

THE APPLE CASE: A SUCCESSFUL ENFORCEMENT ACTION

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1. INTRODUCTION

As of 2010, the Italian Competition Authority (ICA), that is also the Italian consumer protection authority, has been implementing the legal guarantee regime on consumer goods, as defined by the Directive 1999/44/EC, as a priority of its enforcement action.

The Authority has received many complaints concerning traders' conducts, in various ambits, such as: refusal to replace the goods or to recognize lack of conformity, insufficient information on consumers' rights on the specific issue, inadequate assistance or incorrect repair, refusal to fully cover the two-year regime, as well as false information concerning the guarantee period.

Two conducts have been commonly investigated: a) the refusal to grant the "legal guarantee", also through misleading or insufficient information about its content; b) the sale of assistance services (in some cases insurances) in conjunction with the sale of primary products, additional to the two-year legal guarantee, but passed off as the only guarantee available for consumers.

The ICA has carried out 34 proceedings on infringements of guarantee provisions by main retail chains, 16 of which closed without the

assessment of violation because relevant and comprehensive commitments proposed by the traders were accepted and made binding. The commitments concerned:

- detailed information on legal guarantee;
- clear procedures in providing repair or product replacement free of charge;
- improved information when selling an additional assistance service, clearly separated from legal guarantee.

The major traders were:

- retail chains specialized in the sale of electronic and IT goods and electric consumer devices (2010 Trony, Euronics, Unieuro, Mediamarket, Marco Polo Expert; 2011 Di Salvo; 2012 Computer Discount);
- supermarket chains (2011 Iper, Eldo, Auchan, Expert, Panorama, Carrefour; 2012 Esselunga);
- Telecommunication companies (2011 Telecom Italia, Vodafone, Wind, H3G);
- National and international retailers selling on internet (2012 Amazon);
- Producers selling directly on the internet (2012 Apple, Dell).

Furthermore a consumer guide on legal guarantee has been published on the Authority's website.

2. THE APPLE CASE

The most important case in this enforcement framework was the Apple case. The proceeding was initiated on 29th April 2011, against Apple

Sales International ("ASI", based in Ireland, seller on the online "Apple Store"), Apple Italia S.r.l. ("AI", which assists ASI with technical and aftersales support) and Apple Retail Italia S.r.l. ("ARI", owner of the "Apple Stores" retail shops) of the Apple Group (hereinafter, Apple). The alleged infringements concerned information given to consumers in stores and on the website under the heading "*Legal guarantee of compliance and commercial guarantees for consumer goods*", as well as traders' conducts regarding replies to requests for assistance and information on additional assistance services. Inspections at the companies' Italian premises were also carried out.

In the decision, issued on 21st December 2011, the Authority found two unfair practices carried out by Apple.

The first practice concerned the traders' conduct. In fact, at the time of sale and at the time of request for assistance, the trader: a) did not adequately inform consumers about their two-year free-of-charge guarantee; b) mentioned the existence of a one-year guarantee; c) refused to provide repair or replacement after 6 months from sale requiring for consumers to demonstrate the lack of conformity of the product and recognized only the "standard" one-year producer guarantee to customers.

The information on the legal guarantee was missing in the bill of sale, as well as in the form of acceptance for service repair. Furthermore, the Standard Operating Procedure expressly indicated that: "*Consumers must generally prove that the defect existed at the time of delivery, except for the first 6 months, during which, the defect is presumed to have existed at the time of delivery. Sellers can provide evidence so as to demonstrate that said presumption is wrong.*" Many mails confirmed this conduct: "*in*

the second year, customers have to prove that the lack of conformity existed at the time of the sale"; "*In my personal opinion, what we should do asap is tell the call center agents to AVOID saying anything about the second year warranty and redirect the customer to the retailer.*"

The second unfair conduct concerned the presentation to customers of the additional assistance services, called Apple Care Protection Plan (hereinafter, APP), as well as of its nature and its duration. The APP service was always compared with Apple's one-year warranty.

The investigation showed that Apple sent mails to customers just before the one-year deadline after purchase, reminding them about the one-year guarantee expiration and soliciting the purchase of APP; mails were also sent to retailers soliciting the sale of APP together with the products instead of completing the free-of-charge repair or replacement to which consumers were entitled and requiring retailers to sell a certain quantity of APP packages as a condition for their recognition as "collection centers".

The ICA issued a decision prohibiting the continuation of both commercial practices, which were considered deceptive (lack of information) and aggressive (imposition of barriers to the exercise of consumers' rights) and imposed fines for a total amount of €900,000 –in detail, on ASI (€240,000 and €300,000), AI (€80,000 and €100,000) and ARI (€80,000 and € 100,000). Moreover, the Authority- ordered Apple to publish an *abstract* of the decision for 30 days on its website, and to inform the Authority within sixty days about the actions undertaken to comply with the decision. Finally, it set a deadline of ninety days for the modification of the APP sale packages.

The administrative court of first instance (TAR) confirmed the ICA's resolution with three decisions dated 16th May, 2012¹. The court confirmed the factual and legal analysis of the ICA's decision and stated that:

- the right to legal guarantee entails the duty for the seller to accept the good upon the consumers' request for repair or replacement, in order to verify if malfunctioning depends on a defect existing at the moment of sale;
- the consumer has to pay for the cost of such test only if the lack of conformity results to be negative;
- traders' duty to fulfill the guarantee obligation not only stems from the law, but it is also the logical outcome of the interest structure, given the different level of competence and of resources between traders and consumers.

Despite several changes on Apple's website, consumers kept sending complaints about the repetition of unfair commercial practices. The ICA, on 6th June 2012, initiated another administrative proceeding against Apple for non-compliance with the previous inhibitory ruling dates 21st December 2011. Apple communicated the specific measures undertaken on 10th November 2012.

The changes concerned several webpages, some articles of the General Terms and Conditions of Sale, the handling procedure and appropriate measures to provide comprehensive information about the legal guarantee of conformity even in shops. Moreover, the APP packages were to be sold only through Apple Online Store (AOS).

The findings showed that Apple had simply added information on the legal guarantee to the previous misleading information; in fact: a) the legal guarantee was described as an additional consumer right; b) there was still no clear distinction with the standard producer guarantee; c) the legal guarantee was presented in a table of comparison with other assistance services in order to highlight its lower coverage (also with a different wording: defects present at the moment of delivery and defects occurred after delivery); d) there was still confusion on content and duration of APP services; e) finally, no clear change was introduced in repair/replacement procedures.

In the light of the findings of the investigatory proceedings, with a decision issued on 5th December 2012, ICA resolved that the conduct carried out by ASI, AIS and ARI from 28th March 2012 (the final deadline for complying with the warning) until 10th November 2012 (the implementation date for the new measures adopted) constituted non-compliance with the previous decision of 21st December 2011 and for this reason, for each commercial practice repeated, the ICA imposed fines for a total amount equal to €200,000 Euros, on ASI (€60,000 and €60,000), AIS (€20,000 and €20,000) and ARI (€20,000 and €20,000). However, the ICA considered the far-reaching actions undertaken by Apple to completely cease the unfair practices, and assessed them positively.

In fact, Apple completely modified the way information was conveyed to consumers on the legal guarantee, emphasizing its existence in every relevant part of the website (as well in the FAQ and in the terms and conditions).

Apple decided to sell the APP packages only through the website and modified the package,

¹ Decisions n. 4455-4456-4457/2012.

eliminating any reference to duration and coverage.

The Apple case carried out by the Italian Competition Authority has been recognized as a leading example of consumer protection enforcement at the EU level.

Following the ICA's decision, EU Commissioner Vivianne Reding sent a letter to all member states soliciting the other jurisdictions to verify and ensure the traders' full implementation of the EU legal guarantee regime.

Many consumers' association, primarily The European Consumer's Organization (BEUC), sued Apple in court in other jurisdictions in order to broaden the geographical scope of the changes in Apple's commercial policies obtained in Italy.

Owing to the ICA's enforcement action, the legal guarantee regime is now widely and generally applied in Italy. It also made traders change their commercial behavior, bringing a cultural change and filling the informative gap between sellers and consumers, certainly improving consumers' welfare.