



19.6.2024

NOTICE TO MEMBERS

Subject: Petition No 1283/2023 by V. K. (German) on liberalising the smartphone market in the EU

1. Summary of petition

The petitioner calls for the smartphone market to allow more freedom, such as free choice of operating system and more rights to set options (administrator rights). According to the petitioner, manufacturers provide new smartphones with updates only for a short period of time, which means that smartphones become unusable after a short time, even though the hardware is still intact. Smartphone manufacturers should be required to allow the unbundling of the device from the operating system, so that users can choose, install and run their own operating system. Breaking the dependency between hardware and software would also contribute to sustainability, as software would no longer be the limiting factor for the lifetime of a smartphone. In addition, users would be able to customise their smartphones according to their preferences, e.g. in terms of privacy or data protection. Alternative operating systems would introduce new features, so opening up could also stimulate and encourage innovation in smartphone IT.

2. Admissibility

Declared admissible on 18 June 2024. Information requested from Commission under Rule 227(6).

3. Commission reply, received on 11 March 2024

The petitioner calls for the smartphone market in the Union to allow more freedom, such as free choice of operating system and more rights to set options (administrator rights). According to the petitioner, manufacturers provide new smartphones with updates only for a short period of time, which means that smartphones become unusable after a short time, even though the hardware is still intact. Smartphone manufacturers should be required to allow the unbundling

of the device from the operating system, so that users can choose, install and run their own operating system. Breaking the dependency between hardware and software would also contribute to sustainability, as software would no longer be the limiting factor for the lifetime of a smartphone. In addition, the petitioner calls for the possibility to download applications on websites, as an alternative to distribution through application stores. Moreover, according to petitioner, users should be able to customise their smartphones according to their preferences, e.g., in terms of privacy or data protection. Alternative operating systems would introduce new features, so opening up could also stimulate and encourage innovation in smartphone IT.

The Commission understands, based on the issues raised in the petition, that it aims both at fostering user choice and contribute to sustainability.

In that respect, it is useful to point out that, in principle the combined sale of a hardware equipment and an operating system does not in itself constitute an unfair commercial practice, unless such a practice is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product¹. If correct information is provided to consumers, a combined offer of different products or services can satisfy the requirements of fairness laid down in Directive 2005/29.²

Moreover, consumer protection law³ requires the sellers of goods with digital elements to ensure that the consumer is informed of and supplied with updates necessary to keep the goods with digital elements in conformity for the period of time that the consumer may reasonably expect given the type and purpose of those goods. The new Empowering Consumers for the Green Transition Directive 2024/825 will also ensure in the future better consumer information at the point of sale about the minimum period of software updates for goods with digital elements.⁴

The Digital Markets Act (DMA)⁵, adopted in 2022, aims at ensuring contestability and fairness for the markets in the digital sector, by introducing a series of obligations and prohibitions on undertakings that have been designated as gatekeepers in relation to the core platform services which they provide. In September 2023, the Commission designated six gatekeepers.⁶ In that respect, a number of provisions of the DMA are creating the conditions for more open mobile ecosystems, through various obligations, including: (i) the possibility for software application developers (“app developers”) to distribute their software applications (“apps”), and end users to download such apps, outside of the gatekeeper’s own software application store (“app store”); (ii) the obligation for the gatekeeper to allow effective interoperability with, in particular, the same hardware and software features that are accessed or controlled via their operating system, as are available to services or hardware provided by the gatekeeper; (iii) the

¹ Judgment of 7 September 2016 in Case C-310/15- *Deroo-Blanquart*, paragraph 53, available at <http://curia.europa.eu/juris/documents.jsf?num=C-310/15>

² Judgment of 23 April 2009 in cases C-261/07 and C-299/07 *VTB-VAB and Galatea*, paragraph 66.

³ 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, p. 28-50. It applies to sales contracts concluded as from 1 January 2022.

⁴ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information. Available at <https://eur-lex.europa.eu/eli/dir/2024/825/oj>

⁵ [Ref.: full title and OJ]

⁶ https://digital-markets-act.ec.europa.eu/gatekeepers_en.

requirement for the gatekeeper to allow end users to easily un-install apps and to easily change defaults settings on the operating systems, virtual assistant and web browser of the gatekeeper that direct or steer end users to products or services provided by the gatekeeper. The gatekeepers were required to effectively comply with these obligations as of 7 March 2024. The Commission is actively assessing the compliance of the solutions implemented by the gatekeepers and has in some cases already opened non-compliance proceedings and investigations⁷.

The DMA already contains an obligation for gatekeepers designated in relation to their operating system (which are currently: Alphabet for Android OS⁸, Apple for iOS⁹, and Microsoft for Windows PC OS¹⁰) to enable the alternative distribution of apps (i.e., via alternative app marketplaces or via web-distribution), as this seems to be proposed in the petition. However, the DMA contains no obligation on gatekeepers to enable the installation of an alternative operating system on the mobile device.

Furthermore, whether the bundling or tying of mobile devices with specific operating systems constitute an infringement of EU competition rules would depend on a case-by-case assessment of a range of factual, legal, and economic elements throughout a full-fledge antitrust investigation. In this regard, it is not possible to determine in the abstract an infringement of EU competition law by smartphone manufacturers implementing such widespread practice.

With respect to the sustainability, the Commission has been exploring the issues relating to ICT equipment for some time. A detailed report¹¹ on this work was published last year. Among other things, this report explores the issue of functional obsolescence including in relation to operating systems and makes a number of policy recommendations. These cover issues including the availability of software security, corrective / functionality updates and software update impact on device performance.

In this regard, it may be of interest to you to know that a new regulation laying down ecodesign requirements for smartphones, mobile phones other than smartphones, cordless phones and slate tablets¹² was adopted in June 2023. This regulation sets requirements that will apply to mobile phones and tablets put on the EU market from 20 June 2025 onwards, including the obligation to make operating system updates available, at no cost, for at least 5 years from the date of the end of placement on the market of the last unit of a product model.

The Commission's portal on "Ecodesign and Labelling" provides updated information of the different regulations part of the legislative framework¹³. The press note on the mentioned Regulations on smartphones can be found here as well¹⁴.

⁷ https://digital-markets-act.ec.europa.eu/commission-opens-non-compliance-investigations-against-alphabet-apple-and-meta-under-digital-markets-2024-03-25_en.

⁸ https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100002_145.pdf.

⁹ https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100013_215.pdf.

¹⁰ https://ec.europa.eu/competition/digital_markets_act/cases/202344/DMA_100017_183.pdf.

¹¹ Alfieri, F. and Spiliotopoulos, C., ICT Task Force study: Final Report, Publications Office of the European Union,

Luxembourg, 2023, doi:10.2760/486253, JRC133092

¹² Commission Regulation (EU) 2023/1670 of 16 June 2023 laying down ecodesign requirements for smartphones, mobile phones other than smartphones, cordless phones and slate tablets pursuant to Directive 2009/125/EC of the European Parliament and of the Council and amending Commission Regulation (EU) 2023/826, OJL 214, 31.8.2023, p. 47-93

¹³ <https://energy-efficient-products.ec.europa.eu/>

¹⁴ https://energy-efficient-products.ec.europa.eu/news/circular-economy-new-rules-make-phones-and-tablets-more-durable-energy-efficient-and-easier-repair-2023-06-16_en

Conclusion

On the basis of the above, the Commission can indicate that the DMA already contains measures aiming at ensuring contestability and fairness for the markets in the digital sector, including an obligation for gatekeepers designated in relation to their operating system to enable the alternative distribution of apps. Without prejudice to the application of EU competition law, mobile device manufacturers are not currently subject to an obligation to allow the installation of alternative operating systems. Moreover, from 20 June 2025, economic operators placing smartphones on the market will have to ensure that users keep receiving operating system upgrades for a minimum period of time and at no cost, including for a period of five years after the manufacturer stops selling the relevant product model.