A response

DTI / BERR consultation

Consumer Protection from Unfair Trading Regulations 2007

INTRODUCTION

The British Brands Group provides the voice for brand manufacturers in the UK. It is a membership organisation, with member companies ranging in size and supplying a variety of branded goods including food, drink, household, toiletry, cosmetic, pharmaceutical, DIY, clothing and sports goods.

The vast majority of members supply packaged consumer goods, where the packaging is a vital tool to help consumers identify, and understand the heritage, quality and nature of, the products within. The packaging conveys the reputation of both product and producer and is critical to the trust and confidence behind the consumers' purchasing decision.

OVERVIEW

The British Brands Group welcomes the Unfair Commercial Practices (UCP) Directive and broadly welcomes the draft implementing regulations. However, it has significant misgivings over the proposed enforcement mechanism relating to one practice specifically banned by the Directive – copycat packaging.

Such packaging, which mimics the packaging of familiar brands in order to mislead consumers, affects significant numbers of consumers. Conservatively, over 4 million shoppers have bought a product by mistake as a result of such deception and 7½ million more are persuaded by unlawful copycat packaging to make incorrect assumptions about goods[1]. The losses that such practices cause to consumers run to millions of pounds each year. It is arguably **the** most widespread problem that this Directive is designed to address.

The Government's proposal to limit enforcement powers to public bodies such as Trading Standards and the Office of Fair Trading is inadequate in addressing this specific problem as neither organisation is expected to consider it a priority (they do not at present). Weak enforcement will fail to deter and may even encourage the practice, resulting in millions of consumers continuing to be misled.

The Group urges the Government to put in place the provisions that would allow the Directive to be adequately and effectively enforced. It should do so to help millions of consumers to make more informed purchasing decisions. It can achieve this by granting companies with a legitimate

[1] See ACG / British Brands Group submission to Gowers Review, Annex 8.

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interest a right of private action, as the Directive allows. Indeed, the UK is required by the Directive to ensure that "persons or organisations….having a legitimate interest….have legal remedies" (Recital 21 in the Directive).

COPYCAT PACKAGING AND THE UCP DIRECTIVE

Copycat packaging constitutes a "misleading action" as defined by Article 6 of the UCP Directive and Section 5(4) of the draft regulations. This is because it misleads consumers as to the commercial origins and/or characteristics of the product (Article 6(1b)) and/or creates confusion with products of a competitor (Article 6(2a)), in either case causing the consumer to take a transactional decision that he or she would not otherwise take. Additionally, copycats are covered by item 13 of the Annex to the UCP Directive – "Commercial Practices which are in all circumstances considered unfair" (see Article 5(5)) – corresponding to item 13 of Schedule 1 of the draft regulations. In terms of the draft regulations therefore, copycat packaging is considered by the Government as sufficiently serious to be a criminal offence.

THE KEY POLICY ISSUES

The UCP Directive is founded on the following policy principles:

(1) The object of the UCP Directive is to give effect to the aims of the Treaty – to attain a high level of consumer protection (Recital 1 UCPD);

(2) To remove internal barriers to trade within the single market by development of a uniform regime which removes trade distortions resulting from divergent consumer protection regimes (Recitals 3-6 UCPD);

(3) To allow all persons having a legitimate interest in the matter to initiate legal or administrative proceedings (Recital 21 UCPD);

(4) Indirectly "to protect legitimate businesses from competitors who do not play by the rules [of the UCP Directive]", and thus guarantees fair competition in fields co-ordinated by it (Recital 8 UCPD).

In cases of copycat packaging, the interests of consumers and of competitors in avoiding misleading actions and unfair practices converge. By permitting competitors to enforce compliance with the standards set by the Directive, the aim of the Directive will be fulfilled. The approach taken by the draft regulations in excluding enforcement by competitors and to limit enforcement to administrative bodies such as Trading Standards runs counter to the policy principles above. The Group believes this to be the wrong approach both as a matter of policy and of law in relation specifically to copycat packaging.

ENFORCEMENT BY PUBLIC BODIES

The enforcement organisations relevant to copycat packaging are the OFT and Trading Standards, it not being relevant to sector regulators and not a "market practice" to warrant a super complaint. The Group believes that both the OFT and Trading Standards are however unlikely to exercise their enforcement authority rigorously to combat unlawful copycat packaging. This is for the following reasons:

- Both organisations have limited resources and therefore must prioritise their enforcement activities. Neither organisation has acted against copycat packaging in the past, despite having the power to do so under the provisions of the Trade Descriptions Act and the Control of Misleading Advertisements Regulations (CMARs);

- Both the OFT at a meeting in January and the DTI in its December 2006 response to its consultation (page 6, para 3) indicated that a consumer detriment test be used to determine priorities. This test is not contained in the UCP Directive and introduces a major hurdle to achieving "high levels of consumer protection" in those areas addressed by the Directive;
- Products in copycat packaging tend not to be a risk to public health or safety. Unlike counterfeits where the aim is to achieve the highest possible price for the lowest possible production cost, products in copycat packaging tend to be of acceptable quality, albeit formulated differently to the brand being copied. The Group believes that, as a result, enforcement bodies' priorities are likely to lie elsewhere;
- Were a company to raise concerns over an instance of copycat packaging, the OFT indicates in its guidance to the Directive that it will look to "established means" and "codes of conduct" as tools to ensure compliance[2], an approach it currently adopts under CMARs. In the case of copycats, there is no self-regulatory code that controls the practice (packaging falls outside the CAP[3] Code). Public enforcement bodies, therefore, will point in the direction of intellectual property rights and the tort of passing off as "adequate established means" available to competitors to protect their interests against copycats. However, designers of copycats tend to copy subtly and in ways that may make IPR enforcement difficult and of limited value. The Gowers Review of Intellectual Property concluded that the law of passing off "does not go far enough to protect many brands and designs from misappropriation". Enforcement through private property or common law rights, therefore, does not provide and effective answer to the unlawful practice of copycat packaging;
- Consumers tend not to complain about copycat packaging[4]. Without complaints from consumers, Trading Standards and the OFT are unlikely to even consider the issue, let alone enforce. There are a number of reasons why consumers do not often complain:
    - a consumer who wrongly believes, as a result of the packaging being misleading, that a product is made by a particular manufacturer (which is the test in the list of unlawful practices) in most cases will never know that their belief is incorrect and will therefore never even consider complaining;
    - consumers who purchase a product by mistake and later realise their error are most likely to blame themselves, not realising they have been deliberately misled;
    - consumers sustain enormous losses in mistaken purchase resulting from copycat packaging, but the purchase price of a single packaged consumer product tends to be low, in most cases well under £10. Consumers are therefore likely to put any mistaken purchase "down to experience" and not bother to complain;
- Copycat packaging is easy to recognise but difficult to define. Such cases raise complex and subtle evidential issues and burdens that do not lend well to enforcement by busy enforcement bodies with tight budgets and competing priorities. It is only by establishing that consumers (often subconsciously) associate specific features of the packaging of the branded item with that particular brand that one can show why the deliberate copying of those features has an effect on consumers' economic behaviour (particularly in a hurried, low-involvement purchase context as regular shopping) and the degree to which that is

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[2] Section 10.2, OFT931con

[3] The British Code of Advertising, Sales Promotion and Direct Marketing

[4] see for example D. Halstead "Five common myths about consumer satisfaction programs" Journal of Services Marketing, Vol 7, No. 3, pp 4-12.

likely in a specific case. As the RIA points out, enforcement bodies have to weigh competing factors of budget and be more likely to take any cases they feel confident of winning. Whilst this may be a pragmatic view for enforcement bodies to take, it does not serve the interests of consumers misled by copycats;

- Companies that use copycat packaging are often of significant size with strong reputations, being major local employers and influential in their communities. They are generally not rogue traders (although they may well seek to sail as close to the wind as the law or enforcers will allow) and therefore are not traditional targets for enforcement bodies.

For these reasons, enforcement by the OFT and Trading Standards against copycat packaging can be expected to fall well short of providing "a high level of consumer protection". It is worth noting that there is no other body designated under Part 8 of the Enterprise Act which would give this issue a high priority. As a result of under-enforcement and lack of deterrence, deliberate unlawful copycat practices which harm consumers and (theoretically) constitute criminal offences will continue to be the reality in the marketplace in the UK.

THE APPROACH OF OTHER MEMBER STATES

The UCP Directive sets out to promote cross-border activities by eliminating obstacles to the free movement of goods, seeking to eliminate these obstacles by establishing uniform rules at Community level which establish a high level of consumer protection and clarify legal concepts to give legal certainty.

The draft regulation's provisions in relation to copycat packaging are unlikely to deliver a high level of consumer protection for the reasons given and will not bring legal certainty across Member States. Some Member Sates, including Germany and Ireland, are implementing the Directive by providing companies with enforcement rights, in contrast to the position of the United Kingdom. Others that are not giving companies such rights already have in place well-established unfair competition laws that can control copycat packaging and thereby deliver high levels of consumer protection through competitor-led action.

The UK is alone in having the combination of high incidence of copycat packaging (a recent trawl of the market has identified well over fifty current examples) and ineffective regulatory mechanisms to address them (no self-regulation and an ineffective law of passing off). The UCP Directive holds the potential to address this situation, but only with effective enforcement. Without it, a copycat may be successfully challenged in Poland, Greece, Spain, and Finland but not in the United Kingdom, providing less protection for British consumers than enjoyed in other EU member states.

DRAFT BUSINESS PROTECTION FROM MISLEADING MARKETING REGULATIONS 2007

There has been a suggestion from civil servants in the past that CMARs may represent a remedy to the problem of copycat packaging. The Group notes that this door, which it found to be firmly closed on investigation last year, is now fully bolted and locked by the proposed business protection regulations. These only apply to the deception of traders, when of course copycats deceive consumers.

OTHER CONSIDERATIONS

It is worth noting that excluding action by companies under the UCP Directive against copycats is at odds with Government enforcement policy in competition matters, which seeks, so far as

possible, to relieve the public purse of enforcement costs. It is ironic that, on 11th July 2006, Vincent Smith, Director, Competition Enforcement Division, OFT, stated:

> "This [implementation of the UCP Directive] means that we have an opportunity here to develop, through guidance, a coherent consumer enforcement policy which is consistent with our processes for competition enforcement."

In fact, the approach proposed in the draft regulation is wholly inconsistent. The stark contrast is highlighted in a speech by Philip Collins, Chairman of the OFT, to the Law Society on 6th June 2007, when he makes two particularly relevant observations:

> "I firmly believe that private enforcement has a vital role to play in contributing to effective enforcement of the law and to encouraging a culture of compliance throughout the UK to the benefit of consumers", and
>
> "We regard private enforcement as an essential complement to public enforcement. At the OFT we strongly support the development of private enforcement - both follow-on and direct actions. And we are considering the ways in which we may be able to facilitate an increase in private actions."

THE CONSULTATION

The consultation asks some specific questions:

Question 1: Do both sets of Regulations meet the intentions set out in the Government Responses to the two previous consultations?

The Group believes that the Regulatory Impact Assessment (RIA) which resulted from both widespread and in-depth consultation shows that Government has generally taken a pragmatic approach to implementing the UCP Directive. The Group agrees with the RIA observations that the regulations will greatly simplify the current complex regulatory framework and that this in turn will allow consumers to become better informed about their rights and allow business more easily to understand and comply with its obligations to consumers. The Group also believes that the adoption of a uniform code has potentially pro-competitive effects within the single market.

The Group does note however (as did the RIA) that a move to a flexible principles-based regime may result in some legal uncertainty. Given the discretion inherent in the application of principles or policy-based regulation, there is greater scope for different application of the regulatory regime in the single market where local cultural/market or legal/regulatory/judicial approaches apply. However, the Group notes the significant advantage of this approach in that it allows the principles of consumer protection to be applied flexibly in rapidly changing consumer markets.

The fact remains however that, in the specific instance of the unlawful practice of copycat packaging, the Draft Consumer Protection from Unfair Trading Regulations 2007 are inadequate and fail to meet the intentions of the UCP Directive itself, let alone the Government's intentions:

> **The objective of a high level of consumer protection**: The reality is that consumers will enjoy little protection from copycat packaging (let alone a high level of protection) for the reasons discussed;
>
> **Removal of internal barriers to trade in the single market**: Currently, national consumer protection in many Member States allows persons harmed, i.e. consumers and

competitors, to enforce relevant consumer protection law. In denying this to UK consumers and competitors, the draft Regulations will, in practice, fail to "level the playing field" between businesses in different Member States, thereby distorting trade in the single market;

Maximum harmonisation: Protection that is not effectively enforced becomes theoretical rather than real. Harmonisation cannot be achieved where consumers and businesses can enforce in some Member States but cannot (or cannot effectively) enforce in others which the Group believes will be the case unless provisions allowing private enforcement are included in BERR's implementation of the UCP Directive;

Indirect protection of legitimate businesses who "play by the rules": The RIA recognised as an objective of both the UCP Directive and the draft Regulations, the protection of businesses that trade fairly, the sanctioning of those who do not and the consequent consumer benefit. This objective will fail in relation to copycats if business competitors are denied enforcement rights. The Directive's aim of guaranteeing "fair competition in fields co-ordinated by it" will also fail;

Persons harmed by unfair commercial practices to be able to take action: Businesses are harmed by the misleading practice of copycats. The reason they are harmed is because their consumers are deceived. Business is entitled under the Directive to retain rights of action and to enjoy the objective of the Directive: indirect protection in the consumer interest.

For all the reasons given above, the Government's confidence "that the wide-ranging changes set out below will help it meet its objective of raising the UK's consumer protection regime to the level of the best in the world" (statement in DTI's 2006 consultation response) is, sadly for both UK consumers and UK business, likely to be misplaced in the context of misleading packaging.

Question 2: Are there any particular additions or changes to the Regulation that you would like to see?

The Group wishes to see companies with a legitimate interest being given powers to bring civil actions specifically against the banned practice listed in section 5(2) and 5(3) and in Schedule 1, Clause 13 of the Regulations. This will bring a number of benefits:

- the burden of proving why copying of specific features is misleading falls on the people best able to provide that information, ie. the brand manufacturer who knows and can show that packaging features have been used extensively and have come to be associated by consumers with a specific product;
- the cost to the public purse is saved;
- a higher level of consumer protection will be achieved;
- adheres to the Government's priorities in developing risk-based regulation where private enforcement sits alongside public enforcement in addressing unfair competition

The Group believes that allowing such a targeted and specific right to companies is both justified (because of the problem of copycats in the UK and the ineffectiveness of other national laws) and achievable. The UK implementation of the qualified entity test in Part 8 of the Enterprise Act (section 213) lists the OFT, Trading Standards, BERR and "any person or body….which the Secretary of State (a) thinks has as one of its purposes the protection of the collective interests of the consumers and (b) designates by order". The Group contends

that brand manufacturers can be said to have “as one of their purposes” the protection of the collective interests of consumers by reason of the fact that, in the case of copycat packaging, there is a total convergence of interests between a copied branded manufacturer and consumers. This view is shared by the UCP Directive in Recital 8.

Once the convergence of interests is established, it is clear that designation for a specific issue is also permitted (see section 213(6b)). In order to define *who* the designated enforcer should be, it would be appropriate to adopt wording that refers to a manufacturer of a product as covered by Clause 13 of Schedule 1 of the regulations. Such an approach would enable BERR to provide enforcement by competitors in relation to copycats either via the secondary legislation implementing the Directive or by designation under section 213 of the Enterprise Act.

Question 4: Are there any impacts or unforeseen consequences of these proposed Regulations that you can identify?

The proposed enforcement approach in relation to copycat packaging creates a situation in which something is technically a criminal offence but where in practice the law is not enforced. The selection of the publicly enforced criminal route in this instance has the unintended consequence of creating legislation which may well be widely ignored in practice. This is far from a desirable situation and falls well short of the UK's obligations on implementing the Directive.

This cannot conceivably have been the intention of the legislator and the Department has a responsibility immediately to re-think this serious omission from the Regulations. Including enforcement rights for competitors in the Regulations will cost the public exchequer precisely nothing and will in fact reduce the potential regulatory burden on public enforcement authorities. Leaving the Regulations unchanged, in spite of repeated representations by ourselves and other interest groups over many years since the draft directive was first mooted, would be perverse.

CONCLUSION

Whilst noting and welcoming the overall benefits of the UCP Directive and the draft implementing regulations, the Group believes that, without business enforcement rights in relation to copycat packaging (a practice that affects millions of UK consumers), the draft regulations fail the objectives of the Directive and fail properly and lawfully to implement it into UK law, giving rise to possible infraction proceedings against the UK. The Group recommends that the Government revisits and revises its decision to omit provisions allowing private enforcement of provisions relating to copycat packaging in the implementation of the UCP Directive in the United Kingdom.

3rd August 2007