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

Respondent: Trading Standards Officer

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As a respondent to this call for evidence I am an Individual.

Yes, I would like you to publish or release my response.

**Summary**

In my view, there is no justifiable case for granting businesses a civil injunctive power in relation to copycat packaging, because

* there is no evidence base which sufficiently establishes that there are unfair business-to-consumer commercial practices;
* businesses can prosecute those responsible for copycat packaging under current CPRs enforcement arrangements – but fail to do so;
* a fundamental change of policy in the enforcement of consumer law would be needed to allow private bodies to take civil action to enforce the CPRs.

**Comments and submissions**

1. When the [Unfair Commercial Practices Directive](http://en.wikipedia.org/wiki/Unfair_Commercial_Practices_Directive) (UCPD) was implemented, the Government stated that 3 years after the CPRs came into force (i.e. May 2011) a formal review would be conducted.

In particular, the review would re-consider the decision, in relation to copycat packaging, not to allow businesses with a legitimate interest to take civil (injunctive) action to enforce the CPRs. The Government said - in its response to the December 2005 consultation on implementation of the [UCPD](http://en.wikipedia.org/wiki/UCPD) - that it did not propose to allow businesses to take enforcement action for breaches of the UCPD because it believed that the existing enforcement arrangements were adequate for dealing with cases that result in real consumer detriment.

Also – “in order to get a better understanding of the true impact of the UCPD on business” - the review was supposed to cover

* the UK’s policy of implementing UCPD, to establish the actual costs and benefits and the achievement of the desired effects; and
* the offences in the CPRs generally and, specifically, the inclusion of *mens rea* in the regulation 8 offence, to see if it has had any adverse effects on the enforcement of the UCPD.

Following this Call for Evidence, I presume a review of these matters will now take place.

2. The Call for Evidence is focused (solely) on the enforcement of the CPRs as an enforcement mechanism to potentially take action against copycat packaging.

The IPO-commissioned study -*The Impact of Lookalikes* - *Similar packaging and fast-moving consumer goods* – stated “It is probable that the prevention of certain lookalikes is within the scope of the (UCPD)...” and that “...certain lookalikes are already unlawful under the CPRs”.

Enforcement action is theoretically possible under the CPRs but the study underlines the fact that some copycat packaged products do not fall within the UCPD/CPRs. It is also possible to argue that the labelling of some copycat packaged products constitute trade mark infringement or passing off and, in extreme cases, are breaches of section 2 of the Fraud Act 2006.

3. The UCPD concerns unfair business-to-consumer commercial practices in the internal market.

Paragraph 11 of the Call for Evidence states: “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.”

So far as I am aware there have been no formal actions under the CPRs, against any copycat packaged products, taken by any enforcers, since the CPRs came into force.

In 2013 Which? (an Enterprise Act 2002 enforcer) reported that “a fifth of Which? members have bought an own-label product by mistake because it looked so much like a big brand” (the action taken by Which? appeared to be a press release).In any event, it is not clear from the Which? findings, whether those buying the product ‘by mistake’ could have been assumed to be consumers who were reasonably well informed, observant and circumspect, who take reasonable care of themselves, as opposed to those who were ignorant, careless or over-hasty - see *Office of Fair Trading v Purely Creative Ltd and others* [2011] EWHC 106. Consumers failing to take time to read copycat product labelling, as a whole, raises fact-sensitive issues which might also hamper effective enforcement – see, in a different context, *Lewin v Purity Soft Drinks Ltd* [2004] EWHC 3119 (Admin).

Some businesses may perceive that there is an unfair competition (a business-to-business issue) with copycat packaging (which they now, more emotively, refer to as parasitic packaging) but it is clear that this not an area where an evidence base establishes that there are unfair business-to-consumer commercial practices or where there is real consumer detriment sufficient to support CPRs enforcement action, under the current arrangements.

Since this is the case, there is no justification for providing commercial interests with statutorily-based powers.

4. Paragraph 4 of the Call for Evidence incorrectly states “A breach of the CPRs is enforceable through criminal prosecutions under (the CPRs) 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.” (It should say “Under the latter”).

Criminal prosecutions under the CPRs are not restricted to enforcers. Any person may institute a prosecution for an offence under the CPRs.

If an individual business – or a representative body – believes that a trader is engaged in an unfair commercial practice under the CPRs in connection with the production/marketing of copycat packaged products, then it is perfectly legitimate for that business or body to take action by alleging a criminal offence in the criminal courts. No change of the law is required for this – see, for example, *House of Cars v Derby Car and Van Contracts Limited* [2012].

So far as I am aware there have been no prosecutions under the CPRs, against any copycat packaged products, taken by businesses or other private bodies (or, as stated earlier, by local authorities or the OFT), since the CPRs came into force.

5. The current legislation enabling public bodies to be enforcers is the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003.

Paragraph 5 states “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 provision”

The criteria in the Order that an applicant must satisfy in order that the Secretary of State may grant it to be a designated enforcer, more fully, states (in part)

*(a) the applicant is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity and has established procedures to ensure that any potential conflicts of interest are properly dealt with;*

*(b) the applicant has demonstrated experience, competence and expertise in promoting or protecting the collective interests of consumers in respect of domestic infringements or Community infringements, including, where the applicant is a successor to any person or body which had such expertise, by reference to that person or body;*

*(c) the applicant has 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;...*

An individual business – or a representative body of businesses – could not satisfy the current criteria and there is no evidence to support a change in the criteria.