

On the seller's obligation, or not, to make spare parts available for a certain period of time in line with Italian legislation and that of the major European countries

Maurizio Iorio, Lawyer © June 2012

I am often asked by my clients and by my associates if there is an obligation for the seller to make spare parts available for the products sold and, if so, for how long.

Accordingly, in this article I would like to briefly examine the current governing legislation and provide an accurate answer to the readers.

THERE IS NOT A SPECIFIC LAW TERM

As regards to Italy - although, as we shall see, the following reasoning applies to most European countries - I must immediately say that there is not a specific governing law requiring the seller to make available for a certain time period the spare parts for the products sold.

However, there are several situations for which regulations are such to make it advisable for the seller to keep a supply of spare parts for a certain period of time.

Let us briefly examine these cases:

SALE: LEGAL GUARANTEE AND SPARE PARTS

In the case of business-to-business ¹ sale (the relationship between these two subjects shall hereinafter also be referred to as "B2B"), two guarantees are foreseen: a legal one (Art. 1490 et seq. of the Italian Civil Code) and a conventional one (almost entirely governed by the sole agreements between the parties).

- In the case of legal guarantee "... *the buyer may, at its option, demand to cancel the contract or a price reduction ...*" (Art. 1492 of the Civil Code).

- In the case of conventional guarantee, the provisions regulating the content of the guarantee are those agreed between the parties, and sometimes they, expressly, specify the availability of spare parts for a certain period of time, often of five or even 10 years. From this originates the current widespread "belief" according to which spare parts - which in effect are a product like any other - should necessarily be made available for at least 5 or even 10 years.

In conclusion: in the case of B2B transaction, the obligation to keep spare parts for a certain period of time shall only subsist if the seller has expressly and contractually agreed to it.

¹ Pursuant to the Italian Consumer Code, the term "professional business" means ... *any natural or legal person who is acting in the exercise of his trade, business or profession, or his intermediary*".

In the case of sale to a “non-business” consumer (hereinafter referred to as “B2C”), what is provided in articles from 128 to 135 of the Italian Consumer Code shall apply. Said articles foresee that if a product is not in “conformity with the sale contract”, the consumer can rely on a 2-year guarantee articulated in four alternative remedies (repair, replacement of the product, cancelling the contract with consequent reimbursement of what paid, price reduction).

The choice between one remedy and another is not an option exercisable by the consumer, since the law - in order to achieve a balance between the consumer’s interests and those of the seller - states that it should be made according to a system of two pairs of remedies, in which the first pair (repair or replacement) excludes the second (cancelling the contract or price reduction), and one remedy excludes the other in each of the pairs, as follows:

- First pair of remedies: Repair - Replacement

First of all, the consumer has the option to choose between having the product replaced or repaired, with the proviso that replacement can only be requested in some well-defined circumstances, i.e. when the repair is “disproportionate” or “impossible” to carry out.

- Second pair of remedies: Cancelling the contract - Price reduction

The consumer can request the implementation of this second pair of remedies only if:

- (1) those of the first pair prove to be materially impossible or,
- (2) the seller did not repair ² or replace the product or, in the process of complying with one of these remedies, the same has caused considerable inconvenience to the consumer ³.

In this case, the choice between cancelling the contract or accepting a price reduction is entirely and exclusively up to the consumer (except in the case of a “minor” defect, which in any case it does not entitle to cancel the contract but only to a price reduction).

In concluding, in the case of B2C transaction, the seller offering to repair the product as the only remedy (as for him it is usually cheaper than replacing it), and in effect “barring” the three other remedies, must purposely keep a supply of spare parts for at least two years after delivery of the product sold.

CONTRACT: REPAIR AND SPARE PARTS

The supply of a product can also occur within or as part of a tender contract, as, for instance, the case of an installer commissioned to turnkey supply and install a single air-conditioning unit or a full air-conditioning system in a flat. If the client is a consumer, the previously considered case of “B2C” transaction shall apply.

² Because, as an example, the product just repaired shows the same or another defect.

³ As the seller, for example, has taken too long to repair the product in relation to the consumer’s reasonable expectation.

If the installation work has been commissioned by a business, the contractual guarantee terms - (which in the goods market are always of 2 years) consisting of three remedies alternative to each other: repair, price reduction and cancelling the contract - shall apply.

In summing up, if the product is supplied as part of a tender contract with a business, the supplier who wants to avoid a price reduction or, worse still, the cancellation of the contract, must keep a supply of spare parts for at least 2 years from the receipt of the delivered product.

PROHIBITION OF DECEPTIVE PRACTICES FOR THE CONSUMER - SPARE PARTS

With the Legislative Decree No. 146 of 2 August 2007 (later transposed into the Italian Consumer Code, Articles 20 and following), Italy has implemented the EC Directive 2005/29 which bans all “unfair” commercial practices, or any practice that is *“contrary to professional diligence ... false or likely to substantially distort the economic behaviour, as regards to the product, of the average consumer ... ”*. Unfair practices are subdivided into two broad categories: (1) misleading commercial practices (*“is considered misleading a commercial practice if it contains information that are in any way ... likely to mislead the consumer”*) and (2) aggressive commercial practices (*“is considered aggressive a commercial practice that ... through harassment, coercion, ... including undue influence ... significantly impair the average consumer’s freedom of choice or conduct ... and causes or is likely to cause him to take a transactional decision that he would have not otherwise taken”*).

In particular, falls into the category of misleading, and thus prohibited commercial practices, any *“... practice that contains false information and is therefore untruthful, or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and, in any case, causes or is likely to cause him to take a transactional decision that he would have not otherwise taken: (...)* b) *the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling ... (...)* e) *the need for a service, spare part, replacement or repair”*.

The task of repressing unfair commercial practices is assigned to the Antitrust Authority (the competition and fair trading watchdog) which has at its disposal a rather broad range of powers: it can force the seller to supply detailed information on the after-sale technical assistance provided, arrange, at the seller’s expense, the publication in the press of its corresponding decision, or it can simply take note of the seller’s “willing” undertaking to supply from now on accurate information and make this undertaking binding; it can impose administrative sanctions and, in cases of reiterated non-compliance, order the suspension of the business activity up to 30 days.

In summing up, I consider that when dealing with a non-business consumer, the seller - at least prudentially and in order to avoid having to deal with complaints - should: (1) keep an adequate supply of spare parts in line with the product’s life cycle (deemed as an obligation, or as such

reasonably believed by the average consumer) or, alternatively, (2) warn the consumer from the onset that spare parts shall not be available beyond a certain period after delivery of the product.

CONCLUSIONS ON THE OBLIGATION OR NOT TO MAKE SPARE PARTS AVAILABLE FOR A CERTAIN PERIOD OF TIME

Let us take stock of what's said so far:

In the absence of contractually agreed terms with the buyer, there is not a specific law or regulation which obliges the supplier to make a certain amount of spare parts available for a certain period of time.

In the case of goods being supplied to a non-business consumer (through sale, contract or other agreement), it is however possible to deduce the convenience and the opportunity for the provider of goods to keep a supply of spare parts for at least two years: this in accordance with the legislations on legal guarantee and with those relating to unfair commercial practices, both contained in the Italian Consumer Code.

In the case of supply to a business customer as part of a tender contract (not involving a government entity), it is possible to deduce the convenience for the contractor to keep a supply of spare parts for a period of at least two years in order to meet, in case of guarantee, the legal obligation to carry out repairs and thus prevent the contract from being cancelled. The customer and the contractor can obviously contractually agree on a longer or shorter period, or, hypothetically, exclude any obligation for the contractor to provide or keep a supply of spare parts.

THE SITUATION IN THE OTHER EUROPEAN COUNTRIES

What so far said applies, in addition to Italy, to almost all other European countries (except Spain), including France, Belgium, Switzerland, Greece, Germany, Austria, United Kingdom, Ireland, Poland, Hungary, Romania, Turkey, Portugal, Denmark, Holland, with the following, few, specifications:

As for France:

In this country, in the case of supply of goods to a consumer there is an obligation, even if not ratified, to communicate the availability of spare parts. In fact, art. 111-2 of the "Code de la consommation" foresees that in the case of sale of goods, the seller must notify the buyer of the time period in which spare parts shall be made available; however, no sanctions are foreseen in case of failure to communicate this information. In such cases, are applied the standard regulations laid down by French law regarding the legal guarantee (Art. L211-L212 of the "Code"), which are similar to the above-exemplified ones in force in the Italian Consumer Code since the buyer can request the product to be repaired or replaced, or, ensuingly, the cancellation of the contract or a

price discount, in line with the same measures applied in Italy. Consequently, it may be convenient for the seller to keep a supply of spare parts to enable him to repair the product sold.

As for Germany:

The situation is similar to the Italian one. In particular:

- There is no legislation requiring to make spare parts available for a given time period.
- The practical necessity of making them available only subsists in order to meet the legal guarantee obligations towards the consumer in wanting to avoid having to replace the product. - It is customarily accepted that spare parts should be made available throughout the product's normal life cycle, which only exceptionally is below 5 years⁴.

As for the United Kingdom:

The situation is similar to the Italian one, as the practical necessity of making spare parts available solely exists in order to comply with the legal (or conventional) guarantee obligations towards the consumer in wanting to avoid having to replace the product. It must however be pointed out that in the case of sales to consumers, the legal guarantee lasts for 6 years (5 in Scotland) from the date of delivery of the product⁵.

As for Holland:

The situation is similar to the Italian one, even though it is worth mentioning that there is a judicial interpretation whereby, if a supplied product is intended to have reasonable durability, spare parts must be supplied in a manner permitting such durability, save for such circumstances where this undertaking is objectively not economically viable. There are factors that can release the producer/seller from the ensuing responsibility for no longer supplying spare parts, such as, for example: having informed from the very beginning, and no later than the time of delivery, that spare parts shall only be made available for a certain period of time; having communicated via an information bulletin, giving in this regard suitable advance notice, that spare parts shall no longer be available after a given date.

THE SITUATION IN SPAIN

It is worthwhile to briefly illustrate the discipline of Spain, which is rather unique and complex:

General provision (supply of durable goods to consumers):

the ~~Spanish Law 1/2007~~ states that the manufacturer or, in his absence, the importer, shall in any case guarantee to buyers the availability of adequate technical service for the durable goods he

⁴ Sources: VDKF: Associations of air-conditioning and refrigeration equipment installers; Augsburg Chamber of Commerce, IHK-Rechtsinformation nr.25: Die Verpflichtung zur Ersatzteillieferung (The obligation to supply spare parts)

⁵ Further details are available at this website: <http://www.berr.gov.uk/whatwedo/consumers/factsheets/page38311.html>

manufactures or imports, as well as the supply of spare parts for a minimum period of five years from the date the manufacturing of the product has ceased.

Special provision (supply of domestic appliances to consumers) :

The Royal Legislative Decree 58/1988 of 29 January 1988 on the protection of consumers rights in the supply of domestic appliances ⁶, sets out that the supply of spare parts must be guaranteed for the following periods of time, all as from the date the production has ceased:

- for the functional spare parts costing over € 60.10: 7 years;
- for the functional spare parts costing below € 60.10: 5 years;
- for the “aesthetic” parts (TV cabinet, for example): 2 years.

THE SITUATION IN TURKEY

Due to its uniqueness and to the commercial ties binding us, it is worth giving a brief description of Turkey’s legislation, even though this country does not belong to the European Union. In the case of Turkey, the current legislation ⁷ foresees the obligation to supply spare parts for a period of 10 years after delivery of the product. This term applies to air conditioners/climate control units and to the majority of consumer electronics products.

There are shorter periods (which according to the case are respectively of 5 or 3 years) for some categories of electrical and electronic products.

Pursuant to the same legislation, in order to sell air-conditioning equipment it is necessary to have at least 20 service points distributed throughout seven geographic regions (including at least one per region).

Maurizio Iorio , lawyer ©

⁶ With the term “*domestic appliances*” are intended “... *those durable in time domestic consumer goods that to work must directly or indirectly use any kind of energy and transform it*”. (Art. 1.2.1. Royal Legislative Decree No. 58/1988); hence, it must be supposed that all electrical and electronic appliances of not (exclusive) business use are covered by the provision of the law in question.

⁷ Regulation about After-Sales Services of Industrial Products (Sanayi Mallarının Satış Sonrası Hizmetleri HakkındaYönetmelik, Official Gazzette 14/6/2003 – No. 25138)