

E-cigarettes: how the situation in the US could give rise to litigation in the EU

IN THIS ISSUE

Deaths and injuries allegedly linked to e-cigarettes have been in the headlines in the US for a number of weeks. A similar situation has not occurred yet in the European Union. Nonetheless, the European Member States' authorities are starting to investigate the issue and many claim that they fear that they have been exposed to a health & safety risk. Could this result in proceedings even if the deaths and injuries are limited to the US territory? The answer is yes...

Electronic cigarettes have hit the headlines many times and been the topic of many statements throughout the world these last few weeks. Accusations related to their potential health hazard are becoming more and more common, with some conflicting statements. What are the consequences of such media exposure going to be for professionals of this industry in the near future? The aim of this article is to attempt to clarify the facts and warn professionals about the disputes that can result from mere allegations.

At the international level, the first concerns appeared in the United States in June 2019, where 17 deaths and more than 800 cases of diseases declared as being possibly attributable to electronic cigarettes were reported in some forty states. According to the media, a first case would have just been reported in Canada.

In most of the reported cases, e-smokers supposedly ingested e-liquids containing THC oil (a psychoactive substance contained in cannabis), which in some cases were apparently bought on the street on an irregular basis. Some people equally blame flavoured e-liquids. The direct consequence was that the states of Michigan and New York banned commercialising flavoured e-liquids. The other consequence is that the American Food and Drugs Administration (FDA) stated that a study shows that the problems resulting from vaping are mostly pulmonary and that 75% of the people affected are men between the age of 18 and 34 and 16% are under 18 despite it being prohibited to sell these products to this part of the population.

India reacted in a much more drastic way, announcing on 18 September 2019 the ban on manufacturing, importing, exporting, transporting, storing and selling any kind of electronic cigarette regardless of the sort of liquid.

In parallel, the World Health Organization (WHO) declared in a report in July 2019 that electronic cigarettes are "undeniably harmful". Many statements followed from health organisations and scientists, siding with one position or its opposite, a battle having

started between those who support electronic cigarettes, claiming that they help smokers quit smoking and those who criticise them, saying that there are more and more young people who are introduced to smoking, through electronic cigarettes.

In France, the French Agency for Food, Environmental and Occupational Health and Safety (ANSES), declared through its President that no danger had been proved with regard to controls carried out by the authorities before these products were put on the market. However, as a precaution, the French national public health agency *Santé publique France* and the French Directorate General of Health have set up a monitoring programme, enabling pulmonologists and other health professionals to report any suspicious cases. The French market surveillance authority further published, on October 1, 2019, the result of an on-field investigation it carried out. This study showed that the majority of e-liquids tested were not compliant.

We therefore gather that the debate is only just starting and that the US cases, which seem to be mainly related to a specific use of a product which is not allowed in Europe, are likely to lead to a new, more global liability that would concern all kinds of electronic cigarettes and e-liquids.

In this context, the increase in litigation related to the concern of developing cancer as well as the fact that class action mechanisms are becoming more and more common in Europe is not a good sign.

Chemical substance litigation in France indeed shows for instance, that the fact that suspicious cases are appearing, that scientific reports or statements for health authorities are becoming more and more common, whatever direction their conclusions take, are going to become a means of proof against professionals (manufacturers, distributors, sellers). The concept of "danger awareness" developed in the scope of social security law is latent in all disputes related to the exposure to a risk, regardless of which jurisdiction is seized. Yet, what could be a better tool to spark awareness than the media? It therefore seems very unlikely that the statement from the WHO



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is going to remain without consequences, even though it appeared in a specific context and regardless of the conflicting statement from the ANSES.

Globalisation of litigation at the EU level should not be underestimated either. Since the dieselgate / Volkswagen scandal, the market surveillance authorities of all the Member States have learnt how to work together in a way that allows them and plaintiffs to target companies in all countries and at the EU level. This type of sanitary scandal could also incline the European Commission to push for an even wider scope of the EU collective redress mechanism that is currently discussed at the European Parliament level. Note that the EU class action, if voted as it is, would be an opt-out mechanism that would exist in addition to Member States' level class actions. The risk for large and complex litigation is here.

Professionals in this industry should therefore not underestimate the attention that is currently being given to this product. This attention will most probably become the means of proof used against them by plaintiffs, whether they are ill or not. We can indeed fear mass litigation such as litigation related to the anxiety of developing an illness due to an exposure to asbestos or litigation corresponding to those triggered due to air pollution, both before Criminal Courts and Administrative and Civil jurisdictions. The trend today is indeed to multiply the kinds of appeals, hoping that one of them will be successful and that the said case law will encourage all the other jurisdictions to hand down condemnations.

Professionals should equally expect regulations to become more complex, which is a typical political reaction in cases of health

risks. This is how national discrepancies arise, under the guise of a specific protection of national public health. The first consequence is often a different marketing authorisation and a specific labelling per country instead of a harmonised approach for all Europe.

Thorough work must therefore be undertaken in order to prepare means of proof in order to prove that the products put on the market are not harmful.

Such proof admittedly already exists, particularly when the product is sold in Europe in light of the existing regulatory requirements. However, litigation experience shows that it is necessary to go beyond this and carry out new analyses and draw up new reports for every rumour. It is also necessary to find information about the products that are accused of causing deaths and illnesses and analyse the difference between these products and your products. Professionals could be blamed of not doing so in the case of a dispute. An overview of all the statements made must be drawn up as soon as possible in order to identify the ones that could be related to your products. Furthermore, many statements aiming at reassuring users in a concrete way need to be made. Numerous jurisdictions indeed accuse professionals of having encouraged this state of anxiety by remaining silent.

As a conclusion, from a legal point of view, the situation of these last few weeks shows the first signs of a very high risk of litigation, which must be taken into account as soon as possible by professionals of this industry, who should not underestimate any allegation or claim received from a user or directed against them.

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