

The Consumer Voice in Europe

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Brussels, 19 December 2017

Re: The European Commission's revised approach to CMR substances in cosmetic products is unlawful

Dear Member of the Working Group on Cosmetic Products,

At the September 2016 meeting of the Cosmetics Working Group, the European Commission **announced** that it no longer considers that substances which may cause cancer, change DNA, or harm reproductive health (CMR substances) are automatically prohibited for use in cosmetic products. **BEUC, The European Consumer Organisation strongly opposes the Commission's revised position which may create avoidable and unacceptable health risks for consumers.** We enclose a brief overview of our main concerns.

As a first 'operational' step in this revised approach, the Commission has proposed an '**Omnibus Act**' to amend Annexes II, III and V of the Cosmetics Regulation with regard to substances classified as CMR prior to 1 January 2017. In parallel, the Commission is asking Members of the Cosmetics Working Group to endorse a procedure for the *future* management of newly classified CMR substances.

BEUC questions the legality of the Commission's revised approach, which would set aside the principles introduced with the Cosmetics Regulation.¹ The Commission seeks to codify its revised approach through implementing measures which *de jure* would go against the clear wording and meaning of the legislative act authorising such measures in the first instance. **That is plainly illegal.** The revised approach transgresses the powers conferred on the Commission by the Legislator and thus lacks a legal basis – in short it is *ultra vires*.

As such, any implementing decision taken as a consequence of the Commission's revised position on CMR substances, including the proposed Omnibus Act, could under Article 263 TFEU be challenged before the European Court of Justice under an action for annulment. In such an event, **both legal certainty and the protection of consumer health would be endangered.**

The 'CMR ban' and its implementation directly touches upon the health of millions of consumers across the EU. **BEUC insists that a decision on the future management of this essential consumer safeguard cannot proceed without a full democratic debate at legislative level.** We therefore urge the Members of Cosmetics Working Group to resist any decision that would serve to endorse the Commission's revised approach.

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¹ Regulation (EC) No 1223/2009.

In the interest of consumer safety, BEUC again insists that the European Commission reconsiders its position and urgently reverts to the previous implementation practice which guaranteed that CMR substances were automatically prohibited for use in cosmetics products. We also encourage the Commission to facilitate a broader public debate on how the Commission administers this essential safeguard of consumer health and safety.

Given the public interest in the matter BEUC will make this letter publicly available.

Yours sincerely,

Monique Goyens
Director General

Annex The Commission's revised position on toxics in cosmetics threatens to undermine an essential consumer safeguard

The Cosmetics Regulation² prohibits the use in cosmetic products of substances classified as carcinogenic, mutagenic or toxic for reproduction (CMR). **This generic ban constitutes an essential safeguard to protect the health and safety of consumers.**

Since December 2010, the *legal effect* of this generic ban has been automatic: once classified under the CLP Regulation,³ a CMR substance is automatically prohibited for use in cosmetic and personal care products, *as from the date of application of its classification*.

Consequently, the European Commission no longer needs to adopt an implementing measure to make the ban effective. Implementing measures are only required to authorise the use in cosmetic products of CMR substances that have been evaluated *and* found safe by the Scientific Committee on Consumer Safety. For CMR 1A or 1B substances, the four conditions laid down in Article 15(2) must further be met before such substances exceptionally can be authorised for use in cosmetics.

When the European Parliament and Council enacted the Cosmetics Regulation in 2009, all parties including the European Commission understood that the ban on CMR substances should become automatic to ensure that a lack of full scientific certainty did not prevent or delay protective action. This common understanding thus reflects the precautionary underpinnings of the Cosmetics Regulation; it also expresses a consensus on the need to mitigate any negative implications for consumer safety arising from the new exemption possibility for CMR 1A and 1B substances which did not exist under the old EU Cosmetics Directive.⁴

Notably, the European Commission confirmed this approach to the implementation of the generic ban on CMR substances in a working document⁵ circulated to Members of the Working Group on Cosmetic Products ahead of the November 2010 meeting. As correctly observed in the working document, “[a] different interpretation, which would imply the need to adopt implementing measures for CMR [...] substances in order to ban them, would mean that these substances are allowed in cosmetic products as long as the Commission has not adopted specific measures to ban them.”

At the September 2016 meeting of the Working Group on Cosmetic Products, the Commission however **announced** that it no longer considers CMR substances as being automatically prohibited for use in cosmetic products. Instead, a ban must be implemented by specific acts amending the Annexes of the Cosmetics Regulation.

BEUC has repeatedly expressed concern with the Commission revised approach to the generic ban on CMR substances in cosmetic products. If the ban is not automatic, a CMR substance can be used until the Commission includes the substance in Annex II of the Cosmetics Regulation. **The implication of the Commission's revised approach is thus that it could take longer before a ban enters in to force, and that Member State authorities must wait on the Commission before they can enforce them – ultimately, this could endanger the health of consumers.** The Commission's revised position further implies that approximately 200 CMR substances currently not listed in Annex II of the Cosmetics Regulation may now be used in cosmetics and personal care products – including in cosmetics for children.

² Regulation (EC) No 1223/2009.

³ Regulation (EC) No 1272/2008.

⁴ Council Directive 76/768/EEC.

⁵ European Commission, Working document on the implementation of Article 15 of Regulation 1223/2009 on CMR substances, 25 October 2010.

An 'automatic' ban combined with regular amendments to the relevant Annexes of the Cosmetics Regulation represent in our view the most effective and efficient route to achieve a high level of consumer protection, while also ensuring legal certainty for economic operators and national authorities. An automatic ban does not preclude the Commission from amending the Annexes of the Cosmetic Regulation when new CMR substances are classified under EU chemicals legislation. Nor should an automatic ban exempt the Commission from doing so.

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