FASHION LAW

"Style is the only thing you can't buy. It's not in a shopping bag, a label, or a price tag. It's something reflected from our soul to the outside world—an emotion."

Alber Elbaz

MAY 2021

WELCOME

WELCOME TO A NEW EDITION OF FASHION LAW

As many countries ease into a new way of living post COVID-19, it has been encouraging to see fashion festivals and events slowly return to the runway almost to the day one year later. The Melbourne Fashion Festival in March was successfully delivered with a mixture of live and virtual runways and events. London Fashion Week in February had a focus on streamed shows, which for many was the first opportunity to get a 'front row' seat to explore and watch what the best designers have created. Many fashion and luxury brands were able to pivot and maximise a market online but that was not the case for all.

In this edition of Fashion Law, we cover advertising during COVID-19 especially as we learnt how to work remotely and go online. This opened up new areas and for others, it had a particular impact on those who were vulnerable. We also discuss how a TikTok video was found to be in breach of the Advertising Standards Authority's requirement for disclosure in the UK.

In Australia, the Designs Act is being reviewed with a possible introduction of a grace period which would help clients that have found their work quickly copied where no design application was filed.

We cover cases regarding trade marks and copyright where there have been infringements and the importance of having the right brand protection in place.

Our Antitrust, Competition &Trade Regulation lawyers have been active with the EU verticals rules which have been under review, with the revised laws to come into force in May 2022. Our team has been participating in the consultation on our own behalf and for luxury fashion associations.

Our Asia Pacific, International Trade Team explains the Regional Comprehensive Economic Partnership (RCEP) which is the world's largest free trade agreement (FTA) involving ASEAN, Australia, New Zealand, China, Japan and the Republic of Korea. The RCEP was signed in November 2020 and is expected to enter into force in 2021. Our team examines how businesses can look forward to more seamless trade flows and integrated value chains under the RCEP and think about positioning themselves to take advantage of the potential benefits that will flow from this new FTA.

We hope you find this edition insightful. If we can be of any assistance, no matter where you are in the world, please contact us.

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Look out for our virtual roundtables bringing together global senior executives and general counsel for networking and a frank exchange of ideas and experiences on topics relevant to the luxury goods and fashion industry. Please register your interest here:

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ADVERTISING IN THE TIME OF COVID-19

By Arthur Artinian and Georgina Rigg

COVID-19 and the many national lockdowns that have followed have caused a huge shift in advertising and marketing. Suddenly, everyone is at home and receiving nearly all content digitally; through their phones, tablets and TVs, and advertising budgets have been sliced and squeezed as companies shift scarce resources to other parts of their business.

Regulators are faced with a new challenge and responsibility to protect consumers from companies who would price gouge and profit off panic cause by the coronavirus. The UK regulator, the Advertising Standards Authority ("ASA"), has published a fair number of decisions and guidance in relation to the coronavirus. We provide a brief summary of relevant decisions and lessons for advertisers:

1. Be careful how you address life post-lockdown

In a recent decision by the ASA (see here), the ASA found that a commercial aircraft carrier's 'JAB AND GO' advertisement was irresponsible and misleading. The advertisement invited consumers to buy their plane tickets for the Easter and Summer holidays because of the hopeful news of a vaccine roll out. The ASA received 2,370 complaints about the advertisement. In its decision, the ASA acknowledged the UK Government and other sources at the time were indicating that travel may be possible, but nevertheless found that the advertisement was misleading in relation to the impact of the vaccines and irresponsible for encouraging irresponsible behaviour.

Takeaway: Use caution when advertising events, goods and services that require travel or business restrictions to be lifted, and ensure that consumers are not misled.

2. Avoid medical and medicinal sounding claims about COVID-19

Claims to prevent, treat or cure the infection are likely to be considered 'medical or medicinal claims' and can only be used in relation to licensed products or appropriately marked medical devices. This applies to all products not just products you would associate with medicines. The ASA upheld a complaint against a facemask producer whose advertisement claimed '*Protection against bacteria and viruses! 'Coughs and sneezes spread diseases…'*, stating that the producer did not have sufficient evidence to show that the face masks had been tested to, and met, PPE standards despite the face marks passing other conformity assessments.

Takeaway: Even if you have the necessary authorisations, never make a medical or medicinal sounding claims unless you have robust, independent substantiation to support a claim. Remember that claims can be visual in nature e.g. using a medical symbol could be taken as indicating that your product is medical in nature.

3. Take care with health-related claims

Only health claims listed as authorised in the EU Register, or claims that have the same meaning to the consumer may be used in marketing communications. The ASA upheld complaints against two food companies (see here and here) for their use of improper claims. Both companies made claims referring to the immune boosting

properties of ingredients in their advertised products, one for vitamin C in its shot drink and the other in relation to gut bacteria in kefir yogurt.

Takeaway: Unless you have robust substantive evidence that your claim is justified and that it is listed on the EU Register, avoid all health-related claims.

4. Social responsibility & fear and distress

Advertisers must take care not to exploit public fear in order to mislead them into buying a product. An appeal to fear to encourage sensible behaviour or to discourage risky behavior may be considered justifiable. However, in all circumstances the fear must not be excessive and exaggeration should be avoided at all times. The ASA ruled that an advertisement using the following language was likely to cause fear or distress:

> "The death toll is 493 and rising. It would be an understatement to say that there is a growing sense of panic" and "the new virus is spreading so fast it has become barely controllable ... any extra layer of protection is beneficial in order to decrease your chances of getting infected" (see here).

The ASA concluded that the advertiser was exploiting people's fears in an inappropriate manner.

Takeaway: There is a delicate balance to be struck when utilising the coronavirus to motivate a sale, we recommend that a legal professional reviews the copy of each advertisement where this subject is included.

5. Using imagery in your advertising

In a statement in September 2020 (see here), the ASA was keen to stress the importance that all advertisements should depict current government and scientific rules and guidelines on measures designed to limit the spread of the coronavirus. Although the ASA indicated that it would take a pragmatic approach, noting that many advertisements may have been created before certain guidelines were available.

Takeaways: The ASA provided three key points

1) advertisements must not actively discourage protective measures such as mask wearing or social distancing

2) advertisements that make explicit reference to the coronavirus must show the correct safety measures in line with current Government advice at the time the advertisement was created, and

3) advertisements that do not explicitly reference the coronavirus may not need to depict coronavirus protective measures but should be made in a socially responsible manner.

6. Train your influencers

The importance of social media influencers as an effective method for reaching new customers and to generating authentic content for a brand is greater than ever during the pandemic. However, as can be seen in a number of recent ASA decisions, the ASA will uphold complaints against influencers on a range of channels, including TikTok (see here). A brand will be deemed equally responsible for the influencer content; this can apply even if the brand had no editorial control. In a recent ruling, the ASA found that a short-term loan provider, who was using Instagram influencers to promote their delayed payment plans, was irresponsible for linking purchasing items as a way of boosting consumer's low moods caused by the coronavirus (see here).

Takeaway: If you are going to engage with an influencer, ensure that you provide training and support so that the influencer understands what rules they must comply with and, ideally, vet all content before posting.

7. Conclusion

All advertisements must be created with social responsibility in mind, particularly during these times when consumers are particularly vulnerable. The ASA and other international regulators will take a very dim view of advertisers attempting to exploit the coronavirus through misleading consumers or relying on underhanded sales techniques. Accordingly, all businesses should take great care when making any direct or implied claims about coronavirus in advertising and marketing.

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COULD YOU BE USING YOUR TRADE MARKS TO STOP UNAUTHORISED RESELLERS IN THE EU?

By Gabriela Da Costa and Georgina Rigg

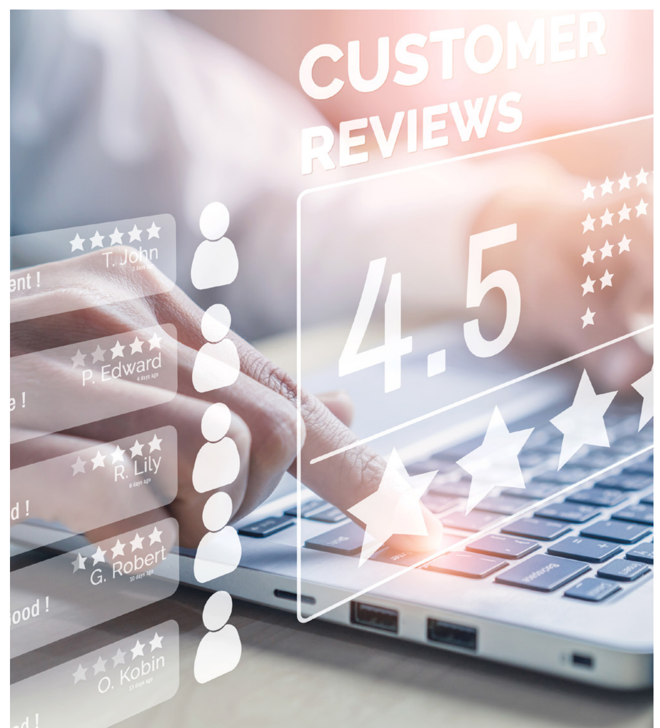
In this internet age, where a brand can be damaged by a single, negative review going viral, never has it been more important for a brand owner to protect its image and reputation. The pandemic forced all shopping online for some periods and has dramatically changed consumer buying habits, increasing the risks of unauthorised and poor quality online selling for high-quality brands without appropriate measures in place.

How can you stop a third party selling your genuine goods in a manner that damages your brand? Be it poor customer service, bait and switch practices, long delivery times, substandard internet sites or poor returns policies, issues such as these, the prevalence of which has only been exacerbated by the pandemic, can create negative consumer associations with a brand. The answer – through an effective selective distribution strategy.

In a selective distribution model, the brand only permits select authorised resellers to distribute its products to end users and to other approved resellers. In order to be legally valid, resellers must be authorised based on objective selection criteria justified by the nature of the goods and designed to ensure a high quality brand and customer experience.

Traditionally, as demonstrated by the limited case law on the subject, successfully enforcing a selective distribution system against third parties outside of the system has been difficult, primarily due to the high evidential burdens imposed by local laws. However, there has been a recent trend in case law where brand owners operating a valid and actively enforced selective distribution system in Europe have been able to prevent inferior third party resellers from selling their products using trade mark principles, despite the doctrine of trade mark exhaustion.

The exhaustion doctrine provides that a trade mark owner cannot prevent a third party from reselling its branded goods when they have already been placed on the EU market with its



consent, i.e. “exhausted” trade mark rights can no longer be asserted to prevent the further commercialisation of the goods. However, a trade mark will not be considered ‘exhausted’ where “legitimate reasons” exist.

Under the emerging case law, sales outside a selective distribution system can act as this “legitimate reason” allowing the brand to stop the resale of its goods, provided that the system has been designed in compliance with EU competition law principles, and the third party seller’s practices are damaging to the trade mark’s reputation and/or involve a change in the products’ condition.

There was some question of whether this exception was only available for luxury goods due

to the existing (IP) case law focusing on the luxury sector. However, consistent with the European courts' and Commission's approach on the types of products to which selective distribution can be applied, there have been a number of national cases relying on this exception for a broader array of goods. Manufacturers have successfully enforced selective distribution for high quality branded items falling outside the luxury sphere. This trend signifies a slow but steady convergence of IP and competition principles that give selective distribution much stronger teeth.

The Takeaway

Trade mark rights (and incidentally copyright) can be powerful tools in a brand owner's arsenal against unauthorised third party resellers when combined with carefully designed distribution terms. In drafting your terms and criteria think strategically about the role your IP rights will play.

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UK ADVERTISING REGULATOR MAKES FIRST EVER RULING ON DISCLOSURES REQUIRED FOR COMMERCIAL MARKETING VIA A TIKTOK VIDEO

By Arthur Artinian and Georgina Rigg

A TikTok post on an Emily Canham's account, a beauty blogger and YouTube star, is the first TikTok video found to be in breach of the Advertising Standards Authority's ("ASA") requirement for disclosure in the UK (see here).

The post, which featured a video of Emily Canham using a branded hairdryer and straighteners, included a caption alongside the video stated

> "hiii just a lil psa there's 20% off the [Brand] website TODAY ONLY with the code EMILY … #fyp #foryourpage".

The brand in question had entered into an agreement with Ms Canham, which required Ms Canham to post a number of social media posts while at a music festival. The music festival was cancelled as a result of COVID-19. However, the contract was varied and still required several social media posts featuring a certain promotional code.

It was submitted to the ASA that the TikTok was created without the oversight or approval of the brand, and did not form part of Ms Canham's contract. Additionally, both Ms Canham and the brand pointed to the fact that she had not been compensated for the promotional code featured in the TikTok video.

In the UK, all marketing communications must be obviously identifiable, and they must make their commercial intent clear if it not obvious from the context. Despite the lack of payment to Ms Canham or the lack of oversight and control from the brand, the ASA still found that the post had commercial intent, and that, as it appeared in-feed on TikTok, it would not clear to viewers that is was an advert.

Ms Canham has since deleted the video, and she and the brand have been instructed by the ASA to ensure her future posts feature an advertising identifier clearly and prominently. Although this in itself is a soft penalty for a breach of the CAP Code, the negative media attention that the ruling has garnered shows the true penalty for a breach of advertising rules.

The ruling is not an unexpected development as the ASA has upheld other complaints made against social media influencers who do not make their connection with brands clear. An ASA spokesman has stated that

> "Our rules place an emphasis on protecting children and, where an audience/followers of an influencer or celebrity are predominantly young people, particular care has to be taken to ensure they are not misled".

This clearly shows the ASA's focus on social media as a platform to advertise to young people, and their concern with social media generally.

It is not just the ASA whose attention is focused on social media. The Competition and Markets Authority ("CMA") has investigated hidden advertising on Instagram and found concerns that social media influencers are not making paid-for (or incentivised) content clear to viewers. As a result of the investigation, Instagram has signed up to a package of changes to help ensure clear labelling of paid-for content. It may be that other social media platforms will be required to do the same.

The ruling acts as a clear reminder to brands and social media influencers that advertising

rules and regulations apply across all online activities and on social media, including newer and emerging platforms like TikTok. All posts and content, whether paid for or not, when made by a brand ambassador must be clearly identifiable as an advert. Brands should ensure that their influencers are fully compliant with the rules as they can be held responsible for content even where that content has been posted outside their immediate control.

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A WELCOME PROPOSAL TO INTRODUCE A GRACE PERIOD INTO THE AUSTRALIAN DESIGNS ACT

By Chris Round, Savannah Hardingham and Olivia Coburn

In Australia, the *Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020* (Bill), with important changes to designs law, is currently before Senate for consideration. It includes a much-anticipated change to implement a grace period that will allow designers to publish their designs before applying for design protection.

Presently to get an enforceable design right, the design must be "new and distinctive", meaning that the design must not have been disclosed publicly before the design was filed. For many businesses, this non-publication requirement has made the designs regime impractical since they would not want to incur the cost of seeking design protection unless the design turned out to be commercially successful. For businesses releasing hundreds of new designs to the market each year, this cost is significant.

Businesses can try to predict the success of their designs but in many cases they just don't know whether a design will be successful (and likely to be copied) until after the design had been released to the market. By this time the design is invalid.

For many designers and businesses, the introduction of the grace period will be welcome news by the proposed Bill, however, they should be aware that accompanying the new grace period is a "prior use" infringement exemption. Would-be infringers will be able to defend an infringement action based on their use of the design during the grace period.

The changes introduced by the Bill are as follows:

- The 12-month grace period will be introduced. For the purpose of deciding whether a design is new and distinctive, any publication or use of a design (not necessarily the subject design) by the designer or the owner of the subject design that occurs in the 12 months before the filing date will be disregarded. Important qualifications to this rule are that:
  - » Publications of designs by the Designs Office in Australia and overseas designs offices will still count towards the assessment of the "new and distinctive" requirement.
  - » Where another, substantially similar design ("other design") has been published by a third party within that 12-month grace period, the Designs Office will assume that the third person has obtained or derived the other design from the designer or owner of the applied-for design. This means that if someone is attacking the validity of the registered design on the basis of the other design, they will need to show that the other design was not derived from the registered owner of the design.
- A prior use exemption to the infringement of designs will be created. Third parties will have a defence to infringement where they start using a published design during the grace period, or if they take "definite steps" to start using a published design during the grace period. "Definite steps" includes contractual steps or otherwise and includes steps taken within or out of Australia. The purpose of this exemption is to protect businesses who have invested in a publicly disclosed design during the grace period, when they cannot know if the designer intends to seek registered design protection.

- The innocent infringer defence will be available any time after the design's filing date. Currently, this is available only when infringement occurs between the filing date and the registration date. Since publication of the design can be delayed for up to six months after the filing date, this means that a person can infringe a design that they would not have been able to find on the Register of Designs. The innocent infringer defence will extend to those circumstances.

The introduction of a grace period would be welcome news to many of our clients that have found the current law relating to novelty difficult. It should help with clients that have found their work quickly copied where no design application was filed. It should assist fashion clients releasing hundreds of designs per year.

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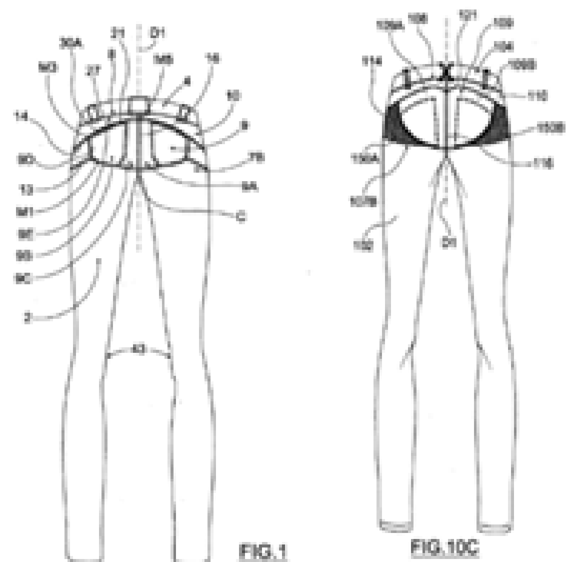
NOT SUCH A FRIENDLY DECISION FOR HUGZ: PASSING OFF COULD HELP COMBAT FASHION COPY-CATS

By Simon Casinader and Georgina Rigg

On 19 November 2020, the Intellectual Property Enterprise Court (known as the "IPEC") in the UK handed down its judgment in the case of *Freddy SPA v Hugz Clothing Ltd & Ors* [2020] EWHC 3032, which ran for an unsually long time for the IPEC (three days).

The decision was a rare occurrence of a passing off claim, together with other IP causes of action, succeeding in the get-up of a functional item, being "*bum enhancing jeans*". Ordinarily, such cases, particularly with respect to fashion items, fail as the get-up is seen as merely design elements or ornamental, or the circumstances of the use lead to a conclusion that other trade marks (e.g. brand names and logos) dominate consumer perception.

This case could embolden brand owners in relation to enforcement of the look and feel of their clothing as it creates the possibility of confusion 'post-sale' in addition to the point of sale.



The case

The claimant, Freddy SpA ("Freddy") launched WR.UP branded jeans in 2012, marketing the products as "*body-enhancing*" jeans, which give the wearer "*the appearance of slimmer hips, whilst simultaneously lifting and separating the buttocks*". These jeans departed from the usual shapewear as they applied to the outer-garments using a system of silicone inserts rather than common body-enhancing undergarments.

The defendants, HUGZ Clothing Limited (among others) ("Hugz") previously admitted copying the WR.UP jeans and the parties entered into a settlement agreement in April 2019. However, not long afterwards Hugz launched a second version of their HUGZ branded jeans. Freddy claimed that the marketing of the second HUGZ model jeans breached the settlement agreement, infringed their patent and various unregistered design rights, in addition to constituting unlawful passing off.

In an unusual turn of events, from June 2020 Hugz were not represented and barely interacted with the court process. In fact, no-one from Hugz attended the trial, and as a result, all Hugz's counterclaims were struck off on an application by Freddy. The Court was therefore in the uncommon position of having uncontested fact and expert evidence from Freddy, and nothing from the Hugz other than its amended defence.

Deputy Judge Stone found an infringement of patent and breach of the settlement agreement, in addition to the more unusual aspects of the claim for passing off and infringement of designs.

Passing off

Freddy claimed goodwill in relation to a combination of elements of its WR.UP jeans, including the polished metal badge, the positioning of the badge on the jeans and the positioning and shape of the seams ("Freddy Get-Up"). Hugz claimed that, because the jeans are sold by reference only to the brands FREDDY and WR.UP, all the goodwill lay in these brands, and that Hugz did not use either brand and was therefore not infringing.

The judge found that it was conventional for women's jeans to bear branding elements on their rear pockets, and that consumers were aware, through Freddy's marketing efforts, of the Freddy Get-Up, and had been educated that the Freddy Get-Up on jeans was an indication of origin. The Court found that the second HUGZ jeans misrepresented, through the HUGZ get-up, that there was a connection in the course of trade with Freddy.

Freddy was able to provide evidence as to the damage caused by the HUGZ jeans, including complaints from distributors and social media advertisements from former distributors of Freddy who now stock the HUGZ jeans instead. Freddy also provided an email from a long-term customer, asking if it had rebranded its product from WR.UP to HUGZ.

An interesting and unique element in this case was post-sale confusion. Post-sale confusion occurs where a consumer knows they are purchasing a 'knock-off' when they buy the goods, but they do so because they want other consumers to believe that the jeans are associated with Freddy and its products. Post-sale confusion is actionable as a matter of trade mark law (*Datacard Corporation v Eagle Technologies Limited* [2011] EWHC 244 (Pat)) but is not a commonly pleaded in passing off.

The Court struggled to find instances where this question had been considered, and referenced instead a decision by the High Court of New Zealand in *Levi Strauss and Co and Anor v Kimbyr Investments Limited*, which stated:

> "The whole point of this particular mark is to maintain the connection between the goods and the proprietor during the life of the garment after sale. There is no reason in principle why this aim should be frustrated. It is a legitimate and classic use of a mark. If the Kimbyr argument is correct the purpose of this mark would be negated. A defendant could insert a deliberately misleading mark on a garment, ensure that there was no confusion at point of sale, but continue to gain the benefit of its unethical trading by arguing that the confusion happened after sale only. This kind of result would cut against the clear objective of the trade marks legislation which is to support the use of trade marks to distinguish the goods of one manufacturer or trader from others and to minimise public confused."

Deputy Judge Stone found on the evidence that HUGZ jeans continue to make misrepresentations to consumers *whenever* they are worn, and that that misrepresentation damages Freddy. As such, the judge found passing off at point of sale *and post-sale.*

Designs

There was a small but interesting note in relation to unregistered designs that also arose in this case. This was that the shape of the jeans 'when worn' is not a valid design and cannot be used for enforcement. Freddy attempted to claim that Hugz had also infringed one of their unregistered designs representing when the jeans are being worn. The judge found that the shape of a pair of jeans "when worn" is not a protectable design, because it is a shape that is infinitely variable

depending on the particular person wearing the jeans.

To quote to Deputy Judge:

> "the wearers' buttocks would be lifted and separated, but if those buttocks are of differing shapes, the resultant shapes of the jeans "when worn" will differ".

All the other unregistered designs infringement claims under the case were accepted and upheld.

Key takeaways

The new and interesting development of the law of passing off in relation to post-sale confusion could represent a huge victory for fashion brands, whose garments are often imitated for the sole purpose of passing them off as 'similar to' a famous original. Fashion brands could have an additional tool in their arsenal to help combat copycat designs, although passing off is difficult to prove, brands could benefit from this widening of possible confusion.

Brands must also remember that care must be taken if attempting to rely on an unregistered design when being worn or used by a user.

Above: The First HUGZ Jeans are shown on the right and differ from the Second HUGZ Jeans in relation to the seam.

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"LETTUCE TURNIP THE BEET" PUN ON T-SHIRTS NOT TRADEMARK USE, NINTH CIRCUIT AFFIRMS

By David Byer and Eric Lee

The owner of the trademark "LETTUCE TURNIP THE BEET" cannot prevent third parties from printing the mere phrase on t-shirts, tote bags, or other products. On 20 January 2021, the U.S. Court of Appeals for the Ninth Circuit affirmed that consumers are likely to purchase such products because they find the phrase aesthetically pleasing and not because they associate the phrase with any particular source.[1]

LTTB LLC, the owner of incontestable U.S. trademark registrations for "LETTUCE TURNIP THE BEET," sued Redbubble Inc., an online print-on-demand marketplace, for trademark infringement, counterfeiting, and contributory infringement over use of this phrase on products. The Northern District of California granted Redbubble's motion for summary judgment, and LTTB appealed.

Although LTTB owns incontestable U.S. trademark registrations for "LETTUCE TURNIP THE BEET" for clothing, the right to use registered marks is subject to nine "defenses or defects" listed in 15 U.S.C. §115(b), including that "the mark is functional." Here, the Ninth Circuit concluded that the "LETTUCE TURNIP THE BEET" mark is functional because it "improves the usefulness or appeal of the object it adorns" and therefore exclusive use of the mark "would put competitors at a significant non-reputation-related disadvantage."

LTTB presented evidence of the popularity of its goods, including photos of musician Jason Mraz wearing a t-shirt and images showing t-shirts worn on television programs *Million Dollar Listing Los Angeles* and *Real Housewives of New York*, but the Ninth Circuit held that the evidence did not raise a triable issue as to whether consumers buy the products because they identify LTTB as the ***source*** of the goods. The court distinguished the facts in *Vuitton et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769 (9th Cir. 1981), where the plaintiff presented an affidavit by a buyer stating that buyers were unlikely to purchase a Vuitton product solely because of the aesthetic characteristics of the Vuitton trademark rather than an association of that trademark with Vuitton.

The Ninth Circuit concluded that LTTB presented no evidence to avoid the conclusion that the "LETTUCE TURNIP THE BEET" mark serves an aesthetic purpose wholly independent of any source-identifying function, and therefore it affirmed the district court's grant of summary judgment for Redbubble.

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[1] *LTTB LLC v. Redbubble, Inc.*, 19-16464 (9th Cir. 2021)

DON'T BANK-SY ON TRADE MARKS: BANKSY LOSES EU TRADE MARK DUE TO "BAD FAITH"

By Simon Casinader and Ravena Guron

Banksy's trade mark for one of his most famous artistic designs has been declared invalid by the European Union Intellectual Property Office (the "EUIPO") on the grounds that it was filed in bad faith. The EUIPO finding him having engaged in "inconsistent with honest practices" in his attempt to protect his trade mark. A full copy of the decision can be found here.

The EUIPO said Banksy was attempting to use trade mark law to protect his artwork from being used commercially by third-parties because he couldn't copyright it and maintain his anonymity. This decision highlights that the court will take a dim view of anyone – even famous artists – attempting to find a loophole in the law.

Background

The disputed trade mark was Banksy's "flower bomber" image, in which a protester is throwing a bunch of flowers (see below). It was originally graffiti painted onto the side of a garage in Jerusalem in 2005.

Banksy's company applied for a trade mark for the "flower bomber" image in in 2014. However, under EU law, the trade mark needed to be used as such within the first five years. Otherwise, it was susceptible to being removed on the basis of non-use. Unfortunately for the artist, Banksy had not sold any merchandise or other items by reference to the trade mark until Full Colour Black, a greetings card company, challenged the trade mark in 2019. In response to the challenge, Banksy set up a store he said was specifically opened to get around the fact he had not used the trade mark commercially, as required.

Legal analysis

The EUIPO concluded Banksy's trade mark was registered in "bad faith" as it was "clear that Banksy did not have any intention" of using the trade mark when he filed it. Any goods he sold were created solely for the purpose of not losing the trade mark. This was even stated by Banksy himself when he opened his store. The store was not open to the public; customers could look through the window and buy items online after a careful vetting process to make sure they were not going to resell the items.

The EUIPO also focused on Banksy's distain for copyright law: the artist has famously declared that "copyright is for losers", and previously invited the general public to download and use his images as long as it was not for a commercial purpose. While the court did not take his view on copyright into account, it did note that to get copyright protection Banksy would have needed to lose his anonymity. In contrast, any entity hiding behind the corporate veil can file a trade mark, which lasts forever as long as it is used.

As Banksy did not create the trade mark to use as a business asset, the EUIPO declared it invalid.

Conclusion

The EUIPO was not impressed with Banksy's attempt to use trade marks to protect his art, with a rather generous finding of "bad faith". Perhaps more interesting than the legal conclusion are the passing comments made by the EUIPO regarding copyright. The EUIPO questioned whether Banksy's work was even deserving of copyright protection, as it was originally graffiti painted without the permission of the owner of the wall. This suggests that legal art is worthy of protection whereas illegal art is not, although the comment was not added upon.

The EUIPO also spent some time considering Banksy's views on copyright, though it did conclude that these should make no difference in its decision. Copyright owners worried about putting their foot in their mouths need not necessarily worry: the law will still offer protection.

Full Colour Black has challenged the trade marks of six more of Banksy's works, and is likely to contest more. With Banksy's trade mark portfolio now at risk, it will certainly be interesting to find out what will happen next for everyone's favourite anonymous artist.

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NEOPRENE TOTE BAGS: WATERTIGHT NOT COPYRIGHT

By Jonathan Feder, Olivia Coburn and Nicholas Fellows

In a judgment handed down on 6 November 2020 of *State of Escape Accessories Pty Limited v Schwartz* [2020] FCA 1606, Justice Davies of the Federal Court of Australia found a fashionable neoprene tote bag was not a "work of artistic craftsmanship" and therefore not an "artistic work" for the purposes of the *Copyright Act 1968* (Cth) (the Act). Since the Court found that copyright did not subsist in the State of Escape bag (the Escape Bag), there was no finding of copyright infringement.

If the Court had found that the Escape Bag was a work of artistic craftsmanship then State of Escape, as the owner of the copyright work, would have had the exclusive right to reproduce that work in a material form. State of Escape relied alternatively on two forms of the Escape Bag, pictured below.

The alleged copyright infringement

State of Escape claimed that the respondents, Ms Schwartz and her company (Chuchka) had infringed copyright in the Escape Bag by doing various acts in relation to 34 neoprene tote bags with rope handles (the Chuchka Bags). Examples of the Chuchka Bags are pictured below and denoted "infringing". Chuchka based its designs on photos of the Escape Bag taken from the website of Chuchka's manufacturer (Happy Sport).

No copyright in the Escape Bag

Justice Davies found that copyright did not subsist in the Escape Bag as it was not "a work of artistic craftsmanship" constituting an "artistic work" as required for copyright protection under the Act.

To determine whether the Escape Bag was a work of artistic craftsmanship, Justice Davies considered the extent to which the Escape Bag's artistic expression, in its form, was unconstrained by functional considerations. Applying the principles set out in *Burge v Swarbrick* [2007] HCA 17, Justice Davies found only the use of perforated neoprene by the designer of the Escape Bag, Ms MacGowan, was "governed by considerations of appearance and aesthetics" and that otherwise the Escape Bag design was "constrained by functional limitations", namely choices such as the sailing rope handles and their arrangement were not "merely matters of visual and aesthetic appeal but also, critically, resolved functional issues". The use and combination of readily available commercial materials was "an evolution of styling" at most. Further, Ms MacGowan did not approach the design as an artist-craftsperson and she had no special training, skill and knowledge and primarily responded to functional issues.

Justice Davies was not influenced by Ms MacGowan's aspirations or intention when creating the Escape Bag, its beauty or aesthetic appeal, or any of its distinctive features.

What would have been

Justice Davies found the infringement claims would have been successful if copyright subsisted in the Escape Bag, and that Chucka would not be protected by the innocent infringement defence, because:

- Chuchka was aware of the State of Escape brand and its branding on the Escape Bag image;
- Chuchka did not inquire whether it could use those images as a basis for its design (and should not have assumed it could do so); and
- Importantly, Chuchka had no prior business dealings with or knowledge about Happy Sport and therefore no basis to assume it was reputable (in contrast to *The Dempsey Group Pty Ltd v Spotlight Pty Ltd* [2018] FCA 2016 where Justice Davies found the innocent infringement defence was made out because of the prior relationship and trust between a designer and their supplier/manufacturer).

Despite Chuchka continuing to sell the Chuchka Bag after State of Escape flagged the alleged copyright infringement, Justice Davies found

additional damages would not have been awarded because of the uncertainty around whether or not copyright subsisted in the Escape Bag.

Australian Consumer Law and passing off claims

Justice Davies found Chuchka had made misleading promotional representations (eg "classic neoprene tote") in contravention of the Australian Consumer Law and that declaratory relief and damages were appropriate. Ms Schwartz was also found to have accessorial liability in respect of the misleading conduct. The form and quantum of that relief is yet to be determined.

However State of Escape's similarity of appearance and passing off claims were not made out because:

a) State of Escape did not have a reputation corresponding to the Escape Bag's features;

b) the Chuchka Bag was clearly labelled with the "Chuchka" word mark, and that mark and the logo mark were used in connection with its bags sold via various trade channels;

c) neither the Escape Bag and the Chuchka Bag were impulse or casual buys; and

d) there was no evidence of actual confusion.

Justice Davies found Ms Schwartz (director of Chuchka) would have been liable as an accessory to Chuchka's similarity of appearance representation infringement (if it was established) but would not have been liable for the copyright or passing off infringements merely for causing or directing Chuchka to engage in the alleged acts.

Key takeaways

Designers need to be aware that:

- It is going to be difficult to prove that articles like bags are "works of artistic craftsmanship" where functional considerations dictate the design, or key parts of the design;
- Importers are unlikely to make out the "innocent infringement" defence where they just assume that a previously unknown manufacturer or supplier is reputable and the importers don't make any inquiries about designs offered by the manufacturer/ supplier; and
- Designers should register their original designs under the *Designs Act 2003* (Cth) prior to disclosing the design publicly. Generally speaking, having a registered and certified design is a more straightforward approach to combatting copycats than trying to argue that the article is a work of "artistic craftsmanship" under the Act. Presumably, State of Escape did not have a registered design for the Escape Bag.

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LOUIS VUITTON PLAYING CHESS OR CHECKERS? THE CJEU ANNULS' THE INVALIDATION OF LOUIS VUITTON'S EU TRADE MARK

By Simon Casinader and Niall Lavery

Louis Vuitton received a favorable decision from the EU General Court ("General Court") in June 2020 which may assist brand owners seeking IP protection of their decorative patterns. The decision confirms the distinctive character an EU trade mark must possess in order to benefit from protection throughout the EU as well as highlighting how patterns may be protected through registration as a trade mark rather than under other forms of IP protection such as copyright or design protection.

However, the decision also reaffirmed the EU's strict approach to assessing the unitary character of EU trade marks, which potentially sets a high bar for applicants to clear.

Background

In 2008, Louis Vuitton had obtained EU trade mark protection for the mark displayed below, the Damier Azur mark, in relation to class 18 goods including luggage, bags and leather goods. In 2015 a Polish individual, Norbert Wisniewski, challenged the validity of the mark by filing an application for invalidity with the EUIPO.

Above: The 'Damier Azur' mark

In 2016 the Cancellation Division of the EUIPO declared Louis Vuitton's trade mark invalid under Article 59(1)(a) of the EU Trade Mark Regulation ("EUTMR") on the grounds that the mark was devoid of any distinctive character in line with Article 7(b) of the EUTMR. The Cancellation Division did not agree with Louis Vuitton's claim that the mark had acquired distinctiveness through its use. Louis Vuitton then took its claim to the EUIPO Second Board of Appeal who also dismissed their claim and agreed with the Cancellation Division.

General Court

In 2019 the matter was appealed to the General Court of the CJEU and Louis Vuitton put forward two main arguments that:

1. the Second Board of Appeal had incorrectly assessed the inherent distinctive character of the Damier Azur mark as the Board had relied on 'well-known facts' to supplement the arguments presented by Mr Wisniewksi in the absence of any concrete and substantial evidence for a declaration of invalidity; and
2. the Board of Appeal had failed to carry out an overall assessment of the Damier Azur mark and had therefore erred in its assessment of the distinctive character acquired through use of the mark.

With regard to point one, the General Court considered that the Board of Appeal had relied upon a number of well-known facts in its decision including how the chequerboard pattern of the mark was a commonplace figurative pattern, which is permissible. The General Court determined that the Board had been correct in its finding that the mark was a basic and a commonplace pattern that did not depart significantly from the norms of the sector and that this was a well-known fact within the meaning of case law. The first argument was therefore rejected.

As to argument two, the General Court inferred that the Board of Appeal had focused on evidence which expressly referred to a specific set of Member States and had excluded other evidence without conducting any further analysis on said evidence. The General Court determined that the excluded evidence did contribute to the arguments put forward by Louis Vuitton concerning the acquired distinctiveness of the mark including the widespread use of the mark across the whole of the EU and the market shares held by the mark in each Member State. The General Court thus found that the Board of Appeal had failed to sufficiently take into account the distinctive character of the mark in relation to the goods and services for which it is registered.

Takeaway points

The decision by the General Court reaffirms the wide scope of evidence and rigorous determination that must be followed by the courts and IP administrative bodies. The General Court also emphasized the need for a mark to be distinctive throughout the whole of the EU rather than just across a defined set of Member States, which is often a high threshold for applicants to meet (as seen in the Kit Kat case, among others). Although the General Court did annul the decision of the Second Board of Appeal on the basis of an error in the full assessment of the evidence, it is still not yet fully clear whether Louis Vuitton's excluded evidence would be sufficient to prove the required distinctiveness of the mark as the General Court made no comment on this point. This is an intriguing space to follow and we will keep you updated as the case progresses.

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BATTLE OF THE BALLET SHOES: UK COURT FINDS INFRINGEMENT OF REGISTERED COMMUNITY DESIGN

By Simon Casinader and Ravena Guron

The UK IP Enterprise Court has ruled that an Austrian shoe company infringed a registered community design ("RCD") held by a US based sustainable fashion brand although there was no infringement of the corresponding unregistered community design ("UCD"). The decision is a relatively rare example of a UK, or EU, based Court analyzing fashion items and addressing design novelty issues between 2017 and now.

Background

Rothy's, a Califoronia-based brand, launched its "pointed loafer" (the "Loafer") (see below left) in November 2017. This was a "ballerina-style" shoe made of knitted material and recycled plastic.

Giesswein, an Austrian company, started marketing its "pointy flat" (the "Flat") range of ballerina-style shoes in April 2019 (see below right). The upper parts of these shoes were made of a knitted meshwork fabric, and also sourced from recycled plastic.

Above: Rothy's Loafer

Above: Giesswein's Flat

In July 2019, Rothy's issued proceedings in the UK claiming that Giesswein's Flat infringed two of its EU design rights, an RCD (see below) and a UCD (see next page).

Above: Rothy's RCD includes seven views (the maximum allowed by the European Intellectual Property Office)

Above: Rothy's UCD – this was derived from disclosure of images of the Loafer on various social media platforms such as Facebook and Instagram, in emails sent to people based in the EU and on its own website. Some of the images are excerpted in this table.

In response, Giesswein counterclaimed for the invalidity of Rothy's RCD and UCD, claiming they were imitative of two of its earlier designs (the "Previous Designs") (see below).

Giesswein's "Allegra K" shoe

Giesswein's "Bonnibel" shoe

Legal analysis

Validity of RCD and UCD

The court dismissed Giesswein's counterclaim that the RCD and UCD should be invalidated due to similarities to the Previous Designs, on the basis the Previous Designs produced "different overall impressions on the informed user."

When considering the validity of the RCD, the Court considered the fact that the Allegra K had a higher heel, was made of a different material, and did not feature a counterline. In particular, the informed user, "who is aware of particular shoe designs and pays a high degree of attention" would notice the difference in material compared to the RCD. The difference in material between the Bonnibel and the RCD was also a key factor in the Court finding it produced a different overall impression. The court stated that for either of the Previous Designs to invalidate the RCD,

> "the RCD would have to be described at an unacceptable level of generality – such as a pointed-toe, slipper-cut ballerina shoe made of a fabric with some texture."

This was not what the RCD portrayed.

When considering the validity of the UCD, the Court simply stated neither of the Previous Designs created the same overall impression on the informed user, having considered the most salient points when determining the validity of the RCD.

The Valid RCD Was Infringed

The parties agreed Rothy's was the first fashion brand to introduce ballerina shoes made of knitted yarn, sourced from recycled plastic. However, Giesswein argued the company had not infringed the earlier design on the basis the disputed RCD

displayed a “regular, generally square pattern”, that implied a “woven” rather than a “knitted”, textile.

The Court, however, held that it was clear the shoe showed “a knitted fabric.” The informed user would not be aware fabrics knitted from a heavy thread had been applied to ballerina shoes, notwithstanding their known used in gym shoes and sneakers. While the RCD and the Flat had some differences, they would not create a different overall impression to the informed user. The Court therefore concluded Giesswein’s Flat infringed Rothy’s RCD.

The Valid UCD Was Not Infringed

When considering the status of the UCD, the court held that Rothy’s claim Giesswein had unconsciously copied its UCD was “far-fetched.” In reaching this decision, the court considered the following factors:

- Rothy’s Loafer was a short-run product, only available on its website for a comparatively short period of time; and
- Giesswein’s Flat was created by a designer who “may be reasonably thought not to be familiar” with the Loafer.

As a result, the court held that Giesswein had not infringed Rothy’s UCD.

Conclusion

While the specifics of the case are of interest as they allow insight into a Court’s analytical process when deciding if an RCD or a UCD is infringed, more broadly designers concerned about “accidental” infringement can take heart from the court’s conclusions in regards to the UCD. Designers who are exposed to numerous items on a daily basis should not fear being found to infringe on a previous design if they happen to independently come up with something similar. However, the broader protection of RCDs should still be a relevant consideration and clearance searches conducted.

Additionally, the decision is a reminder of the utility of registered design rights in a portfolio as the broader protection afforded can enable infringement action when unregistered designs may otherwise fail.

Finally, whilst this decision was decided before the conclusion of the Brexit transition period, it is worth noting that RCDs and UCDs that existed in the EU before the finalisation of the UK leaving the EU will continue to be protected in the UK as re-registered designs, continuing unregistered designs or supplementary unregistered designs.

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DOES THE FRENCH LEGO CASE THREATEN THE BUILDING BLOCKS OF YOUR PRICING POLICY FOR ONLINE SELLERS?

By Gabriela Da Costa, Dr. Annette Mutschler-Siebert, Mélanie Bruneau, Jennifer Marsh and Christopher Finnerty

On 27 January 2021, the French competition authority (*Autorité de la concurrence* or ADC) adopted a decision accepting commitments from the building block producer Lego France (Lego) to amend its discount policy. The ADC concluded that Lego's policy created a price differentiation that "was likely to handicap" pure online players, since they were de facto unable to access certain of Lego's discounts linked to functions carried out only by physical stores (such as the shelf space reserved for Lego products). As a result, Lego has agreed to redefine its rebate award criteria by making them more accessible and transparent to all resellers.

The current position on dual pricing in Europe

Under the current EU competition law rules, restrictions on online selling are generally regarded as "passive sales restrictions." Accordingly, they are treated as hardcore restrictions of competition under Article 4(b) of the Commission's Vertical Block Exemption Regulation (VBER). These are serious restrictions of competition, which normally invalidate an agreement and expose the parties to high antitrust risk.

The Commission's Guidelines on Vertical Restraints (Vertical Guidelines) list "dual pricing" as a form of hardcore (passive sales) restriction in this category, insofar as it can restrict a buyer's ability or incentives to sell online.

> "Dual pricing" is defined in the Vertical Guidelines as charging a higher price for products intended to be resold by a distributor or reseller online than for products intended to be resold by that distributor or reseller offline.

However, the current Vertical Guidelines recognise that in particular cases dual pricing may qualify for individual legal exemption where the sales online "lead to substantially higher costs for the manufacturer" than sales made offline (for example, because the manufacturer has to deal with more customer complaints and warranty claims).

The current Vertical Guidelines also permit sellers to award a customer a fixed fee to support its offline sales efforts. In other words, there is an implicit recognition that the costs of operating an offline operation differ from those of an online operation. Such financial support is permitted provided it is not a variable sum that increases with the reseller's offline turnover, since this would amount indirectly to dual pricing (i.e. make purchases for offline sale cheaper the more offline sales are made, as opposed to linked to its different cost base).

Welcomed clarification and relaxation of rules at the EU Level

At Commission level, there is additionally a growing (more explicit) acceptance of the need

for greater clarity and flexibility for manufacturers that appropriately reflects the different costs of each channel and increases suppliers' ability to incentivise investments, notably in physical stores.

In its Final Report in the e-commerce Sector Inquiry (published in May 2017), the Commission firstly clarified the scope of the current rules. It noted that the Inquiry had revealed a "potential misunderstanding of the rules on pricing practices" where the manufacturer:

- Sets a different wholesale price for the same product to the same (hybrid) retailer, depending on the resale channel through which the product is to be sold (offline or online); and
- Sets a different wholesale price for the same product to different retailers.

The Commission's Final Report clarified that charging different wholesale prices to different retailers is "generally considered a normal part of the competitive process." The hardcore restriction under the Vertical Guidelines is concerned only with dual pricing for one and the same (hybrid) retailer.

Secondly, the Commission explained that:

> "[d]ual pricing is often viewed by stakeholders as a potentially efficient tool to address freeriding. They argue that dual pricing may help to create a level playing field between online and offline sales, taking into consideration differences in the costs of investments. Comments in relation to dual pricing point to the need for a more flexible approach to performance-related wholesale pricing. A more flexible approach would allow for differentiation between sales channels, depending on the actual sales efforts, and would encourage hybrid retailers to support investments in more costly (typically offline), value added services."

Accordingly, the Commission concluded that:

> "the Final Report points to the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding."

This helpfully demonstrated that the Commission was prepared to broaden its interpretation of the scenarios that might qualify for "individual exemption" compared with the narrow example provided in the current Vertical Guidelines. Specifically, this confirmed that in the Commission's view it is legitimate to apply different prices if these avoid an offline business being forced to compete unfairly with businesses that are not required to make the same level of investment.

It is welcomed that a further relaxation is predicted in the new VBER and Vertical Guidelines, which will come into force in May 2022. The majority of feedback to the Commission's current Consultation (including our firm's own submissions) supports a change to the rules, so that dual pricing even in the narrow sense defined above (for hybrid sellers) would no longer be regarded as a hardcore restriction, with appropriate safeguards to be defined in line with the case law. This direction of travel is supported, particularly as high-street retail continues to suffer due to an inability to compete with major online vendors on price and the continued challenges brought about by pandemic lockdowns.

Strict approach in Lego case

Against the backdrop of the European position outlined above, the Lego case is surprising.

The facts in Lego can be summarised as follows: In late 2013, Lego revised its reseller pricing policy. In parallel with increasing the price of all of its products by 15 percent, Lego introduced a system of "functional discounts" of up to 13.044

percent, which would have the effect of mitigating the price increase for partners who qualified for the discounts/rebates.

Two pure online players, Cdiscount and EMC Distribution, complained to the ADC that the difference in the total discounts available for pure online players compared with partners selling through brick and mortar stores was discriminatory, because online-only resellers de facto could not access the extra discounts linked to qualitative physical store functions such as extra shelf space (7 to 9 percentage points' difference, depending on the period).

Following an investigation, the ADC expressed concerns that this practice of different effective pricing for pure online players "*might constitute a discriminatory pricing likely to have anti-competitive effects, by disadvantaging the pure players and reducing the competitive pressure they could exert.*" Accordingly, Lego proposed commitments to address the ADC's concerns, which following modification have now been accepted.

This case echoes the findings and outcome of the German Federal Cartel Office (Bundeskartellamt or FCO) investigation of Lego in 2016.

Why the Lego cases don't stack up

The very rigid approach to differential pricing in the Lego investigations is flawed for several reasons:

- Foremost, it seems hinged on a hypothetical possibility that pure players might be disadvantaged, whilst failing to take account of differences in the actual costs and efforts involved. Taking shelf space for instance: a physical store has finite available space—shelf allocated to one product necessarily means there is less space for other inventory and thus needs incentivising; this is obviously not a problem for a website. Indeed, dictating identical pricing could seriously threaten competition more than aid it; since it makes it even more difficult for struggling offline players to continue competing because manufacturers have no ability to put them on a level footing as pure players. (Ironically, the ADC and FCO's narrow interpretation of the dual pricing rules could also remove the ability to compensate costs borne by online players that are not relevant in the brick and mortar environment.)

- These cases interpreted the dual pricing rule as applying to different pricing between online (only) sellers compared with other sellers. As explained above, the Commission has clarified this is a mistaken (overly broad) interpretation of the EU rules, which limit the hardcore restriction to dual pricing for the same hybrid seller.
- Even if there were some sort of "de facto discrimination," it is unclear on what basis this would be illegal. Under EU (and French and German) laws, there is no legal obligation on a non-dominant supplier to apply identical terms to its different customers (this is perhaps the only area where EU antitrust law is more liberal than the United States, where the Robinson Patman Act prohibits price discrimination). Further, even where a company is dominant, there is arguably a defence in the EU for charging different prices if these are justified by objective differences.

Should brands be concerned?

In recent years, the ADC and FCO have diverged from the Commission's position in several areas, pursuing a conservative and strict analysis compared with an increasingly fact-based approach by the Commission, which in our view more accurately reflects the realities of e-commerce developments in the EU market. However, here we do wonder whether the Lego cases are outliers, even for France and Germany, given their specific context.

Firstly, Lego's conduct and the key analyses in the investigations (at least in Germany) took place prior to the Commission's clarification of the EU position, and in the context of the wider EU rules originally pursuing a policy designed to protect emergent online players at all costs. Second, and critically, we believe the FCO's conclusions (which the ADC will have been minded to follow for similar facts) will no doubt have been coloured by the fact that Lego had just (separately) been fined for resale price maintenance in Germany. That separate conduct included sending resale price lists which retailers were expected to observe,

threatening not to supply retailers who deviated, and importantly for current purposes: sometimes making discounts conditional on adherence to those price lists. In other words, it seems at least possible that the FCO and ADC may have been influenced by suspicions that Lego's functional discounts were aimed primarily at controlling end prices, not the compensation of actual costs or efforts by offline partners.

Indeed, in prior statements or decisions involving dual pricing, these authorities have not been blind to the differences in the channels and Lego represented a major departure.

Following its own e-commerce sector inquiry, the ADC published a report (Avis 12-A-20 du 18 septembre 2012 available in French here), which in fact reflected a more flexible approach to dual pricing for online and offline resellers than the EU approach under the current rules. The ADC expressed the view that different prices for offline and online players would not be regarded as a restriction by object if (i) the price differential was not likely to have anticompetitive effects by limiting competitive pressure from online resellers in the particular market; and (ii) the price difference was objectively justified (e.g. by different costs).

In Germany, in contrast to Lego's discounts, which were linked to actual qualitative retail functions,

the prior dual pricing cases had involved more obvious restrictions of online selling not linked to the resellers' respective efforts. For example, in a 2011 case involving sanitary fittings maker Dornbracht, the significantly deeper discounts for supplies on-sold to offline players were accompanied by numerous public statements showing that the supplier had the specific intention of discriminating against internet sales. The other cases, relating to a major household appliance brand and to the gardening tools brand Gardena respectively (both in 2013), involved rebates linked to hybrid resellers' turnover achieved from offline versus online sales (in line with the accepted EU interpretation of unlawful dual pricing).

More recently, in October 2019, although the FCO confirmed a strict view of dual pricing and called for maintaining the hardcore restriction in the new EU vertical rules, it expressly recognised in the "Quo vadis Vertikal-GVO" working paper (available here in German) that differentiation linked to sellers' actual costs and sales efforts can have the effect of encouraging hybrid dealers to invest in added-value physical services for consumers. It also recalled the possibility of a fixed remuneration for offline efforts as currently provided for in the Guidelines.

Accordingly, albeit that these authorities may currently approach dual pricing with higher scrutiny, we would hope that in a case with a different context their approach would be more fact-specific and less rigid than in Lego. Nonetheless, these cases highlight the need for the Commission to state the more relaxed position very clearly in the new VBER, to ensure a harmonised rule across Europe, and reduce the significant uncertainties for businesses resulting from these divergent national approaches.

In the meantime, it always remains prudent in Europe—irrespective of territory—to ensure differential treatment has an objective justification, for example, the relative costs of trading or real incentives to deliver customer value in the physical world. Additionally, where an offline player is compensated for efforts that can also be delivered in a virtual space and are not exclusive to a physical store (e.g. extra staff training, customer engagement initiatives, additional marketing spend), it seems sensible to consider also compensating the equivalent efforts of the online player who meets such requirements.

Finally, brands should not forget that it is also open to them to require online players to meet qualitative criteria as a condition for authorisation that deliver a quality customer experience equivalent to that required in an offline sales environment—in other words, provided they do not amount to a de facto online sales ban, it is legitimate and in fact sensible to require online authorised resellers to also invest in qualified staff, warranty support functions, and so on, if these are expected from brick and mortar players. For many (particularly technically complex or premium) products, a physical store requirement as a condition to online selling also remains appropriate in our view.

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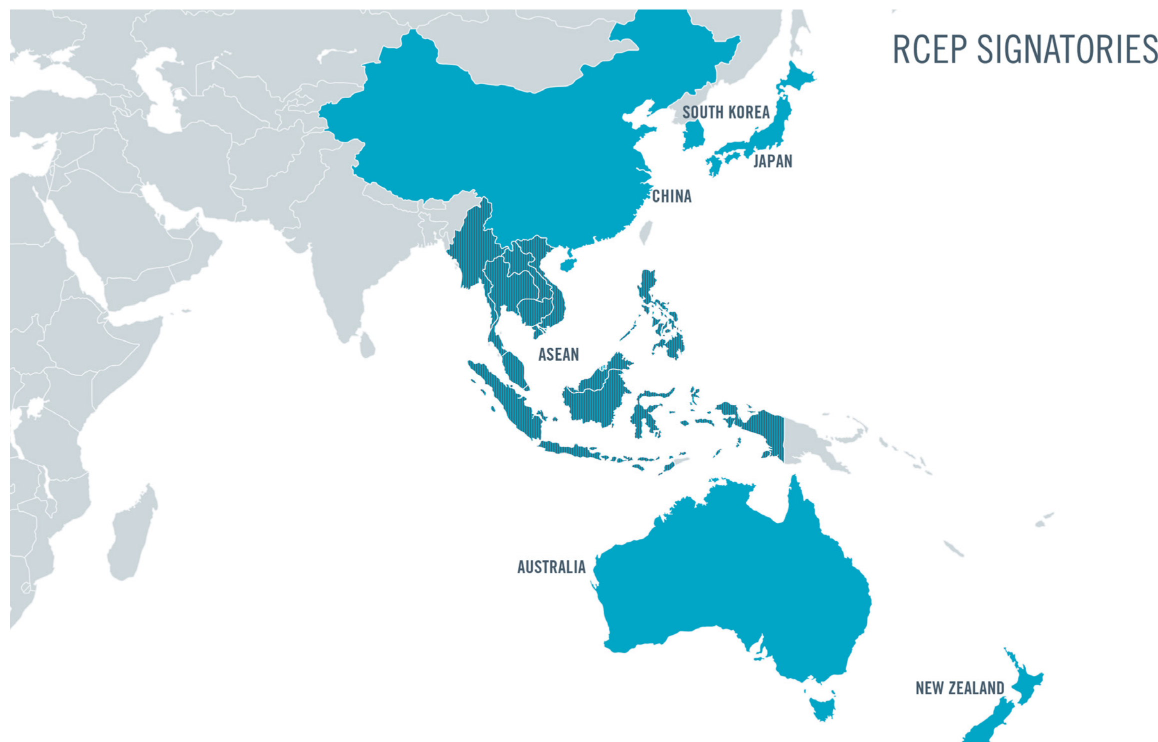
ASIA PACIFIC SIGNALS STRONG COMMITMENT TO ECONOMIC INTEGRATION AND COOPERATION WITH RCEP SIGNING

By Chian Voen Wong, Cecil Leong, Anthony Kerr, Raja Bose, Robert Houston and Linda Odom

After eight years of negotiations, the Regional Comprehensive Economic Partnership (RCEP)—covering 15 economies in the Asia-Pacific region, accounting for 30 percent of the global population, 30 percent of global GDP, and 34 percent of global investment flows—was finally signed on November 15 2020. The RCEP is expected to enter into force in 2021.

Besides being the world's largest free trade agreement (FTA)[1], one of the most significant achievements is that the RCEP will finally realize the economic integration of the three Northeast Asian geopolitical rivals: China, Japan, and South Korea. ASEAN[2] (comprising Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam) already has FTAs (commonly known as ASEAN+ FTAs) with the other five parties to the RCEP (Australia, New Zealand, China, Japan and Republic of Korea).

The RCEP is an excellent showcase of the art of compromise in international trade negotiations. It not only brings together vastly disparate economies with huge differences in standards of living and economic conditions, but seeks to ensure that the RCEP signatories can and will effectively implement the agreement.



RCEP SIGNATORIES

[1] With a combined GDP of US$2.6 trillion, the RCEP area is bigger than the US-Mexico-Canada Agreement, the European Union, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

[2] ASEAN refers to the Association of Southeast Asian Nations, a regional grouping comprising 10 member states.

CEP Signatory	Total Population (2019, million)	GDP (2019, US$ billion)	GDP per capita (2019, US$)
Brunei Darussalam	0.43	13.47	31,087
Cambodia	16.49	27.09	1,643
Indonesia	270.63	1,119.19	4,136
Lao PDR	7.17	18.17	2,535
Malaysia	31.95	364.70	11,415
Myanmar	54.05	76.09	1,408
Philippines	108.12	376.80	3,485
Singapore	5.70	372.06	65,233
Thailand	69.63	543.65	7,808
Vietnam	96.46	261.92	2,715
ASEAN	**660.62**	**3,173.14**	**4,803**
Australia	25.36	1,392.68	54,907
New Zealand	4.92	206.93	42,084
China	1,397.72	14,342.90	10,262
Japan	126.26	5,081.77	40,247
Korea, Rep.	51.71	1,642.38	31,762
RCEP	**2,266.59**	**25,839.81**	**11,400**
World	7,673.53	87,697.52	11,429

Above: Data Source: The World Bank

The RCEP is keeping its doors open to other economies, allowing “any State or separate customs territory” to accede 18 months after the date of entry into force of the agreement, subject to the consent of the current parties. India will be considered an original negotiating State and can accede to the RCEP at any time. As WTO Members and separate custom territories, Hong Kong and Macau may participate in the RCEP, and perhaps, even the separate customs territories of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).

While some commentators consider the RCEP a China-led initiative, seasoned analysts in the region see hallmarks of ASEAN’s centrality in the agreement. ASEAN-centered trade agreements tend to be more accommodative of local sensitivities while at the same time, provide

for improvements over time. As such, there is optimism that the RCEP in its current form will be a cornerstone for further economic integration in the Asia-Pacific region.

In the forthcoming series of publications on the RCEP, K&L Gates will focus on three key areas which businesses operating in the region should consider.

Value chains and trade facilitation

Market access for goods is not very significant under the RCEP as tariffs on most items are already eliminated under other FTAs. However, businesses may leverage the RCEP to consolidate their value chains vertically within the bloc. Imagine—minerals from Australia will be shipped to China, Korea or Japan for processing; then transferred to Thailand for further processing into intermediate products; and finally to Vietnam for assembly and finishing. The final product will then be sold into China. At every stage of the value chain, goods transferred between the RCEP parties will not be subject to import duties.

What is even more interesting are the trade facilitation provisions under the RCEP, which will reduce costs and time for moving goods across the region. The RCEP institutionalises an expedited customs procedures and formalities mechanism for "authorised operators", which will include elements such as low documentary and data requirements; low rate of physical inspections and examinations; rapid release time; deferred payment of duties, taxes, fees, and charges; use of comprehensive guarantees or reduced guarantees; a single customs declaration for all imports or exports in a given period; and clearance of goods at the premises of the authorised operator or another place authorised by a customs authority.

The RCEP also establishes the timeframe for goods clearance, including for perishables. K&L Gates will examine in greater detail the trade facilitation measures which will be put in place under the RCEP.

Dispute resolution

While the RCEP may hold significant promise for certain gains in trade, foreign investors would be wise to conduct reasonable due diligence before finalizing investment plans on the basis of potential opportunities arising from the RCEP.

The RCEP does contain a number of treaty obligations with regard to the promotion and protection of foreign investments, but there are also some variations from the familiar terms of substantive protections that are used in many other international investment agreements. These terms as employed in the RCEP may not provide the same degree of protection that may be available under other international investment agreements, including applicable bilateral investment treaties.

In fact, in certain circumstances, the RCEP even provides for the denial of investment protection benefits that otherwise would be applicable, such as in the case of an investor incorporated in one RCEP Party for the sole purpose of investment in another RCEP Party where the investing entity is owned or controlled by legal persons of a third non-RCEP Party. In this regard, foreign investors will also need to consider whether their present or future ownership or control may affect any benefits they may otherwise have received under the RCEP.

Most importantly, however, it remains to be seen whether and how the RCEP may provide a mechanism for dispute resolution at all between investors and RCEP Parties. For now, the RCEP merely provides for negotiations in this regard to start within two years after entry into force of the agreement. Until such a mechanism for investor-State dispute settlement is put into place, investors will be unable to initiate proceedings independently as the need may arise from the breach of substantive obligations for the promotion and protection of covered investments under the RCEP.

Ultimately, while the RCEP may open interesting doors of opportunity for trade, foreign investors would be wise to consider the broader context of

investment promotion and protection in specific jurisdictions (including any investment protections that may exist under other applicable international investment agreements) prior to entering into investments in RCEP Parties.

Electronic Commerce

The Electronic Commerce chapter of the RCEP addresses many causes of friction in cross-border e-Commerce transactions including inconsistent or opaque rules regarding the use and acceptance of electronic signatures, varying consumer protection regulations, fraud and misleading practices, and unsolicited electronic email and text messages. However, there are few specific prescriptive provisions, and instead the focus in many areas is on better disclosure of rules and practices and more cooperation and dialog among the RCEP Parties.

There are some key provisions with which the Parties must comply. For example, a Party may not require a business to use or locate computing facilities in that Party's territory in order to operate in the territory, and Parties must adopt measures to give recipients the ability to stop receiving unsolicited electronic messages.

Even though most e-Commerce regulation is left up to the Parties, there are important steps each Party must take in creating more transparency and cooperation in cross-border e-Commerce transactions. These measures should alleviate some uncertainty and regulatory concerns in these transactions and improve the economic environment for all Parties and e-Commerce participants.

The RCEP presents a means and opportunity for the Parties and e-Commerce businesses to make significant progress toward the goal of seamless cross-border transactions. The true benefits of this RCEP chapter can be most fully realised if e-Commerce businesses from all member Parties work together to help the Parties clearly identify the practical and regulatory hurdles they face and specific ways to minimise them.

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RCEP: BOOSTING VALUE CHAINS AND FACILITATING TRADE FLOWS

By Chian Voen Wong, Cecil Leong and Tony Kerr

The RCEP is the world's largest free trade agreement (FTA) involving ASEAN (the Association of Southeast Asian Nations, comprising Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam), Australia, New Zealand, China, Japan, and the Republic of Korea (ROK). The agreement was signed in November 2020 and is expected to enter into force in 2021.

The RCEP holds significant promise for certain gains in trade, as it brings together 15 of the most active trading economies in the Asia-Pacific region. In this alert, K&L Gates will examine how businesses can look forward to more seamless trade flows and integrated value chains under the RCEP and think about positioning themselves to take advantage of the potential benefits that will flow from this new FTA.

Potential for consolidation of regional value chains

Market access for goods does not appear to be very significant under the RCEP, as tariffs on most items are already eliminated under other FTAs; ASEAN, Australia, and New Zealand already have FTAs with all the other RCEP Parties. However, bilateral FTAs have eluded China-Japan and ROK-Japan. Thus, one of the most significant achievements of the RCEP is the economic integration of the three Northeast Asian geopolitical rivals: China, Japan, and the ROK. In 2018, intra-China-Japan-ROK trade made up 19 percent of the three countries' total trade with the world (trade in intermediate goods was 23 percent; trade in final goods was 13 percent). The implementation of RCEP tariff liberalization is expected to expand trade between the three East Asian countries, given that 86 percent of Japanese industrial goods will enjoy preferential tariffs when exported to China, 92 percent for Korean goods.

Even more exciting is the potential for businesses to consolidate their value chains vertically within the RCEP bloc (RCEP-15). The RCEP-15 already trade heavily with one another. In 2018, 40 percent of RCEP-15's total trade was within the bloc; intra-RCEP-15 trade in intermediate goods and final goods were 44 percent and 28 percent respectively of their global trade. The removal of tariff barriers between the RCEP-15 and the origin accumulation rule mean that goods transferred between the RCEP parties at every stage of the value chain will not be subject to import duties.

Furthermore, the trade facilitation and customs-related provisions under the RCEP seek to enhance the transparency and predictability of the trading environment, reducing the costs and time for moving goods across the region. Although many of the customs-related provisions are found in other trade agreements, the RCEP sets out concrete goals, as set out below.

RCEP goals

1. Paperless trade with seamless electronic exchange of trade data and documents

This is an ambitious goal for the RCEP-15, and an expansion of ASEAN's on-going work to implement cross-border paperless trade. According to the United Nations Global Survey on Digital and Sustainable Trade Facilitation, "the ASEAN Single Window is one of the most

advanced cross-border paperless trade initiatives in the world."

If the RCEP can achieve the inter-connectivity of the customs import, export, and transit declaration process, and businesses will only need to file customs declaration one time for intra-RCEP trade flow, then, the RCEP will have achieved an elusive goal. Businesses will truly experience greater efficiency and seamless cross-border movement of goods.

2. Consistent application of customs regulations

This is a very important and critical element of the customs and trade process. Many of the developing RCEP Parties have made significant improvement in this area but there is still a lot of work to be done. Myanmar (and surprisingly, China) has requested and been granted a five-year period in which to achieve this obligation. Furthermore, the Parties can invoke the RCEP consultation procedures to request for direct consultation in cases where another Party is not complying with this obligation.

3. Transparency

Parties will need to ensure that businesses are kept fully informed with regularly updated information on the laws, processes, procedures, and documentation required when importing, exporting, or transiting goods into or through their countries. With the exception of Myanmar, all Parties have agreed to achieve this immediately upon implementation of the RCEP; Myanmar has five years to achieve this obligation.

4. No more pre-shipment inspections in relation to tariff classification and customs valuation

While this obligation does not cover pre-shipment inspections for sanitary and phytosanitary purposes, the RCEP precludes the introduction or application of new pre-shipment inspection requirements. Thus, a Party should not use a phytosanitary pre-shipment requirement as pretense for a valuation or tariff classification check.

5. Pre-arrival processing to expedite release of goods upon arrival

The parties are required to adopt or maintain procedures allowing for the submission of documents and other information required for the importation of goods, before the arrival of goods. Cambodia and Myanmar have a five-year extension to meet their obligations, while Vietnam has an extension until 31 December 2023.

6. Advanced rulings on customs issues

Advanced ruling is already an obligation under the World Trade Organization Agreement on Trade Facilitation. Under the RCEP, this obligation specifically refers to advanced rulings on:

a) tariff classification;

b) whether the good is originating under the RCEP;

c) the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts, in accordance with the Customs Valuation Agreement; and

d) such other matters as the Parties may agree.

While businesses can enjoy the certainty of an advanced ruling, we note that it would only apply in the Party that issued the ruling. In other words, businesses will still need to apply for rulings in each Party. However, we are hopeful that there will be a central RCEP platform for the uploading and sharing of such information and approvals.

7. Trade facilitation measures for Authorized Operators (AO)

A number of the RCEP Parties already have their own AO schemes; the RCEP sets out the impetus for them to negotiate mutual recognition of one another's AO scheme.

8. Expedite clearance of express consignments

The RCEP requires the adoption or maintenance of customs procedures to expedite the clearance of express consignments for at least those goods entered through air cargo facilities. In particular, express consignment should be released under normal circumstances as rapidly as possible, and within six hours when possible, after the arrival of the goods and submission of the information required for release. This would have great benefits for businesses, especially e-commerce flows.

The biggest benefit of the RCEP is that it brings under a single trade agreement 15 of the most active trading economies in the Asia-Pacific region. It provides an opportunity for greater harmonization of customs procedures and the elimination of some of the not-so-transparent practices. In the customs and trade arena, practitioners know that the path to greater transparency, cooperation, conformity, and less documentation is a long and arduous one. We acknowledge that individually, all RCEP Parties have made considerable progress in modernizing their customs practices, procedures, and laws. Despite its complexity, ASEAN has been a driving force in pushing for greater customs connectivity, reducing documentation, and introducing the ASEAN Single Window initiative. Australia and New Zealand have very efficient and effective customs processes that have helped reduce costs of trade. China, ROK, and Japan have continued to be innovative and proactive in their approaches to implementing customs processes and procedures that further facilitate trade. The RCEP introduces a common platform to pool resources and share know-how, and more importantly, to lift the standard of customs practices, procedures and laws of all RCEP Parties. We are optimistic that businesses can look forward to more seamless trade flows and integrated value chains in the Asia-Pacific region.

Looking before you leap

While the RCEP holds significant promise for certain gains in trade, businesses should conduct reasonable due diligence before finalizing investment plans on the basis of potential opportunities arising from the RCEP. K&L Gates will further explore the implications of RCEP for foreign investors in the next (third) alert of our four-part series on the RCEP.

Ratification

As at 30 April 2021, the process of ratification had been completed by Singapore, China, Thailand and Japan. Ensuring that the ratification process moves forward quickly is essential as the RCEP Agreement will only enter into force 60 days after six ASEAN Member States and three ASEAN FTA Partners have deposited their instrument of ratification, acceptance or approval with the Secretary-General of ASEAN.

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THE ENFORCEMENT OF ABUSE OF ECONOMIC DEPENDENCE IN THE EU

By Alessandro Di Mario, Marion Baumann, Dr. Helene Gerhardt, Nicolas Hipp, Dr. Annette Mutschler-Siebert, Jennifer Marsh, Francesco Carloni, Gabriela Da Costa and Tobias Schneider

Behaviors such as excessive pricing and refusal to supply are often well understood to create potential issues if the company is dominant. However, under the national laws of some EU member states, such conduct can be problematic without the company being dominant on the market, but rather when another party is in a position of economic dependence to the market participant in relation to its dealings with that party. This could include a customer, a supplier, a distributor or a franchisee and could be considered to introduce an additional, arguably relatively onerous, obligation on companies to treat counterparties fairly in these geographies.

This article explores key recent developments concerning the economic dependency laws, including new rules in Germany and Belgium, and increased enforcement efforts in France and Italy. These developments reflect a growing trend in Europe in favor of adopting new legislation and enforcing existing laws to more aggressively police economic dependency claims. They therefore add a new dimension governing business relations which all companies should pay attention to when dealing with their business partners, even if they would not be regarded as having market power.

Germany

The German provision sanctioning an abusive exploitation of relative market power towards economically dependent undertakings is § 20(1) and (2) of the Act against Restraints of Competition (ARC).

The legal situation in Germany has just changed significantly: Until mid-January 2021, undertakings with relative market power were only sanctioned under § 20(1) ARC if they directly or indirectly impeded a dependent small or medium-sized enterprise (SME) in an unfair manner or treated it differently from other enterprises without objective justification.

The 10th amendment to the ARC - ARC-Digitisation Act – which has just passed the Federal legislative bodies and entered into force on 19 January 2020, has significantly broadened the scope of review with regard to an abuse of relative market power and economic dependence:

a) The causal link between (relative) market power and abusive conduct has been loosened and strict causality is no longer required. Rather, it will be sufficient that market power is reflected in the anticompetitive outcome of the abusive conduct (so-called causality of outcome, this was already introduced by the Federal Court of Justice's Facebook-decision of 23 June 2020, KVR 69/19).

b) In addition, § 20(1) ARC is no longer limited to SMEs. Instead, dependence is qualified by a clear economic disequilibrium, which leads to even bigger companies' countervailing market power not being able to counterweigh the market power of the undertaking they are dependent on. For example, under the new rule claims for data access even by larger companies should be easier to enforce against so-called "Gatekeepers" (i.e. companies that can influence the activities of undertakings in

markets in which they themselves are not active through network effects, data access, resources, and strategic positioning).

c) A new form of economic dependency is introduced: In two-sided markets, an undertaking providing essential intermediary services is also subject to the prohibition of abusive impediment and discrimination if there are no sufficient and reasonable possibilities to substitute the intermediary service.

d) Finally, access to competition-relevant data is included as a criterion for relative market power in a new §20(1a) ARC (data access claim). If access to such data is denied, a resulting dependency on data can lead to undue impediment even if commercial utilisation of this data has not yet started.

These rules – while new in legislation – actually previously have been used and been of particular significance in the German Federal Cartel Office's (FCO) abuse investigations. In the last two years alone, important decisions have been based on the abuse of economic dependency in the automotive sector, on e-commerce and online marketplaces, on selective distribution systems and even for sports associations.

Of particular interest was the decision of the FCO that a narrow most-favored nation clause used by Booking.com, in the particular case of a two-sided network platform, violates competition rules and constitutes an unfair impediment to dependent SMEs. In a court case, this decision was initially overturned by the Regional Higher Court of Düsseldorf (see our pervious Alert). The final outcome remains unclear currently, though, as the Federal Court of Justice (the highest German antitrust court) has upheld a complaint of non-admission by the FCO and paved the way for final judicial review of the case.

At the same time the FCO substantially broadened its powers to review abusive behavior, the new law has significantly reduced the probability of a merger control filing in Germany by raising the turnover thresholds to EUR €50 and 17.5 million (from previously EUR €25 and 5 million) – thereby re-allocating resources at the FCO and reducing the regulatory burden on SMEs.

Belgium

Belgium recently adopted legal provisions prohibiting the abuse of economic dependence. In particular, a law of 4 April 2019, entered into force on 22 August 2020, introduced Article IV.2/1 in the Belgian Code of Economic Law (CEL).

Article IV.2/1 CEL sets up a threefold cumulative test similar to the one of Art. L 420-2 FCC:

a) a situation of economic dependence;

b) an abuse of that situation; and

c) an actual or potential impact on competition in the Belgian market.

The new rules can be enforced by both the Belgian Competition Authority (BCA) and the civil courts. In that regard, the BCA can impose fines up to a maximum of 2 percent of the consolidated Belgian turnover of the infringing company.

On 28 October 2020, the President of the Ghent Commercial Court applied the provision for the first time in a judgment regarding a cease-and-desist order against a supplier of children's clothing. The court's president found that the supplier's refusal to supply its winter clothing collection to a retailer constituted an abuse of economic dependence. It is worth noting that the new legal provisions list "the refusal of a sale, a purchase, or other transaction terms" as an example of abuse. While the court's president ignored the third condition of the legal test, it found that the retailer was in a position of economic dependence (the retailer's supplies depended completely on the supplier) and that the supplier abused such a position.

France

An abuse of economic dependence is an anticompetitive practice prohibited under French law (Art. L 420-2 of the French Commercial Code (FCC)). The German legal basis served as a template for Art. L 420-2, so that the legal situation in Germany and France is very similar. The prohibition aims to allow companies to be

sanctioned, even when they do not hold a dominant position (relative market power), if they use the dependence in which their customers or suppliers are placed to enforce anticompetitive behavior.

An abuse of economic dependence is established where three cumulative criteria are met:

a) The existence of a situation of economic dependence;
b) An abusive exploitation of this situation; and
c) An injury, actual or potential, on the functioning or structure of competition in the market.

The types of conduct caught are generally in line with those flagged as an abuse of a dominant position, e.g., refusal to supply, tying and bundling, or discrimination.

In practice, the three cumulative criteria are rarely met, often because the state of dependence or the damage to the market could not be established. Indeed, it is rare that companies carry out most of their activity with one specific partner and that they are deprived of any alternative when the relationship with this partner breaks down.

Having said that, the French Competition Authority (FCA) has already used Art. L 420-2 FCC, notably very recently against Apple Inc. (Apple).

In March 2020, the FCA fined Apple €1.1 billion for an abuse of the economic dependence of its premium resellers (among other things). The premium resellers were economically dependent on Apple, as they were contractually required to sell almost exclusively Apple products and their customers were particularly loyal to Apple. This meant that it would not have been viable for the premium resellers to stop selling Apple products. Apple abused this economic dependence by discriminating against premium resellers in terms of supply in comparison to Apple-owned stores and bigger retailers (e.g., supermarkets). In addition, there was uncertainty with respect to the volume of supplies and the terms of the rebates granted by Apple. The profitability of the premium resellers' business depended on those rebates and the ability of the premium resellers to satisfy the orders/demands of their customers.

Italy

Article 9 of the Italian Law n.192 of 18 June 1998 (so-called Law on Subcontracting in Production Activities), prohibits the abuse by one or more companies of the economic dependence in which a customer or supplier company may be found. The criteria for determining economic dependence are the following:

a) The possibility for the company to impose an "excessive imbalance of rights and obligations in the companies' commercial relationships"; and
b) The "effective possibility" for the alleged abused company in "finding satisfactory alternatives on the market."

The Italian law remedies provided in the context of such an abuse are the nullity of the agreement concerned, injunctions, and compensation for damages.

If the Italian Competition Authority (AGCM) deems an abuse of economic dependence relevant for the protection of competition in a relevant market, it can proceed with warnings and sanctions against the company or companies committing the alleged abuse, after having enforced its investigative powers. As with traditional abuses of dominance, fines can be up to 10 percent of the turnover of the company concerned as well as penalty payments in the case of non-compliance with the AGCM's decision.

The AGCM recently opened an investigation against Benetton Group S.r.l. (Benetton) for an alleged abuse of economic dependence in the clothing market. In particular, the AGCM focused its attention on two franchise agreements entered into with an independent retailer of Benetton branded products. The AGCM conducted unannounced dawn raids at Benetton's premises, in collaboration with the Italian Tax Police.

According to the AGCM, the alleged conduct relates to the discretionary use by Benetton of some contractual clauses that allow Benetton to influence the retailer's strategic choices, such as defining sales proposals and purchase orders, not just in terms of timing, but also of quantities.

Benetton may have significantly affected the economic activity of the franchisee concerned, by preventing the latter from independently managing its own commercial activity, thus creating an excessive imbalance of rights between the companies.

Conclusion

Accordingly, dealings with counterparties must be considered not only from the perspective of EU and UK competition laws on anti-competitive agreements and abuse of dominance but also from the perspective of any relevant national laws on economic dependence.

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VERTICAL AGREEMENTS IN THE LUXURY SECTOR

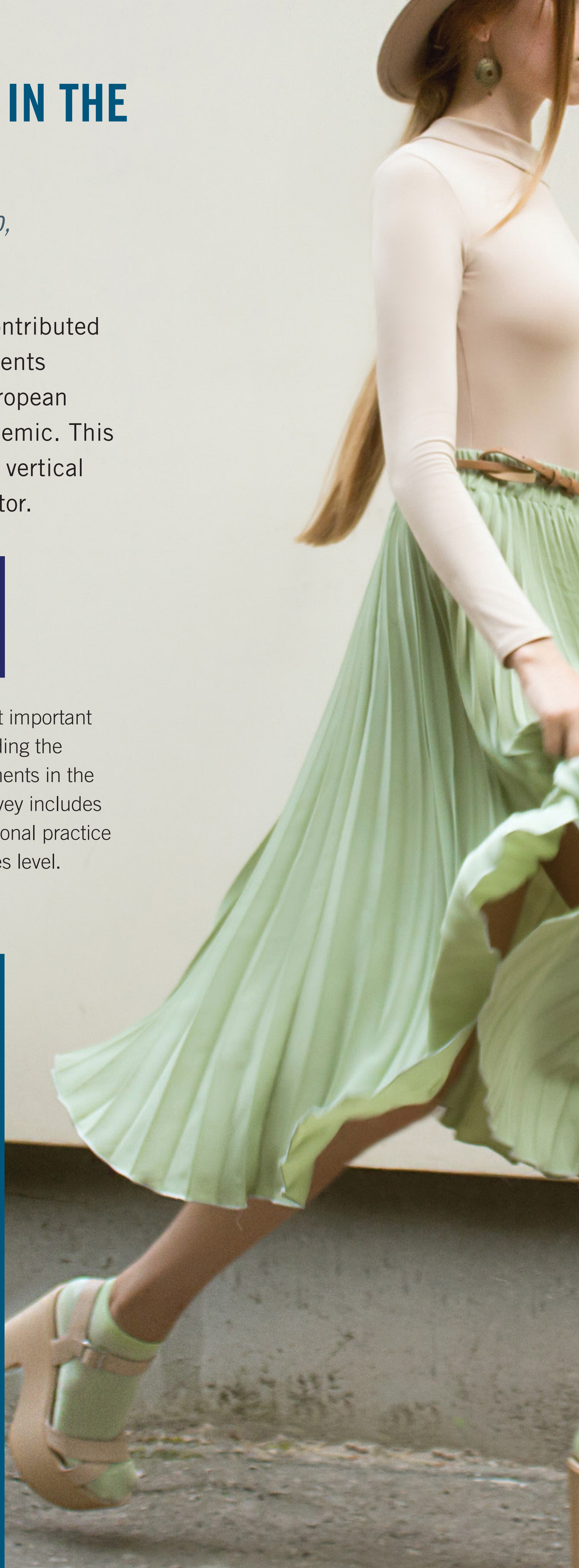
By Francesco Carloni, Alessandro Di Mario, Michal Kocon and Nicolas Hipp

Our Brussels and London lawyers have contributed a Survey Article entitled "Vertical agreements in the luxury sector" to the Journal of European Competition Law & Practice, Oxford Academic. This is the first ever JECLAP Survey Article on vertical agreements in the luxury and fashion sector.

Journal of European Competition Law & Practice

This Survey Article provides an overview of the most important developments over the preceding 12 months regarding the application of EU competition law to vertical agreements in the luxury and fashion sector. For this purpose, the survey includes recent legislative development, case law, and decisional practice at the European Commission and EU Member States level.

Read the full article here.



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WATCH THIS SPACE!

Revision of legal rules affecting how you distribute your products in Europe

The European Commission is currently conducting a comprehensive review of the antitrust rules that will govern the legality and design of supply, distribution and other vertical agreements in the EU for at least the next decade. The revised laws will come into force in May 2022 and will cover key areas, including online sales restrictions, dual pricing, marketplace policies, selective distribution systems, exclusivity, and more.

The Commission has gathered extensive views from various stakeholders, including in the luxury and fashion industries. A live workshop was held in Brussels in November 2019 and detailed commentary on the possible new rules and guidelines was submitted by third parties in late March 2021.

Our EU competition team at K&L Gates has been assisting various major luxury stakeholders with their respective contributions, including the ***Camera Nazionale della Moda Italiana*** and the ***Fédération de la Haute Couture et de la Mode.***

Our team has also contributed detailed papers calling for pragmatism and flexibility in the revised rules, to reflect the new challenges and opportunities that the growth of e-commerce (accelerated by the pandemic) has brought for brands.

The EU's top antitrust regulator will use the feedback gathered to prepare and publish a draft of the revised verticals laws later this year.

More details of the Commission's consultation and the potential future laws are available here.

Please keep an eye on our Antitrust, Competition and Trade Regulation Hub for developments including final opportunities to comment.

The Commission's consultation presents a rare opportunity for industry stakeholders to get involved in shaping the laws that will affect how they can go to market in Europe for years to come.

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various fashion associations including the **Luxury Law Alliance (UK)**

We can help you **across all stages** of your company's lifecycle including establishing your business and e-commerce structures, protecting your brand and designs, and any employment and real estate needs

We have over 80 lawyers active in fashion and retail globally – meaning we can assist wherever you need it

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