Reforming Competition and Consumer Policy

A response from the British Brands Group

Please note: we have not responded to every question

Competition policy

1	**What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?**
	Assessing the state of competition in any economy, let alone one of the diversity and scale of the UK, is not a simple task. Clearly, an overly formalistic analysis will not provide sufficiently robust evidence to appropriately inform policy. This is because the relevant metrics and indicators must necessarily vary by sector and should therefore be considered in the context of the competitive dynamics of the relevant sector. It is therefore not possible to adopt a uniform, "one size fits all" approach to the use of metrics and indicators to monitor the state of competition in the UK. At this point, it would be helpful to see proposals on the metrics and indicators that are being considered (with metrics and indicators proposed at a sector level). It should then be possible to comment upon these proposals, having regard to those sectors in which Group members operate (predominantly fast moving consumer goods), to confirm that the contemplated metrics and indicators would address the relevant sector-specific dynamics and provide sufficiently robust outputs to inform policy appropriately.
2	**Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?**
	We urge government to be mindful of the impact upon business when it requires the provision of information for any purpose. We do not believe it proportionate to broaden the CMA's evidence-gathering powers in this area, especially as the CMA is already able to request information from businesses on a voluntary basis and has existing powers to investigate and gather evidence where it believes that markets may not be working well.
3	**Should government provide more detailed and regular strategic steers to the CMA?**
	In light of the CMA's investigatory powers, and the potential impact upon businesses resulting from the exercise of these powers, it is essential that the CMA remains

	demonstrably independent from government. This is critical to the CMA's reputation as an effective, independent authority and to ensure that businesses continue to trust the CMA as an effective, independent authority. It is also vital to the UK remaining an attractive location for inward investment. While we note that the more detailed steer would technically be "non-binding", given that this could include: (i) specific metrics against which government will measure the CMA's performance; and (ii) a requirement for the CMA to state how it is responding to the steer, there is a risk that the steer becomes (or is perceived by businesses as becoming) a means by which government can direct the activities of the CMA. This, we believe, would undermine the CMA's reputation as an effective, independent competition authority and could make the UK a less attractive destination for investment as a result.
4	**Should the CMA be empowered to impose certain remedies at the end of a market study process?**
	This would depend on the circumstances. Compared to a market investigation, a market study does not comprise an in-depth review. In addition, behavioural remedies (which the proposal suggests could be imposed at the end of a market study) may have a significant impact on businesses and markets, even though these are not structural remedies. Therefore, any powers to impose remedies at the end of a market study would need to be accompanied by carefully calibrated safeguards to ensure that these powers were used proportionately. For example, clear evidence of adverse effects on competition should be required and any proposed remedies should be subject to a full consultation process.
5	**Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?**
	To the extent that a two phase process is retained, we consider there to be advantages in there being separate case teams which would create internal checks and balances which reinforce the objectivity of the process overall and confirm the independence of the CMA's investigative approach. This would reduce any risk of perceived or actual confirmation bias in the second phase.
6	**Should government enable the CMA to impose interim measures from the beginning of a market inquiry?**
	In the scenario presented (i.e. urgency to prevent significant market damage or harm to the public interest), it may be appropriate to impose interim measures at the start of a market inquiry. This however should be an extraordinary power only used *in extremis* and could even be subject to positive affirmation by the courts or CAT (akin to an application for an injunction). In the context of the CMA's investigations under the Competition Act 1998, to date we note that interim measures have been imposed only once, which may suggest that it would only be appropriate for interim measures to be imposed rarely in the context of market inquiries.
7	**Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?**
	Where there is a clear-cut case and parties are willing, then it should be possible for the CMA to accept binding commitments at any stage in the market inquiry process, provided that the commitments in question: (i) would be sufficient to address appropriately the identified competition concerns; (ii) would not require the CMA to dedicate resources to the ongoing monitoring of the accepted commitments; and (iii) had clearly enforceable sanctions

	in the event of a breach. These are complicated procedures and any resulting proposed remedies should be subject to appropriate consultation after a thorough review.

13	**Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?**
	The independent CMA Panel should be retained without reform. The proposal to reduce the number of the members of CMA Panel, when considered in the context of the overarching proposal to streamline internal CMA processes (lessening the oversight and involvement of CMA Panel members in cases), clearly risks introducing confirmatory biases into CMA investigations by removing appropriate checks and balances. This would be an unwelcome outcome, which would undermine the international standing of the UK's competition law regime.
14	**Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?**
	We support the jurisdictional requirements of the Chapter I and II prohibitions being changed so that they apply to anticompetitive agreements and abuses of a dominant position that either: (i) are implemented in the UK; or (ii) have, or are capable of having, direct, substantial and foreseeable effects within the UK (irrespective of the geographical location in which the undertaking(s) implemented the anticompetitive conduct).
15	**Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?**
	No response.
16	**If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?**
	No response.
17	**Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?**
	Providing holders of full immunity (i.e. in the public enforcement process) with an additional immunity (i.e. from liability for damages in the context of private actions) should incentivise

	leniency applications within the UK, particularly where liability for damages is limited to the UK.
18	**Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?**
	The CMA should be able to impose interim measures within a shorter timescale if the rules regarding access to file where revised as proposed. However, the "full merits" standard of review should remain, particularly if access to file has been streamlined.
19	**Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?**
	No response.
20	**Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?**
	No response.
21	**Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?**
	The protection of such documents would be a reassurance to businesses and would remove a potential obstacle to the use of voluntary redress schemes.
22	**Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?**
	No response.
23	**Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?**
	Where decisions will have a significant impact on a business, we place particular value on the importance of an independent, fresh pair of eyes, proposing that this element in the approach is preserved.
24	**What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?**
	The current standard and level of judicial scrutiny is appropriate.
25	**What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?**
	The current standard and level of judicial scrutiny is appropriate.

26	**Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?**
	No response.
27	**Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?**
	The risk of a significant penalty should improve responsiveness and co-operation, and we note that the proposed penalty caps align with comparable caps (e.g. in the context of the European Commission's enforcement activities in relation to EU competition law). We would suggest that the imposition of criminal penalties should be reserved only for the most egregious cases.
28	**Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?**
	Companies should comply with the CMA's directions and orders, as well as undertakings and commitments accepted by the CMA, and the proposed new enforcement powers can be expected to improve compliance.
29	**What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?**
	Given the legitimate concerns businesses have regarding how their commercially sensitive information is obtained, used, stored, and retained, it would be welcome if proposed conditions could be made available for consultation, so that businesses can provide feedback in relation to these issues.

Consumer rights

30	**Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?**
	The description is clear, straightforward and inclusive.

42	**Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?**
	In light of the importance of reviews to informed, accurate decision-making by shoppers, it is appropriate for specific provisions to be included in Schedule 1 of the CPRs to make it clear

	that it is unlawful in all circumstances to commission or incentivise fake reviews. We therefore support option (c). We do however consider it legitimate to commission genuine reviews for the reasons given in the consultation. Where reviews relate to a particular product and are a genuine reflection of the consumer's opinion and experience, we see value in those informing the decisions of other consumers, where it is transparent that the review was incentivised. Reviews can be a factor in the operation of algorithms and the presentation of choice to consumers, directly affecting competition in the market, yet there can be high levels of inertia amongst consumers to provide reviews. It is therefore important to the provision of choice and the competitiveness of markets that companies are able to generate genuine reviews in a transparent way.
43	**What impact would the reforms mentioned in Q42 have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?**
	We envisage a positive impact on all businesses were their potential consumers able to rely on genuine reviews both of their own products and those of their competitors. This would encourage fair, vigorous competition on the merits.
44	**What 'reasonable and proportionate' steps should be taken by businesses to ensure consumer reviews hosted on their sites are 'genuine'? What would be the cost of such steps for businesses?**
	Proposals would be valuable on what would be considered 'reasonable and proportionate'. It would be reasonable to expect businesses to record key facts about the review (e.g. date) and demonstrate that…. - Any review related to a specific product or range; - That such a review featured only against that product or range and not others; - That, where an incentive had been provided, it was made explicit to the reviewer that the review must reflect their personal experience or opinion of the product. If the review related only to an aspect of the product (e.g. its promotion, delivery, instructions for use, performance or after-sales service), that this should be made clear; - That incentivised reviews were presented in a transparent way to consumers. The costs of any 'reasonable and proportionate' steps would be best assessed once proposals are clear.
45	**Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?**
	There should be every incentive to discourage the generation of fake reviews and therefore support clarity that it is unlawful for traders to offer or advertise to submit, commission or facilitate fake reviews.
46	**Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?**

	Our members have direct experience of such practices in the bricks-and-mortar world in the form of competitors mimicking, often unlawfully, the visual cues on packaging used by shoppers to identify and understand familiar branded products. Shoppers may be aware that the products are not the familiar brand though, due to the similar packaging, subconsciously consider them to be familiar and to have tangible and intangible qualities they do not, resulting in them purchasing the product when they would not otherwise have done so. In this case, coverage by national broadcast and print media from time to time over at least three decades and visibility in major retail outlets visited by high numbers of shoppers, many consumers are likely to be broadly aware of the practice. Two articles from Which? accompany our consultation response to give further background (see below). While we believe shoppers to be aware of the practice, we do not believe them to be alert to the subconscious behavioural influences it exerts on their purchasing decisions. We also do not believe it to be easy for shoppers consciously to counter these subconscious influences. It is important for regulators to be alert to such practices and their impact on consumers. Equally it is important to ensure the CPRs provide an effective means of enforcement. This is currently not the case for misleadingly similar, 'parasitic' packaging above. Only one enforcement action under the CPRs has been undertaken since their introduction in 2008. Lack of enforcement has led to the practice being adopted as an ongoing business strategy by more than one large retailer, has increased consumer awareness and, ironically, has made enforcement more difficult, it being argued that awareness reduces likelihood of confusion. Transferring our experience of parasitic packaging in the offline world to online, it is essential for there to be effective enforcement against unlawful dark patterns. This helps remedy specific instances while creating a credible deterrent. Specifically it is important for the Digital Markets Unit, as part of its toolbox, to be granted enforcement powers under the Enterprise Act. This would allow it to use the CPRs in its work to deliver good outcomes for consumers and to promote effective, fair competition.
47	**Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?**
	We believe government <u>and</u> regulators should do more to address any practice that breaches the CPRs. Where consumers are induced by practices to make choices they would not otherwise make, they are inhibited from making fast, accurate and informed purchasing decisions and competition is unfairly distorted and disrupted. The key area for attention is enforcement. Currently enforcement resources are severely constrained and enforcement inhibited by use of prioritisation principles that mean many practices go unchallenged. In the case of misleadingly similar packaging above, we have been urging since 2006 that brand owners should have enforcement powers in that specific area, recognising that enforcement would be unlikely by public enforcers. Those calls continue to be ignored, enforcement has been non-existent for years and the misleading practice has continued and indeed grown in incidence.

48	**Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?**
	We consider there to be a strong case for affected brand owners to be able to invoke and use the CPRs when misleadingly similar packaging is used to dupe consumers. The remedy would be for the misleading product packaging to be replaced with compliant packaging, with the product in the packaging thereby remaining on market. This would enhance levels of consumer protection, strengthen fair competition and encourage innovation at no cost to the public purse. More information on misleadingly similar packaging is given below.
49	**Are there perverse incentives or unintended consequences from our existing consumer law?**
	There are perverse incentives and unintended consequences arising from the way enforcement of consumer law is (not) undertaken in the offline world, mentioned in the paragraphs above. We were assured by Government prior to 2008 that the consumer enforcement regime would be effective against misleadingly similar packaging. This continues not to be the case. We are not yet aware of instances in the online world.
50	**Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?**
	We are not aware of any.

Consumer Law Enforcement

61	**Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?**
	Fines are very likely to incentivise compliance and alignment with the fining regime for non-compliance in competition-related cases is a coherent approach.

See below for more on misleadingly similar packaging and the need for stronger enforcement of the CPRs.

ADDITIONAL INPUT

Detriment to consumers and legitimate business arising from enforcement shortfall against misleadingly similar packaging.

When reforming consumer policy, the Group urges the Government to consider instances where potential breaches of the CPRs go unenforced and there are no other effective means of redress. A case in point is misleadingly similar packaging for products. These mimic the designs of familiar branded products to prompt the shopper to make incorrect assumptions about the product, its reputation and/or values such that the shopper purchases something they would not otherwise have done.

Where the copying of packaging features is sufficiently blatant to infringe intellectual property (IP) rights (whether registered or unregistered trade marks or designs, and/or copyright) and the evidence can be gathered to the level required by the court, then IP rights can be an effective means of preventing harm to consumers and protecting the original brand from unfair competition. Often though IP rights are not directly infringed or the evidentiary requirements of the court are set so high that the production of evidence to the required level is nigh impossible. The CPRs provide the provisions that would remedy the problem, at more achievable levels of evidence, but remain largely unenforced (one successful intervention was made by Trading Standards in 2008).

Challenges associated with enforcing IP rights and the absence of enforcement of the CPRs by those empowered to do so have meant that many instances of misleadingly similar packaging go unchallenged. This in turn has resulted in potentially misleading packaging, with its associated deception of consumers, becoming a business strategy adopted by companies of significant scale and affecting shoppers in large numbers.

The UK is unusual in not having effective remedies against misleadingly similar packaging. Many countries have effective unfair competition rules and many also allow companies to enforce consumer protection rules, in addition to public enforcement. This contrasts with the situation in the UK.

Advances in neuroscience and behavioural economics have highlighted the way that similar packaging deceives. The products affected are fast-moving consumer goods, which tend to be low cost, regular purchases. Shoppers make their purchasing decisions at speed (typically around 2 seconds per item) using ‘fast thinking’, often subconsciously and often on autopilot, with the colour and shape of products being the primary means of identifying and understanding their choices (on average, only 8 words are read during a usual supermarket visit). The shopper may or may not be confused to the extent that they mistake the copy for the original or believe it to come from the same factory (though many thousands do). They do however recognise the familiar signals on the packaging that trigger brand memory in error and that is sufficient to distort their purchasing decision in favour of the misleading copy.

The Group favours effective enforcement of the CPRs as a remedy to such deception. It called for this in 2006, being assured by Government that enforcement by public enforcers would be effective and efficient. Thirteen years on from the introduction of the CPRs, with only one enforcement action and many examples of misleadingly similar packaging on the market, the enforcement regime cannot be described as effective. The Government explored in 2014 whether affected brand owners should be granted enforcement powers,

an approach that was rejected then though with a promise to review the effectiveness of Trading Standards. Such a review remains outstanding.

The Group suggests that products that infringe the CPRs are re-packaged in distinctive packaging such that they no longer mislead consumers. Penalties are not sought and, by allowing products to return to the market in distinctive packaging, consumer choice and vigorous competition are preserved.

While misleadingly similar packaging impacts shoppers most strongly when they are making their selection from shelf, there are also online effects. Furthermore, the practice is also an example of consumers being manipulated, the enforcement regime not working for consumers as intended and businesses that play by the rules being undercut by those who do not.

The reform of consumer policy to build back better presents an opportunity to consider the deception caused by misleadingly similar packaging and to consider how the CPRs may better protect both consumers and legitimate businesses.

[redacted]

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SPOT THE DIFFER ENCE

– BIG BRAND OR SUPERMARKET EQ UIVALENT?

A fifth of Which? members say they've accidentally bought a supermarket version of a product thinking it was the big brand's label on the pack – can you spot the difference?

Have you ever got your shopping home, only to find that the well-known branded product you thought you'd picked up was actually an own-label lookalike? A fifth of Which? members have done this at least once, and given the profusion of own-label 'copycat' products, that's hardly surprising.

In our latest investigation, we found more than 150 own-label products in supermarkets and shops selling cosmetics that we think borrow elements of their packaging from branded competitors. Sometimes these similarities are subtle – but in other cases, we think there's such a close resemblance that it would be easy to pick up the wrong product by accident.

WHAT WE FOUND

We uncovered products in Aldi, Asda, Lidl, Morrisons, Sainsbury's and Tesco that appear to borrow from leading brands. Typically, these were in categories where there are well-established and distinctive brands, such as crisps, biscuits and butter. Some brands – such as Lurpak – seem to have a recognisable own-label imitator in most major supermarkets.

Imitations are also common with toiletries. As well as the supermarkets, Boots and Superdrug both have products that look very similar to leading brands.

We challenged a panel of Which? members to spot the difference between similar-looking products by removing the brand names. We also wanted to find out whether supermarket products can match up to brands on taste – see p24 for more.

OWN-LABEL APPEAL

With 75% of UK adults worried about food prices, according to Which? research, own-label products – which tend to be cheaper than brands – are becoming more enticing for consumers. Which? members are buying more from almost all own-label ranges, regardless of the supermarket or whether it's a premium or budget line, according to our latest supermarket shopping survey.

And a similarity to a brand can be a reason to buy an own-label product – when we surveyed Which? members on lookalike packaging, 18% of you said you have deliberately bought an own-label product because it resembled a branded one. Of those, 60% of you said you did so because the own-label was cheaper, while 59% wanted to try it to see if it was as good as the branded product. Aldi's recent advertising campaign – featuring the slogan 'Like brands, only cheaper' – played on this.

However, where there's confusion between own-labels and brands, own-label products are looked upon less favourably. Of those Which? members who bought an own-label product by mistake, 38% were annoyed by this, and 30% felt misled.

A PROBLEM FOR BRANDS

There's a lot in it for retailers that 'copy' brands, according to John Noble, director of the British Brands Group, an organisation that represents brand manufacturers. 'Our research shows that consumers are more likely to buy own-label products if they look like brands.' He also believes that retailers can charge more for lookalike products.

Noble says that 'copying' has become more prevalent, and sees it as a significant problem. 'Brands survive by being distinctive and standing out, and retailers are free-riding on brands' reputations.

'Currently in the UK there is little to stop a competitor packaging its product to look like a familiar brand, whether or not the product's performance is in any way

EXPERT VIEW

How retailers imitate brands

Mark Shayler | Packaging consultant

Own-label products can mimic or echo established brands by 'borrowing' elements of the packaging, such as colour, shape, tone of voice or typeface – or sometimes all four.

Colour and shape are the two elements of packaging that consumers pay most attention to, as they're the first things they notice about a product and allow them to quickly recognise an item when they're in a rush. Colour and shape are also the easiest elements to recall from memory, so the most effective imitations borrow from both of these.

Aldi's cream crackers (p24) are a great example of this – the colour is almost identical to that of Jacob's, and consumers associate orange with Jacob's crackers. The Aldi packaging uses lots of diamond shapes – in the positioning of the crackers, the product logo and name, and the different shades of orange in the background – just like Jacob's does.

Some of the similarities are obvious, while others are very subtle. Lidl's chocolate digestives have similar colours to McVitie's (pictured), they both have a picture of a biscuit with a bite out of it, and the font is very similar, right down to the angle of the writing. But less obvious is the fact that the Lidl digestives use an oat motif, like McVitie's, and frame the logo in the same way. Sainsbury's Olive Spread (pictured) doesn't try to imitate Bertolli's name or font, but if you look carefully you'll see that both packs feature very similar-looking houses, each with tall trees outside.

Retailers use this 'copycat' packaging to reassure customers that their product is of a similar quality to the brand leader. There's also the possibility of confusing customers so that they buy the own-label product instead. This may not be the retailer's intention, but it could certainly be a happy side effect for them.

PHOTOGRAPHY BY: EUGENE FRANCHI

50% correctly identified Jacob's Cream Crackers

43% identified Aldi's Savour Bakes Cream Crackers as the branded product

84% correctly identified Head & Shoulders for Men

7% identified Boots Anti Dandruff Shampoo for Men as the branded product

50% correctly identified Sarson's Malt Vinegar

40% identified Samson's Malt Vinegar (sold in Lidl) as the branded product

AN OBVIOUS IMITATION?

We showed four branded products alongside their own-label imitators and asked Which? members to identify the brand. The catch? We removed the names of the products.

More than a third of respondents mistakenly identified at least one of the own-label products as the branded version, demonstrating that it's easy to get brands and own-labels mixed up if you don't read the label carefully.

Figures exclude those who answered 'don't know'

64% correctly identified Clairol Herbal Essences

13% identified Boots Fruit Essence shampoo as the branded product

Do brands taste better?

Supermarket products might look just like their branded equivalents, but do they taste as good? We conducted a series of blind taste tests to find out which people prefer – as you can see from our results (right), branded products came out top in two out of the three tests. Each pair of products was tasted 20 times.

70%

McVitie's Hobnobs

vs

Belmont Oaties (Aldi)

30%

'More oaty and a fuller flavour' (McVitie's Hobnobs)

45% vs **55%**

Pringles Original

Tesco Chipz Original

15% vs **85%**

Asda Beastie Bites pickled onion

Monster Munch pickled onion

'Very vinegary...an unpleasant aftertaste' (Asda's Beastie Bites)

Copycat products on trial

Penguin vs Puffin bars

Asda's Puffin chocolate bars were ruled to be a copy of Penguin bars in a 1997 court case. Asda was found guilty of passing-off, but was allowed to continue selling Puffins on the condition that the packaging was changed.

Pimm's vs Pitchers

Pimm's owner Diageo began legal proceedings against Sainsbury's in 2009 over the supermarket's lookalike drink Pitchers. The case was settled when the companies came to an agreement over new packaging for Pitchers.

Cadbury trademarks Dairy Milk purple

Cadbury trademarked the particular shade of purple it uses on Dairy Milk bars in 2012, despite the objections of rival Nestlé. That shade can now be used only on Cadbury milk chocolate bars and drinking chocolate.

similar. That can't be good if we want a market in which shoppers can make informed decisions at speed.'

RETAILERS' VIEW

Retailers, unsurprisingly, take a different view. When we contacted the shops featured here, they said they were confident that consumers weren't being misled and could tell the difference between branded and own-label products.

Boots said that colours can be synonymous with certain active ingredients and so can help consumers find the right product. Morrisons and Superdrug said that customers are used to certain products being in a specific colour scheme, and so retailers use the same colours to help customers quickly find products. Aldi also said that it uses colours and iconography that are common to a particular category, to help customers find products.

WHAT THE LAW SAYS

Legal claims against copycat products can be brought under one of several laws. But trademark and copyright claims are very difficult to bring, according to Noble: 'Retailers can look at what's been trademarked or copyrighted, and adapt their designs so they don't fall foul of that.'

Passing-off is another option, if the brand can prove that the retailer is attempting to present their version of the product as the branded one, through brand name, trade description, or individual features of labelling or packaging.

Consumers and brands are also protected by the Consumer Protection from Unfair Trading regulations (CPRs), which say that traders can't deliberately mislead consumers into believing that a product is made by a different manufacturer. But it's up to trading standards to decide whether to take action under the CPRs, and such action is rare because it's hard to determine whether there was a deliberate intention to mislead consumers.

WHICH? SAYS

Own-label equivalent products can be a good thing – they're typically cheaper, so you can weigh up whether the quality of the own-label is close enough to the real thing to make it worth the saving. Which? testing has uncovered several own-label Best Buys that have topped our tests, such as champagne and balsamic vinegar from Sainsbury's, mayonnaise from Lidl, and washing-up liquid from Aldi.

But some products walk a fine line between suggesting a similarity with an established brand and confusing consumers to the point where they end up buying the wrong item by accident.

Have you spotted any products that you think cross that line? Join our conversation at www.which.co.uk/copycat.

YOUR VIEWS

Which? members share their opinions on 'copycat' own-label packaging

"Some own-brand items are just as good as the originals and some are terrible by comparison – it varies. The only way to find out is to try them.

"I think Aldi's packaging tends to mimic the market leader. I don't know why it bothers. Its own-label products are generally good quality and excellent value for money.

"It's always worth trying an own-brand product at least once. If it disappoints then don't buy it again.

"I think the supermarkets are piggy-backing on the brand investment by manufacturers in a very unfair way.

"Own-brand products should be distinctly marked to display that they *are* own brand. To use the same colours, images and shapes on the outside packaging as the market leaders to me is blatantly confusing the consumer.

"I think it is fine for supermarkets to sell own-brand products, but they must be clearly labelled.

"Having worked where branded products are rebranded as supermarket own-labels, I found that some are the same, while others have cheaper ingredients. I think all supermarket-branded products should say who they were produced by. But I would rather have a better choice of branded products than see them being replaced by cheap, supermarket-branded ones.

OUR RESEARCH

We surveyed 2,244 Which? members about 'copycat' packaging in February 2013, and have included a selection of their opinions about this in the column above.

Don't fall for these 10 packaging tricks

From copycat own-brand products to well-hidden small print, we reveal the tactics that supermarkets and manufacturers use on product packaging to persuade you to buy

AT A GLANCE

- **Poor-value gift sets can mean you're effectively paying several pounds for packaging**
- **'Light' or 'reduced fat' products aren't always healthy**
- **Copycat packaging means own-label products can be mistaken for brands**

Product packaging is designed to convey a raft of information to you – from how healthy something is, to what it tastes like and how much is actually inside. So there are plenty of ways that supermarkets and manufacturers can use packaging to tempt you to buy a product you wouldn't have picked up otherwise, and steer you away from information that might make you avoid buying it.

We've investigated 10 of these packaging tricks and tactics – many of which have been reported to us by Which? members – and have picked out some of the most glaring examples we found. Whatever the intention, they certainly run the risk of misleading consumers.

To research packaging tricks, we asked 7,855 Which? members in September 2014 about their experiences with packaging, and we examined hundreds of products in shops and on supermarkets' websites.

We also asked packaging expert Mark Shayler, who has 20 years' experience in eco design and environmental consultancy, to assess the examples of copycat packaging and excess packaging we found.

1 Tiny portion sizes that make products look healthier

Most products say on the pack how much of your reference intake (RI) of salt, sugar, fat and saturated fat they provide. Some base these values on a portion size smaller than most people would eat.

The Essential Waitrose 165g pizza is just five inches wide and nine inches long, but the given portion size is half. All Goodfella's pizzas give the portion size as one quarter – even the 10-inch 'Extra Thin' range. Four in five Which? members who eat this type of pizza would normally eat at least half.

Some packs of sausages or bacon – including Sainsbury's, Morrisons, Wall's and Richmond – give the amounts for one sausage/rasher, even though more than 80% of Which? members who eat these products said they'd normally eat two or three.

Kerry Foods (Richmond and Wall's) said providing values for one sausage/rasher is the simplest and most transparent method, and Morrisons said it allows customers to use the values in a way that suits them. Sainsbury's said its sausage packs will soon list two as the portion size. Waitrose said that its pizza portion size reflects a typical meal with accompaniments such as garlic bread and salad. Goodfellas said it's changing its labelling and the given portion size to half.

TIP Check the portion size carefully when looking at RI information.

2 Copycat own-brands

Nearly a quarter of Which? members we surveyed have bought an own-brand item unintentionally because the packaging was similar to a branded item.

Plenty of products from Aldi and Lidl borrow heavily from brands: Belmont Breakfast Biscuits and Snackrite Thick Ridged Crisps from Aldi, and Newgate Cream of Tomato Soup from Lidl are some of the more obvious examples we found. When we removed the brand names from McVitie's Ginger Nuts and Lidl's Tower Gate Ginger Nuts, some 39% of you – excluding those who answered 'Don't know' – identified the Lidl version as the brand instead of McVitie's.

Other supermarkets do it, too. Asda's Relax Bath Soak resembles Radox, right down to the embossed writing on the bottle.

Own-label equivalent products are often cheaper, and many own-label items have been rated as Best Buys in our tests. But they shouldn't look so similar to big brands that you could buy them accidentally.

Aldi said it uses generic colours and iconography on products to help customers find what they want quickly. Asda said it gets very few complaints from customers that they've bought one of its products by mistake. Lidl said it always ensures that its own-label and branded products are clearly differentiated, and that it would offer refunds to customers who are dissatisfied with one of its products.

TIP Check you've picked up the brand you want, especially in Aldi and Lidl.

Own-label products shouldn't look so similar to big brands that you could buy them accidentally

3 Poor-value gift sets

Some toiletry gift sets offer such poor value for money that you're effectively paying for the box it comes in.

A Lynx gift set costing £6.50 contained deodorant that normally costs £3 and shower gel that's £2 – although when we checked prices both of these were on offer, making the gift set an even worse deal. We also found a £6.50 Dove gift set of products that can be bought separately for £4.40.

Unilever told us the retailer decides the in-store selling price, and that the cost of manufacturing gift packs is much higher.

TIP Check prices of the individual products before buying a gift set.

Some gift sets offer such poor value for money that you are effectively paying for the box ›