



Brussels, 9.12.2015  
SWD(2015) 270 final

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Regulation of the European Parliament and of the Council  
to ensure the cross-border portability of online content services in the internal market**

{COM(2015) 627 final}  
{SWD(2015) 271 final}

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## 1. CONTEXT

The digital economy has been a major driver of growth in the past two decades, and is expected to grow seven times faster than the overall EU GDP in coming years.<sup>1</sup> Under the political guidelines of the European Commission, adapting the current EU copyright rules to the realities of the Digital Single Market (DSM) “*in light of the digital revolution, new consumer behavior and Europe’s cultural diversity*” is one of the flagship projects for the next years.<sup>2</sup> In particular, the DSM Strategy<sup>3</sup> puts forward a range of initiatives, among others, in copyright with the objective of creating an internal market for digital content and services. It calls for addressing a set of key obstacles to the functioning of the DSM, including allowing wider online access to copyright-protected works by users across the EU. The Strategy however also recognizes that these obstacles are very different in scope, nature and complexity; therefore it endorses a step-by-step approach.

This Impact Assessment report (IA) accompanies a self-standing initiative to enhance the cross-border portability of online content services in the DSM. This is one of the first of those initiatives under the DSM Strategy that aim at facilitating access to digital content, in particular by removing the barriers that currently stop consumers, when travelling in the EU, from accessing services they subscribed to or digital content they have purchased or rented in their home Member State (MS). Cross-border portability is a specific aspect of the broader discussion on access to services across borders where currently there are ongoing consultations both as regards the rules applicable to satellite broadcasting and cable retransmission services<sup>4</sup> and, more generally, to services<sup>5</sup>. The problems with cross-border portability however are specific and they necessitate a specific solution (as explained later in this IA). They could not be addressed and resolved by the above or any other initiative under the DSM Strategy. In particular, the ongoing review of the Satellite and Cable Directive<sup>6</sup> has a different scope (e.g. as regards the relevant services). Moreover, limited or no access of consumers in a MS to online content services provided in other MS<sup>7</sup> is a situation that is very different from cross-border portability (as described above). The former would require a different legal solution and would have different economic impacts. These issues are not addressed in this IA.

Specific early intervention on the cross-border portability of online content services is also timely now that consumers are nearing the date where there will be an end to roaming charges for travelers within the EU<sup>8</sup>.

This initiative will be followed by others regarding the further areas identified in the DSM Strategy<sup>9</sup>.

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<sup>1</sup> <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/FI3P%20Fact%20Sheet.pdf>

<sup>2</sup> [http://ec.europa.eu/about/juncker-commission/docs/oettinger\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/oettinger_en.pdf)

<sup>3</sup> Communication from the Commission "A digital single market strategy for Europe", 6 May 2015, [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf)

<sup>4</sup> Consultation on the review of the Satellite and Cable Directive, <https://ec.europa.eu/digital-agenda/en/news/consultation-review-eu-satellite-and-cable-directive>

<sup>5</sup> <https://ec.europa.eu/eusurvey/runner/geoblocksurvey2015/>

<sup>6</sup> Directive 93/83/EEC

<sup>7</sup> Also referred to as "cross-border access" or "geo-blocking".

<sup>8</sup> [http://europa.eu/rapid/press-release\\_IP-15-5265\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5265_en.htm)

<sup>9</sup> The interplay of this initiative and the draft legislation on digital contract has been examined and their consistency ensured.

## 2. WHAT IS THE PROBLEM AND WHY IS IT A PROBLEM?

With growing access to the internet digital has become, for many, the main way to enjoy content such as music, games, films or sport and a means to participate in society. More and more consumers access content online: between 2009 and 2013, consumers' spending increased by 86% on digital *music* downloads and by 413% on streaming<sup>10</sup>. Today there are close to 600 online music services in Europe.<sup>11 12</sup> The same trend is observable for *video*: consumers' spending on digital video increased by 400% between 2010 and 2013<sup>13</sup>. In 2014 there were more than 3000 video-on-demand (VOD) services in Europe, including catch-up TV services of broadcasters (1196 services) and VOD services providing access to a catalogue of programs (2101 services).<sup>14</sup> In 2014, subscription VOD services had 25 million users in 14 EU MS.<sup>15 16</sup> In 2013 the online on-demand TV revenues reached €938 million and online on-demand film revenues €588 million in the EU.<sup>17</sup> As regards *e-books*, Europeans have embraced them only to a limited extent so far: sales of e-books in Europe accounted for 7% of the global digital sales (a total of €8.1 billion in 2014). A trend towards more digital revenues is forecasted for the coming years but these remain far behind revenues from hard copies.<sup>18</sup> In Europe consumer spending on *video games* is estimated at more than €20 billion in 2015, out of a global market of €68 billion. The number of active social network game users rose in Europe from 17 million a month in 2008 to 376 million a month in 2013.<sup>19</sup> Furthermore, 58% consumers in the EU access live events (such as sports, concerts, etc.) online.<sup>20</sup> Online *sports* consumption is also growing globally, including in the major European markets.<sup>21 22</sup>

**Online content services** (for the purposes of this IA: services giving access over the internet to copyright-protected content such as films, music, e-books or games and to radio and TV programs) provide viewers with flexibility when watching audiovisual (AV) programs, including sports events, listening to music, reading books or newspapers, by giving them vast catalogues to choose from and the possibility to access such content at the time of their choice.<sup>23</sup> **Tablets and smartphones** further facilitate such uses by providing access from wherever the viewers are. Smartphone penetration has almost doubled in Europe in the last two years and the use of tablets has increased from 18% in

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<sup>10</sup> PWC Global entertainment and media outlook 2014-2018 (data available for 18 EU MS)

<sup>11</sup> <http://www.pro-music.org> (September 2015), see also Annex 5.

<sup>12</sup> Figures are not available on the value of the EU digital market. The global digital revenues of the recording industry reached USD 6.85 billion in 2014. IFPI Digital Music Report 2015

<sup>13</sup> European Video Yearbook 2014, International Video Federation (IVF);

[http://www.ivf-video.org/new/public/media/Europe\\_2014.pdf](http://www.ivf-video.org/new/public/media/Europe_2014.pdf)

<sup>14</sup> N.B. The data used in the problem definition on VOD services per MS are from a 2013 study.

<sup>15</sup> AT, BE, DE, DK, ES, FI, FR, IE, IT, LU, NL, PT, SE, UK

<sup>16</sup> IDATE Digiworld Yearbook 2015, Audiovisual Observatory and IHS.

<sup>17</sup> Audiovisual Observatory

<sup>18</sup> IDATE Digiworld Yearbook 2015

<sup>19</sup> <http://www.isfe.eu/> and IHS

<sup>20</sup> 2015 DSM consumer survey: identifying the main cross-border obstacles to the Digital Single Market and where they matter most. More specifically, over 50% consumers in FR, DE, IT, ES and GB consume sports content online, including streaming live sport events; see Global Sports Media Consumption Report 2014.

<sup>21</sup> See Global Sports Media Consumption Reports 2012 and 2014, which cover FR, DE, IT, ES and GB.

<sup>22</sup> For further economic data see Annexes 4 and 5.

<sup>23</sup> This IA extends to online content services. It does not cover satellite broadcasting services etc. as the Satellite and Cable Directive (Directive 93/83/EEC) is currently under review. The public consultation runs until 16 November 2015 and contains questions (e.g. Q2, Q2.2 and Q4) relevant to the cross-border portability of such services. This initiative therefore should not pre-empt the results of the consultation and the assessment of the different options in that area.

2012 to almost 50% of households in 2014<sup>24</sup>. In 2012, 36% of individuals in the EU used a mobile device to connect to the internet. In 2014, this share has risen to 51%.<sup>25</sup> <sup>26</sup> In 2012, 14% of individuals in the EU used a mobile device for reading or downloading news and 12% for playing games, watching images, video or listening to music.<sup>27</sup> <sup>28</sup>

Online content services rely predominantly on **content** that is **protected by copyright and related rights**,<sup>29</sup> e.g. films or music. However these services may also include content that is not necessarily protected by copyright, the most notable example being **sporting events**. At the same time, **when sporting events are broadcast**, broadcasting organisations can invoke rights in such broadcasts under EU copyright law.

Providers of online content services wanting to use **copyright-protected content** need to get a licence from the holders of the rights<sup>30</sup> in the content they want to use and for the territories in which they want to provide the services. The manner in which online rights are licensed depends on the type of content and the category of right holder. For example, rights in AV content are normally licensed by AV producers and, as far as premium AV content<sup>31</sup> is concerned, on an exclusive territorial basis, whereas rights in music are licensed in part by record producers and music publishers and in part by authors' collective management organisations (CMOs) and, normally, without territorial exclusivity.

The **rights to transmit sporting events**, i.e. the authorisation given by a sports organiser to a broadcaster (to be distinguished from the rights the broadcaster has in broadcasts itself – see above) or to another service provider so that they can transmit the sporting event to the public, further referred to as “**sports broadcasting rights**”, are often sold jointly, in particular when sport clubs entrust national or international sport associations to sell these rights on their behalf.<sup>32</sup> As indicated by the Commission's decisional practice in competition cases,<sup>33</sup> in a number of EU markets premium sports content broadcasting rights are sold in open tenders and in packages.<sup>34</sup> However, such selling practices are not yet spread in all EU markets: there are markets where rights are sold in one bundle

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<sup>24</sup> Source: Ericsson mobility report appendix, Europe, November 2014 (data: Ericsson ConsumerLab research from 2014)

<sup>25</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Information\\_society\\_statistics\\_-\\_households\\_and\\_individuals](http://ec.europa.eu/eurostat/statistics-explained/index.php/Information_society_statistics_-_households_and_individuals)

<sup>26</sup> Almost 60% of consumers use multiple screens to perform the same digital activity (i.e. change devices according to their location during the day). Ericsson mobility report appendix, Europe, November 2014.

<sup>27</sup> Source: Eurostat 2012

<sup>28</sup> Globally, 61% of consumers watch TV & video on their smartphones, an increase of 71% since 2012. <http://www.ericsson.com/res/docs/2015/consumerlab/ericsson-consumerlab-tv-media-2015-presentation.pdf>

<sup>29</sup> "Copyright" is used in this document to encompass copyright (the right of authors) and related rights (the right of performers, producers and broadcasters).

<sup>30</sup> "Holders of rights" or "right holders" are used in this document to denote holders of copyright and related rights as well as sports organisers who hold rights to broadcast sporting events.

<sup>31</sup> Content that is the most attractive in commercial terms, e.g. new films and series.

<sup>32</sup> E.g. broadcasting rights to football clubs matches are mainly sold collectively, the International Olympics Committee (IOC) is the owner of the global broadcast rights for the Olympic Games, see <http://www.olympic.org/olympic-broadcasting>. Broadcasting rights may also be marketed individually by sports organisers. See Annexes 4 and 5 for further details on sports.

<sup>33</sup> See cases COMP 37.398 (UEFA Champions League, 2003), COMP /37.214 (German Bundesliga, 2005), COMP/38.137 (FA Premier League, 2006).

<sup>34</sup> In the FA Premier League case (COMP/38.137), the Commission also imposed on the collective selling entity a no single buyer obligation, to avoid that all broadcasting rights are consolidated by one buyer.

without a tendering process.<sup>35</sup> Premium sports content is routinely marketed on an exclusive territorial basis. Non-premium sports content may be licensed by sports organisers without geographic restrictions.<sup>36</sup>

At EU level, there is a significant body of legislation that applies to the provisions of online content services including copyright and related rights, audiovisual media services and broadcasting. The legal framework is explained in Annex 6 in detail.

#### Problem tree

**Cross-border portability**, or the absence of it, concerns online content services to which consumers have lawful access (whether in exchange for a payment or free of charge), or content that they purchased or rented online in their country of residence and to which they want to continue to have access when travelling in another MS.

It is one of the issues identified in the DSM Strategy and it is a question separate from the discussion on cross-border access by consumers to online content and to online content services which are available in MS other than their own. Cross-border portability and possible other initiatives under the DSM Strategy will eventually complement each other in removing barriers to the functioning of the DSM. They are however different and need to be addressed separately. An initiative on cross-border portability does not pre-empt any decision as regards other DSM-related initiatives but those initiatives would not be able to resolve the problem with cross-border portability either. Therefore, they will be addressed subsequently. The problem identified in the context of cross-border portability is summarised in Figure 1 below. Its drivers are related to contractual practices and, as far as copyright-protected content is concerned, to copyright law. There are significant differences between the sectors of the content industries. As a result, the scale of the problem varies depending on the sector.

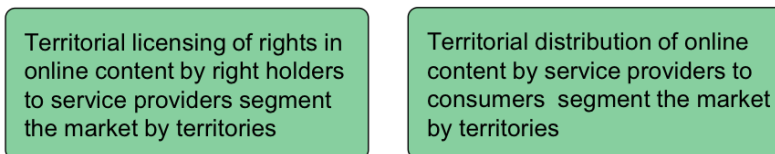
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<sup>35</sup> See ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, p 94.

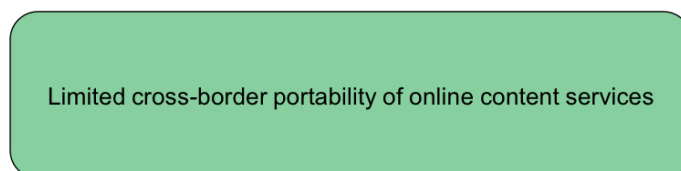
<sup>36</sup> Ibid.

Figure 1: Problem tree

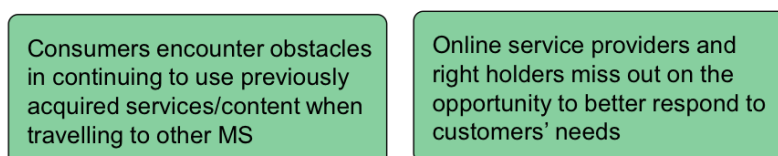
**DRIVERS**



**PROBLEM**



**CONSEQUENCES**



Description of the problem

When using online services, consumers either purchase<sup>37</sup> or rent<sup>38</sup> content on a one-off basis ("**transactional services**", e.g. those services provided by Amazon or iTunes where particular films or songs are offered for purchase or rent) or they establish a longer-term contractual relation with them ("**subscription services**", e.g. Netflix, Deezer or Skoobe).

In the case of *transactional services*, where a copy which is purchased by the consumer is downloaded on the consumer's device (e.g. a film bought on iTunes and downloaded to an iPad), the consumer may access such a copy anywhere and no issues related to portability arise. The question of portability however arises where the content is accessible via a digital locker or where it is streamed by the service provider, which is typical for rental, as in these cases the access to content is not within the consumer's control. Transactional services increasingly use streaming and/or cloud-based technologies.

*Subscription services* give consumers access to an unlimited amount of content from the provider's catalogue on an ongoing basis<sup>39</sup> either upon payment of a monthly fee or, e.g. where the service is supported by advertisers, free of charge. A typical feature of subscription services is that they allow consumers to access content on different devices,

<sup>37</sup> i.e. acquire the right to a digital copy of content which they download to their device and/or have an unlimited access to, from e.g. a digital locker (online storage service for digital content, e.g. films, music).

<sup>38</sup> i.e. acquire the right to access content for a certain period of time (typically 24 to 48 hours).

<sup>39</sup> Though, certain temporal limits may apply depending on the content, e.g. catch-up services of broadcasters (i.e. services giving online access to content that has been previously aired on a TV network) are typically limited in time (e.g. available for 30 days).

either on a program-scheduled or an on-demand basis.<sup>40</sup> The question of portability arises also in these services as content is normally streamed by the service provider.

In many cases, the access to these online content services is only possible in the MS of the consumer/service provider. **When consumers travel abroad**, they often cannot, or can only partially use the service that they have subscribed to in their home country or they cannot access the online content that they have previously purchased or rented.

It is important to note that many online content services are freely accessible in the sense that they do not involve any explicit contractual relation<sup>41</sup> between the service provider and the consumer or that they do not involve the verification of the consumer's MS of residence.<sup>42</sup> These services are out of the scope of this IA.

**The presence and the scale of the problem is not the same in all sectors.** While the business models are changing and the consumer demand is rapidly increasing, the description below captures the main features of the different sectors:

The problem is particularly present in online **audiovisual (AV)** services. In most cases these services are not portable across borders at all. Consumers travelling in other MS cannot access the service or the content to which they have lawful access in their home country. This concerns both standalone VOD platforms and those operated by pay-TV operators<sup>43</sup> regardless of whether the services are subscription-based or transactional.

Examples:

A subscriber of HBO Nordic staying for some days in Italy will not be able to access his account and watch films and will, instead, see a message saying that the service "is only available in Sweden, Norway, Denmark and Finland".

The same will happen to users of the Belgian IPTV service Proximus TV Partout who can watch their favourite TV channels on tablets and smartphones, but only in Belgium.

Similarly, the Internet TV platform Magine TV Germany, which encompasses both a limited unpaid service and paid subscription services, is only available to users residing in and accessing the service from the territory of Germany.

A French user of the transactional MyTF1 film and series service will not be able to rent a new film while staying temporarily in the UK.

An Italian user of the transactional ChiliTV film and series service will not be able to rent and stream a film while on holiday in Spain.

In some cases online AV services are **partially portable**. This can mean that A) only content that the consumer previously downloaded (if the provider offers such a possibility) to his portable device is available when travelling abroad<sup>44</sup> or B) that a consumer's access is limited to a selection of the content the service normally offers.<sup>45</sup> C) Partial portability can imply that only the content offered by the same service provider in the visited MS is available. In this case, the availability of the service depends on the

<sup>40</sup> Current Market and Technology Trends in the Broadcasting Sector, p.28.,

[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=307382](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=307382)

<sup>41</sup> e.g. the acceptance of HTTP cookies (i.e. data sent from a website and stored in a user's web browser while the user is browsing that website for purposes of notifying the website every time the user loads the website of the user's previous activity on this website) will not be regarded as a contractual relation for the purposes of this IA.

<sup>42</sup> e.g.: <http://www.rtve.es/television/>, <http://ninateka.pl/> (the vast majority of content), <http://www.btv.bg/videos/>, <http://www.rtf.be/video/>, <http://www.vtuner.com/>.

<sup>43</sup> All major pay-TV services offer to their customers the possibility to access their programs away from the main TV screen; most of them provide web portals and/or apps. Current Market and Technology Trends in the Broadcasting Sector, p.28.,

[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=307382](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=307382)

<sup>44</sup> e.g. Sky Go, Canal Play, Amazon Prime Video

<sup>45</sup> Normally in the case of a broadcaster's own productions when it holds the rights in all EU MS.



presence of the online service provider in the visited MS<sup>46</sup> and on the catalogue of content offered in that MS<sup>47</sup>, which may be very different from the one offered in the home country (and in a different language or without specific features available in the home country such as accessibility features for persons with disabilities).

Examples:

A) If a user of the transactional Universciné (Belgium) film service wants to watch an already rented film while staying temporarily in the Netherlands, he has to download it before travelling – he will not be able to rely on the streaming feature.

B) A subscriber of one of the main French online AV services - Canal Play - could benefit from its "Summer to go" option allowing to download a selection of content and then watch it for 30 days.

Users of the German RTL Now TV service can access it using a PC, smartphone or tablet, but will have only partial access to the content (mostly to RTL own productions) when they are outside of Germany.

C) A Dutch subscriber travelling to France will only be able to watch films offered by Netflix to French consumers. The same subscriber travelling to Poland will not be able to watch films on Netflix as Netflix is not available in Poland.

In the above cases, consumers are cut-off from their online content services or – in the case of partial portability - significantly limited in their experience. Using services offered in the visited country may not be an option as it may not be practical to enter into a subscription when only visiting a country for a limited duration, the content may not be available or available only in a foreign language, etc. and in any event this is not a reasonable proposition from the consumer's point of view.<sup>48</sup>

Similarly to AV content, much of **premium sports content** made available online is not portable across borders, in particular the streaming of live sporting events.<sup>49</sup> As explained above, the offers by broadcasters to watch their programs (including sports programs) on the "second screen" are currently limited to the national territory. The same trend is observed concerning broadcasters' standalone online services for sports.

Examples:

Viasat's Viaplay is one of Europe's first unbundled<sup>50</sup> online TV sports services,<sup>51</sup> available in Denmark, Finland, Sweden and Norway. However, a consumer cannot login to his account while travelling in the EU.

Sky's Now TV is an online service offered by Sky in Italy, Germany and the UK, which includes unbundled online sports offerings. These services cannot be accessed by consumers while travelling in the EU.<sup>52</sup>

As a result of territorial restrictions, consumers can only enjoy the services of the broadcaster/service provider they have subscribed to in their home MS and not when travelling abroad.<sup>53</sup> Again, consumers cannot easily replace their home services by services available in the visited country as e.g. the desired content may not be available

<sup>46</sup> N.B. only large players are present in several MS. e.g. Netflix is currently present in 15 European countries, smaller Italian VoD provider ChiliTV is present in 5 European countries

<sup>47</sup> For which the service provider has licences in the visited MS.

<sup>48</sup> Further examples of terms of service from across the EU resulting in access or use restrictions are presented in Annex 7.

<sup>49</sup> Access to premium sports content, even though it may be available on the broadcasters'/service providers' online platform, is usually not accessible when travelling to other MS.

<sup>50</sup> i.e. sports-only as opposed to bundled with other elements of a TV program.

<sup>51</sup> See IHS Technology, Television Media Intelligence Service, Insight Report - Sports Rights: Operators Evolve the Pay TV Proposition as Costs Go Up, August 2015, p. 13.

<sup>52</sup> Sky TV Now content shown in Germany can be watched also in Austria.

<sup>53</sup> A recent survey shows that consumers who tried to access live events (including sports) online while abroad experienced problems. According to 2015 DSM consumer survey: identifying the main cross-border obstacles to the DSM and where they matter most, of the 38% of respondents who streamed live events (e.g. sports matches) in the last 12 months and tried to access streaming services of their own country while abroad, 51% reported not being able to access them.

at all in the visited MS, e.g. if that sport is not popular in the visited MS or not available due to other preferences in that market<sup>54</sup>. In particular, the offer of premium sports content by other service providers can be limited. One specific feature of sports is the value of live watching, i.e. consumers want to watch sports live and therefore, a delayed viewing/listening, e.g. upon consumer's return via catch-up TV, is not a substitute. As for watching other (non-premium) sports content, consumers may also experience problems while travelling in the EU, as - even though there may not be territorial restrictions in place - major pay-TV operators offer access to their programs away from home only in the national territory.

In other content sectors, the cross-border portability of online services is more present.

In the **music** sector, consumers, when travelling, are normally able to access and use the online music services to which they have subscribed in their home country.<sup>55</sup> Therefore, in practice, there seem to be no restrictions to the cross-border portability of online music services. At the same time, the legal situation appears to be less clear as some end-user agreements limit uses to the home country of the subscriber.<sup>56</sup>

There do not seem to be issues with the cross-border portability of **e-books**. Most online services offer the possibility to download e-books to the reader's device<sup>57</sup> (at present, this is the typical use pattern in the sector). There are also more and more subscription-based streaming services<sup>58</sup> in the market. These are generally portable across the MS.<sup>59</sup>

Finally, streaming services that offer access to **video games** are also generally available across borders. Subscription is not the main mode of access.<sup>60</sup> The business models used by video game providers include free to play online or free applications, models relying on advertising and/or in-game sales of features enhancing the gamer's experience, subscription-based as well as pay-per-download. It appears that the free to play model<sup>61</sup> has been gaining ground at the expense of other models. Cross-border portability is usually not restricted.

The **scale of the problem** in the AV sector and in sports coverage is important and it continues to grow, partly due to the increasing number of online subscription-based services and partly because of the increasing consumer demand.

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<sup>54</sup> E.g. if the team of the visited MS plays at the same time, the match of the consumer's MS may not be broadcast, or if it is broadcast, it is likely to be without "home-specific" commentary or interviews.

<sup>55</sup> E.g. a consumer can access his Spotify or Deezer account anywhere in Europe. See summary and conclusions from the "Cross-border Access and the Portability of Services" Working Group of Licences for Europe, which indicate that online music services are generally portable: <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/WG1-Music.pdf>

<sup>56</sup> e.g. <https://www.spotify.com/be-fr/legal/end-user-agreement/>

<sup>57</sup> e.g. Amazon, Kobobooks

<sup>58</sup> e.g. Skoobe (DE, ES), Izneo (FR, BE), Mofibo (DK, NL), ECI (BE), Yieha (BE), Youboox (FR), Youscribe (FR), 24Symbols (DE, UK, IT, ES), Paper C (UK, DE), Elly's choice (NL), Multinova (PT), Leia Comprazer (PT), Nubico.es (ES).

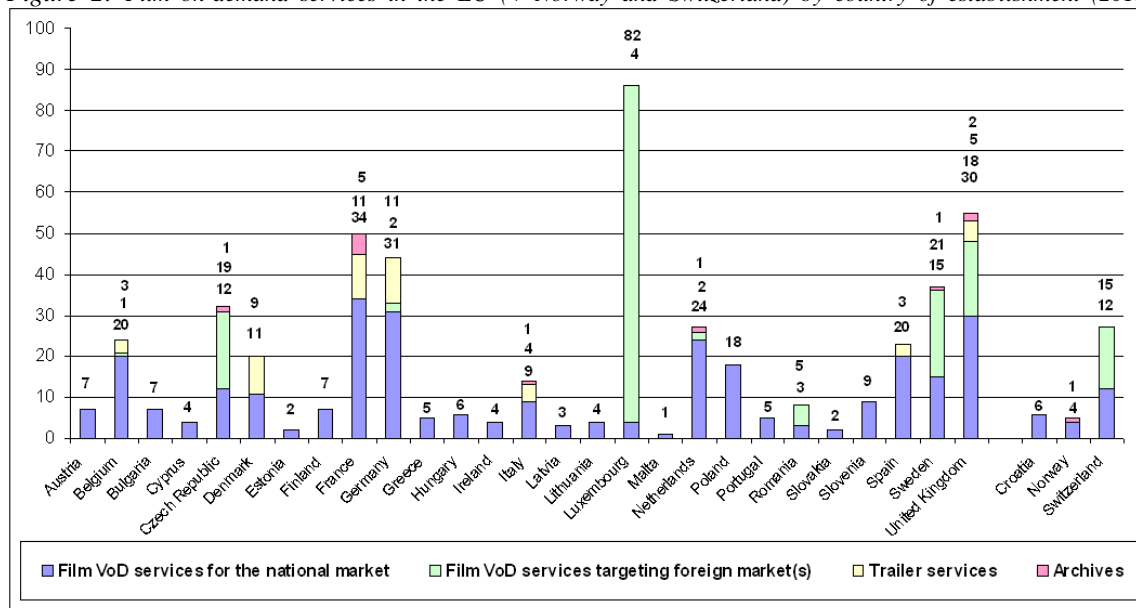
<sup>59</sup> Information provided by the Federation of European Publishers, see e.g. <http://www.fep-fee.eu/FEP-attends-the-first-roundtable>

<sup>60</sup> E.g. <http://www.ipdigit.eu/2015/03/business-models-for-digital-goods-video-games-free-to-play-games/> and <http://www.economie.gouv.fr/files/03-rapport-igf-igac-culture-economie.pdf>. Multi-player interaction as well as integration with social networks are important features of the video games environment too (e.g. <http://alliancenumerique.com/wp-content/uploads/2013/01/JRC60711-GamesReport.pdf>)

<sup>61</sup> It is often accompanied by advertising and/or in-game sales.

As regards the **number of services**, in 2013, 3087 on-demand AV services were identified, out of which 2733 were established in an EU MS and 447 were focused on films.<sup>62</sup> Figure 2 gives an overview of their presence in the different MS.<sup>63</sup>

Figure 2: Film on-demand services in the EU (+ Norway and Switzerland) by country of establishment (2013)



Source: European Audiovisual Observatory, 2013c

Moreover, in AV, subscription VOD (SVOD) services experienced the strongest growth for digital video (2013) with an increase of 147.5% (compared to a 43% increase for digital rental and 37% increase for digital purchase). Digital subscriptions accounted for 26% of digital video services in 2013<sup>64</sup>. For sports content, new offerings are emerging, where broadcasters offer unbundled online TV services allowing consumers to access sporting events "à la carte"<sup>65</sup>, alongside all-encompassing broadcasters' offers to view their programs on a "second screen".

As regards the **consumer demand**, the lack of cross-border portability is a missed opportunity to offer better services. The Body of European Regulators for Electronic Communications (BEREC) estimated that Europeans, who travel at least once a year, spend abroad on average 11.6 days per year. For citizens of Cyprus and Luxembourg the yearly average is 30 days, and for citizens of Finland, Ireland, Lithuania and the Netherlands close to 20 days.<sup>66</sup> Indeed, the growing use of connected mobile devices (smartphones, tablets),<sup>67</sup> in particular for watching video, indicates consumers' interest for accessing content wherever and whenever they want.

The current consumer demand was confirmed in a recent Eurobarometer survey<sup>68</sup>. 16% of the respondents (representing 20% of internet users) indicated they pay a subscription to access online content and 17% of people having a subscription indicated they have

<sup>62</sup> Fragmentation of the Single Market for on-line video-on-demand services: point of view of content providers, 2014. <https://ec.europa.eu/digital-agenda/en/news/fragmentation-single-market-line-video-demand-services-point-view-content-providers>

<sup>63</sup> It is important to note that multiple VOD services are often exploited by the same service provider.

<sup>64</sup> IVF Report: [http://www.ivf-video.org/new/public/media/EU\\_Overview\\_2014.pdf](http://www.ivf-video.org/new/public/media/EU_Overview_2014.pdf)

<sup>65</sup> IHS Technology, Television Media Intelligence Service, Insight Report - Sports Rights: Operators Evolve the Pay TV Proposition as Costs Go Up, August 2015, p. 13.

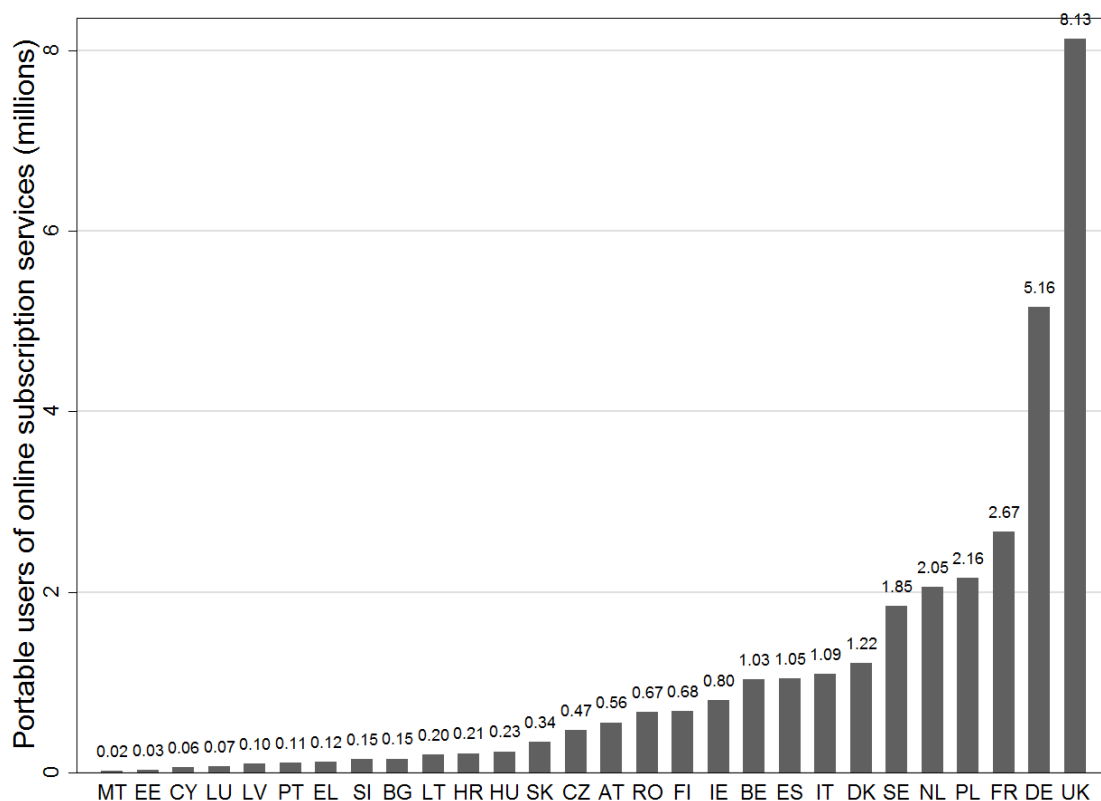
<sup>66</sup> For more data on tourism see Annex 5.

<sup>67</sup> See figures in the introduction.

<sup>68</sup>

already tried to use it abroad, while 21% responded they would be interested to do so in the future. In addition, **33% of those who do not have a subscription consider cross-border portability as an important element if they were to take one.** Having combined these findings with the results from a previous Eurobarometer survey carried out on tourism<sup>69</sup>, it is possible to estimate the percentage of European consumers who would potentially use this feature of online subscription services. They would represent over 29 million people<sup>70</sup> (5.7% of European consumers) at EU28 level<sup>71</sup>, with significant differences by countries (from 1% in PT and GR to 20% in SE and 22% in DK), as indicated in the graph below. This number does not include European consumers who may want to benefit from portability of content acquired on a transactional basis nor of free-of-charge subscription services.<sup>72</sup>

Figure 3 – The current potential demand for portability of paid subscription-based services, by country



Source: own calculations on the basis of Flash Eurobarometer 411 and Eurobarometer 392

The fast evolution of the market for online content services as well as the rapid increase in the number of consumers travelling within the EU show that the level of demand can increase significantly in a short while. This is explained in the baseline scenario.

### Drivers

The variations in the availability of cross-border portability of online content services in the EU are caused mainly by different business practices in the different sectors. The

<sup>69</sup> Eurobarometer 392 "Preferences of Europeans towards tourism" (fieldwork in January 2014)

<sup>70</sup> On EU 28 level, 29.174 million people. Population figures from the Penn World Tables dataset (2011).

<sup>71</sup> Own calculation based on Eurobarometer on cross-border access to content and Eurobarometer 392. On the EU28 level, 15.96% of all survey participants have a subscription. 86% of people planned to travel in 2014, 42% of whom to another MS.

<sup>72</sup> Globally, 42% of consumers think it is very important to watch their TV & video content wherever they are. <http://www.ericsson.com/res/docs/2015/consumerlab/ericsson-consumerlab-tv-media-2015-presentation.pdf>

problem described above, in particular, results from the deep-seated **licensing practices of right holders** and/or from the **commercial practices of service providers** in some sectors of the content industries.

These practices are **facilitated by the fact that copyright is territorial** which means, in essence, that those rights under copyright which are harmonised at EU level are implemented in national laws and that the geographical scope of these laws only extends to the territory of the MS in question. In consequence, **a service provider** that is making content available online in more than one MS, including if it does so only for the purpose of cross-border portability, **must have the rights to use such content for the relevant territories**. Of course, the fact that copyright is territorial would not in itself prevent right holders from granting multi-territorial licences (where otherwise they are in a position to do so)<sup>73</sup>. When they do so, the service providers would be able to offer portability (in those MS covered by the multi-territorial licence). Moreover, in principle, the territoriality of copyright also does not prevent right holders from granting licences to service providers which, taking into account the limited extent of use of the content in territories other than the home MS of the consumer, allow the use of the content in other MS but only for the purposes of cross-border portability.

The licensing of sports broadcasting rights by sports organisers follows the same logic as the licensing of copyright. The economic incentives often drive sports organisers to exploit their sports broadcasting rights on a territorial basis.<sup>74</sup> Hence, broadcasters/service providers wanting to offer cross-border portability would need licences for the affected territories.

*The licensing practices of right holders:*

**I.** In the **audiovisual** sector, the general practice is territorial licensing and territorial exclusivity for premium content (e.g. films and TV series of particular interest for the audience) that is characterised by high upfront investment. AV producers of **premium content** typically grant an exclusive licence to a single distributor/service provider in each MS. This form of licensing, in combination with release windows<sup>75</sup>, allows applying different prices in different territories and for different types of media and ensuring that consumers wishing to watch a particular piece of content have access to it only through one provider at a given time. Rights are also often pre-sold at the pre-production stage to ensure the financing of the content. In exchange for a fixed upfront payment to the film producers, **distributors obtain exclusive exploitation rights in a specific territory for a defined period of time**.

As a result, **service providers willing to acquire a licence for another territory to be able to offer portability would not be able to do so** despite the limited effect of portability on issues such as the exclusivity of the exploitation in a given territory (including on the release windows) because another provider would have the exclusive rights for the territory. Alternatively, the provider wanting to offer portability would have to bid for the licence against a provider who would want the rights to provide its service

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<sup>73</sup> e.g. where the rights are not held or administered by another entity in other MS

<sup>74</sup> See further in Annex 4. However, this is not always the case, as in practice sports broadcasting rights may also be sold on multi-territorial basis, E.g., the broadcasting rights for the Olympic Games in 2018-2024 were sold to Eurosport/Discovery for the entire Europe, see <http://www.olympic.org/news/ioc-awards-all-tv-and-multiplatform-broadcast-rights-in-europe-to-discovery-and-eurosport-for-2018-2024-olympic-games/246462>.

<sup>75</sup> Release windows allow rights owners to apply different prices to different means of distribution of the product. Different release dates are defined for cinema exhibition, DVD (rental/sales), VoD (with a distinction between VOD and SVOD) or Pay-Per-View, Pay TV and Free TV. Release windows are generally negotiated by the distributors according to commercial considerations; only in certain MS they are regulated by law.

in the territory (not only to provide portability). The acquisition of such a licence would require disproportionately high investment.

Cross-border portability is **considered as an attractive feature of online content services** not only by consumers<sup>76</sup> but also by the AV industry. In 2013 their joint statement at the Licences for Europe forum confirmed their willingness to work towards cross-border portability.<sup>77</sup> However, in order to be able to allow AV service providers to provide this feature to their consumers as regards every film or other piece of content in their service, right holders would need to A) take into account cross-border portability when negotiating new licences, B) review and amend the existing complex network of contracts that currently ensures territorial exclusivity to distributors/service providers (and consequently excludes cross-border portability) in 28 MS.<sup>78</sup> The industry has not embarked on this exercise yet and if it does so, achieving a situation where cross-border portability becomes a standard feature of all online content services may take a substantial amount of time<sup>79</sup> and lead to diversified practices in the industry.<sup>80</sup> However, until cross-border portability becomes a standard element of all new and existing licences, consumers may only be able to watch certain parts of the online content when travelling abroad with black-outs for the "non-portable" parts.<sup>81</sup> This is unlikely to satisfy the consumer demand.

**II. In the sports sector, the prevailing commercial practice of sports organisers is to sell sports broadcasting rights for premium content on an exclusive territorial basis.**<sup>82</sup> Such exclusivity enables right holders to collect higher revenues due to the uniqueness of the content, and also allows them to adapt the price of rights to the level of interest in different territories. As for the purchasers, i.e. normally broadcasting organisations as well as other service providers, the exclusivity gives them a competitive advantage as they can differentiate their offers from their rivals and a possibility to attract large audiences. This in turn helps them to maximise their revenues from advertising and/or subscription fees. As in the AV sector, **the cumulative effect of exclusive territorial licences acts as an obstacle to cross-border portability.** On the contrary, non-premium content sports organisers often do not require territorial exclusivity.<sup>83</sup> In such cases, service providers may be entitled to stream the content without territorial restrictions (or sports organisers may launch such services themselves).<sup>84</sup>

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<sup>76</sup> See above and the results of Flash Eurobarometer 411.

<sup>77</sup> See the joint statement of the AV industry (pledge No. 1) at the Licences for Europe forum (Annex 2).

<sup>78</sup> The duration of licences in the AV sector varies significantly – it seems that such licences are concluded for 3-10 years with the average duration of 4-7 years.

<sup>79</sup> This is also supported by the fact that the pledge of the AV industry at the Licences for Europe forum delivered no results in two years, in a market that is otherwise very dynamic. The lack of progress was also confirmed by the Commission's monitoring of the terms of service offered by the service providers to consumers (see Annex 7) and the discussions with stakeholders (see Annex 2).

<sup>80</sup> E.g. as regards the length of the stay in another MS or other conditions of using this feature

<sup>81</sup> It is to note that "partial portability" as explained earlier cannot be considered as a step towards "full" cross-border portability in the AV sector as "partial portability" only covers content for which the service providers has exploitation rights also in the visited MS, e.g. because the content is the broadcaster's own production, or the provider also provides service in the visited MS and therefore already has a licence also for that territory. This business practice will not lead to the cross-border portability of the vast majority of AV content.

<sup>82</sup> See ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, p71 et seq.

<sup>83</sup> Furthermore, if they cannot sell their media rights across borders or in certain territories, they may want to offer their content across borders for free in order to increase their audience and attract more sponsorship.

<sup>84</sup> Examples include free streaming of various sports at the Sports Hub Channel, developed by SportAccord in collaboration with YouTube; free online streaming of the second division of the Spanish football league in 2014; matches of the Swedish football league are available across borders;



**III.** In the **music** sector, the licensing of rights in musical works is often organised on a territorial basis<sup>85</sup> although a number of music publishers and collective management organisations (CMOs) grant multi-territorial licences. The multi-territorial licensing of rights in musical works for online uses will be facilitated by the Directive 2014/26/EU on Collective Rights Management which has to be implemented by MS by April 2016. In June 2015, the CMOs PRS (UK), GEMA (Germany) and STIM (Sweden) received the clearance of their deal by the Commission with a view to establishing a multi-territorial licensing hub in Europe.<sup>86</sup> Multi-territorial licensing is widely used for the rights held by record producers<sup>87</sup>.

Where multi-territorial licences are granted, service providers can provide their services, including portability, across multiple territories. On the contrary, where licences are granted for a single territory, the service provider would not be able to offer the cross-border portability of its service without having obtained licences for all affected territories (or without the possibility in the licence to engage in a certain "overspill" when providing the portability of the service). At present, online music service providers, also those that operate in a single MS and presumably license rights only for this MS only, seem to offer their services with a cross-border portability feature.<sup>88</sup> The reason behind could be that **the vast majority of music content is not licensed on an exclusive basis** (e.g. most musical works are available from multiple service providers in the same MS), therefore the licensing practice of right holders **does not create obstacles**, beyond some legal uncertainty (in cases where a licence is granted only for one MS and the service provider offers portability in other MS), **to the cross-border portability of services**.

**IV.** In the **book** sector, one publisher typically acquires from the right holders exclusive rights on, at least, a pan-European basis, often together with the translation rights that will enable the book to be translated (by that publisher or another one after rights are assigned to him) to other languages.<sup>89</sup> As a result, publishers are in most cases able to license a retailer to sell the e-book in multiple territories and, in practice, usually do so. This also **allows the retailer to provide cross-border portability of the service**. For books in English language, there is generally a split of the rights that are granted by authors: publishers in the UK and Ireland generally hold the exclusive rights for these markets as well as the Commonwealth countries. The US publishers usually hold exclusive rights for the US, Mexico and South America. For all other territories, publishers generally hold non-exclusive rights.<sup>90</sup>

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the Basketball World Championship organised in Lithuania in 2014 was available on a specific streaming website; European Tour TV, Ryder Cup's platform, streams for free golf matches. However, live streaming is available only in MS which do not benefit from local broadcasting, i.e. where there is no broadcaster/service provider who bought the rights to broadcast live events; see <http://www.europeantour.com/europeantour/season=2013/tournamentid=2013038/news/newsid=193330.html#7eG3vMYYaEkdTFbl.97> Also see ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, pages 68-69.

<sup>85</sup> Right holders usually transfer their rights for all EU territories to a single CMO or a publisher, who in turn enter into agreements with other collective management organisations and sub-publishers for representation in separate EU MS.

<sup>86</sup> EC press release: [http://europa.eu/rapid/press-release\\_IP-15-5204\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5204_en.htm)

<sup>87</sup> Independent record producers often license local distributors to manage their rights in particular EU territories but they also resort to "aggregators" to provide multi-territorial licences for online services.

<sup>88</sup> The European grouping of author CMOs, GESAC, states that the agreements that their members have with online music service providers do not prevent portability of such services.

<sup>89</sup> E.g. in the UK and Spain, the agent is generally the one holding the translation rights on behalf of the author; s/he then assigns the rights to a publisher for a given language.

<sup>90</sup> This means that consumers in the EU, with the exception of those in the UK and Ireland, may choose between two versions of an English book (one published by a US and the other by a UK publisher).

**V.** In the **video games** sector, online game developers were traditionally the holders of rights and would grant licences to game publishers without territorial limitations. However, as the sector evolves and new forms of distribution emerge, copyright ownership and licensing is changing too. On the one hand, game developers often distribute games themselves - directly over the Internet or through application stores (which act as agents for the game developers). On the other hand, game publishers tend to produce games themselves and rely less on independent game developers. In any case, a game developer or publisher has the ability to make a game available without territorial restrictions and typically publishes a game simultaneously in multiple territories<sup>91</sup>. This **general absence of territorial restrictions** and the fact that downloading is still a prevalent mode to access games explain why a consumer is usually able to continue using an online gaming service or a particular video game while staying temporarily abroad.

*The commercial practices of service providers:*

The lack of portability of content across borders can also be the result of business decisions taken by service providers. As a result, there are instances where even if no obstacles to portability are created by right holders e.g. multi-territorial licences are granted and licences are granted without territorial exclusivity, portability is not offered.

Service providers, especially in the **AV sector and for premium sports content**, may not be interested or financially capable of acquiring multi-territorial licences which require a substantial budget.<sup>92</sup> Further, according to the feedback received from stakeholders,<sup>93</sup> considerations such as regulatory requirements,<sup>94</sup> technological constraints,<sup>95</sup> the existing demand for the particular services, the position of competitors as well as the availability of advertising may result in service providers deciding not to enter certain markets at all and hence not to offer portability of their services in these markets.

In the **other sectors** (music, e-books, video games) either online service providers are able to acquire multi-territorial licences and offer the portability of their services in the different territories covered by the licence or licensing is not carried out on a strict territory-by-territory basis (e.g. licences allow small-scale use of the service beyond the licensed territory) enabling service providers to offer cross-border portability. Consequently, service providers do not seem to apply restrictions to the cross-border portability of their online content services.

Consequences

In consequence of the above-described licensing practices and business considerations, a substantial number of online content services, especially in the AV sector, as well as premium sports content, remain locked in national territories (and are thus not portable). This situation generates **frustration for a high number of consumers** who, while

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<sup>91</sup> Information from the Interactive Software Federation of Europe (ISFE); as regards evolution of IP management in general, see article published in the WIPO Magazine, available at [http://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html)

<sup>92</sup> See Annex 2 for the AV sector. For instance, when sports organisers offer their broadcasting rights on territorial basis, broadcasters/service providers need to bid separately for each market and for the entirety of the rights, not only for rights linked to cross-border portability. Therefore, a broadcaster/service provider who is interested only in a cross-border portability function, in addition to broadcasting in a national territory, would not have a possibility to acquire such a right. E.g., in December 2014 Premier League issued invitations to tender for its UK AV broadcasting rights for the seasons 2016/17-2018/19, and separately sold its international broadcasting rights.

<sup>93</sup> See Annex 2.

<sup>94</sup> e.g. consumer protection rules

<sup>95</sup> e.g. broadband infrastructure



travelling in other parts of the EU internal market, cannot use their subscription services or enjoy the online services or content they have previously purchased or rented. Furthermore, either because of the licensing practices or due to the high costs of obtaining multi-territorial licences, **online service providers** miss out on the opportunity to innovate, better respond to consumers' needs and provide them with an attractive additional feature of the service.

In the *AV sector*, **right holders** may also lose out by not being able to allow service providers in their licences to provide for a value-added service to consumers as this would require the renegotiation of their existing network of exclusive licences<sup>96</sup> in different territories. This is a missed opportunity as offering the cross-border portability of services would not affect the current functioning of the AV sector (as described above) as only consumers that have subscribed to the service in their home country or rented/purchased content there and are temporarily in another MS would benefit from it. The same logic applies in the premium sports sector.<sup>97</sup>

Based on the evolution of the market, as explained below, the consumer demand that is unmet by the online service providers can be expected to increase rapidly in the coming years.

#### How would the problem evolve, without EU action?

Consumer demand for the cross-border portability of online content services is expected to increase with the growing use of mobile devices. To illustrate this trend, it is expected that by the end of 2020, the number of smartphones in Europe will have doubled, reaching 800 million, meaning that more than 70 percent of mobile subscriptions will be for smartphones. Smartphone viewers in Europe consume more than four hours of video content on a weekly basis, almost half of which they view on-the-go<sup>98</sup>. Moreover, more than 59 million European households (20% of the European pay-TV market) are expected to pay for subscription streaming video services by 2020<sup>99</sup>.

Overall, also taking into account the projections for the increase in tourism, it can be expected that **the percentage of European consumers at EU28 level who would potentially use the cross-border portability feature of online subscription services could reach 14% by 2020**. This would equal around 72 million people in Europe.<sup>100</sup> In

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<sup>96</sup> See explanation above.

<sup>97</sup> As in the AV sector, the duration of licences for broadcasting rights for sporting events varies, e.g., in the UK the rights for the rugby matches in the Six Nations tournament were sold for six years starting from 2016, see <http://www.rugbyworld.com/tournaments/six-nations-2012/tv-rights-will-six-nations-deal-set-a-trend-46689>, for club championships, broadcasting rights may be licensed for a shorter period, e.g. Sky Deutschland acquired the exclusive pay-TV rights for all live Bundesliga and 2nd Bundesliga matches from the 2013/14 to 2016/17 season in Germany, i.e. three seasons, see <http://www.broadbandtvnews.com/2012/04/18/sky-deutschland-wins-live-bundesliga-rights/>.

<sup>98</sup> Ericsson mobility report; <http://www.ericsson.com/thecompany/press/releases/2014/11/1872291>

<sup>99</sup> Data from Digital TV Research; see: <http://www.homemediamagazine.com/streaming/report-20-european-tv-homes-have-svod-2020-34036>

<sup>100</sup> Own calculation based on Eurobarometer on cross-border access to content and Eurobarometer 392. This is calculated by multiplying the percentage of the European citizens who travel or temporarily stay in other EU MS by the estimated percentage of European citizens having a subscription for AV content, estimated growth in tourism, and estimated growth in the number of subscriptions. 14% of EU consumers equal approx. 72 million. Sources: for the estimated population in EU28 for 2020 (Eurostat); forecast for the growth in the number of subscriptions for AV content (IHS data); forecasts for tourism trends in EU 28: [https://ec.europa.eu/growth/tools-databases/vto/documents?name\\_list=All&field\\_type\\_tid=9040&field\\_year\\_value=All&items\\_per\\_page=10](https://ec.europa.eu/growth/tools-databases/vto/documents?name_list=All&field_type_tid=9040&field_year_value=All&items_per_page=10)

Assumptions: 1) Forecast for the number of subscriptions is for AV only but assuming that the trend will be the same across all media types. While the number of paid subscriptions in music is still lower than in AV, the growth is similar. See e.g.

the public consultation, the vast majority of consumers who responded argued in favour of cross-border access to (including the cross-border portability of) online content services.

As regards other measures related to the DSM, the end of mobile **roaming** charges as of June 2017 will have a beneficial economic effect on cross-border portability in sectors where it already exists and vice versa. On the one hand, the roaming measure will encourage consumers to use the online content services without the fear of incurring prohibitive telecoms charges and thereby increasing consumer demand for portable services. On the other hand, the cross-border portability of content will mean more traffic flowing through the networks,<sup>101</sup> justifying further investments by telecom operators. The measure on roaming will however not be able to ensure cross-border portability of content in areas where it does not exist yet. Also, as explained earlier in the IA, cross-border portability is a self-standing problem that would not be resolved by any other initiative foreseen in the DSM Strategy.

In particular, for those consumers who wish to access the services they subscribed to or the content they bought or rented in their home country, the barriers deriving from the licensing and distribution of content on a territorial and exclusive basis are likely to persist in the **AV sector and for premium sports content** due to the reasons described above. Exclusive territorial licence agreements would continue to restrict the cross-border portability of content, except where service providers have licences for all EU or for multiple territories (or where contracts allow for certain overspill, i.e. small-scale use of the service beyond the licensed territory).

Changes in this area could be very slow to materialise, as shown by the lack of tangible progress after the pledge that the representatives of the AV sector made in 2013 at the "Licences for Europe" stakeholder dialogue to facilitate cross-border portability.<sup>102</sup> Two years after the "portability" pledge was undertaken, there do not seem to be any tangible results or concrete industry follow-up. While the cross-border portability of all online AV content services in the EU is not expected to materialize in the medium term for the reasons explained earlier, it cannot be excluded that some or all of the AV industry would still try and follow up on the pledge made at the "Licences for Europe" forum. In this case, right holders would have to negotiate and grant new licences all over Europe taking into account the limited cross-border use required by portability. These licences would however only allow for the cross-border portability of the "new" content covered by them. Therefore, right holders would also have to embark on renegotiating the existing licences with territorial exclusivity in all EU MS in order to allow the cross-border portability feature to function across the EU. It is also possible that a limited number of major providers try and gradually initiate such re-negotiation process to be able to propose portability services to their subscribers. For other (smaller) providers however re-negotiating contracts would likely represent a very burdensome exercise.

Even if some progress is achieved by the market participants themselves, the situation would lead to consumers being put on an unequal footing in the internal market due to the disparities that will result from individual renegotiations of contracts. Moreover, even if right holders granted service providers the right to provide cross-border portability, the

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<http://www.musicbusinessworldwide.com/files/2015/04/Netflixvsbiz2.jpg>

2) Forecast for the number of subscriptions is for 14 EU MS (AT, BE, DE, DK, ES, FI, FR, IE, IT, LU, NL, PT, SE, UK) but assuming that it would be the same for EU28. While data is only available for the 14 higher income MS, they represent over 77% of the European population. 3) Projections of the growth in tourism are available for years 2010-2020 and for subscriptions for 2014-2019.

<sup>101</sup> A "fair use" safeguard will mitigate excessive uses.

<sup>102</sup> See Annex 2 for details on the "Licences for Europe" forum and the pledge of the representatives of the AV sector.

contractual arrangements surrounding it would be diverse and service providers may also eventually opt for not providing this feature to their consumers, e.g. due to the required safeguards or the obligation to black out parts of their service. Therefore, even if the AV industry follows up on the "Licences for Europe" pledge, also taking into account the relatively long duration of licences in the AV sector, the growing consumer demand can be expected to remain unmet or only partially met in medium term.

In the **sports** sector, it may be easier to negotiate licences covering cross-border portability when sport broadcasting rights are licensed for a short duration. However, this may not ensure a uniform practice. Moreover, broadcasters/service providers who purchase rights for live events may be less willing to ensure portability, if they cannot offer the same for other premium content, including AV content. Otherwise, they would have to offer their services with "black outs" for consumers which could be unacceptable for reputational reasons.

In the **music** sector, the cross-border portability of subscription and transactional services, which is already commonly proposed by platforms (both by larger players and smaller providers) would probably continue to be the norm. The existing business practice in the sector is unlikely to change in the short term and it would not be possible for new players to enter the market without such offer. In the longer term, the licensing practices in the market could develop in different directions. While the introduction of further territorial restrictions seems unlikely, it cannot be excluded. Both in short and in longer term, in those cases where the terms of the use of the service diverge from the actual practice, unless those online service providers review the terms and/or their licences with the right holders, legal uncertainty would remain.

**Book** publishers and **video game** developers and publishers are likely to continue to generally grant multi-territorial licences enabling online services to offer cross-border portability; although due to the rapid evolution of these markets, longer-term developments are hard to forecast.

To conclude, under the baseline scenario, in the AV sector and for premium sports content, there would be an increasing demand for portability of online services from an increasing number of consumers who travel abroad for work, studies or holiday and are unable to access online services they have subscribed to or online content they have purchased/rented in their home country. In the other sectors, cross-border portability is generally unrestricted (at least in practice) and at present it can be expected to remain so. This development in both technology and resulting consumer habits calls for the adaptation of the legal framework in the general interest.

### **3. WHY SHOULD THE EU ACT?**

#### Legal basis

Article 114 of the Treaty on the Functioning of the European Union (TFEU) confers on the EU the power to adopt measures, including a regulation, which have as their object the establishment and functioning of the internal market. Removing the existing barriers to the portability of online content services during temporary presence outside of the home MS would, depending on the sector, be a first step to make possible or facilitate and encourage the free movement of those services in the internal market, and adapt the legal framework to the change in circumstances brought about by the very rapid growth of the use of portable devices across borders.

Online content services which would be affected by EU action predominantly rely on copyright-protected content. The EU has harmonised the area of copyright as regards the rights which are relevant for online dissemination of content (notably the reproduction, communication to the public and making available rights) – see Annex 6. As explained in

more detail in Section 2, these rights are territorial and in consequence a service provider that is making online content available in more than one MS must have the rights to use such content for the relevant territories. The rapid technological development as regards access to the internet and the increasing use of mobile devices whilst temporarily in other MS require reexamining the above framework as to whether it can continue contributing to the development of the single market.

The present initiative would concern the exercise of these harmonised rights across borders. Without the adaptation of the way the rights are exercised it would be extremely difficult to respond to developments in technology and commercial practices of service providers that allow consumers to access their online content services on the go via portable devices. As this adaptation would affect the harmonised framework concerning the scope of copyright and related rights, it would have to rely on Article 114 TFEU as a legal base.

As explained in Section 2, certain elements of online content services, e.g. sporting events, are not protected by copyright and therefore not subject to the copyright harmonised legal framework. However, certain aspects of TV transmissions of sporting events have been harmonised by Directive 2010/13/EU (see Annex 4). Also, sporting events are included in broadcasts in which broadcasting organisations can invoke rights harmonised at EU level. Other rightholders, as the case may be, can also invoke rights harmonised at EU level to works and other subject matter contained in those broadcasts. Furthermore, as indicated by the CJEU<sup>103</sup>, sporting events, when broadcast, are often accompanied by copyright-protected elements such as the opening video sequence or the anthem. The present initiative has as its objective facilitating access, inter alia, to transmissions of broadcasting organisations which include transmissions of sporting events where such transmissions are offered to consumers as an online content service. In order to fully deliver to consumers the benefits of access to online content services when they travel in the EU, taking into account the rapidly changing development of technology and resulting consumer habits, it is important to include all elements of such transmissions in the initiative. Otherwise the result with regard to online transmissions, would be such that consumers would obtain access to those parts of the service which are protected by copyright while the other parts would be 'blacked-out' by service providers. This would be inconsistent with the objective of ensuring uninterrupted access to the entirety of the online content service to consumers who travel in the EU.

### Subsidiarity

The subsidiarity principle (Article 5(3) TEU) requires the assessment of the necessity and the added value of the EU action.

**Necessity:** The portability of online content services is per definition a question of a cross-border nature. It ensures that consumers who have subscribed to an online service in their home country or who have purchased or rented content there, could access this service or content when they travel to another MS. In addition to certain business considerations, a key reason why this is not possible today in some sectors (AV and sports content) is the complex system of contracts between the right holders and the distributors/service providers in the 28 MS which ensure territorial exclusivity. They would need to be reviewed one by one and in a consistent manner in all territories in order to carve out cross-border portability. While this possibility cannot be excluded, it would entail significant costs for the parties and it would lead to diverse solutions in the

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<sup>103</sup> See Joined Cases C403/08 and C429/08, *Football Association Premier League Ltd, v QC Leisure*, (C-403/08); *Karen Murphy v Media Protection Services Ltd* (C-429/08), para 149.

market (as it was explained in Section 2).<sup>104</sup> Also, until cross-border portability becomes a standard element of all licence agreements, which can be expected to take a long time considering the need for a one-by-one revision of the contracts in AV and sports in 28 MS, some of the content in the catalogue of the service provider would be portable and some would not. This would require providers to black out some of the content during the consumers' temporary stay abroad. Therefore the fragmentation in the market would persist or even increase in the short to medium term. As copyright and rights related to copyright such as rights of broadcasting organisations in transmissions have been harmonised at EU level, MS cannot intervene via legislation in order to ensure cross-border portability. Therefore, such action can only be taken at EU level. Consequently, if the rights in question require adaptation in order to ensure cross-border portability, only the EU is entitled to act to adapt the legal framework.

Intervention only in copyright would facilitate the negotiations between right holders and service providers however it would not be sufficient to ensure that cross-border portability becomes available to consumers. This may only be achieved if the obligation to provide for this feature cannot be overridden by contracts. This must include existing contractual arrangements so as to ensure that portability becomes available for consumers at the same time across the EU. Action by MS would not be sufficient to achieve EU-wide results and the availability of content would remain patchy with limitations not only as regards certain pieces of content but also to certain MS.

As far as the other sectors (music, e-books, video games) are concerned, currently there is no evidence of problems with cross-border portability. However, in the music sector, in some instances despite service being portable in practice, end-user agreements state that customers are allowed to access the service solely in a territory of the MS in which they subscribed to the service. This is due to the licensing practices for online uses which are, unlike in the AV sector and for premium sports content, generally not based on territorial exclusivity. Consequently, in principle, it would seem that these sectors could be excluded from the intervention. However, in order to provide for full legal certainty and for the initiative to be future-proof by avoiding possible future fragmentation<sup>105</sup>, it is indispensable to cover all sectors of the content industry in an equal manner. If these areas would not be covered by this intervention, MS would not be able to address problems arising in relation to copyright-protected content for the reasons explained above. Legislative action at the EU level to adapt the copyright acquis would ensure greater legal certainty and would do away with the need to seek separate licences for the purposes of cross-border portability. It would provide service providers a guarantee that they will be able to provide portability to their consumers also in the long run and to consumers to be able to benefit from this feature.

**Added value:** In the short to medium term, only EU intervention can ensure that the conditions for consumers' access to online content services do not vary according to the MS they are located in at a specific moment. Including cross-border portability in all contracts by market participants may be attainable in the long term but it would be costly and will result in diverse solutions applied by different right holder and providers. On the contrary, in the case of EU intervention the consumer would have access to the service he

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<sup>104</sup> Two years after the pledge made by the AV industry at the "Licences for Europe" forum, there is no evidence that "full" cross-border portability has been made available by any European service provider in the sector. Partial portability, as provided today and as explained in Section 2, cannot be expected to lead to solution across the board.

<sup>105</sup> Some of these sectors could start using exclusivity to differentiate offers. If only some right holders changed their licensing practice and applied some form of territorial exclusivity, service providers would not be able to provide for the cross-border portability of their service anymore.

has subscribed to or to the content he has purchased/rented under the same conditions, no matter in which of the other 27 MS he travels to. EU action providing for further harmonised conditions would also produce clear benefits to online service providers, compared to any national solutions, by creating a legally certain framework for the provision of cross-border portability of online content services across Europe.

#### 4. WHAT SHOULD BE ACHIEVED?

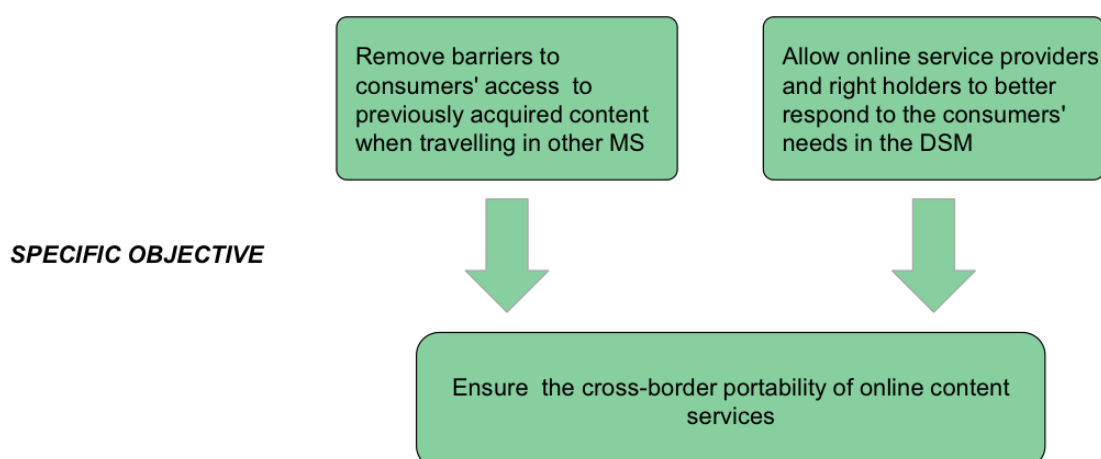
The goal of the EU policy intervention is to solve the problem identified in Section 2. The absence of cross-border portability in the EU is a specific problem that requires a specific solution. It is necessary to remove certain barriers in the functioning of the DSM to ensure that consumers can access online content services they have subscribed to or online content they have purchased or rented when being temporarily present in another MS. Other measures under the DSM Strategy will address other matters and would not solve this particular problem. They would not make this initiative obsolete but would complement it.

Currently certain licensing practices by right holders and certain terms of use by service providers prevent consumers, when travelling abroad, from accessing the service they have subscribed to or the content they have bought or rented in their home country. This problem is particularly present with respect to AV and premium sports content. The initiative should aim at removing these barriers so that the needs of users can be met more effectively. In the other sectors (music, e-books and video games), the current contractual practices do not seem to limit cross-border portability (despite legal uncertainty in some services' terms of use – see Section 3). It cannot however be excluded that licensing practices change in the future or service providers decide to restrict the access of consumers to some of their currently available services. Furthermore, services may combine different types of content (e.g. AV, music, sports) with different degrees of portability. Therefore, in order for the EU intervention be future-proof and effective, it is necessary to cover all types of content and not to differentiate between online content services according to the content they use.

At the level of the DSM, the general objectives aim at removing barriers that currently prevent consumers from using the services they have previously subscribed to or from accessing content they have previously purchased or rented, when travelling in other EU MS. From the perspective of right holders and service providers, the objective is to better respond to the needs of consumers. The specific objective of the EU action is to ensure the cross-border portability of online content services; it is one of the measures necessary to complete the DSM.

Figure 4: Objective tree

#### GENERAL OBJECTIVES



## 5. WHAT ARE THE VARIOUS OPTIONS TO ACHIEVE THE OBJECTIVES?

As regards copyright-protected content, the objectives presented above could be achieved by the introduction of the rule localising all copyright-relevant acts occurring online combined with a further harmonisation of copyright law or by a full harmonisation of EU copyright law and a single European copyright title. Such options, while not excluded as a longer term project, are beyond what is needed to solve the specific problem identified in this IA as they would address not only the question of cross-border portability of online content services but also a much broader question of the exploitation of works and other protected subject-matter over the internet as well as other issues such as authorship and ownership of works. Due to the very wide scope of such options, the timeframe for their negotiation and implementation would necessarily be very long. Consequently, they are not part of the short or medium-term actions envisaged in the DSM Strategy which aim at providing targeted solutions to specific problems. Also, the problem of cross-border portability of online content services would not require such far-reaching measures and can be resolved under a much shorter timeframe. The above options are therefore discarded as disproportionate for the current objectives.

### **Baseline**

No policy intervention. This option would consist in relying on market players to progressively offer portability of content online as well as on the courts, and notably the CJEU, to clarify the application of provisions of EU secondary law and of the Treaty relevant to the free movement of services. It would also mean continuing to rely on the application of competition law to address territorial restrictions as this may have an effect on the provision of portable online content services.

### **Option 1 – Guidance to stakeholders on the cross-border portability of online content services**

This option consists in guidance to stakeholders by the Commission encouraging online content service providers to provide for cross-border portability of their services across the EU. In addition to service providers, this guidance would also be addressed to right holders, who would be encouraged, when licensing rights to online content service providers, to grant the rights allowing for portable uses i.e. temporary uses of the online content in a MS other than the MS where the consumer concluded the subscription (or the transaction in the case of download to own or rental services). The extent of the portable uses would have to be defined in contracts and so would be the necessary safeguards (e.g. as regards the authentication of customers). The guidance would also address MS which would be invited to actively monitor market developments and the conditions under which the portability of services is provided.

#### *Stakeholders' views*

This option is not favoured by consumers as their objective is to have a solution that delivers portability in a fast and efficient manner. It used to be favoured by right holders and service providers although over time, the views of at least a part of content industry evolved and support was expressed with regard to the legislative solution (see below).

### **Option 2 – Legal mechanism to facilitate the cross-border portability of online content services in the EU**

#### *Main elements*

This option would entail a legal mechanism according to which the provision of the online content service<sup>106</sup> to a consumer who:

- has lawful access to an online content service in his MS of residence, and
- is temporarily present in a MS other than his MS of residence,

would be deemed to occur in the MS of consumer's residence (as opposed to in the MS of temporary stay of the consumer). The service provider could therefore, if not limited by contract, provide cross-border portability of his service across the EU without the need to acquire rights for the relevant EU MS; the right to provide an online content service in one MS would be sufficient.

There would be no prohibition on contractual clauses which limit or prevent the application of the legal mechanism.

### *Definitions and other provisions*

#### Services to be affected by the intervention:

- an audiovisual media service within the meaning of Directive 2010/13/EU of the European Parliament and of the Council<sup>107</sup> as well as a service the main feature of which is the provision of access to content protected by copyright and/or related rights such as films, music, books, games, etc. or to transmissions of broadcasting organisations<sup>108</sup>,
- portable (accessible from all locations that allow online access) in the MS of residence of the consumer<sup>109</sup>,
- provided to the consumer against payment of money or without such payment (e.g. advertisement-based services), in the latter case only if the MS of residence of the consumer is verified by a provider.

'MS of residence' would be defined as the MS in which the consumer habitually resides. This is normally established by the use of proxies such as banking details, the existence of an agreement for broadband or telephone connection, IP address, etc.

'Temporary presence' would be defined, for a subscriber, as a presence in a MS other than his or her MS of residence. No concrete indication as to the length of such temporary presence would be provided in the intervention. Several factors explain the choice of this approach.

Specification of duration of temporary presence is not required, as the main defining feature is that such presence does not change the habitual residence of the subscriber. The definition needs to accommodate temporary presences of various length and for

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<sup>106</sup> Therefore e.g. services of satellite or 'classical' cable TV would not be included (but internet-based cable services like "Magine" would).

<sup>107</sup> 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 OJ L 95, 15.4.2010, p. 1–24.

<sup>108</sup> Including online services linked to subscription-based TV or radio services.

<sup>109</sup> It is necessary to distinguish the two types of services as in practice, for AV content, in-home and out-of-home rights are sold separately and therefore certain service providers using IP platforms (such as cable or IPTV) are granted only in-home rights. If the proposed rules applied to such providers, they would be required to enable cross-border portability of their services despite not being able to provide portability in their national territory. Furthermore, even if not restricted by licensing conditions, service providers may make a commercial decision not to offer their services on a portable basis in the national territory e.g. because of the investment necessary for the launch of such services.



various purposes, such as leisure, travel, work and study. This will benefit consumers without generating extra cost for service providers or undermining right holders' content distribution practices. Also, online content services are developing dynamically and are characterised by a variety of offers, which makes it difficult to set a uniform duration. Furthermore, the objective of the intervention is to keep the possible verification of the MS of residence within what is reasonable and necessary. This objective would not be served by a fixed period of temporary presence which would imply checks of the exact duration of consumers' presence in MS other than his or her MS of residence.

The intervention would not require service providers to use any authentication tools but would leave this matter to arrangements between holders of relevant rights and service providers.

The legal mechanism would apply to the ongoing licensing contracts for online content between right holders and service providers only if both parties would agree on its application. It would apply to all new licensing contracts between right holders and service providers.

Full application to SMEs is envisaged (see Section 6). '

#### *Legal instrument*

This option entails EU legislative intervention as only a binding instrument can guarantee that sufficient uniformity of the application of the legal mechanism and legal certainty are achieved for all stakeholders.

A regulation would be directly applicable and would not need to be implemented in national law as it would have immediate effect and is a particularly suitable instrument when the objective is the uniform application of rules in a certain area. This type of instrument would be the best to achieve the objective of facilitating the portability of online content across the EU. It would allow a uniform application of the portability rules across MS and would guarantee that right holders and online service providers from different MS are subject to the exact same rules. This would be particularly important for online content services present in different territories.

On the contrary, a directive would leave too much room for MS to choose how to implement the relevant rules in their national legislation. As a result, there would be a high risk that the conditions for the access to the relevant subscription services would be different for consumers when travelling to different MS. Furthermore, the conditions may be different for service providers wishing to offer services across borders in the internal market. It may also take longer time to deliver the expected results in the market. Therefore, a directive would fail to achieve the pursued objectives.

#### *Stakeholders' views*

Right holders and service providers which had initially favoured Option 1 expressed support for a legislative intervention. The content industry recognises that there is a demand for portability and that offering portability, especially for AV and premium sports content, is extremely difficult due to the existing network of agreements. Option 2 is the preferred option of the content industry as it would eliminate the licensing obstacle to portability while leaving the contractual freedom for the parties. Service providers would not be obliged to provide the cross-border portability of their services and right holders could influence the conditions on which this portability is provided by their contracts with service providers. AV producers would prefer to control the triggering of the legal mechanism, i.e. condition the application of this mechanism on the agreement between right holders and service providers. The option is not favoured by consumers as it does not include the mandatory element of providing portability.

### **Option 3 – Intervention to ensure the cross-border portability of online content services in the EU**

#### *Main elements*

The intervention would contain the following three elements:

- 1) The legal mechanism described in Option 2.
- 2) An obligation on the providers of online content services who lawfully provide a portable online content service in a MS of the EU to ensure cross-border portability of services, i.e. to provide customers who are residents of this MS with access, during their temporary stays in other MS, to the same content, on the same range and number of devices and the same range of functionalities (including, for instance, accessibility features for people with disabilities) as those offered in their MS of residence. Providers would not be however obliged (unless they commit to it in an express manner) to provide the same quality of the delivery of an online content service in other EU MS as in the MS of residence of the customer.
- 3) Prohibition of restrictions in contracts between right holders and providers of online content services or such service providers and their customers limiting cross-border portability of online content services.

#### *Definitions and other provisions*

Definitions would be the same as in Option 2.

The intervention would not require service providers to use any authentication tools but would leave this matter to arrangements between holders of relevant rights and service providers. At the same time, there would be appropriate safeguards relating to the proportionality and necessity of the requirements potentially imposed by right holders to ensure that such requirements would be adequate for the objective of authentication and would not result in an excessive burden on service providers.

There would be also general data protection safeguards to ensure that the potential use of authentication tools is made in a proportionate manner.

The intervention would apply to the ongoing contracts for online content services between right holders and service providers and between service providers and consumers. Market players would benefit from a transitional period to make arrangements necessary to adapt to the new rules.

Full application to SMEs is envisaged (see Section 6).

#### Legal instrument

This option entails EU legislative intervention as only a binding instrument can guarantee that the portability is achieved in all MS and that sufficient uniformity and legal certainty are achieved for all stakeholders.

The considerations as regards the choice of legal instrument are the same as in Option 2. A regulation seems better suited to reach the objectives of the initiative.

#### *Stakeholders' views*

This option is favoured by consumers. As to the views of right holders and service providers see Option 2.

### **6. WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTIONS AND WHO WILL BE AFFECTED?**

#### **Baseline**

## Effectiveness

The impacts of the baseline scenario will significantly vary depending on the sector, the development of business models and on licensing practices, as described in the problem definition.

**Content industries:** The pressure exerted by consumers who increasingly use mobile devices to access content might result, in the medium to long term, in right holders and service providers progressively finding solutions to allow cross-border portability of online *AV content*. However, this is likely to require long negotiations, as it would involve changes to multiple, often long-running licensing contracts, possibly also with regard to licence fees (though it is not evident given the negligible impact of portability on the territorial exploitation of content). Right holders are expected to be, at first, rather reluctant to allow for portable uses within the EU, due to the difficulty deriving from reviewing the existing network of licensing agreements and because of possible problems in determining/monitoring that the use is really a "portability" use, i.e. that the use in MS other than the home MS of the consumer is limited to temporary stays.

*In sports*, gradually, due to consumer preferences, sports organisers may offer cross-border portability when selling their broadcasting rights. Where broadcasting rights for premium sports content are licensed for a short duration, such evolution could take place in a short to medium term. However, the duration of licences may vary significantly. Furthermore, due to different market dynamics applicable to different sports, this evolution can take some time and lead to diversified results. Sport right holders may, at first, have the same concerns as described above for the determination and monitoring of the portability use.

In the short or medium term, there is no significant change expected in the licensing practices in *music*. Producers of music (majors and independent) are likely to continue to license on a multi-territorial basis if online service providers request such licences. As regards authors' rights, music publishers and CMOs (those that comply with the requirements of the CRM Directive) are likely to do the same. These multi-territorial licences would allow online service providers to continue offering portability. Even in the case of territorial licences being granted to online service providers, right holders are likely to accept a certain level of portability offered by service providers as these licences would not be based on exclusivity. In the same way, in the short or medium term, no change in the licensing practices for *e-books* and *online games* is expected. However, it is difficult to make predictions in that regard for the long term given the rapidly-evolving context in which these services operate.

**Service providers:** Online *AV* services, in particular subscription services (including online content services offered by pay-TV operators), would be increasingly interested in offering to their customers the possibility to access the service when travelling in other EU MS. Certain operators have already announced their intention to explore with right holders the possibility to offer this.<sup>110</sup> However, concrete results could be achieved only if right holders are willing to review existing licensing arrangements and accept to grant authorisations for portable uses. This would partly depend on the market power of service providers which in turn puts smaller providers and especially start-ups (SMEs) in a difficult position. In any case, it is likely that service providers would only be able to provide the cross-border portability of parts of the content offered by their service.

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<sup>110</sup> E.g. Canal+ for its SVOD service, see: <http://electronlibre.info/le-groupe-canal-pret-a-adopter-la-portabilite-pour-ses-abonnements/>

Concerning *sports*, consumers who increasingly use mobile devices for viewing sports content online<sup>111</sup> may exert pressure on broadcasters/service providers to ensure portability of their services. However, broadcasters/service providers, who acquire exclusive rights for live sporting events, may be less willing to ensure cross-border portability for consumers, if they cannot offer the same for other premium content, including AV content. Indeed, it could be difficult to explain to consumers why part of the content is portable, while the other is "black-out". Portability of sports content may then depend on the portability of other AV content.<sup>112</sup> Also, the territorial exclusivity enjoyed by broadcasters/service providers leads to less competitive pressure to differentiate their offerings (including by offering cross-border portability) as such content is not available to consumers elsewhere.

As both major and smaller *music* platforms already offer cross-border portability of subscription services, they are expected to continue to do the same under the baseline scenario (assuming no changes in the licensing practices of right holders). Portability is so common that it is highly unlikely that new players could enter the market without providing this service to their customers. The same would apply to *e-books* and *video games*.

This option would have no impact either on **competition in the internal market** or the **competitiveness** of the creative industries. It would have no impact on **employment** either. Other than those mentioned above, there are no specific impacts on **SMEs**.

**Consumers:** In the short term, consumers travelling abroad would remain cut-off from their home countries as regards the access to *AV content and premium sports content*. However, in the medium to long term, certain online services might be able to offer to their customers the cross-border portability of their service. However, under this option, this is not expected to become a standard industry practice. The number of consumers being able to use portability across borders is likely to increase slowly and unevenly across Europe. Specifically for *premium AV and premium sports content*, given that there are prevailing exclusivity arrangements, consumers may not have an option to switch services providers in favour of providers offering cross-border portability, as the content may not be available elsewhere.

No significant impact is expected for consumers as regards other types of content (*music, e-books and games*). Cross-border portability is likely to continue to be widely available for EU consumers assuming no changes in the licensing practices of right holders. However, as far as the music content is concerned, the legal uncertainty as regards terms of use of the service<sup>113</sup> would continue.

### Efficiency

The baseline scenario would not entail any compliance costs and would not deliver any benefits.

### Coherence with other EU policies

**Cultural diversity:** The baseline scenario would not have any impact on cultural diversity. It would not affect the production of new cultural content.

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<sup>111</sup> See Annex 5.

<sup>112</sup> However, unbundled offerings are also emerging, where broadcasters offer sports content 'à la carte', see Section 2. Portability of such unbundled services would be less dependent on the portability of broadcaster's overall package.

<sup>113</sup> See Section 2.

**Fundamental rights:** The baseline scenario would not have any impact on copyright as property right or on the freedom to conduct a business, as recognised in the European Charter of Fundamental Rights (Articles 16 and 17).

**Third countries, trade and environment:** The baseline scenario would not have any impact on third countries and trade or on the environment. It also does not affect the EU's and the MS's **international obligations**.

### **Option 1 – Guidance to stakeholders on the cross-border portability of online content services**

#### Effectiveness

The impact of this option would also vary across sectors, depending on the existing licensing practices (use of multi-territorial licences, territorial exclusivity etc.).

**Content industries:** Right holders in the AV and sports sectors would be the most impacted, as, in practice, this option would mainly address them and invite them to review their licensing practices which currently limit cross-border portability. They would be encouraged to grant licences for portable uses outside the home territory when they hold the rights for all EU territories, which is generally the case for AV producers. Their willingness to authorise portable uses would depend on the market power of online service providers and on the proposed safeguards concerning access to content from territories other than the MS of residence of the consumer and on the degree of difficulty to renegotiate licences they may have granted with territorial exclusivity. Portability is not expected to affect the value of territorial exclusivity, however the authorisation of portable uses would require changes in licensing contracts based on territorial exclusivity (portable uses would have to be carved out). Right holders are expected to be reluctant to authorise portable uses of their content if online service providers do not offer the sufficient guarantees in terms of authentication procedures, confirmation that the presence outside the home country is temporary, quality of the service provided to travelling customers, etc. Also (though it is not evident given the negligible impact of portability on the territorial exploitation of content), there could be negotiations on licence fees as right holders could, ask for higher licence fees when authorising portable uses (claiming additional use of content) while service providers could ask for lower fees (claiming lower value of their territorial exclusivity). In any case, a substantial change to licensing fees is not expected. All in all, this option could encourage right holders to consider adapting their licensing practices; however it is unlikely to generate a consistent approach across the AV or sports industry. The experience with the Licences for Europe stakeholder forum shows that in spite of the industry's commitment "to continue to work towards the further development of cross-border portability"; no visible progress has been achieved for the portability of AV and sports online services despite two years having passed in which many online TV and film service providers successfully introduced out-of-home viewing solutions. The Commission has monitored the market (e.g. by a systematic analysis of terms of use of online content services) for developments on portability but saw none except for one development (which falls short of cross-border portability), i.e. some streaming services offering to consumers the possibility to download films or TV programmes in their home MS before travelling and then to access the downloaded content in other MS. The discussions with stakeholders also confirmed that no progress has been made on the basis of the commitment – this is in contrast with certain other pledges made in the process of Licences for Europe.<sup>114</sup>

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<sup>114</sup> e.g. regarding the digitisation of heritage films or the building the rights data infrastructure, with regard to which the Commission was informed of the progress made by the relevant stakeholders.

Right holders in other sectors (*music, e-books and video games*) are not likely to be impacted, in particular if they grant multi-territorial licences to online service providers. Where this is not the case, this option could encourage the introduction of specific terms in licensing contracts allowing service providers to offer portability.

**Service providers:** In the *AV sector*, online subscription services and pay-TV operators are likely to be interested in developing a cross-border portability option in order to improve the service to their customers and better respond to their needs in terms of mobility. In the future, subscription video-on-demand (SVOD) services are likely to compete directly with pay-TV operators<sup>115</sup>, notably through lower subscription prices. The development of the portability feature could constitute a competitive advantage for the “first mover” (SVOD service or pay-TV operator). As mentioned above, there could be negotiations between right holders and service providers on licence fees but a substantial change to licensing fees is not expected.

In the *sports sector*, premium sports content is often exclusively licensed in packages to broadcasters/service providers, who may be entitled to make the content available across the platforms, including online.<sup>116</sup> For these broadcasters/service providers, their willingness to offer portability may depend on their ability to offer it for their entire package, including AV content. As for portability for sports content only, the broadcasters/service providers may have less competitive pressure to be the “first mover”, if they have exclusive rights to transmit live sporting events in a given territory. Indeed, such premium sports content is irreplaceable, so service providers are less likely to lose consumers in a short and medium term due to the lack of cross-border portability. On the other hand, portability is not likely to lead to higher licence fees because it would have a limited impact on how the sports broadcasting rights are licensed, i.e. in packages shaped taking into account the specific demand in a given territory, and because of vast differences in value of the rights between the primary market and other markets.

In other sectors (*music, e-books, games*), the impact of this option would be marginal unless negotiations are deemed important by some service providers to gain legal certainty from right holders on portable uses.

As explained above, this option could have an impact on the **competition** between online service providers in the AV sector and with pay-TV operators, with the first online services offering portability benefiting from a competitive advantage over the other services. It would however not affect the competition between service providers in different MS, if portability is offered on the basis of a residence requirement. This option would not have any impact on **employment**. For service providers that are **SMEs**, the specific impacts are proportionally higher costs (see below).

**Consumers:** This option could bring benefits for consumers in terms of the higher number of portable online content services offering *AV content and premium sports*

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<sup>115</sup> Up to now it seems that pay-TV services have withstood the arrival of new online subscription services. For example, despite the launch of Netflix in the UK in 2012, BskyB maintained constant 10.6million subscribers between 2012 and 2013. The main reason would be that most viewers consider online subscription services as a complementary offer to pay-TV services (notably because pay-TV subscriptions also offer sports programs). Another possible explanation would be that the development of AV online services is based on a new market segment and viewer profile (mainly young people). See “Creating growth – Measuring cultural and creative markets in the EU”, EY, December 2014, at: [http://www.ey.com/Publication/vwLUAssets/Measuring\\_cultural\\_and\\_creative\\_markets\\_in\\_the\\_EU/\\$FILE/Creating-Growth.pdf](http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf)

<sup>116</sup> E.g. the UEFA sells its broadcasting rights on the platform neutral basis; Sky Deutschland acquired the exclusive pay-TV rights for all live Bundesliga and 2nd Bundesliga matches from the 2013/14 to 2016/17 season in Germany, which covers the rights for all platforms; see also Annex 4.

*content*. However, this development would likely be slow and heterogeneous, as it would depend on the willingness and possibility of online service providers to offer portability and on the result of their negotiations with right holders. In some cases, online service providers may only be in the position to offer portability for certain types of content (for which right holders would have granted a licence covering portable uses) but not for their entire catalogue.

This option could potentially result in higher prices for consumers compared to the current situation, because of the combined effect of the potential increase in licence fees (see above), administrative costs of renegotiations of contracts and potential cost of technical improvements to the service (see section on efficiency). In this case, online service providers could decide to pass these costs through to the consumers. Their ability to increase prices is however likely to be limited by the competition between the different market players (in particular SVOD services and pay-TV operators). As portability becomes a standard feature (like in, for instance, music) the possibilities to charge additionally for it will diminish.

The impact of this option on consumers' access to the portability of *music, e-books and games* online services is expected to be marginal, as portability is already offered in most cases, either on the basis of multi-territorial licences, or through territorial licences allowing a limited “overspill” in other territories.

### Efficiency

This option could entail significant transaction costs for those right holders and online service providers in the *AV sector* who decide to follow the Commission's guidance and offer cross-border portability. This would generate administrative costs related to the review of licences and terms of services. To allow for portable uses in other territories, on the one hand, right holders would need to adapt all the contracts they have with distributors in the different territories where their content is licensed. On the other hand, online service providers may need to negotiate with a high number of right holders or intermediaries (distributors, online aggregators of rights) in order to obtain the necessary rights for ensuring the portability of their entire catalogue. Aggregators of online rights<sup>117</sup> could play an active role to limit these costs, by negotiating directly with right holders and ensuring to online service providers the licensing of rights including portability. Costs associated to the renegotiation of contracts are very difficult to estimate as they would, among other things, depend on the number of parties involved, the extent of changes that parties would want to introduce and on the current practices of online service providers (e.g. with regard to authentication tools). As regards *sports content*, taking into account the way how the sports broadcasting rights are licensed (in packages and for a certain number of sporting events/seasons), the administrative costs related to the review of licences and terms of service may be less significant.

Negotiations may result in higher licence fees (see above) and in a set of safeguard measures, required by the right holders, which service providers would have to implement if they want to ensure portability<sup>118</sup>. This could entail some technical costs for online service providers (e.g. strengthening of their authentication measures, use of content delivery networks to improve the quality of the content delivered to users etc.)<sup>119</sup>. Depending on their size and on their customer base, certain AV online services, especially **SMEs** may prefer not to engage into such negotiations in order to limit the

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<sup>117</sup> Services of intermediaries whose purpose is to negotiate with rights holders of different films in order to create a catalogue that is attractive for VoD platforms.

<sup>118</sup> These are explained in Option 3.

<sup>119</sup> These are explained in Option 3.

transaction costs. In particular, their lower bargaining power may result in worse deals for them than for larger players which can reduce their competitiveness.

The potential benefits delivered by this option could be for consumers (i.e. higher number of portable AV and premium sports content services) but they are expected to be limited as this option is unlikely to lead to a consistent change in the commercial practices of the industry.

This option would have no compliance costs for other stakeholders or in other sectors.

#### Coherence with other EU policies

**Cultural diversity:** This option would not have impact on the production of culturally diverse content. Slight benefits may be expected in terms of enhanced access to cultural content as the current users of some online content services would have better access to some of the content they have acquired online while travelling in the EU. It is unlikely that heterogeneous cross-border portability would attract new consumers to online content services.

**Fundamental rights:** This option would not have any impact on copyright as property right or on the freedom to conduct a business, as right holders and service providers would remain free to decide whether to follow or not the Commission's guidance.

**Third countries, trade and environment:** This option would not have any impact on third countries and trade or on the environment. It also does not affect the EU's and the MS's **international obligations**.

### **Option 2 – Legal mechanism to facilitate the cross-border portability of online content services in the EU**

#### Effectiveness

**Content industries:** The impact of this option on right holders would depend on the existing licensing practices in place in the different content sectors and on the bargaining power of right holders vis-a-vis service providers. The most affected, in terms of the manner in which the content is licensed, would be AV and premium sports content sectors.

*Producers of AV works and sports organisers* (as far as premium content is concerned) could continue to license this content on an exclusive territorial basis but no separate licence from them would be required for a service provider to offer portability of its services to consumers who are temporarily present in other EU countries. In principle, a provider could offer such portability across the EU based on a licence for one EU MS. However, as right holders and service providers would be free, within the limits of competition law, to limit or prevent the cross-border portability of online content services, the actual application of the legal mechanism would depend on the outcome of contractual negotiations between the parties as well as on the commercial decisions of service providers. Negotiations between the parties would be facilitated in the sense that the solution for cross-border portability would be ready in the form of the legal mechanism, only conditions of its application could be negotiated.

Right holders are expected to be reluctant towards the legal mechanism if online service providers do not offer the sufficient guarantees in terms of authentication procedures, confirmation that the presence outside the home country is temporary, quality of the service provided to travelling customers, etc. Also (though it is not evident given the negligible impact of portability on the territorial exploitation of content), there could be negotiations on licence fees as right holders could, ask for higher licence fees when the legal mechanism applies (claiming additional use of content) while service providers could ask for lower fees (claiming lower value of their territorial exclusivity). Right



holders willingness to allow portable uses would depend on the market power of online service providers and on the proposed safeguards concerning access to content from territories other than the MS of residence of the consumer.

As regards ongoing contracts, right holders would be in a stronger position as without their agreement the legal mechanism would not be triggered. As regards new contracts, the position of right holders would be weaker as the legal mechanism would apply and right holders wishing to limit its effects would have to introduce appropriate provisions in their contracts with service providers. Right holders could also opt not to license the online content at all or not license it on the portable basis. If right holders prevented portability, the option would not have any impacts on them. In cases where service providers would be able to resist the demands of right holders, the decision whether to provide portability of online content services would rest only with service providers. If service providers decide to use the legal mechanism, limited impacts as described below for right holders would arise. In any case, as the cross-border portability of online content services does not extend the range of users of the service, i.e. it merely allows the current users of the service to use it while temporarily present in other MS, the expected impact on the industry would be marginal.

#### *Impacts arising if service providers use the legal mechanism*

On the one hand, the portability feature may attract more consumers, especially those that frequently travel, to subscribing to or purchasing AV or sports online content services and could result in more revenues for right holders. Also, the right holders licensing works on a per-use basis (e.g. where the licence fee depends on the number of streams by users of a service) are likely to generate additional revenue in case of increased uses by subscribers as well as from transactional services as consumers would be more willing to purchase or rent online content while travelling in other MS.

On the other hand, it cannot be excluded that as the result of this option, the affected customers would be less likely to use local services (especially advertisement-financed or transactional AV or sport services as these are more likely to be used by persons staying only temporarily in the given MS) in the MS to which they travel. This would not have an impact on revenues from services which are advertisement-based as occasional viewing does not generate any advertisement revenues and therefore the loss of such viewing is neutral for the service. On the other hand, there could be potential marginal decrease in revenues of local services that are transactional and this in turn could reduce the revenues of the AV producers (depending on the structure of fees payable to producers). However, such effect would be limited to the cases where different right holders have the rights for different territories for the same piece of content. This is not necessarily the case in the area of AV and premium sports content as rights tend to be held by a single right holder (unless e.g. rights are split between co-producers, in case of films, or sub-licensed, in case of sports). Moreover, the revenues of the holders of rights would be compensated by higher revenues from the increased use of services as mentioned above. Finally, the scenario based on the assumption that a consumer could buy content in a visited country is theoretical, especially if the temporary stay is short: few consumers would engage in exploring a new market for content services (especially in languages they do not know). Therefore, no (or negligible) negative impact on AV and sports right holders' revenues is expected. Incentives to create and produce for right holders would therefore remain unchanged.

The impact on AV industry's and sports organisers' possibility to exploit content on a territorial basis could be negative if customers residing in other MS than the MS in which the service is offered would be able to use the portability functionality to access the service in the MS of their actual residence (i.e. the portability function would be used to achieve a cross-border access to content). However, such risk could be averted by the use

of adequate authentication mechanisms which would ensure that the service is provided only to those customers who are residents of the MS in which the online content service is provided and that the stay in other MS is indeed temporary. As mentioned above, the possibility of imposing requirements as to authentication tools would depend on the bargaining power of right holders vis-a-vis service providers.

The impact of this option on the industry would be very limited in the *music, book and games sectors* where generally the licensing practice is not an obstacle to portability. In these sectors this option would mainly deliver legal certainty for market participants.

In the *music sector*, the fact that most online services, including local services, already grant portability and that generally right holders do not grant a separate licence to service providers for use of works in additional territories on a temporary basis, suggests that right holders in the music sector view possible impacts of portability as negligible. This is despite the fact that contrary to AV and sports, in the music sector rights are often held by different right holders in different territories and different CMOs are often involved in the management of these rights and therefore theoretically right holders holding rights in the 'visited market' could be affected as customers would be less likely to use local services in the MS to which they travel. The impact is however limited as the effects in the 'visited' market are minimum. As mentioned above, the scenario according to which a consumer could buy content in a visited country seems theoretical, especially if the temporary stay is short: few consumers would engage in exploring a new market for content services. Moreover, if consumer demand for online services was to increase thanks to the portability feature, revenues for right holders would also increase (the licence fees that right holders receive would increase as well in cases where they are, at least partly, calculated on the basis of revenue per stream). In cases of lump sum payments, the revenue would remain unchanged.

This option is not likely to have a significant impact on the right holders in the *e-books* sector. Firstly, in most cases an e-book is downloaded to the reader's device, and the providers of subscription-based services typically offer portability. Secondly, rights to e-books are granted on a per-language rather than per-territory basis, therefore in most cases the current licensing contracts do not prevent access from another MS.

The same applies to the *video games sector*, where already now right holders are not restricting access to online video games from abroad. Service providers delivering video games through streaming are likely to continue offering portability of such video games, including across borders.

**Service providers:** Under this option, service providers would benefit from the legal fiction applicable to the licensing of the rights, unless agreed differently with the right holders. They would not be obliged, however, to ensure that consumers can benefit from cross-border portability.

In the AV sector, the availability of cross-border portability to consumers would depend on service providers' business decisions and their bargaining power towards right holders. The right holders' possibility of imposing increased licence fees would depend on their assessment of the impact of portability on the existing business models and on the bargaining power of the service providers. It cannot be excluded that the fact that the service provider has a choice whether to offer cross-border portability or not could result in pressure from right holders to increase licence fees due to an increased functionality of services if the service provider opts to offer portability. Even though cross-border portability would not increase the size of audience, the fact that the service provider has a choice whether to offer it or not may turn the portability function into a provider's competitive advantage which thus could arguably be monetized. Therefore, the right holders could ask for a share of such perceived value. At the same time, service providers could ask for lower fees claiming lower value of their territorial exclusivity. It is

therefore not entirely evident that right holders would demand an increase of licence fees or that they would succeed in raising such fees.

The potential increase in licence fees could have more negative impact on smaller providers than on larger ones as the larger ones would have stronger bargaining power vis-à-vis right holders and would be in a better position to absorb the increased cost of licence fees. However, given the limited effect of the portability feature on the territorial exploitation of rights, it is expected that such increase, if any, would not be significant.

As concerns *sports content*, portability is not likely to lead to higher licence fees because it would have a limited impact on how the sports broadcasting rights are licensed, i.e. in packages shaped taking into account the specific demand in a given territory, and because of vast differences in value of the rights between the primary market and other markets.

As mentioned above under *Content industries*, it cannot be excluded that the consumers benefiting from portability would be less likely to use local – especially AV transactional - services in the visited MS. However, as explained above, such scenario is rather theoretical, especially if the temporary stay is short.

*Music, e-books, and games payment-based* online services which do not offer portability yet could benefit from the legal certainty because they would be sure not to infringe copyright laws or their licences with right holders in any of the MS by granting portability.

**Consumers:** This option could bring benefits for consumers in terms of the higher number of portable online content services offering *AV content and premium sports content*. However, this development would likely be heterogeneous and relatively slow, as the availability of cross-border portability would depend on the outcome of the negotiations between right holders and service providers. The legal mechanism under this option would facilitate these negotiations but the decision to provide portability to consumers would remain subject to the agreement between right holders and service providers. Consequently, consumers are unlikely to have access to the entire catalogue offered by a service provider when travelling in another MS in short and even in medium term.

Like Option 1, this option could also result in higher prices for consumers compared to the current situation, because of the combined effect of the potential increase in licence fees, administrative costs of renegotiations of contracts and potential cost of technical improvements to the service. Nonetheless, the ability of service providers to increase prices is likely to be limited by the competition between the different market players.

The impact of this option on consumers' access to the portability of *music, e-books and games* online services is expected to be marginal, as portability is already offered in most cases.

### Efficiency

**Content industries and service providers:** As this option does not entail an obligation to provide for the cross-border portability of online content services there are no costs directly linked to the intervention. Should service providers decide to rely on the legal mechanism and offer cross-border portability of their services, potential costs would concern mainly, if not exclusively, the AV and sports sectors and would be the same as the costs described in Option 3, i.e. costs of authentication of subscribers, costs of renegotiation of contracts and service providers' costs related to the use of network infrastructure. However, as the legal mechanism would apply to the ongoing contracts only to the extent both parties would agree on such application, the expected extent of

such renegotiations is limited. **Consumers:** The potential benefits for consumers (i.e. higher number of portable AV and premium sports content services) but they are expected to be limited as this option is unlikely to lead to a consistent change in the commercial practices of the industry.

This option would have no compliance costs for other stakeholders or in other sectors.

#### Coherence with other EU policies

**Cultural diversity:** This option would not have any impact on the production and offer of diverse cultural content. As mentioned above, indirect substitution effects would be non-existent or marginal as consumers while temporarily present in other territories typically do not subscribe to online content services. Limited benefits can be expected in terms of enhanced access to cultural content as current users of some online content services (and possibly only with regard to some content) would have a better experience of the content they have acquired online through easier access while travelling in the EU. It is unlikely that heterogeneous cross-border portability would attract new consumers to online content services.

**Fundamental rights:** This option would have a limited impact on copyright as property right and on the freedom to conduct a business, as recognised in the European Charter of Fundamental Rights (Articles 16 and 17). However, the measure would be justified in view of the Treaty fundamental freedom to provide and receive services across borders<sup>120</sup>. Restricting the above-mentioned freedoms (through the legal fiction) would be justified in light of the objective of facilitating cross-border portability of online content services for European consumers. The initiative would only affect these freedoms in a very limited manner (i.e. right holders holding rights in MS in which consumers are temporarily present would neither be able to prevent the provision and use of online content services in their territories nor to benefit from them) under very limited circumstances, i.e. to facilitate portability of online content services which have already been subscribed to or purchased/rented by consumers. It would not have any significant impact on the revenues of either right holders or service providers or on business models based on territorial exclusivity. In addition, given that the disadvantages caused to right holders would be of a very limited scope while consumers would be afforded a clear benefit of enhanced access to online content services across the internal market, the measure is not disproportionate to the aims pursued. It would not go beyond what is necessary to facilitate portability in all content sectors. The above arguments also apply to any possible affectation of the right of consumers to the protection of their personal data (Article 8 of the Charter). Service providers are likely to use some tools for the verification of the temporary nature of the consumer's stay in another MS but this would only require an occasional check of the MS in which the consumer is present<sup>121</sup> and should be carried out in line with the requirements for legitimate data processing in Directive 95/46/EC (Article 7).

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<sup>120</sup> Article 52(1) of the Charter allows for restrictions interfering with the exercise of the freedoms of the Charter: those restrictions (i) must be provided for by law and (ii) respect the essence of those rights and freedoms. In addition, the limitations are (iii) “subject to the principle of proportionality” and “may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”

<sup>121</sup> The verification of the temporary nature of the consumer's stay in another MS does not require the permanent control of his location or any information on his precise location, only an occasional check as to in which MS he is present.

**Third countries, trade and environment:** This option would not have any impact on third countries and trade or on the environment. It also does not affect the EU's and the MS's **international obligations**.<sup>122</sup>

### **Option 3 – Intervention to ensure the cross-border portability of online content services in the EU**

#### Effectiveness

**Content industries:** The impact of this option on right holders would depend on the existing licensing practices in place in the different content sectors. The most affected, in terms of the manner in which the content is licensed, would be *AV and premium sports content sectors*.

Producers of AV works and sports organisers (as far as premium content is concerned)<sup>123</sup> could continue to license this content on an exclusive territorial basis but no separate licence from them would be required for a service provider to offer portability of its services to consumers who are temporarily present in other EU countries. A provider could offer such portability across the EU based on a licence for one EU MS and the right holders would not be able to prevent it. This would affect the way in which the harmonised rights are exercised as right holders granting a licence in a territory would know that such a licence will allow for the portability of services to the other MS and those holding rights for the territories in which customers would stay temporarily and enjoy portability of their home MS online content service would not be able to prevent such a service provider from offering its service to its customers. It would be a notable change as far as the premium content is concerned as currently such online services do not offer portability or offer limited cross-border portability.<sup>124</sup> However, as the portability of online content services does not extend the range of users of the service, i.e. it merely allows the current users of the service to use it while temporarily present in other MS, the expected impact on the industry would be marginal.

More detailed impacts are identical to impacts described under Option 2.

*Impacts arising if service providers use the legal mechanism.* Under Option 3 however right holders would be limited in their possibility of imposing authentication tools on service providers by proportionality and necessity provisions.

**Service providers:** Under this option, service providers would benefit from the legal mechanism applicable to the licensing of the rights and be able to better respond to their customers' needs by granting cross-border portability of their online services. If the service is provided in exchange of remuneration, the service provider would be obliged to ensure cross-border portability. If the service is provided free of charge, the provider would only be obliged to enable the cross-border portability if the provider can verify the subscriber's MS of residence on the basis of information or other means readily available to the provider. If a service provider offers free of charge services without such verification, they would not be obliged to ensure portability.

In the AV sector, similarly as in Option 2, it cannot be excluded that right holders may make pressure on service providers to increase licence fees due to increased availability of services (despite the fact that portability only concerns consumers that are entitled to receive the service in their MS of residence). However, contrary to Option 2, because

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<sup>122</sup> Persons who are not residents in any MS would not benefit from the intervention when travelling in the EU.

<sup>123</sup> For other (not premium) AV and sports content, the impact of this option would be insignificant as rights to such content are licensed without exclusivity.

<sup>124</sup> See examples provided in problem definition.

portability would not be a choice but an obligation, the pressure to increase the licence fees would be smaller. Right holders could not rely on the fact that portability is an additional or optional functionality. Therefore, portability would not be perceived as a competitive advantage which could be monetized in the same way as it could be under Option 2.

As in Option 2, the possibility of imposing increased licence fees would depend on the parties' assessment of the impact of portability on the existing business models and on their bargaining power. However, given the limited effect of the portability feature on the territorial exploitation of rights and its binding nature, it is expected that such increase, if any, would be marginal and even less significant than under Option 2. Also, right holders rely on a diversified distribution system comprising both bigger and smaller service providers. Therefore, it is unlikely that they would undermine the competitive position of smaller providers by their fees policy, especially because smaller providers would not have a choice but would be obliged to offer portability to consumers. As a result, all service providers could offer a better product which could attract more customers.

As concerns *sports content*, similarly as in Option 2, portability is not likely to lead to higher licence fees because it would have a limited impact on how the sports broadcasting rights are licensed.

A number of service providers have expressed support for cross-border portability of online services<sup>125</sup> but are usually in favour of industry-led solutions and soft law instruments as opposed to legal obligations in this area.

*Music, e-books, and games payment-based* online services which do not grant portability yet could benefit from this option as they would be able to offer a better service to their customers. The impacts of this Option to these industries are equivalent as in Option 2. Moreover, in the longer term this option would ensure that even if right holders change their current licensing practice in a way that applies more territorial restrictions than today, service providers in these sectors could always offer cross-border portability to their consumers.

This option could have limited impact on the **competitiveness** of online service providers in the AV sector, as the ability to absorb the indirect costs of providing portability (see below) would depend on their size and on their geographical coverage of EU MS. However, such costs are not expected to be significant. This option is not likely to affect **cross-border competition**, as consumers would not be able to subscribe to an online service offered in another MS on the basis of portability. This option is not expected to have any impact on **employment**.

**Consumers:** This option would respond to consumers' demand to continue their access to online content services when they travel in the EU. Accordingly, this option would respond to the increasing mobility of consumers and their willingness to access content from anywhere. Based on the results of the recent Eurobarometer survey on cross-border access to content and the results of a previous Eurobarometer survey carried out on tourism, approximately 5.7% of European consumers would potentially be "portable users" of online subscription services and this could reach approximately 14% by 2020 (see Section 2). Consumers would be able to use their subscription-based online content services while staying temporarily in another MS. It would also allow consumers to access the online content they have acquired or rented (or to acquire or rent more

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<sup>125</sup> See e.g. the EDiMA <http://www.europeandigitalmediaassociation.org/pdfs/EDiMA%20positioning%20on%20territoriality.pdf> or Cable Europe <http://www.cable-europe.eu/>

content) from the MS where they are temporarily. Moreover, as the measure would apply also to the existing subscription-based and transactional services, all consumers (whether already using online content services or not) could benefit in an equal manner and at the same time.

This option would result in the substantial increase in convenience for consumers as regards *AV content*. It could generate a greater interest in online AV services, in particular subscription services.

In the *sports* sector, this option would bring substantial benefits for consumers. It would enable them to watch "home" content while travelling in the EU which is of particular importance in this sector given that the value of sports content lies in it being viewed 'live', including with commentary focusing on their home team and targeted interviews.

In the *music* sector, this option could produce some benefits for consumers, if they have a subscription to a music online service which currently does not offer portability or offers portability in practice but this practice is not in line with the terms of use signed by the consumer. In the *e-books* and *games* sectors, consumers are not likely to be significantly affected by this option. In principle, where a particular service is not providing the portability feature yet, its introduction would respond to the needs of the increasingly mobile consumers, creating extra value for them. In these sectors, this option would make sure, even in the long term, that consumers always have cross-border portability of the services available, even if right holders or service providers decided to introduce more territorial restriction in their future contracts.

Finally, a significant number of **Member States** have already expressed their support for an EU initiative on cross-border portability while a couple of them appear more inclined to support industry-led solutions.<sup>126</sup>

### Efficiency

**Content industries and service providers:** Potential costs related to the offering of portability of online content services could concern mainly, if not exclusively, the AV and sports sectors and can be divided between potential costs directly related to the intervention, i.e. service providers' potential costs of authentication of subscribers and costs which may arise but are only indirectly related to the intervention, i.e. costs of renegotiation of contracts and service providers' costs related to the use of network infrastructure.

#### *1. Costs directly linked to the intervention - potential costs of authentication of consumers*

The measure would in practice require modifying the current geo-blocking where such geo-blocking is used, i.e. re-configuring authentication tools from the geo-blocking approach to the temporary access approach. This does not necessitate the acquisition of new technology and would therefore result in none or marginal administrative cost. The measure would not require service providers to use any authentication tools but would leave this matter to arrangements between holders of relevant rights and service providers. At the same time, this option would include appropriate safeguards relating to the proportionality and necessity of the requirements potentially imposed by right holders to ensure that such requirements would be adequate for the objective of authentication and would not result in an excessive burden on service providers. In addition, service providers would have to comply with the requirements for legitimate data processing in Directive 95/46/EC. It is assumed that the MS of residence checks, even if not imposed

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<sup>126</sup> E.g. UK: <https://engage.number10.gov.uk/digital-single-market/>, France: <https://m.contexte.com/docs/6431/position-francaise-sur-le-marche-unique-du-numerique.pdf>

by the measure itself, would be carried out (due to the residence requirement) in the AV and premium sports content sectors and that they would go beyond requesting of consumers' to make a declaration as to their Member State of residence. Most likely such checks would occur at the moment of activating the subscription/purchase/rent of online content and would be carried out by the use of proxies such as banking details, the existence of broadband or telephone connection or IP address.

Currently online content service providers in all sectors use different techniques to verify the MS of residence of a customer. The basic method is to check whether the user's IP address is in the national registry. In addition methods such as checking address, credit card information or geolocation data of devices are used. The vast majority (if not all) of affected service providers already has such authentication mechanisms in place and could maintain them. The cost of implementing such authentication tools would only relate to the limited cases of providers that do not have such mechanisms in place. IP address authentication can be achieved at a relatively low marginal cost since it consists in a limited (software) processing function (usually performed centrally) using a managed set of parameters such as a blacklist or whitelist at the main server site against the address is checked. Despite our enquiries addressed to the affected industries, we have not received any information allowing us to quantify the potential costs related to authentication tools. As indicated above, the extent of costs would depend on whether and what authentication tools are already used by service providers and the cost would further vary depending on the parameters used for the authentication. In the context of Licences for Europe stakeholder dialogue, the network of independent VOD platforms EuroVoD stated: *"The EuroVoD platforms can propose to their subscribers to have access to films available within their SVoD offers, when travelling abroad. This type of access is technically possible for the web-based services developed and operated by the EuroVoD platforms."*<sup>127</sup> which would suggest that VOD service providers already have the technical feasibility to provide portable services (including the authentication tools).

The mechanism envisaged in this option would mean that the legal fiction would apply as long as the consumer in question would continue to be a resident of the MS in which the service is offered, the consumer would access the service in the EU and the stay in another EU MS would be temporary. All these conditions would have to be satisfied at the time of consumption of content. Therefore it would be possible that, despite the lack of such obligation in the measure itself, content owners in AV and sports sectors would insist on more accurate and more costly methods of authentication to be used by service providers to effectively verify the user's identity and uses (mainly periodic checks on user logs based on IP address) and avoid any fraudulent activity. Such a software check on the user logs is routine and does not entail significant costs. Moreover, the measure would ensure that requirements imposed by holders of rights would not exceed what is necessary and proportionate. As mentioned above, service providers would have to comply with the requirements for legitimate data processing in Directive 95/46/EC. As regards sectors in which portability is already provided, i.e. music, e-books and games, in the short term, no cost related to the authentication is expected as the intervention would not create a new situation for these sectors (portability would continue to be provided on the same terms). Costs could arise in longer term if licensing practices of right holders would change, e.g. rights would be granted on an exclusive basis. In such a case, the same considerations as applying to AV and sports sectors would apply to these sectors.

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<https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/EuroVoD%20Statement.pdf>



In addition, content service providers in AV and sports sectors themselves might be interested in using more accurate methods authentication e.g. to avoid/reduce any risk of licensing lawsuits. For example, EuroVoD, in the statement referred to above explains: *"In order to enable cross-border access, the EuroVoD platforms can apply a combined identification of the subscribers – through their IP (geolocation) and through their user's account (bank card used for payment). When subscribing to the service, users declare their country of residence as the same as the territory where the platform operates and accept the Terms and Conditions of use of the service. At this stage, users are identified through their IP and they can also pay with a foreign bank card. When travelling abroad, users can have access to the SVoD offer they have subscribed to, thanks to an identification through their user's account and bank card. If consumption is done exclusively from abroad for a certain period of time, users receive alerts and warnings for non respecting the Terms and Conditions of use. The access to the service can be shut down."* This implies that VOD platforms foresee the application of not only authentication tools but also IP address checks allowing verifying whether the presence of a customer in a given MS is indeed temporary.

In conclusion, costs directly linked to the intervention are not expected to be significant and could be absorbed in the routine software maintenance costs of service providers.

Moreover, it has to be kept in mind that most of the authentication/identification methods can be circumvented. Economically the most important effect of using more accurate checks resides in raising the direct and indirect costs of circumvention to an extent that it is no longer attractive for a substantial number of users. Since both right holders and service providers have a shared interest in generating revenues from subscribers and advertisers it can be expected that the market dynamics will lead to a suitable path of technological improvements which would balance the interests of increasing security and generating additional revenues from legal content distribution.

## *2. Costs which may arise but are only indirectly related to the intervention*

### *(i) Potential costs of renegotiation of contracts*

In order to ensure that all EU consumers (whether already subscribers to online content services or not) could enjoy the cross-border portability feature without any delay, at the time when the measure becomes applicable, the measure would also apply to the ongoing contracts for online content services between right holders and service providers and between service providers and consumers. Application to existing contacts is also necessary because otherwise, due to the typical long duration of the contracts especially in the AV sector<sup>128</sup>, cross-border portability would become a norm for some pieces of digital content before others. This would require service providers to "black out" parts of their service which would reduce its attractiveness.

Despite the fact that the intervention would apply to the existing contracts, the mechanism foreseen in this option would not require holders of rights and service providers to renegotiate such contracts and therefore there is no associated administrative cost. The legal fiction would apply to the existing contracts and the currently existing clauses that require that service providers geo-block their services and provide such services solely in their national territories would be interpreted (without the need of amendments) in the light of the new rules i.e. such clauses would not apply to cross-border portability. It cannot be excluded that holders of rights and service providers would want to renegotiate the existing contracts nonetheless to e.g. adjust the licence fees or amend the authentication requirements but that would be their own decision and not a necessity linked to the intervention under this option.

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<sup>128</sup> The duration of licences in the AV sector is estimated for 3-10 years with the average of 4-7 years.

In addition, in certain cases (especially in regard to AV and premium sports content) online service providers would also need to review the terms of use of their services, including with respect to existing contracts. As adding cross-border portability to the service would be for the benefit of consumers (assuming no change to the price of subscription), it could be easily introduced and the only related cost would be the administrative cost of notifying the affected consumers (which is normally done by email or on the website itself). In addition, as only consumers who are residents in a certain MS can benefit from the legal fiction and consequently from cross-border portability, those service providers that do not currently check the MS of residence of their consumers and would need to rely on the legal fiction would have to carry out this check during a transitional period and possibly offer different terms for their existing (and future) consumers on this basis.

Costs associated to the renegotiation of contracts are very difficult to estimate as they would depend on various factors such as the number of relevant contracts, the extent of changes that parties would want to introduce, the current practices of online service providers (e.g. with regard to authentication tools) and the duration of the given contract.<sup>129</sup> It is expected that the longer the duration of the contract, the more important would be for the parties to renegotiate its terms. We have not been able to obtain any estimation of such costs.

This option could also result in savings for those holders of rights that would be willing to license their rights in such way that ensures their portability and who, in order to achieve that, would have had to amend numerous agreements that they have entered into with distributors and service providers in various territories (as such agreements provide for territorial exclusivity, all of them would have to be amended in order to license a provider rights with portability function). This option allows such holders of rights to change their licensing practices without having to amend the existing contracts. By the same token, this option could result in savings for service providers who would not have to amend contracts they entered into with various right holders and distributors.

*(ii) Potential costs related to the use of network infrastructure*

This option does not set legal requirements with regard to the quality of the service delivered in the MS other than the MS of residence of the consumer. This means that service providers are not obliged to adapt the technical infrastructure in order to ensure the same quality of service across borders and therefore there is no associated administrative cost.

Service providers (especially bigger AV content service providers, including premium sports content providers) may see a need (e.g. due to reputational considerations) to adapt the technical infrastructure in order to ensure the same quality of service across borders.<sup>130</sup> If service providers see a need to adapt the technical infrastructure, it might lead to more substantial costs (e.g. the cost of upgrading the internet connection of the origin server in terms of bandwidth or traffic volume or the cost of content delivery networks (CDN)<sup>131</sup>). Such costs would be substantial if providers of AV content services decide to invest in CDN in order to ensure quality of their service also when accessed in other MS. Allowing portable uses without ensuring the same or comparable user

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<sup>129</sup> Based on information obtained from the stakeholders it seems that the duration of contracts in the AV sector is between 3 and 10 years (depending e.g. on the type of content and the type of the service provider) with the average at 4-7 years while the duration of contracts for sports content seems to be generally shorter but also varies.

<sup>130</sup> See Annex 8 for the description of technology used for the delivery of online content services.

<sup>131</sup> A CDN allows faster delivery of content by using the servers closest to each user and therefore to increase the quality of the streamed content – see Annex 8 for more information.

experience may not be seen as an acceptable option to bigger service providers, but also to right holders as it could affect the way in which their content is distributed. One study analysed the impact of speed and online video quality on user behavior and found that delays in starting up a video or interruptions could increase abandonment rates and result in loss of viewership.<sup>132</sup> Right holders may therefore try to impose on service providers requirements concerning quality of service provided to customers temporarily present in other MS.

Costs associated to the use of CDN for portable uses are very difficult to estimate as they would depend on the current practices of online service providers (whether they already use a CDN or not) and on the volume of data transferred and stored (which would vary according the volume of portable uses by consumers).<sup>133</sup> Moreover, CDN is not the only technical means to ensure quality of video services. Some providers<sup>134</sup> use the less expensive peering technologies, which use end-users' devices as content storage points. Also, the whole content delivery segment is characterised by intense technological and business innovation, meaning that the present content delivery infrastructure costs are likely to go down, and online content service providers are likely to have - depending on the nature and scale of their services - an even greater choice of content delivery options.

**Impact on SMEs (including micro-enterprises)**<sup>135</sup>: While the costs described above could put proportionally more burden on SMEs than on large businesses (which is also the case for the day-to-day business of SMEs), the negative consequences of exempting them (or even micro-enterprises) are likely to outweigh the savings in costs: as consumers become increasingly aware of the requirement to provide cross-border portability, they are likely to start seeing it as a "must-have" feature of online content services, and the inability of smaller online service providers to provide that feature might result in a serious competitive disadvantage. Furthermore, costs directly related to the intervention are expected to be marginal since all service providers covered by the initiative already provide for subscription-based or transaction-based services online and thus already apply some form of authentication mechanism. Including SMEs (including micro-enterprises) in the scope of this exercise would probably be the only way to enable them to align their offers and provide portability to their customers (as the cost of renegotiating all existing contacts with right holders could be too high for SMEs), thus contributing to their competitiveness on the market. Moreover, exempting micro-enterprises from the scope of the rules is likely to undermine the efficiency of the measure, considering that many online content service providers are micro-enterprises. No data on the percentage of micro-enterprises among providers of online content services is available, however the creative industries in the EU are dominated by micro

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<sup>132</sup> "Video Stream Quality Impacts Viewer Behavior: Inferring Causality Using Quasi-Experimental Designs", 2012: [https://people.cs.umass.edu/~ramesh/Site/HOME\\_files/imc208-krishnan.pdf](https://people.cs.umass.edu/~ramesh/Site/HOME_files/imc208-krishnan.pdf). The study found that "viewers start to abandon a video if it takes more than 2 seconds to start up, with each incremental delay of 1 second resulting in a 5.8% increase in the abandonment rate" and that "a viewer who experienced failure is 2.32% less likely to revisit the same site within a week than a similar viewer who did not experience a failure."

<sup>133</sup> A survey carried out by one streaming media technology expert on the costs of CDN for video delivery found that 77% of CDN customers are spending \$250K per year or less, while 11% are spending between \$250 and \$500K, 6.5% between \$500K and \$1M and 5% over \$1M per year. It also showed that there was a 20-25% decline in pricing on 2013 and this trend is expected to be confirmed for 2014 and 2015; see "The State Of The CDN Market: Video Pricing, Contract, Volume and Market Sizing Trends", Dan Rayburn, <http://www.streamingmedia.com/dansblog/2014CDNSummit-Rayburn.pdf>

<sup>134</sup> E.g. Voddlar

<sup>135</sup> An enterprise that has less than 10 employees and its turnover or balance sheet total does not exceed EUR 2 million (Commission Recommendation 2003/361 concerning the definition of micro, small and medium-sized enterprises)

firms with 95% having fewer than 10 employees, the overwhelming majority (90.8%) of the value added generated within the EU-27's film and sound recording activities sector in 2010 was provided by SMEs, which employ just over three quarters (75.4%) of the total number of persons employed in the sector.<sup>136</sup> In the recorded music industry, 99% of music businesses are SMEs.<sup>137</sup>

**Consumers:** Impact of the intervention on consumer prices is directly linked to the potential costs associated with the intervention that service providers may bear – if such costs arise, service providers would be expected to pass them on to consumers. As described above, potential costs encumbering service providers are limited (assuming no changes to licensing practices) to AV and premium sports content sectors. In consequence, the possibility of an increase in consumer prices is also limited to these sectors. On the one hand, as described above, it cannot be excluded that right holders in such content succeed in increasing licence fees for service providers (which is less likely for sports content). This will to a large extent depend on the bargaining power of service providers vis-à-vis right holders. The ultimate outcome of such potential negotiations over licence fees is very difficult to predict and in any case, given the limited effect of the portability feature on the territorial exploitation of rights, it is expected that an increase, if any, would be marginal. On the other hand, service providers may have to bear the above-described costs of authentication tools, the costs of renegotiation of contracts and the costs of the use of networks. As explained above, only the costs of authentication tools are directly linked to the intervention. These costs are estimated as marginal. It cannot be excluded that in the AV content sector the combined impact of the potential increase in licensing fees (even if marginal), authentication tools (even if marginal) and the indirect costs (the costs of renegotiation of contracts and the costs of the use of networks) would amount to an increase in prices for consumers. At the same time, the ability of online service providers to raise prices would be limited, notably due to the consumers' willingness to pay, to the competition with other market players and due to the constraining effect of illegal websites distributing online content and therefore, the potential increase of consumer prices, if any, is not expected to be significant. Finally, as explained above, the possible need to check the MS of residence of consumers in order for them to benefit from cross-border portability might result in some inconvenience (and marginal cost) for the consumers in the case of those service providers which do not currently check such residence.

#### Coherence with other EU policies

**Cultural diversity:** This option would not have any impact on the production and offer of diverse cultural content. As mentioned above, indirect substitution effects would be non-existent or marginal as consumers while temporarily present in other territories typically do not subscribe to online content services. However, benefits can be expected in terms of enhanced access to cultural content. Cross-border portability as a part of an online content service may attract a number of new consumers to access it. It would also allow existing consumers to have a better experience of the content they have acquired online through easier access while travelling in the EU.

**Fundamental rights:** This option would have a limited impact on copyright as property right and on the freedom to conduct a business, as recognised in the European Charter of Fundamental Rights (Articles 16 and 17). However, the measure would be justified in view of the Treaty fundamental freedom to provide and receive services across

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<sup>136</sup> European Competitiveness Report 2010,

<sup>137</sup> Independent music companies Association (IMPALA) comments on the EC consultation on a future trade policy, July 2010.

borders<sup>138</sup>. Restricting the above-mentioned freedoms (through the legal fiction, the obligation to offer cross-border portability as well as by rendering unenforceable any contractual provisions contrary to this obligation) would be justified in light of the objective of ensuring cross-border portability of online content services for European consumers. The initiative would only affect these freedoms under very limited circumstances, i.e. to ensure portability of online content services which have already been subscribed to or purchased/rented by consumers. It would not have any significant impact on the revenues of either right holders or service providers or on business models based on territorial exclusivity. In addition, given that the disadvantages caused to right holders and service providers would be of a very limited scope while consumers would be afforded a clear benefit of enhanced access to online content services across the internal market, the measure is not disproportionate to the aims pursued. It would not go beyond what is necessary to make portability an ordinary business practice in all content sectors, in a manner that allows all consumers to benefit from the measure at the same time. The above arguments also apply to any possible affectation of the right of consumers to the protection of their personal data (Article 8 of the Charter). While it is not an obligation imposed by this option, service providers are likely to apply tools for the verification of the temporary nature of the consumer's stay in another MS. This however would only require an occasional check of the MS in which the consumer is present<sup>139</sup> and should be carried out in line with the requirements for legitimate data processing in Directive 95/46/EC (Article 7).

**Third countries, trade and environment:** This option would not have any impact on third countries and trade or on the environment. It also does not affect the EU's and the MS's **international obligations**.<sup>140</sup>

## 7. HOW DO THE OPTIONS COMPARE?

Criteria ► Policy option▼	Effectiveness			Efficiency	Coherence		
	Impact on consumers	Impact on content industries	Impact on service providers	Costs/benefits	Cultural diversity	Fundamental rights	Third countries, trade, environment
Baseline	0	0	0	0	0	0	0
Option 1	0/+	0	0/+	0/-	0	0	0
Option 2	0/+	0/+	0/+	0/-	0	0/-	0
Option 3	++	0/+	-* // +**	-* // +**	0/+	0/-	0

"0" – no change    "+" – positive impact    "-" – negative impact    \*short term (<5 years) // \*\*long term (>5 years)

Options 1, 2 and 3 would allow, to a different extent, to respond to the objective of facilitating the cross-border portability of content within the EU. The **effectiveness** of

<sup>138</sup> Article 52(1) of the Charter allows for restrictions interfering with the exercise of the freedoms of the Charter: those restrictions (i) must be provided for by law and (ii) respect the essence of those rights and freedoms. In addition, the limitations are (iii) “subject to the principle of proportionality” and “may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”

<sup>139</sup> The verification of the temporary nature of the consumer's stay in another MS does not require the permanent control of his location or any information on his precise location, only an occasional check as to in which MS he is present.

<sup>140</sup> Persons who are not residents in any MS would not benefit from the intervention when travelling in the EU.

each of these options will vary according to the different categories and sectors of stakeholders involved.

**Consumers:** Under the baseline scenario, consumers would continue to benefit from the cross-border portability of music, e-books and games services, but not of AV and premium sports content which they would continue to have problems accessing while travelling in the EU. In the longer term, licences (in particular new ones) could allow for cross-border portability but it is probable that an important part of the content offered by the service provider could remain locked in the national territory, as service providers may consider that the partial portability they could offer to consumers (with black-outs) would not increase the appeal of their service. Option 1 could gradually improve this situation in the medium to long term, as it would encourage the market participants to ensure cross-border portability however it is not likely to result in a consistent change of industry practices, hence its effectiveness would be limited. Option 2 could have a slightly more positive impact on consumers than Option 1 since the availability of the legal mechanism would make it easier for right holders and service providers to agree on portability in the licences. However, its application would eventually depend on the will of the parties, it would only happen gradually over a longer period of time, and therefore the scale of the consumer benefits would remain uncertain. Only Option 3 would effectively ensure that the portability feature is offered by all subscription-based and transactional online content services and accordingly meet the demand of a high number of consumers (see Section 2). It cannot be excluded that Options 1, 2 and 3 could result in higher prices for AV and premium sports content; however this impact is expected to be limited by the competition between market players and the need to provide an attractive legal offer to consumers. In the *music, e-book and games sectors*, Option 3 would mainly improve legal certainty for consumers. In the long term, unlike the other options, it could also act as a safeguard to ensure that cross-border portability remains available for consumers despite possibly changing commercial practices of right holders and/or service providers.

**Content industries:** Under the baseline option and Option 1, right holders in the AV sector and, to a lesser extent, for premium sports content are likely to be reluctant to allow for the portability of their content, therefore progress would be gradual and the results would be diverse even in the longer term. The guidance foreseen in Option 1 would encourage them to negotiate with online service providers but industry-wide positive results cannot be expected due to the significant effort requires by right holders to review the existing network of contracts based on territorial exclusivity. The legal mechanism in Option 2 would make it easier to the parties to make cross-border portability available but the decision whether to allow it or not would remain with the holders of the rights, as in the baseline scenario and in Option 1. They would also be free to decide what kind of requirements they set for service providers to allow portability. Therefore, meeting the objective of this initiative would depend on the agreement between right holders and service providers. Option 3 would provide for a solution to ensure portability regardless of licensing practices of right holders and therefore would be the effective in meeting the objectives, including for AV and premium sports content. If the cross-border portability feature of the online service is considered attractive by the consumers, Option 3, and to some extent also Option 2, may increase the use of the service and the income of right holders. In the *music, e-book and games sectors*, Option 3 would mainly improve legal certainty but would not bring about tangible economic impacts. The other options would have no relevant impacts.

**Service providers:** Under the baseline option, Options 1 and 2, service providers (especially for AV and premium sports content) would continue to be able to restrict portability and many of them would continue to encounter problems (contractual restrictions) when wanting to offer it, should right holders be reluctant to allow it. Option

1 would be somewhat more effective than the baseline because negotiations could result in certain online service providers being able to offer portability. However the outcome of the negotiations would depend on the market power of online service providers vis-à-vis right holders and will require negotiations of multiple contracts, especially in the AV sector. The effect of Option 2 would be similar; however it could be more beneficial to service providers as in the negotiations they could argue that, due to the legal mechanism, there is no need to carve out portability from the licences that cover the other 27 MS. Therefore, allowing portability in a licence can be, in principle, easier and less costly than in Option 1. Option 3 would be more effective as service providers would be able to systematically offer portability to their customers across Europe. Unlike other options, Option 3 would include legislative safeguards ensuring the necessity and proportionality of the requirements for authentication negotiated by right holders and service providers. Therefore, Option 3 would be more efficient in terms of transaction costs and implementation by service providers (see also efficiency below). In the *music, e-book and games sectors*, Option 3 would mainly improve legal certainty for the current and future dealings with right holders e.g. for music service providers that may be providing portability without having this right clearly covered in the licensing contracts. It would also ensure for the future that service providers in these sectors would continue to be able to allow cross-border portability, despite possibly changing licensing practices by right holders. The other options would have no impacts.

To summarise, from the perspective of consumers, industries and service providers, Option 3 would be the most **effective** in meeting the objectives set out in Section 4.

**Efficiency:** The baseline option would not entail any compliance costs while Options 1 and 2 could generate administrative and technical costs (as explained below), for all those right holders and service providers who decide to adapt their licensing practices and terms of use in order to allow for portability of content. This would particularly affect the AV and the sports sector. Options 1 and 2 would not impose cross-border portability; therefore they would not generate costs directly. However it is likely that in the absence of a legal mechanism that facilitates licensing for this specific purpose, the negotiations under Option 1 would be more complex and costly than under Option 2. Option 3 could generate some technical costs for all those service providers which do not yet offer portability to their customers as it would not leave it for their decision to provide for portability, like the other options. This could imply investing in technical functionalities to verify the MS of residence and verify the temporary use of the service as well as costs which are not directly triggered by Option 3 (and therefore not qualifying as administrative costs) such as short-term costs, in case the parties want to review the licensing agreements and possibly long-term costs related to the use of network infrastructure. In any case, despite the short term and limited costs of providing for portability, service providers would benefit from the more attractive service they can provide to their consumers already in the medium term.

**Cultural diversity:** All options would have no or only very limited impact on cultural diversity. None of these options would affect the production or distribution of culturally diverse content or would directly extend the range of consumers having access to such content. Option 3, and to a minor extent Options 1 and 2, would be beneficial in terms of easier access to culturally diverse content as they would allow consumers to enjoy online content in a more flexible way across the EU. Option 3 may also attract some new consumers to use the online content services.

**Fundamental rights:** The baseline option, Option 1 and Option 2 would not have any impact on fundamental rights. Option 3 would have a limited impact on copyright as property right and on the freedom to conduct a business, as recognised in the European Charter of Fundamental Rights (Articles 16 and 17). Option 3 and, to the extent right



holders and service providers choose to rely on the legal mechanism, Option 2 could affect the consumers' right to the protection of personal data, should service providers verify the temporary nature of the stay in another MS. However, the measure would be justified in view of the Treaty's fundamental freedom to provide and receive services across borders and data processing would have to comply with the provisions of Directive 95/46/EC in all cases.

**Third countries, trade and environment:** None of the options would have any impact on third countries and trade or on the environment. Neither do they affect the EU's and the MS's international obligations.

**Subsidiarity and proportionality:** None of the options go beyond what is necessary to solve the identified problems. Moreover, the initiative is limited to solving a problem of a cross-border nature that cannot be achieved by the MS alone (see Section 3). Among the examined options, the baseline option is not sufficient to achieve the objective of ensuring cross-border portability of content online in the AV and sports sectors where this problem is the most present. Option 1 could allow reaching this objective only partially and would create uncertainty for service providers and for consumers travelling in several MS as to the authorised uses. Option 2 might be slightly more effective by putting a legal mechanism at the parties' disposal to facilitate the negotiations but providing cross-border portability would remain optional. Consequently, the objective would only be achieved under Option 3. The obligations foreseen under Option 3 as regards the licensing agreements are necessary to make sure that the providers of online content services (both subscription-based and transaction-based) offer cross-border portability to their customers. They do not affect territorial licensing as such and therefore have a limited effect on the current licensing practices and business models.

## **8. THEREFORE, THE PREFERRED OPTION IS OPTION 3. HOW WOULD THE ACTUAL IMPACTS BE MONITORED AND EVALUATED?**

The Commission will ensure that the action selected in this IA contribute to the achievement of the set policy objectives. The preferred option should be able to respond to the general and specific objectives in Section 4 as well as the following operational objectives:

1. Increase the number of subscription-based and transaction-based online content services that are portable across borders, 2. Increase the number of consumers using this feature of the online content services.

The process of monitoring the impacts should consist of two phases:

Phase 1: The first phase will start right after the adoption of the legislative act and continue until its start of application in 2017. It will focus on how the Regulation is put in place in the MS by the market participants in order to ensure a consistent approach. The Commission will organise meetings with MS representatives (e.g. group of experts) and the relevant stakeholders in particular to see how to facilitate to transition to the new rules.

Phase 2: The second phase would start from 2017 and would focus on direct effects of the rules contained in the Regulation. It would also extend to the monitoring of the amendment of the existing contractual arrangements which would need to take place during a one-year transitional period. This monitoring will pay particular attention to the impacts on SMEs and the extent to which existing contracts are renegotiated. The Commission will continue to work with stakeholders to ensure effective implementation.

The table below presents the main output and impact indicators that will be used to monitor progress towards meeting the above objectives, as well as the possible sources of

information. The data collection should start in 2017 so as to gather sufficient baseline data that can serve as a basis for comparison and then followed up every second year after the start of application of the Regulation. Econometric methods should be used (e.g. by putting the portability offer trend in a regression with a dummy variable for when the regulation starts to apply) so as to help (to some extent) to disentangle the effects of the regulation from the natural progress in the market. Moreover, the collected data should be compared (using difference-in-difference method) to data from countries (e.g. Switzerland) that will not be subject to a regulation.

Indicators	Source of information	Frequency of measurement
<p>The following indicators could be used <u>in each sector</u> (AV, music, e-books, games, sport):</p> <ol style="list-style-type: none"> <li>1. Increase in the number of subscription-based online services offering cross-border portability;</li> <li>2. Increase in the number of transaction-based services offering cross-border portability;</li> <li>3. Increase in the number of customers using cross-border portability;</li> <li>4. Average number of days of use outside the MS of residence;</li> <li>5. Evolution of the prices of subscription-based and transactional services offering cross-border portability.</li> </ol>	<p>The Commission can obtain this information from the following sources:</p> <ul style="list-style-type: none"> <li>- existing data sources, such as the IHS database, European Audiovisual Observatory;</li> <li>- directly from online content service providers or right holders (through bilateral contacts or questionnaires).</li> </ul> <p>In addition, the Commission could obtain data from the following sources:</p> <ul style="list-style-type: none"> <li>- specific studies to monitor the cross-border portability of online services;</li> <li>- ad-hoc surveys to monitor consumers' behaviour (Eurobarometer).</li> </ul>	<p>Every second year.</p>

A comprehensive evaluation will take place 5 years after the start of application of the rules.

## 9. ANNEX 1 – PROCEDURAL INFORMATION

### Consultation within the Commission

DG Connect has the lead of this file which is in the Commission Work Programme for 2015. The number of the entry in the Agenda Planning is 2015/CNECT/022.

The work on the IA started in December 2014. The first meeting of the Copyright Inter-Service Steering Group ("ISSG"), chaired by the SG, took place on 25 March 2015. The second and third meeting took place respectively on 13 May 2015 and 21 September 2015. In addition to DG CONNECT, DG COMP, EAC, ECFIN, EMPL, ENV, ESTAT, GROW, JRC, JUST, RTD, SANTE and TRADE participated to the ISSG, together with the LS and the EPSC.

### Consultation of the RSB

The recommendations of the RSB	Changes in the IA report
<p><b>1) Clarify the 'need to act' on the identified problem.</b> The report should clarify under which conditions the problem of the lack of portability of online content could be solved and explain whether these conditions are currently fulfilled or not. In addition, more explanations should be provided as to why the market will not be able to solve the problem within a reasonable period of time, at a reasonable cost and/or in a uniform way, given that no evidence-based evaluation of the industry pledge ("Licences for Europe") from 2013 is presented in the report.</p>	<p>The IA explains <i>inter alia</i> in the context, in the problem definition and in the section on subsidiarity the specificities of this issue and the relation between this initiative and others considered in the DSM Strategy. It also clarifies the reasons why the market could only solve this problem in the AV and sports sectors in the long term, if at all; although even if it does so, the result is likely to be inconsistent and deliver limited benefits for consumers. It justifies why EU intervention is the only way to effectively resolve the existing problem. Moreover, the problem definition and the assessment of Option 1 explain better why the pledge at Licences for Europe is unlikely to deliver consistent results.</p>
<p><b>2) Better justify the limited range of options and scope of action.</b> The report should better justify the limited choice of options considered in the analysis and give more reasoning behind discarding some of the options which are preferred by stakeholders (e.g. the introduction of the legal fiction without the obligation to introduce portability into the offer). For instance, it should give more explanation why it was decided not to define the 'temporary stay' and consider impacts of different definitions thereof in view of possible inquiries during the legislative process.</p>	<p>The IA report now contains a separate option (Option 2) that assesses the impacts of solution that would imply the introduction of the legal fiction without the obligation to introduce portability into the offer. It concludes that such a solution could not solve effectively the identified problem.</p> <p>The options in the IA also explain the relevance of "temporary stay" in a MS as opposed to the MS of habitual residence of the consumer.</p>
<p><b>3) Explain in more detail the characteristics of the legal fiction.</b> The report should be more specific about how the legal fiction, removing the legal obstacles for service providers to offer cross-border portability of online content, will be introduced in practice and what direct and indirect impacts it will have on service providers, right holders and consumers (the need to renegotiate the contracts, the associated costs, the risks of abuse, the duration of the temporary stay, etc.).</p>	<p>The new Option 2 describes the characteristics of the legal fiction and provides for a self-standing assessment of its direct and indirect impacts. Option 3 assesses the impacts of the legal fiction together with those of the obligations on service providers to ensure the cross-border portability of online content services.</p>
<p><b>4) Strike a more sound balance in assessing impacts of options.</b> The report should elaborate on the extent to which the proposal reaches a balance between increased cross border portability of legally acquired online content and the limitation of</p>	<p>The assessment and comparison of the options have been reviewed to provide a more sound balance of the impacts, including on fundamental rights.</p> <p>The options and Annex 2 explain the targeted stakeholder consultation and how the views of</p>

<p>fundamental rights for the consumers via increased consumer surveillance by service providers linked to the verification of the (undefined) temporary stay outside the country of residence. Moreover, the results of the targeted stakeholder consultations (workshops) conducted specifically on the issue of cross-border portability should be more explicitly reflected in the report and justification should be provided in case stakeholder views are discarded.</p>	<p>stakeholders have been taken into account.</p>
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### Evidence used in the IA

Information and data needs mainly concern the situation in the different sectors of the market, the views of stakeholders and the possible technical costs of adding the cross-border portability feature to online content services.

The IA was prepared using diversified sources of information, including information received from stakeholders, input from external experts, market reviews (available publicly or through subscription), sources of statistics (including Eurostat) and surveys, as well as publicly available information from service providers and holders of rights in content (and their representatives).

The Commission carried out a public consultation and conducted a stakeholder dialogue "Licences for Europe"<sup>141</sup>, (see Annex 2). These exercises brought input from various stakeholders, which was taken into account in the IA.

### External expertise used in the IA process

A series of legal and economic studies were conducted on various aspects of the existing copyright rules.<sup>142</sup> One of these studies assesses the extent to which the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society is appropriate for the economic and technological realities of digital markets<sup>143</sup>. An economic study on the territoriality of the making available right<sup>144</sup> was also conducted. These studies, together with the consultations mentioned above, constitute a solid basis for this IA.

Further studies have been conducted by DG JRC (IPTS) on the impacts of digitisation on the production and distribution of content, as well as on the cross-border access to content<sup>145</sup>. DG EAC carried out a number of studies concerning sports, including the Study on the Contribution of Sport to Economic Growth and Employment in the EU<sup>146</sup> and the Study on sports organisers' rights in the European Union<sup>147</sup>.

<sup>141</sup> See <https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site>

<sup>142</sup> While no formalised evaluation of the copyright acquis has been carried out, many aspects have been evaluated in the framework of the Commission Green Papers, consultations and the "Licences for Europe" stakeholder dialogue, alongside with the input from the studies. .

<sup>143</sup> "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society", De Wolf and partners, December 2013.

<sup>144</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/studies/131216\\_study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf)

<sup>145</sup> Study on the "Economic analysis of the territoriality of the making available right", CRA, March 2014, [http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study1\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf)

<sup>146</sup> <http://is.jrc.ec.europa.eu/pages/ISG/DigEcocopyrights.html>

<sup>147</sup> <http://ec.europa.eu/sport/library/studies/study-contribution-sports-economic-growth-final-rpt.pdf>

<sup>147</sup> [http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible\\_en.pdf](http://ec.europa.eu/sport/news/2014/docs/study-sor2014-final-report-gc-compatible_en.pdf)

## 10. ANNEX 2 – STAKEHOLDER CONSULTATION

The Commission held a series of consultations that are of relevance for the present impact assessment, e.g. the Green Papers on the online distribution of audiovisual works in the EU<sup>148</sup> and on "preparing for a Fully Converged Audiovisual World: Growth, Creation and Value".<sup>149</sup> A wide-ranging public consultation on the review of EU copyright rules<sup>150</sup>, covering, inter alia, the area discussed in this IA, was conducted in 2013-2014. The public consultations were complemented by a stakeholder dialogue - "Licences for Europe".

The Commission's minimum standards with respect to the stakeholder consultation have been met. The following paragraphs describe in more detail the public consultation on the review of EU copyright rules as well as the "Licences for Europe" process together with their results.

### Public consultation on the review of EU copyright rules

The public consultation on the review of EU copyright rules was conducted from 5 December 2013 to 5 March 2014. All citizens and organisations from across sectors were welcome to contribute to the consultation. Contributions were particularly sought from consumers, institutional users (e.g. a library, a university), authors, performers, publishers, producers, broadcasters, intermediaries, distributors and other service providers, collective management organisations, public authorities and Member States. The consultation document explained the context of the consultation in order to facilitate responses by interested parties. Each specific section of the consultation document provided an introduction to the relevant subject in order to make it easier for respondents to understand the issue and be able to respond adequately. Over 9,500 replies (published on the Commission website) were received from a broad range of stakeholders.<sup>151</sup> There were also a total of more than 11000 messages, including questions and comments, sent to the Commission's dedicated email address. A report summarising the responses to the public consultation was published in July 2014.<sup>152</sup>

While not exhaustive, the results of the consultation that are of relevance for the impact assessment are provided by stakeholder category (see below for an exhaustive summary of replies by stakeholders):

- Some *end users* argued that, apart from facing problems when trying to access online services in another EU country, they had difficulties or could not access their national services or products they have bought online when travelling or living abroad. This was due to digital rights management systems and technological protection measures used by service providers to enforce territorial restrictions.
- *Institutional users* indicated that market-led solutions have not proven to be effective with respect to problems with cross-border provision of copyright protected content and that harmonisation measures are necessary to improve cross-border availability of cultural content.
- *Authors and performers* generally consider that there are multi-territorial licences available (at least in the book, image and music sectors) and that services providers' commercial decisions determine the rolling-out of digital content.

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<sup>148</sup> COM(2011) 427, available at: [http://ec.europa.eu/internal\\_market/copyright/initiatives/audiovisual/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/audiovisual/index_en.htm)

<sup>149</sup> <http://ec.europa.eu/digital-agenda/en/consultations-media-issues>

<sup>150</sup> [http://ec.europa.eu/internal\\_market/copyright/initiatives/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/index_en.htm)

<sup>151</sup> [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)

<sup>152</sup> [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)

- For *record producers*, there is a wide offer of online music in Europe and music services are portable across borders. *Broadcasters'* views are split on whether further measures are needed at EU level in the area of territoriality. *Film producers* generally consider that the current EU copyright rules should not be changed and some of them also consider that territorial restrictions in licences are needed. *Publishers* generally consider that territoriality is not a factor in their business, given that authors usually provide them with a worldwide licence.
- Numerous *service providers* raise the issue of cross-border portability of services and would favour licences that allow them to continue to serve their customers.

To summarise the views of the affected stakeholders, it can be said that: consumers are generally in favour of improving cross-border access to online content, including the cross-border portability of online services; the content industry, representatives of right holders, service providers, etc. are not against cross-border portability of online services but are usually in favour of industry-led solutions and soft law instruments as opposed to legal obligations in this area.

#### "Licences for Europe" initiative

Turning now to the "Licences for Europe" initiative, this structured stakeholder dialogue gathered stakeholders in four Working Groups and went on until November 2013. Working Group 1 was called "Cross-border access and portability of services" and addressed, amongst others, the specific issue of cross-border portability, i.e. the ability of consumers having subscribed to online services in their Member State to keep accessing them when travelling temporarily to other Member States. The Group had 3 sub-groups - "Audiovisual", "Print" and "Music" - and comprised stakeholders representing different content sectors and parts of the value chains, notably consumers, right holders, service providers and ICT providers. The Group held 9 meetings throughout 2013. As a result, representatives of the audio-visual sector issued a joint statement affirming their commitment to continue working towards the further development of cross-border portability:

#### **Cross-border portability of subscription services: joint statement by the audio-visual industry**<sup>153</sup>

Today, subscribers to audio-visual services online, e.g. consumers watching movies via an Internet service provider or web-store, are often denied access to services legally bought in their own EU country when they cross national borders.

##### This will change:

Representatives of the audio-visual sector have issued a statement affirming their willingness to continue to work towards the further development of cross-border portability. Consumers will increasingly be able to watch films, TV programmes and other audio-visual content for which they have subscribed to at home, when travelling in the EU on business or holidays. This is already largely the case with music, e-books, magazines and newspapers.

[Signatories: Association of Commercial Television (ACT), European Coordination of Independent producers (CEPI), Europa Distribution, EUROVOD, Federation of European Film Directors (FERA), International Federation of Film Distributors Associations (FIAD), International Federation of Film Producers Associations (FIAPF),

<sup>153</sup> For more details, see the document "Licences for Europe – ten pledges to bring more content online": [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf)

Independent Film & Television Alliance (IFTA), International Video Federation (IVF), Motion Picture Association (MPA), Sports Rights Owners Coalition (SROC), Society of Audiovisual Authors (SAA)]

### Three stakeholder workshops in 2015

In January 2015, Commissioner Oettinger held a stakeholder roundtable "Territoriality: Exploring Consumer and Business Opportunities in a Digital Single Market". One of the objectives of the roundtable was to discuss cross-border portability of online content services. Representatives of consumers, right holders and service providers in the different content sectors participated. Most of the participants referred explicitly to the need to ensure portability or, respectively, signaled openness to work towards portability.

In May 2015, Commissioner Oettinger invited key stakeholders in the audiovisual sector to discuss "how to ensure the portability of legally acquired content and cross-border access to legally purchased online services, while respecting the value of rights in the audiovisual sector and making sure that copyright remains a driver for creativity and investment". Representatives of film directors, producers and distributors, broadcasters, online platforms as well as film financing providers participated. Several participants signaled openness to work towards portability.

In October 2015, DG Connect convened a dedicated stakeholder workshop on cross-border portability of online content services. The main objective of the workshop was to discuss and test different options for achieving portability. Stakeholders representing different content sectors and parts of the value chains, notably consumers, right holders, service providers and ICT providers, participated. The participants (i) appreciated the focus on portability and differentiation from cross-border access to content; (ii) were interested to find out more and made points about the main features and likely impacts of possible legislative instrument: scope, extent of obligations, possible costs, safeguards, application to existing contracts. While some participants (representing consumers, ICT sector) expressed full support for the possible legislation on cross-border portability, some other participants (representing the film sector, broadcasters) were in favour of facilitating rather than mandating it.

### **Extract from the Report on the responses to the Public Consultation on the Review of the EU Copyright Rules<sup>154</sup>**

#### **Cross-border access to online content (Questions 1 to 7)**

1. *[In particular if you are an end user/consumer:] Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?*
2. *[In particular if you are a service provider:] Have you faced problems when seeking to provide online services across borders in the EU?*
3. *[In particular if you are a right holder or a collective management organisation:] How often are you asked to grant multi-territorial licences? Please indicate, if possible, the number of requests per year and provide examples indicating the Member State, the sector and the type of content concerned.*
4. *If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?*
5. *[In particular if you are a right holder or a collective management organisation:] Are there reasons why, even in cases where you hold all the necessary rights for all the territories in question, you would still*

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<sup>154</sup> This Annex contains the summary of responses on issues addressed in this IA. The complete report is available at [http://ec.europa.eu/internal\\_market/copyright/initiatives/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/index_en.htm)



*find it necessary or justified to impose territorial restrictions on a service provider (in order, for instance, to ensure that access to certain content is not possible in certain European countries)?*

*6. [In particular if you are e.g. a broadcaster or a service provider:] Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?*

*7. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?*

Respondents were asked whether they had faced problems when trying to access/seeking to provide online services across borders, and to share their experiences/views as regards multi-territorial licensing and territorial restrictions. Views were also sought on whether further measures (legislative or non-legislative, including market-led solutions) beyond recent initiatives such as the Collective Rights Management Directive<sup>155</sup> and the Licences for Europe dialogue would need to be taken at EU level to increase the cross-border availability of content services in the single market, while ensuring an adequate level of protection for right holders.

#### End users/consumers

The vast majority of end user/consumer respondents report facing problems when trying to access online services in another EU country. They state that they are regularly confronted with access restrictions depending on the geographic location of their IP address.

Concrete examples were given. Many report seeking to view a video online via YouTube, but being blocked by a national collective management organisation for copyrighted content. Others signal the lack of access to popular video on demand services such as Netflix and the BBC iPlayer, which are currently only available to the residents of some EU Member States. Music services such as iTunes and Spotify are also criticised for either not being accessible in certain countries or only featuring a limited online catalogue compared to the one they offer in other countries. More generally, consumer report being frequently confronted with messages indicating that a given item of content/service is not available in their country. The experience is all the more frustrating, some say, when it happens to people seeking to view or listen to content from their home country when in another EU country.

For some services, consumers/end users report being redirected to a national website when trying to access the same service in a website with a different geographical location. Consumers argue that this negatively impacts their freedom of choice, by being forcefully limited to a national selection of content while different or more extensive content is available to residents of other EU countries.

Respondents highlight that the redirection to national online stores and the consequential separation of markets along national borders often leads to price discrimination and different conditions for identical products and services depending on the Member State. Some note that when, for example, wanting to buy a video game online, the price for this product may be higher on their national web shop version than on web shops in other EU countries.

Some respondents also report that digital rights management systems and technological protection measures used by service providers to enforce territorial restrictions make it difficult or even impossible to access their own national services or products they have bought online when travelling or living abroad.

In general, end users/consumers would like to be able to access all content from any online stores whether directed to the Member State in which they reside or not. At the minimum, many consumers say, there should be transparency as to the possibilities of accessing content cross-border and on territorial restrictions. They consider the blocking of content to be mostly arbitrary and unpredictable.

Some end users/consumers call for a 'common copyright' in Europe (sometimes indicating the 'Wittem' Project - [www.copyrightcode.eu](http://www.copyrightcode.eu) - as an example). These users believe that a single copyright title would do away with territorial restrictions and allow for content to be freely accessed, purchased and transferred across the entire EU market.

#### Institutional users

Libraries report that it is very difficult to negotiate licences and manage subscriptions for multiple Member States. Universities point to problems that students face in accessing online educational resources when

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<sup>155</sup> 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.



they are not resident in the country of the university (e.g. students of online courses). Some institutional users also note problems with access to cultural content by users from the same language group residing in different EU countries.

Institutional users generally consider that territoriality of copyright creates problems in particular in the area of exceptions, where a higher level of harmonisation is needed.

Some institutional users acknowledge that problems with cross-border provision of copyright protected content stem not only from the fact that copyright is territorial but also from technological, regulatory and taxation differences between EU Member States. Many respondents consider that market-led solutions have not proven to be effective and that harmonisation measures, also in areas going beyond copyright, are necessary to improve cross-border availability of cultural content. Some libraries and universities also point to problems with the identification of rights and rightholders and call for more transparency on these issues and for simplified licensing mechanisms.

The great majority of respondents in this category consider that further measures are needed to increase the cross-border availability of services in the single market.

#### Authors/performers

Authors and performers generally consider that the deficit of cross-border accessibility of content does not result from the fact that copyright is territorial or from problems in licensing. They highlight that multi-territorial licences are available (at least in the book, image and music sectors) and that service providers' commercial decisions determine how, when and where services distributing digital content are rolled out. Very often, authors and performers argue, there is no demand for cross-border services and therefore no business case for service providers. Cultural, language and regulatory differences between Member States are cited as among the reasons for territory-based services. For example, according to authors and performers, providers of audio-visual services prefer to roll out services on a territorial basis due to the required contextualisation and versioning. They also highlight that in the audio-visual sector territorial roll-out with exclusive distributors per territory is a tool for rightholders to secure adequate financing at the pre-production stage.

According to some authors, the only licensing-related problems in the music sector are due to the fragmentation of the Anglo-American repertoire between collective management organisations and publishers. They believe that the problems with licensing in the music sector should be alleviated by the newly adopted Collective Rights Management Directive and market-led solutions such as the Global Repertoire Database.

As regards the way forward, the vast majority of authors and performers consider that further measures to increase the cross-border availability of content are needed. However, many respondents consider that these measures should be taken in areas such as consumer protection, payment measures and VAT and not in the area of copyright.

#### Publishers/producers/broadcasters

*Record producers* state that they grant EU-wide cross-border licences and in some cases also worldwide licences. They emphasise the wide offer of online music in Europe and the fact that music services are portable across borders. In their view there is no clear evidence that problems with cross-border access exist in the music sector, including any unsatisfied consumer demand for cross-border access. Record producers point to the fact that many digital platforms elect to roll out services on a gradual country by country basis, for commercial reasons, and to adapt their services to consumers' needs and tastes in each country. They state that many non-copyright factors are also involved in the development of services across borders, and require considerable investment, such as negotiating deals with local operators, including internet service providers (ISPs), mobile networks, advertisers, and payment providers. *Music publishers* generally consider that the territoriality of copyright does not cause them problems as they commonly grant multi-territorial licences. However, in some cases service providers prefer to be licensed on a territory-by-territory basis because their services are intended for only one or a few territories. Music publishers generally answer that they do not impose any territorial restrictions on their licensees and that when limitations exist, they are a result of the service providers' choice.

The vast majority of record producers and music publishers do not think that measures are needed at EU level to increase the cross-border availability of content. They point to the fact that the market is delivering with multiple services and millions of songs available to European citizens

A large part of *broadcasters* state that there is often no incentive to provide services in several Member States because of various considerations including viewing habits of consumers, consumer demand, language, ability to provide consumer support in more than one language, cost of marketing, etc. The majority of broadcasters see a need to restrict rights on a territorial basis and to guarantee full exclusivity to

distributors who are pre-financing productions to enable them to make return on their investment. They also emphasise the role this form of financing plays in maintaining cultural and linguistic diversity. Some broadcasters say that the market is naturally moving towards addressing demand for cross-border delivery of content where it is economically significant. Many *commercial broadcasters* emphasise that there are no legal obstacles to the trade in audio-visual productions on a multi-territorial basis. Some broadcasters report having problems in acquiring multi-territorial licences for music.

Broadcasters' views are split on whether further measures are needed at EU level in the area of territoriality: some broadcasters (mostly commercial) do not see any need for legislative change, while others, in particular public service broadcasters, see a need for some legislative changes. In particular, many *public service broadcasters* call for the application of the country of origin approach to online media services (as a minimum to broadcast-related online services). They also call for the system currently applicable to cable retransmission under the Satellite and Cable Directive<sup>156</sup> to be applied also to simultaneous retransmission of broadcasts via online platforms. Moreover, public service broadcasters emphasise the need of finding effective rights management solutions for on-demand services which are related to linear programmes (e.g. catch-up TV) and which can be offered by the broadcaster itself or by third parties. They suggest that the system of extended collective licensing of the underlying rights to works and other subject matter used in broadcast programmes could be a solution. Finally, public service broadcasters call for the extension of the broadcasters' neighbouring right to protect their signals on whatever platform against unauthorised alteration or other use by third parties. A minority of broadcasters state that there is a general need to improve the licensing schemes in Europe and to encourage one stop licensing

*Film producers* in general point out that service providers mostly cater to national or specific linguistic audiences and therefore are not interested in multi-territorial licences except for territories in which the same language is spoken. Multi-territorial distribution can be very costly as it involves targeted local advertising campaigns, employing multilingual staff for customer services, the use of different delivery networks, operating in territories with varying internet costs, broadband penetration and VAT rates, etc. Further harmonisation in those fields could reduce costs and incentivise licensing on a broader territorial scope. Some film producers say that territorial restrictions in licences are needed as without them distributors that pre-finance productions would not have the capacity to finance new films. Film producers generally consider that the current EU copyright rules should not be changed.

In the print sector, *book publishers* generally consider that territoriality is not a factor in their business, as authors normally provide a worldwide exclusive licence to the publishers for a certain language. Book publishers state that only in the very nascent eBooks markets some licences are being territorially restricted. Book publishers also generally do not see a need for changes to the EU copyright rules. *Newspaper and magazine publishers* in general take the same view. They believe that when territorial restrictions exist, they are the consequence of commercial choices. This stakeholder group points to projects such as the Press Database and Licensing Network, as examples of how rightholders can manage cross-border and multi-territorial licensing.

#### Collective Management Organisations (CMOs)

CMOs state that they are generally willing to grant and do grant multi-territorial licences. However, demand by service providers for multi-territorial licences varies across sectors and it is especially limited in the audio-visual sector. CMOs active in the audio-visual sector consider that a framework to remunerate audio-visual authors should be established, failing which, they say, it is impossible for them to offer multi-territorial licences. Moreover, demand for multi-territorial licences depends largely on the repertoire the CMO holds. In the music sector the more popular repertoires are often licensed on a multi-territorial basis. Multi-territorial licences are also often demanded in the fine arts and artistic photography sector.

CMOs mention that in some cases licences are territorially limited as a result of right holders granting them territorially limited mandates. CMOs in the audio-visual sector state that in some instances, territorial limitations in granting licences are a necessary consequence of the exclusive territorial distribution of audio-visual works. Some CMOs argue that imposing multi-territorial licensing could endanger services that cater for the specificities of local customers. They also find that the demand for multi-territorial access to copyright protected content is not that strong yet and that digital distribution in this area is still a distant second to distribution of physical goods.

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<sup>156</sup> Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

In general, the great majority of CMOs do not see any need to intervene on copyright although many see the need for action in other areas, such as taxation. CMOs in the music sector consider that the results of the Collective Rights Management Directive should be awaited before considering taking further steps.

#### Intermediaries/distributors/other service providers

Service providers distributing digital content point to the lack of information on content (such as who represents particular rights and for which territories) as a major problem for the clearance of rights and licensing in the single market. Fragmentation of repertoire in the music sector, the need to contract with multiple licensors and the inefficiency of CMOs are also quoted as obstacles to launching services. Some service providers (e.g. video on demand –‘VOD’- platforms) indicate that they are contractually required to prevent cross-border access to their content as a result of territorial licensing. This means that VOD operators can only make the content available in a given country and have to put in place digital rights management measures (geo-blocking of foreign IP addresses) which prevent cross-border access and portability of services.

Service providers also refer to a number of non-copyright related factors that are taken into account when deciding on the potential multi-territorial roll out of services, including the cost of compliance with divergent consumer protection laws; national rating systems; protection of minors obligations; taxation; release windows; private copying regulations; the cost of contextualisation (i.e. market-specific marketing) and versioning (subtitling and dubbing); the cost of providing customer care and responding to customer complaints in several languages; no common technical standards for content delivery; the risk of fraud and non-payments and the diverse economic realities which make a single price impossible; lack of digital infrastructure/access to high speed broadband; and difficulties in payment processing; divergent advertiser preferences..

Finally, providers of audio-visual services point to insufficient demand for cross-border services. Such demand is limited to areas with common language and to migrant populations.

The vast majority of service providers believe that further measures are needed to increase cross-border availability of content. Service providers call for the simplification of the licensing process in the single market. Some emphasise the need to develop right information initiatives such as the Global Repertoire Database and to enhance the transparency of who owns the repertoire. Other call for one-stop-shop licensing based on the country of origin principle and for imposing obligations to license on CMOs. Numerous service providers raise the issue of cross-border portability of services – they argue that licences should allow them to continue serving customers who have paid for the content when they travel within the EU. Some also call for a harmonised VAT on online services and content.

#### Member States

Those Member States who responded to the public consultation consider that there is no major problem of lack of cross-border access to content online, whilst recognising that this is an important issue to discuss. Some Member States are open to consider new legislation if needed but the general message is that no urgent action is necessary. The market is dynamic and new solutions are emerging spontaneously. Some Member States mention the Licences for Europe dialogue and stress the importance to foster market-based solutions (for example on content portability) to improve cross-border availability of content and more in general to enhance legal offers. Sectors are not all the same and specificities of each of them need to be taken into account.. The need to preserve cultural diversity and consumer preferences is also highlighted. Member States consider that the market, the implementation of the Collective Rights Management Directive (and more in general the role played by Collective Management Organisations) as well as the case-law of the Court of Justice should help improve the cross-border availability of content.

#### Other

Academics are divided on the issue of cross-border availability of copyright protected content with some claiming that problems are limited to situations where rights are in different hands and others making more general statements on problems related to multi-territorial licensing.

The latter group believes that problems in licensing are limited to the music sector and points to the Collective Rights Management Directive as the potential solution, and argues that its effects over time must be assessed before any other potential steps are taken. They emphasise that rightholders should be able to license for certain territories only, for instance to avoid territories with a high level of infringements and a low level of enforcement.

## 11. ANNEX 3 – WHO IS EFFECTED BY THE INITIATIVE AND HOW

This annex sets out the practical implications of the initiative for affected stakeholders, namely content service providers and holders of rights in content. Consumers are key stakeholders and the main beneficiaries of this initiative; however they would not have obligations to comply with or costs to bear under the new rules.

The annex is prepared on the basis of the preferred policy option (i.e. Option 3, see Sections 4-6). First, this annex indicates the key obligations which would have to be fulfilled. Second, it describes the actions that the affected stakeholders might need to take in order to comply with these obligations. And, third, it gives an overview of possible costs linked to these obligations.

### *Key obligations*

As the outcome of Option 3, no separate licence would be needed by a service provider to cover a temporary use for the purposes of cross-border portability of the content in the EU<sup>157</sup>. In order to ensure the effectiveness of this measure, the following key obligations would be imposed:

#### *On right holders and service providers:*

- A prohibition of restrictions in contracts between holders of rights in content and the service providers which would limit the cross-border portability of services.

#### *On service providers:*

- Service providers would have to offer the portability feature to consumers and provide them with access, during temporary stay in other MS, to the same content, on the same range of devices and the same range of functionalities as those offered in consumers' MS of residence. However, as service providers do not control delivery networks, they should not be liable for any deficiencies in the quality of the services delivered in a MS other than the MS of residence.
- The measure would not require service providers to use authentication tools in order to check that the online content service is being accessed by authorised users. This matter would be left to negotiations between right holders and service providers. The measure would include appropriate safeguards to ensure that the potential requirements regarding authentication tools imposed by holders of rights would not go beyond what is necessary and proportionate for the objective of authentication.

The proposed intervention would set out a reasonable time in order to allow the affected stakeholders to comply with the above obligations.

### *Actions to be taken to comply with the key obligations*

#### *Actions directly linked to the key obligations*

- Service providers may be required by right holders to use authentication tools in order to check that the online content service is being accessed by authorised users. If this is the case, service providers would need to introduce such tools, if they are not yet available. Vast majority (if not all) of affected service providers already has authentication mechanisms in place and could maintain them (see

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<sup>157</sup> This should include a legal fiction according to which the delivery of the service to a consumer temporarily present in a MS other than his MS of residence would be deemed to occur in the MS of consumer's residence (as opposed to in the MS of temporary sojourn of consumer). This Option will not, as such, limit a possibility to grant licences for online content services on a territorial basis.

Section 5 of this IA). The preferred option could also imply the need to carry out periodic checks on user logs based on IP address.

*Actions which may be taken as an indirect consequence of the intervention*

- Even though not required by the measure, right holders and service providers could decide to renegotiate their contracts to e.g. amend provisions on the use of authentication tools.
- In certain cases (especially with regard to AV and premium sports content), online service providers would need to review the terms of use of their services. As the change would be for the benefit of consumers (assuming no change to the price of subscription), it could be easily introduced and the only related cost would be the administrative cost of notifying the affected consumers (which is normally done by email or on the website itself).
- The preferred option would not set legal requirements with regard to the quality of the service delivered in the MS other than the MS of residence of the consumer. Service providers would not be obliged to adapt the technical infrastructure in order to ensure the same quality of service across borders. However, they could do so if they decide to do this voluntarily or commit to it in contracts with right holders.

*Potential costs to be incurred*

Potential costs related to the offering of cross-border portability of online content services can be divided into:

*Costs directly linked to the intervention*

- Service providers' costs of authentication of subscribers: the cost of implementing such authentication tools would only relate to the limited cases of providers that do not have such mechanisms in place and would be obliged to introduce them (or would take such a decision voluntarily). The periodic checks on the user logs based on the IP address that the service provider may undertake in view of detecting abuses should not imply an additional cost.

*Costs which may indirectly arise due to the intervention*

- Costs of renegotiation of contracts between holders of rights and service providers (renegotiation is not necessary under the preferred option).
- Service providers' costs related to the use of network infrastructure: while the measure would not oblige service providers to do additional investment, they may see a need (e.g. due to reputational considerations) to adapt the technical infrastructure in order to ensure the same quality of service across borders or commit to it in contracts with right holders.

The detailed analysis of the costs is provided in Section 5 of this IA.

## 12. ANNEX 4 – COPYRIGHT, SPORTS RIGHTS AND THE CONTENT INDUSTRIES IN THE EU ECONOMY

### Copyright and the provision of online content services

Copyright is a property right<sup>158</sup> that rewards creativity (of composers, writers, film directors, musicians, actors, etc.) and investment in creativity (by book and newspaper publishers, film and record producers, broadcasters etc.) by granting rights<sup>159</sup> over the use of works (e.g. a novel, a film) and other protected subject-matter (e.g. records, broadcasts). This area is harmonised by EU law to a great extent (see Annex 6 for details).

These rights and their effective enforcement promote the formation of markets for creative content by providing the framework within which right holders can negotiate licensing agreements with users authorising the use of their work and can obtain remuneration for such use. Providers of online services wanting to use copyright-protected content need to get a licence from the holders of the rights in the content they want to use and for the territories in which they want to provide the services.

The method of licensing of online rights depends on the type of content and the category of right holder (e.g. rights in audiovisual content are normally licensed by AV producers and, as far as premium AV content<sup>160</sup> is concerned, on an exclusive territorial basis whereas rights in music are licensed in part by record producers and music publishers and in part by collective management organisations (CMOs) representing authors of musical works and normally without territorial exclusivity).

### Copyright content industries

According to a Report by the Office for Harmonization in the Internal Market and the European Patent Office<sup>161</sup> 33 sectors of the EU economy are considered to be copyright-intensive. They account directly for 3.2% of employment in the EU with around 7.05 million jobs (on average in 2008-2010).<sup>162</sup> Overall, 4.2% of the EU's GDP is generated in copyright-intensive sectors (on average in 2008-2010).<sup>163</sup> Copyright-intensive industries account for 4.2% of EU's exports, with net exports of around €15 billion in 2010.

On top of being essential drivers for cultural diversity in Europe,<sup>164</sup> copyright-intensive industries are one of Europe's most dynamic economic sectors. More than 1 million companies are involved in motion picture, video and television programs production, sound recording and music publishing activities, providing over 400,000 jobs, with net

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<sup>158</sup> Article 17(2), Charter of Fundamental Rights of the European Union;

<sup>159</sup> For example, right of reproduction, right of communication to the public, right of distribution. Many of these rights are harmonised in the directives mentioned in Annex 6.

<sup>160</sup> Content which is most attractive in commercial terms, e.g. new films and series.

<sup>161</sup> "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union. Industry-Level Analysis Report". A joint project between the European Patent Office and the Office for Harmonization in the Internal Market, September 2013.

<sup>162</sup> Using an adapted version of the methodology developed by the World Intellectual Property Organization (WIPO) in the WIPO guidelines, industries are grouped into four categories according to the degree to which their activity depends on copyright: core copyright industries, inter-dependent industries, partial copyright industries and non-dedicated support industries. The report, however, is based on a stricter approach to the definition of core copyright-intensive industries and does not cover inter-dependent, partial or non-dedicated support industries.

<sup>163</sup> Applying the original WIPO methodology, the report would arrive at 6,7% contribution to the employment and 7,8% contribution to GDP of copyright-intensive industries in the EU.

<sup>164</sup> Communication of the European Commission 'Promoting cultural and creative sectors for growth and jobs in the EU' 26 September 2012.

contribution to the EU economy of over €13 billion,<sup>165</sup> with the audiovisual sector worth nearly €132 billion in 2011, and online video on demand (VoD) €616 million (having grown by 45% compared to 2010).<sup>166</sup> The European game market is valued at €14,5 billion.<sup>167</sup> The creative industries in the EU are dominated by micro firms with 95% having fewer than 10 employees coexisting with very large corporations.<sup>168</sup> The overwhelming majority (90.8 %) of the value added generated within the EU-27's film and sound recording activities sector in 2010 was provided by SMEs,<sup>169</sup> which employ just over three quarters (75.4 %) of the total number of persons employed in the sector. In the recorded music industry, 99% of music business are SMEs while 80% of the music released today is produced by SMEs independent music companies,<sup>170</sup> and one of the three major labels is European. Europe is particularly competitive in the publishing industry (books and newspapers). According to the Global Ranking of World Publishing released in July 2013, 7 of the top 10 book publishing companies are European,<sup>171</sup> and large enterprises (employing 250 or more persons) generated almost half (49.3 %) of the EU-27's value added in 2010. Nevertheless, the average publishing industry employs 5.4 employees and less than 1% of the publishing companies have 250 employees.<sup>172</sup>

### Sport rights and selling broadcasting rights into sporting events

In 2011-2012, the share of sport-related gross value added of total EU gross value added was 1.76%.<sup>173</sup> Sport activities significantly contribute to jobs in the EU: the share of sport-related employment in the total employment is 2.12%.<sup>174</sup>

Under EU law, sporting events as such are not protected by copyright (as clarified by the Court of Justice of the European Union (CJEU)<sup>175</sup> or other intellectual property rights. Nevertheless, it is permissible for a MS to protect sporting events by putting in place specific national legislation, or by recognising, in compliance with EU law, protection conferred upon those events by agreements concluded between the persons having the right to make the AV content of the events available to the public and the persons who wish to broadcast that content to the public of their choice.<sup>176</sup> As for broadcasts of sporting events (as opposed to sporting events as such), broadcasting organisations can invoke rights in the transmissions accorded to them under EU copyright law.<sup>177</sup>

Joint selling is one of the standard ways of marketing broadcasting rights for sporting events. Sports clubs entrust national or international sports associations to sell broadcasting rights on their behalf. For example, rights to broadcast European football

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<sup>165</sup> Source : Eurostat, 2013

<sup>166</sup> European Audiovisual Observatory 2012 Yearbook Volume 2 Television, cinema, video and on-demand audiovisual services – the pan-European picture

<sup>167</sup> PwC Global Entertainment and Media Outlook 2012-2016

<sup>168</sup> European Competitiveness Report 2010, p. 15

<sup>169</sup> Enterprises employing fewer than 250 persons.

<sup>170</sup> Independent music companies Association (IMPALA) comments on the EC consultation on a future trade policy, July 2010.

<sup>171</sup> See "the World's 60 Largest Book Publishers, 2013", <http://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/58211-the-global-60-the-world-s-largest-book-publishers-2013.html>

<sup>172</sup> Source: Eurostat

<sup>173</sup> See Study on the Contribution of Sport to Economic Growth and Employment in the EU, November 2012, commissioned by the European Commission, Directorate-General Education and Culture, page 2. This figure is based on the "broad definition" of sport, covering all activities which are inputs for sport and activities which require sport as an input, i.e. related to a sport activity.

<sup>174</sup> Ibid, page 3.

<sup>175</sup> See Joined Cases C403/08 and C429/08, Football Association Premier League Ltd, v QC Leisure, (C-403/08); Karen Murphy v Media Protection Services Ltd (C-429/08), para 98.

<sup>176</sup> Ibid, para 102

<sup>177</sup> Ibid, para 150

leagues matches are mainly sold collectively by the respective associations. Cyprus and Portugal are the last EU markets where first division football clubs sell their rights individually.<sup>178</sup> The International Olympics Committee (IOC) is the owner of the global broadcast rights for the Olympic Games.<sup>179</sup> Sport broadcasting rights may also be sold individually by sports organisers.

In the light of Commission's decisional practice in competition cases<sup>180</sup>, in a number of EU markets premium sport content broadcasting rights are sold in open tenders and in packages<sup>181</sup>. In its decisions, the Commission required the creation of two or more independently valid packages for the most important rights, in particular the exclusive rights to broadcast live sport events. Also, rights not sold by the sport association within a certain time period would fall back to the individual clubs for parallel exploitation.<sup>182</sup> However, such selling practices are not yet spread in all EU markets: there are markets where rights are sold in one exclusive bundle without tendering proceedings.<sup>183</sup> On the other hand, the AVMS Directive established a possibility for MS to ensure that certain sporting events of "major importance for society" would be shown on free TV.<sup>184</sup>

Presently, premium sports content is routinely marketed on an exclusive territorial basis.<sup>185</sup> To ensure such exclusivity, the licensee is required to eliminate the possibility of viewing its transmission outside the licensed (usually national) territory. However, this is not always the case, as sports broadcasting rights may also be sold on multi-territorial basis. E.g., the broadcast rights for the four Olympic Games in 2018-2024 were sold to Eurosport/Discovery for the entire Europe (in France and the United Kingdom, only for 2022-2024, as the rights were already sold for 2018-2020).<sup>186</sup> Other (not premium) sports content may be licensed without geographic restrictions. Moreover, there are experiments with exploiting such rights through own website or other online platforms, including without geographic restrictions, as well as mixed solutions, where in certain territories rights are sold to broadcasters/service providers, while in other countries (where sports organisers could not sell its rights) live sporting events are streamed for free.<sup>187</sup> Thus the

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<sup>178</sup> See ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, page 70. In Spain, the rights for the football league were sold collectively in July 2015, while previously they were sold on an individual basis by the clubs (for the season 2015/16, the broadcasting rights were sold to Telefónica, while a public tender is expected for the three upcoming seasons, see <http://www.laliga.es/en/news/nota-informativa-28>).

<sup>179</sup> See <http://www.olympic.org/olympic-broadcasting>

<sup>180</sup> See cases COMP 37.398 (UEFA Champions League, 2003), COMP /37.214 (German Bundesliga, 2005), COMP/38.137 (FA Premier League, 2006).

<sup>181</sup> In the *FA Premier League* case (COMP/38.137), the Commission also imposed on the collective selling entity a no single buyer obligation, to avoid that all broadcasting rights are consolidated by one buyer.

<sup>182</sup> Ibid.

<sup>183</sup> See ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, p 94.

<sup>184</sup> Article 14(1) of the Directive provides that each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television.

<sup>185</sup> Licencing in various territories may generate different level of revenues, in particular for national league matches. For example, in the 2011-2012 season, the top five European football leagues received the great majority of the revenue from the sale of media rights is generated in the domestic market (see ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, p 67).

<sup>186</sup> See <http://www.olympic.org/news/ioc-awards-all-tv-and-multiplatform-broadcast-rights-in-europe-to-discovery-and-eurosport-for-2018-2024-olympic-games/246462>

<sup>187</sup> Examples include free streaming of various sports at the Sports Hub Channel, developed by SportAccord in collaboration with YouTube; free online streaming of the second division of the



coverage of free streaming may be limited to the territories where such content is not sold.<sup>188</sup>

Major sporting events (such as the Olympic Games and football matches) are generally recognised as a vital input for the main TV broadcasters. In the free-to-air environment, sports are a key instrument of differentiation between channels given its unique branding abilities and its appeal to advertisers. For pay TV, top sports are one of two main subscription drivers, along with the first screening of major movies.<sup>189</sup>

In the past, media content providers delivered sport content via one platform, e.g. analogue TV, DTT, cable or satellite. However, a new trend is to market premium sports content rights on a platform-neutral basis with rights packages carved out by time windows (e.g. live, near-live or deferred, highlights, and clip rights). For example, a licensee who acquires the live rights to certain matches will thus benefit from exclusivity across all media platforms, including internet and mobile.<sup>190</sup>

Broadcasting is among the most important source of revenues for premium sports content. For example, in 2013/14 season the broadcasting revenues of five major European football leagues ranged from 29.3% to 59% of their total revenues;<sup>191</sup> broadcasting represented 77% of UEFA's revenues in 2013/2014 season<sup>192</sup>. Broadcasting revenues amounted to 73% of the International Olympic Committee's revenues in 2009-2012.<sup>193</sup> However, apart from a handful of premium sporting events, most professional sports struggle to attract significant revenue from selling their broadcasting rights.<sup>194</sup> Furthermore, of the total budget for grassroots sport, revenue from media rights allocated to grassroots sport represents € 0.5 billion (0.7% of the total).<sup>195</sup>

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Spanish football league in 2014. See also ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, pages 68-69.

<sup>188</sup> For example, European Tour TV, Ryder Cup's platform, streams for free golf matches. Live streaming is available only in MS which do not benefit from local broadcasting, i.e. where there is no broadcaster/service provider who bought the rights to broadcast live events; see <http://www.europeantour.com/europeantour/season=2013/tournamentid=2013038/news/newsid=193330.html#7eG3vMYaEkdTFbl.97>

<sup>189</sup> See case COMP/M.4066, *CVC/SLEC*, European Commission decision of 20 March 2006; OECD Policy roundtables, Competition Issues in Television and Broadcasting, 2013, available at <http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>

<sup>190</sup> See ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014. For example, the UEFA sells its broadcasting rights on the platform neutral basis, thus football fans can follow UEFA football matches also via the internet portals and mobile platforms of the official broadcasters as well as via the relevant radio stations, see <http://www.uefa.org/about-uefa/administration/marketing/#>; Sky Deutschland acquired the exclusive pay-TV rights for all live Bundesliga and 2nd Bundesliga matches from the 2013/14 to 2016/17 season in Germany, which covers the rights for all platforms, including online and mobile, see <http://www.broadbandtvnews.com/2012/04/18/sky-deutschland-wins-live-bundesliga-rights/>; the broadcast rights for 2018-2024 Olympic Games in Europe were sold on a multiplatform basis: all rights on all screens, see <http://www.olympic.org/news/ioc-awards-all-tv-and-multiplatform-broadcast-rights-in-europe-to-discovery-and-eurosport-for-2018-2024-olympic-games/246462>.

<sup>191</sup> Premier league (UK) 54%; Bundesliga (Germany) 29.3%, La Liga (Spain) 49%; Serie A (Italy) 59%; Ligue 1 (France) 40%, see Deloitte Annual Review of Football Finance 2015, available at <http://www2.deloitte.com/uk/en/pages/sports-business-group/articles/annual-review-of-football-finance.html>; Bundesliga Report 2015, page 26.

<sup>192</sup> See UEFA Financial Report 2013/14.

<sup>193</sup> See IOC Financial Summary, Update – July 2014, available at [http://www.olympic.org/Documents/Reference\\_documents/Factsheets/IOC\\_Financial\\_Summary.pdf](http://www.olympic.org/Documents/Reference_documents/Factsheets/IOC_Financial_Summary.pdf)

<sup>194</sup> See ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, p 68.

<sup>195</sup> Study on the funding of grassroots sports in the EU, June 2011; [http://ec.europa.eu/internal\\_market/top\\_layer/services/sport/study\\_en.htm](http://ec.europa.eu/internal_market/top_layer/services/sport/study_en.htm)

On the other side, acquiring sports rights makes a substantial part of broadcasters' expenses. For example, in 2009 out of the EUR 34.5 billion spent in the EU by broadcasters on the content, approximately EUR 15.6 billion was spent on acquiring rights, of which EUR 5.8 billion on sports rights<sup>196</sup>. In 2011, broadcasters in the top five European markets spent on average 79% of their annual sports rights expenditure on football.<sup>197</sup> The acquisition of media rights to the domestic football league accounts for more than half of the total spent. In this context, the second biggest sport is Formula 1, followed by rugby, the Olympic Games and tennis.<sup>198</sup>

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<sup>196</sup> Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services, 2011, page 99.

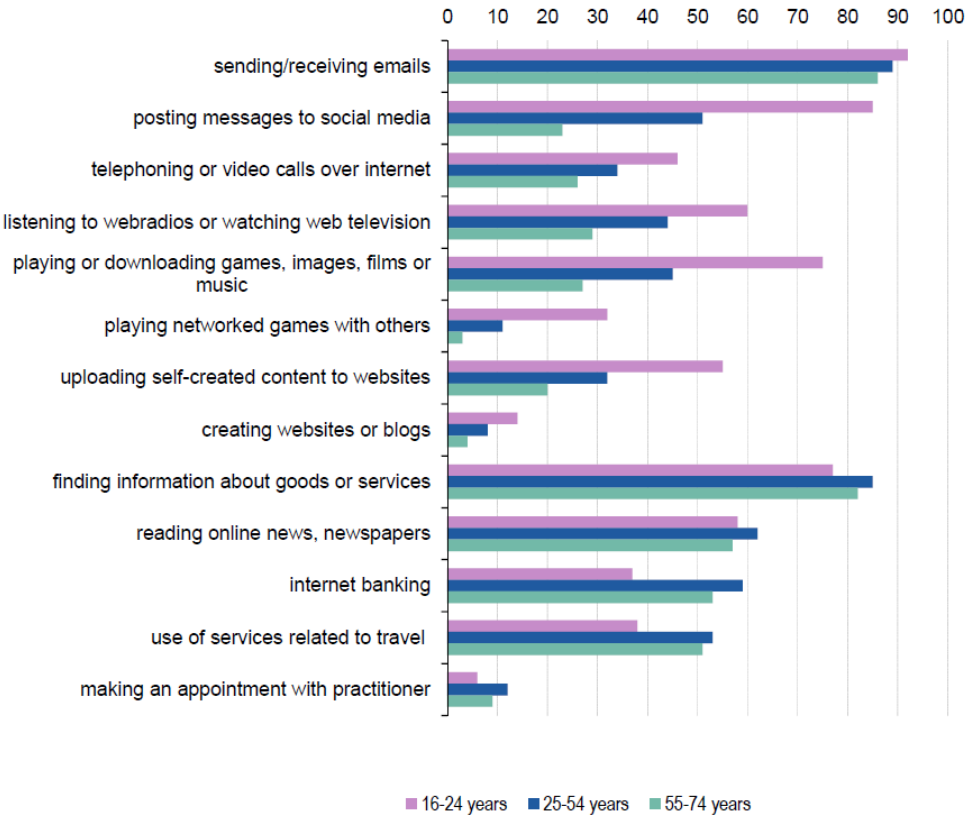
<sup>197</sup> ASSER/IVIR Study on sports organisers' rights in the European Union, Final Report, February 2014, page 64.

<sup>198</sup> Ibid, data quoted from Sportbusiness Intelligence (2011).

**13. ANNEX 5 – NEW TECHNOLOGIES, NEW WAYS OF ACCESS TO AND DISTRIBUTION OF CONTENT**

Digitisation has deeply impacted the ways works and services are consumed. With growing **access** to the internet, the use of online services is becoming a part of consumers’ daily life: 81% of households in EU28 have internet access and 83% of EU citizens use internet daily, and 38% of individuals use the internet for playing or downloading games, images, films or music<sup>199</sup> (see also Table 5.1). VoD services provide viewers with more flexibility when watching programs, listening to music, reading books or newspapers. Tablets and smartphones further facilitate such uses. Consequently, consumers increasingly expect to access content at any time and from anywhere. The Body of European Regulators for Electronic Communications (BEREC) has estimated that Europeans, who travel at least once a year, spend abroad on average 11.6 days per year (see also Table 5.2).

*Table 5.1: Use of the internet for communication, entertainment and other selected activities, by age group, EU 27, 2012 (% of internet users)*



Source: Eurostat<sup>200</sup>

<sup>199</sup> Source: Eurostat 2014 (% of individuals who accessed internet in the last 3 months preceding the Eurostat survey)

<sup>200</sup> [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF)

Table 5.2: Percentage of citizens who never travel in comparison to those who travel more frequently and the average number of days abroad for all citizens and citizens who travel at least once a year.

Country	Citizens who never travel	Citizens who travel at least once a year	Yearly average days abroad - all citizens	Yearly average days abroad- citizens who travel at least once a year
Austria	10%	66%	11.2	14.3
Belgium	19%	62%	10.9	14.6
Bulgaria	63%	11%	0.9	4.1
Croatia	33%	31%	5.4	12.2
Cyprus	15%	37%	12.1	30.4
Czech	23%	39%	5.1	9.5
Denmark	7%	68%	12.6	16.0
Estonia	27%	41%	6.4	11.8
Finland	14%	48%	11.0	19.7
France	37%	33%	4.0	8.3
Germany	18%	52%	8.9	14.7
Greece	63%	11%	0.8	3.2
Hungary	59%	13%	2.5	15.5
Iceland	36%	35%	5.7	12.4
Ireland	18%	51%	10.9	19.0
Italy	52%	16%	2.2	8.4
Lithuania	52%	22%	5.1	18.4
Luxembourg	4%	86%	27.1	30.1
Netherlands	7%	78%	15.0	17.3
Norway	10%	57%	12.6	19.2
Poland	52%	18%	3.0	12.0
Portugal	61%	14%	1.5	6.3
Romania	57%	17%	1.4	3.5
Slovakia	26%	48%	5.9	8.6
Slovenia	19%	60%	6.9	8.3
Spain	55%	16%	1.8	8.9
Sweden	6%	65%	12.1	15.9
UK	27%	40%	7.6	15.6
EEA Average	36%	35%	5.7	11.6

Source : BEREC International Roaming Analysis of the impacts of "Roam Like at Home" (RLAH), 17 December 2014<sup>201</sup>

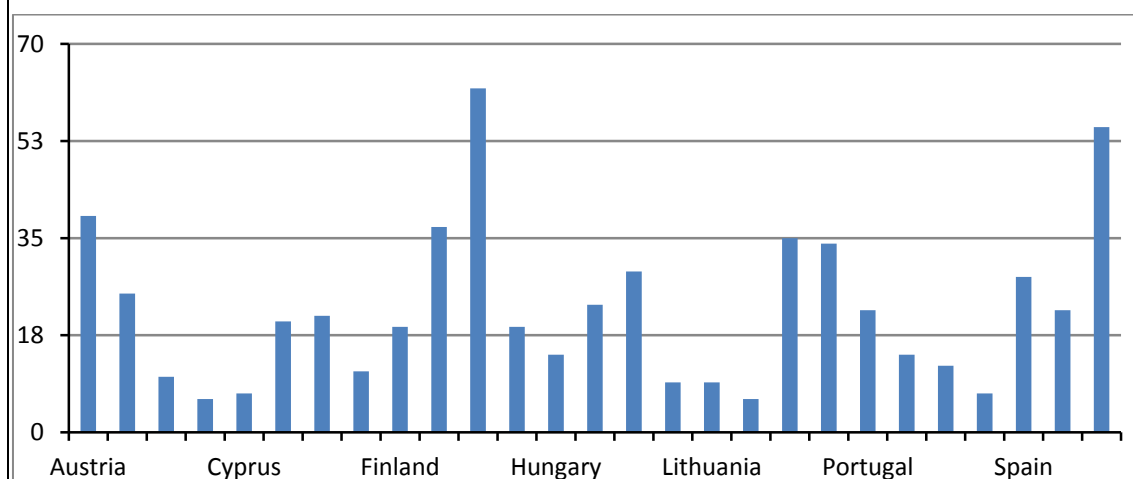
During the next 5 years global digital spending on entertainment and media is expected to increase at a rate of 12.1%, whereas non-digital spending will only increase by 2.8%.<sup>202</sup>

Digital technology also creates new forms of **production and distribution** of content, often making them more efficient and less costly. Some transaction costs decrease (e.g. by more efficient matching between owners and users; easier monitoring of consumption). Some new uses (e.g. digitisation of out-of-commerce works) however involve significant costs. There is also a vast scope for individuals to self-publish, reaching consumers directly online.

The last years have seen a plethora of **new services** coming into the market. The figures below illustrate their importance in the EU economy:

The number of licensed **digital music** services worldwide is steadily growing (about 400 at the end of 2010 and close to 600 at the end of 2015).<sup>203</sup> In the digital music sector, cloud computing and the shift from ownership to access-based models of consumption is changing the ways in which consumers access digital content, enabling e.g. subscription to extensive libraries on a streaming rather than download-to-own basis. Although download sales continue to account for a large part of global digital revenues (52%). The number of paying subscribers increased by 46.4% globally in 2014 and stands at an estimated 41 million as opposed to 8 million in 2010. Subscription services now account for the majority of digital revenue in e.g. Croatia, Denmark, Finland, the Netherlands and Sweden.<sup>204</sup> The global digital revenues of the recording industry reached USD 6.85 billion in 2014.<sup>205</sup>

Online music services in the EU in 2015 (download, subscription and ad-supported services)



Source: [www.pro-music.org](http://www.pro-music.org)

In the **audiovisual** sector, in 2014 there were more than 3000 video-on-demand services in Europe, including catch-up TV services of broadcasters (1196 services) and VoD services providing access to a catalogue of programs – without payment, on a transactional basis or through a subscription (2101 services). The number of users of subscription VoD services in 14 EU MS<sup>206</sup> was 25 million in 2014.<sup>207</sup> In 2013 the online on-demand

<sup>201</sup> [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/opinions/4826-international-roaming-analysis-of-the-impacts-of-8220roam-like-at-home8221-rlah](http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/4826-international-roaming-analysis-of-the-impacts-of-8220roam-like-at-home8221-rlah)

<sup>202</sup> PWC, Global entertainment and media outlook: 2012-2016 (PWC 2012), <http://www.pwc.com/us/en/pressreleases/2012/digital-now-embedded.jhtml>. "In 2016, 67% of total global spending on entertainment and media growth will be generated by digital spending"

<sup>203</sup> <http://www.pro-music.org>

<sup>204</sup> IFPI Digital Music Report 2015

<sup>205</sup> Ibid.

<sup>206</sup> AT, BE, DE, DK, ES, FI, FR, IE, IT, LU, NL, PT, SE, UK

<sup>207</sup> IDATE Digiworld Yearbook 2015, Audiovisual Observatory and IHS.

TV revenues reached €938 million and online on-demand film revenues €588 million in the EU.<sup>208</sup> VoD film online accounted for 0.44% of the EU audiovisual market in 2013, growing by almost 60% compared to 2012. 409 film VoD services were established in the EU in 2013, while 124 services of this type were established in the US, but were targeting European countries.<sup>209</sup> With regard to the TV distribution platforms, the number of IPTV platforms in Europe has increased steadily (from 66 in 2008 to 188 in 2014).<sup>210</sup> In 2013, consumers spent around €1.5 billion on TV and film on demand in Europe.<sup>211</sup> Spending on physical video media (DVD/Blue-ray Disc) amounted to € 5.9 billion, down 11.3% compared to 2012. Digital delivery over the internet is still generating fairly small revenues but is growing fast. Nevertheless, broadcasters remain, for the time being, the major distributor of AV content, with 10 800 TV channels available in Europe. Broadcasters' net revenues totalled over €71 billion in 2013.<sup>212</sup>

The **online games** market is one of the fastest growing markets in recent years and is expected to grow further. In Europe consumer spending on *video games* is estimated at more than €20 billion in 2015, out of a global market of €68 billion. The number of active social network game users rose in Europe from 17 million a month in 2008 to 376 million a month in 2013.<sup>213</sup>

The acceptance of **e-books** by EU consumers has increased over the years and this upward trend is likely to continue. However, revenues from digital titles remain low in comparison to the print books: only 7% of global digital revenues resulted from the sale of digital titles in Europe whereas Europe is still the biggest book market on a global level.<sup>214</sup> Figures differ amongst Member States: in 2013, it is estimated that the e-book market accounted for close to 4% of the book market in Germany whereas this figure reached almost 12% in the UK.<sup>215</sup> More and more e-books are available and book publishers increasingly offer digital content such as e-books and apps in addition to print books, thus entering in direct competition with online retail platforms. European citizens can choose among 2.5 million book titles available in digital format.<sup>216</sup> Some platforms still privilege distribution of content over proprietary networks (so called “walled gardens”) on the internet. Educational publishers<sup>217</sup> also increasingly offer resources (e.g. textbooks) in digital formats throughout the EU.

## **Sports**

The television remains the main medium through which consumers follow sports<sup>218</sup>. However, there is a trend towards mobile/online consumption, which is helped by cross-platform services offered by broadcasters as well as sports organisers' licensing practices.<sup>219</sup>

58% consumers in the EU accessed live events (such as sports, concerts, etc.) on line. Amongst those who reported accessing online live events (including sports), 77% did it via free streaming and 28% via paid streaming.<sup>220</sup>

The below graph shows the types of access to digital content by market, over the past year: live events include sports, concerts, etc.<sup>221</sup>

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<sup>208</sup> Audiovisual Observatory

<sup>209</sup> Data from European Audiovisual Observatory

<sup>210</sup> MAVISE/European Audiovisual Observatory, Yearbook 2011, <http://www.obs.coe.int>

<sup>211</sup> Data from European Audiovisual Observatory

<sup>212</sup> European Audiovisual Observatory

<sup>213</sup> <http://www.isfe.eu/> and IHS

<sup>214</sup> Idate report, Digiworld Yearbook 2015.

<sup>215</sup> Rudiger Wischenbart, The Global eBook Report, 2013

<sup>216</sup> <http://www.cmba-alliance.eu/facts-and-figures/>

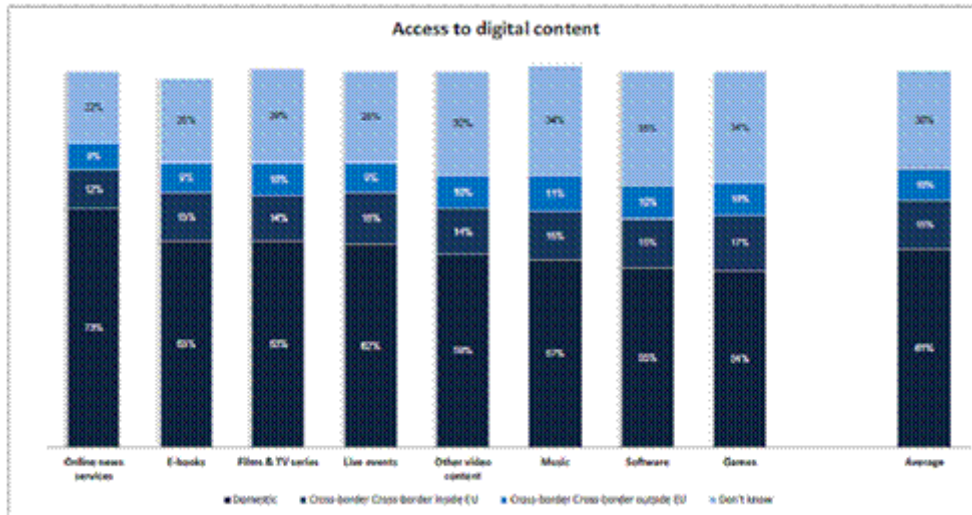
<sup>217</sup> Educational publishing represents between 15 and 20% of the publishing market at EU level.

<sup>218</sup> See Global Sports Media Consumption Report 2012, page 4 and Global Sports Media Consumption Report 2014, p. vi and 10-11. The 2014 report covers sixteen global markets, including France, Germany, Italy, Spain and GB.

<sup>219</sup> Traditionally, media content providers delivered their services via one particular platform, e.g. analogue TV, digital terrestrial TV (DTT), cable TV or satellite TV. However, these services are increasingly migrating towards distribution platforms that are hybrids of traditional broadcasting and internet (see Annex 4).

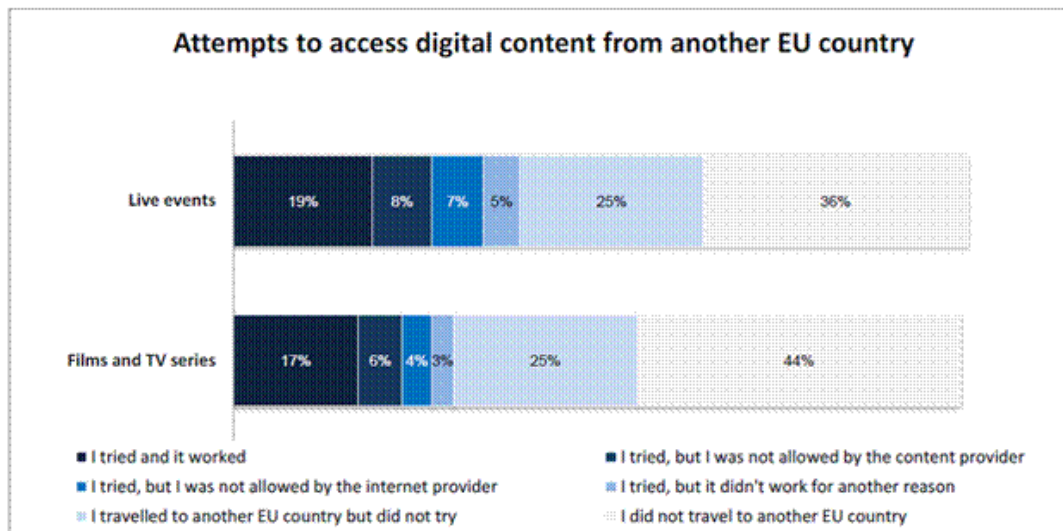
<sup>220</sup> 2015 DSM consumer survey: identifying the main cross-border obstacles to the Digital Single Market and where they matter most,

[http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm)



Online sports consumption is growing globally, including in the major European markets. Namely, in 2014, in France, Germany, Italy, Spain and Great Britain, consuming sports content online is the second most popular method after TV, attracting between 51-67% of consumers.<sup>222</sup> Of those who consumed sports online, between 44-60% watched live streaming of games or sport events.<sup>223</sup>

While consumers increasingly watch sporting events online, many of them cannot watch them online while travelling in Europe. The below graph shows consumers' attempts to access digital content (films, TV series or live events, including sports) from another EU country.<sup>224</sup>



The respondents who noted that they had streamed films and TV series or live events in the last 12 months were subsequently asked if they had tried to access such live events that one

<sup>221</sup> 2015 DSM consumer survey: identifying the main cross-border obstacles to the Digital Single Market and where they matter most,

[http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm)

<sup>222</sup> 53% in France, 51% in Germany, 67% in Italy, 67% in Spain and 61% in the UK. See Global Sports Media Consumption Report 2014.

<sup>223</sup> 44% in France, 51% in Germany, 47% in Italy, 60% in Spain and 51% in the UK. See *ibid.*

<sup>224</sup> 2015 DSM consumer survey: identifying the main cross-border obstacles to the Digital Single Market and where they matter most;

[http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm)

can normally view in their country of residence from abroad. Of the 38% of respondents who streamed live events (e.g. sports matches) in the last 12 months and tried to access streaming services of their own country while abroad, 51% reported not being able to access them. 39% reported that they were not allowed by the content provider, 35% that they were not allowed by the internet service provider and a further 26% that it did not work for 'another reason'.



## 14. ANNEX 6 – INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

### EU legal framework

Directive 2001/29/EC (the "InfoSoc Directive") was designed to update copyright rules to the (then nascent) digital networks and to implement the two 1996 WIPO<sup>225</sup> Internet Treaties - the WIPO Copyright Treaty (WCT)<sup>226</sup> and the WIPO Performances and Phonograms Treaty (WPPT).<sup>227</sup> It harmonises several exclusive rights and exceptions that are essential to the online dissemination of works and other protected subject-matter. The Directive has to be read in conjunction with all other Copyright Directives,<sup>228</sup> in particular, in terms of the definition of rights and of exceptions, it has to be read together with Directive 96/9/EC (the "Database Directive"), Directive 2009/24/EC (the "Software Directive"), Directive 2006/115/EC (the "Rental and Lending Directive") and Directive 2012/28/EU (the "Orphan Works Directive"). Remedies against infringements of intellectual property rights are foreseen in Directive 2004/48/EC on the enforcement of Intellectual Property rights ("IPRED").

As regards the broadcasting of TV and radio programmes, Directive 93/83/EEC (the "Satellite and Cable Directive") aims to facilitate the clearing of copyright and related rights for cross-border satellite broadcasting and cable retransmission services.

Many of the copyright directives reflect the obligations of MS under the Berne Convention, and the Rome Convention, and of the EU and its MS under the WTO TRIPS Agreement and the 1996 WIPO Internet Treaties.

All these Directives have as their objective and their legal bases<sup>229</sup> the establishment and functioning of an internal market, notably as regards the free movement of goods and services which consist of or contain works and other protected subject-matter.

The shift of content distribution from goods to services provided over digital networks and with a potential cross-border reach makes it increasingly important to interrelate the existing copyright rules with the rules applicable in the area of services in the internal market, notably Directive 2000/31/EC (the "E-commerce Directive"), which sets the rules applicable to the provision of online services in the internal market and also contains provisions which are relevant for the exercise and the enforcement of copyright, Directive 2006/123/EC (the "Services Directive") which sets the rules applicable to the provision of services in the internal market and Directive 2010/13/EU (the "Audiovisual Media Services Directive" or "AVMS Directive") which sets the rules applicable to the provision of AV services in the internal market.

As regards sports, the acquisition and transfer of broadcasting rights to sporting events are governed by national law, subject to the applicable EU rules, such as competition (Articles 101 and 102 TFEU). Article 14(1) of the AVMS Directive establishes a possibility for MS to ensure that certain sporting events of "major importance for society" would be shown on free TV. Furthermore, and in the light of the European Convention on Transfrontier Television (ECTT), Article 15 of the AVMS Directive introduces the right to short reporting of major events, which includes sports.

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<sup>225</sup> World Intellectual Property Organization, <http://www.wipo.int>

<sup>226</sup> <http://www.wipo.int/treaties/en/ip/wct/>

<sup>227</sup> <http://www.wipo.int/treaties/en/ip/wppt/>

<sup>228</sup> [http://ec.europa.eu/internal\\_market/copyright/acquis/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm)

<sup>229</sup> Article 114 TFEU as well as Articles 50, 53 and 62 TFEU.

Moreover, the above-described legal framework complies with the obligation of the EU to take cultural diversity aspects into account in its actions<sup>230</sup> and the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions, to which the EU is a Party, recognises the importance of intellectual property rights in sustaining those involved in cultural creativity.

Finally, in the last years, the CJEU has developed a substantive body of case law interpreting the provisions of the above mentioned rules as well as their relation to the free movement of services principle established in the Treaty.

#### International treaties

Berne Convention for the Protection of Literary and Artistic Works

WIPO Copyright Treaty (WCT)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

WIPO Performances and Phonograms Treaty (WPPT)

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

Beijing Treaty on Audiovisual Performances (not in force)

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (not in force)

UN Convention on the Rights of Persons with Disabilities (UNCRPD)

#### EU legislation

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, OJ L 167, 22.6.2001, p.10. ("InfoSoc Directive")

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28. ("Rental and Lending Directive")

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32. ("Resale Right Directive")

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15. ("Satellite and Cable Directive")

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, p. 16–22. ("Software Directive")

Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right, OJ L 157, 30.4.2004, p. 45–86. ("IPRED")

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<sup>230</sup> Article 167(4) TFEU

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28. (“Database Directive”)

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, p. 12–18. (“Term Directive”)

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1-5. (“amended Term Directive”)

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5-12. (“Orphan Works Directive”)

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 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, 20.3.2014. p. 72-98. (“CRM Directive”)

Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (to be replaced as of 10 January 2015 by Regulation 1215/2012)

Regulation (EC) N° 593/2008 on the law applicable to contractual obligations

Regulation (EC) N° 864/2007 on the law applicable to non-contractual obligations and

Regulation (EC) N° 1206/2001 on cooperation between Member States in the taking of evidence in civil or commercial matters

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16 (“E-commerce Directive”)

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68 (“Services Directive”)

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, OJ L 95, 15.4.2010, p. 1–24 (“Audiovisual Media Services Directive”)

**15. ANNEX 7 – EXAMPLES OF ACCESS OR USE RESTRICTIONS IN TERMS OF SERVICES BY ONLINE CONTENT PROVIDERS**

Name of the service/ web address	Main features	Access/use restrictions (according to the terms of use)
<b>Audiovisual and sports content providers</b>		
<b>iTunes</b> <a href="http://www.apple.com/itunes">www.apple.com/itunes</a>	<u>Type:</u> VOD – streaming, downloads <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid - transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data, credit card	Each iTunes store is available in the territory "covered" by the store. E.g. the Belgian iTunes store is only available in Belgium and cannot be used abroad – IP address check.
<b>Sky Now</b> <a href="http://www.nowtv.com">www.nowtv.com</a>	<u>Type:</u> Live simulcasting and VOD - streaming <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid - subscription <u>Requirements for registration:</u> subscriber's data, credit card	Available only to residents of UK accessing the service from the territory of UK – IP address check.
<b>MyTF1</b> <a href="http://www.mytf1vod.tf1.fr">www.mytf1vod.tf1.fr</a>	<u>Type:</u> VOD - streaming <u>Devices:</u> PC <u>Business model:</u> paid - transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data (credit card details upon first payment)	Available only to residents of France accessing the service using French IP address – IP address check.
<b>CanalPlay</b> <a href="http://www.canalplay.com">www.canalplay.com</a>	<u>Type:</u> VOD - streaming, downloads <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid - subscription (access to a general catalogue) and transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data, credit card	Available only to residents of France accessing the service from the territory of France – IP address check.
<b>Maxdome</b> <a href="http://www.maxdome.de">www.maxdome.de</a>	<u>Type:</u> Live simulcasting and VOD - streaming, downloads <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid - subscription (access to a general catalogue) and transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data, means of payment	Available only to users accessing the service from the territory of Germany – IP address check.

Name of the service/ web address	Main features	Access/use restrictions (according to the terms of use)
<b>RTL Now TV</b> <a href="http://www.nowtv.de/rtl">www.nowtv.de/rtl</a>	<u>Type:</u> Live simulcasting of TV channels and VOD (catch-up TV) – streaming <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid and unpaid depending on content <u>Requirements for registration:</u> subscriber's data	Service restricted in principle to users accessing it from the territory of Germany. Not all videos are available outside Germany – IP address check.
<b>Magine TV Germany</b> <a href="https://magine.com/de">https://magine.com/de</a>	<u>Type:</u> Live simulcasting of TV channels and VOD (catch-up TV) – streaming <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid and unpaid depending on content <u>Requirements for registration:</u> subscriber's data	Available only to users residing in and accessing the service from the territory of Germany – IP address check.
<b>Universciné</b> <a href="http://www.fr.universcine.be">www.fr.universcine.be</a>	<u>Type:</u> VOD - streaming, downloads <u>Devices:</u> PC, tablet, smartphone – 5 devices maximum <u>Business model:</u> paid – transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data	Available only to residents of Belgium accessing the service from the territory of Belgium – IP address check.
<b>Proximus TV Partout</b> <a href="http://www.proximus.be/en/id_cr_everywhere/personal/our-products/television/tv-experience/tv-partout.html">www.proximus.be/en/id_cr_everywhere/personal/our-products/television/tv-experience/tv-partout.html</a>	<u>Type:</u> Live simulcasting of TV channels and VOD (catch-up TV) - streaming <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> paid - subscription <u>Requirements for registration:</u> subscriber's data	Available only to subscribers of Proximus TV (IPTV service). Available only via the fixed and mobile networks of Proximus. Available only to users accessing the service from the territory of Belgium – IP address check.
<b>Filmin</b> <a href="http://www.filmin.es">www.filmin.es</a>	<u>Type:</u> VOD – streaming, downloads <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid - subscription (access to a general catalogue) and transactional (payment for a film to get access for 72 hours) <u>Requirements for registration:</u> subscriber's data (credit card details upon first payment)	Streaming service available only to users in the territory of Spain – IP address check.

Name of the service/ web address	Main features	Access/use restrictions (according to the terms of use)
<b>Filmotech</b> <a href="http://www.filmotech.com">www.filmotech.com</a>	<u>Type:</u> VOD – streaming <u>Devices:</u> PC, tablet, smartphone. Up to 5 different IP addresses allowed per user <u>Business model:</u> paid - subscription (access to a general catalogue) and transactional (payment for a film to get access for 48 hours) <u>Requirements for registration:</u> subscriber's data	No restrictions linked to territory are mentioned.
<b>Mediaset Infinity</b> <a href="http://www.infinitytv.it">www.infinitytv.it</a>	<u>Type:</u> VOD - streaming <u>Devices:</u> PC, tablet, smartphone, Smart TV – 5 devices maximum <u>Business model:</u> subscription (access to a general catalogue) and transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data, fiscal code, means of payment	Available only to users accessing the service from the territory of Italy – IP address check.
<b>ChiliTV</b> <a href="http://it.chili.tv/">http://it.chili.tv/</a>	<u>Type:</u> VOD - streaming, downloads <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> paid and unpaid (limited service), depending on content; paid - transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data, means of payment (for paid service)	Italian residence is a condition to set up an account – IP address check. The use of certain content can be limited to certain devices.
<b>Onet VoD</b> <a href="http://www.vod.pl">www.vod.pl</a>	<u>Type:</u> VOD - streaming <u>Devices:</u> PC <u>Business model:</u> paid and unpaid depending on the content <u>Requirements for registration:</u> subscriber's data, credit card	Available only to users in the territory of Poland – IP address check. Service may allow access to specific content also to users having other IP address than Polish.
<b>Voyo Bulgaria</b> <a href="http://www.voyo.bg">www.voyo.bg</a>	<u>Type:</u> VOD - streaming <u>Devices:</u> PC, tablet, smartphone, Smart TV <u>Business model:</u> subscription (access to a general catalogue) and transactional (payment for a film) <u>Requirements for registration:</u> subscriber's data (credit card details upon first payment)	Available only to users accessing the service from the territory of Bulgaria – IP address check.
<b>Nova Play</b> <a href="http://www.play.novatv.bg">www.play.novatv.bg</a>	<u>Type:</u> VOD (catch-up TV) - streaming <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> unpaid <u>Requirements for registration:</u> registration not compulsory but gives access to more functionalities	Not all videos are available outside Bulgaria – IP address check.

Name of the service/ web address	Main features	Access/use restrictions (according to the terms of use)
<b>Music providers</b>		
<b>Spotify</b> <a href="http://www.spotify.com">www.spotify.com</a>	<u>Type:</u> streaming, temporary downloads (for offline use) <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> unpaid (limited service) and paid (subscription) <u>Requirements for registration:</u> subscriber's data	Non-paying users can use the service abroad for 14 days; this time limit does not apply to subscribers.
<b>Apple Music</b> <a href="http://www.apple.com/music/">www.apple.com/music/</a>	<u>Type:</u> streaming, temporary downloads (for offline use) <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> unpaid (limited service) and paid (subscription) <u>Requirements for registration:</u> subscriber's data	The service is available in the territory "covered" (e.g. Belgium) and cannot be used abroad.
<b>7digital</b> <a href="https://es.7digital.com">https://es.7digital.com</a>	<u>Type:</u> downloads <u>Devices:</u> PC, tablet, smartphone – 5 devices maximum <u>Business model:</u> paid - transactional (payment for a track) <u>Requirements for registration:</u> subscriber's data	The content may be limited to a territory. For this type of content, the user shall provide his or her billing information related to that territory. The user accepts the terms and conditions related to territorial restrictions.
<b>Rdio</b> <a href="http://www.rdio.com">www.rdio.com</a>	<u>Type:</u> streaming, downloads <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> unpaid (limited service) and paid (subscription) <u>Requirements for registration:</u> subscriber's data	Songs available in any particular territory will depend upon the rights Rdio obtains with respect to that territory, and, accordingly, not all songs will be available in all territories.
<b>Napster</b> <a href="http://de.napster.com/">http://de.napster.com/</a>	<u>Type:</u> streaming, downloads (for offline use) <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> paid (subscription) <u>Requirements for registration:</u> subscriber's data and means of payment	The user has to declare that she/he is residing in one Member State of the EU, from which she/he registers to the service or uses the service.
<b>Tidal.com</b> <a href="http://tidal.com/">http://tidal.com/</a>	<u>Type:</u> streaming, temporary downloads (for offline use) <u>Devices:</u> PC, tablet, smartphone <u>Business model:</u> paid (subscription) <u>Requirements for registration:</u> subscriber's data	The service shall not be used in any manner that may violate the restrictions applicable to the utilization of the service, including failing to respect applicable geographic/territorial restrictions.



Name of the service/ web address	Main features	Access/use restrictions (according to the terms of use)
<b>Music me</b> <a href="http://www.musicme.com">www.musicme.com</a>	<u>Type</u> : streaming, downloads <u>Devices</u> : PC, tablet, smartphone <u>Business model</u> : unpaid and paid – subscription and transactional (payment for a track) <u>Requirements for registration</u> : subscriber's data and means of payment (for paid service)	The service is offered in France only. Means of payment required is a credit card issued on the French territory
<b>Starzik</b> <a href="http://www.starzik.com">www.starzik.com</a>	<u>Type</u> : downloads <u>Devices</u> : PC <u>Business model</u> : paid – subscription and transactional (payment for a track) <u>Requirements for registration</u> : subscriber's data and means of payment	The service is reserved to clients living on the French territory or in specific territories authorized by Starzik at the date of purchase AND having a credit card issued in France
<b>eMusic</b> <a href="http://www.emusic.com">www.emusic.com</a>	<u>Type</u> : downloads <u>Devices</u> : PC, tablet, smartphone <u>Business model</u> : paid – transactional (payment for a track) <u>Requirements for registration</u> : subscriber's data	eMusic derives its rights to use the media offered on the Service from artists and record labels, publishers and other third parties for fixed periods of time and, sometimes, for limited territories. As well, eMusic is sometimes required to pull certain media off the Service (or otherwise restrict access to such media) for legal or commercial reasons. Therefore, certain media offered or advertised by eMusic may not be available when you try to download, and not all media are available in all countries.
<b>Akazoo</b> <a href="http://www.akazoo.com">www.akazoo.com</a>	<u>Type</u> : streaming, downloads <u>Devices</u> : PC, tablet, smartphone <u>Business model</u> : paid (subscription) <u>Requirements for registration</u> : subscriber's data and means of payment	Content may be restricted by territory of Akazoo access, as determined by the IP address. The user agrees not to circumvent any territorial restrictions in place on the Services or use any methods altering or prevaricating the IP address when accessing the Services.

Name of the service/ web address	Main features	Access/use restrictions (according to the terms of use)
<b>Pakartot</b> <a href="http://www.pakartot.lt">www.pakartot.lt</a>	<u>Type</u> : streaming <u>Devices</u> : PC, tablet, smartphone <u>Business model</u> : unpaid, can be used without registration (registration gives access to certain features, e.g. making playlists) <u>Requirements for registration</u> : subscriber's data	None

## 16. ANNEX 8 – TECHNOLOGIES FOR DELIVERING ONLINE CONTENT SERVICES

### **Content Distribution/Delivery Networks (CDNs), Adaptive Bit Rate (ABR) and Peer-to-Peer (P2P)**

When content is delivered from a content provider to a content consumer, there are two important techniques used to increase the Quality of Experience of the consumer: Content Distribution/Delivery Networks (CDNs) and Adaptive Bit Rate (ABR) streaming. Both techniques are generally independent; in particular a CDN is not necessary to provide ABR streaming. However, CDNs can provide streaming services with ABR. Further, ABR streaming is a technique necessary/useful only for live streaming of video (not necessarily live video). ABR is briefly explained here for the sake of clarity. It does not have a cost impact in the context of geo-blocking, but can be used to provide a best-effort service to a user outside the usual target territory.

A third technique is Peer-to-Peer (P2P) but it is a niche technology for commercial content distribution. The fact that the devices on which the content is displayed are portable, such as a tablet or a smartphone, or fixed, such as a connected TV or a computer, does not have a big impact on these processes, in particular as fixed devices increasingly use the same local Wi-Fi connection (portable devices have lower requirements for quality and corresponding bit rate parameters).

#### Adaptive Bit Rate (ABR) streaming

If a video is streamed from a server to a content consumer, the bitrate of the video is an indicator for the Quality of Experience of the consumer: for the same video codec a higher bit rate generally means higher quality. But at the same time, the bitrate is also proportional to the bandwidth necessary to stream the video to the consumer. If now the bandwidth between server and consumer is not sufficient and the bitrate remains constant, the buffer at the consumer device will run empty and the video will stall which is known to cause high customer dissatisfaction. Therefore, ABR streaming adapts the used bitrate to the available bandwidth based on some feedback mechanism between content consumer and content provider server. If the feedback mechanism signals that the buffer fill at the consumer device decreases due to lack of bandwidth, the server then switches to a lower bitrate to alleviate the problem. This of course leads to a decreased image quality at the consumer device, but avoids stalling and usually consumers are more readily willing to accept slightly reduced image quality than stalling. The bitrate is usually fixed for a segment of the video of – depending on the implementation – a duration of two to ten seconds, but in principle each segment can be streamed at a different bitrate. Like that the streaming server can also adjust itself to different end devices since it makes a difference whether it streams to a laptop connected via a vDSL connection or a mobile device connected via the mobile network.

#### Content Delivery Networks (CDNs)

The purpose of CDNs is the fast and efficient delivery of content from content providers to content consumers. In principle, all content could be delivered directly from the origin server at a single location under the control of the content provider. However, in practice this reaches scalability limits and produces quality problems for widely consumed (both in terms of number of consumers and in terms of geographic spread of consumers) content. For instance, the capacity of the origin server needs to be very high, which is expensive; the bandwidth of the connection between the server and the Internet needs to be very high and sufficient capacity may not even be available; and finally, a lot of traffic is duplicated

unnecessarily on network links causing network congestion. The latter point can be illustrated as follows: let's assume a content provider with its origin server in Germany. If consumer A from Portugal accesses content from this provider, the content is sent from some point in Germany to some point in Portugal. If now consumer B from Portugal accesses the same content from this provider, the content is sent once again all the way from Germany to Portugal while it would have been much more efficient to replicate the content on a server in Portugal and serve consumers A and B directly from there. In this simple example the replication of content in Portugal reduces the traffic roughly by 50%.

And this is exactly what CDNs are doing: they replicate content at different (geographic) locations for more efficient delivery. Next to the points mentioned above, placing content as close as possible to the consumer also reduces delay and generally makes the quality of delivery more predictable.<sup>231</sup>

So a CDN is a collection of interconnected servers at different locations that replicate content and deliver it to consumers. It is important to place the servers well in different regions, but also for instance within a region inside different ISPs or at the peering point of different ISPs in order to avoid unnecessary peering traffic between ISPs. CDNs can be private, i.e., the content provider has its own CDN, or they can be bought as a service from a CDN service provider. Operating a private CDN only makes sense for very big content providers: CDN service providers often can offer the service cheaper due to economy of scales when providing the distribution service to many content providers at the same time. As an example, Akamai is amongst the best known and world's largest CDN providers and serves – according to estimates – between 15 to 30 percent of all web traffic.

### *Technology in a nutshell*

A content provider offers at its origin server content on some sports event under [www.provider.eu/sports/sports.html](http://www.provider.eu/sports/sports.html) including a video 'sportsvideo.mpg' which is replicated inside a CDN. If a consumer requests this content, the request for the information [www.provider.eu/sports/sports.html](http://www.provider.eu/sports/sports.html) first goes to the origin server, but the request for the video itself is then redirected by the origin server inside the above HTML-file to [www.cdn.com/www.provider.eu/sports/sportsvideo.mpg](http://www.cdn.com/www.provider.eu/sports/sportsvideo.mpg). Now the CDN provider receives the request, selects inside its CDN a suitable server which can serve the consumer best and delivers the video. The selection is actually done by the CDNs authoritative DNS server<sup>232</sup> based on a map of distances between its own servers and individual ISPs. So it returns the IP address of its server which is closest to the ISP of the consumer.

In short, the first request goes to the content provider and the content provider redirects to the CDN. In particular it could decide to not redirect to the CDN for specific customers. Hosting files in a CDN works for big files such as for software distribution, video on demand, but also for live video, the latter being the most demanding case.

Peer-to-peer (P2P) networks can also be used to distribute content. In this case, all consumers host parts of the file(s) – so called chunks - to be distributed and share it amongst themselves

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<sup>231</sup> Please note in that context that "close to the user" is not necessarily meant geographically only. The closest server to a consumer out of couple of possible servers also might be the one with the best connection to the consumer.

<sup>232</sup> The Domain Name System (DNS) server translates requests for domain names into actual IP addresses, in this case [www.cdn.com](http://www.cdn.com) into the IP address of the specific server inside the CDN which is supposed to serve the request.

according to some distributed algorithms underlying the P2P network. P2P networks became well known due to their use for file-sharing music pirate sites a while ago, but, e.g., the BBC also used it originally in the design of its iPlayer. The BBC gives lacking server performance and very high distribution costs as the reasons for this decision at that time and of course P2P networks are very cost efficient since the content provider does almost not have to invest in a server infrastructure. However, in 2009 the BBC abandoned the P2P technology since downloaded files contributed only 10% to their overall traffic, which mainly consisted in (live) video streaming, for which P2P networks are not very suitable. Consequently, today P2P networks are rather a niche technology for content distribution.

### *The future of CDNs*

Some telecommunication service providers have started to operate their own CDN. A clear advantage is that telcos can bring content even closer to the end user than traditional CDN service providers can. A clear advantage for the telco itself is that such a telco CDN enables them to better manage and control the traffic in their network. However, depending on the size of the telco, such a telco CDN has very limited reach, which lead to standardization efforts for CDN federation, i.e., interconnection of CDNs, and contrasts with the current proprietary nature of CDNs. In how far this will change the CDN world so that maybe also small content providers could more easily profit from CDN technology is yet to be seen.

*What could happen when geo-blocking is lifted? What would work differently and where could additional costs occur?*

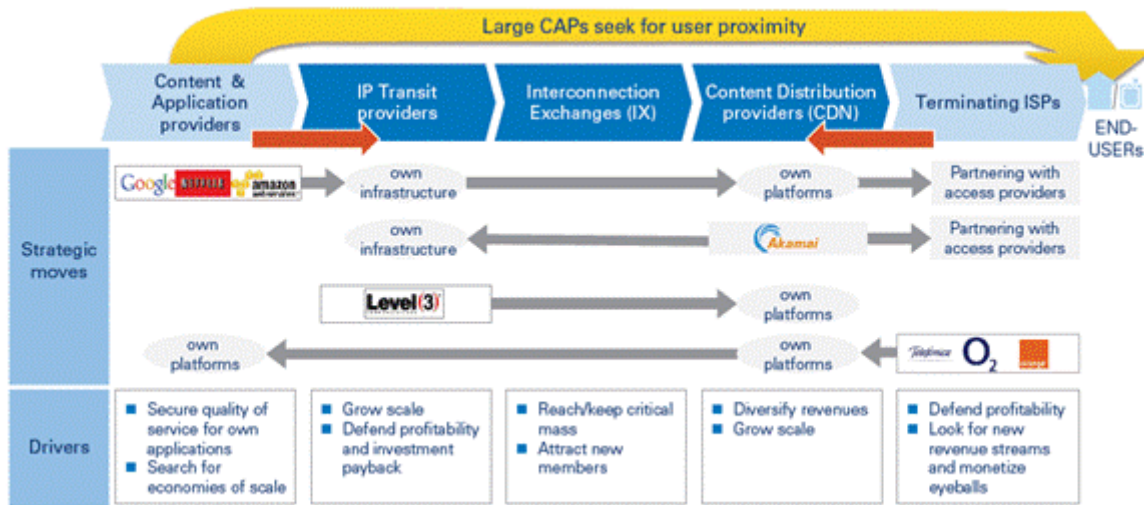
*Scenario:* A German content provider focused on the German market has a contract with a CDN provider for Germany. So far content consumers outside Germany were blocked. If now consumers access from, e.g., Portugal, the following options exist:

*Option a:* When the request arrives from the consumer in Portugal, the origin server localizes the consumer outside Germany and decides to serve the consumer directly, i.e., without redirection to the CDN. The advantage is that the CDN contract is not touched upon, however, the quality may decrease since the path of delivery is longer with less foreseeable behaviour, in any case the quality will not be predictable – ABR might help to alleviate the effects. Costs arise if the server performance has to be increased or the contract with the ISP for the Internet connection of the origin server has to be upgraded in terms of bandwidth or traffic volume between the content provider and the ISP. The ISP itself might encounter unforeseen peering traffic with other ISPs. However ISPs should not be able to block or slow down traffic of the content provider because of such possible increase in peering traffic. In any case, the effects should be manageable in terms of costs, unless there is a massive increase in consumers outside Germany, which then could probably be monetized.

*Option b:* When the request arrives from the consumer in Portugal, the origin server localizes the consumer outside Germany, but still redirects the request to the CDN. The CDN serves the consumer from its server which is best located towards this consumer, but since the contract with the content provider may be limited to Germany, this server is probably also not optimally placed and quality might be decreased due to similar reasons as above – ABR might again help to alleviate the effects. Additional costs may occur if the contract with the CDN provider is – for instance – volume based and the customers outside Germany have a noticeable impact on this contract.

*Option c:* The content provider wants to serve all over Europe to its customers with optimal quality and thus extends its CDN contract.

Figure C – Trends over the IP Interconnection value chain



Source: Arthur D. Little analysis

## 17. ANNEX 9 - GLOSSARY

**"Creative industries"**: they include services such as publishing activities (books, periodicals and software), motion pictures, video and television programme production, sound recording and music publishing activities, programming and broadcasting activities, computer programming, architectural and engineering services, advertising, design activities, photographic activities, translation and interpretation activities, creative, arts and entertainment activities.

**"Content industries"**: the creative industries and the sports industries.

**"Copyright and related rights"**: copyright is vested in authors whereas related rights are vested in performers, phonogram (i.e. record) and film producers as well as broadcasting organisations. Copyright and related rights include so-called "economic rights" which enable rightholders to control (license) the use of their works and other protected subject matter (i.e. performances, phonograms, audiovisual productions and broadcasts) and to be remunerated for their use. These rights normally take the form of exclusive rights and include (among others): the right to copy or otherwise reproduce any kind of work and other protected subject matter; the right to distribute copies to the public and the right to communicate to the public performances of such works and other protected subject matter. These rights are, to a large extent, harmonised at the EU level. They can be managed directly by the original rightholder (e.g. the author of a book) or by those to whom the rights have been transferred (e.g. a book publisher). They can also be managed collectively by a collecting society. Authors are also granted so called "moral rights" (these are normally not granted to rightholders protected by related rights though some legislations provide for moral rights for performers). Moral rights may include the right to decide on disclosure of the work; the right to claim authorship of the work and the right to object to any derogatory action in relation to the work. Moral rights are not harmonised at the EU level.

**"Work"**: creative output of authors protected by copyright. It includes: literary (books, lyrics, etc.), dramatic (plays, opera librettos, etc.), musical and artistic (photography, painting, etc.) works.

**"Other protected subject-matter"**: output of holders of related rights i.e. performers, phonogram and film producers and broadcasting organisations.

**"Commercial users" or "service providers"**: any person or entity involved in the provision of goods or services who for its activities needs a licence from rightholders of copyrights and/or related rights.

**"Collective management organisations (CMOs) "**: organisations traditionally set up by rightholders at national level and whose sole or main purpose is to manage copyright or related rights on their behalf.

**"Three-step test"**: Copyright exceptions may only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

**"Collective rights management"**: means the provision of the following services: the grant of licences to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to rightholders.

**"Repertoire"**: the sum of the rights of all rightholders that a collecting society directly represents.

**"Reproduction right"**: the right to authorise or prohibit direct or indirect, temporary or permanent reproductions of a work or other protected subject matter by any means and in any form, in whole or in part (Article 2 of the InfoSoc Directive).

**"Distribution right"**: the right to authorise or prohibit any form of distribution to the public of the original or copies of a work or other protected subject matter by sale or otherwise (Article 4 of the InfoSoc Directive and Article 9 of the Rental and Lending Directive).

**"Right of communication to the public"**: the right to authorise or prohibit any communication to the public of a work or other protected subject matter by wire or wireless means (includes acts such as broadcasting). Recognised as a broad exclusive right encompassing the making available right (see below) to authors (Article 3(1) of the InfoSoc Directive); of a more limited scope for other rightholders (Article 8 of the Rental and Lending Directive).

**"Right of making available"**: the right to authorise or prohibit the making available to the public of a work or other protected subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them (Article 3 of the InfoSoc Directive).

**"Rental and lending right"**: the right to authorise or prohibit the rental or lending of the original or copies of a work or other protected subject matter (Article 3 of the Rental and Lending Directive).

**"Music publisher"**: music publishers market musical works and provide authors with a number of other services. Publishers usually track various royalty payments, monitor uses and license certain uses on behalf of authors. They often pay the author an advance on royalties and promote the work, e.g. by creating "demo" recordings or finding performers and record producers which might be interested in the work. In return, publishers obtain a share of royalties from rights and/or a transfer of certain rights e.g. mechanical rights.

**"Record producer"** (also referred to as "phonogram producer"): record producers take the initiative and arrange the recording of music performances as well as the marketing and distribution of those recordings.

**"Sports organiser"**: an entity who is entitled to exploit economic rights into sporting events, including rights to organise or authorise recording of sporting events and to broadcast or authorise broadcasting of such recordings.

**"Premium sports content"**: content which is considered as a vital input for broadcasting services because they attract substantial audiences and thus generate substantial revenues for sports organisers. While certain sporting events are globally considered as "premium content" because they attract mass audiences (e.g. Olympic Games or certain football matches), there are also significant differences depending on national preferences (e.g. tennis, rugby or Formula 1 events are considered as premium content in some countries and generate significant audiences as well as substantial revenues for sports organisers, while in others they do not).