Response of the Competition and Markets Authority to the Department for Business, Innovation and Skills' Call for Evidence on the review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging

1. The Competition and Markets Authority (CMA) has, in responding to this Call for Evidence on copycat packaging, concentrated on those issues in relation to which it has particular expertise. Given the relative lack of clear evidence available in relation to many of the questions raised by the Call for Evidence[1], this response is based largely on our assessment of the likely potential benefits and risks of introducing the changes to the status quo that are under consideration.

2. We consider that the introduction of a new right for business to take enforcement action under the CPRs is undesirable, and unnecessary, given the rights of action already available to businesses under alternative UK domestic law. We take the view that in so far as it is necessary, desirable and appropriate for businesses to have legal recourse for the protection of their interests in relation to lookalike packaging issues, such recourse is currently available to them and is sufficiently effective. Furthermore, we consider that there is a strong risk of unintended (and/or unforeseen) consequences resulting if the possible changes which are subject of the BIS review were to be introduced. We believe, as we explain further below, that such consequences could potentially include:

    - adverse impacts on the development of the law, and on legal clarity in the field of lookalike packaging;
    - adverse impacts on markets, and on SMEs in particular, with bigger players seeking to use financial strength, coupled with the new rights, as a means of achieving disproportionate power in respect of their brands, so as to preserve market share and force competitors (particularly newcomers and smaller businesses) out;
    - risk of adverse impacts on business planning and innovation as a direct result of increased legal uncertainty; and
    - risk of an increase in frivolous or mischievous/obstructive claims, and a risk of parallel actions, imposing additional costs and burdens on business.

[1] Much of the available evidence is gathered together in the recent IPO report referred to in the Call for Evidence.

Issue 1: The nature and scale of any problems associated with the current enforcement arrangements; and
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; and
Issue 8: The nature and scale of any risks associated with both continuing the present arrangements and giving businesses a civil injunctive power

Adequacy of existing law

3. We see little evidence to suggest that the existing Intellectual Property (IP) law/trademarks/passing off protections available to business (which Trading Standards, as well as businesses, are already able to enforce where appropriate) are not adequate to deal with business interests where there is clear evidence that they are illegally harmed by breaches of those protections. In addition, we would urge caution when considering the introduction of any change to the existing regime because of the risks of unintended consequences (including the possibility of adverse impacts for competition).

4. We would strongly suggest that for a change to the status quo to be justified, it would require there to be both firm evidence of the harm that the change is intended to address, and a convincing explanation of why the current legal remedies that are already available to business are not adequate to address that harm. In the event that is shown to be the case, it would need to be clear why it would not be more appropriate to introduce change in respect of those provisions that currently provide remedies for business, rather than seeking to introduce piecemeal enforcement rights under the CPRs in respect of only a very specific set of practices. As we discuss below, we consider that whilst studies do show some evidence that there is a lookalike effect, they do not appear to us to establish strong evidence of harm to consumers either directly, or indirectly through adverse impacts on competition.

Risk of damage to coherency of consumer protection regime, and clarity of the law

5. Given the underlying consumer protection purpose of the CPRs, we would also query the justification and coherency of a regime that provides business with broader rights than have been given to consumers who, whilst they have now been provided with certain rights to enable them to obtain redress, have been given no specific right to enforce.

6. We would not expect it to be any easier to establish breach of the CPRs in relation to lookalike claims than it currently is to establish a breach of IP or passing off law in such situations. Where there are currently difficulties with establishing IP claims in respect of particular lookalike packaging practices,

we believe that very similar difficulties are equally likely to arise in any attempted CPRs actions. In particular, establishing a breach of the misleading actions prohibition under the CPRs would require the 'average consumer' test to be met. Schedule 1, practice 13 requires deliberate deception of consumers such as to lead them to wrongly believe that the product is made by a particular competing trader. The difficulties presented by these tests appear to us to be very similar to the difficulties that exist in respect of the establishment of claims under IP or passing off law.

7. In our view there is a fine line between packaging practices that – whilst they may seek to influence consumers' perceptions – do not go so far as to deliberately manipulate them in a manner which is unfair or harmful, and those which can be shown to be genuinely both unfair and harmful (where, in the latter case, we would expect IP and passing off law to apply). To the extent that there may be any difficulties in applying the existing IP and passing off case law to lookalikes, we believe that this results from the difficulty of establishing clear evidence of their impact on consumers. We are not convinced that actions brought under the CPRs would achieve any greater consistency or clarity in their outcomes, given the difficulties in assessing what the likely impact of specific packaging practices would be on the average consumer.

8. Enabling private business to take enforcement actions under the CPRs specifically in relation to lookalike issues, appears to us to carry with it a real risk of confusion in the interpretation of the law as a result of 'cross-contamination' between a principles-based CPRs regime which is only newly being developed and understood, and which is based in European law, and other domestic UK law that has been established through a different route, (much of it through the development of case law). The difficulties which we anticipate would occur in applying the universal concepts and principles of the CPRs in this very specific area could adversely impact the interpretation of those concepts and principles across the wider range of CPRs breaches, and hinder the achievement of clarity in relation to the CPRs. Difficulties in applying the CPRs could potentially, in turn, feed back into, and undermine, any legal certainty and consensus that has currently been reached in IP and passing off law.

9. The underlying consumer protection purpose of the Unfair Commercial Practices Directive (UCPD), and of the CPRs through which the Directive is implemented in the UK, is clear. That purpose is, we believe, safeguarded by the fact that enforcement powers are explicitly vested only in public authorities acting wholly and exclusively, and together, in the collective interests of consumers. This gives the UK consumer protection regime a particular strength and integrity, which should not be compromised. We consider that

allowing businesses a narrow and limited right to enforce in respect of only one very specific type of commercial practice, where the primary motivation of businesses making such claims would be the protection of their own individual commercial interests, has the potential to damage the integrity of the regime.

Other considerations

10. The creation of a new right for businesses to enforce claims under the CPRs in respect of lookalikes, in parallel with their already existing rights under IP and passing off laws, could result in increased court time being taken up with such issues. There would be a risk that arguments already made under IP/passing off law, which reached conclusions with which the claimants were not satisfied, could be revisited under the CPRs before reaching the same result through the prism of the average consumer test. Any consequential increase in the court time taken up with attempts to resolve lookalike issues, would dilute the limited time available for the courts to decide more pressing matters. Any risk of additional, and/or parallel cases, may also serve to increase legal uncertainty with consequential adverse impacts on the ability of businesses in the affected market to plan ahead. Furthermore the costs to business of any growth in litigation, or other business planning risks, could ultimately be passed onto consumers in the form of higher product prices.

11. There is a risk that the development of law and policy in relation to the CPRs could be distorted due to an imbalance in the ability to take cases between larger businesses, who are able to commit significant resources in support of claims they decide (or threaten) to litigate, and smaller businesses who are unable to commit similar resources to either defend such claims or take cases themselves. New enforcement rights in this area may therefore unbalance the selection of cases being taken overall and any increase in resourcing of enforcement cases would be restricted to too small a range of cases to be of real benefit to the general consumer interest.

Issue 2: The extent of any consumer detriment arising from copycat packaging; and 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

12. In general terms we do not consider, currently, that there is consumer detriment (as defined in the discussion that follows) arising directly out of copycat packaging practices.

13. In any consideration of the possible existence, or extent, of consumer detriment, it is important first of all to establish what we mean by this term. It may be helpful here to refer to the common definition of consumer detriment

agreed by the Consumer Protection Partnership[2] and published in its 2012-2013 priorities report[3]. That definition is "the harm (loss of welfare) caused to individuals as a result of a problem with a commercial practice or the behaviour of a business or trader". Within this, there is a wide range of possible causes - including problems with traders, consumers' inability to exercise choice (for example because of the complexity of products and services), and failure of markets. Trader, and market, practices can have both direct and indirect effects for consumer welfare. They may have an immediate impact (for example financial loss, wasted time and effort in remedying a problem and psychological effects), and longer term impacts (for example consumers' ability to maintain a standard of living or pay for essentials, loss of confidence in purchasing goods/services in particular markets or exclusion from markets, or negative impact on health and well-being). The assessment of harm is complex, and must take into account not only the empirical evidence that is available in respect of the practices under consideration, but also what is known about the nature and economic behaviour of the markets in which those practices are found, and of markets more generally. It is important to recognize that whilst certain practices may have short-term negative impacts on individual consumers, they may at the same time be accompanied by longer term positive, and countervailing, impacts for consumers more generally. The key question for us here, therefore, is whether or not there is an overall loss of consumer welfare arising out of the incidence of copycat packaging practices.

14. We have not seen evidence of an overall loss of consumer welfare. If there were potential harm to consumers, it could be mitigated by the effects of consumer learning. We recognise that consumers can, and do, sometimes make mistakes but that alone does not necessarily signal either unfair practices or detriment arising out of them. None of the research we have seen has been conclusive in establishing significant harm to consumers, or an overall loss in consumer welfare.

15. We also remain unconvinced that there is harm to competition (or a loss of consumer welfare indirectly caused by such harm) arising out of lookalike packaging practices. In fact the practice of developing lookalikes that do not infringe IP law could be seen as pro-competitive, if it leads to consumers

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[2] The Consumer Protection Partnership (CPP) was formed in April 2012 as part of the Government's institutional reform of the consumer landscape. The CPP includes the National Trading Standards Board, Trading Standards Scotland, the Department for Enterprise, Trade and Investment Northern Ireland, the Office of Fair Trading (and subsequently the Competition and Markets Authority), Consumer Futures, the Financial Conduct Authority, the Trading Standards Institute, Consumer Council for Northern Ireland, and the Citizens Advice Service.
The CPP's primary purpose is to bring together the key partners within the new consumer landscape to identify and prioritise areas where there is greatest harm caused to consumers, agreeing and coordinating collective action to tackle such detriment, and using all available tools at the disposal of each member.

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252730/bis-13-1267-consumer-protection-partnership-future-priorities.pdf

having more choices between products at competitive prices and does not hinder innovation overall. If the ability to develop lookalikes does potentially lead to consumers having greater choice, it follows that limitations on the ability of competitors to produce lookalikes might also lead to reductions in consumer choice.

16. We believe that competing traders' use of similar packaging can perform a useful signalling function for consumers which helps to promote consumer awareness of choice. Learning effects can (where brands offer a genuinely superior product) enhance brand value by encouraging consumers to take corrective actions for subsequent purchases, as well as weaken it where a branded product relies very heavily on customer perceptions that are not borne out by the underlying quality of the product. There is a risk that concentrating too much on problems in relation to the legality or otherwise of certain lookalike packaging practices can take the focus away from competition based on quality and/or price.

17. The recent IPO[4] report seems to take the view that retailer bargaining power, which gives retailers the leverage to introduce copycat products, is strong (see section 3.2 of the report). However, the recent experience of the UK competition authorities indicates that retailer bargaining power may not always be able to impose a competitive constraint on some highly concentrated manufacturing and supply sectors.[5]

18. The IPO report, in addition, notes concerns about retailers' copycat products replacing new branded products (see section 3.3). However, the CMA takes the view that what matters is not the identity of innovators (i.e. whether new products come from retailers or brand owners) but the aggregate amount of innovation in a market or sector, because this is what contributes to economic growth. There appears to be little evidence that lookalike packaging practices lead to any reduction in the aggregate number of new products (a driver of growth) being lower.

19. The Call for Evidence asks for views on the relationship between market power and innovation. This is complex. A business with market power might not want to innovate for fear of displacing the profit it makes on its existing sales, or it might want to for fear that if it does not innovate then a rival will. The best empirical evidence suggests that on balance, *at higher levels of market power*, market power retards innovation (so the first effect dominates

[4] http://www.ipo.gov.uk/ipresearch-looklikes-310513.pdf
[5] See here for a 2011 article in the Economist highlighting this trend http://www.economist.com/node/21528313

the second)[6]. To the extent therefore that branding increases market power, it may inhibit innovation, everything else being equal.

20. We would expect the costs of enforcement before the courts to be high because demonstrating that the average consumer is likely to be misled specifically by lookalike packaging will probably be difficult. Given the likely complexity, costs of defending cases might also be expected to be high. Benefits derived from introducing a new enforcement right are in our view likely to be limited, given than we've seen no convincing evidence of loss of consumer welfare.

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

21. We have no information to add to that which is summarised in the recent IPO report. We would note, however, that the presence in the UCPD of a provision enabling Member States to provide for enforcement by competitors should not necessarily be seen as indicative of a consistent European position on the desirability of consumer protection measures being enforced by private interests (or of it being desirable, in particular, in relation to lookalike packaging issues). The provision, as drafted, is merely an enabling one, with each individual Member State being left to decide the appropriateness or otherwise of granting private enforcement rights to business competitors.

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?

22. In view of the fact that we believe it to be both unnecessary, and undesirable, to provide business with such a right, we do not suggest mechanisms by which this might be accomplished. However, we would comment that the Part 8 injunctive mechanism is based on and triggered by harm to the collective interests *of consumers*. It would be very difficult, and cumbersome, to adapt Part 8 for use in establishing private business enforcement rights. In our view a whole new mechanism would therefore need to be established solely for this purpose. We would anticipate that there might be technical legal issues around the creation of mandatory enforcement orders. Also, as suggested by the question, there are likely to be inherent risks around the need to isolate and define a very particular and specific kind of practice for the purpose of attaching a private right of action to that type of practice alone. These could

[6] See Aghion P., Bloom N., Blundell R., Griffith R. and P. Howitt, Competition and Innovation: An Inverted-U Relationship, The Quarterly Journal of Economics, MIT Press, vol. 120(2), pages 701-728, May 2005

be very difficult to resolve. The potential risks would seem to lie not only in the possibility of providing too broad a power, but also in introducing overly prescriptive definitions into a principles based regulation, with the possibility that this would result in a provision that goes beyond that intended by the UCPD.