



# Briefing

Unfair Commercial Practices (UCP) Directive

**The UCP Directive provides a window of opportunity to protect UK consumers from being misled by copycat packaging and to spur producers to greater competition based on distinctiveness. This opportunity however depends on proper enforcement.**

## WHAT IS THE UCP DIRECTIVE?

Copycat packaging mimics the distinctive features of familiar branded goods and is used to mislead shoppers into believing that a product has the same qualities, reputation or source as the brand when it does not. The UCP Directive is consumer protection legislation and imposes a duty on businesses not to trade unfairly. Included are provisions against misleading consumers, provisions that effectively outlaw copycat packaging. The Government is now considering how best to implement and enforce this Directive in the UK.



An example of a familiar brand and its copycat (2006)

## WHY IT MATTERS TO UK CONSUMERS

Copycat packaging exploits both shoppers and the branded products they plagiarise.

Shoppers are duped into buying something they believe to be linked with the brand when it is not. In other instances, shoppers simply buy the wrong product, being confused by the similar pack design (see Notes below). The reputation of the brand, built up over years of investment in innovation and product performance, is effectively hijacked. Sales are lost to the brand and its costs are increased, stifling the potential for further investment in innovation.

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## INEFFECTIVE LEGAL REMEDIES IN THE UK

Designers of copycats avoid infringing intellectual property (IP) rights. The law against passing off is also ineffective as the copycat tends to carry a different name to the original, making it hard to show there has been misrepresentation. The recent Gowers Review of IP concluded that passing off does not go far enough to protect brands against misappropriation.

The UCP Directive represents a potential remedy. Copycat packaging is addressed by Article 6 (“Misleading actions”) and Clause 13 of the Annex which lists it amongst those practices that in all circumstances are to be considered unfair.

The effectiveness of the UCP Directive however depends on enforcement. Currently the DTI plans to restrict enforcement to organisations such as Trading Standards and the Office of Fair Trading. These organisations have wide responsibilities, limited resources and the strict need to prioritise cases according to the public interest. TSI and OFT have admitted that it is highly unlikely that copycats will be a priority for either organisation, leaving the Directive’s provisions in this area to all intents and purposes un-enforced.

## THE SOLUTION

Companies whose consumers are misled by copycats should be granted the right of civil action under the Directive against misleading packaging. The Directive permits such a right<sup>1</sup>.

## THE CASE FOR EFFECTIVE ENFORCEMENT BY COMPANIES

- **More shoppers** able to make informed decisions at **less cost** to the taxpayer;
- The UK is under **treaty obligations**<sup>2</sup> to give nationals effective protection against acts of unfair competition. The UK is currently not meeting this obligation in relation to copycats;
- The Directive requires member states to ensure “*adequate and effective means exist to combat unfair commercial practices*” (cf. Article 11). The UK would **not be complying** if enforcement against copycats is limited to authorities without the resources to enforce;
- **Other member states** such as Ireland are giving both companies and national authorities the right to take legal action, demonstrating that this can be done. Different enforcement regimes in different countries will result in **lack of harmonisation** in Europe;
- Companies are best placed to **identify** when packaging designs are sufficiently close to result in consumers being misled;
- The Gowers Review of IP recommended that the UCP Directive be given a chance to work before further measures are considered to remedy copycat packaging. The Directive will have **no chance to work** unless it is enforced.

## NOTES

1. **Shopper reactions – deception over the nature of the product:** Consumers’ Association<sup>3</sup> research found that, of four copycats tested, between 42% and 52% of consumers thought the copycat was “probably or definitely” made by the brand manufacturer when it was not.
2. **Shopper reactions – mistaken purchase:** The Consumers’ Association found that 6% of consumers (1.4 million households) had purchased a copycat in error. Other research has put this figure much higher at 17%.
3. Civil action by companies is only being sought in relation to misleading packaging.
4. Products found to be in misleading packaging would be free to return to the market in distinctive packaging, thereby preserving consumer choice and competition.

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<sup>1</sup> Article 11: “persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may ... take legal action against such unfair commercial practices”

<sup>2</sup> Article 10bis of the Paris Convention and TRIPS

<sup>3</sup> “Confusion in the supermarket?” RSL, 1998