subscriber's Member State of residence
 - b) Payment details, such as the bank account or credit or debit card number of the subscriber;
 - c) The place of installation of a box, decoder or similar devices used for the supply of services;
 - d) The subscriber's payment of a licence fee for other services provided in the Member State, such as public service broadcasting;
 - e) An internet or telephone service supply contract, or any other similar contract linking the subscriber to the Member State;

*** The last 3 means of verification (i - k) can only be used in combination with one of the means of verification under points a-h, unless the postal address under point i is included in a publicly available register.

- f) Registration on local electoral rolls (if available);
- g) Payment of local taxes (if available);
- h) A utility bill linking the subscriber to the Member State;
- i) The subscriber's billing or postal address;
- j) A declaration from the subscriber confirming their address;
- k) An IP (internet protocol) check to confirm which Member State the subscriber accesses the online service.

The service provider have to apply maximum 2 means of verification from this list. Any processing of personal data will have to be carried out in accordance with EU data protection rules.

If the subscriber is unable to provide the necessary information for Member State of residence verification, the provider will neither be allowed nor obliged to offer said subscriber cross-border portability under this Regulation.

However, in case all the rightholders of the content used by the provider allow their content to be provided, accessed and used without verification, the obligation to verify does not apply.

Areas of Concern

Future reviews of the Regulation should assess whether the provided safeguards are efficient enough so the principle of territorial exclusivity is not threatened. The definition of how long subscribers can be "temporarily present" is important, as is the verification of subscribers' Member State of residence, in order to avoid short-term portability expanding to become de facto pan-EU availability.