

A draft bill on planned obsolescence, which extends, inter alia, to 10 years the duration of the statutory warranty and to 7 years the obligation to supply spare parts, has been brought on its legislative way

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The Italian Senate has recently begun examining the bill presented to the House of Representatives and Senate by the Five Star Movement (“ *Movimento Cinque stelle* “), aimed at combating planned obsolescence. The bill provides, inter alia, for the extension of the statutory warranty up to 10 years, the obligation of manufacturers to supply spare parts for at least 5 years from the cessation of production of each product, and the imposition of a criminal penalty and a heavy fine. The supervisory role has been entrusted to the existing National Council of Consumers and Users, set up at the Ministry of Economic Development (MISE) and made up of the main consumer associations.

Planned obsolescence definition

In May 2019, the Italian Senate began the discussion of a bill against ‘planned obsolescence’ presented to the House of Representatives and Senate during 2018 by the Five Star Movement. The bill aims to introduce a number of important amendments to the Italian Consumer Code (Legislative Decree 206/2005). The definition of planned obsolescence (Article 1) is very broad and includes “ ...**a range of techniques and technologies through which the manufacturer ... in designing a consumer good, intentionally shortens the life or potential use of the same good, in order to increase its replacement rate**”. Fall within the definition of ‘planned obsolescence’ and are prohibited all those activities contributing to this effect, such as (a) the use of construction techniques having the effect of **accelerating the wear** of a good, or (b) prevent or hinder **its repair**, or (c) making it necessary to **replace more than one component**, or, (d) the inclusion in the good of **special control or counting systems** leading to its obsolescence or, finally, (e) the use of software **components or operating systems** having the same effect.

It should be noted that with two recent ‘pioneering’ and controversial decisions, the AGCM (Italian Competition Authority) has fined two well-known manufacturers for the alleged planned obsolescence of their smartphones; the fines imposed were challenged and the related proceeding is still ongoing (<http://www.datamanager.it/2018/10/apple-e-samsung-multate-dallantitrust-per-lobsolescenza-programmata/>).

Information obligations

The objective of preventing and suppressing planned obsolescence is first pursued by increasing the information requirements of manufacturers and sellers, since the products and their packaging should also include indications regarding “*the guaranteed life span and presumable duration of the product*” (Articles 4 and 5).

Extension of the statutory warranty duration

Let us now come to the ‘sore points’: in fact, while up to this point the bill could receive broad consensus, drastic and highly questionable amendments are foreseen from Article 6 onwards of the Consumer Code.

Before examining these amendments, it is worth recalling briefly what is the statutory warranty provided for by the Consumer Code. The remedies provided for are 4, divided into two alternative pairs.

First two remedies: (i) Replacement or (ii) Repair: To start with, the consumer has the choice of opting either for the replacement or repair of the product. However, this is not a totally arbitrary choice, but very much dependent on a number of objective parameters: the consumer can opt for the replacement only when repair: (a) is objectively impossible, or (b) represents a disproportionate remedy since excessively burdensome for the seller.

Next two remedies: (iii) Termination of the contract or (iv) Price reduction: The consumer can resort to this second pair of remedies only if the first two are: (a) materially impossible, or (b) the seller has not repaired or replaced the product or if, in having tried one of these remedies, he has caused significant inconvenience to the consumer. In the event of the consumer opting for the termination of the contract or for the reduction of the price, the choice between one and the other of these two remedies is left at his sole and unappealable discretion.

However, the 3 deadlines currently provided for by the Consumer Code for exercising the warranty rights by consumers are the following: (1) **Two-year limitation period:** the lack of conformity must become apparent within 2 years from delivery of the product; (2) **Two months limitation period** (for exercising the right): the consumer must report to the seller the conformity defect within 2 months from its discovery; (3) **26 months limitation period** (for exercising the action): in addition, the consumer must take legal action (if necessary) against the seller within 26 months from the delivery of the product. It is worth noting, finally, that the product that presents a conformity defect within six months from the date of purchase, will be presumed not to have been in conformity from the very beginning, and therefore covered by the statutory warranty.

The bill under review increases by up to five times the previous two-year period of the statutory warranty and extends to one year the presumption period of non-conformity of a product whose non-obvious defect becomes apparent within this period. For comparative purposes, the following summary Table 1 shows the proposed amendments.

TABLE 1 – Warranty				
Type of good	Draft bill: Warranty duration	Draft bill: Presumption of defect	Draft bill: Limitation period for the legal action	Consumer Code current text
Small sized domestic appliances/goods	5 years	1 year	4 years	2 year warranty; 6 months presumption of defect; 26 months limitation period for the action
Large sized domestic appliances/goods	10 years	1 year	8 years	2 year warranty; 6 months presumption of defect; 26 months limitation period for the action

As can be seen, the duration of the warranty, as well as that of the related action, varies depending on

the size of the good or appliance, but it is not absolutely clear what parameters are used for determining when a good or appliance should be defined ‘large’ or ‘small’. Likewise, it is difficult to understand the limitation period for the action envisaged by the bill for enforcing the warranty rights through legal action (increased to 4 and 8 years), given that this term should be longer and certainly not shorter than that of the limitation period for the warranty (increased to 5 and 10 years). Extending the warranty period up to 10 years would de facto create favourable conditions for distance sellers operating from other countries, especially non-EU members, to the disadvantage of the Italian ones. In fact, although foreign distance sellers would be too subject by law (Article 61, Law 218/1995) to the obligations examined here in terms of extended warranty, in practice it would be extremely burdensome for consumers to take legal action against them, just as it would be very burdensome and costly for the authorities to sanction them.

Obligation to provide technical assistance and supply spare parts

The bill sets out in Article 7 the minimum statutory terms for which the technical assistance service must be provided (5 years) and for the supply of spare parts (7, 5 or 2 years, depending on the case); in both cases, the periods start to run “from the date of cessation of production” of the good in question (Article 7). All such terms are better detailed in the summary Table 2 below.

TABLE 2 – Service and Spare parts			
Type of good	Draft bill: Technical assistance	Draft bill: Spare parts	Current situation
Electrical and electronic equipment and all other goods that depend on energy use/transformation, for functional parts priced over EUR 60	5 years	7 years	<u>Service</u> Technical assistance must be provided for two years by the seller wanting to avoid replacing the product under the statutory warranty.
Electrical and electronic equipment and all other goods that depend on energy use/transformation, for functional parts priced under EUR 60	5 years	5 years	
Electrical and electronic equipment and all other goods that depend on energy use/transformation, for purely aesthetic and non-functional parts	5 years	2 years	<u>Spare parts</u> Save in exceptional cases, there is no a statutory period for the supply of spare parts.
Any other durable consumer good	5 years	5 years	

Here too it is worth mentioning the current legislative and regulatory framework: there is no today a specific law requiring the supplier, in the absence of contractual arrangements with the buyer, to keep available a certain quantity of spare parts for a defined period of time. In the case of supply of goods to a non-professional consumer (through sale, works contract or other agreements), it is however possible for the supplier of the goods to derive a benefit and an opportunity in maintaining a stock of spare parts for at least two years, both on the basis of the statutory warranty regulations and those relating to unfair commercial practices¹, equally

¹ According to Article 21 of the Italian Consumer Code, is classified as a misleading commercial practice, and therefore prohibited, any “...commercial practice that contains information of an untrue nature or, even if the information is factually correct, in any way, including overall presentation, deceives or is likely to deceive the average consumer in relation to one

contained in the Consumer Code². Similarly, also as regards the technical assistance there is no a precise time constraint that goes beyond the current two-year duration of the statutory warranty, during which the seller (or rather the manufacturer in case of recourse) intending to avoid the more expensive remedy of replacing the product (or terminating the contract) must necessarily guarantee a repair service, free of charge if necessary.

In Europe, only the **French legislation** (and the Spanish one, which will be discussed below) provides that in the case of supply of goods to a consumer there is the obligation, although not sanctioned, to communicate the availability of spare parts. In fact, Article 111-2 of the “*Code de la consommation*”, provides that in case of transfer of movable goods, the supplier is required to communicate to the buyer the period of availability of spare parts; however, no sanctions are specified if this obligation is not respected.

In Spain, the Ley 1/2007 establishes that the producer or, in the absence thereof, the importer, will in any event warrant to the buyers the existence of an appropriate technical service for durable goods manufactured or imported by the same, as well as the supply of spare parts for a minimum period of five years starting from the time in which the product is no longer manufactured. Always in Spain, the Royal Decree 58/1988 of 29 January 1988 on the protection of consumers rights in the supply of domestic appliances (from which the bill in question probably took inspiration), establishes that the supply of spare parts must be guaranteed for the following time periods, all starting from the date that production ceases: (a) 7 years for functional parts priced over EUR 60.10; (b) 5 years for functional parts priced under EUR 60.10; (c) 2 years for purely aesthetic parts (such as a TV cabinet or a mobile phone casing).

Therefore, also in this case the bill seems disproportionate and extremely burdensome for all actors in the chain going from the manufacturer/importer up to the final consumer, who as a consequence of these further burdens would see the associated costs reflected in the pricing of goods, to the benefit of online sellers operating from other countries and not burdened with such additional expenses. Also from the point of view of combating planned obsolescence, where it effectively exists, the remedies envisaged raise questions as regards their highly dubious effectiveness. In fact, technical assistance and spare parts, if provided outside the warranty period, would not be free of charge and therefore, if the product were designed to have a limited duration in time, the repeated repairs would prove either impossible or uneconomical for consumers.

Supervision and sanctions

or more of the following elements, and in case, causes or is likely to cause him to take a decision of a commercial nature that he would not otherwise have taken: (...) b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after sale customer assistance and complaint handling... (...) e) the need for a service, part, replacement or repair”. It follows that, at least conceptually, failure to inform the consumer prior to the purchase that the spare parts necessary for the maintenance and/or repair of a product sold will not be available for a certain reasonable period of time can be regarded as a form of misleading advertising. As of today, however, there is no case law on the subject.

² For those interested in learning more, see my following article (in Italian):
<https://www.avvocatoiorio.it/wp-content/uploads/2017/03/Articolo-su-Market-Place-25-MKT.pdf>

Article 9 of the bill provides for the imposition of a criminal penalty for producer and distributor (imprisonment up to two years) and a fine of EUR 300,000.00, for having “*misled or attempted to mislead the consumer, by any means or process, also through third parties*” on the use of planned obsolescence techniques and/or the nature and/or quality of consumer goods, on their suitability for use and/or on the lifespan of the consumer good. The supervision has been entrusted to the National Council of Consumers and Users, set up at the MISE (Ministry of Economic Development) and whose impartiality cannot be assured since constituted by the main consumer associations³.

The imposition of a criminal penalty is undeniably open to criticism, in that it is excessive and unbalanced, and appears, moreover, to derive from a conduct described in very vague and all-encompassing terms so as to appear possibly illegitimate from the outset.

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³<https://www.mise.gov.it/index.php/it/mercato-e-consumatori/associazioni-dei-consumatori/cncu>