

# Chapter Four

## Terms & Conditions of Supply

### 4.1 Introduction

In the previous Chapters we looked in some detail at the history and structure of the prohibition on selling below the net invoice price, the terms of which are set out in Article 11 of the 1987 Order. This prohibition is the most contentious provision in the Order and is often viewed in isolation.

However, our analysis of Article 11, and in particular the concerns expressed by the Consumer Strategy Group and others at the practice of off-invoice discounting, suggest strongly that Article 11 must be read in close conjunction with the provisions of Article 13 which relate to the terms and conditions of sale in the grocery trade.

This close relationship between Articles 11 and 13 is inevitable because it seems self-evident to us that off-invoice discounts, which we know to exist without knowing the extent of them, must be a term and/or condition of sale.

### 4.2 Standard Terms and Conditions

Since its inception in 1956, the simply stated objective of the Groceries Order has been to ensure the existence of trading conditions within the grocery business, which were fair to all.

The 1956 Order included provisions, which allowed a supplier to impose terms and conditions according to which he would sell to his customers. The Order did not stipulate what those terms and conditions should be but it did say

- (a) that they should reflect efficiencies and economies in the production and distribution systems, and
- (b) that they must be applied in an equitable manner and must be made available to anyone in the trade who requested them.<sup>1</sup>

It also went on to specifically, but perhaps ambiguously, state that a supplier should not differentiate between one purchaser and another provided they were of the same class.<sup>2</sup>

The 1958 Order clarified this latter provision by providing that a supplier might divide his customers into separate classes for the purposes of applying

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<sup>1</sup> Restrictive Trade Practices (Groceries) Order, 1956, Art.14.

<sup>2</sup> Ditto, Art.15

different terms and conditions – in essence bigger customers got a cheaper price or better credit terms.

### 4.3 Supplementary Terms

Over the next 14 years or so, suppliers began to extend their basic terms and conditions and to establish a structure of supplementary terms. These were usually discounts, rebates or allowances paid by suppliers to their customers in arrears as a means of rewarding loyalty or promoting sales. The 1972 Fair Trade Commission Report of their enquiry into the grocery trade described them thus:

*“They are of a somewhat arbitrary character, since they are negotiated individually, and on a confidential basis, with particular customers. The facts disclosed at the enquiry showed that, even as between organisations of equivalent buying power, incentives were provided by a number of suppliers in what appeared to be, from any economic standpoint, an arbitrary fashion. Where private negotiations are the practice, the supplier, even on grounds of time alone, will concentrate on large buyers to the exclusion of small buyers. The procedure facilitates the application of pressures and the abuse of economic power; concessions obtained reflect the bargaining power of the large scale buyers and can result in unfair discrimination. Well devised standard terms are preferable to supplementary terms. It is also in the interest of equity in trading, and often in the suppliers interest also, that supplementary terms should be kept at a level that will not distort, or even undermine, the application in practice of standard terms.”<sup>3</sup>*

In 1972, the FTC considered recommending that supplementary terms be prohibited but decided that such an approach would be unrealistic. Instead they recommended that they be subject to certain safeguards.

As a result of the FTC Report, the new Groceries Order made in 1973 introduced some changes into the provisions regarding terms and conditions. In regard to standard terms and conditions the FTC found that the provisions of the 1956/58 Orders were insufficient to prevent discrimination against certain traders, particularly wholesalers, and needed to be rectified.<sup>4</sup> In regard to standard terms and conditions, the Order provided as follows:<sup>5</sup>

- A supplier had to maintain a statement of terms and conditions of sale
- Those terms and conditions could provide for discounts of different amounts having regard to the different types of buyers and the quantity or value of the goods in question.

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<sup>3</sup> FTC Report 1972, Para. 167, P.76

<sup>4</sup> FTC Report 1972, Para 143, P 68

<sup>5</sup> Restrictive Practices (Groceries) Order, 1973, Art. 3(5)

- Those terms and conditions should also provide “a general indication” of the nature and extent of any supplementary terms that were available.

Supplementary terms were a new legislative concept and were defined as a discount in consideration of either:

- a buyer purchasing more than a specified quantity of the goods in question over a period of time, or
- the promotion of those goods by or on behalf of the wholesaler or retailer.

And, reflecting the concerns of the FTC that supplementary terms should not be of such a magnitude so as to substantially alter the impact of the standard terms, the new 1973 Order also provided that the discounts allowed as part of the supplementary terms should not be “substantially bigger” than those allowed as part of the standard terms.

One critical difference between standard and supplementary terms was that whereas standard terms had to be published (in the sense of being available to anyone who asked for them), supplementary terms were secret, were negotiated separately with individual suppliers and only a “general indication” of their nature and extent had to be published.

In order to safeguard against unfair application of supplementary terms in such circumstances, The Examiner (of Restrictive Practices – now the Director of Consumer Affairs) was entitled to see details of a supplier’s supplementary terms as a means of ensuring fair play.

Off-invoice discounts are one manifestation of supplementary terms.

#### 4.4 The 1975 Enquiry

The 1975 Restrictive Practices Commission’s Enquiry, which did not deal at all with the issue of below cost selling, did look in detail at the terms and conditions of supply in the grocery trade.

In regard to standard terms, the Commission accepted the view put to them that the 1971 Order was unclear and unduly restrictive in regard to the criteria according to which a supplier might be allowed to apply different discounts or rebates to different classes of buyers. It was felt that the Order did not recognise the range of factors which might influence economies in the distribution system.

And so they agreed to insert an additional provision which stated that discounts and rebates could differ having regard to *“objective criteria which are designed to promote efficiency in supply or distribution and which are*

necessary in the legitimate interests of the supplier's business" (emphasis added).<sup>6</sup>

This was an important change because the new provision clearly allowed much greater discretion to suppliers in deciding what discounts and rebates to apply to particular customers.

In regard to supplementary terms, the Commission also accepted the view put to them by the trade that the provision in the 1971 Order that supplementary terms should not be "substantially bigger" than standard terms was unclear and open to a variety of interpretations, particularly in regard to the use of the words "substantially bigger". The Commission recommended that the term be deleted from the Order.

This was also a very important change because it clearly lifted the restriction, such as it was, on supplementary terms.

In so doing, it lifted the restriction, such as it was, on off-invoice discounts.

The Commission themselves recognised that as a result of the changes they recommended, and which were carried through in the first 1978 Order, "*...the onus would inescapably be on the supplier – within his capacity in a competition situation – to ensure equity of treatment for all his customers.*"<sup>7</sup>

This supplier discretion was tempered by a provision inserted into the 1978 Order which provided that terms and conditions generally should not

*"...discriminate unfairly against purchasers and, having regard to the legitimate interests of the supplier's business, shall take reasonable account of the economies of supply and distribution to different purchasers."*

## 4.5 The 1981 Order

The 1980 RPC Enquiry, as we have seen elsewhere, concentrated on below cost selling and no changes to the provisions in regard to terms and conditions were recommended. The 1981 Order, which consolidated all existing groceries orders into one single piece of legislation, effectively restated the same provisions as had been introduced in 1978.

## 4.6 The 1987 Review of the 1981 Order

The Restrictive Practices Commission reviewed the operation of the 1981 Order and they reported the findings of the review in a Report submitted to the Minister in January, 1987.

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<sup>6</sup> Restrictive Practices (Groceries) (Amendment) Order, 1978, S.I. No. 82/1978, s.4

<sup>7</sup> RPC Report, 1975 Para.49, P.23

The Commission found, based on discussions with the trade, that there was only token compliance with the 1981 Order. Standard terms and conditions (which had to be published and available to all) were little more than a charade and the real terms achieved by both buyer and seller were the supplementary terms that the Commission had accepted, in 1972, were secretive, arbitrary and discriminatory.

The Commission's "General Conclusions on Terms and Conditions" are set out in two paragraphs, 5.28 and 5.29 on page 74 of their Report.

These conclusions are important to our current review of the operation of the Groceries Order. The Commission said:

*"The Commission has always considered that unfair discrimination was undesirable. We are satisfied that suppliers are continuing to discriminate unfairly between their customers at the present time. This discrimination is principally effected through the granting of supplementary terms of a type never envisaged by the Commission. The objectives of the Order have, therefore, not been achieved. In our opinion this failure has occurred, among other reasons, because of the increase in buying power of the multiples and the decision of the Examiner (of Restrictive Practices) to react to complaints but not to do spot checks to ensure that the Order was being observed. The unwillingness of suppliers to complain about breaches of the Order, because of possible reaction from powerful customers, has also contributed to the difficulties. We recognise, also, that the wording of parts of the Order was deficient, in that it was ambiguous and not clearly defined. There is a major problem in deciding whether terms are unfairly discriminatory or not, particularly if the terms can have 'regard to the legitimate interests of the supplier's business'. The Examiner had no guidelines on discrimination available to him."*

The Commission went on to look at some of the changes they might make to the Order to rectify these deficiencies but they concluded:

*"We have decided that, in order to make a recommendation which could have a major impact, we need to study this issue in much greater depth than we have been able to do on this occasion. We also need to obtain detailed information on the extent of unfair discrimination in terms and conditions in the trade."*

In order to facilitate study of the issue, changes were made in the 1987 Order to require any retail grocer with more than 5 outlets, and all wholesalers, to provide the Examiner (of Restrictive Practices – now the Director of Consumer Affairs) on a monthly basis with details of supplementary terms negotiated with their suppliers.<sup>8</sup>

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<sup>8</sup> RPC Report, 1987, Para 5.30, P.75 & Restrictive Practice (Groceries) Order, 1987, S.I. No. 142/1987, Art.14(3)

In order to facilitate the Examiner in this regard, the Order limited supplementary terms to three categories. They were long-term allowances in respect of quantities purchased over a specified period of time, promotional allowances and “any other arrangement” relating to price not included in the standard terms. This requirement is curious given that the Order being amended (the 1981 Order) defined supplementary terms as including only the first two of these categories. The inclusion of the “any other arrangement” clause in the 1987 Order does seem to have extended the definition considerably.

The subsequent review of the 1987 Order was to have taken place within 12 months but in fact a report of the review was not submitted to the Minister until 2 August 1991.

#### **4.7 The 1991 Report**

The 1991 Report of the Fair Trade Commission drew particular attention to the difficulties encountered by the Director (of Consumer affairs) in attempting to monitor and evaluate supplementary terms as it had been envisaged he should do in order to allow the Commission make a determination on the matter.

Some parties refused to co-operate and it was not clear that they could be required to do so. In other cases the sheer volume of material made it difficult to find any effective way to analyse it. Others saw the whole process as an unwarranted burden on the trade and viewed the operation as unsustainable. In the final analysis, the resources were simply not available to conduct the exercise in any meaningful way.<sup>9</sup>

The three-man Fair Trade Commission was split on the issue of terms and conditions just as it was in regard to the ban on selling below invoice price. The Chairman and one Member were of the view that the requirements and objectives of Article 13 of the 1987 Order (regarding terms and conditions) were covered by the provisions of the 1991 Competition Act, were consequently unnecessary and should be repealed. They recognised that new legislation might be required at some time in the future to deal with any problems that might arise in the case of credit terms, advertising allowances or “hello money”.<sup>10</sup>

The third Member of the Commission agreed that many of the provisions of Article 13 could be repealed in the light of the Competition Act, 1991. However, he did not go as far as his colleagues. He believed that there should be a continuing requirement for suppliers to maintain and make available a statement of terms and conditions.

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<sup>9</sup> FTC Report, 1991, Para 8.29, P.140

<sup>10</sup> FTC Report 1991, Paras 8.82 to 8.94, Pgs. 153 to 156

He also envisaged that suppliers be allowed to continue the operation of supplementary terms although he did express concern in regard to off-invoice discounts and recommended that “cost” for the purposes of a ban on below cost selling should mean the actual cost after taking account of all allowances, discounts and rebates.

With the benefit of hindsight, it is difficult to see how the latter provisions could have been enforced. The problem is essentially that identified by the High Court in 1979. If supplementary terms allow for the payment of discounts and rebates in arrears, how can the Director of Consumer Affairs, or indeed a Court, form a view at any given point in time whether or not the sale by a retailer of a product is actually a sale below cost thus constituting an offence?

A further difficulty arises in this respect and has to do with the way in which such off-invoice discounts are negotiated.

Our understanding is that in a typical scenario, a retailer might purchase during the course of the year a large number of product lines from a single supplier. Subsequent discounts are negotiated and paid as a single sum based on the overall volume of trade. They are not product specific. Relating them back to an earlier invoice in order to determine the actual cost of a specific product (and thus to determine whether or not the product had been sold below actual cost) seems likely to add an additional, and perhaps equally insuperable, obstacle to the whole process.

We have examined in Chapter Three the reason why no action was taken on foot of the recommendation contained in the FTC’s 1991 Report (See Paragraph 3.10). No changes were made to the 1987 Order despite the clear and unambiguous concerns of the FTC because it was the intention of the Minister of the day to revoke the Order entirely once the 1991 Competition Act had been properly embedded. That this never happened is now history.

## **4.8 Conclusion**

It is regrettable in our view that the provisions of Article 13 of the Groceries Order are unchanged since the 1978 Order – despite the fact that as long ago as 1987 the RPC acknowledged that they were not achieving their objective and there was only token compliance with them.

We believe that this remains the case and the provisions of Article 13 of the 1987 Order are not working in the manner envisaged by the Commission, the Minister and the Oireachtas