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DRAFT REGULATION ON THE CROSS-BORDER PORTABILITY OF ONLINE CONTENT SERVICES

On 9 December 2015 the European Commission (EC) tabled a proposal for a Regulation aimed at allowing consumers of an online content service subscribed to in their country of residence to access the service even when they are temporarily present in another Member State. The proposal is limited to “portable services”, i.e. those services which are already portable on the domestic market, provided either for or without payment of money.

The proposal is based on the legal fiction according to which the online service is considered to remain accessed to and used within the member state of habitual residence also when it is accessed from abroad (in the territory of another EU Member State). The legal fiction applies when the user is temporarily abroad and his/her residence has been verified by the service provider (“SP”).

ETNO believes that this proposal can have positive effects on the market, to the extent that it implies a significant benefit for consumers, who will be able to “carry” the content they legally access and use “at home” when travelling abroad. As a matter of fact, the portability regulation meets some consumers’ needs and represents progress by enabling consumers to access their content, while being abroad in other EU Member States.

However, the Commission’s proposal seems not to be fully balanced since it results in obligations imposed on online content SPs only, and in a discretionary power accorded to right holders (“RH”). As a matter of fact, Art. 5 (2) grants RHs the power to impose on SPs a duty to make use of “effective means” to verify that the service is provided in conformity with the rules of the Regulation. Therefore a balanced outcome is needed between the obligations imposed on Service providers and RH’s in order to make the portability proposal workable and, as such, not put at risk the desired positive effects for consumers.

The increase in the RHs’ ability to negotiate might lead to an increase in the cost of content services. It is left unclear whether and, if in the affirmative case, which of the different stakeholders engaged in the licensing/distribution chain should bear any relating additional costs. ETNO therefore stresses the need to clarify - in the regulatory part of the text - that the widespread possibility to access online content services under the concept of “content portability”, granted by this regulation, should neither impact on existing licenses, nor justify a change in future pricing structures.

ETNO stresses the need for a balanced approach to be adopted in the portability regulation: provisions have to be neutral and proportionate for all industry sectors and must by no means lead to additional burdens on SPs. It is ETNO’s general opinion that the text should introduce a

simplification of the applicable rules, which would be beneficial for market players and the market in general and would lead to a smooth approval of the Regulation.

The discussions within the EU Council and specifically the General Approach adopted by the Council on 26 May (based on the Presidency Compromise Text) seem to introduce some substantial improvements in terms of balance amongst players.

First, the Council text further clarifies (recital 20) that there is no need for SP, in case of portability of paid services, to acquire the relevant rights in another MS. This clarification is a first step towards overcoming the concerns related to the possible modification of current (and future) licensing contracts.

Also, the new process of verification of the MS of residence introduced by art.3B is particularly interesting.

In this respect, ETNO finds it crucial to use a more precise definition for the “Member State of residence” of a subscriber and the associated means of verification.

The principles of proportionality and necessity should not be exceeded in both these areas, and these should clearly remain in compliance with privacy rules.

In relation to the definition of MS of habitual residence, the Council’s compromise proposal refers to “the actual and stable residence to which he or she returns regularly”: this definition could go beyond the above-mentioned principles, since it could imply a definition of the “regularly” concept that would lead to an unnecessary complex system of verification. The wording of the regulation should reflect that there are existing established mechanisms in MS, for instance for fiscal purposes, which will be sufficient to confirm habitual residency in most cases. This would allow the proposal to be adopted quickly while allowing SP providers to investigate further if there are accounts which raise concerns about the true habitual residence of the account holder.

As far as the verification means are concerned, the Presidency’s compromise text, in particular art. 3B, is welcomed for making substantial improvements on the requirements which SPs have to observe when verifying the MS of residence. Verification is an essential component of making portability a successful measure for legitimate customers. At the same time, a trustworthy verification mechanism should help avoid the creation of “grey markets in content” which significantly undermine value of rights and services, also to the disadvantage of local players.

In ETNO’s view, it is fundamental to ensure that services providers have the possibility to choose reliable means of verification, with no intervention of RH. These means must be robust and cannot open up for constantly monitoring of a user’s location. ETNO therefore is particularly concerned about the Council’s proposal and Commission recital 17 to include, within the possible verification means of access control, the sampling of IP addresses, and strongly suggest eliminating it from the list. Permanent sampling of IP address should not be an option since such a process does not seem to offer enough safeguards for subscribers in terms of privacy protection. In addition, it does

not provide certainty of the consumer's location, since IP address verification can be circumvented via the use of VPNs and other masking technology. Verification, by a SP, of a subscriber's Member state of residence should be built upon reliable criteria, and it should be left to the SPs to combine several suitable criteria where there might remain doubts as to the accuracy of the result of the verification process. Among such criteria, i.e. an address information obtained via establishing a current customer relationship, a current bank account in the member state of residence, combined with a recent utility bill, an ID card, a driving license or a passport may be relevant. In particular, where this level of verification is carried out for existing account holders, it can be deemed sufficient and reliable for portability purposes.

Within the list of verification means, ETNO stresses that a particular attention is to be paid to the declaration made by the subscriber on his/her MS of residence, because of the easiness of fakes.

A further positive element introduced by the Council relates to the scope of portability: according to the Compromise text, SPs are obliged to grant portability of AV media services only when services are provided against payment of money, since providers of such services are in a position to verify the MS of residence; in case of services provided without such a payment, providers have the option to provide for portability, if they comply with the requirements suggested for the verification of residence in the other cases. ETNO believes that this provision fully reflects the market needs: where providers of services provided without payment of money or free to air services wish to offer portability to their viewers, they must also fulfill the verification criteria set out above. ETNO stresses the general need to align these regulatory provisions with the ones included in the Consumer rights directive.

Some other elements of the Council text need to be clarified in order to avoid any misinterpretation and divergent results at national level (especially because of the choice of a Regulation, which was likely and rightfully motivated by the established need to avoid any such divergence).

Specifically, regarding art. 3(3), providing that the SP has to provide information concerning the quality of delivery of the service, prior to providing the service, it has to be stressed that a domestic SP is not in a position to give full information to consumers in relation to features that remain outside its knowledge, power of control and verification. This limitation therefore should be specified accordingly.

Similar considerations are to be drawn in relation to recital 18, providing that users can access the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities as those offered in their MS. In this respect, it is important to stress that the number of users and functionalities of the service may differ also due to the visited network's characteristics that are outside the SP control.

As the implementation of this regulation will require adjustments of technical and consumer information systems, more time to implement the regulation should be given than the currently proposed 6 months.

In conclusion, this Regulation must ensure clear and robust provisions applicable to current and future contracts, in order to secure them, while avoiding creating grey markets in access to content which disadvantage regional and local players. In parallel, the Regulation should ensure robust verification means of the MS of residence, which must remain compliant with privacy rules. Provisions also need to be clear and robust, so as to ensure a quick and efficient implementation of the Regulation.

At this stage, although we share the purpose of the Commission's proposal for the benefit of consumers, we believe that the text is not entirely developed and balanced. The Council's approach is a step in the right direction but leaves room for legal uncertainty and disproportionate obligations. We believe that improvements should be made to ensure that the text is clear, simple, balanced and proportionate.

About ETNO

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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