

Import challenges for cosmetic products

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By harmonising the technical regulations governing the cosmetics industry in the Asean region over the past few years, the Asean Cosmetics Association has been the driving force toward better quality and standards. This harmonisation has also helped remove trade barriers under the Asean Free Trade Area.

The Asean Harmonized Cosmetic Regulatory Scheme (AHCERS) has set out the requirements for cosmetic products for all signatories, including Thailand, since Jan 1, 2008. Since then, a product manufactured or marketed in any signatory country can enter any other signatory country if it complies with the AHCERS requirements.

By harmonising their regulations, the 10 Asean countries, and particularly Thailand, have become an extremely attractive market in which cosmetics distributors can expand their businesses. There are, however, some technical regulations that have not been harmonised as they are subject to national controls, such as the restrictions on importation into Thailand.

Importing for personal use: The Thai Food and Drug Administration (FDA) has set forth clear guidelines to differentiate between cosmetic product imports intended for personal use and for sale. If a person brings into Thailand more than six items of the same cosmetic product from another country, the Import and Export Inspector from the Thai FDA at the port will conclude that the person intends to import the products for local sale.

Registration requirements: When importing products for sale, each Asean country requires individual registration with the regulatory authorities where the product will be marketed. In Thailand, the FDA is flexible in allowing either a company or an individual to register as a distributor for a cosmetics business. And there is no limitation on the number of importers of one product, so the same product, with the same name, can be imported by several companies.

The Thai FDA requires that the company or person who intends to place any cosmetic on the market must register as an importer with the FDA, as well as register the product itself after the FDA approves the company's or individual's registration.

Using the established registration process, many individuals have tried to register themselves as authorised marketers or importers of a broad range of cosmetic products – even well-known products that are already registered with the FDA. These individuals have all eventually failed, as they are unable to produce the specific documentation the FDA requires for product registration. This includes, for example, the full ingredient listing and percentages of all ingredients contained in the product formula. This is important because this kind of information is extremely confidential and belongs only to the product owner and its authorised marketer.

A letter of authorisation from the product owner or manufacturer is also required, especially when a well-known product brand is already registered with the FDA. It appears that some of these individuals lack the knowledge and experience to be importers or authorised marketers in accordance with FDA practice.

The FDA has also become more rigorous in post-marketing steps. FDA officials now regularly conduct random inspections of importers. Thai cosmetic companies are therefore required to prepare the four parts of the product information files, which consist of more detailed product information, in case they are randomly inspected.

Parallel import: Importing cosmetics products into Thailand also creates some uncertainties with regard to parallel imports. For example, a manufacturer might give exclusive authorisation to different distributors to sell its products in Malaysia and Thailand. The Malaysian distributor might then decide that it wishes to export the product to Thailand. In doing so, the Malaysian distributor will be required to carry out the registration process, and the Thai FDA will still be in a position to authorise the registration and import of such cosmetics on the basis that all documents have been provided.

If this happens, the Thai distributor, who had independently reached an agreement with the foreign manufacturer to be the only distributor in Thailand, will no longer be the exclusive distributor. The Thai importer would also not be able to claim trademark infringement against the Malaysian distributor. This is because Thailand recognises the principle of exhaustion of rights. This principle holds that once a product has legally entered the market somewhere (in this case, in Malaysia), then resale of the product anywhere in the world no longer constitutes trademark infringement.

Faced with this scenario, the only available option is for the foreign manufacturer to claim breach of the contract it signed with the parallel importer (the Malaysian distributor), provided a clause exists that indicates that such distributor will not sell outside its designated territory.

In summary, if an individual wishes to import cosmetics into Thailand, he or she should first check the requirements, and then ensure that if they have a distribution agreement with the foreign manufacturer, sufficient provisions are included to allow them to enforce their rights.