

Chapter Six

Off-Invoice Discounting and the Prohibition of Sale Below Net Invoice Price

6.1 Introduction

In their submission to the Consultation Process, BWG Foods Limited¹ states as follows:

“As the Consumer Strategy Group also points out, OID’s (off-invoice discounts) have for many years been an integral feature of the grocery trade yet only now are they being identified as an area of serious concern.”

This is an incorrect statement.

Off-invoice discounts have been a cause for concern in the context of a ban on below cost selling for at least the last 33 years.

In 1972, the Fair Trade Commission, in opting not to recommend a ban on below cost selling, stated as follows:

“...the inclusion of rebates based on future performance would be difficult...To exclude rebates would mean that the figure for a particular outlet earning a rebate would not be a true net purchase price...”²

This was a clear reference to the difficulty in accounting for retrospective discounts.

We have explained in Chapter Two how the term net invoice price was nonetheless introduced into the second 1978 Groceries Order and how this gave rise a year later to court proceedings which determined that off-invoice discounts could not be regarded as part of the invoice price. This was an issue in the 1980 Report of the Restrictive Practices Commission and occupied the minds of the Commission again in 1987 and in 1991.

6.2 How Off-invoice Discounts Operate

The Groceries Order requires a supplier to publish his standard terms and conditions and to supply a trader on those terms. The purpose of including this requirement in the Order was to prevent discrimination in the trade.

¹ BWG Foods Limited (BWGFL) is part of the BWG Group and is a long established wholesale company. It owns the SPAR symbol brand for the Republic of Ireland and the Mace symbol brand for Leinster and Munster.

² FTC Report of Enquiry, 1972, Para. 218, P.91

Standard terms and conditions would typically include a supplier's price list and credit terms for different classes of customer. They might also specify discounts and rebates that are available to reflect the quantity or value of the goods purchased as well as economies and efficiencies in the production or distribution system.

However, the Groceries Order allows a supplier to operate a system of supplementary terms. These need not be published, but only a general indication of their nature and extent must be given.

Such supplementary terms can also include a rebate or discount in consideration of quantities purchased, the promotion of individual products by the retailer or *"any other arrangement relating to price"*³ not indicated in the standard terms.

It is these latter rebates or discounts that, because they are part of a supplier's supplementary terms, are paid in arrears and are not included on the invoice at the time the goods are delivered to a retailer's premises.

In Chapter Four, we indicated our understanding of the way in which these discounts are negotiated and paid. During the course of the year a retailer might purchase anything from one to a large number of product lines from a single supplier. The supplementary discounts are negotiated at a review meeting between the retailer and his supplier at the end of a trading period. The agreed discount is paid as a single lump sum. Typically, it is not product specific.

6.3 Extent of Off-invoice Discounts

The Consumer Strategy Group stated:

"In some cases the discounts can benefit the largest retailers an average of 18 per cent, with corresponding reductions as the buying power of the retailer decreases".

The CSG provides no evidence for this figure.

It is clear to the Department as a result of submissions received, including the comments by BWG Foods Limited identified above, that off-invoice discounts are a feature of the grocery trade. This is not disputed by any party.

However, very little information has been provided to us in regard to the extent, or average amount, of discounts paid by suppliers to their retail customers. For instance, we have received a large number of submissions

³ Article 2(1) (c) of the 1987 Groceries Order. The 1991 FTC Report listed the type of supplementary terms as including long term agreements (LTAs) whether or not related to meeting quantity targets, promotional discounts, discounts to ensure listing of new products, allowances for collection of goods by the customer, and allowances for use of direct debit payment or for payment on time.

from individual⁴ retailers advocating retention of the Groceries Order. The vast bulk of these submissions make no reference at all to off-invoice discounts. We consider this surprising given that the existence of off-invoice discounts were such a significant part of the case made by the Consumer Strategy Group for the repeal of the Order.

BWG Foods Limited say that *“Discount income received from suppliers forms an integral part of the wholesaler’s gross margin and is therefore a key component in deriving net wholesale margin.”*

They go on to add that: *“Were wholesalers to reduce their prices by some or all of the element of OID’s, they would ultimately be selling product at a net loss.”*

In the light of this comment, it is worth emphasising that the debate is not about discount income earned by wholesalers but rather the level of discounts paid by suppliers and wholesalers to their retail customers.

BWG go on to acknowledge the existence of off-invoice discounts at retail level in the following terms:

“The trading arrangements between BWGFL and our independent retail customers involves the payment by BWGFL of retrospective rebates to our retailer customers based on volume purchases and other performance indicators. These rebates include percentage rebates applied to all volumes of products purchased from BWGFL and specific percentage rebates applied to specific categories or specific manufacturers. In excess of 40% of BWG’s OID income is passed on to its retail customers as year end rebates.”

PARAGRAPH REMOVED DUE TO INCLUSION OF COMMERCIALY SAENSITIVE INFORMATION

ADM Londis⁵ state in reference to the CSG’s estimate of discounts of up to 18% that *“This is certainly not the case in Londis where our discounts are not even close to double digit.”* We have also clarified with ADM Londis that this is a reference to discounts paid by suppliers to their wholesale operation.

⁴ These submissions are almost entirely from symbol or franchise operators.

⁵ ADM Londis operate and supply the Londis franchise in Ireland

We acknowledge that OID income earned by wholesalers may be relevant to the extent that it is likely to form at least part of the income out of which any discounts are paid in turn by the wholesaler to the retailer. However, the information provided is insufficient to allow us to draw any firm conclusions in this regard.

RGDATA describe the CSG figure of 18% as “*entirely unsubstantiated.*” They add that their own research among members suggests that “*the average discount received by retailers and wholesalers (emphasis added) from suppliers is not to the scale suggested by the CSG.*” This statement is actually incapable of telling us anything about the average discounts earned only by retailers.

RGDATA also doubt that multiples operating in the Irish market are securing off-invoice discounts of 18%.

IBEC also describe the CSG figure as “completely unsubstantiated” and suggest that, based on information they have obtained from suppliers and retailers, the figure is nearer 10%. They don’t say whether this should be interpreted as more than or less than 10%.

Tesco have acknowledged the existence of off-invoice discounts but have given no indication of their extent.

In 1991, the Restrictive Practices Commission concluded that “*...off-invoice discounts appear to be quite significant in some cases and to have increased in magnitude since the introduction of the ban.*” The Commission went on to say that some suppliers “*have paid substantial discounts (up to 25% and 30%) off the invoice...*”

Nonetheless, the Department is forced to conclude that the information provided in response to the Public Consultation Process by representatives of the grocery trade in regard to the payment of off-invoice discounts contains no information that would allow us to conclude either the average extent or range of such discounts.

We regard this as a disappointing outcome because an opportunity existed as part of the Consultation Process to clarify in some detail one of the most critical aspects of the operation of the 1987 Groceries Order - the extent to which off-invoice discounts are paid by suppliers to their retail customers. This is particularly so given the assertion by the Consumer Strategy Group that such discounts were keeping the price of groceries in retail outlets unnecessarily high.

That the response is disappointingly vague, underlines in our view, the critical and secretive way in which these terms are regarded by the trade.

Furthermore, we conclude that even if such discounts average less than the 18% suggested by the Consumer Strategy Group, that such income is

nonetheless a significant and substantial part of the income earned by the retail trade.

6.4 Impact of Off-Invoice Discounts on Retail Margins

The Groceries Order prohibits a retailer from selling at a price that is less than the price on the invoice given to him by his supplier.

If the retailer later receives a discount in respect of a product covered by the Groceries Order, he cannot then pass that discount on to the consumer in the form of a reduction to a price that is below the invoice price of the product concerned.

That is because:

- (a) The Groceries Order says that to do so would be against the law, and
- (b) It would be impracticable in any event given that the discount is paid in arrears and the product has probably long since been sold to the consumer.

However, even if the retailer was in a position, based, for example, on his previous trading experience with the supplier concerned or on the provisions of his written agreement with his supplier, to anticipate the amount of the retrospective discounts he might obtain, it would still be against the law for him to reduce the selling price of the product in question below the value stipulated on the invoice.

The essence of the CSG reasoning is that if the Groceries Order is revoked, there would no longer be any incentive for suppliers to put discounts off-invoice, and even if there was, such discounts could be anticipated and passed on to the consumer in the form of lower retail prices.

The CSG contention is disputed by various trade interests who have made submissions in the matter.

RGDATA state: *“There is nothing in the Order that prevents supplier discounts from being included on the invoice.”* And they add that their research of 87 suppliers in the Irish market revealed that 68% of them *“frequently placed discounts on the invoice and regard this as a matter that is one to be agreed between the retailer and the supplier.”*

We are not convinced by this argument.

It is certainly true that the Order doesn't prevent discounts being placed on the invoice. That is not where the problem lies. The problem lies in the fact that the Order does not prevent discounts being placed **off** the invoice. In fact it specifically allows it and encourages it. More weight could be attached to

the RGDATA research if it had concluded that suppliers **always** placed **all** discounts on the invoice. Clearly they do not.

Of much greater relevance in our view is the assertion by RGDATA and a number of others that income earned by retailers from off-invoice discounts is actually off-set against operating costs.

RGDATA, IBEC, ADM Londis, BWG Foods Ltd, Musgrave Group and others all refer to a report by economists Tansey Webster Stuart in 2003⁶ which concluded that the net profit margin earned by a sample of independent food retailers in 2002 was 2.65%.⁷

RGDATA: *“On the basis of these figures, it is clear that, in effect, the benefits of any discounts received by independent wholesalers or independent retailers are being passed directly to consumers through the distribution chain and are reflected in the low level of profitability secured by enterprises in this competitive sector.”*

IBEC: *“Information from suppliers and retailers suggests that this figure (for off-invoice discounts) is nearer 10% and reflects the cost of promotions in the Irish retail market rather than being a measurement of profit.”*

ADM Londis: *“...The CSG Report appears to ignore the fact the retailers have increasingly high levels of operating costs.”*

BWG Foods Ltd: *“These net margins include the discount or rebate income which has been passed on to them by the relevant wholesaler. As is the case for the wholesalers, were independent retailers to pass on their rebate income to consumers in the form of lower prices then they too would be selling product at a net loss.”*

Musgraves: *LTAs are part of the overall margin of the business as all off-invoice discounts are included in the overall profit margin.”*

Tesco have not referred to Tansey but have stated as follows: *“...we pass on to customers the full value of off-invoice discounts in the form of lower margins on a wide range of products...”*

The Department accepts the principle involved in this argument but we have serious reservations in regard to the conclusions drawn from the extent of retailers' margins in the grocery trade as indicated by the Tansey Webster Report.

We don't make any comment on the methodology by which Tansey Webster concluded that retail margins in the trade are an average 2.65%. However we

⁶ Food Production and Food Prices in Ireland, prepared by Tansey Webster Stuart for RGDATA and Food & Drink Industry Ireland. Published November 2003.

⁷ A large number of symbol group retailers have also referred to the Tansey Report. However, such submissions have generally not referred to off-invoice discounts and so no direct link between margins and discounts can be inferred.

do wish to make the point that net margins are not a valid test for determining whether or not the consumer is getting value for money. Low margins can hide great inefficiencies at any point in the distribution chain and do not constitute an argument in support of the notion that the person earning the low margins is charging low prices.

An analogy would be the high fares charged in the airline industry at a time when many airlines were losing large sums of money. On the other hand many low fare airlines are now among the most profitable in the industry.

Tansey argues that the scope for productivity gains in the retail distribution sector is limited.

No evidence is adduced for this assertion. In any event, the proposition advanced by Tansey has never been tested and is no justification for protecting the status quo.

Tansey does acknowledge that in the absence of substantial productivity gains, high labour costs will inevitably lead to higher retail prices. This is undoubtedly true but we caution against confusing labour costs with labour rates, particularly in an industry that is protected from competition.

Nevertheless, it is clear that the cost to a retailer of any product sold to a consumer is made up, not just of the purchase price paid to a wholesaler for the product in question, but also of the operating costs associated in bringing the product to the market – costs such as wages, light, heating, rent, rates, transport, insurance and so on.

Indeed, the difficulty in defining cost has always been in deciding how such operating costs might be apportioned to individual products on a retailer's shelves.

It is equally clear that a retailer has to pay such costs out of his gross margin i.e. the difference between actual cost price of the product (including all discounts whether on or off the invoice) and the actual selling price (including any discounts paid to the consumer).

When all costs have been paid, whatever is left over is the retailer's net margin or profit.

Off-invoice discounts are one component of the retailer's gross margin and it seems reasonable to assume that at least a proportion of the off-invoice discount income earned by a retailer must go towards paying operating costs.

This would not be the case, however, if the selling price to the consumer was sufficient to meet all operating costs before any off-invoice discount income was received. In such circumstances, off-invoice discount income would represent a contribution to a retailer's net margin or profit.

6.5 Do Consumers benefit from off-invoice discounts?

The Department believes that off-invoice discounting has a significant impact on retail prices in a number of ways.

Assuming for a moment that off-invoice discount income earned by retailers averages 10% (the figure suggested by IBEC) and assuming also that the Tansey Webster Stuart figures for average net margin earned by independent retailers is correct at c. 2.65%, then it follows that at least a proportion of the off-invoice discount income earned by retailers is being passed on to consumers in some form or another.

It is self evident that the extent to which it can be passed on in the form of lower prices on products covered by the order is severely restricted because the minimum price at which such products can be sold is fixed at the price on the invoice.

There are other ways, however, in which the consumer conceivably benefits. We have identified four possible methods which we outline below.

Discounts on products not covered by the Order: It is presumed that a proportion of off-invoice discount earned by retailers is in respect of products not covered by the Order. The retailer is free to sell these to the consumer at less than invoice price thereby, in effect, passing on some element of his off-invoice discount income to the consumer.

Lower prices overall on products not covered by the Order: A retailer could use off-invoice discount income earned in respect of products covered by the Order to reduce the selling price of products that are not covered.

This seems to be suggested by at least two submissions received. Tesco say that they pass on to customers *“the full value of the off-invoice discounts, in terms of lower margins on a wide range of products.”*

RGDATA say that *“In practice these discounts are passed back to consumers, at least by the independent trade, in the form of lower prices across the board and through increased investment in new shops. Different suppliers give retailers different discounts and in many instances, the discounts are used to reduce the cost of products across the board.”*

Interestingly, this is not the view of wholesale Group BWG who operate the Spar and Mace symbol brands. They say: *“...were independent retailers to pass on their rebate income to consumers in the form of lower prices then they too would be selling product at a net loss.”*

Either way, the practice would involve an element of cross subsidy between products which creates distortions in the market and, in our view, is most likely to disadvantage less well off sections of the population who spend a higher proportion of their income on foodstuffs covered by the Order.

A further undesirable outcome of this is that if the products on which the discount is being effected have a lesser weighting within the Consumer Price Index, then the CPI will also be adversely impacted.

Such price dispersal was considered to be a feature or consequence of resale price maintenance in the 1950s. In its 1956 report on the grocery trade, the Fair Trade Commission concluded that:

“This maladjustment (of costs and margins) arises primarily because of the effect of resale price maintenance in raising the margins of proprietary goods relative to those of ‘free’ goods and this may occur either because some manufacturers allow higher profit margins where retail prices are fixed, or because in the absence of price competition in respect of proprietary goods such competition tends to be concentrated on the ‘free’ goods sector thus compressing margins within that sector.”⁸

Many proponents of the Order maintain that if the ban is removed, it will result in high margins on less well known products in order to subsidise below cost selling on those items most purchased by consumers – the so-called KVI’s.⁹ This would simply be the cross-subsidy working in reverse. Whatever view one takes of the Order, cross-subsidy pricing is hardly transparent whichever way it might work.

Promotional Discounts financed by the retailer: Most multiples and symbol group operators offer some form of promotional or loyalty discounts such as money-off vouchers or the opportunity to buy household products at a reduced price. Such schemes can, in our view, have a distorting effect on both prices and competition. Consumers can only derive benefit from such promotional offers by shopping in the store that issues them thus tying them to that retailer and discouraging them from shopping elsewhere. Alternatively, they can only recover their outlay by purchasing a discounted product that they may or may not want. Such schemes limit consumer choice and consumers would be better off if they could avail of lower prices in the first instance and make their own decisions on when and where to spend the additional disposable income this allows them. Alternatively, they could shop in outlets charging higher prices but offering such incentives. The point is that there should be choice. Retailers’ pricing policies, and not the law, should be the determining factor.

Another disadvantage with regard to price reductions effected in this way would seem to be that there is no mechanism by which they can be reflected in the Consumer Price Index.

⁸ Fair Trade Commission Report of Enquiry into the conditions which obtain in regard to the Supply and distribution of Grocery Goods and Provisions, 1956 (Stationery Office, Dublin, Pr 3722), Para 178, P.121.

⁹ Known Value Items

We also note in this context that a case is currently pending before the courts which will determine whether or not the use of money-off vouchers to secure reduced retail prices for goods covered by the Order might constitute an offence in circumstances where the effect is to bring the sale price of the goods in question below the net invoice price paid for them by the retailer.

Investment in store infrastructure: Such investments tend to be once-off in nature and are unlikely to represent a continuing impact on a retailer's net margin. The difficulty as we see it in justifying the Groceries Order by arguing that it facilitates such investment is that it places a premium on service and the overall shopping environment and denies the consumer a choice to decide where to shop based on other factors – such as price. It also prevents retailers from responding to consumer preferences in regard to price, quality, choice and so on. However, the marketplace and not the law should be the determining factor. Again, such restrictions were not just a consequence of resale price maintenance in the 1950s but were used by some as a justification for it:

“Quality and service should be the determining factor: if the price is universally known, then the consumer can concentrate on comparing the advantages and qualities of the product against competing goods, and the benefits and services to be obtained from purchasing the particular goods in one place rather than the other.”¹⁰

6.6 Resale Price Maintenance (RPM)

There are two types of resale price maintenance – individual and collective.

Individual RPM is where a single manufacturer stipulates a minimum price¹¹ at which his products may be sold by the retail trade. Typically, the manufacturer enforces the edict by threatening to withhold supplies from any retailer who sells below that stipulated price.

Collective RPM would usually be enforced by a trade association who might seek to arrange a boycott of any retailer who sold below agreed minimum prices – a very severe sanction indeed and the legitimacy of which should be questioned in a society where economic efficiency is achieved through the competitive operation of free markets.

The foregoing were both features of resale price maintenance as it operated in the Irish grocery trade in the 1950's prior to the introduction of the 1956/1958 Groceries Orders. The practice was seen as anti-competitive in that it denied consumers the opportunity to make choices based on the prices of products available in grocery stores.

¹⁰ Fair Trade Commission Report of Enquiry, 1956 op. cit., RGDATA submission, Appendix III, P.151.

¹¹ We stress the point made earlier that we are speaking here of minimum resale price maintenance.

The 1956 Groceries Order prohibited such activity. This was contrary to what the trade had sought. RGDATA had lobbied the Fair Trade Commission seeking the legalisation of RPM. This call was rejected and the prohibition of RPM has been regarded ever since as a major step forward in the evolution of the Irish grocery trade. It opened the trade to new practices, promoted competition and allowed greater choice to consumers.

In the United Kingdom, in the period immediately following the Second World War, the case for and against the abolition of resale price maintenance provoked one of the most bitter political debates of the period. In 1956, almost simultaneously with the introduction of the Groceries Order in Ireland, the Restrictive Trade Practices Act was passed by the House of Commons and had the effect of prohibiting collective RPM. The debate on individual RPM, however, continued to rage and it was not until the passing of the Resale Prices Act in 1964 that RPM was finally abolished in the UK.

In Ireland, Article 3 of the 1987 Groceries Order prohibits any supplier or wholesaler from inducing a retailer, by any means, to sell at either a specified fixed price, or at a price not less than a fixed or minimum price.

Furthermore, Section 4 of the Competition Act, 2002 prohibits any agreements or concerted practices that have the effect of directly or indirectly fixing the buying or selling prices of commodities. Any person who is found to be in breach of this provision may be liable to criminal sanctions.¹²

However, the effect of Article 11 of the 1987 Order is to provide that a retailer may not sell below the fixed price stipulated on the invoice he receives from his supplier when he buys the goods. The Consumer Strategy Group and others have argued that this means that the supplier is effectively determining the minimum retail price for the product and that this is a form of resale price maintenance.

RGDATA have rejected this suggestion by the Consumer Strategy Group and contend that the argument displays *“a remarkable amount of naivety on the part of the CSG.”*

“No one with any practical knowledge of the retail grocery market could possibly conclude that any supplier has the ability or power to determine the minimum resale price of a product. Any supplier endeavouring to determine the resale price of a product in a shop would not sustain a long-term relationship with any retailers, regardless of size. This is reflected in the responses by suppliers to the RGDATA survey where over three quarters of suppliers (77%) rejected that the mechanism for net invoice price in the Order gave them any control over the minimum resale price of a product in grocery shops. Of the 23% who indicated that it enabled them to exercise some influence

¹² In October 2000, The Competition Authority successfully prosecuted Estuary Fuel Limited for resale price maintenance in regard to the sale of motor fuels at a filling station in Tralee. Limerick District Court imposed a fine of IR£1,000 (€1,270) for a breach of s. 4 of the 1996 Competition Act.

over the resale price of products, all were adamant that the ultimate arbiter of the price of products in shops is the retailer.”

What RGDATA appear to be suggesting is that it is the retailer who decides what price appears on the invoice given to him by his supplier. We have serious doubts whether or not this is the case. If it is the case, it may well represent an offence under Section 4 of the Competition Act, 2002.

RGDATA's view is inconsistent with that expressed in successive reports by the Restrictive Practices Commission in 1972, 1980, 1987 and 1991 to the effect that a ban on below cost selling would either constitute or facilitate a form of RPM.

It is also inconsistent with the view expressed in the past by the Director of Consumer affairs:

“The Director considered that the ban was open to abuse in that it could be used by suppliers to achieve Resale Price Maintenance...Use of the net invoice price to achieve RPM would have to be regarded as anti-consumer and would need to be tackled.”¹³

It is also inconsistent with the view of the Competition Authority who in their submission have argued:

“This restriction (in passing on off-invoice discounts) not only prevents customers from benefiting from lower prices, it also allows suppliers to control the price at which retailers sell their products. In this way the Order induces and legalises ‘resale price maintenance’.”

Tesco, while not referring specifically to RPM have stated as follows:

“Article 13 of the Groceries Order requires suppliers to prepare and maintain written terms and conditions of sale and to subsequently sell in accordance with these, in what is alleged to be a non-discriminatory manner. This effectively imposes wholesale price fixing.”

There is no doubt in our view that the ban on selling below the invoice price, is aggravated by the provisions of Article 13 which requires a supplier to prepare standard terms and conditions and not to deviate from them. The requirement seems to make it less likely that individual retailers are in a position of strength when it comes to negotiating the invoice price for a product.

There is a danger that any reduction negotiated would, if they represent an amendment to the standard terms and if the terms of the Order are being complied with, have to become available to everyone. That doesn't seem to be in the supplier's interest certainly, but neither does it seem beneficial to a

¹³ RPC 1991 Report of the Operation of the Groceries Order, op.cit., Para 7.31, P.59

retailer if his competitor automatically secures the benefits of his negotiating power.

This would certainly encourage the transfer of negotiations away from the invoice price to the supplementary terms which are not published and are not available to everyone.

This view is consistent with the view of the Restrictive Practices Commission over the years.

“There is in most cases token compliance with the Order through the publication of terms and conditions and the issuing of invoices in accordance with them. However, the terms and conditions appear to be merely a basis of discussion and the real terms achieved by buyer and seller are what are referred to in the Order as ‘supplementary terms’”¹⁴

“Discrimination in terms now takes place largely by way of off-invoice discounts.”¹⁵

Thus, while the effect of the Order might be to discourage negotiations on invoice price (although there is no prohibition on such negotiations) and to encourage negotiations instead on off-invoice discounts, this does not, as many proponents of the Order have argued, prevent retailers from using market power to put a squeeze on supplier margins. However, an important consequence of this effect is that whereas consumers might benefit from lower invoice prices, they cannot benefit so readily from higher discounts.

There is also some historical evidence of invoice manipulation on the part of suppliers.

The Director expressed concern about a case of invoice manipulation which was intended to ensure that goods would be sold at a price not less than a minimum price specified by the supplier.¹⁶

And in her submission to the Oireachtas Joint Committee in January, 2005, the Director stated as follows:

“...we have had a case where a retailer was getting a specified discount but the supplier would not put it in cash terms on the invoice and, therefore, it could not be deducted from the price on the invoice.

While we are discussing invoice price, I would mention another case where a retailer wanted to buy a particular product from his supplier at the same price as it was on sale in a large multiple and asked his supplier to supply him on similar terms. The supplier was prepared to

¹⁴ RPC 1987 Report of the Operation of the Groceries Order, op.cit., Para 5.13, P.66.

¹⁵ FTC 1991 Report of the Operation of the Groceries Order, op. cit., Para 7.140, P.91.

¹⁶ FTC 1991 Report of the Operation of the Groceries Order, op.cit., Para 5.12 P.45. Full details of the case, which involved the sale of yoghurts, is given in the Report.

give him an invoice to that effect provided that the difference between that price and his normal supply price was paid separately. What the supplier was suggesting here would facilitate a breach in spirit, if not in law, of the Order. We were unable to take any action in the matter.”

While we acknowledge that this evidence of invoice manipulation is anecdotal, we are satisfied that the cases cited offer ample evidence that the Order facilitates and perhaps even encourages the practice.

Invoice manipulation can also work in a manner that could allow certain retailers to circumvent the provisions of the Order. For example, if a large multi-national was in a position to be supplied and invoiced for products through an associated company, they could arrange for a price of their choosing to be placed on the invoice. This would give them a distinct competitive advantage over other retailers who did not enjoy such a facility and represent a serious distortion of trade in the sector.

We conclude that Article 11 of the Order – both on its own but particularly when taken in conjunction with Article 13 - facilitates a supplier in fixing a minimum price below which a retailer may not sell the supplier’s products.

It has been argued that Article 11 facilitates a form of legalised resale price maintenance. In our view, Article 11 is incapable of producing any outcome other than resale price maintenance.

We recall the words of Sean Lemass in 1956 when he rejected the case for legalisation of resale price maintenance and he said that the case for RPM had been “thoroughly demolished” by the FTC and that the practice was contrary to the public interest.

If those trade representatives who argued for the legalisation of resale price maintenance in 1956 had engineered the 1987 Order, they could not have designed a more effective contrivance to guarantee the achievement of their objective.

Furthermore, we believe there is a startling contradiction between on the one hand Article 3 of the 1987 Groceries Order and Article 4 of the 2002 Competition Act both of which prohibit resale price maintenance, and, on the other hand, Articles 11 and 13 of the 1987 Groceries Order which operate as a form of resale price maintenance.

We consider that this contradiction has the potential to bring the Irish statute book into disrepute.

In our opinion, the foregoing conclusions are axiomatic and require little elaboration. Our conclusion is consistent with the views expressed in successive Reports over the years by the Restrictive Practices Commission.

6.7 Impact on Competition

The Groceries Order is often seen as being synonymous with the ban on selling below cost (or, more accurately, selling below invoice price). In fact the Order is much broader than that.

Firstly, a supplier¹⁷ of such goods must prepare and, in effect, publish a statement of the terms and conditions on which he is prepared to trade. He cannot unreasonably refuse to trade on those terms. The purpose is to prevent unfair discrimination within the trade by ensuring every purchaser has some idea of the terms on which every other purchaser is buying from that supplier.

However, the supplier is allowed to prepare what are called supplementary terms which he is not required to publish. This type of arrangement means that the supplier can pay discounts retrospectively to purchasers and he is free to negotiate these discounts individually with each purchaser. He is under no obligation to tell one purchaser what he pays the others.

In 1975 the Restrictive Practices Commission identified a number of features of supplementary terms, which facilitated unfair discriminatory practices “against which safeguards ought to be provided”:

“These were an element of secretiveness, their arbitrary nature and their discriminatory character.”¹⁸

In 1987, the Restrictive Practices Commission concluded:

“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.”¹⁹

While we have received no information that would allow us to determine the extent of off-invoice discount income earned by the retail grocery trade, we are satisfied that such discounts are a critical aspect of the way in which business in the trade is conducted.

In the circumstances, we see no reason to demur from the conclusion of the Restrictive Practices Commission in 1975 that such discounts are “secretive, arbitrary and discriminatory”.

¹⁷ Defined in the 1987 Order as a manufacturer or importer of goods for sale to wholesalers or retailers.

¹⁸ 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), 1975, Para. 48, P.23.

¹⁹ Restrictive Practices Commission Report of Review of Restrictive Practices (Groceries) Order, 1981 (Stationery Office, Dublin, PI 4678), 1987, Para 5.28, P.74.

The discriminatory nature of these discounts does not imply that the retailer is always the “victim”. In fact the opposite may often be the case where a large retailer might, because of the considerable buying power he wields, be in a position to negotiate a larger discount or other more attractive supplementary terms than might his competitor. In such circumstances the pressure is put on the supplier.

Of course, this process whereby the terms are negotiated by a supplier individually with each buyer at the end of a trading period gives rise directly to their arbitrary nature.

And of course, it is in the interests of both parties that the negotiated terms remain confidential. The supplier will not be pressurised by other buyers to offer similar terms and the retailer is not compromised by the details of the transaction being available to his competitors.

The Department does not consider that the “*secret, arbitrary, and discriminatory*” nature of the terms to be necessarily a bad thing. We could as easily characterise them as being “*confidential, negotiated, and based uniquely on the trading relationship between the parties.*”

If a large retailer has by virtue of the size of his operation and the economies of scale that are built into it, a greater negotiating power than his competitor, then that can be viewed as a manifestation of the forces of competition that are at work in every sector of the economy - including the grocery trade.

The critical difference with the grocery trade as compared with all other sectors of the economy is that the benefits of that competition are restricted by law – Article 11 of the Groceries Order – from being passed on to a consumer.

Put another way, let’s assume a supplier, all or the majority of whose goods are covered by the Groceries Order, meets his biggest retail customer for an end of year review, the result of which is the payment to that retailer of a bulk, off-invoice discount payment of €1m. That retailer can use that €1m to pay his operating costs, he can use it to offer promotional deals to his customers, he can use it to reduce the price of other goods he sells, or he can use it to invest in new refrigerated display cabinets for his store.

He is, however, prohibited by law from using his €1m cheque to reduce, to below a specified minimum level, the price he charges to consumers for the goods he buys from the supplier whose office he has just left.

The impact of this is to limit price competition in the market. This was a direct result of resale price maintenance in the 1950s and it is, we suggest, a direct result of the form of resale price maintenance that is currently operating in the Irish grocery trade.

As we have seen in Paragraph 6.5, such price competition as does exist is likely to be on goods not covered by the Order while at the same time, the

need to attract customers is encouraging forms of non-price competition – including loyalty schemes, advertising, investment in store infrastructure and so on. It is self evident that such competition is expensive and the costs incurred – many of which are sunk costs – are not easily recovered.

This in turn drives concentration in the market because entry is made more difficult and costly. This is more likely to impede the arrival of new independents rather than international multiples like Aldi and Lidl. But more importantly, many of those already in the market – such as small independents – who cannot afford this type of competition, and who are not allowed by law to compete on price, are forced to either exit or consolidate with larger players.

We have seen this in submissions received from independent symbol franchisees who have highlighted, in many cases, multi-million euro investments made in their stores over recent years. It is the need for this type of investment that is driving the greater concentration of the market we have identified in Chapter Five. That concentration is happening mainly at the symbol/convenience store level and is we suggest a direct impact of the Groceries Order.

It is accepted economic thinking that forcing price competition out of the market leads to higher sunk cost investment which in turn drives increased concentration in that market.²⁰ We believe that is a serious restriction on competition and a serious interference with the freedom to trade. So serious in our view that it can only be justified if clearly identifiable benefits accrue to all parties as a result of its imposition.

6.8 Impact of Repealing the Prohibition on Selling Below Net Invoice Price

The combined impact of the ban on selling below invoice price and the practice of off-invoice discounting is to put a floor under the retail price of goods covered by the Order. This floor, which acts as a minimum price below which the goods cannot be sold, is determined, not by normal competitive forces, as might be the case in other traded sectors of the economy, but by the supplier acting either unilaterally or in agreement with his retail customer.

The impact of revoking the Groceries Order would be to remove this price floor and eliminate the upward pressure on prices that it creates. It would also remove one of the principal incentives for off-invoice discounting and result in substantially greater price transparency by ensuring that the invoice price more accurately reflects the true purchase price of goods to the retailer.

²⁰ Sutton, J (1991) “Sunk Costs and Market Structure: Price Competition, Advertising and the Evolution of Concentration.” Cambridge; MIT Press

We would expect that the impact of the resulting competition in the market would be to bring about decreases in the retail prices of goods covered by the Order.

However, we don't believe that it is possible to predict in any meaningful way the precise extent of such price reductions. Ultimately, that will be a function of a variety of factors including the amount of off-invoice discounts that are available for transfer back to the invoice, the actual level of net margin obtaining in the retail trade currently, and the extent to which resulting competitive forces will drive efficiencies at all levels of the production and distribution chain.

Other extraneous factors, including input costs and consumer demand, also impact on retail prices and make it difficult to isolate the impact of any one factor such as the ban on selling below net invoice price.

We expect that greater price competition at retail level, and the reductions in the retail price of groceries that would result, would impact at all levels of the distribution chain although, once again, we do not believe it is possible to predict the extent of that impact.

However, much of the downward pressure on prices could be absorbed by greater efficiencies generated at the retail level of the trade.

Undoubtedly, however, some impact would be felt at supplier level and we would expect that pressure here would be absorbed through greater efficiencies.

Consequently, we would expect the impact at producer level to be both diluted and dispersed. Producers of produce covered by the Order would now be subject to the same competitive pressures as producers of fresh produce, which is not covered.

6.9 The Role of the Director of Consumer Affairs

At a recent meeting of the Joint Oireachtas Committee on Enterprise and Small Business, it was suggested by the Consultant to the Committee that because resale price maintenance was prohibited under Article 3 of the Groceries Order, the Director of Consumer Affairs might invoke powers available to her under later Articles to prevent off-invoice discounts being used as a means to facilitate the practice.

We don't believe that this is a valid suggestion for a number of reasons.

Firstly, we can discern no provision in the Order that prohibits off-invoice discounts. In fact they are implicitly permitted by the provisions dealing with supplementary terms. The Director informed the Committee in her presentation to them in January, 2005, that when she identified instances of suppliers refusing to place discounts on the invoice, she was unable to take

any action in the matter although she recognised that what was happening was very probably a breach of the spirit of the legislation (see Paragraph 6.6 above).

Secondly, as shown above in Paragraph 6.6, it is the very act of providing an invoice that causes an instance of resale price maintenance to occur – once that happens, the resale price is fixed regardless of whether or not off-invoice discounts are paid later.

The Director cannot be realistically expected to prosecute a supplier for providing an invoice to his retail customers.

The retailer does not commit an offence of resale price maintenance but even if that were possible, the offence in this case would be not selling below the invoice price. The retailer can hardly be prosecuted for refusing to do something which, by law, he is prohibited from doing.

Provisions were included in Articles 13, 14 & 15 of the 1987 Groceries Order on the recommendation of the Restrictive Practices Commission which allow the Director of Consumer Affairs to request from any supplier a copy of their terms and conditions of sale – including details of any supplementary terms negotiated by them with their wholesale or retail customers.

If the Director subsequently forms the view that any of the terms have had the effect of unfairly discriminating against any party, they could request the supplier to amend them so as to eliminate the unfair discrimination.

One of the reasons for these provisions was to allow terms and conditions of trade to be monitored and so to facilitate a planned review of the operation of the Order after 12 months in operation.

When, in the period after the introduction of the 1987 Order, the Director sought to exercise these powers, he found them ineffective for a variety of reasons. There were doubts about the capacity to require recalcitrant suppliers to comply, the sheer volume of material overwhelmed the Director's office, the requirement was regarded in many quarters as an unwarranted burden on the trade and, all in all, no means could be found to conduct the exercise in a meaningful way. The operation became unsustainable.

A number of submissions have been received from interested parties suggesting that the Director should once again seek to exercise her powers to establish the extent of off-invoice discounts in the trade.

BWG Foods Limited: *“We would point out that the Director of Consumer affairs has the authority to review any trading agreement between a retailer and a supplier as part of her responsibility to police the operation of the Order.”*

Joint Oireachtas Committee on Enterprise & Small Business: *“The Director of Consumer Affairs should obtain information from the principal*

grocery trade suppliers of the levels of off-invoice discounts, rebates, etc, being granted to individual retailers.”

The Joint Oireachtas Committee has also suggested that the Competition Authority should conduct a study under Section 30 of the Competition Act 2002 to ascertain the level of profitability of the major grocery multiple companies and the level of discounts, rebates, etc granted by suppliers to the grocery multiple companies, and issue a report within one year.

RGDATA: *“There is also no evidence presented by the CSG to indicate that consumers are not getting the benefits of any off-invoice discounts. Indeed the Director of Consumer Affairs has power under the Order to access details of the level of off-invoice discounts and should be encouraged to do so.”*

RGDATA also endorses the recommendation of the Oireachtas Joint Committee concerning a possible role for the Competition Authority in investigating the issue.

The Department has given careful consideration to these proposals. We have consulted with the Director of Consumer Affairs who has indicated that she has grave doubts, based on previous experience, as to whether or not her Office would have the resources to carry out the exercise in any meaningful way.

We have also consulted with the Attorney General in regard to the possible exercise of the Director of her functions in this regard. Based on advice received, we are concerned that the provisions of Article 14 may be insufficient to elicit the information required in any event.

The Article requires that suppliers maintain a register of supplementary terms and conditions but does not specify what the content of such a register must be. It seems that such content may be governed by Article 13 which requires only that a general indication of the nature and extent of supplementary terms and conditions be given.

Furthermore, the provisions are complicated by the fact that the Order defines a “supplier” and a “wholesaler” as completely separate things. Only a supplier is required to maintain a statement of terms and conditions and no such obligation is placed on wholesalers. Neither are the supplementary terms negotiated between a wholesaler and a retailer required to be made available to the Director under Article 14 (3). Consequently, the obligation to supply information to the Director may not apply evenly across the trade. This latter anomaly is addressed further in Paragraph 12.8 below.

We are also cognisant of the fact that, although the question was not specifically asked of them, the industry has been afforded an opportunity as part of this Consultation Process to volunteer this information but have chosen not to do so in any meaningful way.

Furthermore, we believe that we are in a position to draw conclusions in regard to issues arising as a result of the confirmed existence of off-invoice discounts. We do not believe that knowing the full extent of the discounts would be likely to alter those conclusions.

We see some merit in a study by the Competition Authority but in a different context and we will address that proposal in more detail in Chapter 13 of this Report. For the moment, however, we see no reason why any such study should be confined to the grocery multiples only.

RGDTA have submitted that before considering any amendment to the definition of net invoice price, it would be important to determine evidence on the profitability of the multiples. *“If profit levels by multiples were high, then their power to engage in predatory pricing would be an unnecessary extra resource, in circumstances where they had ample resources and reserves to reduce prices across their product ranges.”*

We see a danger that this could become a circuitous argument. It can be argued, and very cogently argued, that retail margins are maintained at an artificially high level by virtue of the provisions of the Groceries Order. To argue then that high margins are a reason for maintaining the Order seems to be something of a double-edged sword.

We conclude that it is not realistic, may not be legally enforceable, nor should it be necessary, for the Director of Consumer Affairs to exercise the powers available to her under the Groceries Order in order to seek to establish the level of off-invoice discount income earned by Irish grocery retailers.

We further conclude that such information is unlikely to alter the conclusions and recommendations of this Report.

Additionally, to undertake this exercise as a pre-condition to deciding the future of the Order would delay a decision unnecessarily and such a delay would not be in the public interest.

6.10 Views of the Director of Corporate Enforcement

The Director of Corporate Enforcement is a statutory officer appointed under the provisions of the Company Law Enforcement Act, 2001. The Director is legally responsible for:

- Encouraging compliance with company law, and
- Investigating and enforcing suspected breaches of the legislation.

The Director has made a submission to the Public Consultation Process in which he draws attention to some concerns he has in relation to off-invoice discounts. He identifies Section 202(1), (2), (3) & (4) of the Companies Act 1990 as being relevant to the issue.

Section 202(1) provides that every company shall cause to be kept “proper books of account” that –

- (a) correctly explain the transactions of the company,
- (b) will at any time enable the financial position of the company to be determined with reasonable accuracy,
- (c) will enable the directors to ensure that any balance sheet, profit and loss account or income and expenditure account of the company complies with the requirements of the Companies Acts and
- (d) will enable the accounts of the company to be readily and properly audited.

Section 202(2) states that such books are required to be kept on a continuous and consistent basis, “that is to say the entries therein shall be made in a timely manner and be consistent from one year to the next.”

Section 202(3) provides specifically that where a company’s business involves dealing in goods, the company’s books of account must contain “a record of all goods purchased, and of all goods sold (except those sold for cash by way of ordinary retail trade), showing the goods and the sellers and buyers in sufficient detail to enable the goods and the sellers and the buyers to be identified and a record of all the invoices relating to such purchases and sales.”

Section 202(4) deals further with the concept of what are proper books of account by indicating that they should “give a true and fair view of the state of affairs of the company and explain its transactions.”

The Director goes on to state as follows:

“It may be possible of course for the books of account of a company giving or receiving the benefit of ‘off-invoice discounts’ to be prepared in accordance with the requirements of Section 202. However, if – as I understand it – a practice has developed whereby certain invoices are drawn up on a basis which suggests that a different form of transaction is recorded to that which actually occurs in practice, it seems to me that, in some instances at least, there may be potential breaches of Section 202. In other cases, it seems conceivable that even if no criminal breach of Section 202 occurs, the company’s books and records may be less than fully reflective of the true form and substance of the company’s transactions. From a company law perspective, it is difficult to see how that can ever be advantageous.”

The Director points out that his office has no empirical evidence as to whether off-invoice discounting is leading to actual infringements of the Companies Acts or of what the impact or extent of such breaches might be. He goes on to note that the Consumer Strategy Group confined themselves to saying that such practices *may* be encouraged by the 1987 Order – rather than that they

are encouraged by it. According to the Director, this does not allow his Office to take a firm view in relation to the matter. The Director concludes, however:

“Nonetheless, it does seem desirable to us that if the Order is being retained, it should be amended to remove any direct or indirect inducements therein which may lead companies to cause their primary books and records (including invoices) to be kept on any form of artificial basis.”

6.11 Views of the Chambers of Commerce of Ireland

A not dissimilar view has been expressed by the Chambers of Commerce of Ireland who have indicated their support for removing the ban on selling below net invoice price. The CCOI state:

“Another significant argument for abolition of the current order is that it allows for a system of confusing invoice and actual prices which could facilitate the type of profit overstating that led to the collapse of Royal Ahold in 2003 – a company which was at the time the third largest food retailer in the world.”

The CCOI also say that the Order is *“...an anti competitive practice that prohibits business from passing on the majority of discounts that they receive.”*

They conclude by saying that the Order should be replaced with one that requires invoices to reflect the actual cost of goods supplied and protects smaller retailers from predatory pricing by banning real below cost selling outright or else by disallowing restrictions such as customer quotas on the purchase quantities of “special offers.”

6.12 Likely Impact of Prohibiting Supplementary Terms.

We believe we should draw attention briefly to what we consider might be one possible deleterious impact of either the repeal of Section 13 of the 1987 Order as a standalone measure to remove the provisions in relation to supplementary terms, or alternatively of an amendment to the Order to prohibit off-invoice discounts.

Submissions received from the trade make it clear that off-invoice discount income is off-set, to some extent at least, against the operating costs of the retailer.

In such circumstances, if off-invoice discounts were prohibited – as a stand alone measure – it would be desirable that there would be corresponding reductions in invoice prices to reflect and match the retailer’s lost income.

If there were not such corresponding reductions in invoice prices – and there is no law that we can conceive of that would require it – then a most likely effect of such a measure would be an increase in the retail price of groceries to consumers in order to compensate retailers for the lost income.

6.13 The Views of Other Parties

A number of other parties have expressed views in regard to the treatment of off invoice discounts which we wish to specifically refer to. These include the following:

Irish Farmers’ Association: The IFA have argued strongly for the retention of the 1987 Order. However, specifically in regard to off-invoice discounts, they have stated the following:

“The current practice of off-invoice discounts and supply agreements, which are not included in the assessment of costs, is detrimental to transparency, and is used by the larger retailers to improve their margins at the expense of both suppliers and consumers.”

Joint Oireachtas Committee on Enterprise & Small Business: The Joint Committee also wishes to see the Order retained but considers that

“The benefits of discounts, rebates, etc granted by suppliers to their customers should be passed on to consumers.”

IBEC: *“Finally all payments outside supplementary terms should be prohibited”*

We were unclear as to the meaning of this reference. However, we have clarified with IBEC that their view is that supplementary terms should be limited to performance related bonuses only.

The Department is, frankly, doubtful, if such a move would be likely to have a major impact on the practice of offering supplementary terms. It may also prove difficult, if not impossible, to enforce.

Tesco: Tesco have submitted that if off-invoice discounts are removed while leaving in place a requirement for suppliers to prepare and publish standard terms and conditions, the result will be increased prices to consumers as retailers seek to recover lost income.

This view appears to be not dissimilar to the view of the Department as expressed above that a prohibition on off-invoice discounts – if introduced as a stand alone measure – could result in increased retail prices unless such a move resulted in corresponding reductions in invoice values.

ISME: ISME believe that the CSG's contentions that discounts could be passed on to consumers is "*extremely simplistic.*" ISME add:

"Quantity and loyalty discounts are, by their very nature, future time related and not attributable to specific individual purchase invoices. Under the Prudence concept of accounting, it is not correct to anticipate a discount/profit and therefore not a viable method of costing a product for sale."

ICTU: ICTU are unclear as to the evidence supporting the contention that off-invoice discounts will be passed on to the consumer in the event that the ban on selling below net invoice price is removed. They state:

"There is growing complexity in the behaviour of different retailers and in the relationship with suppliers (as evidenced by the development of off-invoice i.e. discounts (sic) etc). Evidence is needed from other countries which have removed the ban as to the validity of this approach and the implications (winners and losers) among each of the stakeholders concerned."

Patrick M Lyons: Patrick Lyons was a Member of the Restrictive Practices Commission in 1987 an co-author of the RPC Report of that year which recommended the introduction of a ban on below cost selling. Mr Lyons submits as follows:

"It is clear that the recommendation on banning sales of groceries below net invoice price was dependent upon the invoice showing all allowances, etc, so that the net invoice price would represent the real net price of the goods. By extension, if the three members of the Commission considered that the invoice would not show the real cost of the goods, then they would, in logic, not have recommended a ban on sales below net invoice price, since this would represent a form of resale price maintenance. This was certainly my view at the time and it remains my view."

Mr Lyons was also Chairman of the Commission in 1991 when they reviewed the operation of the 1987 Order. He was in the majority at that time in recommending that the Order be repealed in favour of the newly enacted Competition Act, 1991. His submission recalls in some detail both the majority and minority views as expressed in the 1991 Report in regard to off-invoice discounts. We have dealt extensively with the 1991 Report elsewhere and so do not consider it necessary to repeat Mr Lyons' submission in detail. However, his submission concludes as follows:

“I continue to agree with the evaluation given in the 1991 Report by Mr Massey and myself (the majority view), and consider, in particular, that the ban on selling grocery goods below net invoice price, or below real cost, should be terminated, along with the rest of the Groceries Order.....Abolition of the Groceries Order, and especially the ban on below cost selling, is long overdue in the interests of competition and consumers.”

6.14 Conclusions

We have not been provided with sufficient information, by either retailers or suppliers, as part of this review to determine the precise extent of off-invoice discounts paid to grocery retailers.

However, we are satisfied that off-invoice discount income earned by retailers is a substantial and significant element of the trade that cannot be passed on to consumers in the form of reductions, to a price below the invoice price, of goods covered by the Order.

The invoice price in turn bears little or no relationship to the actual purchase price of the product concerned.

This has the effect of limiting price competition from the market and that, in turn, is driving market concentration. That is unlikely to be advantageous to consumers.

This serious restriction on competition and interference with the freedom to trade can only be justified if clearly identifiable benefits accrue to all parties as a result of its imposition.

Off invoice discount income can only be passed on by retailers, if at all, in a way that distorts competition in the trade and which may impact negatively on the Consumer Price Index.

The 1987 Order in our view does not, and cannot, prevent retailers from exercising buyer power to put pressure on suppliers to accept lower margins, as has been argued by many proponents of the Order. One impact of the Order, however, is that margins are more likely to be squeezed as a result of the negotiation by retailers of higher discounts from which consumers are less likely to benefit.

The effect of the Order is that a form of resale price maintenance operates in the retail grocery trade in Ireland, despite the fact that such practice is declared to be illegal and can attract criminal sanctions under the provisions of the Competition Act 2002.

It is not realistic, may not be legally enforceable, nor should it be necessary, for the Director of Consumer Affairs to exercise the powers available to her

under the Groceries Order in order to seek to establish the level of off-invoice discount income earned by Irish grocery retailers.

If it could be done, it likely would require the allocation of enormous resources and result in the imposition of a substantial regulatory burden on the trade, the costs of which would not doubt be borne by the consumer.

We further conclude that such information is unlikely to alter the conclusions and recommendations of this Report.

Additionally, to undertake this exercise as a pre-condition to deciding the future of the Order would delay a decision unnecessarily and such a delay would not be in the public interest.

The Director of Corporate Enforcement has submitted that *“...it does seem desirable to us that if the Order is being retained, it should be amended to remove any direct or indirect inducements therein which may lead companies to cause their primary books and records (including invoices) to be kept on any form of artificial basis.”*

We believe that there is little doubt but that the Order encourages the practice of off-invoice discounting and we submit that particular weight must be attached to the views of the Director of Corporate Enforcement in this regard.