

FACILITATING THE CROSS-BORDER USE OF DIGITAL CONTENT

Position of the Federation of German Consumer Organisations, *Verbraucherzentrale Bundesverband* (vzbv), vis-à-vis the European Commission proposal of 09/12/2015 on a Regulation to ensure the cross-border portability of online content services within the single market (COM(2015) 627 final).

1. June 2016

Publisher

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Bundesverband e.V.*

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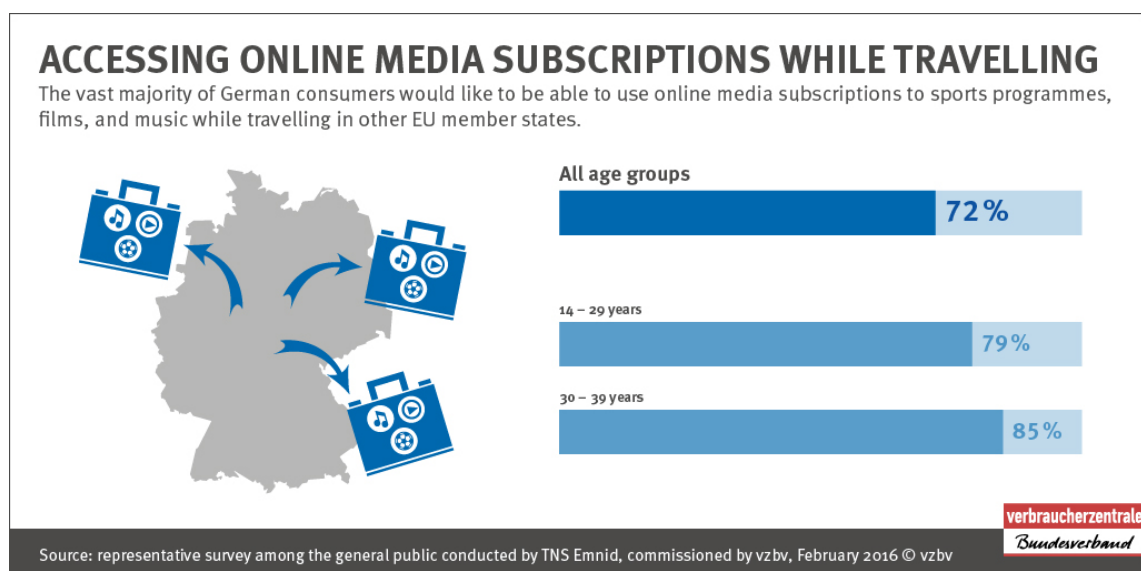
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I. INTRODUCTION

The aim of the proposal for a Regulation on ensuring the cross-border portability of online content services within the single market (published on 9th December 2015, *COM(2015) 627 final*; hereafter Portability Regulation) is to strengthen the rights of consumers. The Commission's proposal would allow users of online content services they have subscribed to and/or paid for in their home countries to access content from other EU countries on a temporary basis. The proposed Regulation does not, however, cover consumer access to online content offered abroad from within their country of residence.

vzbv welcomes the European Commission proposal. If implemented in its current form, this Regulation will provide tangible improvements for digital content providers' subscribers and reflect the wishes of a vast majority of German consumers, almost three quarters (72%) of whom, according to a recent study commissioned by vzbv and carried out by TNS Emnid, want to be able to use online media subscriptions to music, film, or sports programming from elsewhere in the EU.



Source http://www.vzbv.de/sites/default/files/infografik_abos_auf_reisen_nutzen.pdf

Furthermore, vzbv is pleased that the Commission has expressly not included a time limitation for the use of services in other EU member states: there is a variety of reasons for which consumers may find themselves outside their home country within the EU, including for work, holiday, or study-abroad programmes. As such, limiting portability to a specified number of days would in no way reflect the diversity of consumers' situations.

Another point on which vzbv shares the Commission's views is that this can only be a first step as, from the perspective of consumers, a common market ought to make it possible to access a range of content from all Member States across borders. Currently, this is by no means the case and a future European digital single market must enable this kind of access. It is important to stress this issue in order to make sure that rightholders do not misconstrue this proposal as a sort of deal which will, so to speak, "get them off the hook in this whole geoblocking business"; otherwise, there is a risk

that the fundamental challenge of improving cross-border access to as many types of content as possible will be neglected. It is important to bear in mind that this proposal is, in fact, about little more than achieving a state of affairs which should, by rights, already be the case: it ought to be beyond question that consumers have the right to make full use of online content services, for which they have already paid, in EU countries other than their own.

II. SUMMARY

1. Preventing time limits on using services

The European Commission proposal expressly does not state a time limitation on use of online services abroad; vzbv is of the view that this must remain the case as the proposal passes the various stages of negotiation on its way to becoming law.

2. Inclusion of “for free” data-for-product/service online content providers in the scope of the Regulation

The scope of the Regulation must be extended to cover online content services which offer access in return for consumers’ personal data and other types of data. The draft directive on digital content (*COM(2015) 634 final*) currently being discussed in parallel to this proposal considers such providers to be offering paid-for services, meaning that any narrowing of the scope of the proposed Regulation solely to services offering online content for payment in money would be neither coherent nor an accurate reflection of the reality of internet business models.

3. Assuring the proportionality of authentication methods

It must be ensured that no authentication methods are imposed which place disproportionate requirements on consumers or collect more personal data from consumers than is strictly necessary.

III. POSITIONS ON SPECIFIC ISSUES

1. PREVENTING TIME LIMITS ON USING SERVICES

The European Commission proposal expressly does not state a time limitation on use of online services abroad; the Commission is of the opinion that “temporary stay” in an EU country other than consumers’ Member State of residence is a perfectly sufficient choice of words. The European Parliament rapporteur from the Culture and Education Committee (CULT) is in favour of this phrasing¹, too, as is vzbv since the result of any form of time limitation imposed would be to hollow out the substance of the regulation – i.e. giving consumers the ability to take digital content they have acquired legally into other Member States. There is any number of reasons for which consumers may find themselves outside their home country within the EU, including for work, holiday, or study-abroad programmes. As such, limiting portability to a specified number of days

¹ See p. 4 Draft Opinion of the Committee on Culture and Education on the portability proposal <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARTL&reference=PE-578.729&format=PDF&language=EN&secondRef=01> (viewed on 12.05.2016)

would in no way reflect the diversity of consumers' situations and thus be detrimental to them. Moreover, time limitations come with the risk that companies may charge the same consumer twice over for services once their time quotient is up, effectively opening up a backdoor through which a kind of roaming fee for content services could be levied.

What is more, the risk of abuse will already have been minimised by the provisions of article 5.2 of the Portability Regulation in which the European Commission allows the use of "effective means" to check consumers' country of residence, rendering a time limitation on use of services unnecessary.

2. INCLUSION OF "FOR FREE" DATA-FOR-PRODUCT/SERVICE ONLINE CONTENT PROVIDERS IN THE SCOPE OF REGULATION

It should be the aim of legislation to go beyond simply responding to current developments and, to the greatest possible extent, to lastingly keep pace with future developments. Business models are changing fast, and nowhere more so than on the internet; the European Commission has been perspicacious in recognising this and has included services for which consumers pay with their data in the scope of the Regulation insofar as said services verify the Member State in which consumers are resident.

In view of this, there was no reason for the Dutch Council Presidency to offer a compromise which goes against the European Commission proposal and limit the mandatory scope of application to providers which charge for their services in money².

This suggestion would lessen the importance of data as a means of payment as against money; vzbv advocates treating monetary charges and payment in user data as equals, especially in view of how much more valuable data can be in comparison to the 99 cents paid for software in an app store. As such, the European Commission proposal would only serve to update the regulatory framework to reflect what has long been the case on the internet: many services would hardly be offered at all if data were not available as a currency of payment.

In addition, any narrowing of the scope of application would run counter to the conclusion reached by the European Commission in the proposal for a Directive on digital content (*COM(2015 634 final)*) that data represents contractual consideration. In order to preserve the coherency of European law, bills concerning the digital single market ought to be coordinated in terms of their content and the terminology; the use of consumers' data as a means of payment for the provision of a service should be treated identically to monetary payment. This is already the case in German law, as demonstrated by the explanatory memorandum pertaining to the implementation of the Consumer Rights Directive:

Specifically, it is not imminent in the term "paid-for service" that payment consists in transferring a sum of money; rather, "payment" must be interpreted far more broadly, i.e. any consideration offered by the consumer is sufficient. The subject (of this legislation) is therefore any contractual exchange in which both

² Cf. <http://www.politico.eu/wp-content/uploads/2016/04/st07891.en16.pdf> (viewed on 10/05/2016)

parties provide consideration; there need be no parity between the service provided and the payment offered, nor need the payment be described as such. In this way, the law can be applied to contracts in which consumers provide, in return for the provision of a service or the delivery of a product, personal data and agree to its being stored, used, or passed on.³

3. ASSURING THE PROPORTIONALITY OF AUTHENTICATION METHODS

Article 5.2 of the draft portability Regulation offers provisions for providers to be able to check whether users are accessing services from other EU Members States on a solely temporary basis, citing “effective means” provided that they are reasonable and appropriate.

The crux of the issue is that the ability to verify which Member State consumers are residents of must not lead to authentication methods being imposed which place disproportionate requirements on consumers. As such, vzbv is critical of the proposal for compromise made by the Dutch Council Presidency, listing as it does in article 3B.2 of the Council draft Portability Regulation a whole list of methods which content providers would be able to use to verify consumers’ place of residency. In due course, it ought to be made clear that consumers’ activities may not be recorded on a lasting basis and that no more than the necessary minimum amount of personal data may be collected (e.g. it would be disproportionate to request a copy of official identification and a bank statement and proof of residency from local authorities all at the same time).

What is more, authentication methods must be used in such a way that consumers are not prematurely prevented from accessing services or discriminated against based on their personal circumstances: e.g. a German consumer should be able to subscribe to a German online content service provider using his or her Belgian credit card. The existing right of German consumers to apply for credit cards from, say, a Belgian bank must not be undermined.

4. UPHOLDING THE PRINCIPLE OF TECHNOLOGY NEUTRALITY

The principle of technology neutrality should be expressly anchored in the regulation so that consumers are guaranteed a free choice of end devices and transmission methods when accessing online content services.

5. MAKING SERVICE QUALITY ABROAD TRANSPARENT PRIOR TO SUBSCRIPTION

According to article 3.3 of the Portability Regulation, providers of online content services will be obliged to inform customers about the quality of service they provide to consumers when they are abroad. What the proposed Regulation does not contain, however, are quality requirements of the services provided cross-border.

³ Taken from Bundestag document BT 17/13951, p.72 relating to legislation to implement the Consumer Rights Directive.

vzbv is of the view that there should be a legal obligation for providers to inform consumers even before they enter into a contract, in a clear and comprehensible manner, about the quality of the service in other EU countries.

6. ASSURING THE ENFORCEABILITY OF PORTABILITY REGULATIONS

vzbv also sees a lack of clarity with relation to how individual consumers will be able to enforce their rights in cases in which online content services do not provide portability. The draft Directive on digital content (*COM(2015) 634 final*) currently being debated in parallel to this proposal does offer rules which are suited to assuring enforceability. This is for instance the case in Article 6.2 of the draft, which includes issues such as access to digital content in its requirements for the contractual conformity of digital content; this provision would enable consumers to respond to a lack of portability (and, by extension, a lack of access) by enforcing a price reduction, compensation for damages, or termination of contract (Article 10 *et seqq.* of the proposal).

However, the draft Directive on digital content does not explain in any detail what is sufficient to constitute the contractual requirement of “access”. Furthermore, in Article 3.7 and recital 21 of the draft Directive, it is expressly stated that these provisions must not be applied to the Portability Regulation; the consequence of this would be that enforcement of portability would continue to rely on national legislation. In any case, there is still a need to define the nature of the contract in order to understand what consumers’ individual rights are or to carry out a detailed analysis of general terms and conditions: is it a sales contract, a rental contract, a service provision agreement, or a wholly new type *sui generis*? The effect is the perpetuation of the unacceptable practice of concluding what are referred to as licencing agreements without any legal framework, a practice which is to the clear detriment of consumers.

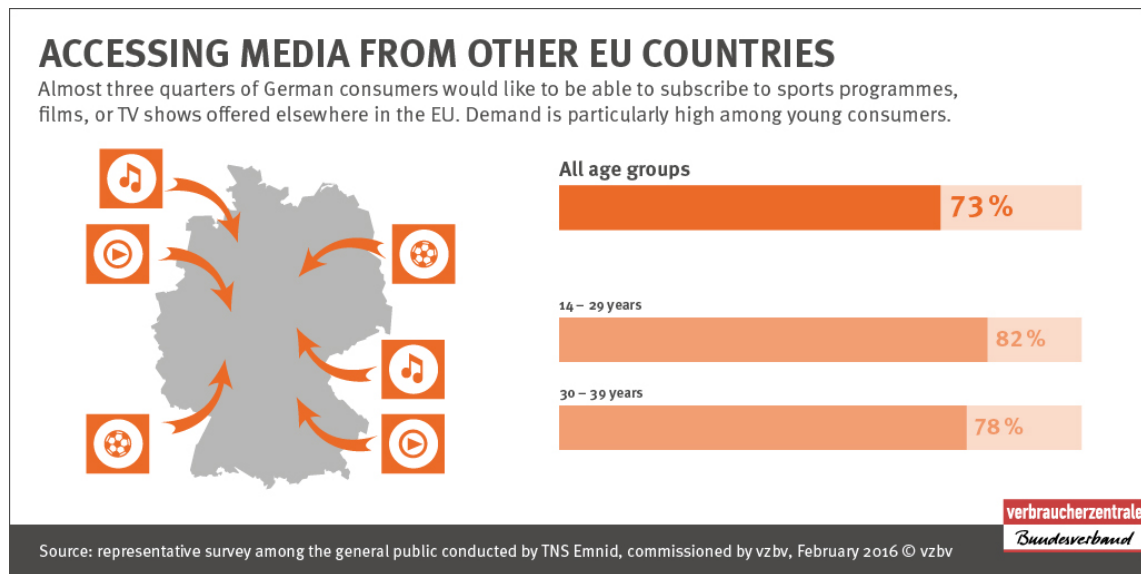
In order to make sure that these two pieces of legislation are coordinated with one another, vzbv proposes that the Directive on digital content refer in its definition of contractual conformity directly to the requirements of the Portability Regulation.

7. ENABLING ACCESS TO DIGITAL CONTENT FROM OTHER MEMBER STATES

“Assuring cross-border portability” may sound like a promising, consumer-friendly initiative, but it is important to bear in mind that this proposal is, in fact, about little more than achieving a state of affairs which should, by rights, already be the case: it ought be beyond question that consumers have the right to use online content services, for which they have already paid, in EU countries other than their own. Moreover, the proposal is limited to content services in which there is a contractual relationship between provider and consumer. Limitations remain on the ability to initiate this kind of contract across borders, e.g. to subscribe to content services from other Member States; open-access services, too, can still be blocked. For a genuine digital single market in which consumers are able to access content from across the European Union, continuing efforts to harmonise copyright law across member states will be necessary, specifically a revision of the Cable and Satellite Directive. While the European Commission has announced proposals for reform in 2016, it remains unclear how far its suggestions will go.

German consumers would be sure to welcome a proposal from the European Commission which promised action here. Almost three quarters (73%) of consumers would like

to be able to subscribe to sports programming, film, or TV series from other Member States.



Source <http://www.vzbv.de/sites/default/files/mehrthemenumfrage-geoblocking-vzbv-2016.pdf>