

**G-Regs™**

The Centre for Protection against Unfair Competition  
(Wettbewerbszentrale) – Overview/ Summary of Cosmetics



**Full title:** Cosmetics

**Overview**

This priority area is not only concerned with the advertising of cosmetic products but, rather, also with the advertising behaviour of beauticians. You can find further information under the following headings:

- Cosmetics Regulation
- Misleading advertising claims
- Beauticians

**Cosmetics Regulation**

The Act Against Unfair Competition (UWG) also applies to advertising in the cosmetics sector. The special rule, however, is the Cosmetics Regulation (Regulation (EC) no. 1223/2009<sup>1</sup>). It entered into force on 11.07.2013 and was – unlike a directive – directly applicable in every Member State (cf. *Wettbewerbszentrale News*: New Cosmetics Regulation from 11 July 2013<sup>2</sup>). The labelling of products is provided for in Article 19 of the Cosmetics Regulation, the requirements for advertising claims in Article 20. In terms of content, nothing has fundamentally changed compared with the previous legal situation: the extensive prohibition on deceptive/ misleading advertising remains. What is new, however, is the provision in Article 20, Paragraph 2, under which the EU Commission is to specify, in cooperation with the Member States, common criteria that justify the use of an advertising claim. Regulation (EU) no. 655/2013<sup>3</sup> laying down common criteria for the justification of claims used in relation to cosmetic products entered into force at the same time as the Cosmetics Regulation.

**Misleading advertising claims**

Article 20 of the Cosmetics Regulation prohibits the feigning of characteristics or functions that the relevant product does not possess. This applies to the claimed effects as well as to the promotion of ingredients that a product does not have or not have in the advertised quality<sup>4</sup>. Caution is advised for all designations that give the impression that it is a particularly “pure” (*“reine”*) cream or lotion (see, for example, the Higher Regional Court of Saarbrücken, judgement of 03.03.2010, ref. 7 KfH O 9/10 on the term “natural” or the Upper Regional Court of Hamm, judgement of 27.03.2012, ref. I 4 U 193/11 on the term “bio”).

A further priority area is advertising with test results or opinion polls, which are very popular in the cosmetics industry as well as other sectors. Even with a cream, consumers evidently trust the result of a (sometimes only alleged) objective test or statements by third parties more, even though these only express a subjective opinion. The general principles apply to such advertising: if it is a comparison, this must comply with the provisions of Section 6 of the Act Against Unfair Competition. For example, a reference must be given that enables the consumer to understand the test result. In the event of

<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009R1223-20150416&from=EN>

<sup>2</sup> <https://www.wettbewerbszentrale.de/de/branchen/kosmetik/aktuelles/news/?id=1301>

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:190:0031:0034:en:PDF>

<sup>4</sup> G-Regs note: i.e. misrepresenting a product's ingredients by exaggerating their quality or including ingredients not contained in the product

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advertising with opinion polls, the company must, however, also provide consumers with basic information to enable them to understand a particular customer judgement. This results from Section 5a, Paragraph 2 of the Act Against Unfair Competition. The claims must also be true in terms of content. Anyone claiming "95% of the testers would recommend fragrance E. to their friends" is advertising in a misleading manner if, in fact, only 66% of the women answered the relevant question "yes, definitely", with the other 29% answering "yes, probably" (Upper Regional Court of Mainz, consent decree of 25.04.2014, ref. 10 HK O 1/14).

A repeated reason for complaint or objection is packaging, keyword "sham/ deceptive packaging" ("*Mogelpackung*"). Section 5, Paragraph 1 prohibits misrepresentation of the amount/ quantity of a product. However, under Article 7 of the Eichgesetz (Verification Law) and Article 43, Paragraph 2 of the new Mess- und Eichgesetz (Weights and Measures Law), pre-packaged products must be designed in such a way that they do not pretend to contain more than they actually do.

As in other areas, the *Wettbewerbszentrale* also supports its members in the cosmetics sector by examining the admissibility of advertising campaigns under competition law before they are published. This can avoid costly and protracted litigation in many cases.

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## Beauticians

The prohibition of misleading advertising under the Act Against Unfair Competition and the Cosmetics Regulation also applies to this occupational group. The general prohibition of deception (prohibition against misleading commercial practices and misleading by omission) under Section 5 of the Act Against Unfair Competition must, of course, be observed for all job titles. This applies, for example, to using a "diploma". The *Wettbewerbszentrale* regards the term "diploma" as misleading if it was awarded by a private school. In such cases, it gives the incorrect impression of an academic qualification (Higher Regional Court of Cologne, judgement of 17.07.2002, ref. 6 U 54/02). Some dazzling professional titles feigning a special qualification have also been criticised by the *Wettbewerbszentrale*.

The question often arises with regard to what activities may be performed at all by a beautician then they apparently or actually go outside the area of cosmetic care activity. The lynchpin of the legal assessment is the Alternative Medical Practitioners Act (Heilpraktikergesetz), under which, apart from a doctor, only an alternative practitioner with the corresponding permit may exercise so-called alternative medicine. What alternative medicine means is defined in Article 1, Paragraph 2 of the Alternative Medical Practitioners Act: "Exercising alternative medicine within the meaning of the law is deemed to be any activity undertaken professionally or commercially to diagnose, cure or alleviate diseases, suffering or bodily harm in people, even if it is practised in the service of others." References to the "treatment" of acne, for example, can alone give the impression that therapeutic (medical) treatment is taking place which is reserved for a doctor or alternative practitioner.

However, beauticians can now offer "medical pedicure" even if they are not podiatrists. The Federal Supreme Court has ruled that the Podiatry Law only protects the professional title of "chiropodist" (cf. *Wettbewerbszentrale News* from 21.11.2013<sup>5</sup>).

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<sup>5</sup> <https://www.wettbewerbszentrale.de/de/branchen/kosmetik/aktuelles/news/?id=1347>

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