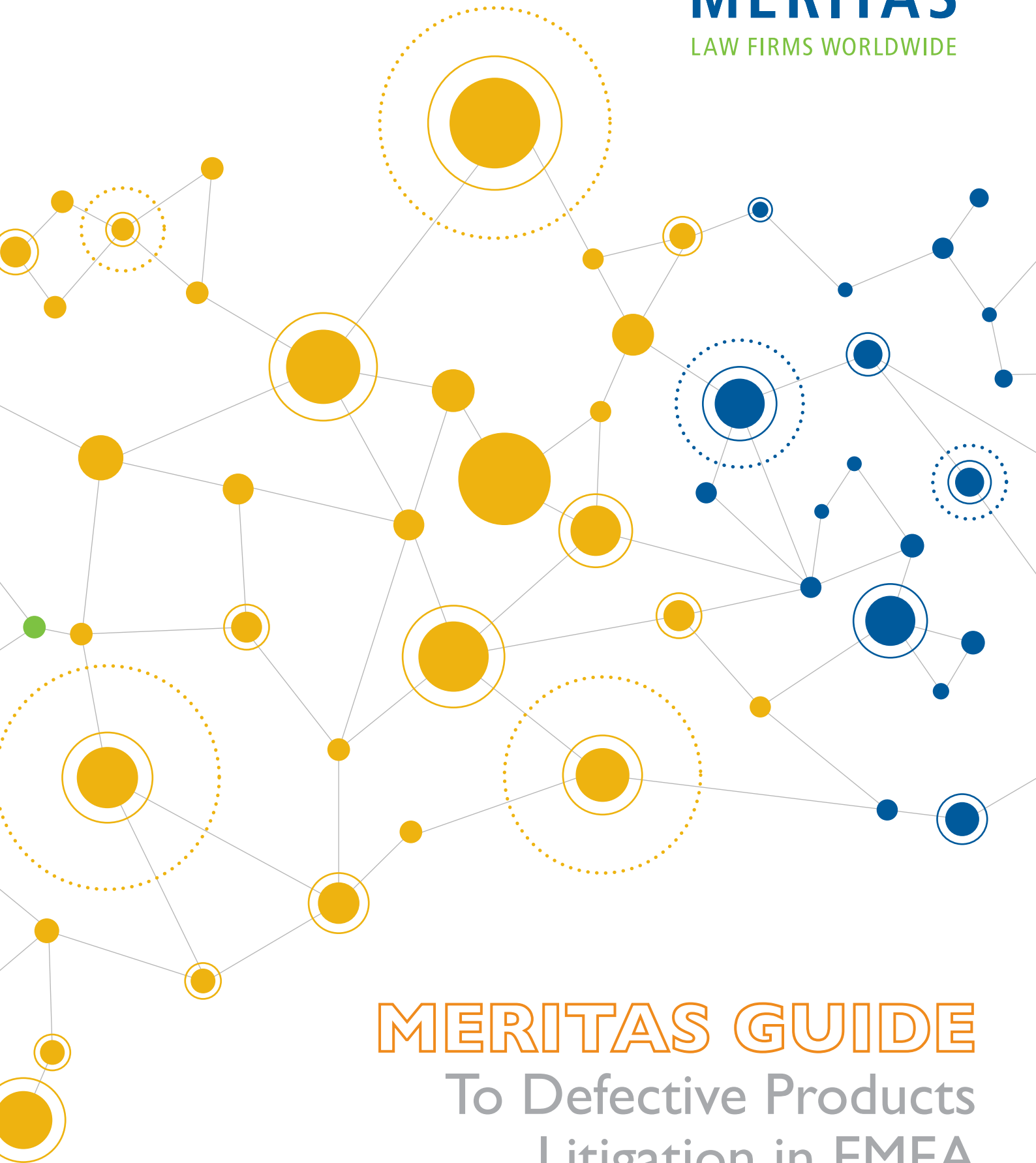




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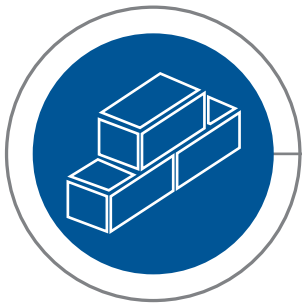
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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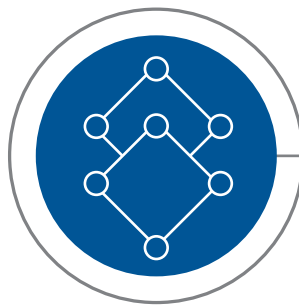
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?



Who is liable to compensate a claimant for a claim?

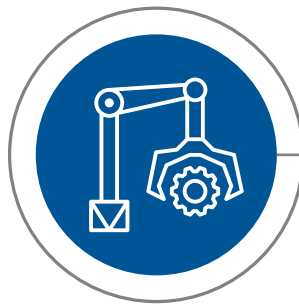
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences 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 Norway, defective product claims may be brought in contract and the tort of negligence and/ or under the Product Liability Act 1988 (“the Act”), which implemented the EU Product Liability Directive.

Product liability applies to the liability of the producer and/or a distributor/ importer 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 or supplier/importer objectively liable for any damage caused by a safety defect in the product. This does not apply if the producer / supplier / importer can prove:

1. That the producer / supplier / importer did not place the product in the market as part of his ordinary business activities;
2. That the defect was not present at the time when the product was placed in the market and the defect should neither have been prevented or warned about, or
3. That the defect is due to the product being in compliance with mandatory regulations issued by public authority.

The Act cannot be waived by prior agreement to the detriment of the injured party.

Outside the Act, a claimant will have to prove fault or negligence on the part of the producer (subjective liability). In this respect, the Act covers only claims for damage to persons or things which are normally meant for a consumer or used by a consumer. Damages to property in business to business purchases are not

covered by the Act wherefore claims must be based on contract and/or tort. 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 or based on the Consumer Protection Act 2002 or the Sale of Goods Act 1988.

negligence.

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 objectively liable. Also, the distributor and/or importer may be held 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, suppliers, retailers and other intermediaries may be liable towards the claimant.

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 may therefore claim compensation for death or personal injury, but claims for damage to property may only be brought by consumers.

Outside the Act, both consumers and professional parties can bring claims for damage to property in contract or



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

Strict liability for the producer can only be excluded or restricted under the Act, if one of the exemptions outlined under no. 1 above are at hand.

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?

Under the Act, the importer of a defective product may be held liable. The distributor of an imported defective product may only be held liable if the importers or intermediary's name and address in Norway are not provided within reasonable time.

Regarding the jurisdiction of the law suit, ordinary jurisdiction rules apply. Generally, the courts of Norway will have jurisdiction if the claim has adequate connection with Norway.

If a claimant suffers injury in Norway, the Courts of Norway is likely to have jurisdiction over a claim on the basis that the harmful event happened in Norway

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, importers and distributors to notify the authorities in cases where they know or should have known that a product they have made available to consumers is unsafe, may under the Product Control Act 1976 result in fines and/or imprisonment, unless higher punishment is implied by other legislation. Criminal liability may also apply if a manufacturer, importer or distributor breaches its duty of care to prevent an unsafe product if they do so with intent or gross negligence.

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?

Normal procedures and rules of evidence 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?

Before issuing any court proceedings, the claimant must send a letter of notification to the defendant. Failure to send such notification will not result in rejection of the claim, but it might become significant as to which of the parties will bear the litigation costs

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 in accordance with the normal rules under the Norwegian Sale of Goods Act, the Consumer Protection Act or the UN Convention on Contracts for the International Sale of Goods (CISG). The buyer of a defective product may also claim compensation for his indirect losses and loss of profit. Often, the seller will exclude liability for indirect losses in the sales contract.

In addition to compensation, subject to the Sale of Goods Act, the buyer of a defective product can elevate the purchase in its entirety if the defect is material, or the buyer can claim correction, replacement or a proportionate discount of the purchase sum equal to the lesser worth of the product.

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. Experts' cost is payable by the party who calls for the expert witness. The winning party is generally awarded costs payable by the losing party, and experts' costs are generally a part of the litigation costs. The Court may derive from this main rule.

11. 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.

12. 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 his products while they were under his control.

13. 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 or the date when he should have gained such knowledge. The overriding time limit is ten years from the date on which the producer brought the defective product into circulation. The limitation period for compensation for personal injury may be 20 years or longer depending on the circumstances.

The limitation period is interrupted when the claimant takes legal action against the debtor.

14. 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.

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

Approximately 6-8 months on average (city courts) from a claim being issued at Court. Generally, longer if there is a Group Litigation Order.