

LEGAL OPINION

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QUESTIONS AND ANSWERS ON MATTERS OF AFTER-SALES SERVICE

The following are some of the answers provided by the Attorney at Law Maurizio Iorio on matters of technical assistance, in reply to questions from clients or ANDEC's members submitted to him as part of his legal advice and assistance activity.

LEGAL WARRANTY ON PRODUCT SOLD TO THE RETAILER BY MORE THAN TWO YEARS

I wanted to ask you the following question: does the (legal) warranty apply in the case of a final consumer buying from a retail outlet, serviced from the commercial viewpoint by one of our distributors, a product actually placed on the market in 2001?

And if so, should it be provided by the retailer or by us as manufacturer/importer? Said product has been out of production for quite a few years.

What's more, the selling price was about 10 times lower than the price applicable at the time, since – I presume – it was part of unsold stock.

1) The legal warranty provided for by the Italian Consumer Code lies with the retailer who sells the product to the final consumer and not with your company, in not having the same any direct dealings with the latter.



MAURIZIO IORIO

This monthly column originates from the partnership between Marketplace and ANDEC, and it is edited by Maurizio Iorio, in his dual role of professional Attorney at Law in Milan and President of ANDEC. In each issue he will address legal matters with a specific focus on the electronics industry. Further details are available on the website: www.andec.it, while this column published also in Italian and French can be found on the website: www.avvocatoiorio.it.

2) The retailer complying with the legal warranty has the right of recourse against the person or entity that in the sale chain that goes from the manufacturer to the retailer is liable for the defectiveness of the product. This right of recourse must be exercised within one year from the performance of the warranty work, but (unlike other jurisdictions such as Germany, where a period of 5 years is provided) there are no limitation or expiry periods with respect to the time when the product that later proved defective was sold to the retailer (hence, even in 2001). However, the recourse action must be undertaken against the person or entity to whom the liability for the defect is attributable (due to an act or omission), and, in the present case, it seems highly unlikely that this responsibility can be attributed to your company, since importer and not the manufacturer of the product.

WARRANTY ON PRODUCTS RESOLD BETWEEN PRIVATE PARTIES

Our company has marketed tablets for children, all fitted with parental controls via which parents register the product (serial number, MAC address, email address, etc.) on our servers for parental monitoring and ensuring safe navigation. For some time now, we note that some of these tablets are being resold to friends, relatives or others.

These latter purchasers ask us to change the registration data from the first owner to them.

Consequently, I ask you: are we obliged to do it?

If so, should we do it for free or for a fee?

Moreover, does the warranty restart from now, or does the first date of sale apply?

Can we cancel the registration and close in this way that serial number?

I can only answer the third of your questions: if for warranty you mean the conventional one included in a warranty certificate – allegedly – intended for a not clearly identified person (i.e. generally understood as the purchaser of the product), the warranty is in my view valid

also for the transferee, but its validity starts from the original purchase date. In the case of legal warranty due by the seller to the final purchaser, this does not follow the product as it does only apply to the first purchaser.

The other three questions that you pose are exempt from any legal requirements, but entrusted to your company, or rather, to the provisions set out in the documentation drawn up by the same that accompany the product or to the conditions that your company has published. In other words, your business is free to act as it wishes, as long as it sets clear, definite rules and makes them known from the very beginning to customers. In fact, your company is not obliged to comply with the requests to transfer to third-party assignees also the IT services enjoyed by the purchaser of the product.

WARRANTY ON REPLACEMENT PARTS

I would like to have some clarifications on the spare parts warranty.

1. How long is the warranty on spare parts?

2. What happens if the part is replaced during the warranty period? Does its warranty run out with the equipment's warranty?

“The part replaced during the warranty term is not covered by an independent warranty period, but by the same two-year legal warranty of the product in which it has been incorporated”.

3. What happens if the part is replaced outside the warranty period?

In accordance with the – in my opinion – more correct interpretation of the law referred to in the Italian Consumer Code concerning the legal warranty for the consumer, the answer is the following:

- Part replaced during the warranty period: the part does NOT have an independent warranty period, but it follows the same two-year legal warranty period of the product in which it has been incorporated for the repair.

- Part replaced after the warranty period: the part is covered by an independent two-year warranty period (see also in this regard the answer to the next question).



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DURATION OF WARRANTY ON REPLACEMENT PARTS

Following increased discussions with customers as a result of complaints raised by them on the warranty duration of spare parts for sales, I would like to ask you a question. But first, let me explain better: we have (a) end-users (either natural or legal persons) who buy spare parts/accessories (product out of warranty) from service centres, or (b) unauthorized service centres that buy spare parts/accessories through authorized centres.

“The legal warranty lies with who sold these products to the final purchasers who invoke the legal warranty, and certainly not with you who never had any direct contact with the purchasers themselves”.

The discussion arises from the need to answer the following question: are they consumer goods for which applies the warranty of 24 + 2 months for natural persons (purchasing with receipt) and 12 months for legal persons (purchasing with invoice), or do spare parts have a different warranty? Thank you in anticipation for your reply and attention.

Spare parts purchased separately and independently from work carried out under warranty are products like any other and thus follow the warranty's general conditions: in the case of purchases by consumers shall apply the legal warranty

terms provided for in the current Italian Consumer Code (24 plus 2 months which however refer to its action and not to the interruption of the 24 months course of the cover period), while in the case of purchases by “professionals” shall apply the warranty provisions (and thus also the one year duration) of the Italian Civil Code.

Allow me, however, to disagree with you on one point: the fact, for instance, that the attorney Maurizio Iorio purchases an HP printer with a sale invoice does not prevent him from providing the proof – even with sole testimony of the person concerned – that the printer is exclusively used by his daughter for school studies and that consequently the warranty period is of two years instead of one. And this applies also to spare parts.

LEGAL WARRANTY AND DISTANCE SALE: WHO PAYS THE SHIPPING COSTS?

In case of defective product, the customer sends the same back to the online seller for repair/replacement.

The shipping costs of the defective product from the customer to the seller are to be borne by one or the other of the parties?

In this case the shipping costs will be borne by the online seller, since the Italian Consumer Code (Article 130 No. 2) provides in this respect that “... the consumer shall be entitled to have the goods brought into conformity free of charge ...”.



“Replacement parts purchased separately and independently from work under warranty are products like any other and thus follow the warranty’s general conditions: 24 plus 2 months for consumers”.

SALE OF REPAIRED PRODUCTS AND LEGAL WARRANTY

We sold a stock of repaired products to a vendor who in turn sells to some of his customers who resell these used products on the internet.

The end customer turns to us for technical assistance.

Are we obliged to provide the warranty?

No. The legal warranty lies with those who sold these products to the final purchasers who invoke the legal warranty, and certainly not with you who never had any direct contact with the purchasers themselves.

PRICE LIST FOR THE OUT OF WARRANTY REPAIRS OF INDEPENDENT TECHNICAL ASSISTANCE CENTRES (TACs)

For some time we have been thinking to communicate to our assistance network the rates for the out of warranty repairs.

As well as a price list for the repairs under warranty, we would also like to have one for those out of warranty.

Is this possible?

Are there any contrary legislative provisions?

There are antitrust rules both at the EU (Article 101 TFEU) and Italian level (Article 2, Law 287/90) that expressly prohibit any agreement between undertakings, concerted practices – including vertical agreements between the manufacturer and the assistance centres – or a decision by an association of undertakings (such as for example a standard contractual clause drawn up by an association), which restrict the free competition of prices and rates applicable to both goods and services.

Therefore, in order not to breach the said regulations, in this case in point we must limit ourselves to: (1) recommending rates for the out of warranty repairs (but not impose them), and/or (2) agreeing upon in the ongoing contracts with the TACs that the rates for the out of warranty repairs will be freely decided and applied by each TAC but they

must not cause damage to the manufacturer’s market image.

However, as said, there is no possibility whatsoever of establishing fixed prices for out of warranty repair work performed by the TACs

CONTRACTUAL CLAUSE IN CASE OF LATE PAYMENTS BY THE TACs

Our company manages its after-sales service through a network of technical assistance centres (TACs) located all over the national territory. I have a question to ask: could the TACs be contractually required to issue invoices on a monthly basis and in

any event no later than the month following the date of the work performed?

Notwithstanding the warnings, some of them issue invoices with delays of several months and in some cases of more than a year. Consequently, if we wanted to carry out cross-checks, we would have some problems due to the unjustified, lengthy delays.

The question is the following: are we always and in any case bound to pay invoices received late, or can we impose a time limit (realistic nonetheless) for the issuance of invoices?

You could include in the contractual provisions (with a specific amendment in case of ongoing contracts) a penalty clause for the assistance centre forwarding the invoice after a certain date. Such a penalty clause – so long as the penalty amount is reasonable – would certainly be enforceable provided it has been agreed in writing with double signature by the TAC (as required in such cases by Articles 1341 and 1342 of the Italian Civil Code).

Instead, a contractual clause that in case of failure to issue invoices within a time limit would result in the TAC’s forfeiture of the right to remuneration for the work performed, would be both unusual and – probably – legally invalid, for reasons that would be too long to explain here.