Copy of the document received from the European Commission

Sent: 01 October 2012
Subject: Your complaint 2012/1170

Dear Mr Secară,

Following on the reply you received on 10 April 2012 from the Cabinet of Ms Androulla Vassiliou, Commissioner for Education, Culture, Multilingualism and Youth, I am happy to address your concerns in more detail.

You first of all note that messages sent via the Short Message Service of GSM based cell phones can either be encoded in the default GSM 7-bit alphabet, the 8-bit data alphabet (user defined) or the 16-bit UCS-2 alphabet. The 7-bit alphabet is the standard encoding used for GSM messages; but while in its SMS coding pack it is possible to send up to 160 characters in one SMS message, it only allows for the transmission of texts containing basic characters, essentially in the Latin alphabet, Greek alphabet but only upper-case, several special characters of some western European languages, with the exclusion of others, in particular Eastern languages. On the other hand, while the 16-bit UCS-2 alphabet supports substantially more characters and languages, including Eastern ones, it can only do so at the cost of taking up greater space: it is in fact possible to send only up to 70 characters in one SMS message using this encoding.

You mainly contend that such differences place at a disadvantage users of less supported languages and discriminate between languages, thus failing to protect the linguistic identity of several Member States and actually proving detrimental to the cultural and linguistic diversity within the European Union. In addition to such cultural aspects, you note that the differences in question have also economic consequences, given that a text of more than 70 characters in the 16-bit encoding will require more than a single SMS message to be sent , therefore incurring in higher costs.

You therefore argue that, pursuant to the provisions of article 3(3) of the Treaty on the European Union (TEU) stating that the Union must act to safeguard and enhance Europe's cultural heritage, the Union should do more for the protection of linguistic diversity and linguistic identity. You point out in this respect that the Union has already regulated the use of certain hazardous substances in electrical and electronic equipment, and you suggest that it could therefore expand such regulations to include cultural aspects, in particular as concerns the equal treatment of all languages.

In response to this, I would point out that while it is true that article 3(3) of the Treaty on the European Union states that the Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced, these provisions must however be read in conjunction to those of article 6 TFEU, which state that in the areas of culture and education, the Union only has competence to carry out actions to support, coordinate or supplement the actions of the Member States. Furthermore, article 167 TFEU states that the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time brining the common cultural heritage to the fore. In this respect, harmonizing measures are excluded and action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action. It follows that the scope for Union's action in the area of culture is thus limited and does not include the power to legislate. This remains a national competence in cultural matters, including language policy.

It is important to note in this respect that, as the Court of Justice of the European Union has consistently held, the references in the Treaties to the use of languages cannot be regarded as establishing a general principle of EU law that confers a right on every citizen to have access in his language in all circumstances to anything that might affect his or her interests (Case C-361/01 P Kik v OHIM [2003] ECR I-8283, paragraph 82, and Case T-185/05 Italy v Commission [2008] ECR II-3207, paragraph 116). There is no provision in EU law that would set out a general principle of equality between languages within the European Union in those terms.

It is true that the technical limitations in dispute might have unfavourable consequences for those users wishing to make use of the special characters unique to their languages, but in the present case I would argue that there is no legal basis for the European Commission to start infringement proceedings or present a legislative initiative.

I would underline in this respect that the Commission can only initiate infringement proceedings under article 258 of the Treaty on the Functioning of the European Union (TFEU) against a Member State and not a private entity, and only if it deems that the Member State in question has failed to fulfil an obligation under the Treaties. Even if it is assumed that a Member State could be pursued in matters such as the one you raised for a failure to act concerning the difference of treatment in dispute, I would recall that, as it was stated above, there is no obligation under the Treaties for Member States to ensure equality between languages.

As concerns a possible legislative initiative, it is indeed true that the European Union has regulated the use of certain hazardous substances in electrical and electronic equipment (Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003), as well as other related areas concerning product safety (for example Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety). However, it is important to recall in this respect that, pursuant to article 5 TEU, under the principle of conferral, the Union acts only within the limits of the competences conferred upon it by Member States in the Treaties. Coming back to the directives mentioned above, you may notice that they are based on the provisions of the former article 95 TEC, now 114 TFEU. This article deals with the possibility of approximating laws, within the framework set out by article 26 TFEU, which states that the Union adopts measures with the aim of establishing or ensuring the functioning of the internal market. As the Court of Justice of the European Union has consistently held, harmonizing measures should aim to prevent the heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of goods within the European Union and thus directly affect the establishment and functioning of the internal market (see Case C-350/92 Spain v Council [1995] ECR I-1985, paragraph 35). However, such a measure must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market (Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419, paragraph 84).

It is therefore clear that the Union's competence in such matters is limited to approximating the laws of Member States and only with the aim of preventing a heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of goods within the European Union. In the present case there would be no basis for proposing any approximation of laws, as it is not evident that Member States regulate such aspects in connection with the use of mobile devices, particularly since only a limited number of Member States are concerned by these limitations.

I would however note in this respect that Member States do have the competence to regulate such cultural aspects in connection with the sale and use of mobile devices on their territories. Such regulations must nevertheless be compatible with the provisions of the Treaties on the free movement of goods, as Member States cannot forbid the sale on their territories of products which

are lawfully marketed in another Member State, even if they were manufactured according to technical and quality rules different from those that must be met by domestic products (this is in fact the application of the principle of mutual recognition, as defined by the Court originally in its landmark Cassis de Dijon judgement - Case 120/78 Rewe-Zentral [1979] ECR 649). There are a few exceptions to this principle, mainly justified on the grounds of the protection of public morality or public security, protection of the health and life of humans, animals or plans or on the basis of mandatory requirements of general public importance recognised by the case-law of the Court of Justice. It is important to mention in this respect that the Court has accepted that the protection of culture may, under certain specific conditions, constitute such a mandatory requirement (see Joined Cases 60/84 and 61/84 Cinéthèque [1985] ECR 2605.

I hope these further clarifications will be helpful in understanding the Commission's position in this matter and provide you with an adequate response to your queries.

Yours sincerely,

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