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Safety defects – economic operators' liability and obligations

INSIGHT

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Summary

Economic operators have an obligation under the Danish Products and Market Surveillance Act only to market products that are safe and to take relevant measures if a product turns out to be dangerous. In this article, the author summaries the obligations on economic operators to take safety measures with regard to dangerous products and the Danish Safety Technology Authority's possibility of issuing orders to enforce such measures. The article also outlines users' possibilities of claiming defects and damages from economic operators whose products turn out to be dangerous and therefore necessitate safety measures.

1. Introduction

the Danish Products and Market Surveillance Act (the "PMS Act")[1], which entered into force on 1 July 2020, imposes an obligation on manufacturers, distributors, and importers only to market products that are safe and to take relevant measures if a product turns out to be dangerous to its users. Complementing the Market Surveillance Regulation[2], the PMS Act is actually not a novelty in Danish law, being based on the same principles as the now repealed Product Safety Act[3].

The PMS Act consolidates product safety regulations – and regulatory powers in the area – both in relation to the products that were covered by the Product Safety Act and in relation to a variety of other products that are subject to EU rules as listed in section 2 of the Act.

This article deals with the obligations of manufacturers, distributors and importers under the Act and the action that may be taken by the authorities (primarily the Danish Safety Technology Authority[4]) against potentially dangerous products. Essentially, manufacturers, distributors, and importers, etc. have the same obligations under the Act, being collectively defined as "economic operators" in section 4(1)(i). This article will therefore use the same terminology, and no distinction will be made between manufacturers, distributors, etc., which will be jointly referred to as "economic operators".

Then, the possibilities for buyers and users (collectively "users") to complain of safety deficiencies and claim damages, including in connection with a product recall due to a potential risk, will be discussed. These rules are not laid down in the PMS Act but can be inferred from the general Danish rules on the sale of goods and tort liability.

[1] Act no. 799 of 9 June 2020
[2] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products
[3] Consolidated Act no. 3 of 3 January 2019 (now repealed), see section 39.
[4] See section 9(1) of the Products and Market Surveillance Act. Specific products with specific risks which must comply with special rules may be subject to supervision by another enforcement authority. However, such alternative enforcement authority will be vested with the same powers, and this article will only refer to the Danish Safety Technology Authority, which is the authority that is responsible for most products.

2. Statutory obligations of economic operators

According to section 5(1) of the PMS Act, economic operators must ensure that products which are brought into circulation or made available on the market meet a number of requirements, and that they do not present any risks when properly installed and maintained and when used for the intended purpose or under reasonably foreseeable conditions (section 5(1)(iii)).

A product that does not satisfy these requirements may not be marketed or made available on the market. Nor may the product be installed or put into service by electricians or fitters (section 5(2)). According to the legislative history, section 5[5] is intended to "*make it clear that the economic operator must make an active effort to ensure that the product which is brought into circulation or made available on the market complies with the rules and is safe to use*". Thus, all economic operators have a general duty to ensure that the products they contribute to placing on the market are safe to use.

When assessing whether a product is safe, its properties and intended use, the users' qualifications, and the possibility of providing guidance on and warn against any hazards will be taken into account. The following is stated in the legislative history behind section 5: "*The [product safety] requirements will, in particular, be related to specific risks presented by the product, e.g. physical and mechanical resistance, enclosure of potentially dangerous parts, inflammability, electrical properties, impact on other products, accuracy, etc. or to its performance characteristics, e.g. provisions on materials, construction, structure, manufacturing process, expected life and instructions issued by the manufacturer, warning and age labelling*". Based on their knowledge of the design and properties of the product, economic operators must therefore identify any potential risks and issue the necessary warnings and guidance to make the product safe to use.

In case Ufr.2000.679 S, which involved tealight candles, the Danish Maritime and Commercial Court ruled on the term "safe" within the meaning of section 6 of the then current Product Safety Act. The Court held as follows:

According to section 6(1) of the Product Safety Act, a product is safe if it does not pose a health or safety risk to any individual or to property when used for its intended purpose or in a foreseeable manner. The provision must be interpreted in light of Article 2(b) of the Directive, which provides for a high level of protection for the safety and health of persons, and according to which the risks presented by a product must be assessed taking into account in particular its characteristics, composition, presentation and labelling, any directions as to its use, and any information about categories of users who are at risk when using the product, in particular children.

In assessing the reasonably foreseeable use of the product, a certain atypical use should also be allowed for if, based on experience, such use is likely to occur."

It is safe to assume that the principles underlying section 6(1) of the former Product Safety Act still apply. Thus, for risk assessment purposes it must be established if the product, with its specific properties, poses a health or safety risk to individuals or to property when used in the manner foreseen by the economic operator.

The assessment of product safety is in many ways similar to the assessment of defects to be made under product liability law, where a product is deemed defective if it does not offer the safety that may reasonably be expected from it as provided in section 5 of the Danish Product Liability Act (and the corresponding principle established in product liability case law). In assessing whether a product is defective, the marketing of the product, its reasonably foreseeable use, and the time when it was brought into circulation will be of particular relevance (see section 5(1)(i)-(iii) of the Product Liability Act).

However, the assessment of defects made for product liability purposes cannot be fully equated with the risk assessment to be made under the PMS Act. Hence, the fact that a product is defective does not necessarily mean that it also presents a risk under the PMS Act, although it will probably be easier to establish a safety risk if the product is found to be defective. Conversely, a product that poses a safety risk under the PMS Act will, as a rule, also be deemed defective under the product liability rules as established by Jens Rostock-Jensen and Allan Kvist-Kristensen in the annotated Product Liability Act dealing with section 5 of the Act, p. 135. However, reference is also made to so-called development damage as discussed below.

[5] Bill no. 179 of 23 April 2020.

The principle of system damage (damage caused by a known and unavoidable risk associated with the product) which exempts the manufacturer from product liability also applies in relation to the assessment of safety risks under the PMS Act. Thus, section 5(1)(iii) b) provides that the product may not present a risk when "*used for the intended purpose or under reasonably foreseeable conditions*". Conversely, a product will not be deemed to present a risk if its general properties involve an acceptable risk that can be eliminated by foreseeable and normal use. According to the legislative history behind section 5, a product "*is not considered as dangerous if the risk involved in using it is limited and acceptable, nor is a product considered as dangerous only because safety can be increased, or because another and safer product can be obtained*".

A knife carries a risk that the user will cut themselves, but the risk is known and acceptable and will not manifest itself if the knife is used in the usual and sensible way. As a general rule, the knife will therefore not pose a risk under the PMS Act (nor will it be deemed defective under the product liability rules). Similarly, a medicinal product which has a known and acceptable risk of common adverse effects will not normally be considered to present a risk under the law (and, again, will not be defective under the product liability rules).

However, both the knife and the medicinal product may still present a risk (and be deemed defective) if the risk exceeds what would normally be expected and accepted in connection with ordinary use of the product.

The risk associated with a product may, if possible, be eliminated by easy-to-understand instructions or a warning. The greater the potential risk, the higher the requirements to be met by the instructions or warning, and the risk may obviously be so high that it cannot be completely eliminated by instructions or warnings. Also, the usual target group for the product must be taken into account to ensure that products aimed at e.g. children meet a higher safety standard than products aimed at adults, where the risk may be countered through proper instructions or warnings[6].

According to section 6 of the Act, a product is presumed to be compliant, i.e. not to present a risk, if it is manufactured in accordance with standards listed in the EU Official Journal or bears a conformity marking (typically CE marking). This is a rule of presumption only – not an imperative rule implying that products will always be considered safe if they have been manufactured according to an EU standard. Thus, if an economic operator learns that a product poses a risk even if it meets an EU standard or

bears the CE mark, the operator must refrain from placing the product on the market under section 5 of the Act.

If an economic operator is informed that a product which he has placed or made available on the market does not meet the requirements in section 5(1)(iii) or (iv), for instance because it presents a health risk when used in the usual foreseeable way, the economic operator must immediately notify the Danish Safety Technology Authority and take the "*necessary measures*" (see section 5(3)).

The notification must allow the Authority to assess the risk, including whether the "*necessary measures*" taken to eliminate the risk are sufficient. The notification should therefore include a description of the product and the risk, including the likelihood of the risk materialising, a specification of the affected products placed on the market, details of the purchasers of the product (distributors, consumers, etc.), and a statement by the operator explaining how the risk will be eliminated (the "*necessary measures*"). According to the legislative history behind section 5, the duty of notification must be complied with by all parties in the supply chain, including both manufacturers, importers, distributors, commercial agents, retailers, and other operators. However, it is sufficient for one of them to notify the Safety Technology Authority, as long as the information provided is adequate.

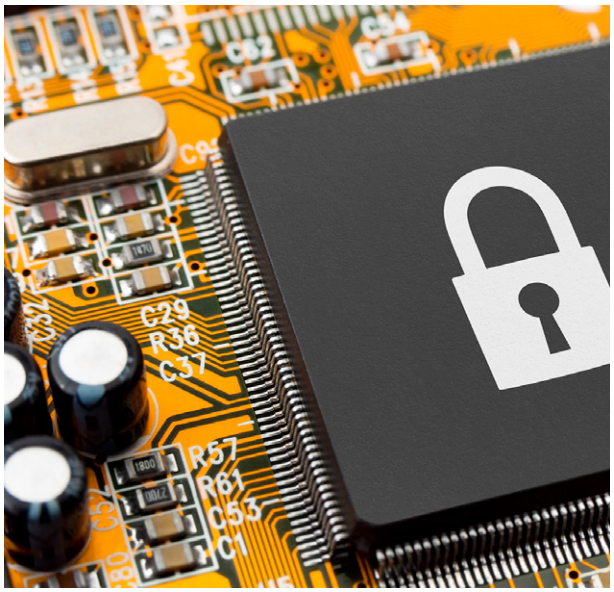
[6] This follows from the legislative history behind section 5, Bill no. 799 of 9 June 2020: "*In assessing whether a risk is acceptable, the category of persons for whom the product is intended must also be taken into account. For example, a soother or toothbrush must be designed so that it does not cause harm when it comes into the hands of young children, while an experienced hobby mechanic may use potentially dangerous products as long as they are accompanied by the necessary protective devices, including risk information.*"

If the product has been sold in several EU Member States, notification of the relevant national authorities may take place using the EU Commission's Product Safety Business Alert Gateway[7]. For the purpose of such joint notification, a form with details on the product, the risk, and the proposed measures must be submitted online to a joint EU database from which the local safety authorities can get access to the information.

An economic operator who has submitted a joint notification through the Product Safety Business Alert Gateway should still notify the national authorities of the identified risk and further notify the Safety Technology Authority separately as stated by the Authority on its website.

Section 5(3) of the Act does not provide any guidance as to which "*necessary measures*" must be taken, and it is therefore for the economic operator to assess which measures are necessary in the situation to effectively prevent the risk from materialising. For this purpose, section 14 of the Act, which empowers the Authority to order economic operators to take certain measures, may serve as inspiration when considering relevant measures. The possible orders that may be issued under section 14 are generally intended to warn users, stop the sale or marketing of the product and recall, withdraw, or destroy the product. For further details on the individual measures, reference is made to paragraph 3 below.

The list in section 14 is not exhaustive, but only gives examples of the possible measures which economic operators may be required to take on their own initiative under section 5(3) of the Act. Operators may take any one or more of the listed measures to counter the risk



posed by their product or any other measure which is better in the circumstances. Decisive is whether the measures effectively prevent the risk or reduce it to an acceptable level.

The more serious the risk, the more extensive the measures required. A limited risk of property damage may be dealt with by a warning or guidance, whereas a serious risk of personal injury is more likely to require withdrawal and – if the product has been resold to the users – recall of the product.

The economic operator will be required to take the necessary measures under section 5(3), even if the product was considered safe at the time when it was put into circulation. Thus, the PMS Act does not contain any concept equivalent to the product liability concept of development damage – i.e. damage caused by defects that could not be established in the light of the scientific and technical knowledge available when the product was put into circulation[8].

Under section 7(1)(iv) of the Product Liability Act, a manufacturer will be exempt from liability if the damage was in the nature of development damage within the meaning of section 7(1)(iv) of the Product Liability Act and the corresponding principle that has developed in product liability case law. However, an economic op erator cannot avoid the obligations imposed by the PMS Act by arguing that the risk could not be established at the time when the product was placed on the market. If, as a result of new knowledge or technological developments, the economic operator realises that the product poses a risk, the operator must notify the Safety Technology Authority and take the measures required by section 5(3), even if the risk could not have been established when the product was placed on the market.

It is up to the operator to decide which measures will be most effective in mitigating the risk presented by the product. However, this "discretion" to choose the right measures must be seen in the light of the Authority's powers to intervene and order further measures if the operator's voluntary measures are deemed insufficient (see paragraph 3 below).

The economic operator's obligations in relation to the products it has brought into circulation are not subject to any time limits under the PMS Act. It may therefore be assumed that the operator's obligation to notify the Authority and to take risk-mitigating measures persists during the life of the product[9], which is in line with the statutory consumer protection regulations. The life of the products must be assessed on a product-by-product basis.

[7] Product Safety Business Alert Gateway (europa.eu). The Danish Safety Technology Authority offers detailed guidance on the creation of an EU login, the use of the Business Alert Gateway portal, etc: What to do if I have sold a dangerous product? (sik.dk)
[8] See also Ulla Brøns Schnohr and Lars Økjær Jørgensen, annotated Product Liability Act, p. 48, on section 6 of the then current Product Safety Act.
[9] See also Ulla Brøns Schnohr and Lars Økjær Jørgensen, annotated Product Liability Act, p. 48 and 62, on section 12 of the then current Product Safety Act.

In practice, however, the operator will be released from the obligations over time, as most products are eventually worn out and discarded, and as it becomes increasingly difficult to trace the relevant products and the users.

Conversely, economic operators' obligations under the Sale of Goods Act will not exist indefinitely as explained in more detail in paragraph 4 below.

Section 5(3) of the PMS Act provides for sanctions, and any violation is punishable by a fine or, in serious cases, imprisonment for up to two years (section 37).

3. Regulatory powers

As supervisory authority under the Act, the Safety Technology Authority has powers to ensure that economic operators comply with the Act. The Authority monitors compliance with the Act as provided in section 9(3). According to subsection 4, this must be done "*in such a way that action is taken using such means and speed as are required by the severity of the risk, including by use of a cover identity.*" Thus, the Safety Technology Authority has wide powers to intervene against potentially dangerous products and may for instance single out products for inspection or carry out inspections by means of enquiries or use of social media without revealing that the inspection is being carried out on behalf of the Authority.

The Authority may further ask operators to provide any information which is deemed necessary for its activities (section 10), and the Authority will not need a warrant to access business premises, where products falling within the Act are being kept (section 11). In the case of lifts, elevators and other lifting, pressure, electrical and gas equipment, the Authority also has a right to enter private premises, where such equipment has been installed or is being kept.

Hence, the Safety Technology Authority may search the premises of economic operators without a warrant if the Authority suspects that a product does not meet the statutory requirements. According to the legislative history behind section 11[10], this right of access can be *"exercised to establish if products comply with the rules, or if an economic operator meets its obligations*". The right of access can be exercised both where the Authority suspects a violation (proactively), and where the Authority has been notified of an actual risk, for instance in connection with an accident (reactively). The Authority may inspect the products on site or single out products for safety checks as provided in section 11(2) and section 12. The Safety Technology Authority can engage experts to assist with technical investigations (section 11(4)) and may, if necessary, ask for assistance by the police in getting access to perform the inspection (section 11(5)).

Based on the legislative history, the Authority must apply a principle of proportionality to ensure that the action taken is reasonable having regard to the suspected risk. In assessing whether it is necessary for the Authority to get access to take test samples, the nature of the product to be tested and the need for the Authority to select the specific product itself will be taken into account. If it is not necessary for the Authority to select the products itself, it may request to receive one or more product samples for safety checks, and economic operators are required under section 12(2) of the Act to comply with such request.

If the Authority believes that a product poses a risk – if applicable following an inspection as provided in section 11 – the Authority may issue an interim order banning delivery, marketing, or other ways of making the product available (section 13). For this purpose, the Authority must again apply a principle of proportionality, meaning that the ban may be upheld only as long as is necessary to complete the investigation or assess the safety of the product.

If the Authority concludes that the product does not fulfil the statutory safety requirements, or that an economic operator does not comply with the statutory rules, for instance because the operator's own riskmitigating measures are inadequate, the Authority may issue further orders against the operator as provided in section 14. According to section 14, all parties in the supply chain may be ordered to:

1. warn users of the risks posed by the product
2. ban any marketing likely to mislead users
3. remedy any matter which conflicts with the rules
4. stop selling or distributing the product
5. effectively and immediately withdraw the product from the market
6. recall the product, or
7. destroy the product properly

When resorting to such orders, the Safety Technology Authority must again, based on the legislative history behind section 14, apply a principle of proportionality and use the least intrusive measure.

Warnings – being the least intrusive order – can be placed on the product itself, on the package leaflet or in the instructions, on signs in physical stores, or on websites selling the product, or may be given in any other way. The content of the warning will depend on the nature of the product and the perceived risk. The warning must be targeted at the relevant users and be written in Danish (and any other language, if necessary).

[10] Bill no. 179 of 9 June 2020.

Remedial action may be taken by the economic operator picking up the product or asking the user to send it to the operator or to a repairer, or the action may be taken by the user himself. Where the remedial action is taken by the user, the economic operator must provide all relevant instructions and any spare parts needed by the user. According to the legislative history, the remedial work may be left to the user only in connection with "*uncomplicated remedial actions*", which excludes extensive and/or highly technical work.

The remedial costs are payable by the economic operator, whether the remedial action is taken by the operator or by the user.

The difference between a withdrawal and a recall is that, in connection with a withdrawal, the product has not yet reached the users. In that case, the operator must therefore withdraw the product from the downstream market to ensure that it is not distributed or made available to the users by other means. In the case of a recall, the product has already reached the users, and the economic operator must therefore trace the product and ask users to return it to eliminate the risk presented.

All withdrawal and recall activities must be effective to ensure that downstream distributors and/or users understand the gravity of the situation and the importance of returning the product. It is not clear from the Act or the legislative history how many products need to be returned for the withdrawal or recall to be considered effective. In the case of a withdrawal, the economic operator will generally be able to trace most of the products that are still being kept in storage facilities or by distributors, and it may therefore be assumed that the Safety Technology Authority can demand withdrawal of a large proportion of the products.

In the case of a recall, it will be more difficult to trace the products and contact the individual users, and the required number of recalled products is therefore assumed to be lower. Ultimately, the effectiveness requirements will depend on the nature of the product, the severity of the risk, and the actual possibilities of contacting users and ensure a successful recall.

According to the legislative history, a recall must be organised so as not to cause significant inconvenience to the user. Neither the Act nor the legislative history provides any guidance in relation to the economic operator's obligations in this respect, and it is therefore up to the operator – and ultimately the Safety Technology Authority – to decide on the organisation of the recall in the specific situation. However, it will not be possible in practice for

the operator to do all work in relation to the recall. As an example, the user will have to return the product as directed by the operator.

Users' rights under tort and sale-of-goods law in connection with a product recall are discussed in paragraph 4 below.

An order for destruction is the most intrusive order and can only be issued if none of the other orders are sufficient, for instance where even storage of the recalled products is associated with a risk. The Safety and Technology Authority cannot order the economic operator to destroy products that are not in the operator's possession, for instance because they are still with the users. In these cases, destruction of the products is subject to the products having been returned to the operator as a result of a withdrawal or recall.

The Authority may issue multiple orders at the same time if deemed necessary.

Under section 36(1) of the Act, the economic operator may have an order which has been issued under section 14 brought before the courts within 4 weeks of the date of the order. Such hearing by the courts will not have suspensive effect, unless specifically decided by the court (section 36(2)). As a general rule, the order must therefore be complied with while the proceedings are pending.

Under section 16 of the Act, the Authority may further prohibit anyone from marketing or making a product available on the market if it does not meet the statutory requirements.

In the case of so-called online interfaces – i.e. web shops and trading platforms selling products on behalf of others – the Authority can order the owner of the platform to change or remove content referring to products that do not comply with the statutory rules (see section 17). The owner may be ordered either to change the marketing of the product, for example by including a warning or guidance in the marketing, or to remove the product from the website altogether.

If the owner of an online interface does not comply with an order from the Authority or has repeatedly sold or facilitated the sale of products that pose a serious risk, the online interface may be blocked at the Authority's request (section 18(1) The blocking decision is made by the court, which will issue an order against the information society service provider, typically the internet provider, which can easily block access to the interface. Therefore, the formal addressee of the order is not the economic operator – i.e. the website owner – but the internet provider. But the order will still have consequences for the economic operator whose trading platform is blocked.

For a website to be blocked, the risk must be serious. According to Article 3(20) of the Market Surveillance Regulation, the severity of a risk must be assessed taking into account the probability of a hazard causing harm in connection with normal and foreseeable use of the product, the degree of severity of the harm, and the need for rapid intervention by the authorities. If the product poses a risk of personal injury when used in the ordinary manner, it will probably not take much for the court to consider the risk as serious.

Furthermore, it is a condition for blocking that the online interface has repeatedly sold or arranged for the sale of a dangerous product, meaning that the economic operator has committed at least two similar offences within the last 2 years, i.e. three offences in aggregate. It does not have to be the same products, and it makes no difference if the Safety and Technology Authority has issued previous orders against the operator. Decisive is whether the Authority has repeatedly found products offered for sale on the website that pose a serious risk without the economic operator having taken measures to stop such sale.

Both the owner of the online interface (the internet provider) and the economic operator (the owner of the website) must be given the opportunity to make a statement before the court makes its decision (section 18(2) of the Act). If the court grants the blocking request, the Authority must, on its own initiative, ensure that sales are blocked only as long as is necessary and must lift the blocking order when the risk no longer exists. The decision to stop the blocking can be made by the Authority without a court order.

The court must, if requested by the economic operator, reconsider whether the blocking should be maintained – also where the Authority insists that it should (section 18(5)).

4. Claims as a result of safety measures

Economic operators' obligations to take action to avoid product risks and the authorities' possibilities of issuing orders if such action is not sufficient have been summarised above. However, an issue that has not been addressed yet is users' rights under sales and tort law as a result of product safety measures. This will be dealt with below.

Based on the legislative history behind section 14, the PMS Act serves another purpose than the Sale of Goods Act. Thus, the possibility of making a claim for defects in connection with e.g. a recall is a civil law matter, which is not regulated by the PMS Act but by the general rules on tort liability and sale of goods.

A product which is considered by the Authority or by the economic operator to be potentially dangerous when used in the ordinary way will generally be deemed defective and provide users with the remedies available under sections 42-54 (commercial transactions) and section 78-80 (consumer transactions) of the Sale of Goods Act. Depending on the product and the specific defect, users may have a right to rectification, replacement delivery or a proportionate reduction of the purchase price and/or a right to rescind the contract and demand repayment of the purchase price.

Even if the risk presented by the product has not yet caused actual damage, the product could still be defective and trigger remedies for defects, if the economic operator takes preventive measures under the PMS Act, either voluntarily or by order of the Authority[11]. The mere fact that the use of the product involves a risk may, in the circumstances, constitute a defect. It may also amount to a defect if the economic operator, through its safety measures, deprives the user of access to use the product temporarily or permanently.

If the operator remedies the defect within reasonable time, the user will generally not have further remedies as provided in sections 49 and 78a of the Sale of Goods Act. However, the user may demand that the operator pay any remedial costs (see also section 14(1)(iii) of the PMS Act and its legislative history as reviewed in paragraph 3 above) and may, in the circumstances, also claim compensation for any loss caused by the defect as discussed below.

[11] The following is stated in the legislative history behind section 54 of the Sale of Goods Act, Bill no. 166 of 26 February 2007: "The proposed provision will also apply where an order for recall or destruction is issued, even if it has not been definitively established that the product is dangerous. If, however, the product is subsequently found not to be dangerous, it will often not be deemed defective or entitle the buyer to make a claim against the seller."

If the operator does not remedy the defect within reasonable time, the user will have further remedies, including the right to claim replacement delivery or rescission of the contract (sections 49, 78 b and 80 of the Sale of Goods Act).

If the operator recalls the product, remedial action will no longer be relevant. Instead, the user may, if possible, demand delivery of a new product free from defects or, if the defect is material, rescind the contract (sections 42, 43, 49 and 78 a and b of the Sale of Goods Act). A risk necessitating a recall of the product – thereby preventing the user from using the product safely – will, all things equal, be considered as serious, thus entitling the user to rescind the contract and demand repayment of the purchase price.

If the defect has caused a loss to the user, for instance because the user depends on the recalled product for business purposes and the product cannot easily be replaced, the user may also be entitled to damages under section 45 of the Sale of Goods Act (see section 25 and section 80). For the user to claim damages, the product must not only be defective; the other requirements as to causal connection and foreseeability must also be satisfied, and the user must also produce evidence of the loss.

Since the user's remedies for defects are set out in the Sale of Goods Act, the user must also observe the usual time limits when complaining of defects. In the case of product safety deficiencies, however, the general 2-year limitation period does not apply where the Safety Technology Authority has ordered the operator to recall or destroy the product (section 54(2) and section 83(4) of the Sale of Goods Act).

The consequence is that the buyer of a defective product that has been recalled by order of the Authority can make a claim for defects also after expiry of the 2-year claims limitation period. It is clear from the legislative history behind section 54 of the Sale of Goods Act that the provision applies only to orders for recall and destruction – not to orders for remedy or withdrawal,[12] in which case the 2-year limitation period will continue to apply.

It is further clear from the legislative history on section 54 that the user cannot take advantage of the extended limitation period, where the economic operator has recalled a product on his own initiative[13]. In case of a product recall, the user's possibility of claiming remedies for defects after expiry of the limitation period will therefore depend on whether the recall has been ordered by the authorities, or whether it has been initiated on a voluntary basis.

By voluntarily taking the necessary action to avoid an identified risk, the operator can be sure that the claims limitation period will not be set aside, and that users will be barred from making claims for defects after 2 years. However, the Safety and Technology Authority may still intervene and issue an order against the operator if the voluntary measures are deemed insufficient as provided in section 14 of the PMS Act and described in paragraph 3 above.

If the voluntary measures to mitigate the safety risk are insufficient, and the Authority orders a recall, the 2-year limitation period will be set aside, and the operator will be at risk of claims for defects, also after expiry of the limitation period.

Thus, the interaction between section 54(2) of the Sale of Goods Act and section 83(4) and section 14 of the PMS Act encourages economic operators to take effective and adequate measures at their own instance without the Safety and Technology Authority having to issue orders under section 14 and without jeopardizing the limitation period for claims.

Any claim for defects or damages will still be subject to the general limitation rules in the Limitation Act. Since the user is unlikely to be aware of the defect or the claim before he is notified of the risk by the economic operator or by the Authority, the limitation period will in many cases only start running from that point (section 3(2) of the Limitation Act).

If a product causes damage to property or injury to users, the injured party may both rely on the remedies available under the Sale of Goods Act as described above and claim damages under the product liability rules. In the

[12] Bill no. 166 of 28 February 2007.
[13] See also Ulla Brøns Schnor and Lars Økjær Jørgensen, annotated Product Liability Act, p. 86, on section 12 of the then current Product Safety Act.

case of personal injury and damage to consumer products, the operator's liability will be assessed under the Product Liability Act (and supplementary case law), and in the case of damage to commercial property, the assessment must be made under the product liability rules established in case law.

For the operator to incur liability, it is a condition under both regimes that the product is defective. As explained in paragraph 2 above, a product presenting a risk and thus necessitating measures under the PMS Act will often also be defective. Therefore, it will probably be relatively easy to claim damages under the product liability rules if the product has caused damage.

5. Summary

Economic operators have a clear obligation to ensure that the products they contribute to making available to users are safe and do not present a risk when used in an ordinary and foreseeable way. If, despite such efforts, an operator learns that a product poses a health or safety risk to individuals or property, the operator has an equally clear obligation to take the action necessary to mitigate that risk and prevent it from causing damage. How operators choose to meet these requirements is very much up to them, and as long as effective and sufficient precautions are taken, there will be no need for the Safety Technology Authority to get involved.

If the economic operators do not take the necessary measures themselves, the Authority has extensive powers to intervene and issue orders to effectively address the risk.

A product that suffers from a safety deficiency will generally also be deemed defective. In that case, users' potential claims against economic operators are regulated by the general rules on the sale of goods and will therefore become timebarred according to the usual limitation rules.

Accordingly, as long as the operators take the necessary measures themselves without involving the Safety and Technology Authority, any claims for defects will become timebarred after two years from the date of purchase. If, however, the Safety Technology Authority finds it necessary to issue an order for recall or destruction of the product, the claims limitation period in the Sale of Goods Act will be set aside (section 54(2) and section 83(4)), allowing users to make claims for defects also after expiry of the two-year period, still subject to the general limitation period though.

Furthermore, users may claim damages under the general tort and product liability rules.

Thus, economic operators have a strong incentive to take effective measures to ensure that their products do not pose a risk to users, as such measures – in addition to satisfying public interest in harm prevention in general – will reduce the likelihood of claims for defects and payment of damages. Finally, economic operators have an interest in organising and coordinating such safety measures themselves rather than being ordered to do so by the Safety and Technology Authority, because it will make cost and resource management easier.

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