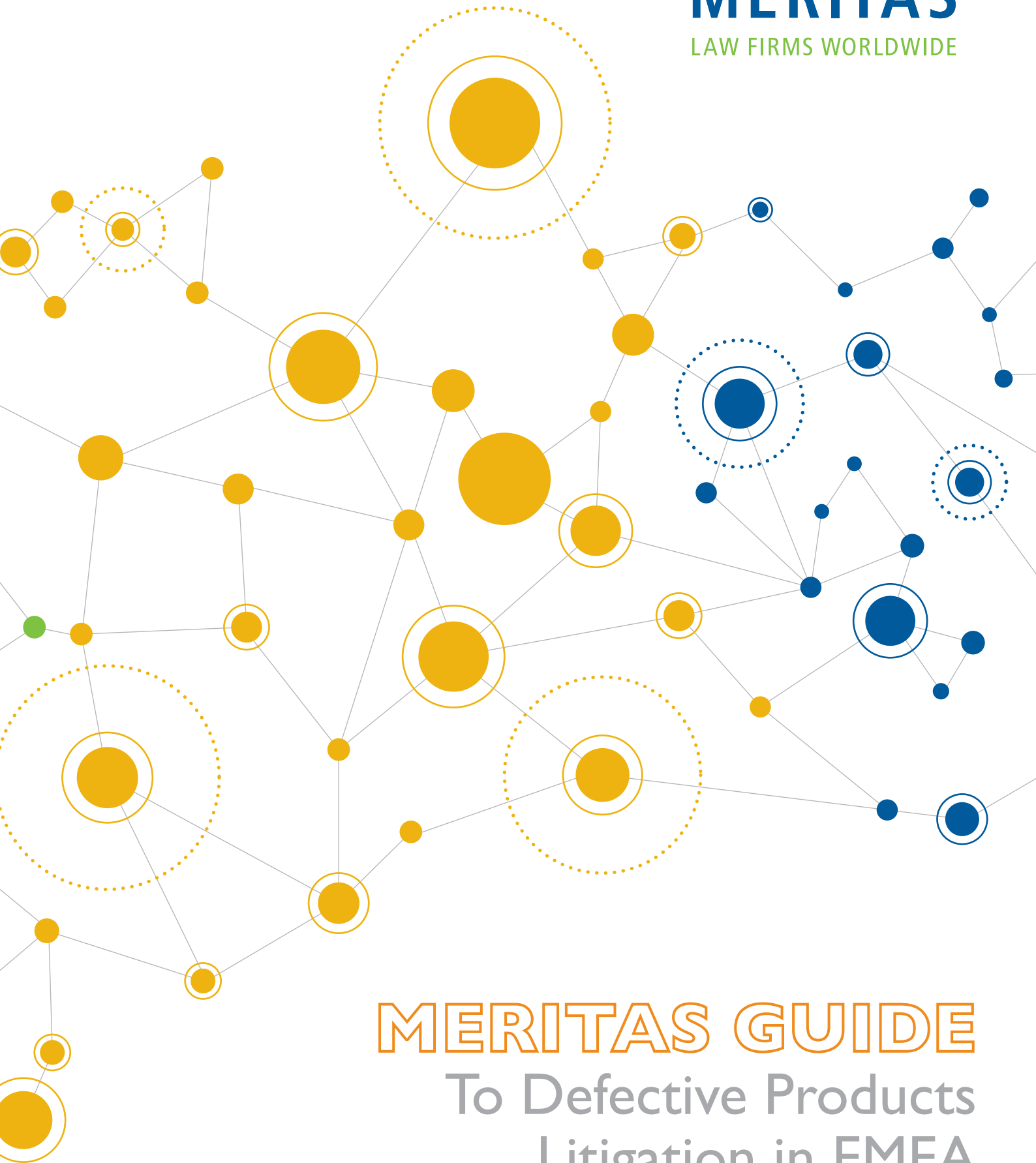




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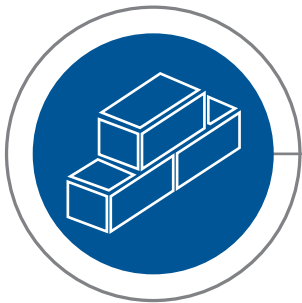
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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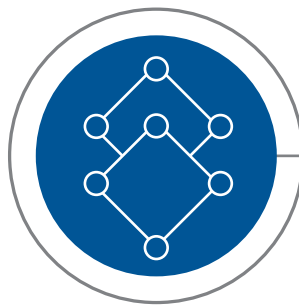
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?

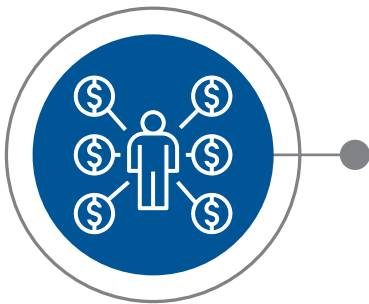


Who is liable to compensate a claimant for a claim?

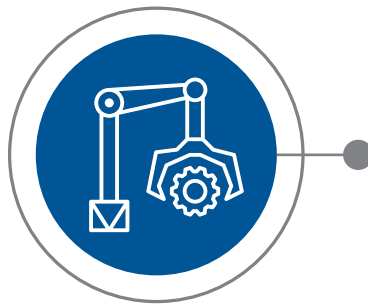
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences including heavy fines and imprisonment, not to mention the loss of business revenue.

Understanding the laws and regulations that concern defective products and the liabilities that may result is therefore vital for any company doing business across Europe, Middle East and Africa.

The trend in many countries has been to **strengthen consumers' levels of protection** in respect of defective products, particularly within the EU.



Is there a difference if you are a consumer or professional buyer of the product?



Can a manufacturer of a defective product limit their liability?

Whilst a consumer may recover damages for losses caused by negligent acts or omissions, there are **important differences** between jurisdictions as to how principles of fault liability are applied. For example, in civil law jurisdictions, the burden of proof is often reversed once a defect and damage is proved and a defendant must prove that it was not negligent. In contrast, in common law jurisdictions, the burden generally rests on the claimant to prove all aspects of the claim.

The following Meritas guide asks these are other **key questions** related to defective products litigation and provides answers as they relate to **30 countries across EMEA**.

Please note: this guide is for general information purposes only and is not intended to provide comprehensive legal advice. For more information, or for detailed legal advice, please contact any of the lawyers listed at the end of each chapter.

The information contained in this guide is accurate as at 1 August 2018. Any legal, regulatory or tax changes made after this date are not included.



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1. What claims may be brought for liability for defective products? Is liability based on fault/negligence, or strict liability, or both?

In Denmark, defective product claims may be brought a) in contract and the tort of negligence and/or b) under the Product Liability Act 1989 (“the Act”), which implemented the EU Product Liability Directive. Claims in contract and negligence are frequently found in combination with a claim under the Act.

Product liability applies to the liability of the producer and/or an intermediary for damage caused by a defect in a product produced or supplied.

The Act provides a strict liability claim for damage caused by a defect in the product, making the producer automatically liable for any damage caused. An intermediary may become liable unless the intermediary can prove that the damage is not due to his fault or negligence.

Outside the Act, a claimant shall typically have to prove fault or negligence on the part of the producer, but allegedly the tendency in case law is going towards presumptive liability. If the producer is liable, any intermediary and supplier will be jointly and severally liable without fault of his own.

Claims subject to product liability concern damage to persons or things or the defective product’s surroundings. The defect or loss of the defective product itself or a pure economic loss are not subject to product liability but may be subject to a claim in contract.

2. Who is potentially liable to compensate a claimant in such a claim? The manufacturer, the importer, the distributor or the retailer/shop?

Under the Act, the producer is automatically liable and an intermediary may also be liable.

In respect of a contract claim, generally a claim may only be brought by one party to a contract against another party.

A claim in negligence can be brought against a party who has breached a duty to take reasonable care and that breach has resulted in damage to the claimant. Outside the Act, importers, suppliers, retailers and other intermediaries will be liable towards the claimant for the producer’s liability.

3. Are there differences if the buyer is a consumer or a professional buyer?

The Act covers claims for damage and compensation related to personal injury and loss of provider. Also covered is damage to movables if the damaged item in question was of a type ordinarily intended for private use or consumption and was used by the claimant mainly for his own private use or consumption. Non-consumers therefore may claim for death or personal injury, but claims for damage to property may only be brought by consumers.

Outside the Act, Claimants can bring claims for damage to property in contract or negligence without regard as to whether the Claimant is a consumer or not.

4. Can the seller or other potentially liable party exclude or limit its liability?

Strict liability for the producer cannot be excluded under the Act, unless the producer can prove:

1. That the producer did not put the product into circulation;
2. That the product neither is manufactured, produced, collected or placed on the market in the course of the producer’s business;
3. That the defect is due to the product being in compliance with mandatory regulations issued by public authority, or

4. That on the basis of the scientific and technical knowledge at the time when the product was brought into circulation, it was not possible to detect the defect.

Furthermore, the producer is not liable, if it can be assumed that the defect which caused the damage was not present at the time when the product was brought into circulation. An intermediary may become liable unless the intermediary can prove that the damage is not due to his fault or negligence. The Act cannot be waived by prior agreement to the detriment of the injured party.

In respect of a contractual claim, general contractual rules apply. Generally, other terms which seek to limit or exclude liability in a contract may be regarded as unfair and therefore unenforceable. Even in business to business contracts there is a tendency to minimise the extent of a clause limiting a party’s liability. In contracts with consumers, one cannot on beforehand agree that a consumer should have lesser opportunities to obtain compensation than the law prescribes.

5. What are the rights of the consumer if products are manufactured outside your jurisdiction or the EU?

A consumer domiciled in Denmark may file a law suit in tort against a producer or intermediary domiciled in the EU if the damage occurred in Denmark.

In contract, essentially, the consumer must file a law suit in the EU country, where the seller is domiciled unless the product was delivered in Denmark or if the seller’s business efforts or were also directed towards Denmark.

Intermediaries of products produced outside Denmark can be subject to the product liability rules. Furthermore, a person who, in the course of his business, introduces a product in the EU and the EEA for resale, rental or other form of marketing can be



considered to be a producer. If it not identified who is the producer of a product, any intermediary of the product is considered to be a producer.

6. What are a manufacturer's and a retailer's liabilities for omitted or delayed recall campaigns?

With regard to criminal liability, the failure of the manufacturers and distributors to notify the authorities of an unsafe product they have marketed, may under the Product Safety Act result in fines, unless higher punishment is implied by other legislation.

7. Is there a specific procedure or are there specific rules of evidence for defective products litigation, or do normal/summary procedures and rules of evidence apply?

Normally available Court procedures apply.

8. What kind of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?

No specific pre-action measures are mandatory. A party may be asked by the court to report on what contact prior to court proceedings there has been between the parties with the purpose of settling the claim.

9. What sort of remedy is generally available to the buyer of a defective product (replacement of the product, repayment of purchase price and other damages)?

The damage to the defective product itself can be compensated after the normal rules regarding purchase in the Danish Purchase Act or following the UN Convention on Contracts for the International Sale of Goods (CISG) with regard to international purchases between businesses. Subject to the Purchase Act, the buyer of a defective product can a) avoid the purchase in its entirety if the defect is material or the buyer can claim b) replacement or c) a proportionate discount of the purchase sum equal to the lesser worth of the purchased item. The buyer of a defective product can claim compensation for his losses including indirect losses and loss of profit. Generally, the seller will in the sales contract exclude liability for indirect losses.

10. What are the costs of defective products litigation? Who ultimately bears such costs? Who is responsible for experts' costs?

The costs of defective products litigation depend on the particular case in question. Costs-shifting applies in Court proceedings. The winning party is generally awarded costs payable by the losing party, but the awarded amount seldom fully compensate the winner's own legal costs. The Court's cost order follows a cost-table where the amount in dispute is the main factor in deciding the costs awarded.

I 1. Who has the burden to prove that a product is defective? Is it always the buyer?

Under the Act, the burden of proof is on the claimant to establish that the product was defective, that all loss occurred and that the defect did cause the loss.

In a contract and negligence claim the burden of proof is also on the claimant.

I 2. Is the state of the art defence available?

In addition to other available defences, the state of the art, or development risks, defence is available. It is a defence to show that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in their products while they were under their control.

I 3. What are the deadlines within which a claimant must notify defects and/or commence proceedings? Can such deadlines be frozen or extended?

An action under the Act must be brought within three years of the date of the Claimant's knowledge of damage. The overriding time limit is ten years from the date on which the producer brought the defective product into circulation, but thirty years with regard to compensation for personal injury outside the Act.

The limitation period is interrupted when the claimant takes legal action against the debtor, including by filing a request for a payment order.

I 4. What are the rules for bringing a claim in a class/collective action?

Class action proceedings are available for product liability claims, in so far as there are procedural mechanisms available that enable claims to be considered in a grouped fashion.

If two or more are liable for the same claim, they are usually jointly and severally liable, but the court may decide that a liable party shall indemnify another liable party in the internal economic relation between such jointly liable parties.

If several are responsible as producers, the responsibility is divided between these in the absence of an agreement, taking account of the cause of the defect, the reason an ability for the individual producer to control the product, present liability insurance and all other circumstances.

I 5. What is the average duration of defective products litigation?

Approximately 12 to 18 months from a claim being issued at Court. Generally, longer if there is a Group Litigation Order.