LEGAL PERSPECTIVE ON THE DIGITISATION OF THE FASHION SECTOR IN THE CONTEXT OF THE COVID-19 CRISIS

April 30th 2020

The COVID-19 crisis is affecting all the sectors of our economy and, especially, fashion and retailers. In an attempt to combat the economic consequences of the virus, many fashion brands are looking for innovative solutions that will enable them to maintain their turnover.

Some of the most relevant initiatives that companies are implementing in this area are the following:

1. Strengthen online sales channel

The closure of physical stores and the restrictive security measures to be taken once the gradual plan to de-escalate the confinement begins, i.e. stores without fitting rooms, changes in payment methods and strict disinfection of clothing, will mean that the traditional purchasing process through a physical store will be replaced, in most cases, by online shopping.

From a legal point of view, this situation will have several implications.

These include the existence of a contract concluded at a distance and by electronic means, defined by the Law on the Information Society and Electronic Commerce (LISEC) as one in which the offer and acceptance are transmitted by electronic means. These contracts shall also be deemed to be concluded at the place where the consumer who makes the purchase has their habitual residence. In addition, the online retailer must comply with all the requirements laid down for this case in the General Law for the Defence of Consumers and Users (GLDCU), particularly with regard to the guarantees of the products, the withdrawal periods and the information which must be offered to the consumer before making the purchase.

To conclude, the retailer, as controller of the data, must respect and comply with all the requirements of the General Data Protection Regulation (GDPR), which will involve, among other measures, providing the interested party with all the information relating to the processing of the data provided during the purchase process. In addition, the data controller must obtain the data subject's consent, if necessary, in the event that it is intended to send commercial communications that exceed those covered by the legitimate interest set out in Article 21.2 of the LISEC and Article 6.1.f) of the GDPR.

2. Multi-brand platforms

As an alternative to the traditional model, many brands have decided to join forces by making their websites available to third parties, in many cases to competitive brands, so that they can offer and sell their products and, in return for the use made of the infrastructure provided, the website owner would obtain a percentage of their sales, while the new brands would act as a claim to increase the sales of the products on the website itself. This model has been followed by some platforms such as Douglas that have decided to increase the number of brands offered through their Marketplace and by Spanish reference brands such as El Ganso.

In seeking to regularize the legal relationship mentioned above, it will be necessary to conclude a contract for the provision of services which will set out the terms and conditions under which the new brands interested in accessing the platform will make use of it and the compensation they will have to pay for such use. In many cases, as we have explained previously, this compensation will consist of a percentage of the sales achieved through the website by the new brand.

In addition, with regard to data protection regulations, it will be possible to opt between signing a contract as joint controllers of the personal data of the data subjects who register on the website in order to purchase products or signing a data processing agreement. In the first case, both the owner of the platform and the new brand establish, jointly, the purposes and means of processing the data of the data subjects who access the platform. The second case implies that the owner of the platform acts under the orders of the new brand, meaning that it will only process the data for the purposes and through the means specified by the new brand. In any case, the parties must strictly comply with the requirements established by the GDPR for each type of contract (Articles 26 and 28 GDPR).

With regard to the use of intangibles, the host platform must be allowed to use the commercial name or registered trademark of the new brand on its platform and even to use it in commercial communications with its customers. For this purpose, a specific clause must be included in the contract for the provision of services or an Appendix must be included in the contract that provides for all the uses of the registered trademarks allowed to the owner of the host platform.

Finally, in order to be able to sell products online it is essential to show an image of them, especially if we are talking about clothing. The customer needs to appreciate the details of the product in order to make an informed purchasing decision. These images will be in any case protected by the Law on Intellectual Property (LIP) which includes the existence of photographic works and mere photographs depending on the creative altitude appreciated in each case. Consequently, making these images available to the owner of the host platform would entail the transfer of the intellectual property rights over them, at least, for reproduction and public communication through the host platform.

3. Change in advertising models

It has been some time since physical shop windows and TV commercials stopped being so relevant to pave the way for the promotion of fashion items through social networks by means of so-called influencers. It is likely that this crisis will make fashion brands take another step forward and opt for innovative marketing solutions, such as the use of video on demand platforms, with integrated tools, as Looklive currently does, allowing the user to locate, buy or save in the shopping basket, while watching series or movies, the clothes worn by their favorite stars. In this way, the customer can be offered a more complete user experience.

For the implementation of this model it will be necessary to raise a negotiation between the brands that intend to advertise through films and series, video on demand platforms and tools that act as intermediaries and that are necessary to offer such functionality.

Nevertheless, in this scenario, as in the case of influencers, the client must be informed that the content being shown is for advertising purposes and must respect the provisions of the General Audiovisual Communication Act (GACA) regarding the regime of Product Placement. All of this is done in order to avoid incurring in a case of illicit advertising of the General Law of Advertising (GLA), which may, in turn, imply a breach of the Law of Unfair Competition (LUC), given that illicit advertising is qualified as unfair.

Additionally, it is necessary to emphasize that the use of an unfair practice with consumers or users will be considered an infringement of the GLDCU, with the corresponding administrative fine that this may entail.

Given the above, when using new commercial techniques, a study of the legal risks and the requirements to be complied with must necessarily be carried out to ensure that all the rules that may be affected are observed and complied with.

4. The resurgence of online outlets.

One of the most serious problems being faced by both luxury brands and fast fashion companies as a result of the crisis caused by the COVID-19 is the accumulation of stock or inventory of the items they had planned to sell during the months of confinement. This has caused companies to return to using sales models known as outlets. Whilst it may be the brand itself that sells its products at outlet prices, as may be the case with Mango Outlet, there are companies such as Privalia, Showroomprivé and Zalando Privé, to mention just a few examples, that specialise in multi-brand outlets, not only for clothing but also for furniture, beauty products and even technology.

In order to sell the stock through the so-called outlets, different promotional techniques provided for by the Law on the Regulation of Retail Trade (LRRT) may be used, specifically, sales of leftover stock and sales in liquidation. The LRRT does not contain any reference to the figure of the outlet, so it is very important that the buyer can identify, in each case, what type of promotion is being applied to it. In addition, the seller must comply with the requirements that the LRRT establishes for each of the types of promotion envisaged. In general terms, the duration of the promotion and the reduction in price must be indicated, with the exception of those articles being offered on sale for the first time. We define below, very briefly, each of the promotions that could be applied to reduce the stock of fashion companies:

Sales of damaged stock at a discount: are those in which the products have decreased in value due to deterioration, damage, disuse or obsolescence. We understand that the products that come from the remaining stock of past seasons are outdated, ie, do not conform to new trends and, therefore, proceeds to its sale as leftover stock. The legislator establishes a limit to the sale of damaged stock at a discount: only those retailers who have disposed of the products they intend to sell six months before the date of the promotion will be able to do so. However, the law provides for an exception to the limit and decrees that it does not apply in cases where the establishment is specifically dedicated to this sales system, i.e. the sale of damaged stock at a discount. An outlet could be considered to be specifically dedicated to the sale of leftover stock if its economic activity is focused on the sale of clothing from other seasons that have become "obsolete" and would fall within the exception to the limit of the rule.

Clearance sales: these sales are exceptional and their purpose is to extinguish stocks of products. They can be carried out if any of the following circumstances apply: (i) execution of a judicial or administrative decision, (ii) total or partial cessation of the trade activity, (iii) modification of the branch or orientation of the economic activity, (iv) change of the commercial premises or substantial works in the same and (v) existence of a case of force majeure that represents a serious obstacle to the normal development of the commercial activity. Of all the circumstances envisaged in the LRRT, the one that applies as a result of the pandemic produced by COVID-19 is the existence of a force majeure that has

prevented the normal sale of the products that are intended to be sold in liquidation. This promotion will be subject to certain requirements: the clearance sale must cease once the force majeure ceases, it will be carried out for a maximum period of three months and the force majeure reason for the clearance sale must be indicated. Furthermore, as in the previous case, the legislator establishes a limitation: products that were not previously part of the seller's stock or those acquired to be sold for this purpose cannot be included in the sale in liquidation. The latter leads us to conclude that only those brands that have their own outlets or specialised outlets may carry out clearance sales because of COVID-19 with respect to stock that they had previously held and that they had not acquired for that purpose.

While it is true that fashion sector is experiencing one of its worst economic crises, it is also true that the adoption of measures such as those referred to in this newsletter will allow to mitigate, to some extent, the losses and will even create new business opportunities. If anything characterises the fashion sector, both nationally and internationally, it is its innovative nature. So there is no doubt that, now more than ever, the survival of brands will depend on their ability to know how to reinvent themselves in a hostile environment.

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