

## **Position of the Polish Confederation Lewiatan on the proposal for a regulation on ensuring the cross-border portability of online content services in the internal market.**

### **I. Introduction.**

Further to the publication by the European Commission of the proposal of the EU regulation on ensuring the cross-border portability of online content services in the internal market<sup>1</sup> (hereinafter: Proposal), the Polish Confederation Lewiatan is hereby presenting its observations with regard to the Proposal.

The Commission's initiative has the objective of satisfying the expectations of users who want to legally use the digital content they have purchased while they are travelling or while they are temporarily away from their Member State of residence (habitual residence). This is also important to European companies which are present in several Member States, which, because of the Commission's proposal, will be able to provide uninterrupted access to services to their customers, who are temporarily away from the place of their habitual residence.

In accordance with the Proposal, "online content service" means a service, as defined in Article 56 and 57 of the Treaty on the Functioning of the European Union, which a service provider is lawfully providing online in the Member State of residence on a portable basis and which is an audio-visual media service within the meaning of Directive 2010/13/EU or a service, the main feature of which is the provision of access to and the use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner, which is provided to a subscriber on agreed terms either:

- 1) against payment of money; or
- 2) without payment of money, provided that the subscriber's Member State of residence is verified by the provider.

The Proposal envisages changes which are limited to that which is necessary to introduce portability, while its structure implies the least possible interference in relations between holders of copyright and related rights (hereinafter: Copyright Holders) and providers of online content services (hereinafter: Online Service Providers).

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<sup>1</sup> 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, Brussels, 9.12.2015 COM(2015) 627 final 2015/0284 (COD)



According to Polish Confederation Lewiatan, the Proposal requires amendments which ensure that the right of portability will not be abused and will not create legal doubts or technical difficulties and will not impose disproportionate costs related to the implementation of this solution. We have presented our detailed comments on the Proposal below.

## **II. Detailed comments.**

### **1. Clarification of the premises for cross-border portability of online content service.**

#### **a. Definition of temporary presence.**

The notion of “temporary presence” should be clarified such that it cannot be abused. The current, very broad definition contained in Article 2 (d) in connection with Article 2 (c)<sup>2</sup> means that every, even a very long stay outside the place of permanent residence (habitual residence) would give the subscriber the right of portability of services purchased in the Member State of habitual residence. Meanwhile, the entitlement to “portability” should not undermine the principle of territoriality of copyright. It can be presumed that such far-reaching extension will result in an increase in the licence costs because, in relations between Copyright Holders and Online Service Providers, it will be difficult to accept the possibility of regular use of cross-border portability of services as being an “exceptional” extension beyond the scope of the licence.

#### **b. Ability to verify the place of habitual residence.**

According to Article 5 (1) of the Proposal, claims arising from contractual provisions, including those between Copyright Holders and Online Service Providers, which are contrary to the possibility of the cross-border portability of online content services are not enforceable. At the same time, paragraph 2 of this article gives Copyright Holders the right to demand that the service providers make use of effective means to verify that the online content service is provided (and hence whether the subscriber uses the service) in accordance with Article 3, which introduces cross-border portability of online content services. This means that, in event of abuse by subscribers, the Copyright Holders will be able to assert claims against the Online Service Provider who did not prevent the illegal use of the content. Therefore, Article 5 (2) indirectly imposes the obligation on Online Service Providers to apply effective means to prevent abuse, such as the use of the cross-border portability by unauthorised persons (e.g. people who are actually permanently resident in the State of “temporary presence”).

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<sup>2</sup> Article 2 (d): “Temporarily present” means a presence of a subscriber in a Member State other than the Member State of residence, Article 2 (c): “Member State of residence” means the Member State where the subscriber is habitually residing.



It is possible to determine the place of habitual residence, for instance on the basis of identity documents (identity card, passport, driving licence). However, these are not sources which determine the Member State of residence. In many countries, such documents do not contain addresses and the mere fact of having an identity document issued by a given Member State does not necessarily need to be equivalent to permanent residence in that Member State. The effective verification of the Member State of permanent residence would require related data to be collected from several sources. There are currently no legal grounds for such action. On the contrary, recital 23 indicates that the processing of the subscriber's data should not go beyond what is necessary to authenticate him and therefore limits the scope of personal data which can be processed.

In order to dispel these doubts, avoid the need to collect too much subscriber data and prevent disputes between Copyright Holders and Service Providers as to the proper verification of the Member State of residence, it would be necessary to clarify (e.g. in an annex to the regulation) how the Member State of residence should be verified. We believe that leaving this matter to the parties to the contract to resolve could result in a lack of uniformity of requirements which can have a negative impact on the creation of uniform European Union solutions.

**c. The need to clarify the rights of subscribers so as not to give them room for fraud.**

The Regulation should indicate that the use of cross-border access to digital content online in a Member State other than the State of residence is only possible for personal use. In the current wording, recital 21 allows for the commercial circumvention of the territorial nature of the acquired rights e.g. for the public dissemination of a transmission.

Proposition

The addition of a clause to the text of the Proposal showing clearly that the right to cross-border access to digital content online purchased in the Member State of residence is limited to only personal use.

**2. Subject matter.**

According to the Polish Confederation Lewiatan, guaranteeing subscribers the right of portability in the case of services provided free of charge is disproportionate. It does not seem as if a rational consumer would expect such rights and that such expectations can be considered reasonable. It is understandable that a subscriber who has paid for access to a particular service can consider that crossing an internal border of the EU should not deprive him of the ability to use "purchased" content. Access to free content should not be guaranteed.



The inclusion of services provided free of charge in the definition of online content services will create numerous doubts. In accordance with Article 2 (e) (2), an online content service is a service provided against payment of money or without payment of money provided that the subscriber's Member State of residence is verified by the provider. It is unclear whether this means the obligation to check the place of permanent residence or that the service provider providing services without payment of money can decide that it will not verify the subscriber's place of residence and therefore not provide cross-border portability of services. Recital 17 suggests that service providers should not be required to verify the subscriber's place of residence, although this is not confirmed in the Proposal. There is also a question of whether cross-border portability of services can be applicable if the place of permanent residence arises from the service provider's data or on the basis of this data, it can be reasonably assumed that the given country is the place of habitual residence.

Unless audio-visual services are related to other types of service (based on the customer's detailed personal data) provided by the providers of these services after signing the subscriber contract, service providers do not collect such detailed data about their subscribers. The location of the terminal device on which the service is reproduced is determined on the basis of the IP address and the given user's rights to use a particular service are verified on this basis. The question of verifying the Member State of residence if the service provider has not been collecting such data to date in order to provide the service gives rise to the risk of incurring financial outlay on solutions enabling users to increase the scope of data provided.

#### Proposition

It should be clarified that, if an online service is provided without payment of money, the verification of the Member State of residence for the purposes of the Proposal and thus ensuring portability, should be voluntary.

### **3. Contracts regarding on-line content services.**

As already pointed out in the introduction, the assumption that the introduction of cross-border portability of on-line content services will not affect contracts between the Copyright Holders and the Online Service Providers, as well as between the Online Service Providers and the subscribers appears to be incorrect. Relationships with entities from third countries give rise to particular doubts. In practice, agreements with Copyright Holders from States from outside the EU contain an indication of the applicable law and this is usually the law of those States. This means that Copyright Holders from third States will not be bound by the structure adopted in the Proposal. Even if they are prepared to guarantee such a right to their European trading partners in contracts, it can be expected that the actual extension of the scope of the licence granted will result in an increase in the licence fees related to



granting additional (from their point of view) rights. Therefore, it is probable that costs will increase for the Service Providers.

If the matter of portability is not regulated in a contract and, in accordance with the Proposal, the service provider from the EU grants the right of portability of the services, there is a risk of claims arising from entities from third States. Since disputes arising from such contracts are often subject to the jurisdiction of arbitration courts, there is a risk that the courts will acknowledge that the assurance of portability extends beyond the scope of the licence that has been granted and therefore breaches the terms of the agreement. This can expose the Service Providers to costs related to arbitration and a possible judgement regarding a breach of contract.

#### Proposition

In view of the said problems related to contract with entities from outside the European Union, the introduction of the Regulation should be preceded by appropriate negotiations by the European Commission with third countries at the level of international conventions.

#### **4. Changes in the terms of contracts with trading partners.**

The introduction of “portability” changes the conditions on which the service provider provides services to the subscriber. Therefore, it should inform the subscriber of these changes. Under Polish law, the subscriber will be entitled to terminate the contract, even one which is concluded for a definite term. This could adversely affect the economic situation of companies which, planning their activities, take into account the revenues from agreements concluded for a fixed period as a certain part of their budget.

#### Proposition

The Proposal should provide that amendments to the Online Service Provider’s contract with the subscriber related to the fulfilment by the operator of the obligations provided for in the Proposal cannot enable subscribers to terminate the service provision contract early (without incurring the consequences of this provided for in the contract).

The provision could make reference to recital 30 of TSM Regulation 2015/2120 and provide that “in cases in which the Online Service Provider amends contracts with a subscriber only in order to adapt it to the requirements of this Regulation, these amendments shall not give subscribers the right to withdraw from the contract on the basis of national laws.”



## 5. Costs and transitional period.

In accordance with Article 8 (2) of the Proposal, it is to be applied from 6 months following the date on which it enters into force. The Polish Confederation Lewiatan notes that this is insufficient time. The implementation of Proposal's provisions will result in the need for service providers to implement and test the technical functionalities of the solutions developed for this purpose. Depending on the final wording of the Proposal, they may be, *inter alia*, tools enabling the authentication of the Member State of residence of the users or the country of temporary residence of the users or the means required by the Copyright Holders for effectively verifying whether the user is benefiting from cross-border access to digital content in accordance with the assumptions of the Proposal (cf. Article 5 (2)).

### Proposition

The time after which the Regulation is to be applied should be extended to at least 12 months.

## 6. Information about quality.

Article 3 (3) of the Proposal requires the provider of the online content service to inform the subscriber of the quality of delivery of the online content service provided in the Member State in which the subscriber is temporarily present. It should be noted that it is not possible for the service provider to establish the quality of such a connection. It will depend on many factors including the speed of the network used by the subscriber (e.g. access through an open network in a café), which the service provider is unable to predict. This obligation should be deleted.

### Proposition

Information that the quality of the service provided will depend on the conditions prevailing in the country of temporary presence should be sufficient for the consumer.

*The Polish Confederation Lewiatan, Warsaw, 8 March 2016*  
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