

LEGAL PROTECTION OF CIRCULATION OF COSMETICS ONLINE

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Abstract - Nowadays many cosmetics are traded online that do not meet the requirements of security, usefulness and quality. This can be seen in the public warnings that have been issued by the Food and Drug Supervisory Agency containing lists of harmful cosmetics. This paper is the result of legal research that analyses the legislation in the field of health and licensing as an effort to control and protect the community. Based on the results of this research study, the government has established regulations and licensing in the field of manufacturing and in relation to the supervision of the circulation of cosmetics and online trading, as a legal protection for quality cosmetics guarantees. This is not yet supported by inter-institutional coordination in relation to supervision, law enforcement and education for the public about their understanding of unsafe cosmetics.

Keywords: *Consumer Protection, Licensing, Online Liabilities and Trade*

I. Introduction

Everyone in the world wants to be better looking, so everyone makes the effort to be more beautiful or handsome. One of the attempts to make a more beautiful look or to change the appearance of someone by using cosmetics is an attempt to cover up their deficiency or to show off their advantages.

In Indonesia, the circulation of cosmetics is very diverse, whether it is cosmetics produced domestically or imported from abroad, where the circulation is done conventionally, by way of multi-level marketing or online. The diverse types and marketing of cosmetics requires comprehensive control and supervision efforts, because the circulation of cosmetics that contain harmful ingredients may result in damage to health and may even cause permanent damage or death. Known cosmetics contain pharmaceutical ingredients intended for use on the outside of the human body (epidermis, hair, nails, lips and external genital organs) or tooth and mouth mucous membranes primarily to cleanse, decompose, to alter the appearance, to fix odours of the body or to protect and maintain the body in good condition.

The use of cosmetics containing hazardous substances such as **Mercury, Hydroquinone, Retinoic Acid / Tretinoin / Retionic Acid, Lead, Resolsinol,**

Dyestuff and Diethylene Glycol (DEG) can have an impact on skin damage, the central nervous system depression, liver toxicity and kidney failure. Permanent damage can be done to the brain and nervous system, and trigger problems in behaviour and learning, decreasing IQ and hearing, inhibiting growth and causing anaemia.

In practice, the circulation of cosmetics in Indonesia involves a lot of illegal imported cosmetics and local cosmetic products, so the government needs to interfere in controlling the circulation of cosmetics as a form of legal protection for the public, to ensure the quality of cosmetic products and to prevent the occurrence of harm to the community. Currently the Government has made various legal efforts towards the control of cosmetics containing hazardous substances through the establishment of legislation in the field of health, especially cosmetics. Licensing involves marketing authorisation and business licenses for companies producing cosmetics and business licenses for companies that import or export cosmetics. This legal effort has not given optimal results, because according to the results of the surveillance done on the circulation of cosmetics, there are still some cosmetics containing hazardous materials that can cause harm and damage to public health.

Based on the data obtained from the surveillance of cosmetic circulation by the Food and Drug Supervisory Agency (BPOM) in the community, there is an illegal cosmetic circulation that does not have marketing authorisation, has fake circulation permits or has expired. In accordance with the data of the Food and Drug Supervisory Agency (BPOM), the survey obtained information in 2016 that involves 9,071 types of imported and illegal imported cosmetics. BPOM has revoked the circulation of 1,491 cosmetics and cosmetics annihilation worth Rp. 34.7 billion.¹ In accordance with supervision and legal action, the BPOM also published a Public Warning to the public. One example of a public warning is the issuance of the Letter to the Head of BPOM Number B-IN.05.03.1.43.12.16.4139, dated of December 6, 2016 about Cosmetics Containing Dangerous Materials, where there are 43 types of cosmetics in the form of nail polish, facial cream and lip colour containing materials that are

dangerous especially mercury and red dye, whether it is in the cosmetics' overseas or domestic production.

The rise of the online cosmetics trade has meant that the Food and Drug Administration has conducted a joint operation with Interpol, where the operation was called the Pangea Operation. In 2015, Operation Pangea managed to close 298 online stores that sold food supplements and cosmetics without being equipped with a Circulation License through social media.² Besides supervision, the operation also opened several accounts on all social media to campaign for vigilance against the circulation of drugs and illegal food.

With the background mentioned above, it is necessary to study the legal protection for consumers of medicine and food, especially cosmetics, as it can have an impact on public health and cause harm to society. Consumer protection efforts must be carried out in a preventive phase, i.e. preventing the occurrence of cosmetic circulation containing hazardous materials and a repressive phase that is an attempt to provide a deterrent for people who produce and distribute cosmetics and compensation efforts.

In accordance with the legal function to improve compliance, consumer protection efforts against the circulation of cosmetics containing hazardous substances, specifically traded online, must be formalised in legislation in an effort to realise the legal certainties and legality principles for the government in implementing the policies providing protection against consumer cosmetics and as legality to allow the public to obtain legal protection for compensation for losses that befall them.

II. Problem Statement

Based on the background described above, the legal issues undertaken in this paper include:

1. How are the government's actions carried out by the government and local government in controlling the cosmetics trade conducted online as a consumer protection effort?
2. What is the legal protection for consumers who are harmed by the online cosmetics trade?

3. Governmental Actions as an effort to Control Cosmetic Circulation

Based Article 1 Sub-Article 1 Act Number 8 in 1999 concerning consumer protection, hereinafter abbreviated as UUPK, it is stated that consumer protection is any effort made to guarantee legal certainty in order to provide protection to consumers. In accordance with the purpose of consumer protection as contained in the UUPK, consumer protection is preventive and repressive. Preventive consumer protection aims to prevent the occurrence of harm to consumers, while repressive consumer protection aims to provide opportunities for consumers who are harmed

to obtain compensation for any loss that is incurred.

Preventive consumer protection is the duty of the government to carry out various policies as a safeguard given to consumers or the users of goods or services so they are not harmed. The task of the government in implementing policies to prevent the occurrence of harm to consumers is the realisation of Article 28 I Paragraph (4) of the Constitution of the Republic of Indonesia 1945 that states that: "The protection, promotion, enforcement & fulfilment of human rights is the responsibility of the State, especially the government". Pursuant to this article, the state as a regulator has the authority to regulate the exercising of a person's right not to disturb the rights of others through legislation and licensing.

In the welfare state, the State has functions as a provider, regulator, entrepreneur and umpire,³ where the functions of the State as a regulator authorise the State to establish laws and regulations that are used as an effort to balance the human rights of the various parties as set forth in Article 28 J Paragraph (1) and Paragraph (2) of the Constitution of the Republic of Indonesia 1945. One of the legal instruments used as an effort to protect the people is administrative law. This is in accordance with the components of administrative law which includes laws for the administration of government, the law by the government and the law against the government.⁴

According to the explanation above, a license is a governmental action in the form of a government decision with the aim of controlling the activities and / or selecting the quality of a person. Permission is often referred to as a preventive instrument that aims primarily to prevent deviant behaviour from the community to comply with legal provisions and not merely a source of income.⁵

Article 1 Sub-Article 4 of Law Number 36 2009 on Health, hereinafter abbreviated as 'Health Law, Cosmetics' is one of the pharmaceutical preparations where the use of cosmetics can have an impact on consumers, especially on public health. The use of cosmetics has the potential to adversely affect public health, therefore in the manufacture and circulation of cosmetics, there needs to be interference from the government to provide assurance on the availability of pharmaceutical preparations that are safe, useful and of high quality, especially cosmetics as part of SKN. *The reason for the need for government intervention in regulating pharmaceutical activities is also explained by Richard A. Abood that: "As health professionals, pharmacists are highly regulated because of the smallest misstep in drug circulation or pharmaceutical care could cost a life."*⁶

Government actions in controlling the production and circulation of cosmetics that are safe, of high quality and are useful to provide assurances to the public on the quality of cosmetics and protection for the community includes the formulation of legislation, licensing and law enforcement. A license for the organisation of activities and/or business in the field of cosmetics has a very important position, because cosmetics as a pharmaceutical preparation and as a product of from pharmaceutical activities consumed by the community can have a very important impact on the quality of one's health.⁷

In the cosmetics business, a person is entitled to do business to meet his needs. On the other hand, everyone is entitled to the right to health. The government as a regulator is in charge of balancing the rights of everyone as an effort to fulfil human rights. The government's efforts to fulfil the rights of everyone and to balance the exercising of those rights should be done by establishing legislations and licensing. Licensing in the field of cosmetics serves as an effort to select and control the activities of manufacturing and the circulation of safe cosmetic products with a view to provide quality assurance to do with the traded cosmetics products in order to meet the standards of safety, usefulness and quality and on the other hand, this permit provides legal certainty for entrepreneurs in this business.

In accordance with the rules of licensing in the field of cosmetics, businesses that have started from manufacturing and circulation, licensing in the field of cosmetics include Business License, Production Permit, Circulation License, Import Recommendation, and Trade License. This is based on the legality of licensing in the field of cosmetics having different legal basis, functions and permits. There are many licenses and differences in the agencies issuing licenses that brings the consequences of permission violations resulting from the ignorance of the entrepreneurs, the public and a higher economic burden. Differences in each permit can be described in Table 1 below:

Table 1
Types of Licensing in the field of Cosmetics

The matters	Legal basis	Authority	The function
Business license (IUI, TDI/SIUP)	Government Regulation Number 107 Year 2015 on the license of Industrial Business	Ministry of Industry or Provincial / City / Regency Government	Legality of industrial establishment or business activity in the field of production, distributor or trade
Production license	Permenkes No. 1175 / VIII / 2010 concerning	Directorate General of Pharmacy & Medical Device	To control the production of cosmetics to meet CPKB

	Production Permit for Cosmetics	Ministry of Health	
Circulation License	Head of BPOM Regulation No. Hk.00.05.1.23.3 516 on Circulation License of Drugs Products, Traditional Drugs, Cosmetics, Food Supplements	BPOM	Registration of cosmetic products so that the product can be legally circulated in the territory of Indonesia.
Import Approval	Permenkes No 14/2016 on Recommendation on Approval of Import of Complementary Goods	Ministry of Trade	Permits used for selecting and controlling businesses doing Import of complementary Goods, Goods for Market Test and after sales service

Source: Health Legislation

Business Licenses are an agreement granted to every person to conduct business activities, where the nomenclature of the business license is followed by the type of business. For example, for the cosmetics industry, it is called the Cosmetics Industry Business License. The trade is called the Trade Business License. The purpose of granting the business permit in the field of cosmetics for the government is a means to control the business of the cosmetics business so as not to harm other people or the environment. For cosmetics entrepreneurs, the business license functions as a step of legality in doing business.

The Circulation License is a registration for medicinal products, traditional medicines, cosmetics, dietary supplements, and foods issued by the Food and Drug Administration of the Republic of Indonesia in the form of a notification number so that the product can legally be circulated in the territory of Indonesia. In the Regulation of the Head of BPOM concerning the permit for the circulation of Drug Products, Cosmetics, food and food supplements, it is stipulated that products containing certain substances that are sourced, or contained, or derived from animals or other living things in a single or mixed form or processed products or derivatives there of (excluding honey) being in contact with certain substances may be granted the Circulation License as long as the product is for an emergency and has been evaluated for the safety, benefits and quality of the Cross-Sector Team on Shadows and Emergencies in the form of recommendations. The Cross-Sector Team comprises of the Ministry of Health, the Food and Drug Supervisory Agency, the Indonesian Council of Ulama, and a group of specialist doctors.

Based on Article 4 Paragraph (1) of Regulation of the Head of BPOM on the Circulation License of Products mentioned above, it is stated that traditional drug products, cosmetics, and dietary supplements are not generally for an emergency, so for cosmetic products that are sourced, contained, or derived from certain materials, they are not given a circulation license. This includes traditional medicinal products, cosmetics and dietary supplements containing alcohol which do not include certain ingredients that must include alcohol content on the label composition.

Online trading is a form of electronic commerce, as regulated in Article 1 Sub-Article 2 of Act Number 11 2008 regarding Information and Electronic Transactions as amended by Act Number 19 20016 concerning the Amendment of Law Number 11 2008, in turn concerning Information And Electronic Transactions. It is stipulated that electronic transactions are legal acts committed by using computers, computer networks and/or other electronic media.

Electronic Transactions are a buying and selling agreement between buyer and seller parties electronically that usually use personal computer networks or other electronic media. In the process of buying and selling, consumers use a web browser to place an order and provide information on how to pay, whether it be credit card, digital cash, or electronic check.

Electronic transactions are between e-merchants or parties offering goods or services over the internet with e-customers or parties purchasing goods or services that occur in cyberspace or on the internet. This generally takes place in the form of paperless transactions. The documents used in transactions are not paper documents, but an electronic document or a digital document. Electronic transactions as a fixed trade fulfil the element of the agreement or contract.

Contracts in trading are the realisation of the principle of legal certainty and the principle of legal protection, because the contract indicates an agreement to the process of sale, purchase and an agreement on the rights and obligations of each party (seller and buyer) and the object of sale and purchase.

The permit in online trading business is intended to be a means of legal protection for traders on the legal certainty of their business and for the consumer on the quality of the traded goods or services. This is in addition to the permit that aims to support the development of the business and means to improve the business's credibility.

4. Legal Protection for Consumers Online Trade Cosmetics

Repressive consumer protection is an effort to provide legal certainty for the aggrieved consumer to make legal remedies; this can be by obtaining compensation for the losses they receive. A repressive consumer protection effort is the realisation of the concept of accountability. Liability is an *aansprakelijkheid* which states the obligation of a person for unlawful acts committed. For the act of violating the law, the perpetrator must be responsible and accountable for his actions in the lawsuit filed before the court by the patient against the perpetrator.⁸

Some of the formal sources of law, both regulations and standard agreements in the field of civil law, often provide restrictions on the responsibilities borne by the consumer rights violator. In general, the principles of responsibility can be differentiated into:

a. Liability is based on fault, this principle is used under Article 1365, 1366, 1367 of the Civil Code which states the fault. The definition of the fault is an element that is contrary to the law, which is not only limited to the law, but also propriety and decency in society.

b. *Presumption of liability*

This principle states that the defendant will always be considered a liability, until he can prove his innocence. So, the burden of proof is on the defendant.

c. *Presumption of non liability*

This principle is the opposite of the previous principle, so this principle releases the defendant to be liability. In the case of consumer protection, this principle is used only in a limited way, i.e. only limited to the limitation of compensation, amounting to a maximum of one million rupiah.

d. *Strict liability*

Absolute liability is a special form of unlawful act, namely the principle of liability in unlawful acts that are not based on fault. This principle requires the perpetrators to be accountable for the losses incurred by unlawful acts. In Indonesia, the strict liability can be implicitly found in articles 1367 and 1368 BW.

e. *Limitation of liability*

The principle of liability with this limitation states that the defendant will be liable for the damages suffered by the plaintiff, but in this case, the limitation of liability is granted by the defendant.

Normally this principle is combined with other principles of liability as in Article 17 paragraph (1) of the Guatemala Protocol 1971. The principle of liability with this limitation is attributed to the principle of absolute liability. This principle is included as an exoneration clause or as a standard clause in any standard agreement made by the business actor, so that the consumer is severely disadvantaged by the existence of such a unilateral provision.⁹

4.1. Liability Based on UUPK

According to Article 19 paragraph (1), UUPK mentions that the business actors are responsible for providing compensation for damage, pollution, and / or consumer loss due to the consumed goods and / or services produced or traded. The liability system contained in UUPK outline is a system liability of faults, where there is a need to prove the element of faults.

The liability of faults with the reversal of the burden of proof held by UUPK implies that the obligation to prove whether there is an element of faults is on the business actor. When a business actor cannot prove that he is innocent or has been proven guilty, then the business actor is obliged to provide compensation to the consumer.

The system of liability for faults with the reversal of the burden of proof is explicitly defined in Article 28 UUPK. "The proof of whether or not there is an element of faults in the claim of compensation as referred to in Article 19, Article 22, Article 23 shall be the burden and responsibility of the business actor. The liability of faults by reversing the burden of proof is a form of sharpened liability, with this system the disadvantaged consumer position being strengthened by not neglecting the elements of liability".

Furthermore, special legal protection for cosmetic consumers through online trading, in Article 65 paragraph (3) of the Trade Act, has stated that in the event of a dispute related to trading transactions through electronic systems, a resident person or business entity may settle the dispute through a court or through a mechanism with another form of dispute resolution. Thus the repressive law protection against cosmetic consumers through on-line trading may be based on a judicial mechanism by filing a lawsuit under Article 1365 BW or under Article 28 of the Consumer Protection Law, namely related to accountability with reversed proof.

The repressive legal protection through the administrative law efforts in reporting acts of online trading entities to the Regent or Mayor authorised to issue SIUP and TDP is to be followed up by the suspension of business activities and / or revocation of permits is as stated in article 65 paragraph (3) of the Trade Law. Legal protection through a criminal procedure can be done by reporting it to the Police, to be followed up with an investigation and the process of confirmation in accordance with the provisions of the Indonesian Criminal Code, Act Number 36 2009 on Health, Act Number 8 1999 regarding Consumer Protection. This is a prohibition to offer, promote or advertise medicine, traditional medicine, food supplement, medical device and health service by promising gift giving in the form of goods and / or other services.

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6. Conclusions

In the online cosmetics trade, licensing is a preventive instrument that is undertaken by the Government and Local Government to control the trade of cosmetics production in order to meet the requirements of security, usefulness and quality. The types of licensing related to the manufacture and distribution of cosmetics online include the Business License (Production Industry, Import Industry, Trading Business), Production Permit, Circulation Permit (Notification), Import Approval issued by each agency having duties and functions in the Field, and SIUP and TDP. This can be referred to as a preventive law protection effort.

Repressive legal protection can be done through government liability and law enforcement that includes law enforcement administration and law enforcement penalties. The liability of civil law may be made by way of liability based on the fault, or with an inverted proof.

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