

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Cross-border portability of online content services in the internal market		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	CNECT F5	DATE OF ROADMAP	10/2015
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ADDITIONAL INFORMATION	http://ec.europa.eu/dgs/connect/en/content/dg-connect		

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A. Context, Subsidiarity Check and Objectives

Context

The digital economy has been a major driver of growth in the past two decades, and is expected to grow seven times faster than the overall EU GDP in coming years.¹ Under the political guidelines of the European Commission, adapting the current EU copyright rules to the realities of the Digital Single Market (DSM) *"in light of the digital revolution, new consumer behaviour and Europe's cultural diversity"* is one of the flagship projects for the next years.² In particular, the DSM Strategy³ calls for addressing within the EU copyright framework a set of key obstacles to the functioning of the DSM, including to allow for wider online access to works by users across the EU. There are different issues related to the access to content by users in the DSM. In particular, there is an ongoing consultation as regards the functioning of the existing rules applicable to satellite broadcasting and cable retransmission services and their possible extension to certain online transmissions.

This roadmap focusses on a distinct aspect of the broader discussion on access to services across borders, i.e. the issue of cross-border portability of lawfully accessed online content services. Its consideration is particularly timely now that consumers are nearing the date where there will be an end to roaming charges for travellers within the EU. This initiative will be followed by others regarding the further areas for reform identified in the DSM Strategy.

A series of consultations have been held during the last years, e.g. the Green Papers on the online distribution of audiovisual works⁴ and on "preparing for a Fully Converged Audiovisual World: Growth, Creation and Value"⁵ as well as a wide-ranging public consultation on copyright⁶, covering, inter alia, the area discussed in this IIA, including questions related to the provision of and access to online services across borders. The public consultations were complemented by a stakeholder dialogue "Licences for Europe" which followed the adoption in December 2012 of the Commission Communication on content in the Digital Single Market.⁷ Both the public consultation and the stakeholder dialogue addressed cross-border barriers to online access to content, including in the context of 'portable uses' (i.e. when travelling in another Member State).

Moreover, a series of legal and economic studies were conducted on various aspects of the existing copyright rules which, together with the consultations mentioned above, constitute a solid basis for future work. Finally, a Eurobarometer survey on cross-border access to online content was carried out in the 28 Member States in January 2015⁸. The area discussed in this roadmap is not part of the REFIT agenda.

In the music sector, Directive 2014/26/EU on collective rights management and the multi-territorial licensing of rights in musical works for online uses will eliminate the remaining obstacles online service providers have to face in obtaining multi-territorial licences from collective management organisations. The implementation deadline is 10 April 2016.

¹ <u>https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/FI3P%20Fact%20Sheet.pdf</u>

² <u>http://ec.europa.eu/about/juncker-commission/docs/oettinger_en.pdf</u>

³ Communication from the Commission "A digital single market strategy for Europe", 6 May 2015, <u>http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf</u>

⁴ COM(2011) 427, at: <u>http://ec.europa.eu/internal_market/copyright/initiatives/audiovisual/index_en.htm</u>

⁵ <u>http://ec.europa.eu/digital-agenda/en/consultations-media-issues</u>

⁶ <u>http://ec.europa.eu/internal_market/copyright/initiatives/index_en.htm</u>

⁷ http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm#onlinecontent

⁸ http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059

Issue

<u>Problem</u>: Besides online services which offer access to all consumers without the need to enter into any agreement with the service provider, consumers either purchase or rent content from the provider piece by piece ("transactional services") or they establish a longer-term contractual relation with them ("subscription services") which typically gives consumers access to an unlimited amount of content from the provider's catalogue on an ongoing basis either upon payment of a monthly fee or, where the service is supported by advertisers, free of charge. A typical feature of these services is that they allow consumers to access content on different devices, either on a programme scheduled (linear) or an on demand basis. However, in many cases, these possibilities only extend to the territory of the Member State of the consumer/service provider. On the contrary, when consumers travel abroad, they often cannot or only partially use the service that they have subscribed to in their home country or they cannot access the online content that they have previously purchased or rented.

The presence and the scale of the problem is not the same in all sectors. The above situation is particularly acute in the case of online audiovisual (AV) services. In most cases these services are not portable across borders at all and consumers cannot stream or download content they have paid for while travelling in other Member States. In some cases online AV services are partially portable (i.e. parts of the service are available or the customer only has access to the catalogue of films offered by the service provider in a Member State they are visiting). Also, all major pay-TV service providers offer to their customers the possibility to access their programmes away from the main TV screen but this is in most cases limited to the national territory.

This is also valid for premium sports content which is not portable across borders, in particular the streaming of live sports events. The offers to watch programmes on the "second screen" are currently limited to the national territory.

In the music sector, consumers are able to access and use the online music services to which they have subscribed in their home country, when travelling. At the same time, the legal situation appears to be less clear as some end-user agreements limit the uses to to the home country of the subscriber. At present, however this does not seem to create any obstacles in practice.

Finally, cross-border portability is generally possible for e-books (including for streaming services) and for services that offer access to video games.

Changes in the licensing practices of right holders however can take place any time in the future or service providers in these sectors can decide to restrict the access of consumers to some of their currently available services. Furthermore, services may combine different types of content (e.g. audivisual, music, sports) Therefore, in order for the EU intervention to be future-proof and efficient, it is necessary to cover all types of content and not to differentiate between online content services according to the content they use or the sector in which their at currently active.

<u>Drivers:</u> The variations in the availability of cross-border portability of online content services in the EU is caused mainly by different business considerations in the different sectors. They result from the licensing practices of right holders and/or the commercial practices of service providers.

These practices are often facilitated by the fact that copyright is territorial which means, in essence, that the geographical scope of the rights under copyright only extends to the territory of the MS whose national law granted the protection. Right holders in the EU therefore have a bundle of 28 rights to the same work. Therefore a service provider that is making content available online in more than one MS must acquire a licence for all the different territories in which the content is made available. Of course, the fact that copyright is territorial does not prevent right holders from granting multi-territorial licences. However in the AV sector the general practice is territorial licensing and territorial exclusivity for premium content (e.g. films and some TV series of particular interest). This form of licensing, in combination with release windows, allows applying different prices in different territories and for different types of media. The licensing of sports broadcasting rights by sports organisers also follows a territorial pattern, notably for the most popular/commercially valuable sports, because of the large differences in the value of the same sporting event across different Member States on the basis of a strong national preference. The scale of the problem in the AV sector and in sports continues to grow as the number of online subscription-based services is rapidly increasing. The growing use of connected mobile devices (smartphones, tablets), in particular for watching video, indicates consumers' interest for accessing content wherever and whenever they want. The current consumer demand for cross-border portability of online content services was confirmed in a recent Eurobarometer survey. 16% of the respondents (representing 20% of internet users) indicated they pay a subscription to access online content and 17% of people having a subscription indicated they have already tried to use it abroad, while 21% responded they would be interested to do so in the future. In addition, 33% of those who do not have a subscription consider cross-border portability as an important element if they were to take one.

Stakeholders: Of all stakeholders, this problem mainly affects right holders (including the holders of copyright, related rights and of sports rights), online service providers and consumers. Collective management

organisations (CMOs) may be affected in the music sector in their role as licensors of authors' rights to online service providers. The initiative would increase the value of the service for consumers as they would have the access to the service they have subscribed to or the content they have purchased or rented when travelling abroad. It would also help right holders and service providers to provide a service that better meets the consumers' needs and avoid significant and time-consuming administrative and compliance costs for them (linked in particular to the need to re-negotiate a large number of contracts). This issue has no practical relevance for institutional users, as a stakeholder group.

Consumer demand for the cross-border portability of online content services is expected to increase with the growth in travelling⁹ and in the use of mobile devices. However, for those consumers who wish to access the services they subscribed to or the content they bought or rented in their home country, the barriers deriving from the licensing and distribution of content on a territorial and exclusive basis are likely to persist in the AV sector and for premium sports content. Exclusive territorial licence agreements would continue to restrict the cross-border portability of content. In the other sectors, cross-border portability is generally unrestricted (at least in practice) at present however to ensure legal certainty for the parties and to guarantee that the cross-border portability feature will be a part of future content services in all sectors, the initiative should not exclude certain types of protected content only because the existing business models do not limit cross-border portability in that specific sector.

Subsidiarity check

<u>Legal basis:</u> The EU's right to act follows from Article 114 of the Treaty on the Functioning of the European Union which confers on the EU the power to adopt measures for the establishment and functioning of the internal market.

<u>Subsidiarity</u>: The portability of online content services, as such, is a question of cross-border nature. It ensures that consumers who have subscribed to an online service in their home country or who have purchased or rented content there, could access this service or content when they travel abroad. In addition to certain business considerations, a key reason why this is not possible today in some sectors (AV and sports content) is the complex system of contracts between the right holders and the distributors/service providers in the 28 Member States which ensure territorial exclusivity. They would need to be reviewed one by one and in a consistent manner in all territories in order to carve out cross-border portability.

As copyright and rights related to copyright such as rights of broadcasting organisations in transmissions have been harmonised at EU level, Member States cannot intervene via legislation in order to ensure cross-border portability. Therefore, such action can only be taken at EU level. Consequently, if the rights in question require adaptation in order to ensure cross border portability, only the EU is entitled to act to adapt the legal framework.

As far as the other sectors (music, e-books, video games) are concerned, currently there is no evidence of problems with cross-border portability. However, in the music sector, in some instances despite service being portable in practice, end-user agreements state that customers are allowed to access the service solely in a territory of the Member State in which they subscribed to the service. This is due to the licensing practices for online uses which are, unlike in the AV sector and for premium sports content, generally not based on territorial exclusivity. Consequently, in principle, it would seem that these sectors could be excluded from the intervention. However, in order to provide for full legal certainty and for the initiative to be future-proof by avoiding possible future fragmentation (should commercial practices change), it is indispensable to cover all sectors of the content industry in an equal manner. Also, there are already providers that offer different types of content in the same service (e.g. sports, audiovisual and music are common features of broadcasting services) and this may be even more the case in the future. This could not be addressed by individual Member States. Legislative action at the EU level to adapt the copyright acquis would ensure greater legal certainty and would do away with the need to seek separate licences for the purposes of cross-border portability.

The added value of the EU action is that only EU intervention can ensure that the conditions for consumers' access do not vary according to the Member State they are located in at a specific moment. The consumer would have access to the service he has subscribed to or to the content he has purchased/rented under the same conditions, no matter in which of the other 27 Member States he travels to. EU action providing for harmonised conditions would also produce clear benefits to online service providers by creating a legally certain framework for the provision of cross-border portability across Europe.

Main policy objectives

The initiative aims at removing barriers that currently prevent consumers from using the services they have

⁹ Notably by tourists: <u>http://ec.europa.eu/eurostat/statistics-explained/index.php/Tourism_statistics;</u> and cross-border commuters <u>http://europa.eu/youreurope/citizens/work/work-abroad/cross-border-commuters/index_en.htm</u>

previously subscribed to or from accessing content they have previously purchased or rented in their home Member State, when travelling in the EU, more specifically to ensure the cross-border portability of online content services.

Currently certain licensing practices by right holders and certain terms of use by service providers prevent consumers, when travelling abroad, from accessing the service they have subscribed to or the content they have bought or rented in their home country. This problem is particularly acute with respect to AV content and premium sports content. The initiative should aim at removing these barriers and allowing for consumers to port online content services across borders.

B. Option Mapping

Baseline scenario – no EU policy change

No policy intervention. In case of no EU action, the achievement of the objective would rely on market players to progressively offer portability of content online as well as on the courts, and notably the CJEU, to clarify the application of provisions of EU secondary law and of the Treaty relevant to the free movement of services. It would also mean continuing to rely on the application of competition law to address certain issues of territorial restrictions as this may have an effect on the provision of portable online content services. For those consumers who wish to access the services they subscribed to or the content they bought or rented in their home country, the barriers deriving from to the licensing and distribution of content on a territorial and exclusive basis are likely to persist in the AV sector and for premium sports content. For music, e-books and video games, the cross-border portability of subscription and transactional services is already commonly proposed by platforms and it is unlikely to change, although due to the rapid evolution of these markets, longer-term developments are hard to forecast.

Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

<u>Option 1:</u> This option would consist in guidance to stakeholders by the Commission encouraging online content service providers to provide for cross-border portability of their services across the EU, in particular for AV content and premium sports content. The guidance would also be addressed to right holders, who would be encouraged, when licensing rights to online content service providers, to grant the rights allowing for portable uses. The guidance would also be addressed to Member States which would be invited to actively monitor market developments, notably as regards whether the terms proposed to consumers willing to benefit from portability are reasonable.

Alternative policy approaches

<u>Option 2:</u> This option would entail EU intervention to guarantee that online content services that are lawfully accessed in the Member State of residence of the consumer on the basis of an agreement and delivered over the internet on a portable basis can be used by consumers when leaving their Member State of residence temporarily to travel/stay in another Member State. The EU intervention would address restrictions to the provision of temporary portability linked to territorial licences. In addition, service providers could not prevent the portability of the service during temporary stays in other Member States, to the same content, on the same range of devices and the same range of functionalities (including accessibility for persons with disabilities) as those offered in their Member State of residence.

Alternative policy instruments

In the past, the Commission encouraged market-based solutions in the AV sector, in the Licences for Europe stakeholder forum. Despite the pledge confirming stakeholders' intention to make cross-border portability available for consumers, no progress has been achieved in this area.

A non-binding instrument, such as a recommendation encouraging right holders and service providers to make sure that portable online content services to which consumers have lawful access in their Member State of residence, on the basis of an agreement, can be used by consumers when travelling in another Member State could support market developments in these areas. However the effectiveness of this instrument would be very limited as its success would depend on the commercial decisions taken by the different market players and would not be suitable to address the issue in all MS at once, perpetuating thus legal uncertainty.

Alternative/differentiated scope

Providing for cross-border portability is expected to result in very low technical cost for service providers that already provide for subscription-based or transaction-based content services online which could be absorbed in their routine software maintenance costs. Service providers could however benefit from the new feature of the service that could attract new consumers. Providing for an alternative scope of application of the proposed initiative by excluding small businesses or micro-enterprises from the scope of the application could undermine the efficiency of the measure, considering that a lot of the affected businesses fall into these categories.

Options that take account of new technological developments

All options take into account technological developments and are designed to address problems arising in relation to access to online content services.

Preliminary proportionality check

None of the options go beyond what is necessary to solve the identified problems. Moreover, the initiative is limited to solving a problem of a cross-border nature that cannot be achieved by the Member States alone.

C. Data Collection and Better Regulation Instruments

Data collection

Information and data needs mainly concern the situation in the different sectors of the market, the views of stakeholders and the possible technical costs of adding the cross-border portability feature to online content services.

Stakeholder views have been gathered via a series of consultations (see below). A series of legal and economic studies were conducted on various aspects of the existing copyright rules. One of these studies assesses the extent to which the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society is appropriate for the economic and technological realities of digital markets¹⁰. An economic study on the territoriality of the making available right¹¹ was also conducted.

Further studies have been conducted by DG JRC (IPTS) on the impacts of digitisation on the production and distribution of content, as well as on the cross-border access to content¹². DG EAC carried out a number of studies concerning sports, including the Study on the Contribution of Sport to Economic Growth and Employment in the EU¹³ and the Study on sports organisers' rights in the European Union¹⁴.

Consultation approach

Stakeholder views have been gathered via a series of consultations: e.g. the Green Papers on the online distribution of audiovisual works¹⁵ and on "preparing for a Fully Converged Audiovisual World: Growth, Creation and Value"¹⁶. From 5/12/2013 to 5/03/2014, the Commission held a wide-ranging public consultation¹⁷, covering, inter alia, the area discussed in this IA. Over 9,500 replies were received from a broad range of stakeholders. A Eurobarometer survey on cross-border access to online content was carried out in the 28 Member States. The

¹⁰ "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society", De Wolf and partners, December 2013.

http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf 11 Study on the "Economic analysis of the territoriality of the

making available right", CRA, March 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf 12

http://is.jrc.ec.europa.eu/pages/ISG/DigEcocopyrights.html 13

http://ec.europa.eu/sport/library/studies/study-contribution-spors-economic-growth-final-rpt.pdf 14

http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf 15

COM(2011) 427, at: http://ec.europa.eu/internal_market/copyright/initiatives/audiovisual/index_en.htm 16

http://ec.europa.eu/digital-agenda/en/consultations-media-issues 17

lt is referred to as "the public consultation" below. The consultation document is available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm ¹⁸<u>Http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059</u> Some 26,586

respondents from different social and demographic groups were interviewed via telephone.

results of this survey were published in August 2015¹⁸.

The public consultations were complemented by a stakeholder dialogue - "Licences for Europe".¹⁹ This structured stakeholder dialogue addressed, amongst others, the specific issue of cross-border portability, i.e. the ability of consumers having subscribed to online services in their Member State to keep accessing them when travelling temporarily to other Member States. As a result, representatives of the audio-visual sector issued a joint statement affirming their commitment to continue working towards the further development of cross-border portability.

Will an Implementation plan be established?

x Yes D No

D. Information on the Impact Assessment Process

The work on the IA started in December 2014.

The Inter-service Steering Group met three times. It is chaired by the SG and in addition to DG CNECT, DG GROW, COMP, JUST, EMPL, ECFIN, ENV, RTD, EAC, TRADE, JRC, SANTE, the EPSC and the LS take part in it.

E. Preliminary Assessment of Expected Impacts

Likely economic impacts

The economic impact of this initiative would depend on the existing licensing practices in place in the different content sectors. The most affected would be the AV and premium sports content sectors where producers and sport organisers could continue to license this content on an exclusive territorial basis but could not prevent service providers from offering portability of their services. As the portability of online content services merely allows the current users of the service who have lawfully obtained access to the service in the Member State of residence to use it while travelling in other Member States, an initiative in this area would not affect the current financing and business models in the AV sector.

On the one hand, the possible technical costs are expected to be mostly linked to technical adaptations which could be absorbed in the routine software maintenance costs by service providers that already provide for subscription-based or transaction-based content services online. The exact costs would depend on the content of the agreement between right holders and service providers. On the other hand, the portability function could attract more consumers and could result in more revenues for right holders and service providers. In the other content sectors, the initiative would not have economic impacts.

The initiative's main impact would be to make it possible for consumers to access online content services that they have subscribed to or content they have previously purchased or rented, when they travel in other EU Member States.

Likely social impacts

The initiative would not have social impacts.

Likely environmental impacts

The initiative would not have environmental impacts.

Likely impacts on simplification and/or administrative burden

The initiative would not directly put burden on businesses. In the case of non-legislative intervention, contracts between right holders and service providers would need to be renegotiated one by one, in order to allow for cross-border portability, in all EU MS. While it would not be indispensable, it cannot be excluded that the parties may decide to reopen their contracts also in the case of legislative intervention (e.g. with respect to licence fees).

Likely impacts on SMEs

Exempting SMEs from the scope of the rules could undermine the efficiency of the measure, considering that a lot of online service providers are SMEs.

Without legislative intervention, large service providers benefiting from a strong bargaining position vis-à-vis right

¹⁹ For details. the document "Licences for Europe – ten pledges to brina more content online": see http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

holders are likely to be able to respond to consumer demand and offer a portability feature to their subscribers in the medium term. This is however likely to take time as it would require re-negotiating all existing contracts with right holders. While such re-negotiation would probably be feasible for large service providers, the same objective would be much more difficult to achieve for SMEs. Including SMEs in the scope of this exercise would therefore probably be the only way to enable them to align their offers and provide portability to their customers, thus contributing to their competitiveness on the market.

As described above, the costs directly linked to the EU intervention are not expected to be significant. While such costs may put proportionally more burden on SMEs than on large business, they are expected to be of limited scale since all service providers covered by the initiative already provide for subscription-based or transaction-based services online and thus the vast majority of them already apply some form of authentication mechanism.

Likely impacts on competitiveness and innovation

The initiative could help innovation in online content services and attract more consumers to online content services.

Likely impacts on public administrations

The impacts would depend on the chosen instrument. In the case of legislative instrument, a regulation would not require the MS to work on the transposition. If the chosen instrument were to be a directive, MS would have to prepare the implementing legislation within the set transposition deadline.

Likely impacts on third countries, international trade or investment

The initiative would not have impacts on third countries, international trade or investment.