

The new EU GPSR

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

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“Brands are well advised to get ready for the multiple new tasks and challenges the GPSR will bring to the table.”

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In just over a year, the EU's General Product Safety Regulation ("GPSR") will come into effect. Our legal expert Dr. Jochen Schaefer answers some of the questions brands, retailers, and distributors may have about the GPSR, including what is the GPSR, what products does it cover, and, crucially, how you as a business can prepare.

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The GPSR Safety Gate

What is the EU General Product Safety Regulation ("GPSR"), and why does it matter? The EU Commission defines the forthcoming GPSR (General Product Safety Regulation) as "a new key instrument in the EU product safety legal framework, replacing from December 13, 2024 onward the current General Product Safety Directive ... It modernizes the general product safety framework and addresses the new challenges posed to product safety by the digitalization of our economies." After nearly three years of intensive work on this new legislative tool, the GPSR was published in the EU's Official Journal in May of this year. Since it is an EU Regulation, it will apply from December 2024 onward in all the territories of the European Economic Area without the need to be transposed into the national laws of those countries. And in contrast to an EU Directive, a Regulation leaves no room for divergence by national legislators.

December 2024 may seem a fairly long way off right now, but given the very substantial impact the GPSR will have on the sporting goods sector – throughout the whole supply chain – brands are well advised to get ready for the multiple new tasks and challenges the

GPSR regulation will bring to the table. It consists of 50 articles, but it is not the sheer volume of the GPSR that counts, but its far-reaching contents. The following article is by no means meant to be exhaustive, but it highlights certain focal points of the new regulations and some of the major practical consequences it has for sports brands, manufacturers, importers, distributors, and retailers.

What products are covered by the EU's GPSR? A prime objective of the new GPSR Regulation is to prevent European consumers from being exposed to health and safety risks when using consumer products under reasonably foreseeable conditions. So all consumer products on the EU markets are affected. However, products that are exclusively designed for professional use but which have subsequently migrated to the consumer market are also affected by the GPSR regulation. A practical example would be safety footwear. Even secondhand products or products that have been repaired, reconditioned, or recycled and which reenter the supply chain in the course of commercial activity fall within the scope of the GPSR. This is unless a clear message is sent to the targeted consumer that such a product has been reworked.

Who is affected by the EU's GPSR? The GPSR makes it clear that economic operators in the supply chain should have proportionate obligations in relation to their respective roles. This means that spheres and scopes of responsibilities and obligations need to be defined. A retailer, for instance, may not be required to examine whether certain product information provided by a manufacturer or importer is correct or not; while a distributor at the wholesale level may well have such an obligation. Unsurprisingly, the most comprehensive obligations and corresponding liabilities are imposed on the manufacturers of consumer products. Article 9 of the GPSR contains 13 paragraphs alone outlining (in detail) the scope of such obligations. These range from:

carrying out an internal risk analysis prior to placing the product on the market

specific instruction and identification requirements

constant product monitoring duties

the obligation to take, in a timely fashion, corrective measures such as a product recall.

The Commission provides a communication channel through its Safety Business Gateway and the publication of any incidents, which is fully accessible to consumers on its Safety Gate Portal. Article 10 of the GPSR defines the role, tasks and duties of authorized representatives, while Article 11 creates a set of extended obligations for importers. In addition, Article 12 stipulates the obligations of distributors such as retailers, who are e.g., required to immediately inform the manufacturer or importer of a certain product if they have reason to believe that such article constitutes a dangerous health risk to consumers. All economic operators in the supply chain must fully cooperate with market surveillance authorities in the event of product safety-related incidents. In this context, it will become imperative to be well-documented.

How does the EU's new GPSR define "health" and "safety," and why does this matter? The EU legislators have adopted the very broad WHO definition of health, which is defined as "a state of complete physical, mental and social well-being and not merely the absence of

disease or infirmity.” This terminology triggers a much broader liability of economic operators than is the case right now. When it comes to the assessment of whether a certain product is “safe” or not, the EU GPSR regulation again interprets “safety” in the broadest possible manner. What is emphasized is that all relevant aspects of a product need to be taken into consideration, which means:

materials

features

how it is presented, and for which kind of consumers, in particular for children, older or disabled persons.

What are the consequences of this definition? One key action decision-makers in companies should take is to consider reviewing their existing contractual arrangements with their suppliers. They should look at whether the allocation of risks – including the possibility of recourse in the event of being exposed to third-party claims – is still up to date in the light of the increased liability deriving from this new EU-wide law. The GPSR gives an example of the mental health risks that may be posed by digitally connected products for vulnerable consumers, in particular children. The GPSR requires that such kind of products meet the highest standards of safety and also emphasizes that product safety must be guaranteed over the entire lifespan of a product: “When assessing the safety of digitally connected products likely to have an impact on children, manufacturers should ensure that the products they make available on the market meet the highest standards of safety, security and privacy by design, in the best interests of children.”

In line with the current practice, the GPSR clarifies that a product is presumed to be in conformity with its general safety requirement if it is in compliance with European standards (or in their absence, with national standards of a member state).

Will the EU’s GPSR require more comprehensive technical product documentation? Since the GPSR does not exempt small enterprises from compliance with its terms and provisions, even small manufacturers will be required to establish a product safety regime. This should be done by documenting all necessary information, which proves that the respective product they place on the market is indeed safe. As is already the case, any commercial operator selling a product under its own name or brand or substantially modifying a product is treated as a manufacturer, along with the comprehensive legal obligations deriving from such legal definition. Internal risk avoidance management will become even more important than is the case today, with the need to establish more sophisticated internal procedures, guidelines or standards. The GPSR clearly states in this context that such internal processes are the sole responsibility of the respective economic operators.

The EU’s GPSR and products imported from outside the European Economic Area. What’s the impact? Under the new GPSR, any non-European Economic Area (EEA) based seller of products offered and sold to European consumers needs to have a responsible economic operator (authorized representative) established within the EU. This will have a major impact on the DTC distance sale business models of foreign manufacturers and companies. It will certainly not be sufficient to just appoint a single person residing in the EU since the

tasks, responsibilities and liabilities of such a person will require much more than just providing an EU address.

The EU's GPSR and the special focus on online marketplaces In view of the significant growth of online marketplaces and the reduced significance of traders offering products on their own (DTC) web stores – the percentage decreased from 77 percent in 2010 to 60 percent in 2022, according to the HDE Online Monitor 2022 – the EU Commission has put a special emphasis on this market segment. Article 3 (14) of the GPSR defines the provider of an online marketplace (POMP) as “a provider of an intermediary service using an online interface, which allows consumers to conclude distance contracts with traders for the sale of products.” Under this definition, any

BTC online platform, be it websites or other applications such as mobile apps, operated by a POMP falls within this definition. Once again, there is no exemption for small online businesses in this area. POMP's fall under their own special category within the EU's GPSR. They will be affected by the new law in terms of numerous new obligations they will have to meet. These include:

the duty to register with the Safety Gate Portal

the establishment of internal processes and tools relating to product safety requirements,

the obligation to remove unsafe or even dangerous products within extremely short periods from their platforms

comprehensive information requirements vis-à-vis those customers trading on their platforms (“traders”) and the creation of reliable and swift communication channels with those traders

a duty to fully cooperate with market surveillance and enforcement authorities and to notify them swiftly of the existence of unsafe or even dangerous products on their platforms.

Operators of online marketplaces also have to ensure that appropriate measures have been taken to inform consumers without undue delay about products that are not in compliance with the EU's safety requirements. The EU will need to establish adequate online communication tools with consumers so that they can swiftly notify the POMP of any safety-related issue regarding a certain product. The extensive powers conferred to the EU and national authorities in this context (including the creation of technical tools to be able to access and screen in an automated fashion the website presentation and other business information of a POMP) raise numerous constitutional and privacy concerns. It remains to be seen how national courts within the EEA and the European Court of Justice will deal with these highly sensitive topics.

The GPSR Safety Gate For many years, the EEA-wide information system RAPEX was in place. This informed consumers and national market surveillance authorities about unsafe products with the authority to withdraw these from the EU's internal market. It has now already been renamed Safety Gate, and under the GPSR's regime, its competencies will be significantly extended. The Safety Gate consists primarily of three elements: The Safety Gate Rapid Alert System, the Safety Gate Portal, and the Safety Business Gateway. POMP's

have to be registered there and need to name a central, single point of contact. They also need to carefully and continuously monitor the Safety Gate's websites to check whether any of the products listed there are offered for sale by any of their traders.

If POMPS realize that any of their B2B clients (traders) are offering unsafe products on their platform, they are required to first issue a warning and, provided such warning remains fruitless, temporarily ban the traders on the respective platform. To enforce such mechanisms, appropriate contractual arrangements between the POMPS and the respective traders should be in place. However, the Safety Gate is at this stage not fully operational. It also undoubtedly creates a lot more red tape and additional administrative costs and burdens for this specific category of commercial operators and others. As with other commercial operators, POMPs need to establish an internal Product Compliance Management Process to meet the requirements of the new GPSR without any undue delay. Some elements of such Process are already described in Article 20, but not in an exhaustive manner.

Conclusion Given the complexity of the new GPSR and the sheer abundance of obligations imposed on various categories of economic operators and providers of online marketplaces, it is certainly not too soon to start with a review of existing product safety-related processes and tools at individual company level in order to find out whether they need to be changed, amended and/or updated by also looking at the whole supply chain. The GPSR sets a very short deadline once it applies from Dec. 13, 2024, onward, and all such measures and steps take time. This is true in particular if external business partners such as distributors, importers and retailers, external legal advisors and a company's insurance partners need to be involved. To quote Walt Disney: "The way to get started is to quit talking and start doing." Respectively, in a very much abbreviated version and one more fitting for the sporting goods community, remember the slogan: "Just do it!"

Dr. Jochen M. Schaefer 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 working group. At the individual client level, he represents a significant number of well-known brands within and beyond the bicycle/sporting goods sector. He is a specialist in national and international distribution topics, intellectual property (IP) and risk management issues, and the drafting and negotiation of comprehensive contracts at the operational level; in particular in the area of European selective distribution schemes. 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.