Law à la Mode

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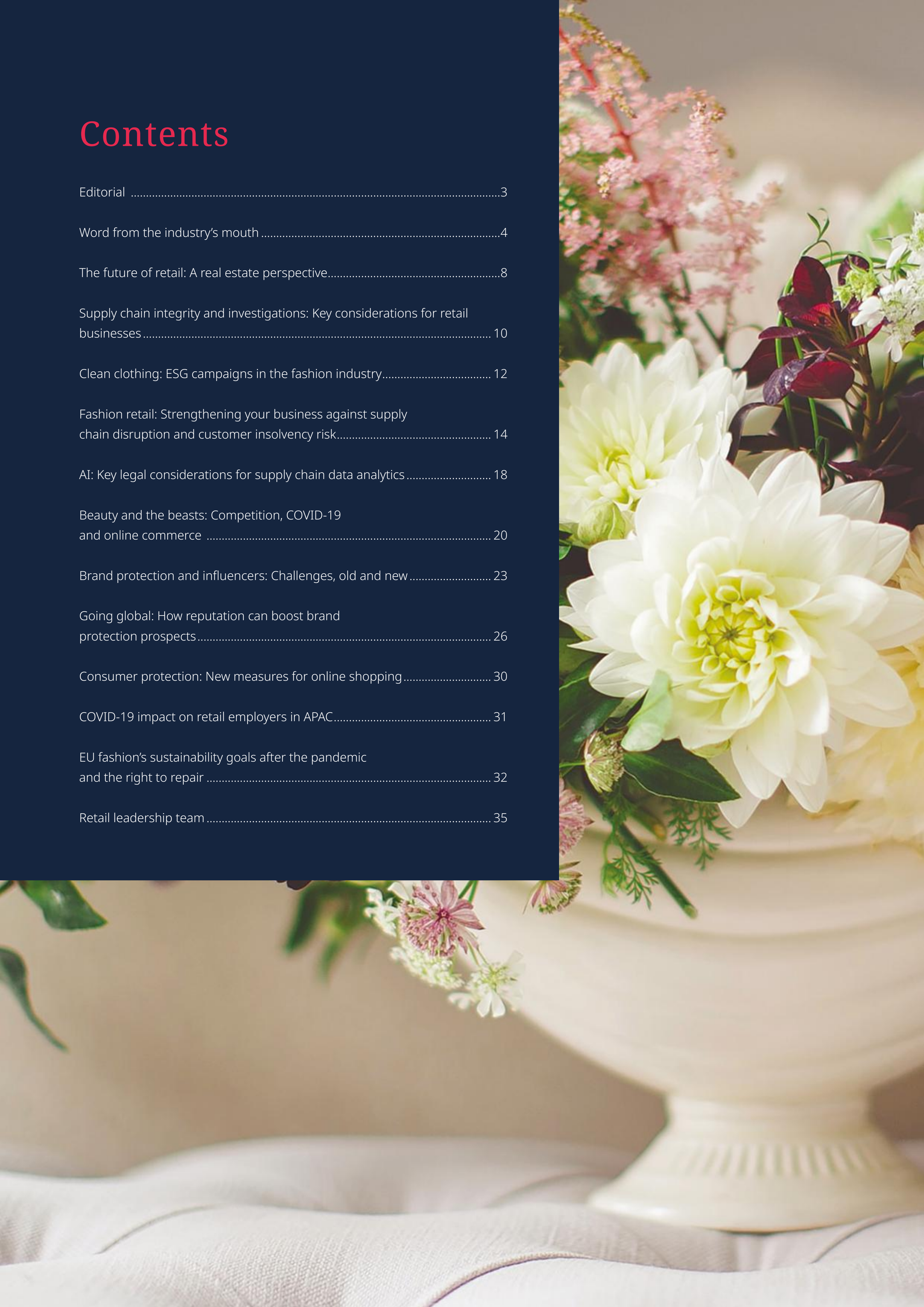

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Editorial

The APAC editorial team is very pleased to bring you the 31st edition of Law à la Mode.

As we come towards the end of what has been a difficult year, in this issue our colleagues from around the world tackle the theme of defining the new normal – no easy feat as the effects of the pandemic continue to ripple across economies and so many facets of our daily lives. Although fashion, and retail at large, has been hit hard by COVID-19, the innovation that has been induced by this crisis promises to reshape the industry for the long-term.

This edition features articles that reflect the scope of change; from pieces on trends in bricks and mortar real estate, to managing insolvency and supply chain risks, and the adoption of artificial intelligence. Our colleagues also provide their insights on e-commerce laws, protecting global brands, integrating ESG into marketing campaigns, and upcoming sustainability reforms in the textiles industry.

The word from the industry's mouth in this edition is an insightful interview with ASOS CFO Mathew Dunn, covering the partnership between fashion and technology, the future of fast fashion, and meeting the expectations of the new youth market.

We hope that you enjoy this edition of Law à la Mode.

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Word from the industry's mouth

Mathew Dunn, CFO, ASOS

Technology

Technology and fashion have been partners in the ASOS journey. What opportunities do you see for increased personalization of the shopping experience through emerging technology?

As an online fashion retailer, we're constantly working to deliver the best possible experience for our customers. Our tech teams take a build/test/learn approach, which in practice means that as soon as we get our hands on some new technology – say Augmented Reality that puts models in customers' living rooms – we'll try to get it in front of the customer as quickly as possible to engage them with its application and help us determine where to go next.

That's one of the more obvious ways we use technology to give our customers a new experience. The ways in which we apply AI and machine learning to deliver personalization are somewhat less visible, but, if anything, are more fundamental to how we operate because they're present and switched on throughout the customer journey.

For the customer, it means that we showcase the products they are most interested in seeing, at the time they want to see them, whether that's through a bespoke curated product range (My Edit) or through recommending similar products to ones that customers are already looking at. We have about 85,000 products on site at any one time, so surfacing the most relevant fashion for each customer in that way is a key tool for us to overcome any challenges with product discovery.

More recently, we've even been experimenting with a bespoke algorithm called fRank that looks at all of the products in one category, and orders them based on a customer's preferences, without them even knowing. It means that they see the products that appeal to them at the top of the list, without the need for scrolling. That's a better experience for the customer, but it also means they're more likely to shop, so it's better for us too. There's lots of opportunity for us to further improve the experience for our customers in this way, so we're excited to see where the future takes us.

Supply chain

COVID-19 placed significant pressures on supply chains across industries, what role has automation played for ASOS during this period, and do you see use increasing in the future?

Automation in our fulfilment centres has been critical to our continued operation and success during COVID-19. We took significant steps to reduce capacity in each of our fulfilment centres (we have centres in the UK, US and Germany) once COVID-19 hit to ensure we could continue to operate safely and in line with all social distancing measures. That reduction was only possible because of the significant level of automation we've already implemented in our sites. This is something that's going to continue and which has always been our roadmap, because it unlocks a lot of efficiency for us, but also means our customers will get their orders as fast as they've come to expect from ASOS.

Sustainability

ASOS has been running its Third Party Brands program since 2018. What level of willingness do you see in the fashion industry for systemic change on sustainability and supply chain transparency, and what does ASOS see as its role in this?

We've been working closely with our third-party brand partners to try to encourage them all to sign up to the five minimum requirements that we expect brands to meet to be able to sell their product on ASOS. In the last few months, we've taken another look at that and have asked our brand partners that manufacture in the UK to sign up to a number of further steps, including publicly declaring their supply chains. We've done that because we think it's what our customers expect of us, but also because it's the right thing to do.

I'd argue that the appetite for change in the industry has always been there, at least for the last few years since the Rana Plaza disaster, but what might have been missing is that spirit of collaboration – where the younger players, who are perhaps less far along on their sustainability or ethical trade journeys or less engaged, can learn from those who have been working in this space for a while and have very robust strategies. As a hybrid retailer of our own products but also those from other brands, we very much see our role as the glue that can join those younger brands with ASOS and with other, more established players. We've hosted several workshops bringing together brands to foster collaboration, including one in September on UK manufacturing, and that's something we're going to continue into the future.

E-commerce model

ASOS has seen lower than expected product returns, even after lockdown restrictions in certain markets began to ease. What areas does the business focus on to optimise return rates?

A lot of the marked shift in returns behavior that we've seen recently is about the different products that people are purchasing now – so while in the past it might have been going-out wear, which has a naturally higher returns rate, it has now shifted towards loungewear and make-up, which tend to have inherently lower returns rates.

There's also some steps that the business has been taking to reduce our returns rate more broadly. We've deliberately shifted our mindset so that we view each return as a poor customer experience: nobody wants to have to send back something they've bought. That has allowed us to really focus in on those areas that might be sticking points for customers – size and fit or product presentation, for example. On the former, we've done a lot of work with technology to ensure our customers get the right size, first time, for example by launching an AI-powered tool called Fit Assistant, which recommends sizes to our customers based on collated returns behavior and information on size and fit reported by other customers. We're looking at delivering some further innovation in this area in the coming weeks, so watch this space.

Future trends

ASOS's key demographic, 20-somethings, now faces an uncertain economic outlook, and brings new values to the table than those of the 20-something generation of five to ten years ago. How do you see this new generation of consumers shaping the fashion industry into the future?

There's no question that this generation will be more discerning than ever before – they want to know that the brands they shop with are responsible, that they try to do the right thing, and that they stand for something.

ASOS ticks all those boxes, although sometimes we need to do a better job of letting our customers know that! It will be on all of us in the industry to ensure customers feel confident supporting fashion and continuing to shop, knowing that we've done the hard work for them, particularly when it comes to issues around sustainability.

Future trends

ASOS has talked about focusing on fashion as a force for good, what does that look like in a post-COVID-19 world?

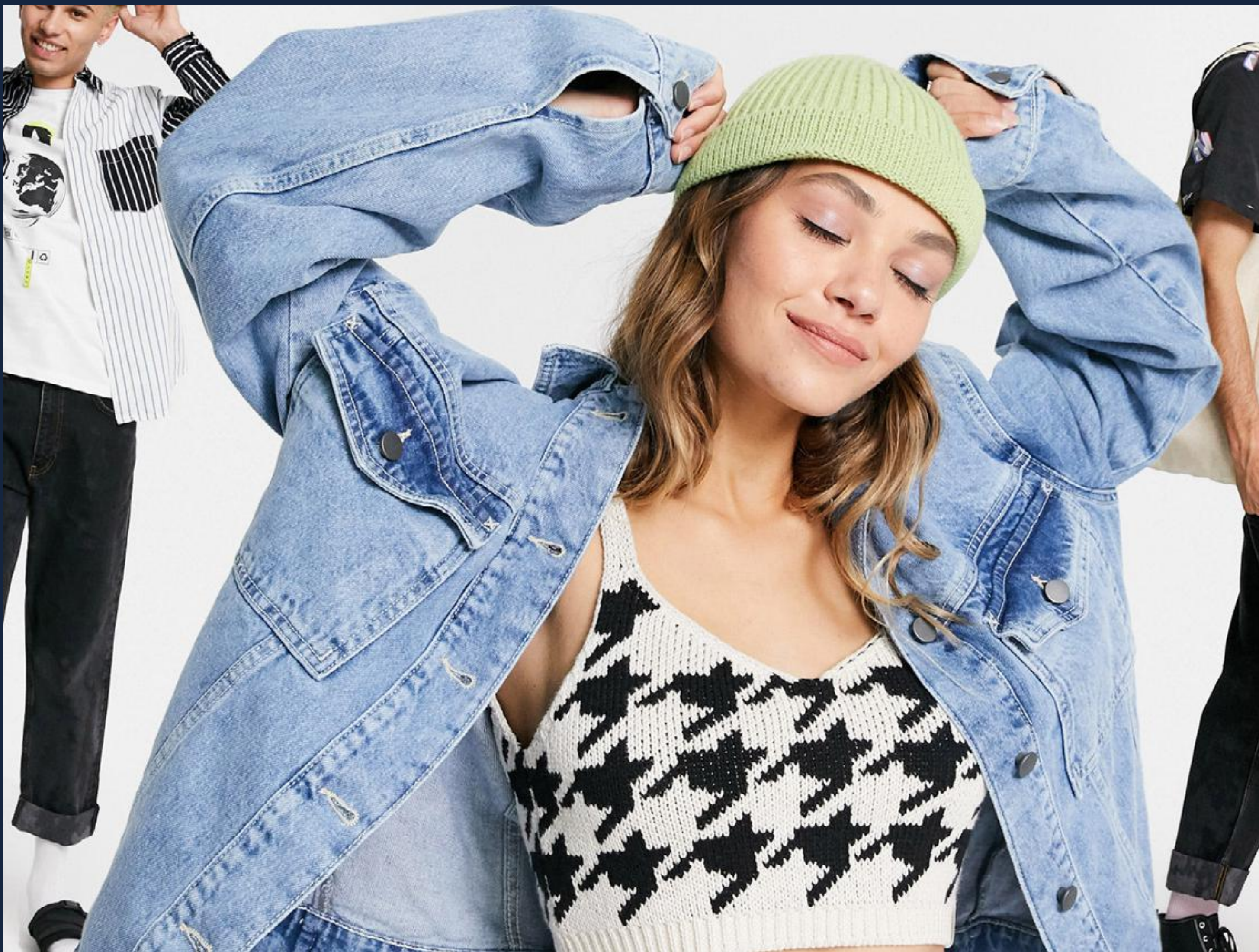
COVID-19 has definitely changed the mindset of a lot of people. We knew from early on in the pandemic that it would be important for us to support the national effort and the communities in which we operate, so we put a lot of effort into doing all we can to help, whether that's donating clothes to front-line workers, offering laptops to children in need close to our warehouse in Barnsley or donating funds to NHS Trusts through the sale of charity tees. Those trends are only going to accelerate, so it's important for us that we continue to play a positive role in the communities within which we operate.

What keeps you awake at night?

From a CFO perspective the economic uncertainty of the current situation makes planning difficult for everyone, in particular the lifestyles of ASOS's key consumer – 20-somethings – is likely to be disproportionately affected by COVID-19. Because of this, scenario planning is ongoing as we try to maintain a dynamic outlook. More broadly, the focus is on how the business continues to keep up with the pace of technological change, our ongoing evolution and next phases for growth.

What do you do to take time out?

I try to exercise as that makes a big difference to the day and we're often at our best when that forms part of the daily routine. I'm also a big reader and find this a good way to switch off. I enjoy experimenting with different foods, and while we can't really do it this year, I also like to travel, and socialise to the extent that we can at the moment.



The future of retail:

A real estate perspective

By **Graham Quinn** (Partner, Dublin) and **Micheál Mulvey** (Legal Director, Dublin)

The COVID-19 pandemic is having a major impact on the retail sector across the world, revealing growing conflicts between the interests of landlords and tenants and accelerating trends that are likely to permanently reshape the real estate and retail landscapes in significant ways.

Retail leasing

When the pandemic first hit, the short-term focus of retail landlords and tenants was on preserving cash flow. Most landlords took a pragmatic view of the difficulties in which retail tenants suddenly found themselves and many were willing to agree to give short-term relief in the form of rent-free periods, rent reductions and/or rent deferrals. However, as it has become clearer that the pandemic is likely to be a longer term phenomenon, tenants have increasingly started to call for more fundamental changes to the way retail leases work. Institutional landlords have had to start thinking about longer term re-gearing of leases, to preserve value in their investments.

Many retailers are now calling for a shift from open-market-based to turnover-based rents. Such arrangements are usually structured as a combination of a fixed base rent, topped up by a percentage of the turnover generated by the retailer at or in connection with the store. Proponents argue that it is fairer for landlords and tenants to share in both the upside and the downside, and that where landlords are incentivized to help drive turnover, everyone wins. This model has been successfully implemented at scale for some time by forward-thinking landlords like Value Retail at its outlet shopping locations around the world, including Bicester Village in England and Kildare Village in Ireland.

But the turnover model has its challenges, including how turnover and customer data can be accurately collected and shared, and whether turnover should include online and click-and-collect sales. For most professional landlords (and their investors and lenders), the uncertainty in predicting rental income, and the effect that would have on the ability to accurately value premises from an investment perspective, makes turnover-based leases unattractive. So, instead, many landlords, who are also worried about the potential impact of large-scale insolvencies or restructurings, are now increasingly focusing on re-gearing (the process of amending existing lease terms), such as by agreeing rental to changes in consideration of tenants waiving break options or agreeing to longer terms. Both landlords and tenants are also acknowledging the need to include provisions governing what happens when tenants are forced to close for pandemic related reasons; negotiating such issues is keeping property lawyers busy.

Retail insolvencies and rescue

The impact of the pandemic has already forced the insolvency of some high-profile retailers, and this trend is likely to continue, if not accelerate. Many have been forced to consider availing themselves of corporate rescue or restructuring arrangements. Debenhams went into administration for the second time in 12 months in April 2020. Cath Kidston closed all 60 of its UK stores

and surrendered its leases as part of a pre-pack administration rescue deal with its Hong Kong-based owner. Interestingly, that deal involved the owner buying the brand (IP rights), e-commerce platform and wholesale business only, and walking away from bricks-and-mortar related liabilities. Boohoo did something similar in June by acquiring the online platform and brand IP of Oasis and Warehouse from Hilco Capital (which had acquired only those parts of that business in a previous administration). The possibility of retailers cherry-picking the valuable parts of their businesses will no doubt make many institutional retail landlords uneasy, as will the likelihood that a considerable number of retail premises will be empty once the full impact of the pandemic is known.

Technological innovation

There is now a clear opportunity for landlords and tenants to collaborate in the use of technology to their mutual advantage, and proptech is likely to play an ever-increasing role in the retail sector for the foreseeable future. Tech-savvy landlords are investing in ways to closely monitor customer related data, and tenants are using more and more sophisticated methods to monitor in-store turnover, footfall, and customer spending habits. Provided that such data is collected, processed and shared in compliance with relevant privacy regulations, it can be used by all concerned to identify problems as soon as possible, drive tailored initiatives to improve the overall shopping experience, and boost individual store performance. This will be increasingly the case as high street and shopping centre premises become more and more about showcasing brands. But there will need to be a culture shift in the minds of most landlords and tenants towards a more collaborative and transparent relationship, which may take some time.

Conclusion

It is still too early to say how the effects of the COVID-19 pandemic will play out. But what does seem clear is that the rigid traditional leasing model is going to need to evolve in a way that demands more flexibility, pragmatism and long-term thinking from landlords. Retail leasing needs to become fairer and rents more sustainable. Some way needs to be found to make the liabilities associated with retail premises less onerous. Landlords and tenants need to start thinking more in terms of their shared interests and work together to develop a mutually beneficial relationship.

Supply chain integrity and investigations:

Key considerations for retail businesses

By **Laura Ford** (Partner, London), **Jonathan Eatough** (Partner, Manchester) and **Daniel D'Ambrosio** (Associate, London)

It is impossible to ignore the controversies that have emerged this year in the UK's Leicester textile industry, which include allegations of modern slavery and other serious misconduct levelled at suppliers of household retail fashion names. This is not an isolated incident. From the Rana Plaza factory collapse to increasing reports of modern slavery and worker exploitation in garment factories across Southeast Asia, similar controversies are increasingly common for retail supply chains.

While one particular fashion retailer bore the brunt of the headlines, these events have had an impact across the retail sector. Prudent businesses are reassessing the policies and processes needed to understand whether similar practices are taking place within their supply chains so they can address them decisively. Investors and shareholders are also expecting more consistent action from retailers and are using financial leverage to influence supply chain policies, processes and performance.

Why are privileged investigations important in the retail sector?

The regulatory landscape has moved from disclosure-based requirements to compliance obligations covering environmental and social issues across the supply chain. Germany, France and the UK are among the jurisdictions where civil claims are increasing against major brands and companies at the top of large supply chains, based on charges of environmental and social harm that occurs deep in their supply chains. Against this backdrop, businesses find that privileged investigations may be used to establish the facts and get ready for potential legal proceedings.

In the regulatory space, the EU is developing supply chain human rights due diligence laws that will have extraterritorial reach and liability for non-compliance. While a draft law will not be available until 2021, the EU Commissioner for Justice has indicated that the European

Commission is considering a range of liability options, including civil and criminal liability as well as supervision at a local and European level. A number of countries in Europe have already developed similar laws or are in the process of doing so; for instance, France, the Netherlands, Germany and Switzerland.

In the UK, proposals for supply chain human rights due diligence were included in a draft environment bill earlier this year and supported by civil society and environmental groups. More recently, the UK government announced a consultation to develop new laws that would prevent large companies from using commodities grown on land that has been illegally deforested. This would include a requirement to undertake due diligence and fines for non-compliance.

What issues are we talking about?

Supply chain investigations of this nature need to grapple with a number of complex issues. Often arising from the interplay between domestic regulatory requirements, international law and sector-based standards for working conditions, minimum wage standards, and modern slavery and human rights issues – all while being closely scrutinized by investors, lenders, customers, the public, and the media.

Key issues in retail supply chains include:

- workforce exploitation and modern slavery, including use of forced and child labor, abuse of migrant workers, gender discrimination, working hours and freedom of association;
- living wage;
- health, safety, and working practices;
- environmental degradation and pollution;
- impacts on use of and access to land and natural resources;
- inadequate engagement with indigenous peoples and affected communities; for instance, leading to forced evictions and involuntary relocation; and
- intimidation, harassment, and abuse of human rights and environmental defenders.

Five questions for retail businesses

The vast scope of raw material and products and the range of sourcing, production, and manufacturing geographies across their supply chains means that retail business will be among those most exposed to increasing liability in this space. They will also be keen to respond to increasingly sophisticated investor demands driven by evolving sustainability risk disclosure requirements for investors, shareholders and lenders.

Although retail businesses will almost certainly have supply chain due diligence protocols in place, they should consider these five key questions as they evolve their approach:

1. **Strategy and governance:** Does my sourcing strategy align with my overall corporate strategy and is this reflected in supply chain and sourcing policies and risk protocols?
2. **Risk protocols and prioritization:** Are risk protocols effective to identify potential misconduct at both tier one and lower tiers of the supply chain in line with internationally recognized standards and best practice?
3. **Sourcing contracts:** Are compliance protocols being passed down to subcontractors as required under mandatory contract provisions and are context-specific key performance indicators used to enable more flexible objectives to be set and managed outside strict contractual requirements. For instance, positive incentives to drive continuous improvement or specify remedial outcomes as well as punitive measures for failure to perform to a minimum acceptable standard?
4. **Incident response and crisis management:** Are incidents flagged and investigated even where they arise beyond direct sourcing relationships?
5. **Disclosure**: Is disclosure framed by reference to the overall sustainable sourcing strategy and prioritization of risks to ensure a consistent and factual narrative used to manage stakeholder relationships, especially in response to incident reporting?

Clean clothing

ESG campaigns in the fashion industry

By **Kai Tumbrägel** (Partner, Cologne), **Gabriele Engels** (Counsel, Cologne) and **Hayley Maher** (Associate, Dublin)

For some time now, British Vogue's #GetYourGreens series has been exploring how the fashion industry is trying to move towards a greener future. It highlights sustainability initiatives by fashion brands and advises readers how to be both fashionable and committed to environmental sustainability.

In a publication like Vogue, this long-term series reflects the broad shift in consumer demand and attitudes towards sustainability in the fashion industry and also the wider conversation taking place between brands and consumers. It is a conversation that has been heightened due to the COVID-19 crisis. Today, consumers expect the fashion and retail industry to uphold its environmental, social and governance (ESG) responsibilities.

Since 2018, Lyst, a global fashion search engine, has seen a 66% increase in searches for sustainable fashion and a 187% increase in page views for sustainable denim brands.

An April 2020 report by McKinsey which surveyed consumers in the UK and Germany found that 57% of consumers had made significant changes to their lifestyles to reduce their environmental impact. The report also found that "67% of those consumers surveyed consider the use of sustainable materials to be an important purchasing factor, and 63% consider a brand's promotion of sustainability in the same way." In Ireland, a similar 2019 PwC survey found that 41% of Irish consumers are prepared to pay a premium for sustainable products.

It's clear that companies need to be taking sustainability and transparency considerations into account as part of their corporate strategies – and companies are.

Recent pioneers

Levi Strauss & Co., for example, has made commitments to sustainability throughout its entire design and manufacturing process. The company intends to achieve a 90% reduction in greenhouse gas emissions and use 100% renewable energy throughout its facilities, as well as to reduce greenhouse gas emissions by 40% throughout its global supply chain by 2025.

Notably, luxury fashion group Kering, which includes fashion houses Balenciaga, Gucci, Saint Laurent and Alexander McQueen, has pledged to become carbon neutral within its own operations and across its entire supply chain. The group-wide pledge involves avoiding and reducing annual greenhouse gas emissions and offsetting all emissions since 2018, as well as supporting the conservation of forests and biodiversity worldwide.

Nike has also been working on creating a more circular business model, with many of its core products using upcycled materials. Its Flyknit shoes are made from 100% recycled polyester – by using this product, the company has diverted more than four billion plastic bottles from landfill.

Similarly, Adidas has been working to increase the use of more sustainable materials in its production. The company's new flagship ecoproduct, Futurecraft Loop, is due to be launched in 2021. It is a 100% recyclable performance running shoe – which will be able to be returned to Adidas, then broken down and reused to create new performance running shoes. From 2024 onward, Adidas will only use recycled polyester in every product.

ESG claims as marketing instruments

As companies take steps to implement more sustainable manufacturing processes and overhaul their supply chains, questions arise as to how these changes in company practices and new products are – and should be – marketed to consumers and whether there are any legal considerations. Buzz words like "sustainable" and "environmentally friendly" are often used to promote the green credentials of companies, where no formal definitions or official standards exist. So what does the applicable law say with regard to these kind of claims?

EU-wide consensus

At EU level, there are several directives in place tackling the issue of misleading advertising dealing with unfair business-to-consumer commercial practices (2006/2004/EC) and concerning misleading and comparative advertising (2006/114/EC). In addition, there are numerous sector-specific provisions, e.g. for automotive (concerning compulsory information regarding fuel consumption or CO2 emissions) or energy-related products (with regard to how much energy is consumed; ads including energy or price information must specify energy efficiency class). As to textile products and their composition, a specific regulation covers fiber names and the related labelling.

Therefore, with respect to fashion and ESG claims, the general requirements applicable to all advertising must be observed:

- marketing communications must not mislead consumers; and
- claims consumers regard as objective must be substantiated.

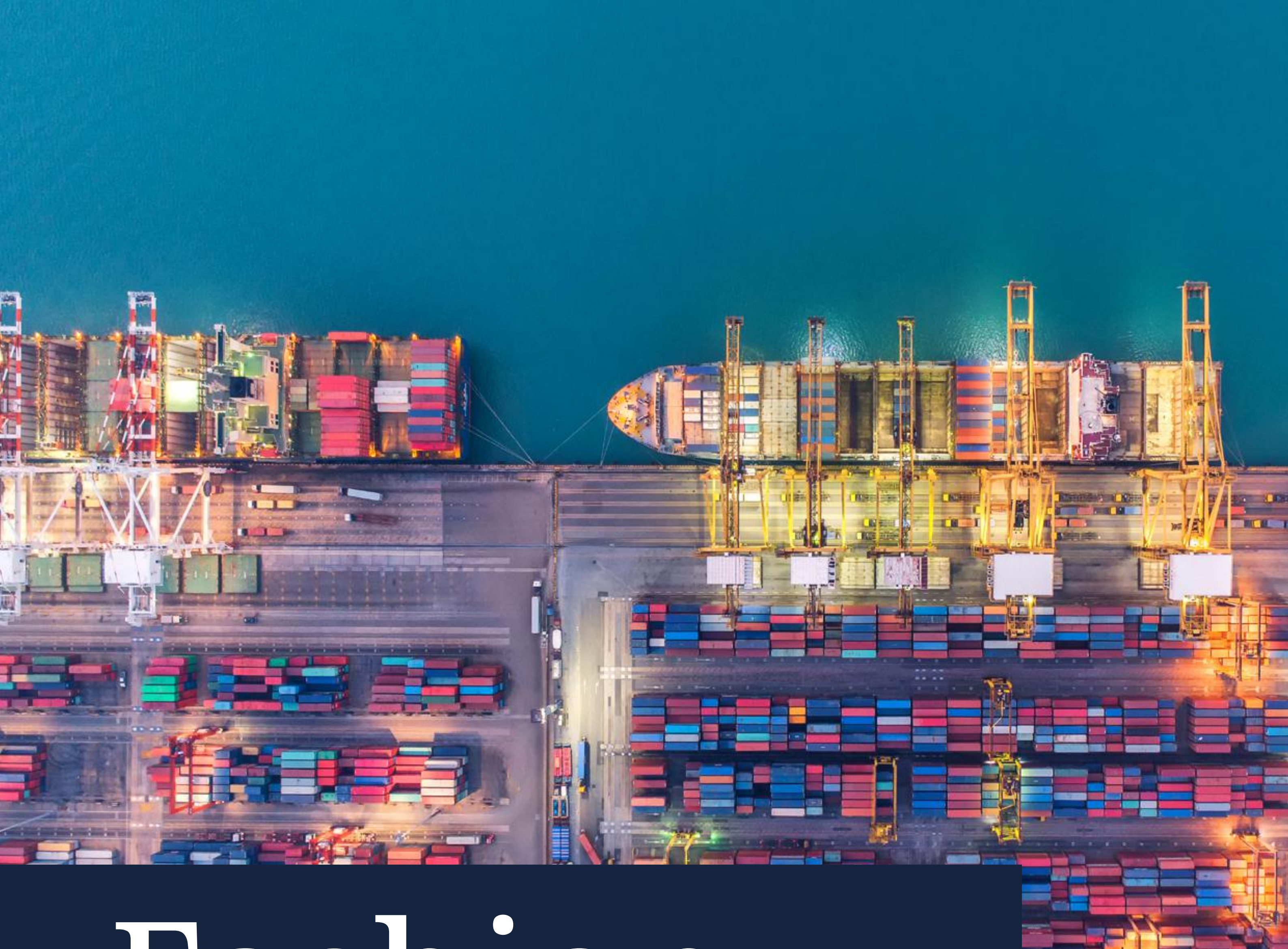
Notably, when it comes to compliance with these requirements, the particular sustainability or eco-friendliness of clothing, third-party certifications such as fair trade, a company's participation in charity partnerships and fundraisers, its cooperation with sustainability specialists or alignment with social causes are irrelevant: advertising must never contain false statements or other information likely to deceive. When determining what qualifies as a misleading ad, changing consumer expectations and their attitude towards specific ESG claims are decisive.

Practical examples: proceed with caution

- Popular terms such as sustainable, eco-friendly, 100% natural produced sustainably or ethically produced should be used with caution. Several jurisdictions have strict transparency requirements in place around the use of such terms. For instance, under German case law, the extent of the information duty depends on the type and promotion of the product and its effects on the environment. The use of ambiguous words, such as the terms mentioned above, requires an explicit explanation if the concrete meaning is not apparent from the circumstances of the particular case. The unspecified use of such words carries the risk of the term being considered misleading.
- For the same reason, oversimplifying exaggerations should also be avoided. A product claimed as being "made from recycled paper" was ruled misleading by German judges because only 80% of the product's components contained recycled materials; the court found that, based on the wording of the claim, German consumers would expect this product to be 100%. Similar concerns are likely to apply for fashion-related claims.
- Any ESG claims-related advertising should not be overly emotional, whether imagery is used or not. Since advertising with sustainability-related claims has a great emotional appeal and promotional effectiveness, there are also strict transparency obligations to observe. In that regard, the same applies as mentioned above: whether an ad is misleading or not is decided on a case-by-case basis.

Summary

Social commitment will be a dominant theme in the fashion industry in the foreseeable future and consumers will hold companies responsible for their investment in sustainability initiatives. However, advertising with ESG claims requires legal diligence in order to comply with existing advertising laws. In this regard, advertisers should always aim to avoid the inclusion of misleading claims or false statements. Any claim that may be regarded as objective by consumers must be substantiated to comply with existing laws.



Fashion retail:

Strengthening your business against supply chain disruption and customer insolvency risk

By **Peter Manley** (Senior Associate, London) and **Chloe Ball** (Associate, London)

The onset of COVID-19 has precipitated and accelerated substantial change for businesses in fashion retail, adding to particular headwinds already facing the sector in the UK. While many brick-and-mortar fashion retailers were already experiencing challenging trading conditions at the start of 2020 – ranging from rent and rates overheads to increased online competition – restrictions on and changes to consumer preferences resulting from the pandemic have intensified the challenges facing many fashion retailers and businesses operating in the supply chain.

The UK's government-mandated lockdown signalled immediate cash flow impacts for retailers forced to shut their stores and re-position for remote outlet channels which, in turn, has had a knock-on effect for businesses in the supply chain. It is no surprise, therefore, that several retailers in this sector have been forced to turn to insolvency processes in recent months, and there is potential for further financial distress in the coming period as temporary government support measures and tax deferral arrangements are withdrawn and deferred liabilities become payable. Meanwhile, there is uncertainty as to how consumer confidence and disposable income levels will hold up as we enter Q4 and move into 2021.

In addition, new UK legislation (the Corporate Insolvency and Governance Act 2020) brought into force in June has rendered ineffective the operation of a range of contractual clauses in both new and existing supply contracts which a supplier would commonly expect to rely on in a customer insolvency/restructuring scenario. It is likely that many suppliers will only be alerted to this new position when next seeking to enforce those terms, expecting that they will operate effectively, as they had previously (see further details below).

Nonetheless, the industry continues to evolve and adapt quickly to a substantial shift in retail trends. There are significant opportunities for businesses to enhance value by implementing effective protections against disruption from supply chain shock and the adverse financial impact of key commercial customer distress. Well-positioned fashion retail businesses will also have the potential to seize strategic opportunities to enhance their offerings and implement operational efficiencies by being alert to competitors and supply chain businesses facing insolvency.

Enhancing resilience

Businesses in the sector are advised to protect themselves by (i) taking early action to critically assess their potential exposure to supplier and customer insolvencies; (ii) reviewing whether legal protections in supply contracts may be ineffective in light of new legislation; and (iii) implementing enhanced legal and operational protections. Specific legal and operational planning and ongoing monitoring processes, tailored to the jurisdictions in which the operations/exposure may arise, will significantly mitigate the risks of customer or key supplier insolvency, increase optionality from an early stage and enable resulting business costs to be minimized.

This article outlines a number of legal and practical solutions within the legal and operational toolkit for manufacturers, suppliers, retailers and other businesses in the fashion retail supply chain to enhance their resilience to supplier and customer distress, mitigating potentially costly risk of disruption to supply and financial loss from key supplier failure.

Warning signs of supplier/customer financial distress

Businesses in this sector should implement structures to identify warning signs of counter-party distress, including:

- delayed payment/stretching of supplier credit;
- re-negotiated payment terms sought/requests for deposits and upfront payments;
- store and office premise closures;
- deteriorating service levels;
- spurious/unjustifiable claims;
- county court judgments (CCJs), late filing of accounts, withdrawal of credit insurance, pending winding-up proceedings;
- auditor's reports subject to qualifications;
- new/additional security being granted to an alternative funding provider;
- market rumor/industry specific challenge/ external shock;
- over-leveraged business; and
- significant changes in management.

Corporate Insolvency and Governance Act 2020

The Corporate Insolvency and Governance Act 2020 came into law in June and affects a number of typical rights and protections of suppliers:

- The legislation precludes the operation of a range of supplier contractual rights where they arise by reference to a customer entering an applicable insolvency process (e.g. a right to terminate supply). Additionally, a supplier's rights are effectively suspended if they arise in relation to a breach of contract by the customer which occurred before the commencement of the customer's insolvency procedure, to the extent that such rights were not exercised by the supplier before that date.
- The legislation applies to supply contracts irrespective of when they were entered into (i.e. retrospectively to existing contracts) and the changes are relevant to all businesses, including those of financial good standing, with UK supply operations to customers. The prohibitions operate widely in respect of commercial supply contracts with only specific contract types excluded under the legislation.

Options to protect your goods/exposure

CUSTOMER RISK

- Review supply terms for UK operations and consider revision if the current provisions (notably termination and related rights) may be rendered ineffective under the Corporate Insolvency and Governance Act 2020 upon the customer's insolvency.
- Retain title to goods supplied until all payments due from the customer are made – robust contractual retention of title provisions properly incorporated in supply contracts can be very valuable for a fashion retail business which seeks to mitigate its exposure to the potential insolvency of its customers.
- Consider periodic ongoing monitoring of the following:
  - Have customer accounts been filed on time?
  - Have any CCJs/winding up proceedings been commenced?
  - Has there been an audit of stock segregation conditions at customer premises where the customer is holding goods supplied which are not yet paid?
  - Is credit insurance available?
- Review of financial position and payment terms.
- Monitor and review level of credit exposure.

Supplier Risk

- Is the supplier key to your supply/production operations?
- If the supplier ceased trading, what alternatives would be available, at what cost and within what timeframe?
- Monitor potential knock-on impact on your ability to deliver an onward supply contract.
- In the event of supplier distress, would that provide an opportunity to acquire assets/bring part of production required for your business in-house?

Early action to recover assets/obtain payment

- Where there are concerns with regard to a customer or supplier, early action is key to avoiding potentially large exposure as an unsecured creditor upon an insolvency.
- Key steps can be taken at an early stage, including:
  - enhancement of protective provisions in your terms and conditions of trade (for example, retention of title clauses and early triggers where financial distress appears);
  - diversification of the supply of key goods and services;
  - audit and inventory of stock held by the customer where title has been retained;
  - recovery action in respect of stock/suspension of credit terms in the absence of payment of outstanding debts;
  - written reminders of directors' duties/potential personal liability for directors acting in breach of duties to creditors and/or threat of early enforcement action/commencement of insolvency proceedings to apply immediate pressure for payment;
  - procuring payment on account/guarantees from third parties for continued supply;
  - the taking of security and guarantees to elevate and enhance creditor rights;
  - securing provision of pertinent financial information; and
  - early engagement with a key supplier in financial distress to identify options to secure continuing supply, including potential financial support to the current supplier or by procuring continued supply from an alternative.

Proactive action and opportunity

As can be seen, while challenging trading conditions in this sector are likely to continue, retailers and businesses in the supply chain can enhance their resilience to supplier and customer distress by taking the proactive steps outlined. Early monitoring of warning signs and maintaining connection with market intelligence to identify the potential insolvency of businesses in the industry and/or supply chain can and should be used to reduce risk, protect continuity of supply and identify opportunities for strategic acquisition.

AI:

Key legal considerations for supply chain data analytics

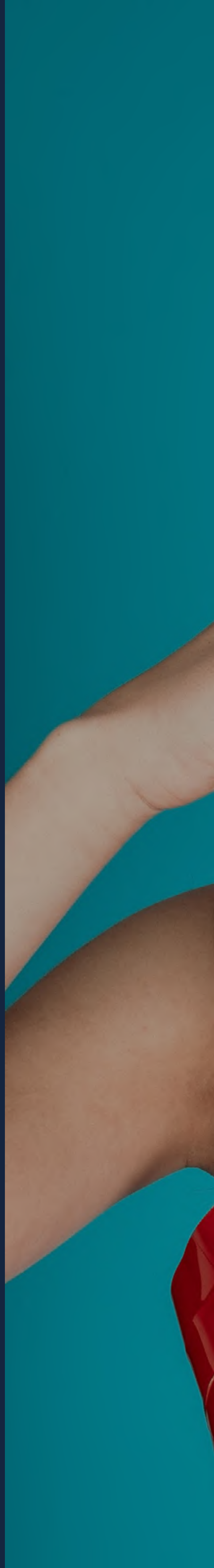
By **Chloe Forster** (Partner, London)

Pressure on supply chains has never been greater as a result of prevailing consumer trends, shorter product lifecycles and the effects of COVID-19. These demands are accelerating adoption of supply chain 4.0 technologies and digital transformation. Robotics and artificial intelligence (AI), once the preserve of science fiction, are now a reality for retail and consumer goods supply chains. Technology is being used to automate and make decisions at every stage. Underpinning all of this, data is your crown jewel.

Retailers and consumer goods businesses can use AI and data analytics to drive predictive forecasting, where demand signals are used to determine levels for production and inventory, taking into account vast amounts of historic operational data, predictions regarding future trends based on ingesting real-time market reactions and environmental factors, such as weather patterns. Where any of these signals change, an automated supply chain will be able to adapt more quickly, mitigating risk. By predicting and reacting to changing demand levels, the supply chain is able to operate more efficiently, lowering costs and reducing waste and carbon footprint.

When considering implementing automated decision-making or AI, there are a number of legal risks to consider, even where, as is the case for most supply chain use cases, personal data is not being processed. Legal teams at retailers and consumer goods businesses need to:

- Ensure due diligence has been conducted on the underlying technology, so you understand how the tool will learn from your data and that the business understands how decisions will be reached.
- Appreciate what matters to your business from an intellectual property perspective – often the learnings cannot be separated from the underlying tool, so understanding how that improved tool will then be used by the vendor and its other customers is critical. Care should be taken if commercially sensitive data is being used.
- Check that you have the ability to use your data with the AI – this is a heightened risk where personal data is used, but consider any data belonging to the other actors in your supply chain.
- Examine auditability of the decision-making process – looking particularly at whether decisions can be traced where something goes wrong and making sure that accountability and liability is clearly allocated and understood.
- Mitigate the risk of any bias/discrimination caused by the data sets – for example, this could be relevant to supply chain, where AI is used to make decisions about product supply to the market.
- Understand how you get access to your data, the model parameters and the learned algorithms – this is key to avoiding supplier lock-in, should you wish to part ways with the technology vendor in the future.



Beauty and the beasts

Competition, COVID-19 and online commerce

By **Bertold Bär-Bouyssiere** (Partner, Brussels), **Lesli C. Esposito** (Partner, Philadelphia and Washington, DC) and **John Fogarty** (Partner, Melbourne)

No stone unturned, some say when reflecting on the new normal in the COVID-19 era. Surprisingly, this is not so in competition law, where things have largely remained the same. How is that possible?

The COVID-19 pandemic has not only led to an enormous health crisis but has also resulted in an economic slowdown in many sectors, not least the fashion industry. According to Deloitte's *Fashion & Luxury Private Equity and Investors Survey 2020,* the COVID-19 pandemic is expected to have a large impact on this industry, and particularly on the personal luxury goods – other high-end sectors, such as luxury hotels and cruises, high-end furniture, and fine jewelry will also likely experience shocks. A significant drop in sales and a relatively long demand contraction are expected across these markets. How will competition law enforcement react to these challenges?

There are three layers of competition law: antitrust, merger control and state aid. Let us get the last one out of the way: shortly after the outbreak of COVID-19, the European Commission adopted a Temporary Framework which stated that it would relax its otherwise strict standards on limiting public subsidies to companies by Member States. Money was shelled out on an emergency basis, but there was nothing conceptually new. The US and governments throughout Asia Pacific have also supported companies in need by emergency aid.

Antitrust

Now let us look at antitrust. Under antitrust rules, collaboration between competitors is only allowed in certain cases and to a limited extent.

In Europe, so-called Block Exemption Regulations automatically authorize competitor collaboration for joint R&D, for specialization in manufacturing and in joint purchasing and joint distribution. Such collaboration is authorized where the combined market share of the parties does not exceed 20% on the relevant market, which is not always easy to define and quantify. Further, the more the joint collaboration is close to the market, the less freedom exists. Therefore, competitors collaborating in joint purchasing and joint marketing must be wary not to fall into cartel behavior. Again, the European Commission published a Temporary Framework for antitrust, which allowed suppliers of "essential goods" to coordinate their supply logistics in order to ensure a balanced allocation of supply flows. In other words, it was okay to coordinate the supply of masks, ventilators, and other medically relevant supplies. But this exception did not apply to food and wine, and certainly not to products like handbags, shoes and silk scarves.

In the US, regulators took a similar approach, with the Department of Justice and the Federal Trade Commission announcing temporary new procedures for business review letters and opinions related to

proposed competitor collaborations. Many companies, mostly in the life sciences sector, were quick to take advantage of the new expedited review procedures.

Unlike regulators in other jurisdictions, the Australian regulator, the Australian Competition and Consumer Commission, opted against a general "forbearance" approach to collaboration among suppliers of essential goods. Instead it responded to the pandemic by expediting its authorization of collaborative arrangements. In normal circumstances, the ACCC would require up to 28 days to determine an urgent application for interim authorization and up to six months to grant final authorization. During the pandemic, it has in some cases granted interim authorization within 48 hours of receiving the application. These authorizations have covered a broad range of sectors where collaboration is considered necessary to mitigate the impact of COVID-19, including banking, life sciences and supermarkets. So in Australia, coordinating the supply of pasta and wine may be permitted during the pandemic, but sorry, still not the shoes and silk scarves.

Asia – Merger control

The third layer is merger control. The object of merger control is to prevent the emergence of monopolies through the combination of previously independent companies. Again, mergers between competitors are the most likely to create monopolies, dominant position or to otherwise lessen competition to a significant extent. One justification for mergers has been the "failing firm defense," where the buyer acquires a company that would exit the market anyway due to immediate failure. This justification has been on the books for years. We expected that due to COVID-19, this concept will be more frequently used, but the "failing" had to be established according to certain standards; it was not sufficient to just claim it.

In a recently decided case which concerned the merger between two retail chains for sports footwear, the failing firm defense was not even claimed, as there was no sign of failure of either party. However, the parties claimed that their combined market power should be discounted due to the general distress caused by COVID-19.
The decision of the regulator sheds an interesting light on how COVID-19 may influence the assessment of a merger. The regulator took good account of the fact that the government measures restricting store visits would likely result in fewer in-store sales, and that even after the expiry of restrictions people may just be less inclined to visit stores. However, the regulator also noted

that for these reasons online sales increased generally. Moreover, evidence did not show that COVID-19 had hit the parties harder than their competitors or any other player in the industry. Thus, it did not alter the competitive relationship between the parties or between the parties and their competitors. In other words, COVID-19 did not change the assessment methodology absent evidence of a particular impact on the merging parties.

We would expect other regulators, including in the US and Asia, to follow similar patterns of thinking. In fact, in the US, other than a temporary ban on early termination of merger control review that has already been lifted, merger control seems to be business as usual. US regulators even publicly stated as much when they announced that companies should not rely on the failing firm defense to get deals approved during the pandemic; the regulators will view with skepticism claims that the acquired company would fail without the acquisition. The same can be said of the approach to merger clearance in Australia. Aside from temporary changes to the foreign investment regime intended to protect the national interest during the pandemic by subjecting all inbound investments to screening, and delays to the ACCC's merger clearance process arising from the pandemic, it is business as usual. The ACCC did not relax its approach to merger control during the global financial crisis and, as it prepares for increased merger activity involving distressed assets, it has made clear that it will carefully scrutinize "failing firm" claims.

Asia

There is, however, another beast emerging. While COVID-19 may not have affected competition law and policy, it has certainly given online sales an even greater boost. Competition regulators around the world are busy renovating the competition enforcement tools suitable for the bricks and mortar economy to adapt competition law to the digital era.

The encouragement of online sales is therefore a very important concept, and there are a number of other issues on the radar screen. Price-following algorithms create an unprecedented level of price transparency and price alignment, which is beyond the reach of enforcers as it does not involve collusion. Marketplaces are also scrutinized, as some powerful platforms have leverage over suppliers in relation to terms and conditions. The access of marketplace platforms to supplier data is sensitive where the platform operator also sells substitutable products over its own marketplace, acting as a reseller.

The review of the rules for horizontal and vertical collaboration are already well on the way, and over the European summer, the EU Commission has put several reform proposals up for public consultation. Thus, over the next few months, market operators have the opportunity to help shape the competition enforcement tools for the years to come.

Brand protection and influencers:

Challenges, old and new

By **Claire Sng** (Legal Director, London) and **Tabitha Norris** (Associate, London)

Brands will likely be spending up to USD15 billion on influencer marketing by 2022, up from USD8 billion in 2019, according to Business Insider Intelligence estimates based on Mediakix data. These figures are not really surprising, given that nearly 4 billion people (as of July 2020) are using social media and, despite the pandemic, 96% of US and UK social media users say they are engaging with influencers the same as or even more than they were pre-pandemic.

The existing challenge

Influencers provide a huge opportunity for brands to grow their brand following but, at the same time, they create a potential brand protection risk, in particular from a reputational perspective. For example, the Advertising Standards Authority (ASA) 2019 annual report, published in June 2020, found that a quarter of all online complaints about UK ads last year related to influencer posts.

In the UK, it is well established that when the ASA finds a breach of rules, it will hold both influencer and brand responsible for an influencer post relating to a brand. This is the case even if a brand has an agreement and policies in place requiring an influencer to post on social media in accordance with advertising rules.

The new challenge

In addition to these known risks of partnering with influencers, brands should be aware of a new form of scam that is emerging whereby influencers are being targeted to help unwittingly promote counterfeit products – which is particularly relevant given the rising volume of counterfeit goods being sold online.

According to a survey on the purchasing of physical counterfeits published by the UK IPO in September 2020, 16% of consumer respondents had unintentionally purchased counterfeit goods. No doubt if more influencers fall into this trap, this figure is likely to increase.

Use of influencers in this way could divert sales from legitimate goods, but perhaps more worryingly, when seeing these posts alongside posts for legitimate goods and brands, consumers may think counterfeit goods promoted by influencers have been vetted and are legitimate. If a consumer is persuaded to purchase goods which then turn out to be faulty or substandard or which never turn up, this is a serious reputational issue for the influencer and in turn, potentially, for any brand associated with the influencer.

What can advertisers do?

To address this risk, brands should take steps to:

- conduct appropriate due diligence to make sure the influencers they are working with are prudent and their previous actions may not come back to bite the brand;
- include appropriate obligations on influencers with an effective mechanism for review of posts and an effective communication channel to achieve swift removal of posts that break the rules;
- make sure their influencers are aware of this type of scam;
- consider whether it is appropriate to have exclusivity with the influencer for a particular period/(s) e.g. so posts about other brands (or that unwittingly promote goods for third-party counterfeiters) don't tarnish their brand; and
- include appropriate termination provisions in their agreements with influencers should this be necessary.

Powers to fight counterfeiters

Interestingly, powers to fight counterfeiters are currently under the spotlight. Two sets of draft sentencing guidelines (one for individuals and now also one for organizations) were published for consultation in July 2020 by the Sentencing Council. They relate to the offence of unauthorized use of a trademark contrary to s92 of the Trademarks Act 1994. This catches not only possession or sale of counterfeit goods but also possessing the means of counterfeiting goods without the trademark owner's consent and with a view to making a gain or causing a loss. If implemented, these draft guidelines would replace the current guideline published in 2008, which only applies to individuals and is used in the lower courts, the magistrates' courts.

The draft guidelines were developed with current sentencing practice in mind and were not intended to increase or decrease sentence levels overall but to provide greater certainty and consistency in sentencing approach. That being said, it could lead to an increase in the penalties imposed, in particular, in more serious cases. As such, if the goods of a brand are the subject of this type of scam by counterfeiters, these proposed amends to the sentencing guidelines may mean a better result can be achieved against counterfeiters in future.

In terms of the impact of these new sentencing guidelines on influencers, the first thing to consider is whether the s92 offences could apply. The wording of s92 speaks in terms of deliberate wrongdoing for financial gain. As such, where an influencer unwittingly promotes counterfeit goods, this is unlikely to be an offence under s92 and/or the statutory defence in s92(5) (reasonable belief of non-infringement) should apply. In contrast, where they knowingly promote counterfeit goods, it will then be necessary to consider all the circumstances to see if an offense has occurred e.g. the nature of the post(s), whether the brand's registered trademark is used, whether they gain from it e.g. a substantial fee for the posts.

For brands, unlike the established practice of being held jointly liable for their influencer's posts that breach advertising rules (even where the influencer acts against the brand's stipulations), there is no equivalent practice for s92. Nevertheless, what this issue highlights is the importance of taking steps to ensure the influencer is someone that it is appropriate for a brand to work with and be associated with to avoid potential reputational harm to the brand.

Going global:

How reputation can boost brand protection prospects

By **Melinda Upton** (Global IPT Co-Chair, Sydney), **Alexandra Moore** (Solicitor, Sydney), **Stefan Engels** (Partner, Hamburg), **David Alexandre** (Partner, Luxemburg) and **Benjamin R. Mulcahy** (Partner, Los Angeles)

Even before retail was pushed further online due to the pandemic, the highly connected global marketplace was seeing greater consumer awareness of brands that might not be available locally. Consumer awareness of international brands and an eagerness to engage with them makes such brands desirable targets for potential infringers.

Brand owners looking to prevent local traders from taking advantage of their hard-won status should take stock of their international influence and consider whether this can become another tool in the brand protection arsenal.

In this article, we take a whistle-stop tour of some recent developments and important considerations for using brand reputation in key markets around the world:

Australia – spill over reputation

In certain circumstances Australian courts recognize that the reputation a business has accrued from trading in overseas markets is so significant that consumers in Australia are taken to have sufficient awareness of that business. This is known as spill over reputation.

Spill over reputation is often raised in support of a tortious claim of passing off, or a statutory claim of misleading and deceptive conduct under the Australian Consumer Law – neither of which require a claimant to have locally registered trademarks. While reliance on the doctrine is increasing, international brands must be able to particularize their reputation among the relevant class of Australian consumers through evidence. The recent case of *In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd & Ors* [2020] FCA 193 demonstrates this.

In that case, the Federal Court of Australia sided with the popular US burger chain In-N-Out, which claimed a local trader operating in Sydney infringed their registered trademarks and engaged in passing off and misleading and deceptive conduct. To establish that the local trader had engaged in misleading and deceptive conduct (which here, included falsely representing an association between it and In-N-Out), the relevant class of Australian consumers must have been capable of being misled, i.e. they must have an awareness of In-N-Out in the first place, notwithstanding that In-N-Out did not (and does not) have any permanent stores in Australia.

In-N-Out was able to bring substantial evidence of a reputation built among Australian consumers over a number of years. Among this evidence: local media mentions about the US chain, including journalists encouraging Australians to try In-N-Out when next in the US; the prominent positioning of its Californian outlets in high-traffic tourist areas such as airports; and statistics relating to pop-up events In-N-Out had run in Australia over several years, with the Federal Court accepting that these activities established sufficient awareness.

Asia – brand protection regime

China's brand protection regime is very registration-focused and limited recognition is given to unregistered rights in China. Unregistered trademarks need to be either well-known or have achieved a certain level of influence/reputation through use in China in order to qualify for protection. Chinese authorities do not normally consider evidence of overseas reputation or recognize spill over reputation, which presents a huge evidentiary barrier for foreign brand owners which may be internationally renowned but have a limited reputation in China. However, while the evidential threshold remains high, recent decisions show that the Chinese courts are becoming more willing to protect unregistered marks owned by foreign brand owners. In the case of *Southcorp Brands Pty Limited v. Huai'an Huaxia Manor Brewing Co., Ltd*, Penfolds scored victory in its trademark infringement battle against a Chinese brewing business, and the Chinese court went further to recognize "奔富" (the Chinese brand name for "Penfolds") as an unregistered well-known trademark in China. While the ruling was predominantly based on Penfold's established reputation in China, Penfold's global reputation as one of Australia's most renowned wine brands compelled a finding that the defendants intended to exploit the goodwill and fame that Penfold has amassed in the market.

For foreign brand owners who struggle to demonstrate extensive use and reputation in China, it is worth noting that the PRC Trademark Law was recently amended to further curb bad faith filings. Notably, the newly amended Article 4 provides that a bad faith trademark application without intent to use should be rejected, and Article 7 provides that trademarks should be registered and used in good faith. Administrative and judicial practice has shown that Articles 4 and 7 could be a potent weapon in brand owners' arsenal against any pirate or copycat marks in China.

Europe – reputed and well-known marks

In Europe, there are two main scenarios in which a brand lacking registration may nevertheless be protected:

- Reputed trademarks are registered for certain goods or services, but lack registration for others. Their scope of protection may be extended to any "unregistered" goods or services, provided such trademarks (i) are known by a significant part of the public and (ii) the use of the infringing sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark. For example, in *Viaguara v OHIM* – Pfizer (General Court , January 25, 2015, T-332/10), it was ruled that the owner of the trademark Viaguara, registered for beverages, took unfair advantage of the reputation of the brand Viagra (which was not registered for beverages), benefiting from its power of attraction, reputation and prestige.
- Well-known trademarks are unregistered trademarks which may nevertheless benefit from protection if they are well known to the public of the country where relief is being sought. This principle is derived from Article 6 bis of the Paris Convention for the Protection of Industrial Property.
- Whether a brand may be deemed "well known" or "reputed" must be decided by the courts on a case-by-case analysis. The burden of proof rests on the brand owner, who may provide any indications such as advertising brochures, sponsoring contracts, market studies or declarations about the volumes of sales to support his claim. The renown or reputation of a brand does not have to exist in the whole territory of the Member State where protection is being claimed, it is sufficient that it exists in a substantial part of it.

The EU Member States recently had to transpose the 2015 Directive. In this context, some Member States have introduced new provisions on the enforcement of reputation into national law. For instance, in France, since November 2019, the infringement of a reputed trademark outside of its "registered scope" is now aligned with the legal regime of regular trademarks, while the protection of a well-known trademark is now enshrined into French law through dedicated tortious liability provisions.

US – Generic marks and consumer perception

A generic term – the commonly used name of a class of products or services – is ineligible for federal trademark registration in the US. But a generic term combined with ".com" can create a federally protectable trademark, even if the generic term alone could not. Recent case law shows consumer perception is an important factor in this.

Booking.com is a business that maintains a travel-reservation website by the same name. Booking.com tried to register booking.com as a trademark. The US Patent and Trademark Office (USPTO) had previously adopted a nearly per se rule that when a generic term is combined with a generic internet-domain name suffix like ".com," the resulting combination, ie, a "generic.com" mark, must automatically be deemed generic and, therefore, ineligible for trademark protection. Applying that rule, the USPTO concluded that Booking.com was a generic name for online hotel-reservations and refused registration. Booking.com sought judicial review. The District Court determined that Booking.com – unlike the term "booking" standing alone – is not generic. The Court of Appeals for the Fourth Circuit affirmed, rejecting the USPTO's per se rule that combining a generic term like "booking" with ".com" yields a generic composite.

In a recent decision in *USPTO v. Booking.com B.V., U.S.,* No. 19-46, 6/30/20; 591 US_(2020), one of the last opinions written by the late Justice Ruth Bader Ginsburg, the US Supreme Court affirmed, similarly rejecting the USPTO's per se rule. Instead, the Court explained that consumer perception will determine whether a term is a generic term for goods and services or is a protectable trademark. Because survey and other evidence showed that consumers perceive Booking.com as a brand name, not a generic term, the Court concluded that it was entitled to be registered.

The decision underscores the importance of consumer perception evidence for those seeking to claim trademark rights in arguably generic terms, regardless of whether they are domain names or other terms. Various sources of evidence may help determine whether consumers perceive a term as one that identifies a class of goods or services, in which case it would be generic, or whether they perceive it as capable of distinguishing among different sources of those goods or services, in which case the term may be eligible for trademark protection. Practitioners will, therefore, want to consider all forms of consumer perception evidence that may be at their disposal when trying to demonstrate that an arguably generic term is understood by consumers to be a brand.

Consumer protection:

New measures for online shopping

By **Duncan Calow** (Partner, London) and **Jonathan Salt** (Associate, London)

Lockdowns induced by COVID-19 have accelerated the consumer trend away from the physical high street to online marketplaces across Europe. With this acceleration, it is timely for retailers to recall that the Directive on Better Enforcement and Modernisation of EU Consumer Protection must be implemented by November 28, 2020.

The Directive introduces key online consumer protection measures, intended to apply on a platform neutral basis, and contains three key elements likely to impact on the fashion retailers' day-to-day activities:

Price reductions

For every price reduction claim, retailers will have to display (as the reference price) the lowest price applied within a period of at least 30 days preceding the price reduction announcement to that product. This requirement will likely be of particular importance when planning major promotions around key sales dates in the retail calendar like Black Friday, Cyber Monday and Boxing Day.

Consumer reviews

Consumer reviews are a useful tool in building trust and reputation. Under the Directive, online retailers will only be permitted to claim that reviews were submitted by consumers if they take "reasonable and proportionate" steps to validate the relevant reviewee, such as by ensuring that only consumers who purchased or used the good(s) or service(s) submit a review.

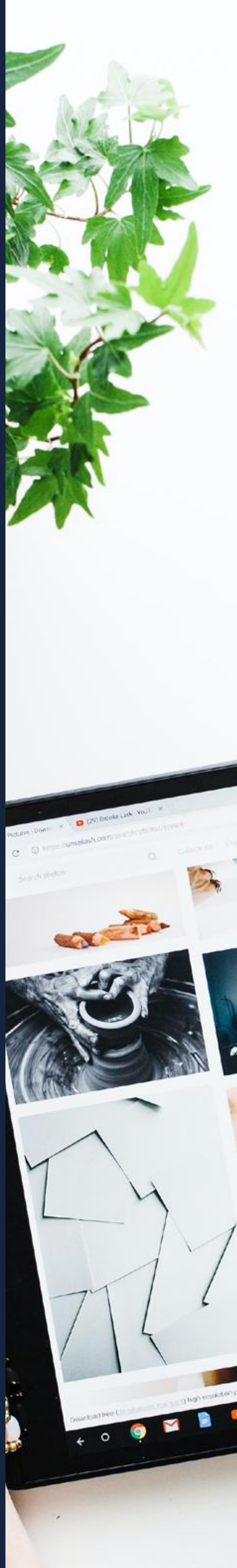
Personalized pricing and ranking

Consumers must be informed each time the price presented to them online is based on an algorithm which takes into account their personal consumer behavior, so they are aware of the risk that the retail price was "artificially" increased. Additionally, retailers will also have to inform consumers of the main criteria (and relative importance placed on that factor) which determines the ranking of offers provided in response to a search query.

The Directive provides national authorities with autonomy to implement a number of enforcement measures which will provide consumers with a consistent minimum standard of protection/redress throughout the EU.

The headline here: national authorities must have the ability to impose fines for "widespread" breaches of consumer law of at least 4% of a trader's annual turnover (or up to EUR2 million when turnover information is unavailable).

A note on Brexit: As at the date of writing, the UK has been supportive of the implementation of the Directive and it is conceivable that the UK could enshrine the new rules in its local law even if it leaves the EU in a no-deal scenario.



COVID-19

Impact on retail employers in APAC

By **Helen Colquhoun** (Partner, Hong Kong) and **Nicholas Turner** (Partner, Sydney)

The global retail sector has been hard hit by the COVID-19 pandemic. Retailers across APAC have had to adapt to the new normal by implementing short- and long-term measures to keep their businesses and employees afloat.

In many locations, retailers have had no choice but to close their stores due to government-imposed restrictions and reduced consumer spending. While businesses in other sectors pivoted to a work-from-home model, there were limited opportunities for retail employees (particularly those working in physical retail outlets) to do so. As a result, retailers in many jurisdictions stood down their employees without pay for an indefinite period of time, or took other cost-cutting measures, such as reducing working hours and pay in an attempt to preserve their workforce and to avoid making any redundancies.

In Australia, the employment tribunal, the Fair Work Commission, implemented measures to mitigate the adverse effects on employees in the retail industry by introducing "Schedule X" to the Retail Industry Award 2010, the industrial instrument which governs the minimum terms and conditions of employment for employees in the majority of the retail industry. Schedule X enables employees to take two weeks of unpaid pandemic leave where they are unable to work as a result of receiving a direction to self-isolate, and allows employees to take twice as much annual leave at half pay (with employer consent). In addition, the Australian government introduced the JobKeeper Scheme, a wage subsidy scheme to help employers maintain employment relationships. Hong Kong and other jurisdictions have introduced similar subsidies and reliefs in an effort to prevent widescale redundancies across the sector. However, as the long-term effects of the pandemic show little sign of abating, it is becoming increasingly difficult for widescale redundancies to be avoided.

Retailers are therefore having to consider alternative ways to evolve and survive in the current economic climate where demands for some goods may fluctuate and where in-store shopping may not be feasible or desirable to consumers. In many jurisdictions, retailers have witnessed panic buying of essential goods, frequently leading to shortages and supply issues in relation to certain items. However, in China, which has been one of the first countries to emerge from lockdown, "revenge shopping" saw large spikes in spending in the luxury goods sector. Retailers and malls in other locations are trying to encourage similar returns to consumer spending through promotions, discounts and government-financed voucher schemes.

Retailers are also focusing on a longer-term move towards online selling and exploring other alternatives to in-person store sales. eMarketer projects, for example, that Chinese online retail sales will rise by 16% in 2020, while total retail revenues contract 4%. Retailers will increasingly focus on e-shopping platforms and experiences to meet consumer preferences for how they are willing to shop in the new normal world of retail.

EU fashion's sustainability goals after the pandemic and the right to repair

By **Alexis Fierens** (Partner, Brussels), **Frédérique Gillet** (Counsel, Brussels) and **Anna Kovaleva** (Junior Legal Advisor, Brussels)

The COVID-19 outbreak has undeniably been an unprecedented challenge for all types of industries, many of which found themselves unprepared to deal with the immediate economic impact of the pandemic. However, despite fears that the crisis would wipe away all the sustainability efforts of the past years in various segments of the fashion industry, the pandemic has also shown an unexpected societal impact, with a transformation of consumer behavior leaning towards a more conscious consumption that is clearly becoming part of the new normal. A recent study[1] confirms that the current crisis demands that companies accelerate their progress on sustainabiity initiatives to be competitive in the market that will emerge after the pandemic.

What does the European strategy for a more sustainable fashion industry look like?

The textile and clothing industry plays an important role in Europe, employing 1.7 million people and generating an estimated turnover of EUR166 billion. However, it also has a significant impact on the environment which seems hardly compatible with the Commission's European Green Deal and circular economy goals.

Over the past few years, the EU has been implementing a number of initiatives aimed at greening the sector which, undoubtedly, will leave their mark on the post-pandemic period, including the 2018 waste management rules package, imposing separated collection of textiles by 2025; the EU Ecolabel; and the Green Public Procurement (GPP) encouraging sustainability. However, a harmonized legal framework ensuring minimum sustainability and circularity standards across Member States still needs to be defined.

In the new Circular Economy Action Plan, adopted in March 2020, the European Commission announced an upcoming EU Strategy for Textiles with the ultimate goal to boost the European market for sustainable and circular textiles, to incentivize textile reuse versus fast fashion and to drive new business models. In particular, the Strategy shall:

- introduce a new sustainable product framework ensuring that textile products are fit for circularity, i.e. are more durable, reusable, recyclable and not containing hazardous chemicals. The Commission is currently seeking views of various stakeholders on the roadmap that will guide the revision of the Ecodesign Directive, covering so far energy-related products but the scope of which might be broadened to include textiles;

- provide guidance to achieve high levels of separate collection of textile waste, which Member States have to ensure by 2025;
- encourage the sorting, re-use and recycling of textiles through regulatory measures such as the extended producer responsibility; and
- extend the right to repair to garments.

Both legislative and non-legislative measures establishing a European right to repair are expected to be adopted by the Commission in 2021. In the meantime, France has recently approved national legislation requiring manufacturers and vendors of electronics to introduce a "reparability index," a score from 1 to 10 informing consumers about the ease of repairing the product and official repairers of the availability of spare parts in order to grant repair options. In addition, repairers shall offer to consumers the choice between recycled spare parts and new ones. It is possible that EU legislation will be shaped after the French model.

In the path towards a more sustainable fashion sector, the right to repair is considered key also by the civil society that, in April 2020, published a position paper with recommendations to the Commission on how the 2021 EU Textile Strategy should look[1]. In this so-called Civil Society Strategy, various organizations call for the respect of human rights and the establishment of high social and environmental standards throughout the whole value chain. They point out that the introduction of a right to repair would create new jobs, prevent textile waste and tackle the issue of hazardous chemicals contained in garments. The text has been backed by a number of Members of the European Parliament, who invited the Commission to endorse the Civil Society Strategy and include it in the development of the Union's proposal for 2021.

It remains to be seen whether and to what extent the pandemic will affect these initiatives.

1 Weaving a Better Future: Rebuilding a More Sustainable Fashion Industry After COVID-19, Boston Consulting Group, Sustainable Apparel Coalition and Higg Co.

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