

# Product Liability & Consumer Contracts

## REGULATORY

### 1. Which are the main laws governing product liability?

The Consumer Code is the main legal enactment regulating product liability and consumer rights; it deals *inter alia* with consumers' access to goods and services, consumers' rights, producers' obligations, as well as the general rules applicable to non-governmental organisations and product security.

In addition, more detailed rules regarding the terms and circumstances when product liability is engaged are regulated by Law No. 449/2003 on selling products and ancillary warranties, Law No. 240/2004 on producers' liability for damages resulting from defective products, Government Ordinance No. 21/1992 on consumers' protection and Law No. 193/2000 on unfair clauses in contracts concluded between professionals and consumers. General norms governing tort and contractual liability as provided by the Civil Code supplement special legislation on product liability.

### 2. Which are the main Governmental and NGO Watchdog Bodies?

The Government's policy in the field of consumer protection is mainly coordinated by the National Authority for Consumer Protection (ANPC). The ANPC is responsible for the constant harmonisation of the Romanian legislation with the EC laws, as well as for supervising compliance with specific legislation applicable to the sale of consumer goods.

Non-governmental organisations in the field of consumer protection have several prerogatives such as the right to participate to consultative councils (organised based on territorial criteria and in charge of enforcing the consumer protection policy and coordinating the activity of public institutions and non-governmental organisations in

the field of consumer policy) and to run consumer information and consulting centres subsidised with public funds.

The observance of the product liability laws ultimately falls within the remit of the courts of law.

## **SCOPE OF PRODUCT LIABILITY RULES**

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### **1. Who is protected?**

The main subject of the protection granted by product liability laws is the “consumer” which is a person legally deemed as having limited knowledge as regards the risks generated by the use of products.

The concept of “consumer” refers to not only the purchaser of a product directly from the producer, but also to any subsequent acquirer (i.e. the end-user), to the extent the concerned product was normally designed for private consumption. Should any of these persons incur damages resulting from a defective product, they may file a claim against the seller.

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### **2. Who bears legal responsibility?**

Product liability applies only to professionals and not to private individuals.

As a general rule, the liability for defective products is borne by the seller, as the primary contact against whom the consumer may claim product liability, and by the producer, as ultimate bearer of responsibility. Under the law, whenever product liability is triggered based on a warranty obligation towards the consumer, the “seller” of the product shall be held liable first. The seller is defined as the person who, during its professional activity, sells products based on agreements concluded with consumers. If the seller’s liability is triggered due to a lack of conformity in the product resulting from an action or omission of the producer, or of another economic operator from the same contractual chain, the seller is entitled to redress against the entity responsible for such lack of conformity. The term “producer” covers the manufacturer of the finished product, of the raw material, or of various components of the product; any person representing itself as producer by way of applying its name, trademark, or other distinctive element on the product; the importer of a product in Romania, who shall be liable on the same terms as the manufacturer, etc.

The Consumer Code broadens the definition of the term “producer”, additionally including certain categories of entities such as: the economic operator that reconditioned the product; the distributor which, within the context of its business, alters the features of the product; the representative registered in Romania of an economic operator headquartered outside Romania; the importer of products aiming a subsequent sale, lease, leasing or any other distribution form.

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### **3. Which types of products fall under the scope of product liability legislation?**

Only movable goods fall under the scope of the product liability laws, including raw materials (either transformed or unchanged), including moveable goods incorporated into another good, be it moveable or immovable.

Legal scholars generally acknowledge that the category of “product” also includes medicines or even the parts of the human body (e.g. organs for transplants) or products of the human body (e.g. blood, male or female reproductive cells). Although not unanimously accepted, opinions have been expressed that also intangible assets (e.g. software) qualify as “products”, because they may harm the corporal integrity or health of the consumers, they may generate pecuniary damages, or even cause death.

## **RULES AND PROCEDURES OF PRODUCT LIABILITY CLAIMS**

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### **1. Which are the defects that trigger product liability?**

Any lack of conformity existing at the time of delivery may constitute basis for product liability. The concept of “defect” covers any deficiency in the product, be it a manufacturing defect or a design defect.

Product liability may also be triggered whenever the product fails to provide the security that the consumer is entitled to expect based on the foreseeable and reasonable purpose of utilisation of the product. However, this source of product liability may only be discussed in the context of tort liability for a damage caused to the consumer.

The notion of the defect is not automatically implied where products are dangerous by their nature (e.g. weapons) should the consumer be properly informed on the dangers associated with such products.

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## 2. Is there any term within which a defect may be claimed?

One needs to distinguish between where (i) the defect is claimed under the warranty obligation of the seller, and where (ii) the defect is claimed under the tort liability for damages caused by defective products.

As regards defects claimed under the warranty obligation the seller bears liability if the lack of conformity becomes apparent within two years from delivery of the goods. The consumer shall inform the seller on the occurrence within two months from the date the lack of conformity was discovered. Unless proven otherwise, any defect which becomes apparent within six months as of the delivery of the goods shall be deemed as having existed at the time of delivery, unless this assumption is incompatible with the nature of the goods or the nature of the defect.

Under tort liability, where the defect caused damages to the consumer, the prejudiced consumer can bring action in court for product liability. Such court actions are subject to a three-year term of statutory limitation, starting on the date the claimant knew or should have cumulatively known of (i) the existence of the damage, (ii) the existence of the defect and (iii) the identity of the producer. The law however provides that, in any case, any claim on product liability must be lodged with the court within ten years as of the date the producer released the product onto the market. Both the right to initiate legal proceedings, as well as the substantive right to indemnification cease upon the expiry of this 10-year term.

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## 3. What defences are there available to the seller / producer against liability for a defective product?

Law No. 240/2004 provides for a number of causes of limitation of the producer's liability, or exemption from liability related to defective products, among which: (i) where the product was not released on the market by the producer; (ii) where the defect that caused the damage did not exist at the moment the product was released on the market, or the defect appeared subsequently due to causes for which the producer bears no responsibility; (iii) where the defect results from complying with certain mandatory regulatory provisions; (iv) where the level of scientific and technical knowledge existing at the moment when the product was released on the market prevented the producer from discovering the defect; (v) where the defect was caused by the consumer's own actions.

Generally, the seller / producer will not be able to limit its liability towards the consumer if the damage occurs both because of a product's defect and a third party's

action or inaction.<sup>1</sup> However, the seller / producer may seek an indemnity from the third party who contributed to the damage (within the same proceeding initiated by the claimant or by separate lawsuit against the third party).

#### 4. What remedies are there available if a lack of conformity / defect occurred?

A distinction needs to be made between where the defect is claimed under the warranty obligation of the seller, and where the defect is claimed under the tort liability for damages caused by defective products.

If defects are claimed under the warranty obligation, the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered. The consumer is entitled to have the goods brought into conformity free of charge by repair or replacement, to have an appropriate discount in the price, or to have the contract partially rescinded (i.e. with regard to those goods). The price discount or the rescission of the contract may be applied only (i) if the defective good has not been repaired or replaced; (ii) if the seller has not provided complete remedy within a reasonable time; (iii) if, in remedying the defect, the seller caused significant inconvenience to the consumer. The consumer is not entitled to have the contract rescinded in case of minor lack of conformity.

By contrast, for defects claimed under tort liability the prejudiced party may seek indemnification. Under Law No. 240/2004, the following damages caused by a defect/lack of conformity must be covered: (i) damages deriving from the death or bodily/health injury, irrespective of whether the person was or not a contracting party (moral damages included); and (ii) damages deriving from the degradation or destruction of an asset, other than the defective product, provided that this asset is of a type ordinarily intended for private utilisation or consumption, and the value of the damage is not less than the equivalent in RON of EUR 500.

#### 5. What is the procedure for product liability claims?

Product liability claims are settled by the relevant courts of law under the rules of the Civil Procedure Code. Civil lawsuits are subject to a three-tier jurisdiction. This means that first court decisions may be challenged in higher courts under first-appeal procedure (on factual and legal grounds), while the decisions passed by appellate

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<sup>1</sup> The law provides for a specific exemption of liability in case of producer of components if he proves that the defect was caused by the design of the product into which the component was integrated or by the wrong instructions given by the manufacturer of the product into which the component was integrated.

courts may subsequently be challenged under second-appeal procedure (limited to technical and procedural grounds).

Under the law, the parties may any time prior to or during the litigation conclude a settlement with respect to any product liability claims.

Romania has transposed the EU directive on alternative dispute resolution (ADR) between consumers and traders. This legislation allows the out-of-court settlement of the consumer related disputes, by deferring it to independent and impartial extrajudicial resolution bodies (ADR Entities). It is to be noted that ADR may be used only if both consumer and trader agree in advance on such manner of dispute settlement. The solution issued by the ADR Entity will become binding upon the parties if they accept it, or if the parties do not challenge it within a specific deadline.

The general competence on settlement of disputes between consumers and traders (including disputes on product liability) belongs to the Department for Alternative Dispute Resolution (an independent body within ANPC specially created for this purpose in October 2016).

The ADR systems has a few clear advantages: it is easier to access, less expensive (it does not involve any special fees for ADR Entity), and faster (generally 90 days, and only exceptionally the procedure may exceed this term).

## **CONTRACTS CONCLUDED BETWEEN CONSUMERS AND PROFESSIONAL VENDORS**

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### **1. What clauses are deemed unfair and sanctioned as such?**

Consumer protection legislation focuses on establishing rules designed to ensure that contractual clauses are drafted in an accurate and clear manner allowing the consumer to understand their content. Ambiguous clauses will be construed in favour of the consumer.

Contractual clauses which are not subject to negotiation may be considered unfair if they lead to a significant imbalance between the parties' rights and obligations.

The law provides a non-exhaustive list of clauses deemed unfair, among which:

- Clauses providing for the unilateral right of the seller to amend the contract;
- Clauses whereby the consumer is not entitled to obtain remedies in case the seller

does not fulfil its contractual obligations;

- Clauses whereby the indemnifications the consumer has to pay in case of non-compliance with the contractual clauses are disproportionately bigger than the effective damage incurred by the seller; or
- Clauses providing for the right of the seller to unilaterally terminate the contract without a similar right being granted to the consumer.

Unfair clauses are deemed as null and void under the law. The standard of protection against unfair contractual clauses has been recently raised, as the applicable legal framework currently regulates a form of “*contamination effect*” of contracts containing unfair clauses.

Essentially, in cases where unfair clauses are found in standard contracts, ANPC and specialised NGO’s have been granted the right to ask in court for the systematic elimination of such unfair clauses from the entire portfolio of ongoing standard contracts of similar kind.

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## 2. What other rules govern specific types of contracts?

Besides the general consumers’ protection legislation applicable to all the contracts concluded between sellers and consumers, there are special legal enactments setting rules applicable to specific types of contracts, of which we mention the following:

- Distance contracts;
- Off-premises contracts;
- Credit contracts;
- Real estate intermediation contracts;
- Package and linked travel arrangements.

### 2.1. Distance and Off-Premises Contracts

The Romanian legal framework addressing the regime of business-to-consumer contracts has been amended in 2014 with a view to alignment with the provisions of the EU directives on consumer rights. Business-to-consumer contracts legislation establishes harmonised rules on information to be provided to the consumers generally and, particularly, when distance contracts and off-premises contracts are concluded.

Also, this legislation lays down unified rules addressing the consumers’ right of withdrawal from distance and off-premises contracts. More precisely, consumers have 14 days to withdraw from the contract without penalty and without providing any justification.

The only charge that may be imposed on the consumer for the exercise of such right of withdrawal is:

- The direct cost of returning the goods, except when:
  - The trader has agreed to bear them; or
  - The trader has failed to provide to consumer a notice of the right of withdrawal; or
  - The goods delivered to the consumer's home based on an off-premises contract, by their nature, cannot normally be returned by post mail.
- An amount necessary to cover any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods (if the case), unless the trader has failed to provide to consumer a notice of the right of withdrawal.

As a rule, if the consumer has exercised his right of withdrawal, the trader must reimburse all payments received from the consumer, including, if applicable, the costs of delivery not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract. As an exception, if the consumer has expressly opted for a type of delivery other than the standard delivery offered by the trader, the additional costs for such special delivery are not to be reimbursed.

## 2.2. Credit Contracts

Given the value and inherent sensitive nature of credit contracts, special legislation has been enacted as to ensure a minimum standard of protection for consumers entering into credit contracts, by way of imposing express obligations on providers of financial services. Specific norms set forth the information that needs to be provided to customers in the pre—contractual phase, upon marketing and advertising credit products, as well as the rules to be observed upon concluding credit contracts.

Financial services providers must inform consumers, in an accurate and exhaustive manner, on all the costs and risks related to the credit contract. Also, the interest, commissions, fees or other banking expenses need to be mentioned directly in the credit agreement rather than merely indicated by reference to other documents such as general terms of the provider, list of tariffs, etc. Amendments brought to the legal framework in view of the national transposition of Directive 2008/48/EC and Directive 2014/17/EU on consumer credit contracts further provide a broad array of protective measures for consumers (such as an obligation to provide specific information binding upon the financial services providers during the pre-contractual period, prohibition from imposing new, or the increase of the existing commissions, fees, taxes or banking costs, other than those provided by the law, during the performance of the credit agreement; a prohibition from imposing certain contractual clauses detrimental to



the consumers, etc.). Consumers have two procedural means for challenging clauses included in credit contracts which infringe aforesaid statutory standards: either (i) file a complaint with the ANPC followed, where unfair clauses are found, by requesting the court to apply administrative sanctions and amend/annul the unfair clauses; or (ii) directly challenge the defective contractual clauses in court.

### 2.3. Real Estate Intermediation Contracts

Consumer protection legislation sets particular focus on real estate intermediation contracts (including intermediation for sale-purchase and rent). Such contracts need to include, besides the regular clauses, a minimum set of compulsory clauses such as the maximum commission owed to the real estate agency, the exclusivity clause (if the case), as well as a clear determination of the cases where the customer owes the agency a commission. Statutory obligations have been imposed on real estate agents in the pre-contractual phase, such as the obligation to inform the interested customer on any legal or practical deficiencies or inconveniences related to the asset of which the agent is aware.

### 2.4. Package Travel and Linked Travel Arrangements

Romania has recently transposed into its legislation the provisions of Directive (EU) 2015/2302 on package travel and linked travel arrangements (i.e. national transposition via the Government Ordinance No. 2/2018). The enactment introduces enhanced and uniform rules for protection of the consumers in the context of travel / travel-related contracts (i.e. the so-called package travel and linked travel arrangements (LTAs)).

The most relevant legal requirements under the package travel and LTAs legislation may be summarised as follows:

- *Consumer information*: the traders must provide the consumers with a minimum set of information before entering into a contractual arrangement, such as: (a) itinerary with dates and number of nights included; (b) transport provided, including the times of departure and return, stops and connections; (c) accommodation details; (d) meal plan. Also, the law prescribes specific requirements regarding the information to be included in the contract confirmations sent by the traders.
- *Amendment of contractual terms*: travellers can transfer the package to another person after giving the organiser reasonable notice on a durable medium before the start of the package. Notices given by the travellers at least 7 days before the start date of the travel package are deemed reasonable. There are specific conditions applicable to the increase of prices by the traders, namely: (i) the contract expressly reserves that possibility; (ii) the price increase results only from cost of fuel or other power

sources, third-party tax or fee increases, exchange rates; (iii) the increase should be notified at least 20 days before the start of the package (together with a justification of the price increase and a relevant calculation); (iv) as a general rule, the increase cannot exceed 8% of the initial price (additional restrictive rules apply for the price increase exceeding this threshold).

- *Specific remedies for consumers with respect to contract performance:* consumers may ask that non-conformities be remedied within a reasonable period determined by the consumer; where a significant proportion of the travel services cannot be provided as agreed, suitable alternative arrangements of equivalent or higher quality services should be offered at no extra cost; travelers may unilaterally terminate the agreement if the performance of the obligations under the package is substantially affected by the non-conformity and the trader failed to remedy it; specific liability for traders in case of technical errors during the booking process.
- *Insolvency protection:* the law regulates specific obligations so as to provide adequate securities for the refund of all payments made by or on behalf of travelers should travel agencies become insolvent.