

REGULATION (EU) 2017/1128 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CROSS-BORDER PORTABILITY OF ONLINE CONTENT SERVICES IN THE INTERNAL MARKET

OVERVIEW

With the adoption of Regulation (EU) 2017/1128 on the cross-border portability of online content services in the Union ("Portability-Regulation"), a major step towards abolishing geo-blocking in Europe was taken. The new Regulation will make online services even more attractive for consumers and together with the abolition of roaming charges which already entered into force on 15 June 2017, it is one of the objectives of the digital single market strategy to create a truly internal market for digital content and services.

WHAT IS A PORTABLE ONLINE CONTENT SERVICE?

A portable online content service provides digital contents, such as music, games, movies, e-books entertainment or sports programs for their subscribers who can – without being limited to a specific location in their home country (portability) – either downloaded or stream the content on different devices (e.g. smartphone, laptop, tablet). The best known examples of such online content services are among others: Netflix (movies and series), DAZN (sports) or Spotify (music).

The popularity of such online services is growing steadily due to the increasing spread of smart devices: According to the European Broadcasting Corporation (EBU), in 2016 around 11 percent of all European households subscribed to a video-on-demand service. It is estimated that this percentage will double by 2020.

WHAT DOES CROSS-BORDER PORTABILITY MEAN?

Under the current legal situation, a subscriber is able to access and use online content services only in his home country; a cross-border access and use of subscribed online content services in other EU member states has so far been impossible for legal and technical reasons (for example due to restricted access rights for certain geographical IP addresses). The main reason for this restriction is that the content of such services (music, games, movies, etc.) and the broadcast of certain events (e.g. sport events) are protected by copyright or related rights. The owners of these rights generally provide this content only under restrictions based on the user's geographical location (geo-blocking). Under the new Regulation, these restrictions are intended to be a thing of the past: Subscribers to online content services are now able to use subscribed audiovisual media services in their country of residence as well as in other EU countries. However, the Regulation only applies if the subscriber's stay in another member state is merely temporary – for example for holiday or business trips (temporarily present in a Member

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State' means being present in a Member State other than the Member State of residence for a limited period of time –the exact duration for being permitted to consume subscribed online content in the digital internal market is not defined in the Portability-Regulation). Hence, the purpose of the new Regulation is to give consumers additional opportunities to legally access online content by allowing cross-border portability of such services.

To avoid misuse of this new cross-border portability, providers of online content services have to take reasonable, proportionate and effective actions to verify the Member State of residence of the subscriber. For this reason, the Regulation provides various means of verification. For example: identity card, electronic means of identification; bank account or credit card number; the place of installation of a set top box, a decoder or a similar device used for supply of services to the subscription; the payment of a license fee for other services provided in the Member State, such as public service broadcasting; internet or telephone service supply contract; publicly available payment of local taxes; the billing address, the postal address or the IP address of the subscriber.

The Regulation applies only to subscribed online content services against payment of money; however, providers of such online content services are not allowed to charge additional fees for the use of cross-border portability. Public service broadcasters, which are financed by broadcasting fees, may decide to enable its subscribers who are temporarily present in a Member State to access and use the online content service on condition that the provider verifies the subscriber's Member State of residence in accordance with this Regulation.

WHEN DOES THE CROSS-BORDER PORTABILITY ENTER INTO FORCE?

The Regulation on the cross-border portability of online content services in the internal market, which is directly applicable in all EU Member States and will apply from 20.3.2018, expressly states that its provisions are mandatory. This means any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, are unenforceable. This is also valid for existing subscription contracts.

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