



21.6.2024

NOTICE TO MEMBERS

Subject: Petition No 1103/2023 by Sérgio Pereira (Portuguese) on the geoblocking of smartphone firmware within the single market

1. Summary of petition

The petitioner denounces the fact that he owns a Samsung smartphone bought in Poland and, being in Portugal, he is unable to access firmware updates because Samsung restricts access to phones from other countries within the EU economic zone. Due to this limitation, the petitioner cannot update to Android 14 and has only been able to update Google security patches. Despite seven firmware updates released after the current one, the petitioner is unable to update beyond April 1st. The Samsung website acknowledges the limited access to services for phones from Poland and the petitioner believes this is a breach of consumer's rights within the EU single market.

2. Admissibility

Declared admissible on 9 February 2024. Information requested from Commission under Rule 227(5), New Rule 233(5).

3. Commission reply, received on 21 June 2024

The Geo-blocking Regulation (Regulation (EU) 302/2018)¹ addresses the problem of geo-blocking and unjustified discrimination of customers for reasons related to their nationality, place of residence or place of establishment, in order to facilitate access to offers across the borders within the internal market. In particular, Article 4(1) of that Regulation prevents

¹ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018.

traders from applying different conditions of access for reasons related to a customer's nationality, place of residence or place of establishment. This non-discrimination obligation applies to both the sale of goods and the sale of electronically supplied services other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form. While Article 4(1) of the Geo-blocking Regulation does not prevent traders from offering in the Union general conditions of access, including net sale prices, which differ between Member States or within a Member State and which are offered to customers on a specific territory or to specific groups of customers on a non-discriminatory basis, it nevertheless implements the "shop-like-a-local" principle, according to which a foreign European customer should be entitled to buy a given product or service at the same conditions as those applicable to other domestic customers. In this regard, the Commission notes that the term "general conditions of access" includes "all terms, conditions and other information, including net sale prices, regulating the access of customers to goods or services offered for sale by a trader, which are set, applied and made available to the public at large by or on behalf of the trader and which apply in the absence of an individually negotiated agreement between the trader and the customer"². Depending on the specific circumstances of the case, the terms of purchase for a product may also entail the obligation to regularly provide the necessary updates to maintain the product functional, while other updates may only be optional, subject to the activation of other specific services or available on a stand-alone basis, without affecting the functionalities of the product sold and therefore not part of the general conditions of access for the product sold. If the provision of necessary updates are covered by the terms of purchases, while Recital 28 of the Geo-blocking Regulation clarifies that it does not prevent the application of territorial limitations on after-sales customer assistance or after-sales services offered by the trader to the customer, Article 4(1) of the Geo-blocking Regulation requires that in any case the after-sales assistance and support as applicable to the products sold in the country of purchase of the product shall remain applicable without discrimination (e.g. essential updates available for buyers of the products in accordance with the terms of sale in a given Member State shall be available even if the customers does not reside in the same country of sales). In conclusion, depending on the assessment of the specific facts of the case, being prevented from accessing essential on-line updates necessary for the functionality of the product made available in accordance with the general condition of access applicable to the sale in question only in view of the actual location of the smartphone may run against the "shop-like-a-local" principle laid down in Article 4(1)(a) of the Geo-blocking Regulation. On the other hand, where the firmware at stake consists in stand-alone electronically supplied service, the applicability of the "shop-like-a-local" principle laid down in Article 4(1) of the Geo-blocking Regulation will depend on the specific feature of the service at stake, e.g. whether for instance the desired firmware entails the provision of a service the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, or whether it only allows to get access to other kind of electronically supplied services, such as data storage, firewalls or distance maintenance of equipment³. In the latter case, indeed, the Geo-blocking Regulation always prevents the trader from discriminating the customer in view of its location, including by preventing access to any of such services (or any version of such

² Ibid, Article 2, point 14.

³ See some examples listed in Q. 2.1.16 of the Q&A document provided by the services of the Commission, available at <https://digital-strategy.ec.europa.eu/en/news/geo-blocking-regulation-questions-and-answers>.

service) in view of its location in the Union. Should the firmware at stake entail the provision of a service the main feature of which is the access to and use of copyright protected works or other protected subject matter, Article 4(1) of the Geo-blocking Regulation does not apply, but Article 20(2) of the Services Directive⁴ remains applicable⁵. Article 20(2) of the Services Directive requires Member States to ensure that “the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria”. Objective differences due to the different location of the customers may be taken into account in setting different conditions of access⁶. However, the absolute impossibility of getting access to items for which the trader holds the required copyright and related rights may have a discriminatory character while the absence of required intellectual property rights cannot be invoked to justify a refusal to supply customers in other Member States⁷. In such case, the refusal to supply customers in other Member States will have to be justified on other grounds⁸. This being said, it is for the relevant national authorities to perform a case-by-case assessment as to whether different treatment is applied to recipients and whether or not that treatment is justified by objective reasons. It should also be noted that under the Sales of Goods Directive⁹, a trader that acts as the seller is responsible for delivering goods to the consumer that meet the requirements for conformity set out in that Directive. In the case of goods with digital elements¹⁰, such as smartphones, Article 7(3) of the Sales of Goods Directive particularly requires the seller to ensure that the consumer is informed of and **supplied with updates**, including security updates, that are necessary to keep those goods in conformity, for the period of time:

- (a) that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or
- (b) indicated in Article 10(2) or (5) of the Sales of Goods Directive, as applicable, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time.

In case the good does not meet this requirement for conformity, the consumer will be entitled

⁴ 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.

⁵ Indeed, Article 20(2) of the Services Directive continues to apply to the extent that the Geo-blocking Regulation does not lay down more specific provisions. This is the case for situations not covered by the Geo-blocking Regulation, but still included in the material and geographical scope of the Services Directive and relevant for the purpose of Article 20(2) of that Directive.

⁶ Such as differences in market conditions, applicable national requirements, or limitations in distribution agreements in line with EU law.

⁷ See in this regard, the Handbook on the implementation of the Services Directive available at <https://op.europa.eu/en/publication-detail/-/publication/60e2d020-6c6f-11ed-9887-01aa75ed71a1>.

⁸ See SWD(2012) 146, page 18.

⁹ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.5.2019.

¹⁰ ‘Goods with digital elements’ means any tangible movable items that incorporate or are interconnected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions (Article 2(5)(b) of the Sales of Goods Directive).

to have the good brought into conformity through repair or replacement, or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in Article 13 of that Directive. The seller can only be exempted from this liability if, at the time of the conclusion of the sales contract, the consumer was specifically informed that a particular characteristic of the good was deviating from the requirement for conformity and the consumer expressly and separately accepted that deviation when concluding the sales contract (Article 7(5) of the Sales of Goods Directive). Moreover, if an update is deployed to mitigate risks responding to aspects covered by Union legislation (for example, health and safety risks), limiting the access of users in the EU to these updates could, depending on the circumstances, also be inconsistent with the relevant EU product legislation¹¹. On the basis of the information provided by the petitioner, the Commission understands that the matter is about consumers rights, as in the petition there is no indication of non-compliance of the equipment in question with the applicable requirements of the Union legislation. The enforcement of such Union legislation falls within the remit of Member States.

Conclusion

As illustrated above, specific rules laid down in Union law prevent against unjustified discrimination of customers of goods and services within the internal market. However, in order to ascertain and enforce these rules in a specific individual case, an assessment of the specific facts of the case is still needed, for instance to conclude which kind of updates are at stake, whether the provision of the firmware is provided for in accordance to the general condition of access for the purchase of the product or it is a stand-alone service and, in the latter case, the kind of service provided through the specific firmware at stake, whether specific general conditions of access applicable to sales in a given Member States limit the kind of firmware made available (without prejudice to the fact that these should nevertheless be available regardless of the location of the smartphone). The Commission is not empowered to assess such specific issues of fact and intervene in individual cases, as the enforcement of the Geo-blocking Regulation as well as of the Services Directive, is a competence of the Member States. In particular, Member States had to designate bodies enforcing the Geo-blocking Regulation, including by providing the necessary powers to investigate and pursue infringements committed against consumers, as well as providing practical assistance to consumers in case of a dispute with a trader arising from the application of that Regulation, including providing information on the applicable rules and on the available remedies in case of a dispute. The Commission has collected the information about the relevant enforcement and assistance bodies for the Geo-blocking Regulation¹², with a view to facilitate contacts in individual cases with the competent information and enforcement bodies. In terms of consumers enforcement and redress, it should be noted that the enforcement of the Geo-blocking Regulation by Member States, as well as of Article 20 of the Services Directive, are facilitated by their inclusion in the list of acts covered by the Consumer Protection Cooperation (CPC) Regulation¹³. Under the CPC Regulation, national enforcement authorities

¹¹ General Product Safety Directive (Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety) soon to be repealed by the General Product Safety Regulation (Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety) or the relevant Union product harmonisation legislation, notably the Radio Equipment Directive (Directive 2014/53/EU) applicable to radio equipment when it is placed on the EU market.

¹² Available at <https://digital-strategy.ec.europa.eu/en/policies/geoblocking>.

¹³ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws

of Member States form a network to investigate and take action against cross-border infringements of EU consumer protection legislation. The Commission either facilitates or coordinates such joint investigations and enforcement actions. Apart from the formal channels to exchange information between authorities related to specific enforcement cases, the CPC Network and the Commission also have a shared online platform to keep each other informed about relevant news and developments in the area of consumer law protection. To the extent that this petition becomes public information, the Commission will use the said online platform to inform the CPC Network about its content. In addition, the Geo-blocking Regulation, as well as Article 20 of the Services Directive, are also included in the list of acts covered by the Representative Actions Directive¹⁴. Accordingly, Member States are required to ensure that designated “qualified entities” (such as consumer organisations) can seek injunctive measures against traders before courts or administrative authorities in order to bring about the cessation, or, where appropriate, the prohibition of practices that infringe the Regulation and Article 20 of the Services Directive. Such qualified entities can also seek redress measures from the trader for consumers that are affected by the infringement.

and repealing Regulation (EC) No 2006/2004.

¹⁴ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020.