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 (Text with EEA relevance)

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Seamless access throughout the Union to online content services that are lawfully provided to consumers in their Member State of residence is important for the smooth functioning of the internal market and for the effective application of the principles of free movement of persons and services. Since the internal market comprises an area without internal borders relying, inter alia, on the free movement of persons and services, it is necessary to ensure that consumers can use portable online content services which offer access to content such as music, games, films, entertainment programmes or sports events, not only in their Member State of residence but also when they are temporarily present in another Member State for purposes such as leisure, travel, business trips or learning mobility. Therefore, barriers that hamper access to and use of such online content services in such cases should be eliminated.

(2) The technological developments that have led to a proliferation of portable devices such as laptops, tablets and smartphones are increasingly facilitating the use of online content services by providing access to them regardless of the location of consumers. There is a rapidly growing demand on the part of consumers for access to content and innovative online services not only in their Member State of residence but also when they are temporarily present in another Member State.

Changes to legislation: *Regulation (EU) 2017/1128 of the European Parliament and of the Council is up to date with all changes known to be in force on or before 28 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(3) Consumers increasingly enter into contractual arrangements with service providers for the provision of online content services. However, consumers that are temporarily present in a Member State other than their Member State of residence often cannot continue to access and use the online content services that they have lawfully acquired the right to access and use in their Member State of residence.

(4) There are a number of barriers which hinder the provision of online content services to consumers temporarily present in a Member State other than their Member State of residence. Certain online services include content such as music, games, films or entertainment programmes which are protected by copyright or related rights under Union law. At present, the barriers to cross-border portability of online content services differ from one sector to another. The barriers stem from the fact that the rights for the transmission of content protected by copyright or related rights, such as audiovisual works, are often licensed on a territorial basis, as well as from the fact that providers of online content services might choose to serve specific markets only.

(5) The same applies to content, such as sports events, which is not protected by copyright or related rights under Union law but which could be protected by copyright or related rights under national law or by virtue of other specific national legislation and which is often also licensed by the organisers of such events or offered by providers of online content services on a territorial basis. Transmissions of such content by broadcasting organisations are protected by related rights which have been harmonised at Union level. Moreover, transmissions of such content often include copyright-protected elements such as music, opening or closing video sequences or graphics. Also, certain aspects of transmissions of such content, specifically those relating to broadcasting events of major importance for society as well as to short news reports on events of high interest to the public, have been harmonised by Directive 2010/13/EU of the European Parliament and of the Council[(4)]. Finally, audiovisual media services within the meaning of Directive 2010/13/EU include services which provide access to content such as sports events, news or current affairs.

(6) Increasingly, online content services are marketed in a package in which content which is not protected by copyright or related rights is not separable from content which is protected by copyright or related rights without substantially lessening the value of the service provided to consumers. This is especially the case with premium content such as sports events or other events of significant interest to consumers. In order to enable providers of online content services to provide to consumers full access to their online content services when consumers are temporarily present in a Member State other than their Member State of residence, it is indispensable that this Regulation also covers such content used by online content services and therefore that it applies to audiovisual media services within the meaning of Directive 2010/13/EU as well as to transmissions of broadcasting organisations in their entirety.

(7) The rights in works protected by copyright and in subject-matter protected by related rights ('works and other protected subject-matter') are harmonised, inter alia, in Directives 96/9/EC[(5)], 2001/29/EC[(6)], 2006/115/EC[(7)] and 2009/24/EC[(8)] of the European Parliament and of the Council. The provisions of international agreements in the area

***Changes to legislation:** Regulation (EU) 2017/1128 of the European Parliament and of the Council is up to date with all changes known to be in force on or before 28 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

of copyright and related rights concluded by the Union in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights annexed as Annex 1C to the Agreement establishing the World Trade Organization of 15 April 1994, the WIPO Copyright Treaty of 20 December 1996, and the WIPO Performances and Phonograms Treaty of 20 December 1996, as amended, form an integral part of the Union legal order. Union law should, insofar as is possible, be interpreted in a manner that is consistent with international law.

(8) It is essential that providers of online content services that make use of works or other protected subject-matter, such as books, audiovisual works, recorded music or broadcasts have the right to use such content for the relevant territories.

(9) The transmission by providers of online content services of content that is protected by copyright or related rights requires the authorisation of the relevant rightholders, such as authors, performers, producers or broadcasting organisations, regarding the content included in the transmission. This is equally true when such transmission takes place for the purpose of allowing a consumer to carry out a download in order to use an online content service.

(10) The acquisition of a licence for relevant rights is not always possible, in particular when rights in content are licensed on an exclusive basis. In order to ensure that territorial exclusivity is effectively complied with, providers of online content services often undertake, in their licence contracts with rightholders, including broadcasting organisations or events organisers, to prevent their subscribers from accessing and using their services outside the territory for which the providers hold the licence. Such contractual restrictions imposed on providers require them to take measures such as disallowing access to their services from internet protocol (IP) addresses located outside the territory concerned. Therefore, one of the obstacles to the cross-border portability of online content services is to be found in the contracts concluded between the providers of online content services and their subscribers, which reflect the territorial restriction clauses included in contracts concluded between those providers and the rightholders.

(11) The case law of the Court of Justice of the European Union should be taken into account when balancing the objective of protecting intellectual property rights with the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU).

(12) Therefore, the objective of this Regulation is to adapt the harmonised legal framework on copyright and related rights and to provide a common approach to the provision of online content services to subscribers temporarily present in a Member State other than their Member State of residence by removing barriers to cross-border portability of online content services which are lawfully provided. This Regulation should ensure cross-border portability of online content services in all sectors concerned and hence provide consumers with an additional means of accessing online content lawfully, without affecting the high level of protection guaranteed by copyright and related rights in the Union, without changing the existing licensing models, such as territorial licensing, and without affecting the existing financing mechanisms. The concept of cross-border portability of online content services should be distinguished from that of

Changes to legislation: *Regulation (EU) 2017/1128 of the European Parliament and of the Council is up to date with all changes known to be in force on or before 28 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

cross-border access by consumers to online content services provided in a Member State other than their Member State of residence, which is not covered by this Regulation.

(13) Given the Union instruments that exist in the field of taxation, it is necessary to exclude the field of taxation from the scope of this Regulation. Therefore, this Regulation should not affect the application of any provision related to taxation.

(14) This Regulation defines several concepts necessary for its application, including the Member State of residence. The Member State of residence should be determined taking into account the objectives of this Regulation and the necessity to ensure its uniform application in the Union. The definition of the Member State of residence implies that the subscriber has his or her actual and stable residence in that Member State. A provider of an online content service who has verified the Member State of residence in accordance with this Regulation should be allowed to assume, for the purposes of this Regulation, that the Member State of residence as verified is the only Member State of residence of the subscriber. Providers should not be obliged to verify whether their subscribers are also subscribers to an online content service in another Member State.

(15) This Regulation should apply to online content services that providers, after having obtained the relevant rights from rightholders in a given territory, provide to their subscribers on the basis of a contract, by any means including streaming, downloading, through applications or any other technique which allows use of that content. For the purposes of this Regulation, the term contract should be regarded as covering any agreement between a provider and a subscriber, including any arrangement 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. A registration to receive content alerts or a mere acceptance of HTML cookies should not be regarded as a contract for the provision of online content services for the purposes of this Regulation.

(16) An online service which is not an audiovisual media service within the meaning of Directive 2010/13/EU and which uses works, other protected subject-matter or transmissions of broadcasting organisations in a merely ancillary manner should not be covered by this Regulation. Such services include websites that use works or other protected subject-matter only in an ancillary manner such as graphical elements or music used as background, where the main purpose of such websites is, for example, the sale of goods.

(17) This Regulation should apply only to online content services which subscribers can effectively access and use in their Member State of residence without being limited to a specific location, as it is not appropriate to require providers of online content services that do not offer portable online content services in the Member State of residence of a subscriber to do so across borders.

(18) This Regulation should apply to online content services which are provided against payment of money. Providers of such services are in a position to verify the Member State of residence of their subscribers. The right to use an online content service should be regarded as acquired against payment of money, whether such payment is made directly to the provider of the online content service, or to another party such as a

***Changes to legislation:** Regulation (EU) 2017/1128 of the European Parliament and of the Council is up to date with all changes known to be in force on or before 28 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

provider offering a package combining an electronic communications service and an online content service operated by another provider. For the purposes of this Regulation, the payment of a mandatory fee for public broadcasting services should not be regarded as a payment of money for an online content service.

(19) Providers of online content services should not subject their subscribers to any additional charges for the provision of cross-border portability of online content services in accordance with this Regulation. It is possible however that subscribers, in order to access and use online content services in Member States other than their Member State of residence, could be subject to fees payable to operators of electronic communications networks used to access such services.

(20) Providers of online content services which are provided without payment of money generally do not verify the Member State of residence of their subscribers. The inclusion of such online content services in the scope of this Regulation would involve a major change to the way those services are delivered and involve disproportionate costs. However, the exclusion of those services from the scope of this Regulation would mean that providers of those services would not be able to take advantage of the legal mechanism which is provided for in this Regulation and which enables providers of online content services to offer cross-border portability of such services, even when they decide to invest in means that allow them to verify their subscribers' Member State of residence. Accordingly, providers of online content services which are provided without payment of money should be able to opt to be included in the scope of this Regulation provided that they comply with the requirements on the verification of the Member State of residence of their subscribers. If such providers exercise that option, they should comply with the same obligations as imposed under this Regulation upon the providers of online content services which are provided against payment of money. Furthermore, they should inform the subscribers, the relevant holders of copyright and related rights and the relevant holders of any other rights in the content of the online content service of their decision to exercise that option in a timely manner. Such information could be provided on the provider's website.

(21) In order to ensure the cross-border portability of online content services, it is necessary to require providers of online content services covered by this Regulation to enable subscribers to use such services in the Member State in which they are temporarily present in the same manner as in their Member State of residence. Subscribers should have access to online content services offering 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 Member State of residence. It is essential that the obligation to provide cross-border portability of online content services be mandatory and therefore the parties should not be able to exclude it, derogate from it or vary its effect. Any action by a provider which would prevent subscribers from accessing or using the service while temporarily present in a Member State other than their Member State of residence, for example restrictions to the functionalities of the service or to the quality of its delivery should be considered to be a circumvention of the obligation to provide cross-border portability of online content services and therefore contrary to this Regulation.