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# THE PRODUCT REGULATION AND LIABILITY REVIEW

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EDITORS  
CHILTON DAVIS VARNER  
AND BRADLEY W PRATT

LAW BUSINESS RESEARCH

# THE PRODUCT REGULATION AND LIABILITY REVIEW

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CHILTON DAVIS VARNER  
AND BRADLEY W PRATT

LAW BUSINESS RESEARCH LTD

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# EDITORS' PREFACE

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In today's global economy, product manufacturers and distributors face a dizzying array of overlapping and sometimes contradictory laws and regulations around the world. A basic familiarity with international product liability is essential to doing business in this environment. An understanding of the international framework will provide thoughtful manufacturers and distributors with a strategic advantage in this increasingly competitive area. This treatise sets out a general overview of product liability in key jurisdictions around the world, giving manufacturers a place to start in assessing their potential liability and exposure.

Readers of this publication will see that each country's product liability laws reflect a delicate balance between protecting consumers and encouraging risk-taking and innovation. This balance is constantly shifting through new legislation, regulations, treaties, administrative oversight and court decisions. But the overall trajectory seems clear: as global wealth, technological innovation and consumer knowledge continue to increase, so will the cost of product liability actions.

This edition reflects some of these trends. For example, Turkey has recently enacted a new consumer protection law aimed at protecting consumers in commercial transactions and expanding available remedies. In South Korea, new legislation has been proposed to permit consumer class actions and to lower a plaintiff's burden of proof in product liability cases. Australia has experienced a renaissance in product liability litigation due to a relatively plaintiff-friendly class-action regime and the emergence of litigation funding companies. And, in the United States – traditionally a consumer-friendly nation – private lawsuits show no signs of abating, while state and federal governments take an increasingly aggressive role in enforcing strict safety and manufacturing standards. Although these changes and trends may be valuable in their own right, they also create a greater need for vigilance on the part of manufacturers, distributors and retailers.

This edition covers 15 countries and provides a high-level overview of each jurisdiction's product liability framework, recent changes and developments, and a look forward at expected trends. Each chapter contains a brief introduction to the country's product liability framework, followed by four main sections: Regulatory Oversight

(describing the country's regulatory authorities or administrative bodies that oversee some aspect of product liability); Causes of Action (identifying the specific causes of action under which manufacturers, distributors or sellers of a product may be held liable for injury caused by that product); Litigation (providing a broad overview of all aspects of litigation in a given country, including the forum, burden of proof, potential defences to liability, personal jurisdiction, discovery, whether mass tort actions or class actions are available, and what damages may be expected); and the Year in Review (describing recent, current and pending developments affecting various aspects of product liability, such as regulatory or policy changes, significant cases or settlements, and any notable trends).

Whether the reader is a company executive or a private practitioner, we hope that this edition will prove useful in navigating the complex world of product liability and alerting you to important developments that may affect your business.

We wish to thank all of the contributors who have been so generous with their time and expertise. They have made this publication possible. We also wish to thank our colleague Dmitry Epstein, who has been invaluable in assisting us in our editorial duties.

**Chilton Davis Varner and Bradley W Pratt**

King & Spalding

United States

April 2014

## Chapter 11

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# PORTUGAL

*Alexandre Mota Pinto and João Pedro Castro Mendes<sup>1</sup>*

### **I INTRODUCTION TO THE PRODUCT LIABILITY FRAMEWORK**

Decree-Law 383/89 of 6 November, as amended by Decree-Law 131/2001 of 24 April (the Defective Product Liability Act) primarily governs product liability in Portugal. The Defective Product Liability Act transposes Directives 85/374/EEC of the Council, of 25 July 1985, and 1999/34/EC, of the European Parliament and Council, of 10 May to the Portuguese legal order. It is complemented by Decree-Law 67/2003 of 8 April (the Sale of Consumer Goods Act), which transposes Directive 1999/44/EC to the Portuguese legal order, and governs warranties in consumer goods sale and purchase agreements.

According to the Defective Product Liability Act, a producer is strictly liable for any defects in products it puts into circulation.

A producer is defined as a manufacturer of any finished product, component part or raw material and presents itself as such by affixing its name, mark or other distinctive sign on the product. An entity that, while operating in the European Union and as a part of its commercial activity, imports, from outside the EU, products for sale, rent, finance lease or any other form of distribution will also be considered a 'producer', as will any supplier of a product whose EU producer or importer is not identified, unless, when notified in writing, it notifies the injured party, also in writing, within three months, of the identity of either, or of any preceding supplier.

A product is defined as any moveable, even if incorporated in another moveable or immovable. A product is considered to have a defect if it does not offer the safety that may be legitimately counted on, bearing all circumstances in mind, in particular its presentation, reasonable use and the moment it entered into circulation. A product is not

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<sup>1</sup> Alexandre Mota Pinto is a partner and João Pedro Castro Mendes is a junior associate at Uría Menéndez – Proença de Carvalho.

considered to have a defect merely because a more perfected product has more recently been placed into circulation.

Under the Defective Product Liability Act, an injured party may seek compensation for damages resulting from death or personal injury, or damages to something other than the defective product, provided certain criteria are met. Damages are only recoverable provided they exceed €500.

Liability towards an injured party may not be contractually excluded, according to the Defective Product Liability Act.

The Sale of Consumer Goods Act governs certain aspects of sale and purchase agreements executed between professionals and consumers. It is also applicable, with the necessary adaptations, to consumer goods supplied under a works contract or another provision of services, as well as to the lease of consumer goods.

The Sale of Consumer Goods Act provides that the vendor has a duty to deliver goods to the consumer in accordance with what is specified in the sales and purchase agreement.

Consumer goods are presumed not to be in accordance with what is established by the agreement when any of the following applies:

- a* they do not fit the description that the vendor makes of them and they do not possess the qualities of the good that the vendor had presented to the consumer as a sample or a model;
- b* they are not adequate for the specific use the consumer wants them for, of which the consumer had informed the vendor and that the latter had accepted;
- c* they are not adequate to the uses usually given to goods of the same kind; or
- d* they do not present the usual qualities and performance for goods of the same kind and that the consumer should reasonably expect, given the nature of the good and possible public statements about its specific characteristics made by the vendor or its representative, namely in advertising or labelling.

The good is not considered not to be in accordance with the agreement for the purposes of the Sale of Consumer Goods Act if, when the agreement is executed, the consumer is aware of that lack of conformity or cannot reasonably ignore it, or if it derives from materials provided by the consumer. Non-conformity with the contract resulting from poor installation of the consumer good is considered equivalent to non-conformity when the installation is a part of the sale and purchase agreement and has been done by the vendor, or under his or her responsibility, or when the product, which is meant to be installed by the consumer, is installed by the consumer and the poor installation is connected to mistakes in the assembly instructions.

The vendor is liable to the consumer for any non-conformity that exists when the good is delivered to the latter. Non-conformity that manifests itself within two or five years from the date of delivery of a moveable or an immovable, respectively, is presumed to have existed on that date, unless that assumption is incompatible with the nature of the good or with the characteristics of non-conformity.

In case of contractual non-conformity, the consumer has a right under the Sale of Consumer Goods Act to have the good repaired or replaced by the vendor, to a reduction in the price or to termination of the agreement, all without extra charges. In case of an immovable, the repair or replacement must be made within a reasonable period, bearing

in mind the nature of the defect and, in case of a moveable, within a maximum period of 30 days, in both cases without any great inconvenience to the consumer. The rights to terminate the contract or demand a price reduction may be exercised even if the good has perished or become deteriorated for a reason that is not attributable to the consumer. All of these rights are transferred to any third party that acquires the good.

The Sale of Consumer Goods Act establishes a right for the consumer, without prejudice to any rights he or she may hold regarding a vendor, to demand the repair or the replacement of a defective product, unless it is impossible or disproportionate to do so, bearing in mind the value of the product if there were no defect, the gravity of the defect and the possibility of the alternative solution to be implemented without a grave inconvenience for the consumer.

Finally, in addition to civil liability, it is important to note that producers may face criminal and administrative liability, in the latter case in particular concerning sector-specific regulation on product safety.

## **II REGULATORY OVERSIGHT**

The Consumer Institute (IC) is the regulatory authority responsible for public enforcement of consumer rights in Portugal. It may order interim measures to cease, suspend or prohibit the supply of goods or services that, independently of proof of a real loss or damage, hold or may hold dangers for the health, the safety and the economic interests of consumers, due to their object, form or purpose. It represents, in court, the diffuse rights and interests of consumers.

The Authority for Economic and Food Safety (ASAE) is the regulatory authority, and also the criminal police body, primarily responsible for overseeing product safety in Portugal. It enforces the various safety regulation regimes for the various economic sectors.

The National Authority for Pharmaceuticals and Health Products (INFARMED) is responsible for overseeing medicines and medical devices. It is responsible for the pharmacovigilance system in Portugal.

Although not public bodies, consumer protection NGOs, such as the Portuguese Association for Consumer Defence (DECO), play an important role in raising awareness for possible defects in products through independent testing and reviews.

## **III CAUSES OF ACTION**

Under the Defective Product Liability Act, injured parties may sue the producer based on a defective product the producer put into circulation causing them personal injury or damages to property other than the product.

Under the Sale of Consumer Goods Act, consumers may sue the vendor based on non-compliance of the good they purchased with what was established by the sales and purchase agreement. In addition, they may sue the producer directly (or a representative of the producer for the area of domicile of the consumer), for repairs or replacement of the product, in such cases.

The ASAE may initiate administrative proceedings against a producer, under the Sale of Consumer Goods Act, for failure to replace or repair an immovable within a reasonable period or a moveable within 30 days, without great inconvenience to the consumer. They may also initiate administrative proceedings based on failure to provide a guarantee to the consumer fitting all the requirements set out by the Sale of Consumer Goods Act.

## IV LITIGATION

### i Forum

Civil liability in product liability cases will either be determined by a judge or a panel of judges in a judicial court or by an arbitral court. There are consumer arbitration centres that allow for arbitrations on matters concerning amounts lower than €5,000, or there may be an *ad hoc* arbitration under the Portuguese Voluntary Arbitration Act (Law 63/2011 of 14 December).

Administrative liability, where applicable, will be determined by the ASAE.

Any possible criminal liability will be determined by the criminal courts, after an investigation by the Public Prosecutor.

### ii Burden of proof

Under the Defective Product Liability Act, the injured party has the burden of proof regarding the defect and causality between the damage suffered and the defect.

Under the Sale of Consumer Goods Act, the burden of proof that it provided the requisite guarantee falls to the vendor.

For any administrative or criminal liability cases, the burden of proof lies with the entity prosecuting the case.

### iii Defences

Under the Defective Product Liability Act, a producer will not be held liable if, alternatively, it proves:

- a* that it did not place the product into circulation;
- b* that, taking into account surrounding circumstances, it is reasonable to conclude that the defect did not exist when the product was placed into circulation;
- c* that it not manufacture the product for sale or any other form of distribution with an economic purpose, nor did it manufacture or distribute as a part of its professional activity;
- d* that the defect is due to the product conforming to imperative rules established by public authorities;
- e* that the state of scientific and technical knowledge at the time the product was placed into circulation was not sufficiently advanced to allow the defect to be detected; or
- f* that, in the case of a component, the defect is attributable to the conception of the product in which it was incorporated or to the instructions provided by the manufacturer of same.

In addition, the injured party has three years to seek compensation for damages resulting from a defective product, counted from the date when the injured party had or should have had knowledge of the damage, the defect or the identity of the producer. In addition, the producer will no longer be liable after the product has been in circulation for 10 years, unless a claim by the injured party is pending before the courts.

When the injured party contributed to the damage occurring, the court may, bearing in mind all circumstances, reduce or exclude indemnities. A third party contributing to damages to the injured party does not, however, reduce a producer's liability.

Under the Sale of Consumer Goods Act, the consumer has three or five years to exercise his or her rights against vendors for moveables and immoveables, respectively. In addition, the consumer must first notify the vendor of the existence of the non-conformity within two months, for moveables, or one year, for immoveables, from the date when the defect was detected.

The producer may oppose the exercise of that consumer right if either of the following applies:

- a* the defect is the exclusive result of statements made by the vendor about the product and its use, or from poor use;
- b* the producer did not put it into circulation;
- c* it may be considered, taking the surrounding circumstances into account, that the defect did not exist when the product was put into circulation;
- d* the producer did not manufacture the product for sale or for any other form of distribution for profit, or it did not manufacture it or distribute it as a part of its professional activity; or
- e* 10 years have elapsed since the product was put into circulation.

#### **iv Expert witnesses**

In Portugal, parties may retain industry and other experts to testify as part of their defence. In addition, arbitrators or judges may decide to call upon experts retained by the court to testify.

#### **v Discovery**

Common law-style 'discovery' is not available in Portugal.

If a party wishes for documents the other party or a third party holds in its possession to be presented in court, it may request that the court notify the other party or the third party to present it within a certain period. Should the facts the applicant wishes to prove with those documents be relevant to the case, the court will notify the other party or the third party to present the documents at issue.

#### **vi Apportionment**

If several persons are responsible for the same damages under the Defective Product Liability Act, they will be jointly and severally liable. When it comes to internal relations, relevant circumstances, especially the risk created by each responsible party, their degree of guilt and their contribution to the damage are taken into account when apportioning responsibility. In case of doubt, responsibility will be apportioned equally.

Under the Sale of Consumer Goods Act, the representative of the producer in the area where the consumer is domiciled is jointly and severally liable with the producer towards the consumer (the same defences mentioned before apply).

In addition, the vendor that has satisfied the right of a consumer under the Sale of Consumer Goods Act has a right of recourse against the professional from whom the vendor had acquired the product, for all damages caused by the exercise of the consumer's rights, as does an entity against whom that right of recourse had been exercised.

#### **vii Mass tort actions**

There are no 'class actions' in the US sense in the Portuguese legal system. There is an 'action to defend general interests', whereby any citizen, association or foundation active in the relevant area, local authorities or the Public Prosecutor's Office may submit claims related to the defence of public health, the environment, quality of life, cultural heritage and public dominion, as well as the protection of the consumption of goods and services, but it is very rarely used.

#### **viii Damages**

Under the Defective Product Liability Act, injured parties may recover economic and non-economic damages for personal injury. Economic damages will be calculated based on the difference between the situation at the most recent date the court may consider and the situation at that same date if the injury had not taken place. Non-economic damages will be calculated based on equity, bearing in mind certain case-specific circumstances.

There are no punitive damages in the Portuguese legal system.

There are some administrative offences specifically relevant to product liability (see Section III, *supra*), but no specific criminal offences.

## **V YEAR IN REVIEW**

There have been no significant developments regarding product regulation and liability in Portugal over the past year. The legal regime, which is derived essentially from European directives, has remained predominantly stable over the last two decades.

The 'market' for product liability is primarily based on injured parties suing producers or vendors directly. Insurance companies may be called in to participate in judicial proceedings where they are parties to the dispute.

## Appendix 1

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# ABOUT THE AUTHORS

### **CRISTINA AYO FERRÁNDIZ**

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Cristina Ayo Ferrándiz is a member of the litigation practice area of Uría Menéndez's Barcelona office. She joined the firm in September 2000.

She focuses her practice on advising on contentious and pre-contentious civil and commercial issues. Cristina specialises in judicial proceedings before the Spanish courts and tribunals and national and international arbitration proceedings relating to contractual liability, non-contractual liability and product liability, as well as contractual, corporate, lease agreements, banking, financial and private party disputes.

### **ALEX FERRERES COMELLA**

*Uría Menéndez*

Alejandro Ferreres Comella is a partner of Uría Menéndez and the head of the litigation and arbitration practice areas of the Barcelona offices of the firm.

He is a practising litigator in the jurisdictions of Madrid and Barcelona, among others, and concentrates his practice in the areas of contractual liability and tort. In particular, he has taken part in the defence of car manufacturers, pharmaceutical companies, tobacco companies and the chemical industry in some of the most important product liability cases in Spain, including several collective claims.

He is considered a leading lawyer in the main international legal directories by Chambers and Partners and Who's Who Legal, among others.

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Alexandre Mota Pinto has been a partner at Uría Menéndez – Proença de Carvalho since 2010. He provides advice to companies on corporate and commercial law, corporate

finance and white-collar crime. He has vast experience in litigation and corporate affairs, and he serves as a member of the board of the Portuguese Corporate Governance Institute. He is also a college professor, currently focusing on teaching courses in commercial law.

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Carlos Viladàs Jené is a partner emeritus of Uría Menéndez. He has been a partner of the firm since 1991 and was head of the Barcelona office from 1996 to 2001.

His professional expertise encompasses a wide variety of areas, including: product liability litigation, in particular tobacco-related claims; the acquisition of companies in the industrial, mining and services sectors; sales of industrial and service companies; mergers, joint ventures and other types of agreements between companies, particularly in the financial, industrial and logistics services sectors; banking-insurance transactions; advising sports people, artists and cultural associations; legal and arbitration proceedings concerning disputes among shareholders and the enforcement of representations and warranties; criminal litigation dealing with economic, environmental and corporate issues, threats, and accidents at work, especially on construction sites; and insolvencies and plant closures.

He is regarded as a leading lawyer in the main international legal directories by Chambers and Partners and Who's Who Legal, among others.

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