

Questions and Answers regarding compliance, marking, instructions and inscriptions on products

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I considered it pertinent to gather and publish in this issue of Market Place some recent questions, posed by my clients or by ANDEC's associates, that I feel will be of particular interest to most readers of this magazine - while, in view of the available space, summarizing at best my answers. I would also like to point out to interested readers that more "Questions and Answers" on these and various other topics can be found at my firm's website: http://www.avvocatoiorio.it/public/_PIOR4_DOMANDE-E-RISPOSTE-----1062.asp?idPulsante=1062&idPP=1788&M=Y

(1) When must a product sold be accompanied by written instructions as provided by Article 6 of the Italian Consumer Code?

A client has raised the question on whether it is mandatory to include in the packaging of a LED flashlight the user's instructions in Italian.

We would like to know if the client is right in requesting that the product sold by us be accompanied by instructions, also in view of what foreseen in this regard by the Consumer Code (Art. 6 Legislative Decree 206/2005), which we quote below:

The products or the packaging of products intended for consumers, marketed within the national territory, shall at least show, in a clearly visible and legible manner, the information relating to:

(....) e) the materials used and the production methods adopted when these are significant in determining the quality of the product or its characteristics;

f) the instructions, any precaution and intended use, when relevant for the product's use and safety.

Answer

It must first be said that in the case of products subject to CE marking (in the ICT product sector: Low Voltage, EMC, R&TTE), the relative Directives (2004/108/EC; 2006/95/EC; 1999/5/EC) always foresee the obligation to supply written instructions for the use of the product.

When the products are not subject to CE marking or other explicit national or EU Directives setting out specific requirements, the provision of the Consumer Code mentioned by you shall apply. Said provision must be interpreted with reference to the Ministerial Decree 101/1997 - cited in Art. 10 paragraph 2 of Legislative Decree 206/2005 - which contains various useful indications on the manner of affixing and on the instructions and warnings content.

As for those national areas where bilingualism is permitted and protected (e.g. Trentino Alto Adige, Val d'Aosta, Friuli - Venezia Giulia), given that Law no. 482 of 15 December 1999 states that also

in these areas the official language is to all intents and purposes always the Italian one, the instructions must be written in Italian and the translation into other locally protected languages is not required.

I would like to remind that battery-operated flashlights are not subject to CE marking, unless they are equipped with built-in circuitry and rechargeable accumulators and/or for other particular cases.

(2) CE marking and batteries

We know that batteries do not require CE marking as they do not fall within the scope of the LVD or within the scope of the Electromagnetic Compatibility (EMC) Directive. However, Customs has stopped one of our shipments containing batteries for video cameras.

We would like to know if also in this case it is right to say that the batteries for video cameras are not subject to the LVD and EMC Directives.

Answer

Unfortunately it is not that simple.

Batteries and accumulators do NOT require CE marking if - obviously - they are just batteries and accumulators.

When the accumulators are grouped into a pack and this pack (called “battery pack”) **incorporates a circuitry** (e.g. a circuit preventing the video camera’s batteries from overcharging when left in charge for too long), they require CE marking.

I have no idea of the characteristics of the battery packs in question. My advice to you is to always examine well in advance the documentation relating to the purchased products, obviously prior to passing through Customs. In this specific case the request by the Customs authorities may be justified and hence legitimate.

(3) OEM Products and CE marking

*Can we resell in bulk the power supply units for TV antennas that we import to Italian distributors, i.e. without any label specifying “**Imported by**” and without including any user’s instructions, without incurring in any penalty?*

I must point out to you that the distributors to whom we will sell said units appear to be our competitors and, consequently, we cannot add our brand name to these products.

In order to protect ourselves, must we include a kind of notice for the sale to these distributors?

*What we are considering to do is to include a note in the invoice itself with, for example, the warning: “**PRODUCT NOT INTENDED FOR CONSUMERS**”.*

Answer

Your company imports power supply units into the EU without affixing its own brand name - namely OEM (Original Equipment Manufacturer) products - and as such it qualifies as “**importer**” pursuant to Art. 2.1.5 of Regulation 765/08, while your clients are legally equated to “**manufacturers**” since

they fall within the category of who, even though indirectly, has the power supply units “*designed or manufactured*” and “*markets them under their trade or brand name*” (Regulation 765/08, Art. 2.1.3). It follows that your clients, as “manufacturers”, are required to fulfil their obligations deriving from the sector-specific regulations (among which the Directive 2006/95/EC on low voltage, implemented in Italy by the Law 791/77), including: CE marking, preparation of technical documentation, declaration of conformity. You, as “importers”, are accountable for ensuring that your clients comply with said requirements and, in the case of non-compliance of the products with the aforesaid regulations, can be held directly liable for penalties together with your clients (pursuant to Law 791/1977, Art. 9).

In concluding, my advice is: (1) to verify in advance that the products imported by you comply with the aforementioned regulation, (2) to agree in advance, in writing, with your clients that the responsibility for complying with any requirement regarding the marketing of products (CE marking, declaration of conformity, availability of technical documentation, etc.) will be entirely theirs.

I want to add that the “rebound” of responsibilities between an importer of unbranded products and the client in case of penalties (but also outside such occurrence) is a fact well known to me, rather recurrently found in the judicial reports and in litigation issues with the appointed inspection authorities with which I have often to professionally deal with.

I am therefore suggesting that you refrain from being tempted “*to do nothing because it is only a small deal and the product sold has hardly any margin on it*”; rather than placing on the market a “non-compliant” product, my advice is that you should give up the deal.

(4) Accessories and WEEE crossed-out wheelie bin

Must the accessories of electrical and electronic equipment bear the crossed-out wheelie bin logo?

Answer

As stated by the WEEE Vigilance and Control Committee with a decision dating back to 16.02.2009, only accessories that will presumably become individual waste must be marked since their use is not intended to be *solely in relation with the specific device* with which they are sold (as for example a universal remote control suitable for a wide range of TV sets), while in the case of not “universal” accessories they do not need to be marked as the marking already present on the product to which they are “assigned” to and to which they relate will suffice.

(5) Device with an English-only display

We are about to market also in Italy a GPS device for bicycles whose display and operating menu will not be available in Italian, but only in English. It must anyway be said that the words being used will be very few and basic (like: Speed; Cadence; Heart Rate; Distance ... etc.) and that there are many images which will make its use very intuitive (there are not any special instruction such as “turn right or left”) among which the turning indicators.

Bearing in mind that we will instead supply a detailed translation of the instruction manual in Italian, do you think that by marketing a product without a display in Italian we could have problems with the authorities?

Answer

The device in question ought to be subject to the EMC regulation (electromagnetic compatibility: Directive 2004/108/EC - Legislative Decree 194/2007) and , accordingly, my advice is to sustain that the command indications are comparable to the instructions necessary for the correct use of the device and consequently, pursuant to Art. 11 no. 5 of Art. 11 paragraph 5 of Legislative Decree 194/2007, the command indications in Italian, namely the translation of the English commands appearing on the display, can be reproduced on a separate sheet/manual, like all other user's instructions.

If we sustain, as I suggest we do, that the command indications are equivalent to the user's instructions/indications, applies in this regard also the Art. 6 letter f and Art. 7 of the Consumer Code (Legislative Decree 206/2005) which in any case (i.e. for the case in which the specific EMC regulation does not apply) states that the user's instructions can also be included in the descriptive documentation accompanying the products.

Finally, I would like to remind that the European Commission, with the letter of the Directorate XV dated 26.03.1999 ref. no. 00001842, in amicably resolving an appeal from ANIE - Italian Trade Association of Electric and Electronics Industries (appeal P/97/4050) against the Legislative Decree 26/03/1992 (TVs' Channel "C"), ruled that Italy could not demand that television commands be in Italian rather than in English, as long as the instructions accompanying the devices did include the complete translation in Italian of the commands.

The product here is different, but - it could be argued - the principle is the same.

(6) Affixing the CE marking on a device not requiring it

We would like to ask you of possible penalties that we, as first importers, might have to face if the CE marking is affixed on a product not requiring it, such as domestic power plugs and sockets, bearing in mind that we hold a CE Certification (EMC and LVD) and related test reports.

Answer

(1) Domestic power plugs (which, what is more, are subject to well articulated and precise EN standards) are not in themselves subject to CE marking (see **Directive 2006/95/EC, Annex II "Equipment ... outside the scope of this Directive: ... Plugs and sockets outlets for domestic use"**).

(2) The Article 30 of Regulation 765/2008/EC prohibits to affix the CE marking to products for which its affixing is not foreseen; the Regulation does not obviously set out any penalty in this regard since, in fact, the same are defined by national legislations.

(3) The Italian Antitrust Authority considers that the unjustified affixing of CE markings may constitute a form of misleading advertising, punishable as provided by Art. 27 paragraph 9 of the Consumer Code with a statutory penalty of between € 500,00 - € 500.000,00 (see *Decision no. 15580 by the Autorità Garante della Concorrenza e del Mercato* (Guarantor Authority for Competition and Market) of 31 May 2006, PI5186 – “Incoming goods from China - CE marking”).

(7) Inscriptions on products

The wording “*Made in*”, “*...imported by ...*”, “*Distributed by ...*” already printed on the packaging of the products sold, must they also be included in their user manuals?

Answer

The question is only apparently simple: the answer must in fact be articulated, as it is not possible to translate it into a simple yes or no.

Let us start with “***Made in Italy***”

There is NOT any law that imposes such wording except in a particular case, namely when making “*...use of a sale indication that presents the product as entirely produced in Italy, such as «100% made in Italy», «100% Italian», «entirely Italian», in whichever language, or anything else which may similarly lead the consumer to believe that the product was entirely produced in Italy, or, in another way, signs or figures inducing the same mistaken belief ...*” (Art. 16 of Legislative Decree 135/2009, ratified as Law 166/2009). In such cases, the owner or licensee of the brand name (of an Italian or non-Italian business) which uses the same in the aforesaid manner is subject to an administrative penalty of between € 10.000,00 - € 250.000,00.

To avoid the above-mentioned administrative penalty it is necessary to, **alternatively**:

- show - on the product or on the packaging or on the accompanying documentation - *precise and clear indications about the origin or the foreign country of origin* of the product;
- show - on the product or on the packaging or on the accompanying documentation - any *different indication apt at avoiding any possibility of misunderstanding* by the consumer as regards to the true origin of the product;
- include with the product a statement - *issued by the owner or licensee of the brand name - concerning information which, at his own care, will be given during the sale* as regards to the effective country of origin of the product.

Products without said indications are subject to be administratively confiscated, unless the same are affixed to the products at the care and expense of the owner or licensee of the brand name.

As for “***Imported by:***”, “***Distributed by:***”

- In the case of products subject to the CE marking (in our product-specific sector: low voltage, electromagnetic compatibility, TLC) the relative Directives (2004/108/EC; 2006/95/EC; 1999/5/EC, as implemented in Italy by the corresponding laws and legislative decrees) impose that each device must be accompanied “... by the name and address of the manufacturer and, if

he is not established in the EU, by the name and address of his authorized representative or importer” (cited purely as an example, with reference to the EMC regulation, from Art. 11 of Legislative Decree 194/2007). As specified by the Guide to the EMC Directive 2004/108/EC, paragraph 3.4.3. (but the principle should apply to all product directives), these information, since they “accompany” the device, can be shown in the documentation supplied with the same (which purpose is to provide all complementing information different than those already present on the main body of the device) or be printed on the packaging.

- When the products are not subject to CE marking or other explicit national or EU Directives setting out specific provisions, the Art. 6 of the Consumer Code (Legislative Decree 206/2005) shall apply, which, at number 1.b, requires to indicate the name or trade name or brand name and registered office of the manufacturer or of an importer established in the EU. Said indications must be shown, in accordance with the next Art. 7, “ ... on the products’ packaging or labels when they are offered for sale to the consumer ... ”.