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Alessandro Gravante

1. Introduction

Six years after the overhaul of Italy’s civil code, Law No. 52/1996 transposing the Council Directive on unfair terms in consumer contracts has once again prompted the Italian legislature to amend the corpus iuris civilis – and for a second time, at the behest of Community organs.

The high priority that Community institutions assign to consumer protection issues is underscored by Article 153(1) second time, at the behest of Community organs. The article states that the Community shall contribute to a high level of consumer protection through measures adopted pursuant to Article 95 EC.

In 1996, as Section 14 bis (“Consumer contracts”) was added to the second title of the fourth book of the Italian civil code, it so happened that Legislative Decree No. 24/2002, the law transposing Directive 1999/44/EC, introduced Section 1 bis (“The sale of consumer goods”), composed of Articles 1519 bis – 1519 nonies into Section 2, Chapter 1, Title 3 of the Codice civile (hereinafter: “c.c.”).

There was a sentiment in part of the literature that the time was ripe for the creation of a single text embracing all consumer protection statutes in one organic unit. Contrary to these expectations, the Italian legislature eventually chose to tack another component of consumer protection onto the already existing regulations, once again relegating the consumer to a weaker status vis-à-vis tradesmen in contractual relations with respect to contracts for “consumer goods”.

In contrast to the German parliament, which had seen the transposition of Directive 1999/44/EC as an opportunity for the fundamental reform of sales law in its civil code along the lines contained in the Directive (the “big solution”), Italian lawmakers opted for a more limited alternative (the “small solution”), i.e. transposing the Directive in a separate section of the civil code.

In light of the new regulation entitled “The sale of consumer goods” added right after the second section of the first chapter of the book on the law of obligations, the Italian statute can be characterised as a dual track system. While sales in general are regulated by the provisions of Articles 1490 et seq. c.c., the sale of consumer goods is governed by a separate set of special rules.

As a result, protections for “consumers” are even more extensive in the case of a contract for the sale of “consumer goods”. This protection goes beyond the warranty of quality consisting of three distinct elements (i.e. the warranty for hidden material defects (Articles 1490-1497 c.c.), for the absence of features (Article 1497 c.c.) and for incorrect delivery).

2. The amendment text

Legislative Decree No. 24 of 2 February 2002 contains two articles. Article 1 regulates the sale of consumer goods and introduced the above-mentioned Section 1 bis and related Articles 1519 bis to 1519 nonies into the Italian civil code. Transitional provisions are set out in Article 2.

On the basis of Directive 1999/44/EC, Article 1519 bis c.c. limits the scope of application of the new legislation to certain haps too extreme view expressed in De Cristofofo, Difetto di conformità al contratto e diritti del consumatore, Padua (I), 2000, at 268 et seq., calling for the total repeal of Articles 1490-1497 c.c.

In Germany, Directive 1999/44 was transposed by means of the Schuldrechtsmodernisierungsgesetz (Law on the reform of the law of obligations) of 26 November 2001 (BGBl. 2001 I, at 3138).

The relevant law was published in [2000] 57 GURI on 8 March 2002 and entered into force on 23 March 2002.
aspects of sales contracts and guarantees relating to consumer goods. An inventory of useful definitions has been added in order to ensure an accurate interpretation in this regard.

The provisions apply mainly to the following types of contracts: contracts for the sale of consumer goods; barter contracts; subscriber contracts; work contracts for services concluded by undertakings; simple work contracts as well as all other contracts for the supply of consumer goods that must be manufactured or produced. Under the last paragraph of Article 1519 bis c.c. this also holds true for contracts for the sale of used consumer goods, taking into account the duration of use and, to a lesser extent, any defects resulting from abnormal use of the good.

Pursuant to Article 2 of Legislative Decree No. 24/2002, the new provisions do not govern contracts for the sale of goods or similar contracts where the consumer took possession before 23 March 2002, the date the legislation entered into force. With respect to its temporal application, the decree clearly does not refer to the point in time at which the contract was concluded, but rather the point at which the goods were delivered. The rationale is twofold: First, with this type of contract, delivery of the goods has significant relevance for the consumer; second, the Community Directive is self-executing, since the deadline for its implementation had already lapsed on 1 January 2002.

The experience of Community lawmaking demonstrates the advisability not only of posting guidelines for national legislatures to promote harmonisation in the laws of the Member States, but also of establishing a common basis for the creation of national regulations in the domestic legal systems of EU countries. Article 1519 bis thus defines the most important concepts for the error-free interpretation of the section introduced by the decree. In particular, this includes terms such as “consumer”, “consumer goods”, “seller”, “producer”, “contractual warranties agreed upon after the original contract” and “cure of defects”. Further attention to the term “consumer” is not necessary, given that this concept has already become engrained as part of Italy’s legal culture with the introduction of the “Community definition” in Article 1469 bis c.c. of the 1996 amendment.

However, it would be useful to take a closer look at the term “consumer goods”, which lies at the heart of the new legislation. The legislature has provided a comprehensive definition of “consumer goods”, subsuming under this term all tangible movable items and excluding from its scope of application – as suggested by the EU political committee of the Italian Chamber of Deputies – specific goods clearly falling outside the new statute (e.g. goods obtained in a forced/judicial sale; electricity, and water and gas where they are not put up for sale in measured quantities). Among the various actors affected by the legislation, it is worth take note of the “seller” (i.e. any particular “tradesman” making use of those contracts mentioned in the first paragraph of Article 1519 bis) as well as “producer” (a term which had already been defined in Article 3 of Legislative Decree No. 115/1995 on general transportation security). The latter term encompasses manufacturers of consumer goods and importers of these goods into the territory of the European Union, as well as all other persons advertising themselves as manufacturers by affixing their names, trade marks or other distinctive signs on the consumer goods.

3. The concept of “conformity with the contract”

The term “conformity” of goods was already introduced into the international legal panorama by the 1980 UN Convention on Contracts for the International Sale of Goods (hereinafter: “CISG”), which was ratified in Italy by Law No. 765/1985.

The CISG text – and Article 35 in particular – provides defines “conformity of goods” in the negative: Article 35 states that goods do not conform with the contract if they do not meet certain requirements. In contrast, the positive definition of “conformity with the contract” in Article 1519 ter c.c. means that the exact requirements must be present to establish liability on the part of the seller.

The seller is obliged under Article 1476 c.c. to deliver the goods to the consumer. Added to this obligation is the requirement that the delivered goods must conform with the description in the sales contract.

Up to now, the Italian civil code has limited the buyer’s protections to only those cases in which the goods sold have a material defect, are lacking in a characteristic or have been incorrectly delivered.

Directive No. 1999/44/EC extends this protection by requiring that the goods be “in conformity with the contract”. It stands to reason that this somewhat artificial phrase was used by the legislature in an effort to capture a number of characteristics in a single phrase.

To begin with, the requirement of “conformity with the contract” obviously must be satisfied with respect to the subject-matter of the contract: this is determined by the totality of the contractual obligations – including those only tacitly

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7 In this regard, it should be noted at this point that the term “consumer” (consumatore) refers to natural persons acting for purposes unrelated to his trade, business or profession. A “tradesman” (professionista), in contrast, is a natural person or a legal person (public or private) entering into a contract with a consumer for the sale of goods or services within the scope of his business or professional activities (see in this regard Article 1469 bis).

8 See Article 1519 bis c.c.


10 See Section 2 – The conformity of goods with the contract and rights or claims of third parties.

11 Pursuant to this article, the seller’s primary obligations consist of: 1) delivering the goods to the purchaser, 2) enabling the acquisition of ownership in the goods or of the right, if the acquisition is not a direct effect of the contract, 3) giving the purchaser a warranty against withdrawal or defects of the goods.

12 See Article 2(1) of the Directive. This provision, transposed in Article 1519 ter c.c., has resulted in the annulment of the traditional rule under Article 1477(1) c.c. which read: “The goods must be delivered in the same condition that they were in at the time of purchase.”
agreed to. General principles of interpretation make it possible to determine whether the goods that are delivered by the seller actually live up to the stipulations of the contract.\textsuperscript{13}

However, in the event that determining conformity proves impossible due to insufficient or imprecise specifications in the contract, the legislature has introduced certain "presumptions". One such presumption is that goods are assumed to conform with the contract. This presumption entails a number of corollary provisions covering: a) the appropriateness of the goods for the purposes for which similar goods are normally used; b) the conformance with the seller’s description or with the sample or model presented to induce the consumer to buy the good; c) the fact that the goods exhibit the quality and performance typical to goods of the same type which the consumer can reasonably expect, given the nature of the goods and taking into account, for example, any public statements on the specific characteristics of the goods by sellers, producers or their representatives, particularly with respect to advertising or labelling; and lastly d) the suitability for any particular purpose required by the consumer that is expressly or impliedly made known to the seller and accepted by the seller at the time of conclusion of the contract.

The same article also provides that a nonconformity does not exist if the consumer was aware or could not reasonably be unaware of the lack of conformity with the contract at the time it was concluded, or if the lack of conformity can be traced to instructions or materials furnished by the consumer.

The seller is not bound by public statements made by him under c) above and thus not liable if he can demonstrate: that he had no knowledge of these statements and could not reasonably be expected to have knowledge of the statements; that the statement was duly corrected at the time of conclusion of the contract and the consumer was aware of this correction; or that this statement could not have influence the decision to buy.

The presumption of Article 1519 \textit{ter} c.c. has essentially reversed the burden of proof in order to create an even more comprehensive protections for consumers with respect to statements falling under c) above at the expense of sellers and producers making such statements. If one of the aforementioned situations exists, the purchaser is exempted from the burden of proof with regard to the nonconformity of the goods, insofar as this is provided for in the contract (a rebuttable presumption).

The tenth commission of the Chamber of Delegates had proposed repealing this reversal of the evidentiary burden so as not to complicate the seller’s procedural position to such an extent. However, it was noted that the reversal ensued from the transposition of Article 2(4) of Directive 1999/44/EC, which the national legislature may not circumvent. Moreover, the rule satisfies the consumer’s needs, since the consumer is viewed as the weaker party in the contractual relationship. The seller’s eventual right of recourse against the producer of the goods remains unaffected.

4. The seller’s liability and available remedies in the event of contractual nonconformity

The provisions on consumer protection constitute the core of the legal reform.

Article 1519 \textit{quater} c.c. provides that the seller is liable for any nonconformity present at the time the goods were delivered.

In this regard, one may ask whether the statute’s reference to the time of delivery was intended to change the way contracts \textit{in rem} are ordinarily governed, i.e. the transfer of risk from seller to purchaser occurs at the moment at which legal consent exists between the parties.\textsuperscript{15}

It should be emphasised that the reference to the time of delivery does not imply that Member States must change their rules on the transfer of risk; this is clear from recital no. 14 of the Directive. In the Italian legal system, defects which occur after the conclusion of the contract (even when they exist before the delivery) present a risk that the buyer must bear as owner of the good.\textsuperscript{16} Thus, the provision obviously aims at no more than an enhanced level of consumer protection to the extent to which it applies to the delivery of goods (which occurs after the transfer of possession).

The remedies available to the consumer in the event of nonconforming goods are essentially limited to the right to have the goods brought into conformity with the contract (at the seller’s expense) by repair or replacement within a reasonable time, or alternatively the right to rescind the contract. The consumer’s choice of subsequent repair or replacement of the goods is restricted to the extent to which the chosen remedy is objectively impossible or disproportionate in comparison to the other remedy. The concept of “disproportionality” takes into account the value that the goods would have had if they were conforming, the significance of the nonconformity and the question as to whether the alternate remedy could be reverted to without significant inconvenience to the consumer.

The consumer is entitled to choose between an appropriate reduction of the purchase price or rescission of the contract only in cases: in which repair or replacement is objectively impossible or disproportionate; in which the seller has not completed the repair or replacement within a reasonable time; or in which the previous replacement or repair of con-

\textsuperscript{13} Articles 1362-1371 c.c., which regulate the interpretation of the contract, are primarily consulted for these purposes. In light of the analytical and exhaustive nature of these norms, the question arises as to the significance (if any) that the presumption rule contained in the new Article 1519 \textit{ter} c.c. can assume.

\textsuperscript{14} See, e.g., Mariconda, Conformità al contratto dei beni di consumo e onere della prova, [8/2002] Corriere Giuridico 1095 et seq.

\textsuperscript{15} Article 1376 c.c. – \textit{Contract in rem} – provides as follows: “With regard to contracts concerning the transfer of ownership in a specific good, the creation or transfer of a right \textit{in rem}, or the transfer of another right, the ownership or right is transferred and acquired on the basis of the legal consent of the parties”.

\textsuperscript{16} This applies according to the Roman law principle of \textit{res perit domino}.

\textsuperscript{17} This represents a departure from the criterion proposed in the Directive for “rationality” with regard to the time limit; the criterion of “ap-
sumer goods brought about such a significant inconvenience to the consumer that the continued measures necessary for the remedy of defects are seen as objectively unreasonable.

After notification of the nonconformity, the seller may offer to cure as provided for in the legislation. This can occur in two different situations. If the buyer has not demanded any specific remedy, he must accept or reject the proposal made by the seller and simultaneously require another remedy. Alternatively, if the buyer has already requested a specific remedy, Article 1519 quater, paragraph 6 c.c. obliges the seller to perform within a reasonable time unless the consumer prefers the other remedy presented to him.

In order to not unduly disadvantage the seller, the last paragraph of Article 1519 quater c.c. provides the consumer the right to demand a reduction of the price – but not rescission of the contract – when repair or replacement would be impossible or disproportionate.

Up to this point, the orientation of the legislative provisions clearly regards the remedies for bringing about conformity with the contract as those which best correspond with the interests of the consumer; in this way remedial action is favoured over termination.

This raises the question whether the hierarchical relationship among the various potential remedies created pursuant to the legislation can circumscribe the rights of the consumer in cases where the consumer would prefer rescission although a repair or replacement of the goods is possible.

Although the new law extends the protections already afforded by Article 1490 et seq. c.c., this latter provision has not been replaced. This extended protection is set apart from the regulation in the Italian code. Unaffected are the rights of buyers to bring actions under the general provision relating to the sale of defective goods, insofar as the requirements have been satisfied. Moreover, it should be reiterated that consumer protection cannot assume the form of a remedy that unreasonably disadvantages the tradesman: This would lead to a disproportionate imbalance between the two contractual parties, even if the protective norms would intervene to cure as provided for in the legislation. This can occur in the event that any nonconformity which becomes apparent within the first six months following delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or of the nonconformity.

The statutory period of limitation for asserting claims for defective goods where the defect was not fraudulently concealed by the seller is 26 months from the time of delivery. In the exceptional case where the consumer is summoned before the court for performance of the contract, the consumer can assert his rights under the second paragraph of Article 1519(2) quater, provided that notification of nonconformity was made within two months from the date of delivery and before expiry of the limitation period of 26 months.

Finally, the new regulation establishes a so-called contractual guarantee. In this regard, a distinction must be made between the guarantee in the legislation and the independent guarantee offered by the seller. Whereas the former is an obligatory guarantee provided for by law which cannot be excluded by the parties, the latter essentially provides for a more comprehensive protection of the purchaser, insofar as it is voluntarily offered by the producer or seller of his own free will, i.e. parallel to the statutory guarantee. This has recently dealt with a widespread form of guarantee of importance for effective competition and associated advertising.

The contractual guarantee under Article 1519 septies c.c. is classified as a freestanding guarantee: this is clear from the definition in Article 1519 bis, (c) c.c., which refers to the con-

5. Time limits, duration and validity of guarantees

Article 1519 sexies c.c. provides that the seller is liable for nonconformity of goods where this becomes apparent within two years from delivery of the goods. The buyer must then take steps to inform the seller of the nonconformity within a period of two months from the date on which the nonconformity was detected; otherwise he forfeits his rights under Article 1519 quater c.c.

This protection is clearly somewhat more extensive than provided under the general provisions regulating sales in the Italian code.

Indeed, the amendment allows for a preclusion period of two months for consumer goods, as opposed to a mere eight days under Article 1495(2) c.c. and a bar on claims brought after twelve months from delivery. As in the case of the general provision, notification is not necessary if the defects were known to or concealed by the seller. Furthermore, Article 1519 sexies c.c. introduces the iuris tantum presumption that any nonconformity which becomes apparent within the exceptional case where the consumer is summoned before the court for performance of the contract, the consumer can assert his rights under the second paragraph of Article 1519(2) quater, provided that notification of nonconformity was made within two months from the date of delivery and before expiry of the limitation period of 26 months.

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cepts “specifications set out in the guarantee statement or in the relevant advertising” as well as “extra charges”.

The contractual guarantee is legally binding for the offeror under the conditions laid down in the guarantee statement and the associated advertising; moreover, this guarantee must be set out in a written document or feature in another durable medium drafted in Italian and available to the consumer upon request.

The provision lays out the minimum contents for the guarantee. In particular, the consumer must be informed of his legal rights under Article 1519 bis – 1519 nonies c.c and it must be clearly stated that these are not affected by the guarantee. The contents of the guarantee must furthermore include the essential particulars necessary for making claims under the guarantee, such as the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

Article 1519 octies c.c. provides that the consumer is not bound by agreements which are concluded with the seller before the nonconformity is brought to the seller’s attention and which directly or indirectly waive or restrict the rights of the purchaser of consumer goods under Legislative Decree No. 24/2002. Only the consumer may raise defenses of voidness, which can be officially established by the court.

With this regulation, the Italian legislature appears to have abandoned the defense of invalidity adopted in the 1996 amendment in the area of abusive clauses, in favour of a return to voidance. In this regard, it was established in 1996 that invalidity is the mere consequence or implication of a pathological phase in the legal relationship following the infringement of an imperative norm, which results in nullity. The provisions discussed – which appear to bring sanctions for the nonobservance of consumer protection rules more in line with the Italian legal tradition – have thus come at the right time.

6. Conclusion

The implementation of Legislative Decree No. 24/2002 represents another step in the regulation of consumer protection as part of the harmonisation process within the European Union.

The need for a Community regulation of consumer protection in the area of contractual guarantees goes back to the mid-80’s. The adoption of Directive 85/374/EEC concerning liability for damage caused by defective products and Directive 85/577/EEC on contracts negotiated away from business premises marked the start of a long series of legal initiatives culminating in the adoption on 15 November 1993 of the Green paper on guarantees for consumer goods and after-sales services. This document led to the adoption of Directive 93/13/EEC (which itself occasioned the 1996 amendment relating to abusive contractual clauses) and Directive 97/7/EC in respect of distance contracts. After various modifications, it also led to the elaboration of Directive 94/44/EC, which was concerned with the harmonisation of the divergent regulations in the Member States with respect to the sale of consumer goods. The goal was to allow consumers to purchase goods within the European Union with the awareness and guarantee of a minimum protection of assets. Legislative Decree No. 24/2002 gives a major push in this direction by introducing an entirely new concept into the Italian legal system with respect to “nonconformity”, even if the concept was already in use in international parlance (see Article 35 of the Vienna Convention of 1980). The essential uniformity with which this Directive was transposed into the domestic legal systems of the Member States played an important role in the creation of a legal instrument to which actions of the Community organs must aspire. In the field of consumer protection, it could mean the final step towards the creation of a single text as foreseen in Article 15(2) of Law No. 185/1999 and awaited for many years. A law of this sort covering consumer protection in its entirety would strengthen the uniformity and effectiveness in this area.

ECJ 21 November 2002 – C-473/00 – Cofidis SA v Jean-Louis Fredout

Directive 93/13/EEC¹ – Unfair terms in consumer contracts – Action brought by a seller or supplier – National provision prohibiting the national court from finding a term unfair, of its own motion or following a plea raised by the consumer, after the expiry of a limitation period

Council Directive 93/13/EEC on unfair terms in consumer contracts precludes a national provision which, in proceedings brought by a seller or supplier against a consumer on the basis of a contract concluded between them, prohibits the national court, on expiry of a limitation period, from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair.

Facts: By a contract of 26 January 1998, the plaintiff granted the defendant the opening of a credit. When instalments remained unpaid, the plaintiff brought an action on 24 August 2000 in the Tribunal d’instance (District Court), Vienne (France) for payment of the sums due.

According to the national court’s judgment, the offer of credit took the form of a leaflet printed on both sides, with the words