



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

The Director General

Brussels, 01.06.2018

DG

**Subject:** *Letter to the attention of the competent national authorities on the application of Regulation (EU) 2017/1128*

Dear Madam, Dear Sir,

I am writing to you about the practical application of the EU Portability Regulation<sup>1</sup>. Under this Regulation, consumers in the EU who buy or subscribe to online content in their Member State are now able to access this content when they stay temporarily in another EU Member State (so called ‘portability’). I understand that your Authority is most likely to play a role in your Member State in supervising the application of the Regulation and enforcing its consumer rights.

It is essential that the Regulation is applied effectively and correctly in all EU Member States. However, the Commission has observed that a number of service providers across the EU have applied portability in certain ways which might be contrary to the Regulation, and which may prevent consumers from enjoying portability. These concern in particular:

- limitation of portability to a specific period of time;
- requests for information beyond those required to verify the Member State of residence;
- use of checks of IP addresses to monitor consumers' whereabouts on a regular basis;
- limitation of the range of devices on which portability is available.

A detailed description of the issues of which the Commission is aware so far is to be found in the Annex, along with the Commission’s own interpretation of whether the issues identified so far comply with the Regulation.

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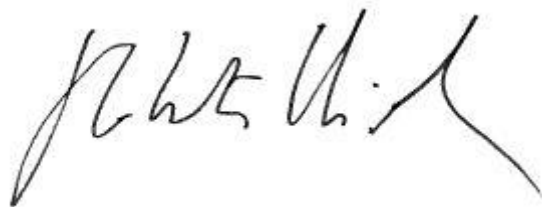
<sup>1</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market. Full text available under [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.168.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.168.01.0001.01.ENG)

In this context, I would like to draw your attention to the fact that any contractual provision which is contrary to the Regulation is unenforceable, according to Article 7(1). This applies to all issues set out in this Annex.

I would be grateful if you could take this assessment into account when monitoring the correct application of the Regulation. I also invite you to communicate the Commission's view on the Regulation and share it with other relevant authorities in your Member State.

In addition, I would like to inform you that as of January 2020, cooperation at EU level between national consumer authorities will also cover portability<sup>2</sup>. I would like to remind you that Member States have to designate the competent authorities for the Portability Regulation under the new CPC Regulation and inform the Commission accordingly, as required by its Article 8 (by sending a letter for the attention of the European Commission, Directorate General for Justice and Consumers, Unit E.3. - Consumer Enforcement and Redress). If your Member State has not yet done so, you may want to bring this matter to the attention of the competent instances. In this connection, I would like to inform you that the Commission will make a presentation on the Portability regulation at the next Consumer Protection Cooperation (CPC) Committee Meeting on 7 June in Rome.

Yours sincerely,



Roberto Viola

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<sup>2</sup> In conformity with Article 8 of Regulation 2017/1128. See in particular Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

## **Annex: Issues detected related to the correct application of the Portability Regulation**

This Annex contains a detailed description of the issues of which the Commission is aware so far along with the Commission's own interpretation of whether these issues comply with the Regulation, read in the light of the Union rules on data protection<sup>3</sup>.

### **I. Restrictions on the time period for portability**

#### **Issue**

Some service providers appear to limit portability to a specific time period, for example by:

- requiring subscribers to log in from their Member State of residence at regular intervals of, for example 30 or 37 days; or
- setting an upper limit for portability to a certain number of non-consecutive days in a year (such as 30, 60 or 90).

There is no provision in the Regulation which limits portability to a specific time period. Inclusion of a specific time period was expressly rejected in the course of the legislative procedure.

The Regulation obliges service providers to enable portability for subscribers "*who are temporarily present in another Member State*", based solely on their Member State of residence and not on the number of days spent abroad.

The intention of the Regulation is to allow portability for all forms of temporary presence in other Member States. In the view of the Commission this would notably include situations in which the absence from the Member State of residence is longer than would typically be the case for routine business trips or travel.<sup>4</sup> "Learning mobility", for example under the Erasmus program, can cover cases where students are abroad for an extended period of time.

Any contractual provision which is contrary to the Regulation is unenforceable, according to Article 7(1).<sup>5</sup> This applies to all issues set out in this Annex. This includes limitation of portability to a specific time period by service providers as set out above.

#### **Recommended approach**

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<sup>3</sup> In conformity with Article 8 of Regulation 2017/1128. See in particular Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>4</sup> See Recital 1.

<sup>5</sup> Recital 15 clarifies that the term "contract" for the purposes of the Portability Regulation covers all kinds of arrangements, including implied-in-fact agreements, by "which the subscriber accepts the provider's terms and conditions for the provision of online content services, whether against payment of money or without such payment."

- (1) Service providers should not limit portability to a specific time period
- (2) As a general rule they should determine whether a subscriber is "temporarily present" in another Member State by verifying the Member State of residence using the means listed in the Regulation
  - (a) at the conclusion or renewal of the contract<sup>6</sup> or
  - (b) in case of existing contracts by 2 June 2018<sup>7</sup>

## **II. Undue requests for additional information to verify the Member State of residence**

### **Issue**

In some cases, service providers have asked consumers to provide additional information to verify their Member State of residence (e.g. a copy of an identity card) before enabling them to use portability. Service providers appear to do this even though they already have sufficient means of verification - based on the means of verification listed in the Regulation - to verify the Member State of residence (e.g. payment information).

In the Commission's assessment, service providers should rely, if possible, on information which is already in their possession. This concerns in particular contracts concluded before the application of the Regulation and renewals of contracts.<sup>8</sup> Requesting additional information from subscribers is excluded by the Regulation if the service provider already has enough data for the verification of the Member State of residence:

- The Regulation limits the possibility for service providers to request information from subscribers. Under Article 5(1), in order to verify the Member State of residence service providers can use not more than two means of verification from a closed list laid down in the Regulation. Some means of verification in the list (i-k) can only be used in combination with other specific means of verification (a-h).
- Under Article 5(3), service providers can only request the "information necessary" from subscribers.
- Asking for further information regarding the subscriber's Member State of residence is not "necessary" if the service provider already has sufficient information available to carry out the verification.

### **Recommended approach**

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<sup>6</sup> See Article 5(1)(k)

<sup>7</sup> See Article 9(2).

<sup>8</sup> See Recital 27.

- (1) Service providers should choose no more than two means of verification of the Member State of residence of their subscribers from the list provided in the Regulation and shall combine those means only as provided in the Regulation.
- (2) Service providers should rely, where possible, on information already available to them.
- (3) Service providers should only ask for additional information from subscribers when the information in their possession does not allow for verification of the Member State of residence in accordance with Article 5(1).<sup>9</sup>

### **III. Undue use of IP address checks to monitor consumers' whereabouts on a regular basis**

#### **Issue**

The Commission has become aware that some service providers appear to track subscribers' location regularly, or even continuously, by checking their IP address. This is done to limit portability to a specific period of time, as described under Point I.

In some cases, service providers have justified this policy based on "reasonable doubt" regarding the Member State of residence of the individual subscriber.

In the Commission's assessment, the regular or continuous IP tracking of subscribers is excluded by the Regulation,<sup>10</sup> for the following reasons:

- IP address checks are allowed only at certain specific points in time, as one of the means of verification of the consumer's Member State of residence.<sup>11</sup> These are the conclusion and the renewal of the contract. In the case of contracts predating the application of the Regulation, checks are allowed only in the period between 1 April 2018 and 2 June 2018.<sup>12</sup>

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<sup>9</sup> This can e.g. be the case when the information at hand, such as billing information, only allows for verification on the basis of the means listed under points (i) to (k) of Article 5(1), which according to Article 5(1) subparagraph 2 shall only be used in combination with one of the means of verification under points (a) to (h). Another possible example would be that the information available is not clearly linked to a specific Member States. Payment details for instance are a listed means of verification according to Article 5(1)(b), but there may be cases where no verification on this basis is possible, due to the nature of the payment services used (such as for example Bitcoin or voucher cards).

<sup>10</sup> In this regard it is also interesting to read the Opinion of the associated Committee on Culture and Education (CULT) in the European Parliament that stated in this regard: *"Moreover, the rapporteur fully supports the Commission's approach not to allow for constant location tracking. To limit the duration to stay abroad to a specific amount of days would require constant IP tracking, which should be avoided."*, Report of 15 July 2016 on the 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, A8-0378/2016, p. 71, available under <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA8-2016-0378%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

<sup>11</sup> See Article 5(1)(k).

<sup>12</sup> See Article 9(2).

- Service providers may repeat an IP address check as the sole means of verification of the Member State of residence only when they have "reasonable doubt" regarding the Member State of residence of the individual subscriber.<sup>13</sup>
- An IP check based on "reasonable doubt" as the sole means of verification should be carried out exceptionally and only in duly justified cases, where service providers give specific reasons for their doubts. As such, "reasonable doubt" needs to be based on the facts of the individual case;<sup>14</sup>
- There are no circumstances in which the Regulation permits a generalised IP check to be carried out across the board.

In addition, there is an obligation to not to store any of the data collected, including by IP checks, to determine the subscriber's location any longer than necessary for that purpose. That data must be immediately and irreversibly destroyed afterwards, according to Article 8(2). This means that data gathered, including by IP checks, cannot be retained for any another purpose. This means that data cannot be retained for the purpose of counting the days that consumers spend abroad in order to limit portability to specific time periods imposed by the service provider which is in any event contrary to the Regulation and unenforceable

### **Recommended approach**

- (1) Service providers should not carry out IP checks other than for the purpose of verifying the subscribers' Member State of residence, as outlined under Point I.
- (2) IP checks based on reasonable doubt may be carried out as a sole means of verification but should remain exceptional and need to be based on the facts of the individual case.
- (3) All personal data, including those collected by IP checks,, should not be stored longer than what is necessary for the purpose of verification of the subscribers' Member State of residence and must be immediately and irreversibly destroyed afterwards.

## **IV. Undue limitation of the range of devices on which portability is available**

### **Issue**

Some service providers seem to limit the range of devices on which portable content is available when consumers are temporarily abroad. For example, there are reports that some service providers do not appear to have enabled portability as regards their applications on certain portable streaming devices (such as for example Google Chromecast, Amazon FireTV Sticks and others).

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<sup>13</sup> See Article 5(2) and (1)(k).

<sup>14</sup> This could for example be the case where a service provider has received conflicting information by the subscriber, e.g. when a subscriber changes its payment means to a credit card or account that was issued or is registered in another Member State than the one in which the subscribers' original payment means was issued or registered.

In the Commission's assessment, limiting the range of devices on which portable content can be enjoyed by a consumer is clearly excluded by the Regulation, for the following reasons:

- Subscribers who are temporarily present in another Member State should be able to access and use the online content service in the same manner as in the Member State of residence, according to Article 3(1).
- This includes providing access i) to the same content; ii) on the same range and number of devices; iii) for the same number of users; and iv) with the same range of functionalities.

It should however be noted that the obligation to offer portability extends only to those online content services that are offered in the Member State of residence and are portable.<sup>15</sup>

### **Recommended approach**

- (1) Service providers should provide cross-border portability in the same manner as they provide portability in the Member State of residence.
- (2) This obligation extends to content itself, the range and number of devices, the number of users and range of functionalities.

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<sup>15</sup> It is important to highlight that there is no obligation on service providers to offer services on portable devices abroad where they are not portable (i.e. limited to a specific location) in the Member State of residence. The latter is for example the case when the provision of a service relies exclusively on dedicated devices, such as set-top-boxes or decoders. This means that if a service provider decides to provide a service by means of a set-top box or a decoder, there is no obligation to offer portability to subscribers that are temporarily abroad regarding this service (the situation would be different as regards complimentary portable online services that some service provider may offer in addition or separately to non-portable services). The same logic also applies to functionalities. If, for example, a service provider offers its service on mobile devices such as tablets and smartphones in the Member State of residence, but decides not to allow for certain functionalities (such as for example screen mirroring or streaming of content from these devices to TVs or projectors with or without the use of receiving devices such as Apple TV, Chromecast or Amazon FireTV Stick etc.), then the service provider would be under no obligation to make this functionality available while the consumer is temporarily abroad.