

Sainsbury's response to the Department for Business, Innovation and Skills review of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging

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About Sainsbury's

Sainsbury's was founded in 1869 as a dairy shop, with the promise of higher quality milk and butter, at affordable prices.

The Sainsbury's family built a business which has grown to become one of the UK's largest retailers. Today we operate over 1,200 stores, around 600 of which are smaller format convenience stores. We employ 161,000 colleagues and have over 2,000 direct suppliers.

Serving over 23 million customers a week, we now have a market share of almost 17 per cent. Our large stores offer around 30,000 products (around half of which are Own Brand) and we offer complementary non-food products and services in many of our stores.

We aim to help our customers *Live Well for Less* – in many ways echoing our original 1869 promise of 'Quality Perfect, Prices Lower' and to be an asset to the community.

Our values are critical to achieving this. In recent years we've transformed our business, and our five values have been integral to our success, drawing from our 145 year heritage. They are:

1. Best for food and health
2. Sourcing with integrity
3. Respect for our environment
4. Making a positive difference to our community
5. A great place to work.

These values are part of what makes us different from other supermarkets, so we see this as a strength, as well as a responsibility. Our customers trust us to do the right thing, and expect us to maintain high social, ethical and environmental standards.

Overview

Sainsbury's welcomes the opportunity to respond to the Department for Business, Innovation and Skills (BIS) review of the Consumer Protection Unfair Trading Regulations 2008 (CPR) in respect of copycat packaging.

We have always recognised the value of associating products with Sainsbury's, long before some of the best known manufacturer brands existed in the UK. John James Sainsbury's made his first excursion into production in the 1880s when he built two bacon-smoking stoves and described the bacon he smoked as 'Sainsbury's Brand'. We launched our Red Label Tea in 1903 - it is our biggest selling Own Brand tea line and all our own-label teas are now Fairtrade, including our speciality teas.

Our Own Brand philosophy has always been to provide value, quality and innovation and also to broaden choice for our customers.

Sainsbury's is now recognised as a major brand. Around half of the products in our large stores are Own Brand products. These are available only through Sainsbury's stores and online channels and **all our products and stores are strongly branded so as to avoid**

any confusion for our customers. We also clearly inform the customer through the packaging as to the nature and origin of our products.

Every product bearing our name has to provide value for money equal to or better than branded equivalents to our customers. Our products also provide healthy competition to help keep the domination of one or two very large brands in check. For example, we believe our Own Brand whisky (the first of which launched in 1967) is on a par with many well-known manufacturers when it comes to quality and perception. These products have the same positioning in the market place as branded products – offering choice and reassurance to customers.

Our strategy is for buyers and technical colleagues to work closely with suppliers to create our Own Brand products and to develop new products for Sainsbury's to our own specifications and high quality standards.

Where we consider that a pack design causes customer confusion then we will review and adapt as necessary the design of that product. Our own experience and access to customer feedback tells us that consumers are not confused by our packaging. We take seriously any concerns expressed by brands and will take action where it is appropriate.

We believe that the industry self-regulates and that **the existing statutory framework for copyright, trademark, design rights and the common law of passing off already provide ample protection** for all brands and innovative products.

Response to each issue:

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

- Our own experience and access to customer feedback tells us that consumers are not confused by our packaging. We serve 23 million customers a week and have had no contact from them on the issue of copycat packaging over the last year.
- We reject the suggestion that there is an enforcement gap in relation to copycat packaging. As the call for evidence itself suggests, and particularly in the current climate of austerity, enforcers will be careful to ensure that resource is used in a way that reflects where true consumer detriment arises. The absence of enforcement is a clear indicator that consumer detriment is either entirely absent or is adequately dealt with using the existing civil mechanisms.

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

- We offer branded and Own Brand lines across most product categories, providing a wide range and choice for the customer. All our Own Brand products are signposted properly, recognising the quality, integrity and reputation of them.
- We would reject the notion that packaging denotes the quality of the product. It is the brand that does. Recent incidents, such as the horsemeat scandal, have reinforced the importance of reputation and customer trust. We were not implicated by the horsemeat scandal as we have one of the most extensive quality control programmes in the industry. Brands such as Findus were affected.

- It is common practice for manufacturers and retailers to use a similar 'language' in terms of pack design, showing customers instantly what the pack contains. Certain pack colours and shapes have become standard and category cues are often followed (e.g. blue for non-Bio washing powder and green for biological; red tops for skimmed milk and green tops for semi-skimmed) so as to aid the customer in identifying the characteristics or flavor of that product.
- 3. *The equivalent enforcement provisions existing in other Member States and how they have worked***
- We do not operate outside the UK.
- 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 would refer you to the BRC's response to this consultation question; we also do not believe that this will really benefit the collective interests of consumers. We are concerned that as a tool, it is likely only to be used by the biggest brands due to the costs and challenges that would be entailed and would be too draconian in empowering those major brands.
 - There continues to be examples to suggest that the law of 'passing off' is still successfully used. Lord Halsbury's famous words in *Reddaway v Banham* are still applied through high profile cases like *Penguin v Puffin* to the recent High Court injunction won by the Saucy Fish Company v. Aldi earlier this month. These would suggest that the current system is still working and that the law of 'passing off' continues to be effective and provides ample protection for brands and products.
- 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***
- We agree with the BRC response that the CPRs should be enforced, where appropriate, by the body responsible for consumer enforcement in the UK, namely Trading Standards whose approach is risk based and proportionate where they see consumer detriment. We believe that an extension of enforcement powers to Big Brands is not in the interests of effective competition and will result in self interested litigation at the expense of consumer choice and price.
 - Further, threatened litigation by big brands with huge warchests will often intimidate smaller brands on an unequal footing. This would only serve to perpetuate the dominance of big international brands and stifle innovation
 - It could also result in the demise of investment and resource in the appropriate bodies responsible for consumer enforcement, such as Trading Standards. They play a vital role in helping to identify counterfeit, sometimes illegal, imports that are not fit for the domestic market (e.g. counterfeit perfumes or handbags sold illegally at a local market). This type of enforcement has smaller financial reward and therefore might not be prioritised by private companies despite the significantly greater risk and detriment to consumers.
- 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?

- We believe that the right to take civil (injunctive) enforcement against retailers and small manufacturers already exists through existing legislation and the common law tort of passing off and that this works well. If civil enforcement of CPRs is extended to Big Brands it may be necessary to review domestic competition policy to ensure that large manufacturers are not allowed to abuse a dominant position.

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

- We agree with the BRC's response that the best place for consumer enforcement lies with the public enforcer. Unlike Big Brands who will take action when they perceive their dominance and profits are threatened, or a financial reward exists, the public enforcer will act when it is properly justified after considering the wider consumer detriment.
- We believe in a balanced market approach where the consumer has the choice to purchase the Big Brand or a comparable, high quality product at a lower price. We believe that all of our customers should have access to great products at affordable prices.

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

- As stated in the BRC response, we would be concerned as to the risk that public enforcers will be railroaded into taking action that they could not otherwise justify through the threat of businesses resorting to injunctions amid criticism that they were only doing so due to the failure of the public enforcers to take action themselves.
- We believe that enforcers would be minded not to take enforcement over counterfeiting, which could lead to consumer detriment particularly where product safety is concerned.

Conclusion

For 145 years, our Own Brand products have provided value, quality, innovation and choice for our customers. We believe that the industry self-regulates and that **the existing statutory framework for copyright, trademark, design rights and the common law of passing off already provide ample protection** for all brands and innovative products. Any attempt to change the current status would be contrary to the Government's commitment to reducing red tape and may increase the burden of regulation on business.

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