

Mrs. Elżbieta Bieńkowska
Commissioner for Internal Market,
Industry, Entrepreneurship and SMEs
European Commission
Rue de la Loi 200

The Consumer Voice in Europe

B – 1049 Brussels

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Brussels, 23 April 2018

Subject: The EU Commission's revised approach to toxic cosmetic ingredients

Dear Commissioner Bieńkowska,

The European Union prohibits the use in cosmetic products of ingredients that may cause cancer, change DNA or harm reproductive health (so-called CMR substances). This 'CMR ban' established through our cosmetics legislation is an essential safeguard of public health and consumer safety as well as tangible proof of how the EU benefits all its citizens.

BEUC, the European Consumer Organisation is therefore alarmed that the European Commission now no longer **considers** that CMR substances are *automatically* prohibited for use in cosmetic products; but instead insists that the ban in each case must be implemented through specific legal acts amending the Annexes of the Cosmetics Regulation. We caution that such an approach could create avoidable and unacceptable health risks for consumers.

Consumers are in frequent, intimate and often prolonged contact with cosmetic and personal care products: a **survey** of more than 2,300 people found that the average adult uses nine personal care products each day. This aggregate figure however hides significant variations. One in four women for example use at least 15 products daily, according to the same survey. Cosmetic and personal care products are thus a major direct source of exposure to chemicals for all EU consumers.

The legitimacy of an automatic ban of CMR substances in cosmetics

When the European Parliament and Council enacted the current Cosmetic Products Regulation in 2009, the Legislator deliberately sought to strengthen the protection of consumers through an 'automatic' ban on CMR substances to guarantee that a lack of full scientific certainty would not prevent or delay protective action.

The automatic CMR ban reflects the precautionary underpinnings of the Cosmetics Regulation; it also expresses a *generic* risk consideration that justifies direct risk management consequences given the characteristics of the hazard and the vulnerability of certain parts of the population (e.g. children), as well as the potential for widespread consumer exposure. The automatic CMR ban is thus a legitimate response to cosmetic ingredients that may harm consumers' health.

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Longer transition periods before bans become effective are unacceptable

The Commission's revised position implies however that it will take longer – up to 15 months – 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 result in adverse health effects, including for vulnerable groups, such as small children, pregnant and breast-feeding women, and the elderly.

Indeed, your own services confirmed this concern in a 2010 working documentⁱ observing that “[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.”

If the Commission's revised position is accepted, approximately 200 CMR substances may now provisionally be used in cosmetics and personal care products, including in cosmetics for children, since these substances have not been explicitly prohibited. Similar situations could arise for newly classified CMR substance in future. One of the main rationales for the automatic ban is thus to prevent that procedural delays in regulation will weaken consumer protection.

No good reason for a revised approach

We understand that the Commission explains its revised position with reference to recent practical experience in implementing the CMR ban. Nevertheless, the Commission has presented no compelling evidence that could justify such a radical departure from the approach instituted by the Legislator; nor have the Commission services demonstrated that the longer transition periods entailed by this revised approach will avoid adverse effect on public health and consumer safety.

Inappropriate legal rationale for a revised approach

We likewise contest the opinionⁱⁱ of the Commission Legal Service that the CMR ban as established in the 2009 Cosmetic Products Regulation is not automatic. This opinion contradicts the Commission's previous position on the CMR ban, and instead closely reflects legal arguments advanced by industry on at least two separate occasions.ⁱⁱⁱ

The Legal Service's and industry opinions inappropriately describe the approach to CMR substances in consumer products enshrined in EU legislation. Whereas restrictions on the production and use of CMR substances under the REACH regulation indeed are implemented through specific legal acts, this is not the case for other consumer product frameworks. The Toy Safety Directive or the Commission regulation on plastics food contact materials for example automatically prohibits the use of CMR substances *without* a need for specific legal acts.

The approach to CMR substances in cosmetics products implied by the Commission's revised position would thus be inconsistent with existing Union laws protecting vulnerable consumers (e.g. children) or regulating situations that could result in widespread exposure (e.g. food packaging). Given the potential for direct, extensive consumer exposure, including of vulnerable groups, a different approach for cosmetic products is not justified.

Further, the Legal Service appears to base its opinion on a perceived ambiguity in the English language version of the Cosmetic Products Regulation.^{iv} This is however incompatible with the basic approach in EU law which requires multi-lingual interpretation of EU legal texts. All language versions have equal validity. Indeed, this ambiguity is not found in other language versions which explicitly refers to an active ban (e.g. the French "est interdite" or the German "ist verboten").^v

Conclusion: revert to the approach instituted by the Legislator

Against this background, we regret that the Commission's revised position, which differs substantially from the Legislator's intention, has been announced without consultation of the European Parliament and Council. We worry that this could set a precedent for other areas or sectors where current EU laws automatically prohibits the use of CMR substances, such as in toys or in plastics food packaging.

Automatic 'CMR bans' and their implementation directly touches upon the health of millions of consumers across the EU. We therefore urge you to reconsider your position and to urgently instruct your services to revert to the previous approach which guaranteed that CMR substances were automatically prohibited for use in cosmetics products. This would allow the Commission to reassure European consumers that the EU genuinely cares for their health and safety at a time where too many people question what the EU does for them.

For your information, we have also sent this letter to Commissioner Andriukaitis and Commissioner Jourová. Given the public interest in the matter BEUC will make this letter publicly available.

Yours sincerely,

Monique Goyens
Director General

ⁱ DG SANCO, Working document on the implementation of Article 15 of Regulation 1223/2009 on CMR substances, 25 October 2010.

ⁱⁱ As detailed in 'Note to Lowri Evans, Director General, DG GROW. Opinion of the Legal Service', dated 14 July 2016.

ⁱⁱⁱ Overview table prepared by BEUC on the basis of documents received through an application for access to document under Regulation (EC) No 1049/2001 (Registered under Gestdem number 2017/6696). Available upon request.

^{iv} Specifically, that the Annexes establishing derogations from the ban shall be amended "to these ends", cf. Article 15(1).

^v The French and German versions thus explicitly use a singular form (i.e. "à cet effet" and "hierzu").