Brussels, D(2015)

Opinion

Title

DG CNECT - Impact assessment on the Regulation of the European Parliament and of the Council to ensure the cross-border portability of online content services in the internal market

(draft version of 5 October 2015)*

(A) Context

The Digital Single Market (DSM) Strategy calls for addressing within the EU copyright framework a set of key obstacles to the functioning of the DSM, including allowing a wider online access to copyright-protected works by users across the EU.

This initiative aims at enhancing the cross-border portability of online content services in the DSM. This is a specific aspect of the broader discussion on access to services across borders and of EU copyright law. Limited intervention on the cross-border portability of online content services (preceding the review of EU copyright law) would also allow the consumers to take full advantage of the nearing end to roaming charges for travellers within the EU.

(B) Overall opinion: POSITIVE

The Board gives a positive opinion on condition that the following elements of the report are improved:

- 1) The impact assessment report should objectively present the evidence base underpinning real policy choices rather than only offer justification for a preferred solution. It should also better explain the need to act, taking account of stakeholders' views, and the coherence with other DSM initiatives.
- 2) The report should be more explicit on the range of options to solve the problem of cross-border portability of online content and possibly extend it with real alternatives/sub-options as stipulated e.g. by stakeholders or explain clearly if no options exist. More justification (evidence) should be given as well in relation to the discarded options, especially if these options have been preferred by stakeholders.
- 3) The analysis of impacts should be more balanced in terms of presenting positive and negative aspects and provide more details on the effect of particular elements of the discussed options, e.g. the (non-)definition of the temporary stay or the potential costs linked to the intervention.

^{&#}x27; Note that this opinion concerns a draft impact assessment report which may differ from the one adopted

(C) Main recommendations for improvements

- 1) Clarify the 'need to act' on the identified problem. The report should clarify under which conditions the problem of the lack of portability of online content could be solved and explain whether these conditions are currently fulfilled or not. In addition, more explanations should be provided as to why the market will not be able to solve the problem within a reasonable period of time, at a reasonable cost and/or in a uniform way, given that no evidence-based evaluation of the industry pledge ("Licences for Europe") from 2013 is presented in the report.
- 2) Better justify the limited range of options and scope of action. The report should better justify the limited choice of options considered in the analysis and give more reasoning behind discarding some of the options which are preferred by stakeholders (e.g. the introduction of the legal fiction without the obligation to introduce portability into the offer). For instance, it should give more explanation why it was decided not to define the 'temporary stay' and consider impacts of different definitions thereof in view of possible inquiries during the legislative process.
- 3) Explain in more detail the characteristics of the legal fiction. The report should be more specific about how the legal fiction, removing the legal obstacles for service providers to offer cross-border portability of online content, will be introduced in practice and what direct and indirect impacts it will have on service providers, right holders and consumers (the need to renegotiate the contracts, the associated costs, the risks of abuse, the duration of the temporary stay, etc.).
- 4) Strike a more sound balance in assessing impacts of options. The report should elaborate on the extent to which the proposal reaches a balance between increased cross-border portability of legally acquired online content and the limitation of fundamental rights for the consumers via increased consumer surveillance by service providers linked to the verification of the (undefined) temporary stay outside the country of residence. Moreover, the results of the targeted stakeholder consultations (workshops) conducted specifically on the issue of cross-border portability should be more explicitly reflected in the report and justification should be provided in case stakeholder views are discarded.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.

(D) Procedure and presentation

The report should present evidence in an objective and balanced way and offer a real choice for decision makers rather than promote the preferred solution.

(E) RSB scrutiny process	
Reference number	2015/CNECT/022
External expertise used	No
Date of RSB meeting	28 October 2015