



# Product Recall

in 20 jurisdictions worldwide

Contributing editor: Mark Tyler

# 2010



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# France

Florian Endrös and Muriel Mazaud

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## General product obligations

1 What are the basic laws governing the safety requirements that products must meet?

The basic French laws governing the safety requirements that products must meet are:

- Act No. 83-660 of 21 July 1983 (published in the Official Journal of 22 July 1983, page 2262);
- the decrees 2004-670 of 9 July 2004 and 2008-810 of 22 August 2008 (published in the Official Journal (JORF) No. 0196 of 23 August 2008, page 13238 text 13 and JORF No. 159 of 10 July 2004, page 12520) implementing Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety (General Product Safety Directive) in France; and
- special acts in force also govern specific fields, for example, there are specific provisions within the Public Health Code (CSP), concerning safety requirements regarding drugs and public health, etc.

Act No. 83-660 of 21 July 1983 and Decrees 2004-670 of 9 July 2004 and 2008-810 of 22 August 2008 are integrated into the Consumer Code under title II, book II.

Article L.221-1 of the Consumer Code creates a fundamental right to safety for consumers:

*Products and services must, under normal conditions of use or under other circumstances that may reasonably be foreseen by the professional, offer the safety that can legitimately be expected, and must not be a danger to public health.*

Articles L.221-1 et seq of the Consumer Code also defines other obligations for professionals in connection with this general product safety obligation, including the obligation to provide information, the follow-up obligation and the obligation to notify.

The safety requirements apply to any professional, that is to say the ‘producer’ and the ‘distributor’ (article L.221-1 of the Consumer Code):

- ‘producer’ means the manufacturer of the product, the manufacturer’s representative and other professionals in the supply chain, as far as their activities may affect the safety properties of a product; and
- ‘distributor’ means any professional in the supply chain whose activity does not affect the safety properties of a product.

2 What requirements exist for the traceability of products to facilitate recalls?

French law has set up requirements to ensure the traceability of products to facilitate recalls:

- article L.221-1-2 II of the Consumer Code introduces a follow-up obligation for the producer who accordingly has to take measures in order to control, follow up and be informed about risks

that his products might present, for example by organising their traceability (by indicating, on the product or its packaging, the producer’s identity and address, as well as the product reference or the batch of products to which it belongs);

- article L.214-1 of the Consumer Code insists on the requirement of taking measures to ensure the traceability of products and foods; and
- French case law requires the organisation of the traceability of products based on the precautionary principle (decision of the French Administrative Supreme Court of 29 December 1999).

3 What penalties may be imposed for non-compliance with these laws?

The Consumer Code does not stipulate specific penalties for non-compliance with the obligations regarding the safety of products set forth in its articles L.221-1 et seq (ie, the obligations to provide information, to follow up and to notify).

Nevertheless, if non-compliance with one of these provisions leads to harm to a consumer, the professional may be held liable in both civil and criminal jurisdictions and sentenced by the civil courts to remedy the damage caused to the victim. Furthermore, a person who has misled or tried to mislead its contracting partner about the nature, origins or risks inherent in the use of the product (deception) is punishable by a fine of €37,500 and up to two years’ imprisonment (article L.213-1 of the Consumer Code).

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## Reporting requirements for defective products

4 What requirements are there to notify government authorities (or other bodies) of defects discovered in products, or known incidents of personal injury or property damage?

The ‘obligation to notify’ government authorities (or other bodies) of defects discovered in products, or known incidents or property damage, results from the General Product Safety Directive and was implemented in article L.221-1-3 of the Consumer Code.

According to article L.221-1-3 of the Consumer Code the professional responsible for marketing a product has to immediately inform the competent administrative authorities as soon as they notice that a product does not comply with the general product safety requirements provided by article L.221-1.

5 What criteria apply for determining when a matter requires notification and what are the time limits for notification?

### Criteria applied for determining when to notify a defect

According to article L.221-1-3 of the Consumer Code, the professional has to notify government authorities (or other bodies) of defects in products, or incidents, as soon as he knows that the product he has put on the market does not comply with the requirements laid down in article L.221-1 of the Consumer Code (General Safety obligation).

The Commission's Decision of 14 December 2004 sets out guidelines for the notification of dangerous consumer products to the competent authorities of the member states by producers and distributors (the Guidelines) in accordance with article 5(3) of the General Product Safety Directive. This is the reference document for the application of the provisions of the General Product Safety Directive concerning notification of dangerous consumer products to the French competent authorities by producers and distributors.

These guidelines set out the notification criteria which apply to France and are as follows:

- the product is understood to be intended for, or likely to be used by, consumers (article 2a of the General Product Safety Directive);
- article 5 of the General Product Safety Directive applies (unless there are specific provisions established by other Community legislation);
- the product is on the market;
- the professional has evidence that the product is dangerous according to the General Product Safety Directive, or that it does not satisfy the safety requirements of the relevant Community sectoral legislation applicable to the product considered; and
- the risks are such that the product may not remain on the market.

#### Time limits for notification

According to article L.221-1-3 of the Consumer Code, the professional has to immediately notify the competent administrative authorities of the incident. No precise time limit is defined within the national provisions.

The guidelines for the notification of dangerous consumer products in France (Commission's Decision of 14 December 2004) provide two time limits:

- a company must inform the competent authorities as soon as the relevant information has become available, and in any case within 10 days from when it has reportable information, even while investigations are continuing, indicating the existence of a dangerous product; or
- when there is a serious risk, companies are required to inform the authorities of the situation no later than three days after having obtained notifiable information.

- 6** To which authority should notification be sent? Does this vary according to the product in question?

According to the Ministerial Order of 9 September 2004 concerning the application of article L.221-1-3 of the Consumer Code, notifications (pursuant to article L.221-1-3) should be sent to one of the three authorities. According to the product in question, the competent authority is one of the following:

- The Directorate for Road Safety and Traffic. Notification must be provided from car manufacturers and their distribution network when vehicles and equipment sold under the manufacturer's brand are concerned.
- The Directorate General for Food. Notification must be provided when food products are concerned, which includes animal food, animal food products or human food. All notifications regarding food products which are not included in these categories (such as additives, aromas, etc) are to be submitted to the DGCCRF (see below).
- The DGCCRF (Directorate General for Competition Policy, Consumer Affairs and Fraud Control). The DGCCRF receives any other notifications which do not fall under the auspices of the Directorate for Road Safety and Traffic or Directorate General for Food referred to above.

- 7** What product information and other data should be provided in the notification to the competent authority?

According to article 2 of the Ministerial Order of 9 September 2004 the following information should be provided in a notification to the competent authority:

- the date of notification;
- the name and address of the professional or company providing the notification, as well as those of its suppliers and the professionals who have been supplied with the product;
- the product's description (particularly its name, brand, batch number, volumes involved, etc);
- the description of the danger and the measures taken by the professional;
- any other information that could be useful to the authorities.

Notification forms can be found on the DGCCRF's website, but they are not mandatory. The following form is composed of seven sections that must be filled out very precisely ([www.dgccrf.bercy.gouv.fr/securite/alertes/documents/formulaire\\_prof.pdf](http://www.dgccrf.bercy.gouv.fr/securite/alertes/documents/formulaire_prof.pdf)). Another form is available in annex I of the European Guidelines ([www.dgccrf.bercy.gouv.fr/securite/alertes/documents/notific\\_prod\\_danger\\_0904.pdf](http://www.dgccrf.bercy.gouv.fr/securite/alertes/documents/notific_prod_danger_0904.pdf)).

- 8** What obligations are there to provide authorities with updated information about risks, or respond to their enquiries?

There is no explicit obligation under French law (the Consumer Code) to provide authorities with updated information about risks. The professional's obligation to inform, as laid down in article L.221-1-2 of the Consumer Code, only concerns the obligation to provide the consumers with information that enables them to assess the risks inherent in a product.

However, French controlling authorities, listed in articles L.215-1 of the Consumer Code, and their officials have investigatory powers and the professionals must respond to their enquiries. Article L.218-1 of the Consumer Code authorises those officials to enter business premises, and premises in which a service is being provided, and can require that the professional provide them with all information allowing them to determine the specifications of the products or services or to estimate whether the product or the service is dangerous.

The Consumer Safety Commission, created in 1983, is composed of judges, experts and representatives of various occupational groups, and consumers. The Commission is in charge of collecting information on the dangers caused by a product or a service. If necessary, it has to inform the public of these dangers and additionally to submit a notice with possible measures to avert any imminent danger. The Commission can initiate investigative proceedings in which the professional must communicate all information useful for the execution of the Commission's mission (article L.224-4 of the Consumer Code).

The Sanitary Surveillance Institute (IVS), created in 1998, and whose task is, in the case of a threat to public health, to inform the public authorities of the origin of the threat and to take appropriate measures to avert the danger, can also request that a person communicates any information in its possession relating to serious threats to human health (article L.1413-5 of the CSP).

- 9** What are the penalties for failure to comply with reporting obligations?

See question 3.

- 10** Is commercially sensitive information that has been notified to the authorities protected from public disclosure?

Article 11 of the Criminal Procedure Code specifies that the procedure during an inquiry is secret.

In accordance with this fundamental principle the officials and employees of the competent authorities have to respect professional confidentiality (this therefore includes the members of the Consumer Safety Commission in application of article L.224-6 of the Consumer Code).

Despite the provisions of article 11 of the Criminal Procedure Code, article L.216-10 of the Consumer Code does however allow the disclosure of confidential information where doing so would avert the risk of serious and immediate danger to the health and safety of consumers.

Therefore, commercially sensitive information that has been communicated to the competent authorities is not in all circumstances protected against public disclosure.

**11** May information notified to the authorities be used in a criminal prosecution?

Information notified by professionals to the authorities can be completed by means of inquiries or hearings before the competent authorities that are in charge of the investigation and assessment of breach of the legal provisions regarding product safety (indeed the professionals have to provide them with all information related to the product and its potential danger (see question 8)). For this reason, information notified by the professionals to the authorities and completed during the inquiries may be used in a criminal prosecution when a breach of the legal provisions regarding product safety has been noted.

#### Product recall requirements

**12** What criteria apply for determining when a matter requires a product recall or other corrective actions?

According to article L.221-3(3) of the Consumer Code, a product recall can be ordered by decree of the French administrative Supreme Court for modification or full or partial reimbursement or exchange if the products do not comply with the general safety obligations defined in article L.221-1.

Under the provisions of article L.221-5 a recall can also be ordered by ministerial order in cases of a 'grave or immediate danger' and if the products do not comply with the general safety obligations defined in article L.221-1.

**13** What are the legal requirements to publish warnings or other information to product users or to suppliers regarding product defects and associated hazards, or to recall defective products from the market?

According to the provisions of the Consumer Code two kinds of measures can be taken if products do not comply with the statutory safety requirements: permanent measures, and temporary or urgent measures.

#### Permanent measures

Article L.221-3 of the Consumer Code specifies that the government may order, by decree of the French administrative Supreme Court, that products shall be recalled or withdrawn from the market for the purpose of modification or exchange if the products do not comply with the general safety obligation defined in article L.221-1. This article also allows for determination of the different ways in which products or services are to be prohibited or regulated if they do not comply with the general safety obligation.

#### Temporary or urgent measures

##### Orders

In case of serious or imminent danger in connection with the provision of a service, and if the products do not comply with the general safety obligation defined in article L.221-1, the prefect at

'department' level can take urgent measures and suspend the provision of a service for a period not exceeding two months (article L.221-6 of the Consumer Code).

A recall can also be ordered pursuant to the provisions of article L.221-5 by ministerial order (in case of serious or immediate danger in connection with the provision of a service and if the products do not comply with the general safety obligation defined in article L.221-1). The representative may also order the destruction of the product or the suspension of the provision of a service as well as the publication of warnings.

##### Injunctions

Article L.221-7 allows the competent ministries to issue two kinds of administrative injunctions (an injunction for the product to be adapted so as to be compliant with the safety provisions and an injunction for inspection by an authorised testing institute in order to rule out any danger).

**14** Are there requirements or guidelines for the content of recall notices?

There are no express requirements in French law for the content of recall notices. However, the decrees or orders must specify:

- the measure that has been taken;
- the duration of that particular measure (in case of temporary measure); and
- the conditions under which the costs bound with the execution of this measure are borne by the professional.

Article L.221-9 of the Consumer Code also insists on the fact that:

- the measures taken must be proportional to the danger presented by the products and services; and
- the only purpose of these measures is to prevent or to put a stop to the danger in order to guarantee the safety that may justifiably be expected.

**15** What media must be used to publish or otherwise communicate warnings or recalls to users or suppliers?

The communication of warnings or recalls to professionals and suppliers is made by official legal documents (decrees and orders).

The communication of warnings or recalls to users may be carried out by:

- information campaigns issued by the administrative authorities;
- publication of guidelines by the administrative authorities (for example, in the field of risk prevention for blood products and for pharmaceuticals obtained from blood, the minister for employment and social affairs published guidelines for patient information); and
- information on recalls in the press (for example, in the periodical *Que Choisir* managed by a consumer association), on television or on the internet.

**16** Do laws, regulations or guidelines specify targets or a period after which a recall is deemed to be satisfactory?

French law does not specify targets or a period after which a recall is deemed to be satisfactory.

**17** Must a producer or other supplier repair or replace recalled products, or offer other compensation?

The civil courts will sentence the producer or other supplier to repair or replace recalled products or offer other compensation.

If the producer cannot prove that the end user used the product despite being informed of the recall, he has to indemnify the victim.

**18** What are the penalties for failure to undertake a recall or other corrective actions?

The penalties for failure to comply with decrees or ministerial orders ordering recalls or other corrective actions are as follows:

- a failure to comply with a decree taken in accordance with the provisions of article L.221-3 of the Consumer Code is punishable by a fine defined in the decree;
- a failure to comply with a ministerial order taken in accordance with the provisions of article L.221-5 of the Consumer Code is punishable by a fine in the amount of €1,500 for an individual and in the amount of €7,500 for a corporate entity. The dangerous product can also be confiscated (articles R.223-1 and R. 23-4 of the Consumer Code); and
- a failure to comply with the measures ordered by the government representative at 'department' level in accordance with the provisions of article L.221-6 of the Consumer Code is punishable by a fine in the amount of €750 (article R. 223-2). The legal entity is liable to a fine in the amount of €3,750.

There are also product-specific criminal consequences. For products whose intended use relates to health, there are special provisions in the CSP (article L.5451-1 and seq).

These impose a criminal fine of €30,000 (for individuals) and €150,000 (for a corporate entity) or a sentence of up to two years' imprisonment on a person who:

- continues trading despite a banning order,
- does not comply with any sales restrictions; or
- fails to withdraw the product from the market or to pass on warnings or the relevant instructions for use.

Similarly severe provisions apply to foodstuffs. In this regard, failure to comply with a withdrawal order may satisfy the definition of fraudulent misdescription of goods for sale (falsification). The falsification occurs by creating the false impression that a product is marketed as complying with standards when it does not.

Merely offering for sale such 'fraudulently misdescribed' foodstuffs or animal food constitutes 'fraudulent misdescription' and carries the same sentence (article L.213-3 of the Consumer Code).

There are also general criminal law consequences. Three criminal offences may be committed in connection with failure to withdraw unsafe products from the market or a failure to warn consumers of possible risks with those products:

- involuntary manslaughter;
- negligent bodily harm; and
- endangerment.

The elements of the offence of endangerment are satisfied if the person concerned owes a duty to ensure the safety of the product, if the violation of this duty creates the risk of death, mutilation or permanent disablement, if this risk is immediate, if another person is exposed to this risk and if the breach of the duty to ensure safety was intentional (article 223-1 of the Penal Code).

### Authorities' powers

**19** Can the authorities impose recall action plans?

According to the provisions of articles L.221-3 and L.221-5 of the Consumer Code, the authorities can impose, by decree or ministerial order, recall action plans.

The French regulatory agency for medical devices (AFSSAPS), which monitors the application of the statutes and statutory orders relating to the various stages of the production process, and of the marketing of products whose intended purpose relates to public health, is also entitled to order a withdrawal or a recall at the cost of the producer or of the person who is responsible for placing the product on the market (L.5312-3 and 5312-4 of the CSP).

### Update and trends

There is no duty on the victim to mitigate damages under French law (according to a Decision of 19 June 2003 of the Cour de Cassation). In the courts there is less argument as to the duty to mitigate damages or the question of contributory negligence, and more in connection with the interruption of the chain of causation between the breach of contract and the occurrence of the property damage.

The Consumer Safety Commission may demand or propose a recall and withdrawal of the product from the market in an official opinion that may be published. On the basis of this opinion, the government may draft a decree imposing a recall action plan. Although as a general rule the opinions of the Consumer Safety Commission are only of an advisory nature, they are generally complied with.

The IVS (article L.1413-2s of the Public Health Code) and the AFSSA (French Food Safety Agency) (article L.1323-1s of the Public Health Code) are also entitled to advise or recommend a product recall. The IVS ensures the constant control of the health of the population. The purpose of the AFSSA is to monitor compliance with hygienic and public-health provisions in the field of foodstuffs, from raw materials, to supply, to the end user.

**20** Can the government authorities publish warnings or other information to users or suppliers?

The Consumer Safety Commission is entitled to bring any information that it deems necessary to the attention of the public (article L.224-2 of the Consumer Code).

The AFSSAPS must inform, if necessary, the public by any media, and notably by broadcasting health messages or recall notices on any product which represents a danger to human health (L.5312-4 CSP).

According to article L.1323-2 of the CSP, the AFSSAPS may lead any information campaign to the consumers, and also broadcast scientific and technical documentation in connection with its tasks.

Finally, the IVS may warn the minister for health affairs about any threat to public health.

**21** Can the government authority organise a product recall where a producer or other responsible party has not already done so?

Pursuant to the provisions of article L.221-3 and L.221-5 of the Consumer Code, the government authority can organise a product recall where a producer or other responsible party has not already done so.

**22** Are any costs incurred by the government authority in relation to product safety issues or product recalls recoverable from a producer or other responsible party?

The costs incurred by the government authorities in relation to product safety issues are recoverable from the producer or other responsible party.

This results from decisions of the Administrative Supreme Court as well as from the provisions of the Consumer Code. Article L.221-3(4) regarding decrees of the Administrative Supreme Court and article L.221-5 regarding ministerial orders, stipulate that the decrees or ministerial orders indicate the conditions under which the costs associated with the safety measures pursuant to a decree or ministerial order are to be borne by the professional. However the professionals often challenge the obligation to bear these costs.

Article L.216-5 of the Consumer Code also provides that the testing costs of the products will be charged to the professional.

**23** How may decisions of the authorities be challenged?

Decrees of the Administrative Supreme Court may be challenged before the administrative courts, in proceeding, set aside an administrative decision on the grounds that such a decree is ultra vires, submitting that there were no safety regulations for the product in question or that the product complies with European safety provisions.

The banning or suspension order in case of imminent danger issued by the prefect or by the competent minister is a unilateral administrative act which can also be challenged by claiming ultra vires.

The opinions issued by the Consumer Safety Commission cannot be challenged in front of the administrative courts, because of their advisory nature and due to the fact they are not regulatory decisions. The same applies for the opinions of AFSSA and the IVS.

**Implications for product liability claims****24** Is the publication of a safety warning or a product recall likely to be viewed by the civil courts as an admission of liability for defective products?

The publication of a safety warning or a product recall is likely to be viewed by the French civil courts as an admission of liability for defective products, or at least as an indication that the product is defective.

**25** Can communications, internal reports, investigations into defects or planned corrective actions be disclosed through court discovery processes to claimants in product liability actions?

In product liability actions, communications, internal reports or investigations into defects may be disclosed by the producers to claimants in order to prove that:

- their product is not defective (and that any damage is caused by the conditions of use of the product); or
- the defect results from a third party product which has been supplied and incorporated into the end product.

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