



February 2016  
AK Position Paper

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

## About us

**The Austrian Federal Chamber of Labour is by law representing the interests of about 3.4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudi Kaske  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.4 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

## The AK's position in detail

### Summary of consumers' concerns

Based on contacts with consumers and discussions with broadcasting organisations, BAK concurs with the finding of the EU Commission that Austrian consumers, too, do not currently enjoy unlimited cross-border portability for audio-visual media services that can be called up on online. Consumers traveling abroad do not understand why they do not have (full) access to their usual information and entertainment platforms that they can access in their country of residence. This situation accords with our experiences from consultations with consumers. The proposed regulation goes a long way toward meeting consumers' needs, and BAK welcomes it in principle against this backdrop.

Regardless of the regulatory details, the proposal is also accommodating toward the online service providers themselves. The latter complain about the power imbalance that exists to their disadvantage in negotiations with (international) right holders with regard to the territorial terms and conditions and the licence costs of broadcasting rights.

One must keep in mind in this context that consumers will also only enjoy full benefits from the proposed regulation if the detailed rules actually do allow online service providers to disseminate media content in all EU countries in actual practice

- firstly, without (substantial) additional costs and

- second without monitoring actions that impair users' privacy and reduce users' trust.

If the territorial limitations to use are eliminated for media content, licensors can assume that the potential user group will expand and demand financial compensation for expanding the potential of interested consumers. The fear is that online suppliers could switch in this situation to no longer putting certain media content online at all, so as to circumvent the duties under the regulation and the additional costs indirectly resulting from it. Of course, consumers would not be well served with a dilution of the range of services.

Online service providers may be forced in any case to provide verification to licensors that only the consumers within the country of residence for which a license was obtained would receive access to online content when traveling in the EU. This obligation assumes corresponding checks, which could quickly become contrary to the interests of the internet users in the protection of their privacy and their data. From the standpoint of consumers, it is not permissible to leave it to the market to find a fair way of reconciling these conflicting interests between control and fundamental freedoms under the law. From the perspective of BAK, the regulation should include rules that serve the protection of the consumers' interests in secrecy. For instance, it would suffice to determine the users' country code in the IP address in connection with the first foreign

use (or on expiration of a period from which a permanent stay abroad can be assumed and not just a temporary one). By contrast, further determinations of people's identity and their use behaviour outside their country of residence should be explicitly prohibited for the purposes of this regulation.

### Regarding the individual points

#### Proportionality

According to the findings of the EU Commission, the proposal "does not substantially affect the licensing of rights and therefore has a limited effect on the business models of right holders and service providers. The proposal will not oblige right holders and service providers to renegotiate contracts as it will make unenforceable any provisions in contracts contrary to the obligation to provide for cross-border portability. Moreover, the proposal does not impose on service providers any disproportionate cost..."

BAK believes that this optimistic view could turn out to be incorrect. The consequences of the non-enforceability of clauses under contract law relate only to inadmissible limitations on portability. However, they do not pertain to demands by right holders to bill additional charges in return for consent to cross-border access to copyrighted content or to conduct an inappropriate check on the identity of the user (or on whether the country of residence is outside the licensed territory and foreign use is more than just temporary). Either action can entail disadvantageous consequences for consumers. The subscription costs could rise (also for consumers who never use the access). Certain content

might not be offered online anymore at all. The internet users' interests in having anonymous access (currently assured for example in media libraries of broadcasting organisations) could be disregarded right along with their interests in not having their user behaviour recorded.

Against this backdrop, it would appear expedient to include additional rules that would prevent right holders from demanding (substantially) higher license fees or technical protective measures critical to data protection.

#### Stakeholder consultations

The EU Commission says the proposal addresses the concerns voiced by stakeholders. For instance, the duty to provide portability is not imposed on those service providers that deliver services "free of charge and without authentication of the consumer's Member State of residence". To establish legal certainty, one must clarify whether broadcasting organisations with their publicly accessible media libraries fall under this exception. Broadcasting services financed by advertising lack the payment aspect or the alternative criterion of the service provider verifying the subscriber's Member State of residence (in the case of free services). Public broadcasters may not meet the two criteria as regards their media library, which are accessible in the most general sense in the country of residence (without registration of the country of residence) and thus may be excluded from the scope of applicability of these provisions. Moreover, their legal mandate to provide service pertains explicitly to the domestic market as a rule. Since consumers would also benefit from cross-border access in these cas-



es, broadcasting organisations should have the choice of opting into the regime of the regulation for instance to enjoy the contractual terms in Articles 4 and 5.

### **Article 2 Definitions**

A subscriber is defined in this article as “any consumer who, on the basis of a contract for the provision of an online content service with a provider, may access and use such service in the Member State of residence.” We deem this definition to be an indication that the regulation does not apply to conventional broadcasting organisations with respect to their generally accessible services. After all, (unregistered) access to this range is open to everyone – regardless of whether they are an individual or a legal entity, a consumer or not . A clarification would be useful, however.

The term “temporarily present” definitely needs further elaboration to assure legal certainty but also to ensure that internet users are not exposed to inappropriate monitoring actions with regard to the period of use abroad.

In the definition of “Online content service”, BAK likewise urges more precise formulation in the explanations of this passage: “services which are provided without payment of money provided that the subscriber’s Member State of residence is verified by the service provider”. According to the explanations, the verification of the Member State of residence should be based, inter alia, on information such as an IP address. To us, this appears to be a criterion for distinguishing who is to be considered

a subscriber of an online content service and who is not. It is not suitable for this purpose because ultimately every service provider that wants to and must prevent cross-border portability inevitably determines the user’s IP address by way of geoblocking.

### **Article 3 Obligation to enable cross-border portability of online content services**

The obligation to offer subscribers access to services also abroad pertains – logically – only to temporary stays abroad. As the term “temporary” is not defined, it is left up to the market (or to the rulings handed down by the European Court of Justice (ECJ) on the matter) to decide which minimum or maximum periods of time are to be heeded by the service provider. As the interpretation of service providers could vary, it would be useful to have points of reference as to the minimal length of time after which a stay would definitely no longer be considered temporary. This clarification would have the advantage that service providers or right holders cannot plead that intermediate monitoring of the place of use is required at shorter intervals.

### **Article 4 Localisation of the provision**

This article establishes that access to the service is to occur solely in the Member State of residence. Under certain circumstances, it opens up the chance for service providers not to be confronted with substantial additional costs for the territorial enlargement of the distribution territory in contractual negotiations with right holders. As this chance is far from being certain, how-

ever, BAK urges that provisions be included regarding the cost issue – akin to earlier comments about assuring a diverse range for consumers.

#### **Article 5 Contractual provisions**

This article states that contractual provisions that limit portability shall be deemed unenforceable. BAK explicitly welcomes the inclusion of this legal consequence. However, it is questionable whether this principle would also have to be heeded by right holders from third party countries outside the EU. Given the major market dominance of US licensors with respect to sport and film rights, this issue requires clarification.

#### **Article 6 Protection of personal data**

The reference made in this article to valid EU directives on data protection by no means suffices in BAK's estimation. To protect consumers, the regulation must take a stand about which measures can be required of legal holders and can be taken by service providers and which measures constitute such intense interventions that they are inadmissible in fundamental rights. As conflicting interests of different parties can be expected, the provisions regarding the reasonableness of the methods allowed to verify temporary presence abroad and the users' place of residence must be as concrete as possible.

Should you have any further questions  
please do not hesitate to contact

**Daniela Zimmer**

T: + 43 (0) 1 501 65 2722

daniela.zimmer@akwien.at

**and**

**Christof Cenovar**

(in our Brussels Office)

T +32 (0) 2 230 62 54

christof.cesnovar@akeuropa.eu

**Bundesarbeitskammer Österreich**

Prinz-Eugen-Straße 20-22

1040 Vienna, Austria

T +43 (0) 1 501 65-0

**AK EUROPA**

Permanent Representation of Austria to the EU

Avenue de Cortenbergh 30

1040 Brussels, Belgium

T +32 (0) 2 230 62 54

F +32 (0) 2 230 29 73