

The Consumer Voice in Europe

PROPOSAL FOR A REGULATION ON ENSURING CROSS-BORDER PORTABILITY OF CONTENT SERVICES

BEUC position



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Why it matters to consumers

Consumers who are abroad want to use their video or music subscriptions in the same way than they do at home. With tablets and smartphones being our constant companion, those subscriptions are not meant to be used only when at home. Content such as TV series, films and sport events are nowadays available through multiple channels, including online distribution. Due to outdated copyright rules consumers cannot reap the benefits of these technological developments. Legally acquired content should be accessible from anywhere in the Union.

Summary

Introduction

BEUC strongly welcomes the European Commission's proposal on portability of content services in the internal market.¹

Consumers feel frustrated when they cannot access their subscriptions to online services while being abroad. Technical and contractual restrictions to the so-called 'portability of content' are not acceptable in the EU's single market, which is there to benefit consumers.

BEUC supports the proposed scope of the Regulation and how it would trigger the legal obligation to provide cross-border portability. We particularly support the absence of specific time limits for enjoying portability, the 6-month deadline for the Regulation to enter into force and its retroactive application.

The Commission's proposal provides a very good basis for an agreement although there are some elements where further clarifications are necessary, notably how to verify the 'habitual residence' of the consumer.

Portability of content services is an important first step towards a functioning and consumer-centric Digital Single Market. However, further legislative measures are necessary to solve the problem of geo-blocking in the online environment.

Elements of the proposal that BEUC supports

BEUC asks the European Parliament and Member States to support the following provisions of the Commission's proposal:

- **Scope of application (article 1):** BEUC supports that both paid and 'free' online services (e.g. services provided in exchange of in-kind payments such as data) are included in the scope of the Regulation.

¹ Our UK member Which? is not signatory to this paper.

- **Definition of “temporary present” (Article 2):** BEUC strongly supports that there is no time limit for portability. Consumers travel abroad for different reasons (e.g. work, holidays, studies, etc.) and it will not be appropriate to set a maximum amount of days or fixed period of time for portability of online services.

As long as a consumer is temporarily abroad, he should be able to access the online services like he would do in his country of habitual residence. The prohibition to impose a time limit for portability should be specifically mentioned in the regulation.

- **Obligation to enable cross-border portability (Article 3):** BEUC supports that there is an obligation imposed on service providers to guarantee cross-border portability, as well as the obligation to inform subscribers about the quality of delivery of the service abroad.

As expressed by the case-law of the European Court of Justice (*Murphy/Premier League case*), certain restrictions to the provisions of services in the single market cannot be justified by the protection of intellectual property rights. This includes restrictions to content portability when it has been lawfully acquired in a member state in the form of an online subscription.

It is important to take into account that if a certain online audiovisual service (e.g. a video-on-demand platform) operates in different Member States, the catalogue they offer might vary from one Member State to another due to the territorial licensing of content.

The obligation to enable portability shall not preclude such service providers from giving consumers that are abroad the possibility to choose between accessing the service as if they were ‘at home’ or as it is offered in the Member State where they are temporarily present.

- **Legal fiction to adjust the copyright framework (Article 4):** BEUC supports the approach proposed by the European Commission of establishing that the act of communication to the public occurs in the country of residence of the consumer and not in the country of access. This will bring more legal certainty for distributors and right holders. In particular, it will prevent eventual copyright claims from right holders or collective management organisations (CMOs) of the Member States from where the consumer is accessing the content.
- **Protection of personal data (Article 6):** BEUC supports this article and recalls that any verification of habitual residence carried out by the service provider must be reasonable and proportionate and done in full compliance with EU and national data protection rules.
- **Retroactive effect of the proposed regulation (Articles 5(1) and 7):** BEUC supports the retroactive effect of the Regulation for those subscription contracts concluded before the date of its application. Consumers that have acquired a subscription before that date should not be prevented from enjoying portability, especially when they are long-term or open-ended subscriptions.
- **Six-month time frame for application (Article 8):** BEUC strongly supports the 6-month time frame for the application of the Regulation. Lack of cross-border portability of online content is a consumer concern that must be addressed without undue delay.

Elements of the proposal that need to be clarified

Although overall the proposal is very good, there are some aspects that would require further clarification such as:

- **No obligation to ensure quality of the service provision when roaming (Article 3 (2)):** It is acceptable that the proposal does not impose any obligations in terms of the quality of the service when roaming. A quality obligation is likely to impose considerable cost on service providers and might be impossible to meet in some cases (for example, where national infrastructure is insufficient). However, if the service is available at a sufficient quality level, consumers must not be prevented from accessing it cross-border.
- **Means to verify the habitual residence of the consumer (Article 5(2)):** The proposal is not clear enough as to what means can be used by a service provider to verify the habitual residence of a subscriber. BEUC supports the inclusion of an indicative open-ended list of verification methods. Enough flexibility shall be granted to service providers in terms of the verification methods they chose, provided that such methods are reasonable and proportionate, and that the verification process remains simple for consumers. Any methods that involve constant tracking of subscribers' activities or cumulative verification measures which are too invasive or impose too much burden on consumers (e.g. providing a passport scan, plus a residence certificate, plus a bank statement) should not be accepted.
- **Inclusion of the principle of technology neutrality:** The principle of technology neutrality should be explicitly incorporated in the regulation to ensure that consumers are completely free to choose what device or technology they use to access the online services.

What are the next steps?

BEUC welcomes this proposal. Further reforms of the copyright framework are necessary to solve the problem of geo-blocking in the online environment, particularly in relation to audiovisual services. The present legislative initiative will only benefit those consumers who already have access to local online content services. Consumers living in member states where online offers are not yet developed and who want to access services available in other Member States will not be able to benefit from this initiative. They continue to face geo-blocking with the inherent risk of turning to unauthorised source if they cannot find the desired content.

The European Commission will make a [proposal](#) on the review of the Satellite and Cable Directive by late spring 2016. BEUC has made concrete proposals how to address geo-blocking in our response to the public consultation on the review of this Directive. Geo-blocking contradicts the very notion of a Digital Single Market and must be effectively tackled.



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