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Digital Single Market portability and cross-border access proposals

the story so far...

April 2016

The EU's Digital Single Market (DSM) initiative has been a major policy focus of the EU Commission installed in 2014.

The DSM package aggregates a wide range of policy areas, including e-commerce, physical delivery services, copyright law, VAT, telecoms infrastructure, mobile roaming, data regulation and digital skills, with the aim of increasing employment and stimulating economic growth in the EU.

The DSM package is politically driven by EU politicians' need to demonstrate results of the European project to their increasingly sceptical citizens – hence the focus on populist benefits such as mobile roaming and content portability.

However, the DSM package created controversy within the audiovisual content industry following various statements by senior EU Commissioners criticising geo-blocking. Added to the Commission's antitrust investigation of territorial exclusivity between major US studios and Sky in the UK, the industry sensed a concerted Commission assault on territorial rights licensing.

Naturally, the audiovisual content industry responded with a strong case in defence of territorial licensing, stressing its criticality to content financing models, and its importance in maintaining the cultural diversity of European audiovisual content.



My aim for 2017 – no roaming charges, no unjustified geo-blocking and portability of legally bought content in the EU.

EU Vice President Ansip



May 2015 Strategy Paper

In May 2015, the Commission published its DSM strategy document. While it reserved much detail for a later stage, it was in some respects more conciliatory than the audiovisual content industry had feared. Its proposals on territoriality centred on:

- ‘portability’, i.e. the ability of consumers of content services to continue to access and use those services while travelling within the EU; and
- ‘cross-border access’, i.e. the ability of a consumer in one Member State to purchase online services provided in another Member State.

The latter had raised fears of mandatory multi-territory licences and/or the prohibition of exclusive territorial licences, fundamentally changing the nature of content financing and exploitation. However, the Commission acknowledged the need to “respect the value of rights in the audiovisual sector”, narrowing its objections to **“unjustified geoblocking”** and **“absolute territoriality”**.

December 2015 Proposals and Draft Portability Regulation

This left many matters open to speculation until December 2015, when the Commission published further details of its proposals. The first key proposal was a draft EU-wide portability Regulation which would:

- require “portable” online content services which are provided in a Member State to subscribers who are “habitually resident” there, to be accessible by those subscribers while they are “temporarily present” in another Member State;
- avoid the need for a grant of rights in the second Member State by creating a ‘legal fiction’ deeming the provision of an online content service outside the Member State of residence to occur solely in the Member State of residence; and
- render unenforceable any contractual provision which prevents portability (e.g. between rights holders and service providers requiring content to be geo-blocked).

The Regulation will, when passed, have direct effect and so will not need to be separately enacted into local law in each Member State.

Secondly, the Commission adopted a gradual approach to full cross-border access (although it stressed that this remains the ultimate objective), which will initially take the form of a support package to encourage cross-border access comprising:

- promotion of tools to bring more European works into the single market (e.g. ‘ready to offer’ catalogues of European films, licensing hubs, greater access to dubbing and subtitling services, standard identifiers of works, online search aggregation, and exploration of alternative financing models); and

- potential legislation following its review of the Satellite and Cable Directive (among other things, this Directive enshrines the “country of origin principle” such that where a broadcaster uplinks its signal to a satellite for communication to the public, rights need only be cleared according to the laws of one EU Member State in order to allow the broadcast of the satellite signal to the whole of the EU).

While this limited set of proposals assuaged some of the fears of the audiovisual content industry around cross-border access, nonetheless the Commission made its ultimate long-term objective clear. In the shorter term, the reviews of both the Satellite and Cable Copyright Directive and the Audiovisual Media Services (AVMS) Directive have potential to change the landscape. In particular, some German public service broadcasters are pushing for the Satellite and Cable Directive to be extended to online services which it is feared might potentially offer a degree of cross-border access via the back-door.

As for AVMS, the existing structure of “one-stop shop” regulation in one EU country and free movement of services into every other EU country, is under close scrutiny, with some EU Member States - eg France - advocating greater “country of destination” powers, largely in order to sustain their own audiovisual sector in the face of competition from cross-border services. Meanwhile, traditional broadcasters push for the relaxation of existing regulation to compete in a more level regulatory environment with on-demand services. Debate also continues about imposing regulation on services based entirely outside of the EU.

Key Issues with the Draft Portability Regulation

Since December 2015, the audiovisual content industry, Commission and the EU Council have been in dialogue seeking to improve the draft portability Regulation to:

- clarify the meanings of “habitually resident” and “temporarily present” (undefined in the draft Regulation) and to add some detail as to how these are to be verified. There is a school of thought in the Commission that if the Regulation has a robust definition of the former (so requiring service providers to authenticate anyone wishing to enjoy portability as validly being a subscriber in the “home” or licensed Member State), the audiovisual content industry should be more relaxed about the latter. This could at its extreme mean that “temporarily present” could stretch to many months whereas the French government is lobbying to restrict it to 45 days;

- clarify the extent to which the Regulation will apply to free content services. As currently drafted, a free service would automatically be included within the scope of the Regulation if customers’ “home” Member State is adequately verified – the Commission now seems to favour an “opt-in” regime for them; and
- address the very short implementation period between the Regulation passing into law and the commencement of the obligation to provide portability. This is a key practical issue for service providers who will need to amend their systems and technology to implement any authentication measures that the Regulation stipulates – or indeed that are required by their rights licensors as a matter of contract.

Next steps

The adoption of the Regulation requires consensus between the EU Council (representing the EU Member State governments) and the directly elected European Parliament, which has not yet begun detailed consideration of the proposal. The Parliament typically adopts an aggressive pro-consumer line in this type of negotiation and, for example, is expected to push for a more flexible concept of temporary.

The Commission has indicated its aim for the portability Regulation to come into force in 2017. This can only be achieved if consensus can be reached quickly between the Council and the Parliament as it would require passage of the Regulation by the end of June 2017 (assuming the current six month implementation period remains unaltered). This is a very ambitious timeline.

As to the next package of proposals towards greater cross-border access, the Commission had indicated its intention to publish this package before summer 2016, but the timetable appears now to have slipped with publication delayed until September 2016.

We have published more detailed updates on both the May 2015 strategy paper and the draft Regulation which are available [here](#).

Timeline

15 October 2014

Vice President Ansip: "Geo-blocking should not exist in a true Digital single Market."

23 February 2015

Vice President Ansip: "No one can be punished for accessing legally purchased content in another country. There is no space for geo-blocking in Europe."

24 August 2015

Commission begins a public consultation on potential review of the Satellite and Cable Directive.

15 September 2015

Vice President Ansip: "My aim for 2017 – no roaming charges no unjustified geo-blocking and portability of legally bought content in EU."

2014

15 July 2014

Incoming President Juncker sets out his political guidelines for the new Commission. These include the Digital Single Market, one aim of which is to "ensure that consumers can access services, music, movies and sports events on their electronic devices wherever they are in Europe and regardless of borders".

18 December 2014

EU Council calls on EU legislators to give new momentum to the proposed Digital Single Market and asks the Commission to submit an "ambitious communication" in this area.

2015

6 May 2015

Commission publishes its initial Digital Single Market strategy document. The paper aims to end **"unjustified geo-blocking"**, and its key features include proposals regarding:

1. portability of legally acquired content; and
2. ensuring cross-border access to legally purchased online services, while respecting the value of rights in the audio-visual sector.

The paper also promises to review the Satellite and Cable Directive, "to assess the need to enlarge its scope to broadcasters' online transmissions and the need to tackle further measures to ensure enhanced cross border access to broadcasters' services in Europe".

2015



2015

9 December 2015

The Commission issues a further detailed paper on its Digital Single Market proposals, including:

- draft legislation to enable subscribers “habitually residing” in one EU Member State to access their content services while “temporarily present” in another Member State (the “Portability Regulation”);
- a support package of non-legislative initiatives to promote cross-border access to online content services; and
- potential legislation to amend the Satellite and Cable Directive.

The paper reiterates the Commission’s ultimate goal of a harmonised copyright regime and cross-border access to content, albeit to be achieved gradually.

Commissioner Oettinger: “proposal on portability of online content presented today is just appetizer, main course will come 2016.”

September 2016

Anticipated publication by the Commission of detailed proposals on cross-border access, the amendment of the Satellite and Cable Directive, and other copyright exceptions. NB this was trailed for publication prior to the summer, but appears now to have been delayed.

19 November 2015

Vice President Ansip: “I don’t want pan-European licences, principle of territoriality should stay. But need to foster legal access.”

16 December 2015

Commission publishers statement on preliminary trends coming out of the public consultation on the Satellite and Cable Directive: “While a number of respondents see value in extending the clearance system applicable to cable retransmission to the simultaneous retransmission of TV and radio programmes on platforms other than cable (e.g. IPTV, open internet), others regard it as unwarranted.”

2016

Late 2016

Anticipated passage of the Portability Regulation

2017

July 2017

Anticipated coming into force of the Portability Regulation.

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