Cancel culture: how the creative industries should ride out the storm

Cancel culture is upon us. This is what we are currently being told by British and French mass media, who have finally caught up with the content of the latest, and first non-fictional, book ever published by acclaimed, yet heavily criticised, American author **Bret Easton Ellis**, **"White"**. The polemic rages on both sides of the pond, ignited by more than 150 public figures signing a **controversial letter denouncing cancel culture**. So, what's going on? What is "cancel culture"? Why should you pay attention to, and be cautious about it, as a creative

professional? Is this even a thing in Europe and, in particular, in France and the United Kingdom? If so, how should you position yourself, as a creative, on, and about, cancel culture?

1. What is it? Where does it come from?

Following the 1990s' culture wars, which sprung up in the United States of America as a way of denouncing and forbidding contemporary art exhibitions and other medium of creative expression judged by those instigating such culture wars as indecent and obscene, "cancel culture" has taken off in the early 2000s on social media, and has since become a cultural phenomenon in the USA and Canada – especially in the last five years or so – pervading every aspect of Northern America's mass media.

"Cancel culture" refers to the popular desire, and practice, of withdrawing support for (i.e. cancelling) public figures, communities or corporations, after they have done or said something considered objectionable or offensive. "Cancel culture" is generally performed on social media, in the form of group online shaming.

Therefore, as a result of something said or done, which triggered negative reactions and emotions such as anger, disgust, annoyance and hate from some members of the public, a natural person or legal entity or group of natural persons ends up being publicly shamed and humiliated, on internet, via social media platforms (such as Twitter, Facebook and Instagram) and/or more localised media (such as email groups). Online shaming takes many forms, including call-outs, cancellation or cancel culture, doxing, negative reviews, and revenge porn.

While the culture wars of the 1990s were driven by right-wing religious and conservative individuals in the US (triggered by "hot-button" defining issues such as abortion, gun politics, separation of church and state, privacy, recreational drug use, homosexuality), the cancel culture of our 21st century is actually a left-leaning supposedly "progressive" identity movement which has taken hold in recent years due to the conversations prompted by #MeToo and other movements that demand greater accountability from public figures. According to the website Merriam-Webster, "*the term has been credited to black users of Twitter, where it has been used as a hashtag. As troubling information comes to light regarding celebrities who were once popular, such as Bill Cosby, Michael Jackson, Roseanne Barr and Louis C.K. – so come calls to cancel such figures*".

Yep. Check out your Twitter feed by typing in the search bar the hashtags #cancelled, #cancel or #cancel[*then name of the individual, company, organisation you think might be cancelled*], and you will be able to review the top current cancellation campaigns and movements launched against Netflix, British actress Millie Bobby Brown, twitter user @GoatPancakes_, etc.

So under the guise of defending laudable causes such as the recognition of the LGBTQ community and fighting against racism, sexism, sexual assault, homophobia, transphobia, etc., some communities of online righteous vigilante use violent methods, such as cancellation, in order to administer a virtual punishment to those who are on their radar.

This call-out and cancel culture is becoming so pervasive and effective that people lose their jobs over a tweet, some upsetting jokes or inappropriate remarks.

The Roseanne Barr's story is the ultimate cancellation example, since her ABC show, "Roseanne", was terminated with immediate effect, after Ms Barr posted a tweet about Valerie Jarrett, an African-American woman who was a senior advisor to Barack Obama throughout his presidency and considered one of his most influential aides. R. Barr wrote, in her litigious tweet, if the "*muslim brotherhood & planet of the apes had a baby = vj*". Whilst Ms Barr's remark was undoubtedly in extreme bad taste, it is fair to ask whether her tweet – which could have easily been deleted from Twitter to remove such kick well below the belt dealt to Ms Jarrett – justified wrecking Ms Barr's long-lasting entertainment and broadcasting career in one instant, permanently and for eternity.

To conclude, social media channels have become the platforms of virtual trials, where justice (i.e. cancellation) is administered in an expeditious manner, with no possibility of dialogue, forgiveness and/or statute of limitation. This arbitrary mass justice movement is not only cruel, but tends to put everything under the same umbrella, indiscriminately: so a person who cracked a sexist joke on Twitter would become vilified and even “cancelled”, in the same manner than an individual effectively sentenced for sexual assault by an actual court of justice.

How did we get to this point? Why does a growing number of Northern Americans feel the uncontrollable need to call-out, cancel and violently pillory some of their public figures, corporations and communities?

A pertinent analysis, although skewed by a European perspective, is that made by French sociologist Nathalie Heinich in French newspaper Le Monde and explained on the podcast “Histoire d’Amériques”, dedicated to Bret Easton Ellis’ “White”.

According to Ms Heinich, there is no legal limitation to freedom of speech – a personal liberty which is enshrined in the first amendment to the US constitution, in the USA. As a consequence, the US congress cannot adopt laws which may limit or curb freedom of expression, as is set out in this first amendment. Therefore, according to N. Heinich, since the US authorities cannot forbid speech and freedom of expression, it is down to US citizens to take on the role of vigilante and organise spectacular information and public campaigns, in order to request the prohibition of such expression and such speech.

This analysis made by this French sociologist needs to be nuanced: whilst it is true that no US statute or law may curtail freedom of speech in the USA, there is consistent and ample body of case law and common law, which rule on the categories of speech that are given lesser or no protection by the first amendment of the Bill of rights. Those exceptions include:

- incitement (i.e. the advocacy of the use of force when it is directed to inciting or producing imminent lawless action, Brandenburg v Ohio (1969));
- incitement to suicide (in 2017, a juvenile court in Massachusetts, USA, ruled that repeatedly encouraging someone to complete suicide was not protected by the first amendment);
- false statement of fact and defamation (Gertz v Robert Welch, Inc. (1974));
- obscenity (Miller v California (1973) established the Miller test whereby speech is unprotected if "*the average person, applying contemporary community standards, would find that the subject or work in question, taken as a whole, appeals to the prurient interest*", and "*the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law*", and "*the work, taken as a whole, lacks serious literary, artistic, political or scientific value*"), and
- child pornography (New York v. Ferber (1982) which ruled that if speech or expression is classified under the child pornography exception at all, it becomes unprotected).

Therefore, there are some common law exceptions to the first amendment consecrating freedom of speech in the USA, but they are few and far between, and they need to be hotly, and expensively, debated in court, probably months or years after the triggering content was made available in the public space in the first instance, before being found, by a court, unprotected by freedom of speech, in favour of higher public policy interests.

As a result, many American and Canadian citizens resort to violent tactics, in order to request the immediate, swiftly-enforced and free of legal fees and court fees, prohibition of controversial art exhibitions, entertainment shows, movies, jokes, remarks, etc. first through the 1990s culture wars, and now through the 21st century’s cancel culture.

This is paradoxical since cancel culture and call-out culture are some of the tools used to advocate for worthy causes such as fighting against racism, sexism, sexual predation and aggression, promoting LGBTQ rights. However, the methods used, through cancel culture and online shaming, to achieve those laudable goals, are very violent and totalitarian, all taking place in the virtual realm of social media, but with very serious and long-lasting “real-life” consequences such as loss of employment, loss of reputation, self-harm and sometimes, suicide.

2. Can cancel culture enter through our European borders, in particular in France and the United Kingdom?

I hate to break it to you, but cancel culture is already upon us in France and the United Kingdom. We are in a globalised world, all of us are online and check the media and social media from all over the world, thanks to the internet. So this Northern American trend has, of course, reached our European shores.

It is worth noting that the recognition of “cancel culture”, and the realisation that is has become a sizable part of online culture, took place in the United Kingdom (“**UK**”) at the beginning of the year 2020, when British television presenter and socialite Caroline Flack committed suicide allegedly because she was vilified on social media and by British tabloids, further to being sacked from British reality show “Love Island”. This UK epiphany about “cancel culture” arrived earlier than elsewhere in Europe, probably due to the shared language, and culture, that the British have with Americans and Canadians.

France is only now getting familiar with this new concept of “cancel culture”, further to hearing about the “letter on justice and open debate”, drafted, and signed, in July 2020, by more than 150 global intellectuals and authors (among whom Margaret Atwood, Wynton Marsalis, Noam Chomsky, J.K. Rowling and Salman Rushdie), and denouncing the excesses of online shaming and cancel culture. France is currently going through a phase of introspection, asking itself whether “la culture de l’annulation” could take off on its Gallic shores. And it is.

Proof is, I was interviewed for the 8.00pm TV News of France TV on Sunday 20 September 2020, to discuss the attempts made by no less than the new very controversial French minister of the interior, Gerald Darmanin – who was himself under criminal investigation for sexual coercion, harassment and misconduct in 2009, and then again between 2014 and 2017 – to eradicate from all SVoD services platforms such as YouTube, Spotify, Deezer, Dailymotion, the release of the first music album created by Franco-Senegalese 28 years’ old rapper, Freeze Corleone, “La Menace Fantôme” (“**LMF**”). On which grounds is such cancellation requested? Provoking racial hatred and racial slander, no less.

Artist Freeze Corleone is an uncompromising rapper, abundantly peppering his raps with the French translations of “nigger” (“négro”) and “bitches” (“pétasses”) in the purest Northern American rap tradition (F. Corleone lived in Montreal, Canada, before settling down in Dakar, Senegal). He also obscurely refers to “Adolf”, “Goebbels”, “Ben Laden” and “Sion” in his rather enigmatic LMF lyrics. However, qualifying his body of work in LMF as racial slander and/or provoking racial hatred is a stretch. If you do not like it, because this content triggers you, just move on and don’t listen to it.

Freedom of speech is enshrined in the French declaration of rights of the human being and citizen, dated 1789. Article 11 of such declaration provides that the “*free communication of thoughts and opinions is one of the most precious rights of the human being: any Citizen may therefore speak, write, print freely, except where he or she has to answer for the abuse of such freedom in specific cases provided by law*”.

And such specific cases where freedom of speech may be curtailed, under French statutory law, include:

- Law dated 1881 on the freedom of the press which, while recognising freedom of speech in all publication formats, provides for four criminally-reprehensible exceptions, which are insults, defamation and slander, incentivising the perpetration of criminal offences, if it is followed by acts, as well as gross indecency;
- Law dated 1972 against opinions provoking racial hatred,

which – like the four above-mentioned exceptions, is a criminal offense provided for in the French criminal code;

- Law dated 1990 against revisionist opinions, which is also a criminal offense in order to penalise those who contest the materiality and factuality of the atrocities committed by the Nazis on minorities, such as Jews, homosexuals and gypsies before and during world war two, and
- Law dated July 2019 against hateful content on internet, which provisions (requiring to remove all terrorist, pedopornographic, hateful and pornographic content from any website within 24 hours) were almost completely censored by the French constitutional council as a disproportionate infringement to freedom of speech, before entering into force in its expunged finalised version later on in 2019.

Therefore, according to French sociologist Nathalie Heinich, France does not need “cancel culture” because freedom of speech is already strictly corseted by French statutory laws. By this, she means that French individuals won’t have to take to social media platforms, in order to “cancel” whoever is misbehaving, since the all-pervading French nanny state will strike the first blow to the “offender”, in the same manner than French minister of justice G. Darmanin unilaterally requested all cultural streaming and video platforms, from YouTube to Spotify and Deezer, as well as all French radio and TV channels, to immediately and permanently remove the songs of Freeze Corleone’s LMF, further to opening a criminal inquiry against the latter, for allegedly committing racial slander and/or provoking racial hatred through his lyrics.

Is this above-mentioned French regal method a better tool than having the populace publicly decrying and shaming an individual who “steps out of line”, by using “cancel culture”? By no means, because, at the end of the day, it’s our collective freedom of speech which is being breached and infringed, on a whim. And that is unacceptable, in a democracy.

On the other side of the channel, the legal framework around freedom of speech is no panacea either. Freedom of expression is usually ruled through common law, in the UK. However, in 1998, the UK transposed the provisions of the European Convention on human rights, which article 10 provides for the guarantee of freedom of expression, into domestic law, by way of its Human rights act 1998.

Not only is freedom of expression tightly delineated, in article 12 (Freedom of expression) of the Human rights act 1998, but there is a broad sweep of exceptions to it, under UK common and statutory law. In particular, the following common law and statutory offences, narrowly limit freedom of speech in the UK:

- threatening, abusive or insulting words or behaviour intending or likely to cause harassment, alarm or distress, or cause a breach of the peace (which has been used to prohibit racist speech targeted at individuals);
- sending any letter or article which is indecent or grossly offensive with an intent to cause distress or anxiety (which has been used to prohibit speech of a racist or anti-religious nature, as well as some posts on social networks), governed by the Malicious communications act 1988 and the Communications act 2003;

- incitement (i.e. the encouragement to another person to commit a crime);
- incitement to racial hatred;
- incitement to religious hatred;
- incitement to terrorism, including encouragement of terrorism and dissemination of terrorist publications;
- glorifying terrorism;
- collection or possession of a document or record containing information likely to be of use to a terrorist;
- treason including advocating for the abolition of the monarchy or compassing or imagining the death of the monarch;
- obscenity;
- indecency including corruption of public morals and outraging public decency;
- defamation and loss of reputation, which legal framework is set out in the Defamation act 2013;
- restrictions on court reporting including names of victims and evidence and prejudicing or interfering with court proceedings;
- prohibition of post-trial interviews with jurors, and
- harassment.

In Europe, and in particular in France and the UK, there is already a tight leash on freedom of speech, whether at common law or statutory law. However, "cancel culture" is nonetheless permeating our European online shores, following the trend started in Northern America. As a result, it is a tough time to be a free and creative European citizen, let alone a public figure or corporation, in this 21st century Europe. Indeed, not only could you have trouble with the law, if you were to make triggering or contentious comments or jokes or lyrics in the public domain, but you could also be shot down in flames by the online community, on social media, for your speech and expression.

3. How to ride the storm of "cancel culture", while remaining consistently creative and productive?

In the above-mentioned cultural and legal context, it is crucial for creative professionals to think long and hard before posting, broadcasting, speaking, and even behaving.

As a result, book publishers use the services of "sensitivity readers", before releasing a new work, whereby such consultants read books to be published, in order to look for, and find out, any clichés, stereotypes, scenes, formulations that may offend a part of the readership. This use of sensitivity readers is becoming more and more systematic, especially when the author speaks about themes which he, or she, does not personally master.

For example, an heterosexual author who describes a gay character, or a white author who describes Mexicans, in his or her new book, will most definitely have a sensitivity consultant review his or her output before publication. Almost inevitably, such sensitivity reader will request that some changes be made to the written content, so as to avoid a boycott of the published book, or cancellation of the author and book, altogether.

Whilst some of the classics of global literature were perceived as very shocking when they were first released (think “Lolita” from Vladimir Nabokov about the obsession of a middle-aged literature professor with a 12 year’s old girl, which today would probably be described as a glorification of pedophilia), they would probably never see the light of day, if they were to be published in our era.

Therefore, today’s cultural sensitivities push towards the publication and broadcasting, of written, audio and visual creative content which is bland, right-thinking, watered-down, in which the author only refers to what he or she knows, in the most neutral way possible.

This need to use “auto-censorship” in any content a creator wishes to publish is compounded by the fact that today, consumers of creative content do not differentiate between the author of the work, and his or her creative output. There is no separation between the author and content creator, and his or her body of work and/or fictional characters. With Millenials and US universities becoming obsessed with identity questions (i.e. the identity or feeling of belonging to a group, such as the gay community, the black community, etc.), it is the person who writes the book, or song, or writes or directs a film, who is now also important, maybe even more important than the work itself.

As a result, any content creator who writes or sings or produces an audiovisual work about a community other than his or her own, may be accused of cultural appropriation (i.e. the adoption of an element or elements of one culture or identity by members of another culture or identity) and even become the object of victimhood culture (i.e. a term coined by sociologists Bradley Campbell and Jason Manning, in their 2018 book “The rise of victimhood culture: microaggressions, safe spaces and the new culture wars”, to describe the attitude whereby the victims publicize microaggressions to call attention to what they see as the deviant behaviour of the offenders, thereby calling attention to their own victimization, lowering the offender’s moral status and raising their own moral status).

In this climate, it is therefore easier to publish or broadcast creative content if you belong to a minority (by being, for example, homosexual, black, brown, or a female), while white heterosexual male creators have definitely become disadvantaged, and more susceptible to being targets of “cancel culture”.

To conclude, a lot of prior thoughts and research and preparation and planning need to be put into the creation, and then broadcasting and publication, of any creative content today, not only with respect to such output, but also in relation to the identity, and positioning, of his or her author. If this conscious effort of adhering to right-thinking and bland ideologies is appropriately and astutely done, you and your creative output may successfully ride the storm of, not only French and UK legal limitations to your freedom of expression, but also the nasty impact of cancel culture and online shaming, hence maximising your chances that your creative work generates a commercial success.

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How to fight abuses of dominant position done by way of IP claims & denigration?

When a competitor which used to reign as a warlord in a particular market becomes challenged by a new player, this competitor may use tactics such as systematic and heavy-handed enforcement of alleged intellectual property rights, as well as aggressive smearing and denigration campaigns, to deter this new entrant. The situation may soon become untenable for the new kid on the block, as potential customers are scared away and dissuaded by the blows forcefully and repeatedly inflicted upon by the dominant player. What to do if you and your business are targeted by such hyper-aggressive competitor? How can you defend yourself against these abuses of dominant position?

The right balance between intellectual property rights (“**IPRs**”) and free competition is very difficult to strike, especially in markets and jurisdictions which are hyper protective of IPRs of right owners, like in Europe. When the right owner is manipulative, hyper-aggressive and unprepared to share his or her turf, they may use the so-called enforcement of IPRs to drive any new entrants in their specific market away; thus creating many abuses of dominant position.

1. What’s going on?

Nowhere as seriously have I witnessed such anti-competitive behaviour from a competitor occur, than in the automotive sector.

I was instructed to attend a trade show in the South of France, last year in September 2019, in order to assist a Chinese automotive company and its Spanish distributor on their stand, as they were systematically and repetitively subjected to court-ordered police raids and interim seizures, on any European trade fair that they had attended, and were attending, since the launch of their new automotive business two years’ prior.

As you might have guessed, it is their competitor, a German company in a monopolistic situation on that particular segment of the automotive sector, which was behind this constant derailing of each one of my clients’ trade exhibitions in Europe.

None of my clients’ trade shows in the USA were perturbed by these court-ordered seizures and police raids and court orders to immediately close down their stand on the tradeshows, based on the allegations of IPR counterfeiting made by such German competitor: no US court was accepting to grant the German competitor such overarching measures to stop free competition on a pretence of infringement of IPRs.

However, each one of the European courts to which such over-the-top interim and immediate measures were requested by such German competitor, in the context of European trade fairs held in Germany, Spain, France and Monaco, happily obliged and granted such court orders. As a result, these interim measures had forced my clients to close down their stand on each of these European trade shows prematurely, because my clients were deprived of their products and prototypes taken away during those police-led raids and seizures on their stands, as well as forced sales and seizures of their prototypes and products, ordered by some of these European courts.

Not only was the German competitor using its monopolistic status to manipulate European courts into driving its Spanish and Chinese competitors (my clients) away, alleging some IPRs infringements right and left, but it also conducted a vast, well-oiled and well-orchestrated denigration and smearing campaign against my clients, through the use of private eyes in various European locations, as well as through listening and taping the phone calls and text messages exchanged by my clients on their mobile phones. As a result, the German monopolist was able to always contact, before my clients, all the trade fair organisers, potential distributors and other third parties and business partners interested in my clients' products, in order to denigrate my clients as "Chinese counterfeiters" who manufactured "dangerous and unfit automotive sea products" (sic). Consequently, European trade show organisers, potential European distributors and potential European end-consumers of my Chinese and Spanish clients were spooked, and took an enormous amount of convincing and cajoling, in order to establish, or re-establish, a rapport with my two clients.

Thanks to my intervention, during two of my clients' trade fairs in Cannes, France, and Monaco, in September 2019, the humiliating option of having to close down their stand before the end of these trade shows was spared, since I efficiently liaised with the bailiff instructed by the French lawyers of the German competitor, in order to salvage some of my clients' prototypes from a forced sale imposed by the Paris "tribunal de grande instance" on some quaint and unfounded allegations of patent and design infringement made by this German competitor.

I had seen some prior abuses of dominant position, in particular in the fashion sector and the fashion textile trade shows' segment, perpetrated by luxury conglomerates and the largest fashion textile trade fair in the world, in the past. However, this first-hand experience of abuse of IPRs, abuse of dominant position and smearing and denigration campaigns against my automotive clients was on another level.

2. What can you do to protect yourself against some abuses of IPRs and of dominant position perpetrated by a competitor?

The enforcement of IPRs across the European Union ("**EU**") has been harmonised, to some extent, by the Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (the "**Enforcement directive**"). However, nothing is set out, in the 21 articles of the Enforcement directive about any restrictions on the enforcement of IPRs due to a breach of competition law by the IPRs owner.

Consequently, and since France is extremely protective of IPRs owners, there are no restrictions on how IPRs may be enforced by right owners against third parties, in the French Intellectual property code; provided that any mandatory prior depositing and registration procedures (which are applicable to industrial IPRs such as design rights, trademarks and patents) have been complied with.

Under English law, there are some key restrictions on the ability to enforce IPRs, which include:

- the risk of incurring liability for groundless threats of IPRs infringements, the law of which has been significantly reformed in the United Kingdom (UK) by the Intellectual Property (Unjustified Threats) Act 2017, and
- specific defences to infringement and restrictions on available remedies for each IPR.

Therefore, if your dominant competitor raises some alleged IPRs infringement claims against you and your business in the UK, then you may make the most of these legal tools offered to you, from the "actionable threats" defense, to the "unjustified threats" defense, via UK civil court proceedings.

When an IPRs owner abuses its dominant position, it starts with obtaining some interim IPRs measures, such as the seizures and force sales on my clients' stands in their trade show, against its competitors. Then, the dominant abuser lodges some IPRs infringement proceedings in front of the competent civil – and sometimes criminal – courts, against its smaller competitors, to obtain some damages for the alleged acts of IPRs infringements.

In France, the "*Tribunaux judiciaires*" (district courts) have exclusive jurisdiction in hearing cases concerning copyright, national trademarks and national design rights; while the Paris Tribunal judiciaire has exclusive jurisdiction in hearing cases concerning patents and EU rights (i.e. EU trademark and design rights). For example, after the Cannes yachting trade show in September 2019, the German monopolist lodged a fully-fledged patent infringement lawsuit against the Spanish distributor of the Chinese manufacturer, with the

Paris Tribunal judiciaire, within 30 days from the day of the seizure and forced sale which took place during the Cannes trade fair. Copyright holders can also take action in the French criminal courts for counterfeiting.

In the UK, IPRs are primarily enforced via civil court proceedings, and the English High Court is the most common venue. IPRs proceedings in the English High Court are heard in the Chancery division, and different specialist lists are available:

- the Intellectual Property Enterprise Court ("**IPEC**") can hear any IPRs claim of relatively low complexity and value: the IPEC is suitable for claims which can be tried in two days or less, damages are capped at GBP500,000 and recoverable legal costs are subject to a cap of GBP50,000;
- the Patent Court can hear claims relating to patents, registered designs, semiconductor rights and plant varieties. There is no cap on damages or recoverable legal costs; and
- all other IPRs claims can be heard in the Intellectual Property List of the Chancery Division, of which the Patent Court and IPEC are sub-lists.

The problem, though, is that aside from the above-mentioned "actionable threats" and "unjustified threats" defenses, which can only be invoked in front of UK courts, neither the French Tribunaux judiciaires, nor the English High Court and its specialist lists, can review and decide on any anti-competitive behaviour and abuse of dominant position claims raised, as a counter-offensive, by the new entrant in a particular industrial sector, which is being subjected to IPRs infringement claims in front of these IP courts by the dominant player in that particular industry.

So, to continue with the example of my Spanish and Chinese clients, the Spanish distributor which is now the defendant in the patent infringement lawsuit lodged by the German monopolist in the automotive sector (the claimant), with the Paris Tribunal judiciaire, cannot make some counterclaims of abuse of dominant position and anti-competitive behaviour, as a counter-offensive, within the scope of that lawsuit with the Paris Tribunal judiciaire. Why? Because the Paris Tribunal judiciaire is not competent to review such claims relating to breaches of competition law: like the other French tribunaux judiciaires, it is only competent to review claims in relation to breaches of IPRs and laws on intellectual property.

So what is a quashed new entrant in this industrial sector to do then, under these circumstances? Well, the first priority is to find and retain expert and very aggressive legal counsel who will defend it against the wrongful allegations of IPRs infringement made by the monopolistic competitor. Such lawyer specialised in intellectual property matters shall also file some counterclaims against such abusive competitor, on behalf of its client, for like-for-like breaches of its client's IPRs, invoking free riding and unfair competition (if in front of French courts) or passing off (if in front of UK courts).

The second priority, for the new entrant being wrongfully sued for alleged IPRs infringement by its dominant competitor, is to simultaneously file a claim against that abusive competitor with the national authorities responsible for reviewing and investigating the competitive effects of conduct related to the exercise of IPRs.

In France, the French Competition Authority ("**FCA**") is the independent administrative body that specialises in analysing and regulating the operation of competition on markets to protect the economic public order. Its goal is to supervise the free play of competition in France. It can issue an opinion on the investigations it carries out, which can be subject to appeal only to the Paris Court of appeal. The rulings of the Court of appeal can also be the subject of recourse to the French Supreme court (*"cour de cassation"*). However, any judicial action relating to an infringement concerning the application of competition law can be taken before the Marseilles, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes Commercial tribunals on the first instance jurisdictions.

Therefore, our Spanish and Chinese clients should not only fight the patent infringement allegations lodged by their German dominant competitor in front of the Paris Tribunal judiciaire, but also file some claims against that German competitor with either the FCA, or the Paris Commercial tribunal, for abuse of dominant position and anti-competitive behaviour. The claimants will try to obtain a judgment against these anti-competitive practices, as well as some paid damages for the prejudice suffered.

In the UK, the competition authority is the Competition and Markets Authority ("**CMA**"), which reviews and investigates compliance with competition law. The CMA's remit includes the review and control of the exercise of IPRs insofar as they affect competition. The Competition Appeal Tribunal ("**CAT**") is a specialist competition tribunal and hears appeals against the decisions of the CMA. An appeal from the CAT can be made to the Court of Appeal. Follow-on and standalone claims for competition law damages can be raised in the High court and in the CAT.

As you might have inferred from the above, the new entrant who is subjected to these various IPRs infringement claims by the abusive and dominant competitor, better have very deep pockets and unlimited wells of patience and resilience, in order to not only fight off an IPRs infringement lawsuit against its monopolistic competitor, but also drive through to completion some well-evidenced abuse of dominant position and anti-competitive behaviour claims in front of the competent competition authorities or courts, in either France or the UK.

It may all be worth it in the long term, though, as the recent high-profile cases dealing with the intersection of competition law and IPRs detailed below attest.

In 2014, the FCA ruled against Nespresso, the market leader for machines and capsules. Nespresso linked the purchase of its capsules with that of its coffee machines, thereby excluding manufacturers of competing capsules. Such exclusionary practices were reported by its competitors DEMB and Ethical Coffee to the FCA, as abuse of dominant position. In the decision issued by the FCA dated 4 September 2014, Nespresso was required to make several commitments intended to remove the obstacles to the entry and development of other manufacturers of capsules that would work with the brands' coffee machines.

In 2016, the CMA fined GSK and two other pharmaceutical companies (the generic companies) in relation to anticompetitive patent settlement agreements. The CMA also found that GSK abused its dominant position in the UK market, by seeking to delay the generic companies' entry into the market.

3. What can you do to protect yourself against some the acts of denigration and smearing perpetrated by a competitor?

A new form of abusive conduct has been identified, namely the practice of dominant companies excluding or reducing competition from competitors, by identifying exactly what non-price parameters are important for competition, and setting up some strategic campaigns to influence the purchasing behaviour of customers, typically by portraying competing products or services as unsafe and/or inefficient or of significantly lower quality.

These practices are usually referred to as “denigration” and “smearing campaigns”. Denigration means to criticize a competitor’s products or services in a derogatory manner, ultimately with a view to influencing customers purchasing patterns.

While such practices are usually dealt with under the unfair marketing rules in national legislations, some very serious cases found their way into the competition law arena.

Indeed, in several cases, the denigrating conduct has been part of dominant companies’ communication strategies with the clear object of disseminating information to customers about a competitor in order to create an air of uncertainty and/or doubt regarding either the competitor’s ability to carry out certain activities or putting a question mark on the quality, safety or efficacy of their products and services.

Denigrating conduct is most often seen in the form of dissemination of negative information based on false or misleading assertions in regard to competing products with the intention of having an impact on customers’ purchasing decisions.

Denigration of competitors’ products have long-lasting effects in the market because the unjustified doubts or fears can only be overcome with a significant effort by the target company to (re)educate and (dis)prove the denigrating statements in front of end-customers, distributors, etc.

Whilst at the European level, the European Commission has not yet had the opportunity to take a decision on a dominant company denigrating competitor products, there is considerable body of law at national level under article 102 TFEU, in particular in France.

The French cases have covered not only the pharmaceutical sector, but also the telecoms, electricity and pay-TV industries. Common to all these cases is that the dominant player has attempted to hinder market entry and product switch through denigrating competitor products in a number of different ways. Typically, the dominant company conducted a consistent, widespread strategy of misinformation to people who took or influenced purchasing decisions.

For example, in the matter with my Chinese and Spanish clients, their German dominant competitor would spread the word, before each trade show, that they had been sentenced to paying some counterfeiting damages to such German competitor, by a German court, and that their China-made sea scooters were of inferior quality and breaking all the time. This false information was diffused to the trade fair organisers, by the German competitor, in order to push the trade fairs to refuse access to their show to my clients, who were branded “counterfeiters” by their German competitor. But this denigration was also done with each one of the European potential distributors my clients, with threats made by the German competitor that it would stop trading with the distributor if the latter started any business with the Chinese manufacturer and its Spanish representative.

In France, the FCA has thus in its more than 10 denigration cases consistently held that denigration of competitors or their products, does not constitute competition on the merits and as as result, denigration can constitute an abuse of dominant position in certain circumstances. In French case law, for denigration to infringe article 102 TFEU, four clear elements have to be proven:

- there is denigration of a competitor’s product with a view to obtaining a commercial advantage;
- a link between the dominance and the practice of denigration has to be established;
- it has to be verified whether the statements put forward in the market by the dominant company are based on objective findings or assertions that are not verified,

and

- whether the commercial statements are liable to influence the structure of the market.

The denigration cases assessed by the FCA and other European competition authorities have so far turned on the dominant company identifying the most important non-price parameters to be able to compete in a market and concluding that the relevant customer decision process could be influenced by instilling fears or concerns that are then conveyed to decision makers and stakeholders in a systematic and consistent smearing campaign.

Therefore, it seems that abuse of a dominant position as a consequence of denigrating conduct is more likely to be sanctioned in sectors where non-price competition parameters are more relevant than price. The more important a given parameter is, the more critical it is when a dominant company tries to exclude competitors through either false or misleading information, or tries to make information credible in a covert manner.

To conclude, a new entrant in a market, which is subjected to an abuse of IPRs and/or a smearing campaign to systematically denigrate its products, by the dominant player in that particular industry, has more than one string to its bow in order to fight back. However, such new kid on the block must brace himself or herself for lengthy, draining and expensive legal battles, both as a defendant against the wrongful alleged claims of counterfeiting of its IPRs, raised by the dominant and abusive competitor, and as a claimant in front of the competent European competition authority, through which it will have raised some claims against such competitor for abuse of dominant position, in particular by way of denigration and smearing campaign.

These various legal battles will eventually neutralise the dominant competitor, while having a rigorous and well-organised IPR registration and maintenance strategy in place, for the new entrant in the market, is essential. All new models, products, brands, services should have their respective IPR registered, and then listed in a catalogue of IPRs maintained by the legal counsel of the new entrant. All evidence, and certificates, of registration should be kept and archived meticulously, to anticipate any IPRs infringement claim that the dominant competitor may bring. Non-disclosure and confidentiality clauses should be set out in all the contracts entered into with new employees, distributors, service providers who will assist the new entrant before and during the trade shows (PR agencies, hostesses' agencies, logistics companies, etc).

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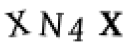

Do you need to put in place an escrow agreement with respect to the software and/or source code that you license?

In this digital and technological corporate world, having a plan B in case your software or computer program license goes wrong is a must. Can a customer successfully

leverage its position, by entering into an escrow agreement with the licensor? How does the source code escrow work, anyway? When can the source escrow be released to the licensee?

1. What is software escrow and source code escrow?

1.1. What is source code?

Source code is the version of software as it is originally written (i.e. typed into a computer) by a human in plain text (i.e. human readable alphanumeric characters), according to the Linux Information Project.

The notion of source code may also be taken more broadly, to include machine code and notations in graphical languages, neither of which are textual in nature.

For example, during a presentation to peers or potential clients, the software creator may ascertain from the outset that, "*for the purpose of clarity, "source code" is taken to mean any fully executable description of a software system. It is therefore construed to include machine code, very high level languages and executable graphical representations of systems*".

Often, there are several steps of program translation or minification (i.e. the process of removing all unnecessary characters from the source code of interpreted programming languages or markup languages, without changing its functionality) between the original source code typed by a human and an executable program.

Source code is primarily used as input to the process that produces an executable computer programme (i.e. it is compiled or interpreted). Hence, computer programmers often find it useful to review existing source code to learn about programming techniques. So much so, that sharing of source code between developers is frequently cited as a contributing factor to the maturation of their programming skills.

Moreover, porting software to other computer platforms is usually prohibitively difficult – if not impossible – without source code.

1.2. Legal status of software, computer programs and source code

In the United Kingdom, section 3 (Literary, dramatic and musical works) of the Copyright, Designs and Patents Act 1988 ("**CDPA 1988**") provides that among works which are protected by copyright, are "computer programs", "preparatory design material for a computer program" and "databases" (i.e. collections of independent works, data or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means).

Section 3A of the CDPA 1988 provides that the standard for copyright protection is higher, for databases, than for other "literary works", since they must be original (i.e. by reason of the selection or arrangement of the contents of the database, the database constitutes the author's own intellectual creation). Since the CDPA 1988 has no equivalent provision for computer programs, it is common knowledge that the provisions of section 3A of the CDPA 1988, relating to originality, apply to both databases and computer programs.

Moreover, the European Directive on the legal protection of databases (Directive 96/9/EC) and the Computer Directive (Directive 91/250/EEC) confirm these higher standards of originality for computer programs and databases, in the sense that they are the author's own intellectual creation. This is a higher standard of originality than "skill, labour and judgment".

Article L112-2 of the French intellectual property code ("**IPC**") provides that softwares, including preliminary conception work, are deemed to be 'works from the mind' protected by copyright. That copyright protection includes source code.

Both in France and the UK, the duration of copyright for software and computer programs is 70 years after the death of the author or, if the author is a legal entity, from the date on which the software was made public.

Copyright is acquired automatically in France and the UK, upon creation of the software or computer program, without any need for registration of such intellectual property right.

Both under English and French law, computer programs are regarded as not protectable via other registered intellectual property rights, such as patents. Indeed, section 1(2) (c) of the Patents Act 1977 ("**PA 1977**") lists computer programs among the things that are not regarded as being inventions "as such". Article L611-10 of the IPC does the same in France.

1.3. Software escrow / source code escrow

Since authors of software and computer programs – which include source code – own the copyright to their work, they can licence these works. Indeed, the author has the right to grant customers and users of his software some of his exclusive rights in form of software licensing.

While some softwares are “open source”, i.e. free to use, distribute, modify and study, most softwares are “proprietary”, i.e. privately owned, restricted and, sometimes, kept secret.

For proprietary software, the only way for a user to have lawful access to it is by obtaining a license to use from its author.

When some very large sums of money are exchanged, between the licensor (i.e. the author of the software and source code) and its licensees (i.e. the users of such software and source code), a precautionary measure may be required by the latter: software escrow.

It is the deposit of software source code with a third-party escrow agent, such as Iron Mountain or SES. The source code is securely administered by a trusted, neutral third party to protect the developer’s intellectual property, while at the same time keeping a copy safe for the licensees in case anything happens, such as the licensor no longer being able to support the software or going into bankruptcy. If that situation materialises, the licensees request a release of the source code from the escrow account and are able to keep their businesses up and running. This escrow solution effectively gives the licensee control of the source code and options to move forward.

2. How do you put source code escrow in place?

Many organisations have a standing policy to require software developers to escrow source code of products the organisations are licensing.

Therefore, alongside the licensing agreement to use the computer program, in-house or external lawyers of the licensees also negotiate the terms of an escrow agreement pursuant to which the source code of that computer program will be put in escrow with a trusted third party.

3. Is it worth requesting source code escrow alongside a software license?

Only a small percentage of escrows are ever released: Iron Mountain, the dominant escrow agent in the USA, has thousands of escrow accounts and more than 45,000 customers worldwide that have stored their software and source code with them. Over the 10-year period from 1990 to 1999, Iron Mountain released 96 escrow accounts, less than 10 per year.

Just as well, because escrow agreements are entered into as a kind of insurance policy, only to be used in case something goes very wrong at the licensor's company, which triggers one of the release events (insolvency, case of force majeure, death of the computer developer, etc.).

However, one valid cons is that most escrowed source code is defective: often, upon release, source code fails to provide adequate protection because it is outdated, defective or fails to meet the licensee's needs. According to Iron Mountain again, 97.4 percent of all analysed escrow material deposits have been found incomplete and 74 percent have required additional input from developers to be compiled. This is a valid point and licensees of the software, who insist on getting an escrow agreement as well, must insert some clauses in the escrow agreement whereby the escrowed source code is tested on a very regular basis by both the licensee and the licensor, in order to ensure that such escrowed source code will be usable as soon as one "release event", set out in the escrow agreement, materialises. The licensor should have an obligation of result to maintain the escrowed source code up-to-date and fully operational, throughout the duration of the escrow agreement.

Another point of caution is that licensees may lack the expertise to use the released source code. Even if the licensor has been diligent and the released source code is properly updated, well-documented and fully operational, most licensees lack the technical resources or capability to utilise the source code upon release. The licensees may work around this problem by either hiring an engineer who has the technical knowledge to make the most of that released source code (bearing in mind that most software licensing agreements bar licensees from poaching licensor's employees during the term of the license) or instructing a third-party software company. The best and most economical approach is to be as autonomous as possible, as a licensee, by developing in-house expertise on the workings of the software, and its source code, even before one of the release events materialises.

Another identified problem is that software licensors may prevent the timely release of the escrowed source code by imposing some unilateral conditions to the release, such as the vendor having to provide its written prior approval before the source code is released by the escrow agent, upon the materialisation of a release event. Additionally, many escrow agreements require parties to participate in lengthy alternative dispute resolution proceedings, such as arbitration or mediation, in the event of a dispute relating to the release of the source code. A commonly disputed issue is whether a release event actually occurred, even when the software licensor has gone into bankruptcy! The long delay and expensive legal battle needed to obtain the source code release, may become very heavy burdens for a licensee, compounded by the difficulty to keep the licensee's computer program and software working – as the licensor, and its technical support, have faded away. In order to avoid such delays and complications in the release of the escrowed source code, the terms of the escrow agreement must initially be reviewed, and negotiated, by an IT lawyer experienced in this area, so that all clauses are watertight and can be executed immediately and in a smooth manner, upon the occurrence of a release event.

Another cost consideration is that the expenses related to the opening and maintenance of an escrow agreement are high, and typically borne by the licensee. In addition to the fees paid to the escrow agent, the customer will often incur significant legal expenses related to the drafting and negotiation of the escrow agreement, as explained above. Software licensors being really resistant to providing their proprietary source code to anyone, escrow agreements are often subjects of long negotiations, before they are signed. However, while doing a costs/benefits analysis of getting the source code escrow, the licensee must assess how much it would cost, in case a release event occurred (bankruptcy of the licensor, case of force majeure, etc) but no prior software escrow had been put in place. If the licensee has made a considerable investment in the software, the cost to protect this asset via an escrow agreement may be trivial.

Some companies say that, since they now rely on Software-as-a-Service solutions (“**SaaS**”) for some of their IT needs and functionalities, there is no need for software escrow because the SaaS relies on a cloud-based system. However, SaaS implies that you need to think about both the software and your company’s data, which is indeed stored on the cloud – which adds a level of complexity. Since most SaaS provider’s business continuity/disaster recovery plans do not extend to a company’s application and data, some new insurance products have entered the market, combining both the source code escrow and disaster recovery and risk management solution. For example, Iron Mountain markets its SaaSProtect Solutions for business continuity.

To conclude, licensees need to conduct a costs/benefits analysis of having an escrow agreement in place, alongside the licensing agreement of their major software applications, in respect of each computer program which is perceived as absolutely paramount to the economic survival, and business continuity, of the licensees. Once they have balanced out the pros and cons of putting in place escrow agreements, they need to draft a list of their essential “wants” to be set out in each escrow agreement (for example, a detailed list of the release events which would trigger the release of source code to the licensee, the quarterly obligation borne by the licensor to maintain the source code in up-to-date form and working order, the secondment of a highly qualified computer programmer employee of the licensor to the offices of the licensee, on a full-time or part-time basis, in order to train in-house IT staff about the intricacies of the software and its source code) and then pass on such list to their instructed lawyer – who should be an IT expert lawyer, seasoned in reviewing and negotiating escrow agreements – for his or her review and constructive criticism and feedback. Once the licensees have agreed an “escrow insurance plan” strategy internally, and then with their counsel, they need to contact the licensor, its management and legal team, and circulate to them a term sheet of the future escrow agreement, in order to kick off the negotiation of the escrow agreement.

An escrow agreement is, and should remain, an insurance policy for the licensee, as long as it – in coordination with its legal counsel – has paved the way to a successful and well thought-out escrow rescue plan. This way, the user of the software will avoid all the pitfalls of poorly understood and drafted escrow agreements and source codes, for the present and future.

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Fashion law in France: a 2020 overview

Since its inception in 2003, the

law of luxury goods and fashion law have evolved, matured, and become institutionalised as a standalone area of specialisation in the legal profession. Here is Crefovi's 2020 status update for fashion law in France, detailing each legal practice area relevant to such creative industry.

1. Market spotlight & state of the market

1 | What is the current state of the luxury fashion market in your jurisdiction?

France is the number one player worldwide in the luxury fashion sector, as it is home to three major luxury goods conglomerates, namely:

• LVMH Moet Hennessy-Louis Vuitton SE (full year (“**FY**”) 2017 luxury goods sales US$27.995 billion and the number one luxury goods company by sales FY2017, with a selection of luxury brands, such as: Louis Vuitton, Christian Dior, Fendi, Bulgari, Loro Piana, Emilio Pucci, Acqua di Parma, Loewe, Marc Jacobs, TAG Heuer, Benefit Cosmetics);

• Kering SA (FY2017 luxury goods sales US$12.168 billion and the number four luxury goods company by sales FY2017, with a selection of luxury brands, such as: Gucci, Bottega Veneta, Saint Laurent, Balenciaga, Brioni, Pomellato, Girard-Perregaux, Ulysse Nardin); and

• L’Oreal Luxe (FY2017 luxury goods sales estimate US$9.549 billion and the number seven luxury goods company by sales FY2017, with a selection of luxury brands, such as: Lancome, Kiehl’s, Urban Decay, Biotherm, IT cosmetics).

2. Manufacture and distribution

2.1. Manufacture and supply chain

2 | What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The French law on duty of vigilance of parent and outsourcing companies, dated 27 March 2017 (article L 225-102-4 inserted in the French commercial code), is the French response to the UK Modern Slavery Act and the California Transparency in Supply Chains Act.

This is a due diligence measure that requires large French companies to create and implement a “vigilance plan” aimed at identifying and preventing potential human rights violations – including those associated with subsidiaries and supply chain members.

The law applies to any company headquartered in France that has (i) 5,000 or more employees, including employees of any French subsidiaries; or (ii) 10,000 or more employees, including French and foreign subsidiaries.

The law requires that the vigilance plan address activities by the company's subcontractors and suppliers ("supply chain entities"), where the company maintains an ongoing business relationship with these supply chain entities, and such activities involve its business relationship. The vigilance plan, as well as the minutes related to its implementation, must be made available to the public.

As of February 2019, the enforceability of this new French law was mitigated, at best. Certain corporations had still not published a vigilance plan regardless of their legal obligation to do so (eg, Lactalis, Credit Agricole, Zara or H&M). Those that had published vigilance plans merely included them in their chapter on social and environmental responsibility within their company's annual report. Such vigilance plans were vague and had gaps, the actions and measures were not detailed enough and only very partially addressed the risks mentioned in the risk mapping. There is, therefore, room for improvement.

The usual contractual arrangements for the relationships relating to the development, manufacture and supply chain for fashion goods in France are standard French law-governed manufacturing agreements or supplier agreements.

Such contractual arrangements are subject to the French civil code on contract law, and the general regime and proof of obligations, which was reformed in October 2016, thanks to Order No. 2016-131 of 10 February 2016. The order codified principles that had emerged from the case law of French courts, but also created a number of new rules applicable to pre-contractual, and contractual, relationships, such as:

- new article 1104 of the French civil code, which provides that contracts must be negotiated, concluded and performed in good faith, and failure to comply with such obligation can not only trigger the payment of damages, but also result in the nullification of the contract;

• new article 1112-1 provides that if a party to the contractual obligations is aware of information, the significance of which would be determinative for the consent of the other party, it must inform such other party thereof if such other party is legitimately unaware of such information, or relies on the first party;

• new article 1119 provides that general conditions invoked by a party have no effect against the other party, unless they have been made known to such other party and accepted by it. In the event of a 'battle of the forms', between two series of general conditions (eg, general sales conditions and general purchase conditions), those conditions that conflict are without effect;

• new article 1124, which provides that a contract concluded in violation of a unilateral promise, with a third party that knew of the existence thereof, is null and void; and

• new article 1143 provides that violence exists when a party abusing the state of dependency in which its co-contracting party finds itself, obtains from such co-contracting party an undertaking which such co-contracting party would not have otherwise agreed to in the absence of such constraint, and benefits thereby from a manifestly excessive advantage.

2.2. Distribution and agency agreements

3 | What legal framework governs distribution and agency agreements for fashion goods?

In addition to the reform of the French civil code on contract law and the general regime and proof of obligations explained in question 2 above, distribution and agency agreements for fashion goods need to comply with the following legal framework:

• European regulation ("**EU**") No. 330/2010 dated 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union ("**TFEU**"), which places limits on restrictions that a supplier could place on a distributor or agent (the "**Regulation**");

• article L134-1 of the French commercial code, which sets out what the agency relationship consists of;

• article L134-12 of of the French commercial code, which sets out that a commercial agent is entitled to a termination payment at the end of the agency agreement;

• books III and IV, and article L442-6 of the French commercial code, which set out that a relationship between two commercial partners needs to be governed by fairness and which prohibit any strong imbalance between the parties; and

• the law No. 78-17 dated 6 January 1978 relating to IT, databases and freedom (the "**French Data Protection Act**") and its implementation decree No. 2005-1309.

French luxury houses often use selective distribution to sell their products. It is, indeed, the most-used distribution technique for perfumes, cosmetics, leather accessories or even ready-to-wear.

The Regulation provides for an exemption system to the general prohibition of vertical agreements set out in article 101(1) of the TFEU. The lawfulness of selective distribution agreements is always assessed via the fundamental rules applying to competition law, in particular article 101 of the TFEU.

Selective distribution systems may qualify for block exemption treatment under the vertical agreements block exemption set out in article 101(3) of the TFEU.

4 | What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Under French law, it is essential to avoid any confusion between a distribution agreement and an agency agreement.

French law sets out that a distributor is an independent natural person or legal entity, who buys goods and products from the manufacturer or supplier and resells them to third parties, upon the agreed trading conditions, and at a profit margin set by such distributor.

A distributor may be appointed for a particular territory, either on an exclusive, or non-exclusive, basis.

Under French law, there is no statutory compensation for the loss of clientele and business due to the distributor upon expiry or termination of a distribution agreement. However, French case law has recently recognised that some compensation may be due when some major investments had been made by the distributor, on behalf of the manufacturer or supplier, in the designated territory.

Moreover, there is no statutory notice period to terminate a distribution agreement under French law. However, most distribution agreements set out a three-to-six-month termination notice period. French law sets out a detailed legal framework relating to the role of commercial agent, which is of a ‘public policy’ nature (ie, one cannot opt out from such statutory legal provisions). In particular, commercial agents must be registered as such, on a special list held by the registrar of the competent French commercial court.

Under French law, not only is it very difficult to terminate a commercial agent (except for proven serious misconduct), but also there is a statutory considerable compensation for the loss of clientele and business that is due to the terminated agent by the manufacturer or supplier.

Selective distribution is the most commonly used distribution structure for luxury goods in France, as explained in question 3.

Such selective distribution systems of luxury products can escape the qualification of anticompetitive agreements, pursuant to article 101(3) of the TFEU (individual and block exemption). However, in 2011, the European Court of Justice (**"ECJ"**) held that the selective distribution agreement that has as its object the restriction of passive sales to online end-users outside of the dealer's area excluded the application of the block exemption in its decision in Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi. The ECJ ruled that it was down to the French courts to determine whether an individual exemption may benefit such selective distribution agreement imposed by French company Pierre Fabre Dermo-Cosmétique SAS to its distributors. To conclude, it is clear that the ECJ set out that the prohibition of internet sales, in a distribution agreement, constitutes an anticompetitive restriction.

2.3. Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

A French company, upon incorporation, will be provided with the following numbers by the French authorities:

• an intra-community VAT number, provided to all companies incorporated in a EU member state;

• a SIRET number, which is a unique French business identification number; and

• an EORI number, which is assigned to importers and exporters by the French tax authorities, and is used in the process of customs entry declaration and customs clearance for both import and export shipments, travelling to and from the EU and countries outside the EU.

Fashion and luxury products manufactured outside of the EU, and brought into the EU, will be deemed to be imports, by French customs authorities.

In case such fashion and luxury products are transferred from France, or another member state of the EU, to a third party country in the rest of the world (outside of the EU), then these products will be deemed to be exports by French customs authorities.

For imports of fashion and luxury products, (ie, when they enter the EU), the French importer will have to pay some customs duties or other taxes when it imports these products from a third-party country to France or another member state of the EU.

Such customs duties are the same in each of the 27 member states of the EU because they are set by EU institutions. The importer can compute such customs duties by accessing the RITA encyclopedia, which sets out the integrated referential to an automated tarif, for each luxury and fashion product.

Through rather complex manipulations on the RITA encyclopedia, the importer can find out the relevant customs duties, additional taxes and any other fees (such as anti-dumping rights) payable for each type of fashion product and other imported merchandise.

For example, if you are importing a man’s shirt in France or any other EU member state from China, there will be a 12 percent customs duty to pay (the “**Customs duty**”).

Such Customs duty will be payable on the price paid to the

Chinese manufacturer for the man’s shirt in China plus all transportation costs from China to France (or another EU member state).

Therefore, if the man’s shirt has a manufacturing price (set out on the invoice of the Chinese manufacturer) of €100, and if there are €50 of transportation costs, the customs value basis will be €150 and the customs duty amount will be €18 (€150 multiplied by 12 per cent).

The computation of Customs duties, additional taxes and other charges being such a complicated and specialised area, and the filling out of customs declarations being done only on the Delta software that is accessible only to legal entities that have received an authorisation to use such software, most EU companies that sell fashion and luxury goods use the services of registered customs representatives, also called customs brokers or customs agents.

For exports of fashion and luxury products (ie, when they leave the EU to go to a third party in the rest of the world), a French company will not have to pay any Customs duties or other taxes. However, it is also important to check whether such third-party country will charge the French exporter some Customs duties, additional taxes and other charges, upon the luxury and fashion products entering its territory.

In addition, it is important for the importers to double check whether the EU, and consequently France, may be giving preferential treatment to fashion and luxury products imported from certain developing countries, which names are set out on the list entitled “*Système Généralisé de Préférence*” (“**SPG**”). SPG is a programme of trade preferences for goods coming from developing countries, such as Bangladesh, Vietnam, etc. It may be financially more advantageous to manufacture luxury and fashion products in the countries that are included on the SPG list, to ensure that lower tariffs and Customs duties will apply when importing these products to the EU.

Finally, and especially if the goods are in the luxury bracket, it may be possible to put a “Made in France” label on them, provided that such products were assembled in France.

2.4. Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

As explained in question 2 above, the French law on duty of vigilance for parent and outsourcing companies, dated 27 March 2017 (article L 225-102-4 inserted in the French commercial code) is the legal framework that applies to disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in France.

The vigilance plan made compulsory by such French law must set out a detailed risk mapping stating the risks for third parties (ie, employees, the general population) and the environment. French companies subject to this law must then publish their risk mapping, explicitly and clearly stating the serious risks and severe impacts on health and safety of individuals and on the environment. In particular, the vigilance plan should provide detailed lists of risks for each type of activity, product and service.

It is these substantial risks (ie, negative impacts on third parties and the environment deriving from general activities) on which vigilance must be exercised and which the plan must cover. Moreover, the vigilance plan must include the evaluated severity criteria regarding the level, size and reversible or irreversible nature of the impacts, or the probability of the risk. This prioritisation should allow the French company to structure how it implements its measures to resolve the impacts or risks of impact.

The vigilance plan, as well as the minutes related to its implementation, must be made available to the public.

The French law on duty of vigilance of parent and outsourcing companies sets out some stringent enforcement mechanisms. Any person with a demonstrable interest may demand that a company comply with the due diligence requirements (i.e. creating and implementing a vigilance plan) and, if the French company fails to comply, a court may fine the offending company up to €10 million, depending on the severity of the breach and other circumstances. Additionally, if the activities of a French company – or the activities of its supply chain entities – cause harm that could have been avoided by implementing its vigilance plan, the size of the fine can be trebled (up to €30 million), depending on the severity and circumstances of the breach and the damage caused, and the company can be ordered to pay damages to the victims.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

As set out above in our answers to the questions set out in sub-paragraphs 2.2. and 2.4. above, the French law on duty of vigilance of parent and outsourcing companies, dated 27 March 2017 (article L 225-102-4 inserted in the French commercial code) is the legal framework that applies to disclosure obligations in relation to occupational health and safety across their supply chains, for fashion and luxury brands in France.

In addition, the main legislation on occupational health and safety in France is set out in Part IV of the French labour code, entitled "Health and Safety at Work". Health and safety at work legislation is supplemented by other parts of this labour code (ie, work time legislation, daily rest period, respect of fundamental freedoms, bullying, sexual harassment, discrimination, execution in good faith of the employment agreement, work council competencies, employee delegates' abilities).

Collective bargaining is also a source of health and safety legislation (via inter-branch agreements, branch agreements, company-level agreements) in France. These collective agreements regulate employer versus employee relationships, in particular as far as occupation health and safety are concerned.

3. Online retail

3.1. Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

The Hamon law dated 17 March 2014 ("**Hamon law**") transposes the provisions of the Directive 2011/83/EU on consumer rights, which aims at achieving a real business-to-consumer internal market, striking the right balance between a high level of consumer protection and the competitiveness of businesses. This law strengthened pre-contractual information requirements, in relation to:

• the general duty to give information that applies to any sales of goods or services agreement entered into on a business-to- consumer basis (for on-premises sales, distance sales and off-premises sales); and

• information specific to distance contracts about the existence of a withdrawal right.

Thanks to this law, the withdrawal period has been extended from 7 to 14 days. It introduced the use of a standard form that can be used by consumers to exercise their withdrawal rights. Such form must be made available to consumers online or sent to them before the contract is entered into. If a consumer exercises this right, the business must refund the consumer for all amounts paid, including delivery costs, within a period of 14 calendar days.

Also, the General Data Protection Regulation (“**GDPR**”) and the French Data Protection Act with its implementation decree No. 2005- 1309, govern the launch of any online fashion marketplace or store in France. This is because e-commerce stores must have a data privacy policy, as well as a cookies policy, as well as some general terms and conditions of use of their e-commerce website, as well as some general terms and conditions of sale on their e-commerce website in place, which all comply with the GDPR and the French Data Protection Act. These online marketplaces must also appoint a data protection officer, to ensure that they comply with such data protection legal framework and so that the Commission Nationale Informatique et Libertes (“**CNIL**”, the French data protection authority) has a point of contact within the French online fashion marketplace or store.

With respect to the cookies policy, e-commerce stores must comply with the cookies and other tracking devices guidelines published by the CNIL in July 2019.

3.2. Sourcing and distribution

9 | How does e-commerce implicate retailers’ sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

As explained in our answer to question 4, luxury and fashion brands (manufacturers, suppliers) cannot ban their distributors from selling their products online, through e-commerce, since this would be a competition law breach under article 101 of the TFEU, entitled an anticompetitive restriction.

However, luxury and fashion brands may impose some criteria and conditions for their distributors to be able to sell their products online, in order to preserve the luxury aura and prestige of their products sold online, via the terms of their distribution agreements.

3.3. Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

As explained in our answer to question 8, these terms and conditions for customers of an e-commerce website must comply with the GDPR, the French Data Protection Act and the cookies and other tracking devices guidelines from the CNIL.

Therefore, those terms must comply with the following principles:

• privacy by design, which means that fashion and luxury businesses must take a proactive and preventive approach in relation to the protection of privacy and personal data;

• accountability, which means that data controllers, such as an e-commerce website, as well as its data processors, must take appropriate legal, organisational and technical measures allowing them to comply with the GDPR. They must be able to demonstrate the execution of such measures to the CNIL;

• privacy impact assessment, which means that an e-commerce business must execute an analysis relating to the protection of personal data, on its data assets, to track and map risks inherent to each data process and treatment put in place, according to their plausibility and seriousness;

• a data protection officer must be appointed, to ensure the compliance of treatment of personal data by fashion businesses whose data treatments present a strong risk of breach of privacy;

• profiling, which is an automated processing of personal data allowing the construction of complex information about a particular person, such as his or her preferences, productivity at work and whereabouts. This type of data processing may constitute a risk to civil liberties; therefore, online businesses doing profiling must limit their risks and guarantee the rights of individuals subjected to such profiling, in particular by allowing them to request human intervention or contest the automated decision; and

• right to be forgotten, which allows an individual to avoid that information about his or her past that interferes with their current, actual life. In the digital world, that right encompasses the right to erasure, as well as the right to dereferencing.

3.4. Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

No, online sales are not taxed differently than sales executed in brick-and- mortar stores. They are all subjected to a 20 percent VAT rate, which is the standard VAT rate in France, and which is applicable on all fashion and luxury products.

4. Intellectual property

4.1. Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

French fashion designs are usually protected via the registration of a design right in France, with the Institut National de la Propriété Industrielle (“**INPI**”). Articles L 512-1 et seq and R 511-1 et seq of the French intellectual property code govern the design application and registration process.

Of course, this French design protection applies in addition to any registered or unregistered community design right that may exist.

To qualify for protection through the French design right, the design must be novel and have individual character. Functional forms, as well as designs in breach of public policy or morality, are excluded from protection.

French fashion designs are protected by copyright, as long as they meet the originality criteria. Indeed, article L 112-2 14 of the French intellectual property code provides that "*the creations of the seasonal industries of garments and dresses*" fall within the remit of copyright, as "*works of the mind*".

Copyright being an unregistrable intellectual property right in France, the existence of copyright on fashion products is often proven via the filing of an "*enveloppe SOLEAU"* with INPI, or by keeping all prototypes, drawings and research documents on file, to be able to prove the date on which such copyright arose.

Indeed, under the traditional principle of unity of art, a creation can be protected by copyright and design law. Recent case law distinguishes between these IP rights, by stating that the originality required for copyright protection differs from the individual character required for design protection, and that both rights do not necessarily overlap.

In the same way, the scope of copyright protection is determined by the reproduction of the creation's main features; while in design law the same overall visual impression on the informed user is required.

As far as the ownership of commissioned works is concerned, the default regime in France is that both an independent creator (i.e. a fashion freelancer, contractor, creative director) and an employee of any French fashion house is automatically deemed to be the lawful owner of all intellectual property rights on a fashion and luxury item that he or she has created during the course of his or her service or employment. Therefore, it is essential in all French law-governed service providers agreements entered into with third-party consultants, and in all French law-governed employment agreements entered into with employees, to set out that an automatic and irrevocable assignment of all intellectual property rights in any fashion creation will always occur, upon creation.

13 | What difficulties arise in obtaining IP protection for fashion goods?

France enjoys the most extensive and longstanding intellectual property rights in connection with fashion designs. As explained in our answer to question 12, copyright protection is extended to any original work of the mind.

Even spare parts are protectable under French design law, which means that a design protecting only a spare part (eg, a bag clip) is valid without taking into consideration the product as a whole (ie, the bag).

Therefore, IP protection for fashion goods is very achievable in France, and it is important for applicants to systematically register their designs (not rely simply on copyright law) to be on the safe side.

4.2. Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are usually protected by a French trade mark registration filed with INPI.

French trade marks are governed mainly by law 1991-7, which implements the EU first council directive related to trade marks (89/104/EEC) and is codified in the French intellectual property code. This code was amended several times, in particular by Law 2007-1544, which implements the EU IP rights enforcement directive (2004/48/EC).

Ownership of a trade mark is acquired through registration, except for well-known trademarks within the meaning of article 6 bis of the Paris convention for the protection of industrial property dated 20 March 1883. Such unregistered well-known trademarks may be protected under French law if an unauthorised use of the trade mark by a third party is likely to cause damage to the trade mark owner or such use constitutes an unjustified exploitation of the trade mark.

To be registered as a trademark, a sign must be:

• represented in a way that allows any person to determine precisely and clearly the subject-matter of the trade mark protection granted to its owner;

• distinctive;

• not deceptive;

• lawful; and

• available.

French trademarks, registered with INPI, may coincide with EU trademarks (filed with the European Union Intellectual Property Office ("**EUIPO**")) and international trademarks (filed with the Word Intellectual Property Office ("**WIPO**"), through the Madrid protocol).

Under French law, unauthorised use of a trade mark on the internet also constitutes trade mark infringement. The rights holder may sue those that unlawfully use its trade mark on the ground of trade mark infringement or unfair competition.

Moreover, luxury and fashion brands are also protected by domain names, which may be purchased from domain name registrars for a limited period of time on a regular basis.

French domain names finishing in .fr can only be purchased for one year, once a year, pursuant to the regulations of the French registry for .fr top level domains, Afnic.

It is the responsibility of the person purchasing, or using, the domain name in .fr to ensure that he or she does not breach any third party rights by doing so.

A dispute resolution procedure called Syreli is available for disputes relating to .fr domains, along with judiciary actions. This procedure is managed by Afnic and decisions are issued within two months from receipt of the complaint.

With online ransom, a proliferation of websites being used for counterfeit sales, fraud, phishing and other forms of online trade mark abuse, most French luxury and fashion companies take the management and enforcement of domain name portfolios very seriously.

With the advent of new generic top-level domains (generic top-level domains or "**gTLDs**"), it is now an essential strategy for all French luxury and fashion houses to buy and hold onto all available gTLDs relating to fashion and luxury (eg, .luxury, .fashion, .luxe).

4.3. Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

French IP rights may be assigned, licensed or pledged. The French intellectual property code refers to licences over trade marks, patents, designs and models, as well as databases. With respect to copyright, this code only refers to the assignment of the patrimonial rights of the author (ie, representation right and reproduction right) in its article L122-7. In practice, copyright licences often occur, especially over software.

When it involves French design rights, the corresponding deed, contract or judgment must be recorded in the French Design register, to be enforceable against third parties. The documents must be in French (or a translation must be provided). Tax will be incurred only up to the 10th design, in a recordal request filed with INPI. For community designs, recordal must be made with EUIPO. For the French designation of an international design, recordal must be requested through WIPO for all or part of the designation.

When it involves French trade marks, the corresponding deed, contract or judgment should be recorded in the INPI French trade mark register, especially for evidentiary and opposability purposes, for the licensee to be able to act in infringement litigation and for such deed, contract or judgment to be enforceable against third parties. Again, the copy or abstract of the deed, or agreement, setting out the change in ownership or use of the trade marks should be in French (or a French translation be provided).

Of course, copyright of fashion products does not have to be recorded in any French register, as there is no registration requirement for French copyright. However, best practice is for the parties to the deed, agreement or judgment to keep, on record, for the duration of the copyright (70 years after the death of the creator of the copyright) such documents, so that the copyright assignment, pledge or licence may be enforceable against third parties.

Fashion brands such as Tommy Hilfiger, Benetton and Ermenegildo Zegna use franchising to access new markets, increase their online presence and develop flagship stores. Franchise agreements generally include a trade mark, trade name or service mark licence, as well as the transfer of knowhow by the franchisor, to the franchisee. On this note, knowhow licences exist in France, although knowhow does not constitute a proprietary right benefiting from specific protection under the French intellectual property code.

A licensor must make some pre-contractual disclosure to prospective licensees, pursuant to article L330-3 of the French commercial code, when he or she makes available to another person a trade name or a trademark, and requires from such other person an exclusivity undertaking with respect to such activity. The precontractual information must be disclosed in a document provided at least 20 days prior to the signature of the licence agreement. Such document must contain truthful information allowing the licensee to commit to the contractual relationship in full knowledge of the facts.

A licensing relationship governed by French law must comply with the general contract law principles, including the negotiation, conclusion and performance of contracts in good faith (article 1104 of the French civil code). This statutory legal provision implies an obligation on each party of loyalty, cooperation and consistency. In case of breach of this good faith principle, the licence may be terminated and damages potentially awarded.

4.4. Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Lawsuits involving the infringement or validity of a French design, or the French designation of an international design, may be lodged with one of the 10 competent courts of first instance (Bordeaux, Lille, Lyon, Marseille, Nanterre, Nancy, Paris, Rennes, Strasbourg and Fort-de-France).

Lawsuits involving the infringement, in France, of a registered or unregistered community design may be lodged only with the Paris court of first instance. An invalidity action against a community design may only be brought before EUIPO. However, invalidity may be claimed as a defence in an infringement action brought before the Paris tribunal.

The scope of protection for the design is determined exclusively by the various filed views, on the design registration, irrespective of actual use. Therefore, applicants should pay great care to those views, when filing a design application, so as to anticipate the interpretation made by the judiciary tribunal.

Infringement is identified when a third-party design produces, on the informed observer, the same overall visual impression as the claimant’s design.

The infringement lawsuit may be lodged by the design owner, or the duly recorded exclusive licensee.

The claimant will be indemnified for lost profits, with the court taking into account: (i) the scope of the infringement; (ii) the proportion of actual business lost by the claimant; and (iii) the claimant’s profit margin for the retail of each unit.

Damages may also be awarded for the dilution or depreciation of a design.

As far as trademarks are concerned, lawsuits may be lodged before the 10 above-mentioned competent courts at first instance if they are French trademarks or the French designation of an international trademark. Lawsuits relating to the infringement of EU trade marks may only be lodged with the Paris judiciary tribunal.

Such infringement proceedings may be lodged by either the trademark owner or the exclusive licensee, provided that the licence was recorded in the trademark register.

To determine trademark infringement, the judiciary tribunal will assess: (i) the similarity of the conflicting trademarks, on the basis of visual, phonetic and intellectual criteria; and (ii) the similarity of the goods or services, bearing such trademarks, concerned. Such trademark infringement may be evidenced by any means.

To secure evidence of the infringement, and to obtain any information related to it, rights holders may ask, and obtain, from the competent judiciary tribunal, an order to carry out a seizure on the premises where the products that infringe the copyright, trademarks, designs, etc. are located. Such order authorises a bailiff to size the suspected infringing products, or to visit the alleged infringer's premises to collect evidence of the infringement by taking pictures of the suspected infringing products, or by taking samples. The IP rights holder must lodge a lawsuit against the alleged infringer with the competent judiciary tribunal within 20 working days, or 31 calendar days, whichever is the longer, from the date of the seizure. Otherwise, the seizure may be declared null and void on the request of the alleged infringer, who may also ask for some damages.

In addition, IP rights holders may also request an ex parte injunction, to prevent an imminent infringement, which is about to happen, or any further infringement, to the competent judiciary tribunal.

Infringement action, for all IP rights, must be brought within three years of the infringement. There is one exception, for copyright, which statute of limitations is five years from the date on which the copyright owner was made aware, or should have been aware, of such copyright infringement.

There is also an option to protect design rights, copyright, trade marks, patents, etc at French borders, which we often recommend to our fashion and luxury clients. They need to file their IP rights with the Directorate-General of Customs and Indirect Taxes, via a French and EU intervention request, and obtain some certifications from those French customs authorities, that such IP rights are now officially registered on the French and EU customs databases. Therefore, all counterfeit products infringing such IP rights registered on these French and EU customs databases, which enter the EU territory via French borders, will be seized by customs at French borders for 10 days. Potentially, provided that certain conditions are met, French customs may permanently destroy all counterfeit products thus seized, after 10 days.

5. Data privacy and security

5.1. Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

As explained in questions 8 and 10, fashion and luxury companies must comply with the GDPR, the French Data Protection Act and the cookies and other tracking devices guidelines from the CNIL.

5.2. Compliance challenges

18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

The strict compliance with the GDPR, as well as the amended version of the French Data Protection Act, do present some challenges to luxury and fashion companies and to their business models.

Indeed, on a factual level, most small and medium-sized enterprises (“**SMEs**”) incorporated in France are still not in compliance with the GDPR, the French Data Protection Act and the cookies and other tracking devices guidelines from the CNIL. Most of the time this is because such SMEs do not want to allocate time, money and resources to bringing their business in compliance, while they are fully aware that a serious breach may trigger a fine worth up to 4 per cent of their annual worldwide turnover, or €20 million, whichever is greater.

Fashion and luxury companies now have to take ownership of, and full responsibility for, the rigorous management and full protection of their data assets. They can no longer rely on a ‘I was not aware this may happen’ defence strategy, which was very often used by fashion companies before the GDPR entered into force when their internal databases or IT systems got hacked or leaked to the public domain (eg, Hudson’s Bay Co, which owns Saks Fifth Avenue, Macy’s, Bloomingdales, Adidas, Fashion Nexus, Poshmark). The way to rise up to such challenge, though, is to see the GDPR as an opportunity to take stock of what data your company has, and how you can take most advantage of it. The key tenet of GDPR is that it will give any fashion company the ability to find data in its organisation that is highly sensitive and high value, and ensure that it is protected adequately from risks and data breaches.

With the GDPR, almost all fashion and luxury businesses worldwide that sell to EU customers (and therefore French customers), either online or in brick and mortar locations, now have a Data Protection Authority (“**DPA**”). Businesses will determine their respective DPA with respect to the place of establishment of their management functions as far as supervision of data processing is concerned, which will allow them to identify the main establishment, including when a sole company manages the operations of a whole group. However, the GDPR sets up a one-stop DPA: in case of absence of a specific national legislation, a DPA located in the EU member state in which such organisation has its main or unique establishment will be in charge of controlling its compliance with the GDPR. This unique one-stop DPA will allow companies to substantially save time and money by simplifying processes.

To favour the European data market and the digital economy, and therefore create a more favourable economic environment, the GDPR reinforces the protection of personal data and civil liberties. This unified regulation will allow businesses to substantially reduce the costs of processing data currently incurred in the 27 member states: organisations will no longer have to comply with multiple national regulations for the collection, harvesting, transfer and storing of data that they use.

The scope of the GDPR extends to companies that are headquartered outside the EU, but intend to market goods and services into the EU market, as long as they put in place processes and treatments of personal data relating to EU citizens. Following these EU residents on the internet to create some profiles is also covered by the scope of the GDPR. Therefore, EU companies, subject to strict and expensive rules, will not be penalised by international competition on the EU single market. In addition, they may buy some data from non-EU companies, which is compliant with GDPR provisions, therefore making the data market wider.

The right to portability of data allows EU citizens subjected to data treatment and processing to gather this data in an exploitable format, or to transfer such data to another data controller, if this is technically possible. Compliance with the right to portability is definitely a challenge for fashion and luxury businesses.

5.3. Innovative technologies

19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Innovative technologies, such as AI and facial recognition, involve automated decision making, including profiling. The GDPR has provisions on:

• automated individual decision making (making a decision solely by automated means without any human involvement); and

• profiling (automated processing of personal data to evaluate certain things about an individual), which can be part of an automated decision-making process.

These provisions, set out in article 22 of the GDPR, should be taken into account by fashion and luxury businesses when deploying innovative technologies. In particular, they must demonstrate that they have a lawful basis to carry out profiling or automated decision making, and document this in their data protection policy. Their Data Protection Impact Assessment should address the risks, before they start using any new automated decision making or profiling. They should tell their customers about the profiling and automated decision making they carry out, what information they use to create the profiles, and where they get this information from. Preferably, they should use anonymised data in their profiling activities.

5.4. Content personalisation and targeted advertising

20 | What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

There is a tension, and irrevocable difference, between the GDPR’s push towards more anonymisation of data, and the personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour. This is because the latter needs data that is not anonymous, but, instead, traceable to each individual user.

Indeed, a fashion and luxury business cannot truly personalise an experience in any channel – a website, a mobile app, through email campaigns, in advertising or events in a store – unless it knows something about that customer, and the luxury business cannot get to know someone digitally unless it collects data about him or her. The GDPR and the increasing concerns around privacy complicate this process.

However, GDPR does not prohibit fashion businesses from collecting any data on customers and prospects. However, they must do so in compliance with the core GDPR principles set out in question 10.

6. Advertising and marketing

6.1. Law and regulation

21 | What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

Advertising and marketing communications are regulated by the following French laws:

• law dated 10 January 1991 ("**Evin law**") that prohibits advertising alcohol on French TV channels and in cinemas, and limits such advertising on radio and on the internet;

• law dated 4 August 1994 ("**Toubon law**") that provides that the French language must be used in all advertising in France; and

• decree dated 27 March 1992 that provides for specific rules relating to advertising on TV.

Various legal codes set out some specific rules governing advertising and marketing communications in France, such as: the French consumer code, which prohibits deceptive and misleading advertising, and regulates comparative advertising; or article 9 of the French civil code, which protects individuals' images and privacy.

Moreover, there are some industry codes of practice, drafted by the French advertising self-regulation agency ("**ARPP**"), which represents advertisers, agencies and the media. These codes of practice set out the expected ethical standards and ensure proper implementation of these standards, through advice and pre-clearance, including providing mandatory advice before the broadcast of all TV advertising.

The French consumer and competition governmental authority (**"DGCCRF"**) has investigative powers in relation to all matters relating to the protection of consumers, including advertising and marketing practices.

DGCCRF agents are entitled to enter the professional premises of the advertiser, advertising agency or communication agency during business hours to request an immediate review of documents, take copies of these documents, and ask questions.

The ARPP works with an independent jury that handles complaints against advertisements that violate ARPP standards. Its decisions are published on its website.

If there is a data breach within a marketing campaign, the CNIL, the French DPA, may fine the culprit data controller (such as an advertiser or an agency) up to €20 million, or 4 percent of their worldwide annual turnover, whichever is the highest.

6.2. Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

Online marketing activities are regulated in the same manner as activities conducted in the "real world", pursuant to the French digital economy law dated 21 June 2004. However, more specific to the online world, the digital economy law provides that pop-ups, advert banners, and any other types of online adverts must be clearly identified as such and therefore distinguished from non-commercial information.

Article L121-4-11 of the French consumer code provides that an advertiser who pays for content in the media to promote its products or services must clearly set out that such content is an advertisement, through images or sounds clearly identifiable by consumers. Otherwise, this is a misleading advert or an act of unfair competition.

The ARPP issued a standard relating to digital adverts, communications carried out by influencers, native advertising, etc emphasising the fact that all such online marketing communications and advertising should be clearly distinguishable as such by consumers.

7. Product regulation and consumer protection

7.1. Product safety rules and standards

23 | What product safety rules and standards apply to luxury and fashion goods?

French law dated 19 May 1998, which is now set out in articles 1245 et seq of the French civil code, transposes EU directive 85/374/EEC on the liability for defective products in France.

Alongside this strict civil liability for defective products exists some criminal liability for defective products on the grounds of deceit, involuntary bodily harm, involuntary manslaughter or endangering the lives of others.

Articles 1245 et seq. of the French civil code apply when a product is considered unsafe. Therefore, a fashion business would be liable for damage caused by a defect in its products, regardless of whether or not the parties concluded a contract. Consequently, these statutory rules apply to any end-user in possession of a fashion product, whether or not such end-user had entered into an agreement with the fashion company.

Articles 1245 et seq. of the French civil code provide for a strict liability, where the claimant does not need to prove that the ‘producer’ made a mistake, committed an act of negligence or breached a contract. The claimant only has to prove the defect of the product, the damage suffered and the causal link between such defect and such damage.

A defective product is defined in article 1245-3 of the French civil code, as a product that does not provide the safety that any person is entitled to expect from it, taking into account, in particular, the presentation of such product, the use that can reasonably be expected of it and the date on which it was put on the market.

Such strict civil liability rules apply to the “producer”, a term that may refer to the manufacturer, the distributor, as well as the importer in the EU, of defective products.

As soon as a risk of a defective product is recognised, the “producer” should comply with its duty of care and take all necessary actions to limit harmful consequences, such as a formal public warning, a product recall or the mere withdrawal of such product from the market.

7.2. Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The regime governing product liability for luxury and fashion goods is described in our answer to question 22.

The Hamon law introduced class action for French consumers. Consequently, an accredited consumer association may take legal action to obtain compensation for individual economic damages suffered by consumers placed in an identical or similar situation, that result from the purchase of goods or services.

There has been no notable recent product liability litigation in the fashion and luxury sectors. However, a health class action matter is currently pending before the Paris judiciary tribunal. A pharmaceutical company was sued by 4,000 French individuals because it sold an anti-epileptic drug without providing adequate information relating to the use of such drug during pregnancy. As a result, some French babies were born with health defects because such drug has detrimental effects on foetal development. The judiciary tribunal should hand down its decision about the laboratory’s liability soon.

8. M&A and competition issues

8.1. M&A and joint ventures

25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

As set out in question 2, the general contract law provisions included in the French civil code, which underwent a major reform in 2016, must be complied with. Therefore, for private M&As, the seller would seek to promote competition between different bidders through a competitive sale process, which conduct must comply with the statutory duty of good faith.

In France, it is compulsory for the transfer of assets and liabilities from the seller to the buyer to cover all employment contracts, commercial leases and insurance policies pertaining to the business. Except from those, all other assets and liabilities relating to the transferred business may be excluded from the transfer transaction by agreement. Furthermore, the transfer of contracts requires the approval from all relevant counterparties, thus making the prior identification of such contracts in the course of the due diligence an important matter for any prospective buyer.

In private M&As, there is no restriction to the transfer of shares in a fashion company, a fashion business or assets in France. However, French merger control regulations (in addition to merger control regulations of other EU member states) may require a transaction to be filed with the French competition authority (“**FCA**”) if: (i) the gross worldwide total turnover of all the fashion companies involved in the concentration exceeds €150 million; and (ii) the gross total turnover generated individually in France by each of at least two of the fashion companies involved in the concentration exceeds €50 million.

There are no local ownership requirements in France. However, French authorities may object to foreign investments in some specific sectors that are essential to guarantee France’s interests in relation to public policy, public security and national defence. As of today’s date, fashion and luxury are not part of these sectors that are protected for national security purposes.

In addition to prior agreements, such as non-disclosure agreements or promises, final agreements will set out the terms relating to the transaction; in particular, a description of the transferred assets, the price, the warranties granted by the seller, the conditions precedent, any non-competition or non-solicitation clauses. Asset purchase agreements must set out compulsory provisions, such as the name of the previous owner, some details about the annual turnover, otherwise the buyer may claim that the sale is invalid. Most of these agreements, and most sales of French targets and assets, are governed by French law; in particular, the legal transfer of ownership of the target’s shares or assets.

More specific to the fashion and luxury industries, any sale of a fashion business would entail transferring the ownership of all intellectual property rights tied into that fashion target. As such, the trade marks, which have sometimes been filed on the name of the founding fashion designer of the acquired fashion business (eg, Christian Dior, Chantal Thomass, John Galliano, Ines de la Fressange) would be owned by the buyer, after the sale. Thus, the founding fashion designer would no longer be able to use his or her name to sell fashion and luxury products, without infringing on the trade mark rights of the buyer.

8.2. Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

Articles L 420-1 and L 420-2 of the French commercial code are the equivalent to articles 101-1 and 102 TFEU and provide for anticompetitive agreements and abuses of a dominant position, respectively.

Specific provisions of the French commercial code are also applicable, such as article L 410-1 et seq. on pricing, article L 430-1 et seq. on merger control, L 420-2-1 on exclusive rights in French overseas communities, L 420-5 on abusively low prices and L 442-1 et seq. on restrictive practices.

For example, a decision handed down by the Paris court of appeal on 26 January 2012 confirmed the existence of price fixing agreements, and anti competitive behaviour, between 13 perfume and cosmetics producers (including Chanel, Guerlain, Parfums Christian Dior and Yves Saint Laurent Beaute) and their three French distributors (Sephora, Nocibe France and Marionnaud). The court also upheld the judgment from the FCA, dated 14 March 2006, sentencing each of these luxury goods companies and distributors to fines valued at €40 million overall.

Court action for breach of competition law may be lodged with a French court of the FCA by any person having a legal interest. Class actions have been available since the entering into force of the Hamon law, but only when the action is filed by a limited number of authorised consumer associations.

There has been a rise in antitrust damage claims lodged in France, and French courts are now responsive to such claims. A section of the Paris commercial court has been set up to review summons lodged in English, with English-language exhibits, and can rule on competition cases with proceedings fully conducted in the English language.

As set out in question 4, while selective distribution is tolerated as an exemption, pursuant to article 101(3) TFEU, total restriction of online sales by a manufacturer, to its selective distributors, is a breach under article 101(1) TFEU (Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi, ECJ, 2011).

The ECJ has refined its case law (which, of course, applies to France) in its 2017 ruling in Coty Germany GmbH v Parfumerie Akzente GmbH. The ECJ ruled that a contractual clause, set out in the selective distribution agreement entered into between Coty and its selective distributors, and which prohibits members of such selective distribution network from selling Coty cosmetics on online marketplaces, such as Amazon, complies with article 101(1) TFEU. This is because, according to the ECJ, the clause is proportionate in its pursuit of preserving the image of Coty cosmetics and perfumes, and because it does not prohibit distributors from selling Coty products on their own online e-commerce sites, provided that some quality criteria are met.

This new ECJ case law is useful guidance for national courts on how to assess, in pragmatic terms, the prohibition of selling luxury products in marketplaces. Indeed, the Paris court of appeal handed down a judgment in relation to the validity of a similar clause set out in the contracts for Coty France on 28 February 2018, and used the ECJ analysis to confirm the validity of such prohibition, in relation to a marketplace that sold Coty perfumes during private sales.

9. Employment and labour

9.1. Managing employment relationships

27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Employer–employee relationships are governed by the following complex set of laws and regulations that leave little room for individual negotiation:

• the French labour code set out a comprehensive legal framework for both individual and collective relationships between employers and employees;

• collective bargaining agreements have been negotiated between employers' associations and labour unions covering the industry as a whole, or between employers and labour unions covering a company. In the former case, the collective agreement usually applies to the industry sector as a whole, even to companies within that sector that are not part of the employers' associations (for the fashion and luxury sectors, the "clothing industry collective agreement", the 'textile industry collective agreement (OETAM)', or the "collective agreement for the footwear industries" may apply, for example); and

• individual employment agreements, which relate only to the aspects of the employer–employee relationship not already covered by the labour code or relevant collective bargaining agreement.

Because more than 90 per cent of French employees are protected by collective bargaining agreements, the rules set out in the French labour code are supplemented by more generous rules in areas such as paid leave, maternity leave, medical cover and even working time.

Under the "Aubry law" dated 19 January 2000, a standard 35-hour working week became the rule. Employees working beyond 35 hours are entitled to overtime. A company-wide collective bargaining agreement may provide for a maximum working time of 12 hours, and a maximum weekly working time of 46 hours over 12 consecutive weeks. Extra time is either paid via overtime, or compensating by taking extra days off (called "**RTT**").

Any dismissal of a French employee must be notified in writing, and based on a 'real and serious' cause. A specific procedure must be followed, including inviting the employee to a pre-dismissal meeting, holding such meeting with the employee, and notifying the dismissal by registered letter with an acknowledgement of receipt. Dismissal for economic reasons and dismissals of employee representatives are subject to additional formalities and requirements, such as the implementation of selection criteria to identify the employees to be dismissed, the involvement of, and approval from, the French labour authorities and compulsory consultation with employee representatives. Upon termination, French employees are entitled to a number of indemnities (severance payment, notice period, paid holidays, etc) and, should the dismissal be deemed to be unfair, the "Macron scale", set out in article L 1235-3 of the French labour code, provides that, in case of a court claim for unfair dismissal, French labour courts must allocate damages to former employees ranging between a minimum and a capped amount, based on the length of service with the former employer. Because many regional labour courts were resisting the application of the "Macron scale" to their court cases, the French supreme court ruled in July 2019 that such "Macron scale" is enforceable and must apply.

Of course, French freelancers and consultants who work for fashion and luxury houses are not protected by the above-mentioned French labour rules applying to employer–employee relationships. However, French labour courts are prompt at requalifying an alleged freelancing relationship into an employment relationship, provided that a subordination link (characterised by work done under the authority of an employer, which has the power to give orders, directives, guidelines, and to control the performance of such work, and may sanction any breach of such performance) exists, between the alleged freelancer and the fashion company. Most creative directors of French fashion houses are consultants, not employees, and therefore have the right to execute other fashion projects or contracts, for other fashion houses (for example, Karl Lagerfeld was the creative director of both Chanel and Fendi).

Article L 124-1 et seq of the French education code provide that a "gratification" (not a salary) may be paid to an intern, in France, if the duration of his or her internship is more than two consecutive months. Below that time frame, a French company has no obligation to pay a gratification to an intern. The hourly rate of such gratification is equal to a minimum of €3.90 per internship hour; however, in certain sectors of the industry where collective bargaining agreements apply, the amount may be higher than €3.90.

9.2. Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

As mentioned in question 24, an employer may have to consult employee representatives if it wants to dismiss, for economic reasons, some of its employees. Also, trade unions, either covering a company or a group of companies, or covering an industry as a whole, negotiate, and will renegotiate and amend, any collective bargaining agreements in place in France.

Unsurprisingly, employee representatives play a very important role, in French employer–employee relationships. Depending on the size of a company, some employee delegates or a works council, as well as a health and safety committee, may have to be appointed and set up. Such employee representatives not only have an important say on significant business issues such as large-scale dismissals, but must be consulted prior to a variety of changes in the business, such as acquisitions, or disposals, of business lines or of the company itself. In French companies with work councils, employee representatives are entitled to attend meetings of the board of directors, but are not allowed to take part in any votes at such meetings. As a result, most strategic decisions are made outside of board of directors' meetings.

Dismissals of employee representatives are subject to additional formalities and requirements, such as the approval given by French labour authorities.

While the top creative management of French fashion houses may be terminated at will, because most creative directors are freelancers, the core labour force of most French fashion and luxury houses (eg, blue-collar workers on the shop floor (seamstresses etc), lower to middle management, etc) is almost immovable because of the above-mentioned strict French labour laws relating to hiring and firing. One advantage of such "job security" is that French students and the young labour force do not hesitate to train for, and take on, highly specialised and technical manual jobs, which are necessary to creative and exceptionally high-quality luxury products (eg, embroiderers working for Chanel-owned Lesage, bag makers working for Hermes, feather workers employed by Chanel-owned Lemarie and all the seamstresses working for Chanel and all the haute couture houses in Paris).

9.3. Immigration

29 | Are there any special immigration law considerations for

fashion companies seeking to move staff across borders or hire and retain talent?

Yes, the multi-year "*passeport talent*" residence permit was created to attract foreign employees and self-employed persons with a particular skillset (eg, qualified or highly qualified employee, self-employed professional, performer or author of a literary or artistic work) in France.

Such residence permit provides the right to stay for a maximum of four years in France, starting from the date of arrival in France. A multi-year residence permit may also be granted to the spouse and children of the "talented individual".

10. Update and trends

30 | What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

The future prospects of the luxury and fashion sectors in France are extremely high, because the Macron reforms are slowly but surely transforming the French economy into a liberalised and free-trade powerhouse, bringing flexibility and innovation at the forefront of the political reform agenda. However, the downside to these sweeping changes is the resistance, violence and riots that have taken place, and still regularly happen, in France, and in Paris in particular, emanating from a French people unsettled about, and scared of, a more free and competitive economic market.

Fashion and luxury businesses are the first to bear the brunt of these violent acts of resistance, as their retail points on the Champs Elysees and other luxurious locations in Paris and in the provinces have been heavily disrupted (and sometimes ransacked) by rioters, some “yellow vests” and “anti-pension reforms” social unrest movements.

However, in the medium to long term, fashion and luxury businesses will be among the first to benefit from those sweeping reforms, thanks to a highly productive, and more flexible, French workforce, better contractual and trade conditions to conduct business in France and abroad, and a highly efficient legal framework and court system that are among the most protective of IP rights owners, in the world.

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Subject

Your message

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Why the valuation of intangible assets matters: the unstoppable rise of intangibles' reporting in the 21st century's corporate environment

It is high time France and the UK up their game in terms of accounting for, reporting and leveraging the intangible assets owned by their national businesses

and companies, while Asia and the US currently lead the race, here. European lenders need to do their bit, too, to empower creative and innovative SMEs, and provide them with adequate financing to sustain their growth and ambitions, by way of intangible assets backed-lending.

Back in May 2004, I published an in-depth study on the financing of luxury brands, and how the business model developed by large luxury conglomerates was coming out on top. 16 years down the line, I can testify that everything I said in that 2004 study was in the money: the LVMH, Kering, Richemont and L'Oreal of this word dominate the luxury and fashion sectors today, with their multibrands' business model which allows them to both make vast economies of scale and diversify their economic as well as financial risks.

However, in the midst of the COVID 19 pandemic which constrains us all to work from home through virtual tools such as videoconferencing, emails, chats and sms, I came to realise that I omitted a very important topic from that 2004 study, which is however acutely relevant in the context of developing, and growing, creative businesses in the 21st century. It is that intangible assets are becoming the most important and valuable assets of creative companies (including, of course, luxury and fashion houses).

Indeed, traditionally, tangible and fixed assets, such as land, plants, stock, inventory and receivables were used to assess the intrinsic value of a company, and, in particular, were used as security in loan transactions. Today, most successful businesses out there, in particular in the technology sector (Airbnb, Uber, Facebook) but not only, derive the largest portion of their worth from their intangible assets, such as intellectual property rights (trademarks, patents, designs, copyright), brands, knowhow, reputation, customer loyalty, a trained workforce, contracts, licensing rights, franchises.

Our economy has changed in fundamental ways, as business is now mainly "knowledge based", rather than industrial, and "intangibles" are the new drivers of economic activity, the Financial Reporting Council ("**FRC**") set out in its paper "Business reporting of intangibles: realistic proposals", back in February 2019.

However, while such intangibles are becoming the driving force of our businesses and economies worldwide, they are consistently ignored by chartered accountants, bankers and financiers alike. As a result, most companies – in particular, Small and Medium Enterprises ("**SMEs**")- cannot secure any financing with money men because their intangibles are still deemed to … well, in a nutshell … lack physical substance! This limits the scope of growth of many creative businesses; to their detriment of course, but also to the detriment of the UK and French economies in which SMEs account for an astounding 99 percent of private sector business, 59 percent of private sector employment and 48 percent of private sector turnover.

How could this oversight happen and materialise, in the last 20 years? Where did it all go wrong? Why do we need to very swiftly address this lack of visionary thinking, in terms of pragmatically adapting double-entry book keeping and accounting rules to the realities of companies operating in the 21st century?

How could such adjustments in, and updates to, our old ways of thinking about the worth of our businesses, be best implemented, in order to balance the need for realistic valuations of companies operating in the “knowledge economy” and the concern expressed by some stakeholders that intangible assets might peter out at the first reputation blow dealt to any business?

1. What is the valuation and reporting of intangible assets?

1.1. Recognition and measurement of intangible assets within accounting and reporting

In the European Union (“**EU**”), there are two levels of accounting regulation:

- the international level, which corresponds to the International Accounting Standards (“**IAS**”), and International Financial Reporting Standards (“**IFRS**”) issued by the International Accounting Standards Board (“**IASB**”), which apply compulsorily to the consolidated financial statements of listed companies and voluntarily to other accounts and entities according to the choices of each country legislator, and
- a national level, where the local regulations are driven by the EU accounting directives, which have been issued from 1978 onwards, and which apply to the remaining accounts and companies in each EU member-state.

The first international standard on recognition and measurement of intangible assets was International Accounting Standard 38 ("**IAS 38**"), which was first issued in 1998. Even though it has been amended several times since, there has not been any significant change in its conservative approach to recognition and measurement of intangible assets.

An asset is a resource that is controlled by a company as a result of past events (for example a purchase or self-creation) and from which future economic benefits (such as inflows of cash or other assets) are expected to flow to this company. An intangible asset is defined by IAS 38 as an identifiable non-monetary asset without physical substance.

There is a specific reference to intellectual property rights ("**IPRs**"), in the definition of "intangible assets" set out in paragraph 9 of IAS 38, as follows: "*entities frequently expend resources, or incur liabilities, on the acquisition, development, maintenance or enhancement of intangible resources such as scientific or technical knowledge, design and implementation of new processes or systems, licenses, intellectual property, market knowledge and trademarks (including brand names and publishing titles). Common examples of items encompassed by these broad headings are computer software, patents, copyrights, motion picture films, customer lists, mortgage servicing rights, fishing licences, import quotas, franchises, customer or supplier relationships, customer loyalty, market share and marketing rights*".

However, it is later clarified in IAS 38, that in order to recognise an intangible asset on the face of balance sheet, it must be identifiable and controlled, as well as generate future economic benefits flowing to the company that owns it.

The recognition criterion of "identifiability" is described in paragraph 12 of IAS 38 as follows.

"*An asset is identifiable if it either:*

a. is separable, i.e. capable of being separated or divided *from the entity and sold, transferred, licensed, rented or exchanged, either individually or together with a related contract, identifiable asset or liability, regardless of whether the entity intends to do so; or*

b. arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations".

"Control" is an essential feature in accounting and is described in paragraph 13 of IAS 38.

"*An entity controls an asset if the entity has the power to obtain the future economic benefits flowing from the underlying resource and to restrict the access of others to those benefits. The capacity of an entity to control the future economic benefits from an intangible asset would normally stem from legal rights that are enforceable in a court of law. In the absence of legal rights, it is more difficult to demonstrate control. However, legal enforceability of a right is not a necessary condition for control because an entity may be able to control the future economic benefits in some other way*".

In order to have an intangible asset recognised as an asset on company balance sheet, such intangible has to satisfy also some specific accounting recognition criteria, which are set out in paragraph 21 of IAS 38.

"*An intangible asset shall be recognised if, and only if:*

a. it is probable that the expected future economic benefits that are attributable to the asset will flow to the entity; and

b. the cost of the asset can be measured reliably".

The recognition criteria illustrated above are deemed to be always satisfied when an intangible asset is acquired by a company from an external party at a price. Therefore, there are no particular problems to record an acquired intangible asset on the balance sheet of the acquiring company, at the consideration paid (i.e. historical cost).

1.2. Goodwill v. other intangible assets

Here, before we develop any further, we must draw a distinction between goodwill and other intangible assets, for clarification purposes.

Goodwill is an intangible asset that is associated with the purchase of one company by another. Specifically, goodwill is the portion of the purchase price that is higher than the sum of the net fair value of all of the assets purchased in the acquisition and the liabilities assumed in the process (= purchase price of the acquired company – (net fair market value of identifiable assets – net fair value of identifiable liabilities)).

The value of a company’s brand name, solid customer base, good customer relations, good employee relations, as well as proprietary technology, represent some examples of goodwill, in this context.

The value of goodwill arises in an acquisition, i.e. when an acquirer purchases a target company. Goodwill is then recorded as an intangible asset on the acquiring company’s balance sheet under the long-term assets’ account.

Under Generally Accepted Accounting Principles (“**GAAP**”) and IFRS, these companies which acquired targets in the past and therefore recorded those targets’ goodwill on their balance sheet, are then required to evaluate the value of goodwill on their financial statements at least once a year, and record any impairments.

Impairment of an asset occurs when its market value drops below historical cost, due to adverse events such as declining cash flows, a reputation backlash, increased competitive environment, etc. Companies assess whether an impairment is needed by performing an impairment test on the intangible asset. If the company's acquired net assets fall below the book value, or if the company overstated the amount of goodwill, then it must impair or do a write-down on the value of the asset on the balance sheet, after it has assessed that the goodwill is impaired. The impairment expense is calculated as the difference between the current market value and the purchase price of the intangible asset. The impairment results in a decrease in the goodwill account on the balance sheet.

This expense is also recognised as a loss on the income statement, which directly reduces net income for the year. In turn, earnings per share ("**EPS**") and the company's stock price are also negatively affected.

The Financial Accounting Standards Board ("**FASB**"), which sets standards for GAAP rules, and the IASB, which sets standards for IFRS rules, are considering a change to how goodwill impairment is calculated. Because of the subjectivity of goodwill impairment, and the cost of testing impairment, FASB and IASB are considering reverting to an older method called "goodwill amortisation" in which the value of goodwill is slowly reduced annually over a number of years.

As set out above, goodwill is not the same as other intangible assets because it is a premium paid over fair value during a transaction, and cannot be bought or sold independently. Meanwhile, other intangible assets can be bought and sold independently.

Also, goodwill has an indefinite life, while other intangibles have a definite useful life (i.e. an accounting estimate of the number of years an asset is likely to remain in service for the purpose of cost-effective revenue generation).

1.3. Amortisation, impairment and subsequent measure of intangible assets other than goodwill

That distinction between goodwill and other intangible assets being clearly drawn, let's get back to the issues revolving around recording intangible assets (other than goodwill) on the balance sheet of a company.

As set out above, if some intangible assets are acquired as a consequence of a business purchase or combination, the acquiring company recognises all these intangible assets, provided that they meet the definition of an intangible asset. This results in the recognition of intangibles – including brand names, IPRs, customer relationships – that would not have been recognised by the acquired company that developed them in the first place. Indeed, paragraph 34 of IAS 38 provides that "*in accordance with this Standard and IFRS 3 (as revised in 2008), an acquirer recognises at the acquisition date, separately from goodwill, an intangible asset of the acquiree, irrespective of whether the asset had been recognised by the acquiree before the business combination. This means that the acquirer recognises as an asset separately from goodwill an in-process research and development project of the acquiree, if the project meets the definition of an intangible asset. An acquiree's in-process research and development project meets the definition of an intangible asset when it:*

a. meets the definition of an asset, and

b. is identifiable, i.e. separable or arises from contractual or other legal rights."

Therefore, in a business acquisition or combination, the intangible assets that are "identifiable" (either separable or arising from legal rights) can be recognised and capitalised in the balance sheet of the acquiring company.

After initial recognition, the accounting value in the balance sheet of intangible assets with definite useful lives (e.g. IPRs, licenses) has to be amortised over the intangible asset's expected useful life, and is subject to impairment tests when needed. As explained above, intangible assets with indefinite useful lives (such as goodwill or brands) will not be amortised, but only subject at least annually to an impairment test to verify whether the impairment indicators ("triggers") are met.

Alternatively, after initial recognition (at cost or at fair value in the case of business acquisitions or mergers), intangible assets with definite useful lives may be revalued at fair value less amortisation, provided there is an active market for the asset to be referred to, as can be inferred from paragraph 75 of IAS 38:

"*After initial recognition, an intangible asset shall be carried at a revalued amount, being its fair value at the date of the revaluation less any subsequent accumulated amortisation and any subsequent accumulated impairment losses. For the purpose of revaluations under this Standard, fair value shall be measured by reference to an active market. Revaluations shall be made with such regularity that at the end of the reporting period the carrying amount of the asset does not differ materially from its fair value*."

However, this standard indicates that the revaluation model can only be used in rare situations, where there is an active market for these intangible assets.

1.4. The elephant in the room: a lack of recognition and measurement of internally generated intangible assets

All the above about the treatment of intangible assets other than goodwill cannot be said for internally generated intangible assets. Indeed, IAS 38 sets out important differences in the treatment of those internally generated intangibles, which is currently – and rightfully – the subject of much debate among regulators and other stakeholders.

Internally generated intangible assets are prevented from being recognised, from an accounting standpoint, as they are being developed (while a business would normally account for internally generated tangible assets). Therefore, a significant proportion of internally generated intangible assets is not recognised in the balance sheet of a company. As a consequence, stakeholders such as investors, regulators, shareholders, financiers, are not receiving some very relevant information about this enterprise, and its accurate worth.

Why such a standoffish attitude towards internally generated intangible assets? In practice, when the expenditure to develop intangible asset is incurred, it is often very unclear whether that expenditure is going to generate future economic benefits. It is this uncertainty that prevents many intangible assets from being recognised as they are being developed. This perceived lack of reliability of the linkage between expenditures and future benefits pushes towards the treatment of such expenditures as "period cost". It is not until much later, when the uncertainty is resolved (e.g. granting of a patent), that an intangible asset may be capable of recognition. As current accounting requirements primarily focus on transactions, an event such as the resolution of uncertainty surrounding an internally developed IPR is generally not captured in company financial statements.

Let's take the example of research and development costs ("**R&D**"), which is one process of internally creating certain types of intangible assets, to illustrate the accounting treatment of intangible assets created in this way.

Among accounting standard setters, such as IASB with its IAS 38, the most frequent practice is to require the immediate expensing of all R&D. However, France, Italy and Australia are examples of countries where national accounting rule makers allow the capitalisation of R&D, subject to conditions being satisfied.

Therefore, in some circumstances, internally generated intangible assets can be recognised when the relevant set of recognition criteria is met, in particular the existence of a clear linkage of the expenditure to future benefits accruing to the company. This is called condition-based capitalisation. In these cases, the cost that a company has incurred *in that financial year*, can be capitalised as an asset; the previous costs having already been expensed in earlier income statements. For example, when a patent is finally granted by the relevant intellectual property office, only the expenses incurred *during that financial year* can be capitalised and disclosed on the face of balance sheet among intangible fixed assets.

To conclude, under the current IFRS and GAAP regimes, internally generated intangible assets, such as IPRs, can only be recognised on balance sheet in very rare instances.

2.Why value and report intangible assets?

As developed in depth by the European Commission ("**EC**") in its 2013 final report from the expert group on intellectual property valuation, the UK intellectual property office ("**UKIPO**") in its 2013 "Banking on IP?" report and the FRC in its 2019 discussion paper "Business reporting of intangibles: realistic proposals", the time for radical change to the accounting of intangible assets has come upon us.

2.1. Improving the accurateness and reliability of financial communication

Existing accounting standards should be advanced, updated and modernised to take greater account of intangible assets and consequently improve the relevance, objectivity and reliability of financial statements.

Not only that, but informing stakeholders (i.e. management, employees, shareholders, regulators, financiers, investors) appropriately and reliably is paramount today, in a corporate world where companies are expected to accurately, regularly and expertly manage and broadcast their financial communication to medias and regulators.

As highlighted by Janice Denoncourt in her blog post "intellectual property, finance and corporate governance", no stakeholder wants an iteration of the Theranos' fiasco, during which inventor and managing director Elizabeth Holmes was indicted for fraud in excess of USD700 million, by the United States Securities and Exchange Commission ("**SEC**"), for having repeatedly, yet inaccurately, said that Theranos' patented blood testing technology was both revolutionary and at the last stages of its development. Elizabeth Holmes made those assertions on the basis of the more than 270 patents that her and her team filed with the United States patent and trademark office ("**USPTO**"), while making some material omissions and misleading disclosures to the SEC, via Theranos' financial statements, on the lame justification that "*Theranos needed to protect its intellectual property*" (sic).

Indeed, the stakes of financial communication are so high, in particular for the branding and reputation of any "knowledge economy" company, that, back in 2002, LVMH did not hesitate to sue Morgan Stanley, the investment bank advising its nemesis, Kering (at the time, named "**PPR**"), in order to obtain Euros100 million of damages resulting from Morgan Stanley's alleged breach of conflicts of interests between its investment banking arm (which advised PPR's top-selling brand, Gucci) and Morgan Stanley's financial research division. According to LVMH, Clare Kent, Morgan Stanley's luxury sector-focused analyst, systematically drafted and then published negative and biased research against LVMH share and financial results, in order to favor Gucci, the top-selling brand of the PPR luxury conglomerate and Morgan Stanley’s top client. While this lawsuit – the first of its kind in relation to alleged biased conduct in a bank’s financial analysis – looked far-fetched when it was lodged in 2002, LVMH actually won, both in first instance and on appeal.

Having more streamlined and accurate accounting, reporting and valuation of intangible assets – which are, today, the main and most valuable assets of any 21st century corporation – is therefore paramount for efficient and reliable financial communication.

2.2. Improving and diversifying access to finance

Not only that, but recognising the worth and inherent value of intangible assets, on balance sheet, would greatly improve the chances of any company – in particular, SMEs – to successfully apply for financing.

Debt finance is notoriously famous for shying away from using intangible assets as main collateral against lending because it is too risky.

For example, taking appropriate security controls over a company’s registered IPRs in a lending scenario would involve taking a fixed charge, and recording it properly on the Companies Registry at Companies House (in the UK) and on the appropriate IPRs’ registers. However, this hardly ever happens. Typically, at best, lenders are reliant on a floating charge over IPRs, which will crystallise in case of an event of default being triggered – by which time, important IPRs may have disappeared into thin air, or been disposed of; hence limiting the lender’s recovery prospects.

Alternatively, it is now possible for a lender to take an assignment of an IPR by way of security (generally with a licence back to the assignor to permit his or her continued use of the IPR) by an assignment in writing signed by the assignor[1]. However, this is rarely done in practice. The reason is to avoid “maintenance”, i.e. to prevent the multiplicity of actions. Indeed, because intangibles are incapable of being possessed, and rights over them are therefore ultimately enforced by action, it has been considered that the ability to assign such rights would increase the number of actions[2].

Whilst there are improvements needed to the practicalities and easiness of registering a security interest over intangible assets, the basic step that is missing is a clear inventory of IPRs and other intangible assets, on balance sheet and/or on yearly financial statements, without which lenders can never be certain that these assets are in fact to hand.

Cases of intangible asset- backed lending (“**IABL**”) have occurred, whereby a bank provided a loan to a pension fund against tangible assets, and the pension fund then provided a sale and leaseback arrangement against intangible assets. Therefore, IABL from pension funds (on a sale and leaseback arrangement), rather than banks, provides a route for SMEs to obtain loans.

There have also been instances where specialist lenders have entered into sale and licence-back agreements, or sale and leaseback agreements, secured against intangible assets, including trademarks and software copyright.

Some other types of funders than lenders, however, are already making the “intangible assets” link, such as equity investors (business angels, venture capital companies and private equity funds). They know that IPRs and other intangibles represent part of the “skin in the game” for SMEs owners and managers, who have often expended significant time and money in their creation, development and protection. Therefore, when equity investors assess the quality and attractiveness of investment opportunities, they invariably include consideration of the underlying intangible assets, and IPRs in particular. They want to understand the extent to which intangible assets owned by one of the companies they are potentially interested investing in, represent a barrier to entry, create freedom to operate and meet a real market need.

Accordingly, many private equity funds, in particular, have delved into investing in luxury companies, attracted by their high gross margins and net profit rates, as I explained in my 2013 article "Financing luxury companies: the quest of the Holy Grail (not!)". Today, some of the most active venture capital firms investing in the European creative industries are Accel, Advent Venture Partners, Index Ventures, Experienced Capital, to name a few.

2.3. Adopting a systematic, consistent and streamlined approach to the valuation of intangible assets, which levels the playing field

If intangible assets are to be recognised in financial statements, in order to adopt a systematic and streamlined approach to their valuation, then fair value is the most obvious alternative to cost, as explained in paragraph 1.3. above.

How could we use fair value more widely, in order to capitalise intangible assets in financial statements?

IFRS 13 "Fair Value Measurements" identifies three widely-used valuation techniques: the market approach, the cost approach and the income approach.

The **market approach** "*uses prices and other relevant information generated by market transactions involving identical or comparable*" assets. However, this approach is difficult in practice, since when transactions in intangibles occur, the prices are rarely made public. Publicly traded data usually represents a market capitalisation of the enterprise, not singular intangible assets. Market data from market participants is often used in income based models such as determining reasonable royalty rates and discount rates.

Direct market evidence is usually available in the valuation of internet domain names, carbon emission rights and national licences (for radio stations, for example). Other relevant market data include sale/licence transactional data, price multiples and royalty rates.

The **cost approach** "*reflects the amount that would be required currently to replace the service capacity of an asset*". Deriving fair value under this approach therefore requires estimating the costs of developing an equivalent intangible asset. In practice, it is often difficult to estimate in advance the costs of developing an intangible. In most cases, replacement cost new is the most direct and meaningful cost based means of estimating the value of an intangible asset. Once replacement cost new is estimated, various forms of obsolescence must be considered, such as functional, technological and economic. Cost based models are best used for valuing an assembled workforce, engineering drawings or designs and internally developed software where no direct cash flow is generated.

The **income approach** essentially converts future cash flows (or income and expenses) to a single, discounted present value, usually as a result of increased turnover of cost savings. Income based models are best used when the intangible asset is income producing or when it allows an asset to generate cash flow. The calculation may be similar to that of value in use. However, to arrive at fair value, the future income must be estimated from the perspective of market participants rather than that of the entity. Therefore, applying the income approach requires an insight into how market participants would assess the benefits (cash flows) that will be obtained uniquely from an intangible asset (where such cash flows are different from the cash flows related to the whole company). Income based methods are usually employed to value customer related intangibles, trade names, patents, technology, copyrights, and covenants not to compete.

An example of IPRs' valuation by way of fair value, using the cost and income approaches in particular, is given in the excellent presentation by Austin Jacobs, made during ialci's latest law of luxury goods and fashion seminar on intellectual property rights in the fashion and luxury sectors.

In order to make these three above-mentioned valuation techniques more effective, with regards to intangible assets, and because many intangibles will not be recognised in financial statements as they fail to meet the definition of an asset or the recognition criteria, a reconsideration to the "Conceptual Framework to Financial Reporting" needs being implemented by the IASB.

These amendments to the Conceptual Framework would permit more intangibles to be recognised within financial statements, in a systematic, consistent, uniform and streamlined manner, therefore levelling the playing field among companies from the knowledge economy.

Let's not forget that one of the reasons WeWork co founder, Adam Neumann, was violently criticised, during WeWork's failed IPO attempt, and then finally ousted, in 2019, was the fact that he was paid nearly USD6 million for granting the right to use his registered word trademark "We", to his own company WeWork. In its IPO filing prospectus, which provided the first in-depth look at WeWork's financial results, WeWork characterised the nearly USD6 million payment as "fair market value". Many analysts, among which Scott Galloway, begged to differ, outraged by the lack of rigour and realism in the valuation of the WeWork brand, and the clearly opportunistic attitude adopted by Adam Neumann to get even richer, faster.

2.4. Creating a liquid, established and free secondary market of intangible assets

IAS 38 currently permits intangible assets to be recognised at fair value, as discussed above in paragraphs 1.3. and 2.3., measured by reference to an active market.

While acknowledging that such markets may exist for assets such as “*freely transferable taxi licences, fishing licences or production quotas*”, IAS 38 states that “*it is uncommon for an active market to exist for an intangible asset*”. It is even set out, in paragraph 78 of IAS 38 that “*an active market cannot exist for brands, newspaper mastheads, music and film publishing rights, patents or trademarks, because each such asset is unique*”.

Markets for resale of intangible assets and IPRs do exist, but are presently less formalised and offer less certainty on realisable values. There is no firmly established secondary transaction market for intangible assets (even though some assets are being sold out of insolvency) where value can be realised. In addition, in the case of forced liquidation, intangible assets’ value can be eroded, as highlighted in paragraph 2.2. above.

Therefore, markets for intangible assets are currently imperfect, in particular because there is an absence of mature marketplaces in which intangible assets may be sold in the event of default, insolvency or liquidation. There is not yet the same tradition of disposal, or the same volume of transaction data, as that which has historically existed with tangible fixed assets.

Be that as it may, the rise of liquid secondary markets of intangible assets is unstoppable. In the last 15 years, the USA have been at the forefront of IPRs auctions, mainly with patent auctions managed by specialist auctioneers such as ICAP Ocean Tomo and Racebrook. For example, in 2006, ICAP Ocean Tomo sold 78 patent lots at auction for USD8.5 million, while 6,000 patents were sold at auction by Canadian company Nortel Networks for USD4.5 billion in 2011.

However, auctions are not limited to patents, as demonstrated by the New York auction, successfully organised by ICAP Ocean Tomo in 2006, on lots composed of patents, trademarks, copyrights, musical rights and domain names, where the sellers were IBM, Motorola, Siemens AG, Kimberly Clark, etc. In 2010, Racebrook auctioned 150 American famous brands from the retail and consumer goods' sectors.

In Europe, in 2012, Vogica successfully sold its trademarks and domain names at auction to competitor Parisot Group, upon its liquidation.

In addition, global licensing activity leaves not doubt that intangible assets, in particular IPRs, are, in fact, very valuable, highly tradable and a very portable asset class.

It is high time to remove all market's imperfections, make trading more transparent and offer options to the demand side, to get properly tested.

3. Next steps to improve the valuation and reporting of intangible assets

3.1. Adjust IAS 38 and the Conceptual Framework to Financial Reporting to the realities of intangible assets' reporting

Mainstream lenders, as well as other stakeholders, need cost-effective, standardised approaches in order to capture and process information on intangibles and IPRs (which is not currently being presented by SMEs).

This can be achieved by reforming IAS 38 and the "Conceptual Framework to Financial Reporting", at the earliest convenience, in order to make most intangible assets capitalised on financial statements at realistic and consistent valuations.

In particular, the reintroduction of amortisation of goodwill may be a pragmatic way to reduce the impact of different accounting treatment for acquired and internally generated intangibles.

In addition, narrative reporting (i.e. reports with titles such as “Management Commentary” or “Strategic Report”, which generally form part of the annual report, and other financial communication documents such as “Preliminary Earnings Announcements” that a company provides primarily for the information of investors) must set out detailed information on unrecognised intangibles, as well as amplify what is reported within the financial statements.

3.2. Use standardised and consistent metrics within financial statements and other financial communication documents

The usefulness and credibility of narrative information would be greatly enhanced by the inclusion of metrics (i.e. numerical measures that are relevant to an assessment of the company’s intangibles) standardised by industry. The following are examples of objective and verifiable metrics that may be disclosed through narrative reporting:

- a company that identifies customer loyalty as critical to the success of its business model might disclose measures of customer satisfaction, such as the percentage of customers that make repeat purchases;
- if the ability to innovate is a key competitive advantage, the proportion of sales from new products may be a relevant metric;
- where the skill of employees is a key driver of value, employee turnover may be disclosed, together with information about their training.

3.3. Make companies' boards accountable for intangibles' reporting

Within a company, at least one appropriately qualified person should be appointed and publicly reported as having oversight and responsibility for intangibles' auditing, valuation, due diligence and reporting (for example a director, specialist advisory board or an external professional adviser).

This would enhance the importance of corporate governance and board oversight, in addition to reporting, with respect to intangible assets.

In particular, some impairment tests could be introduced, to ensure that businesses are well informed and motivated to adopt appropriate intangibles' management practices, which should be overseen by the above-mentioned appointed board member.

3.4. Create a body that trains about, and regulates, the field of intangible assets' valuation and reporting

The creation of a professional organisation for the intangible assets' valuation profession would increase transparency of intangibles' valuations and trust towards valuation professionals (i.e. lawyers, IP attorneys, accountants, economists, etc).

This valuation professional organisation would set some key objectives that will protect the public interest in all matters that pertain to the profession, establish professional standards (especially standards of professional conduct) and represent professional valuers.

This organisation would, in addition, offer training and education on intangibles' valuations. Therefore, the creation of informative material and the development of intangible assets' training programmes would be a priority, and would guarantee the high quality valuation of IPRs and other intangibles as a way of boosting confidence for the field.

Company board members who are going to be appointed as having accountability and responsibility for intangibles' valuation within the business, as mentioned above in paragraph 3.3., could greatly benefit from regular training sessions offered by this future valuation professional organisation, in particular for continuing professional development purposes.

3.5. Create a powerful register of expert intangible assets' valuers

In order to build trust, the creation of a register of expert intangibles' valuers, whose ability must first be certified by passing relevant knowledge tests, is key.

Inclusion on this list would involve having to pass certain aptitudes tests and, to remain on it, valuers would have to maintain a standard of quality in the valuations carried out, whereby the body that manages this registry would be authorised to expel members whose reports are not up to standard. This is essential in order to maintain confidence in the quality and skill of the valuers included on the register.

The entity that manages this body of valuers would have the power to review the valuations conducted by the valuers certified by this institution as a "second instance". The body would need to have the power to re-examine the assessments made by these valuers (inspection programme), and even eliminate them if it is considered that the assessment is overtly incorrect (fair disciplinary mechanism).

3.6. Establish an intangible assets' marketplace and data-source

The development most likely to transform IPRs and intangibles as an asset class is the emergence of more transparent and accessible marketplaces where they can be traded.

In particular, as IPRs and intangible assets become clearly identified and are more freely licensed, bought and sold (together with or separate to the business), the systems available to register and track financial interests will need to be improved. This will require the cooperation of official registries and the establishment of administrative protocols.

Indeed, the credibility of intangibles' valuations would be greatly enhanced by improving valuation information, especially by collecting information and data on actual and real intangibles' transactions in a suitable form, so that it can be used, for example, to support IPRs asset-based lending decisions. If this information is made available, lenders and expert valuers will be able to base their estimates on more widely accepted and verified assumptions, and consequently, their valuation results – and valuation reports – would gain greater acceptance and reliability from the market at large.

The wide accessibility of complete, quality information which is based on real negotiations and transactions, via this open data-source, would help to boost confidence in the validity and accuracy of valuations, which will have a very positive effect on transactions involving IPRs and other intangibles.

3.7. Introduce a risk sharing loan guarantee scheme for banks to facilitate intangibles' secured lending

A dedicated loan guarantee scheme needs being introduced, to facilitate intangible assets' secured lending to innovative and creative SMEs.

Asia is currently setting the pace in intangibles-backed lending. In 2014, the intellectual property office of Singapore ("**IPOS**") launched a USD100 million "IP financing scheme" designed to support local SMEs to use their granted IPRs as collateral for bank loans. A panel of IPOS-appointed valuers assess the applicant's IPR portfolio using standard guidelines to provide lenders with a basis on which to determine the amount of funds to be advanced. The development of a national valuation model is a noteworthy aspect of the scheme and could lead to an accepted valuation methodology in the future.

The Chinese intellectual property office (“**CIPO**”) has developed some patent-backed debt finance initiatives. Only 6 years after the “IP pledge financing” programme was launched by CIPO in 2008, CIPO reported that Chinese companies had secured over GBP6 billion in IPRs-backed loans since the programme launched. The Chinese government having way more direct control and input into commercial bank lending policy and capital adequacy requirements, it can vigorously and potently implement its strategic goal of increasing IPRs-backed lending.

It is high time Europe follows suit, at least by putting in place some loan guarantees that would increase lender’s confidence in making investments by sharing the risks related to the investment. A guarantor assumes a debt obligation if the borrower defaults. Most loan guarantee schemes are established to correct perceived market failures by which small borrowers, regardless of creditworthiness, lack access to the credit resources available to large borrowers. Loan guarantee schemes level the playing field.

The proposed risk sharing loan guarantee scheme set up by the European Commission or by a national government fund (in particular in the UK, who is brexiting) would be specifically targeted at commercial banks in order to stimulate intangibles-secured lending to innovative SMEs. The guarantor would fully guarantee the intangibles-secured loan and share the risk of lending to SMEs (which have suitable IPRs and intangibles) with the commercial bank.

The professional valuer serves an important purpose, in this future loan guarantee scheme, since he or she will fill the knowledge gap relating to the IPRs and intangibles, as well as their value, in the bank's loan procedure. If required, the expert intangibles' valuer provides intangibles' valuation expertise and technology transfer to the bank, until such bank has built the relevant capacity to perform intangible assets' valuations. Such valuations would be performed, either by valuers and/or banks, according to agreed, consistent, homogenised and accepted methods/standards and a standardised intangible asset's valuation methodology.

To conclude, in this era of ultra-competitiveness and hyper-globalisation, France and the UK, and Europe in general, must immediately jump on the saddle of progress, by reforming outdated and obsolete accounting and reporting standards, as well as by implementing all the above-mentioned new measures and strategies, to realistically and consistently value, report and leverage intangible assets in the 21st century economy.

[1] "Lingard's bank security documents", Timothy N. Parsons, 4th edition, LexisNexis, page 450 and seq.

[2] "Taking security – law and practice", Richard Calnan, Jordans, page 74 and seq.

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