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Consultation Response

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

Which? welcomes the opportunity to submit written evidence to the BIS review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging.

1. Consumer research about impact of copycat packaging

Though we have not conducted detailed research on the issue of copycat packaging, Which? magazine and Which? Conversation have both recently featured the issue; in both cases we sought the views of Which? Members. Appended to this consultation response are:

Which? May 2013 investigation: 'Spot the difference'

Which? Conversation: one dated April 2013 and the other dated May 2014

<http://conversation.which.co.uk/consumer-rights/copycat-packaging-products-supermarket-saucy-fish-aldi/>

<http://conversation.which.co.uk/consumer-rights/copycat-packaging-supermarket-brands-copy-food-labels/>

In summary, we found that consumers were split in their view of the benefits and/or detriment of copycat packaging. 56% of respondents in the Which? Conversation poll (April 2013) thought there was nothing wrong with it. But, consistent with other research, in our May 2013 research, we found that just over one third of Which? Members incorrectly selected at least one of the four copycat products we were testing as the branded version. The tested products were: Boots Fruit Essence/Claire's Herbal Essences, Sarson's Malt Vinegar/Samson's Vinegar, Head & Shoulders/Boots Anti Dandruff Shampoo for Men and Jacob's Cream Crackers/Aldi Cream Crackers.

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We recommend that BIS reads the Which? Conversation comments to gauge the flavour of the views expressed by consumers, whilst noting the comments on Which? Conversation are subjective comment, not qualitative research.

In our market research, we also found that (among Which? members) 22% have unintentionally bought an own brand product because they mistook it for a branded one. Which? Members were split on the detriment suffered by this scenario. Of the 22% who had mistakenly bought a copycat packaged product 38% felt misled, 30% felt annoyed and 17% felt cheated. Looking at it the other way round, 16% were not bothered and 6% were positively surprised.

We found that 18% of Which? Members deliberately bought an own brand product that resembled a branded one. Their reasons for doing so were diverse: 60% because it was cheaper, 59% wanted to see if it was as good as the branded product and 32% because they thought it was as good as the branded product.

Probing further, we found that a significant minority of Which? Members (41%) thought it was easy to get an own brand version and a branded product mixed up with each other. But a similar proportion agreed that 'own brand versions of branded products were just as good as the branded product but are cheaper'.

In conclusion, our research does not show strong consumer demand for enforcement action against copycat packaging. In fact, there is as much evidence that consumers welcome own brand products, even when they look like branded ones.

2. Response to the Call for Evidence questions

The call for evidence asks a number of detailed questions; we do not have the necessary information to give detailed answers to all of them but instead we provide some general commentary below.

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

We acknowledge that there has not been significant enforcement action by public agencies against copycat packaging, given the difficulties in demonstrating consumer detriment at a level that justifies taking action. Our market research among Which? Members (summarised above) reinforces this point; consumers often state they like own brand products.

Despite the lack of enforcement action by public enforcement agencies, we note that businesses can and do take successful action against other businesses they claim to have copied their branding. The most recent example occurred while this consultation was underway when The Saucy Fish Company won an injunction against Aldi Supermarket regarding the packaging of their 'saucy salmon fillets'¹.

This shows that it is possible for brand owners to take successful legal action under existing mechanisms without the need to rely on the prohibition in the CPRs.

¹ <http://www.thegrocer.co.uk/fmcg/fresh/saucy-fish-co-set-to-square-up-to-aldi-over-copycat-line/357058.article> (May 2014)



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

Which? considers the extent of any consumer detriment very hard to prove. Please refer to the market research we have undertaken with Which? Members (summarised above). In most cases, individual financial detriment to the consumer is likely to be relatively small - usually no more than the price paid for the product (assuming that individual consumers mistakenly purchase a particular product only once). However, collective consumer detriment may be more significant; for example, there may be effects on the wider market that individual consumers are not aware of.

Consumer detriment may also be offset to some extent by potential consumer benefit arising from copycat packaging, such as savings made by purchasing cheaper copycat products mistakenly.

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

Which? has no information to offer on equivalent enforcement provisions in other EU Member States.

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.

Which? has done no quantitative research on the costs and benefits of giving businesses the right to take civil (injunctive) enforcement action. However, there are several issues that we believe the Government should carefully consider before any changes are made.

First, we acknowledge that the financial cost of taking civil enforcement action is likely to ultimately be paid by consumers in the form of higher prices. We thus recommend the Government keeps a careful eye on the impact of the proposed policy, if implemented, for the reasons outlined in the Call for Evidence.

Second, we believe that any enforcement action brought by private businesses should be predicated on proven consumer detriment (i.e. harm to the collective interests of consumers in the UK), as required for all enforcement actions that are currently brought under Part 8 of the Enterprise Act.

Under the existing regime, a regulator will independently assess the degree of consumer detriment caused by a particular practice and present evidence of that detriment to the court. However, the key driver for business-led enforcement action will be brand protection. As the Call for Evidence and our research shows, it is not clear that this commercial driver will always be aligned with consumer protection. As a result, businesses may have an incentive to bring enforcement action where there is no detriment - or possibly even a benefit - to consumers, if this is to their commercial advantage.

Thus we believe that any new right for businesses to take civil enforcement action should be couched with appropriate incentives to align the interests of claimant businesses with the interests of consumers. At the least, this should include robust requirements to prove actual consumer detriment in each case.



Finally, we note that there is a current trend in consumer protection law and policy to separate business-to-consumer laws from business-to-business laws. A number of the reforms introduced via the Consumer Rights Bill illustrate this trend. The Government may therefore want to ensure that allowing business-to-business litigation to be conducted under the CPRs via a civil enforcement action is not counter to the efforts of Government in other areas.

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.

Which? agrees it would be a novel use of consumer legislation to enable businesses to take action under the CPRs as this was not the primary reason for their introduction. It is obvious the CPRs are primarily in place to protect consumers, not businesses. We thus would be concerned if the proposed extension resulted in numerous actions between businesses which had little relevance to consumers and which should have or could have been brought in the courts via a more appropriate mechanism (as per The Saucy Fish Company example noted above). We would also be concerned if it led to a highly litigious regime as any costs will ultimately be borne by consumers.

If the Government does conclude that a right to take private enforcement action is warranted, we hope the Government will consider all possible mechanisms that might be used to implement that right to ensure that the CPRs are in fact the right vehicle for addressing any perceived gap.

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?

If the Government is inclined to allow businesses to take civil enforcement action, Which? considers it very important that this be strictly limited to copycat packaging.

It is possible to construe Regulation 5(3)(a) quite broadly; it could potentially cover many practices of which copycat packaging is merely one. Indeed, Regulation 5(3)(a) relates to *any* marketing that causes confusion with the products and trademarks etc of a competitor. Such marketing could be found on packaging, but might also be found on websites, in social media, in traditional forms of advertising, and so on.

We therefore think the Government should very clearly define the practice covered by any private right of action and should not adopt a wholesale reference to Regulation 5(3)(a) for this purpose. We think the Government should also make clear that any further extension of the right to bring a case under the CPRs would require a further consultation and evidence base at least equivalent to this consultation process.

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

Which? has no further comments to make.

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



Which? has no further comments to make.

Issue 9: Other issues

Which? has no further comments to make.