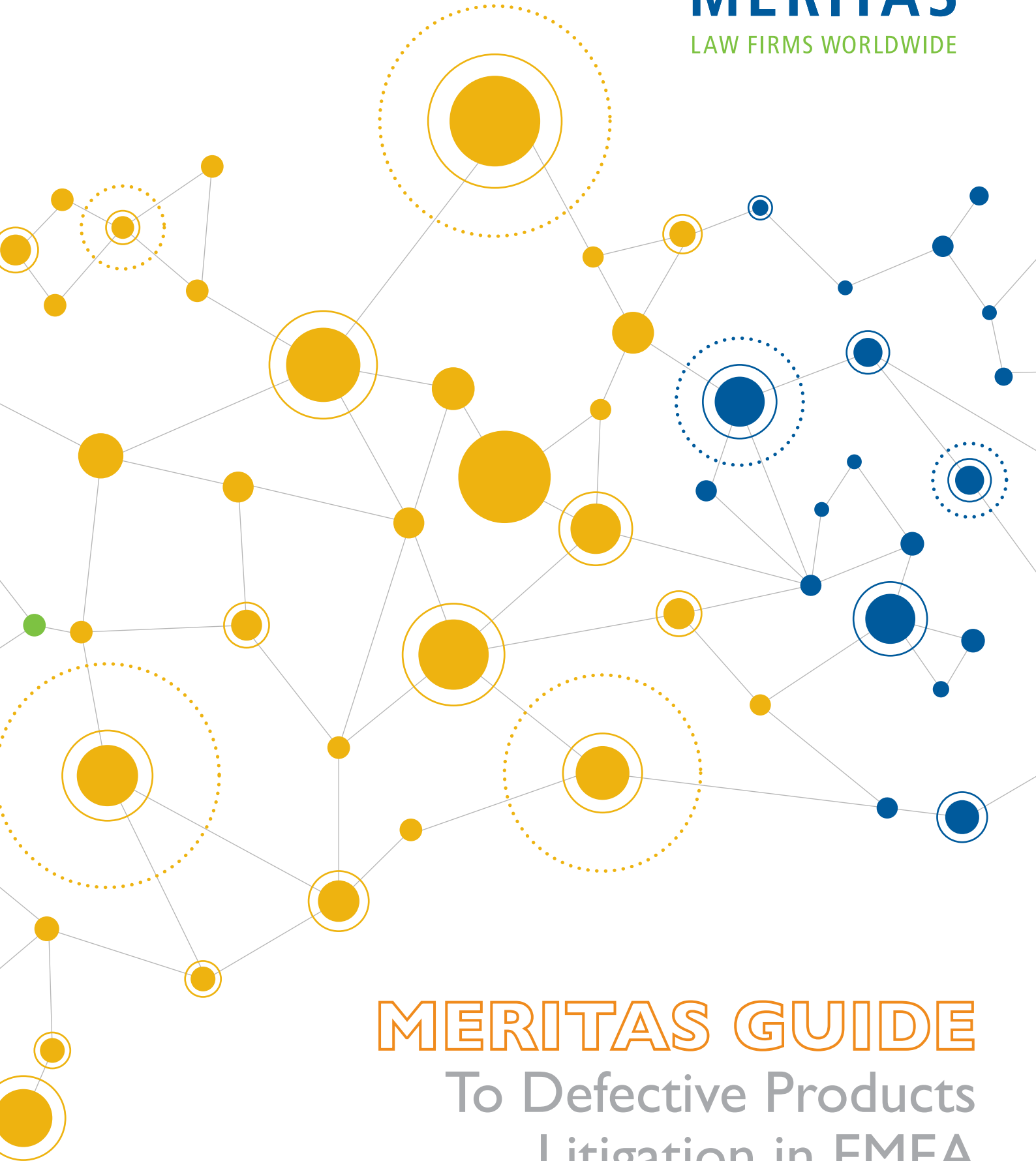




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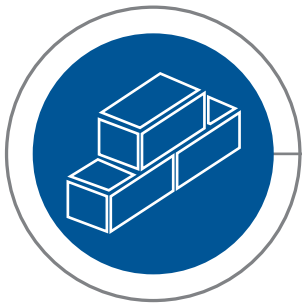
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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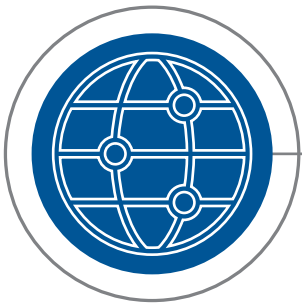
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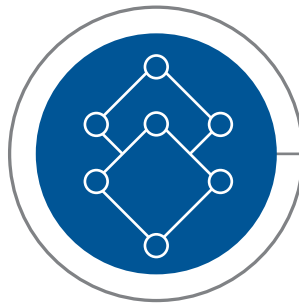
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?



Who is liable to compensate a claimant for a claim?

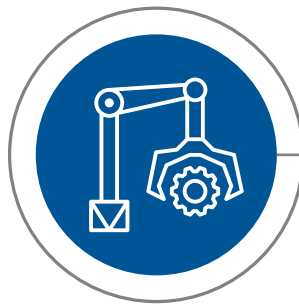
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences 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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I. What claims may be brought for liability for defective products? Is liability based on fault/negligence, or strict liability, or both?

The liability of defective products is regulated by the:

- Portuguese Civil Code (Articles 913 to 922) which can be claimed by non-consumers;
- Sale of Consumer Goods and Guarantees Law (Decree-Law No. 67/2003, dated of 8 April, as subsequently amended) which is only applicable should the sale is made from a professional to a consumer;
- Consumer Protection Law (Law no. 24/96, dated of 31 July, as subsequently amended) which is only applicable should the sale is made from a professional to a consumer;
- Product Liability Law (Decree-Law No 383/89, dated of 6 November, as subsequently amended) applicable should the producer is responsible for putting the products into circulation;
- Commercial Acts Code (Law Letter dated of 28 June 1888, as subsequently amended) only for the purpose of determining the deadline to notify defects and applicable to non-consumers (dealt in more detail below).

Portuguese Civil Code

In accordance with the Portuguese Civil Code, the claims for liability of defective products that may be brought against the seller are:

- annulment of the sale contract, based on error or willful deception;
- compensation in the case of a seller's willful deception (note that in case there is no fault/negligence of the seller, such compensation is not due);
- a reduction on the price;
- repair or replacement of the product (except in the case where the seller was unaware of the defect of the product, however should there is the obligation to provide a warranty that does in

fact oblige the seller to repair or replace the product irrespectively of fault/negligence or error).

Consumer Goods and Guarantees Law and Consumer Protection Law

Based on Consumer Goods and Guarantees Law, consumers may claim the repair of the product, its replacement, reduction of price or annulment of the sale contract and may exercise any of these rights unless it is considered that the consumer is abusing its rights, e.g. claiming for a replacement when the product is reparable will be deemed an abusive enforcement of a right.

In accordance with the Consumer Protection Law, consumers are entitled to compensation for property and non-property damage arising from the supply of defective products or services.

If the consumer chooses to claim the defect to the producer (or his representative), he can only demand repair or replacement and cannot impose a price reduction or rescission of the contract.

Producer, for the purpose of the Consumer Goods and Guarantees Law can either be the manufacturer, the importer for the EU or any other entity that poses as the manufacturer by placing its identification, trademark or other distinctive sign on the product.

A producer's representative is any entity that acts in the capacity of commercial distributor for the producer and/or an authorised post-sale services centre. Independent retailers will not be deemed and producer's representatives.

Product Liability Law

This Law entitles legal persons to claim compensation against the producer who puts a defective product into circulation; regardless of the fault (this is a strict liability legal provision which is deemed objective liability in the Portuguese law which means that the injured party does not need to prove that the producer's behaviour is unlawful). These claims will be based on death or injury or damages caused in other objects either the defective product, provided that the product is envisaged to private usage.

Producer, for the purpose of the Product Liability Law is the manufacturer of the finished product or any material used to produce it or any other entity that poses as the manufacturer by placing its identification, trademark or other distinctive sign on the product. The importer of a product to the EU is also deemed a producer.

In case the manufacturer of a product established in the EU, or the importer for the EU, are not identified on the product, the supplier of the product may be deemed as the producer in terms of having to assume liability.

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

All of the categories mentioned are potentially liable to compensate a claimant in such claim.

Non-consumers can only make a claim

- i. before the seller or
- ii. from the producer/manufacturer if there is a warranty and under the terms thereof.

Consumers may either make a claim before the seller or the producer/producer's representative (please refer to the above answer in order to determine who can be deemed a producer or his representative for defective consumer goods liability).

For the objective product liability, the liability lies with the producer who can be either the manufacturer, the importer or the supplier (please refer to the above answer in order to determine who can be deemed a producer for product liability claims).

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

Yes. A professional buyer is a non-consumer and therefore cannot invoke the Consumer Goods and Guarantees Law and Consumer Protection Law neither the Product Liability Law.

Furthermore, a professional buyer must observe a shorter deadline (8 days only, since verification of the defect as foreseen in the Commercial Acts Code, as opposed to 6 months provided by the Portuguese Civil Code) to claim for a defective product.

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

Excluding or limiting liability for defective products would be possible to agree between professional parties as long as death, serious injuries and intentional conduct is not excluded or limited and such exclusion or limitation is not deemed as offending the laws of the country.

Regarding relationships with consumers, the liability protection are statutory mandatory legal provision which cannot be excluded nor limited.

Furthermore, strict objective product liability cannot be limited or excluded in any way, irrespectively of the nature of the injured party.

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

The seller is always liable, before a consumer, for any defect in the product.

In order for the manufacturer to be liable, there must be an original defect in the product (manufacturing defect).

However, the manufacturer may not be liable if:

- the defect results from misuse;
- has not placed the product on the market;
- considering the circumstances, the defect did not exist at the time when the product was put into circulation.
- did not manufacture the product for sale or for profit;

- more than 10 years have elapsed since the date of placing the product on the market.

If the manufacturer is from another country and has not put the product in circulation out of his jurisdiction/ or in the EU, then he is not liable.

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

In accordance with the legal regime on the safety of products placed on the market (Decree-Law no 69/2005 of 17 March), the fact that manufacturers and distributors do not notify the authorities of an unsafe product they have placed on the market may lead to the application of fines that can go from EUR 7,480 up to 24,940 if it is a legal person.

Manufacturers and distributors also bear the cost of withdrawal operations.

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?

Yes, the buyer must send written communication notifying the defect before issuing any proceedings.

Portuguese Civil Code

Notification of the defect must be made up to thirty days after the defect is known and within six months after delivery of the product. If the product is a real estate, the terms are one and five years, respectively.

If the defect is not eliminated, then the buyer can proceed with legal action but has a period of six months to do so, after which its rights expiry.

Consumer Goods and Guarantees Law

If a consumer is involved, the complaint must be made to the seller (or, as mentioned above, directly to the producer) within two months, in the case of movable property, or within one year, in the case of real estate.

A lawsuit aiming at enforcing consumers rights in the event of a product defect must be filed within two years from the notification of the defect if it is a movable asset. In case of real estate, the term is three years. After this period, the consumer cannot claim its rights.

Commercial Acts Law

If the sale is between traders (trading buy/sale), the deadline for the buyer to report the defect of the product is eight days. For starting a lawsuit, the Portuguese Civil Code provisions are applicable.

Product Liability Law

An injured party must file a lawsuit within three years from the date on which it became aware of the damage, the defect and the identity of the manufacturer.

After 10 years of the product being put into circulation, no lawsuit can be brought against the producer. Pending lawsuits will still continue to be valid.

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)?

As mentioned above, the buyer/consumer may choose to claim (with the caveats mentioned above):

- repair of the product;
- replacement of the product;
- adequate price reduction;
- contract cancellation (in this case, the consumer returns the product to the seller, who, in turn, must return to the consumer the amount paid).

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 (the official fees paid to the Court depend on the amount of compensation that is sought). The winning party is generally awarded their Court costs payable by the losing party.

Experts are born by each party and may or may not be included in the Court's costs that are compensated by the losing party. It depends on how the experts were used by the party or summoned by the Court.

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

Portuguese Civil Code

The buyer has the burden of proof that the seller was knowingly selling a defective product and has to prove that it has notified the defect within the deadline. Should the product be protected under warranty, the buyer has the burden of proof that the product is malfunctioning.

Consumer Goods and Guarantees Law

The consumer benefits from the presumptions established by the law that any defect that occurs during the two years period counting from delivery of the product is legally presumed as being present at the time of the sale.

Therefore the burden of proof that the product was/is not defective lies with the seller/producer.

Product Liability Law

The injured party has to prove the defect, the injury and the cause-effect connection between the defect and the injury. Producer's guilt is presumed and does not need to be proven.

12. Is the state of the art defence available?

A state of the art defence is only available under Product Liability Law.

A product is not considered defective, and therefore the manufacturer will not be liable, should the state of the scientific and technical knowledge at the time the product has been put into circulation did not allow to detect the defect.

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

Please find the answer in point 8.

When the buyer is a consumer, in case a mediation or negotiation procedure is started, or during the time while the product is being repaired, the deadlines set out in point 8 are frozen.

Should a consumer be offered a replacement product, the replacement product shall be granted a new warranty period of two years, if it is movable, or five years if it is a real estate property.

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

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

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

We cannot provide this estimation. It depends on the Court in question (in Lisbon and Porto, legal proceedings take longer, however there are Courts of other locations like Sintra and Loures that are known for being extremely slow). Out-of-court settlement mechanisms for consumer disputes will be faster.