Hogan Lovells

Doing business in the UK

Consumer Sector 2020

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Introduction

The UK's consumer sector has shown resilience against the backdrop of challenging political and economic conditions. Consumers in the UK remain willing to spend; however the way in which they do so is changing, with e-commerce accounting for around 20 percent of retail sales in 2019. Meanwhile, regulation attempts to keep pace with the changes in both consumer behaviors and the geopolitical landscape. For those seeking to do business in the UK, an understanding of how to best navigate this legal and regulatory environment has never been more crucial to success.

Whether you are already well-established in the UK or looking to enter the market, this overview provides a guide to navigating legal pitfalls and successfully conducting business in the UK's dynamic consumer sector.

This guide is current as of 1 February 2020. On 31 January 2020 the UK left the European Union (EU) and entered a transition period, which is currently set to end on 31 December 2020 (Exit Day). During the transition period, most EU laws will continue to apply to and in the UK and the UK will still be treated as an EU member state when trading and for the purposes of many EU regulatory regimes.

From Exit Day the UK will be treated by the EU as a third country. The terms of any trade between the UK and the EU will be governed by the terms of a new free trade agreement which the UK government intends to negotiate during the transition period. It is currently unclear what the terms of this trade agreement will be and if it will be agreed by 31 December 2020, creating significant uncertainty as to the impact of Brexit on the consumer sector.

Under the European Union (Withdrawal) Act 2018, EU law in force immediately before the end of the transition period will be implemented into UK law on Exit Day. However, after Exit Day it is likely there will be increasing regulatory divergence from the EU. As a considerable amount of UK consumer law is derived from EU law, businesses should be prepared for the possibility of (potentially significant) change in the near future.

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B2C: Consumer Protection

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The UK has an extensive body of consumer protection law, which aims to provide consumers with certain absolute rights. A significant amount of legislation in this area is derived from EU laws, which have been implemented into the UK's domestic law.

UK consumers have a right to receive certain pre-contract information and, if they have entered into a distance contract, consumers benefit from a 14-day cancellation period during which they can cancel the contract and receive a full refund of amounts paid (although this right can be limited in certain, specific circumstances).

Consumer contracts must be in plain and intelligible language and any terms that are deemed unfair will not be binding against a consumer. The ability of a business to exclude or limit its liability in a consumer contract is also limited; for example, it is not possible to exclude or limit liability for supplying defective, misdescribed, or incorrectly installed goods to consumers. Consumers also have a number of statutory rights and remedies if the goods or services purchased do not meet certain statutory standards.

The content of advertisements, including any claims made about the products being marketed, is regulated by a combination of legislation and industry self-regulation. Communications to consumers cannot be misleading and aggressive commercial practices are prohibited.

The enforcement network comprises numerous governmental bodies, each with its own specific mandate. The Competition and Markets Authority (CMA) is responsible for encouraging competition and for tackling practices and market conditions that prevent consumers from freely exercising choice. Its powers are broad and range from the investigative to the contentious, allowing it to stop unfair commercial practices via civil proceedings and even prosecute market operators in serious cases.

Although the CMA has an overarching market focus, Trading Standards Services (TSS) is operated by local councils across the UK to combat consumer detriment through similar means. Though TSS generally does not intervene in individual cases, its local remit enables it to actively monitor trading standards, enforce legislation, and respond to complaints referred to it by both consumers and businesses.

Consumer protection is further bolstered by sector-specific regulators, such as the Advertising Standards Agency (ASA) and the Food Standards Agency (FSA). These regulators are empowered to investigate non-compliance with sector-specific regulation and some can impose penalties for non-compliance with sector-specific regulation. Many work with TSS in taking action against non-compliance and also have concurrent powers with the CMA in respect of broader competition or consumer protection breaches.

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B2B: Supply Chain Issues

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Although B2B contracts are less heavily regulated than B2C contracts in the UK, there are a number of statutory controls on B2B arrangements that should be considered when structuring a supply chain.

It is not possible to limit liability for death or personal injury caused by negligence, fraud, or fraudulent misrepresentation under English law and it is only possible to exclude or limit other liabilities in B2B contracts if it is "reasonable." If a limitation or exclusion clause is found unreasonable, it is wholly unenforceable.

Certain terms are implied into B2B contracts – for example, that goods are supplied with good title and are of satisfactory quality. Some implied terms cannot be excluded and others can only be restricted or excluded if it is "reasonable" to do so. Again, any unreasonable exclusion or limitation of implied terms will be unenforceable under English law.

There are also rules to protect suppliers against late payment. A term is implied into B2B contracts giving a creditor a right to simple interest at 8 percent on the price payable, plus a fixed sum and reasonable costs of recovery. This right can only be excluded if the contract provides an alternative substantial contractual remedy for late payments (i.e., an interest clause specifying an alternative interest rate which sufficiently compensates the supplier for late payment). When dealing with smaller businesses, there are restrictions on the length of payment terms that can be included in the contract.

Consumer businesses in the UK have faced increasing scrutiny of their anti-bribery and anti-slavery practices. Larger companies which carry on a business, or part of a business, in the UK and have an annual turnover of £36 million or more, are required to produce a statement each year setting out the steps they have taken to ensure that their business and supply chains are slavery free or a statement that they have taken no steps to do this. UK bribery laws are far-reaching and can carry significant penalties of imprisonment and/or an unlimited fine. Therefore, businesses should ensure companies in their supply chains have robust anti-bribery and corruption policies and procedures in place and include contractual protections to this effect in their agreements.

The relationship between a commercial agent and principal is regulated by the Commercial Agents Regulations 1993. Both the agent and principal have statutory duties to each other, and the agent is entitled to a compensation or indemnity payment upon termination of the agency agreement. The statutory controls on commercial agency relationships do not apply to distribution arrangements. However, EU and UK competition laws, which prohibit anti-competitive agreements and abuse of a dominant position, may potentially have an impact on the appointment of a distributor.

Intra-EU supply chains benefit from no tariffs and low costs when moving goods across borders and limited border delays. Once the UK leaves the EU, many of these advantages will no longer apply to companies' UK operations so organizations will need to assess (and possibly restructure) their supply chains accordingly. Most companies have begun preparations to mitigate any potentially adverse impacts of Brexit upon their supply chains. This approach should be balanced with a focus on how they will respond in the medium term to take advantage of any opportunities presented by the changing global trading environment.

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Product Regulation

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UK product regulation is made up of a combination of local UK and EU laws. Under the European Union (Withdrawal) Act 2018, EU regulations will be implemented into UK law when the UK leaves the EU. However, it is likely there will be increasing regulatory divergence from the EU over time as new technologies and ever-changing consumer behavior will lead to frequently changing regulations. Consumer businesses must navigate this complex and fast-paced regulatory environment when bringing their products to the UK market.

While the regulatory requirements and risk profile differ from product to product, consumer safety is at the heart of product regulation. This is sought through both the setting of standards for the manufacture of products (including ingredients and components used) and the mandating of information that must be made available to consumers. Claims which manufacturers use to promote specific characteristics or qualities of products are also governed by a combination of legislation, codes of practice, and guidance issued by regulators.

Compliance issues can arise during all stages of the product lifecycle – concept development, manufacture, supply chain, marketing, and end-user. Problems can be prevented by implementing business-wide compliance programs and carrying out in-depth analysis of individual products.

However, although businesses must ensure products are safe and compliant, the attractiveness, design, production, and presentation of such products should always be considered due to the competitiveness of the UK consumer market. Therefore, it is important to carry out a risk assessment that considers compliance requirements, as well as taking account of market practice and the likely attitude of UK regulators, to ensure a product's reputation and goodwill are protected.

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Product Liability

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Though UK consumers are less litigious than their American counterparts, any business whose products are distributed in the UK may find itself subject to a product liability claim. Broadly, there are three potential avenues for a consumer to pursue a claim against a manufacturer or producer for damage caused by a product.

First, a purchaser of a product may bring a claim against the seller for any breach of the contractual terms of sale, whether such terms were expressed or implied (for example, there is an implied term in all sale of goods contracts that the goods will be of satisfactory quality).

Second, an injured party may bring a claim under the Consumer Protection Act 1987 (CPA) for any damage caused by a defect in a product. A claimant under the CPA is not required to prove that the producer was at fault – all that is required is for them to prove that the product had a defect and that the defective product caused the claimant damage.

Finally, a claimant can bring a claim against the manufacturer for negligence. Manufacturers owe a duty of care to the intended users of its products. However, the fact that a negligence claim requires proof of a breach of such duty makes it more difficult to bring than a claim under the CPA.

In England and Wales, damages are recoverable on a purely compensatory basis. Punitive damages are only available in very limited circumstances and, as such, are rarely awarded.

A court may also make a group litigation order where claims have "common or related issues of fact or law". A group litigation order enables more effective case management where there are multiple claims by multiple parties and, in some circumstances, may give recourse to justice where a large number of claimants are affected by a defendant's product but their individual losses are too small for each individual action to be economic outside of group litigation.

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Competition and Antitrust

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Superior market power, mergers, distribution systems, and pricing strategies are increasingly scrutinized – by the EU and national regulators, competitors, and others. When developing business and pricing strategies, companies need to navigate through an even greater number of potential regulatory obstacles including potential antitrust/competition issues, endorsements, comparative advertising, promotions, product pricing, and discounts (including in relation to online sales). Businesses need to consider legal restrictions, as well as industry and other voluntary codes of practice.

In the UK, as in the rest of Europe, the enforcement activities of competition/antitrust watchdogs have focused on e-commerce and online services in recent years. This holds true for the UK Competition and Markets Authority (CMA), which is very active in this area and has launched a number of significant investigations and consultations to grapple with the specific issues relevant to online activity, including social media and banking. The CMA has powers to impose significant sanctions on wrong-doing under both competition and consumer laws.

Any kind of restrictions of online sales are of particular concern, as is the growing market power of online platforms and marketplaces. The use of new technologies in distribution (e.g., pricing algorithms, personalized pricing, dynamic pricing or profiling/scoring) likewise is increasingly capturing the attention of competition authorities.

Also, as discussed in the B2B: Supply Chain Issues section of this guide, EU and UK competition laws, which prohibit anti-competitive agreements and abuse of a dominant position, may potentially have an impact on the appointment of a distributor.

Companies need to be mindful in these areas in order to avoid the pitfalls. There is often more than one way to reach the business objective in hand and businesses need to balance commercial goals against the risks of complaints to regulators or litigation by aggrieved third parties.

Competition law can also be used to help companies protect their own legitimate interests where more powerful competitors or suppliers are not playing by the rules.

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Corporate M&A

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The consumer sector in Europe has been one of the most active sectors for M&A activity throughout recent periods, and in the UK it has been the second most active sector in terms of companies for sale in 2019. Notwithstanding the impact of Brexit, this is expected to continue into the foreseeable future and, therefore, M&A will play a key role in a company's growth plans.

A robust due diligence process is critical in executing an acquisition of a consumer business. Identification of material risks in the target's business enables the buyer to price the deal correctly and obtain suitable protections from the seller. Consumer companies are often employee-heavy. If the target company participates in a defined benefit scheme, the buyer should carefully consider the associated risks and liabilities, particularly where there is a pension plan deficit. A pension plan deficit not only may have a direct impact on value, but it may also mean that negotiations need to be conducted with the trustees of the pension plan and, in some instances, the Pensions Regulator, as well as the seller, with a consequential impact on the complexity and length of negotiations. Other key areas of diligence for consumer sector companies to focus on are brand protection, commercial agreements, competition law, and data protection. Depending on the nature of the due diligence findings and the outcome of negotiations with the seller, the relevant risks will be addressed in the purchase agreement through warranties, indemnities, or closing conditions.

Consumer sector companies active in M&A in the UK should be aware of the option of warranty and indemnity insurance which provides cover, under an insurance policy, for losses arising from a breach of warranty or, in some cases, under an indemnity. Indemnity coverage is not available for indemnities which have been negotiated to cover a known issue. Policies are available to indemnify either the buyer (as a top-up to the amounts available to claim from the sellers) or the warrantors under a purchase agreement. Warranty and indemnity insurance can be a useful tool to bridge the gap between the buyer and seller in respect of overall risk exposure.

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Intellectual Property

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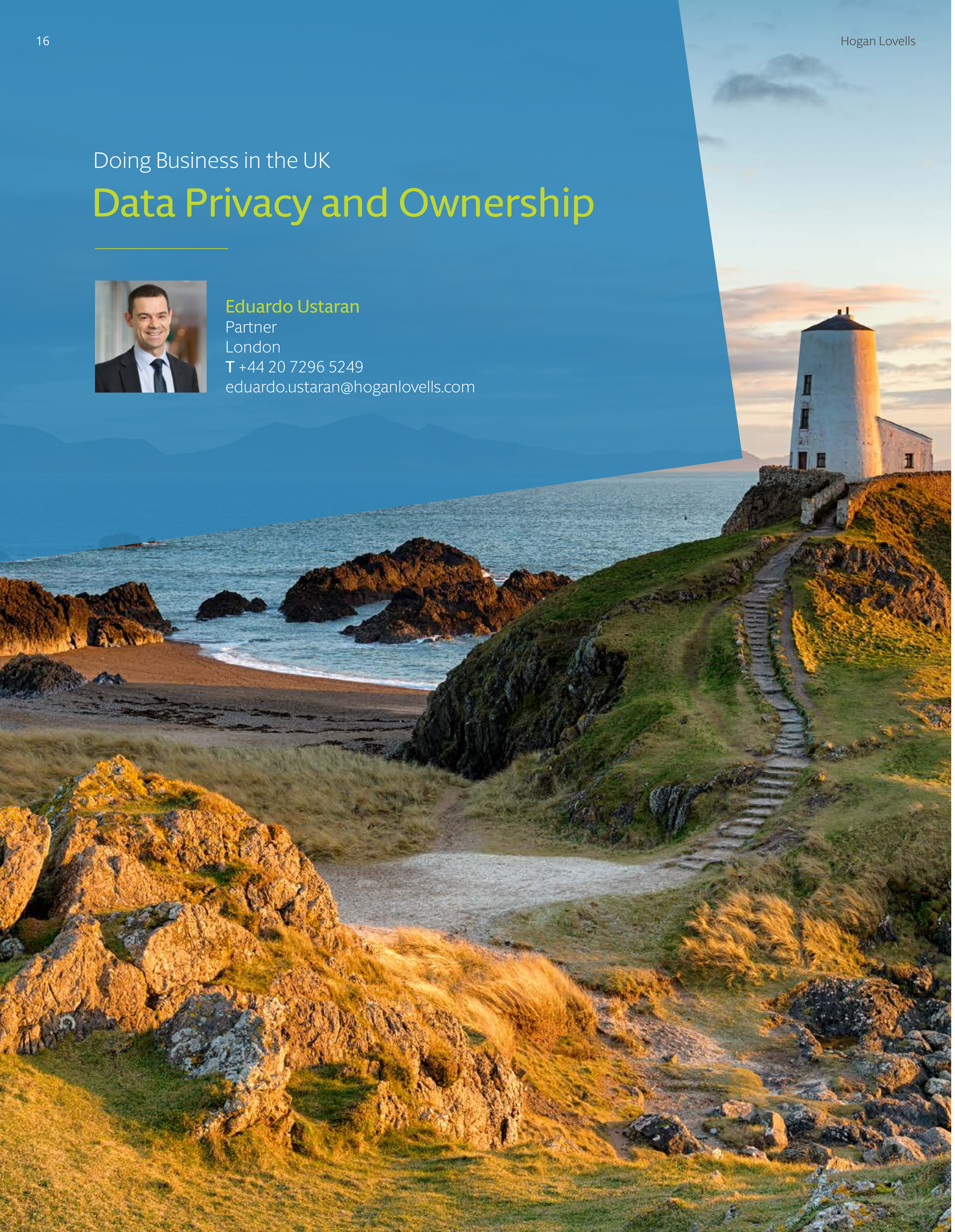
British luxury brands have a reputation for highly skilled craftsmanship and exceptional quality. They are estimated to be worth £48 billion to the British economy, mainly due to exports. Sales from the luxury sector are reported to have grown nearly 50 percent in the last four years and are predicted to continue to grow. Underpinning the value of a British luxury brand is the intellectual property in the brand and its designs.

The UK has a sophisticated and well-developed framework for the protection of IP. Although litigation is seen as expensive compared to other jurisdictions, the UK has a robust and internationally respected enforcement system with a variety of specialist IP courts. In addition, the relevant law enforcement authorities (including the specialist Police IP Crime Unit) and criminal courts are highly sophisticated and very thorough. Unlike in many other high-performing jurisdictions, criminal prosecutions in the UK are an attractive enforcement method in relation to infringing goods. The police and local Trading Standards officers carry out investigations at little or no cost to the rights owner, and their investigations can act as a deterrent.



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Data Privacy and Ownership

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International organizations looking to enter the UK market may take some comfort in the fact that the regulator, the Information Commissioner's Office (ICO), is known to be pragmatic and business-friendly. However, this does not mean that the ICO is a 'soft-touch' regulator. It relies on businesses operating within the UK to be accountable for, and to be able to demonstrate, compliance with the General Data Protection Regulation (GDPR) in practice and it will not hesitate to act in serious situations where it finds that a company's practices fall short of the required standards.

Recent statements from the ICO regarding its intention to fine two major consumer-facing companies should serve as a caution for those companies that view data protection as a simple compliance issue, rather than a major consideration for how they will conduct their business in the UK. For example, the ICO confirmed its intention to fine British Airways £183.39M (approx. $237M USD) for poor security arrangements which resulted in a cyber incident involving customer log-in, payment card, and travel booking details.

The ICO also intends to fine Marriott International £99.20M (approx. $128M USD) for a cyber incident involving a large number of hotel guest records. In this instance, the ICO found that the vulnerability in question began when Marriott failed to undertake sufficient due diligence of a company it acquired (Starwood Hotels group) and that it should have done more to secure its systems.

The interplay between the e-Privacy Directive and the GDPR continues to shape the landscape of data-driven marketing strategies in the UK. The introduction of the GDPR has not changed the law with respect to promotional emails to consumers, and in most cases in the UK these can be sent to existing customers on an opt-out basis (subject to certain conditions). However, where a company wants to undertake personalization activities such as targeted advertising or personalization of websites or app content using cookies and other device tracking technologies, then it must ensure compliance notice and consent requirements as interpreted by regulators and courts. In practice, this is likely to amount to displaying opt-in consent mechanisms.

Programmatic/online behavioral advertising is a current priority area for the ICO due to the complexity of the AdTech industry, the risks posed to individuals, and the perceived low level of data protection maturity of industry participants. Precisely because of the increasing reliance by consumer-facing businesses on personalization and tracking technologies, regulators are paying greater attention than ever before to compliance in this space.

Any discussion of the future changes to data protection law in the UK would be incomplete without a consideration of the implications of Brexit. The data protection landscape is unlikely to change in the UK post-Brexit as the UK Government has confirmed that the GDPR will be adopted into UK law at the point of exit from the EU. However, transfers from the UK to the EEA and vice versa will likely be affected when the UK leaves the EU.

Currently, personal data is permitted to flow freely in both directions, due to adequacy of laws in all countries within the EEA. Post Brexit, the UK Government has confirmed that it intends to continue to permit transfers of personal data from the UK to the EEA on the same basis. However, it remains to be seen whether the EEA countries offer reciprocal terms to the UK. This does not mean that businesses will be prohibited from transferring data to the UK, but simply that they will need to ensure that there are safeguards in place (like those currently required to transfer data from the UK and the EEA to other countries) to facilitate the transfer of data.

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Litigation and Arbitration

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Although it is not something that any company relishes thinking about, international companies who seek to enter the UK market should consider how they would be placed if they had to handle a dispute in the UK. Disputes may arise from a wide range of areas: relationships with consumers, suppliers and employees; in respect of data protection; distribution and licencing arrangements; insurance; intellectual property; product liability; real estate; and tax, to name a few.

In circumstances where a dispute is subject to the jurisdiction of the UK courts, parties must abide by the UK litigation process. This process is underpinned by the "overriding objective," which means that cases are dealt with justly and at proportionate cost. Parties to litigation have a duty to make disclosure to each other, meaning that all relevant documentary evidence must be exchanged and there is transparency (although certain communications will be protected from disclosure by the English law principle of privilege). There are mechanisms for interim relief in situations where a speedy remedy is required before a claim is fully heard (for example, where there is risk of dissipation of assets), which can serve as effective tactical tools. Cases are decided by a highly experienced and independent judiciary, and international companies litigating in the UK can be confident that disputes will be decided on their merits. The general rule is that the unsuccessful party will be ordered by the court to pay the costs of the successful party, but the court has a wide discretion to make a different order if it sees fit. UK court judgments are generally recognized and enforced abroad (and this is set to continue post-Brexit).

If businesses opt for their dispute(s) to be resolved by arbitration seated in London, they will benefit from the pro-arbitration stance of the UK courts (which exercise supervisory jurisdiction), a highly-experienced and varied pool of arbitrators to choose from, a private dispute resolution process, and the procedural flexibility afforded by arbitration (including less-extensive document production than in UK litigation). UK arbitration awards are subject to very limited grounds of appeal and are recognized and enforced worldwide pursuant to the well-established mechanism in the New York Convention (1958), which has been ratified by more than 150 countries.

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Payment and Financial Services Regulations

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In the UK, many forms of financial services, including payment services and providing credit, are regulated activities that need a license from the UK regulators. Companies providing these services need to comply with a number of ongoing conduct and reporting requirements as well. The main UK regulator is the Financial Conduct Authority, and certain types of large financial institutions (banks, insurance companies, and systemically-important investment firms) are also regulated by the Bank of England/Prudential Regulation Authority. A person who wishes to obtain a license from the UK regulators typically has to establish a permanent place of business in the UK or even be a UK company.

Although most payment services are confined to banks and e-money institutions, the way in which this area is regulated means that other firms can stray into the area. For example, a company may be carrying on a payment service if it, as commercial agent and/or through an online platform, brings a buyer and seller together and manages the cash flow between them through its own accounts. Customer cards, vouchers, or loyalty cards fall outside of licencing requirements if they are limited in scope or if they are accepted only within a limited network. If these conditions aren't met, then the programs may be regulated and require a license. Providing payment services without appropriate authorization is an offense. There are a number of available exemptions to the regime and as the scope of payment services has expanded some difficult perimeter issues.

Generally, lending to a business doesn't require a license unless it's a small business. Lending to consumers, sole traders, or partnerships of three or less is regulated, although there are some important exemptions such as business lending more than £25,000. Some activities related to this type of lending also need a license. This includes credit broking and debt-related activities, such as debt-administration and debt collecting. Lending to consumers where the loan is secured on residential property also generally needs a license and different requirements apply.

A number of activities ordinarily require a license when they involve particular investments, such as securities (e.g., shares, debt instruments, and warrants), derivatives, and insurance policies. These activities include:

- Dealing in the investment (whether as principal or agent).
- Arranging deals in investments (which includes acting as an intermediary or an introducer).
- Managing investments belonging to another.
- Advising on the merits of buying or selling investments.

Some exemptions from the requirement to be licenced are available, but their availability depends on what activities are being undertaken and in what context.

It is very important to understand when a licence is required. Carrying on an activity without the relevant license is a criminal offence and any contracts entered into as a result of that activity are potentially unenforceable. Unless an exemption applies, it is also illegal for a person without a license to issue promotional material which relates to any activities that require a license.

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Tariffs and Customs

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The world is a global marketplace, and many businesses import goods to the UK to meet their customers' or supply chain's needs. Compliance with the EU and UK rules and regulation for imports can give your business a real competitive edge, help you manage costs, and improve the range of goods and services you offer to your customers. As an importer into the UK, you need to consider how you will bring goods into the UK, including how much tax and duty you will need to pay, and whether you need to get a license or certificate before placing it on the UK market (and ultimately in free circulation into the rest of the EU).

Which import rules apply will be depend on whether goods originate from within the EU or elsewhere. Import duty is payable on goods imported to the UK from outside of the EU. In most cases, goods imported from within the EU are not liable to import duty, though this might change depending on the terms of the UK's exit from the EU.

When you are importing goods from within the EU, you are able to access favorable conditions derived from the EU internal market and in most cases do not have to pay any import duties - but only if you can prove that your goods really did originate from an EU member state. There are certain other compliance requirements, although an import license is not usually required (firearms, pharmaceutical products, tobacco, or alcohol beverages being key exceptions).

If you import from outside of the EU, the level of regulation is significantly greater and you will usually have to pay import duty (and sometimes associated tariffs) on goods imported into the UK. The exact amount payable depends on what you are importing and its country of origin.

The rules regarding import duty and the process for declaration are highly complex. Also, the duty payable can vary, depending on the goods, their origin, their value, and how they are to be used.

It is important for businesses to understand the UK's complex customs law not only from a compliance perspective, but also to ensure they do not accidentally overpay duty, tariffs, or value added tax (VAT).

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Real Estate

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Those looking to have an operational base for their business in the UK are likely to need premises. At an early stage, this will often mean renting rather than investing significant capital to acquire a property outright.

The good news is that there are currently no restrictions on foreign ownership or control of real estate and more than 80 percent of the land in England and Wales is now registered (meaning there is a state guarantee of title). Despite this, before signing up to a lease you will want to carry out due diligence with the landlord, local authorities, and service providers.

It is important to bear in mind that real estate in England and Wales is relatively highly regulated and, in addition, codes of practice are becoming ever more widely used – even where compliance is not mandatory. These range from the "Service Charge Code," which sets out best practice for the costs of building management, to the "Lease Code," which aims to achieve a fair balance between the interests of landlord and tenant.

Subject to market practice and acceptable "institutional" leases, the terms of business leases are, with relatively limited exceptions, freely negotiable. However, general practice is that rents are calculated based on the market rent per square foot with provisions that they can never decrease during the term of the lease. In addition, there will be various restrictions on lease disposal (often requiring the landlord's consent) and alterations (which will be constrained or prohibited).

Unsurprisingly, in an era of increasing focus on social and environmental responsibility, government policies are encouraging landlords and occupiers of business premises to focus upon energy efficiency and sustainability with leasing arrangements rather than dealing with how costs and responsibilities are allocated.

Potential tax liabilities should also be taken into account on all property transactions including leases. The default position is that value added tax (VAT) isn't payable on real estate but landlords can "opt to tax" making the transaction subject to the standard rate of VAT (currently 20 percent). Stamp Duty Land Tax may be applicable on the grant of a lease with the rate payable varying from 0-2 percent dependent on a figure calculated from the annual rent of your property (inclusive of VAT).

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