

# The Portability Regulation (Regulation (EU) 2017/1128)

## A Commentary on the Scope and Application

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**Abstract:** Since 1 April 2018, the Portability Regulation prohibits geo-blocking of online content within the European Union. The regulation regulates the unrestricted access to (paid) subscribed online content of all European citizens, regardless of where they are present in EU territory. The presence must be “temporary”. Providers of fee-based online content are then obliged to guarantee their subscribers

cross-border portability. A limitation of the access or the demand of additional fees is prohibited. The Portability Regulation does not apply directly to offers that are not or not directly liable to payment, such as media libraries. It is rather voluntary for these providers. Furthermore, the Portability Regulation also includes rules to minimize the user’s personal data collected in order to identify the Member State.

**Keywords:** Portability Regulation; portability; geo-blocking; online content; digital borders

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Recommended citation: Sebastian Engels and Jan Bernd Nordemann, The Portability Regulation (Regulation (EU) 2017/1128): A Commentary on the Scope and Application, 9 (2018) JIPITEC 179 para 1.

## A. Introduction

### I. Meaning and purpose

1 The Portability Regulation is part of the Initiative of the European Commission towards a Digital Single Market, which has its origin in the Commission’s communication on the Digital Single Market Strategy for Europe (COM(2015) 192 final), which was published in May 2015. The objective stated in the communication was the achievement of a Union-wide connected Digital Single Market based on three pillars: (1) better access to online goods and services, (2) optimum conditions for digital networks and services and (3) the digital economy as a growth engine. As a Digital Single Market, the Commission envisions a digital European single market, in which private citizens and businesses are able seamlessly to access and pursue online activities and use web applications, under conditions of fair competition and with a high level of consumer

and personal data protection, irrespective of their nationality, residence or place of business. The Portability Regulation therefore only governs a small part of the first pillar. It only legislates for the portability of online content outside the Member State of residence for subscribers to a service who are temporarily present in another Member State (Art. 1 (1) Portability Regulation). As such, the Portability Regulation uses a legal fiction that such a temporary presence is deemed to be a presence in the Member State of residence, see Art. 4 Portability Regulation. Therefore, it is not about consumers’ general cross-border access across the EU to online content services in Member States other than their Member State of residence. The Regulation, which implemented the Portability Regulation as one of the first projects of the “digital agenda”, thus separates the question of the portability of content services in cases of temporary presence in another Member State from the far more complex and economically more serious question of cross-border access to online content services (c.f. section B.I.1.).

2 Prior to the Portability Regulation, there were various barriers to the provision of access to content to consumers temporarily present in a Member State, in particular due to the fact that licences to use content protected by copyright or related rights are often granted on a territorial basis (as in the case, for example, of films) and that providers of online content services can decide only to service certain markets (see Recital 4 Portability Regulation). The possibility under copyright law to grant rights for individual States separately is also not excluded by antitrust law (Art. 101 TFEU). There is no general country of origin principle under EU anti-trust law governing online uses in EU copyright law. The exceptions also confirm this, namely the restricted country of origin principle in Art. 4 Portability Regulation and the country of origin principle for satellite broadcasting as per Art. 1 (2) (b) Satellite and Cable Directive (for more detail c.f. below section B.VII.2.(c)). The Portability Regulation is aimed at bringing about a balancing of the different interests<sup>1</sup>: on the one hand, the **user** of digital and copyright protected content is increasingly mobile and expects online access to the works throughout the European Union. It would reach the limits of user acceptance if a consumer, who is temporarily present in another country, were not able to access something they have acquired and paid for.<sup>2</sup> The privilege is only afforded to users domiciled within the European Union, however; people who have their permanent residence in a country outside the European Union do not come under the Portability Regulation (c.f. below section A.II. and section B.II.2.(a)). On the other hand, the interests of the rightholders in maintaining their exclusive rights position must be preserved. The provisions of the Regulation are not intended to reduce the high level of protection enjoyed by authors (Recital 12 Portability Regulation). One of the interests of authors and other rightholders is in particular the ability to define their own optimum exploitation strategy themselves, through a territorial splitting of rights. For example, a differentiation in price and conditions by territory enables film rightholders to secure a sufficient return on investment in the high risk business of film production, thereby

ensuring diversity in European film is protected.<sup>3</sup> Furthermore, the interests of the providers of online services must be taken into account.

## II. History of the Regulation

- 3 On 9 December 2015 the Commission published a proposal for a Regulation to ensure cross-border portability of online content services in the internal market (COM(2015) 627 final), that is to say the first draft of the Portability Regulation. This draft version was based on the results of a consultation carried out in 2013 and 2014 on the review of the EU copyright rules.<sup>4</sup> The proposed Regulation was adopted by the European Parliament on 18 May 2017 with a series of amendments and published on 30 June 2017. The Regulation has therefore been in force since 20 July 2017 (Art. 11 (1) Portability Regulation). However, the Portability Regulation only applies in the Member States from 1 April 2018 (Art. 11 (2) Portability Regulation).
- 4 The Portability Regulation is the first EU regulation in the area of copyright law. Elsewhere, the EU had pursued the harmonisation of copyright law through directives, which then had to be transposed into the national copyright laws. EU regulations differ from directives in that regulations are directly applicable in every Member State (Art. 288 (2) TFEU). The Portability Regulation has thus become the first part of a European copyright system directly applicable in all Member States. It remains to be seen whether this trend will continue. The reasoning behind the decision to employ the legislative instrument of a regulation, as stated in Recital 35, namely that it was “necessary in order to guarantee a uniform application of the cross-border portability rules across Member States and their entry into force at the same time with regard to all online content services can also be applied to other copyright questions which have to date only been harmonised by way of directives.

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1 *Eginger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 698, 712; *Ranke/Glöckler*, Multimedia und Recht (MMR) 2017, 378, 382; *Synodinou* in Synodinou et al, EU Internet Law (2017), p. 217.

2 *Grünberger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 697, 698; *Synodinou* in Synodinou et al, see Fn. 1, p. 237.

3 *Schwarz*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2015, 950; *Ranke/Glöckler*, Multimedia und Recht (MMR) 2017, 378, 382 regard this interest as being protected; *Synodinou* in Synodinou et al, see Fn. 1, p. 233; see on this point, in detail *Engels*, Die Vereinbarkeit der territorialen Aufspaltung von Verwertungsrechten mit den europäischen Binnenmarktregeln, p. 44 et seqq.

4 <[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf)>.

### III. Charter of Fundamental Rights of the European Union

- 5 According to Recital 30 Portability Regulation, the Portability Regulation is in line with the fundamental rights and principles which are recognised in the EU Charter of Fundamental Rights. The Portability Regulation must therefore be interpreted and applied in accordance with that Charter. Of particular relevance are the right to respect for privacy and family life, the right to the protection of personal data, the right to freedom of expression, the right to freedom to conduct a business and the protection of property, including intellectual property rights. The processing of personal data is subject to detailed regulation in Art. 8 Portability Regulation (c.f. below section B.VIII.1.). National constitutional law of EU member states should not apply. For example, the German Grundgesetz (GG, German Constitution) does not apply because the Portability Regulation is EU law directly applicable in Germany<sup>5</sup>, neither does the ECHR, to the extent the scope of application of the EU Charter of Fundamental Rights applies<sup>6</sup>.

### IV. International legal framework

#### 1. International scope of application of the Portability Regulation

- 6 The Portability Regulation only applies in favour of users who have their permanent residence in a Member State of the European Union (see Recital 26 Portability Regulation). People who have their permanent residence in a country outside the European Union do not fall under the Portability Regulation (c.f. below section B.II.2.(a)). However, online services which are not located within the EU or which supply their service from a country outside the EU do fall under the Portability Regulation (c.f. below section B.II.2.(e)).

#### 2. International conflict of laws

- 7 Under Art. 7 (2) Portability Regulation, the provisions of the Portability Regulation apply irrespective of which national contract law is applicable to the contracts of the provider of the online content

5 See BVerfG (Bundesverfassungsgericht, German Federal Constitutional Court) decision of 31 May 2016 in case 1 BvR 1585/13, para. 115 - *Metall auf Metall*, remarking on completely harmonised directives.

6 BGH (Bundesgerichtshof, German Federal Court of Justice) decision of 1 June 2017 in case I ZR 139/15, para. 35 - *Afghanistan Papiere*.

service with the rightholders on one side or with the subscribers on the other. This serves to clarify that the rules set out in Art. 7 (1) Portability Regulation are mandatory under international conflict of law rules and thus constitute overriding mandatory provisions as per Art. 9 (1) Rome I Regulation (c.f. below section B.VII.1.).

#### 3. International copyright treaties

- 8 International treaties on the regulation of copyrights and ancillary copyrights (related intellectual property rights) are binding upon EU Member States, but also for the European Union, however individual persons cannot cite such treaties.<sup>7</sup> Recital 7 Portability Regulation stipulates that the provisions of the Portability Regulation must be consistent “insofar as is possible”, in particular with the international obligations under TRIPS (and thus also of the RBC), WCT and WPPT.<sup>8</sup> Above all, the Portability Regulation raises the question of whether the restricted country of origin principle as per Art. 4 Portability Regulation is in line with the provisions of Art. 8 WCT for the affording of a right - also interactive - of communication to the public.

### V. Brief summary of the provisions of the Portability Regulation

- 9 Art. 1 Portability Regulation determines the subject matter and scope of application of the Portability Regulation. This wording of the subject matter of the provision has no independent regulatory content as far as the definition of terms in Art. 2 Portability Regulation and the substantive provisions in Art. 3 to 9 Portability Regulation are concerned (c.f. below section B.I.1.). The material core of the Portability Regulation is contained in Art. 3 and Art. 4 Portability Regulation. Firstly, Art. 3 Portability Regulation provides for an obligation to enable cross-border portability of online content services. Art. 4 Portability Regulation defines the place of residence as the place of provision of online content services as well the access to and

7 CJEU decision of 15 March 2012 in case C-135/10, para. 43 et seqq. - *SCF*; see also CJEU decision of 14 December 2000 in joined cases C-300/98 and C-392/98, para. 41 et seqq. - *Dior/Tuk Consultancy*; CJEU decision of 13 September 2001 in case C-89/99, para. 51 et seqq. - *Schieving-Nijstad*; For more detail on this, see *Nordemann-Schiffel* in Fromm/Nordemann, *Urheberrecht* (Commentary on the German Copyright Act), 12<sup>th</sup> edition 2018, Preliminary note to § 120 UrhG et seqq., marg. nos. 9 et seqq.

8 For more detail on this, see *Nordemann-Schiffel* in Fromm/Nordemann, *Urheberrecht* (Commentary on the German Copyright Act), 12<sup>th</sup> edition 2018, Preliminary note to § 120 UrhG et seqq., marg. nos. 12 et seqq.

use of these services, if the user is only temporarily present in another Member State. Under Art. 5 Portability Regulation, the provider of the online service is entitled to verify this Member State of residence. Art. 6 Portability Regulation contains a special rule for the cross-border portability of online content services provided free of charge, while Art. 7 Portability Regulation then regulates the contractual provisions between providers of online content services and rightholders on the one hand and between providers of online services and their users on the other; the article also contains provisions regarding international private law. The protection of personal data is the subject of Art. 8 Portability Regulation. Transitional provisions governing existing contracts and acquired rights are set out in Art. 9 Portability Regulation. Art. 10 Portability Regulation provides for a review of the Portability Regulation by the Commission by 21 March 2021. The final provisions, in particular regarding the entering into force of the Regulation, are found in Art. 11 Portability Regulation.

## VI. Relationship to other provisions

- 10 The Portability Regulation is subordinate to the extent EU primary law provisions apply. This is true in particular in respect of Art. 101 and Art. 102 TFEU (c.f. below section B.VII.2.(c); see Recital 33 Portability Regulation). The Portability Regulation does not affect the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84 of 20 March 2014, p. 82), as expressly stated in Recital 34 Portability Regulation. No priority is given to national rules, however, because the Portability Regulation takes precedence over them; as such, for example, the provisions national competition law are subordinate, for example the German competition law provisions in Sec. 1, Sec. 19, Sec. 20 GWB (Gesetz gegen Wettbewerbsbeschränkungen, German Act Against Restraints of Competition). However, the national law governing terms and conditions of business has a special role to play in regulating the affected contracts between providers and subscribers on the one hand and the licensing agreements between rightholders and providers on the other; that law of the EU member states continues to apply alongside the Portability Regulation (c.f. below section B.VII.2.(a)).

## B. Commentary

### I. Article 1 Purpose and scope

#### 1. Subject matter of the Portability Regulation (Par. 1)

- 11 Art. 1 Portability Regulation sets out the subject matter and scope of application of the Portability Regulation. According to par. 1, the purpose of the Regulation is to introduce a common approach to the cross-border portability of online content services, by enabling subscribers to portable online content services to access these services under certain circumstances while temporarily present in a Member State other than their Member State of residence. Therefore, the starting point for par. 1 is the possibility under copyright law of granting rights for individual states separately, such that rightholders technically have the ability to prohibit or separately license use of their works even in cases where users are only temporary present abroad. There is no general country of origin principle for online uses under EU copyright law (on antitrust law, c.f. below section VII.2.(c)). The wording of the subject matter of the provision in Art. 1 (1) Portability Regulation is a general intention and thus has, as a basic principle, no independent regulatory content as compared to the definitions in Art. 2 Portability Regulation and the substantive provisions in Art. 3 to Art. 9 Portability Regulation. However, it can be of relevance in the interpretation of the Portability Regulation. It is interesting that in the wording of Art. 1 (1) Portability Regulation, the Regulation has clearly focussed on the interests of subscribers as users of online services. This is clear from Recitals 1 and 12 Portability Regulation, which primarily emphasise the interests of consumers in the cross-border use of online services to which they are subscribed in their home Member State. At the same time, the Regulation insists, in Recital 12 Portability Regulation, that the provisions of the Regulation are not intended to reduce the high level of protection afforded to authors. Correspondingly, the definition of cross-border portability is explicitly separated from the definition of cross-border access by consumers to online content services in a Member State other than their Member State of residence, the latter of which is not covered by the scope of this Regulation. This clarification was generally not necessary, since the limited scope of application of the Regulation already follows from the clearly delineated stipulations in Art. 3 Portability Regulation. The clarification is welcome, however, since the notions of portability and cross-border access are frequently confused with one another in political and social debate. The Regulation, which

implemented the Portability Regulation as one of the first projects of the “digital agenda”, is obviously wanting to separate the question of the portability of content services from the far more complex and economically more serious question of cross-border access to online services and for it to be understood in this way. Art. 1 (1) Portability Regulation only contains an independent provision, however, to the extent that it clarifies that only online services which are lawfully provided in the country of residence are covered by the Portability Regulation. This clarification is not otherwise found in Art. 3 to Art. 9 Portability Regulation. That said, the Portability Regulation would have to be interpreted in that way in any case because Recitals 1, 3, 12, 23 and 34 Portability Regulation contain corresponding statements that only lawfully provided online services are covered.

## 2. Scope of application of the Portability Regulation (Par. 2)

- 12 Par. 2 has its own regulatory content which explicitly excludes the field of taxation from the scope of application of the Regulation. The treatment for tax purposes of the use of online content services in countries outside the subscriber’s home Member State must therefore be determined without considering the provisions of the Portability Regulation. This does not appear to be an entirely unproblematic matter. For example, in cases where access to content is subject to a separate payment obligation (transactional video on demand) the question could be raised as to whether taxes or duties are payable in the country the content was accessed in, although the law of the country of origin of the service otherwise applies as per Art. 4 Portability Regulation, and thus the law of the Member State of residence.

## II. Article 2 Definitions

### 1. General

- 13 Art. 2 Portability Regulation contains a catalogue of definitions which apply to the whole Regulation and thus contribute to determining the scope of application of the Regulation. Additional indicia for the interpretation of the terms defined in Art. 2 Portability Regulation can be found in the Recitals, in which the Regulation communicates its understanding of the scope of application of the Regulation and the terms used therein (see Recitals 14 et seqq. Portability Regulation). All the terms legally defined in Art. 2 Portability Regulation must

be interpreted in a uniform manner throughout the EU, considering the objectives of the Portability Regulation (see Recital 14 Portability Regulation, in respect of “Member State of residence”).

## 2. Key aspects

### a.) Subscriber

- 14 Subscriber within the meaning of the Regulation is any consumer who, based on a contract for the provision of an online content service with a provider whether against payment of money or without such payment, is entitled to access and use the service in the Member State of residence.
- 15 The definition of a subscriber, which at the same time determines the personal scope of application of the Regulation more closely, could thus hardly be broader and requires, unlike the general understanding of the term in everyday language, no recurring provisions of service. The key factor is solely the existence of a contract between the provider and consumer in the Member State of residence, entitling the consumer to the use of the online content service.
- 16 The Regulation would also like to have the term ‘contract’ correspondingly broadly understood such that any type of agreement is covered, for example even the express or implicit acceptance of terms and conditions (see Recital 15 Portability Regulation). The existence of a payment obligation is not a requirement for the assumption that an arrangement constitutes a contract. A simple registration to receive content alerts or a mere acceptance of HTML cookies does not constitute a contract in this sense (see Recital 15 Portability Regulation). The simple use of a website does not therefore qualify the user as a subscriber within the meaning of the Regulation. “Terms of use” or “disclaimer” notices on a website cannot change this in any way, as the mere use of a website does not even involve any effective contractual relationship between website operator and user into which corresponding terms and conditions could be incorporated.
- 17 Persons whose stable residence is in a non-EU country are also not considered subscribers within the meaning of the Regulation. This is because the Portability Regulation only applies to subscribers who reside in the EU (see Recital 26 Portability Regulation).

## b.) Consumers

- 18 A consumer within the meaning of the Regulation is any natural person who, in contracts covered by this Regulation, is acting for purposes which are outside that person's trade, business, craft or profession. The Regulation thus follows the definition of consumer which is generally applicable in harmonised law, which is based on the purpose of the act concerned. The key factor in whether a person is considered a consumer within the meaning of the Portability Regulation is the non-commercial purpose of the contract which entitles the user to access the online content service. The purpose of the individual acts of use is therefore not relevant. Occasional private access via a commercial usage contract is also not covered by the provisions of the Regulation.

## c.) Member State of residence

- 19 Member State of residence means the Member State, determined based on Art. 5 Portability Regulation, where the subscriber has his or her actual and stable residence. There can be only one single Member State of residence (see Recital 14 Portability Regulation: "only Member State of residence of the subscriber"). By including the objective determination criteria from Art. 5 Portability Regulation in the definition of the Member State of residence, the Regulation largely relieves the service provider of the risk of an incorrect determination of the Member State of residence. To the extent the service provider relies on at least two means of verification as stated in the provisions in Art. 5 Portability Regulation (see the remarks there), the Member State thus determined shall be deemed to be the Member State of residence within the meaning of the Regulation. This applies irrespective of whether the consumer actually has their stable residence in the identified country. Based on the unfortunate wording in the definition of the Member State of residence, one could potentially assume cumulative elements. However, in Recital 14 Portability Regulation, the Regulation makes it clear that the service provider should be able to rely on a determination of the Member State of residence in accordance with Art. 5 Portability Regulation. Accordingly, one could, in cases of doubt, see the reference to the provisions in Art. 5 Portability Regulation as a legal fiction in favour of the provider.

## d.) Temporarily present in a Member State

- 20 Temporarily present in a Member State means being present in a Member State other than the Member State of residence for a limited period of time. The purpose of the presence is immaterial.

For example, it could be for holiday, business, work or study purposes.<sup>9</sup> While the Regulation on the determination of the Member State of residence in Art. 5 Portability Regulation contains comprehensive instructions, the definition leaves it completely open as to what should be understood by a "limited period of time". The term "residence for a limited period of time" could thus present a liability risk for providers, because whilst they are given a legally certain solution for determining the Member State of residence in Art. 5 Portability Regulation in conjunction with the presumption rule in Art. 2 No. 3 Portability Regulation, the question of when a residence is temporary and how that should be determined remains unclear. This in mind, a broad interpretation of "temporary presence" would be desirable from the provider's perspective, to avoid the risk of offering services outside its own licensing territory without falling under the special rule in Art. 4 Portability Regulation. However, a broad interpretation of "temporary presence" increases the risk of subscriber abuse.

- 21 Taking into account the clear intention of the Regulation to give providers, through the verification criteria to determine the Member State of residence as per Art. 5 Portability Regulation, a possibility to determine, with legal certainty, the applicability of the Regulation to a particular usage relationship, one can assume that the additional criterion of "temporary residence" was not intended to create a criterion which had to be verified independently by the provider. In the absence of any further restriction, the term "limited period of time" must be understood according to its wording, such that any form of limitation to the period of residence which does not lead to a change in the assessment of the Member State of residence, must be deemed a "temporary presence".<sup>10</sup> There is therefore no maximum time limit for the period of temporary presence, provided it does not lead to a change in the Member State of residence. Should the provider have reasonable doubts, in the course of the duration of the contract, as to whether the subscriber's originally determined Member State of residence is still the subscriber's Member State of residence, the provider has the possibility, under Art. 5 (2) Portability Regulation, but not the obligation, to repeat the verification (c.f. below section V.2.(b)).

9 *Einger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 698, 703; *Roos*, Multimedia und Recht (MMR) 2017, 147, 149; *Riis/Schovsbo*, The borderless online user – Carving up the market for online and streaming services (available at <<https://ssrn.com/abstract=2867353>>), p 13.

10 Of the same opinion, in effect, *Einger*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 698, 704; *Ranke/Glückler*, Multimedia und Recht (MMR) 2017, 378, 380; *Heyde*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 718; *Peifer* Archiv fuer Presserecht (AfP) 2017, 8, 11; *Synodinou* in *Synodinou et al*, see Fn. 1, p. 251 et seqq.

The rightholder can, however, contractually oblige the service provider to perform the respective verifications (c.f. below section V.2.(d), also regarding the content of such obligations).

## e.) Online content service

22 “Online content service” within the meaning of the Regulation is any service as defined in Art. 56 and Art. 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is either an audio-visual media service as defined in Art. 1 (a) of Directive 2010/13/EU<sup>11</sup>, 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. The definition of the online content services could thus hardly be broader and covers, on a general level, any service offered over the internet, the main purpose of which is the linear or non-linear provision of audio-visual, visual or audio content. The use must take place via the internet (not a closed system, even if it is based on the internet protocol; c.f. below section B.II.(f)), because otherwise it is not an “online” use.<sup>12</sup> This therefore covers, in particular, online services for the linear and non-linear provision of films, videos, music, e-books, photographs but also live-picture and audio reporting e.g. of sporting events (see Recitals 1, 5, 8 Portability Regulation).<sup>13</sup> All video-on-demand (VOD) services are also covered but also live-streaming services. The Commission’s press release mentioned video-on-demand platforms (Netflix, HBO Go, Amazon Prime, Mubi, Chili TV), internet TV services (Viasat Viaplay, Sky Now TV, Voyo), music streaming services (Spotify, Deezer, Google Music) or online games marketplaces (Steam, Origin) as examples.<sup>14</sup> The broadcaster’s multi-media libraries are also certainly covered.<sup>15</sup> Whether the services are provided free of charge or against payment of money is irrelevant to their classification as online content services (see Recital 15 Portability Regulation).

23 However, the Regulation only covers portable services (c.f. below section II.2.(f)), which a provider delivers to a subscriber (c.f. above section II.2.(a)) in their Member State of residence (c.f. above section II.2.(c)). Audiovisual media services are excluded, where the provision of audiovisual content merely represents an ancillary purpose. Thus, in particular websites on which audiovisual content is provided merely in an incidental manner or by way of illustration are not covered (see Recital 16 Portability Regulation). Websites that use works or other protected subject-matter, such as graphical elements or background music, only in an ancillary manner, where the main purpose of such websites is, for example, the sale of goods, are excluded (see Recital 16 Portability Regulation). The boundaries may certainly be blurred in this respect. In practice, however, any classification will be, in particular in the case of non-commercial websites, on the basis of the additional feature that the content is being provided under agreed conditions, since as a rule such an agreement between user and website operator generally does not exist where the provision of content is not a main objective (on the criteria for the existence of a contractual agreement c.f. above section II.2.(a)).

24 The online content service does not have to be based within the EU or provide the corresponding online content services from within the EU. The purpose of the Portability Regulation, to ensure access for users with cross-border presence in another Member State, also extends to services based in countries outside the EU. If these services are prepared to contract with users who reside in the EU, they therefore also submit themselves to the provisions of the Portability Regulation.

## f.) Portable

25 Portable within the meaning of the Regulation means a feature of an online content service whereby subscribers can effectively access and use the online content service in their Member State of residence without being limited to a specific location. Any service can therefore be deemed portable which is accessible either online or in another manner using several different end devices (e.g. laptops, tablets, smartphones; see Recital 2 Portability Regulation), but also services which are only accessible on one specific mobile end device. The definition is technology neutral. Services which are exclusively limited to a specific location are excluded. The Regulation did not intend to oblige providers to make services portable (see Recital 17 Portability Regulation). This would mean, for example, IP-TV and other wired services, but also internet based services which are designed solely for access from

11 DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

12 *Kraft*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 722.

13 See also *Kraft*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 721.

14 <[http://europa.eu/rapid/press-release\\_IP-17-225\\_en.htm](http://europa.eu/rapid/press-release_IP-17-225_en.htm)>.

15 *Kraft*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 721.

a specific location, e.g. via a set top box. Even in the latter case, the online content service is generally limited to a stationary use, hence it would be unreasonable to expect the provider to design the service to be mobile solely based on the provisions of the Portability Regulation. If a stationary content service (e.g. a pay-tv service) also offers a portable service with limited content, only this additional service would have to be regarded as portable within the meaning of the Regulation. This does not lead to any conflict with the equivalence rule in Art. 3 (1) Portability Regulation (c.f. below section III.2.(b)), because the additional service is also only available to the subscriber in the limited form in their Member State of residence.

temporary presence in a Member State are concerned (see above section II.2.(a) et seqq.). Therefore, the obligation to ensure portability across the Union only exists if a user who has their stable residence as per Art. 5 Portability Regulation in the European Union has concluded a contract with a provider for use of an online content service against payment of money and is then in another Member State for a limited period of time. Where the provider is based and from where the corresponding online content service is provided are irrelevant to the applicability of the rule (c.f. above section II.2.(e)). The only key factors for the question of the applicability of Art. 3 Portability Regulation are the stable residence of the user and the design of the specific usage relationship which exists between provider and user (subscriber).

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

#### 1. General

26 Art. 3 Portability Regulation, together with Art. 4 Portability Regulation, forms the core part of the Regulation. While Art. 3 Portability Regulation imposes a mandatory obligation to ensure Union-wide portability on providers of paid subscription services, Art. 4 Portability Regulation establishes a country of origin principle restricted to the provision of this portability, to the benefit of the provider such that the provider is thus exempt from obtaining the necessary exploitation rights for all Member States. Art. 3 Portability Regulation also applies, through Art. 6 Portability Regulation, *mutatis mutandis* to providers of free-of-charge online content services with the caveat that such providers are free to decide whether they would like to guarantee portability throughout the Union to their users or not (for details c.f. below section VI.1.).

#### 2. Key aspects

##### a.) The provider of an online content service provided against payment of money (par. 1)

27 All providers of online content services are subject to the obligation under Art. 3 (1) Portability Regulation, who provide their service to subscribers against payment of money within the meaning of the Regulation, to the extent the subscriber is temporarily present in another Member State. As far as the terms online content service, subscriber and

28 The obligation to ensure portability throughout the Union only applies, at a general level, to providers of an online content service provided against payment of money (on free-of-charge online content services c.f. below section VI.1. et seqq.). According to Recital 18 Portability Regulation, this requirement of a payment obligation is intended to be broadly interpreted, such that a payment obligation is assumed regardless of whether the payment is rendered directly to the provider of the online content service or to another party. The decisive element in determining the nature of an online content service in this respect is that users pay money for access to the online content service, regardless of to whom the payment is made. There must, however, at least be an indirect contractual tie between the provider and the user. How the payment obligation is specifically designed is also irrelevant. Regularly recurring payments are considered a payment obligation just as much as single payments related to specific transactions are, or a mixture of the two (c.f. above section II.2.(a)). Services financed by advertising, for which the users themselves do not make any payments of money are not covered by Art. 3 Portability Regulation. According to Recital 18 Portability Regulation, services from public radio broadcasters, which are provided based on a general, public licence fee, are explicitly excluded from Art. 3 Portability Regulation. Also not covered are payments which users do not make as contractual payment for the use of the service but for other services e.g. internet access. Payment through the provision of personal data also does not fall under Art. 3 (1) Portability Regulation, as shown by the clear wording (“payment of money”).

29 In the case of flat rate payments which cover several services, it suffices if the payment at least in part relates to the use of the online content service. There could be cause for debate as to the scope of application of Art. 3 Portability Regulation as far as online content services which are tied into an overall package, such as *Amazon Prime*, which are



only accessible to users with a paid membership, but where membership is partly or primarily for other purposes, so it could be argued that the online content service itself is merely a free perk. Although a clear separation of the various services provided within such packages cannot be made, hence at least a part of the monetary payment must be regarded as being for the online content service, such packages are, according to the regulatory intention behind the Regulation, subject as a whole to the obligation under Art. 3 Portability Regulation. As the Regulation clarifies in Recital 20 Portability Regulation, the differentiation between online content services which require payment and those that do not is primarily based on the consideration that free-of-charge content services can often be accessed without registration. The obligation to verify the Member State of residence in accordance with Art. 5 Portability Regulation would thus represent an unreasonable interference in the freedom of free-of-charge content services to arrange their own business. This problem does not exist in the case of the above-mentioned paid service packages, so there is no reason to exclude them from the scope of application of Art. 3 Portability Regulation.

quality requirements applicable to the delivery of an online content service that the provider is subject to when providing that service in the Member State of residence, unless otherwise expressly agreed between the provider and the subscriber. Recital 22 Portability Regulation clarifies what is meant by this rather cryptic limitation. The quality of an online content service strongly depends on the location and connection to the relevant server and can, accordingly, vary significantly depending on the place of access. The provision in par. 3 is intended to clarify that the provider is not obliged to technically configure its service to ensure a consistent quality of access irrespective of the place of access. This also applies to the extent a specific access quality is contractually agreed for the Member State of residence, which in practice will never be the case anyway, due to a variety of unknowns. Only where the provider makes specific commitments on the quality of access outside the Member State of residence must these be adhered to. In order to prevent abuse to circumvent the obligation under par. 1, par. 3 makes it additionally clear that the provider is prohibited from taking specific action to limit the access quality outside the Member State of residence.

#### **b.) Content and scope of the obligation: Equivalence rule (par. 1 and par. 3)**

- 30 If a contractual relationship falls within the scope of application of Art. 3 (1) Portability Regulation, the provider is subject to an equivalence rule. The provider is obliged to enable a subscriber to access the online content service, while temporarily present in another Member State, in the same manner as in their Member State of residence. In the form of a non-exhaustive list (“including”), par. 1 stipulates an equivalence for, among other things, access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities. This equivalence rule governing the extent of access to online content services from another Member State is intended to prevent providers circumventing the obligation to enable portability by restricting the functionality of the service abroad (Recital 21 Portability Regulation). Accordingly, any restriction 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 the Regulation (Recital 21 Portability Regulation).
- 31 This equivalence rule is given a certain degree of limitation by par. 3, in relation to the quality of access to the online content service outside the Member State of residence. The obligation to guarantee equivalent access does not extend to any

#### **c.) Information obligations (par. 4)**

- 32 The provision in par. 3 is flanked by the provider’s obligation in par. 4 to inform subscribers, based on information available to it, as to the quality of delivery of the online content service outside the Member State of residence. This information must be provided to the subscriber prior to providing the online content service in accordance with par. 1, i.e. outside the Member State of residence, by means which are adequate and proportionate. This information obligation is firstly very vaguely worded and thus has the potential to lead to a significant workload and expense on the part of service providers. However, the crucial factor in ascertaining the scope of the information obligation is the restriction, that the information only must be provided on the basis of information already available to the provider. Recital 22 Portability Regulation clarifies in this respect that the Regulation’s intention was that no obligation should be imposed on providers requiring them actively to seek information regarding the quality of the delivery of a service in another Member State. As a result, the information obligation under par. 4 should thus usually be limited to the advice that due to factors outside the service provider’s control, the quality of the delivery may not correspond to that which applies in their Member State of residence. Even if par. 4 does not contain any specific provisions regarding the type and manner of such a notice,

in par. 4 the Regulation suggests the provider's website as a suitable medium. Accordingly, notices provided in other media, e.g. within an app or other usage software, will be sufficient. A particularly eye-catching notice is not necessary. Very broadly speaking, the service provider can limit itself to references in its terms and conditions.

#### d.) Prohibition on additional charges (par. 2)

- 33 Under par. 2, the provider is not allowed to impose any additional charges on the subscriber for access to the online content service from another Member State. However, this does not prevent the provider, in respect of ensuring portability and the associated additional costs, e.g. for verifying Member State of residence, from taking account of these from the outset in its own pricing system. Par. 2 merely prohibits the charging of additional amounts specifically for the subscriber's access from other Member States. Additional costs incurred from communications providers for the use of communications services abroad (e.g. internet access charges), which are used to access the online content service, are also not prohibited under par. 2 (see Recital 19 Portability Regulation).

### 3. Enforcement

- 34 Art. 3 Portability Regulation contains an obligation to ensure portability throughout the Union, however does not contain any legal consequences. Art. 7 (1) Portability Regulation stipulates this lack of enforceability. This means that only the individual contractual clause which violates Art. 3 Portability Regulation will be unenforceable, (c.f. below section VII.2.(a)).
- 35 In EU member states like Germany providing for a provision in Unfair Competition Law sanctioning the breach of law in favour of the competition of a competitor (Sec. 3a Gesetz gegen den unlauteren Wettbewerb - German Act Against Unfair Competition) the enforcement of an online content service's obligations under Art. 3 Portability Regulation could be achieved through such provision.
- 36 Whether subscribers themselves also have an enforceable claim, against the provider, for provision of portability across the Union is not clearly determined by the Regulation. Art. 3 Portability Regulation initially only states that the provider shall enable portability for subscribers, without explicitly affording subscribers a claim for the provision of portability. If one considers the Regulations stated intention for the Regulation, to enable subscribers

to enjoy online content services to which they have subscribed in their Member State of residence when they are temporarily present in another Member State, that would suggest that the Regulation did imply an own claim on part of subscribers against providers. Accordingly, the Regulation clarifies in Recital 26 Portability Regulation that subscribers should be eligible for cross-border portability of online content services only if they reside in a Member State of the Union. However, the provision in Art. 7 (1) Portability Regulation suggests such a claim on the part of subscribers would not exist. This is because Art. 7 (1) Portability Regulation only stipulates the lack of contractual enforceability as a legal consequence (c.f. below section VII.2.(a)). If one still wanted to conclude that subscribers do have a claim, such a claim could only be a contractual claim, enforceable based on national member state law. The claim (from a German perspective) does not arise based on tort law, because Art. 3 (1), (2) and (3) Portability Regulation only govern the contractual relationship between service and subscriber. The secondary claims of subscribers, in particular with regards to failure to perform and poor performance are also governed by national law.

## IV. Article 4 Localisation of the provision of, access to and use of online content services

### 1. General

- 37 In addition to Art. 3 Portability Regulation, Art. 4 Portability Regulation contains the second core element of the Portability Regulation. It is the legal counterpoint to the obligation to ensure portability throughout the Union. Art. 4 Portability Regulation uses a legal fiction that the use of rights in respect of online content service takes place exclusively in the subscriber's Member State of residence. In this way it places providers in the legal position of ensuring portability of online content without running the risk of violating contractual or legal provisions, e.g. because it does not hold the necessary exploitation rights for access from another Member State. The Regulation achieves this trick by introducing a country of origin principle limited to ensuring portability under Art. 3 Portability Regulation, as can also already be found in other European legal instruments (see for example Art. 1 (2) (b) Satellite and Cable Directive). There is some debate, in connection with Art. 101 TFEU, as to whether the granting of a right of communication to the public limited to one or a few Member States is in violation of competition law and thus exploitation rights can only be granted throughout the Union (for more

detail on this point, c.f. below section VII.2.(c)). If Art. 101 TFEU were to produce such an outcome, Art. 4 Portability Regulation merely would have a clarifying character.

## 2. Key aspects

**38** According to Art. 4 Portability Regulation, the provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence. This country of origin principle restricted to the ensuring of portability under Art. 3 Portability Regulation means that the provider, both in relation to licensing rights and in relation to other legal provisions only needs to secure the lawfulness of the online content service in the subscriber's Member State of residence. To avoid this principle being circumvented by contractual limitations (e.g. in the scope of licensing agreements), Art. 4 Portability Regulation is flanked by Art. 7 Portability Regulation (c.f. below section VII.2.(a)). For the determination of the Member State of residence as the country of origin, the provider can refer to the results of the verification as per Art. 5 Portability Regulation, which it is entitled to rely on, according to the definition in Art. 2 No. 3 Portability Regulation (c.f. above section II.2.(c) and below section V.2.(b)). Art. 4 Portability Regulation does not prevent a provider from enabling a subscriber to access additional content which the provider lawfully offers in the temporary country of residence (see Recital 23 Portability Regulation).

**39** The restricted country of origin principle in Art. 4 Portability Regulation thus firstly has a copyright law dimension. Through the legal fiction of the place of provision, the provider is released from the requirement to obtain the necessary rights for making the online content service available in a Member State other than the Member State of residence of the respective subscriber. That applies both in respect of exploitation rights based on copyright and for exploitation rights based on ancillary copyrights (related rights). If the provider supplies the service to subscribers with different Member States of residence, it (only) needs to have the necessary rights for the respective usage relationship in the respective Member State of residence. The rights concerned are, in particular, the right of making available to the public (Sec. 19a UrhG), the broadcasting right (Sec. 20 UrhG) and the right of reproduction for users in regard to downloading or streaming (Sec. 16 UrhG). The restricted country of origin principle under Art. 4 Portability Regulation only applies to the enabling

of portability of a service. It does not release the provider from obtaining the necessary rights for all Member State in which it offers its service to users residing there. The provisions of Art. 7 Portability Regulation must be considered, which stipulate a mandatory application of the Portability Regulation to contracts. That does not mean, however, that the rightholder is not allowed to set a higher price for the increased scope of use (c.f. section VII.2.(a)). Art. 4 Portability Regulation also has an impact on rightholders' licensing contracts with third parties. The legal fiction protects the rightholder from violations of such contracts. For example, if the rightholder has granted exclusive rights to a third party for a certain territory, Art. 4 Portability Regulation ensures that the exclusivity granted is not violated through compliance with the requirements in Art. 4 Portability Regulation.<sup>16</sup>

**40** Secondly, the restricted country of origin principle in Art. 4 Portability Regulation also has a regulatory dimension, which applies in respect of civil law, criminal law as well as public law. In order to provide portability into another EU Member State, the provider of an online content service only has to observe the regulatory framework of the Member State of residence if the subscriber is only temporarily present. In this respect, the provider thus does not have to allow for sometimes differing legal requirements of each individual Member State. In particular, Art. 4 Portability Regulation contains in this context a civil law connection to the Member State of residence. This applies in particular to tort law: e.g. German tort law only applies if Germany is the Member State of residence. An example from public law is the law governing the protection of minors in the media. In respect of the access of content as per Art. 4 Portability Regulation, the provider only must comply with the relevant rules for the subscriber's Member State of residence. National competition (antitrust) law in the country of access should not apply, because the European law provision in Art. 4 Portability Regulation takes precedence over national antitrust law and its associated rule in the form of the effects doctrine. However, European antitrust law takes precedence over the Portability Regulation (c.f. below section VII.2.(c)). The area of taxation is, however, not covered by the restricted country of origin principle in Art. 4 Portability Regulation (Art. 1 (2) Portability Regulation; see also Recital 13 Portability Regulation). In this respect, national provisions may apply in the country of residence.

<sup>16</sup> Kraft, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 720, 723.

## V. Article 5 Verification of the Member State of residence

### 1. General

- 41 Art. 5 Portability Regulation gives providers a regulated procedure for the verification of a subscriber's Member State of residence. This is intended to ensure, in the interests of consumers, that interference in subscribers' privacy is reduced to the degree actually required. Moreover, the verification process regulated in Art. 5 Portability Regulation takes into account the providers' interest in legal certainty, in that the definition of the "Member State of residence" in Art. 2 Portability Regulation (c.f. above section II.2.(c)) stipulates that a Member State of residence determined in accordance with Art. 5 Portability Regulation shall in all events be considered the Member State of residence within the meaning of the Regulation (see also Recital 26 Portability Regulation).
- 42 In addition to the provisions in Art. 5 Portability Regulation, when verifying a Member State of residence, data protection rules must also be observed, some of which are further specified in Art. 8 Portability Regulation (c.f. below section VIII.).

### 2. Key aspects

#### a.) Timing of verification (par. 1)

- 43 The verification of the Member State of residence must be carried out for paid online content services at the point of conclusion and renewal of the contract. For contracts which are not open-ended but which contain a clause stipulating automatic renewal at the end of the contract period, this means, according to the clear wording of Art. 5 (1) Portability Regulation, that a new verification of Member State of residence must be performed at the end of each contract period. For contracts already existing on 21 May 2018, the verification of the Member State of residence must, under Art. 9 (2) Portability Regulation, be completed by that date at the latest.
- 44 Providers of online content services provided without payment of money, who decide, in accordance with Art. 6 Portability Regulation, to enable portability of their services as per the Regulation, are obligated under Art. 9 (2) Portability Regulation from the date on which they first offer the service in accordance with Art. 6 to complete a verification of the Member State of residence, when concluding or renewing

contracts in future. For customers already in place before that date, a verification must be carried out within two months.

#### b.) Process for verification of Member State of residence (par. 1 to par. 3)

- 45 Art. 5 (1) Portability Regulation stipulates a specific process for verifying Member State of residence, according to which the provider must use no more than two of the listed means of verification in (1) (a) to (k) in order to verify the subscriber's Member State of residence. The list is, according to the wording of Art. 5 (1) Portability Regulation, intended to be exhaustive.<sup>17</sup> According to lit. (a), a ID card should count as an identity document confirming the Member State of residence. The provider has a somewhat limited right to choose. Whilst it is permitted to use just one or any combination of the means of verification under lit. (a) to (h), the more easily manipulated means under (i) to (k) may only be used in combination with one of the means of verification under lit. (a) to (h). An exception to this exists solely for the invoice and postal address under lit. (i), which is permitted as a sole means of verification if the postal address is listed in a publicly available register. Therefore, checking a user's IP address is generally excluded as a sole means of verification, in any case the means listed under lit. (a) to (h) must have been exhausted beforehand<sup>18</sup>, particularly because they can also serve as sole means, c.f. marg. no. 6. In addition, of primary relevance to the selection of the means of verification is the obligation on the part of the provider to ensure that the selected means of verification are reasonable, proportionate and effective. In the scope of its right to choose it seems to be permitted for the provider initially to determine one specific means of verification; that applies in particular if it is a means under lit. (a) to (h) and is the most 'data avoiding' means. That can also be effected through general terms and conditions. However, in the event that this means does not produce a confirmation and the user provides another reasonable, proportionate and effective means as per Art. 5 (1) Portability Regulation, the verification can also, as an exception, be completed using that means. In this respect, it is recommended, in the case of general terms and conditions which stipulate the most data economic means under lit. (a) to (h), that a respective opening clause be included.

17 Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 717; Synodinou in Synodinou et al, see Fn. 1, p. 248.

18 Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 717; Synodinou in Synodinou et al, see Fn. 1, p. 249.

- 46 The provider's right to choose is limited by the principle of 'data minimization' in Art. 8 Portability Regulation expressly for the verification of the Member State of residence. Firstly, the provider is, in this respect, primarily obliged to use those means of verification that are collected by the provider in the scope of concluding the contract anyway, or that are already available to the provider. Secondly, the provider is normally encouraged to limit itself to one of the means of verification, to the extent that one means comes from lit. (a) to (h) and that it seems suitable of being an effective verification of Member State of residence.<sup>19</sup> This will normally result in services provided for payment completing a verification based on the criterion in par. (1) lit. (b) (payment details such as the bank account or credit or debit card number of the subscriber), because this information is available anyway.
- 47 The Regulation does not clarify the question as to what the provider should do if it utilises two of the means of verification stated in par. 1 with contradictory results, such that it is not possible to verify Member State of residence with certainty in this manner. Whilst Art. 5 (1) does set an upper limit for the stated means of verification of two, this restriction is a result of the general data protection principle of data minimisation/data economy, according to which data collection and processing must always be limited to the extent necessary in order to fulfil the respective purpose. If the provider arrives at two different results from two means of verification, such that the collection of further data is necessary to verify the Member State of residence, one must therefore conclude that the provider may, where applicable after rechecking already utilised means of verification, if necessary use a third means of verification.<sup>20</sup>
- 48 If, during the term of the contract, the provider has reasonable doubts about the previously established Member State of residence, he is, under par. 2, entitled to repeat the verification of the Member State of residence. As par. 2 is a justification for data processing which interferes in the subscriber's protected interests, fairly strict criteria will have to be applied in relation to the requirement of reasonable doubts. Since the verification has already taken place, indications that the chosen means of verification has since changed will, in particular, constitute a reason to repeat the verification process. However, the simple fact that access has occurred from a different Member State will not suffice, since enabling access from other Member States is at the very core of the Portability Regulation. Even

if a temporary presence can still be assumed in the case of a longer stay abroad, access from a specific foreign country for several months can indeed form the grounds for legitimate doubts and a right of verification.<sup>21</sup> On contractual options for specifying the right to verify in cases of reasonable doubts (c.f. below section V.2.(d)).

- 49 In order to enable the verification of Member State of residence, par. 3 affords the provider the right to request the information required for verification and listed in par. 1. If the subscriber does not fulfil such a request and if the provider is thus prevented from carrying out an effective verification of the Member State of residence, the provider shall not grant the subscriber access to the online content service while the subscriber is temporarily present in another Member State. In such a case, the provider is exempt from the obligation under Art. 3 Portability Regulation accordingly. This raises the question of whether the provider is possibly obliged, in the case of refusal to provide the requested information, to utilise other effective means of verification, to the extent they are available. This should be answered in the affirmative within the meaning of an effective implementation of the purpose of the Regulation, to the extent that resorting to such means of verification seems proportionate and reasonable. Moreover, it does not follow from the limitation to no more than two of the means of verification that there is no obligation to switch to alternative means of verification, since the provider has specifically not received the information and has thus not utilised the corresponding means of verification.

### c.) Simplified process with consent of the rightholder (par. 4 and par. 5)

- 50 Par. 4 provides for a simplified process if a rightholder authorises the provision of access to its content in the case of temporary presence in another Member State, without verification of the Member State of residence. In this case the contract between provider and subscriber is sufficient to determine the Member State of residence. The authorisation must be obtained, however, for the protected subject matter concerned (work and/or ancillary right/neighbouring right) from the respective rightholder. It can be granted for individual or for all protected subject matter licensed to the service. Authorisation will make sense above all if the rightholder licences their content to the service across borders in any case and the rightholder thus has no interest in the provider of the online content

19 Heyde, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 716.

20 Of this opinion, also Eginger, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 698, 703.

21 See Ranke/Glückler, *Multimedia und Recht (MMR)* 2017, 378, 380, who have doubts after three months as to whether the Member State of Residence might have changed.

service only allowing portability of the content after verification. Furthermore, the rightholder has the inalienable right which, as stated in par. 5, explicitly cannot be waived by contract, to revoke consent from the provider. That can occur at any time, however only after prior notice. The notice must be given with a reasonable time period, so that the provider can make the necessary changes to its service. The notice and the revocation require no specific format. However, the contract with the provider can stipulate a specific form for the notice and revocation, without this constituting a violation of par. 5. On contractual provisions which deviate from par. 4 and par. 5 (c.f. below section V.2.(d)).

#### d.) Possibilities for deviating arrangements in the contract between provider and rightholder

- 51 The Regulation provides for the explicit possibility in Recital 26 Portability Regulation, that providers and rightholders can come to an agreement about which means of verification to use, within the limits of the Regulation. The option expressly provided for in par. 4, whereby the rightholder grants authorisation and completely forgoes the need for verification in respect of the work or ancillary copyright licensed by them is readily permitted. A reduction of the requirements under Art. 5 Portability Regulation, such as an acceptance of the means of verification in accordance with points i) to k) as sole means of verification, should also not raise any concerns. In this respect also, however, the respective rightholder can only dispose of the rights to which he is entitled, such that for every protected subject matter (work and/or ancillary right/neighbouring right) corresponding agreements must be made with all rightholders. Par. 5 stipulates, however, that the rightholders right to revoke a consent granted to the rightholder - whatever its content - cannot be contracted away. Rightholders and service providers can agree that, in cases where the provider has reasonable doubts as to the subscriber's Member State of residence, contrary to Art. 5 (2) Portability Regulation (c.f. above section V.2.(b)), the provider is obligated to complete a verification.
- 52 Since, however, the Regulation contains a number of provisions in particular in relation to the number and selection of means of verification, which serve to protect the user's privacy and thus deprive the provider and rightholder of freedom of action, raises the question as to what extent such agreements are permitted. Against the background of the principle of data minimisation/data minimization/economy, any agreement which represents, in comparison to the provisions of the Regulation, a (potential) intensification of checks and thus of the

interference in the subscriber's privacy, will likely be deemed unacceptable. This applies firstly in respect of agreements under which more than two of the means of verification under par. 1 must be used in every instance. Due to Art. 8 (1) Portability Regulation and the principle of data economy set out therein, even a standard obligation to use two means of verification would likely be unacceptable (c.f. above section V.2.(b)).<sup>22</sup> Secondly, stipulating specific means of verification will likely normally be deemed unacceptable where this goes against the principle that primarily those means of verification should be used which the provider collects or which are available to the provider anyway. Such a stipulation would prevent the provider from selecting the means which represent the least possible intrusion into the subscriber's privacy in each case. An arrangement regarding the selection of the means of verification will thus only be possible provided if it considers the specific circumstances of the respective online content service, in particular the information collected by the provider anyway in the respective case.<sup>23</sup> In conclusion, any arrangement will thus normally only be able to reproduce the selection of means of verification required under data protection law, with the exception of cases where several effective means of verification are collected by the provider anyway, or to provide for a verification process which is less strict than Art. 5 Portability Regulation. An arrangement whereby additional verifications must be carried out (e.g. at regular intervals) without reason would be unacceptable. In the interests of the subscriber's privacy, Art. 5 (2) Portability Regulation provides for an additional verification only where reasonable doubts exist, hence any agreement to perform checks without good reason constitutes an unacceptable increase in the level of strictness not foreseen in the Regulation to the detriment of subscribers.<sup>24</sup> An arrangement regarding additional verification in the case of legitimate doubts can, however, be provided for, because the Regulation does not mandate the protection of the freedom of choice. This does not unreasonably restrict users' rights because the service has a right to a further verification under par. 2. Making the existence of reasonable doubt and thus the right for renewed verification dependent on specific contractually defined circumstances is problematic, but not always unacceptable. Agreeing criteria which, in the individual case, cannot objectively lead to any legitimate doubts is unacceptable because that would involve a deeper intrusion into the subscriber's privacy.

22 Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 716 et seq.

23 Also of this opinion, Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 717.

24 Also of this opinion, Heyde, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 717.

## VI. Article 6 Cross-border portability of online content services provided without payment of money

### 1. General

53 According to Art. 6 (3) Portability Regulation, the provisions of the Regulation also apply to providers of free-of-charge online content services with the proviso that, in accordance with par. 1, they are free to decide whether they would like to enable Union-wide portability for their users. The reason for affording this decision making ability to providers of online content services provided without payment of money (“opt-in”) is that such services regularly require no, only optional, or a very limited form of registration. The Regulation thus regarded it as unreasonable to impose the obligation to verify Member State of residence as per Art. 5 Portability Regulation on such providers (see Recital 20 Portability Regulation). At the same time, however, the intention is for such providers to maintain the possibility of benefitting from the provisions of the Regulation and in particular the limited country of origin principle based on Art. 4 Portability Regulation, if they voluntarily decide to carry out a verification of their users’ Member State of residence.

### 2. Key aspects

#### a.) Choice of providing portability for online content services provided without payment of money (par. 1)

54 Art. 6 (1) Portability Regulation affords the provider of an online content service provided without payment of money the choice (“opt-in”) of committing to the provisions of the Portability Regulation. On the definition of online content services c.f. above section II.2.(e). Free-of-charge online content services are those which are not provided against payment of money as per Art. 3 (1) Portability Regulation. This includes, in particular, services financed through advertising or by public service broadcaster licence fees (c.f. above section III.). The requirement for providers of free-of-charge online content services to exercise their freedom of choice is that they in accordance with Art. 5 Portability Regulation (c.f. above section V.2.(b)).

55 Since Art. 6 (3) Portability Regulation refers in general to the provisions of the Regulation and not to individual articles within it and determines that they apply, it can thus be assumed that in the event that the provider voluntarily decides, as per Art. 6 (1) to enable the portability of the online content service for subscribers temporarily present in another Member State, all rights and obligations which the Portability Regulation sets out for online content services will apply to that provider. Under par. 1, the provider of a free-of-charge online content service is free to decide whether it would like to enable portability in other Member States or not. If the provider decides to enable portability, it cannot limit the portability to individual Member States (see Recital 20 Portability Regulation). The provision in Art. 3 Portability Regulation thus applies. The portability must therefore be ensured for all Member States. In return, the provider benefits from the limited country of origin principle as per Art. 4 Portability Regulation. As far as the verification of the Member State of residence is concerned, Art. 5 Portability Regulation applies.

56 Irrespective of that, the question arises of whether it is possible for the provider of a free-of-charge online content service to obtain the rights for several Member States and restrict access to its service accordingly. That question must be answered in the affirmative, since the Regulation itself explicitly differentiates, in Recital 12 Portability Regulation, between cross-border portability of online content services, which fall under the scope of application of the Regulation, and the cross-border access to online content services not governed by the Regulation (see Art. 1 (1) Portability Regulation). According to Recital 20 Portability Regulation, the freedom to decide afforded to providers of free-of-charge online content services under Art. 6 Portability Regulation is intended primarily to enable them to be included in the scope of this Regulation and thus to benefit from the advantages of the restricted country of origin principle set out in Art. 4 Portability Regulation. Providers of free-of-charge online content services should, according to Art. 6 Portability Regulation, be free to decide whether they will be subject themselves to the scope of application of the Regulation and thus be able to take advantage of the privilege in Art. 4 Portability Regulation or not. From that it follows that the respective providers must have the option of offering cross-border access to their services without falling under the scope of application of the Regulation, if this is possible for them without recourse to the limited country of origin principle in Art. 4 Portability Regulation, e.g. if they have rights throughout the EU anyway. This option is not available to providers of online content services provided with payment of money. If they obtain similarly comprehensive exploitation rights, they would only be able to release themselves

from the obligation to verify the Member State of residence (see Recital 29 Portability Regulation). Equally, providers of free-of-charge online content services are free to decide to commit only a certain part of the content of its free-of-charge service to the scope of application of the Regulation. For example, the provider can decide to design its service so that only its premium content is portable from the Member State of residence, while not providing this possibility for other content. Even just the higher cost of completing the verification according to Art. 5 Portability Regulation justifies the option of such a differentiation.

## b.) Information obligations (par. 2)

- 57 If the provider decides, in accordance with par. 1, to participate in the provisions of the Regulation, it must inform its 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 its decision to provide the online content service in accordance with par. 1, prior to providing that service, as expressly stipulated in par. 2.
- 58 This information must be provided to the respective recipient by means which are adequate and proportionate. In Recital 20 Portability Regulation, the Regulation suggests the provider's website as an example of a suitable medium. This form of information should be a suitable information medium in relation to the own subscribers, since it is assumed that they regularly visit this website to access the online content service. In relation to rightholders, with whom a direct licensing relationship exists, however, it would appear reasonable and proportionate to require direct communication. Otherwise, at the least the contracting party must be notified, for forwarding on to the rightholder.

## VII. Article 7 Contractual provisions

### 1. General

- 59 The provision in Art. 7 (1) Portability Regulation declares contractual agreements which run counter to the provisions of the Regulation to be unenforceable. That is intended to prohibit the provisions of the Portability Regulation from being circumvented by contractual arrangements, and also to exclude providers from being subject to claims for breach of contract due to their mandatory obligations under the Regulation. As such, the provisions of the Portability Regulation

are declared to be binding internationally under international conflict of laws for contracts that fall under the Portability Regulation. These are overriding mandatory provisions as per Art. 9 (1) Rome I Regulation. Art. 7 (2) Portability Regulation clarifies this once more (c.f. below section VII.2.(b)). On conflicts, in particular with Art. 101 and Art. 102 TFEU (c.f. below section VII.2.(cc)).

## 2. Key aspects

- 60 Under Art. 7 (1) Portability Regulation contractual provisions which violate the provisions of the Regulation are deemed to be unenforceable. In this respect, Art. 7 (1) Portability Regulation explicitly mentions agreements between providers and rightholders as well as agreements between providers and subscribers. The wording of the provision ("including those") makes it clear, however, that Art. 7 (1) Portability Regulation applies, irrespective of the respective contracting parties, to any contractual agreements covered by the Portability Regulation.

### a.) Agreements contrary to the Regulation (par. 1)

- 61 Par. 1 second subclause explicitly mentions contractual provisions which prohibit cross-border portability of online content services or limit such portability to a specific time period as being contrary to the Regulation. That applies both to agreements between providers and subscribers and licensing agreements between rightholders and providers. The wording used ("including those") makes it clear that these are non-exhaustive examples of possible unacceptable agreements. These examples make it clear that under Art. 7 (1) Portability Regulation in particular any agreement which prohibits the provider of a paid online content service from enabling cross-border portability or makes it impossible or more difficult for the provider to do so, completely or partially, directly or indirectly, are deemed contrary to the Regulation. Considering this, in particular unconditional obligations for geo-blocking outside the Licensed Territory, which do not take into account the cross-border uses permitted in the Portability Regulation, are considered unacceptable (c.f. above section IV.2.). The Portability Regulation is thus specifically aimed at abolishing such general unrestricted obligations on geo-blocking (see Recital 10 Portability Regulation).
- 62 Agreements with providers of free-of-charge online content services which directly or indirectly restrict the Regulation are also deemed unacceptable,



however only to the extent such providers have taken advantage of their right to choose under the Portability Regulation. Rightholders can therefore continue to contractually prohibit cross-border access, e.g. through means of general unrestricted geo-blocking, for providers who have not exercised the right to choose, provided this is in accordance with antitrust law (c.f. below section VII.2.(c)).<sup>25</sup> However, where a provider decides voluntarily to conduct verification and thus to subject itself to the Portability Regulation, Art. 7 Portability Regulation applies. The prohibition under Art. 7 Portability Regulation is also intended to cover direct or indirect arrangements which prevent the provider of a free-of-charge service from exercising its right to choose or from waiving it.<sup>26</sup> Taking into account the regulatory objective of the Regulation, to create as comprehensive a Digital Single Market as possible, one has to assume that agreements which limit the provider of a free-of-charge online content service in its ability to exercise its freedom of choice will constitute a violation of the Regulation and will thus not be enforceable.

63 Agreements which attempt to limit the scope of application of the Regulation by using a more specific definition of the term “temporary presence”, e.g. by stipulating a specific time limit, will likely also be deemed unacceptable. The Regulation specifically forewent such a specific time limit and worded the definition in Art. 2 No. 2 Portability Regulation openly (c.f. above section II.2.(d)). A further-reaching restriction of this definition must thus generally be regarded as an unacceptable restriction of the rights and obligations of the provider under the Regulation.<sup>27</sup> That also applies specifically to agreements between providers and rightholders. If the provider had to comply with different contractual definitions, it would once more not be able to ensure uniform portability.<sup>28</sup> Everything else would also lead to fragmentation. On the permissibility of contractual arrangements regarding the verification of Member State of residence under Art. 5 Portability Regulation (c.f. above section V.2.(d)).

64 Any agreements with which the scope of services or the quality of the online content services are negatively affected, directly or indirectly, when accessing from another Member State compared to when accessing from the Member State of residence are certainly deemed unacceptable.

25 *Ranke/Glückler*, *Multimedia und Recht (MMR)* 2017, 378, 381; *Synodinou* in *Synodinou et al*, see Fn. 1, p. 258 et seqq.

26 *Heyde*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 719.

27 Also of this opinion, *Heyde*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 718; *Kraft*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 720, 725.

28 *Kraft*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 720, 725.

65 The provisions in Art. 7 (1) Portability Regulation do, however, permit the rightholder to demand a higher price for the enlarged territorial area of exploitation resulting from the restricted country of origin principle. It also does not seem unreasonable to demand a higher usage fee for a territorial area of use which has been increased through Art. 4 Portability Regulation, which also increases the attractiveness of the service.<sup>29</sup> Art. 7 (1) Portability Regulation therefore does not contain any independent limitation on the price setting freedom of rightholders. Rather, the usual antitrust law restrictions apply: the purpose of copyright and ancillary copyrights is not to secure the highest possible remuneration, only an equitable remuneration.<sup>30</sup> This can only be a matter for EU competition law, however, in the case of a dominant market position of the rightholder (Art. 102 TFEU).

66 As the legal consequence of a violation of the Regulation, Art. 7 (1) Portability Regulation, unlike for example Art. 101 (2) TFEU, does not stipulate the invalidity of the violating clause, but merely its unenforceability. How this can be transferred into national law seems problematic. For Germany, it seems to be compelling to assume no legal prohibition exists under Sec. 134 BGB (*Bürgerliches Gesetzbuch*, German Civil Code), hence Sec. 139 BGB also does not apply. Thus, contractual agreements will otherwise remain unaffected, provided, upon application of German contract law, an adjustment under Sec. 313 BGB could not be considered in exceptional cases, which can certainly be excluded in the case of agreements which are concluded after publication of the Portability Regulation. To the extent a reduction to the valid elements is by national law permitted, this should be considered. For example, obligations on geo-blocking which go too far could be reduced to the degree permitted.

## **b.) Applicability of the Regulation independent of the law applicable to the contract (par. 2)**

67 According to Art. 7 (2) Portability Regulation, the provisions of the Portability Regulation cannot be excluded by agreeing a different choice of law. The provisions of the Portability Regulation apply irrespective of which national contract law is applicable to the contracts of the provider of the online content service with the rightholders on one side or with the subscribers on the other. This helps clarify the fact that the provisions in Art. 7 (1)

29 *Heyde*, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2017, 712, 715.

30 CJEU decision of 3 July 2012 in case C-128/11, para. 63 – *UsedSoft/Oracle*; CJEU decision of 4 October 2011 in case C-403/08, para. 108 – *Premier League/Murphy*.

Portability Regulation are mandatory provisions in internal private law and thus overriding mandatory provisions as per Art. 9 (1) Rome I Regulation. Which contracts fall under Art. 7 (1) Portability Regulation is determined by the scope of application of the Portability Regulation and thus Art. 1 Portability Regulation. Thus, the mandatory provisions apply to situations involving a portable online content service which is lawfully provided in a subscriber's EU Member State of residence and for which it must be ensured that the subscriber can access and use this service during a temporary presence in an EU Member State other than the EU Member State of Residence. Furthermore, the Portability Regulation applies for the underlying agreements concerning the acquisition of rights by the online content service from holders of copyrights or ancillary right/neighbouring right, however only to the extent they regulate the acquisition of rights related to the aforementioned portability situation in another EU Member State.

### c.) Relationship to other provisions, in particular Art. 101 and Art. 102 TFEU

68 The provisions of Art. 101 and Art. 102 TFEU with the corresponding invalidity remain applicable alongside Art. 7 Portability Regulation (see Recital 33 Portability Regulation). This can be relevant especially if the contractual provisions between the rightholder and the online content service constitutes an anti-competitive agreement which restricts the internal market as per Art. 101 TFEU.<sup>31</sup> It appears to be correct that Art. 101 TFEU does not generally exclude a territorial limitation of rights under Art. 3 par. 2 Directive 2001/29<sup>32,33</sup> There is therefore no general country of origin principle required by antitrust law for online uses in EU copyright law.<sup>34</sup>

31 See on this point CJEU decision of 4 October 2011 in case C-403/08, para. 134 et seqq. – *Premier League/Murphy*.

32 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

33 Making available to the public; *Stieper*, Multimedia und Recht (MMR) 2011, 825; *Albrecht/Mutschler-Siebert/Bosch*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2012, 93, 96; *Ranke/Roßnagel*, Multimedia und Recht (MMR) 2012, 152, 156; *Baumann/Hofman*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2011, 890; *Ratjen/Langer*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2012, 299, 306; stricter: *Hoeren/Bilek* CR 2011, 735, 740; *Kreile*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2012, 186.

34 Partially of a different opinion, with an assessment looking at an individual market analysis: *Engels*, Die Vereinbarkeit der territorialen Aufspaltung von Verwertungsrechten mit den europäischen Binnenmarktregeln.

69 Art. 102 TFEU also remains applicable (see Recital 33 Portability Regulation) and its legal consequences from Art. 101 par. 2 TFEU in the event of infringement of its prohibition. However, Art. 7 Portability Regulation has priority over national law.

## VIII. Article 8 Protection of personal data

### 1. General

70 Art. 5 Portability Regulation stipulates a mandatory verification of Member State of residence through the collection of a series of subscriber personal data. In order to emphasise the protection of this personal data and to keep any interference in subscribers' privacy as minimal as possible, Art. 8 Portability Regulation contains a provision on handling personal data in the scope of the verification of the Member State of residence. Art. 8 Portability Regulation contains some provisions which are stricter than general data protection law, in particular in relation to the purpose of the data processing as well as the time limits for deletion. In addition to these more specific provisions, however, general data protection law rules apply to the data processing actions, which follow from the General Data Protection Regulation (GDPR).

### 2. Key aspects (par. 1 to 3)

71 Art. 8 (1) Portability Regulation clarifies that the processing of personal data to verify the Member State of residence under Art. 5 Portability Regulation must be carried out in line with European data protection law and in particular the principle of data minimisation must be taken into account. This provision also follows directly from the provisions under data protection law and thus only has clarifying effect. Directive 95/46/EC<sup>35</sup>, mentioned in par. 1, has been replaced by the General Data Protection Regulation, which despite not being explicit mentioned in par. 1, is now applicable to all data processing actions in the scope of the verification under Art. 5 Portability Regulation, provided no more specific provisions follow from Directive 2002/58/EC<sup>36</sup> (so-called ePrivacy Directive)

35 DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

36 DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy

or the corresponding national implementation provisions which pursue the same objective (see Art. 95 GDPR).

- 72 The principle of data minimization/economy explicitly emphasized in par. 1 (see also Art. 5 (1) (c) GDPR) requires that the scope and extent of the collection and processing of personal data are always limited to what is necessary. This principle has particular significance for the selection of verification criteria listed in Art. 5 Portability Regulation. For example, to avoid unnecessary data processing actions, the provider will be required primarily to rely on that data (e.g. payment data), which is already available to it for the purposes of performing the contract or which is necessary in the scope of the setting up or renewal of the contractual relationship (see Recital 27 Portability Regulation). As far as the checking of the IP address under Art. 5 (1) lit. (k) Portability Regulation, only the abbreviated address in binary format is required in order to determine the country from which the subscriber accesses the content service, while the collection of the complete IP address cannot be justified on the basis of Art. 5 Portability Regulation (see Recital 28 Portability Regulation).
- 73 Under Art. 8 (2) Portability Regulation, data collected as per Art. 5 Portability Regulation may be used solely to verify the Member State of residence of the subscriber and may not be disclosed to third parties, in particular rightholders. This provision represents an increase in stringency compared to the provisions of general data protection law, which allow for a rededication of the purpose of personal data processing in certain circumstances (see. Art. 6 (4) GDPR). According to the clear wording of the provision, a rededication of the data collected under Art. 5 Portability Regulation is not possible. However, this restriction does not apply to data which the provider already has in its possession and thus was collected on another basis.
- 74 The same applies to the unconditional obligation, stipulated in Art. 8 (3) Portability Regulation, immediately and irreversibly to destroy all data collected under Art. 5 Portability Regulation after every verification. In this respect also, the general provisions of data protection law provide for exceptions within narrow limits (see Art. 17 (3) GDPR), which, according to the precise wording of Art. 8 (3) Portability Regulation, do not apply to data collected as per Art. 5 Portability Regulation. However, in this respect also, the absolute obligation to delete the data under par. 3 does not apply to data which the provider already has and thus was collected on another basis.

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and electronic communications).

### 3. Data collection to protection against abuse?

- 75 Art. 5 (2) Portability Regulation provides for the possibility for providers with legitimate doubts as to the subscriber's initially determined Member State of residence to repeat the verification as per Art. 5 Portability Regulation. Art. 5 Portability Regulation also justifies the collection and processing of the subscriber's personal data, in accordance with Art. 8 Portability Regulation and the provisions of general data protection law, for the purposes of this repeat verification. However, it remains unclear to what extent the provider is supposed to be entitled to collect and process personal data such as a user's IP address, in order to prevent abuse by subscribers and thus even to establish doubts as to the accuracy of the initially determined Member State of residence in the first place. Since that type of data collection does not constitute data collection under Art. 5 Portability Regulation, rather prior data processing, Art. 8 Portability Regulation is not applicable to such data processing actions. The permissibility of such processing is determined solely according to the general provisions under data protection law. One possible justifying provision in this respect would be Art. 6 (1) lit. (c) GDPR (compliance with a legal obligation) or alternatively Art. 6 (1) lit. (f) (safeguarding the legitimate interests pursued by the controller or by a third party). Ultimately, it must be possible for the provider to verify that the requirements of Art. 3 and Art. 4 Portability Regulation have been met, i.e. in particular the subscriber's Member State of residence, in a proportionate manner. However, in order to make any interference in subscribers' privacy as minimal as possible, the data collection must be limited to the extent absolutely necessary and adequate measures must be taken to prevent any other use of the data collected.

## IX. Article 9 Application to existing contracts and rights acquired

### 1. General

- 76 Art. 9 Portability Regulation contains provisions on the handling of contracts and exploitation rights which were concluded or acquired prior to the application of the provisions of the Regulation on 1 April 2018. With a view to the objective of the Regulation, of ensuring as effective an implementation of the Digital Single Market as possible, these provisions are intended to ensure that the provisions of the Regulation also apply to ongoing contractual relationships.

## 2. Regulatory content

### a.) Applicability of the Regulation also to already existing agreements (par. 1)

77 Par. 1 firstly establishes that the Regulation shall apply also to contracts concluded and rights acquired before 1 April 2018, to the extent they are relevant for the provision of, access to and use of an online content service, in accordance with Art. 3 and 6 Portability Regulation, after 1 April 2018. The provisions of the Regulation thus apply to all usage relationships (existing agreements) in existence on 1 April 2018 for online content services provided for payment of money. At the same time, it must be assumed that the Regulation also applies to existing agreements which run counter to the provisions of the Portability Regulation. The contract clauses which are contrary to the Portability Regulation are thus not enforceable. Thus, the Portability Regulation leads to a contractual amendment. To the extent that it then becomes unreasonable to expect adherence to other contract clauses - not directly affected by the Portability Regulation - an amendment of the contract or even a termination of the contract by the service provider must be possible, in accordance with the principles applicable when the basis of the underlying transaction ceases to exist. However, a contract amendment in the form of a price increase is excluded. This is because Art. 3 (2) Portability Regulation and Recital 19 Portability Regulation exclude additional fees and this also applies to existing agreements. It is, however, conceivable that an existing agreement could be terminated in the event of unreasonableness. The subscriber may also terminate the contract under these conditions, in particular if they have concluded a contract in a country other than their Member State of residence and now want to conclude a contract - which is portable according to the Regulation - in their own Member State of residence. If the subscriber has concluded a package consisting of an online content service on the one side and electronic communications services (e.g. internet access) on the other, they may, however, only terminate the part of the contract which concerns the online content service (Recital 32 Portability Regulation).

78 Furthermore, the Portability Regulation also applies to contracts regarding the provision of online content services with rightholders pre-dating 1 April 2018. Even if the wording of Art. 9 (1) Portability Regulation is not completely unambiguous in this respect, it does follow clearly from Recitals 31 and 32 Portability Regulation, which even afford a grace period between the Portability Regulation coming into force (20 July 2017, as per Art. 11 (1) Portability Regulation) and the first day of application (1 April 2018, as per Art. 11 (2) Portability Regulation),

in order to allow time for existing licensing agreements to be renegotiated. Therefore, it is certainly conceivable for a new price to be set for licensing agreements, which reflects the increased territorial exploitation possibilities and the resulting increase in attractiveness of the service. The Portability Regulation does not in principle prohibit rightholders from demanding higher prices for the larger scope of use (c.f. above section VII.2.(a)). If the parties cannot agree, a claim on the part of the rightholders to an amendment or termination of the contract is conceivable. This is, however, a question of the applicable national contract law.

79 For example, where German contract law applies, the primary possibility is a claim for contractual amendment (or subsidiarily also withdrawal or termination) due to disruption of the basis of the transaction as per Sec. 313 BGB (Bürgerliches Gesetzbuch, German Civil Code). This possibility cannot be excluded on the grounds that risk would then lie with one party.<sup>37</sup> The risk of territorial expansion of the exploitation authorisation through the Portability Regulation does not lie solely in the rightholders area of risk, because the service gains attractiveness. However, the principle of the disruption of the basis of the transaction may not be applied recklessly rather only if it seems essential to prevent consequences which are plainly incompatible with law and justice and thus unreasonable for the contracting parties concerned.<sup>38</sup> A case-by-case assessment is therefore required. One factor which suggests the situation is unreasonable for the rightholder and which would therefore give rise to an adjustment in remuneration is that the rightholder is forced to accept a larger scope of use without additional remuneration whilst the provider's service becomes more attractive to subscribers, even if this cannot be reflected in a higher total payment from the subscriber. In any case, service providers who invoice on a transaction basis may be able to create a higher usage intensity as a result of the larger territorial coverage.<sup>39</sup> Another conceivable consequence is a modification of certain obligations of the service to the degree allowed by the Regulation, e.g. with respect to geo-blocking obligations, which remain permitted without verification of the Member State of residence or for countries outside the EU. In this respect, the contractual amendment should be made in the manner of a reduction to the valid elements.<sup>40</sup>

37 BGH (Bundesgerichtshof, German Federal Court of Justice) decision of 25 November 2004 in case I ZR 49/02 – *Kehraus*.

38 BGH decision of 25 November 2004 in case I ZR 49/02 – *Kehraus*; BGH decision of 4 July 1996 in case I ZR 101/94; – *Klimbim*.

39 *Heyde*, Zeitschrift für Urheber- und Medienrecht (ZUM) 2017, 712, 715.

40 *Ranke/Glückler*, Multimedia und Recht (MMR) 2017, 378, 382.

Withdrawal or termination are subsidiary to remuneration adjustment<sup>41</sup> and should as a rule be considered by the rightholder if the provider of the service does not agree to a remuneration adjustment.

- 80 The legal consequence of the application of the Portability Regulation to existing agreements is that contractual clauses in user contracts (with subscribers) or licensing agreements (with rightholders) are not enforceable from 1 April 2018 onwards, as per Art. 7 Portability Regulation (c.f. above section VII.2.(a)). Furthermore, invalidity could be considered, in particular for violations against Art. 101 or Art. 102 TFEU (c.f. above section VII.2.(c)). In order to avoid negative legal consequences, therefore, a review of and, where applicable, amendment to corresponding licensing agreements appears to be appropriate.

### b.) Verification of Member State of residence in the case of old contracts (par. 2)

- 81 Par. 2 contains specific time limits in relation to the obligation to verify the Member State of residence under Art. 5 Portability Regulation, within which the review of existing contracts which deviate from Art. 5 Portability Regulation must have been completed. For usage contracts concluded prior to 1 April 2018 for online content services provided against payment of money, the corresponding verification of the Member State of residence must be completed by 2 June 2018. Providers of an online content service provided without payment of money, who voluntarily decide to participate in the provisions of the Regulation as per Art. 6 Portability Regulation, must complete the corresponding verification of pre-existing subscribers within two months from the date the service was first offered under Art. 6 Portability Regulation. For contracts concluded or renewed after this date, a verification must be undertaken as per Art. 5 Portability Regulation. In the original text of the Regulation, the date given was still 21 May 2018; however, this date was corrected to 2 June 2018 in a corrigendum to the Regulation in OJ L 198/42 of 28 July 2017.

## X. Article 10 Review

- 82 By 21 March 2021, and as required thereafter, the Commission shall assess the application of this Regulation in the light of legal, technological and economic developments, and submit to the European Parliament and to the Council a report thereon.

<sup>41</sup> BGH decision of 4 July 1996 in case I ZR 101/94;– *Klimbim*.

The report referred to in the first paragraph shall include, inter alia, an assessment of the application of the verification means of the Member State of residence referred to in Art. 5, taking into account newly developed technologies, industry standards and practices, and, if necessary, consider the need for a review. The report shall pay special attention to the impact of this Regulation on SMEs and the protection of personal data. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.

## XI. Article 11 Final provisions

- 83 The provisions and stipulations of the Regulation are binding in all Member States from 1 April 2018, see Recital 35 Portability Regulation. In the original text of the Regulation, the date given was still 20 March 2018; however, this date was corrected to 1 April 2018 in a corrigendum to the Regulation in OJ L 198/42 of 28 July 2017. It does not require transposition into national law of the EU member states.

- 84 The grace period between the entry into force (par. 1) and the date of application (par. 2) is explained by the fact that the Regulation applies to contracts and rights concluded or acquired prior to the date of its application. The intention is to enable rightholders and providers of online content services who fall under the scope of application of this Regulation to make the necessary adjustments to the new situation and enable providers to amend their terms for the use of their services (Recital 32 Portability Regulation).

## C. Conclusion

- 85 The Portability Regulation is another step towards reducing digital borders within the European Union. The new regulations are intended to reflect the behaviour of EU citizens, to conclude contracts for the use of online content. However, the Portability is not free from any conceptual difficulties. It is unclear, above all, what time limit is to be seen in a “temporary presence”.

### Annotation

This Article is based on the commentary of the REGULATION (EU) 2017/1128 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on cross-border portability of online content services (“Portability Regulation”) in the internal market by both authors in the renowned German copyright commentary Fromm/Nordemann, published in German language in

its 12th edition 2018. It has been amended to meet the requirements of this journal and the expectations of an international readership. It does, however, still contain some references to the German perspective on the Portability Regulation, which may serve as an exemplary application of its provisions within a member State.