

# Portability and cross-border access to audiovisual services in the EU: towards the Digital Single Market

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The newly appointed European Commission (EC) announced on 6 May 2015 its strategy to achieve a European ‘Digital Single Market’ (DSM). One of the most contentious areas of the DSM initiative relates to cross-border access to audiovisual services and copyright-protected content. From a seemingly radical starting point, the EC appears to have settled on a more modest set of proposals involving portability of services and cross-border access to lawfully acquired content. The exact definition and legal formulation of the EC’s proposals, what these proposals mean for market participants, and how to overcome potential barriers will all be essential considerations in the coming months. This article discusses how these issues affect service providers and content rights holders, and considers possible solutions for overcoming barriers to full portability.

## The EC is pushing towards a ‘Digital Single Market’ for audiovisual content and services

The EC appears committed to expanding the Internal Market for digital services to go beyond the exemptions to Internal Market rules applied to audiovisual services and copyright-protected content. The recently published DSM strategy suggests that the EC’s ambitions are limited to the “portability of legally acquired content” and “ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector”.<sup>1</sup>

This position, which appears to be much more pragmatic than previously indicated by earlier comments from commissioners Andrus Ansip and Günther Oettinger, addresses the numerous objections that were raised by stakeholders – in particular against pan-European licences to content. There appears to be support for portability, in particular from pay-TV and subscription video on demand (SVoD) providers. For example, Canal+ recently indicated that it would be ready for full portability in a matter of weeks.

## Service providers and content rights holders face costs – and potential revenue loss – if the EC mandates full portability

Full portability will allow consumers who can legally access a service in one country to access it when travelling elsewhere within the European Union (EU) – with identical content. The nature of what constitutes ‘legal access to a service’ is an important question: this status is clear for paid subscription services, but less clear for advertising-funded services. Access to content rights represents a significant barrier to full content portability. As a result, content agreements would need to include, by default, provisions that enable systematic portability.

For audiovisual service providers (both TV and SVoD), portability would entail some costs. These include technical costs to implement conditional access, legal costs for changes to contracts, and monitoring costs to ensure that the agreements with rights holders are respected. However, it could make the service more valuable

<sup>1</sup> European Commission (Brussels, Belgium, 2015), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Single Market Strategy for Europe*, 6 June 2015, COM(2015) 192 final. Available at <http://ec.europa.eu/priorities/digital-single-market/>

– for example, to frequent travellers. Providers of paid services may be able to monetise this, but free-to-air (FTA) TV providers may not.

Content rights holders may also face costs if portability is mandated, which would require established agreements to be reviewed. This process may be particularly complex and burdensome if content is sold in multiple EU Member States. Furthermore, the benefits of portability for rights holders are uncertain: some contracts already provide an option for portability, which typically triggers additional payments. However, this will change if portability becomes mandatory.

## Potential barriers to portability should be addressed directly to ensure the support of most stakeholders

The requirements for portability – and the impact their implementation is expected to have on service providers and content rights holders – create barriers and a degree of residual opposition to portability for audiovisual services. The barriers can be broadly characterised as follows.

- **Potential abuses:** Stakeholders will be concerned that portability may be abused, leading to distortions in the valuation and monetisation of content.
- **Asymmetric impact on rights holders' negotiating position:** If portability becomes mandatory, rights holders that sell content across borders may suffer a loss of revenue, which, in some countries, may affect audiovisual output.
- **Excessive costs for FTA TV providers:** In this context, all providers would need to implement conditional access, and clearly define the meaning of 'legal access' to their services. In addition, providers would have to implement robust monitoring systems that were accepted by rights holders, and this could be burdensome and costly. This would also likely affect smaller pay-TV providers, as costs may largely be fixed.

In order to reach a consensus and gain the support of most stakeholders (service providers, rights holders and Member States) on compulsory portability, these barriers must be addressed – for example, through the following mechanisms.

### A strict definition of the conditions of portability is required to avoid abuses

Content rights holders and service providers will need to ensure that portability is not abused. In particular, if portability is understood as the right for residents in one Member State to subscribe to services available there – and to access them when they travel abroad – then stakeholders will want to ensure that residents of one country cannot subscribe to services of another EU country. In order to do so, services providers can follow these strategies:

- **limit the duration of portability, through a 'fair use' policy (of sorts),** which may help to avoid situations where a subscriber is considered to be resident in another Member State than the one where the service is sold
- **limit the number and location of simultaneous connections,** to help avoid subscription-sharing across borders
- **limit the geographical scope of portability to the EU,** so that out-of-EU portability could become a desirable add-on service.

## **A fair balance for rights holders**

Rights holders appear to consider mandatory portability as an interference with their ability to structure and monetise content rights. As a result, some stakeholders are of the view that the wider the scope of portability, the greater the potential loss for rights holders. In general, any negative impact on rights holders can be managed if the conditions of portability are strictly limited and correctly monitored.

This would leave open the question of ‘value sharing’ between rights holders and audiovisual service providers, and some rights holders are likely to call for a regulated financial settlement as a condition of portability.

## **An acceptable framework for FTA TV services**

Given that FTA TV providers tend to command a high share of viewership (around 80% across the EU), content providers may consider the impact of portability on their content rights to be greatest for FTA TV providers, and insist on specific conditions for portability. Furthermore, given the importance of FTA TV services for European content production funding, and the perceived fragility of ad-funded business models, any additional costs (such as conditional access) for FTA TV providers is likely to raise objections from the governments of some Member States. As a result, although the EC could mandate the implementation of portability for all services – including FTA TV – it is likely that there will be an exemption, at least for a time.

## **Service and content providers must assess the implications of portability on their businesses and prepare accordingly**

If the EC is intent on uniting Member States behind a workable proposal for portability, it must address the concerns of rights holders and service providers. Once the EC’s proposed options are clearer, a detailed impact assessment would enable all parties to assess and agree on a way forward. Until then, service and content providers must understand the impact of the proposals, engage with the details of implementation and prepare to make the most of them.

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Analysys Mason has extensive experience advising service providers, content rights holders and policy makers on these issues. For more information about how we can help service and content providers to understand and manage these developments, please contact [David.Abecassis@analysysmason.com](mailto:David.Abecassis@analysysmason.com).