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Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL on Ensuring the Cross-Border Portability of Online
Content Services in the Internal Market
- Presidency Compromise Proposal

Delegations will find in the Annex a Presidency compromise proposal as the basis for discussion at the next meeting of the Working Party on Intellectual Property (Copyright) on 18 and 19 April 2016.

Changes in relation to the previous version (7470/16) are highlighted.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on ensuring the cross-border portability of online content services in the internal market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Seamless access to online content services by consumers throughout the Union is important for the smooth functioning of the internal market. Since the internal market comprises an area without internal frontiers relying, *inter alia*, on the free movement of services and persons, it is necessary to provide that consumers can use portable online content services which offer access to content such as music, games, films or sporting events not only in their Member State of residence but also when they are temporarily present in other Member States of the Union for purposes such as leisure, travel, business or study. Therefore, barriers that hamper access and use of such online content services in such cases should be eliminated.

¹ OJ C , , p. .

- (2) The technological development leading to a proliferation of portable devices such as tablets and smartphones increasingly facilitates the use of online content services by providing access to them regardless of the consumers' location. There is a rapidly growing demand on the part of consumers for access to content and innovative online services not only in their home country but also when they are temporarily present in another Member State of the Union.
- (3) Consumers increasingly enter into contractual arrangements with service providers for the provision of online content services. However, consumers that are temporarily present in another Member State of the Union often cannot continue accessing and using the online content services that they have acquired the right to use in their home country.
- (4) There are a number of barriers which hinder the provision of these services to consumers temporarily present in another Member State. Certain online services include content such as music, games or films which are protected by copyright and/or related rights under Union law. In particular, the obstacles to cross-border portability of online content services stem from the fact that the rights for the transmission of content protected by copyright and/or related rights such as audiovisual works are often licensed on a territorial basis as well as from the fact that online service providers may choose to serve specific markets only.

- (5) The same applies to other content such as sporting events which is not protected by copyright and/or related rights under Union law but which may be protected by copyright, related rights or by virtue of other specific legislation under national law and which is often also licensed by organisers of such events or offered by online service providers on a territorial basis.

Transmissions of such content by broadcasting organisations would be protected by related rights which have been harmonised at Union level. In addition, transmissions of such content often include copyright-protected elements such as music, opening or closing video sequences or graphics. Also, certain aspects of such transmissions relating to events of major importance for society or events of high interest to the public for the purpose of short news reports, have been harmonised by Directive 2010/13/EU of the European Parliament and of the Council². Finally, audiovisual media services within the meaning of Directive 2010/13/EU include services which provide access to content such as sporting events, news or current events.

- (6) Therefore, increasingly, online content services are marketed in a package in which content which is not protected by copyright and/or related rights is not separable from content which is protected by copyright and/or related rights without substantially lessening the value of the service provided to consumers. This is especially the case with premium content such as sporting or other events of significant interest to consumers. In order to enable service providers to deliver to consumers, when the latter are temporarily present in a Member State other than their Member State of residence, full access to their online content services, it is indispensable that this Regulation also covers such content used by online content services and therefore that it applies to audiovisual media services in the meaning of Directive 2010/13/EU as well as to transmissions of broadcasting organisations in their entirety.

² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services OJ L 95, 15.4.2010, p. 1–24.

- (7) The rights in works and other protected subject matter are harmonised, *inter alia*, in Directive 96/9/EC of the European Parliament and of the Council³, Directive 2001/29/EC of the European Parliament and of the Council⁴, Directive 2006/115/EC of the European Parliament and of the Council⁵ and in Directive 2009/24 of the European Parliament and of the Council⁶.
- (8) Therefore, providers of online content services that make use of works or other protected subject-matter, such as books, audiovisual works, recorded music or broadcasts must have the rights to use such content for the relevant territories.
- (9) The transmission by the online service provider of content that is protected by copyright and related rights requires the authorisation of the relevant right holders such as authors, performers, producers or broadcasting organisations for the content that would be included in the transmission. This is equally true when such transmission takes place for the purpose of allowing a consumer to carry out a download in order to use an online content service.

³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 077, 27.03.1996, p. 20-28.

⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

⁵ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 376, 27.12.2006, p. 28–35.

⁶ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111, 5.5.2009, p. 16–22.

- (10) The acquisition of a licence for the relevant rights is not always possible, notably when rights in content are licensed on an exclusive basis. In order to ensure the territorial exclusivity, online service providers often undertake, in their licence contracts with right holders, including broadcasting organisations or events organisers, to prevent their subscribers from accessing and using their service outside the territory for which the service provider holds the licence. These contractual restrictions imposed on service providers require providers to take measures such as disallowing access to their services from IP addresses located outside the territory concerned. Therefore, one of the obstacles to the cross-border portability of online content services is to be found in the contracts concluded between the online service providers and their subscribers, which in turn reflect the territorial restriction clauses included in contracts concluded between those service providers and right holders.
- (11) In addition, the Court held in Joined cases C-403/08 and C-429/08, Football Association Premier League and Others, EU:C:2011:631, that certain restrictions to the provision of services cannot be justified in light of the objective of protecting intellectual property rights.
- (12) Therefore, the objective of this Regulation is to adapt the harmonised legal framework on copyright and related rights and to provide a common approach to the provision of online content services to subscribers temporarily present in Member States other than their Member State of residence, in order to ensure that the present barriers to cross-border portability of online content services in the internal market no longer exist.
- (12a) This Regulation does not affect the application of any provision related to taxation.

- (13) This Regulation should, therefore, apply to online content services that a service provider, after having obtained the relevant rights from right holders in a given territory, provides to its subscribers on the basis of a contract, by any means including streaming, downloading or any other technique which allows use of that content. A registration to receive content alerts or a mere acceptance of HTML cookies should not be regarded as a contract for the provision of online content service for the purposes of this Regulation.
- (14) An online service which is not an audiovisual media service within the meaning of Directive 2010/13/EU and which uses works, other subject matter or transmissions of broadcasting organisations in a merely ancillary manner should not be covered by this Regulation. Such services include websites that use works or other protected subject matter only in an ancillary manner such as graphical elements or music used as background, where the main purpose of such websites is, for example, the sale of goods.
- (15) This Regulation should apply only to online content services which subscribers can effectively access and use in the Member State in which they habitually reside without being limited to a specific location, as it is not appropriate to require service providers that do not offer portable services in their home country to do so across borders.
- (16) This Regulation should apply to online content services which are provided against payment of money. Providers of such services are in a position to verify the Member State of residence of their subscribers. The right to use an online content service should be regarded as acquired against payment of money whether such payment is made directly to the provider of the online content service, or to another party such as a provider offering a package combining a telecommunications service and an online content service operated by another provider. The payment of a mandatory fee such as a broadcasting licence fee should not be regarded as a payment of money to receive an online content service.

(17) Providers of online content services which are provided without payment of money normally do not verify the Member State of residence of their subscribers. The inclusion of such online content services in the scope of this Regulation would involve a major change to the way these services are delivered and involve disproportionate costs. On the other hand, the exclusion of these services from the scope of the Regulation would mean that these services would not be able to take advantage of the legal mechanism provided for in this Regulation and enabling online service providers to offer their services on a portable basis across the Union even when they decide to invest in means allowing the verification of their subscriber's Member State of residence. This is why providers of online content services which are provided without payment of money should have an option to be included in the scope of this Regulation if they so decide and provided that they comply with the requirements on the verification of the Member State of residence. If they exercise that option, they should be obliged to comply with the provisions of this Regulation in the same way as providers of online content services which are provided against payment of money. Furthermore, they should inform subscribers, the relevant holders of copyright and related rights and those holding any other rights in the content of online content service of their decision to exercise that option. Such information could be provided on the provider's website.

- (18) In order to ensure the cross-border portability of online content services it is necessary to require providers of online content service which are provided against payment of money enable their subscribers to use the service in the Member State of their temporary presence by providing them 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 those offered in their Member State of residence. This obligation is mandatory and therefore the parties may not exclude it, derogate from it or vary its effect. Any action by a service provider which would prevent the subscriber from accessing or using the service while temporarily present in a Member State, for example restrictions to the functionalities of the service or to the quality of its delivery, would amount to a circumvention of the obligation to enable cross-border portability of online content services and therefore would be contrary to this Regulation.
- (19) Requiring that the delivery of online content services to subscribers temporarily present in Member States other than their Member State of residence be of the same quality as in the Member State of residence could result in high costs for service providers and thus ultimately for subscribers. Therefore, it is not appropriate for this Regulation to require that the provider of an online content service provided against payment of money take measures to ensure quality of delivery of such services beyond the quality available via the local online access chosen by a subscriber while temporarily present in another Member State. In such cases the provider shall not be liable if the quality of delivery of the service is lower. Nevertheless, if the provider expressly guarantees certain quality of delivery to subscribers while temporarily present in other Member States, the provider shall be bound by such guarantee. The [...] provider should provide its subscribers in advance with general information concerning the quality of delivery of an online content service in Member States other than the Member State of residence, in particular information that the quality of delivery may vary from the quality of the delivery of the online content service in the Member State of residence.

(20) In order to ensure that providers of online content services which are provided against payment of money comply with the obligation to provide cross-border portability of their services without acquiring the relevant rights in another Member State, it is necessary to stipulate that those service providers which lawfully provide portable online content services against payment of money in the Member State of residence of subscribers are always entitled to provide such services to those subscribers when they are temporarily present in another Member State. This should be achieved by establishing that for the purposes of this Regulation the provision of, the access to and the use of such online content service should be deemed to occur in the Member State of the subscriber's residence. This Regulation and in particular the legal mechanism localising the provision of, the access to and the use of an online content service in the Member State of the subscriber's residence does not prevent a service provider from offering its subscriber who is temporarily present in another Member State an online content service that the provider lawfully provides in that Member State.

- (21) For the licensing of copyright and related rights, this means that relevant acts of reproduction, communication to the public and making available of works and other protected subject-matter, as well as the acts of extraction or re-utilization in relation to databases protected by sui generis rights, which occur when the service is provided to subscribers when they are temporarily present in a Member State other than their Member State of residence, should be deemed to occur in the subscribers' Member State of residence. The service providers, therefore, should be deemed to carry out such acts on the basis of the respective authorisations from the right holders concerned for the Member State of residence of these subscribers. Whenever service providers can carry out acts of communication to the public or reproduction in the Member State of the subscriber on the basis of an authorisation from the right holders concerned, a subscriber who is temporarily present in a Member State other than his Member State of residence should be able to access and use the service and where necessary carry out any relevant acts of reproduction such as downloading which he would be entitled to do in his own Member State of residence. The provision of an online content service by a service provider to a subscriber temporarily present in a Member State other than his or her Member State of residence and the use of the service by such a subscriber in accordance with this Regulation should not constitute a breach of copyright and related rights or any other rights relevant for the use of the content in the service.
- (22) Providers of online content services which are provided against payment of money should not be liable for breach of any contractual provisions contrary to the obligation to enable their subscribers to use the service in the Member State of their temporary presence. Therefore clauses in contracts designed to prohibit or limit the cross-border portability of such online content services should be unenforceable. The providers and holders of rights relevant for the provision of the online content services should not be allowed to circumvent the application of this Regulation by virtue of the choice of the law of a non-member country as the law applicable to contracts between them or to contracts between providers and subscribers.

- (22a) This Regulation defines several concepts necessary for its application, including the Member State of residence. The Member State of residence should be determined taking into account the objectives of this Regulation and the necessity to ensure its uniform application in the Union.
- (23) This Regulation should oblige service providers delivering online content services provided against payment of money to subscribers temporarily present in a Member State other than their Member State of residence to make use of effective means in order to verify the Member State of residence of their subscribers, unless otherwise expressly agreed with the right holders. Unless the Member State of residence can be established to a sufficient degree of certainty on the basis of a single verification means, service providers should rely on a combination of these means. The use of such means should always be reasonable and should not go beyond what is necessary in order to achieve the purpose of establishing the Member State of residence. To that effect, [...] service providers should rely on the verification means listed in this Regulation. The objective of this list is to provide legal certainty as to the verification means to be used by service providers. [...] In each case, account should be taken of the effectiveness of a particular verification means in the given Member State and for the given type of online content service. Furthermore, this Regulation should allow agreements between online service providers and right holders as to which particular verification means, whether listed or not in the Regulation, should be used by service providers. This should allow for flexibility as to the choice of the verification means. Such means should also be effective, reasonable and should not go beyond what is necessary in order to achieve the purpose of establishing the Member State of residence. The online content service provider [...] may request the subscriber to provide [...] information [...] necessary in order to sufficiently verify the subscriber's Member State of residence. If the subscriber fails to provide that information and in consequence the provider is unable to verify the Member State of residence, the provider should be released from the obligation to provide cross-border portability of the online content service to this subscriber for as long as it cannot verify the subscriber's Member State of residence. [...]

- (23a) Verification means may include sampling or periodic checking of IP address instead of constant monitoring of location. Considering that for purposes of the verification what matters is not the precise location, but rather in which Member State the subscriber is accessing the service, precise location data should not be collected and processed for this purpose. Similarly, where authentication of a subscriber is sufficient in order to deliver the service provided, identification of the subscriber should not be required.
- (24) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles, in particular the right to respect for private and family life, the right to protection of personal data, the freedom of expression and the freedom to conduct a business. Any processing of personal data under this Regulation should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directives 95/46/EC⁷ and 2002/58/EC⁸. In particular, service providers should ensure that any processing of personal data under this Regulation is necessary and proportionate in order to achieve the relevant purpose. The necessary technical and organisational measures may include providing transparent information to the subscribers about the methods used for the verification and its purposes as well as ensuring appropriate security measures.
- (25) This Regulation should not affect the application of the rules of competition, and in particular Articles 101 and 102 of the Treaty. The rules provided for in this Regulation should not be used to restrict competition in a manner contrary to the Treaty.

⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31–50.

⁸ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.07.2002, p 37), called, as amended by Directives 2006/24/EC and 2009/136/EC, the "e-Privacy Directive".

- (25a) This Regulation does not affect the application of Directive 2014/26/EU⁹ and in particular Title III of this Directive. The rules provided for in this Regulation are consistent with the objective of facilitating the lawful access to content which is protected by copyright and related rights as well as services linked thereto.
- (26) Contracts under which content is licensed are usually concluded for a relatively long duration. Consequently, and in order to ensure that all consumers residing in the Union can enjoy the cross-border portability feature of online content services on an equal basis in time and without any undue delay, this Regulation should also apply to contracts concluded and rights acquired before the date of its application if they are relevant for the cross-border portability of an online content service provided after that date. This is also necessary in order to ensure a level playing field for service providers operating in the internal market, by enabling providers who concluded contracts with right holders for a long duration to offer cross-border portability to their subscribers, independently of the provider's possibility to renegotiate such contracts. Moreover, this provision should ensure that when service providers make arrangements necessary for the cross-border portability of their services, they will be able to offer such portability with regard to the entirety of their online content. Finally, it should also allow right holders not having to renegotiate their existing licensing contracts in order to enable the offering of the cross-border portability of services by providers.

⁹ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72-98.

- (27) As the Regulation will therefore apply to some contracts and rights acquired before the date of its application, it is also appropriate to provide for a reasonable period between the date of entry into force of this Regulation and the date of its application allowing right holders and service providers to make the arrangements necessary to adapt to the new situation, as well as allowing service providers to amend the terms of use of their services. Changes to the terms of use of online content services offered in packages combining an electronic communications service and an online content service made in order to comply with the requirements of this Regulation should not trigger for subscribers any right under national laws transposing the regulatory framework for electronic communications networks and services to withdraw from contracts for the provision of such electronic communications services.
- (28) In order to achieve the objective of ensuring cross-border portability of online content services in the Union, it is appropriate to adopt a regulation, which directly applies in Member States. This is necessary in order to guarantee a uniform application of the cross-border portability rules across Member States and their entering into force at the same time with regard to all online content services. Only a regulation ensures the degree of legal certainty which is necessary in order to enable consumers to fully benefit from cross-border portability across the Union.

(29) Since the objective of this Regulation, namely the adaptation of the legal framework so that cross-border portability of online content services is provided in the Union, cannot be sufficiently achieved by Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objective. Therefore, this Regulation does not substantially affect the way the rights are licensed and does not oblige right holders and service providers to renegotiate contracts. Moreover, this Regulation does not require that the provider takes measures to ensure the quality of delivery of online content services outside the Member State of residence of the subscriber. Finally, this Regulation does not apply to service providers who offer online content services without payment of money and who do not exercise the option to enable the cross border portability of their services. Therefore, it does not impose any disproportionate costs,

HAVE ADOPTED THIS REGULATION:

Article 1
Objective and scope

This Regulation introduces a common approach in the Union to ensuring that subscribers to portable online content services in their Member States of residence can access and use these services when temporarily present in another Member State.

Article 2
Definitions

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

- (a) "Subscriber" means any consumer who, on the basis of a contract for the provision of an online content service with a provider, may access and use that service in their Member State of residence;
- (b) "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;
- (c) "Member State of residence" means the Member State, established on the basis of Article 3B, where the subscriber has his or her actual and stable residence to which he or she returns regularly;
- (d) "Temporarily present" means a presence of a subscriber in a Member State other than the Member State of residence;

- (e) "Online content service" means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union that a service provider is lawfully providing to a subscriber in the latter's Member State of residence on agreed terms, online and on a portable basis and which is:
- (i) an audiovisual media service within the meaning 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 ;
- (f) "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.

Article 3

Obligation to enable cross-border portability of online content services

- (1) The provider of an online content service provided against payment of money shall enable a subscriber who is temporarily present in a Member State to access and use the online content service.
- (2) The obligation set out in paragraph 1 shall not extend to any quality requirements applicable to the delivery of an online content service that the provider is subject to when providing this service in the Member State of residence, unless otherwise expressly undertaken by the provider.
- (3) The provider shall provide the subscriber [...] with information concerning the quality of delivery of the online content service provided in accordance with paragraph 1 prior to providing that service.

Article 3A

Option to enable cross-border portability of online content services

- (1) The provider of an online content service provided without payment of money may choose to enable its subscribers who are temporarily present in a Member State to access and use the online content service provided that the subscriber's Member State of residence is verified by the provider in accordance with Article 3B.
- (2) The provider shall inform subscribers, the relevant holders of copyright and related rights and those holding any other rights in the content of online content service of its decision to provide the online content service in accordance with paragraph 1 prior to providing that service.
- (3) If the provider chooses to provide the online content service in accordance with paragraph 1, this Regulation shall apply to that provider.

Article 3B

Verification of the Member State of residence

- (1) The provider of an online content service provided against payment of money shall make use of effective means in order to verify the Member State of residence of its subscribers, unless otherwise expressly agreed with the holders of copyright and related rights or those holding any other rights in the content of online content services. These means shall be reasonable and shall not go beyond what is necessary in order to achieve their purpose.

(1a) Unless the Member State of residence can be sufficiently established on the basis of a single verification means, the provider of an online content service shall rely on a combination of such means.

- (2) In order to comply with the obligation set out in paragraph 1, [...] the provider shall rely on the following verification means:
- (a) an identity card or any other valid document confirming subscriber's Member State of residence;
 - (b) the billing address or the postal address of the subscriber;
 - (c) bank details such as bank account, local credit or debit card of the subscriber;
 - (d) the place of installation of a set top box or a similar device used for supply of services to the subscriber;
 - (e) the subscriber being a party to a contract for internet or telephone connection in the Member State;
 - (f) the subscriber paying a licence fee for other services provided in the Member State, such as public service broadcasting;
 - (g) sampling or periodic checking of Internet Protocol (IP) address to identify the Member State where the subscriber accesses and uses the online content service or identifying that Member State by other means of geolocation;
 - (h) a declaration by the subscriber on their Member State of residence;
 - (i) registration on local electoral rolls, if publicly available;
 - (j) the payment of local/poll taxes, if publicly available.

- (3) [...] The provider and the holders of copyright and related rights or those holding any other rights in the content of an online content service may agree on the use of particular means referred to in paragraph 2 or any other means in accordance with paragraph 1 to verify the Member State of residence.
- (4) The provider shall be entitled to request the subscriber to provide the information necessary for the verification of the Member State of residence. If the subscriber fails to provide that information and in consequence the provider is unable to verify the Member State of residence, the provider shall cease to be subject to the obligation set out in Article 3(1) with regard to the subscriber in question for as long as it cannot verify the subscriber's Member State of residence.

Article 4

Localisation of the provision, the access to and the use of online content services

The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of this service by that subscriber, shall be deemed to occur solely in their Member State of residence .

Article 5

Contractual provisions

- (1) Any contractual provisions, including those between holders of copyright and related rights, those holding any other rights relevant for the access to and the use of content in online content services and providers of online content services, as well as those between such providers and subscribers, which are contrary to this Regulation, shall be unenforceable.

- (2) The provisions of this Regulation shall apply irrespective of the law applicable to contracts concluded between providers of online content services and holders of copyright and related rights or those holding any other rights relevant for the access to and the use of content in online content services or to contracts between such providers and subscribers.

Article 6

Protection of personal data

The processing of personal data carried out within the framework of this Regulation [...] shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC.