



GSMA Position Paper

26 April 2016

Relating on the European Commission's proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with more than 250 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as [Mobile World Congress](#), [Mobile World Congress Shanghai](#) and the [Mobile 360 Series](#) conferences.

For more information, please visit the GSMA corporate website at www.gsma.com

Follow the GSMA on Twitter: [@GSMA](https://twitter.com/GSMA)

Policy Contact:

Dagmar Baer
Policy and Programme Advisor
dbaer[at]gsma.com

**GSMA position paper on the
European Commission's proposal for a Regulation on ensuring the
cross-border portability of online content services in the internal market**

GSMA welcomes the European Commission's proposal for a Regulation on ensuring the cross-border portability of online content services within the European Union. It is indeed inherent for GSMA members to support mobility of services. We consider that the objective of the proposed legal instrument to serve consumers positively by allowing them to enjoy the content they have subscribed to in their home Member States, while they are temporarily abroad, should also be proportionate and include the objective of effectively forbearing additional costs for online service providers (OSPs) in relation to the implementation of the future Regulation. Indeed, this new right made for consumers will impose an obligation on OSPs only. In this regard, it would be beneficial to include a definition of OSPs as editors of applications providing audio-visual media services. For subscribers it is key that the benefits of the application of the regulation are easy to attain in practice, otherwise, the intentions of the Regulation will not materialize. Provisions also need to be clear and robust so as to ensure a quick and efficient preparation for technically implementing the necessary mechanisms. The following position is centred on the principles of **achieving cross-border portability providing seamless access for subscribers and ensuring harmonisation of its application across the EU whilst not negatively affecting the existing economical basis underlying the operations of the respective OSPs.**

The core of the proposal is the notion of having access to online content services while being temporarily present in a Member State (MS) other than the MS of habitual residence. GSMA believes that trying to set a specific time limit to the notion of being temporarily present is not the most important aspect of this proposal. **In the view of GSMA, the right to portability should mean that subscribers can access the online content services they are already accessing in their MS of habitual residence also from another EU MS.** Within this context, it is naturally all the more important that OSPs can rightfully have the consumer's MS of habitual residence verified.

However, there is no consistent definition of habitual residence within the EU. As such, it is highly advisable to build upon the appropriate means of verifying a consumer's habitual residence that have already been put in place by service providers. This would enhance, at the same time, security for all stakeholders affected and enable to frame the new right to portability in compliance with data protection and privacy rules. Mobile Network Operators (MNOs) already require the payment details of their subscribers for the services delivered over the mobile networks, backed up by commonly-recognised forms of identification. **In terms of verification mechanisms, the Regulation should specify that the subscriber details already obtained during the process of subscription by the OSPs themselves, or from a reliable source such as a partner of the OSP, are deemed to be fully sufficient for these purposes.** This would achieve a principle-based approach to the verification and authentication mechanisms which is at the same time not leading to additional administrative or process measures and incurring additional costs. Rec. 17 and Art. 5 (2) should be amended accordingly.

The portability aspect is the core of the proposal. **The proposal rightfully limits its applicability to current and future portable services only** which is an important element that should be emphasized in order to avoid the notion that OSPs would face an additional obligation to develop portable versions of services, which today are only available on a fixed/in-home basis such as services limited to cable and in-house Wi-Fi distribution.

The quality-of-service aspect in Art. 3 (3) has to take into account that the OSP will not necessarily have access to information about the quality of service available in third-party networks, particularly in other Member States. The exploration of any such service level would depend on multiple, frequently dynamic factors outside of the OSPs control, and seeking to achieve such an information level would run counter to the objective to enable cross-border access to portable online content services. Introducing a clarification to this effect would help strengthen the intentions of the approach, which already can be derived from Recital (19) based on which Art. 3 (3) seeks to provide for. This should also be reflected in the Commission's other proposal on certain aspects concerning contracts for the supply of digital content, in that this proposal puts forward conditions related to what stipulates conformity and liability on the side of the supplier, which are not compatible with the level of information that the OSP will have access to from another MS.

Furthermore, GSMA strongly advocates for a more balanced text, which considers the role of all the players in the value chain. Indeed, the proposal imposes obligations only on OSPs while at the same time recognizing additional discretionary powers to other players. This is clear in Art. 5 (2) which leaves a wide possibility for right-holders to require OSPs to make use of effective mechanisms of verification without further specifying which player would bear the costs of implementation. Such a condition is unacceptable for OSPs, since it would result in a burdensome exposure to continuous requests from right-holders that might ask them to implement disproportionate verification tools. Art. 5 (2) should, at least, specify that any request by right-holders to OSPs asking for the **implementation of additional or different means of verification (compared to those already used by OSPs) will be subject to the evaluation of the OSPs and, in any case, the relevant costs of implementation would be on the right-holders.**

The timescale for entry into force of the Regulation is ambitiously set at 6 months, which GSMA believes will pose a problem for OSPs. Even where verification and authentication mechanisms are based on existing information, systems and processes - both within the OSPs but potentially also with third parties - will have to be put in place and as such an implementation period of 18 months is more realistic.

Achieving the shortest possible implementation period of the regulation while taking above into account, finally requires a prohibition of contractual provisions contrary to Article 3(1) and 4. However, there could be a risk that less content is licensed for domestic portable online use, or that licenses are granted exclusively to one service, thereby decreasing availability of content. Accordingly, the wording of Recital (26) and Art. 5 (1) should be reinforced to avoid such an outcome.