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(RESTRICTIVE PRACTICES COMMISSION)
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28 November, 1978

Dear Minister,

I enclose a note setting out the results of the series of discussions the Commission have had at your request with the parties to the grocery dispute. As you will see from it, we believe we have been able to secure an extension of the moratorium on wholesale/RGDATA boycotts until the end of March next. The CII have told us that this should give them time enough to complete the negotiation of new terms and conditions, but obviously the success of further negotiations must remain in the balance until they are completed.

The existing moratorium is to run out at the end of November, but the wholesaler/RGDATA interests have recognised that we have been unable to report to you before this because of their own difficulty in giving us at an earlier date a measure of assurance about the prolongation of their moratorium. They therefore accept that you may not be able to make known your decisions until after the 30th November. They are pressing, however, that your decision and any subsequent legislative action should be as soon as at all possible.

The Commission are sending a separate note to your Department as to how the changes in the Groceries Orders which we are recommending could best be effected if you approve them.

Yours sincerely,

Nial MacLiam,
Chairman.

Desmond O'Malley, Esq., T.D.,
Minister for Industry, Commerce and Energy,
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RESTRICTIVE PRACTICES COMMISSION

SITUATION IN THE GROCERY TRADE

In accordance with the Minister's request, the Restrictive Practices Commission has held numerous informal meetings with the interests involved in the dispute in the grocery trade which resulted in a boycott of an Irish manufacturer earlier this year. We have met the CII, the AVG Action Group (representing the wholesalers and RGDATA) and each of the principal supermarket chains. It became immediately clear, as we had expected, that the dispute ran deeper than the under-cost selling issue which was the immediate occasion of the boycott, and that some months would be needed to attempt to resolve issues. We therefore concentrated our efforts on getting an extension of the existing moratorium.

Discussions between the CII and the Action Group under the chairmanship of the Examiner of Restrictive Practices had brought about an agreement to suspend boycott action for three months ending at the end of November on the understanding that the suppliers would withhold supplies from retailers who sold under cost; it was recognised that applicable Restrictive Practices Orders would have to be amended to enable this to be done legally. This agreement correctly identified the issue of under-cost selling as the immediate problem, and successfully brought about a truce in the boycott campaign. There remained, however, the question of what would be the supermarkets' reaction. If they continued to sell under cost, their Irish suppliers would either cut off supplies in accordance with the agreement, in which event the suppliers stood to lose the custom of the supermarkets to imports, or they would not cut off supplies, in which event they might expect to face a boycott from the independents. There was also the problem that the three months' moratorium did not leave time enough to reach agreement on the fundamental issue, terms and condition

The Commission in its discussions therefore sought first of all to get the agreement of the supermarkets not to use under-cost pricing as an aggressive tactic during the period when discussions were continuing with the manufacturers. Following initial hesitations, we believe that there is now a good chance that they will refrain from this tactic over the coming months^{*} provided no-one else uses it and provided that advertising below cost is comprehensively prosecuted. On the basis of this expectation, we put it to the Action Group that to allow time for realistic negotiations on all issues at stake they should extend the moratorium on boycotts for a further nine months. This they were unwilling to do at the time, but they later informed us that they would continue it to the end of March, 1979 on the understanding that the Minister would take certain action. This action consisted principally of the enforcement of the law in relation to below-cost advertising (as envisaged by the supermarkets) and an amendment of the Groceries Orders to make it legal again for manufacturers to withhold supplies from outlets selling at or below cost.

We accordingly recommend that the Minister should make known to the parties his intention to take the following steps. These go beyond what was stipulated by the protagonists and this is because we believe that, as well as offering a reasonable chance of an extension of the moratorium to allow for future discussions, they would form a suitable part of, and help prepare the way for, an ultimate settlement. The steps are as follows:

- (i) The amendment of the Restrictive Practices (Groceries) Orders so as to reapply to all grocery goods (food and non-food) the original provisions of the 1956 Order (which since 1973 apply to non-food only) permitting a supplier to withhold supplies of all goods from an outlet which sells any of that supplier's goods below cost. In this connection, "cost" to be defined as net invoice price plus VAT.
- (ii) The extension to all food and non-food grocery goods of the provision in the 1973 Order prohibiting the advertising of foodstuffs below cost.

* With some, there will have to be a phasing-out period of from 4 to 6 weeks on undercost selling (not on undercost advertising). The Action Group accept this. /...

- (iii) Active and comprehensive prosecution of any future violations of this rule.
- (iv) Future developments in the trade to be monitored closely with a view to possible prosecution of breaches of the Grocery Orders.
- (v) The Director of Consumer Affairs, as soon as appointed, to be asked to give early and special attention to the advertising of goods at specially low prices. There is evidence that, in a number of cases, below-cost prices advertised by a chain have been available only in some of the chain's shops, an apparent breach of the Consumer Information Act, 1978.

In conveying his intentions as above to the parties, the Minister might express the hope that ongoing discussions between them would lead to a settlement acceptable to all, and that all would help towards the success of the discussions by refraining in the meantime from provocative tactics such as under-cost pricing.

As regards (iv) above, the principal provisions in mind which may be the subject of breaches are Article 13 as amended of the 1956 Order (prohibiting combinations to coerce suppliers to withhold goods from or discriminate against certain retailers) and Article 8 of the 1973 Order (requiring the furnishing to the Examiner of statements of the terms and conditions of imports). However, it would probably be impolitic to prosecute these breaches or even to specify them as subjects for future prosecution at a time when negotiations are in progress. At the same time, the parties have been encouraged by the Commission to seek a settlement partly on the grounds that if a "war" were to lead to disruption the Minister would be obliged to step in with possible drastic measures, and we think it would be useful that some sort of veiled threat should appear in the Minister's statement.

Amendment of the Restrictive Practices (Groceries) Orders.

1. In this note, for simplicity's sake, the 1956 Order (for instance) is referred to simply as 1956, and Article 4 of the 1973 Order as 1973/4.

COVERAGE OF EXISTING ORDERS

2. The two basic Orders (both later amended) are 1956 and 1973. Their coverages are rather complex.
 - A. 1956 excluding Articles 8, 9, 10, 11 and 14.

The coverage is ,

 - (i) the goods described in 1956/2, plus
 - (ii) anything added in by 1973/12(1): this means that foodstuffs originally excluded by 1956/2 but included by 1973/2 as amended are no longer to be excluded from 1956. Note that the reverse does not apply: if they were included in 1956 they are still included even though they may be specifically excluded from 1973.
 - B. 1956/8, 9, 10, 11 and 14.

The coverage is as in 1956/2 minus the "grocery goods" defined in 1973/2 as amended by 1978/3.
 - C. 1973

The coverage is as in 1973/2 as amended by 1978/3.
3. Very broadly, it might be said that
 - A. covers grocery foodstuffs (with specified exceptions) and non-foodstuffs,
 - B. covers grocery non-foodstuffs (with a small number of foodstuffs), and
 - C. covers grocery foodstuffs (with specified exceptions) only.

RECOMMENDED AMENDMENTS

4. The changes in the Orders recommended to the Minister are
- (i) to restate the provision allowing suppliers to withhold supplies from distributors selling under cost;
 - (ii) to extend this provision to cover category A above instead of only B as at present; and
 - (iii) to extend the prohibition in the 1973 Order on below-cost advertising to category A instead of only category C as at present.
5. The recommendation at (i) involves the replacement of 1956/8 and the deletion of (b) of 1956/10. The replacement of 8 might perhaps be on the following lines:
8. Where a trader being a wholesaler or retailer sells goods, to which a supplier's brand is affixed, below a price which is equal to the net invoice price of the goods to the trader including value added tax, the supplier may withhold from the trader supplies of any goods to which this Order applies.
- The "any" in the last line is included to make it clear that the supplier may withhold any or all of his lines even though the under-cost selling may have only applied to one of them.
6. Recommendation (ii) could then be achieved by deleting "8" from 1973/12(2). (If 10(b) is not deleted as above, this change becomes much more difficult). As a corollary to the deletion of 8, "11" should also be deleted. Note that 9 and 10 (less (b)) of 1956 will still apply to category B goods. Attention is drawn to the reference to Article 8 in 1956/6 *and in 1958/3*.
7. The existing ban on below-cost advertising is contained in 1973/6, which applies to goods in category C of paras 2 and 3 above. The changes to be made are as follows:
- (i) Extending the ban to all category A goods (as 4(iii) above)
This might preferably be achieved by recasting the whole of Article 6 (paras 1 and 2, with the change and addition suggested below) in the form of an amendment to 1956, its coverage being then automatically extended to 1973 by virtue of 1973/12(i). Alternative ways would be to include in the Article

a new paragraph saying that the Article applies to "grocery goods" (as at present) and to goods to which 1953 applies, or replacing the words "grocery goods" in the text with "grocery goods or goods to which the Restrictive Trade Practices (Groceries) Order, 1956 applies".

(ii) Changing the wording of Article 6(1)

The wording will have to be changed in line with any change to be made in 1956/8, as in para 5 above. For instance, the new wording might be "at a price that is less than the net invoice price to him including value added tax".

(iii) A new clause to remove doubts.

To make sure hand-bills etc. (which are increasingly used in below-cost advertising) are covered, a new paragraph might be added, using the formula in the Consumer Information Act -

(3) In this Article, "advertise" includes the issuing of a catalogue, circular or price-list.

To sum up the changes suggested in relation to 1973/6, the proposed amending Order would delete it from 1973 and would instead provide for the insertion of a new article in 1956 consisting of

- Para 1 of the old article amended as suggested,
- Para 2 of the old article unchanged,
- Para 3 about the meaning of "advertising".