

22 April 2016

Decision

of the Bundesrat

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

COM(2015) 627 final; Council Doc. 15302/15

At its 944th session on 22 April 2016, the Bundesrat adopted the following position pursuant to Sections 3 and 5 EUZBLG:

The proposal in general

1. The Bundesrat welcomes the Commission's plan to enable Europe-wide cross-border use of digital content for consumers. Consumers have a particular need for protection when using these services, since they are completely dependent on the provider for access to the content.
2. The Bundesrat welcomes the proposal's objective, which is to ensure, in the interests of consumers, cross-border access to online subscription content outside the Member State of residence but within the European internal market while temporarily present in another Member State. It could contribute to greater consumer satisfaction, provided that equal consideration is given to the interests of the audiovisual industry and creators. The proposal must not be allowed to hinder national or regional providers from obtaining usage rights.

3. The Bundesrat stresses that European copyright law must not limit cultural diversity in the Member States and must ensure fair compensation for creators in the digital age.
4. The Bundesrat takes the view that, in modernising and harmonising European copyright law, an appropriate balance must be struck between the interests of rights holders, rights users, producers, distributors, consumers and cultural institutions.
5. In relation to the proposal, the Bundesrat also reaffirms its opinion that geoblocking can be justified to enforce copyright and fund audiovisual content in specific circumstances.
6. The Bundesrat requests an assessment of whether, with regard to the principle of proportionality, it is necessary to interfere with existing contracts by means of a Regulation, or whether a Directive containing provisions to be implemented by the Member States for new contracts would not be sufficient.

Article 2(e)

7. In accordance with the legal definition in Article 2(e) of the proposed Regulation, an ‘online content service’ would include services, 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. The Bundesrat assumes that this also covers not only radio, but also other non-audiovisual media services, such as music streaming or online games. If this is not the case, the Bundesrat requests appropriate clarification in the text of the proposal.
8. The Bundesrat reaffirms its position that providers of free services and public service broadcasters must not be obliged to provide portability. In the light of this, an exemption for free services and public service broadcasters should be provided for in the Regulation. At the same time, services for which individual users do not pay but actively provide something else in return, such as personal details or other data, should not automatically come under the heading of free services within the meaning of the exemption. Monies paid should in any

case only be regarded as a fee if they are agreed directly between the user and the provider of the particular online service for the use of that service. Payments for technical infrastructure or suchlike (internet access etc.) should definitely not be covered by this, unless it is linked to the provision of the online content service, for example as part of a package.

9. The Bundesrat therefore reaffirms its view, with reference to point 15 of its opinion of 18 March 2016 (BR Document No 15/16 (decision) on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework, COM(2015) 626 final; Council Doc. 15264/15), that the portability requirement should not extend to free services.

Article 2(d) and Article 3(1)

10. The Bundesrat welcomes the inclusion of a time limit on portability in the proposal through a reference to users being ‘temporarily present’. This will enable a balance to be struck between the legitimate interests of rights holders, rights users, producers, distributors and consumers of audiovisual content.
11. With reference to point 14 of the above-mentioned opinion of 18 March 2016, the Bundesrat reaffirms its view that a clear time limit on portability is required in the Regulation, in order to ensure legal and investment certainty.
12. The Bundesrat therefore calls for the length of time meant by ‘temporarily present’ to be clearly regulated. To date, Article 2(d) does not contain any time element, despite proposing a legal definition of ‘temporarily present’. It therefore remains unclear when a user’s presence is to be regarded as ‘temporary’. In the view of the Bundesrat, it is still necessary to set a definite time limit. Article 2(d) should therefore be amended accordingly, and with sufficient precision, in order to achieve the required clarity and legal certainty both for users of online content services and for service providers. In order to prevent abuse of the verification procedure, clear criteria are necessary in the Regulation to determine the place of habitual residence.

Article 3(2)

13. The Bundesrat supports the Commission's view that rules on the quality of services available in other EU Member States are not appropriate because of the differences in technical infrastructure across the EU.

Article 3(3)

14. In the view of the Bundesrat, the obligations on service providers, set out in Article 3(3) of the proposed Regulation, to inform subscribers of the quality of online content services provided in other EU Member States should be expanded to ensure that consumers are informed in a clear and comprehensible manner, before entering into the contract, of the terms of use for cross-border online content services, especially how to use these services abroad and what quality to expect.

Article 8(2)

15. The Bundesrat considers the implementation time limit of six months, as provided for in Article 8(2), to be too short. The Commission also recognises that the proposed Regulation will be time-consuming to implement. In particular considering the intended (retroactive) application of the rules to all contracts, including those already signed, the time limit should be extended.

Other

16. The Bundesrat is of the opinion that the proposed Regulation does not take adequate account of the contractual relationship between online content providers and rights holders, which is upstream of the legal relationship between service providers and end customers. Online content providers can only grant their customers the usage rights that they themselves have acquired from the rights holders. At present, such rights are usually restricted on the basis of territory. It seems doubtful whether a European service provider can argue that a non-European contractual partner must accept additional portability without higher licence fees because the Regulation creates a legal fiction in this regard (Article 4) and declares such conflicting rights 'unenforceable' (Article 5(1)). In particular, these

reservations relate to the Regulation's intended retroactive application to existing contractual relationships (Article 7).

Procedural matters

17. In connection with this opinion, the Bundesrat recalls the views it has already put forward to the Commission in its opinions of 10 July 2015 (BR Document No 212/15 (decision)) and of 18 March 2016 (BR Document No 15/16 (decision)).

Direct submission to the Commission

18. The Bundesrat is submitting this opinion directly to the Commission.