



Department
for Business
Innovation & Skills

CONSUMER PROTECTION

Review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging - call for evidence

APRIL 2014

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Review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging

This document seeks your views on the case for granting businesses a civil injunctive power in relation to copycat packaging. In the call for evidence we have highlighted what we see as the main points which appear to arise in relation to this subject. We also want to draw attention to certain existing materials which you may wish to consider, and to invite comments or other evidence.

This review is relevant to businesses and retailers, consumers and bodies who represent their interests, bodies who enforce the CPRs, Judicature and Legal Representatives and Academia.

Issued: 11 April

Respond by: 19 May

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1. Executive summary

The CPRs implemented the Unfair Commercial Practices Directive¹ (the “UCPD”) into UK law. The UCPD aims to provide a high level of protection to consumers against unfair commercial practices, particularly those directed to influencing the transactional decisions of consumers in relation to products². These uniform rules, which prohibit traders from all sectors from engaging in unfair commercial practices with consumers, aim to promote and protect fair competition by increasing the confidence of consumers to shop and businesses to trade in the UK and across internal EU borders.

Amongst other things, the CPRs prohibit traders from engaging in certain misleading actions including marketing a product in a way which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor, such that the average consumer takes, or is likely to take, a different decision as a result. They also prohibit (in all circumstances) deliberately misleading the consumer into believing falsely that a product is made by another manufacturer.

The CPRs are enforced by specified enforcers through criminal prosecutions under the Regulations themselves as well as by civil sanctions under Part 8 of the Enterprise Act 2002. At the time of the implementation of the CPRs the decision was taken not to provide businesses with a power to take civil injunctive action against ‘copycat packaging’ (designing a product’s packaging to give it the look and feel of a competing well-known brand).

Ministers in the Department for Business, Innovation and Skills (“BIS”) have decided to review the case for granting businesses a civil injunctive power in relation to copycat packaging under the CPRs. The terms of reference for the review by officials are annexed. This call for evidence is intended to inform interested parties of the review, to highlight what we see as the main issues which appear to arise in relation to the granting of such a power, to draw attention to certain existing materials which parties may wish to consider, and to invite comments or other evidence.

BIS intends to analyse the responses in order to produce an interim report by July, which will then be discussed with stakeholders during the summer. We aim then to produce a final report by September along with the evidence submitted.

¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

² Directive Recital 7

2. How to respond

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents.

The form can be submitted online at <https://www.connect.bis.gov.uk/consultations/cprs.copycat>

Alternatively, the form can be submitted by letter or fax to:

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The review response form is also available electronically at <https://www.gov.uk/government/consultations/consumer-protection-copycat-packaging-call-for-evidence>

Other versions of the document in Braille, other languages or audio-cassette are available on request.

The consultation was published on **11 April 2014** and will run until **19 May 2104**.

3. Confidentiality and data protection

Information provided in response to this call for evidence, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4. Background

1. Regulation 5 of the CPRs sets out conditions in which a commercial practice will be a misleading action (and hence prohibited under Regulation 3, where it also materially distorts or is likely materially to distort the economic behaviour of the average consumer with regard to the product). One such condition is set out in Regulation 5(3)(a), which is satisfied if the commercial practice ‘concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor’. The European Commission’s guidance³ on the UCPD contains information on confusing marketing in which it explains what copycat packaging is and the relevance to it of the corresponding provision in Regulation 5 of the CPRs:

A practice which raises issues of compatibility with the above provisions of Article 6 of the Directive is “copycat packaging”.

“Copycat packaging” refers to the practice of designing the packaging of a product (or its “trade dress” or “get up”) to give it the general “look and feel” of a competing well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting as normally it does not involve copying trade marks.

The risk posed by copycat packaging is consumer confusion, and, consequently, the distortion of their commercial behaviour.

Consumer deception takes a number of forms and each is explained in more detail below:

- a) Outright confusion: the consumer buys the copycat product mistaking it for the brand;
- b) Deception over origin: the consumer recognises the copycat product is different but believes, due to the similar packaging, that it is made by the same manufacturer; and
- c) Deception over equivalence or quality: again, the consumer recognises the copycat is different but believes, due to the similar packaging, that the quality is the same or closer to what they would have assumed if the packaging were different.

Deception over quality or nature

The similar packaging suggests to consumers that the quality or nature of the copycat product is comparable to the quality or nature of the brand in question or at least that is more comparable than they might otherwise assume. As such, similar packaging gives the impression to consumers that the price alone is the only term of comparison between the products (rather than the combination of price and quality).

³ http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf paragraph 2.4.4.

For example, a **trader** names or brands his new sunglasses so as to very closely resemble the name or brand of a competitor's sunglasses. If the similarity is such as to confuse the **average consumer** making him or her more likely to opt for the new sunglasses when, without such confusion, he or she otherwise would not have done so, this practice would breach the Directive.

2. Schedule 1 to the CPRs lists commercial practices which are in all circumstances considered unfair (and hence prohibited). They include, at paragraph 13, promoting a product similar to another product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.
3. The guidance on the CPRs issued by the then Office of Fair Trading (OFT) and Department for Business, Enterprise and Regulatory Reform (now adopted by the Competition and Markets Authority - CMA)⁴ gives the following example of what would be considered unfair under this heading:

A **trader** designs the packaging of shampoo A so that it very closely resembles that of shampoo B, an established brand of a competitor. If the similarity was introduced to deliberately mislead consumers into believing that shampoo A is made by the competitor (who makes shampoo B) – this would breach the CPRs.

⁴ http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf paragraph 7.10

5. Enforcement of the CPRs

4. A breach of the CPRs is enforceable through criminal prosecutions under those Regulations⁵ and by civil injunctive action under Part 8 of the Enterprise Act 2002. Under the former, enforcers may apply to a court for an order to prevent further violations that take place in the UK or elsewhere in the EU. Breach of an enforcement order could be classified as contempt of court, resulting in up to two years' imprisonment or an unlimited fine or both.
5. The CPRs are enforceable by certain 'general enforcers'⁶, the Competition and Markets Authority ("CMA"), Local Authority Trading Standards Services ("TSS"), and the Department of Enterprise, Trade and Investment in Northern Ireland ("DETINI"). In addition, the Secretary of State may designate an enforcer which he thinks has as one of its purposes the protection of the collective interests of consumers and which, if it is a public body, he is satisfied is independent. A number of sector regulators have been so designated⁷. The Secretary of State may also designate a person or body which is not a public body if it satisfies such criteria as have been specified by order⁸. The criteria mainly concern the integrity and independence of the body or person and its capability. In particular, the body or person must have demonstrated the ability to protect the collective interests of consumers by promoting high standards of integrity and fair dealing in the conduct of business in relation to such consumers. Which? has been designated under this provision⁹.
6. This focus on the interests of consumers reflects the UCPD's general purpose and more specifically Article 11, on enforcement, which requires Member States to "ensure that adequate and effective means exist to combat unfair commercial practices in order to ensure compliance with the provisions of this Directive in the interests of consumers." The Article goes on to say that the means "shall include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may (a) take legal action against unfair commercial practices; and/or (b) bring such unfair commercial practices before an administrative authority competent to decide on complaints or to initiate appropriate legal proceedings".
7. The bodies empowered under our national law to enforce the CPRs are those set out above. They do not include "competitors" although consideration was given at the time to whether to give certain brand holders the right to take civil action against copycat packaging if and when it infringed the CPRs. The factors taken into account in deciding not to do so included that the general and designated enforcers would provide an adequate and effective enforcement regime; that, though consumers sometimes purchase the wrong product by mistake when packaging designs are similar, there was little evidence it caused real detriment; and that allowing business to business enforcement could result in a considerable number of disputes reaching the courts as businesses sought to further their

⁵ In England, Wales and Northern Ireland, prosecutions will generally be conducted by the CMA, TSS and DETNI. In Scotland, prosecutions are conducted by the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate.

⁶ Section 213(1), Enterprise Act 2002.

⁷ The Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, SI 2003/1399.

⁸ *Ibid.*

⁹ Enterprise Act 2002 (Part 8) (Designation of the Consumers Association) Order 2005, SI 2005/917.

commercial interests rather than the collective interests of consumers. In practice, it could result in a very different enforcement model than currently exists in the UK.

8. TSS and DETNI have a duty to enforce the CPRs; the CMA is empowered to do so. This does not mean that enforcement action must be taken in respect of each and every infringement. Instead, enforcers promote compliance by the most appropriate means, in the light of their enforcement policies, priorities and consistent with available resources. Their tools include education, advice and guidance, and reference to other means of regulation, including self-regulation, as well as civil or criminal enforcement¹⁰.
9. In line with the Hampton Principles,¹¹ enforcers will normally seek first to stop a violation through consultation with the trader. Instead of seeking a court order, they may accept an undertaking from the trader not to engage in the conduct constituting an infringement. When considering action under the CPRs, enforcers have regard to the principles of proportionality, accountability, consistency, transparency and targeting.¹²

¹⁰ See Guidance on the Consumer Protection from Unfair Trading Regulations 2008, OFT 2008 (“OFT Guidance”) http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf, originally published by the Office of Fair Trading and since adopted by the CMA. The CMA has recently published its own Consumer Protection: Guidance on the CMA’s approach to use of its consumer powers. Note also that Regulation 19(4) of the CPRs provides that in determining how to comply with its duty of enforcement every enforcement authority shall have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case.

¹¹ “Reducing administrative burdens: effective inspection and enforcement” by Philip Hampton, March 2005.

¹² OFT Guidance page 51.

6. Call for evidence

10. As anticipated in the terms of reference, we consider the following to be the main issues raised by this review. Anyone responding should feel free to raise other points, however, if they think they are relevant. In responding it would be particularly helpful if you could supply any underpinning evidence, examples, case studies or estimates to help illustrate your points.

Issue 1: The nature and scale of any problems associated with the current enforcement arrangements.

11. Some brand owners have suggested that there is an enforcement gap in that the current enforcers have not devoted sufficient resources to tackling copycat packaging (where the brand owners say, it infringes the prohibition in the CPRs and the average consumer takes, or is likely to take, a different decision as a result). Our understanding is that, notwithstanding the fact that there is an absence of consumer complaints, the enforcers have considered carefully the evidence presented by businesses. The enforcers do not consider that it establishes that copycat packaging causes significant consumer detriment or other adverse effects on the market. They do not therefore give priority to enforcement action over and above other more clearly detrimental practices.
12. We would be interested in any views and supporting evidence as to whether there is an enforcement gap and, if so, the extent of it.

Issue 2: What is the extent of any consumer detriment arising from copycat packaging?

13. Closely linked to the previous issue is that of consumer detriment, given the reliance the enforcers have placed upon it. We should be interested in views and evidence as to the extent to which consumers are suffering from copycat packaging. Last year the Intellectual Property Office (IPO) commissioned some independent research *The Impact of Lookalikes: similar packaging and fast moving consumer goods* from the Intellectual Property Institute. The report is available here <http://www.ipo.gov.uk/ipresearch-looklikes-310513.pdf>.
14. The IPO and the British Brands Group (BBG) have discussed such report. Their common understanding on its key finding is that there is a lookalike effect. In essence:
 - a) Consumers are more likely to make mistaken purchases if the packaging of products is similar and there is strong evidence that consumers in substantial numbers have made mistakes;

- b) Consumers' perceptions of the similarity of the packaging of goods are correlated with an increased perception of common origin and to a material degree. There is also an increased perception of quality;
 - c) The lookalike effect increases consumers' propensity to buy a product in similar packaging;
 - d) Better sales data might allow more reliable conclusions to be drawn on the impact of lookalikes on consumers and businesses, as current data has limitations;
 - e) There may be limits to the UK's ability to legislate beyond the provisions of the Unfair Commercial Practices Directive in areas within its scope; and
 - f) The evidence exploring whether German unfair competition law provides a more advantageous regime for tackling lookalikes is inconclusive.
15. We should be interested in views on the report, on the interpretation of it above, and any other evidence on the impact of copycat packaging.

Issue 3: The equivalent enforcement provisions existing in other Member States and how they have worked.

16. Copycat packaging is potentially subject to different legislation across Europe. In the UK there is the law of intellectual property (trade marks, designs and copyright), malicious falsehood, groundless threats, and the tort of passing off. Other EU Member States provide protection either through unfair competition law or through unfair commercial practice law. Some of these countries have specific provisions on copycat packaging. As noted above, Article 11 of the UCPD contemplates that "competitors" might have an enforcement role and some countries do allow businesses to take civil (injunctive) action against other businesses.
17. In 2011, Hogan Lovells carried out a study for the European Commission aimed at providing clarification on the legal framework and practices, in the 27 Member States of the EU, of protection against what it describes as "parasitic copying". A copy of the study is available at: http://ec.europa.eu/internal_market/ipenforcement/docs/parasitic/201201-study_en.pdf
18. We would be interested to learn more about how these systems work and what has been the response of consumers, businesses and retailers. It would be very useful to have specific examples of the litigation that has taken place in relation to copycat packaging and its outcome.
19. We note that the Irish legislation implementing the UCPD (the Consumer Protection Act 2007) gives businesses a right to apply for a court order to prohibit copycat marketing, but the right is a broad one in that it applies to alleged infringements of all of the UCPD's provisions and it extends not only to businesses. Since the Irish legal system is in some

ways similar to the UK's, we would be particularly interested to hear how this system has worked and if there are any particular issues in respect of copycat packaging in Ireland.

Issue 4: The costs and benefits of giving businesses the right to take civil (injunctive) enforcement action against copycat packaging, including any effects on competition and innovation.

20. Giving businesses enforcement powers might be expected to bring potential costs and benefits which it would be helpful to assess. Costs might include more enforcement before the courts and benefits might relate to addressing such consumer detriment as arises at present. We would be interested in any views on these issues.
21. Of particular interest are any effects the proposal might have on the operation of markets, especially in relation to competition. Brand reputation can lower search costs for consumers, by enabling them to draw on their experience and other information about a product. However, this mechanism only works if consumers can be confident they will purchase what they want to purchase. Equally, businesses will not invest in higher quality goods and services (and innovate) if they are not confident that consumers will correctly be able to distinguish them from lower quality ones. This potential market failure is addressed by the trade mark system. However, in theory at least, if consumers are being significantly misled by copycat packaging, the market might be failing to work.
22. On the other hand, and again in theory, brand reputation can create strong market power and make a market less contestable. By erecting barriers to entry and inducing market segmentation (by persuading consumers that similar products are different), branding may give rise to competition concerns.
23. There is a fine line between confusing packaging and using generic cues to provide useful signs to consumers¹³. We should be interested in any views or evidence which relates the issue of copycat packaging to competition and innovation.

Issue 5: How the power would work and what impact might there be on the way in which enforcement of the CPRs operates in the UK.

24. Giving businesses enforcement rights over consumer legislation would be novel in the UK and we would be interested in views on how it would work in practice. It could result in a very different enforcement model than currently exists in the UK. In particular, might it cut across public enforcement which, as described earlier, can be carefully calibrated to suit the

¹³ "The effect of Lookalikes: similar packaging ad fast moving consumer goods" page 5, by Philip Johnson, Johanna Gibson and Jonathan Freeman.

circumstances? Would it lead to a more litigious regime? Might it even give rise to mischief-making?

25. On the other hand, the test to be met before the courts would be the same as now and it would focus on whether consumers have been misled, and not on whether competitors had lost business. In addition, given the financial pressures that the public sector including public enforcers face, would there be real benefits in mobilising private sector resources in this area?

Issue 6: What legal changes might be needed to provide businesses with the right to take civil (injunctive) enforcement action against copycat packaging, including defining the practice covered by the private right of action in order to capture what is intended without providing too broad a power.

26. Giving businesses an enforcement right would not readily fit in with the system described above of designating enforcers on the basis of statutory criteria orientated around protecting the collective interests of consumers. In practice, it would likely require substantial modification to the current civil enforcement regime or the setting up of a new one, with significant amendment to Part 8 of the Enterprise Act 2002 (which is a general enforcement regime for consumer law, not one restricted to the CPRs). The Department will consider further whether any such change could be made under section 2 (2) of the European Communities Act 1972 (under which the CPRs were made) or whether reliance on some other powers or primary legislation would be required, but if respondents have any views we would be interested to see them.
27. The review is restricted to consider the case for providing businesses with a power to take civil injunctive action against copycat packaging and is not addressing other aspects of enforcement of the CPRs including a wider enforcement power for businesses. This implies that the practice can be readily identified among those prohibited by the CPRs. Again, the Department will be considering the legal issue further but would be interested in views including on whether a reference to Regulation 5(3)(a) would suffice for this purpose.

Issue 7: Whether there are any legal or policy issues to be resolved and the scope of any implementation task.

28. We have noted above some of the policy issues raised by this review and some of the legal advice we are seeking. We will consider when the review has progressed further what issues remain unresolved and what would be involved in implementing any proposals.

Issue 8: The nature and scale of any risks associated with both continuing the present arrangements and giving businesses a civil injunctive power.

29. We have alluded above to a number of important considerations, pointing in different directions, which will be hard to quantify or indeed judge, such as the risk of more litigation. We shall be seeking to firm up views on some of these matters as the review progresses but in the meantime we would be interested in views – particularly those supported by evidence – on what constitute the most important risks.

Issue 9: Other issues

30. We would be particularly interested if respondents consider there are any significant issues we have not so far identified.

Consumer and Competition Policy Directorate

Department for Business, Innovation and Skills

April 2014

Annex A: Terms of reference of the review

The CPRs prohibit traders from engaging in certain misleading actions including marketing a product in a way which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor, such that the average consumer takes, or is likely to take, a different decision as a result.

The CPRs provide for their enforcement to be through Part 8 of the Enterprise Act 2002 which sets out a framework for the enforcement of certain consumer legislation by specified enforcers. At the time of the implementation of the CPRs the decision was taken not to provide businesses with a power to take civil injunctive action against 'copycat packaging' (designing a product's packaging to give it the look and feel of a competing well-known brand).

The review will examine the issue afresh, taking into account evidence that has accrued since then.

Objectives and scope

The review will consider the case for granting businesses a civil injunctive power in relation to copycat packaging and this aspect of the CPRs. It will also consider how such a power might be implemented. It will not consider other aspects of enforcement of the CPRs including a wider enforcement power for businesses. The review will identify both the pros and the cons of granting businesses the power.

Key issues

The review will examine in particular:

- The nature and scale of any problems associated with the current enforcement arrangements;
- The extent of any consumer detriment arising from copycat packaging;
- What equivalent enforcement provisions there are in other Member States and, if possible, how they have worked;
- The costs and benefits of giving businesses the power, including any effects on competition and innovation;
- How the power would work and what impact there might be on the way that enforcement of the CPRs operates in the UK;
- What legal changes might be needed to provide businesses with the power, including how to define the practice covered by the power so as to capture what is intended without providing too broad a power;
- Whether there are any legal or policy issues to be resolved and the scope of any implementation task;
- The nature and scale of any risks associated with both continuing the present arrangements and giving businesses the power.

Timing

The review will begin in March 2014 and last no more than six months.

Project outputs

The review will produce:

- First, a call for evidence, as a way of informing interested parties and inviting their comments;
- An interim report for further discussion with interested parties;
- A final report addressing the key issues outlined above and assessing the pros and cons of the options;
- The evidence underpinning the report, including any academic studies and international comparisons.

Resources and Governance

The review will be run by Ana de Miguel with the assistance of economists and lawyers working for Consumer and Competition Policy (CCP) directorate and will also draw as necessary on the advice of relevant CCP policy staff. The Senior Reporting Officer will be Kirstin Green, Deputy Director, CCP.

Department for Business, Innovation and Skills

February 2014

Annex B: Q&A

Q. What is copycat packaging?

- A. Copycat packaging (also known as “lookalike” or “parasitic copying”) refers to the practice of designing the packaging of a product to give it the general “look and feel” of a competing well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting as normally it does not involve copying trade marks.

Q. What are the Consumer Protection Regulations (CPRs) 2008?

- A. Amongst other things, the CPRs prohibit traders from engaging in certain misleading actions. These actions include marketing a product in a way which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor, such that the consumer takes a different decision as a result. They also prohibit (in all circumstances) deliberately misleading the consumer into believing falsely that a product is made by another manufacturer.

The CPRs are enforced by specified enforcers through criminal prosecutions under the Regulations themselves as well as by civil sanctions under Part 8 of the Enterprise Act 2002.

Q. Why are you reviewing the CPRs?

- A. The Ministers for Business Innovation and Skills (BIS) have received strong representations from some industry sectors who believe that there is a gap in the UK legislation in relation to brand protection from copycat packaging. One of the proposals suggested that could solve this issue consists of extending the power to seek an injunctive court order from the public organisations referred above to businesses. Ministers have decided to explore this option in more detail and analyse the pros and cons of the options.

Q. What is the scope of this review?

- A. The CPRs include general provisions to prevent misleading actions in a wide range of trading sectors. This review will be limited to the enforcement provisions of the CPRs in relation to copycat packaging only. It will not extend to other areas of the CPRs.

Q. Why are you limiting the review to copycat packaging rather than looking at enforcement action more broadly?

- A. The Government is currently pursuing a comprehensive agenda on consumer protection. For example, we considered in detail and accepted the case for private actions in relation to misleading and aggressive practices. Copycat packaging is another area that has been brought to our attention and we are now considering it further. The Government has made no decision at this point on whether to undertake further work on other aspects of enforcement of the CPRs.

Q. I have already submitted evidence on this same topic in previous reviews. Why are you asking for evidence again? Can I submit the same evidence I sent last time?

A. This issue was considered at the time of the implementation of the CPRs in 2008. However, for the purpose of this review, the Government will look at this issue afresh and will consider evidence that has accrued since then. You are welcome to send to us the same response you may have produced before. It would however be particularly useful if you could update it with any pertinent information and evidence you may have gathered since then.

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