

Ana de Miguel  
Consumer and Competition Policy  
Department for Business, Innovation and Skills  
1 Victoria Street  
LONDON  
SW1H 0ET

19 May 2014

Dear Ms de Miguel,

**CALL FOR EVIDENCE: REVIEW OF THE ENFORCEMENT PROVISIONS OF THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008 IN RESPECT OF COPYCAT PACKAGING**

We write in relation to the above.

Unilever UK Limited markets a wide range of branded consumer goods across the UK, including personal care, home care and foods products. The products are sold under a number of distinctive brands including Flora, Stork, PG Tips, Magnum, Persil, Comfort, Surf, Cif, Dove, Vaseline, Simple, Sure, Lynx and TRESemmé. Our interest in the area of copycat packaging is one of a brand owner.

The majority of the products we sell are sold to consumers via multiple grocery retailers. In short, we would support a proposal to introduce a right for brand owners such as Unilever to seek direct redress for copycatting under the CPRs.

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

As regards an "enforcement gap", we are not aware of any enforcement action being taken by the current enforcers against copycat packaging under the CPRs. We have not seen any enforcement action in relation to Unilever UK's products, nor have we been the subject of any enforcement action in relation to competitor products. We can only speculate as to why we have not seen any action, but suspect that the following factors may be relevant:

- a. enforcement resource;
- b. competing enforcement priorities;
- c. the relative difficulty of proving a breach of the CPRs in relation to copycat packaging (compared to other aspects of the CPRs);
- d. A lack of evidence available to enforcers of significant consumer detriment or other adverse effects on the market.



Despite (d) above, we believe that there is a significant risk of consumer detriment, and, over the longer term, a likely reduction in the ability and willingness of brand owners to innovate in the market, leading to commoditisation of the market and a reduction in consumer choice. Given those beliefs, we would regard the lack of apparent enforcement action as an “enforcement gap” in the sense you intimate.

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

We believe that consumer detriment arises in different ways:-

- a. Firstly, we believe that there is currently a level of consumer confusion leading to consumers buying a product they did not intend to buy. This is supported by the IPO report to which you refer, and also by earlier research conducted by the British Brands Group (BBG) in 2009, and, more recently, by an article in “Which?” from May 2013 (attached as Appendix 1). On the confusion point alone, these reports all suggest a potential for significant consumer detriment;
- b. The propensity of copycat packaging to lead to consumer confusion (and hence a higher risk of their purchasing a product they did not intend to) will be heightened for fast-moving consumer goods, as was recognised by the European Court of Justice in the L’Espagnola case (Aceites del Sur v Koipe-Carbonell v. La Espanola, 3 September 2009);
- c. We suspect that incidents of consumer confusion are underreported to enforcers and brand owners, particularly where the goods are of relatively low value, and where the copycatter is also the retailer of the product. Many complaints will be dealt with by the retailer at a store level, without coming to the attention of either brand owners or enforcers;
- d. The IPO and BBG reports both suggest that similar packaging reinforces a consumer perception of common origin. In Unilever’s case, any such perception amounts to a misapprehension on the part of the consumer, as we do not make own-label goods for our retail customers, and so anything which acts to increase the perception of common origin could be seen as a misrepresentation to consumers;
- e. The packaging designs of brand owners such as Unilever are the result of significant research and development investment, with the innovation risk being borne by the brand owner. Permitting copycat manufacturers to ride upon the success of a brand owner’s product once in the market, with no corresponding research investment or innovation risk for the copycatter, will act as a long term disincentive to innovation and ultimately to consumer choice in a more commoditised market. This effect can be magnified where the copycatter is also the retailer, as it can control the retail prices of both the copycat product and the brand owner’s product to the artificial advantage of the copycat product.
- f. Unilever branded goods based on patented formulation technology represent huge R&D spend. The copycat infers *all* this without providing such technology and the consequential consumer benefits (and so escaping patent infringement). In the long term, the copycat is eroding R&D investment in new technology for consumer goods.

In recent times, the UK grocery market has seen substantial change, an important element of which is the growth in market share of the hard discounter sector, where retailers have been gaining market share from the larger multiple grocery chains. At the same time, we have seen an increase in the amount of, and similarity in, copycat designs. Certain of the discount retailers appear to be trading (in an apparently systematic manner) upon the similarity of designs and the propensity of consumers to buy a product in similar packaging (see Appendix 2, by way of recent example), in a



manner which carefully avoids outright infringement of the brand owner's registered trade mark, copyright and design rights, but which nonetheless calls the brand owner's products (and their attributes) to mind.

**Issue 3: The equivalent enforcement provisions existing in other member states and how they have worked**

The picture in other Member states is mixed from the brand owner's perspective. In some Member states, existing rights under private law to bring actions for unfair competition against copycat packaging appear to be an effective means of redress and to provide a degree of deterrence, whether or not brand owners have civil enforcement powers under national legislation implementing the Unfair Commercial Practices Directive.

**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**

We believe that the inclusion of a right for a brand owner to take civil enforcement action against a copycatter under the CPRs would protect consumers' interests and avoid the consumer detriment referred to above in a more effective way than is the case under current enforcement practices.

Whilst we accept that the damage/detriment to a brand owner is not the mischief at which the CPR regime is aimed, we believe that a brand owner with the power to seek civil enforcement action will be more likely to use such powers than current enforcers, as it will have a collateral interest in protecting the investment in its brands, as well as seeking to protect the interests of the end users of its products. The requirement to demonstrate a likelihood of consumer detriment in any civil enforcement proceedings should act as a brake on any malicious or vexatious litigation between competitors motivated by interests other than the prevention of consumer detriment.

**Confidentiality and Data Protection**

We would be happy to discuss any of these aspects further with you, and would not object to your publishing or releasing this response.

Yours sincerely

On behalf of Unilever UK Ltd  
Ms. Reineta Maas  
Legal counsel

**Attachments:**

Appendix 1: Which? Report May 2013

Appendix 2: Discounter advertising campaign