



Department
for Business
Innovation & Skills

EUROPEAN INTERNAL MARKET

**Government Response to the
Department for Business,
Innovation and Skills' public
consultation on the Enforcement
of Regulation (EC) Number
1223/2009 on Cosmetic
Products (recast)**

OCTOBER 2013

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1. Executive Summary

This document is in response to the Department for Business, Innovation and Skills' public consultation document issued on 15 March 2013 on the draft Cosmetic Products Enforcement Regulations 2013 ("draft Regulations").

The consultation set out the Government's position on the draft Regulations which provide for the enforcement in the United Kingdom of European Regulation (EC) No 1223/2009 on Cosmetic Products (the EU Cosmetics Regulation). They apply in respect of all cosmetic products that are made available on the EU market after 11 July 2013.

The consultation was relevant to stakeholders who are involved in the manufacture, distribution and importation of cosmetics which fall within the scope of the EU Cosmetics Regulation. It was also relevant to those involved in the enforcement of this Regulation, which applies in its entirety from 11 July 2013. The consultation may also have been of interest to consumers as it concerned the enforcement of the EU Cosmetics Regulation which relates mainly to the safety of cosmetic products made available on the market.

The draft Regulations create enforcement powers, offences and penalties within the UK, as required under the EU Cosmetics Regulation.

The offences, penalties and enforcement provisions of these draft Regulations are similar to those in the Cosmetic Products (Safety) Regulations 2008, which they replace, and the Consumer Protection Act 1987. However, it has been necessary to expand the offences and penalties to reflect the broader scope of the EU Cosmetics Regulation.

In addition, some updates to penalties and enforcement powers have been made in order to reflect developments in the wider regulatory context, and the Government's policy in relation to safeguards for powers of entry. Key changes to penalties include increasing the maximum levels of fine from £5,000 to £20,000 for some offences, and a doubling of the maximum imprisonment sentence on indictment for the most serious offences to 12 months. This reflects the current levels of penalties in the UK's General Product Safety Regulations 2005 which covers consumer goods and therefore provides consistency.

Another key change relates to the powers of an enforcement officer to enter premises in order to ascertain whether there has been compliance with the regulations. Powers of entry no longer extend to premises used wholly or mainly as a private dwelling. Also before entering the premises, an enforcement officer must give reasonable notice unless this notice would reasonably be supposed to defeat the purposes of entry. These measures reflect the Government's position on safeguards for powers to enter premises.

The draft Regulations also contain one provision specific to the making available of cosmetics. This is regulation 5, which sets out the labelling requirements for cosmetic products which are not pre-packaged or are pre-packaged at the point of sale. There was a question in this consultation which covered this matter. The rest of the questions focused on the offences, penalties and enforcement powers proposed.

The Department would like to thank all interested parties for taking the time to respond to the consultation. We have considered all your views very carefully and in a couple of

cases have made some changes to the text of the draft Regulations. These changes have been expressed in this document.

The Cosmetic Products Enforcement Regulations were laid in Parliament on 19 June 2013. The statutory instrument took effect in the UK on 11 July 2013 and published on the gov.uk website. Please note that in this document the references to Regulations and Schedules refer to the draft Regulations. However, some numbering has now changed in the final Cosmetic Enforcement Regulations.

2. Background

The purpose of the consultation was to gauge views and gather information on the likely effects of the proposed enforcement of the EU Cosmetics Regulation on United Kingdom business, consumers, enforcement authorities and other interested parties.

We carried out a careful analysis of the relevant domestic legislation to enforce the EU Cosmetics Regulation. We have also worked closely with Trading Standards Services (the enforcement authority) and the Cosmetic Toiletry and Perfumery Association on the provisions in the draft Regulations. As part of our consultation process, we also consulted small and medium size businesses who are involved in the manufacture, distribution and importation of cosmetics which fall within the scope of the EU Cosmetics Regulation.

3. Responses Received

The consultation document was published on the gov.uk website. The consultation posed questions about the draft Regulations. It also mentioned that a regulatory impact assessment had not been produced for the draft Regulations as this instrument has a negligible impact on the costs of business.

A total of ten responses were received (see Annex B for details of the respondents) and they are broken down as follows:-

Small Enterprise (10 to 49 staff)	0
Medium Business (50-250 staff)	0
Micro business (up to 9 staff)	1
Local Government	4
Representative Organisation	1
Trade Association	1
Test House	1
Individual	2

All the responses, bar one, supported the Government's proposed enforcement of the EU Cosmetics Regulation.

4 Summary of Responses

The following analysis of the responses received to the consultation is focused on the questions posed in the consultation document. The Government responses to the points raised are set out following each question.

Question 1: Do you foresee any particular problems that the labelling requirement set out in draft regulation 5 could bring to your business?

Recap of draft regulation 5

This regulation set out the labelling requirements for cosmetic products which are not pre-packaged, are pre-packaged at the point of sale or are pre-packaged for immediate sale.

There were seven responses to this question. Three were from Trading Standards Services, two were from individuals involved in the cosmetics industry, one was from a trade association and another from a micro-business. All the respondents, except the micro business, supported the proposals setting out the labelling requirements for cosmetics products which are not pre-packaged or are pre-packaged at the point of sale. The respondent disagreed with the labelling requirements as it considered them to be too strict.

One Trading Standards Service commented that for non pre-packed cosmetic products, the requirements appear to be a sensible and pragmatic approach in ensuring that the necessary information is made available for consumers at the point of sale, without imposing any undue burden on the retailer.

However, whilst agreeing with the overall labelling proposals, two Trading Standards Services raised specific concerns. They foresaw difficulties with the interpretation of pre-packaged cosmetic products for immediate sale as there is no definition in the EU Cosmetics Regulation of immediate sale. They considered that the lack of a definition would lead to uncertainty and inconsistencies of application. The respondents suggested that guidance in this area should be given. In addition, a trade association commented that draft regulation 5(3) should be more specific to avoid possible confusion with Article 19 of the EU Cosmetics Regulation as this also covered the labelling of ingredients. Ingredients are required to be labelled using the EU glossary and therefore are exempt from any translation.

The Government Response

We note the comments made. We believe that the labelling requirements are practical and not too strict. They are not dissimilar to the labelling requirements which existed in the Cosmetic Products (Safety) Regulations 2008.

Draft regulation 5 applies to cosmetic products that are not pre-packaged, or are packaged at the point of sale at the purchaser's request. It sets out that information required to be provided in accordance with Article 19 (1) (which provides for labelling) of the EU Cosmetics Regulation including those relating to the best before requirements, must appear on the container in which the product is exposed for supply or a notice immediate proximity in that container.

However, where cosmetic products are pre-packaged for immediate sale, the information required under the EU Cosmetics Regulation must appear on an attached label, tag, tape or card, or in an enclosed leaflet. The regulation also states that where this is impossible for practical reasons, this information must appear on a notice in immediate proximity to the container in which the cosmetic product is exposed for sale.

We have taken on board the point made by a trade association to make draft regulation 5 more specific to avoid possible confusion with Article 19 of the EU Cosmetics Regulation. We have therefore amended draft regulation 5 accordingly to make this measure clearer. We agree with the comments that clarity is needed regarding the interpretation of pre-packaged cosmetic products for immediate sale. We will therefore clarify this matter in guidance.

Question 2: Do you agree with the scope of the proposed criminal offences created by the Enforcement Regulations?

Recap of draft regulation 12

The draft regulation makes it an offence to breach certain provisions of the EU Cosmetics Regulation, which are listed in Schedule 3. It also makes it an offence to obstruct, knowingly mislead or fail to cooperate with a person acting in the execution or enforcement of EU Cosmetics Regulation.

There were seven responses to this question. Three were from Trading Standards Services, two were from individuals involved in the cosmetics industry, one was from a representative organisation and another from a micro-business. The majority of the respondents supported the proposals, including an individual involved in the cosmetic product industry. The respondents from the Trading Standards Services were particularly supportive. Two welcomed the fact that enforcement authorities in England and Wales shall have the power to investigate and prosecute for an alleged contravention which was committed outside its area in any part of England and Wales (draft regulation 6 (2) and Schedule 2).

Two respondents were not supportive the proposals. One respondent, an individual involved in the cosmetic product industry, was unsure of the proposals, but did not expand on the uncertainty expressed. Another respondent, from a micro-business viewed the proposals as being disproportionate and aggressive policing of the system.

The Government Response

The Government considers that the proposals on criminal offences are proportionate and balanced and does not agree with one of the respondent's view that it is an aggressive policing of the system.

The offences provisions of the draft Regulations are similar to other consumer product safety legislation. It is also a continuation of the approach in the current Cosmetic Product (Safety) Regulations 2008 of having criminal sanctions. In addition, Article 37 of EU Cosmetics Regulation requires member States to provide for effective, proportionate and dissuasive penalties. We consider the use of criminal law to be consistent with this obligation. We note that using criminal sanctions to enforce product safety legislation is a well-established approach.

It has been necessary to expand the offences to reflect the broader scope of the EU Cosmetics Regulation. The criminal offences have been updated in order to align with the penalties set out in the General Product Safety Regulations 2005 which covers the safety of non-food consumer goods. We therefore consider it important to have a consistent approach to the criminal offences regime for this sector and not to depart from this framework.

In terms of the criminal offences being proportionate, it is important to point out that Trading Standards will commonly seek voluntary actions or use other enforcement methods, e.g. preventative action, or requiring corrective actions or recall of products, before criminal action is considered. We consider that it is still necessary to have a criminal sanction in place as it is a final option to encourage compliance should other approaches fail or prove inadequate for the offences committed.

The number of criminal prosecutions under our cosmetic product safety regime are very low. The latest figures available show that there were 14 prosecutions under the Cosmetic Products (Safety) Regulations 1989 covering the period 1 April 2003-31 March 2008. This is an average of less than 3 a year. We do not envisage that this figure is likely to rise significantly.

However, the deterrent effect of having a criminal sanction with the threat of imprisonment is seen as appropriate for the safety of cosmetic products placed on the market. The aim of the EU Cosmetics Regulation is to protect human health. These substances could be hazardous and pose a risk to consumer safety.

Question 3: Do you consider that the proposed penalties outlined in this consultation are appropriate ?

Recap of draft regulation 13

Regulation 13 sets out the penalties that apply when certain Articles of the EU Cosmetics Regulation and regulation 12 as mentioned above are breached. Breaches of certain Articles are triable either way. This means that they can be tried as either indictable or summary offences, whereas others can only be tried as summary offences.

There were seven responses to this question. Three were from Trading Standards Services, two were from individuals involved in the cosmetics industry, one was from a representative organisation and another from a micro-business. All, bar one of the respondents, supported the proposals on the proposed penalties. The Trading Standards Services considered that the maximum level of proposed penalty is consistent with that already contained in the General Product Safety Regulations 2005.

A representative organisation stated that they welcome the increase in fines which reflect the seriousness of the potential hazard posed by unsafe cosmetics and the lack of appropriate checks and balances carried out by responsible persons to ensure consumer safety. The respondent who did not support the proposed penalties expressed the same view as the response to Question 2.

The Government Response

We consider that the proposals on penalties are proportionate and balanced, for the same reasons expressed for the criminal offences, and do not agree with the view of one respondent that it is an aggressive policing of the system.

We consider it appropriate to put in place key changes to penalties to include increasing the maximum levels of fine from £5,000 to £20,000 for some offences, and a doubling of the maximum imprisonment sentence on indictment for the most serious offences to 12 months. This reflects the current levels of penalties in the UK's General Product Safety Regulations 2005 which covers a very broad range of non-food consumer goods and therefore provides consistency.

Question 4: Do you agree with the proposals to accord rights of appeal against a written notice?

Recap of draft regulation 14 (1) and regulation 15

Draft regulation 14 (1) provides that a responsible person, distributor, or other person who has an interest in the cosmetic product in which the notice is issued has the right to make an application to the appropriate court for an order to vary, or set aside the written notice issued by an enforcement authority. This is similar to the ability to appeal a suspension notice which currently exists under the 2008 Regulations. Draft regulation 15 sets out the appropriate courts for an appeal.

There were seven responses to this question. Three were from Trading Standards Services, two were from individuals involved in the cosmetics industry, one was from a representative organisation and another from a micro-business. All of the respondents supported the proposal to accord rights of appeal against a written notice.

Although supportive of the proposals, two Trading Standards Services commented that the grounds of appeal in draft regulation 14 is different from regulation 17 of the GPSR. Their view on the latter is that an order could only be set aside where there was no breach of the Regulations and the serving of the notice was not proportionate.

The Government Response

We consider that the appeal provisions in the draft Regulations are similar to those in the General Product Safety Regulations 2005, i.e. that it provides the ability of a responsible person, distributor, or other person who has an interest in the cosmetic product in which the notice is issued has the right to make an application to the appropriate court for an order to vary, or set aside the written notice issued by an enforcement authority.

However, we do not agree that the provisions should be cumulative. The intention of the draft Regulations is to deal with two separate scenarios: i) where there has been no breach of the legislative provisions (and therefore any notice would be necessarily disproportionate) and ii): when any such notice would be a disproportionate response to a breach of the legislation. We believe that the draft Regulations achieve this aim.

Question 5: Do you consider that compensation orders, remediation orders, recovery of expenses of enforcement and forfeiture measures are appropriate?

Recap of the draft Regulations 16, 17, 18, 19 and 20.

Draft regulation 16 enables a compensation order to be made when an enforcement authority takes, or requires a responsible person or distributor to take, certain measures in circumstances where no contravention of the EU Cosmetics Regulation has occurred or is likely to occur. The enforcement authority may be liable to pay compensation to any person who has an interest in the cosmetic product in relation to any loss or damage caused. Any disputed question on the right or amount of compensation will be determined by arbitration.

Draft regulation 17 enables a court to order someone to remedy a matter for which they have been convicted. Under draft regulation 18 a court may order a person to reimburse the enforcement authority for expenses of enforcement. Draft regulations 19 and 20 enable orders for the forfeiture of the cosmetic product. This continues the approach in the 2008 Regulations.

There were seven responses to this question. Three were from Trading Standards Services, two were from individuals involved in the cosmetics industry, one was from a representative organisation and another from a micro-business. All, bar one, of the respondents supported the proposals in this area. The respondent, a micro-business, did not agree with the proposals as felt that they were too excessive to deal with these particular areas. In relation to draft regulation 18 (Recovery of expenses of enforcement), two Trading Standards Services considered that whilst the principle is an established one, they felt that in line with regulation 27 of the General Product Safety Regulation, draft regulation 18 should make it clear that recovery of expenses of enforcement should extend to costs incurred in connection with forfeiture. Another respondent asked who would be the arbitrators.

The Government Response

We are pleased that all, except one of the respondents, supported the proposals on compensation orders, remediation orders, recovery of expenses of enforcement and forfeiture measures. We do not consider that the measures are excessive. They have been designed to be proportionate, for the reasons mentioned earlier in this document, and are not burdensome on either of the parties involved in the process.

In relation to the specific comments made about draft regulation 18, although the draft regulation does not exclude the possibility of recovery of expenses of enforcement to cover forfeiture, we acknowledge that this should be made explicit in the regulation. We have therefore revised the wording on the measures on recovery of expenses of enforcement to cover forfeiture. In response to the question raised during the consultation

about who would be the arbitrators, this is dealt with under the provisions on statutory arbitration found in the Arbitration Act 1996. This Act covers England, Wales and NI. The draft Regulations provide for what happens in Scotland.

Question 6: Do you consider that the proposed Enforcement Regulations as a whole are effective and proportionate?

There were 8 responses to this question.

Four were from Trading Standards Services, one from a representative organisation, one from the Government Chemist, two were from individuals involved in the cosmetics industry, and another from a micro-business. All, except the latter, supported the proposals. The overriding view of those who endorsed the proposed draft Regulations was that they are effective and proportionate.

The Government Response

We welcome the fact that nearly all the respondents considered the draft Regulations as a whole to be effective and proportionate.

Whilst agreeing to the draft Regulations, some of the respondents made additional comments on the application of the draft Regulations. These are reflected below.

Draft regulation 8

Trading Standards Services suggested expanding the sub-heading for draft regulation 8 to state “Notice of measures required and requests made under Article 25, 26 and 27 of the EU Cosmetics Regulations”.

The Government Response

We took the point on board about the sub-heading and therefore expanded the title of regulation 8.

Draft regulation 9

Two Trading Standards Services questioned the wording in draft regulation 9. This provides that where an enforcement authority ascertains, or has reasonable grounds for concern, that a cosmetic product presents or could present a serious risk to human health in accordance with Article 27 (safeguard clause) of the EU Cosmetics Regulation it must obtain authorisation from the Secretary of State prior to taking provisional measures under Article 27. Whilst recognising these measures, the respondents considered that draft regulation 9 imposes an additional duty on local authorities to obtain authorisation from the Secretary of State prior to taking the provisional measures described in the Article and in the draft regulation. They commented that they would like to see this particular prior authorisation requirement removed and replaced with a simple requirement to notify the Secretary of State along the lines of draft regulation 10 which concerns notification to the Secretary of State of enforcement action.

The Government Response

We feel that as the measure relates to products which comply fully with the EU Cosmetics Regulation but are nevertheless considered dangerous the Secretary of State should retain this power. This is because we consider that to do so ensures consistency in safeguarding cases where products comply with regulations. However, it is important to point out that this should not be confused with taking measures to deal with non-compliant products.

Schedule 2, paragraph 4; the need for prior notification of inspection

A trading standard services and representative organisation commented on the need for prior notification of inspection. The former felt that the provision in paragraph 4 of Schedule 2 of the draft Regulations does not allow for them to examine, inspect or test-purchase cosmetic products without prior notification to the retailer in question

The Government Response

We do not agree with this view. Paragraph 3 of Schedule 2 of the draft Regulations makes clear that an officer of an enforcement authority must give reasonable notice to enter premises, unless giving such notice would reasonably be supposed to defeat the purpose of the entry. This would therefore allow, for example an enforcement authority to carry out a spot check without giving notice, provided they meet the requirements of the exception.

The availability of testing facilities to Trading Standards Services

One respondent commented about the availability of accredited testing facilities to Trading Standards Services and the lack of mechanisms to resolve local disputes or address national concerns on the safety and testing of cosmetic products.

The Government Response

We have noted these comments. However, on the latter comments, we are not aware that this has produced particular problems.

Training on the EU Cosmetics Regulation

One respondent felt that we should explore the feasibility of facilitating and/or provide training on the new obligations for market surveillance officers in relation to their enforcement responsibilities under the EU Cosmetics Regulation.

The Government Response

As mentioned earlier in this document, we will be producing guidance on some aspects of the finalised Cosmetic Products Enforcement Regulations which will assist enforcement authorities, manufacturers, importers and anyone else involved in the manufacture, distribution and importation of cosmetics which fall within the scope of the EU Cosmetics Regulation.

5. Next Steps

We will be producing guidance to give more clarity to how certain aspects of the finalised Cosmetic Products Enforcement Regulations operate.

The Regulations have been published on the Gov.uk website.

Contact details for further information on the Cosmetic Products Enforcement Regulations is:

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6. Annex A – The Cosmetic Products Enforcement Regulations 2013

http://www.legislation.gov.uk/uksi/2013/1478/pdfs/uksi_20131478_en.pdf

7. Annex B - List of Respondents

A micro business involved in the cosmetics product industry

An individual involved in the cosmetics product industry

Cosmetic Toiletry & Perfumery Association

Essex Trading Standards (Essex County Council)

East of England Trading Standards Association Ltd

London Borough of Hammersmith and Fulham and Royal Borough of Kensington and Chelsea

Pembrokeshire County Council

The Government Chemist

The Oxford Soap Company

Trading Standards Institute

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