



OFT Annual Plan 2008-09

A response

INTRODUCTION

The British Brands Group represents manufacturers of branded products to the UK market. Our members range in size and supply branded products to a wide range of sectors, including food, soft drink, alcoholic drink, petfood, household goods, toiletries, cosmetics, health products, pharmaceuticals, DIY products, sports goods and clothing. A list of members is provided at the end of this response.

The focus of the Group is to build the optimum climate in the UK for branded products to deliver choice and value to consumers, through constant innovation and fair competition.

We welcome this opportunity to comment on the OFT's Annual Plan 2008-09 which promotes the themes that we consider crucial to competitive, innovative and fair markets.

OVERVIEW

We are encouraged that OFT intervention is designed to support the development of competitive, efficient, innovative markets where standards of consumer care are high (para 2.1). We also fully support the aim of ensuring that consumers are able to make informed and rational selections of products, with their choices unimpeded by artificial constraints such as deceptive or misleading practices (para 2.2).

We fully agree that competition and consumer regimes are complementary to one another and that empowered, well-informed consumers act as a positive stimulus to competition between businesses, to innovation and efficient production and supply (para 2.3).

Furthermore, we are encouraged that the OFT intends to focus on unfair commercial practices and misleading advertising (para 2.5).

PRIORITISATION

Despite these positive principles on which the Annual Plan is based, we are concerned that its implementation will fall short in practice. We are particularly struck by the focus on delivering high-impact outcomes, focusing attention only where the benefit to consumers and the economy are greatest and on serious misconduct (para 5.6).

There is a strong case that the OFT should also focus resources on areas which may not yield high impact outcomes but which fit firmly within the OFT's principles and where other remedies are either non-existent or ineffective.

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The voice for brands

MISLEADING PACKAGING

A specific example where consumers are prevented from making well-informed decisions and where markets do not work well concerns misleading (“copycat”) packaging. We have drawn this to the attention of the OFT before.

Such packaging emulates key elements of the presentation of familiar and trusted branded goods. The use of these distinctive features misleads consumers into believing that the copycat actually is the brand or is connected with the brand manufacturer.



An example of a familiar brand and its copycat

The practice undermines many of the factors that the OFT defines in its diagram as underlying markets that work well for consumers (page 12): the unfair use of significant market power, in those instances where the “copycat” is a powerful retailer’s own label product (Industry Source), consumers prevented from making rational choices (Consumer Behaviour), the provision of misleading information (Information Failure) and suppliers not competing fairly (Firm Behaviour).

Such packaging is potentially caught by the Consumer Protection from Unfair Trading Practices (CPRs), in its general clause (Clause 3), its provisions against misleading actions (Clause 5) and the list of banned practices (Schedule 1, Clause 13).

Our concern is based on the fact that many consumers who make mistaken assumptions about products as a result of such packaging may never realise they have been duped and others, if they have bought the wrong product, will not complain because of the combination of the low price of the item and the hassle involved. With very low levels of consumer complaints (if any) and the low price of the items, we fear that the OFT will not consider this a high-impact area for enforcement, despite the practice affecting many millions of consumers.

Nevertheless, the OFT and Trading Standards are the **only** bodies capable of acting against such packaging. Brand manufacturers are unable to act as such packaging tends to avoid infringing intellectual property laws, criminal action is inappropriate in such cases, passing off actions are very difficult to bring (see The Gowers Report, paras 5.82-5.88) and companies have not been granted civil enforcement rights under the CPRs. The practice also falls outside the self-regulatory CAP Code which does not include packaging within its scope. BERR emphasises its focus on enforcement by the OFT and Trading Standards when it stated in its response to its consultation on the CPRs that “OFT and Trading Standards will have to act in a manner consistent with their duty to enforce the Regulations” (Page 16).

RECOMMENDATION

We fully support the OFT's principles and its approach. We however strongly suggest that the OFT treats as a priority not just those areas which have a high impact but also those areas where other means of effective consumer protection simply do not exist. The practice of adopting misleading packaging for consumer goods is one such area. Such an approach is consistent with the Government's objective of delivering a consumer protection regime that matches the best in the world and we ask that it is spelt out both in the Annual Plan and at other opportunities.

We are keen to meet the OFT to give you a full briefing on the nature of this particular problem, the effect on consumers, the absence of any other effective remedies and the seriousness of this issue for the manufacturers of familiar, trusted brands.

Further information on the British Brands Group, our position on the Unfair Commercial Practices Directive and on copycat packaging can be found on our website at www.britishbrandsgroup.org.uk.

J A Noble
15th February 2008