



**INTELLECTUAL PROPERTY OFFICE (IPO)
CALL FOR VIEWS
ON CROSS-BORDER PORTABILITY OF DIGITAL SERVICES**

**SUBMISSION FROM
THE BRITISH SCREEN ADVISORY COUNCIL (BSAC)**

12 February 2016

1. The British Screen Advisory Council (BSAC) has provided evidence and analysis relevant to the issue of cross-border access to audiovisual services, including relating to the provision of portable services, on a number of occasions. We welcome the opportunity to provide views on the draft EU Regulation on cross-border portability. As an independent, industry-funded umbrella group, which brings together many of the most influential people working across the value chain in the UK audiovisual industry, we are well placed to offer views that are widely supported. BSAC Members include not only all of the segments in the UK audiovisual value chain (including development, production, sales, acquisition and licensing of content), but also leading technology firms and ISPs¹.
2. BSAC Members welcome services being made available in a portable way for paying subscribers who value this so that audiovisual content can be enjoyed at home, on the move and, for a limited period of time, even when on holiday in other Member States. However, some of the provisions in the draft Regulation do not in our view deliver a helpful way of meeting consumers' expectations about portability. Indeed, we believe that some of the provisions in the draft Regulation will impede, rather than facilitate, the development of high quality cross-border portable services that meet consumer demand. The draft Regulation does not as currently drafted deliver the aim indicated of promoting innovation for the benefit of consumers, service providers and right holders.
3. We are concerned that the draft Regulation mandates cross-border portability for certain services without linking that mandate to the requirement to provide effective authentication measures to ensure the residency of the

¹ See BSAC's Membership, at <http://bsac.uk.com/membership-list.html>

subscriber, which are integral to the provision of services which are secure and quality-driven. Whilst the draft Regulation imposes no obligation on service providers to guarantee the quality of those portable services, good quality cross-border portable services would, of course, require investment by the industry and so an increase in costs for subscribers is likely. There does not appear to have been any attempt to assess the impact of such increased costs for subscribers. It is important that the draft Regulation permits the market to work to deliver good quality cross-border portability and obtain a return on the investment in doing this.

4. We are surprised that the Government has already indicated its support for the draft Regulation given these serious concerns. We note that some other major EU Member States' governments are expressing serious concerns about the draft Regulation and its scope. Moreover, the mandatory aspects do amount to a significant regulatory burden on service providers. This approach is contrary to the Government's desire more generally to cut red tape and to reduce regulatory burdens on business, such as applauded by the Secretary of State for Business, Innovation and Skills in his recent second reading speech on the Enterprise Bill². A draft Regulation that does not permit the development of flexible services that match consumer demand, and with attractive pricing options, so that consumers can decide what type of service they wish to pay for, is not justified by any of the evidence we have seen³.
5. Some of the issues explored in the IPO call for views on the draft Regulation are ones that we explored in our October 2015 Paper on 'Copyright-Protected Audiovisual Services: Portability and Cross-Border Access'⁴. We have previously supplied the IPO with a copy of this Paper, and have referred to it where most relevant in our comments below with regards to the particular issues raised by the IPO.

Consumer value

6. We agree that some consumers would benefit from being able to access services that they have subscribed to when they are temporarily visiting a Member State other than the one in which they reside. However, this is not something that many consumers currently have an interest in doing. For example, the evidence referred to on pages 11 and 12 of the Impact Assessment accompanying the draft Regulation suggests that fewer than 6% of European consumers would at the moment potentially use a cross-border portability feature of an online subscription service. We acknowledge that this figure could well increase, but there are still likely to be a significant number of consumers who do not have any interest in cross-border portability. The draft Regulation would not, therefore, currently be of relevance to the vast majority of EU consumers, and yet could cause a number of negative impacts, such as

² See 'Oral statement on the Enterprise Bill by the Secretary of State for Business, Innovation and Skills' (2 February 2016), at <https://www.gov.uk/government/speeches/enterprise-bill-second-reading>

³ We have serious concerns that the Impact Assessment published with the draft Regulation has failed to assess some of the impacts that we have indicated in this submission.

⁴ See BSAC, 'Copyright Protected Audiovisual Services: Portability and Cross Border Access' (October 2015), at <http://bsac.uk.com/policy-papers.html?download=319:portability-and-cross-border-access-in-europe>

increases to the price of the services that customers only use in the Member State in which they reside, due to the extra costs that providing cross-border portability to just a few consumers would incur. Issues such as this are not explored in the Impact Assessment, which is therefore seriously misleading with regards to consumer value.

Temporary access

7. The definitions in the draft Regulation do not limit the provisions to be enjoyed by a person who is in another Member State for only a short time, such as whilst on holiday or a business trip. There is no time limit on what is meant by ‘temporarily present’, so that presence for many months or even longer in a Member State that is not that person’s habitual residence could apparently count as temporary. There is also no definition of how to determine where a subscriber is ‘habitually residing’. It would seem entirely possible, therefore, for a person who did reside in the past in one Member State, but who now works for a significant amount of time in another Member State and who possibly rarely returns to the first Member State, to benefit from access in the second Member State to a service that has been subscribed to but is rarely used in the first Member State. This situation would mean that portability provisions could become indistinguishable from cross-border access, and so lead to all the concerns that we raised in our October 2015 Paper. So long as there are mandatory requirements for cross-border portability, the definitions need to be very tightly and narrowly drawn to ensure that there is no creep that leads to having to provide mandatory cross-border access. In the absence of strict and clear limitations on scope there is, moreover, a significant danger that in due course the CJEU might interpret the terms in the draft Regulation even more widely than we have speculated. Cross-border portability should only apply where a subscriber is present for a short and transitory time in another Member State on holiday or a business trip.
8. The preference that we indicated in our October 2015 Paper, of not defining portability in too prescriptive a way⁵, is not contradictory to what we have said in the last paragraph. That preference was indicated on the basis that cross-border portability would not be mandated. If that were the case, we would welcome a definition that is not too prescriptive, beyond the essential starting point that there must be a single Member State where the consumer who has subscribed to the online service is permanently and verifiably resident. However, this would be on the basis of market players then having the freedom to develop and offer secure, competitive and diverse solutions to consumers, which would give consumers a genuine choice with regards to which offers of portability they find attractive and wish to subscribe to. The draft Regulation undermines this by broadly mandating portability, whilst only very loosely defining the meaning of this.

⁵ See the bullet point in the middle of page 15 of our Paper, ‘Copyright Protected Audiovisual Services...’ (October 2015), at <http://bsac.uk.com/policy-papers.html?download=319:portability-and-cross-border-access-in-europe>

Limitation to subscription services

9. As we have already explained, mandating cross-border portability for the services as defined in the draft Regulation is not in the best interests of any stakeholders. Mandating portability does not provide a mechanism under which industry would be encouraged to develop attractive services with good quality cross-border portability options for consumers. This is true for services that come within the scope of definitions in the draft Regulation and otherwise. For example, those who provide services outside the scope of the services covered by the draft Regulation are likely to be more reluctant to explore developing portability options if any services consequently developed would then be caught by the mandatory provisions in the draft Regulation.
10. Facilitating cross-border portability provisions for all types of service would in our view benefit consumers more than the provision in the draft Regulation with mandatory requirements. So long as any provision is mandatory, the application of this should be very tightly drawn, and services which do not provide the required level of authentication should not be covered. However even doing this would not, of course, avoid the problems we have explained, and would also create some additional ones⁶.

Definitions

11. The definitions are not in general tightly drawn. This is a serious issue given in particular that there is no flexibility regarding when and how cross-border portability might be provided. This would ultimately mean that the uncertainty leaves the precise meaning of what must be done open to dispute between various parties, with the interpretation presumably finally being decided by the CJEU. This is not a helpful approach. How terms should be defined is, however, linked to how the provision is made in the draft Regulation, and so we have referred to the issues that need to be considered under the other headings.

Verification

12. The emphasis in the draft Regulation and accompanying documents is that verification should be relatively easy for consumers to satisfy and should not be repeated often. Those developing services for consumers and those who own rights in the content to be delivered would not want to impose unreasonable or unnecessary verification requirements, but they must be able to ensure that services are limited to those who have paid or otherwise subscribed to them. The very wide scope of what might be required on cross-border portability means that there may be an equally wide desire to use a range of content protection and verification measures to ensure that there is a genuine entitlement to a service. The Regulation should balance flexibility and

⁶ See for example the issues that we identified if portability were to apply beyond paid for content on page 15, and also as further explained in footnote 32, of our paper, 'Copyright Protected Audiovisual Services...' (October 2015), at <http://bsac.uk.com/policy-papers.html?download=319:portability-and-cross-border-access-in-europe>

contractual freedom, with the fundamental need to ensure that content carried by services covered by the Regulation is subject to adequate and effective authentication measures in order to verify entitlement and to prevent cross-border portability being indistinguishable from more general cross-border access. Authentication by platforms would include effective means of verifying the residence of a subscriber at the time of subscription as well as periodic verification of residence during subscription plus verification and tracking of presence in another Member State.

13. We are very concerned about what might be deemed as verification for services that have not been provided for payment. As for other terms, the draft Regulation is lacking in any detail regarding what this might mean; however, suggestions in the recitals and elsewhere imply that this could fall well short of having evidence of permanent residence in the Member State where the service has been subscribed to. A TV licence, for example, might be bought for an address in a Member State, but this would not necessarily ascertain that the purchaser was habitually resident there at the time at which the licence was bought.

Localisation of copyright relevant acts

14. We do not support the contract override provisions regarding contractual provisions between service providers and subscribers. The other provisions on contracts, including on localisation, could be helpful to facilitate the development of cross-border portable services that are attractive to consumers; however, the requirement that such provision must be mandatory would not, for the reasons we have explained, benefit anyone.

Application to existing contracts

15. To the extent that there is no mandatory requirement regarding contracts between service providers and subscribers, the application to existing contracts might be reasonable. Regarding contracts between service providers and subscribers, there appears to be no option of recovering any of the costs of providing a good quality service from existing subscribers. This would not be fair, including to new subscribers, who might be charged a higher amount to cover the costs of developing a good quality service and so be subsidising existing subscribers who would enjoy that service for no extra charge.

Quality of service

16. We welcome the recognition in the draft Regulation that it is not reasonable to mandate the provision of cross-border portable services with a guarantee of quality. However, we also note that neither the EU Commission nor the UK Government have drawn attention to this limitation in the various press releases and fact sheets that they have made available to all, including consumers. We are therefore very concerned that the first time a subscriber

might become aware that the quality of a cross-border portable service might be poor is when the service provider is obliged by the provisions in the draft Regulation to inform a subscriber about the quality of delivery of a portable service. This would inevitably mean that consumers who are warned of poor quality and who do not realise that the service provider had no choice other than to permit cross-border portability would complain to the service provider when they find that they are unable to port a service with reasonable quality.

17. The cost of investing in technology, such as content delivery networks, was something we explained in our October 2015 Paper⁷. We said that, as cross-border portability might be technically difficult or even impossible in some cases, a service provider must be free to choose not to support portability rather than be forced to support an inferior service. The draft Regulation removes this option by requiring a service provider to provide a service, even if it is inferior to that in the Member State where the service was subscribed to. This alone would jeopardise their brand, but the additional requirement upon the service provider to inform the subscriber that the service is inferior would clearly make this considerably worse.
18. Moreover, there does not appear to be a mechanism for service providers to invest in a good quality cross-border portable service and to then recoup the costs of this from the small number of subscribers who value that portability. The only way that these costs could be recovered would be by charging all subscribers more, including the very large number who, for the moment, do not appear to have any interest in cross-border portability. (There is also, as we have indicated above, the problem of not even being able to charge existing subscribers more.) If the intention is to encourage high quality cross-border portable services, then the provision in the draft Regulation should not mandate portability. There would be much more incentive to develop such services if service providers were free to invest in quality, and to then charge a premium for a cross-border portable service to recoup that investment from those who see a value in having such access.

Delivery timescale

19. The delivery timescales are very challenging. Changing authentication requirements could only be done when the precise scope of what must be done is known and 6 months after the agreement on this is not sufficient time.

*For more information about the
British Screen Advisory Council (BSAC)
Please see our website
www.bsac.uk.com*

⁷ See page 16 of our Paper, 'Copyright Protected Audiovisual Services...' (October 2015), at <http://bsac.uk.com/policy-papers.html?download=319:portability-and-cross-border-access-in-europe>