Luxury & Fashion 2021

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

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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.

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Getting The Deal Through

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Netherlands

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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 Netherlands is home to the European headquarters of several leading international fashion brands, such as Tommy Hilfiger, Calvin Klein, Patagonia, Karl Lagerfeld, Nike and Asics. Combined with the many Dutch-origin companies also present on the scene – like Scotch and Soda, Suitsupply, G-Star and Hunkemöller – this makes for a vibrant luxury and fashion market in the Netherlands with an international, creative workforce. Amsterdam even prides itself in having the world's highest concentration of denim brands.

In 2017, the value of the apparel market in the Netherlands was already US$14.5 billion and also the footwear market brings in several billion a year. Topics like sustainability, the circular economy and re-commerce are becoming ever more important in the Dutch market. In 2019, 15 per cent of the fashion retail turnover was achieved through online channels, and this market is growing at an even more accelerated pace due to the ongoing covid-19 pandemic. Because of the global covid-19 pandemic, 2020 was one of the most difficult years for retail, but due to government support it actually witnessed fewer bankruptcies than 2019. Recovery from the start of 2021 will depend heavily on the ability of fashion companies to successfully shift their business to the online world and the possibilities for reopening stores.

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?

The development, manufacture and supply chain for fashion goods are governed by general commercial and contract law. In the Netherlands, a general freedom of contract applies. However, under Dutch law, any commercial contract is subject to a reasonableness and fairness test. The concept of reasonableness and fairness may, in specific circumstances, set aside or imply certain contract clauses.

The contractual arrangements regarding the development and manufacturing of fashion goods are often included in dedicated development or manufacturing agreements. As regards the supply chain, companies usually sell their products through a network of vertical agreements (eg, through distribution, franchise and agency agreements).

Distribution and agency agreements

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

The distribution agreement has no specific statutory basis in Dutch law. Because the distribution agreement is commonly used in the Netherlands, several specific subjects related to distribution relationships – for example, the termination of distribution agreements – have been clarified in case law.

The agency agreement has a statutory basis in Dutch law and is regulated in Title 7.7.4 of the Dutch Civil Code. The relevant legislation is, inter alia, based on the EU Directive on the coordination of the laws of the member states relating to self-employed commercial agents (Directive 86/653/EEG).

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

Agency and distribution agreements for fashion goods are often framework agreements that provide the terms that govern separate purchase agreements or orders.

Agency and distribution agreements for fashion goods are often concluded for a specific territory, such as a country (Netherlands) or a group of countries (Benelux). Agents and distributors are, further, usually appointed on an exclusive or non-exclusive basis.

Relevant contractual terms and provisions to include in agency and distribution agreements for fashion goods are, inter alia, stipulations regarding the duration of the relationship, applicable minimum purchasing obligations (subject to competition law requirements), relevant sales targets, marketing efforts, renumeration, recalls, and protection of intellectual property rights.

In addition to the above, it is important to keep in mind the luxury fashion sector specifics when drafting more 'standard' contractual clauses. It will, inter alia, be relevant to consider the seasonality of fashion when agreeing on possible (premature) termination options, including notice periods and any termination fees.

Import and export

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

As a starting point, it is very helpful to assess and determine the correct origin and commodity code of the relevant fashion good being imported or exported. This will enable fashion companies to better identify the applicable rules and restrictions such as whether upon import or export a product needs a permit or stamp under the Convention on

International Trade in Endangered Species of Wild Fauna and Flora (CITES). Some examples of import and export rules and restrictions are as follows:

- fashion goods containing certain fur or leather or other parts from endangered species are subject to prohibitions or specific licensing requirements;
- seal-related fashion goods are subject to prohibitions. Seal products entail all products, either processed or unprocessed, deriving or obtained from seals;
- jeans originating from the United States attract additional customs duties upon importation into the EU and need to be taken into account;
- fashion and luxury goods made subject to EU sanction regimes:
- the EU sanctions against North Korea, prohibiting the sale, supply, transfer or export of luxury goods to North Korea as well as the import, purchase or transfer from North Korea of luxury goods; and
- fashion goods being regarded as economic resources subject to export prohibition to any EU sanctioned parties.

In practice, it is recommended to gain insight of the import and export rules and restrictions at an early stage in view of being able to apply for and obtain any required licences or certifications enabling business operations and the related supply chain to run smoothly.

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?

Generally, listed companies with more than 500 employees have to report on a number of non-financial aspects in their annual report. Information to be provided on corporate social responsibility should in any event touch on policies relating to (1) environmental, social and personnel matters, (2) respect for human rights and (3) the tackling of corruption and bribery. Companies are given a large amount of freedom in their reporting, through mostly non-binding guidelines. Sustainability is more often put as a separate discussion item on the agenda of the general meeting and it is sufficient to include a statement in the management report; a separate, more detailed sustainability report is not mandatory.

There are also specific Guidelines for making sustainability claims, which were introduced by the Dutch Authority for Consumers and Markets (ACM) in January 2021. The Guidelines include five rules of thumb for sustainability claims, on the basis of which companies can make sure that sustainability claims are clear, correct and will not mislead consumers. Pursuant to the Guidelines, companies should (1) make clear what sustainability benefit(s) a product offers when making such claims, (2) substantiate any sustainability claims with facts. Any comparisons with other products, services or companies, (3) must be fair, (4) be honest and specific about their efforts regarding sustainability and (5) make sure that visual claims and labels are clear and useful to consumers.

In the Guidelines, specific references to the fashion market are made. The ACM clarifies, for example, that for each piece of clothing that is claimed to be a 'sustainable choice', the specific sustainability benefits must be stated. We note that during a preliminary study into misleading sustainability claims, the ACM looked at specific industries, including the fashion and cosmetics industry. The ACM clarified that the Guidelines serve as basis for enforcement of the rules on unfair commercial practices (articles 6:193a to 6:193j, Dutch Civil Code) and (comparative) advertising (advertising (articles 6:194 to 6:196, Dutch Civil Code). Misleading or incorrect sustainability claims will be regarded as an unfair commercial practice for which ACM can impose fines up to EUR 900,000 or 1 per cent of the company's annual turnover. Sustainability is one of ACM's key priorities in 2021. In its press coverage on the launch of the Guidelines, ACM explicitly mentions that it has come across examples of misleading or incorrect sustainability claims in various industries, such as food, clothing, cosmetics, and domestic appliances. These findings will be taken into account in choosing the industries where ACM will start enforcing the rules regarding misleading sustainability claims. The Guidelines Sustainability claims can be found online in English.

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

The Dutch health and safety laws focus on industrial accidents and occupational diseases (risque professionnel) and on sickness illness and absenteeism of workers in general (risque sociale). The employer must provide a safe workplace, identify possible hazards and risks, take action where needed and inform employees about the risks and prevention. Furthermore, employers are obliged to report accidents and seek advice from occupational health experts on the risk inventory and assessment. The employer is further obliged to have a contract with an occupational safety and health service or an occupational physician, whose advice or guidance must be sought in case of long-term sickness.

The main Dutch regulations regarding working conditions are:

- the Working Conditions Act, which provides general provisions for employers and employees on how to deal with occupational safety and health; for example, to have a written occupational safety and health policy and a risk inventory;
- the Working Conditions Decree, which covers a wide range of specific occupational health and safety topics, such as provisions on workplaces, dangerous substances, noise, vibrations, etc. These obligations also apply when working from home, which is more common due to the Covid19 crisis. Provided that the employee does not already have the proper equipment, the employer is for instance obliged to provide or reimburse the costs of equipment for an ergonomic workplace;
- the Working Conditions Regulation, which contains very specific provisions that are changing relatively fast; for example, the occupational exposure limit for dangerous substances;
- the Major Accidents Decree and Regulation, which deal with legislation in the field of major accidents related to dangerous substances;
- the Working Hours legislation, covering, inter alia, maximum working hours per shift and the obligation to properly register working hours (exemptions apply); and
- The Collective Labour Agreement Retail Non-Food, which provides for, inter alia, specific provisions for employers and employees on how to deal with working hours and working conditions. The current collective labour agreement will remain in force up to and including 30 June 2022.

The Labour Inspectorate monitors compliance with occupational safety and health legislation and regulations.

ONLINE RETAIL

Launch

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

Online marketplaces and online stores are regulated by e-commerce legislation, primarily included in the Dutch Civil Code. The legislation

relevant for online marketplaces or online stores is mostly the Dutch implementation of the relevant EU regulations and directives.

Websites must comply with applicable e-commerce and platform legislation, including (pre-contractual) information obligations, the right of withdrawal, 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?

E-commerce brings the retailers' sourcing and distribution arrangements within the framework of the e-commerce legislation as contained in the Dutch Civil Code. This means, inter alia, that retailers must comply with (pre-contractual) information obligations, the right of withdrawal, 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. Furthermore, sometimes a model of 'drop-shipping' 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 delivers 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 Dutch legislation concerning general terms and conditions. This legislation is included in Title 6.5.3 of the Dutch Civil Code and is based on the EU directive on unfair terms in consumer contracts (Directive 93/13/EEG).

Online terms and conditions should not be 'unreasonably onerous' for the customer (ie, consumers or small and medium-sized businesses). Whether a clause is unreasonably onerous depends on the circumstances of the specific case. Clauses that are considered unreasonably onerous in all circumstances are included in an exhaustive list (the 'black list'). The Dutch Civil Code also contains a list of clauses that are presumed to be unreasonably onerous for consumers (the 'grey list'). Such clauses are not automatically void, but if found unreasonable in the given circumstances, the clause can be set aside. The relevant articles also regulate the applicability and use of general terms and conditions in contracts with consumers or small to medium businesses.

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 should 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.

Tax

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

For a start, sales in retail stores are taxed with the local value added tax (VAT) rate (currently 21 per cent).

Online sales in the Netherlands where both the seller and the buyer are based in the Netherlands (domestic sales) are taxed with the same VAT rate.

For online sales by buyers in the Netherlands not involving a domestic sale, the VAT rate treatment is based on certain factors, such as where the seller is based (other EU member state or outside the EU) and the location from where the fashion products are being shipped.

For example, online sales from sellers based in another EU member state are taxed either by the regular Dutch VAT rate for domestic sales, or with the VAT rate of the EU member state where the seller is based in the event that certain sales volumes are not met.

INTELLECTUAL PROPERTY

Design protection

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

Fashion designs may be protected by a wide range of IP rights in the Netherlands, which can in part also overlap.

Dutch case law easily accepts copyright protection in works of applied art, including fashion designs. As there is no registration requirement, this offers a straightforward way for fashion designs to be protected. An added benefit is that Dutch case law will in certain cases accept a pan-European injunction on the basis of copyright in the event of a copyright infringement. It must, however, be ensured that the copyright is vested in the right party and that the design process is properly documented. While copyright will automatically accrue to the employer where a work is created within the framework of the employment, provided no other agreements are in place, the copyright commissioned works created by freelancers or outside agencies will remain with the author (thus such freelancer or agency) unless a written deed of copyright transfer is executed.

Fashion designs may also be protected through registered and unregistered design rights. Registered design rights are available at either the Benelux or EU level, while unregistered design rights are only granted at an EU level pursuant to the EU Design Regulation, the latter only giving a short period of protection of three years. Neither a Benelux design right application nor an EU design right application is subject to a substantive check on novelty and individual character before registration, so a registered right is relatively easy to obtain but at the same time not guaranteed to be valid. Having a registered right may be beneficial in enforcement activities.

Fashion designs may in some circumstances also be registered as a trademark. There is the option of going for a Benelux trademark or for an EU trademark. However, contrary to design rights, trademarks are substantively examined before registration and it also possible for third parties to file an opposition within two months (for a Benelux trademark) or within three months (for an EU trademark) from publication. Fashion designs often run into issues concerning a lack of distinctiveness, technical features or the fact that they add substantial value to the goods, which can all preclude them from being registered as a trademark.

Nowadays, with the increasing prevalence of fashion tech, event patents will be relevant for fashion designs. Although it is possible to file a Dutch patent application, most parties would use the European patent system instead.

Finally, additional protection may be found in the doctrine of slavish imitation, a part of unfair competition. This prevents against copying the look of a product, where that product has its own position on the market (as compared to the design of other similar products), there is a risk of confusion, and the copycat could have designed its product differently without detracting from the soundness and usefulness of the product.

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

One difficulty that can arise is that fashion goods often also contain technical features. Such features cannot be protected under either copyright, design rights, trademarks or unfair competition. Yet they are usually not sufficiently inventive to merit patent protection either.

In terms of copyright and unfair competition, common style elements are also excluded from protection. Although a specific interpretation of a general style can be protected under copyright, it is sometimes difficult to draw a strict line between a general style and a specific interpretation. In the case Broeren v Duijsens (2013), the Dutch Supreme Court held that where it concerns a common style that is not protected under copyright law, no further protection will be offered under the doctrine of slavish imitation (unfair competition) either.

Several difficulties may also arise when trying to protect the appearance of fashion goods through trademark law.

Firstly, a trademark must be distinctive. In terms of word marks, this requirement is fairly simple and merely requires the proprietor not to pick a descriptive term. In relation to shape marks and other 2D representations of (parts of) goods including position marks, EU case law has consistently held that the average consumer is not accustomed to recognising such signs as an indication of origin where they coincide with the appearance of (part of) the product. These trademarks will therefore only be distinctive ab initio where they depart significantly from the norm or the customs in the sector at the time of filing. A mere variation of what is already on the market is not sufficient. If this cannot be shown, then the trademark applicant will need to provide evidence of the trademark having acquired distinctiveness through use in either the entire Benelux (for a Benelux trademark) or the entire EU (for an EU trademark).

Secondly, EU and Benelux trademark law also excludes protection for signs that consist of a shape or other characteristic that gives substantial value to the goods. Briefly put, if the consumer buys the goods because of their appealing look, then trademark law cannot provide protection for that look. Furthermore, also technical features or features that result from the nature of the goods are excluded from trademark protection. These three exceptions cannot be overcome by showing acquired distinctive character.

Brand protection

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

Word and device marks may be protected through filing either a Benelux trademark application or an EU trademark application. Furthermore, the trade name of a company is separately protected under Dutch law as a trade name right, provided that it has been used externally in the course of trade. Whether any trade name rights exist depends on the use of the trade name, not on the registration thereof with the Dutch Chamber of Commerce. The registration of a domain name as such does not create any rights but may under certain circumstances contribute to establishing use of a trade name. There is no recognition of unregistered trademarks under Dutch or Benelux law, except for the recognition of well-known marks according to article 6bis of the Paris Convention.

Licensing

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

Rules governing IP licensing are distributed over the various acts relating to each type of IP right.

The Dutch Copyright Act provides that a licence can be granted for the whole or part of the copyright. An exclusive licence can only be granted by way of a written deed.

Both the Benelux Convention on Intellectual Property Rights (BCIP) and the EU Trademark Regulation provide that a licence to a trademark can be granted for all or part of the goods and for all or part of the territory. To invoke a licence against third parties, it should be recorded in the register. For fashion businesses, trademark licence agreements especially require special attention, given that sales contrary to the provisions of the licence agreement may still lead to exhaustion of trademark rights. In that case, the trademark owner will only have a claim against the licensee for breach of contract but will not be able to stop third parties from further marketing the goods in question. The owner can only rely on its trademark rights when the licensee has acted contrary to licence provisions regarding the (1) duration of the licence, (2) form in which the trademark may be used, (3) goods covered by the licence, (4) territory and (5) quality of the goods and services. It is, therefore, essential to include clear arrangements on these points, especially concerning the quality and supervision requirements that the licensee must meet.

The BCIP and Community Design Regulation contain similar provisions as compared to those set out above for trademark licensing.

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?

IP rights can be enforced in the Netherlands through preliminary injunction proceedings or proceedings on the merits. Where a case is particularly urgent and the infringement is clear cut, an injunction may also be obtained through ex parte proceedings without prior hearing of the defendant, particularly where delay would cause irreparable harm.

The Netherlands can be a particularly favourable jurisdiction for copyright holders, as Dutch courts readily grant copyright protection to works of applied art and furthermore under certain circumstances assume jurisdiction to grant pan-European injunction on the basis of copyright against Dutch defendants and any co-defendant sued in the same action with a Dutch defendant where there is a close connection between the cases.

Dutch customs are also active in stopping counterfeit and other infringing goods from entering the EU via the Netherlands through their specialised IP team in Groningen. Customs may stop suspected infringing goods ex officio and will then contact the rights owner and the addressee of the goods, but it is also possible to submit a customs request asking customs to pro-actively monitor for any suspected infringements. In the latter case it may be recommendable to organise training sessions with customs to properly identify counterfeit.

Finally, rights holders can also take action against the registration of any conflicting trademark applications through filing oppositions, cancellations and revocations at the Benelux Office for Intellectual Property.

DATA PRIVACY AND SECURITY

Legislation

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

The EU General Data Protection Regulation 2016/679 (GDPR), the Dutch GDPR Implementation Act and articles 11.7 and 11.7a of the Dutch Telecommunications Act implementing the spam and cookie obligations under the EU ePrivacy Directive (2002/58/EC, as amended 2009/136/EC).

Compliance challenges

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

Generally, the luxury and fashion industries face challenges with regard to data security. Companies operating in these industries are most often public facing and 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 most 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 will face various challenges in the field of spam, cookies and other forms of direct marketing. For example, there are continued developments around new legislation for direct marketing, both on a Dutch as well as European level, as illustrated by proposed new rules on telemarketing in the Netherlands as well as renewed attempts for an ePrivacy Regulation. Further to this, in the absence of the aforementioned ePrivacy Regulation, more and more European regulators have issued guidelines and started enforcement proceedings on direct marketing topics, often using the GDPR as a way to justify a stricter interpretation of direct marketing rules. Notably, the French data protection authority (Commission nationale de l'informatique et des libertés (CNIL)) issued the first two large fines in December of 2020 to Google (€60 million) and Amazon (€35 million) for alleged cookie violations. This is a good indication of what could also be expected in the Netherlands. Companies such as retail fashion companies operating in these areas are 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?

Some new technologies can be quite invasive and intrusive to the privacy of individuals. When use of such technologies involves the processing of personal data, it must adhere to the general principles of necessity and proportionality. In short, these requirements together ensure that the most effective and least intrusive way (ie, also in consideration of alternatives that are less intrusive) to process personal data is chosen and that the interference in the privacy of individuals is proportionate in consideration of the objectives of the retail fashion company.

Especially with more invasive innovative technologies such as facial recognition, it could be that the use of such technologies does not meet the requirements of necessity and proportionality when deployed. Companies wishing to apply such technologies are advised (and sometimes required) to perform a data protection impact assessment (DPIA), which will, inter alia, allow them to assess how to meet these requirements.

Furthermore, most EU countries have specific national rules for the processing of special category data such as biometric data. In the Netherlands, for example, the use of biometrics (including fingerprints and facial recognition) is restricted by law to specific purposes.

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

For example, there are continued developments around new legislation for direct marketing, both on a Dutch as well as a European level, as illustrated by proposed new rules on telemarketing in the Netherlands and renewed attempts for an ePrivacy Regulation. Further to this, in the absence of the aforementioned ePrivacy Regulation, more and more European regulators have issued guidelines and started enforcement proceedings on direct marketing topics, often using the GDPR as a way to justify a stricter interpretation of direct marketing rules. Companies such as retail fashion companies operating in these areas are advised to keep a close watch on these developments.

In the Netherlands, certain forms of profiling or personalisation could 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?

Advertising and marketing communications are firstly covered by the rules on unfair commercial practices (articles 6:193a to 6:193j, Dutch Civil Code) and misleading and comparative advertising (articles 6:194 to 6:196, Dutch Civil Code). Advertising on TV and via video platforms is also subject to the Dutch Media Act.

There is also a self-regulatory framework called the Dutch Advertising Code. This Code applies to all types of advertising and may be enforced through recommendations from the Dutch Advertising Code Committee and naming and shaming for parties who do not comply. Particularly relevant for luxury and fashion companies are the specialised codes on social media and influencer marketing and on cosmetics.

Furthermore, particularly in relation to sustainability claims, the Dutch Authority for Consumers and Markets (ACM) introduced Guidelines for sustainability claims in January 2021. The Guidelines Sustainability claims can be found online in English.

Online marketing and social media

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

The rules for online marketing – in particular influencers and vloggers – are mainly based on two types of self-regulation:

- Advertising on social media is covered by the Dutch Advertising Code Social Media & Influencer Marketing (RSM), which is enforced by submitting a complaint to the Dutch Advertising Code Committee, who can issue a warning and who keep a naming-and-shaming list for parties who do not comply. The main requirements of the RSM are:

- ads must be identified as such where there has been any compensation in cash or in kind;
- children under 12 years old may not be used to advertise products or services on social media; and
- the advertiser is responsible for ensuring that the influencer follows these rules.

- Several YouTube vloggers have created De Social Code, which provides guidance on when and how to identify that a video has been sponsored. There are no sanctions for non-compliance.

Since the entry into force of the new Media Act on 1 November 2020, online video platforms are also covered by the Media Act and can be subject to the same substantial fines imposed by the Dutch Media Authority as already apply to advertising on TV. The main requirements of the Media Act are that a video platform provider must have a code of conduct and that advertising must be clearly recognisable as such.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

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

In the Netherlands, the relevant product safety rules and standards are included in the Dutch Commodities Act, including underlying legislation, such as the General Product Safety (Commodities Act) Decree. This legislation mainly includes safety requirements and labeling and packaging requirements.

Specifically for luxury and fashion goods, the Textile Articles (Commodities Act) Decree will also be relevant. This is the Dutch implementation of EU Regulation No. 1007/2011. This Decree, inter alia, contains the obligation to label goods that consist of over 80 per cent textile. Rules regarding the fire safety of fashion and, in particular, nightwear are, inter alia, included in enforcement agreements on fire safety of clothing.

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 is included in Title 6.3.3 of the Dutch Civil Code. This is the Dutch implementation of the European Product Liability Directive (Directive 85/374/EEG). The rules on product liability protect consumers against damage or injury caused by defective products.

Product liability is, in principle, a strict liability under the Dutch 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.

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?

As with M&A transactions in any sector, one should consider what would be the preferred deal structure (ie, whether the transaction should be structured as a share sale or a sale of all or part of the assets of the target company). Generally speaking, intellectual property is a key component in M&A transactions in the luxury fashion industry, which is reflected in the due diligence investigations as well as in the transaction documentation (notably the representations and warranties). In addition, retention of key persons (such as designers) as well as restrictive covenants is often a point of attention.

Technological innovations are also becoming increasingly important in the luxury fashion industry. Many fashion companies have (in one way or another) an online sales and marketing presence, which triggers all sorts of potential legal issues that are often part of the scope of due diligence and transaction documentation.

Competition

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

Competition law plays a role in the luxury and fashion industry in relation to all forms of distribution and online sales, particularly when it concerns exclusive arrangements, selective distribution, pricing arrangements, customer allocation, etc. Articles 6 and 24 of the Dutch Competition Act (DCA) are the cornerstones of the Dutch competition law framework. Article 6 DCA corresponds to article 101 of the Treaty on the Functioning of the European Union (TFEU) – prohibition of restrictive agreements and concerted practices. Article 24 DCA corresponds to article 102 TFEU – prohibition of abuse of dominance.

The EU competition law regime for 'vertical agreements' (EU Vertical Block Exemption Regulation No. 330/2010 and accompanying Guidelines on the application of article 101(3) TFEU to vertical agreements) applies directly to the distribution of luxury and fashion products in the Netherlands. The notion of vertical agreements covers all types of distribution or re-selling of products or services, except agency agreements under which the agent bears no commercial or financial risk for the products or services delivered (other than its own commission). This EU regime, dating from 2010, is currently under review. The EU Commission is expected to issue a draft for the new block exemption on vertical agreements in the course of 2021.

While recommending resale prices to distributors and retailers is generally allowed under the regime for vertical agreements, it is considered illegal to restrict a distributor's freedom to determine its resale price with the exception of maximum resale prices. Similarly, restrictions of online sales, restrictions on reselling and absolute territorial protection (passive sales bans) are generally prohibited.

Recently, e-commerce agreements are under more scrutiny as the European Commission is stepping up enforcement on e-commerce agreements (following its Digital Single Market objectives). As the Commission notes in its recent ecommerce sector inquiry, there is an uptake in selective distribution as this enables suppliers of (luxury) brand products to get more control over the quality of distribution of their products. The Dutch Authority for Consumers and Markets (ACM) considers that dual pricing may be justified according to article 101(3) TFEU. Thus, the supplier may ask a different price for products that will be sold online (eg, if the costs for offline reselling are significantly higher compared to the online sale).

Companies that are not dominant are generally free to determine their own resale prices and discounts as well as their contract partners. Even if dominant, the application of different prices to different customers or different categories of customers for goods whose costs are the same does not in itself indicate exclusionary abuse (ACM decision of 30 August 2012 in case 7464 Van der Zwan – Kluwer). There are no specific Dutch rules prohibiting selling at a loss (for non-dominant companies).

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?

Because the fashion industry particularly works with a lot of freelancers and external creative experts, there is always a risk that the arrangement with a contingency worker will be reclassified as an employment agreement, if challenged by the contingency worker. The contingency worker may be inclined to do so, for example, in case of sickness (claiming statutory continued payment of sickness) or upon the termination of the relationship at the initiative of the employer. The test to be applied by the court will include many elements, the most important one being the question whether or not the employer exercises supervision and control over the contingency worker. The court will apply a 'substance over form' test.

Without going into detail, in essence there are only two relevant types of contracts for contingency workers:

- a services agreement for the provision of well-defined services, whereby the recipient of those services (the fashion company) will not exercise supervision and control over the service provider (or individual worker who will be engaged in the provision of the services) or the individual contractor; and
- a supply of personnel agreement, pursuant to which the supplier will supply the individual worker to the fashion company to perform work for the benefit and under supervision and control of the fashion company.

The likeliness of the above-mentioned risks materialising will largely depend on the chosen contracting structure, but also on the actual performance (compliance with the structure parameters).

Another common contractual arrangement in the fashion industry relates to interns: provided that the individual is truly engaged as an intern (ie, no employment; no real work contribution; no real work obligation; preferably still registered at university; no salary, just a moderate allowance), the risk of requalification in this respect will be limited. However, if the internship agreement is reclassified as an employment agreement (at the initiative of the intern), the time spent will count towards continuous service. Under Dutch law, this would count as an initial fixed-term employment agreement, meaning the following contract will count as the second employment agreement (which, under certain circumstances, may lead to the employment agreement being considered permanent).

Trade unions

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

Trade union

Collective labour agreements are rather common in the Netherlands, either at the company or industry level. In principle, the collective labour agreement binds the parties and their members. In some sectors, however, (parts of) a collective labour agreement can be binding by law for all employers and employees working in a specific sector. The Collective Labour Agreement Retail Non-Food has a long history of being binding by law and this will – in all likelihood – also be the case for the current collective labour agreement (until 30 June 2022).

Trade unions mainly play a role in negotiating collective labour agreements and in situations involving mass redundancies.

Works council

Especially relevant for larger fashion companies that, for instance, have their headquarters in the Netherlands. Under Dutch law, each company with normally at least 50 employees or more should install a works council. In addition to the right to information, the main rights of the works council are the right to provide advice and the right of prior consent.

Works councils have a legal right to provide advice on a number of legally prescribed important topics. This advice should be sought at a time when the works council can still materially influence the decision of the company. If the company does not respect the advice of the works council, the works council can petition a special chamber of the Court of Appeal of Amsterdam.

Works councils also have a legal right to provide consent prior to a decision to introduce, amend or abolish a regulation on a number of legally prescribed topics. If a works council does not consent to a proposed decision and the company wants to continue with the decision, the company should seek consent from a cantonal judge. If a company does not obtain prior consent or approval of a cantonal judge and still continues with the decision, the works council can annul the decision.

The costs reasonably necessary for the performance of the duties of the works council shall be borne by the employer.

Immigration

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

Because a large number of international fashion companies have their headquarters in the Netherlands and these companies are often run by an international workforce, immigration law can be an important topic in the industry. Employees from the European Union (except Croatia), European Economic Area (EEA) or Switzerland do not have to obtain a valid work permit from the Immigration and Naturalisation Service before starting work.

A work permit will in principle (ie, unless an exception applies) only be granted to the employer of nationals from outside the EU, EEA or Switzerland if no potential worker can be found within the EU, EEA or Switzerland. The work permit must be obtained prior to the foreign worker performing any work. As from 1 January 2021 an employee who will work or stay in the Netherlands for a period longer than 90 days must obtain a combined work and residence permit.

Several exceptions apply to the requirement to obtain a work permit. Some examples are where:

- the foreign worker performs certain types of work and occasionally works in the Netherlands for a short period (examples include business trips, preparation of fashion shows or the launch of a new store);
- the foreign worker is a 'highly skilled migrant';
- the foreign worker holds a residence permit that states 'permitted to work';
- the foreign national holds a residence permit allowing self-employment for the type of work concerned; and
- the foreign national has attained at least a Master's degree in the Netherlands, then he or she can obtain a residence permit for a maximum of one year to find a job as a highly skilled migrant or to start an innovative company.

Please note that due to Brexit, the regulation relating to work permits for third-country nationals will also apply to UK nationals. This means that, for working in the Netherlands, a work permit – or, dependent on the length of stay, a combined residence and work permit – is required for UK nationals (unless an exception applies).

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 covid-19 pandemic has pushed the Dutch luxury and fashion market to accelerate the shift to e-commerce. Like other luxury and fashion companies around the world, the Dutch market is also currently focused on increasing sustainability in the sector, finding new ways of introducing a circular economy and creating value from 're-commerce'. Subscription and rental models for fashion products are gaining importance and this increased focus on sustainability and shifting consumer behaviour is putting pressure on the more traditional fast-fashion companies. Something to keep in mind in this respect are the recently released Guidelines on sustainability claims, issued by the Dutch Authority for Consumers and Markets (ACM). While these are Guidelines, they serve as the basis for enforcement of the rules on unfair commercial practices, violation of which can result in hefty fines.

Another recent development is the entry into force of the new Media Act in November 2020, which will have consequences for advertising through online vlogging as it places online video platforms within the scope of the Media Act and thereby potentially makes them subject to substantial fines in case of non-compliance.

Finally, while the covid-19 pandemic is ongoing, both government measures as well as support packages will be a topic that requires attention, particularly the retail side of the luxury and fashion industry.

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?

In response to the covid-19 pandemic, a range of measures have been introduced by the Dutch government to financially support businesses. Such measures include emergency financial schemes, credits and guarantees and tax options. Also, rules and protocols regarding health and safety measurements for businesses have been introduced. Please note, however, that all measures are subject to change, depending on the current status of the pandemic in the Netherlands. An overview of the current measures can be found online.

NOW

The government adopted the Temporary Emergency Bridging Measure for Sustained Employment (NOW), offering companies an aid package aimed at compensating employers' wage costs over certain subsidy periods (rather than a scheme allowing the reduction of working hours). The amount of subsidy depends on the drop in revenues suffered by the company. At the time of writing, companies can apply for currently the last two tranches of subsidy up to and including 13 June 2021.

TVL

The Reimbursement Fixed Costs Scheme (TVL) aims to compensate both small and medium enterprises with ≤250 employees (SMEs) and lager companies for fixed costs other than wage costs. Until 1 July 2021, all companies (except financial service providers) can apply for this scheme, albeit that a maximum compensation of €330,000 applies for SMEs and €400,000 for larger companies. The most important requirements are: (1) a revenue drop due to the covid-19 pandemic of at least 30 per cent during a three-month period and (2) a minimum of €3,000 in fixed charges over that three-month period.

Stock Support Closed Retail

Non-food retail companies that have had to close their doors as a result of the lockdown – which has been in force since 15 December 2020 – can receive a one-time supplement for the loss of revenue for the stock they have been unable to sell up to a maximum of €200,000. To be entitled to receive the supplement, a company (1) must be entitled to receive TVL over Q1 2021 and (2) is registered as having non-food items as its core business.

Rental agreements

On 10 April 2020, a support agreement was reached between the property and retail sectors on rent suspension for retailers due to the consequences of the covid-19 pandemic. This agreement was also signed by the Ministry of Economic Affairs, as well as a few large banks. The Support Agreement states that under certain conditions tenants (retailers) can ask for suspension of the rent for a period of three months starting April 2020, whereby the suspension should at least regard 50 per cent of the rent. On 3 June 2020, the support agreement was further continued in Support Agreement 2.0, which prescribes that the rent for the months April and May are waived and 50 per cent of the rent for June is suspended until next year. Although the Support Agreement is not binding and every case asks for a tailor-made approach, in practice it is often used as a basis for negotiations and arrangements between landlords and retailers.

Competition law enforcement

Covid-19 inevitably also had an impact on the Dutch Authority for Consumers & Markets (ACM)'s actions. The ACM was temporarily suspended, but in the meantime has resumed unannounced dawn raids and interrogations that are part of investigations into possible violations. The ACM, together with other EU competition authorities, published a statement on the application of the antitrust rules during the coronavirus crisis, explaining how competition authorities can help companies deal with these unprecedented times. The main message is that the competition rules provide ample room for working together in extraordinary times like these, but at the same time that companies cannot take advantage of the crisis by doing things that, under normal circumstances, they would not be allowed to do either. For example, companies are still not allowed to conclude any price-fixing agreements. The European Commission also published a Temporary Framework communication, setting out the main criteria that the Commission will follow when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the coronavirus outbreak. The document also foresees the possibility of providing companies with written comfort (via ad hoc 'comfort letters') on specific cooperation projects falling within the scope of the Temporary Framework. It is likely that the ACM will also apply those criteria when assessing such cooperation projects.

Corporate law

A temporary covid-19 act has entered into force, which inter alia provides for the following temporary deviations from Dutch corporate law:

- The Dutch Civil Code contains various deadlines for drawing-up annual accounts, depending on the type of legal entity (five months after the end of the financial year for limited liability companies (*naamloze vennootschap, NV*) and private companies with limited liability (*besloten vennootschap, BV*)). In principle, the relevant

deadline can be extended by means of a resolution of the general meeting (with a maximum of five months with a NV or BV). Pursuant to the Temporary COVID-19 Act, the management board may now also resolve to extend the deadline for drawing-up the annual accounts, instead of the general meeting (in which case the general meeting of shareholders does not have the authority to extend). We note that the statutory deadlines for listed companies in relation to periodic reporting obligations have not been extended.

- Dutch law provides that in principle, in the event of violation of statutory bookkeeping duties and the duty to timely publish the accounts, liability of directors of a BV or NV is presumed in the event the company is declared bankrupt. However, if the accounts are published late due to the corona outbreak the Temporary COVID-19 Act negates this statutory presumption, provided the managing directors demonstrate that the breach of their reporting duties is due to covid-19. Provisions in this regard of the Temporary COVID-19 Act will.
- The Temporary COVID-19 Act provides that electronic communication means may be used for general meetings, even if the articles of association require a physical meeting. The management board may now resolve to hold a general meeting exclusively via a live streaming service (audio or visual), provided that members or shareholders (as the case may be) have the opportunity to ask questions (in writing or electronically) in relation to the agenda items at least 72 hours in advance of the meeting. These questions will then be answered during the meeting. Voting can also be done electronically (eg, per email).

The Temporary COVID-19 Act entered into force on 24 April 2020, with retroactive effect as of 16 March 2020 (save for the provisions in relation to directors' liability). Initially, the Temporary COVID-19 Act was set to expire on 1 September 2020, but it may be extended for two-month periods. At the date of writing the Temporary COVID-19 Act is still in full force and effect. The provisions in relation to directors' liability will stay into force until 1 September 2023.

Trade & Customs

The following main measures have been introduced and taken by the Dutch tax/customs authorities in view of supporting companies and entrepreneurs:

- there is the availability to request a deferment of payment for tax assessments related to value added tax (VAT), customs and excise duties. Please note that this is subject to prior approval from the competent authority;
- customs related certificates of origin may – temporarily – also be submitted digitally;
- there is a customs duty exemption upon import for donated personal protective equipment; and
- there is leniency in the event of non-compliance related to obligations to meet certain time-limits for customs transit as well as the monthly supplementary customs declaration. There is also leniency with regarding to businesses that do not comply with customs obligations on time as a result of the covid-19 pandemic. If there is no other suspicion of a violation, crime, intent or gross negligence, a fine will not be imposed.

Overall, the Dutch tax/customs authority is open to discussion and willing to think about tailor-made solutions for businesses so it is advisable – in any case – to reach out to the relevant tax/customs inspectors explaining the effects of the corona pandemic to the underlying supply chain in view of seeking alternative solutions and leniency for your trade related import and export activities in the Netherlands.

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