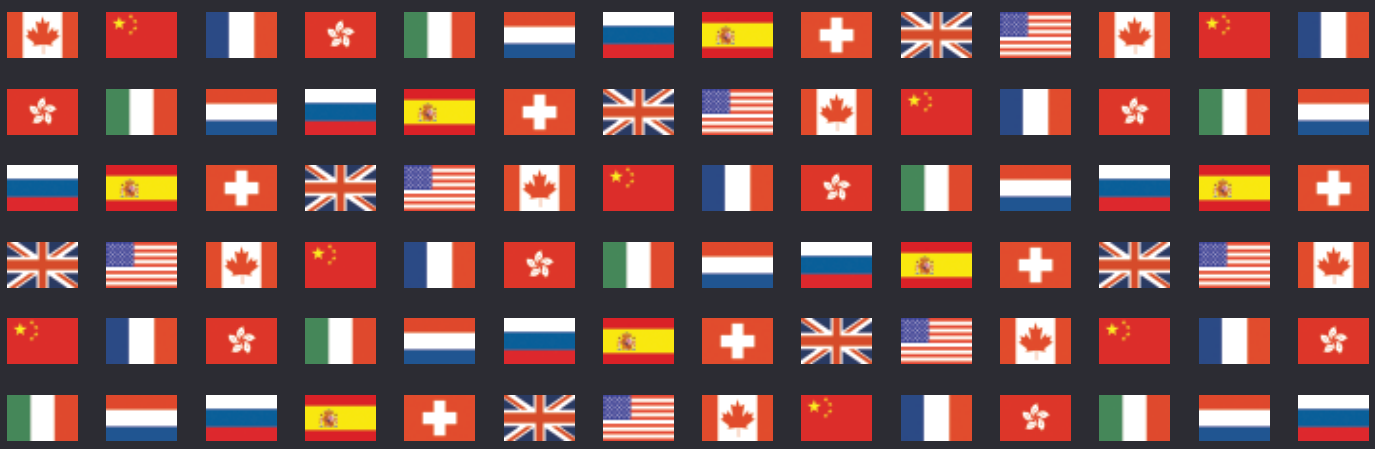
Luxury & Fashion 2021

Contributing editors
Meryl Rosen Bernstein, Sahira Khwaja and Kelly Tubman Hardy



LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the second edition of *Luxury & Fashion*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Hong Kong.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Meryl Rosen Bernstein, Sahira Khwaja and Kelly Tubman Hardy of Hogan Lovells, for their continued assistance with this volume.

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MARKET SPOTLIGHT

State of the market

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

Many high-end UK fashion brands have suffered in recent years, partly as a result of the rising costs of prime store locations and competition from online-only retailers, such as ASOS and Boo Hoo. In 2020, the covid-19 pandemic severely added to those woes, with tourism halting and shops closing. Famous department stores, such as Debenhams, and major UK retailers with a significant central London presence, such as Top Shop, went into administration, with the Top Shop brand being bought by online retailer ASOS in February 2021. However, luxury fashion brands have adapted quickly to the pandemic and those brands who are able to meet the demands of online shoppers, including for a more personalised experience, are weathering the storm. The unique challenge for UK luxury fashion brands for 2021, will now be successfully adapting to the impact of Brexit. UK businesses will notice more burdens and restrictions than they have been accustomed to, however trade between the United Kingdom and European Union will be duty free and quota free provided the goods (including the materials used in production) originate in the United Kingdom or European Union. Luxury brands will now be hoping for an early recovery from the pandemic.

MANUFACTURE AND DISTRIBUTION

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?

Supply chains for fashion goods cover a series of elements ranging from the first conceptualisation of the product, through development and production, to the sale of the product, whether online or offline, to the end purchaser. As a result, there is no overarching legal framework that applies to all aspects of the supply chain or that applies exclusively to the fashion industry. Any supply chain is made up of a series of buyers, sellers and suppliers of both goods and services all entering into different types of contract. The impact of and application of the legal regime that applies to the supply of goods or services often depends on whether the transaction is between two businesses or a business and a consumer.

Contract law

The applicable contract law in England and Wales encompasses both statute and the common law and applies to all parts of the development, manufacture and supply of fashion goods. The basic principle is that contracting parties are free to contract as they wish, subject to some important protections for contracting parties, such as controls on the exclusion and limitation of liability arising from the supply of goods or services. The key sources of exposure to liability in supply chains are breach of contract, tort and breach of statutory requirements. In business-to-business relationships the Unfair Contract Terms Act 1977 prohibits the exclusion or limitation of liability for death or personal injury to a natural person or their estate resulting from negligence. This prohibition is replicated for business to consumer relationships in the Consumer Rights Act 2015. Other contractual restrictions on liability may be subject to reasonableness or fairness requirements.

In the Summer of 2020 new rules retrospectively changed the way that many contracts, both existing and future, work. The new rules, which came into force on 26 June 2020, are set out in the Corporate Insolvency and Governance Act 2020 and are designed to protect supplies of goods and services by prohibiting the termination of supply contracts by the supplier if the customer enters into certain types of insolvency procedures. The new rules also introduced a new prohibition on exercising termination rights which pre-date certain insolvency procedures whilst the procedure is ongoing and a new prohibition on the supplier making it a condition of continued supply of goods and services during the insolvency period that pre-insolvency debts are paid.

Supply of goods or services

The supply of goods or services between businesses is subject to fairly light regulation. The supply of goods is primarily regulated by the Sale of Goods Act 1979 and the Sale and Supply of Goods and Services Act 1982 governs the supply of services. These statutory regimes cover the core aspects of the supply of goods or services, mainly by filling in any key gaps in supply contracts; for example, with implied terms. Most of the implied terms can be excluded completely or adopted in a modified format, although some are mandatory. For example, a term that tries to exclude or limit implied undertakings of title of goods is unenforceable. In comparison, the supply of goods and services to consumers is much more comprehensively controlled, in particular by the Consumer Rights Act 2015, although there is still some freedom of contract. The consumer law regime also fills gaps and implies terms into contracts with consumers as well as providing consumers with statutory protections. These protections include the quality of and fitness for purpose of goods or services and statutory remedies; for example, where goods or services are defective or not as described. There is also a broader legal

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framework encompassing the entire supply chain that gives consumers protection from defective goods.

Contractual arrangements

The arrangements used in the fashion industry depend on which aspect of the supply chain is subject to a contract. Each type of contractual arrangement will usually have some boilerplate clauses that are common to many types of contract, some clauses that are specific to the type of contract and some clauses that are bespoke to the individual deal.

Supply agreements between businesses are often in writing, although they can also be oral or a mix of both. Ideally, though, these contracts take the form of a written agreement, signed by all parties (whether physically or electronically) that has deal-specific terms and that may also incorporate the standard terms and conditions of the supplier or purchaser. Alternatively, the parties may choose to contract just on the basis of one of the parties' standard terms and conditions. Very occasionally the parties may contract on the basis of the statutory implied terms only.

Distribution and agency agreements

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

There is no dedicated legal framework for distribution agreements, such arrangements instead being subject to the general law that applies to supply agreements. There is a common law regime that applies to all agency arrangements and a statutory regime that applies to most commercial agency agreements generally but there aren't any specific agency laws that apply exclusively to fashion goods.

Common law agency rules

These are fairly basic rules that govern the relationship between agent and principal. The primary focus of these rules is to govern the power of the agent to bind and give rights to its principal when dealing with a third party (for example, when the agent enters into a contract on behalf of its principal). The common law rules tend to protect the principal rather than the agent.

Statutory commercial agency rules

The statutory rules are set out in the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053). These regulations apply to commercial agents (both sales and marketing) and give more protection to the agent than the principal, especially in comparison with the common law rules. They only apply to the relationship between a 'commercial agent' and its principal. A 'commercial agent' is 'a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal'. These regulations apply to agents who sell or purchase goods on behalf of their principal, but not to services. The regulations set out the key duties of the agent and principal and provide key protections for commercial agents, such as the right to a payment upon the termination of the agency, minimum termination periods and the timing and payment of commission. Some of the regulations are mandatory and some may be derogated from, provided that it is not to the detriment of the agent.

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

Selective distribution systems are often a popular form of supply chain for suppliers of luxury goods such as perfume, high-end cosmetics and beauty products and fashion goods. This type of system allows a supplier to have more control over the resale of its products, minimising any devaluing of the value of its luxury brand. In a selective distribution system, the supplier only supplies specified (ie, selected) distributors who meet certain minimum criteria, such as: having financial stability and a minimum level of profitability; an approved business such as a retailer of luxury goods; suitable showrooms or sales premises; and the ability to display the goods in a suitable manner. In return, these distributors agree only to supply end users or other distributors or dealers within the approved network. These networks usually impose restrictions upon both the supplier and the distributor, primarily to protect the luxury status of the product, which inevitably can have implications for competition law.

Import and export

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

There are no special import and export rules and restrictions that apply to fashion goods. However, there are general import and export rules for raw materials, components or finished goods that may apply.

The UK and EU announced on 24 December 2020 that they had reached a deal, pursuant to the Trade and Cooperation Agreement (TCA), that determines the framework for the new UK-EU relationship with effect from 1 January 2021. The key elements of the TCA are:

Tariffs

- Goods 'originating' in the EU-UK free trade area will not be subject to import tariffs or other customs duties or quotas.
- Goods that fail to satisfy the relevant preferential origin rules will be subject to normal World Trade Organization (WTO) import tariffs (ie, the EU Common Customs Tariff or the Global UK Tariff).
- Movements of goods (of whatever origin) solely for the purpose of repair will not be subject to customs duties.

Rules of origin

- To benefit from the no-tariffs provision, a product must originate in the UK or EU. This means that EU materials used in UK production, and UK materials used in EU production, will help satisfy the preferential origin rules under the TCA.
- The TCA provides for a number of ways in which a product's origins can be determined, revolving around where a certain proportion of a product's components are made and where it is assembled. Goods wholly obtained in the EU and/or UK will benefit from tariff-free trade. Goods produced using components originating from outside the EU and/or UK will need to meet product-specific origin requirements, which are allocated by tariff custom code in the TCA.
- Proof of origin can be provided through self-declarations of origin, so there is no need to obtain origin certificates from customs authorities.

Customs formalities

- Although import tariffs will not apply in most cases, customs formalities will apply and declarations will be required for imports and exports.
- The TCA provides for mutual recognition of Authorised Economic Operator (AEO) status, which means certain simplified procedures will be available for AEOs.
- Businesses may use a third party, such as freight forwarders or customs agents, to act as their representatives.
- The TCA includes a protocol for UK-EU cooperation in relation to combatting value added tax, customs, and excise fraud.

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Product standards regulation

- There is no cross-recognition of conformity standards. This means that, with a few exceptions, products will have to undergo two separate conformity assessment processes so that they can be placed on both the EU and UK markets.
- However, the TCA will allow self-declaration of conformity with EU product rules for low-risk products.

Importers/exporters of fashion goods will need to verify whether or not the goods being imported/exported are subject to or exempt from tariffs, quotas, or both, and the rules of origin. They will also need to comply with the appropriate and applicable customs formalities and product standards for their goods.

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?

Corporate social responsibility and sustainability disclosures (and reporting) by companies are typically undertaken on a voluntary basis in the UK. However, in accordance with EU Directive 2014/95/EU, The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 do place obligations on certain large organisations that have at least 500 employees to include disclosures on environmental matters (including the impact of the company's business on the environment), social matters and respect for human rights in a Non-Financial Information Statement (NFIS). In particular, this requirement applies to any listed company (or companies that undertake regulated financial activities) that is not a small or medium sized enterprise (SME) and has at least 500 employees (or is a parent company). The report must contain a description of policies pursued by the company, any due diligence processes implemented in respect of these policies and a description of principle risks in relation to these matters. Where an organisation meets these requirements, the NFIS for financial years commencing on or after 1 January 2017 should be reviewed to ensure compliance. In relation to the environment, there are various mandatory reporting requirements in relation to energy usage, greenhouse gas emissions and carbon efficiency that may be applicable, especially to larger and listed fashion companies in UK. Eligibility requirements vary by scheme and need to be considered according to business size, energy usage and operations on a company-by-company basis.

Modern slavery

The Modern Slavery Act 2015 is designed to combat modern slavery and, as well as imposing specific criminal offences on those directly undertaking modern slavery, human trafficking and exploitation, it also places a mandatory reporting obligation on companies that supply goods or services, have a global turnover of at least £36m, and carry on their business, or any part of it, in the UK. Such companies are required to publish a statement setting out the steps that they have taken to eliminate modern slavery and trafficking in their business and their supply chains. The statement must be published on the organisation's website with a link to the statement in a prominent place on the homepage. Where this provision applies, the current statement, and previous statements starting from the financial year ending on or after 31 March 2015, should be reviewed as modern slavery is a particular risk within the supply chain of fashion and clothing brands. As a matter of best practice, it should include information about policies in relation to modern slavery and human trafficking, risks and risk management, supply chains and due diligence undertaken on supply chains, and the effectiveness of such measures. The UK government has indicated that it will amend the Act to make it a legal requirement for the statement to cover these particular matters.

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

All organisations in England and Wales are required to comply with the Health and Safety at Work etc Act 1973 (HSAWA) and specific requirements of subordinate legislation (which is often very industry- or activity-specific, including, for example, working at height and chemical usage). The general duties of the HSAWA place requirements on organisations to ensure an absence of risk to their employees and those who may be affected by their 'undertaking'. This is interpreted widely and means the business of the organisation. As such, a company may be liable for the actions or omissions of its contractors (for example, considering especially high-risk areas such as textile manufacturing and transportation) which could include those in its supply chain. In addition, any safety issues with products that arise could result in liability through the HSAWA. Potential liability under the HSAWA would need to be considered on a case-by-case basis. Failure to ensure an absence of risk so far as is reasonably practicable is a criminal offence liable to an unlimited fine.

ONLINE RETAIL

Launch

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

There is no single legal framework that specifically governs the launch of an online fashion marketplace or store. Such a launch would be subject to several legal frameworks, taking into account whether it is a marketplace or single online store. Online sales targeted at UK consumers must comply with mandatory UK consumer laws. In many areas those mandatory laws currently reflect the provisions of EU legislation, including EU Directives 2011/83 on consumer rights, 1999/44 on guarantees and 29/2005 on unfair commercial practices. As a result of Brexit, from 1 January 2021 EU law stopped applying in the UK. The EU Withdrawal Act 2018, a UK Act of Parliament, has created a new species of UK law to fill the gap where EU law used to be: 'retained EU law'. This retained EU law is based on the equivalent EU rules that it replaces, but the context in which it applies and the rules and principles governing its interpretation, application and interaction with other types of UK law will be new and untested.

The Electronic Commerce (EC Directive) Regulations 2002 forms part of retained EU law and requires information service providers to provide certain information about themselves and about how contracts concluded through electronic means will be made; ensure that commercial communications are clearly identifiable as such and acknowledge receipt of an order placed through technological means without undue delay and by electronic means; and give the service recipient appropriate, effective and accessible technical means allowing them to identify and correct input errors prior to the placing of the order.

Marketplaces that provide search functionality to customers to find traders and via which third-party traders contract online with consumers are subject to some but not all of the legal regimes. Marketplaces may have some protection from the legal regime on the basis that they are online intermediaries, but certain acts by the online marketplace (such as promoting, or optimising the presentation of, its customers' advertisements) would result in it losing the protection of the intermediary exemption.

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Sourcing and distribution

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

E-commerce models do not generate specific sourcing or distribution arrangements. Where an e-commerce platform targets consumers in a specific market, products supplied must comply with mandatory laws in countries where these consumers reside. It is important, therefore, that suppliers are manufacturing and distributing products that are legally compliant with the laws applicable in countries to which products might be shipped.

Lead times can also be crucial – contractual arrangements with suppliers should ensure that products being supplied will be received in time to meet any delivery dates indicated to customers through the e-commerce platform.

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?

The Consumer Rights Act 2015 is the key piece of consumer legislation for the supply of goods, services or digital content to consumers. It sets out a consumer's mandatory statutory rights. Although these rights automatically become terms of the contract with the consumer, most traders draft their terms and conditions to expressly replicate the statutory rights within their standard terms. The Act also gives the consumer a significant and comprehensive set of tiered remedies if the statutory rights are breached. The trader is prohibited from attempting to exclude or limit its liability for breaching such rights. The Act requires that contracts with consumers are fair to the consumer and transparent. It also sets out certain terms that are always deemed to be unfair and other terms that may be seen as unfair when used in a consumer contract. Unfair terms in consumer contracts are unenforceable.

In addition, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 specify a substantial amount of pre-contract information that must be provided to consumers, including the main characteristics of the goods, services or digital content, the identity of the trader and its contact details, the total price or how it will be calculated and the payment, delivery and performance arrangements. This information automatically becomes part of the contract with the consumer and must be complete and accurate. The regulations also give consumers who buy online a cooling off period during which they have the right to cancel the contract if they change their minds. It is common practice to expressly state that consumers have this right and how and when they can exercise it. These regulations also ban traders from charging consumers more than the basic rate for any trader telephone line used by a consumer to discuss an existing contract.

There are also rules that prohibit unfair commercial practices that are intended to make consumers enter into contracts that they wouldn't otherwise enter into and there are also rules that apply to the content and accessibility of an e-commerce website. As a result, it is common to have various sets of terms and conditions and policies for websites, in particular terms regarding the access to and use of the website, an acceptable use policy and a privacy and data protection policy, in addition to the all-important terms and conditions of sale.

Tax

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

In short, they can be. Trading profits of a UK retail store, whether run by a UK or non-UK tax resident company, are subject to UK corporation tax, which currently is levied at 19 per cent. The same applies to trading profits earned from online sales made by a UK tax resident company, or one with a permanent establishment in the UK. This is not true, however, for the trading profits of an online retailer that is neither tax resident nor has a permanent establishment in the UK.

Given the above, a non-UK retailer that only has an online presence in UK (other than perhaps a warehouse or server) is likely historically to have been in a better direct tax position than UK-based retail stores or online retailers. Anti-avoidance provisions may, however, still apply (eg, the UK's diverted profits tax). This situation, however, is changing.

First, the UK has introduced a 2 per cent digital services tax with effect from April 2020. This tax will apply, inter alia, to online marketplaces that host third party sellers of goods, including fashion. Certain thresholds would, however, need to be met (ie, annual group global revenues from digital services activities would need to exceed £500 million, and revenues attributable to the UK would need to exceed £25 million). The tax will apply to online sales made by a company on its own account. An alternative basis for charging can apply to companies with low profitability.

Second, the Organisation for Economic Co-operation and Development (OECD) is targeting international consensus on a long-term plan for taxing the digital economy by mid 2021. Blueprints drafted and negotiated by the OECD/G20's Inclusive Framework of over 130 countries were included in a report to G20 finance ministers in October 2020. In a communique, G20 finance ministers signalled their commitment to the plan and urged agreement to be reached by the target deadline. The blueprints contemplate a solution based upon two 'pillars'. Pillar One will give countries where users or consumers are located greater taxing rights (applying to tech and consumer-oriented business alike). Pillar Two would be a belt 'n' braces measure aimed at ensuring that profits are always taxed at a minimum rate somewhere, somewhat in line with measures introduced by the Trump administration in the United States in its Tax Cuts and Jobs Act.

Where a consumer buys goods in person in a UK retail store, the seller will generally be required to charge VAT at a rate of 20 per cent. There are certain exceptions, such as for children's clothes. Online sales by a UK seller, from UK stock, to a UK customer, suffer the same VAT. Online sales with a non-UK element are treated differently. There is such complexity that this section identifies only some aspects.

Until the end of the Brexit transition period on 31 December 2020, shipments by non-EU sellers to UK consumers suffered UK VAT which was collected with customs duty. Shipments by EU sellers only attracted UK VAT if that EU seller made more than £70,000 of sales to the UK. The rules have now changed, with particular impact for shipments with a value of no more than £135 to UK consumers. On all such direct sales, the seller must register in the UK for VAT and charge UK VAT. If the sale is made via an online marketplace, the marketplace operator must charge the VAT and account for it to the UK tax authority. Unlike the EU, the UK did not defer these rules until 1 July 2021. In addition, different rules apply in Northern Ireland as compared with the rest of the UK, including for movements of goods between Great Britain and Northern Ireland and vice versa.

Finally, until the end of the Brexit transition period on 31 December 2020, non-EU consumers shopping while visiting the UK could apply for a refund of VAT charged on their shopping when returning home. This ability, which broadly applies throughout the EU, has now been abolished in the UK.

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INTELLECTUAL PROPERTY

Design protection

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

Designs for fashion garments and accessories, such as clothes and handbags, are protected by multiple, overlapping intellectual property rights in the UK. However, the most relevant right is design rights. Following Brexit, the UK is no longer part of the Community design rights system. However, there is continued UK protection for designs already registered as at 31 December 2020. Consequently, since 1 January 2021, the UK has five separate design rights: UK registered and unregistered design rights; 're-registered' and 'continuing unregistered' design rights (derived from Community registered and unregistered designs existing on 31 December 2020) and supplementary unregistered design rights (a new right equivalent in scope and duration to Community unregistered design rights, which applies to all designs first disclosed in the UK after 1 January 2021). Registered designs (both UK and re-registered), continuing unregistered design rights and supplementary design rights protect the appearance of the product, including the shape and any surface decoration, texture or colour. UK unregistered design rights protect the shape of a design but not any surface decoration. Obtaining registered trade mark protection for the shape of a product is possible but difficult. It is necessary to show that the shape is distinctive and so far, the courts have been reluctant to find a shape mark sufficiently distinctive.

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

Three-dimensional designs such as fashion garments are generally not protected by copyright. To be protected as a copyright work the item must fall within the definition of an artistic work, specifically a 'work of artistic craftsmanship', and the UK courts have traditionally been reluctant to find that garments are protectable as artistic works. Surface decoration, such a pattern or print on the garment, may be protected as a copyright work, if it could be reproduced separately on any other work. However, surface decoration that is integral to the design of the garment, such as red stripes down the sleeves, is not protectable.

The area of overlapping copyright and design protection for three-dimensional designs is an area where the UK may diverge from the EU post-Brexit. Under the TCA, the UK has agreed that UK designs shall be eligible for both design right protection, including unregistered design rights, and copyright protection. However, the UK has flexibility under the TCA over the conditions for copyright protection for designs and the level of originality required.

Brand protection

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

Brand names, including the names of designers, and logos are protectable as registered trademarks in the UK. Any sign that is 'capable of distinguishing the goods or services of one undertaking from another' is capable of registration. Unregistered trademark rights are also available through use but depend on establishing goodwill in the UK and on showing that the defendant has misrepresented its own goods and services as the goods and services of the claimant, which is difficult. Brand owners can also register their brands as .co.uk domain names in the UK.

Licensing

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

There are no specific rules that apply to IP licensing in the fashion industry in the UK. The scope of the licence granted to a manufacturer, for example, will be critical but it will also be determined by whatever has been agreed on selective distribution.

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?

The UK has a robust enforcement system, with a variety of specialist IP civil courts. In addition, the relevant law enforcement authorities (including the specialist Police IP Crime Unit) and criminal courts are highly sophisticated and very thorough in policing IP crime. Unlike in many other high-performing jurisdictions, criminal prosecutions in the UK are an attractive enforcement method in relation to IP crime: the police and Trading Standards carry out investigations at little or no cost to the rights owner, and their investigations can act as a deterrent. Rights holders can also apply for enforcement of their rights by customs at the UK border, to prevent infringing goods arriving in the UK from outside the UK.

DATA PRIVACY AND SECURITY

Legislation

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

In many respects, the key legal and regulatory considerations for fashion and luxury mirror those that impact retail more broadly.

From a UK perspective, the EU General Data Protection Regulation (EU GDPR) has, post-completion of the Brexit transition period, been replaced with the 'UK GDPR'. In broad terms the UK GDPR retains the compliance measures introduced in the EU GDPR, whilst providing certain tweaks to enable the functioning of the GDPR in a UK domestic context (for example, by replacing references to EU entities and concepts with UK domestic alternatives). The UK domestic Data Protection Act 2018 (DPA), remains law, and includes certain additional provisions. For multinational organisations, in broad terms a single approach to compliance can be taken in response to both the UK GDPR and EU GDPR. In this section, references to the 'GDPR' should be read as applicable to both the UK GDPR and EU GDPR.

In the world of marketing, the EU's e-privacy Directive, implemented in the UK as the Privacy and Electronic Communications Regulations (PECR), remains the standard for electronic direct marketing (read email, text messages, etc) and cookie (and other tracking technologies) compliance. The long proposed and yet to be finalised ePrivacy Regulation will eventually supersede PECR, and is set to substantively impact the world of cookies and marketing compliance. It is unclear at this stage to what extent the UK will adopt similar provisions (through UK domestic law) post implementation of the ePrivacy Regulation in the EU.

Compliance challenges

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

Ensuring trust, lawfulness of data processing activities and acting within the expectations of customers represent essential components of compliance. The nature of the luxury customer base in particular demands robust (and clearly demonstrated) security measures and

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user designs that foreground customer control. As a business model built on responsiveness, ease and consistency, luxury retail would be well advised to consider how to map its core competencies into key areas of compliance.

Increasingly tech-literate and privacy-conscious luxury consumers want to both understand how an organisation will use their data and be empowered to exercise clear controls over this data. Addressing both obligations mandates careful consideration of technical and organisational measures.

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?

Deploying new technologies offers both opportunities and compliance challenges. Artificial intelligence (AI) and similar tools are appearing in both back-end and consumer facing aspects of the luxury and fashion retail experience. From brand-aligned chat bots to AI-driven sales data insights, data-rich technologies are set to increasingly overlap with the worlds of fashion and luxury. Beyond the online space, integrating connected data capture into traditional retail (think customer demographics modelled through in-store cameras) poses novel compliance challenges. Irrespective of context, ensuring risk analysis remains part of any conversation of innovative technologies helps to ensure a 'baked-in' approach to compliance.

The GDPR provides Data Protection Impact Assessments (DPIAs) as a means to risk test new or significant developments of existing projects. DPIAs should be considered at the outset of any major project and are mandatory where a high risk to individuals is likely to arise as a result of the project or new technology. An effective DPIA involves balancing an assessment of (non-exhaustively) the nature, scope and necessity of a data processing project against the risks such processing might present and documenting any mitigating steps. In addition, there is substantial regulatory guidance on the use of AI, both at an EU level and from the UK ICO.

Luxury retail is a sector where the demand for innovation, especially in the context of customer profiling (both online and in-person) is especially acute. In this context, careful consideration should be given to how DPIAs can be built into design and development processes. A streamlined and well integrated DPIA process can assist both in meeting compliance and in being equipped to demonstrate compliance.

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?

With luxury retail's continued push toward personalisation and data-driven design, addressing the compliance obligation of transparency is likely to prove increasingly challenging. The GDPR formalises a detailed set of information that an organisation must make available on collection of personal data. At the same time, the ways in which, and purposes for which retail collects and processes and shares customer data cross-channel is set only to develop in both quantity and complexity. In addition, ensuring transparency around the use of AI technologies is a key focus for the ICO. In this context, innovative approaches to communicating information to customers clearly and compliantly are increasingly a necessity. For luxury and fashion, the challenge of ensuring compliance while maintaining a brand-consistent and oftentimes international-friendly tone poses a particular test.

From a digital marketing perspective, the implementation of the GDPR means the importing of the GDPR standard of consent into electronic direct marketing and cookie compliance. As a practical impact, retailers will need to consider whether consents captured are suitably granular and otherwise compliant with the GDPR. In addition, with the ICO currently investigating the AdTech sector, these activities are under increased scrutiny by regulators and privacy campaigners.

Where data-driven profiling of individual customers results in automated decision making (a decision made by software without human input), further compliance considerations must be addressed. Further rules apply in addition where automated decisions result in a legal or similarly significant effect for an individual. As an example, the developing trend to offer buy now, pay later options for customers may involve significant automated decisions in relation to offering consumer credit.

High-end retail provides certain unique challenges around aligning privacy compliance with the luxury industry's established strength of truly personalised service. For a luxury retailer used to building a highly detailed preference profile of individual customers, the GDPR's data minimisation principle (in which data held is strictly limited to that necessary) may sit somewhat uncomfortably. In a climate of increasing regulatory interest, and consumer mistrust of behavioural monitoring and similar techniques, luxury retailers will need to carefully consider how the possible incentives of such activities align with both compliance and customer expectations.

ADVERTISING AND MARKETING

Law and regulation

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

A core focus of the UK legal regime that applies to all advertising and marketing practices aimed at consumers is to ensure that adverts and marketing communications are clearly recognisable as such. In addition, there are strict information requirements and data protection rules with which advertisers must comply, particularly if the advertising is targeted or driven by the online behaviour of the recipient of the communication.

The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) requires that all advertising, whatever format it uses, must be obviously identifiable as advertising. Key prohibitions that relate to advertising are, among others: misleading actions (such as publishing an advert that gives false information about the existence of a specific price advantage); and misleading omissions (such as publishing an advert that does not state the minimum duration of a contract).

Enforcement of these rules is by the UK public authorities and breach of the rules can be a criminal offence.

The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (part of retained EU law) also require that service providers must ensure that any commercial communication provided by them that constitutes or forms part of an information society service (which would include all advertising) is clearly identifiable as a commercial communication. These regulations are considered in more detail elsewhere in this chapter.

The UK advertising industry also has a self-regulating code, the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code). The code mainly governs online advertising and primary responsibility for observing the code falls on marketers. However, others involved in preparing and publishing marketing communications, such as agencies, publishers and other service suppliers are also subject to the code. The remit of the code is very wide, including:

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- online advertising (including banner, pop-up and online video adverts);
- advertising and marketing communications by email, text and Bluetooth;
- advertorials;
- adverts distributed through web widgets;
- adverts on electronic kiosks and billboards; and
- adverts in electronic games and games that feature in display advertisements.

General principles established by the CAP Code are that all advertisements:

- are legal, decent, honest;
- are not materially misleading;
- can only feature claims that are capable of objective substantiation; and
- must not exaggerate the capability and characteristics of a product.

There are also specific rules governing the use of comparative claims, advertising aimed at children, promotional activities and sustainability claims. The Advertising Standards Authority (ASA) can request that advertising that does not comply with the code is amended or withdrawn and can ask broadcasters and publishers to refuse advertising space. It will also publicise its rulings. The ASA can also refer persistent offenders to Ofcom and Trading Standards Services, which can bring legal action leading to fines, injunctions and further bad publicity.

Online marketing and social media

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

Advertisers are responsible for ensuring that any third-party content that they 'adopt or incorporate' within their own marketing complies in full with the CAP Code and underlying legislation. Adoption and incorporation can range from requesting content from users and placing it on the advertiser's social media channel to retweeting, commenting on or even simply 'liking' a user's post.

Visible responses to questions posed to an advertiser on social media, as part of customer relationship management, could be considered within the remit of the CAP Code if they include claims that the ASA would consider to be advertising.

In addition, in 2019 the Competition and Markets Authority (CMA) published new consumer law compliance guidance for social media influencers, following an investigation into this area. Specific suggestions include, among others: disclosing any relationships with a brand over the past year (as well as any current relationship); using signposting such as 'Advertisement Feature', 'Advertisement Promotion' or #Ad, #Advert plus the 'Paid Partnership' tool on Instagram. The CMA also suggests that certain types of signposting should not be used, including, among others: tagging a brand, business, gift or loan in either the text, picture and/or video of a post without additional disclosure; hiding the disclosure (for example #ad, #advert) at the end of or among other text and/or hashtags and disclosing a commercial affiliation only on an influencer's front, home or profile page. The CMA acknowledges that what works will change as social media evolves and comments that these lists are not prescriptive.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

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

In general, luxury and fashion goods do not have their own specific product safety legal regime. Before the UK withdrew from the EU they fell under the EU General Product Safety Directive, which applies to all products that are intended for consumers. This product safety legislation was already implemented in the UK as the General Product Safety Regulations 2005 (now amended by the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 and other on account of Brexit) and so producers remain subject to a general requirement 'to place only safe products on the market' (article 5 of the UK Regulations). It is notable that on account of Brexit a key change is that a presumption of conformity with the general safety requirement will now be granted where a product conforms to a standard of the UK which the Secretary of State for Business and Enterprise considers appropriate, as opposed to a European Standard published in the Official Journal of the European Union. This general position contrasts for luxury and fashion with the position for other consumer products such as toys, which do have their own specific regime (eg, under the Toys (Safety Regulations 2011) also on account of Brexit). There are particular safety requirements for children's clothes and footwear, which items may fall within luxury and fashion goods for children. For example, the Nightwear (Safety) Regulations 1985/2043 prohibit the supply of children's nightwear that does not meet flammability performance requirements.

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?

In the UK, product liability claims for luxury and fashion goods are brought under the regime applicable to all consumer goods, which does not discriminate between one sector and another. Consumer contracts in the UK are governed by the Consumer Rights Act 2015 (as amended by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018); a consumer can make a product liability claim for breach of contract against the immediate supplier. The European Product Liability Directive 85/374/EEC was implemented in the UK as the Consumer Protection Act 1987 (as amended by the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 and other on account of Brexit), under which strict liability claims can also be brought against the producer of defective products for damage caused by the defect. Further, a product liability claim can be made as an action in negligence, typically against the manufacturer of a defective product.

M&A AND COMPETITION ISSUES

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?

Covid-19 has hit the fashion industry hard. More so than ever purchasers will be interested in acquiring knowhow and in consolidating their assets and targets that provide expertise and efficiencies in supply chains, technology (including e-commerce capabilities) and artistry. It will be vital for purchasers to identify these capabilities and ensure that a target has legal ownership of, or appropriate access to, them.

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To that end, ensuring that adequate due diligence is undertaken on the significant assets of the business and being able to recognise and retain the talent are fundamental to transactions in the luxury fashion industry. For example, when entering into such transactions, a company needs to think strategically and identify the talent and ensure that they are adequately incentivised so that the company can maintain, and preferably enhance, the brand. In the context of M&A, common tools used to retain and incentivise talent are earn-outs, deferred consideration and sweet equity. In the context of a joint venture, providing the talent with equity will deliver this objective. The inclusion of these forms of incentives inevitably result in the parties discussing what controls the talent will require over the business going forwards so that the talent can ensure delivery of their agreed incentive package. The company will need to strike a balance between the controls they can properly cede to the talent and those controls it should retain to enable proper integration of the brand and to ensure that identified synergies with the buyer's current operations are delivered.

The use of restrictive covenants provided by the talent in the sale documentation will protect the brand following the transaction. For example, imposing a restrictive covenant on a founder of a brand who is planning to exit the business entirely following the transaction from competing in the same market will prevent the founder from replicating what makes the brand unique elsewhere. Such restrictive covenants may also be supplemented by restrictions that safeguard or ringfence IP rights (eg, in the founder's name) and prevent the solicitation of employees (again ensuring talent is retained in the brand), customers, suppliers and manufacturers for an enforceable period of time, so that these relationships can be established with the company.

As with any M&A deal, the use of a material adverse change (MAC) provision can be included in sale documentation for the luxury fashion industry. Ensuring that a buyer cannot broadly interpret the MAC to leave the seller exposed is key. References to certain thresholds, sector specific indicators and known events may be vital to limit the circumstances giving rise to the right to use a MAC event to terminate an agreement.

However, even where the parties have clearly given much thought to the MAC, its interpretation and application can cause difficulties as last year's merger of Tiffany & Co with LVMH demonstrated. LVMH claimed that Tiffany's 'catastrophic' performance as a result of covid-19 was a material adverse change to the Tiffany business sufficient to enable LVMH to terminate the merger agreement. By threatening to invoke the MAC clause, LVMH arguably improved its negotiating position for a price reduction post signing. As is common in US agreements, the MAC in the LVMH/Tiffany merger agreement contained specific carveouts to the circumstances giving rise to a MAC. Carveouts are changes or events that the parties have agreed will not give rise to a MAC. In this case, the parties had included some general carveouts to the MAC clause, such as change in laws applicable to Tiffany's business and acts of terrorism (including cyberattacks) and also specific carveouts such as the Hong Kong protests and protests involving the 'Yellow Vest' movement. If such events were to occur, there might be a material change to the Tiffany business, but LVMH would still be required to close the transaction. What was not specifically contemplated in the carveouts was a global pandemic. As a negotiated settlement was reached by the parties it is unknown whether a Delaware Court would have agreed with LVMH, but this does demonstrate that MAC provisions should not be included in sale documentation without careful consideration of their interpretation and potential impact.

Competition

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

Competition law is applicable to the fashion and luxury goods sector just as it is to any other sector. UK competition law governs companies' activities in UK markets in relation to mergers, restrictive practices and, where a party occupies a 'dominant' market position, unilateral firm conduct.

EU competition law no longer applies to trade purely within UK markets following the end of the Brexit 'transition period'. However, EU competition law will still be relevant to many luxury goods and fashion companies that transport and trade goods between the UK and EU. Even for companies that only trade in the UK, there remains a great degree of alignment between the UK and EU competition law frameworks. Furthermore, the CMA as well as the Courts of England and Wales must, in most circumstances, interpret UK competition law consistently with EU competition case law that pre-dates the end of the transition period.

However, insofar as it impacts the fashion industry, there is currently a notable regulatory focus on restrictive distribution and retail arrangements – ones potentially contrary to the EU and UK requirements on restrictive agreements (namely, article 101 of the Treaty on the Functioning of the European Union (TFEU) and the UK equivalent, Chapter 1 of the Competition Act 1998 (CA98)). In particular, there is an intense debate about what should (or should not) be permissible in terms of contractual restraints in an online context, with heightened concerns about the increased use of provisions that might hinder cross-border online trade or otherwise disrupt the benefits of e-commerce (in ways ultimately detrimental to consumers and EU Single Market imperatives).

From the perspective of the fashion sector, there are a number of issues that are relevant, including: (1) resale price maintenance (RPM) or vertical price-fixing which, on the basis of minimum or fixed pricing requirements or pressures, which inhibits downstream distributors or resellers from determining their own resale prices; and (2) restrictions that exclude or limit cross-border trade within the EU Single Market – a construct that is intended to enable consumers to purchase products in other EU member states and take advantage of price differentials between them.

However, the issue likely of greatest relevance to the fashion and luxury product industries is 'selective distribution'. Suppliers and manufacturers typically employ selective distribution to maintain an element of control over how their products are distributed – a system of distribution in which the supplier undertakes to sell the contract goods or services only to authorised distributors who meet specified criteria (which can be 'qualitative' or 'quantitative' in nature). In turn, the authorised distributors undertake not to sell outside of the authorised network other than to end customers.

The immediate competition law concerns arising from selective distribution are clear: restrictions on selling outside the system to unauthorised distributors may result in a reduction in intra-brand competition, foreclosure of certain types of distributors and facilitation of collusion between suppliers or buyers. Yet despite these concerns, 'qualitative selective distribution' is justified on the ground that it increases competition around non-price, qualitative factors (eg, service quality) as recognised and acknowledged by the EU Court of Justice. Therefore (and notwithstanding inherent restrictions of competition within selective distribution systems), purely 'qualitative selective distribution' will fall outside of competition law rules altogether where certain case law requirements are met; namely, those set out in the 1977 Metro judgment (case 26/76 *Metro SB-SB-Großmärkte v Commission* and known as the 'Metro criteria').

However, concerns arose following the *Metro* judgment as to how far suppliers could go in terms of controlling the activities of their authorised resellers; in particular, whether they could restrict them from freely

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employing online sales channels to resell the contract products and whether use of selective distribution would be justified in the context of luxury products (and the protection of a luxury image). In the 2011 ruling in *Pierre Fabre Dermo-Cosmétique* (case C-439/09), the Court of Justice confirmed that an absolute ban on sales over the internet was unlawful. The court's findings in the subsequent *Coty* case (case C-230/16) confirm that suppliers of luxury products, while not permitted to impose absolute prohibitions on online resale, are able (whether assessed under article 101(1) TFEU or the requirements of the EU's Vertical Block Exemption Regulation – the latter 'safe harbour' exemption and its associated guidance currently under review in advance of the regulation's expiry in May 2022) to impose online standards to preserve a luxury brand's image that are equivalent to, or at least consistent with, the kind of requirements they might legally impose offline.

In the 2017 ruling in *Ping* (*Case 50230*), the CMA found that Ping, an up-market retailer of golf clubs, had infringed Chapter I CA98 by preventing retailers from selling its golf clubs online. The CMA's decision was later upheld by both the Competition Appeal Tribunal and the Court of Appeal.

EMPLOYMENT AND LABOUR

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?

Labour relationships fall into one of three different categories: employees, workers and self-employed. Employees have a full set of employment rights, including protection against unfair dismissal, the right to a statutory redundancy payment, and the right to family related leave such as maternity or paternity leave. Workers have more limited rights than employees, but are entitled to receive the national minimum wage, statutory annual leave and protection against discrimination. The self-employed typically have very few rights.

Freelancers and interns will often be classified as workers not employees, particularly if the employer is not obliged to offer work and the individual is not obliged to accept work that is offered, as will be the case for those engaged on zero hours contracts. However, if freelancers genuinely run businesses on their own account, they could be classified as self-employed.

Labour relationships will typically be governed by an employment contract (employees), a worker contract (workers) or a consultancy or contractor arrangement (the self-employed). However, the type of contract is not determinative of the nature of the relationship. Employment tribunals can look beyond the contractual arrangements to how the relationship operates in practice when deciding whether someone is an employee, a worker or genuinely self-employed.

Trade unions

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

There are no special rules relating to fashion companies and their relationships with trade unions or works councils. Under normal principles, an employer can recognise a trade union voluntarily. There is also a complex statutory recognition process that an independent trade union can use to force an employer with more than 20 workers to recognise it.

An application for statutory recognition is admissible if at least 10 per cent of workers in the proposed bargaining unit are union members and a majority of workers in the bargaining unit are likely to favour union recognition. A secret ballot will usually be held to check that there is the necessary level of support. A union will be recognised if a majority of those voting and at least 40 percent of the workers in the bargaining unit vote in favour of recognition. If an application for statutory recognition is successful, the employer will be obliged to bargain collectively with the union on pay, hours and holidays.

Works councils are not common in the UK but an undertaking with 50 or more employees can be forced to set one up if a request is made by two per cent of employees. If an employer has a statutory works council it must inform and consult employees about specified matters, including the development of employment within the undertaking.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

This is a highly specialised, fast-moving area that will be particularly impacted by Brexit. Specific advice should be sought from a specialist firm in relation to any questions on immigration law considerations for fashion companies.

UPDATE AND TRENDS

Trends and developments

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 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 UK luxury fashion industry will depend on both an early recovery from the pandemic and businesses successfully adapting to the impact of Brexit. The covid-19 pandemic has hit UK luxury retailers hard, with sales going down and prime location stores closing as a result of lockdowns. It remains to be seen, when restrictions ease, how quickly customers will revert to buying in-store. Whilst the experience of buying in high-end luxury London boutiques cannot easily be matched online, UK luxury brands, along with all luxury brands globally, will have to be prepared to adapt to the shift to online shopping and consumer demand for an increasingly personalised experience online, in the post-covid world. Unlike the rest of the world, however, UK businesses also have to adapt to the UK leaving the EU. While the UK did finally agree a deal with the EU governing trade, exporters of high-end goods from the UK are facing increased burdens and restrictions when trading with the EU, as a result of Brexit. As the world starts to recover from the pandemic, the UK luxury brands will also be facing increased competition from United States and China, where the luxury industry has fared better than Europe during the pandemic.

Coronavirus

31 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The government's Coronavirus Job Retention Scheme (CJRS) supports the wages of employees and workers who are not able to work their normal hours because of coronavirus restrictions. Employers can place employees and workers on 'furlough', on a full time or part time

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basis. Employers are responsible for paying 80 per cent of wages for periods of furlough, to a maximum of £2,500 per month, which they can reclaim from the government. Employers have to pay employer National Insurance Contributions and employer auto-enrolment pension contributions. The cap on wages is pro-rated for employees on part-time furlough. The government has confirmed that CJRS will be available until the end of September 2021. From July 2021, employers will have to make a contribution to the wage costs of furloughed employees. This will be 10 per cent in July, rising to 20 per cent in August and September.

The government publishes the names of employers who claim under the CJRS, along with an indication of the amount claimed (by reference to bands). Employers who have not been badly affected financially by covid-19 should take the potential reputational considerations into account before making a claim.

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