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## **Copycat packaging and the Unfair Commercial Practices Directive**

The purpose of this presentation is to consider the extent to which the UCP will impact upon copycat packaging in the UK.

We are all familiar with the practice of lookalikes and copycat packaging and thus the practice requires no explanation. It is worth, however, a brief reminder of how it works because that informs the debate as to whether it is a “misleading practice” within the meaning of the UCP.

Research over the years has consistently shown that copycat packaging induces consumers to buy products:

- In the belief that it actually is the imitated branded product;
- In the belief that it is made by the brand manufacturer;
- In the belief that it is the same/has the same characteristics of the branded product.

The first two classes are usually characterised as cases of “trade origin” confusion. The last is one of false claims to product equivalence.

Against this background we look at the UCP. The purpose of the UCP, which is set out in both Recital 1 and Article 1 of the Directive is “...to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests” (emphasis added).

The commercial practices it covers are business to consumer commercial practices which is defined as “... means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader directly connected with the promotion, sale or supply of a product to consumers” (emphasis added). Packaging is widely regarded as one of the most powerful marketing or

communication tools. It is the final communication between manufacturer and consumer and takes place at the point of sale.

A practice will be unfair if it materially distorts the economic behaviour of consumers. This is defined to mean “using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise”.

The general approach of the UCP is to prohibit unfair commercial practices which it categorises into misleading commercial practices and aggressive commercial practices. This presentation does not address the latter category.

Misleading commercial practices are further subdivided into misleading acts and misleading omissions. Generally speaking, misleading omissions will have little relevance to the lookalike debate.

Lookalikes would seem to be covered by both general and specific prohibitions set out in Article 6 - “a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision he would not have taken otherwise:

- (a) The existence or nature of the product
- (b) The main characteristics of the product such as ... composition ... fitness for purpose ... commercial origin ...”.

Query if false claims as to product equivalence will be perceived as “main characteristics”, but trade origin confusion cases appear to be covered by this general prohibition.

Article 6.2 has a specific prohibition of direct relevance to lookalikes - “a commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average

consumer to take a transactional decision that he would not have taken otherwise, and it involves:

- (a) Any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor

The Directive goes further in listing in an annex commercial practices which shall in all circumstances be regarded as unfair. This annex includes “promoting a product similar to a product made by a particular manufacturer in such manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not”.

So, at first sight, the UCP would appear to be a very positive development from a brand owner viewpoint. However, it is far from clear the extent to which the Directive will give brand owners a practical remedy against lookalikes. The Recitals to the Directive give mixed messages. On the one hand Recital 8 states – “This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields co-ordinated by it”. This seems supportive of a brand owner’s legitimate interest in restraining lookalikes. On the other hand, Recital 14 states – “It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading”. This would suggest a relatively high hurdle for cases involving lookalikes causing trade origin confusion and cases involving false claims to product equivalence may be difficult to vindicate.

There are other concerns for brand owners when it comes to the question of practical enforcement. The burden of proof in such cases will be a matter for national Member State law, and one has to wonder, at least as regards the UK, how much the Directive will add to the current law of passing off, a law which requires the lookalike similarity to be so great as to misrepresent the trade origin of the product to the consumer. The practical difficulties of proving a passing off case, and hence the limitations of the

law, are well known. In most cases, which typically involve fairly low price FMCG goods, there are insuperable difficulties of identifying and obtaining evidence from consumers who have made mistaken choices as a result of lookalike packaging. Consumer complaints are rare with people putting low value mistakes down to experience, or being reluctant to admit their error. The problem is compounded in the UK by virtue of retail concentration. In cases involving retailer own label lookalikes, it is almost impossible to interview relevant consumers.

There is a danger that the Directive will fail in its objective to attain a high degree of harmonisation/approximation of Member State laws if the Directive adds little or nothing to the various domestic laws of unfair competition or passing off. Each State may adopt its own standards and approaches to questions such as proof of trade origin confusion. The disparities in national rules which Recital 4 of the Directive identifies as creating barriers within the internal market may remain.

The other practical enforcement issue which may give cause for concern relates to legal standing to enforce, specifically the rights of brand owners to take action under the Directive.

The Directive appears to envisage direct legal action by competitors. Recital 21 to the Directive states - "Persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings" and Article 11 in similar vein states - "Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combatting, including competitors, may:

- (a) Take legal action against such unfair commercial practices and/or
- (b) Bring such unfair commercial practices before an administrative authority competent either to decide complaints or to initiate legal proceedings".

It is difficult to see how competitors damaged by a confusingly similar lookalike would not have a legitimate interest in enforcement. However, it is unclear whether each Member State, including the UK, will take that view in implementing the

Directive. In the UK, the DTI has queried whether merely allowing consumer complaints to an appropriate administrative authority would adequately implement Article 11.1.

Were that view to prevail, the practical value of the Directive could be significantly undermined. We can see this in practice in the UK when considering the role of the Trading Standards Departments in enforcement of the Trade Descriptions Act and similar pieces of consumer protection legislation. Just as in passing off cases there is the perennial problem of consumer apathy. Persons who do not complain to the manufacturers of lookalikes are even less likely to complain to administrative bodies. There is also the question of resource. The financial and human resource of enforcement bodies such as Trading Standards means that they have to concentrate on clear cut cases and often have to prioritise cases raising health and safety issues to the detriment of other enforcement activity.

Cases involving misrepresentation and consumer confusion are rarely clear cut. Cases under the current UK law of passing off are notoriously expensive. Cases fought to trial in the UK frequently cost in excess of £500,000. If the principal means of enforcement were by way of administrative tribunal acting on consumer complaint the system would be unlikely to work, certainly not without a massive injection of resource. By contrast, if the obligations imposed by this Directive were directly enforceable by competitors, the high level of consumer protection would be achieved through brand owners vindicating the indirect protection of their legitimate business as envisaged by Recital 8, and at a cost to the State which is massively reduced. Enforcement is most efficiently done by those who have an economic incentive to do so. In some ways there are analogies with those systems who allow the recovery of punitive damages for infringement of private rights. Whilst there is a danger of the excesses we have seen in US litigation, claimants with an incentive to enforce has resulted in a very high degree of consumer protection.

Finally, a word about self regulation. The Directive is supportive of industry codes of conduct as properly administered codes may minimise the necessity for judicial or administrative action. Such codes may also help to benchmark standards of professional diligence which is one of the criteria in determining whether a

commercial practice is unfair. Recourse to such codes is in addition to the remedies provided for by the Directive. At present, this will be of little relevance to the UK debate on copycat packaging. There is no industry body regulatory code. The closest analogous code is the British Code of Advertising, Sales Promotion and Direct marketing administered by the Advertising Standards Authority, one provision of which is that no marketing communication should so closely resemble any other that it misleads or is likely to mislead or cause confusion.

Whilst most marketers would agree that the appearance of a product and its packaging is a “marketing communication”, the code does not cover packaging. This is anomalous not only in the context of copycats but also false “on pack” product claims. There is a strong argument in favour of extending this code to packaging.

So by way of summary, the Directive both generally and specifically recognises lookalike packaging as an unfair commercial practice. It is clear on packaging causing trade origin confusion, less so on false claims to product equivalence. We will see the extent to which the objective of a high degree of consumer protection is achieved in the Member State implementing legislation. The question of competitor rights to enforce will be key to the successful attainment of the Directive’s objectives.

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