

# Luxury & Fashion 2020

Contributing editors  
Meryl Bernstein and Sahira Khwaja  
*Hogan Lovells*



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# Luxury & Fashion 2020

**Contributing editors****Meryl Bernstein and Sahira Khwaja****Hogan Lovells**

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

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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 Bernstein and Sahira Khwaja of Hogan Lovells, for their assistance with this volume.



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# Germany

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## MARKET SPOTLIGHT

### State of the market

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

The luxury fashion market is quite relevant in Germany. Being one of the strongest economies in Europe, it is also an important market for luxury brands. In addition to the strong international brands like Gucci, Prada etc, you see a tendency to more individual products. You do not find them on the main street or in the luxury districts but more in the 'hipper' or indie parts of town. Trends are clearly hand-crafted and green, eco or sustainable products, etc.

Of course, there is the online versus bricks and mortar shopping situation. Online sales are on the rise and a lot of shops are closing. While this also relates to fashion, it does affect goods like books, electronics etc more heavily. It is worthwhile mentioning that the two biggest German department stores, Kaufhof and Karstadt, have merged in recent years, which is a clear sign of the struggle of bricks and mortar retail. Many retailers (and brands retailing their own products) are working on multi-channel solutions.

Finally, many fashion brands are struggling. Last year saw a number of bigger-size bankruptcies in Germany, including in the fashion sector with Gerry Weber.

## 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?

There are no specific legal stipulations, but standard civil law applies. General terms and conditions (T&Cs) are subject to strict provisions under German law that also largely apply to business-to-business (B2B) contracts. According to German law, standard contractual clauses are, in particular, ineffective if they are surprising (unusual) or unreasonably disadvantage the other party of the contract. The relevant aspect is not whether the T&Cs are labelled as such, but whether they are used as a standard and will or shall not be negotiated.

Stipulations relating to business secrets are very important (in particular considering the requirements following from the new German Law on the Protection of Trade Secrets) and there is a strict regime on delivery times, including penalties.

### Distribution and agency agreements

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

There are no specific legal stipulations, but standard civil law applies. Also, there are restrictions for T&Cs, even in a B2B context, that have to be borne in mind.

A relevant regulation concerns the indemnification of the commercial agent according to section 89b of the German Commercial Code. The commercial agent will receive a 'reasonable indemnity' for business he or she has brought to the principal. The amount is capped at one year's commission. Section 89b is binding law and cannot be circumvented. The provision is often applied by analogy to authorised dealers if certain conditions are met.

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

There are numerous models to arrange distribution. The German market does not differ much from other international markets. On the retail side, the most commonly used model is still the normal dealership model (ie, the dealer acquires goods from the fashion label and sells it to consumers). This model is used both online and offline. Many fashion and department stores offer high street brands like Tommy Hilfiger, Levi's, adidas etc. Another quite common model is that fashion labels more and more arrange their retail through their own stores: 'mono label' stores. This is true for players like Zara and H&M but also and especially in the luxury market where you have stores like Bottega Veneta, Cartier, Prada, Hermès, etc. Luxury brands aim at protecting their luxury brand image through a controlled retail environment.

### Import and export

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

There are some restrictions on the EU level. According to Regulation (EU) 2017/1509, there is a luxury goods embargo (import and export) for the Democratic People's Republic of Korea (article 10, paragraph 1a and b, and Annex VIII); and according to Regulation (EU) 36/2012, a ban on exports of luxury goods to Syria (article 11b, Annex X).

## 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?

Many companies have established a voluntary code of conduct or code of ethics or the like. Furthermore, there are various voluntary programmes and sustainability organisations and labels. In addition to that, for bigger companies (fulfilling certain preconditions and generally employing more than 500 employees), there is a statutory obligation to also provide a report on corporate social responsibility matters. As a result of the German Commercial Code, for bigger companies there exists an obligation to add a non-financial statement to the company reports and to include statements regarding corporate social responsibility in their reports. Details on the necessity and content should then be reviewed on an individual basis.

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

There are various occupational health and safety laws and requirements existent in Germany. Inter alia, there are regulations on working times, maternity protection and parental leave, industrial and safety provisions, technical rules for operational safety and principles of accident prevention, laws regarding work equipment, safety and health at work rules, occupational safety rules, product safety rules and various laws on specific workplaces (eg, computer workplaces, industrial workplaces, workplaces with hazardous materials, etc). Compliance with all industrial standards and applicable laws and provisions needs to be ensured and it is advisable to also include this in any supply or service contracts (naturally depending on concrete contents and circumstances). Furthermore, an employer has to comply with all mandatory rules in this regard and must not expose employees to risks.

## ONLINE RETAIL

### Launch

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

The launch and operation of an online fashion marketplace or store is subject to e-commerce legislation and other relevant regulation, primarily included in the German Civil Code (BGB), the Introductory Act to the German Civil Code, the German Telemedia Act or the Unfair Competition Act (UWG). In terms of data protection, the General Data Protection Regulation (GDPR) as well as the German Federal Data Protection Act (BDSG) are applicable. With regard to the presentation of prices and price components (eg, VAT) in the online fashion marketplace or store, the Quotation of Prices Regulation needs to be considered.

In particular, websites must comply with applicable e-commerce and platform legislation, including (pre- and post-contractual) information obligations, the right of withdrawal, transparency on the moment of purchase ('buy-with-obligation-to-pay' button), obtaining prior consent of the website user before placing cookies (if needed) and complying with geo-blocking restrictions pertaining to the accessibility of the website by customers that reside in another EU member state. Also, during the sales process, unfair commercial practices towards consumers must be avoided.

Online marketplaces and online stores must, furthermore, comply with applicable contract law, including business-to-consumer contracting legislation.

## Sourcing and distribution

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

While e-commerce legislation does not directly affect retailers' sourcing and distribution arrangements, it is recommended to review the existing agreements before the launch of an e-commerce website to ensure that they do not contain exclusive distribution channel provisions that (if valid from an antitrust law perspective) might be infringed by selling through the online website.

There are also obligations that may indirectly impact sourcing and distribution arrangements. Furthermore, sometimes a model of 'drop-shipment' is used. This is a form of e-commerce, where the merchant, in fact the intermediate party, offers products in its online store that are not in stock. The producer, wholesaler or supplier deliver the products directly to the end-user (ie, the customer).

## 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?

Online terms and conditions must comply with the very strict German legislation on standard terms and conditions, as set out in sections 305 et seq of the BGB. Notably, the German legislation on standard terms and conditions imposes strict restrictions not only in relation to consumer customers (B2C sales), but also in relation to business customers (B2B sales).

In B2C contracts, the statutory warranty regime is mandatory. Furthermore, as mentioned above, traders must provide certain pre-contractual information before the contract is concluded. Some of this information must also be provided to the customer after the purchase has been made. Often, this information is included in the general terms and conditions. Information that must be provided to a customer, inter alia, includes information about the right to withdraw from the contract, without providing reasons, within 14 calendar days from the day the consumer received the goods.

Further, the terms and conditions must be effectively implemented in accordance with section 305 of the BGB (eg, by a clear reference to the terms and conditions or by clicking a checkbox before placing an order).

## Tax

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

No, taxation for online sales as such does not vary from taxation for offline sales; taxation depends on the type of commercial activity.

## INTELLECTUAL PROPERTY

### Design protection

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

Generally speaking, design rights, copyrights and also trademarks can be applicable to fashion designs:

- Design rights are the most relevant rights, as they can protect both shapes and patterns. Design rights can be obtained through registration or use. Registered designs are available on the national and EU level. Unregistered rights are only granted on the EU level.
- Copyright can apply to fashion goods, which are considered applied art. For commissioned work, it is advisable to have agreements

in place that transfer any rights to the employer or instructing company, as the 'work made for hire' doctrine does not apply in Germany. Copyrights of employees often automatically transfer to the employer, even if the employment contract has no clauses referring to copyrights.

- If a certain (often recurring) element of a fashion design is known within the public as designating the fashion design from one company or designer, trademark protection can be obtained for this element as well.
- Lastly, the German Act Against Unfair Competition also provides a claim against slavish imitations of objects (and thereby fashion goods), but only if the imitated object has a competitive originality. As a rule of thumb, this means that the object should be different to previously published objects.

All these rights can overlap and apply to the same fashion design. Generally, it is advisable to apply for a registration of an IP right, even if unregistered rights are available. Providing proof of unregistered rights in litigation is very often more expensive than the registration costs.

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

The most common difficulties are technical features, which cannot be protected via copyright, design or trademarks. Common style elements and previously known designs are also not eligible for protection.

Trade mark protection for fashion goods – for example, a 3D trademark for a certain recurring element of a fashion line – is only possible if this element is capable to serve as an indication of origin. Copyright protection for applied art (such as fashion) still requires a very high level of creativity, which is rarely achieved. The easiest way of protecting fashion goods is a design registration, as far as the fashion good can be considered 'new' (as a whole or in parts).

### Brand protection

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

Brands are best protected through trademark registrations, as a trademark through use can only be obtained if a relevant portion of the consumers recognise the brand. Except for well-known trademarks, no brand should rely on unregistered trademark rights in Germany (and even for those, registration is strongly recommended). If the company name is identical to the brand, then the company name's granted right can be used to protect the brand as well. A company name right is gained by having relevant commercial activity in Germany.

### Licensing

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

There are no general restrictions to IP licensing in Germany. Both unregistered and registered rights (trademarks, designs, copyrights) can be licensed, either exclusively or non-exclusively, to a third party. Copyright in Germany consists of both moral rights and exploitation rights. The latter can be transferred or licensed to a third party. The moral rights will, to some extent, always remain with the author and cannot be waived, transferred or licensed.

IP licence agreements for fashion goods should be drafted carefully and contain clear rules on quality of the products, the desired situation at the point of sale, where the products can be sold and how the trademark should be presented.

### 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?

Germany offers similar enforcement options to other European jurisdictions. IP rights can be enforced against registrations (at the relevant offices), against uses (at the courts) and at the border (at the customs office).

Germany is a favourable jurisdiction for litigation, particularly in urgent cases. Preliminary injunctions are granted within a few days, during trade fairs and sometimes also within a few hours. The lawyer fees are to be reimbursed and court fees are capped. The financial risk can therefore be calculated in advance.

## DATA PRIVACY AND SECURITY

### Legislation

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

In terms of data protection, the GDPR as well as the BDSG apply.

### Compliance challenges

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

Luxury and fashion companies are typically well-known brands, for whom negative publicity about security incidents could seriously damage the reputation of their brand. This is all the more relevant because, in the past, various administrative fines imposed under the GDPR are related to security, data breaches and a lack of technical and organisational security measures to safeguard personal data.

Furthermore, as a consumer-focused industry, the retail fashion industry broadly relies on cookies, online tracking technologies, personalised advertising and direct marketing. As such, the industry will need to closely monitor the relevant legal developments in this field, in particular around consent requirements for cookies, tracking and personalised advertising, including the ongoing legislation process on the ePrivacy Regulation. The German data protection regulators have expressed particularly strict views and announced increased enforcement activities in this field. Companies such as retail fashion companies operating in these areas are well advised to keep a close watch on these developments.

### Innovative technologies

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

Innovative technologies typically entail the processing of personal data (whether or not pseudonymised). Accordingly, compliance with applicable data protection rules is key when relying on innovative technologies. Depending on the type of technology and on the level of invasiveness, performing a Data Protection Impact Assessment (DPIA) is advisable or even required. In any event, the processing needs to be shaped and limited according to the rules of necessity and proportionality, and a legal justification (legitimate interest or potentially consent) needs to be identified. It is also crucial to implement a deletion concept to avoid accumulating unnecessary amounts of data. If service providers are engaged, appropriate data processing agreements need to be concluded. Also, all relevant data protection information notices need to be updated so as to reflect the new processing activities.

## 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 regard to both advertising techniques there are many developments ongoing on the legal spectrum, both in Germany as well as in Europe. The trend appears to shift towards a stricter interpretation and use of advertising techniques, although it is currently unclear where the boundaries will fall and for which technologies they will apply.

Certain forms of profiling or personalisation trigger the need for a DPIA.

## 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?

The UWG contains the most relevant regulations on advertising and marketing. The obligations set forth in this act can be enforced either by competition watchdogs or by competitors. The latter are – depending on the industry – often very eager to oppose unlawful activities of their competitors, to prevent an advantage. This self-regulating system has been proven to be very diligent.

### Online marketing and social media

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

Advertising and marketing materials must not be misleading. This is not only inherent in false information. Instead, incomplete information may, in particular as to relevant product features, also trigger an erroneous concept in consumers related to certain goods.

Influencers are typically bloggers having a significant number of followers, and often receive free-of-charge product samples to enable them to comment positively on related products in their online channels. Unfair competition law requires the disclosure of any such commercial speech to consumers; they should not be led to believe that the comments posted on certain products were devoid of any commercial background. Therefore, posts referring to branded products, typically indicating a link to related product websites, shall generally be marked as 'advertising'.

Specific rules govern the advertising of goods such as foodstuffs, alcohol, tobacco or gambling.

## PRODUCT REGULATION AND CONSUMER PROTECTION

### Product safety rules and standards

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

Generally, there are no safety rules and standards for clothing. This is different for electronic elements (smart clothing) or safety clothing.

There is a labelling requirement for textiles. This is the German implementation of EU Regulation No. 1007/2011. This contains a restricted number of fibre names that have to be used.

## Product liability

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

The regime that governs product liability in Germany is included both in the German Product Liability Act and sections 823 to 853 BGB on tort law. The Product Liability Act is an implementation of the EU Product Liability Directive (Directive 85/374/EEG). The rules on product liability protect consumers against damage or injury caused by defective products.

Product liability in terms of the Product Liability Act is, in principle, a strict liability under the German tort regime and cannot be excluded in a contract. In principle, the producer is liable for damage caused by a defect in his or her product. If product liability claims are based on tort law in terms of the German Civil Code, the producer is (also) generally liable for damages caused by a defective product but it is not strict liability; fault is a prerequisite for a claim.

In a broader sense, product liability law in Germany is also connected with product safety law (ie, the Product Safety Act). The Product Safety Act contains public law provisions on the safety of certain consumer products placed on the market and it is an implementation of the EU Product Safety Directive (Directive 2001/95/EC). Product liability claims brought against producers can also be based on product safety law in connection with tort law in terms of the German Civil Code; fault is required for such a claim.

## 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?

Generally, there are not many special considerations on the M&A side. There are especially no local ownership requirements. Of course, it is necessary to deal with own name issues if a business has the designer's name – but that is a relevant issue in all jurisdictions. It is also important to make sure that all relevant IP is within the target company and not with any designers, owners etc.

### Competition

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

In particular, relevant competition law provisions for the luxury and fashion industry in Germany are sections 1, 19 and 20 of the German Act against Restraints of Competition (ACR). Section 1 ACR corresponds to article 101 of the Treaty on the Functioning of the European Union (TFEU) in that it prohibits restrictive agreements and concerted practices while sections 19 and 20 ACR correspond to article 102 TFEU and prohibit the abuse of (relative or absolute) market dominance. These provisions are especially relevant in the context of exclusive arrangements, selective distribution systems, pricing arrangements and customer allocation.

Beyond German national legislation, the European competition law regime also applies. The EU provisions for vertical agreements (EU Vertical Block Exemption Regulation No. 330/2010, VBER, and accompanying Guidelines on the Application of article 101(3) TFEU to vertical agreements). Vertical agreements according to this regime are quite common in the luxury and fashion industry whenever products or services are distributed or resold. If a company restricts a distributor's



freedom to determine resale prices and not merely recommends specific prices, this is considered illegal under the regime for vertical agreements with the exception of maximum resale prices. Furthermore, it is generally prohibited to issue restrictions on online sales and reselling as well as establishing absolute territorial protection. The regime is, however, currently being reviewed with a draft by the EU Commission for new block exemptions on vertical agreements being expected in the course of this year.

The rise of e-commerce has in general sparked the interest of competition authorities with Germany being no exception. The German Federal Cartel Office (BKartA) has shown a relatively strict approach when it comes to scrutinising restrictions in online sales, such as, for example, third-party platform bans. The strict German approach to the e-commerce phenomenon is helped by the fact that German competition law extends the rules on dominant companies also to 'strong' undertakings to which other partners, such as namely distribution partners, do not have an alternative and are thus dependent.

Last summer, the BKartA achieved far-reaching improvements in terms and conditions for merchants on Amazon online marketplaces. For example, Amazon is now no longer exempt from any liability with regard to other vendors on its platform and no longer has the unrestricted right to immediate termination and blocking of vendor accounts without giving reasons. The BKartA is also cooperating with its French colleagues to assess risks for competition associated with the use of algorithms. In a joint study, the authorities focused in particular on pricing algorithms and collusion but have also considered potential interactions between algorithms and the market power of the companies using them. On a European level, the Commission is also stepping up enforcement on e-commerce agreements following its Digital Single Market objectives.

Furthermore, according to the currently pending revision of the German ACR, there will likely be introduced an additional control of abusive behaviour for companies with 'outstanding cross-market significance for competition'. This specific control regime may mainly be relevant for very large, market-leading online or social media platforms. In general, the revision will modernise the ACR with regard to the challenges of digital markets. The revised German ACR is expected to be implemented in the second half of 2020.

## 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?

There is a general statutory minimum wage of €9.35 gross per hour (in 2020).

As the protection against dismissal is high in Germany, companies sometimes prefer to use freelancers for some tasks instead of employing employees directly. While this is permissible in general, the hurdles for a real freelance or service contract practiced are quite high, and as the assessment is not only depending on the contractual circumstances, but also on the performance in practice and the daily work, companies need to be careful. An integration into the business, the giving of work instructions, etc. would lead to a factual employment relationship with the obligation to pay social security contributions (and potential fines for misclassifications).

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### Trade unions

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

An important aspect of the legal framework consists of collective agreements for certain sectors or industries, including the retail sector. These agreements are negotiated between trade unions and employers or employers' associations. While in some sectors and states there are mandatory collective agreements that are to be considered, there also are many regions where no mandatory collective agreement for fashion companies exist. Nevertheless, employees might go on strike for the conclusion of a collective agreement and the competent trade union is relatively aggressive.

There is also strong co-determination of works councils in Germany. If a works council is established (such employee representation body can be elected if the establishment has at least five employees), broad co-determination and consultation rights exist and need to be complied with (regarding social, personal and economic matters).

### Immigration

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

In general, foreigners' access (eg, non-EU member citizens) to the labour market is limited pursuant to the provisions of the Germans Residence Act. Access is in principle limited to certain occupational groups and normally requires a prior approval of the Federal Employment Agency; nonetheless, there are numerous exemptions to this principle. In fact, in recent years and legislation, additional measures have further liberalised access to the German labour market. However, one practical

issue in daily practice is that the competent authorities do not act or decide fast and applicants sometimes must wait a long time for appointment dates.

For unskilled and low-skilled workers, however, access to the labour market remains limited. In contrast, in the case of highly qualified foreign nationals such as university graduates, the legal barriers to working in Germany have been reduced. Simplified rules on access to the labour market especially apply to academics, high qualified professionals, executives, senior employees, specialists and similar groups. Also, foreign nationals with a recognised university degree have easier access to the labour market under the EU blue card system.

All EU citizens can easily work and reside in any member state.

## 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 and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

There appear to be two important trends: digitalisation and eco or sustainable. Both lead to legal questions and challenges. In terms of advertising there are many questions especially relating to misleading advertising. How do influencers have to disclose remunerations? When is a product sustainable? Regulatory and unfair competition law go hand in hand. This leads to question of consumer protection that has become a very important topic for EU legislation. Influencer marketing is one of the hottest topics at the moment.

Digitalisation makes it harder for brands to control their brand image as pricing (and price differences) become much more obvious. This leads to antitrust questions and challenges. Consumer protection also has a strong influence here. It is quite apparent that this has a strong influence on both legislation as well as the practice of offices and courts.



# Bird & Bird

Luxury and fashion businesses are subject to constant change. To stay ahead, you need foresight as well as insight.

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