



## EU Portability Regulation Overview

The purpose of this note is to provide an overview of the provisions of the EU Regulation on ensuring the cross-border portability of online content services in the internal market (hereinafter referred to as the “Portability Regulation”). The Portability Regulation was published in the EU Official Journal on June 30, 2017<sup>1</sup> and applies from April 1, 2018.

### **WHAT IS AN EU REGULATION AND WHOM DOES IT IMPACT?**

An EU Regulation is a European legislative instrument which is directly applicable and enforceable in all EU Member States without further national implementation and/or transposition. As such, it forms part of the EU’s secondary law and aims to ensure the uniform application of EU law in all Member States.

A Regulation is adopted following a legislative procedure by the Council and the European Parliament, upon a proposal by the European Commission.

It is addressed to abstract categories of persons (legal and/or natural), which distinguishes it from a decision, and it is binding in its entirety on the EU institutions, the Member States and the natural/legal persons to whom it is addressed.

In the case of the Portability Regulation, it will be enforceable against license agreements between right holders and VOD platforms for the purposes of verified subscribers (see below for definition of ‘subscriber’ in this context) accessing content outside their Member State of residence but within the EU.

### **HOW IS PORTABILITY DEFINED?**

Subscribers to portable paid-for online content services lawfully provided in their **Member State of Residence** (Section A below) shall be able to access and use across borders within the EU such services when **temporarily present** (Section B below) in another Member State (Art.1), provided the conditions of the Portability Regulation are met (paid-for<sup>2</sup> content/service which is portable in the

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<sup>1</sup> See [here](#) for the final text of the Portability Regulation in all official languages and [here](#) for the corrigendum concerning the date of application of the Portability Regulation.

<sup>2</sup> Free services may opt in and offer portability to their customers but then become subject to all relevant provisions of the Portability Regulation – see also below.

Member State of Residence, verification of Member State of Residence, subscriber is ‘temporarily abroad’, etc.).

Recital 12 distinguishes the concept of ‘cross-border portability’ from that of ‘cross-border access by consumers to services provided in a Member State other than their Member State of Residence’. The latter – cross-border access - does not fall within the scope of the Portability Regulation.

#### What does ‘subscriber’ mean?

Under the Portability Regulation, ‘subscriber’ means a consumer who has a contract with a provider (whether paid or unpaid) for the provision of an online content service (Art. 2) in his/her Member State of Residence.

#### What constitutes an ‘online content service’?

The term ‘online content service’ covers services defined by the AVMS Directive<sup>3</sup>, linear or on-demand access to and the use of works and services concerned. The service must be “portable” in the Member State of Residence (accessible inside or outside the home on mobile devices), and includes delivery by ‘any means including streaming, downloading, through applications or any other technique which allows use of the content’ (Recital 15). The term ‘service’ is used in a relatively wide manner and includes both linear and on-demand services as well as subscription and transactional access/use (see also the relevant definitions set out at the end of this note). The provider must have the rights from the right holder for the licensed territory which the contract designates, i.e. the Member State of Residence.

#### Is portability mandatory for the online content services concerned?

Portability is mandatory for paid-for online content services provided such services are portable in the Member State of Residence and the Member State of Residence has been verified in accordance with the Portability Regulation.

Free online content services may opt-in to the Portability Regulation, but then become subject to all the relevant provisions. Public service broadcasting services are considered ‘free services’ – see Recital 18 – even if a mandatory fee applies to the subscriber.

The obligation to ensure portability does not extend to quality requirements applicable in the Member State of Residence when the service/content is accessed and used from abroad under the Portability Regulation, unless expressly agreed in writing between the provider and the subscriber.

#### How are the copyright aspects of access from outside the licensed territory dealt with?

A legal fiction is established by the Portability Regulation and governs the copyright aspects of the subscriber’s access to the content when traveling outside of the licensed territory. Access and use under the Portability Regulation shall be deemed to occur solely in the Member State of Residence (Art. 4), i.e. the territory in respect of which the service provider has the necessary rights.

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<sup>3</sup> Currently under review and thus subject to change.

## **HOW DO SUBSCRIBERS BECOME ELIGIBLE FOR PORTABILITY?**

### **A: Member State of Residence**

The point of departure is a contract agreed in the subscriber's Member State of Residence and portable within that territory. The 'Member State of Residence' (Art. 2(3)) is defined as the Member State 'established on the basis of Article 5 following the verification procedure established in that Article and 'where the subscriber has his or her actual and stable residence'. The Member State of Residence shall be verified by the service provider at the execution and the renewal of a contract.

The Member State of Residence may be re-verified if the service provider has 'reasonable doubts' that the once verified Member State of Residence is no longer the actual Member State of Residence.

#### **What are the verification criteria?**

Verification criteria (Art. 5) – not more than two combined criteria – including e.g. identity card, bank account details, internet/phone supply contract – some criteria such as IP address checks are too weak to stand alone and may only be used in combination with stronger verification means. A single verification criterion is sufficient (Recital 26). Presumably, the strongest verification criterion would be an identity card as several other verification criteria will not necessarily establish Member State of Residence with the desirable degree of certainty (e.g. bank account details or internet/phone supply contract).

#### **Do right holders have a say in the choice of verification criteria?**

Yes, a holder of copyright (Recital 26) – in EU legislation also referred to as 'right holder' - can influence the choice of verification criteria – to a certain extent: Recital 26 clarifies that 'this does not preclude agreement between service providers and right holders on the means of verification within the limits of this Regulation'. This means, however, that right holders and service providers cannot add other verification criteria which are currently not on the list or covered by the 'or similar' language in connection with certain individual verification criteria.

Right holders may waive verification all-together. This may be relevant e.g. for certain music and e-book services which already permit portability.

### **B: Temporarily present in another Member State**

The second relevant element for the application of the Portability Regulation is the subscriber's temporary presence in another Member State.

Temporarily present (Art. 2(4)) is defined as presence in a Member State other than that of Residence (established by verification set out in Article 5) 'for a limited period of time' – Recital 1 specifies that the temporary presence is intended for purposes such as 'leisure, travel, business trips or learning mobility'. There are no provisions providing for verification of these elements apart from the possibility of re-checking the Member State of Residence where the service provider has 'reasonable doubts'.

No contractual time limits are allowed.

No time limits on portability are allowed whether between right holders and service providers or between service providers and subscribers – and all provisions which are contrary to the Portability Regulation in general are unenforceable (Art. 7).

What if the subscriber seems to be ‘temporarily present’ abroad all the time?

If the service provider has ‘reasonable doubts’ about the subscriber’s Member State of Residence in the course of the duration of the contract – e.g. if the service is consistently accessed from abroad – then the provider may repeat the verification of the Member State of Residence of the subscriber (see Art. 5.2). However, there is no obligation to do so.

What about application of the Portability Regulation outside of the EU?

Art. 5 only regulates the verification of Member State of Residence. Thus, in the context of determining whether a subscriber is temporarily present elsewhere (e.g. in another Member State or outside the EU/EEA) when trying to access the service, the service provider is not regulated and therefore free to undertake IP checks (as is also currently the case with e.g. mobile telephone and data services in connection with roaming). Recital 26 further stipulates the conditions under which IP address checks may be performed for the purposes of verification of the subscriber’s Member State of Residence, including the possibility to check the Member State from which the subscriber is accessing the service, but not the precise location or other personal data. However, Art. 8.2 specifically prohibits the disclosure of data collected for the purposes of verifying the subscriber’s Member State of Residence to right holders or any other third parties.

Interface with data protection rules

The processing of personal data carried out within the framework of the Portability Regulation, in particular for verification, must be carried out in compliance with relevant EU data protection law. Processing therefore has to be limited to what is necessary and proportionate in order to achieve its purpose as a matter of EU law – and take into account other relevant fundamental rights (e.g. the right to property).

In addition, the Portability Regulation stipulates that data collected pursuant to verification may only be used "for the purpose of verifying the subscriber's Member State of Residence. They shall not be communicated, transferred, shared, licensed or otherwise transmitted or disclosed to [right holders] or any other third parties." This provision is likely to complicate efforts by right holders to ensure that portability remains within the boundaries of the Portability Regulation.

Note also that there will be a need to ensure compliance with national data protection rules.

**OTHER RELEVANT PROVISIONS OF THE PORTABILITY REGULATION**

When does the Portability Regulation become applicable?

**The Portability Regulation applies from April 1, 2018.** See also below for more detailed information on the application of specific provisions of the Portability Regulation.

**The Portability Regulation will also apply to existing contracts for licensed content.** The EU

regulators (Commission, Council and European Parliament) argue that there is no need to change existing contracts as any provision contrary to the Portability Regulation will simply be null and void and the legal fiction established under the Portability Regulation will regulate the copyright elements of a subscriber accessing a service outside the licensed territory.

Service providers will have until June 2, 2018 to verify existing subscribers' Member State of Residence.

**Ban on contractual override:** As mentioned above, no time limits on portability are allowed whether between right holders and service providers or between service providers and subscribers (Art. 7.1). Any other contractual provisions contrary to the Portability Regulation are null and unenforceable.

**No additional charges to subscribers are allowed (Art. 3.2 and Recital 19).** While no additional charges are allowed to the subscriber, the Portability Regulation is silent on the matter of the license fees charged by right holders to service providers for portability of licensed content to subscribers.

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## RELEVANT DEFINITIONS – ARTICLE 2 OF THE PORTABILITY REGULATION

“For the purpose of this Regulation, the following definitions shall apply:

- (1) "Subscriber" means 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;
- (2) "Consumer" means any natural person who, in contracts covered by this Regulation, is acting for purposes which are outside his or her trade, business, craft or profession;
- (3) "Member State of residence" means the Member State, determined on the basis of Article 5, where the subscriber has his or her actual and stable residence;
- (4) "Temporarily present in a Member State" means the presence of a subscriber in a Member State other than his or her Member State of residence for a limited period of time;
- (5) "Online content service" means a service as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union that a provider is lawfully providing to a subscriber in his or her Member State of residence on agreed terms, online and on a portable basis and which is:
  - (i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or
  - (ii) a service the main feature of which is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;
- (6) "Portable" means that subscribers can effectively access and use the online content service in the Member State of residence without being limited to a specific location.

## RELEVANT DATES OF APPLICATION OF THE PORTABILITY REGULATION

		Date/Deadline
General	<b>Date of publication</b> in Official Journal:	30 June 2017
	<b>Date of entry into force:</b>	20 July 2017
Paid-for services	<b>Date of application</b> (i.e. date from which providers must provide portability):	1 April 2018
	<b>Deadline to verify</b> the Member State of existing subscribers:	2 June 2018
Free-to-view services	<b>Date from when providers can provide portability:</b> (i.e. date of application)	1 April 2018
	<b>Date for providers to inform right holders and subscribers</b> of intention to provide portability:	Any date prior to providing that service (in a timely manner). The information shall be provided by means which are adequate and proportionate.
	<b>Deadline to verify</b> the Member State of residence of existing subscribers:	Two months from providing portability
Review	<b>1st application report:</b> (to include an assessment of the application of the verification means)	2 April 2021
	<b>Additional application reports:</b>	As required