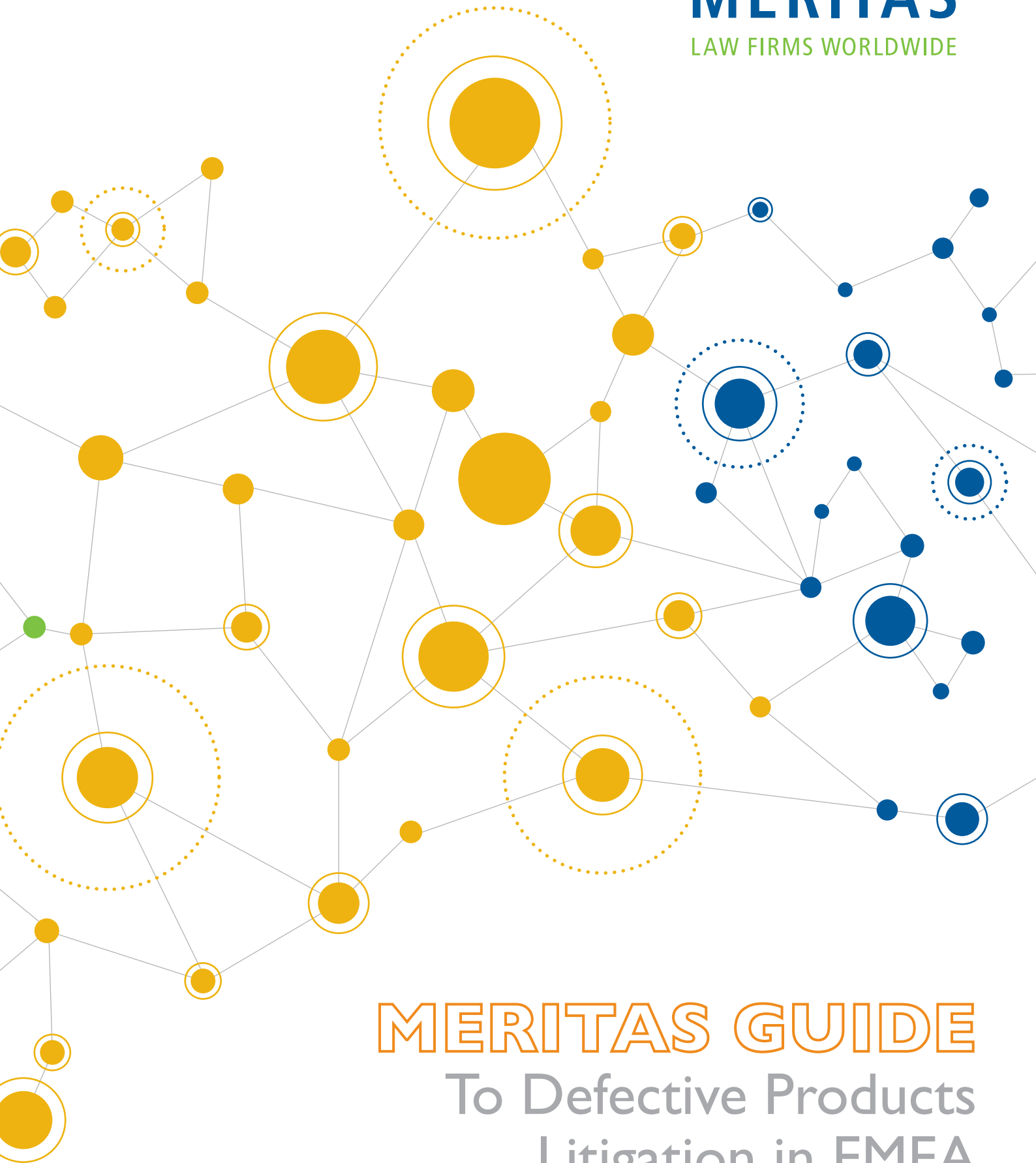




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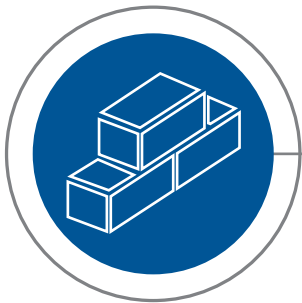
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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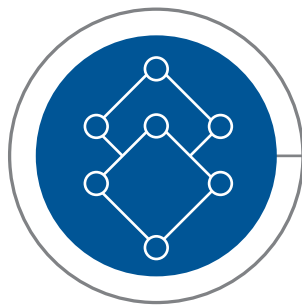
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?

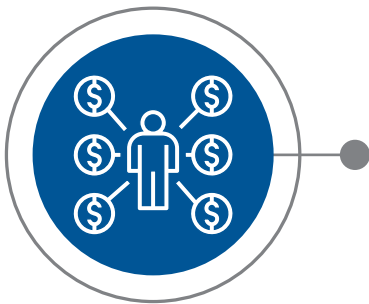


Who is liable to compensate a claimant for a claim?

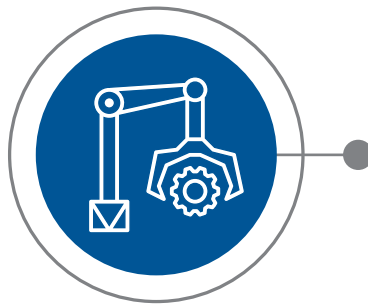
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences 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?

Defective product claims may be brought in contract, the tort of negligence, under the Product Liability Act 1991 (“**the Act**”), which implemented the EU Product Liability Directive as well as under criminal law.

Under the Act, the producer shall be liable, known as the **strict liability**, when any injured person can prove the defect in the product, the reality and importance of the damage suffered, as well as the causal link between the defect and the damage.

Product liability can also be incurred under the Articles 1382 and 1383 of the Civil Code as **tort liability**. The injured person needs to prove the fault, the damage as well as the causal link between the fault and the damage.

Under the **contractual liability**, the seller/producer can also be liable for hidden defects based on Articles 1641 to 1649 of the Civil Code, if the product had these defects at the time of purchase. Furthermore under the Articles 1649 bis to 1649 octies of the Civil Code that are limited to consumers, the seller is responsible for defects existing at the time of delivery of the goods that become visible within two years after the date of delivery. A consumer is defined in Article 1649 bis section 2 of the Civil Code and Article I.1, 2 of the Economic Code as a natural person who acts for purposes that do not relate to his/her professional or commercial activities.

There is also a risk of **criminal liability**. The Articles 418, 419 and 420 of the Criminal Code are the general provisions on which involuntary manslaughter, injury or death are sanctioned. Furthermore Article 498 of the Criminal Code penalises fraud with regard to the nature or origin of goods sold.

Finally, the **UN Convention on Contracts for the International Sale of Goods 1980** applies in Belgium. It includes the requirement for defective-free products. It therefore also forms a basis for claims for defective products in sales relationships.

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

Strict liability

The producer as well as the supplier and any person who imports the product into the EU can be liable for a defective product. The Act extends liability to the supplier and an EU importer, under the same conditions as in the Product Liability Directive.

Contractual liability

The seller is also liable to the buyer under the Civil Code for defective products. The seller can also claim against any party in the supply chain. The buyer also has a direct claim against any previous sellers, as the right to claim damages for defective products is considered accessory to the title to the product.

Tort liability

Only the person who has committed a fault will be liable to compensate a claimant.

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

Yes, under the contractual liability, a distinction needs to be made. The Articles 1641 to 1649 apply to hidden defects at the time of purchase. Otherwise the Articles 1649 bis to 1649 octies of the Civil Code are limited to consumers, in case of defects existing at the time of delivery of the goods that become visible within two years after the date of delivery (see the distinctions that are made in the other answers).

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

Strict liability

Article 10 of the Act states that the liability of a producer cannot be excluded or limited by contract.

Contractual liability

The liability of the supplier for hidden defects, as regulated in Articles 1641 to 1649 of the Civil Code, can be limited by contract if the supplier acted in good faith. However, professional and specialised suppliers are presumed to know about the defect, so they cannot limit their liability in this way. Liability exclusions need to meet two conditions to be valid,

- i. the contractual clause needs to be accepted by the buyer and
- ii. the supplier is not aware of the hidden defect.

Nevertheless, the seller or any previous seller cannot exclude its liability under the Civil Code to consumers.

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

When products are manufactured in the EU, Regulation Brussels I and Regulation Rome I are applicable. When the defendant is domiciled outside the EU the Belgian Code of international private law will apply.

As regards criminal law, when all the elements or the main element of this infringement occurred in Belgium, the Belgian courts will have jurisdiction.

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

The rules set out in Book IX of the Economic Code (implementing the Product Safety Directive) apply. The FPS Economics (Central Contact Point) supervises the Belgian market and makes sure that all products and services comply with safety requirements.

After receiving information from the Central Contact Point on a dangerous product, the government can impose corrective actions on the producer (Article 7, Book IX, Economic Code). These corrective actions can be warning actions (warning the distributors or the users of the products), and/or doing a product recall. Not to comply with an obligation organised by the Economic Code amounts to a fault and allows the injured party to bring a claim based on articles 1382 or 1383 of the Civil Code.

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 and rules of evidence apply. Product liability cases are brought in the court of first instance or the commercial court. A trader can be sued in the commercial court, even if the claimant is not a trader. A consumer can choose to sue the producer/supplier in the court of first instance.

Typically, written evidence is submitted. In business-to-business sales, all types of evidence are allowed, including e-mails and text messages. All documents submitted and related assumptions can be the basis for a court ruling.

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

A warning letter in the form of a formal claim is in any case always recommended. Under the Civil Code, a business-to-business buyer must make a formal claim (by starting litigation) within a short period of discovering the defect. Failure to do so makes the claim inadmissible.

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)?

Strict liability

Article 10 of the Act stipulates that damages for personal injury and moral damages are recoverable. Compensation for personal injury or death is unlimited. There is no maximum amount determined in Belgian law. Property damage to another good can be recovered if the other good was made for private use and has only been used for private purposes, but the Act provides that the damaged party must bear the first EUR 500 of the damages, which therefore is deducted from the claim. The damages to the defective product itself are not recoverable.

Contractual liability

In case of latent defects, a distinction needs to be done between the situation that

- i. the seller is aware of the latent defects, in which case he must provide full compensation of the damages resulting from the latent defects in the product and
- ii. the seller legitimately ignores the latent defects, in which case he will have to reimburse the price paid and the expenses resulting from the sale.

In case of a lack of conformity of a good sold to a consumer, the consumer may choose between having the product repaired, reimbursement or the rescission of the contract. The consumer has the right to a repair or replacement of the good, except if it is not possible or disproportionate. If the consumer has no right to the repairs or the replacement of the good or if the seller has not repaired or replaced the good within a reasonable delay, the consumer may obtain a price reduction or the contract rescission

Tort and criminal liability

In case of liability of the producer or the seller, the injured person has the right to be fully compensated for the damages. He must place the injured person in the position he/she would have been in if no fault had been committed.

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 are the registry and register fees, writ of summons and notification costs, the (judicial) expert costs as well as the proceedings indemnity.

The administrative costs are normally fully reimbursed to the successful party. The attorneys' fees are not but the successful party will be entitled to a proceeding indemnity to cover (a part) of the attorney's fees. Any final Court decision orders

- i. the payment of the judicial costs by the losing party or
- ii. compensation of the judicial costs. The proceedings indemnity is a fixed intervention in the fees and costs of the lawyer of the successful party. The amount is determined by Royal Decree (and varies from time to time) and depends on the nature and value of the claim. There is a base, reduced and maximum rate. Unless specific factors apply (for example, the claim's complexity or other specific uncommon circumstances) the court will grant the base rate.

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

In accordance with Article 870 of the Judicial Code each party has the burden of proof as regards the facts alleged.

As regards strict liability, Article 7 of the Act provides that the burden of proof of the defect, the damage and the causal link between the defect and the damage belongs to the injured person.

Moreover for a claim based on contractual liability, in addition the buyer needs to prove that the defect existed when he bought the product. Finally, as regards sales to a consumer, Article 1649 *quarter* § 4 presumes that the lack of conformity - appearing within a 6-month delay calculated as from the delivery - existed at the moment of delivery unless the contrary can be proven.

12. Is the state of the art defence available?

Yes, accordingly Article 8e of the Act, the producer can prove that the state of scientific or technical knowledge at the time when the product was put into circulation was not such as to enable him to discover the defect. This exemption cause can only be invoked under the strict circumstances as mentioned in the Act.

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

Strict liability

Under the Act the time limit for claims is three years, from the day on which the claimant became aware, or should have reasonably become aware, of the damage, the defect and the identity of the producer (Article 12 § 2). This delay may be interrupted or suspended.

The right to claim expires ten years from the date on which the producer put the product into circulation (Article 12 § 1).

Contractual liability

Under the Civil Code, a business-to-business buyer must make a formal claim (by starting litigation) within a short period of discovering the defect. Failure to do so makes the claim inadmissible. This short period is not specifically defined in the Civil Code and is determined based on the factual circumstances, particularly the length of time required by the seller to inspect the products and discover any defects, the nature of the good sold, the quality of the parties and the judicial and non-judicial acts (negotiation) accomplished by them. It is generally accepted that if an expert is appointed by the parties or the court, or serious negotiations are conducted between the parties, this short period is suspended. In these circumstances it is not uncommon for a buyer to seek the appointment of a court expert, to determine the defect and the related damages. A delay of 6 months up to 1 year is often considered as a "short delay".

Under the business-to-consumer regime, a consumer must bring his/her claim within one year after discovery of the non-compliance and two years after delivery. Following the two years after delivery, the business-to-business provisions apply.

Tort liability

A delay of 5 years as from the date on which the plaintiff was aware of the damage is applicable (Article 2262 bis § 1 of the Civil Code).

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

The Act on Claims for Collective Redress of 28 March 2014 introduced the possibility for consumers to exercise a collective redress action, and is included in Book XVII of the Economic Code. A collective redress action can only be commenced for alleged violations by an enterprise of

its contractual obligations, or of alleged violations of Belgian and European rules that are exhaustively listed in the Economic Code (for example, violations of rules on product liability, competition law, energy law, and banking and finance).

A class of consumers must be represented by a group representative. The bodies that can act as a group representative and bring an action on behalf of the class of consumers are identified in the Economic Code. Natural persons or law firms are not allowed to act as group representatives.

A collective redress action can only be brought on behalf of a group of consumers who have been personally harmed by an alleged violation by an enterprise. It is only admissible if the action appears more effective than an individual action by each of the consumers.

Since the scope of the Act is rather limited, only a few collective redress actions have been introduced since the adoption of the Act.

Important to note is the fact that on 22 March 2018 the amendment to the Code of Economic Law with regard to class actions was approved by the Belgian Parliament. These changes to Book XVII title 2 of the Code of Economic Law have the consequence that the scope of application *ratione personae* of the class action is extended to SMEs. Once the amendment law will be published in the Belgian Official Gazette, the collective claim can be instituted by the group of SMEs to the extent that the common cause occurred after 1 September 2014.

15. What is the average duration of defective products litigation?

The duration of defective products litigation depends from some various factors such as the type of proceedings, the need for an expertise and its progress, the number of different parties etc. A proceeding on the merits is between 12 months and 24 months in first instance and can last until 5 years in appeal.