

# **INTERNATIONAL PRODUCT LIABILITY**

Second Edition

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Printed in the United States of America.  
ISBN: 978-1-57823-286-4

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Juris Publishing, Inc.  
71 New Street  
Huntington, NY 11743 USA  
[www.jurispub.com](http://www.jurispub.com)

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# Ukraine

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## Introduction

The law applicable to product liability in Ukraine establishes a general principle by which a manufacturer (seller) is obligated to provide the consumer<sup>1</sup> with products of appropriate quality and provide consumers with accurate and exhaustive information about the products that are supplied.

As a significant legislative measure to reinforce the product liability regime, Ukraine has recently passed two important laws in the area of product safety, which establish the framework for the enforcement of rules on safety of non-food products and took effect July 2011.

The new laws supplement the existing Ukrainian legislation on product safety and include rules on product liability, consumer protection, standardization and certification, safety of food products and pharmaceuticals, and similar measures. The laws are not limited to the protection of individual consumers and apply equally to commercial transactions.

## Legislative Framework for Product Liability

The general laws determining manufacturer liability are the Civil Code<sup>2</sup> and the Law on Protection of Consumer Rights (the Consumer Protection Law).<sup>3</sup> Specific laws regulate matters connected with certain types of products. Food product matters are regulated by the Law on Quality and Safety of Food Products (as amended),<sup>4</sup> while issues connected with medicines are governed by the Law on Medicines (as amended).<sup>5</sup>

A separate group of regulations includes acts governing standardization and certification of products and product compliance with technical standards and regulations. These regulations include the Decree on Standardization and Certification;<sup>6</sup> the Law on Standardization;<sup>7</sup> the Law on Standards, Technical

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1 For the purpose of this chapter, any reference to manufacturer will include reference to seller, unless manufacturer and seller are specified separately.

2 Law Number 435-IV of 16 January 2003.

3 Law Number 1023- XII of 12 May 1991.

4 Law Number 771/97-VR of 23 December 1997.

5 Law Number 123/96-VR of 4 April 1996.

6 Cabinet of Ministers of Ukraine Decree Number 46-93 on Standardization and

Regulations, and Procedures for Assessing Conformity;<sup>8</sup> and Order Number 28 on state standards and technical regulations.<sup>9</sup>

Ukrainian law provides various definitions of the notion of ‘manufacturer’. Within the meaning of the Consumer Protection Law, a manufacturer is distinct from the seller or supplier of products. A manufacturer is a business person that manufactures products, or claims to be the manufacturer of the products or claims to manufacture such products on order, while placing his name, trade mark, or other element identifying the subject of business activity on the products, and/or packaging, or in the documents provided to a consumer together with the products;<sup>10</sup> alternatively, a manufacturer is a business person that imports the products.

Within the meaning of Ukrainian laws concerning standardization and certification of products, a manufacturer may act personally or be represented by representatives. In most cases, the manufacturer and the seller are equally liable for product-related damage. The consumer has the option to request compensation for damage either from the seller or the manufacturer. The easiest way for a consumer is to apply to the direct seller of the product.

## Theories of Liability

### In General

Ukrainian law establishes several criteria for the manufacturer’s liability. A manufacturer is responsible for the proper quality of its products and for product safety; for provision of necessary, clear, reliable, and timely information about products, their quantity, quality, and product range, as well as for providing information about the manufacturer of those products; and for compensation for harm (damage) caused by defective or counterfeit or adulterated products or products of inadequate quality, as well as damage to property and moral (non-property) damage caused by products dangerous to human life and health, in cases established by law.

### Strict Liability

A manufacturer is held liable under the consumer’s claim, unless he proves that other circumstances (eg, fault on the part of the consumer, compliance

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Certification of 10 May 1993.

7 Law Number 2408-III of 17 May 2001.

8 Law Number 3164-IV of 1 December 2005.

9 State Committee of Ukraine for Technical Regulation and Consumer Policy, Order Number 28 of 1 February 2005 on the List of Products Subject to Mandatory Certification in Ukraine.

10 Consumer Protection Law, art 1(4).

with state norms, a third person's fault) were the reason for the damage to the injured party.

The manufacturer's defenses are further discussed in the section 'Defenses Available to the Manufacturer'. A manufacturer incurs liability for damage caused to a consumer, irrespective of whether he is guilty of such damage.

### **Fraud or Misrepresentation**

A manufacturer incurs liability for misleading a consumer. A manufacturer may mislead buyers by conveying false or incomplete information concerning the product (such as its properties, contents, production, and other features) in the product labeling or by fraudulent advertising. The Consumer Protection Law establishes the manufacturer's liability in specific cases.

In cases where the provision of unclear, unreliable, incomplete, or untimely information about the product and manufacturer resulted in the consumer acquiring products that did not have the required properties, the consumer has the right to cancel the contract and demand compensation for damage.<sup>11</sup>

In cases where fraudulent or misleading information led to the impossibility of use of the purchased product in accordance with its purpose, the consumer is entitled to demand that proper information be provided within a reasonable period, which may not be longer than one month.

If this proper information is not provided within the specified period, the consumer has the right to cancel the contract and demand compensation for damage.<sup>12</sup>

If the fraudulent or misleading information resulted in the infliction of harm to a consumer's life, health, or property, the consumer is entitled to demand that the manufacturer compensate the damage caused to him and to his property.<sup>13</sup>

It also is forbidden to introduce counterfeit or adulterated products into the market.<sup>14</sup> Counterfeit or adulterated products are those manufactured by violating a technological process; those that use a trade mark or copy a product form or package design illegally; as well as illegal reproduction of other persons' products.<sup>15</sup>

Fraudulent advertising, aggressive business, and misleading actions also are forbidden (as further discussed in the subsection 'Defective Marketing').

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11 Consumer Protection Law, art 15(7)(1).

12 Consumer Protection Law, art 15(7)(2).

13 Consumer Protection Law, art 15(7)(3).

14 Consumer Protection Law, art 6(4).

15 Consumer Protection Law, art 1(27).

## Warranty

A manufacturer must ensure proper operational use of products, including proper use of their components during the warranty period established by regulations, normative documents, or contract.<sup>16</sup>

Warranty obligations also include any obligations of the manufacturer or seller provided in advertisements. A warranty obligation terminates based on general grounds regarding termination of duty, as stipulated under Chapter 50 of the Civil Code.

A warranty obligation is not terminated in the event that the obligation cannot be fulfilled because of lack of required materials, components, or spare parts. A manufacturer must compensate all expenses of the seller (or, the enterprise fulfilling consumer demands) that are related to consumers' complaints concerning purchased products.

A manufacturer of products must compensate the enterprise that fulfills consumer demands concerning defective products for expenses incurred by that enterprise, and must do so within one month. Consumers' demands connected with defective products manufactured outside Ukraine will be satisfied at the expense of the seller (importer).

Warranty obligations must be performed within the specific time frames stipulated in Ukrainian legislation. The warranty period is specified in the product certificate, on the label, or in any other document accompanying the product. The warranty period for component parts must not be shorter than the warranty period for the principal item, unless otherwise stipulated by regulations, normative documents, or contract.

For perishable products whose properties may deteriorate over time and that may be dangerous to consumers' lives, health, or property or to the environment, a shelf life is established and stated on the labels, wrappers, or other documents accompanying the products; the specified shelf life is considered a warranty period. The product's shelf life commences on the date of manufacture, which also is stated on the labels or other documents, and is determined either by the period during which a product can be used or by the expiry date.

Sale of products whose shelf life is not stated, or is stated in violation of statutory requirements, and sale of expired products is prohibited. The warranty period for seasonal goods (clothes, furs, and similar goods) commences at the beginning of the respective season established by the Cabinet of Ministers of Ukraine.

In the case of sale of a product by sample or by mail order, as well in cases when the date of entering into a purchase and sale contract and the date of delivery of products to a consumer do not coincide, the warranty period

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<sup>16</sup> Consumer Protection Law, art 7(1).

commences on the day the product is delivered to the consumer. If a product requires special installation or assembling, the warranty period commences on the day the installation or assembling is performed.

If it is not possible to determine the date of delivery, installation, or assembling of the product, or if the consumer possessed the product prior to entering into the purchase and sale contract, the warranty period commences on the day the purchase and sale contract is concluded.

In case of repair of the product under warranty, the warranty term is extended for the period of time that the product was under repair.

A consumer's demand for exchange of a product must be fulfilled immediately if the required product is available; if it is necessary to verify the product quality, the demand for product exchange must be fulfilled within 14 days or a period agreed on by the parties.

If the required product for exchange is not available, a consumer's demand for exchange must be fulfilled within two months after the respective application is filed.

If a consumer's demand for product exchange cannot be fulfilled within the established period, the consumer is entitled to demand that the seller or manufacturer reduce the price of the product, eliminate its defects, or cancel the contract and provide a full refund.

When a consumer purchases food products of inadequate quality, the seller must exchange them for products of proper quality or refund the money paid by the consumer, provided that the defects were revealed during the warranty period.

### **Liability for Non-Compliance with Mandatory Requirements**

#### *Certification of Imported Products*

A manufacturer also is responsible for ensuring certification of imported products as determined by the State Committee of Ukraine for Technical Regulation and Consumer Policy.<sup>17</sup> This list includes specific types of products that may be dangerous to human life and health (eg, some types of electrical appliances, medical devices, detergents, food products, construction materials and equipment, communication tools, means of self-protection, fire-fighting equipment, and vehicles).

Without the requisite certificate, potentially dangerous products cannot be imported into and distributed within the territory of Ukraine.

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<sup>17</sup> State Committee of Ukraine for Technical Regulation and Consumer Policy, Order Number 28 of 1 February 2005 on the List of Products Subject to Mandatory Certification in Ukraine.

### *Product Safety Requirements*

Starting in 2012, Ukraine will implement mandatory application of technical regulations with respect to specific types of products. In particular, Ukraine has adopted technical regulations concerning the safety of some categories of products, such as elevators, toys, electrical equipment, machines, medical products, detergents, textiles, safety signs, radio equipment, marine equipment, and containers for storage and burial of radioactive waste. Some technical regulations have been mandatory since 2010.

The technical regulations establish requirements as to the safety of products. With the aim of verifying conformity with the technical regulations, a procedure for certifying conformity will be implemented. This procedure is expected to be implemented by the time the obligation of mandatory certification of conformity is established.

The circulation of products that do not comply with the technical regulations and were not attested for their conformance with these regulations is prohibited in the Ukrainian market, and the manufacturer, the manufacturer's representative in Ukraine, and the supplier are subject to fines.

### **Concept of Defect**

#### **Defective Manufacture**

Ukrainian law defines two categories of defects: essential defects and defects. An essential defect is a defect which makes use of the product for its designated purpose impossible or unacceptable, occurs through the fault of the manufacturer, recurs after repair or remedial measures for reasons outside the consumer's control, and has at least one of the following features: it cannot be eliminated at all; its elimination takes more than 14 calendar days; and the defect makes the product substantially different from what was provided for in the contract.<sup>18</sup>

A defect means any non-conformity of the product with regulatory requirements and normative documents, terms and conditions of contracts, or requirements established for such product, as well as non-conformity with the product information provided by the manufacturer.<sup>19</sup>

Moreover, the Law on Withdrawal from Circulation, Processing, Utilization, Destruction, or Subsequent Handling of Defective and Dangerous Products (the Law on Withdrawal of Defective and Dangerous Products)<sup>20</sup> also defines the notion of 'defective and dangerous products'.<sup>21</sup> These include products whose

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18 Consumer Protection Law, art 1.

19 Consumer Protection Law, art 1.

20 Law Number 1393-XIV of 14 January 2000.

21 Law on Withdrawal of Defective and Dangerous Products, art 1.

properties do not comply with Ukrainian regulatory requirements and normative documents regarding the respective types of products, and products that do not comply with the mandatory requirements in terms of their safety for human life and health, property, and the environment.

Defective and dangerous products include products which, with the aim of being sold to consumers, were willfully put by the manufacturer into the form of a specific type of product and/or endowed with some properties of such types of product, but which cannot be identified as the products they imitate.

Defective products include those whose labeling does not comply with statutory requirements as to the language and/or contents and completeness of the information that must be provided to consumers; products whose shelf life has expired; and products manufactured and sold without the respective documents certifying their quality and safety, as established by law. In addition, the Law on Safety and Quality of Food Products<sup>22</sup> defines some notions of inconsumable food products.

Under Ukrainian law,<sup>23</sup> a food product is considered inconsumable (adulterated) if the product contains a poisonous or harmful substance which makes it dangerous to human health (except for substances that are not added substances and are used in amounts which are not considered to be harmful for human health) or if it contains added poisonous or harmful substances (except for pesticides in agricultural raw materials, as well as permitted food additives, food dyes, or animal medicines that do not exceed the established maximum thresholds).

A food product that does not comply with mandatory minimum quality specifications is considered inconsumable, as also is a product that was manufactured, prepared, packed, or circulated in such a manner or under such conditions as may cause its contamination and pose a danger to human health.

A food product is considered inconsumable if it was fully or partially obtained from a diseased animal or an animal that was slaughtered in any manner other than at a supervised slaughterhouse; if the product is in a container or packaging that is fully or partially made of a poisonous or harmful substance (or substances) which can make that food product dangerous for human health; or if the product was willfully exposed to irradiation, except when irradiation is used for acceptable technical purposes in accordance with the established international requirements as to safe use of ionizing radiation technology.

A food product is considered inconsumable if it contains a food additive that is not approved for use in Ukraine, that is not allowed to be used in a specific food product, or that is approved for use in a specific food product but was included in the product in amounts exceeding the thresholds established by sanitary or technical rules or rules of the respective international organizations.

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<sup>22</sup> Law Number 771/97-VR of 23 December 1997.

<sup>23</sup> Law on Safety and Quality of Food Products, art 1.

A food product is considered unconsumable if it contains banned pesticides or veterinary drugs or their residues, or residual pesticides or veterinary drugs which exceed the maximum residual levels established by sanitary rules or by rules of the relevant international organizations.

Finally, a food product is considered unconsumable if any useful ingredient was partially or fully removed from the food product, if any substance was partially or fully replaced in the food product, or if damage to or bad quality of the food product was hidden in any manner — either to add volume or weight, to lower its quality or properties, or to unreasonably make it more attractive or valuable.

### **Defective Marketing**

Under Ukrainian law, defective marketing may be found in the form of fraudulent advertising and unfair business practices. Under the Law on Advertising,<sup>24</sup> fraudulent advertising is advertising which misleads or may mislead consumers or impair persons, the state, or society as a result of its unreliability, inconsistency, exaggeration, concealment, or violation of time, place, and means of distribution.<sup>25</sup>

Damage incurred by the consumer as a result of fraudulent advertising is to be compensated in full.<sup>26</sup> Unfair business practices are forbidden and include actions qualifying as unfair competition and any activity (acts of commission or omission) that misleads the consumer, as well as aggressive business practices.<sup>27</sup>

The list of misleading actions is not exhaustive and includes such actions as improper information on consumers' rights or incorrect information about any danger to the consumer, the purchase of one product requiring the consumer to purchase another product, or cases where the information required for the consumer to make a choice is not provided to him or is provided in an unclear or contradictory manner.

An aggressive business practice is a practice that has an element of compulsion, persecution, or improper influence, and influences or may influence the consumer's freedom of choice or behavior while purchasing the product.<sup>28</sup> Transactions concluded under unfair business practices are void.

### **Informational Defects**

The Consumer Protection Law stipulates that the consumer has the right to obtain necessary, accessible, trustworthy, and timely product information.

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24 Law Number 270/96-VR of 3 July 1996.

25 Law on Advertising, art 1(7).

26 Consumer Protection Law, art 15(8).

27 Consumer Protection Law, art 19(1).

28 Consumer Protection Law, art 19(4).

According to the Law,<sup>29</sup> the following product information must be provided to consumers:

- The name of the product and the trade mark under which it is being sold;
- Citation of the regulation whose requirements the product must meet if produced in Ukraine;
- The principal properties of the product (for food products, the ingredients, the nominal weight, whether the product contains genetically modified organisms, and similar essential information);
- Any hazardous substances contained in the product and restrictions on use by certain categories of consumers, together with any warning concerning the use of such goods, should such warning be required by law;
- The price, terms and conditions, and rules of purchase of the product or service;
- The date of manufacture or production;
- Conditions of storage;
- Warranty obligations of the manufacturer, producer, or service provider;
- Rules and conditions of safe use of the product, including term of serviceable life and any disposal requirements after expiration of serviceable life, together with information on possible consequences of a failure to observe the disposal requirements;
- The name and location of the manufacturer, the company authorized to deal with consumers' complaints, and repair and technical services;
- Product certification details, if the product is subject to mandatory certification or was voluntarily certified;
- Exact name of the geographical place where the product was manufactured; and
- For alcoholic and medicinal products, EAN barcodes (which may be voluntarily used on other products).

Special laws and regulations and state standards can establish additional marking requirements for certain specific types of products. The information should be provided by the manufacturer in the Ukrainian language in documentation accompanying the product, on the product label, or presented in some other accessible and visible form.

The information may be placed within the premises where the products are sold or, with the consumer's consent, provided to the consumer through means of telecommunication. Failure to comply with the rules will result in fines imposed by the relevant state authority.

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<sup>29</sup> Consumer Protection Law, art 15.

## Obligation to Warn Consumers or Recall Defective Products

### Recall Initiated by the Manufacturer

When products are found to be defective, the manufacturer must immediately stop manufacturing the products until the reasons for damage caused by the products are eliminated.

If it is established that such products cause or may cause harm to a consumer's life and health, property, or the environment even when the consumer has observed the rules of use, storage, and transportation of such products, the manufacturer must take all necessary measures to withdraw the products from circulation and recall them from consumers.

If the reasons for harm cannot be eliminated, the manufacturer must stop manufacturing those products, withdraw them from circulation, and recall them from consumers. If these obligations are not fulfilled, manufacturing of the products will be halted and the products withdrawn from circulation and recalled from consumers by order of state agencies supervising product safety.

Manufacturers and sellers of food products must prevent the sale of dangerous, inconsumable, and improperly labeled food products; voluntarily withdraw food products manufactured or introduced by them if it is revealed that such food products are dangerous, inconsumable, or improperly labeled; and eliminate defects in food products that are manufactured or circulated without compliance with statutory requirements.<sup>30</sup>

If it is established that products are defective or dangerous, they must be withdrawn from circulation. In the case of products that do not cause harm to consumers' life, health, or property, but for which the manufacturer has communicated inadequate information, the manufacturer must withdraw the products from sale and provide proper and adequate information about the products within one week.<sup>31</sup>

Manufacturers must compensate consumers for all damage connected with the recall of their products.<sup>32</sup> Defective and dangerous products must be withdrawn from circulation by the owner of the products, either by the owner's decision or by the order of respective state agencies.

The owner of such defective and dangerous products must remove them from circulation, and bring them, whenever possible, into compliance with the requirements of relevant regulations and normative documents, or otherwise ensure processing, utilization, or destruction of such products in accordance with the procedure prescribed by law.

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<sup>30</sup> Law on Safety and Quality of Food Products, art 20(5)(7)–20(5)(9).

<sup>31</sup> Consumer Protection Law, art 15(7)(2).

<sup>32</sup> Consumer Protection Law, art 14(5).

### **Recall Initiated by State Authorities**

Based on the results of their inspections, state agencies authorized to exercise state control and supervision over the quality and safety of products may issue resolutions concerning withdrawal of defective and dangerous products from circulation and subsequent handling of those products. These resolutions are binding on the owner of the products.

The owner of defective and dangerous products must withdraw them from circulation by preventing the sale, consumption, or use of the products for their purpose, and also by taking them back from business entities which stocked those products based on agency contracts, storage agreements, contracts of carriage, or other civil law contracts that do not provide for transfer of title to the products.

### **Handling of Withdrawn Products**

Defective and dangerous products withdrawn from circulation must be stored by the owner at properly equipped and sealed premises. After the defective or dangerous products that were withdrawn from circulation are brought into compliance with regulations and normative documents establishing the requirements for such types of products, the products may be reintroduced into circulation by a decision of the appropriate authorized state agencies.<sup>33</sup>

Persons who violate the Law on Withdrawal of Defective and Dangerous Products and do not withdraw such products from circulation or fail to abide by resolutions of authorized state agencies concerning provisions of the Law may incur disciplinary, administrative, civil, or criminal liability.<sup>34</sup>

### **Additional Obligations and Powers under New Legislation**

#### *Manufacturer's Additional Obligations*

At the end of 2010, Ukraine adopted two new Laws: the Law on State Market Supervision and Control over Non-Food Products<sup>35</sup> and the Law on General Safety of Non-Food Products,<sup>36</sup> which took effect on 6 July 2011.

According to the Law on General Safety of Non-Food Products, manufacturers must undertake, on their own initiative, expert examination (testing) of samples of products introduced into circulation under their trade mark. Moreover, they also are obliged to consider consumers' applications concerning safety of products introduced into circulation under their trade marks, take necessary measures based on the results of such consideration, and inform distributors of the respective products about such measures.

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33 Law on Withdrawal of Defective and Dangerous Products, Section II.

34 Law on Withdrawal of Defective and Dangerous Products, art 22.

35 Law Number 2735-VI of 2 December 2010.

36 Law Number 2736-VI of 2 December 2010.

Manufacturers also must provide consumers with information which enables them to assess risks inherent in the products during an ordinary or reasonable period of use if such risks are not immediately evident, and which allows consumers to take preventive measures against such risks. Warning consumers of inherent risks will not release the manufacturer from the obligation to comply with other requirements established by law.

If manufacturers become aware, or can be deemed to have knowledge (based on information at their disposal), that products introduced by them into circulation pose risks for consumers that are inconsistent with the general requirement concerning product safety, they must immediately inform the appropriate state market supervision agency about those risks and about the measures taken to ensure consumer safety in relation to such products (ie, by informing consumers and withdrawing products from circulation).<sup>37</sup>

The Law also establishes similar requirements for distributors of products. Distributors must cooperate with manufacturers and state market supervision agencies in taking measures aimed at a avoidance of risks posed by products and must not deliver products if they are aware, or can be deemed to be aware (based on information at their disposal), that those products do not comply with safety requirements.

Moreover, if distributors become aware, or can be deemed to be aware (based on information at their disposal), that the products they have distributed pose risks for consumers that are inconsistent with the general requirement concerning safety of products, they must immediately inform the appropriate state market supervision agency about the risk.<sup>38</sup>

#### *Additional Powers of the State Authorities*

If a market supervision agency establishes that specific products pose a serious risk, it will immediately request that the business entity withdraw such products from circulation and/or recall them or will prohibit supply of those products in the market. However, products cannot be considered to pose a serious risk only because a higher level of product safety may be achievable or because other products offered in the market have a lower level of risk.<sup>39</sup>

If a market supervision agency reveals that specific products do not comply with the established requirements, it will immediately request that the business entity take measures to bring those products into compliance with the established requirements within a specific period of time.

The relevant market supervision agency may analyze the respective business entity's notification concerning fulfillment of the resolution concerning elimination of the products' non-compliance with the established requirements

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37 Law on General Safety of Non-Food Products, art 8.

38 Law on General Safety of Non-Food Products, art 9.

39 Law on State Market Supervision and Control over Non-Food Products, art 28.

and/or verification of fulfillment of the resolution by the business entity. If, based on the results of the analysis, the market supervision agency finds that the products' non-compliance with the established requirements has not been eliminated or has been eliminated partially, it will take two corrective measures: restriction of or prohibition on supply of the products in the market, and withdrawal of the products from circulation or recall of the products.<sup>40</sup>

When a market supervision agency establishes that products may pose risks under specific conditions, it will immediately take a decision obliging the manufacturer and/or distributor to warn consumers of such risks or take necessary measures for the products to be brought into compliance with safety requirements before they are introduced into circulation in the Ukrainian market.

In the event that a market supervision agency determines that products may pose risks to specific categories of consumers, it will immediately issue an order obliging the manufacturer and/or distributor to warn those consumers of such risks.

If a market supervision agency establishes, by reasonable assumptions, that certain products may be dangerous, it will immediately make a decision concerning temporary prohibition on introduction of such products into circulation in the market.

The temporary prohibition will extend to the supply of the products, offer of the products for sale, or demonstration of the products, for a period necessary for product testing.

In cases when a market supervision agency determines that products are dangerous, it will immediately prohibit introduction of those products into circulation in the market and take measures to secure this prohibition; take measures aimed at immediate withdrawal of the products from circulation and warning consumers of risks posed by those products; and take measures, together with manufacturers and distributors of such products that have already been offered in the Ukrainian market to consumers, to recall those products from circulation and destroy them.

Recall of products is applied as an exceptional measure if measures taken by the manufacturer or distributor are insufficient for the prevention or avoidance of risks posed by the products.

These corrective measures aimed at ensuring product safety will be taken by state market supervision agencies according to the level of threat to the public interest posed by the unsafe products. State market supervision agencies will take measures to collaborate with manufacturers and distributors so as to prevent or mitigate the risks posed by their products offered on the market.<sup>41</sup>

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40 Law on State Market Supervision and Control over Non-Food Products, art 29.

41 Law on General Safety of Non-Food Products, arts 12 and 9.

### Defenses Available to the Manufacturer

At the injured person's option, the manufacturer of the product must compensate for damage caused to an individual or legal entity as a result of structural, technological, and other design or formulation defects of the products, as well as damage caused by providing inadequate or insufficient information about products.

Compensation for damage does not depend on the guilt of the manufacturer, nor on whether the injured person had contractual relations with the manufacturer. A seller or manufacturer of products is released from its obligation in the case of product misuse, insuperable force, and other available defenses.

### Product Misuse

The manufacturer may be released from liability if he proves that the damage occurred as a result of failure by the injured person to follow the rules of use or storage of the products.<sup>42</sup>

According to the Consumer Protection Law,<sup>43</sup> prior to using the product, the consumer has certain obligations. The consumer must study the instructions for use provided by the manufacturer in the product documentation.

In cases where the instructions for use of the product need to be explained, the consumer must, prior to commencing use of the product, ask for clarification from the manufacturer or other person who performs this function, as indicated in the product documentation.

The Law further specifies that the consumer must use the product according to its scope and follow the conditions (requirements, norms, rules) set forth by the product's manufacturer in the usage documentation.

In order to prevent negative consequences from use of the product, the consumer must adhere to the safety precautions foreseen by the manufacturer by following any special rules established in the product's usage documentation; when there are no such rules in the documentation, the consumer must follow the normal and prudent safety precautions established for such types of goods.

Thus, if the consumer does not fulfill these obligations, the manufacturer can plead to be released from its obligations, based on product misuse by the consumer.

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<sup>42</sup> Civil Code, art 1209(2).

<sup>43</sup> Consumer Protection Law, art 4(3).

### **Insuperable Force**

The manufacturer may be released from liability if he proves that the damage occurred as a result of insuperable force.<sup>44</sup>

According to the Commercial Code,<sup>45</sup> circumstance of ‘insuperable force’ means an extraordinary and unavoidable circumstance under existing conditions of performance of business activity. Breach of obligations by counterparties, lack of products necessary for fulfillment of the obligation, or lack of required funds are not considered circumstances due to insuperable force.<sup>46</sup>

### **Other Defenses**

Under the Consumer Protection Law, the manufacturer may be released from liability if ‘the manufacturer did not introduce the products into circulation<sup>47</sup> or if ‘a defect occurred in the products as result of the manufacturer’s observance of legislative requirements or fulfillment of state agencies’ orders binding upon such manufacturer.<sup>48</sup>

Manufacturers and distributors of food products may be released from the obligation to compensate for damage connected with a food product being inconsumable or dangerous and caused by violation of the applicable sanitary rules by other persons, including consumers.<sup>49</sup>

Entities engaged in manufacturing and distribution of food products are entitled to challenge the results of laboratory examinations of their products if those results differ from the results obtained by the manufacturer using the same or identical analytical methods, and to have confirmatory testing of their products conducted at an authorized and accredited reference laboratory. In accordance with the law, they also may challenge any inspectors’ decisions concerning their business activity and apply to the court for protection of their rights.

According to the Law on General Safety of Non-Food Products, manufacturers also are released from liability if they are manufacturers of a component part of the products and the products are dangerous because of the design of the finished products containing the component part, or because of instructions provided to such manufacturers by the manufacturers of the finished products.<sup>50</sup> The Law on General Safety of Non-Food

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44 Civil Code, art 1209(2).

45 Law Number 436-IV of 16 January 2003.

46 Commercial Code, art 218.

47 Consumer Protection Law, art 16(5).

48 Consumer Protection Law, art 16(5).

49 Law on Safety and Quality of Food Products, art 19.

50 Law on General Safety of Non-Food Products, art 16(1)(4).

Products also establishes that distributors will not incur liability for violation of requirements concerning product quality and safety if they prove that:

- The products became dangerous as a result of another distributor's non-observance of conditions of storage of those products, provided that such other distributor may be ascertained; or
- The products delivered by the distributor comply with the established requirements for product safety, but the products are nonetheless dangerous.<sup>51</sup>

### **Proximate Cause**

Ukrainian law upholds the notion of proximate cause. Generally, a proximate cause is considered an act, event, or omission which naturally and predictably leads to causation of damage, even though it might not be its nearest or ultimate cause.

The consumer must prove the causal link between the product's defect and the damage attributed to that defect.<sup>52</sup> The same principle applies to cases of injury and death. The sufficiency of the causal link is decided by a court decision.

The Consumer Protection Law does not contain provisions that would specify the nature of this causal link and whether it is direct or proximate. The Consumer Protection Law only provides that a manufacturer may be released from liability if the damage caused to a consumer was a result of the consumer's violation of rules of use, storage, or transportation of products.<sup>53</sup>

### **Liability of Others in the Chain of Distribution**

#### **Retailers and Others**

If a consumer discovers a defect in a product, his demand for exchange of that product, for elimination of its defect (or defects), for return of the product, or other demands stipulated by law must be fulfilled, at the consumer's option, by the seller or manufacturer of that product.

Moreover, consumer demands for compensation also may be fulfilled by the retailer. Retailers are commercial enterprises and branches that are set up to sell similar products or are charged with this function based on a contract. Functions of manufacturers' representatives are performed by their representative offices

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51 Law on General Safety of Non-Food Products, art 16(2).

52 Consumer Protection Law, art 16(2)(3).

53 Consumer Protection Law, art 16(5)(1).

and branches set up by the manufacturers for this purpose or by enterprises which fulfill these demands based on a contract with the manufacturer.<sup>54</sup>

Given that the liability provisions of the Consumers Protection Law apply in most cases, the manufacturer and the retailer bear joint liability toward the consumer. In terms of product liability, the retailer's obligations include the obligations of the manufacturer, unless otherwise specified.

Harm inflicted to a consumer's life, health, or property by a defective product must be compensated in full by the retailer or manufacturer of the product at the injured person's option. A buyer's demands connected with defects in products manufactured outside Ukraine are fulfilled at the expense of the seller (importer).<sup>55</sup>

The manufacturer must compensate all expenses of the seller that processed the consumer's product complaints. The seller must compensate the enterprise that handles customer complaints for all expenses incurred by that enterprise in connection with addressing consumer grievances about defective products, and must do so within one month.<sup>56</sup>

At a consumer's written request, during the period of free repair of certain domestic products,<sup>57</sup> the consumer must be provided with a product of similar make (model, article, modification), with free delivery. The enterprise fulfilling the consumers' demands must maintain a stock of products for this purpose.<sup>58</sup>

Ukrainian law establishes criminal liability for the sale of defective products. According to the Criminal Code of Ukraine,<sup>59</sup> persons manufacturing and selling large volumes of defective products and products that do not comply with the established standards, rules, and technical conditions are subject to a penalty. In this context, large volumes of products produced or sold means volumes exceeding a value of 300 minimum tax-free incomes of citizens. The penalty ranges from the equivalent of 100 to 200 minimum tax-free incomes of citizens or correctional labor for a period of up to two years, with deprivation of the right to hold specific positions or carry out specific activity during a period of up to three years.<sup>60</sup>

Persons who may be held liable for the sale of defective products may be a director of the company producing or importing the products, or an employee

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54 Consumer Protection Law, art 8(3).

55 Consumer Protection Law, art 8(13).

56 Consumer Protection Law, art 8(12).

57 The list of products is issued by the Cabinet of Ministers of Ukraine.

58 Consumer Protection Law, art 8(9); Cabinet of Ministers of Ukraine, Resolution Number 172 of 19 March 1994 on Implementing Specific Provisions of the Law of Ukraine on Protection of Consumer Rights.

59 Law Number 2341-III of 5 April 2001.

60 Criminal Code, art 227.

responsible for verifying product quality or observance of the company's product standards, or an employee responsible for the sale of products.

In addition, persons who may be held liable for the sale of defective products are employees (including officials) of commercial organizations that sell defective products, as well as individual entrepreneurs who manufacture or sell specific products.

### **Wholesalers and Distributors**

Under the definition provided by the Consumer Protection Law, the manufacturer is a business person who manufactures the product, or claims to be the manufacturer of the product, or imports the product.<sup>61</sup> Thus, distributors and wholesalers (under the condition that they import the relevant products) may be considered to come within the scope of the Consumer Protection Law as manufacturers of the product, bearing all the corresponding liability.

In other cases, wholesalers and distributors may be held liable under contractual obligations with the retailer as having supplied goods of inadequate quality, which caused direct damage and loss of profit (unless otherwise foreseen by the relevant contracts).

The Law on General Safety of Non-Food Products and the Law on State Market Supervision and Control over Non-Food Products establish liability for manufacturers and distributors of non-food products in cases of violation of those Laws. Liability is imposed in the form of penalties, payment of which does not exempt manufacturers and distributors from liability for harm inflicted on consumers.

### **Makers of Component Parts**

According to the Consumer Protection Law, the manufacturer must ensure proper operational use of the products, including their component parts, during the warranty period established by regulations, normative documents, or contract.<sup>62</sup>

A manufacturer incurs liability for harm caused to a consumer's life, health, or property when the harm occurred in connection with the manufacturer's 'use of things, materials, equipment, devices, instruments, or other means' necessary for manufacturing the products, irrespective of the level of the manufacturer's technical and scientific knowledge.<sup>63</sup>

The maker of component parts will not be liable toward the consumer; however, it may be held liable in relation to the manufacturer of the products as a party to

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61 Consumer Protection Law, art 1(4).

62 Consumer Protection Law, art 7(1).

63 Consumer Protection Law, art 16(4).

the contract with the manufacturer (eg, for supplying goods of inadequate quality, which caused direct damage and loss of profit).

The manufacturer may request that the other party (eg, the maker of component parts) be made a co-defendant in liability proceedings. In such cases, the court will decide who is liable for the defect. If the defendant believes that another party (such as the maker of a component part) is, in fact, responsible for the defect, he is free to file a claim in a separate set of proceedings. This claim is subject to a general three-year statutory time limit,<sup>64</sup> which starts to run on the date when the victim learned or ought to have learned of the violation of its rights.

### **Franchisors and Franchisees**

Under a franchising agreement, the franchiser incurs subsidiary liability with respect to claims raised against the franchisee in connection with inadequate quality of the products sold by the franchisee.

With respect to the claims raised against the franchisee as the manufacturer of the franchiser's products, the franchiser and the franchisee are jointly liable.<sup>65</sup>

### **Licensors and Licensees**

Ukrainian law does not expressly establish the licensor's liability for defects in products manufactured based on a license. It only states that, under a licensing agreement, the products manufactured on the basis of the license cannot be of poorer quality than the quality of the licensor's products.

Under the Law on Protecting Rights to Marks for Goods and Services,<sup>66</sup> the licensor also is entitled to enforce observance of this rule.<sup>67</sup>

## **Remedies**

### **In General**

Harm inflicted on a consumer's life, health, or property by defective products or products of inadequate quality must be compensated in full.<sup>68</sup>

### **Personal Injury and Death**

An individual who was maimed or sustained other damage to his health because of a defective product has the right to receive compensation for income lost as a result of the loss or decrease of his professional or general ability to work, as

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<sup>64</sup> Civil Code, art 257.

<sup>65</sup> Civil Code, art 1123.

<sup>66</sup> Law Number 3689-XII of 15 December 1993.

<sup>67</sup> Law on Protecting Rights to Marks for Goods and Services, art 16(8).

<sup>68</sup> Consumer Protection Law, art 16(1).

well as compensation for additional costs incurred for a nourishing diet, healthcare, medical expenses, prosthetics, nursing care, and related costs.<sup>69</sup>

In the case of an injured person's death, the right to claim compensation for damage is given to the deceased's dependents, and to the deceased's child born after his death.<sup>70</sup> Moreover, an entity/person that inflicted harm by causing an injured person's death must compensate the person who bore the necessary costs for funeral expenses, including the erection of a gravestone.<sup>71</sup> If the victim's capacity to work has decreased since the time the compensation for damage was determined, he is entitled to demand an increase of the amount of compensation.<sup>72</sup>

In addition, the law stipulates that in case of a rise in the cost of living and at the injured person's request, the amount of compensation for damage caused by the physical injury or by other injury to health or by death will be subject to indexation, based on a court ruling. In the event of a rise in the minimum salary and at the injured person's request, the amount of compensation will be increased accordingly, based on a court ruling.<sup>73</sup>

### **Punitive Damages**

Persons who violate the Consumer Protection Law will incur penalties, which are imposed by the consumer protection authority.<sup>74</sup> Violations of the Law include:

- Denying a consumer's exercise of his legitimate rights;
- Manufacture or sale of products that do not comply with requirements of normative documents;
- Sale of products that are subject to certification in Ukraine, when the documents under which such products were transferred for sale do not meet mandatory registration, certification, and conformity requirements for such type of products;
- Manufacture or sale of products that do not comply with requirements of normative documents and regulations concerning safety of consumers' life, health, and property and the environment;
- Sale of products whose production and sale are prohibited by the relevant state agency;
- Sale of dangerous products (such as poison, pesticides, explosive and flammable substances) without proper warning labels or without information concerning instructions and conditions for its safe use;

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69 Civil Code, art 1195(1).

70 Civil Code, art 1200(1).

71 Civil Code, art 1201(1).

72 Civil Code, art 1203(1).

73 Civil Code, art 1208.

74 Consumer Protection Law, art 23.

- Lack of necessary, clear, reliable, and timely information about products;
- Creation of obstacles to inspection of the quality of products by officials of a specially authorized state or local agency for consumer protection;
- Failure to fulfill or untimely fulfillment of orders of specially authorized state agencies concerning elimination of violations of consumers' rights; and
- Sale of products whose shelf life has expired.

The scope of penalties envisioned by the Consumer Protection Law for the violation of consumer rights ranges from 1 per cent to 500 per cent of the cost of the goods manufactured or sold or the services rendered. The Law also provides a fine for the violation of consumer rights in the amount of 2 to 100 non-taxable allowances (currently UAH 17) — that is, from UAH 34 to UAH 1,700.

### **Emotional Distress**

Consumers are entitled to receive compensation for moral (non-property) damage caused by products dangerous to human life and health through application to the court for protection of their violated rights.<sup>75</sup> The consumer must calculate the amount of the moral damage and prove that such damage was directly caused by the defective product.

### **Economic Loss**

Consumers are entitled to receive compensation for harm inflicted by defective, counterfeit, or adulterated products or products of inadequate quality, for property damage caused by products dangerous to human life and health, and also are entitled to apply to the court and other authorized state agencies for protection of their violated rights.<sup>76</sup>

In relations between business entities, a supplier (manufacturer) must eliminate, at its own expense, product defects revealed during a warranty period or must exchange the product, unless the supplier proves that the defects occurred as a result of violation of product operation or storage rules by the buyer (consumer). In case of elimination of defects in a product for which a warranty period is established, this period is extended for the time during which the product is under repair. In the case of exchange of the product, the warranty period is reestablished from the date of replacement.

In the event of delivery of a product of inadequate quality, the buyer has the right to collect from the manufacturer (supplier) a penalty equal to 20 per cent of the cost of the defective product.<sup>77</sup>

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<sup>75</sup> Consumer Protection Law, art 4(1)(5) and 4(1)(6).

<sup>76</sup> Consumer Protection Law, art 4(1)(5) and 4(1)(6).

<sup>77</sup> Commercial Code, art 269(6)–(7).

In commercial contracts, a party that violated a commercial obligation or established requirements as to performance of a business activity must compensate any damage caused by such violation to the entity whose rights or legitimate interests have been violated.

In this case, 'damage' means expenses incurred by the affected party, loss of or damage to such party's property, as well as loss of income that would have been earned if the other party had properly fulfilled the obligation or observed the rules of performance of the business activity. Under the Commercial Code,<sup>78</sup> damage that must be compensated by the entity at fault includes:

- Cost of lost, damaged, or destroyed property;
- Additional costs (penalty paid to other entities, cost of additional works, materials, and similar amounts) incurred by the party as result of the other party's violation of its obligations;
- Loss of income that would have been earned by the affected party if the other party had properly fulfilled its obligation; and
- Material compensation for moral damage in the cases stipulated by law.

### **Return or Repair**

If a consumer finds defects in a product during the established warranty period, he is entitled to demand a proportional reduction in the price, elimination of the product's defects within a reasonable period of time and free of charge, or reimbursement of expenses for elimination of the product's defects.

If essential defects are revealed during the established warranty period and such defects occurred through the manufacturer's fault or because of product adulteration (confirmed, when necessary, by an expert's report), the consumer has the option to demand, within the period and in accordance with the procedure established by law and based on rules binding on the parties or under the contract, that the seller or manufacturer either terminate the contract and refund the money paid for the product or exchange the product for a similar product from among the products at the seller's (manufacturer's) disposal.

### **Contractual Disclaimers and Limitations**

A seller (manufacturer) may include in a contract with a consumer any provisions that are not prohibited by law. A seller (manufacturer) must not include in contracts with the consumer any terms that are unfair. Unfair contract terms are those that are contrary to the principle of good faith or that result in an essential imbalance between contractual rights and obligations to the detriment of the consumer.<sup>79</sup> Article 18(3) of the Consumer Protection Law provides a non-exhaustive list of such terms:

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<sup>78</sup> Commercial Code, arts 224 and 225(1).

<sup>79</sup> Consumer Protection Law, art 18(1) and (2).

- Exemption or limitation of legal liability of the seller (manufacturer) in the event of the consumer's death or injury to his health caused by acts or omissions of the seller (manufacturer);
- Denial or limitation of the consumer's rights in relation to the seller (manufacturer) or a third person in case of complete or partial non-fulfillment or improper fulfillment by the seller (manufacturer) of contractual obligations, including terms concerning set-off, the consumer's obligation to pay and his demands in the event of the seller's (manufacturer's) breach of the contract;
- Establishment of strict obligations for the consumer, while the seller (manufacturer) may fulfill its obligations at its own discretion;
- Allowing the seller (manufacturer) not to refund money paid by the consumer in the event of the consumer's refusal to enter into or fulfill the contract, without establishing the consumer's right to receive compensation from the seller (manufacturer) in connection with cancellation or non-fulfillment of the contract by the latter;
- Establishment of the consumer's obligation to pay a disproportionately large compensation (more than 50 per cent of the product cost) in the event of his failure to fulfill obligations under the contract;
- Granting the seller (manufacturer) the right to cancel the contract with the consumer at its own discretion while the consumer is not granted such right;
- Granting the seller (manufacturer) the right not to refund money paid for products that were not provided, in the event of contract cancellation at the seller's (manufacturer's) initiative;
- Granting the seller (manufacturer) the right to cancel the contract concluded for an indefinite term without notifying the consumer of such cancellation, except as otherwise prescribed by law;
- Establishment of an unreasonably short period for the consumer's granting his consent to extension of a contract concluded for a definite term, with automatic extension of the contract if the consumer does not express his intention;
- Establishment of conditions binding upon the consumer, if the consumer had no real possibility to familiarize himself with such conditions before entering into the contract;
- Granting the seller (manufacturer) the right to unilaterally change contract terms and conditions at its own discretion or upon grounds not mentioned in the contract;
- Granting the seller (manufacturer) the right to unilaterally change features of the products that are the subject matter of the contract;
- Determination of the product price at the time of its delivery to the consumer or provision of the possibility for the seller (manufacturer) to increase the price without giving the consumer the right to cancel the contract in the event of increase in the price as compared to the price that was agreed upon on the day of entering into the contract;

- Granting the seller (manufacturer) the right to determine whether the products comply with the contract terms or the exclusive right to interpret the contract terms;
- Limitation of the seller's (manufacturer's) liability with respect to obligations assumed by its agents or establishing that observance of some extra formalities would be a precondition for the seller's (manufacturer's) assumption of such obligations;
- Establishing the requirement that the consumer must fulfill all his obligations, even if the seller (manufacturer) does not fulfill its obligations; and
- Granting the seller (manufacturer) the right to transfer its rights and obligations under the contract to a third person, if such transfer may result in reduction in the guarantees arising out of the contract for the consumer without the consumer's consent.

Clause 11 does not apply to contracts concluded for an indefinite term, provided that such contracts oblige the seller (manufacturer) to notify the consumer in advance about its intention to modify the terms of the contract and grant the consumer the right to cancel the contract in connection with the modification. Clause 13 does not apply to provisions concerning price indexation that comply with the law, provided that the conditions and the method of price calculation are clearly and explicitly stated in the contract.

At the same time, the Consumer Protection Law does not limit the right of the manufacturer to describe the method of use of its products in such a manner that the manufacturer will eventually be able to prove that damage was inflicted on a consumer as a result of the latter's non-observance of the instructions for use of the product.

If a specific contract term, including the one concerning contract price, is recognized as unfair, that term may be modified or deemed invalid.<sup>80</sup> If this implies modifications in other terms of the contract, then, at the consumer's request, those terms also must be modified or the entire contract may be deemed invalid. Recognition of the entire contract or some of its provisions as invalid and introduction of modifications into the contract terms are performed by way of a judicial procedure.

A provision that was deemed invalid is so deemed as of the date the contract was concluded. If contract provisions are modified, the changes are deemed effective starting from the date they are introduced.

If damage is inflicted on a consumer as a result of the application of contract terms restricting the consumer's rights, such damage must be compensated by the person at fault. A consumer also is entitled to reimbursement for damage by a manufacturer in connection with the latter's use of its advantages in production or trade activities.

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<sup>80</sup> Consumer Protection Law, art 18(5).

## Statutes of Limitations

### In General

Ukrainian law provides for several periods limiting the obligations of a manufacturer. These limits apply to the product exchange period, the warranty period, the shelf life of the product, and its 'service life' (the two latter are periods during which the manufacturer guarantees product's safety).

### Product Exchange

The Consumer Protection Law establishes a period during which a consumer has the right, under certain conditions, to have the product of proper quality exchanged for another product of proper quality. This period is 14 days, not including the date of purchase, unless a longer period is established by the seller.<sup>81</sup>

If the consumer is not satisfied with the product because of its form, size, design, or color, or the product cannot be used in accordance with its purpose for other reasons, he is entitled to request the seller to exchange the defective product for a similar product having satisfactory properties. Products that are not subject to exchange or return when such products are of proper quality are specified in a list established by the Cabinet of Ministers of Ukraine.<sup>82</sup>

### Warranty Period and Warranty Term

The warranty period is a period during which the manufacturer (seller or any third person) undertakes an obligation to carry out, free of charge, repair or exchange of the product after it has been put into circulation.<sup>83</sup>

If defects are revealed during the established warranty period, a consumer may request a proportional reduction of price, elimination of the defects (free of charge), or reimbursement of expenses for elimination of the product defects.<sup>84</sup>

If essential defects are revealed during the established warranty period, which occurred through the manufacturer's fault, or if it is established that the product is counterfeit or is adulterated, and these facts are certified by an expert when necessary, a consumer has the option to request that the seller or manufacturer either cancel the contract and refund the money paid for the product or exchange the product for a similar product from among the products at the seller's (manufacturer's) disposal.

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81 Consumer Protection Law, art 9(1).

82 List of Products of Proper Quality that Are Not Subject to Exchange (Return) – Cabinet of Ministers of Ukraine, Resolution Number 172 of 19 March 1994 on Implementing Specific Provisions of Law of Ukraine on Protection of Consumer Rights, Annex 3.

83 Consumer Protection Law, art 1(5).

84 Consumer Protection Law, art 8(1).

### **Shelf Life and Service Life**

The shelf life of a product is the period determined by regulations, normative documents, or contract terms, during which the quality and safety characteristics of the product must comply with requirements of regulations, normative documents, and contract terms, provided that respective rules of storage and/or operation or consumption of such products are observed.<sup>85</sup>

The product's service life term is the calendar period of use of a product in accordance with its purpose, which commences on the date the product is put into circulation or repaired and during which the manufacturer guarantees its safety and bears liability for essential defects that occur due to the manufacturer's fault.<sup>86</sup>

A manufacturer must ensure use of a product in accordance with its purpose for the period of its service life, as established by a normative document or agreed upon between the manufacturer and consumer and, should the service life period not be established, for 10 years.<sup>87</sup>

A manufacturer must ensure technical maintenance and repair of products under warranty and ensure supply of the required spare parts and their delivery to entities that carry out technical maintenance and repair during the entire period such products are manufactured. When the product is no longer manufactured, the manufacturer must ensure technical maintenance and repair during its service life. If no service life period has been established, the manufacturer must ensure technical maintenance and repair for a period of 10 years.

The right to demand compensation for damage inflicted remains exercisable during the product's established service life (or shelf life) and, should this period be unspecified, for 10 years after such products are introduced into circulation by their manufacturer.<sup>88</sup>

### **Consumer Claims**

If essential defects are revealed in the products which occurred through the manufacturer's fault, the consumer is entitled to demand that the manufacturer eliminate product defects free of charge during the established service life and, should such service life period be unspecified, for a period of 10 years.<sup>89</sup>

If this demand is not satisfied within 14 days (or another period agreed upon by the parties), the consumer will be entitled to raise other demands against the manufacturer (as previously discussed in the subsection 'Warranty').

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85 Consumer Protection Law, art 1(24).

86 Consumer Protection Law, art 1(25).

87 Consumer Protection Law, art 6(5).

88 Consumer Protection Law, art 16(2).

89 Consumer Protection Law, art 8(10).

The buyer may file a claim with the court against the seller in connection with the product defects within one year, starting from the time of discovery of the defects,<sup>90</sup> but limited to the warranty period, and the shelf life and service life periods.<sup>91</sup> If no periods are established for the product warranty or shelf life, the limitation term is two years.

The statutes of limitations which are related to filing claims with the court may be prolonged or renewed by the court as stated by the relevant provisions of the Code of Civil Procedure.<sup>92</sup> The court may make this decision upon a petition by a party to the proceedings or by another person, provided that the statute of limitations provision was omitted for valid reasons.<sup>93</sup>

### **Corporate Successor Liability**

The Consumer Protection Law does not contain any special rules concerning legal succession with respect to the manufacturer's obligations. From the viewpoint of civil law theory, legal succession means transfer of rights and obligations from one person to another.

Legal succession may be universal or partial. In case of universal legal succession, a legal successor (individual or legal entity) assumes all the rights and obligations of the person that used to have those rights and obligations. In case of partial legal succession, only specific rights and obligations are transferred from one person to another.

When a legal entity that is set up and operating under Ukrainian laws is terminated (except for cases of liquidation, when a legal entity has no legal successors), a termination commission makes a transfer statement (in the event of merger, accession, or transformation) or a distribution balance sheet (in case of separation), which must contain provisions concerning succession of all obligations of the legal entity being terminated with respect to all its creditors and debtors, including obligations disputed by the parties.<sup>94</sup>

Foreign legal entities acting in accordance with their national legislation may have other legal succession rules. If a legal entity has several successor legal entities and it is not possible to determine an exact successor with respect to specific obligations of the legal entity being terminated, the legal successors will be jointly liable to creditors of the terminated legal entity.<sup>95</sup>

The Civil Code also expressly stipulates that in case of termination of a legal entity which is obliged to compensate damage caused by a physical injury or

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90 Civil Code, art 681.

91 Civil Code, art 680.

92 Law Number 1618-IV of 18 March 2004.

93 Code of Civil Procedure, art 73(1).

94 Civil Code, art 107(2).

95 Civil Code, art 107(5).

other injury to health or by death, the obligation to make monthly payments is imposed on the legal entity's successors, provided that they can be identified.<sup>96</sup> Thus, the liability for defective products is extended to corporate successors.

### Product Liability Insurance

Product liability insurance for manufacturers is not widely used in Ukraine, although this is likely to change in the near future. This type of insurance is not mandatory according to law and is currently offered by a small number of insurance companies.

Insurance services in product liability matters are rendered based on the Law on Insurance<sup>97</sup> and on the rules for rendering insurance services developed by a specific insurance company and registered with the respective state agency.

Insurance companies may offer such services both separately and as a part of a complex insurance package for a company's activity that may result in damage to third parties.

Product liability insurance for manufacturers provides insurance protection of the insured in the event that claims are raised against the manufacturer in connection with damage inflicted on consumers' life, health, or property.

Having analyzed insurance conditions posted on the websites of companies such as JSIC INGO-Ukraine,<sup>98</sup> NJSIC Oranta,<sup>99</sup> and LLC Velta-Insurance,<sup>100</sup> the authors are in a position to comment on certain *de facto* conditions on the issuance of product liability insurance in Ukraine.

A contract of insurance is usually concluded for one year. The insurance contract specifically states the range of products and risks that are insured. Insurance compensation is paid only for damage caused by defective products; damage caused to the products themselves is not compensated.

An insurance contract is concluded in order to cover major industry risks: the risk of liability for the failure to fulfill (or improper fulfillment of) contractual or other obligations related to manufactured (delivered) products, and the risk of the manufacturer's (supplier's) liability for damage caused to life, health, or property of consumers or third parties.

The amount insured is determined by the parties' agreement. The insurance contract may provide for limits of obligations with respect to each specific

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96 Civil Code, art 1205(1).

97 Law on Insurance (Law Number No. 85/96-VR of 7 March 1996), art 6(4)(15).

98 The official website of INGO-Ukraine is at <http://www.ingo.ua/vidv/strahovanie-imuzchestvennyh-riskov/strahovanie-otvetstvennosti-za-vred-tretim-licam.html>.

99 The official website (English version) of NJSIC Oranta is at [http://www.oranta.ua/eng/insurance\\_responsibility.php](http://www.oranta.ua/eng/insurance_responsibility.php).

100 The official website of LLC Velta-Insurance is at [http://www.velta.kiev.ua/products/p\\_quolit.html](http://www.velta.kiev.ua/products/p_quolit.html).

insured event, type of damage inflicted to third persons, and each affected person.

The insurance tariff depends on qualifications, period of activity, and other factors. Insurance compensation is paid within the limits of the respective insurance company's obligations, based on the amount of damage inflicted on third parties and taking into account the deductible and other insurance terms.

As a rule, insurance companies request an exhaustive set of documents before making a decision on the availability or unavailability of risk insurance and, in some cases, even require statistics on the risks posed by specific products. These observations, as well as the small number of cases where consumers apply to the court requesting compensation for damage, are reasons for the low popularity of product liability insurance among Ukrainian manufacturers.

## **Product Liability Litigation**

### **Role of the Courts and Lawyers**

According to the Consumer Protection Law,<sup>101</sup> an individual consumer or a consumers' association may apply to the court for protection of violated consumer rights. When satisfying a consumer's claims, the court decides whether the consumer also will be compensated for moral damage. Claims concerning protection of consumers' rights are filed with local courts at the place of the defendant's location, at the place of the consumer's residence, or at the place where the damage was inflicted.

Decisions of courts of first instance in cases connected with damage to consumers may be challenged in courts of appeal and may be reconsidered by the highest judicial body — the Supreme Court of Ukraine.

### **Frequency of Litigation**

Notably, cases connected with protection of consumers' rights very rarely appear in courts, for a number of reasons: underdeveloped consumer protection law, lengthy period of court proceedings, complicated enforcement of court decisions, low level of people's legal knowledge, the high cost of legal services, and other factors.<sup>102</sup>

According to information posted on the official web site of the Judicial Authority of Ukraine,<sup>103</sup> cases connected with consumer protection constituted a minor proportion of all the cases considered by local courts in Ukraine in 2009.

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101 Consumer Protection Law, art 22.

102 Law Directory on Preparation of Consumer Protection Actions for Consideration – K.: 2008. Joint Project of the European Union and United Nations Development Program, Consumers' and Non-Government Organizations' Community.

103 At [http://court.gov.ua/sudova\\_statystyka/e575747457](http://court.gov.ua/sudova_statystyka/e575747457).

In 2008–2009, among resolutions adopted by the Civil Matters Chamber of the Supreme Court of Ukraine, approximately 6 per cent concerned compensation for material and moral damage related to defective products.

### **Attitude of the Courts**

The courts generally tend to favor the consumer, although resolutions favorable to the manufacturer also are possible. In the majority of cases in 2008–2009, Ukraine's Supreme Court granted cassation appeals partially and overturned decisions of lower courts only to the extent that they related to collection of compensation for moral damage, while upholding the lower courts' decisions concerning compensation for material damage caused by defective products.

For instance, in its Resolution of 17 September 2008,<sup>104</sup> the Supreme Court partially granted a cassation appeal of a car dealer by dismissing the demand for collection of compensation from the dealer for moral damage that had been allegedly inflicted on the buyer of a defective car.

The Supreme Court referred to the rule of law<sup>105</sup> which states that consumers are entitled to compensation of property and moral (non-property) damage inflicted by a product dangerous to human life and health, in cases stipulated by law. The defective car that had been a subject of the claim was not recognized as dangerous to human life and death.

In 2009, a private entrepreneur selling mobile telephones applied to the Supreme Court with a request to reconsider a decision of an appeal court, which obliged the entrepreneur to compensate a buyer of his mobile telephone for material and moral damage for the defective product.

In this case, the court of first instance dismissed the consumer's claims for compensation of material and moral damage. However, the court of appeal granted those claims. In its turn, the Supreme Court ruled, again being guided by Article 4 of the Consumer Protection Law, that there were no grounds for compensation of moral damage.<sup>106</sup>

### **Typical Extent of Damages Awards**

As a general rule, the courts award the consumer the full extent of material damages, but limit the moral damages. Ukrainian courts have not been eager to award moral damages in amounts exceeding UAH 5,000 (approximately €625).

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104 Supreme Court of Ukraine, Court Chamber for Civil Matters, Resolution of 17 September 2008 on cancellation of contract and compensation of damage.

105 Consumer Protection Law, art 4(1)(5).

106 Supreme Court of Ukraine, Court Chamber for Civil Matters, Resolution Number 6-14198sv08 of 14 January 2009 on protection of consumers' rights: compensation of material and moral damage.

### Lawyers' Compensation

The Ukrainian legal market is well developed. The major players practice in numerous legal areas rather than in a specific one. Tariffs, hourly rates, and contingency fees differ from law firm to law firm, and, due to the current market environment, there is no single system for price determination that is mandatory to all the market players. Some lawyers charge hourly rates, others agree with their clients on a cap which they will not exceed, while others have fixed tariffs. Prices are generally negotiable (particularly during this period of economic crisis).

### Choice and Application of Law

Based on the Consumer Protection Law,<sup>107</sup> when considering cases connected with protection of consumers' rights, the courts are to be guided by the provisions of the Consumer Protection Law, the Civil Code of Ukraine, the Commercial Code of Ukraine, and other regulations containing consumer protection rules.

Moreover, if an international treaty ratified by the *Verkhovna Rada* (Parliament of Ukraine) establishes rules different from those stipulated by Ukrainian consumer protection laws, the rules of the international treaty will apply. In this context, in 2000 Ukraine signed the Treaty on Principal Directions of Cooperation of the CIS Member States in the Sphere of Consumer Protection.<sup>108</sup>

### Conclusion

In Ukraine, the principal legislative measure in the area of consumer protection and product liability is the Consumer Protection Law. The key provisions of the Consumer Protection Law have been reflected in the new Civil Code and other laws and normative Acts.

The Consumer Protection Law establishes that manufacturers of products, providers of services, and sellers of goods are duty-bound to supply consumers with products and/or services that comply with the established quality standards and the terms of the agreement with the consumer and which also comply with the information about the goods/services which the manufacture, service provider, or seller has provided or publicized. Moreover, the Law provides that manufacturers are obligated to ensure the safe use of the products throughout the warranty term as established by law or by the agreement with the consumer or, in the absence of any relevant provisions, for a period of 10 years.

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<sup>107</sup> Consumer Protection Law, arts 2 and 3.

<sup>108</sup> Law of Ukraine on Ratification of the Treaty on Principal Directions of Cooperation of the CIS Member States in the Sphere of Consumer Protection (Law Number 3102-III of 7 March 2002).

Furthermore, the Consumer Protection Law establishes that a manufacturer of products must ensure the availability of maintenance services for the product during the relevant period of time and stipulates the obligations of manufacturers and/or sellers toward consumers with respect to the replacement of defective goods and warranty repairs.