



*Brussels, 11.8.2016
C(2016) 5321 final*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market {COM(2015) 627 final}.

This proposal forms part of a broader package of ambitious measures designed to create a Digital Single Market. It aims to remove barriers to cross-border portability so that the needs of users of online content services can be met more effectively whilst also taking into account the need for promoting innovation to the benefit of consumers, service providers and right holders.

The Commission welcomes that the Bundesrat's view that action at the EU level as envisaged in the proposal is welcomed and required to enable citizens to use their lawfully acquired online content services when temporarily present in another Member State. The Commission shares the Bundesrat's view that when modernising and harmonising European copyright law, an appropriate balance must be struck between the interests of various stakeholders, most notably right holders, users and consumers.

The Commission also notes the Bundesrat's concerns relating to certain points of the proposal, in particular regarding the necessity for a Regulation that also applies to the existing contracts rather than a Directive which, when implemented, would apply only to new contracts. The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal and trusts that these will allay the Bundesrat's concerns.

The Commission is of the view that the choice of regulation as the legal instrument is justified. A regulation guarantees 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 services and right holders. 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. As regards the application to existing contracts, it is necessary to ensure that all consumers can enjoy the cross-border portability feature of online content services on an equal basis in time and without undue delay. Contracts under which content is licensed are usually concluded for a long duration. If the Regulation were not to apply to such contracts, large parts of content would not be made portable until new contracts were negotiated. This would mean sub-optimal service for consumers. Also such a situation could create disparities

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between service providers – as some would be in a position to negotiate such contracts and consequently to offer portability with regard to the entire content of their service while others would have to offer portability on a selective basis. The Commission’s proposal ensures a level playing field for service providers in this respect – all will be able to provide portability of their entire content independently of their ability to renegotiate contracts.

As regards the other issues raised by the Bundesrat, the Commission is pleased to provide details in the attached Annex.

The Commission hopes that these clarifications address the issues raised by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Violeta Bulc

Member of the Commission

ANNEX

The Commission has carefully considered the issues raised by the Bundesrat in its Opinion and would like to offer the following observations grouped with reference to the respective paragraphs of the Bundesrat's Opinion.

Paragraph 7

It was the intention of the Commission that the Regulation would also cover non-audiovisual services such as music streaming, online games and e-books by the definition of an 'online content service'.

Paragraphs 8 - 9

The Commission is of the view that providers of online content services which are not provided against payment of money should only be subject to the proposed Regulation if they verify the Member State of residence of their subscribers. As such services do not normally verify the Member State of residence of their subscribers, the Commission believes that their inclusion within the scope of application of the proposed Regulation, regardless of their mutual capacity to conduct such a verification could lead to 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 which enables providers of online content services to offer their services on a portable basis across the Union even when they decide to invest in means enabling them to verify the subscriber's Member State of residence.

The distinction made between services provided against payment of money and those which are not provided against payment of money is based on the fact that payment details such as bank account or credit card details are important means of verifying the Member State of residence and are normally unavailable to providers of services which are not provided against payment of money.

The Commission agrees that the relevant payment should be the payment for the online content service. However such payment does not necessarily have to be made directly to the provider of the online content service – it can also be made to another party such as a provider offering a package combining a telecommunications service and an online content service operated by another provider.

Paragraphs 10 - 12

The Commission would like to point out that the notion of 'temporarily present' is defined in Article 2(d) of the proposed Regulation as meaning the presence of a subscriber in a Member State other than the Member State of residence. This means that as long as a subscriber is habitually residing in one Member State, such a subscriber's presence in another Member State is temporary. The notion as proposed by the Commission does not include any time limit on portability (other than by reference to 'habitual residence'). It is indeed the objective of the proposal to enable portability of online content services in all situations where subscribers habitually residing in one Member State are present in another Member State. Such presence in another Member State may occur from time to time or on an everyday basis

(e.g. when a subscriber travels to work in another Member State every day). The Commission agrees that the key notion for the proposed Regulation is the notion of 'habitual residence' and its verification.

Paragraph 14

It is the Commission's view that the provision set out in Article 3(3) of the proposed Regulation clearly delineates the obligation of service providers (as it requires them to inform their subscribers of the quality of delivery of the online content service on a portable basis), but the Commission has taken note of the Bundesrat's suggestions concerning this provision. It is important to avoid setting burdensome or even impossible requirements on service providers who may not have the knowledge of technical infrastructure in other Member States.

Paragraph 15

The Commission acknowledges that the relevant parties may need to introduce certain arrangements in order to adapt to the new situation and therefore proposes a six-month period allowing for such arrangements to be put in place. The Commission is of the view that such a time-period is a reasonable one.

Paragraph 16

The Commission is convinced that the proposed Regulation would be applicable to all relevant contracts (existing or new), irrespective of the law applicable to such contracts and the fact that one party to a contract may be established outside the European Economic Area. The legal mechanism provided by the proposed Regulation is in that aspect similar to the rule provided for satellite transmission in Directive 93/93/EC. The proposed Regulation is neutral as regards licence fees related to online content services.