



Submission

Trade and Industry Select Committee
20 April 2007

The Work of the Office of Fair Trading (OFT)

- 1 We are responding to your request for evidence for the Trade and industry Select Committee's inquiry into the work of the Office of Fair Trading (OFT).
- 2 Members of the British Brands Group comprise brand manufacturers operating in the UK, ranging in size and supplying a variety of branded goods including food, drink, household, toiletry, pharmaceutical, DIY, clothing and sports goods. Most of them distribute their products through grocery retailers, including supermarkets and convenience stores, and for many this is their main route to the consumer.
- 3 We would like to make two points to the committee:
 - (1) the OFT – operating under existing resources – has been ineffective at properly investigating and then acting upon potential breaches of the Supermarket Code of Practice, a remedy arising from an adverse finding by the Competition Commission;
 - (2) the Unfair Commercial Practices (UCP) Directive, which is about to be transposed into UK law, is important consumer protection legislation that includes in its original form the new right for competitors to take private action through the courts in the event of breaches of its terms. In the course of our regular discussions with the Department of Trade and Industry we have learnt that the Government intends to omit this right from the secondary legislation that it intends to table early next month.
- 5 It is the Government's view that the OFT and Trading Standards provide the best means of enforcing this legislation. Given that both organisations are already overstretched, increasing both organisations' responsibilities with no appropriate increase in resource would lead to potentially negative consequences for consumers and markets and would mean that provisions will not be effectively enforced as the Directive requires. We suggest that companies' right to pursue those who breach the UCP Directive through the courts should be retained in relation to the specific issue of misleading ("copycat") packaging. Such packaging falls outside self-regulatory codes and existing legislation (including IP rights) are ineffective at addressing it, making this Directive particularly important in the UK.

- 6 In general, we believe the OFT to be “fit for purpose”, we support their remit and believe that the effective fulfilment of its main tasks are crucial to the running of a vibrant and innovative economy. We also understand that the scale of these tasks requires that the OFT prioritise the cases it deals with to make the most effective use of its resources.
- 7 However, we believe that the paucity of that resource, a failure of prioritisation and a lack of investigatory vigour have constrained the OFT in the pursuance of its existing remit. Our experience has been that the grocery retail sector – and particularly, though not exclusively, manufacturers and other suppliers to the major grocery retailers – has been neglected by the OFT.

8 **Supermarket Code of Practice**

The Supermarket Code of Practice provides specific illustrations of where the OFT has not been fully effective. We refer in particular to:

- i. the OFT’s difficulty in monitoring proactively the Supermarkets Code of Practice (SCOP), investigating actively when alerted to potential breaches and ensuring compliance;
 - ii. the OFT’s inability to express effectively concerns – where they may have existed – over a specific practice to the retailer involved; and
 - iii. the shortage of practical feedback from the OFT to manufacturers and other suppliers and their trade associations on raising concerns in the first place and then addressing concerns raised about potential breaches of the SCOP, including reviewing the case in question and helping to prevent any future potential incidents.
- 9 If retailers continue to be allowed to exercise anti-competitive commercial practices that have been identified by the Competition Commission and subjected to an adverse finding, then manufacturers and other suppliers will suffer. In the short term this may lead to higher prices for smaller retailers. In the longer term a diminution of consumer choice and innovative products is likely.

10 **Unfair Commercial Practices Directive**

Our members are particularly concerned that the Government intends to hand prime responsibility for enforcement of the UCP Directive to the OFT and Trading Standards. We are convinced that the OFT, operating within its existing resource constraints, would not be able to enforce effectively the Directive’s provisions relating to the specific issue of misleading packaging and that this would perpetuate a regulatory gap in the UK to the detriment of consumers and brand-owners. This view is reinforced by the OFT’s current reluctance to combat such deceptive marketing under its existing powers under the Control of Misleading Advertisements Regulations (CMARs).

- 11 We therefore make the following two suggestions:
 - i. The OFT be given the powers and, importantly, resources so that it may implement effectively the provisions of the UCP Directive as required by European law;
 - ii. Companies be given the right to take enforcement action through the courts against practices that breach of the UCP Directive’s provisions against misleading packaging – thus reducing the burden on Government.

- 12 It is likely that the simple fact of increased resources, combined where appropriate with private action, would represent a significant deterrent to those who might otherwise be tempted to consider unfair commercial practices. This approach seems to be endorsed by the OFT when its Chairman, Philip Collins, stated on launching a consultation on private actions in competition law: "A more effective private actions system would promote a greater culture of compliance with competition law and ensure that public enforcement and private actions work together to the best effect for business and consumers." He may have been talking about competition law but we believe the principle holds true in safeguarding consumers too.
- 13 We appreciate the concerns that have been expressed to us by Ministers and officials from the Department of Trade and Industry about pursuing this course. These include the difficulty in limiting such a right to misleading packaging. However there is a particular gap here in both existing UK law and the self-regulatory regime and, whilst it may well be difficult to limit such a right, it would not be impossible. We have made specific proposals as to how this might be achieved and would be happy to discuss this with the Committee.
- 14 A second concern is that companies might be tempted to bring vexatious actions, to further their own commercial interests rather than the interests of consumers. A simple way of mitigating this risk would be to require companies to refer the matter first to the OFT before proceeding. A further measure would be to instruct the courts to establish at the outset of any case the impact on consumers. Should the Court consider a particular case to be vexatious, it could dismiss the case and require the company bringing the action to pay the defendant's legal costs while imposing a penalty for wasting the Court's time. We have made these suggestions to officials.
- 15 **Conclusion**
- Consumer welfare must rightly lie at the heart of the Government's competition policy and we all have a keen interest in markets working well for consumers. The OFT has a central role to play in delivering such an environment but our concern is that it is insufficiently equipped to be wholly effective and, where it is less effective, other mechanisms are not in place to fill the gap.
- 14 We welcome the Committee's inquiry into the work of the OFT. We ask that it considers the points we have made here in relation to the OFT's role in (1) ensuring that remedies recommended by the Competition Commission to address adverse findings are effective and (2) ensuring that the OFT is resourced to enforce the UCP Directive effectively and, where this is not practical, to recommend that other measures be put in place.
- 15 If you wish to explore any points that we have raised in greater detail, we would be delighted to help further. Similarly, if you wish copies of any past submissions we have made on the two issues we have raised, either to the OFT, DTI or the Competition Commission, please let us know.