Technical assistance, legal warranty and standard warranty on parallel-imported products

Avv. Maurizio Iorio (Attorney at Law) © 2016

What are the obligations imposed on manufacturers under current laws? Can the manufacturer or national distributor lawfully refuse to service products imported in parallel? Can the national official distributor provide its own additional warranty on the products that it places on the market besides that voluntarily provided by the manufacturer? Is the manufacturer obliged to 'open' upon request a Technical Service Centre (hereafter TSC)?In this article I will answer to these and other questions

What are parallel imports?The informal term 'parallel imports' refers to all cases – and thus also to those where technically we cannot speak of imports – in which a given brand's products are introduced, from whatever source, in a Member State of the European Union or the European Economic Area (EEA) (consisting of Liechtenstein, Iceland and Norway) by an independent trade intermediary, other than the manufacturer or the 'official' distributor of the same products .However, while the manufacturer can generally object, on the basis of the exclusive right to the use of its brand, to the import in the EU or EEA of 'parallel' products from a country outside the EU, this save a few exceptions does not apply (actually, exactly the opposite applies) in the case of products from another EU or EEA Member State: in fact, in such cases, count **the rule of free movement of products**. In this regard, it should be noted that pursuant to Article 101 of the TFEU (Treaty on Functioning of the 'European Union) "***Are prohibited all agreements between undertakings which have as their object or effect the material prevention, restriction or consistently distort competition within the national market or a substantial part thereof*** " including those which ***"c) share markets and sources of supply*** …". Someone who knows this all too well is The Volkswagen group, which for having in a continuous, detailed and substantial manner opposed the parallel exports of its vehicles from Italy to Austria and Germany (from 1993 to 1996), was at the time imposed to payby the European Commission a fine of 102 million ECU (1 ECU = 1 EUR), subsequently 'reduced' to EUR 90 million by the Court of First Instance of the European Union with the judgment of 6 July 2000, later confirmed by the European Court of Justice on 18 Sep 2003.

Pan-European warranty and parallel imports Major manufacturers generally supply all or most of their products with a standard warranty different from the legal one (which supplements and does not replace the latter) valid throughout the EU /EEA territory and sometimes all over the world. This

[1]The date was 28 January 1998.

type of warranty, which we will conventionally call '***pan-European***', is subject to constraints arising directly from EU regulations on the free movement of goods, persons, capital and services. For a proper understanding of what we are talking about, there is the need to clarify the concepts of '**internal market without frontiers**' and '**prohibition of quantitative and qualitative**' restrictions to the import and export of goods between Member States.

a) The internal market without frontiers:

As known, the Treaty on the Functioning of the European Union states that the Union, in order to create and make functional its own internal market shall maintain "... *an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*" (Art. 26.2).

More specifically: "***Are prohibited between Member States the quantitative restrictions on imports and all measures having equivalent effect***" (Art. 34 TFEU), as well as "...***the quantitative restrictions on exports and all measures having equivalent effect***" (Art. 35 TFEU).

b) Prohibition of quantitative and qualitative restrictions

As mentioned, the principle laid down by the aforesaid Article 26.2 is defined in detail in Articles 30, 34, 35 and 36 of the TFEU, pursuant to which are:

- Prohibited within the EU duties and equivalent quantitative measures: "*Customs duties on imports and exports and charges having equivalent effect shall be prohibited*..." (Art. 30 TFEU);**- Prohibited other quantitative restrictions on intra-EU imports:** "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States"* (Art. 34 TFEU);

- Prohibited other quantitative restrictions on intra-EU exports: "*Quantitative restrictions on exports and all measures having equivalent effect shall be prohibited between Member States"* (Art. 35 TFEU).● **With the following exception: Article 36 sets out an exception to Articles 34 and 35:** Are in fact allowed restrictions on imports, exports and goods in transit justified on grounds of "… *public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a MEANS OF ARBITRARY DISCRIMINATION or a DISGUISED RESTRICTION on trade between Member States"*.

With 'Disguised restriction' it is meant, inter alia, every 'Equivalent Measure', i.e., any other measures which, although not formally targeted to restrict or hinder imports from other EU country, have in fact the same effect. For instance, a ministerial regulation which makes the marketing or import into Italy of a TV set subject to a ministerial approval of no use and not necessary, for example, for the protection of consumers, the environment, or other requirements referred to in the above Article 36, would be in breach of the Treaty on European Union and the Treaty on the Functioning of the

European Union and could be declared null and invalid, as de facto it would make extremely expensive for the manufacturers of the other Member States to adapt their products to such peculiar – and unjustified – directive, thereby hindering their imports into Italy: this is the case for example of the Ministerial Decree 458/95 (on radio-frequency disturbances of receive-only audio equipment or TV) and Ministerial Decree of 26 March 1992 (on the so-called 'Channel C') which were repealed as a result of numerous complaints to the EU Commission and subsequent objections to the Italian Government. .

Origin of the pan-European warranty – the 'Zanussi case'

The origin of the pan-European warranty dates back to about the middle '70s. The 'leading case' is that of Zanussi, of which the Commission Decision 78/922/EEC of 23 Oct 1978 (IV/1.576 − Zanussi), published in the Official Journal of the European Communities of 16.11.1978 (No. L. 322/36) [2].

In the mid-'70s (1976), the Zanussi Group of Pordenone (Italy), which mainly operated in the domestic electrical appliances industry, employed around 30,000 people manufacturing about 3.8 million appliances a year, and marketed its products in the other countries of the European Economic Community through various national companies.

Until 1977, Zanussi provided to the final customers of its products in Europe a NATIONAL based warranty. In fact, at the time of the sale the resellers were required to issue to the consumer a warranty certificate showing, inter alia, the following conditions:

a) The warranty was provided by the national Zanussi subsidiary ONLY ON PRODUCTS IMPORTED BY THAT PARTICULAR DEALER;

b) The warranty was refused when the products had been modified by people outside the subsidiary of the country that had originally imported the product (it should be noted in this regard that the different technical standards between EEC countries often imposed technical adaptations from country to country).

However, the EU Commission, to whom the warranty scheme had been submitted, deemed it in violation of the then Article 85 of the Treaty of Rome (now, as said, Article 101 TFEU).

- In fact, the Commission pointed out at first that the sale contracts concluded between Zanussi and its resellers also included "... *the obligation for the latter when retailing the appliance to the customer, to include the manufacturer's warranty. Consequently, the contracts in question are agreements between undertakings which, in so far as the conditions of warranty contain restrictions on competition, fall within the prohibition contained in Article 85 of the EEC Treaty* ".

- Second, with particular regard to the content of point sub a) of the warranty mentioned above, the Commission concluded that such agreements "… *HAD THE EFFECT TO RESTRICT OR DISTORT*

[2]The "Zanussi case" is obviously just one example, as there are other cases related to other manufacturers whose warranty schemes were at the time examined by the EU Commission.

COMPETITION within the common market, since the user could only seek service under the Zanussi warranty from the subsidiary which imported the appliance into its own Member State… The result was that Zanussi resellers were placed in an artificially disadvantageous competitive situation compared to other undertakings… ".

As to the content of point sub b*), the Commission found that "… The clause laying down that the users right to claim the warranty and the manufacturer's obligation to provide it ceased if the appliance had been modified in any way by somebody not authorized by the importing subsidiary, had equally the effect of restricting competition within the common market since it prevented resellers who planned to import or export from making the appliance conform to safety and technical standards in other Member States, when it was essential to comply with these in order to sell the appliances ".*

Following these findings by the EU Commission, as of 15 February 1978 Zanussi agreed to radically change its warranty system as follows:

a) The warranty was granted within the EEC countries on all appliances marketed by Zanussi and put on sale in one of the EEC countries. In particular, the service under warranty was carried out by the Zanussi subsidiary of the country in which the product was being used, regardless of the EEC country in which it was originally imported or manufactured;

b) The standard warranty service could, however, be refused in certain specific cases, such as using the appliance in an abnormal way or not conformant with applicable safety regulations or in the event of tampering with the same.

c) The warranty could not be refused on appliances which had not been tampered with but merely modified by a qualified technician in order to make them compliant with the safety regulations of the country in which the warranty was issued (the Zanussi subsidiary was not obliged to carry out these adaptation works, but if it did, the costs were charged to the consumer). **Conclusions on the Zanussi case:**

When the manufacturer provides within the EU a warranty service on its products marketed therein, it cannot allocate such warranty on a national basis and exclude from it the products imported in parallel from a EU country to another, but, under the necessary conditions, the warranty must be provided on all products submitted for repair, without drawing a distinction based on the EU country in which they were originally marketed.

Can the 'official' national importer add its own standard warranty to that of the manufacturer? (the Hasselblad UK case) Whereas the Zanussi case refers to the occurrence of a manufacturer who, through its branches or subsidiaries, provides a warranty on its products throughout the EU territory, the Hasselblad UK case, instead, refers to a distributor who is independent from the manufacturer and offers an ADDITIONAL WARRANTY besides the standard one provided by the latter.

- Hasselblad UK, a British company, had entered into an exclusive distribution agreement for cameras and equipment with Victor Hasselblad Sweden. It should be noted that, despite sharing the same word 'Hasselblad', the two companies are entirely independent from each other, since the UK distributor is neither a branch nor a subsidiary of Victor Hasselblad Sweden.
- Victor Hasselblad Sweden offered to the end-user – through the network of authorized resellers belonging to Hasselblad UK – a standard pan-European warranty such as the one adopted by Zanussi from 1978 onwards, for a period of one year on each camera and equipment originally introduced by it on the EEC market and thus 'imported' into the UK by the official national distributor or 'parallel' traders.
- In addition to this, Hasselblad UK offered a so-called 'Silver Service Warranty', namely an extension of up to two years on the original 1 year warranty, and assured repairs within 24 hours, LIMITED TO THE SOLE PRODUCTS IMPORTED INTO GREAT BRITAIN BY HASSELBLAD UK.
- However, the **EU Commission** questioned this warranty system, objecting that:

1. Hasselblad UK had engaged in discriminatory practices by purposely and intentionally delaying repairs to cameras imported in parallel;
2. the scope of the additional 'Silver Service Warranty' was solely to prevent or at least limit parallel imports.

- The matter came before the **Court of Justice of the European Communities**, which in its judgment stated that:

1) as to point 1., the Commission had not been able to provide evidence that the repair times of Hasselblad cameras imported in parallel into the UK were longer than those ordinarily taken by other European distributors of Hasselblad products from which these products came from;
2) as to point 2., since the after-sales service referred to in the Hasselblad pan-European warranty was normally carried out by Hasselblad UK also on products imported in parallel, the fact that the latter offered an additional warranty on cameras and equipment imported by it into the UK could not in itself be considered – subject to proof to the contrary that the Commission has been unable to provide – as a means aimed at preventing or hindering parallel imports. It is not in fact forbidden to complement the own service offering in order to stay ahead of competitors. What is prohibited are the agreements and concerted practices aimed at artificially partitioning the markets within the EEC (now EU) and thus distorting competition.

Accordingly, both objections from the EU Commission were rejected.

The difference between the Zanussi case and the Hasselblad UK case

As said, the Zanussi case refers to the prohibition of discriminatorily applying, on a national basis, a warranty scheme granted by the manufacturer on all its products marketed in EU countries, while the Hasselblad UK case refers to an additional warranty provided by a distributor with respect to the pan-European warranty.

But there is another much more important difference.

In the Zanussi case we are facing an AGREEMENT between Zanussi and its subsidiaries, authorized distributors and resellers to apply the warranty scheme, which was found illegal by the EU Commission.In the Hasselblad UK case we are facing a UNILATERAL CONDUCT by a company which freely decided, in order to provide a more appealing service to consumers and stay ahead of the competitors, to offer an additional warranty.

Now, since Article 101 of the TFEU does not prohibit unilateral conducts, but only "... *agreements between undertakings… decisions by associations of undertakings and... concerted practice*s... ", it is self-evident that if the Commission was unable to provide proof of a concerted practice between Hasselblad UK and the manufacturer, Victor Hasselblad Sweden, aimed – by means of the warranty – at preventing or hindering parallel imports into the UK, Hasselblad UK's conduct must obviously be considered lawful.

Conclusion on the Hasselblad UK case :

In the presence of a pan-European warranty provided by a manufacturer, it is not prohibited for a national distributor or dealer to offer an additional national warranty valid only on products imported by it into a given EU country, provided that:

- **the purpose of this additional warranty is solely to emerge on the competitors by offering a better service, and that**
- **this additional warranty is not the result of a concerted group policy aimed at dividing and partitioning the EU markets by hindering parallel imports from country to country.**

Obviously, evidence to the contrary, namely the proof of the possible illegality of such warranty must be provided by those who intend to challenge it.

Can the pan-European warranty be refused on products imported in parallel?Let us suppose that we are faced with the following case: the manufacturer TOM provides with the products sold his own contractual worldwide or pan-European warranty; DICK, his national distributor, provides this warranty only to customers who have purchased the products from an authorized dealer belonging to the 'official' national network (whether selective or not), but not to those customers who – despite possessing a product accompanied by the pan-European warranty supplied by TOM – have purchased it from independent resellers: **this refusal is certainly unlawful**, since "...*a warranty scheme under which a supplier of goods restricts the warranty only to customers of his exclusive distributor places the latter and his resellers in a privileged position as against parallel importers and distributors and must therefore be regarded as having the object or effect of restricting competition*..." (European Court of Justice 10 Dec 1985, Case 31/85)

Let us now suppose instead to be faced with the case in which the product imported in parallel is NOT accompanied by the pan-European warranty of the manufacturer TOM, but only by the legal warranty (which, it is worth reminding, lies solely with the retailer who sells the product to the end-user) and/or a standard additional warranty provided by the parallel importer: in this case there is no doubt that **neither TOM and nor his official distributor or any of the authorized resellers under the latter are required to provide the pan-European warranty of TOM.** The consumer will thus be able to only invoke the legal warranty provided for by the Italian Consumer Code (Articles 129 and following) against the retailer who sold him the product, while the latter, under appropriate circumstances, will in turn have the right of redress (pursuant to Article 131 of the Consumer Code) against the party responsible for the supply chain belonging to the parallel importer or, if applicable, directly to the latter.

Can the manufacturer or its official distributor freely decide whether to 'open' or not a TSC?The answer – under certain conditions – is Yes.However, in order to fully answer this question we must bear in mind some legal provisions:

- **Prohibition of discriminatory practices:**

Pursuant to the Italian Antitrust Law (Art. 2, Law 287/1990), which reproduces almost verbatim the parallel EU standard (Art. 101 TFEU), are considered agreements restricting freedom of competition and thus prohibited, *"… all agreements and/or concerted practices between undertakings … which have as their object or effect the prevention, restriction or consistently distort competition within the internal market or a substantial part of it, even through activities consisting of (….)* ***d) applying in trade relationships with other contractors, conditions objectively different to equivalent transactions, thereby placing them at an unjustifiable disadvantage in competition****(…)".* It follows that, notwithstanding the right of the manufacturer or its distributor to freely decide regarding any new contractual relationship, the TSC that can show (even on the ground of serious, consistent and precise presumptions, which however appear – in practice – rather difficult) a discriminatory intent on the part of the manufacturer or its official distributor to refuse to let it join the official technical service network and a subsequent (even tacit) agreement with the other existing TSCs for excluding it, may (try to) oppose this refusal.It must though be remembered that such refusal can be challenged only if the failure to appoint the TSC as 'official' service centre will result or may result in a 'consistent' restriction of competition, and not whether, in this regard, it only has a minimal or marginal effect.

- **Prohibition against the abuse of a dominant position in the spare parts market**

Article 3 of the said Law 287/1990, which prohibits the abuse of a dominant position, consisting also in this case in "... *applying in trade relationships with other contractors, conditions objectively different to equivalent transactions, thereby placing them at an unjustifiable disadvantage in competition*...", lacks, however, an unambiguous legal definition of 'dominant position'. In the Hugin case (Judgment of the European Court of Justice of 31 May 1979, Case 22/78: 1. Hugin Kassaregister AB,

Stockholm, 2) the Court of Justice, which, what's more, on that occasion annulled the fine imposed by the European Commission, acknowledges the theoretical possibility that a manufacturer could be in dominant position in the spare parts market of its own products, with all that implies the refusal to sell them. This in a specific case could be translated (the conditional tense is a must), where there existed a dominant position, in the obligation for the manufacturer/official distributor to supply spare parts to the TSC that requests them, even though it is not part of the official service network and without, in any case, being able to expect to be admitted

.**Prohibition against the abuse of economic dependence**

Article 9 of Law 192/1998 prohibits the 'abuse of economic dependence' which occurs when, inter alia, there is a refusal to negotiate ('to sell or buy') by one or more undertakings able to determine in trade relations with another undertaking a significant imbalance of rights and obligations; in such circumstances, the Italian antitrust authority can apply the 'usual' fines which can reach up to 10% of the last annual turnover of the contravening company(ies). Also in this case, however, there is no abuse of a position of economic dependence if there is not a dominant position in a particular and well identified market, in being each party otherwise free to negotiate or not, i.e., to freely determine their own contractual choices (Court of Cassation No. 3638, 2009). In conclusion, even in the latter case the possibility for a TSC to lawfully oppose the refusal by the manufacturer or its official distributor to admit it in the own network of authorized technical service centres appears necessarily limited to borderline and exceptional minority cases.

Avv. Maurizio Iorio (Attorney at Law) © 2016