Shein, Temu & Co.

How sporting goods brands can cope with disruptive online platforms.

Selected legal insight for the sporting goods and consumer goods sector.

DR. JOCHEN M. SCHAEFER · PLATFORMS / SPORTING GOODS

> *“Competition has to be free AND FAIR.”*

ORIGINALLY PUBLISHED
SGI Europe · 24 October 2024

Shein, Temu & Co. – How to Cope with these Platforms as a Sporting Goods Brand By Dr. Jochen M. Schaefer, October____, 2024 Introduction: Just a couple of years ago, the European fashion and sporting goods retail trade was mainly dominated by solely two distribution channels, namely those where consumers could find and purchase branded products and those, where discounters offered primarily unbranded articles at low-price. From time-to-time brands got upset when they found their high-quality articles displayed e.g. on rummage tables in close vicinity with products of inferior quality. In those days it was comparatively easy to intervene and to stop for instance special sales actions of supermarket chains, which used branded products as loss-leader offers to lure customers into their premises. Foremost in Germany special sales with considerable price reductions were restricted by law to certain exactly defined comparatively short periods during the end of the fall/winter season ("Winterschlussverkauf") and of the spring/summer season ("Sommerschlussverkauf"). Needless to say, that all this has completely changed including the mentality of the end consumer customers. Many are just fixated on the pricing of a product, what in German language is called "Schnaeppchenmentalitaet" the more or less equivalent term in English language would be bargain mentality. And now - somewhat comparable to the present economic developments in the automotive sector - super aggressive primarily Chinese online platforms have been popping up with disruptive business strategies. Those have a major impact on the whole supply chain not only in the area of fastfashion but do also significantly affect the sporting goods sector. Among the most prominent players are the Chinese online platforms Shein and Temu. My following contribution will focus on these two, which may be exemplary for others to follow by shaking and rattling the traditional existing sales patterns in the industry and trade.

Just to avoid any misunderstanding: I am definitely pro competition, protectionism and a 'fortress Europe' arein my opinion no solutions. Yet competition has to be free AND FAIR and this is where I see major deficits by looking at the commercial activities of these two online platforms. 1.

Since not everybody reading this article may be familiar with the two online platforms, some very much summarized facts might be helpful: 1.1

Shein

➢ Shein is owned by the Chinese entrepreneur Sky Xu, or Chris Xu as he is frequently referred to in English language media. He started his business by selling wedding dresses first at wholesale level until he became a fully integrated retailer in 2013, where he changed the company name to Shein with an annual turnover of more than US$5 million at the time already.

➢ The growth pattern of Shein is truly explosive and can be attributed to facts such as substantial advertising activities on TikTok or what he had been still able to deliver Shein's products during the Covid pandemic in a fairly reliable fashion, while others had to temporarily suspend its shipments.

➢ Analysts have valued Shein in March of last year at US$66 billion and in 2021 the sales figures of the Chinese online platform even exceeded those of Amazon.

➢ In particular Gen Z and other young shopper love Shein for its seemingly affordable product offerings and its ability to attract them with a sheer endless range of new products by adding more than 10,000 new articles on Shein's websites – per day (!!). Its business strategy can be compared to that of Zarah and H&M. Production and sale of a certain article is started in small quantities and if such product is liked and accepted by the customers, larger quantities are then added. Only approximately 6% of its whole product portfolio remains on Shein's websites for more than three months.

➢ Shein has considerably broadened its product range, which now also covers a vast range of sneakers, sports and leisure apparel, but also hardware such as tennis and table tennis rackets, fitness equipment, balls, etc. etc.

Its headquarters are now based in Singapore and no more in China.

1.2

Temu

➢ The other major Chinese global player and e-commerce platform is company Temu. It is under the umbrella of PPD Holdings, which among others also owns and operates the popular Chinese online platform P., which now bears the name nowinduoduo.

➢ It has been founded by Colin Huang (Huang Zheng) by operating at first only domestically until it expanded its business under the name of Temu 2022 internationally.

➢ In its shipping logistics Temu focuses mainly on airfreight, which had among others the consequence that freight rates went up globally.

➢ Temu's equally explosive growth can be best demonstrated by looking at the annual turnover figures the online platform provider published. While they amounted in 2022 to approx. €16.3 billion, they nearly doubled in 2023 by exceeding 31 billion already (!!).

➢ Its website presentations are highly interactive and colorful with the aim to induce purchasers to buy products spontaneously by impulse buying on Temu's websites.

➢ Shein and Temu are not affiliated with each other but are fiercely competing with each other in numerous areas. Numerous court cases primarily in in the US prove this, where e.g. Temu claimed that Shein applied unfair trade practices to deter manufacturers from working for Temu and accused the competitor to use "mafia-style intimidation's of suppliers to unduly slow down Temu's growth in the U.S. market. Vice versa Shein started law suits against Temu by alleging that its competitor had stolen trade secrets from them and would use illegal practices to redirect potential Shin online customers to Temu's own web sites through sponsored Google ads, etc.

3.

It is quite obvious that the special business models both Temu and Shin are aggressively pursuing have numerous downsides as well:

➢ For me as a member of the baby boomer generation it is quite fascinating to see how schizophrenic major parts of the younger generation are acting in their consumer purchase behavior. On one hand many of them are at the forefront of fighting against climate change and are vigorously requesting to change our lifestyles, on the other hand they do not even blink when they order in particular fast fashion products, which are only worn two or three times at its best and then thrown away or returned to sender (if possible at all!!). Such returns then frequently end on landfills, since from a pure economic point of view it is cheaper for these two commercial operators to discard them rather than to restock those.

➢ The vast number of small parcel shipments may make the freight forwarders happy and boost their profits, but again from an environmental aspect this is anything but healthy for our planet, to put it bluntly, it is a sheer disaster!!

➢ It is also a well-known fact that both e-commerce platforms have been involved in numerous legal and regulatory disputes in particular in the areas of product safety, poor working conditions and the infringement of intellectual property rights. Numerous items offered on these platforms for sale do not meet mandatory EU standards and have led to warnings of EU and national authorities, not to mention a repeated violation of European and national tax and customs duty laws, e.g. under the de minimis rules.

➢ Last but not least these online traders have also undoubtedly a major negative impact on the traditional retail structures and infrastructure, same as on the competitiveness of European commercial operators within the whole supply chain.

4. How to Cope with these Commercial Operators as an Individual Sports Brand or Retailer: Apart from traditional tools and actions, such as conducting court proceedings in various jurisdictions, when individual rights of a brand or a retailer are infringed upon, a new European legislative instrument can become a powerful ally, namely the EU's new Digital Service Act ("DSA"). 4.1 From February 17, 2024 onward, the DSA is applying to all online platforms in the EU and the European Economic Area (EEA). Since it is a regulation and not only a directive, the DSA did not need to be transposed into the national laws of the 27 EU member states but became

immediately legally binding. Its main objectives are to protect consumers in the EU/EEA, to improve the safety of its citizens and the freedom of expression for everybody, but also to ensure innovation and prevent a legal fragmentation of the internal market of the European Union. The most important element of the DSA in the context of this article is however that this EU regulation provides a toolbox for fighting illegal content also in the product (and service) area. It empowers the EU Commission and national competent authorities to investigate unlawful practices, take action and also sanction those online platform operators and other types of intermediaries, who violate applicable European and national laws and standards. The intervention against the dissemination of illegal content is clearly one prime objective of the DSA. 4.2 The Digital Service Act covers all types of illegal content on those platforms, whereby EU and national laws determine what is covered by the term "illegal". 4.3 It is noteworthy to mention that the EU Commission has currently identified 23 very large online platform providers, who are subject to stricter laws with extended obligations under the DSA. Among those are (of course !!) Shein and Temu, but also AliExpress, Amazon Store, AppleApp Store, Facebook, Google play, Google shopping, Instagram, LinkedIn, Snapchat, TikTok,Twitter and Zalando to name only those, who are commercially relevant from an industry and trade point of view.

4.4 With the aim to ensure a safer and much more transparent online environment, very much summarized these are some of the key due diligence obligations of those so-called very large online platforms (“VLOPs”):

➢ VLOPs are required to establish and implement an efficient risk management system to identify, analyse and mitigate systemic risks such as the dissemination of illegal content or other illegal practices existing on such platforms;

➢ They are obliged to carry out independent audits to ensure compliance with the DSA;

➢ Furthermore, they must publish detailed reports on their content management, which include also the number of content removals and the reasons for these actions;

The key criterion to be classified by the EU commission as VLOP is a number of 45 million+ users.

4.5 All online marketplaces including VLOPs must comply with the following obligations

➢ Traders operating on the online platforms have to be traceable so that they can be identified and have to provide accurate and complete information in this regard;

➢ The interface of those platforms has to be construed in a way that consumers obtain adequate pre-contractual information in the areas of product safety, logos, trademarks, and the like;

➢ Regular random checks are to be performed to identify illegal content and products on these platforms;

➢ If illegal products are identified by the platform operators, they are obliged to inform those consumers directly who purchased such type of products, or alternatively to make such information available and easily accessible on the respective platform’s online interface.

4.6 To supervise online platform operators, digital services coordinators “DSCs”) have already been appointed at national level, who are in charge of supervising and enforcing measures against online platforms below the category of VLOPs. A European Board for Digital Services will act as coordinator between the national DSCs, which will be chaired by the EU Commission. The Commission itself is in charge of supervising and enforcing measures against VLOPs and very large search engines and will act also as a coordinator on cross-border disputes and furthermore intervene upon request of national DSCs. Since October of last year, the Commission has already opened a sizable number of DSA compliance investigations and is currently in the phase of an assessment exercise to see whether the VLOPs act in compliance with DSA obligations. Moreover, formal investigations have already been commenced against the platform X in December 2023, against TikTok in February and April of this year, same as against AliExpress and Mesa in relation to Facebook and Instagram.

4.6 For the sake of transparency the Commission launched a DSA transparency database by the end of January 2024 (see Digital Services Act: Commission launches Transparency Database Update with Dashboard | Shaping Europe's digital future) and even more important for industry and trade also a Digital Terms and Conditions Database, which provides

comprehensive information on online GTCs and the contents of contracts of major players in this sector see Online Platforms Terms and Conditions Database Web Page and Digital Services / contrib-versions · GitLab.

4.7 Yet what in my view could become a very powerful instrument to fight illegal practices and noncompliance with the DSA, where individual sports brands and retailers (including their respective trade associations at European and national level) could play a proactive role is the newly established EU's whistleblower tool (see https://digitalstrategy.ec.europa.eu/en/policies/dsa-whistleblower-tool). This secure tool enables not only employees and other insiders of online platform providers to report illegal practices even anonymously in a data-protected fashion and in 24 EU languages, but could also be meaningfully used by commercial operators and competitors in the private sector to cause national competent enforcement authorities and/or the EU commission to act and to intervene. The proceedings which will then be initiated by the public authorities can be compared with the investigation activities of public prosecutors after they have been notified by a person upon a suspected violation of criminal laws.

4.8 On October 24, 2024 - just after I had finished writing the above contribution, the renowned German daily newspaper Sueddeutsche Zeitung published an article with the [translated] headline "EU Declares War on Temu and Shein"*) , containing additional most recent relevant information and I would like to quote [equally translated) most parts of it below [emphases within the text by me] : *)

lux.XuP2nscG7ReUPJPk36pB76

➢ " …………Chinese discount retailers are flooding the EU market with millions of dangerous products and flouting customs regulations. The European Commission is no longer willing to accept this;

➢ "………… In just over a year and a half, Temu has conquered the European e-commerce market, offers one of the most popular smartphone apps, and has more than 45 million monthly customers in the EU. Prices are low, and the selection is endless, ranging from teddy bears to car wash brushes. You name it, they've got it? That's right for Temu;"

➢ "……………The business model of the platform, which connects Chinese manufacturers and retailers directly with customers in Europe, is revolutionary and goes far beyond the Amazon principle. The goods come directly from factories, sent by plane in small packages, past Europe's customs and control authorities, which simply wave through packages with a value of less than 150 euros. This is as ingenious as it is dangerous;"

➢ "……….. Because at the latest with the import, a series of problems begins that are now so extensive that the EU wants to show Temu, the lowcost fashion retailer Shein and the shopping platform Aliexpress their limits."

➢ “……….According to estimates, four billion parcels will be delivered to the doors of Europeans' houses and apartments by the end of this year. 80 per cent of the products come from China. And so many of them are contaminated with chemicals, dangerous for children or without an electrical test seal that Europe's citizens are bringing illegal goods into their homes on a massive scale. Although there are clear EU standards to prevent this, the authorities are overwhelmed.”

➢ “……….The European Commission has therefore declared war on Temu, Shein and Aliexpress on several levels: as soon as the new commissioners have moved into their offices, they are expected to present a strategy against the flood of cheap goods before Christmas. On the basis of the Digital Services Act (DSA), the Brussels authority recently asked Temu for the second time to provide information about merchants selling illegal products on the platform and to explain how it ensures consumer protection. Now official proceedings are looming, which could end in heavy fines.”

➢ “……………….The pressure on the Commission has increased again recently. Above all, the German government is advocating a tougher approach in dealing with Temu and Shein. Together with Austria, Poland, Denmark, the Netherlands and France, Germany is pushing in the Council of Ministers for more consistent imposition of penalties when online retailers violate rules and do too little against unsafe or illegal products. In a joint letter, the six countries have called on the Commission to take ‘all necessary measures’ to consistently enforce the DSA. This should be accompanied by better

market surveillance, deeper cooperation between national authorities and progress on the already planned customs reform.”

➢ “…………MEPs are now increasingly calling for a tougher approach to the flood of cheap goods. ‘Shein, Temu and Co. are a safety risk for consumers,’ says Anna Cavazzini (Greens), chair of the European Parliament's Internal Market and Consumer Protection Committee. Dangerous teddy bears, toxic plastic jewellery and exploding mobile phone batteries have been shipped to the EU in huge numbers via Temu or Aliexpress. “The EU must put an end to this unfair competition,” says Cavazzini.”

➢ “……….In a twelve-point plan, she calls for additional rules to hold China platforms more accountable. These include tightening the DSA for online marketplaces, making platforms liable for consumers, and obliging marketplaces to take samples to identify safety risks.

➢ “…………..The Green Party politician can count on broad support in parliament for her demand that trading platforms like Temu be granted a special status at customs. If they were classified as so-called ‘presumed importers’, they would have to take responsibility for the products sold by traders. Those who then still have illegal products sold would receive a worse risk profile with more controls and even the blocking of goods.”

➢ “…………….In fact, Europe's customs authorities are overwhelmed not only by the billions of parcels from China that are sent below the duty-free limit. Within the EU single market, the authorities are supposed to work together as a single authority, with a permanent exchange of information. Because that still is not working and – perhaps more than ever – tons of illegal goods are entering the EU, the Commission presented a reform of the Customs Union a year and a half ago. But it is still stuck in the Council of the Member

States.”

➢ “……….As part of this reform, a pan-European customs authority with a coordinating function is to be created and the 150-euro limit is to be dropped. So far, mail-order companies have been deliberately exploiting this limit, including Temu, by simply packaging their goods in pieces costing less than 150 euros. ‘The €150 customs exemption limit must be dropped as quickly as possible,’ demands Bernd Lange (SPD), who chairs the parliamentary trade committee. It is no longer appropriate, he says. “As a result, we are flooded with shipments from

third countries, and customs no longer has the means to check them.” This must be stopped, he says.

CONCLUSION: Since the EU commission is now taking action, does this mean that the European sporting goods industry and trade can now sit still and wait what will concretely happen in this field?? This would in my view be a completely wrong attitude. Both sports brands and retailers can feed the EU commission through the whistleblower tool described above (perhaps channeled through their national and European trade associations) with valid information by emphasizing once again that these actions should serve the purpose to establish an equal level playing field to avoid a distortion of competition between traditional commercial operators and those newcomers shaking and rattling the EU/EEA market with highly aggressive and in numerous cases also rather dubious and phony marketing and sales methods.

Dr. Jochen M. Schaefer (see www.sjlegalonline.de) is a German practicing attorney based in the Munich area. For several years, he has been representing the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their legal counsel. He also chairs the WFSGI’s legal committee and is Co-Chair of the FESI’s digital Committee. At individual client level, he represents a significant number of well-known brands within and beyond the bicycle/sporting goods sector and is specializing in accompanying his clients in the course of their operational and strategic activities, which include national and international distribution topics, intellectual property (IP) and risk management issues, and the drafting and negotiation of comprehensive contracts in a kind of from the cradle to the grave approach. In case of any questions about this article (or in general), he can be reached at sj@sjlegal.de and at +49 151 1640 7932.