

CHAPTER 4

BELOW COST SELLING

BACKGROUND

4.1 In requesting this review of the Order, the Minister stated that he had regard "to representations made to him by organisations representing various sectors of the grocery trade and the recent Private Members' Bill on the subject of below cost selling introduced by Deputy Ivan Yates". Although the review is of the complete order, it was the issue of selling below cost which, more than any other, was instrumental in the review taking place.

4.2 The Commission decided in 1972, after consideration of all the issues involved, not to recommend a ban on below cost selling as such but to recommend the prohibition of "the advertising of products at a price less than the net purchase price by a retailer in any medium outside his own premises". The second Order of 1978 introduced the concept of "net invoice price" as the definition of cost, replacing the "net purchase price".

4.3 The Commission, in July 1979, was requested specifically by the Minister "to hold an enquiry into the retail sale of grocery goods below cost". The Commission, after a public enquiry, reported, in November 1980, that it had decided not to recommend a prohibition of below cost selling but to recommend that the prohibition on advertising below cost should be continued.

4.4 In concluding that the sale of grocery goods below cost should not be prohibited, the Commission was influenced by a number of developments which had taken place about the time of the enquiry. In 1979, IADT and RGDATA had sought and obtained an injunction in the High Court preventing a multiple from advertising below cost. This case established that net invoice price was the price on the invoice accompanying the goods and that other rebates or long term allowances should not be taken into account in establishing net invoice price. There were successful prosecutions of three supermarket multiples for below cost advertising in July 1980. It seemed to the Commission in 1980, that, with an active prosecution policy, the High Court judgment which established beyond doubt the meaning to be attached to the definition of "net invoice price" in the Order, the fact that representatives of independent grocers and retailers were

4.6 The prohibition on advertising below cost is contained in Article 12. The Article states that a retailer, or any wholesaler or other person acting on behalf of a retailer, shall not publish or display an advertisement for the sale of grocery goods at a price that is less than net invoice price. There are sections of the Article which require that carriage and other costs be included in cost if they are not already on the invoice. Where two or more items are advertised for sale at a price which is less than the price if the items were sold singly, then the selling price of each is determined by dividing the price by the number of items. Where an advertisement is published more than four weeks after a price list is altered, "best list price" is substituted for net invoice price. It is not an offence to advertise at a maximum price under the Prices Acts even if that price is below cost. The Article does not apply where an advertisement for goods is displayed solely at the premises where they are on sale. There is no criminal liability on any section of the media if they publish an advertisement for grocery goods which are below cost. An advertisement is defined and there are provisions on the treatment of foreign currency invoices and value added tax.

ARTICLE 12 OF 1981 ORDER

4.5 The Commission's overall conclusion in 1980 was:—"We do not consider that the prohibition of below cost selling would be to the advantage of manufacturers, distributors or consumers to an extent which would justify so serious an interference with freedom of trade, bearing in mind that there are constraints in existence which we believe will, especially if strengthened as we suggest, diminish the extent of below cost selling and reduce its effectiveness where it is used. If, however, concentration in the grocery trade were to advance in the future to a stage where competition between the multiples might tend to fade, or where the independent sector began to cease to be economic, then all factors which might increase the degree of concentration, including the practice of below cost selling, would have to be seriously reconsidered. Our conclusion that the prohibition of sales below cost would not be justified is strongly reinforced by the numerous practical points of difficulty which prohibition would entail. However, the undesirable effects which we have described, while they would not justify prohibition of the practice, would justify the retention of the existing constraints, somewhat strengthened." The Minister accepted the recommendations of the Commission and made an amending Order in 1981.

prepared to undertake court actions and the ability of manufacturers to withhold supplies where their products were being sold below cost, the problem of below cost selling could be dealt with without "so radical an interference with the freedom of trade" which, in the Commission's view, a ban on below cost selling would bring.

4.8 It will be seen that, during the five years from 1981 to 1985, there were only eight convictions for below cost advertising and that the fines imposed were insignificant in a grocery trade with a turnover of more than £2,000 million. As far as we are aware, there have been no injunctions sought by independent grocers or wholesalers or their representatives since the 1980 report was published. The difficulty which arose with the June 1985, High Court judgment effectively meant that the Order was inoperable from that time. The High Court judgment considered that an advertisement must state that, if it was to be held that the advertisement contravened the Order, the goods being advertised were below cost. It would seem that the High Court judgment should have been appealed or, alternatively, an amending Order introduced immediately. An amending Order was not submitted to the Oireachtas for approval until October 1986, and, at the time of completion of this Report, had not been confirmed. The time lost

4.7 Because the effective prosecution of cases where goods are advertised below cost was considered by the Commission in 1980 to be of major significance, we give below the Examiner's views, expressed to us in July, 1986 on the 1981 Order. "Article 12, or the ban on below cost advertising as it is more generally known, has generated more activity on the part of the Examiner than any other single article of the Order. Up to the end of 1985, the Examiner had conducted 75 investigations of suspected or alleged breaches of Article 12. There were 45 complaints and in the remaining 30 cases the investigation was initiated by the Examiner. Twenty-seven cases were reported to the Minister as alleged breaches. Of these 27, a decision not to proceed was taken in 5 cases, 11 prosecution cases were instituted and another 11 cases were pending at the end of 1985. Of the 11 prosecution cases there were 8 convictions. The Probation Act was applied in 2 of those cases and fines of £10, £20, £25, £40, £50 and £60 were imposed in the other cases. In 3 cases the charges were struck-out or dismissed, including 1 case against Tesco Ltd. where the interpretation and meaning of Article 12 became the subject of a Case Stated to the High Court. The judgement of the Court was delivered orally in June, 1985 and was such as to raise considerable doubt as to the true meaning or effect of Article 12. That doubt has not been resolved since then, with the result that the Examiner has not felt that he can with any confidence advise the Minister as to whether any particular advertisement is or is not in breach of Article 12 of the Order. Recently, the Examiner decided that he should no longer investigate complaints of alleged breaches of Article 12 and to all intents and purposes the Article must now be regarded as a "dead-letter". It will be appreciated that these difficulties also raised serious doubts about the possibility or practicability of proceeding any further with the eleven cases which were pending in the Department at the end of 1985".

EFFECTIVENESS OF 1981 ORDER.

4.11 It does appear that the ban on below cost advertising was largely effective up to June, 1985, when the High Court dismissed a case. For some time after this, reaction was awaited by the trade and below cost advertising only became extensive when it was realised that the Court decision was not being appealed and that further prosecutions were not taking place. The intention behind the ban on advertising below cost was to seriously limit the benefits which a seller might obtain by selling below cost, thus lessening the incentive to sell below cost without actually banning the practice. During the period from 1973 to 1985, when the prohibition on advertising existed, it undoubtedly had a considerable impact. However, with the increasing

4.10 In spite of the difficulties with prosecutions and the inability of suppliers to ensure, by withholding supplies, that their products are not sold below cost, views were expressed by some of those we met that below cost advertising had not been extensive and that below cost selling had largely been confined to own brand or generic products over the past eighteen months. These products had been used as an instrument to compete with other multiples on the basis of price. It was understood in the trade that suppliers would not withhold supply of own brand or generic products where these were sold below cost.

4.9 It is apparent also, from discussions with suppliers, that the right to withhold goods which are being sold below cost is, in practice, of little assistance in reducing below cost selling. We discuss elsewhere in this Chapter the difficulties in which suppliers find themselves where their products are selected by a multiple for below cost selling. Most suppliers are unable to ensure, through the withholding of supplies, that their products are not sold below cost. Some few suppliers, because they have market power through advertising or customer brand loyalty, are in the position where a multiple cannot, without loss, be without their products. However, we believe that these are the exceptions rather than the rule. The use which suppliers could make of the ability to withhold supplies has diminished as the buying power of multiples has increased.

between the High Court judgment and the submission to the Dail of an amending Order was, in our view, excessive and allowed advertising of goods below cost, thereby stimulating even more selling below cost. The Minister has recognised the difficulties of having his Department, through the Chief State Solicitor, act as a prosecutor and it is proposed in the Restrictive Practices (Amendment) Bill 1986 to transfer the prosecution function to the Examiner (to be known as the Director of Consumer Affairs and Fair Trade). We welcome this proposal. We have included the proposed amendment to Article 12, in our recommended Order. This is shown in Appendix I. The essential change to the existing Order is that the terms of Article 12 would apply whether or not the advertisement states that the goods are below cost.

4.14 Another submission stated that "the 1980 report suggested that food imports were running at a level of £400 million. These are now in excess of £1,000 million (of which a rapidly growing percentage is substitutable by Irish supplies). More and more frequently, isolated lines of a supplier's product ranges, manufactured in Ireland, are being dropped completely and imported because margins are being squeezed to the point where continued production is not viable. The result is a reduced workforce, a poorer coverage of administrative and sales overheads of the distribution unit in Ireland and the bringing

4.13 A number of the submissions we received made reference to the Commission's conclusions in its 1980 Report and argued that the level of concentration in the trade had become harmful. Some alleged that the multiple share of the grocery market was 60 per cent or more. One submission argued that the trade was dominated by the largest multiple companies, Dunnes and Quinnsworth, and that the effect on a supplier of selling almost half of his products to just two customers was serious. It was also argued that the growth in generic or own brands which, it was stated, grew from "a negligible 1-2% to an estimated 25% of products bought by consumers", increased "the vulnerability of Irish manufacturers and suppliers". It was argued also that consumers "do not benefit from below cost selling although they may be dazzled into thinking that they do. The losses which multiples sustain by this practice are recouped by additions to the prices of other goods such as fruit and vegetables. There is a myth that poorer customers are the biggest beneficiaries of below cost selling. Do they not buy fruit and vegetables? This product category has consistently been shown to carry a very high mark-up for the big supermarkets. And it is seriously suggested that they are relatively large purchasers of beer, wines and spirits? This category is periodically sold below cost".

4.12 All of the submissions we received from trade associations representing independent grocers, wholesalers, and suppliers called for a prohibition on below cost selling. This was the main issue in all of the submissions. The non-multiple trade considered, therefore, that the prohibition on advertising below cost had not solved its problems in relation to below cost selling.

SUBMISSIONS AND EVIDENCE RECEIVED

share of the market being taken by the multiples, with the increasing number of products available on the shelves of supermarkets, especially own brands, and for several other reasons, it is apparent from our discussions with representatives of independent retailers and suppliers that the ban on advertising has increasingly had a very limited impact. We believe that, if the Examiner had been able to prosecute without reference to the Minister, this might have increased the effectiveness of the prohibition.

“Multiples have a consistently high volume of customers on a regular basis who, generally, merely by strolling through the aisles in the course of their normal shopping will become aware of ‘bargain’ prices. The dispersal of this information by word of mouth would reach a huge audience dispensing with the necessity of much, if any, advertising. The savings

4.17 One of the submissions we received made the case for the prohibiting of below cost selling as follows—

4.16 Another submission stated that “a ban on below cost selling would simply add to the test to which the retailer’s skills would be subjected to find a wider range of products which might be sold at or near to cost We believe that below cost selling is a crude commercial practice, not a sophisticated selling skill. We further argue that a wider range of goods at or near to cost would be infinitely better for the consumer, who would not need to travel from one shopping centre to another to pick up the various below cost offers. It is assumed that consumers accept that, where they get one product below cost, they are likely to be paying more for another (although they might not easily identify which one). Below cost selling does not benefit the consumer. Its immediate intention is patently to increase market share and ultimately profitability.”

4.15 Some independent retailers we met considered that, if the present situation were to continue, with below cost selling being permitted, their share of the market would continue to decrease, with further loss of numbers, even among progressive retailers. Wholesale-ability, independent considered below cost selling to be an unfair method of competition and to be extremely disruptive of the market. While they believed they could live with generally lower prices in the multiples they could not survive in the face of the massive price reductions which sometimes occurred when below cost selling was engaged in. They also alleged that consumers did not benefit from below cost selling, as multiples compensated for low prices on a limited range of products, by higher prices on others. This was also misleading to consumers, because they were persuaded that very low prices on certain goods meant that the overall cost of goods in multiples was also very much lower than in the independents.

closer of the day when the viability of the Irish company as a production unit may be called into question. Significant closures have been and will be few. It should be noted, however, that, though the erosion process described above, a significant number of jobs have been lost in the last 5 to 10 years in major companies within the food industry. Imports of biscuits, beer, soft drinks, flour confectionery, sugar confectionery, canned foods, etc., are all increasing significantly”.

4.19 Another submission made the point that National Prices Commission surveys consistently showed that multiples were more expensive for fruit and vegetables and fresh meat than the specialist shops selling those products. The submission stated that "most grocery products are imported. The multiples rely on the profits generated from meat, dairy, fruit and vegetable departments to subsidise the practice of below cost selling. In the Irish situation native produce is used to subsidise imports".

4.18 Another submission made these points. "Soft drinks were and continue to be a growth market and are in the top ten product lines favoured by supermarketiers. Consequent on the intense competition between multiple groups, soft drink brands became one of the items of 'artillery' in the battle for share of the grocery market. It was the policy of the company to cease supplies to chains that engaged in below cost selling. It might be added that the independent traders' organisation had threatened us with boycott in circumstances where they considered our brands to be on sale in multiples below cost. The situation described above changed in the years 1983/84 due to the emergence of generic soft drinks and multiples quickly learned that below cost selling of generics could be engaged in with abandon, without penalty. The consequence is that generic brands now account for circa 43% of all soft drinks in multiples from a position of zero in 82. We conclude, therefore, that the unbridled activity of [selling] generics at quite unsustainable pricing has been to the detriment of the branded goods sector who in the first place provided the dynamism that fuels growth in the market and the contest is clearly uneven given the constraints of having to maintain at or above cost pricing. Because of the nature of the relationship between generic suppliers and retailers it is imperative that these goods are also brought within any new proposals."

achieved on advertising can then be ploughed into below-cost selling. The Commission make the point in their 1980 Report that, because of the low volume of below-cost advertising, the assumption can be made that the prohibition on such advertising has proved effective in limiting below cost selling. However, it could be argued that the practice of below-cost selling which has been prevalent, periodically, since the early 1970's is unrelated to, and not reflected in, the volume of below-cost advertising. In this case, the prevalence of the practice of below-cost selling, unaccompanied by advertising, would suggest that below cost selling (or loss-leaders) achieves its objectives without the assistance of advertising. Therefore, the power of the argument behind the prohibition of below-cost advertising — to limit the damage of below-cost selling and to make it relatively ineffective — is proved impotent. The prohibition has been in effect since 1973 and the practice of below-cost selling has continued with unabated frequency, if with more sophistication".

4.23 In our discussions with suppliers, it became obvious that, from their viewpoint, one of the worst features of below cost selling was the level of aggravation caused. Multiple A decides to sell below cost a supplier's product, without reference to the supplier. Multiples B, C, D, E and the wholesalers immediately phone or contact the suppliers to request better terms, in order to enable them to match the price of multiple A. As the supplier has not given special terms to A, he resists the requests made. Some or all of the other multiples or wholesalers threaten to de-list. The supplier then considers ceasing supplies to A but, as they account for a substantial share of his turnover, he may be very reluctant to do so. If he does cease supplies to A, he may retain the business of all of the others. If he continues to supply A, one or two of the other multiples or wholesalers may de-list the supplier. All of these discussions between the suppliers and his customers seemed to waste very considerable time and not to be in the interests of any of the parties concerned.

4.22 One manufacturer requested that there should be a minimum and a maximum price for his product as he believed that, even if below cost sales were banned, the price in multiples would continue to be too low compared with that in independent outlets.

4.21 It was realised by those advocating a ban on below cost selling that, instead of selling a small range of goods below cost, there might be a large range of goods being sold at cost. It was stated that the independent grocers accepted that prices in multiples were likely to continue to be cheaper than in independent shops but the wide disparity between the prices of a few products would no longer be a factor. Selling a wide range of products at cost by the multiples would not have as dramatic an impact on independents as selling a few items at well below cost, sometimes even at half price. It was stated that consumers found it difficult to understand or accept that products were being sold below cost and believed that the non-multiple trade was charging excessive prices where a wide disparity existed. Because of a general inability to remember prices, value over a shopping basket of goods could be difficult for the consumer to determine.

4.20 A further point, made in a number of submissions and referred to in our meetings with representatives of the trade, was that consumers cannot generally remember prices of individual items. A survey of 500 shoppers in supermarkets in Dublin in March 1986 by Dr. T. Dalgic showed that, when asked to name the prices of 79 frequently purchased items, 109 shoppers or 22 per cent, could not remember any prices and a further 260 shoppers, or 52 per cent, could only remember the prices of between one and ten items. It was alleged by one of the parties making a submission to us that "consumers are open to being misled in regard to the overall value they are getting".

4.24 Some suppliers, particularly those with well-known and popular brands, in order to ensure that their products were not sold below cost, with the attendant problems already described, paid a bonus provided that their products were not de-listed or sold below cost. This bonus might be in addition to a long term allowance. This approach had been found to be effective and had contributed to the reduction in below cost selling of branded products over the past few years. However, the multiples, as already indicated, resorted to using some of their own brands on occasion as loss leaders. The suppliers did not withhold supplies and the share of the market taken by own brands had increased significantly. The pressure on suppliers was even more damaging, because it reduced the sales of national brands.

4.25 In addition, where it intended to sell below cost, a multiple might purchase substantial quantities of a produce, so that, if supplies were later refused by the supplier, the promotion could proceed. When stocks were exhausted, prices reverted to above cost. Supplies were then resumed.

4.26 We met with representatives of five of the six multiple companies. Among the issues we discussed with them was that of below cost selling. One of the companies was in favour of a prohibition but said that it believed there was a consequent danger of increased imports. Another company said that it would accept a ban but believed that the competition for independents would merely be changed and that the independents would not be better off. This company believed that a prohibition on selling below cost would make funds available for improvements in its stores and other forms of promotion. There was also the danger that price reductions would be directed into a product such as fresh meat, which might not be included in the Order. Another multiple company was against a prohibition because of the numerous practical problems which would, it believed, make it impossible in practice and also because it believed strongly that it would be to its commercial disadvantage compared with its multiple competitors. A further company also believed that imports, particularly of own brands, would be increased but advocated the idea that any reduction to below cost should be for a minimum period of, say, a month. The remaining multiple was opposed to a ban because it did not believe it would be enforced properly. It believed that a ban would damage its own brands and that, while below cost selling was essentially a promotional device, it directly benefited and was popular with the consumer. This company believed that, if below cost selling was banned, the consumer would pay more.

ARGUMENTS AGAINST A PROHIBITION IN PREVIOUS REPORTS

4.27 In addition, the Commission's report of 1972 and 1980 give a number of arguments against banning below cost selling. It was

4.30 The Commission in 1980 recommended that "intoxicating

ALCOHOLIC DRINKS

It is of interest to examine the legislation or regulation on below cost selling which exists in other countries. The practice is, in general, banned in France, Belgium, Luxembourg and Austria. In Switzerland, in the Autumn of 1986, an amendment to their unfair competition laws was made to deal, within the constraints of the Swiss Constitution, with below cost selling. Below cost selling is also illegal in twenty five states of the United States of America. It is, however, not banned in countries such as the United Kingdom, Denmark, Germany, Italy, Greece, Spain, Portugal, and the Netherlands, nor in Sweden, Norway or Finland. It is not prohibited, therefore, in nine out of twelve EC countries or in three out of five EFTA countries. In Germany, however, there is a voluntary agreement between leading food manufacturers and retailers that the retailers refrain from systematic selling below cost because of the difficulties the practice causes for small and medium sized businesses.

OTHER COUNTRIES

4.28 However, the Commission did state that "selling below cost is so obviously out of harmony with basic trading principles that it partakes of the character of an artifice; its artificiality is underlined by its short duration in most cases . . . it is capable of causing considerable damage to a practitioner as well as to those against whom it is directed. In our view the use of below cost selling . . . is an undesirable practice involving a distinct element of unfairness and on occasion presenting some of the features of predatory pricing."

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interest that any law would be inviting breaches and avoidance. competitor's price was regarded by the multiples as so vital to their goods. It was also considered that freedom by multiples to match a would be driven to switch to competing lines, which meant imported was thought that, if they were forbidden to sell below cost, multiples be able to offer goods at cost at a lower price than its competitors. It terms meant that there would regularly be some multiple which would was vital to trade, and that the prevalence of bonus offers and special meeting competition, and particularly in prices which in that a prohibition of selling below cost would limit retailers' skills in edge of competition amongst the major retailers. It was also argued that below cost selling benefited the consumer and the immediate and only effect as far as consumers were concerned would be to blunt the common good would result from its absence. It was further believed and that so radical an interference with the freedom to trade would require to be justified by demonstrating that grave damage to the reversal of the State policy which had brought rapid progress to date of official resale price maintenance representing, up to a point, a believed that the fixing of a minimum price would constitute a form

liquors should continue to be excluded [from the Order], particularly because their sale is subject to a special legal regimen and it would be imprudent to apply to it the same rules as apply to the sale of other goods since this would require a special examination of their suitability". The effect of this exclusion was that intoxicating liquors were used both in advertising below cost and in selling below cost. This practice had an adverse effect on the off-licence trade and the licensed trade and the point was made in the submissions we received on this issue that the public perception was that the non-multiple off-licence shops were charging excessive prices. It would seem, therefore, that a prohibition on below cost selling were to be introduced, that alcoholic liquors, which are not for consumption on the premises, should be included. Most alcoholic liquor continues to be sold for consumption on the premises and so is subject to the Intoxicating Liquors Acts. However, an increasing proportion is now being sold through supermarkets and it would be desirable to include such sales in the Order. We would lessen the problem of the special legal regimen if the Order were confined to "intoxicating liquors not for consumption on the premises".

FORM OF A PROHIBITION ON BELOW COST SELLING

4.31 We believe it is useful now to consider the form a prohibition on below cost selling might take. It would seem that, in order to avoid the possibility of below cost selling activity being re-directed from the existing below cost products, there should be as few exemptions as possible. We have seen, above, the effects of excluding alcohol from the 1981 Order. However, there may be some perishable products such as fresh meat, fruit and vegetables, where the balance of advantage might suggest that it would be better if they continued to be excluded from the Order. These reasons will include the practical points of difficulty of determining cost price where the market price changes frequently, of requiring that terms and conditions be published and so on. A further point would be the question of whether one retailer might be allowed to match the price of another, even if, to do so, the first retailer had to sell below cost. Logic would suggest that, if such an exemption were allowed, it would be very difficult to enforce the prohibition and it might be meaningless. A further question to be considered is the definition of cost. The Order at present defines it as net invoice price. We show elsewhere in this Report that this may not be real cost. If a prohibition on selling below cost is to be made, it would seem that, ideally, cost should be the real purchase price. In relation to the prohibition on advertising below cost, selling incentives at a cost to the retailer, such as coupons, money back offers, and so on, have to be deducted from the selling price to arrive at the real selling price. It would seem then that, if a prohibition on below cost selling were to be recommended, it should have the following characteristics—

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4.34 However, we believe that the majority of consumers tend to do the bulk of their weekly shopping in the one supermarket. It is our belief that reductions in prices below cost have probably been compensated for by increases in prices of other products. If this is so, then overall prices for the consumer might not rise. We expect that multiples would reduce the prices on a wide range of products, some to cost and others a little above cost. If, on the other hand, multiples simply raised the price of below cost items to cost or above, without making compensating adjustments elsewhere, this would be to the disadvantage of multiple customers, without any advantage to customers of independents, so the overall effect upon consumers could be adverse. This could not be considered by the Commission to be a favourable outcome of prohibiting below cost selling. However, it is very likely, if there is a competitive market, as there seems to be, that no multiple will be able to raise its average prices above the level

4.33 The effect of a prohibition on below cost selling upon consumers cannot be predicted with certainty. Consumers who have sought out below cost items in several different supermarkets might have to pay more, and in some cases substantially more, in the future. Because cost is defined as net invoice price and, because we expect that the invoice will tend to reflect the real cost more closely in the future, we cannot predict how much of an increase there will have to be on some items to bring them up to cost.

Consumers

4.32 We now consider the effects which a prohibition of the type outlined in the previous paragraph might have on the many interests which would be affected by it. These interests include those of the consumer, independent grocers and wholesalers, suppliers and multiples. We also look at the impact a prohibition on below cost selling might have on imports, excluded products, net invoice price, own brand and market shares, and the problem of enforcement. We also consider the effect of a prohibition on meeting a competitor's price, on allowances for selling below cost and on the stocking up of goods prior to their sale below cost.

Introduction

EFFECTS OF A PROHIBITION ON BELOW COST SELLING

- (i) There should be as few exemptions as possible.
- (ii) It should not be possible to match a competitor's selling price.
- (iii) Net invoice price should be, ideally, the real purchase price by the retailer.
- (iv) Selling incentives, at a cost to the retailer, such as coupons, money back offers, and so on, should be deducted from the selling price to arrive at the real selling price.

which applied before a prohibition on below cost selling was made. On balance, we expect that a prohibition would have very little or no effect on the overall prices which the vast majority of customers in multiples would have to pay. To the extent that independents do not presently sell below cost, they would not have to increase any prices arising from the prohibition and their customers are likely to be no worse off in the new situation. They might indeed benefit if the independents had to reduce prices to meet increased competition from multiples.

4.35. Consumers, we believe, favour supermarkets not for the price of individual items, but for the cost of their weekly shopping basket, among other reasons. Competition between retailers to benefit the consumer and to bring additional consumers into the shop should be on the basis of overall value. For this reason, the selling of a wider range of products at cost or above cost, which is an alternative to selling some items below cost, is a fairer way to promote a multiple as offering attractions to consumers. We believe, therefore, that competition between retailers will in the future be related to price over a wider range of products and not on a selected few. We do not believe, partly for the reasons above, that competition between the major retailers will be blunted. We think it will take on new forms. We hope it will be fairer and generally less disruptive to the rest of the trade. If below cost selling were to be prohibited, we consider it essential, as we argue elsewhere, that prices of grocery goods be surveyed both before such a prohibition is imposed and regularly thereafter, as was done in the past under the auspices of the National Prices Commission.

Independents and Wholesalers

4.36. It is believed by independents and wholesalers that a prohibition on below cost selling would not provide a solution to all the problems in the grocery trade. As far as the independents are concerned, the immediate effect would be that multiples would be forced to increase the prices of items currently being sold below cost up to at least the present net invoice price. Thereafter, much depends on the reaction of the multiples to the new situation. They could, initially, either continue to charge current above-cost prices on all other products, thus narrowing, perhaps substantially, the difference in the overall cost of a shopping basket between the multiple and the independent. Such a reduction in competition could be, and is indeed, likely to be, of benefit to the independent sector. Multiples could, on the other hand, choose to sell a much wider range of products at cost, and advertise them extensively, or engage in various promotional efforts, using the money saved by not selling below cost, neither of which could be matched by independents. In such circumstances, the levels of competition would be unchanged, or might even increase in intensity. We believe that, overall, the competition between multiple and independent would be perceived to be fairer than it is now. The

4.37 *Suppliers* The effects of a ban on below cost selling upon suppliers would vary, according to the reaction of multiples, and to the reaction of independents and wholesalers to the multiples' response. An increase in the selling of goods at real purchase price, for example, might initially increase the pressure upon suppliers from those who were not purchasing on terms as favourable as those given to the at-cost sellers. If multiples requested the inclusion on the invoice of discounts not currently shown, including long-term allowances which could then no longer be incentive-based, or if they tried to secure even better terms of supply, the pressure on suppliers would be no less than at present, and could even be intensified. Similar pressures would be applied by wholesalers to secure the same treatment as multiples. It might be expected that this increased pressure would, however, diminish as adjustments took place. Suppliers' representatives have consistently urged the Commission to prohibit below cost selling and they consider it would be beneficial to them. Among the advantages would be a reduction in the aggravation which below cost selling causes and a resultant saving in management time. As the Order stands, while below cost selling is not prohibited, suppliers have the right to withhold supplies if their goods are sold below cost. Prevention of below cost selling is dependent on action by suppliers. It would seem, because of the high shares of their sales which go to multiples, that suppliers are unable, without causing themselves significant harm, to withhold supplies. Over time, a practice has developed for some suppliers to pay a bonus or allowance contingent on the multiple not

were beneficial effects for the retailer. the success of the independent, the wholesaler would also gain if there more competition from multiples. As the wholesaler is dependent on retailers, although it is possible that they would have to face even that a prohibition could have a favourable impact on independent would be prepared to sell their products. On balance, it would seem know the cost at which some suppliers, in certain circumstances, at cost and if that cost were real net cost, then the independents would existence of greater transparency in the trade. If products were sold unfair. A further advantage for the independent retailer might be the independents and which have seemed to them to be unjust and of the deep price cuts which have been a cause of such concern to the difference to them. The greatest benefit would be from the elimination in the opinion of their representatives, it would make a significant have sought a prohibition on below cost selling for many years and types of outlets than they may have now. The independent retailers more realistic view of the real difference in price between the two relationships. However, we also expect that consumers would have a that prohibiting below cost selling would not, in itself, alter the price independents would continue to be more expensive than multiples and multiple and independent would be eliminated. We expect that inde-