



Law à la Mode

ISSUE 33, DECEMBER 2021

Word from the industry's mouth: Ethique

Turning your employees into influencers:
Best practices

The rise of e-commerce of
post-bankruptcy companies

A whole new world: What Alibaba's
record antitrust fine means for retailers

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Editorial

Law a la Mode

Issue 33 – December 2021

We are very pleased to bring you the 33rd edition of Law à la Mode.

As we are approaching the end of 2021, our colleagues from across the globe have come together to look at the current issues that the fashion and retail industry is facing. After a long period of disruption, the fashion and retail industry is adapting to demands from consumers with ESG and digital as key areas of growth.

In this edition of Law à la Mode we look at the “Athleisure” fashion trend and the increase in M&A activity in this area as retailers are trying to get a slice of the market.

There is lots of content aimed addressing different aspects of ESG. We look at some of the key themes and observations for the retail sector from the Green Zone

sessions at the COP26 Climate Change Conference, how to make sure that ESG advertising-based claims don't get you into regulatory hot water and how new laws in France to tackle waste will impact the fashion industry.

The word from the industry's mouth in this edition is an insightful interview with Brianne West, the founder of Ethique, the world's first regenerative beauty and personal care.

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



Ruth Hoy
Global Co-Chair, Retail and
Fashion (International)
London

Athleisure gears up: concerns for market players

Jon Kenworthy (Partner, London) and
Noemie Cetnarowicz (Trainee solicitor, London)

Wearing athletic clothes outside of the gym has never looked more fashionable. Indeed, when you walk around cities, it's difficult not to notice the rise of the post-workout look. Whether you are going for brunch, to a yoga class, into the office or out for drinks, you are likely doing it in "athleisure" clothes.

"Athleisure," defined as a category of athletic looking clothes with no technical function, has become the defining fashion trend of the 21st century. This already major trend flourished in the pandemic, as boundaries between work, home and exercise were dissolved and a hybrid style of living grew.

While the retail M&A landscape comprised of purchases of distressed assets during the pandemic, the sector is bouncing back and retailers are trying to get a slice of the trendy athleisure market. American footwear group Wolverine recently acquired athleisure brand Sweaty Betty for USD410 million, Levi Strauss & Co. entered the athleisure market through its proposed acquisition of lifestyle apparel brand Beyond Yoga. The rise of retail M&A activity is also visible in investments in emerging growth companies through the use of corporate venture capital. The athleisure brand Vuori Inc. recently announced a USD400 million investment from SoftBank Vision Fund 2. This investment, which is one of the largest investments ever in a private apparel company and will drive international expansion through Europe and Asia Pacific.

While the athleisure trend is encouraging a slate of new players to enter the market, it does raise a number of issues that companies and investors will need to pay close attention to. Here are two key concerns:

- **Innovation:** Athleisure is appealing as a driver of profit – however, it has become a highly competitive and saturated market with low differentiation between products. Companies looking to enter the athleisure market may want to explore niche ideas to thrive against their competition. For example, Altor Fund V has acquired a majority stake in the legal entity owning Oceansapart, which is a uniquely positioned activewear brand that targets mainly female Gen Y and Gen Z customers.
- **Sustainability:** The modern informed consumer market has become increasingly aware of the environmental impact associated with purchasing new clothes. Companies may look towards brands that are not only aware of their carbon footprint but have developed sustainable production methods that reduce their water footprint and waste. New brands Tala and Rockay focus on using upcycled waste materials and natural fibers in their clothes to lower their environmental impact.



COP26 – Key Themes and Observations for the retail sector from Green Zone Sessions

Sarah Ellington (Legal Director, London) and **Tessa Straathof** (Associate, London)

As the legal services provider to COP26 in November 2021, DLA Piper engaged with the conference in many ways. Here we provide an introduction to the key themes, discussion points and takeaways from COP26's Green Zone sessions, which focused primarily on food production and consumption – but which also have relevance to those operating in retail and fashion.

Key themes

As an overarching point, there is an increasing understanding that all parts of society, from government, business and consumers, must be involved in bringing about positive environmental change and that such involvement, engagement and action must be taken now and pursued with urgency. Other key themes include:

- the need for good data to develop sustainable practices and inform consumers;
- empowering stakeholders to make sustainable choices through improved infrastructure and education; and

- acting collectively to create systemic and sustainable change.

Data and information

The availability and use of data determines our ability to understand how climate change affects the supply chain: we need data to inform change in a scientific and data-driven way.

Access to data can be accelerated through information sharing between industry parties. For example, while retail companies may have information on consumer spending and purchasing behavior, they will have less visibility of the issues further up the supply chain and what issues are faced by commodity producers. Nonetheless, information about the circumstances of production is integral to improve production processes and thereby provide the most sustainable products to consumers.

Demands for increased information sharing and data collection inevitably create challenges from a data protection perspective. Retailers will therefore need to consider how they can deliver data-driven insights on sustainability issues whilst respecting individual privacy rights of customers and employees at all levels of the supply chain.

Climate Positive Infrastructure and Education

There is growing consensus that more information and education is needed at both ends of the supply chain.

Consumers often feel they are “swimming against the tide” when making sustainable choices because the unsustainable choice is often the easiest and the cheapest. Their decision-making process could be made easier through improved education on the actual environmental impact of consumer choices and by adapting infrastructure to make the sustainable choice the easiest and the cheapest.

If more information were available, consistent product labelling noting the environmental impact and sustainability of products (which some stakeholders are already in the process of developing) could make consumer choices easier.

At the other end of the supply chain, many groups are pushing towards a “bottom to top” approach in terms of farmers educating manufacturers and consumers on the climate issues they face and viable solutions to address those changes. Agriculture is often incentivized to destroy nature; sustainable incentives should produce the opposite result. Key to developing and maintaining sustainable practice will be to provide better funding, particularly for smallholders, traditionally considered risky investments, but often most in need of financial assistance to maintain their livelihoods while farming sustainably.

Throughout this process, companies within the supply chain reporting and publicizing these developments will need to ensure they are reporting accurately to avoid potential allegations of greenwashing.

Action through partnership

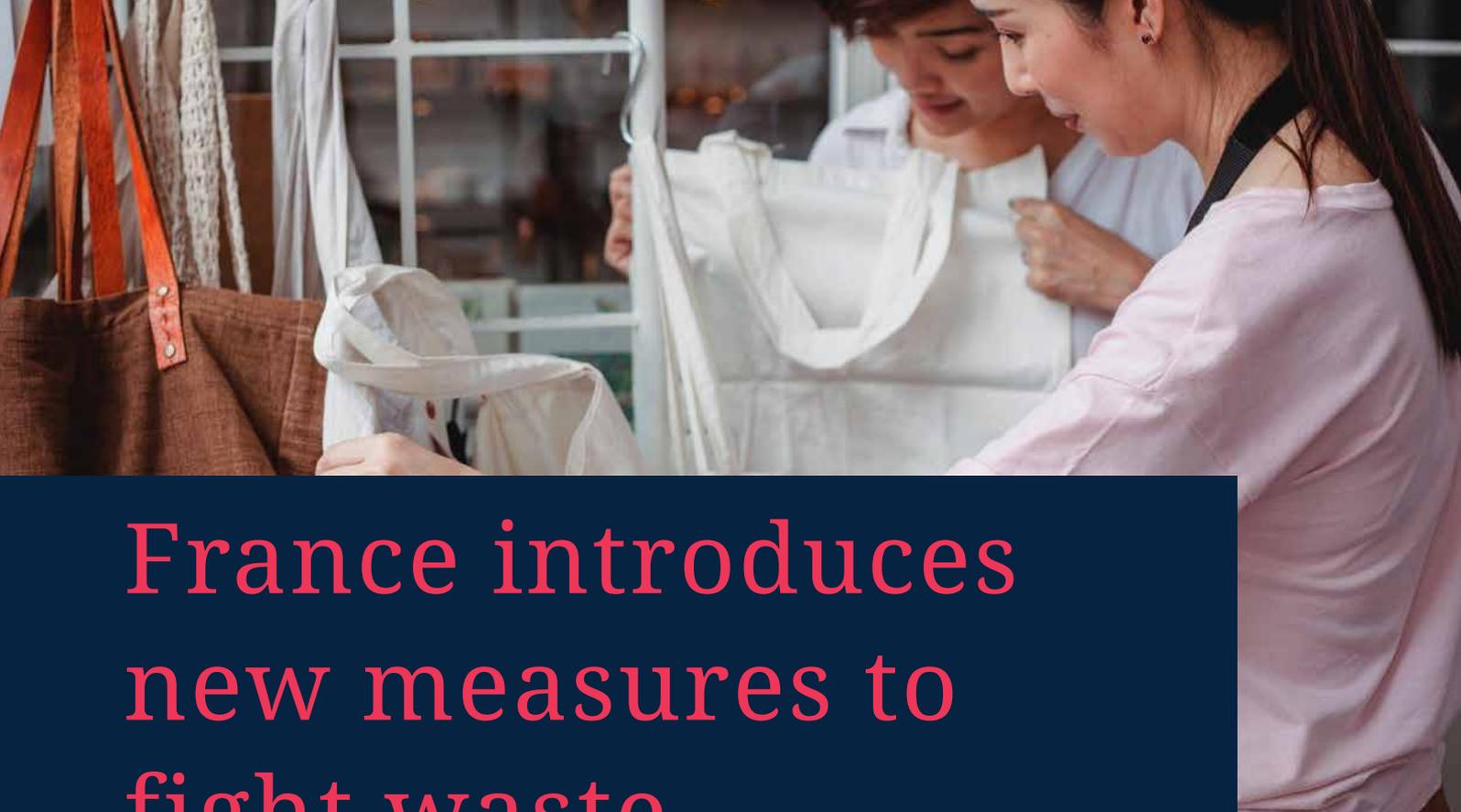
A significant discussion point across sessions was the need for action through partnership. No single group, sector, business or government will be able to resolve the climate crisis for the planet, nor achieve the milestone of net zero in that process, alone. Both horizontal and vertical partnerships in the supply chain are imperative. There have been some challenges to business – that in light of the urgency of climate change, business cannot hold on to sustainable solutions for their own competitive advantage – it is integral that industry shares information and solutions that can positively affect the planet. Nonetheless, taking action through partnerships can raise difficult competition law issues. Companies engaging in partnerships will need to be mindful of complying with competition law obligations and in some circumstances this can act as a barrier.

One outcome of the partnership approach seen at COP26 has been the updating of the UN's Fashion Industry Charter for Climate Action. The updated Charter includes commitments from over 100 well-known brands to halve greenhouse gas emissions by 2030, set science-based targets, and set new targets for 100% of “priority” materials (i.e. cotton, viscose, polyester, wool and leather) to be low climate impact by 2030, particularly through closed loop recycling.

Final thoughts

A piecemeal, voluntary approach to creating sustainable food and fashion chains will fail to ensure implementation of necessary schemes. These sessions therefore highlighted the need for government policy to require industry-wide approaches, industry-wide cooperation to share data and solutions for more sustainable production of goods and consumer engagement to make more sustainable choices.

The final conclusion, overall, was that such cooperation and action are urgent and needs to be implemented now to create lasting sustainable change. Targeted and thoughtful investment will also be key, particularly at the very beginning of supply chains – which are often based in developing countries.



France introduces new measures to fight waste – significant impact on fashion industry

Gregory Tulquois (Partner, Paris) and **Solène Albouy** (Associate, Paris)

In France, the adoption of the Climate and Resilience law on August 22, 2021,¹ which follows the Anti-Waste Law for a Circular Economy from February 10, 2020,² resulted in the creation of several additional environmental-related rules that affect the fashion industry, in particular manufacturers, importers and distributors of textile and clothing products.

These laws introduce new requirements regarding waste and prevention, consumer information, reuse and fight against waste, spare parts availability, manufacturer liability and environmental or sustainability marketing claims. In this article we provide an overview of the main changes that are being introduced under French law. They are numerous, quite complex and still somewhat incomplete: additional implementation

legislation is pending to add requirements/specifications in the form of decrees complementing the statutes already adopted. These developments must be followed very closely because their impact on the fashion industry is significant.

From January 1, 2022, manufacturers and importers of goods intended for the French market will have to inform consumers of the environmental qualities and characteristics of products, including the incorporation of reused material, the use of renewable resources, sustainability, repairability and reusability. This information must be visible or accessible by consumers at the time of purchase, in particular by electronic means, in a format that can be easily reused and exploited by an automated processing system

¹ Law No. 2021-1104 of 22 August 2021 on combating climate change and strengthening resilience to its effects.

² Law No. 2020-105 of 10 February 2020 on the fight against waste and the circular economy.

in an aggregated form. In addition, information on the environmental impact or the compliance with social criteria of goods, services or category of goods or services placed in the French market will become mandatory for the clothing industry, under conditions relating to the nature of the products and the size of the company, to be defined by decree.

As regards reuse and the fight against waste, a new obligation is created for producers, importers and distributors of new clothing (and all other non-food products), to reuse or recycle unsold products. In addition, the Consumer Code has been modified to strongly encourage sale without packaging (bags or other types or containers), or with reusable containers. Retail businesses with a sales area of more than 400 m², have an obligation to make reusable packaging available to consumers.

The law on the circular economy extends the manufacturer liability principle to include new textile clothing products, footwear and household linens intended for individuals and, from January 1, 2022, new textile products for the home (excluding those which are furnishing items or intended to protect or decorate furnishing items). This "extended" manufacturer liability includes, among other things, the contribution of manufacturers (understood in this context as any individual or legal entity who develops, manufactures, handles, processes, sells or imports waste-generating products or components and materials used in their manufacture) to the prevention and management of waste, an eco-design approach and supporting reuse, recycling and repair. This implies that the products, where applicable, must display the Triman logo to inform consumers that the products are subject to recycling rules. However, the Triman logo can be replaced by another common sign, regulated by the EU or by another EU member state, as long as this other sign informs

consumers that the products are subject to sorting rules and that it is mandatory. This implies that the products, where applicable, must display the Triman logo to inform consumers that the products are subject to recycling rules. However, the Triman logo can be replaced by another common sign, regulated by the EU or by another EU member state, as long as this other sign informs consumers that the products are subject to sorting rules and that it is mandatory.



The Triman logo

Advertising rules regarding environmental or sustainability claims are also affected, in particular with the modification of the provisions of the Consumer Code extending the list of misleading commercial practices to false or misleading claims, indications or presentations on the environmental impact of a good or service and creating increased fines for such practices. In addition, the Environmental Code now includes a set of regulations governing very strictly environment-based marketing claims.

Recommendations regarding advertising and marketing claims on sustainable development

As an additional layer of constraints, the French self-regulatory professional advertising authority (ARPP) has in place very detailed and quite restrictive guidelines, which forms widely followed 'soft' law. When in breach of these rules, decisions of the *Jury de Déontologie Publicitaire*, the adjudication body of the ARPP, may be issued and be published.

Fashion companies have to tread very carefully when communicating on sustainability or environmental benefits or characteristics of their products (eg inclusion of recycled materials).



Turning your employees into influencers: Best practices

Frédérique Gillet (Counsel, Brussels) and **Angela Broux** (Lawyer, Brussels)

The marketing impact of influencers is widely recognized. The same holds for the role employees play in a company's brand image. Hence, companies may be tempted to capitalize on both trends and invite their employees to be influencers.

While this marketing practice is becoming increasingly popular, it raises certain legal issues in Belgium with regard to the employment relationship. If not properly addressed, these issues may undermine the benefits associated with employee influencers.

However, a few questions must be asked from a legal point of view.

Employment contract or service contract?

Under an employment contract, the employer can exercise greater control over the influencer's activities, both upstream and downstream of the promotional campaign. As a matter of fact, given the subordinated nature of the employment relationship, the employer has the prerogative to give instructions to the employee on a regular basis as to the content of the promotional message and the way it needs to be delivered.

Furthermore, if the relevant legal provisions are complied with,³ an employment contract enables the employer to have a certain degree of control over the employee's communications to third parties and over the employee's use of telecommunication tools.

However, such control comes up against the independence inherent in the service contract. Under such a contract, any excessive control would entail a risk that the services would be reclassified as an employment relationship.

It should also be noted that, when influencer promotional activities are carried out under a service contract by a person who is also an employee of the company, a similar risk of reclassification may arise if the promotional activities carried out under the service contract are similar to the activities carried out under the employment contract. Therefore, the tasks carried out under these respective contracts shall not be complementary or similar.

That being said, a service contract has the advantage that liability risks associated with issues such as misleading advertising or any other breach of marketing law⁴ will in principle be borne by the influencer himself. Conversely, an employee's liability for misconduct in the performance of their employment contract would be limited, since the employee is only liable in the event of fraud, gross negligence or repeated slight negligence.⁵

How should the activities of an employee influencer be structured?

While using influencers can create a greater sense of authenticity for consumers, the company should ensure that promotional activities align with its overall strategic message. This control is all the more important when influencers are also employees of the company, given the limitation of their liability mentioned above.

³ And in particular the Act of June 13 2005 on electronic communications and Collective Bargaining Agreement N °. 81 of 26 April 2002 on the protection of privacy of the employees in relation with control of electronic on-line communication.

⁴ See book V of the Belgian Code of Economic Law and the recommendations of the Advertising Council with regard to influencers, <https://www.jep.be/>

⁵ Article 18 of the Act of 3 July 1978 on employment contracts.

Best practices

To avoid any problems, certain practices are recommended in Belgium:

- **Define the communications channels to be used.** In principle, employees cannot be obliged to create a profile on a social network, unless it can be considered a professional tool. Therefore, classifying a social network as a “professional tool” in the employment contract or in an addendum could legitimize the fact that the employer requires the employee to use it.
- **Develop a social media policy.** Such a policy is essential to provide an adequate framework for influencer activities, for example, to define a process of prior approval by the employer of content to be shared on social media. A communication policy can also be useful in defining what should not be shared or with whom. Appropriate restrictive covenants are also highly recommended in this regard. Ideally, the social media policy should also address the issue of what happens after the employment contract: for instance, content deletion or removal of any reference to company affiliation on social media.

- **Developing a policy to monitor the use of telecommunication tools by employees.**

In this respect, Collective Bargaining Agreement No. 81 enables the employer to monitor the employees’ internet use and their use of other telecommunication tools, under certain conditions. Even though monitoring of the use of these tools can only be individualized under strict conditions, the possibility of carrying out this supervision can certainly act as a deterrent and help reduce misuse of telecommunication tools.

- **Ensure that influencer activities take place during working hours.** This is an important consideration since employer control or authority over the employee is, in principle, not permitted outside working hours. For example, the employee and the employer can agree on a number of hours per week or per day to be dedicated to the activities in question.

While we understand it may be useful for certain brands to turn their employees into influencers, this can only be done by ensuring that proper practices are in place within the company.





Word from the industry's mouth



ETHIQUE: Revolutionising the cosmetics industry

Laura Scampion (Partner, Auckland) interviewed **Brianne West**, a New Zealand entrepreneur and founder of Ethique, the world's first regenerative beauty and personal care brand.

<https://ethique.com/>

Why Ethique? How did you 'get started'?

It's important to know I am very idealistic. At 23, I had just sold my previous two companies and was completing my Bachelor of Science at university. I thought to myself – I love business, I love science but first and foremost I want to save the world. As grandiose and ridiculous as that sounds, that's been my career aspiration my entire life.

I had a think about what I could do with those three passions [business, science and our environment] and ridding the world of plastic bottles seemed like a good idea.

The cosmetics industry is not only laden with plastic and unnecessary packaging, but the supply chains are murky and filled with child labour. However, I believe in business being the number one way to make positive change in the world simply due to sheer scale and resource, so I didn't want to give up the business angle.

I thought if I combined those into a business that operated as ethically and humanly as possible – think clean supply chain, living wage, B Corp and so on but

also the product had a purpose in that it decreased plastic bottles – then that was a winner.

It's a long-winded way of saying I wanted to save the world really!

Ethique is a plastic free, regenerative, beauty brand. How much hard work is that?

At Ethique we started out like this so it's difficult to compare it to a more traditional business. Obviously, our overheads are a lot higher with our living wage and other employee benefits. The cost of our ingredients and packaging is also a lot higher because we use only sustainably sourced and fairly traded ingredients.

Sourcing is a lot harder due to our choices like using palm oil free ingredients for example. Working with partners who don't 'get it' can be challenging – as often they brush off your requirements. But as we've got bigger, more and more companies want to work with us and there has been quite the revolution within the industry as more cosmetics companies start to implement these values. Consumers are expecting business to do more, to be better. If you want your business to be here for the long haul, you have to walk the line between purpose and profit. Business is no longer here just to line shareholder pockets. I'm not saying all business needs to have some grandiose purpose but, if you want consumers to resonate with you, and build real brand loyalty, you need to have a purpose.

Growing a plastic free business has not been without challenges, many unique to us. Growing any business at the pace we have grown is tough, and encouraging people to get behind an unusual product was at first, very difficult. So having that purpose – protecting our environment and the people within it – have made that easier to understand.

How much plastic and waste has Ethique saved the planet from?

So far we've saved over 13 million plastic bottles from entering landfill, and we're just getting started: our next goal is half a billion by 2030.

We also collect information on carbon emissions saved because by not using plastic we produce less carbon emissions in general. We saved over 3 million gallons of water, we have planted over 340,000 trees and we have offset all carbon emissions we haven't been able to minimize since 2015.

In your view, how much greenwashing is about? How damaging is it?

There are enormous amounts of greenwashing out there. We hear claims like 'we plant a tree for every order' but if you look at the ingredients of that product, they are a direct cause of deforestation.

I guess there's two sides to it: you've got the greenwashing where people are massaging the truth or making something sound better than it is, and then there are the examples where they might have put in place a genuinely great initiative, but it is completely useless because it is outweighed by something else they are doing – like my example above.

'Sustainable' is being able to continue doing what you're doing for an infinite period of time – this is where you might plant a tree for every order for example.

'Regenerative' is about giving back far more than you take. So you ensure that all your products are made of ingredients that are sustainably sourced. And for every tree you cut down through packaging creation or ingredient sourcing, you plant 1.6 trees to ensure there is a fruitful forest forever for that ingredient.

Ethique has always embodied regenerative practices, but now we're talking about it more, and doing more, to be a truly regenerative company. We're certainly not perfect, but we're always trying to do better.

Can you tell us about your Super Soap Project?

It would have been March last year when I was finally beginning to realise that the Covid-19 pandemic was an inevitability. I tried to ignore it for a while there. I wanted to do something beyond looking after the Ethique team and ensuring their friends and family were OK and expand some kind of initiative outside the team.

We wanted to give back to the wider community. 2.2 billion people in the world don't have access to soap and clean water. During the early stages of the pandemic, handwashing was touted as the number one protection – something so many people simply didn't have. So, if people can't access soap, they literally cannot protect themselves – something we all take for granted. So we just wanted to give away as many bars of soap to vulnerable communities as we could. In the end we donated around 50,000 bars to communities across the South Pacific and parts of New Zealand where soap just isn't easily accessed.

We partnered with Oxfam who supported our South Pacific donations. We also worked with lots of smaller local grass roots charities that helped us to reach communities in need.

At DLA Piper we have been partnering with Ethique for a little while now (across the globe). What is important to Ethique in its business partnerships?

We obviously have checklists for ingredient suppliers – anti slavery and sustainability checklists – you know the bare minimum. But it is also a feel, it's about relationships, value sharing, understanding the driving force for your partners.

If a supplier doesn't tick all the boxes, but they are working really hard to try and 'get it' because they really care and are trying to improve, that's good. It's great to have policies and procedures, absolutely. But if you work with a company and help them reach a goal, then that is creating far greater change than if you didn't work with them in the first place and they never achieved that goal.

The rise of e-commerce of post-bankruptcy companies

Jamila Willis (Partner, New York) and **Shelby Nace** (Associate, New York)

The US retail industry continues to undergo change. Following the global economic downturn that began between 2007 and 2009, the US retail industry entered nearly a decade of distress, during which the industry experienced increased chapter 11 bankruptcy filings, increased liquidations and the closing of thousands of brick-and-mortar stores. In 2019 alone, retailers announced the closing of over 9,300 stores – an increase of over 50% from 2018.¹

In 2020, the COVID-19 pandemic further altered the US retail landscape, speeding up the shifts that were already underway. Government-mandated shutdowns to curb the spread of COVID-19 required many retailers to temporarily close their stores and implement social distancing measures. These measures and the pandemic's effect on consumer behavior augmented the existing shifts in the retail industry. In 2020 alone, 30 retailers filed for bankruptcy protection.²

Retailers have continued to quickly adapt and alter business strategies to respond to consumer behavior and macroeconomic factors. One such strategy is to shift focus to e-commerce and hybrid retail platforms. In 2020, the drop in in-person shopping was a direct result of social distancing measures, stay-at-home orders, and temporary store closures. Such behaviors seem to be continuing into 2021 and, we expect, 2022, despite the relaxing of these measures. This, further intensifies the need for retailers to focus on the online space and e-commerce-based sales.

Consumer spending habits

Even before the pandemic, e-commerce sales represented a massive portion of overall retail sales growth in the US. For instance, e-commerce accounted for 56% of overall retail growth in 2019, or USD600 billion in sales, and experts project that e-commerce sales may go as high as USD6.5 trillion by 2023.³ Despite how certain retailers fared in 2020, every national market covered by eMarketer saw double-digit e-commerce growth.⁴ Retail e-commerce sales grew overall by 27.6% in 2020, for a total of USD4.280 trillion, while total worldwide retail sales declined by 3%, to USD23.839 trillion.⁵

As the US re-emerges from the pandemic, consumer spending has risen. Evidencing pent up demand, retail spending grew 5% year-over-year in August 2021.⁶ E-commerce sales have continued to experience even stronger growth, rising by about 30% year-over-year in the same time period.⁷

Distressed retailer shift in focus

Bankrupt retailers acknowledged the shift from bricks-and-mortar retail to online channels well before the COVID-19 pandemic.⁸ During the COVID-19 pandemic, retailers continued to use bankruptcy protection to reorganize their businesses to adapt to a changing society, right size their brick-and-mortar footprint and shift their focus to e-commerce.⁹ Distressed retailers consistently report that amid declining sales in both brick-and-mortar locations and online, net online

¹ Nathaniel Meyersohn, *More Than 9,300 Stores Closed in 2019*, CNN BUSINESS (Dec. 19, 2019 8:34 AM), <https://www.cnn.com/2019/12/19/business/2019-store-closings-payless-gymboree/index.html>.

² Retail Dive Team, *The Running List of 2020 Retail Bankruptcies*, RETAIL DIVE (updated Feb. 5, 2021), <https://www.retaildive.com/news/the-running-list-of-2020-retail-bankruptcies/571159>.

³ Klaviyo, *Consumer Spend is Shifting to Ecommerce: The Untold COVID-19 Story*, EMARKETER (Apr. 24, 2020), <https://www.emarketer.com/content/consumer-spend-is-shifting-to-ecommerce-the-untold-covid-19-story-sponsored-content>.

⁴ Ethan Cramer-Flood, *Global Ecommerce Update 2021*, EMARKETER (Jan. 13, 2020), <https://www.emarketer.com/content/global-ecommerce-update-2021>.

⁵ *Id.*

⁶ Tamara Charm, et al., *US Consumer Sentiment and Behaviors During the Coronavirus Crisis*, MCKINSEY & COMPANY (Oct. 18, 2021), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-us-consumer-sentiment-during-the-coronavirus-crisis>.

⁷ *Id.*

⁸ Payless First Day Decl. at 16 (2019); Charlotte Russe First Day Decl. at 11 (2019); Barney's New York First Day Decl. at 11 (2019).

⁹ *In re BBGI US, Inc.*, Case No. 20-11785 (CSS) (Bankr. D. Del. 2020); *In re J.C. Penney Company, Inc.*, Case No. 20-20182 (DRJ) (Bankr. S.D.T.X. 2020); *In re Neiman Marcus Group LTD LLC*, Case No. 20-32519 (DRJ) (Bankr. S.D.T.X. 2020); *In re Muji U.S.A. Limited*, Case No. 20-11804 (MFW) (Bankr. D. Del. 2021); *In re The Collected Group Exports, Inc.*, Case No. 21-10665 (LSS) (Bankr. D. Del. 2021).

sales have not been as severely affected and, instead, accounted for the majority of total sales in recent years. As a result, many retailers have turned to the chapter 11 process to reject burdensome leases, close failing stores, and redirect funds to grow their e-commerce businesses. These options are not as readily available under non-bankruptcy US law.

For example, Brooks Brothers reported 2019 North America e-commerce sales of USD147 million, 21.3% of North America revenue, but 90% of all North America revenue between March 2020 and July 2020.¹⁰ In July 2020, Brooks Brothers filed for chapter 11 protection, closing 51 stores and shifting their focus to e-commerce.¹¹

In June 2020, JCPenney filed for chapter 11, seeking reorganization to sell the business and close over 200 stores.¹² JCPenney intended to close 29% of its

stores in bankruptcy and to use the process to shed debt.¹³ Following its purchase by Simon Property Group and Brookfield Property Partners, the business exited bankruptcy in December 2020.¹⁴ Since then, JCPenney has closed an additional 170 stores with plans to close more.¹⁵ JCPenney's intention to scale down physical operations is part of a plan to grow e-commerce sales to USD2.3 billion by 2024, up from USD1.5 billion in 2019.¹⁶

Of the 38 retailers that have filed for bankruptcy protection since March 2020, 20 reported plans to close at least 25% of their brick-and-mortar stores to adapt to post-pandemic shifts in the industry and have changed their focus to invest in and transition to e-commerce. Others closed a significant but unspecified number of their bricks and mortar locations.

RETAILER	DATE OF FILING	PERCENTAGE OF STORES CLOSED
Art Van Furniture	March 9, 2020	100% ¹⁷
Modell's Sporting Goods	March 11, 2020	100% ¹⁸
True Religion	April 13, 2020	43% ¹⁹
Roots USA	April 29, 2020	78% ²⁰
J. Crew	May 4, 2020	2% ²¹
Stage Stores	May 11, 2020	100% ²²
J.C. Penney	May 15, 2020	29% ²³

¹⁰ Brooks Brothers' First Day Decl. at 12-13.

¹¹ Madeline Stone, *Brooks Brothers is Permanently Closing 51 Stores as it Enters Bankruptcy During the Pandemic. See Which Have Shut Down So Far*, BUSINESS INSIDER (July 8, 2020, 1:51 PM), <https://www.businessinsider.com/brooks-brothers-closing-stores-list-addresses-affected-by-covid-19-2020-7>.

¹² Sapna Maheshwari & Michael Corkery, *J.C. Penney, 118-Year-Old Department Store, Files for Bankruptcy*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/business/jc-penney-bankruptcy-coronavirus.html>; Kelly Tyko, *JCPenney Closing More Stores After Bankruptcy. Will Your Store Shutter? See the Closure List*, USA TODAY (Sept. 21, 2021, 6:54 PM), <https://www.usatoday.com/story/money/shopping/2020/12/17/jcpenney-stores-closing-march-2021-list-coronavirus-bankruptcy/3940925001>.

¹³ *Id.*

¹⁴ Duke Ratliff, *JCPenney Names Former Levi's, Walmart Ecommerce Specialist as CEO*, RETAIL TOUCHPOINTS (Oct. 26, 2021, 11:38 AM), <https://retailtouchpoints.com/features/news-briefs/jcpenney-names-former-levis-walmart-ecommerce-specialist-as-ceo>.

¹⁵ Tyko, *supra* note 17.

¹⁶ Bryan Wassel, *JCPenney Enters Chapter 11 Bankruptcy, Seeks Financing to Continue Operations*, RETAIL TOUCHPOINTS (May 18, 2020, 9:59 AM), <https://retailtouchpoints.com/topics/store-operations/jcpenney-enters-chapter-11-bankruptcy-seeks-financing-to-continue-operations>.

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²¹ Madeline Stone, *J. Crew is Closing 8 Stores – See if Yours is on the List*, BUSINESS INSIDER (July 23, 2020, 1:58 PM), <https://www.businessinsider.com/j-crew-closing-stores-list-of-addresses-closing-2020-7>.

²² Steven Abrams, *Major Retailers that Closed in 2021 (Or Are Closing Lots of Locations)*, OFFERS.COM (Oct. 12, 2021), <https://www.offers.com/blog/post/store-closings/>.

²³ Tyko, *supra* note 17.

RETAILER	DATE OF FILING	PERCENTAGE OF STORES CLOSED
Tuesday Morning	May 27, 2020	32% ²⁴
GNC	June 23, 2020	37% ²⁵
G-Star Raw	July 3, 2020	100% ²⁶
Lucky Brand	July 3, 2020	7% ²⁷
Brooks Brothers	July 8, 2020	51% ²⁸
Sur La Table	July 8, 2020	42% ²⁹
Muji USA	July 10, 2020	100% ³⁰
RTW Retailwinds	July 13, 2020	"A significant portion if not all" ³¹
The Paper Store	July 14, 2020	0% ³²
Ascena	July 23, 2020	57% ³³
Lord & Taylor	August 2, 2020	100% ³⁴
Tailored Brands	August 2, 2020	Up to 35% ³⁵
Stein Mart	August 12, 2020	100% ³⁶
Century 21	September 10, 2020	100% ³⁷
Furniture Factory Outlet	November 5, 2020	54% ³⁸
Francesca's	December 3, 2020	33% ³⁹
Love's Furniture	January 6, 2021	54% ⁴⁰

24 Abrams, *supra* note 28.

25 *Id.*

26 Heather McLvaine, *G-Star Raw Permanently Closes 57 Stores After Failing to Find a Buyer*, INSIDE RETAIL (Aug. 18, 2020), <https://insideretail.com.au/news/g-star-raw-permanently-closes-57-stores-after-failing-to-find-a-buyer-202008>.

27 Abrams, *supra* note 28.

28 Nathan Bomey, *Brooks Brothers Store Closings Planned: Retailer Files for Chapter 11 Bankruptcy Protection*, USA TODAY (July 8, 2020 3:47 PM), <https://www.usatoday.com/story/money/2020/07/08/brooks-brothers-store-closings-brooks-brothers-files-chapter-11-bankruptcy/5396613002>.

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34 Jordan Valinsky, *Lord & Taylor is Closing All of its Stores After 194 Years in Business*, CNN BUSINESS (Aug. 27, 2020, 10:37 AM), <https://www.cnn.com/2020/08/27/business/lord-and-taylor-store-closures-bankruptcy/index.html>.

35 Jordan Valinsky, *Men's Warehouse and Jos. A. Bank Are Closing Hundreds of Stores*, CNN BUSINESS (July 21, 2020, 3:03 PM), <https://www.cnn.com/2020/07/21/business/tailored-brands-closures/index.html>.

36 Lauren Thomas & Nate Rattner, *Bankrupted Stein Mart is Closing All of its Stores. Heres a Map of Where They Are*, CNBC (Aug. 13, 2020 12:01 PM), <https://www.cnbc.com/2020/08/13/map-bankrupted-stein-mart-is-closing-279-stores-heres-a-list.html>.

37 *Bargain Store Century 21 Closes its Doors After 60 Years*, CBS NEWS (Sept. 10, 2020, 12:04 PM), <https://www.cbsnews.com/news/century-21-bankruptcy-closing-stores/#:~:text=Century%2021%20Stores%20%E2%80%94%20a%20destination%20for%20bargain,across%20New%20York%2C%20New%20Jersey%2C%20Pennsylvania%20and%20Florida>.

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40 Candice Williams, *Loves Furniture Will Close 13 Stores, Including 10 in Michigan*, THE DETROIT NEWS (Dec. 22, 2020, 6:02 PM), <https://www.detroitnews.com/story/business/2020/12/22/loves-furniture-closing-13-stores-including-10-michigan/4016622001/#:~:text=The Loves Furniture store consolidation will result in,challenge of servicing those locations due to distance>.

RETAILER	DATE OF FILING	PERCENTAGE OF STORES CLOSED
Christopher & Banks	January 14, 2021	"A significant portion if not all" ⁴¹
L'Occitane	January 26, 2021	14% ⁴²
Belk	February 23, 2021	0% ⁴³
Paper Source	March 2, 2021	At least 7% ⁴⁴
The Collected Group	April 5, 2021	100% ⁴⁵

Conclusion

As retailers emerging from bankruptcy invest in e-commerce to respond to consumer spending habits, they have much to look forward to. Those retailers that have long invested in e-commerce continue to see success for their efforts and investment. In March 2021, Saks Fifth Avenue entered into a partnership with the Hudson's Bay Company (HBC) and Insight Partners to

establish their e-commerce business as a standalone entity, Saks, which will feature a hybrid retail and marketplace platform to expand available products and maintain a curated experience⁴⁶ In October 2021, Saks announced its intent to file an initial public offering at a valuation of USD6 billion, an increase of three-fold from March 2021.⁴⁷

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45 Ben Unglesbee, *The Collected Group Exits Bankruptcy*, RETAIL DIVE (updated June 7, 2021), <https://www.retaildive.com/news/fashion-brand-owner-the-collected-group-files-for-bankruptcy/597852>.

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Good practices and common pitfalls on ESG advertising in Italy

Elena Varese (Lead Lawyer, Milan)

On green claims.....

DOs



- “Lower environmental impact” is preferable to “ecological”.
- Avoid expressions such as bio-jeans or bio-sneakers, if components are not fully biobased
- Explain in which respect the product is less polluting, e.g. less washing, organic fibres with less use of CO2
- Cite scientific tests with accuracy
- It is better to emphasise a path towards a lower environmental impact than to say result has been achieved in absolute terms.
- Extreme caution when talking about carbon offsetting processes, e.g. in e-commerce transport

Don'ts



- “Sustainable” is not synonymous with “ecological”
- Do not use expressions such as “100% ecological” or “completely green”
- No generic claims such as “environmentally friendly”, “green”, “environmentally safe”, “non-polluting”, “nature friendly”, “ecological”, “sustainable”
- Materials of natural origin are not necessarily less polluting
- Do not use the words “biodegradable” and “compostable” if the material does not comply with ISO standards.

On animal welfare....

DOs



- Clearly explain product lines where there is a focus on animal welfare (do not extend to all, if not applicable)
- Adhere to advertise the treatment of animals as per the company's Code of Conduct and no further
- Verify claims against the entire supply chain

Don'ts



- No pictures of free and happy animals without proper substantiation
- No boasting about the absence of animal testing if required by law anyway
- No scenes of mistreated animals or animals in dangerous situations
- Avoid expressions such as "cruelty-free", if not supported by scientific evidence
- No expressions such as "faux leather" or "faux fur" in Italy

On social issues....

DOs



- Explain the positive impact of any specific social campaigns, without using generic words such as 'sustainable' or 'ethical'.
- Beware of images depicting children or the elderly or minorities
- Use of the Italian flag only when the product is 100% Made in Italy (including origin of materials)

Don'ts



- No images of women and men in a state of subordination or victims of violence
- No images of "objectified" body parts
- Attention to cultural appropriation
- No use of the Italian anthem
- No use of models who are too thin or too fat



A whole new world: What Alibaba's record antitrust fine means for retailers

Ilan Sherr (Legal Director, London)
Juliette Ginsberg (Associate, London) and
Saira Iqbal (Trainee Solicitor, London)

In April, the e-commerce provider Alibaba was fined USD2.7 billion by China's State Administration for Market Regulation (SAMR) for anti-competitive conduct. It is part of a global trend in competition investigations of online retail platforms (including organizations such as Compare the Market and Google). Consequently, it is important for retailers and manufacturers using online platforms to be aware of the potential legal risks in their supply arrangements with online platforms, and also of competition compliance more generally.

Enforcement decisions against online platforms

Alibaba's record fine followed a four-month investigation by SAMR into Alibaba's arrangements with retailers. SAMR was concerned that Alibaba's "choose one of two" practice, by which Alibaba prohibited retailers from participating in promotional activities of rival platforms while doing so on Alibaba. This practice was supported by a system of

incentives and penalties. SAMR considered it effectively forced retailers to deal exclusively with Alibaba and was anti-competitive.

With the Alibaba decision, SAMR joins a wave of global enforcement activity by antitrust regulators into online platforms.

- In November 2020, the UK's Competition and Market authority (CMA) fined price comparison website Compare the Market over GBP17 million for the inclusion of most-favored nation clauses with insurance companies. These clauses restricted insurers from offering better rates on other comparison websites and were found to deter insurers from lowering their prices.
- More recently, the European Commission opened an investigation into an online marketplace that prominently displays only certain sellers of products to the detriment of others, and the criteria by which the company allowed retailers to sell their products to a selected group of customers.



Ensuring competition compliance

Although competition regimes vary throughout the world, competition regimes universally prohibit agreements that have the effect of restricting or distorting competition on a given market. As the trend of recent decisions shows, this prohibition applies not only to traditional cartel arrangements but also to certain agreements or practices between online platforms and retailers.

Considering the above, retailers who sell their goods on online platforms should be wary of any terms which:

- limit the prices or discounts that they can set on the platform;
- restrict them from selling their products or offering discounts on other platforms;
- monitor the prices/ discounts they can offer on other platforms; or
- provide preferential terms only when certain criteria are met.

Not only might retailers have scope to resist such terms on competition law grounds, but even merely agreeing to the terms could lead to retailers themselves facing liability for a competition law infringement.

Retailers should also consider their own behavior on online platforms. While it is permissible for retailers to use online platforms to gather publicly available market intelligence, retailers should refrain from using online platforms to coordinate prices with competitors (even through automated price

fixing algorithms). Not only did the CMA recently fine an online seller for an arrangement with a competitor not to undercut each other's prices on an online marketplace, but it further disqualified the managing director of the retailer for five years.

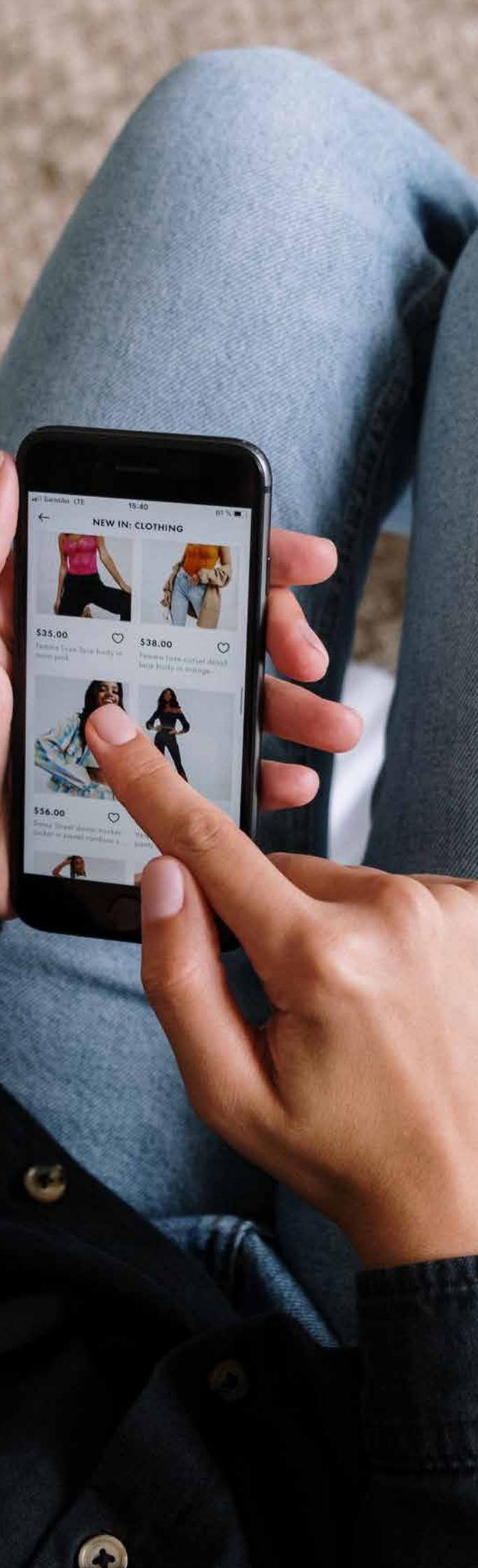
Conclusion

It is likely that arrangements between retailers and online platforms will continue to be subject to enhanced scrutiny by global competition authorities. Regulators will place similar scrutiny on the extent to which retailers use online platforms to coordinate activities with competitors.

Retailers with concerns about such behavior in their business may find that DLA Piper's award-winning Aiscension service will be of benefit.

Aiscension is a cartel risk-management service that uses AI to help detect risks in a business. It combines AI tools with DLA Piper's renowned legal knowhow to audit businesses for cartel risks. Aiscension is faster, more effective and better value than existing reviews, and helps to ensure that any business can spot potential issues and deal with them appropriately. Aiscension can help identify cartel risks before they become a regulatory investigation and maximize the chance of securing regulator leniency and immunity.

For further information regarding Aiscension please contact ilan.sherr@dlapiper.com.



Glow up your marketing strategy in an age of cancel culture

Charlotte Swain (Associate, Birmingham)

Now more than ever, consumers are engaged with the products they buy, and are often overwhelmed with choice regarding prices, formulations, sourcing, sustainability, delivery options and speed of delivery, production methods and so forth. Rather than being loyal to the brand, many consumers are more interested in what their favorite influencer has to say about a product and news of the latest product must-have (or product to avoid) can spread like wildfire. Purchasing can take place with the click of a button, during those “micro-moments” in the day – consumers can shop anywhere, anytime and in any way. Add to this a global pandemic and consumers becoming ever-more reliant on technology, and we are experiencing one of the biggest shifts in consumer behavior over the last 20 years.

This article explores how businesses might need to reconsider their marketing strategy so as to stay ahead of the latest consumer spending habits and to ensure that they are selling their purpose and not just their product in the age of cancel culture.

#TikTokMadeMeBuyIt

Historically, marketing has relied on face-to-face engagement, television advertising, celebrity endorsement in a magazine, or word of mouth, but the end result tended to be a consumer taking a trip to the local shopping center to purchase their product of choice.

E-commerce (buying goods on a website or app) and social-commerce (purchasing direct from a social media platform) have transformed these traditional marketing practices. But while businesses seem to have grasped the movement to a consumer-led focus, they must also be aware of the generational gaps playing a part in their marketing strategies. Businesses seem to have accepted the need for an in-store and online presence, with Boomers⁵³ and Generation X⁵⁴ preferring the in-store experience and Millennials⁵⁵ preferring e-commerce shopping on a company’s website, or via their mobile app.

But are all businesses preparing for the next generation of shoppers – Generation Z or the “Zoomers”? This new wave of consumers, born between 1997 and 2010,

has never known life without unlimited access to people or information and will trust their following on social media more than they will trust a brand. A study from The Influencer Marketing Factory showed 97% of Gen Z consumers say they use social media as their top source of shopping inspiration, while only 40% follow brands they like on social media.

Increasingly, this generation will engage with social media influencers that align with their values, or will shop directly via social media platforms such as TikTok or Instagram, which have “Swipe up to buy” options and built-in algorithms to recommend products based on a user’s preferences. Instagram even launched a “shopping” tab in November 2020, direct from its main navigation page which lists items based on the user’s following, history and content. Yet while TikTok is the core social media platform of the Zoomer, according to Sprout Social, only 32% of businesses are using it as an advertising platform.

To stay ahead of the curve, businesses need to be investing in technology directed at their consumer audiences and should be developing a marketing strategy that spans the various traditional, e-commerce and social commerce platforms. Where businesses are in a regulatory landscape that requires that marketing be targeted (for example, the alcohol industry where advertising must be directed at consumers over the age of 18), investment should be made in technology with targeting tools while making use of social commerce, to ensure that ads are targeted to the correct audience.

Responsible is the new black

Not only are today’s consumer using numerous routes to checkout, but they are much more conscious about issues like responsible sourcing, environmental sustainability, diversity and inclusion, and physical and mental health. A recent study by Accenture of over 25,000 consumers across 22 countries showed 50% of consumers stated that the pandemic caused them to rethink their personal purpose and re-evaluate what was important to them in life.

⁵³ The generation of consumer born between 1946 and 1964.

⁵⁴ The generation of consumer born between 1965 and 1980.

⁵⁵ The generation of consumer born between 1981 and 1996, otherwise known as Generation Y.

Over the last year, we have seen the rise in consciousness around climate change with the release of products such as re-usable make-up wipes, re-fillable products and the movement of many businesses in the race to become carbon neutral. We have seen the #BLM movement and changes to business products in response to consumer backlash; for example, Unilever's renaming of its "Fair & Lovely" skin-lightening cream to "Glow & Lovely." Consumers are more likely to read the ingredients list, and in response to this, many products are moving away from the use of palm oil. And we have seen movement towards a healthier and more climate-conscious lifestyle, with the alcohol industry moving towards low or no alcohol and hard seltzer alternatives and the food industry providing plant-based ranges and other dietary alternatives.

Being responsible is the new black in a world where consumers have endless choice. It's no longer enough to simply market a product – the product must be responsibly sourced, environmentally friendly and must have a purpose.

That's what she said...

In a world of social media and endless communication, the word of the influencer, the celebrity or the athlete trumps the word of the brand.

We live in a world where something as simple as Cristiano Ronaldo (with a 350 million Instagram following) removing a certain well-known soft drink brand from view at a press conference in favor of water during the European Championships earlier this year can lead to news about a USD4 billion drop in market value.

We live in a world where a tweet by singer Nicki Minaj about her cousin's friend's testicles can lead to an official statement by Trinidad and Tobago's health minister that there has been no evidence that any patient in Trinidad, or elsewhere, has become impotent as a result of the COVID-19 vaccine.

We are in a world of "cancel culture", the process of shaming or boycotting a person, brand or company on social media.

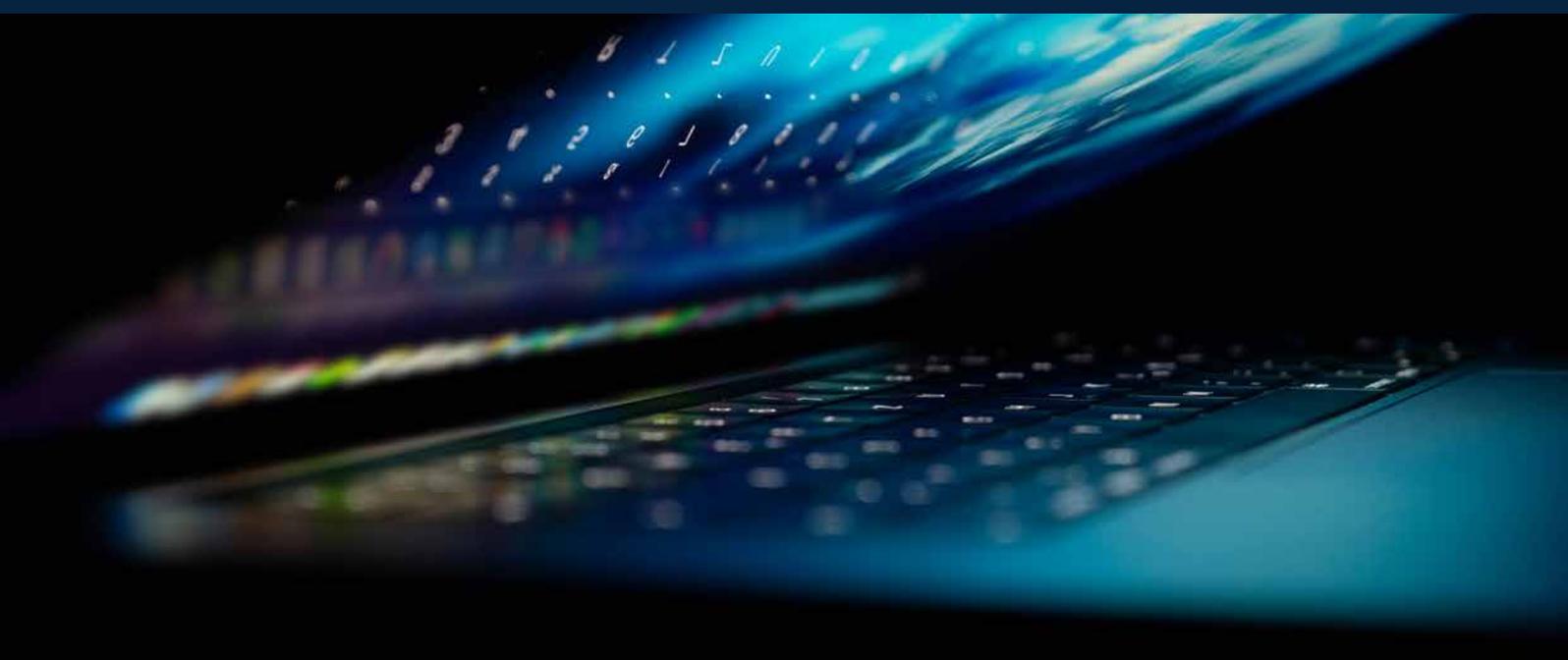
In some cases smart brand management can turn even seemingly negatively intended social media "trolling" into an opportunity to connect with consumers about fundamental values. Nevertheless, the ease with which consumers can share their views in a connected world shows that businesses need to be in tune with the views of consumers is more important than ever before.

Next steps

It's clear that businesses need to understand and engage with their consumers more than ever before. In an increasingly connected world, businesses must be sure to be targeting their proposed audience by investing in technology, providing consumers with tools for feedback and engagement and maintaining a varied cross-platform marketing strategy that meets the needs of each generation of consumer.

Particularly for businesses selling in a regulated environment, investment in such "targeting technologies" is essential and can also provide comfort when sharing content on social media. Equally, in a more enlightened age, businesses should be considering ESG for their products and stay ahead of their competition by developing a wider "purpose" for each of their products. Finally, businesses need to be very careful about the trends that they engage with in their marketing, and the influencers that they are using, to ensure they remain on the right side of their consumer audiences.

For an overview of the legal framework for influencer marketing, please visit <https://www.dlapiper.com/fr/france/insights/publications/2021/01/launch-of-dlapiper-influencer-marketing-guide/> and download a free copy of DLA Piper's Influencer Marketing Guide.



The rise of pop-ups in the declining UK high street retail market: A real estate perspective

Lotte McGuire (Trainee Solicitor, Leeds)

Katie Jacobson (Partner, Birmingham)

It has been widely reported that the UK's high street continues to decline, with both small independent and large multi-chain retailers closing bricks-and-mortar stores on a daily basis⁵⁶. In 2021 alone high street giants Debenhams, Arcadia Group and Victoria's Secret UK retreated online, closing physical stores across the UK⁵⁷. Yet it is interesting to see the rise of brands, known for operating in the online retail space, popping up on high streets nationwide. What is the reason behind this move towards a physical presence in a steadily declining market?

Retailers

The key advantage of a pop-up to a retailer is that it can be delivered by any retailer, anywhere, for any reason, allowing retailers to:

- **harness market opportunities as and when they arise.** For instance, Tesco popped up in a number of Nightingale hospitals across the UK during the COVID-19 pandemic to help NHS staff access essentials in a time of shortages⁵⁸;
- **test and market new products to existing customers or existing products to new customers** as with Primark's 2020 pop-up, which allowed the bricks-and-mortar giant to launch and promote its new environmentally friendly 'Wellness' range⁵⁹;
- **give the impact of a physical presence without a substantial outlay.** 58 Oxford Street, which operates as a pop-up department store, allows small online brands to pop up for one to four days at a time, an experience which would normally be impossible due to the risk, high overheads and fit-out costs associated with long lease commercial retail units⁶⁰; and

- **drive footfall by creating a buzz around a brand or product, using the pop-up as an extension of the brand and creating a unique and immersive consumer experience.** Glossier, the online beauty brand, saw over 100,000 shoppers visiting its Covent Garden pop-up in December 2019 and January 2020 alone⁶¹.

While pop-ups deliver clear benefits to retailers, they do not come without potential pitfalls:

- For retailers to quickly **exploit opportunities as they arise**, it is crucial that internal policies can support the agility required to identify and capitalize on opportunities as they present themselves. Required lease conditions must also be pre-considered to ensure that swift lease negotiations, when taking advantage of an opportunity, do not lead to unforeseen or onerous contract conditions;
- Retailers hoping to take advantage of the "low" rents associated with pop-ups must be aware that pop-up rents in prime locations can be high. The length of the pop-up tenancy must therefore be carefully considered to ensure that the pop-up remains present for long enough to fulfil its purpose, but short enough to be cost effective. It is also important for retailers to consider how pop-up leases deal with lease extension, renewal and termination, including any force majeure events with leases expressly outlining the processes as to how such events are to be handled.

⁵⁶ <https://www.bbc.co.uk/news/business-58433461>

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⁶⁰ <https://www.enterprisenation.com/learn-something/popup-oxford-street-may/>

⁶¹ <https://www.elle.com/uk/beauty/a28631120/glossier-pop-up-shop-london/>; <https://luxurylondon.co.uk/wellbeing/beauty/glossier-shop-covent-garden-london>

Landlords

Given the fluctuations in the commercial retail tenancy market, pop-ups also provide commercial landlords with benefits:

- Unused retail premises can be used to offer some stability to landlords and generate revenue while market fluctuations settle and longer-term tenants are found. Pop-ups also provide landlords with the opportunity to alter their previous long lease strategy and only house pop-ups on shorter leases.
- While pop-ups can market themselves as a short-term solution, landlords should consider the long-term prospects that a pop-up tenant may offer. Glossier's Covent Garden pop-up was initially scheduled to last four months, but high footfall led to a substantial lease extension, seeing the retailer still in tenancy two years later⁶.
- The buzz often created by retailers when launching a pop-up is also a benefit for commercial landlords, as heavier footfall and interest over a pop-up retailer can assist landlords in promoting the retail unit and securing future, possible longer-term tenants.

While the benefits to landlords are clear, the potential pitfalls applicable to retailers, as detailed above, also apply to landlords. Additionally, landlords need to:

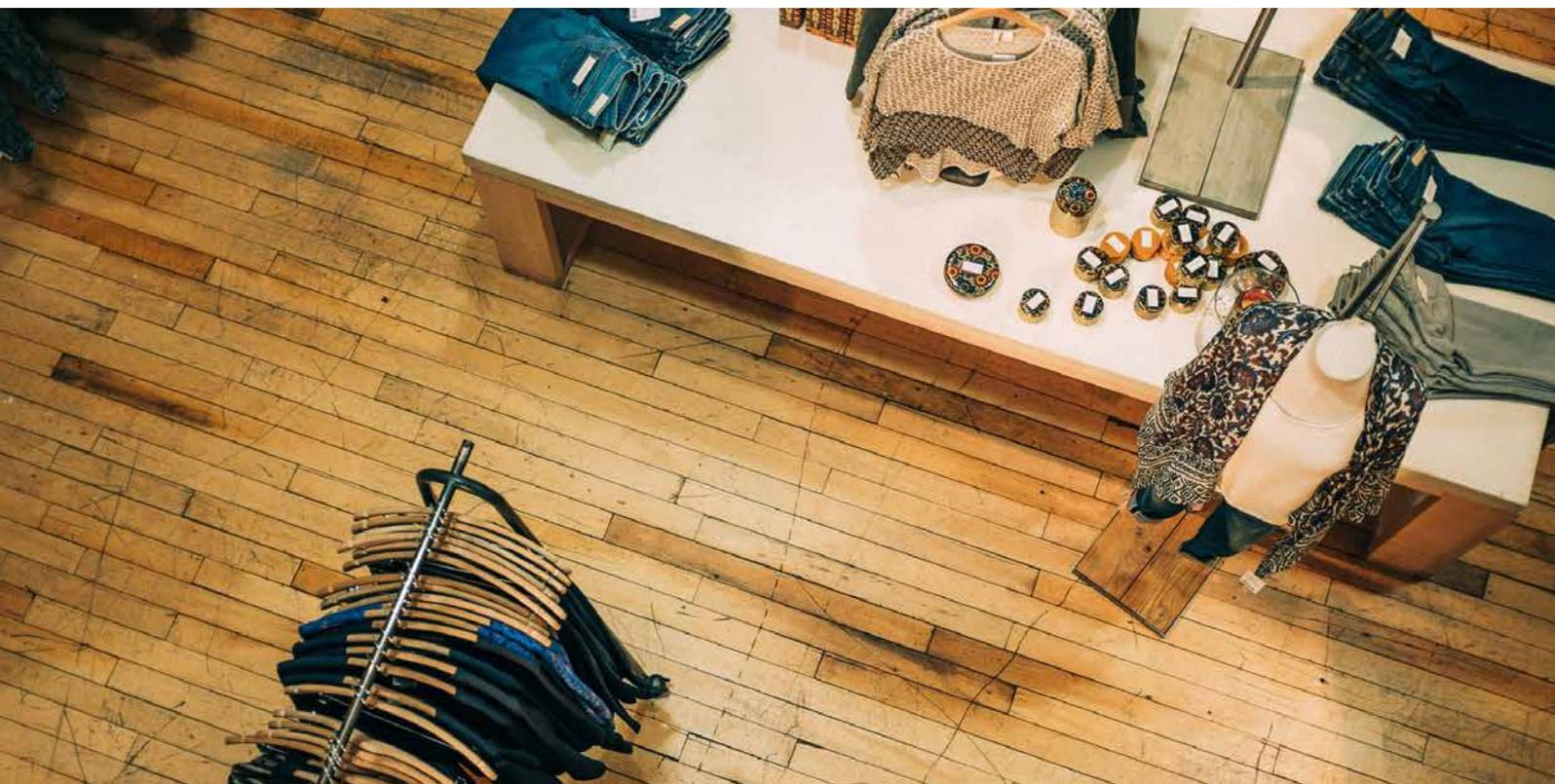
- consider if planning consent for a material change of use is required. The relatively new E Class for change of use provides flexibility to commercial landlords for a change of use to an indoor property. Landlords should still be mindful to a potential withdrawal of the new E Class as COVID-19 restrictions are lifted;

- ensure the correct licenses in relation to opening times and service of alcohol are in place and consider any covenants relating to the retail unit itself. As pop-ups are used to create a buzz, they often come hand-in-hand with later opening hours, service of alcohol or exciting store fronts. To ensure landlords are not caught out, licenses and covenants must be considered and reviewed.

It is evident that when implemented correctly pop-ups offer benefits to both retailers and commercial landlords in equal measure. This is driven primarily by the cost benefits to both parties and the flexibility that a pop-up can offer. It will be interesting to see if in the wake of the COVID-19 pandemic the influx of pop-ups will continue to rise while longer-term tenancies decline or, if driven by customer spending following the various lockdowns, there is a resurgence of more permanent, longer-term tenancies.

Resources

- <https://www.bbc.co.uk/news/business-58433461>
- <https://www.retailresearch.org/whos-gone-bust-retail.html>
- <https://www.thegrocer.co.uk/tesco/tesco-to-build-pop-up-stores-at-nhs-nightingale-hospitals/603756.article>
- <https://www.boxpark.co.uk/news/pop-up-primark-wellness/https://www.enterprisenation.com/learn-something/popup-oxford-street-may/>
- <https://www.elle.com/uk/beauty/a28631120/glossier-pop-up-shop-london/>
- <https://luxurylondon.co.uk/wellbeing/beauty/glossier-shop-covent-garden-london>



Beyond JPEGs: Innovation in fashion and luxury goods NFTs

Jessie Buchan (Senior Associate, Sydney)

Edmond Lau (Solicitor, Sydney) and

Valiant Warzecha (Solicitor, Sydney)

In October 2021, Dolce and Gabbana (D&G) sold its nine-piece *Collezione Genesi* non-fungible token (NFT) collection of digital/physical couture (including access to exclusive D&G events) for a record-breaking USD6.1 million. The sale dispelled the perception of NFTs being limited to niche internet culture and demonstrated their potential for use in fashion and the luxury marketplace.

This article explores the opportunities and risks of using NFTs, including the ability to streamline shared ownership of luxury assets, confirm product authenticity, facilitate environmental, social and governance (ESG) transparency and further personalize customer experiences.

What are NFTs?

NFTs are unique tokens stored on a blockchain. These tokens embed smart contracts tied to an asset such as an artwork. These contracts also contain information about the asset such as its ownership, provenance, and how to distribute funds from asset-related transactions.

The non-interchangeable aspect of NFTs allows them to be linked to a specific item, so it's useful for situations where provenance is important, for example luxury goods. Because NFTs operate on the blockchain, users are provided extra certainty since the blockchain acts as a publicly accessible ledger recording an NFT's ownership and transaction history. For a more detailed explanation of blockchain, refer to our article on the [blockchain revolution, smart contracts and financial transactions](#).

Streamlined shared ownership of luxury assets

Luxury goods and high-end fashion, such as collectible classic cars, high-end accessories (watches, jewelry and handbags) and couture, are often purchased for investment purposes and NFTs can facilitate:

- shared ownership of assets that were previously difficult to be easily divided into parts; and
- certainty around ownership and distribution of royalties (such as if an asset was a collaboration between brands), or other forms of income from transactions involving the asset.

For example, in November 2020, DLA Piper's TOKO platform was used to create multiple NFTs of a painting by Chinese artist Wang Xiaobo. The painting was divided into 16 squares, each represented by a single token, and smart contracts were embedded in the tokens to facilitate the distribution of revenue generated from renting out the artwork to the token-holders, and distribution of proceeds if the piece was sold.

Where an NFT links to a physical asset, additional protection under personal property security laws may be required. Similarly, NFTs that allow holders to receive revenue from their token may be considered a financial product and related regulations could apply. For example, the issuer may be required to hold a financial services license and comply with restrictions on representations about the product. These laws vary between jurisdictions and should be considered before issuing NFTs.

Authenticity and ESG considerations

The ability to embed product information in an NFT, such as the product's manufacturer and location, material composition and carbon emissions created during production, have the potential to benefit both brand owners and consumers. For example:

- As NFTs are on the blockchain, the chain of ownership and provenance of the asset are publicly trackable and verifiable. This also makes digital luxury goods





more desirable – before now, there has not been a reliable method of ensuring the authenticity of a digital luxury good.

- Brand owners can demonstrate ESG credentials for their products, and greater transparency over these considerations improves corporate accountability while also helping to substantiate ESG marketing claims.
- Brand owners and designers can track the lifespan of products from production to disposal or recycling, which could aid the design of more sustainable products.
- Brands and labels can launch digital collections of goods to assess demand before proceeding to manufacture physical items and thereby reducing waste and carbon footprint. Recently, luxury e-tailer FarFetch launched [pre-orders for several luxury clothing collections entirely virtually](#).

However, brand owners should also remember that creating NFTs is carbon intensive and could counteract the benefit of incorporating NFTs into a sustainability strategy. Notwithstanding this, brands can potentially mitigate this risk by using proof-of-stake platforms (as opposed to proof-of-work), such as Hedera when creating NFTs. Proof of work blockchains rely on computers solving complex equations to verify transactions, which relies on computational power and is energy intensive. By contrast, proof-of-stake platforms rely on users verifying transactions in return for a transaction fee, which requires less energy.

Improving customer experience

NFTs can also help verify customer identity and personalize client relationships. By identifying customers using NFTs, brand owners can track customer purchase history and style preferences. As NFTs are designed to be moved from platform to platform, this information can be carried across brands and platforms and allow access to information about customers before a first interaction. This would allow more tailored multi-channel marketing and cross-selling.

Where brands are collecting personal information from NFTs, privacy obligations apply and brand owners should consider whether their privacy policies allow collection of this information and if their use of this personal information is consistent with applicable privacy legislation, particularly the GDPR.

Brands and influencers in the spotlight as FTC focuses on civil penalties for deceptive advertising

Heather Angelina Dunn (Partner, San Francisco) and
Carissa L. Bouwer (Associate, Sacramento)

Social media allows brand owners of all sizes to connect with customers in new, innovative ways. Many companies have come to rely heavily on online reviews and endorsements from social media influencers, average customers and celebrities to reach consumers – but those forms of advertising are all facing increased scrutiny. Now, if not managed carefully, this popular form of advertising may lead to new civil penalties.

In mid-October, the Federal Trademark Commission (FTC) sent letters to over 700 advertisers, many of whom are household names, placing them on notice that they could incur significant civil penalties (up to USD43,792 per violation) if they use endorsements or online reviews in a way that is deceptive.

The notices were directed to a wide swath of large companies, top consumer product brands, major advertising agencies, and others, with a comment that “FTC staff is not singling out your company or suggesting that you have engaged in deceptive or unfair conduct.”

The letters identify several practices the FTC has determined to be unfair or deceptive:

- failing to disclose an unexpected material connection with an endorser
- falsely claiming an endorsement by a third party (for example, fake reviews)
- misrepresenting whether an endorser is an actual, current or recent user

- continuing to use an endorsement without good reason to believe the endorser continues to subscribe to the views presented
- misrepresenting that an endorsement represents the experience, views, or opinions of users or purported users
- using an endorsement to make deceptive performance claims
- misrepresenting that the experience of endorsers represents consumers’ typical or ordinary experience

This is not the first time the FTC has trained its focus on influencer marketing practices. In 2017 and 2020, the FTC sent warning letters to brand owners and influencers, indicating both have a responsibility to ensure material connections are disclosed and avoid deceptive advertising. With this latest round of letters, the FTC is again sending the message that it is closely monitoring advertising on social media and other platforms and will take action to stop practices that it views to be deceptive and unfair.

The Penalty Offense Authority

What is different this time is the authority the FTC is relying on and the public nature of its warning. In April 2021, the Supreme Court ruled in *AMG Cap. Mgmt., LLC v FTC* that the FTC could not rely on Section 13(b) of the FTC Act to obtain monetary restitution and disgorgement from companies found to have engaged in unfair or deceptive advertising practices.⁶² In this recent round of letters, the FTC signals its intent to rely instead on the Penalty Offense Authority under 15 U.S.C. §45(m)(1)(B) of the FTC Act to reach defendants’ wallets.

⁶² 141 S.Ct. 1341 (2021).

The Penalty Offense Authority authorizes the FTC to seek civil penalties, even for first time offenses, where:

- the FTC has issued a final cease and desist order following an administrative proceeding (whether or not the party was subject to such cease and desist order);
- as part of that order the FTC has determined that a specific practice is unfair or deceptive and therefore unlawful; and
- a party has engaged in that practice after the order became final with actual knowledge that the practice is unfair or deceptive.

Civil penalty actions are expected

Since the FTC has previously determined in a final cease-and-desist order that each specific practice mentioned above is unfair or deceptive (the first and second prongs under the Penalty Offense Authority), and the FTC's recent letter advised the recipients that the letter "puts your company on notice" (the third prong required under the Penalty Offense Authority), it is expected that the FTC will now take further steps toward seeking civil penalties for deceptive advertising of the

types identified in the letter. In 1976, the Commission launched a similar pilot program under the Penalty Offense Authority. At that time, it also formally notified dozens of businesses about agency orders declaring that specific practices were unlawful, conducted follow-up investigations to determine whether the companies had continued to engage in unfair and deceptive practices, and then brought civil penalty actions.

No statute of limitations

Notably, there is no statute of limitations under the Penalty Offense Authority. Furthermore, the statute provides: "In the case of a violation through continuing failure to comply with a rule or [the statute], each day of continuance of such failure shall be treated as a separate violation In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." For this reason, companies will want to act promptly to review their practices and take steps to ensure their advertising complies with the FTC's requirements.



Retail leadership team

Sector key contacts



Tamar Duvdevani
Partner and Co-Chair, Consumer Goods and Retail Subsectors



Ruth Hoy
Partner and Global Co-Chair, Retail and Fashion Sector
London



Jamila Willis
Partner and Co-Chair, Consumer Goods and Retail Subsectors

Consumer goods, food and retail sector



Noel Haywood
Partner and Global Co-Chair, Consumer Goods, Food and Retail Sector
Birmingham



Stefanie Fogel
Partner and Global Co-Chair, Consumer Goods, Food and Retail Sector
Boston

