

Chapter One

Evolution of the Groceries Order

1.1 The Beginning – The 1956 and 1958 Orders

Between April and June 1955, the then Fair Trade Commission (FTC) held a public enquiry into “*the conditions which obtain in regard to the supply and distribution of grocery goods and provisions, namely, such foodstuffs (excluding flour, wheaten meal, bread, milk, mineral waters, confectionery, fresh fruit and fresh vegetables) and household necessities as are ordinarily sold in grocery and provision shops.*” The FTC reported the outcome of their Enquiry to the Minister for Industry and Commerce in June 1956¹ and recommended the introduction of statutory rules designed to guarantee fair trading in the grocery sector. The Groceries Order was born.

It was a very different era, as a contemporary reading of the FTC Report makes clear. The total weekly cost of running a household in Ireland was of the order of €12 (216 shillings) per week, the State operated statutory price control on a wide range of everyday products and the structure and operation of the grocery trade was a far cry from today’s modern, streamlined supermarket business.

The 1956 Groceries Order² was the first of its kind. It prohibited a range of activities such as resale price maintenance (discussed in detail in Paragraphs 2.2 and 6.6) as well as the collective fixing of prices by suppliers and wholesalers, unfair discrimination against retailers, the fixing of recommended minimum prices and the withholding of supplies because of dissatisfaction at the prices being charged to the consumer.

The FTC was opposed to a ban on below cost selling but they did recommend that suppliers be legally allowed to withhold supplies from retailers who sold goods at below the wholesale price at which they had bought them.

The Order giving effect to these recommendations was signed by the Minister, William Norton, on 31 December 1956. It did not have immediate effect. Indeed it has been a feature of that Order, and all Orders since, that they have not had effect until such time as they had been confirmed by an Act of the Oireachtas.³

Before the 1956 Order came into effect, it was amended in 1958⁴ “*to render a number of its provisions more equitable.*”⁵ One such provision allowed

¹ Fair Trade Commission Report of Enquiry into the conditions which obtain in regard to the Supply and Distribution of Grocery Goods and Provisions (Stationery Office, Dublin, Pr 3722).

² The Restrictive Practices (Groceries) Order, 1956, S.I. No. 332/1956.

³ This was a requirement originally of the Restrictive Trade Practices Act, 1953 (No 14 of 1953) under which the 1956 Order was made.

⁴ Restrictive Trade Practices (Groceries) Order, 1956 (Amendment) Order, 1958, S.I. No. 163 of 1958.

⁵ Dáil Debates, Vol 171, 12 November 1958, Col 650 (Sean Lemass, Minister for Industry & Commerce).

suppliers to divide their customers into different classes for the purpose of applying different terms and conditions.

Thus, the 1956 Order and the 1958 Amendment Order both came into effect at the same time on 25 November, 1958. The Orders applied, as the opening paragraph above infers, to grocery goods (with the specified exceptions) and household “necessaries” normally sold in grocery shops.

The FTC reviewed the operation of the Orders in 1966 but no changes were recommended.⁶

1.2 The 1973 Orders

The FTC conducted a second review in 1972⁷ which concentrated on the terms and conditions applying in the trade. The Review was limited for a variety of reasons to foodstuffs (to the exclusion of the so-called household necessities).

The review resulted in the making of a new Groceries Order in 1973 (also amended in the same year)⁸, which set new rules in regard to the terms and conditions for the supply of “grocery goods for human consumption”.

This Order established for the first time a ban on retailers advertising goods for sale at “*a price that is less than the price...at which he purchased the goods*” (the ban on below cost advertising). We look at the reasons for this in more detail in the next chapter.

The 1956/58 Orders remained operative in so far as the household necessities were concerned.

1.3 The First 1978 Order

In December 1975, the FTC, now renamed the Restrictive Practices Commission (RPC), submitted a Report⁹ to the Minister in regard to the operation of certain provisions of the Groceries Orders, particularly in regard to terms and conditions and product coverage.

Following protracted consideration of that Report, a new Order was signed by the Minister on 15 March, 1978¹⁰. Its purpose was to amend the 1973 Order

⁶ Fair Trade Commission Report of a Review of the Operation of Orders relating to the Supply and Distribution of Groceries....(Stationery Office, Dublin, Pr 8896).

⁷ Fair Trade Commission Report of Enquiry into the conditions which obtain in regard to the supply and distribution of Grocery Goods for Human Consumption (Stationery Office, Dublin, PrI 2517).

⁸ The Restrictive Practices (Groceries) Order, 1973, S.I. No. 49 of 1973 & the Restrictive Practices (Groceries) (Amendment) Order, 1973, S.I. No. 287 of 1973.

⁹ Restrictive Practices Commission Report of Special Review by Means of Public Enquiry of the Operation of Articles 2 and 3 of the Restrictive Practices (Groceries) Order, 1973...(Stationery Office, Dublin, PrI 5274).

¹⁰ The Restrictive Practices (Groceries) (Amendment) Order, 1978, S.I. No. 82 of 1978.

so as to facilitate new provisions in regard to payment of bills on time, own label goods, the exclusion of fresh and frozen meat from the scope of the Order, and supplementary terms and conditions. The Order was confirmed by an Act of the Oireachtas later that year and came into effect on 20 June, 1978.

1.4 The Second 1978 Order

As 1978 progressed, certain practices emerging in the trade gave the RPC and the Government of the day cause for concern. As we shall see later in this report, this involved a boycott of the products of an Irish manufacturer by a group representing wholesale and retail interests, for failing to take action against a retailer who, it was alleged, was selling grocery goods below cost. The RPC acknowledged, however, that the issue ran much deeper than this.

In November, 1978, the Examiner of Restrictive Practices recommended to the Minister that the Groceries Orders "*be amended so as to reapply in relation to all grocery goods, the provision in the 1956 Order enabling suppliers to withhold supplies from persons who engaged in below cost selling.*"¹¹ These powers had not applied in respect of non-food grocery goods since the making of the 1973 Order.

Critically, and again we look at this in more detail later, the Examiner also recommended changes so as to introduce the notion of selling below "the net invoice price". The reason for this was to introduce some certainty into what was meant by "cost" and to facilitate prosecutions under the Order (see Paragraph 2.11 below).

To implement these recommendations, another amending order was signed by the Minister, this time on 7 December 1978¹². It was confirmed by an Act of the Oireachtas and came into effect on 19 December 1978.

There were now in force no less than six groceries orders - 1956, 1958, 1973, 1973 (amendment), 1978 and 1978 (amendment) - each applying different provisions to different elements of the trade which, not surprisingly, seemed to be hopelessly confused. Better regulation had yet to become a feature of Irish policy making.

1.5 The 1981 Order

In November, 1980, The RPC produced yet another Report of another enquiry, this time into the "*Retail Sale of Grocery Goods Below Cost.*"¹³ The

¹¹ Seanad Debates Vol 90, 13 December 1978 Col 748 (Mrs Geoghegan-Quinn, Minister of State at the Department of Industry, Commerce & Energy).

¹² The Restrictive Practices (Groceries) (Amendment) (No2) Order, 1978, S.I. No. 336 of 1978.

RPC stated at paragraph 7.3 (page 68) of that Report as follows: *“We do not believe that a ban on below cost selling would be justified at this stage....”* We will look at the reasons for this in the next chapter.

The Report went on to recommend some strengthening of the ban on below cost advertising and, mercifully, a revocation of all previous orders still extant and their consolidation into one new order (paragraph 6.2, page 71).

The Minister for Industry, Commerce & Tourism signed the new Order giving effect to these recommendations on 4 March 1981. The Order was subsequently confirmed by an Act of the Oireachtas and came into effect on 7 April, 1981

1.6 The 1987 Order

In July 1986, the Minister requested the RPC to carry out a special review of the operation of the 1981 Order in the light of developments since the Order was made *“and with particular reference to the issue of below cost selling”*.¹⁴ The Report was submitted in January 1987.

The Report recommended a number of very critical changes to the 1981 Order. It said intoxicating liquors should no longer be excluded from the scope of the order, own label goods should be specifically included, and “hello money” was to be prohibited for the first time, thus reflecting changes that had taken place in the business practices in the sector over the years.

But most critically of all, the Report recommended that the practice of below cost selling be prohibited for the first time. In that latter regard, the term “net invoice price”, which was first introduced into the 1978 Order, was retained. This term is, in many respects, central to the current debate.

The Minister for Industry & Commerce signed a new Order giving effect to these recommendations on 25 May 1987. It was confirmed by an Act of the Oireachtas and came into effect on 11 December 1987. It remains in force to this day.

1.7 1987 – 2005

Since its introduction, the 1987 Order has continued to be contentious and provoke debate. Much of that debate has centred on the ban on below cost selling rather than any of the other provisions of the Order. We examine developments in this period in more detail in the next chapter.

¹³ Restrictive Practices Commission Report of Enquiry into the Retail Sale of Grocery Goods Below Cost (Stationery Office, Dublin, PrI 9428).

¹⁴ Restrictive Practices Commission Report of Review of Restrictive Practices (Groceries) Order, 1981 (Stationery Office, Dublin, PI 4678) (Paragraph 1.1, Page 7).

Nonetheless, the following is a brief summary of developments in the period.

The 1987 order was reviewed in 1991 by the FTC (by now back to its original name) and a report of that review was submitted to the Minister in August, 1991.¹⁵ By a majority of 2 to 1 the Commission recommended that the ban on below cost selling, introduced only four years earlier, should be revoked on the grounds principally that it had not operated as intended and that anti-competitive practices in the trade had been adequately covered in the meantime by the Competition Act, 1991. The then Minister decided not to act on this recommendation immediately and opted to keep the matter under review pending the settling in of the new Act.

There were a number of subsequent internal Departmental reviews of the Order in the course of the 1990s but no attempt was made to amend it in any way.

The issue was examined by the Competition and Mergers Review Group and dealt with at length in its Final Report in March 2000.¹⁶ The Group recommended that the ban on below cost selling be repealed on the basis that such a move would enhance the pace and intensity of competition in the trade. Once again that recommendation was not accepted.

In 2001, the OECD, in its Report on “Regulatory Reform in Ireland” recommended that the Order be repealed.

The National Competitiveness Council in its “Competitive Challenge” Report published in October, 2004, recommended that the Government “*reconsider the ban on below-cost selling*” and stated that “*...there is evidence that the ban has undermined vigorous price competition between retailers at the expense of consumers.*”

In 2005, the Oireachtas Joint Committee on Enterprise & Small Business published its report into the operation of the grocery trade in Ireland.¹⁷ They recommended that: “*A ban on below cost selling be retained.*” (Paragraph 8.7, page 57).

In April 2005, the Consumer Strategy Group in its Report, *Make Consumers Count*, recommended that the Order be revoked in its entirety.

¹⁵ Fair Trade Commission Report of the Review of the Restrictive Practices (Groceries) Order, 1987 (Stationery Office, Dublin).

¹⁶ The Final Report of the Competition & Mergers Review Group, March 2000 (Stationery Office, Dublin, PN 8487).

¹⁷ Joint Committee on Enterprise & Small Business, Third Report, Interim Report on the Impact of Grocery Multiples on the Grocery and Retail Markets and its effect on Consumers, Small Grocery Retailers and Small Grocery Suppliers, Houses of the Oireachtas, March 2005.

1.8 Prosecutions Under the 1987 Order

There have been a limited number of prosecutions under the 1987 Order. Most, if not all, resulted from complaints received by the Director of Consumer Affairs from trade representatives rather than from consumers.

16 complaints of below cost selling were received by the Director in 1988, the first year of operation. In the majority of cases the complaint was found to be groundless or the breach a relatively minor one.

Five complaints were received in 1989 but the Director concluded in his Annual Report for the year that *"...overall it seems that there was no below cost selling of any economic significance in the grocery market."*

Between 1990 and 1992 a number of complaints were investigated which involved the use by retailers of money-off voucher schemes which, when used by the purchaser, had the effect of bringing the price of certain groceries below cost. These seem to have been largely terminated voluntarily following intervention by the Director. In subsequent years, investigation and prosecution activity seems to have been limited.

In 1997 there were 16 investigations of below cost selling but no prosecutions.

In 1998, five prosecutions took place.

In more recent years, the Director has informed us that there have been five prosecutions for below cost selling – one each in 2002 and 2004, and three in 2003.

Over the years other provisions of the Order have been invoked by the Director, including in 1991 in regard to allegations of price fixing, particularly on the price of milk and bread, which resulted in court proceedings.

In 1999, the Director investigated a complaint that Superquinn had sought "hello-money" from a supplier. The matter was resolved voluntarily before it came to court.