

# Trading used machinery in the EU Internal-Market Machinery-Regulation (EU) 2023/1230

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Trading used machinery in the EU today is regularly subject to national law because this is not covered by the EC-Machinery-Directive. This statement - whether indented or not -, will not stand so easily in the future.

With the

*DECISION No 768/2008/EC OF THE EUROPEAN  
PARLIAMENT AND OF THE COUNCIL  
of 9 July 2008*

*on a common framework for the marketing of products*

the EU has committed itself to a New Legislative Framework (NLF) and thus to a new concept. A fundamental change was thus created for EU legislations which are based on it. According to the NLF, it is not only the first making products available on the market (i.e., the placing on the market) that is regulated, but also each subsequent making available by all other economic operators, including distributors. This was the first step in closing a legal "gap" that has long played a role in product liability and safety law, namely the responsibility of other parties involved in the retail chain.

Many EU regulations, such as the ATEX Directive 2014/34/EG, the Low Voltage Directive 2014/35/EG and the Pressure Equipment Directive 2014/68/EG, have been following this concept since 2014. In the future other areas will also be based on this concept, e.g., the Machinery Regulation (EU) 2023/1230 (EU-MR), that will replace the EU Machinery Directive 2006/42/EG (MD). Even the new Product Safety Regulation (EU) 2023/988 largely follows this concept.

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## EU-MR: Trading used machinery

EU internal market rules apply to new machinery. So much for the – correct - reading before the NLF.

With the coverage of the entire retail chain associated with the NLF, many apparently assumed that this would also be the case with the NLF. At least that's what the EU Commission's Guidelines for the internal market say. However, this is not regulated in the NLF.

According to the legal text, trading used products is also included. This (unintentionally?) closes a large gap in the internal market regarding the trade of machinery.

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## Authors



RA Carsten Laschet

[Friedrich Graf von  
Westphalen & Partner mbB  
Rechtsanwälte](#)



Dipl.-Ing. Hans-J.  
Ostermann

[DCEM  
www.CEmentor.de](#)



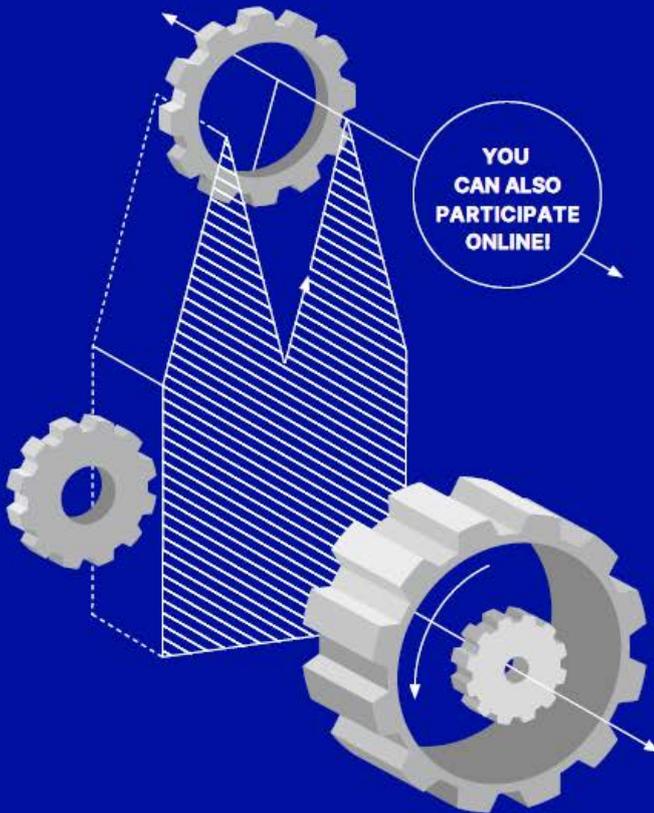
Dr.-Ing. Björn Ostermann

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# MACHINERY DAYS COLOGNE

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**GERMAN  
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about machine law

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SIMULTANEOUS  
INTERPRETING  
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AND GERMAN



**CONFERENCE  
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Wednesday, Thursday

– The conference all about  
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– **Dipl.-Ing. Hans-J. Ostermann**  
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current topics in the  
field of Machinery  
Regulation

## ***End of the supply chain?***

Because the entire retail chain is covered by the NLF regulations, the question also arises as to where this retail chain ends. In particular, the question arises as to whether this only covers the trade of new products or also trading used products.

Especially in trading machinery, not only will the classic distributor be included, which was certainly the basic idea of the NLF. But in this case, even longtime operators/users of machinery would become "distributors" if this used machinery is resold - which would have significant consequences for compliance with product safety law and for the drafting of contracts. This question will be addressed in the following article.

### **Remark:**

A product is considered new as long as it has not been used, regardless of how old the product is, i.e. how long it may have been in stock at the manufacturer or in the retail chain.

## ***Trading used machinery according Machinery Directive 2006/42/EC***

The Machinery Directive 2006/42/EG (MD) regulates the placing on the market (first making available) and the putting into service (the first use after "in-house production") of products in the European Economic Area (EEA) - and thus naturally initially focuses on new products. The other stages of the NLF for making products available on the market, such as used machinery, are currently not covered by the MD and the implementation regulations.

The legal position of the harmonized regulations in the area of machinery is therefore clear, because the scope of application of the MD today only covers:

- new products from the EU that are placed on the market or put into service for the first time in the EU
- new and used products from outside the EU that are placed on the EU market or put into service, with legal details of products once placed on the market then leaving the EU and re-entering the EU being disputed and
- new and used products in the EU that are 'substantially modified'.

Other trade in used machinery within the EEA is not harmonized by the MD.

## ***Trade in used machinery according to Regulation (EU) 2019/1020 on market surveillance***

However, to assess the legal framework for used machinery, it is not enough just to look at the Machinery Directive, but also at related legal regulations, such as the EU Market Surveillance Regulation, due to the uniformity of the law. As the name of the Regulation suggests, the Regulation is primarily aimed at market surveillance, i.e., state supervision in the context of product safety. However, according to Article 4 of this Regulation, additional tasks are also assigned to economic operators, with the exception of distributors.

According to Article 4 (5), the Market Surveillance Regulation only applies if the product falls under an internal market Directive/Regulation listed here. Since the MD, which is relevant in this respect, does not cover used machinery, the Market Surveillance Regulation does not initially change the coverage regarding the trade of used machinery.

## ***Trade in used machinery according to Directive 2001/95/EG on general product safety***

Insofar as products that are subject to the MD are consumer products, the Product Safety Directive 2001/95/EC (GPSD) must also be observed in addition to the MD. In contrast to the MD, this also contains requirements for the provision of used products for private use and thus also for such used machines. However, the Product Safety Directive itself has no provisions on EC declaration of conformity or CE marking. However, the provisions of the Product Safety Directive may have to be applied in addition to the so-called "CE Directives".

The new Product Safety Regulation (EU) 2023/988 was published in the EU Official Journal on May 23<sup>th</sup>, 2023 and must be applied from December 13<sup>th</sup>, 2024. According to the proposal of the EU Commission, an EU Regulation was issued here instead of an EC directive. In the introduction to the proposal at the time, the EU Commission stated, among other things: "*To ensure consistency between the legislation for harmonised and non-harmonised products, this proposal takes up some of the provisions of Decision 768/2008/EC, such as those on traceability requirements and the obligations of economic operators.*" In other words: The new EU Product Safety Regulation also follows the NLF in this respect. Article 2 No. 3 stipulates that used products and products that have been repaired or overhauled will continue to be included.

## ***Trade in used machinery according to the new Machinery-Regulation***

The new EU Machinery Regulation (EU-MR), which has already been adopted by the EU

Council and EU Parliament and published in the EU Official Journal on June 29<sup>th</sup>, 2023, has also been adapted to the NLF. The central point of the NLF is the regulation of the activities of all economic operators from the manufacturer to the distributor. This means that the EU-MR does not end like the current MD after the product has been placed on the market, i.e. after it has been made available for the first time.

The question that arises here is whether the distributor/seller of used machines is within the scope of the EU MR and - if so - what requirements have to be met.

### ***Are used machines also "made available on the market"?***

First a look at the corresponding definitions of "making available on the market" in Article 3 "Definitions":

*"(11) 'making available on the market' means any supply of a product subject to this Regulation for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge;"*

The "*placing on the market*" that is covered in the MD today is only the first stage of "*making available on the market*". Placing on the market is defined in Article 3 as:

*"(12) placing on the market' means the first making available of a product within the scope of this Regulation on the Union market;"*

Instead of "*placing on the market*", the legal text for the "self-manufacturer" regulates "*putting into service*". This is necessary because the self-manufacturer does not place his product on the market as long as it is new, but puts the product into service immediately after completion. "*putting into service*" is defined as:

*“(13) ‘putting into service’ means the first use, for its intended purpose, in the Union, of machinery or related products”*

Machinery manufactured by the operator themselves are therefore *"in the scope of this regulation"* and can be distributed at a later time and thus *"made available on the market"*.

### *Recitals helpful?*

Recital 10 of the regulation is interesting regarding the extent to which the trade in used machinery is covered by the new Machinery Regulation 2023/1230:

*“(10) This Regulation should cover products which are new to the Union market when placed on the market, and are either new products made by a manufacturer established in the Union or products, whether new or second-hand, imported from a third country.”*

Recital 10 of the EU-MR thus explains: The EU-MR covers products that were new – possibly formally – when they were *"put on the market"*. Although this recital does not correspond to the wording of the legal text, it describes the intention of the EU legislator and fits in with the definition of *"placing on the market"*.

The parallel provisions for self-manufacturers on *"putting into service"* (see above) are ignored.

Except for the products of the "self-manufacturer", all products in Europe meet the requirement described here to have been "new" when they were first made available in Europe. With the use of the product in the later life cycle in the EU internal market, these used products do not lose this property either. Any product, and therefore any used product, that was

previously lawfully marketed in the Community will thereafter be covered by the EU-MR. One could assume that the legislature wanted to regulate something else with the EU-MR – but in view of the requirements of the NLF they should have made this clear. If the EU-MR should only apply to new products, as has been the case so far – due to the restriction to only *"placing on the market"* – then the legislator should and must have avoided a cumulation of *"new"* and *"placed on the market"* in the recital.

### *Interim conclusion*

In principle, the EU-MR covers the *"making available on the market"* of all products that fall under its scope. In the legal text, no distinction is made between "new" and "used" products<sup>1</sup>. According to the recitals, all that matters is whether a product in question was new when *"placed on the market"* in Europe, i.e., it was new when it was first made available.

The same applies if it was *"put into service"* as part of self-production, even if this case is not mentioned in the recitals.

It follows from the legal text of the EU-MR that the EU-MR also covers trade in used products. At no point in the EU-MR is there an exclusion for this.

## **Manufacturer / distributor obligations for (used) products**

After concluding that trade in used products falls within the scope of the EU-MR, it is necessary to examine which requirements apply to them.

It must also be taken into account whether the used product is in a different condition compared to its original condition at the time it was placed on the market – i.e., when

<sup>1</sup> A German proposal in the final phase of the EU MRR negotiations to limit the scope to only new products was not heard in the EU-Bodies.

it was new at the time – within the meaning of a modification regarding

- Article 17 „Cases in which obligations of manufacturers apply to importers and distributors“
- or
- Article 18 „Other cases in which obligations of manufacturers apply“

of the EU-MR or not.

### **Manufacturer**

The manufacturer's obligations result from Article 10 of the EU-MR:

#### *Obligations of manufacturers of machinery and related products*

1. *When placing machinery or a related product on the market or putting it into service, manufacturers shall ensure that it has been designed and constructed in accordance with the essential health and safety requirements set out in Annex III.*
2. [...]

**Note:**

Equivalent requirements for partly completed machinery can be found in Article 11, but these will not be dealt with separately here.

However, within the framework of the EU-MR, the manufacturer of a product is also the person who "*substantially modifies*" a product according to Article 18 of the EU-MR. According to the current text, this hurdle is so high that in practice it will often be avoidable to become a manufacturer in the event of a modification. For a distributor, however, there are significantly fewer hurdles in the event of a change under Article 17 of the EU-MR.

If an operator of a machinery that has not been substantially modified according to Article 18 becomes a distributor when it is later sold as a used machinery, he must now

assess the changes according to Article 17. This can mean that he then becomes the manufacturer.

### **Distributor**

The distributor obligations arise from Article 15 of the EU-MR:

#### **Article**

#### **Obligations of distributors of machinery and related product**

1. *When making machinery or a related product available on the market, distributors shall act with due care in relation to the requirements of this Regulation.*
2. *Before making a machinery or related product available on the market, distributors shall verify that:*
  - a. *the machinery or related product bears the CE marking;*
  - b. *the machinery or related product is accompanied by the EU declaration of conformity referred to in Article 10(8);*
  - c. [...]
  - d. *the manufacturer and the importer have complied with the requirements set out in Article 10(5) and (6) and Article 13(3) respectively.*
3. *Where a distributor considers or has reason to believe that machinery or a related product is not in conformity with this Regulation, the distributor shall not make the machinery or related product available on the market until it has been brought into conformity. Furthermore, where the machinery or related product presents a risk to the health and safety of persons and, where appropriate, domestic animals and property, and, where applicable, to the environment, the distributor shall inform the manufacturer or the importer as well as the market surveillance authorities to that effect.*
4. *Distributors shall ensure that, while machinery or a related product is under their responsibility, the storage or transport conditions do not jeopardise*

*conformity with the essential health and safety requirements set out in Annex III.*

There are also no requirements for distributors that differentiate between new and used products. When selling, a distributor only must consider whether there are reasons to doubt the conformity of the product with the EU MR.

**Note:**

For partly completed machinery, equivalent requirements can be found in Article 16.

***Interim conclusion***

For used products that are sold in their original condition, the operator slips into the role of the distributor and thus has inspection obligations that are significantly higher than the current requirements.

For modified used products, it must be checked based on Article 17 (see above) whether the operator is considered to be the manufacturer of a new product in his distributor role and whether he must therefore assume all manufacturer obligations.

***Trading used machinery according to the EU internal market guidelines Blue Guide***

The distributor requirements of Article 15 of the EU-MR remain open as to the depth to which the distributor must assess the safety of a product when selling it. It is also not clear what date he must use as a basis in relation to the required state of the art.

At this point it is worth taking a look at the Blue Guide, which comments on the NLF.

The provisions on making products available on the market and the associated placing on the market is a central regulation of the NLF. It is a regulation that is identical

in all EU legislation that follows the NLF. In this respect, the EU Commission has interpreted this topic in detail in its "Blue Guide", the guide for the internal market. What is important here is that the Blue Guide is only an interpretation of the EU Commission. It is not a legal text! This interpretation can be helpful, but in the event of deviations, the legal text always applies, in this case the legal text of the EU-MR!

**Safe! But when and how?**

Below are the corresponding interpretations of the EU Commission as an excerpt from Chapter 2 of the Blue Guide:

*„2.1. Product coverage*

*[...]*

*The product must comply with the legal requirements that were in place at the time of its placing on the market. [...]*

*Used and second-hand products which are on the Union market, and which are supplied to consumers are covered by the RaPS<sup>2</sup> (Article 2(a) of the RaPs) when they are supplied or made available, whether for consideration or not, in the course of a commercial activity, [...]*

*2.3. Placing on the market*

*[...] Accordingly, new products manufactured in the Union and all products imported from third countries (56) – whether new or used – must meet the provisions of the applicable Union harmonisation legislation when placed on the market i.e. when made available for the first time on the Union market. Compliant products once they have been placed on the market may subsequently be made available along the delivery chain without additional considerations, even in case of*

<sup>2</sup> Productsafety Directive 2001/95/EC

*revisions to the applicable legislation or the relevant harmonised standards, unless otherwise specified in the legislation.*

### 3.4. Distributor

*[...] It is not part of the distributor's obligations to check whether a product already placed on the market is still in conformity with the legal obligations that are currently applicable in case these have changed. The obligations of the distributor refer to the legislation applicable when the product was placed on the market by the manufacturer or the importer unless specific legislation provides otherwise."*

At these points, the Blue Guide states that a distributor may trade a product that was safe when it was first made available – i.e., placed on the market – or put into service as part of self-manufacturing without further concerns, "*unless specific legislation provides otherwise*". However, the text of the EU-MR follows the NLF at this point and has no additional requirements.

This interpretation of the NLF is not limited to just new products here. However, used products may need to be refurbished to meet this requirement. For example, used products may have lost safety-related properties due to wear and tear.

For used products, the Blue Guide states separately that these also fall under the General Product Safety Directive if they are sold to consumers.

## End of the retail chain according to the Blue Guide

The retail chain is described in Chapter 2.1 of the Blue Guide, among other things:

### „2.1. Product coverage

*Union harmonisation legislation applies to products which are intended to be placed (and/or put into service) on the market. Furthermore, Union harmonisation legislation applies when the product is placed on the market (or put into service) and to any subsequent making available until the product reaches the end-user. A product still in the distribution chain falls under the obligations of the Union harmonisation legislation as long as it is a new product. Once it reaches the end-user it is no longer considered a new product and the Union harmonisation legislation no longer applies. [...]"*

At this point, the Blue Guide explains that the retail chain ends with the "*end user*". The end user is in chapter 3.8. described as

*„The end user is any natural or legal person residing or established in the Union, to whom a product has been made available either as a consumer outside of any trade, business, craft or profession or as a professional end user in the course of its industrial or professional activities.<sup>3</sup> Union harmonisation legislation does not create obligations for the end-users of the products in their scope.“*

For the Blue Guide, the retail chain goes all the way to the defined "end user". However, this definition is not very helpful. It is only explained here that the "end user" is, among other things, the "professional end user". That is, the term is explained here with itself. From the pure wording, the end user mentioned in the Blue Guide and in the Market Surveillance Ordinance implies that this is the last user in a series of users, namely at the end of a user chain. This means that only the user who scraps his product after use can be regarded as an end user within the meaning of the Blue Guide.

<sup>3</sup> Diese Definition ist identisch mit der Definition in Artikel 3 Nr. 21 der EU-Marktüberwachungsverordnung Verordnung (EU) 2019/1020

Since the NLF regulations do not contain any obligations for this end user, the Blue Guide stops its explanation here. Within the chapter, it then only goes into occupational safety and the associated obligations.

It stands out that the EU-MR does not recognize the "*end user*" mentioned in the Blue Guide. The EU-MR, on the other hand, knows the "*user*" on whom it also makes requirements according to Article 18 "*substantial modification*". This also applies to the last user in a series of different users, the "*end user*". In this respect, this differs from the explanations in the Blue Guide.

The Blue Guide also does not go into the fact that the handover to a user only interrupts the distribution chain but does not break it off. If a user sells a used product, he changes his role in the legal system and becomes a distributor within the meaning of the EU-MR with all its obligations.

### Comparison Blue Guide with the new EU-Product Safety Regulation

The interpretation of the Blue Guide for making products available on the market does not correspond to the new Product Safety Regulation (EU) 2023/988, which adopts the provisions of the NLF for making products available on the market 1:1 and, on this basis, also trade with used products. It is difficult to interpret the same provisions in different EU regulations differently. However, it should not be concealed that the EU Product Safety Regulation, like the current EU Product Safety Directive, already makes it clear in the legal text that it applies to new and used products. A provision that was carried over from today's Product Safety Directive and certainly serves the purpose of clarification. From today's perspective, however, this provision appears to be superfluous.

### Interim conclusion

The interpretation in the current Blue Guide 2022 follows the intention of the EU Commission when developing the NLF Decision 768/2008/EC. A comparison of the legal text of the proposed EU-MR with the interpretation of the Blue Guide shows that the interpretation is only partially covered by the legal text. In this respect, this interpretation can only be partially applied to the legal text of the proposed EU-MR. However, one must give the EU Commission credit for the fact that the EU-MR was only formulated later, even if this will have no meaning in the interpretation.

It cannot be inferred from the proposed EU MR legal text that, as formulated in the Blue Guide, the making available on the market ends when a product that is subject to the EU-MR passes into the hands of the so-called "end user". Apart from the unclear definition (see above), the basic provisions of the NLF, which the EU-MR also follows, do not recognize such an end user at all. However, this "end user" can also be found in the EU Market Surveillance Regulation with the same unclear definition.

However, it is true that the user is no longer subject to the provisions of EU product law for the time he is using a product. The EU-MR does not regulate the use of a product by the buyer, especially since the EU currently lacks the legislative competence to do so. In the context of the commercial use of a product, the provisions of national occupational safety regularly apply, which, however, are based on EU specifications.

For the commercial user, the EU-MR only comes into play again if he modifies the product significantly and thus becomes a manufacturer, or if he sells the product and thus becomes a distributor. In the area of placing machinery on the market and trading in machines, this consequently means that there is no "user", but

machineries are “used without end” until they are destroyed and can therefore also be traded.

This also applies to the other EU legislation that follows the NLF. Another point of view would also be absurd, because then the retail chain would already end when a distributor demonstrates or tries out a product and so uses it.

### *Conclusion: Is the distributor of used machinery covered by the EU-MR?*

The EU would certainly have done well to clarify in the legal text in all NLF regulations whether this applies to new and used products or only to new ones, as the Blue Guide implies. But this did not happen. Thus, the interpretation of the legal text of the EU-MR and its recitals only allows the conclusion that, according to the present legal text, it also applies to the trade in used machines. It does not matter whether it was originally intended or not.

With the EU-MR, Europe now also has harmonized legislation for trading in used machinery, related products and partly completed machinery.

The distributor may now trade all products within the scope of the EU MR if they meet the requirements of the EU-MR at the time they are placed on the market. He has no obligation to adapt such a product to a newer state of the art, regardless of how old this product is. On the other hand, difficulties in determining whether the state of the art at the time is still being complied with are likely to arise.

Whether originally intended or not, this step will be a great relief for many distributors of used machinery. Especially in times when people are thinking more about sustainability and saving resources, it

makes sense to promote a common European market for used products. And this with requirements that lead to safe products and can also be met.

Of course, it must not be forgotten that used products must be operated at a safe level according to the state of the art in relation to occupational safety regulations within the framework of occupational safety. A “grandfathering”, which many like to see, can be derived from this for distribution, but not for operation. However, this is then the responsibility of the employers who buy and provide the used products. They benefit from the new provisions on the substantial modification, which formulate a higher threshold.