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## Cosmetics: WBZ Annual Report 2013



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**Full title:** Wettbewerbszentrale (Centre for Protection against Unfair Competition) Annual Report 2013

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**Chapter 8: Cosmetics:** On 11 July 2013, Regulation (EC) no. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (EU Cosmetics Reg.) entered into force. The goal of the Regulation is to harmonise the law on cosmetic products in the EU while ensuring a high level of protection of human health (recital 4). The Regulation is directly applicable without any requirement for transposition in the various Member States.

Despite the new Regulation, many of the previous competition law rules have been retained: as previously, numerous labelling requirements apply to cosmetic products, which are now laid down in Article 19 of the EU Cosmetics Regulation. The labelling requirements amount to market conduct rules, with the result that missing or insufficient information may be prohibited under competition law.

Misleading advertising continues to be prohibited. Pursuant to Article 20 of the Regulation, using texts, names, trade-marks, pictures and figures or other signs in the labelling, making available on the market and advertising of cosmetic products, is not permissible in order to imply that these products have characteristics or functions which they do not have. On the other hand, there is a new list "establishing common criteria for claims which may be used in respect of cosmetic products"<sup>1</sup>. The Commission has thus complied with its task specified in Article 20(2) of the EU Cosmetics Regulation of laying down common criteria for the justification of claims used in relation to cosmetic products. The list was issued with the status of a regulation alongside the EU Cosmetics Regulation, and came into force on 11 July 2013. In part the criteria have not changed compared to the existing legal position. Thus, for example the following criterion appears under the heading "truthfulness" (*Wahrheitstreue*): "If it is claimed on the product that it contains a specific ingredient, the ingredient shall be deliberately present."<sup>2</sup> According to competition law standards, this is a matter of course. On the other hand, the scope of other criteria cannot be immediately ascertained. Thus, the Regulation states under the heading "Informed decision-making" that: "Claims are an integral part of products and shall contain information allowing the average end user to make an informed choice." Since the producer must already comply with a duty to provide information and a prohibition on misleading practices, it will probably fall to the courts to concretise this criterion.

During the reporting year the Wettbewerbszentrale received 51 queries and complaints from the cosmetics sector. Many of these concerned prohibited claims relating to effects. Thus, the impression was created for laser treatments offered in a cosmetics institute that they also had therapeutic effects, such as resolving skin problems involving acne (F 4 0397/13). Leaving aside the fact that the beauticians were not authorised to carry out skin

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<sup>1</sup> In German: "Zur Festlegung gemeinsamer Kriterien zur Begründung von Werbeaussagen im Zusammenhang mit kosmetischen Mitteln"

<sup>2</sup> In German: "Wird in einer Werbeaussage für ein Produkt behauptet, dass es einen bestimmten Bestandteil enthält, muss dieser auch tatsächlich vorhanden sein"

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treatments under the German Act on Alternative Practitioners [*Heilpraktikergesetz*], but must rather limit their work to skincare, the claims are largely inaccurate as to their content. The misleading effect is clear if it is suggested to consumers that they will become "immediately wrinkle-free within 7 minutes" (*sofort, in 7 Minuten faltenfrei*) (F 4 0820/13) or will look ten years younger within 72 hours (F 4 0336/13). However, precisely during the second half of the reporting year, complaints increased relating to advertising with test results, customer surveys, etc. The following cases are provided by way of example: a large enterprise with global operations based in New York gave away samples of its face cream in its perfume shops with the reference "after only 4 weeks, the skin of 92% of women appeared visibly tauter as if it had been lifted."<sup>3</sup> The asterisk behind "women" (*Frauen*) is explained as "clinical test" (*klinischer Test*). The Wettbewerbszentrale objected that consumers had not been provided the full information which would enable them to understand the claim (§ 5a(2) UWG). The enterprise issued a declaration of discontinuance under threat of a contractual penalty fines (F 4 0517/13). It is misleading to refer to a "confirmed efficacy" (*bestätigte Wirksamkeit*) or a "proven effect" (*nachgewiesene Wirkung*) if this is based on the subjective assessments of several women, and not on the results of an objective test carried out by a third party (F 4 0815/13). The licensee of a group offering fragrances alongside international fashion brands advertised in a magazine with the claim "95% of testers would recommend Fragrance E to their friends"<sup>4</sup>. The case concerned volume 07/13 of the magazine Glamour. Leaving aside the fact that the source was hardly legible, it was not possible to understand the test result even with this information – the magazine only contained an invitation to women to apply for the product test. However, the issue did not contain any information relating to the test result (F 4 0847/13).

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<sup>3</sup> In German: "nach nur 4 Wochen sah die Haut bei 92 % der Frauen sichtbar straffer aus und wirkte wie geliftet"

<sup>4</sup> In German: "95% der Testerinnen würden den Duft E. ihrer Freundin empfehlen"

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