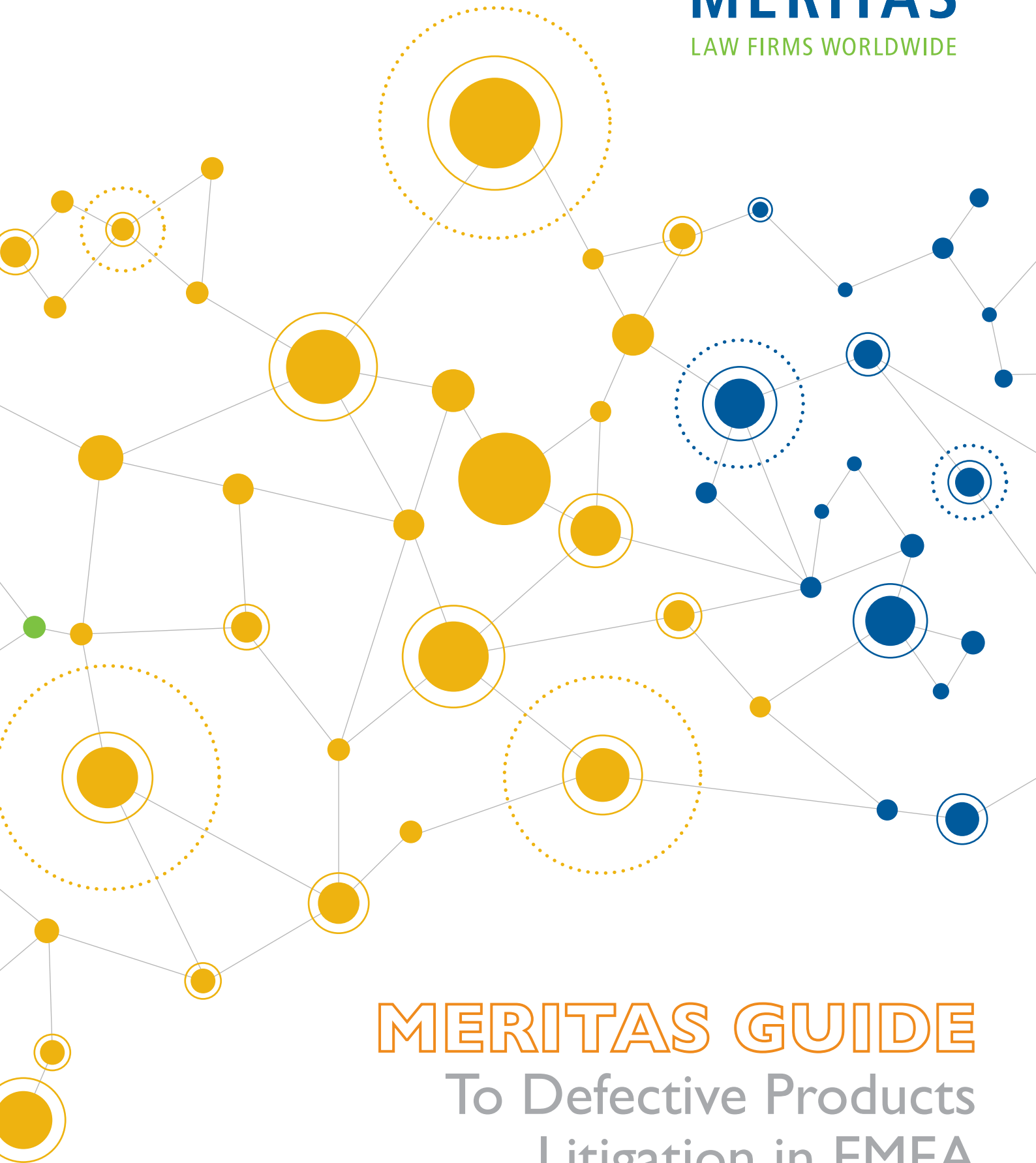




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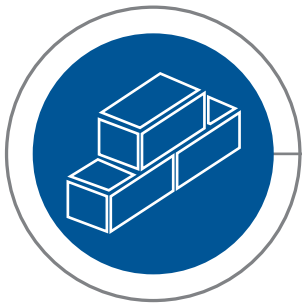
MERITAS GUIDE

To Defective Products
Litigation in EMEA

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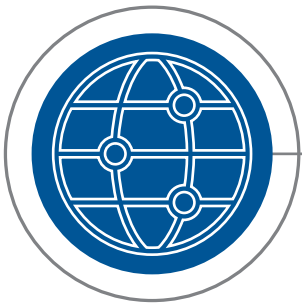
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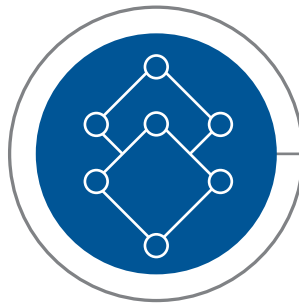
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INTRODUCTION

Key Issues



What claims may be brought for liability for defective products?



Who is liable to compensate a claimant for a claim?

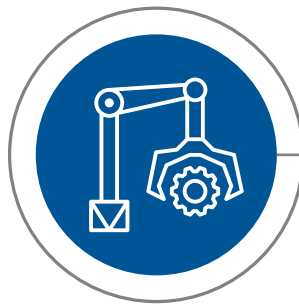
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences 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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1. What claims may be brought for liability for defective products? Is liability based on fault/negligence, or strict liability, or both?

In Slovenia, defective products liability is regulated by the general Code of Obligations (“CO”) and consumer protection legislation, i.e. the Consumer Protection Act (“CPA”). The latter also implemented the EU Product Liability Directive. However, due to the settled case law of the European Court of Justice with respect to the maximum harmonization effect of the EU Product Liability Directive, the CO cannot be used in relation to matters pertaining to product liability which are regulated by the CPA, despite the fact that it envisages a more favourable regime for injured parties. Therefore, if the matters in connection with product liability are envisaged by the CPA, they shall be construed in accordance with the CPA and not the CO. This also stems from settled case law of Slovenian courts. The CPA gives a right to claim compensation against the producer of a defective product, if the defect has caused death, personal injury or harm to human health or if the defect has caused damage to another thing. The CPA provides a strict liability for defective products. Namely, the CPA envisages that an injured party shall only prove a defect, damage and causal link between them.

Notwithstanding the above, an injured person can additionally claim compensation in accordance with a contract, but such claims refers to damage which is not covered under the CPA (i.e. under the EU Product Liability Directive), e.g. damage on the product itself, non-material damage, etc.

Finally, compensation for damages, which are not covered by the CPA within the meaning of the EU Product Liability Directive, can also be claimed pursuant to liability based on fault.

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

In accordance with the CPA, the manufacturer is primarily liable to compensate a claimant with respect to a defective product. In addition to the manufacturer, the importer is secondarily liable to compensate a claimant, where a producer cannot be identified.

In the event that the producer or importer cannot be identified, each supplier of the product shall be treated as the producer unless it informs the injured person, within a reasonable time, of the identity of the producer or importer or of the person who supplied him with the product. Therefore, suppliers are only secondarily liable for compensation.

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

In principle, there are no differences between situations, where a buyer is a consumer or a professional. Namely, Article 11.a of the CPA sets forth that rights from this chapter (i.e. Chapter 2) also belongs to the persons, who cannot be deemed consumers in accordance with the CPA. This provision is a consequence of generally accepted dichotomy between “general” and consumer legislation, pursuant to which the regime under the CPA is not applicable to B2B or C2C relationships.

However, damage to another thing shall be only covered by the producer in the event that such a thing is commonly intended for private use and it was also predominantly used for such purpose by the injured person. Therefore, non-consumers may claim for death or personal injury, but claims for damage to property may only be brought by consumers.

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

In Article 11, the CPA expressly sets forth that liability under the CPA cannot be contractually limited or excluded. This means that liability cannot be contractually limited with respect to damage caused by death, personal injury or harm to human health or damage to another thing which exceeds EUR 500 (i.e. with respect to legally protected damage under the EU Product Liability Directive).

Limitation of other liability shall be asserted in accordance with the OC. The amount of liability which is not envisaged by the CPA can be contractually limited to the extent that the limitation is not obviously disproportional with the amount of damage. Pursuant to the OC, contractual liability is in any event limited with principle of predictability.

Slovenia did not implement the limitation envisaged in Article 16 of the EU Product Liability Directive.

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

Even if the products are manufactured outside the jurisdiction of the Republic of Slovenia or the EU, the consumers maintain their rights under the CPA or EU Product Liability Directive as foreign manufacturers selling their products on the EU market should also respect the relevant provisions. Moreover, according to the CPA any importer or distributor shall be secondarily considered a manufacturer and therefore liable for a defective product in the event that the producer cannot be identified (as explained above). In relation, thereof, the importer is any person who imports the product into the customs territory of the EU, and the distributor

of the product that is not manufactured in the Republic of Slovenia is any trader who first placed the product on the market in the Republic of Slovenia.

Additionally, the Slovenian courts are competent for the enforcement of consumer's rights under the CPA. Therefore, when a consumer has a right to claim compensation under the CPA against the manufacturer (or against the importer or distributor) of a defective product, i.e. when such defect has caused death, personal injury or harm to human health or when a defect has caused damage to another thing, the consumer has several options in regards the competent court. Namely, in a case of the manufacturer's liability in addition to the court of a general territorial jurisdiction the competent courts are also the court on the territory of which the tort has been committed, the court on the territory of which the damage has occurred, and if damages involve death or serious bodily injury the court on the territory of which the claimant has its permanent or temporary residence.

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

In the Republic of Slovenia, the liabilities of manufacturers and retailers for omitted or delayed recall campaigns are regulated with the Act Regulating Technical Requirements for Products and Conformity Assessment (ARTRPCA) and the General Product Safety Act (GPSA).

According to the aforementioned acts, any failure by manufacturers and retailers to notify the competent authorities (in Slovenia the competent authority is every competent inspector) of an unsafe product they have put on the market or any delayed recall of an unsafe product is an offence and can lead to the fines as provided under Article 18 of the ARTRPCA and Articles 21 and 22 of the GPSA.

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?

There are no special procedural arrangements with respect to defective products litigation. The latter is conducted in general civil procedure under the Civil Procedure Act.

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, sending a warning is not a procedural requirement for the initiation of procedure. As in any other litigation procedure, the competent court may grant an interim injunction to preserve the position (subject to general conditions for interim injunction envisaged by the Slovenian law).

Otherwise, the CPA does not envisage any other pre-action measures and the procedure is led in accordance with the Civil Procedure Act.

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)?

In the context of strict liability, the CPA gives a right to a person to claim compensation against the producer of a defective product, if the defect has caused death, personal injury or harm to human health or if defect has caused damage to another thing. In the latter case, a producer is obliged to pay

damages caused on other things if the damaged item is commonly intended for private use and the person has predominantly used it for private use, whereas the injured party's obligatory participation in the damage amounts to EUR 500.

With respect to damages, not covered by the CPA within the meaning of the EU Product Liability Directive, the buyer has also claims deriving from contractual relationship with the seller (a purchase contract), under which the seller is obligated to hand-over to the buyer an item, which is at the time of hand-over free of any material defects (contractual liability of the seller for material defects). In this regard, the buyer has the following claims, if the seller does not hand-over to the buyer an item free of material defects:

- i. a claim for repair and claim for replacement (fulfilment claim),
- ii. a claim for a reduction of purchase price,
- iii. a claim for withdrawal from the contract and
- iv. a claim for compensation for damage. In principle,

the buyer is free to decide, which claim he/she will follow (except that the buyer cannot withdraw from the contract without leaving the seller an appropriate deadline to rectify a defect), whereas a damage claim may be combined with all other claims. The CO and CPA determine different deadlines (e.g. guarantee period) for consumers and non-consumers.

With respect to damages, not covered by the CPA within the meaning of the EU Product Liability Directive, an injured person can also claim compensation for damages pursuant to liability based on fault.

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 depends upon the particular case in question. Costs to be borne by the party are primarily court fees and legal costs (and potentially costs for experts that a party proposes). The general rule for reimbursement of costs is that the winning party is generally awarded its costs payable by the losing party (in part in which the party succeeded with its claim). Legal costs (i.e. the costs of representation) are awarded to the winning party in the amount prescribed by the legislation and not in the actual amount. The party proposing an expert is required to bear those costs in advance and make an advance payment relating thereto, whereas such costs are then reimbursed to such party in accordance with the above mentioned principle for the reimbursement of costs.

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

The CPA provides that an injured party shall prove a defect, damage and causal link between them. In relation to the contractual liability of the seller for damages, it is for the buyer to prove that a product is defective.

In civil claims, the standard is to prove the case against the defendant on the balance of probabilities.

The above mentioned refers to product liability. In addition, it shall be mentioned that with respect to material defects, the CPA envisages that it shall be deemed that a material

defect had already existed at the time of the delivery, if it appeared within 6 months after the delivery of the product. This assumption makes proving of material defect a little bit easier for the consumer (namely, the CPA does not apply to non-consumers with respect to material defects).

12. Is the state of the art defence available?

According to Slovenian law, the state of the art defence is available. The CPA provides that the producer is not liable for damages if it proves that the worldwide state of scientific and technical progress at the time the product was placed on the market was not such that a product defect could be detected (e.g. by known methods and analyses).

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

According to the CPA, the producer is responsible for the damage caused by the defective product if the damage occurs within ten years after the date on which the product was placed on the market (overriding deadline). This deadline cannot be frozen or extended.

The CO envisages that an action for damages must be brought within three years after the injured person was made aware of the damage and the person who caused the damage. These deadlines can be frozen only in the event of some exceptional events (e.g. war, etc.).

Claims for compensation under contract shall be brought within a time envisaged as a statute of limitation for the respective contractual obligation.

The above mentioned deadlines refer to claims pertaining to product liability. In addition, it shall be emphasised that deadlines with respect to claims pertaining to material defects are a lot shorter.

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

The CPA only provides a class action for injunction and not with respect to product liability claims.

A new Collective Actions Act entered into force on 21 April 2018 and enables an action for damages also with respect to defective product liability.

Only a legal person of a private law, who operates a non-profit activity and who has a direct connection with main goals and rights, which should be violated and in connection with which the collective action is lodged, and a higher state attorney are eligible for lodging the collective action. Such person shall be representative and the latter shall be assessed by the competent court. The latter will assess if such a person is adequate for representation of such group (class).

In addition to regular actions (claims), collective action shall also include certain additional components set out in the Collective Actions Act. The competent court decides whether it will apply the system of inclusion or exclusion to the respective collection action procedure.

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

It takes up to two years that the court of the first instance adopts a decision. It takes another year in the event of an appeal by any party to the procedure.

