

# PRODUCT LIABILITY

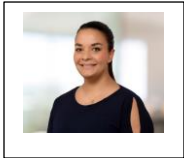
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## IN THIS ISSUE

*The Covid-19 pandemic is raising numerous questions which are starting to lead to litigation against businesses around the world. France is no exception and, like a number of civil law countries, employee-related litigation is the first category to be launched as they generally set the tone for other types of claims, such as consumer claims. In this line, Amazon has been targeted by a claim in France on the grounds of the health & safety of its employees. Amazon's condemnation made the headlines for weeks as the decisions rendered have been designed as a roadmap for companies who are still operational or have decided to resume their activity during the health crisis.*

## Why isn't Amazon Treated as a Prime Company in France?

### ABOUT THE AUTHOR



**Sylvie Gallage-Alwis** is one of the founding partners of the Paris office of the dispute resolution-focused firm Signature Litigation, originally established in London. Sylvie specializes in French and EU Product Liability and Toxic Tort, representing manufacturers in civil, criminal, administrative, class actions and mass tort litigation. She is both registered with the Paris Bar (and can try cases in all Courts in France, whether lower level or appellate courts) and as a Solicitor in England & Wales. Sylvie is Vice Chair of the IADC Under 45 Task Force and Vice Chair of Diversity for the Product Liability Committee. She can be reached at [sylvie.gallage-alwis@signaturelitigation.com](mailto:sylvie.gallage-alwis@signaturelitigation.com).

### ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Governments around the world have asked people to stay home but at the same time have asked companies, especially those that provide essential goods and services for the population, to keep on being operational. One could have thought that governments, in light of these special circumstances, would have provided guarantees to these companies against future litigation through, for instance, the creation of a special State-financed fund or by signing specific insurance policies for these risks on behalf of companies or through special procedural laws or presumptions in favor of companies. This is not the case. Indeed, while governments have decided to help companies face the current lockdown with measures related to unemployment and the decrease in the activity level, for instance, they have not made any statements concerning the future.

When it comes to the health and safety of workers of companies that are still operating, governments have indeed simply provided for rules relating to how the work should be organized (use of masks, only one employee per square meter, availability of hand sanitizer gel, etc.). In France, the government imposes on companies measures like:

- *"assess the risks taken at the workplace that cannot be avoided according to the nature of the work to be carried out;*
- *determine, based on this assessment, the most relevant preventive measures;*

- *carry out this task by involving the staff representatives;*
- *contact, when possible, the occupational medicine service, whose mission is to advise employers, workers and their representatives and, in this respect, recommend any useful information on the efficient protective measures, the implementation of the "barrier gestures";*
- *comply with and enforce the barrier gestures recommended by the health authorities".*

However, when it comes to addressing liability, the French government specified that *"the employer's liability for its non-compliance with this specific obligation to prevent occupational risks can be sought"* and that *"regardless of the situation, complying with this specific obligation or, on the contrary, not complying with it, are not presumed (except in very rare cases) and must be proven, in the event of a dispute"*. The government goes further by expressly stating that employees could file gross negligence claims should they develop Covid-19.

This has not gone unnoticed by trade unions, which have started threatening numerous companies with lawsuits. Amazon is the key example today of all that can go wrong. Amazon has first been targeted by proceedings relating to the right of withdrawal used by some employees and by a criminal complaint on the ground of endangerment of the life of its employees.

But, more original, Amazon has been targeted by a claim grounded on the termination of manifestly illicit disturbance resulting from the breach of the obligation to keep employees safe as per the French Labor Code. This claim led Amazon to close down for around a week in order to implement measures and gather documentation that satisfy the French authorities. It also led it to currently reduce its activity and the products made available to French consumers.

There are three main takeaways from the decision of the Nanterre Civil Court (lower Court) dated April 14, 2020 and the Versailles Court of Appeal's decision dated April 24, 2020:

1. A business can remain open even if the consequence is that more than 100 employees are at work
2. Employees' representatives need to be involved in all decisions taken and must take part in the discussions around health & safety
3. The company must document all the measures it is taking (including its exchanges with the employees' representatives) even in times where urgent actions are needed

### **Documentation is Key**

Documentation is indeed key and this is what French Courts mainly state in their decisions. They indeed did not challenge the relevance of most of the measures taken by Amazon but condemned the lack of written

documents proving that these measures were implemented.

Indeed, when it came to the question of whether or not Amazon involved the employees' representatives, Amazon argued, without being challenged by the workers' representatives, that it:

- implemented 3 daily risk assessments on each site (inspection by the safety team; daily visit of each site with at least 2 volunteers designated by the staff representatives and daily conference calls with the support staff of each site);
- updated at least once a week the risk assessment document for each site;
- shared the risk assessment documents with the staff representatives;
- organized a negotiation meeting with the trade unions regarding the implemented measures;
- drafted a specific Covid-19 action plan;
- organized daily audits of the compliance with the rules established in this action plan.

The Court ruled against Amazon on the ground that it regrets the lack of evidence of these measures, in particular:

- Lack of minutes of the meetings with the Social and Economic Committee (CSE)
- Lack of reports of the daily site visits organized
- Lack of audit reports relating to the protective measures taken
- No evidence of the number of meetings with the CSE or the nature of the exchanges
- No evidence of the documents given to the CSE
- Production of emails with the staff representatives, some of which show that they were informed later of the measures taken and not beforehand

#### **A Necessary "Systematic and Accurate Risk" Assessment**

The Courts then examined the measures taken by Amazon on its sites and it is fair to say that there were only a limited number of criticism as to what was implemented. Interestingly, Amazon was criticized for filing a bailiff report (which is supposed to be unchallengeable in nature in France) that described the measures taken by Amazon but documented such measures with pictures that showed empty sites rather than sites while employees were working. The lesson learnt here is that companies need to document what they do with pictures that are not perceived as "set up" but rather as "real life" pictures.

Another interesting point is the fact that the Courts considered that while taking specific measures, such as limiting the number of employees who can access cloakrooms to those who take public transportation (which was ruled as being a good thing), Amazon created new risks that it did not assess. The courts indeed considered that the employees who no longer have access to the cloakroom put their coats next to their workstation, which creates a new risk of contamination. The lesson learnt here is to ensure that absolutely all the risks are anticipated.

Lack of documentation was again criticized when it came to the measures implemented. Courts considered that there were, notably,

- no written procedure on what the employees who no longer have access to the cloakrooms must do;
- no written procedure on what the employees who have access to the maintenance cloakroom, which is smaller, must do;
- no evidence of a specific protocol for transporters (in particular, hand washing for drivers);
- absence of sufficiently specific protocols on what is done for the cleaning of the sites, e.g. on the cleaning of the forklift trucks on the delivery platforms;
- no specific information on the use to be made of gloves and precautionary measures.

## **The Need to Address the Mental Health of Employees**

At both Court levels, Amazon was criticized for not having addressed the psychological and mental risks to which its employees are exposed during this pandemic. In this respect, the Court of Appeal indicates that *"the minutes of the CSE meetings, the emails sent by the employees and some observation letters of the labor inspectors reveal the particularly anxiety-inducing climate of the unprecedented situation created by the pandemic in an occupational context that it is more difficult, on the one hand because of the injunction to "stay home" imposed by the public authorities to part of the population and, on the other hand, the substantial modification of the working conditions"*.

This is an issue that all companies really need to address, especially in States where the anxiety and the stress of employees are actionable losses that can trigger compensation. This is the case in France where the anxiety damage was first recognized for employees exposed to asbestos and has now been extended to all employees potentially exposed to a hazardous substance during their career.

## **Conclusion**

When it comes to litigation, whether or not the company was facing an urgent situation, it should, at best, implement measures and document such measures in parallel or, otherwise, it should not prioritize its workers' safety over paperwork. This is the paradox of the decisions rendered against Amazon. Indeed, when reading them, one can think that if Amazon had implemented

less measures, less quickly, but had documented each of them, it would not have had to end up closing and then limit its activity but rather could have implemented additional measures, little by little.

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