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The pan-European guarantee

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What happens when a producer provides a commercial guarantee for its products marketed in several Member States of the European Union? In this article we shall examine the producer's obligations, the consumers' rights and more in general the legal obligations and requirements in line with EU law.

(1) What legal framework governs the pan-European guarantee?

The guarantee provided by a producer on all products sold in the various EU Member States is subject to constraints derived directly from the EU legislation on the free movement of goods, persons, services and capital. To understand exactly what we are talking about, it is thus necessary to clarify the concepts of "**internal market without frontiers**" and prohibition of "**quantitative and qualitative**" restrictions on imports and exports of goods between Member States of the EU.

a) The internal market without frontiers

As known, the Treaty on the Functioning of the European Union (TFEU) states that the Union, in order to create and make functional its internal market must preserve "... ***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 TFEU).

More specifically: "***Are prohibited between Member States the quantitative restrictions on imports and all measures having equivalent effect***" (Art. 34 TFEU) and "...***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 in the aforesaid Article 26.2 is defined in detail in Articles 30, 34, 35 and 36 of the TFEU, pursuant to which are:

[1] Namely, the Treaty of Rome, made enforceable in Italy with Law No. 1203 of 14 Oct 1957, as amended by: (i) the Single European Act, which entered into force on 1 July 1987; (ii) the Treaty on the European Union of 7 Feb 1992 (commonly called the Maastricht Treaty); (iii) the Treaty of Amsterdam implemented in Italy with Law No. 209 of 16 June 1998; (iv) the Treaty of Lisbon of 13 Dec 2007, foreseeing a Treaty on European Union (TEU) and a Treaty on the Functioning of the European Union (TFEU).

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- **Prohibited within the EU levies 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).

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"*.

At this point it is necessary to explain what is a QUANTITATIVE RESTRICTION and what is a MEASURE HAVING EQUIVALENT EFFECT:

- QUANTITATIVE RESTRICTION means a quota or a maximum amount of products that can be annually imported from a foreign country.

- EQUIVALENT MEASURE means any other measure which, although not officially aimed at restricting or hindering imports from other EU countries, has in fact the same effect. For instance, a ministerial regulation making the marketing or import into Italy of an appliance subject to the fulfilment of certain construction requirements not targeted to consumers' safety, environment protection or other requirements referred to in the above Article 36, would infringe the Treaty on European Union and the Treaty on the Functioning of the European Union and could be declared null and invalid, as it would de facto make extremely expensive for producers of other Member States to adapt their products to such peculiar – and unjustified – directive, having the effect of hindering their imports into Italy.

c) Freedom of competition

The aim of Article 26.1 of the TFEU (creation of an area without internal frontiers in which the free movement of goods, people and capital is not restricted) is largely taken up and governed by the successive Article 101 of the TFEU which provides that "… ***are prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices***

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which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition...".

Are therefore incompatible with the internal market of the European Union and prohibited:

- agreements between undertakings,
- decisions by associations of undertakings
- concerted practices,

which may

- affect trade between Member States

and

- have as their OBJECT or even only, de facto, the EFFECT of preventing, restricting or distorting competition within the EU.

I would like to remind of an exemplary case of the early '90s [2]: the British company Parker Pen Ltd. had assigned the exclusive distribution of its products in Germany to Herlitz AG, making it sign a contract where the latter undertook not to sell Parker products to purchasers other than those in Germany. A Dutch distributor (Viho Europe BV) had asked Herlitz AG for a price quotation on Parker products and Herlitz refused, arguing that a contractual obligation prevented it from selling Parker products outside Germany.
The EC Commission, to which the case was brought by Viho, felt that the ban imposed by Parker to Herlitz was in breach of Article 85 of the Treaty of Rome (now Art. 101 TFEU, mentioned above), and imposed on both these two companies – but especially to Parker – heavy fines.

In conclusion, there are two aspects of Community law that most come to light when addressing the issue of the guarantee and technical assistance at EU level:

- the prohibition of restrictions to the movement of people, capital and goods between Member States based on factors such as technical standards, unless justified by particularly significant needs (Articles 34, 35 and 36 TFEU);
- the prohibition of agreements, arrangements and practices of any kind aimed at distorting competition within the common market (Articles 101 and 102 TFEU).

Both, but especially the first, influence the origin and content of the pan-European guarantee.

(2) Origin of the pan-European guarantee: The Zanussi case

The origin of the pan-European guarantee dates back to the mid-'70s. The "*Leading Case*"

[2] Case IV/32.725 - Viho/Parker Pen, Commission Decision 92/426/EEC published in the O.J.E.C. No. L 233/27.

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to which reference is usually made is the Zanussi case, 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 16.11.78 (No. L. 322/36) [3].

In the mid-'70s (1976), the Zanussi Group of Pordenone, operating mainly in the domestic electrical appliances industry, employed around 30,000 people manufacturing about 3.8 million appliances a year, and sold its products in the other EEC countries through the following companies, part of the Zanussi Group:

- IAZ International France SA (IAZ France), Montreuil, France;
- IAZ International Belgium SA (IAZ Belgium), Lembeek, Belgium;
- IAZ International UK Ltd. (IAZ UK), Caversham, United Kingdom;
- IAZ Elektrovertrieb Deutschland GmbH (IAZ Deutschland), Frankfurt-am-Main, Federal Republic of Germany;
- IAZ International Denmark AS (IAZ Denmark), Tinglev, Denmark;
- IAZ International Nederland BV (IAZ Netherlands), Alphen a/d Rijn, Netherlands.

On the various EEC national markets Zanussi controlled a significant share (e.g. refrigerators: 25% in Italy, 15% in Belgium and 10% in the Netherlands). The Zanussi products were marketed under various brands, including Zanussi, Rex, Castor, Zoppas, and were distributed through a network of dealers (wholesalers, retailers, supermarkets) who, must be said, were entirely free to sell the products throughout the Community and set their price.

It should also be added that, except in the case of IAZ UK and IAZ Belgium (who respectively supplied also the Irish and the Luxembourg markets), the various Zanussi branches imported the products and distributed them only on the domestic market in which they operated.

Until 1977 Zanussi provided to the final customers of its products in Europe a guarantee on NATIONAL basis. In fact, at the time of sale the dealers were required to issue to the consumer a certificate of guarantee specifying, among other things, the following conditions:

a) The guarantee was provided by the national Zanussi branch ONLY ON PRODUCTS IMPORTED BY THAT PARTICULAR BRANCH (e.g. the consumer TOM buys in France a Zoppas washing machine imported by the trader DICK, who bought it in Germany from the local Zanussi branch or a German trader: the French branch of Zanussi refuses the repair under guarantee; or, the same consumer TOM imports by himself into France the washing machine which he bought in Germany: also in this case the French

[3] The "Zanussi Case" is obviously just one example, as there are other cases related to other producers whose guarantee schemes were at the time examined by the EU Commission.

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branch of Zanussi refuses the repair);

b) The guarantee was refused when the goods had been modified by people outside the branch of the country that had originally imported the product (it should be noted in this regard that the diverse technical standards between EEC countries often imposed technical modifications from country to country).

However, the EC Commission, to whom the guarantee scheme was submitted, deemed it in contravention of the then Article 85 of the Treaty of Rome (now, as mentioned, Art. 101 TFEU).

In fact, the Commission first pointed out that the sale contracts concluded between Zanussi and its dealers also included "... *the obligation for the latter, when retailing the appliance to the customer, to transfer the manufacturer's guarantee according to the conditions set out by the same. Consequently, the contracts in question are AGREEMENTS BETWEEN UNDERTAKINGS which, in so far as the conditions of guarantee 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 a) of the guarantee mentioned above, the Commission concluded that such agreements "… *HAD THE EFFECT TO RESTRICT OR DISTORT COMPETITION within the common market, since the user could only seek service under the Zanussi guarantee from the branch which imported the appliance into its own Member State…. The result was that Zanussi dealers were placed in an artificially disadvantageous competitive situation compared to other firms*… ". (3)

As to the content of point b), the Commission found that "… *The clause laying down that the users right to claim the guarantee 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 branch, had equally the effect of restricting competition within the common market since it prevented dealers 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*". (3)

Here come into consideration also the evaluations made in the initial paragraph (1) in relation to the validity of standards that do not constitute violation of the prohibition of qualitative restrictions on the movement of goods: in the event of modifications necessary to make the products comply with technical standards to which the import of products into a EU country can be legitimately tied (provided that, as stated in Article 36 of the TFEU "... *justified on grounds of public morality, public policy or public security, protection of health and life*..."), such adaptation work, if carried out in a suitable manner by a qualified third party, CANNOT result in the forfeiture of the guarantee, and a guarantee that provides otherwise would constitute an infringement of Article 101 of the TFEU.

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Following these findings by the EC Commission, as of 15 February 1978 Zanussi agreed to radically change its guarantee scheme as follows:

a) The guarantee was granted within the EEC countries on all appliances marketed by Zanussi and offered for sale in one of the EEC countries. In particular, the service under guarantee was carried out by the Zanussi branch of the country in which the product was placed in operation, regardless of the EEC country in which it was originally imported or manufactured.

b) The service under guarantee could, however, be refused in certain specific cases (abnormal use of the equipment, use not compliant with safety regulations of the country where the guarantee is invoked, equipment tampering).

c) The guarantee cannot be refused on equipment that have not been tampered with but simply modified by a qualified technician in a suitable manner to make them compliant with the safety regulations of the country in which the guarantee is issued (the Zanussi branch is not obliged to carry out these adaptation works; if it decides to do so, they are at the consumer's expense).

Conclusions on the Zanussi case:

When the producer supplies within the EU (EEC at the time) a guarantee service on its products marketed therein, it cannot allocate such guarantee on a national basis and exclude from it products imported in parallel between EU countries but, whenever applicable, the guarantee must be provided on all products submitted for repair, without distinction on the EU country in which they were originally marketed[4].

(3) The Hasselblad GB case: the additional guarantee

The Zanussi case refers to the occurrence of a producer who, through its branches or subsidiaries, provides a guarantee on its products throughout the EU.

The Hasselblad GB case, instead, refers to a distributor who is independent from the producer and offers an ADDITIONAL GUARANTEE to the standard one provided by the producer.

Hasselblad GB Ltd., a British company, had entered into an exclusive distribution agreement for Hasselblad cameras and equipment with Victor Hasselblad Sweden. It

[4] These principles are summarized in the EC Council's Eighth Report on Competition Policy of 1978, No. 116 - page 96.

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should be emphasized that besides sharing the same name, the two companies are entirely independent from each other, since the GB distributor is neither a branch nor a subsidiary of Victor Hasselblad Sweden.

Victor Hasselblad Sweden offered the end-users a common European guarantee – namely a pan-European guarantee as the one adopted by Zanussi from 1978 onwards – of one year on every camera.
Each distributor/dealer of Hasselblad products was therefore required to honour such guarantee.

In addition to that, Hasselblad GB offered a so called "Silver Service Guarantee", which extended to 24 months the original producer's 1 year guarantee, with rapid repair service within 24 hours, EXCLUSIVELY FOR PRODUCTS IMPORTED INTO THE UK BY HASSELBLAD GB.

The EC Commission, however, contested this guarantee scheme, objecting that:

1. Hasselblad GB had engaged in unfair practices by deliberately delaying repairs to cameras imported in parallel;

2. the purpose of the additional "Silver Service Guarantee" was solely to prevent, limit or discourage parallel imports.

The matter came before the Court of Justice of the European Communities, which found 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 the repair time ordinarily applied by other European distributors of Hasselblad products, from which these products came from;

2) as to point 2., the Court found that since Hasselblad GB fulfilled equally as good as any other European distributor the Victor Hasselblad International Service Guarantee on products imported in parallel, the fact that the same granted an additional guarantee on cameras imported by it into the UK could not in itself be considered – subject to proof to the contrary that the Commission had been unable to provide – as a means aimed at preventing or hindering parallel imports. **It is not in fact forbidden to improve own services compared to those provided by competitors in order to stay ahead of them. What is prohibited are the agreements and concerted practices aimed at artificially partitioning the markets and thus distorting competition within the EU.**

Accordingly, both objections from the EC Commission were rejected.

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a) The difference between the Zanussi case and the Hasselblad GB case

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

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 dealers for applying the guarantee scheme; an agreement that was deemed illegal by the EC Commission.
In the Hasselblad GB case we are facing the UNILATERAL CONDUCT of a company that has freely decided, in order to provide a more appealing service to consumers and stay ahead of the competitors, to offer an additional guarantee.

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

b) Conclusions on the Hasselblad GB case

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

- **the purpose of this additional guarantee is exclusively to stand out against the competition by offering a better service, and**
- **this additional guarantee is not the result of a concerted group policy aimed at dividing and partitioning the EU markets with the intention of hindering parallel imports from country to country.**

Of course, evidence to the contrary, namely the proof of the possible unlawfulness of such guarantee must be provided by those intending to oppose it.

(4) Examination of a pan-European guarantee

After the Zanussi case, starting from the early '80s, most of the major companies operating in the consumer electronics industry adopted common European guarantee schemes similar to that granted by Zanussi from February 1978 onwards, and approved by the EC

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Commission.

It is therefore worth examining in broad terms what constitutes a pan-European guarantee scheme.

a) Geographical area covered

The entire EU territory, intended as the sum of the territories of the countries part of the EU, and not only as a customs territory of the European Union (e.g.: Livigno is not part of the customs territory of the EU, since it is a Free Zone, but it is part of the Italian territory and thus of the EU: consequently, also products purchased in Livigno and submitted for repair in another Italian location are covered by the PAN-EUROPEAN GUARANTEE).

b) Products covered

b.1. They must firstly be products that were originally placed on the market in the EU territory by the producer or one of its branches, subsidiaries or authorized national distributors (e.g., the ACER PAN-EUROPEAN GUARANTEE will apply to products placed on the European market under the ACER brand by one of its subsidiaries or authorized national distributors – regardless of whether these products were manufactured in the EU or in a non-EU country – but it will not apply to products imported in parallel into the EU by third parties, and come from Taiwan, China or another non-EU country).

b.2. Are normally covered only widely sold consumer products, such as those considered in the Zanussi case: in fact, only in this case the refusal of guarantee service on products imported in parallel could have an appreciable effect on trade between Member States and distort competition.

Are thus generally excluded, for example, the following products:

1. Industrial products;
2. Office automation products of large-scale use (e.g., photocopiers, printers of certain categories and price ranges, telephone switchboards, etc.);
3. Products intended for sale on military markets.

c) Duration of the guarantee period

It is necessary to refer to the guarantee period applied by the producer in the country where the product is presented for repair: if this period is longer than that stated in the certificate of guarantee of the product coming from another EU country there is obviously no problem; if instead this period is shorter and, hypothetically, expired, the consumer may, at his option:

- send the product at his own care and expense to the producer's branch or subsidiary in

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the country where he bought the product; or

- send it at his own expense but through the service assistance of the producer of the country where he submitted it for repair, to the producer's branch or subsidiary in the country where he bought the product.

In both cases, the latter will carry out the repair for free, under guarantee.

d) Who performs the technical assistance on products covered by PAN-EUROPEAN GUARANTEE.

Let us suppose, for example, that the product is submitted for repair in Italy:

1. If the product is a model marketed by the producer in Italy, there is obviously no problem.

2. If instead the product is not marketed in Italy, the producer's branch or subsidiary, if it deems it is unable to carry out the repair, it will offer to the consumer the same two alternatives (the consumer can send it abroad at his own care and expense or through the producer but at his own expense) that we have seen in point c) above.

e) Possible adaptations to technical standards

Although at EU level the technical standards are today almost completely harmonized, there may nonetheless be a few exceptions. In such cases – according to the most current conditions set by producers and accepted by the EU – shall apply the following example: product covered by PAN-EUROPEAN GUARANTEE imported in parallel into Italy from the UK that in order to work in Italy needs to be adapted to the Italian technical standards; in this case, 3 possibilities can concretely arise:

1 The imported product has already been suitably adapted to the Italian technical standards. In this case, there is obviously no problem and the product must be regarded as normally covered by the pan-European guarantee.

2 The product has not been (or has been incorrectly) adapted and the requested repair concerns its adaptation. In that case, the consumer must be informed that no repair under guarantee is possible unless the product has been correctly adapted. In addition, the consumer must be warned of the dangers and possible law violations that he faces by using a product not compliant to the technical standards. If the consumer requests any technical adaptation of the product, there is no obligation to comply with such request, and in any case the technical intervention is not covered by guarantee and it is at the consumer's expense.

3 The product has not been adapted. One of the producer's service centres mistakenly

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carries out repairs on the product before it has been suitably adapted to the technical standards in force: in such case, the service centre – and depending on the circumstances, also the producer – could be held liable towards the consumer for the possible direct damages suffered as a result of the repair.

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