

# Chapter Fourteen

## Other Provisions of the Groceries Order

### 14.1 Introduction

The Consumer Strategy Group recommended the repeal of the Groceries Order in its entirety. We have already recommended the repeal of Articles 11, 12 and 13 of the Order.

There is a disparity of views in submissions received as to the efficacy of the Competition Act, 2002 to deal with anti-competitive practices in the grocery trade. It is necessary, therefore, to test the hypotheses advanced by either side of the argument and form a view on the matter.

For reasons to do with the legal status of the Order (see Chapter Twelve) we believe that the Order should be repealed and that any provisions which might be required to ensure fair trading in the sector be reinstated by means of an amendment to the Competition Act, 2002.

We now look at the other provisions in the Order and assess whether or not they should be removed.

### 14.2 The Arguments

The Competition Authority has stated that the Order is no longer needed as the 2002 Act provides the Authority with strengthened powers to tackle anti-competitive business practices. Specifically, the Act prohibits practices such as resale price maintenance and abuses of buyer power such as hello money.

In 1991, the majority view of the Restrictive Practices Commission was that the Competition Act was adequate to prevent anti-competitive practices in the grocery trade. They were also concerned that the Order might lessen the effectiveness of the Act.

Successive Ministers have also taken this view. In Paragraph 3.10 we recorded the view of Desmond O'Malley when Minister for industry & Commerce who said in 1992:

*“The new legislation (i.e. the Competition Act)...has a much wider scope than the Restrictive Practices legislation (i.e. the Groceries Order) and there is therefore no cause to retain legislation parallel to the Competition Act indefinitely.”*

In 1993, the Department of Enterprise & Employment wrote:

*“As long as the Grocery (sic) Order exists those engaged in the grocery trade will rely on the enforcement powers of the Director (of Consumer*

*Affairs) rather than action under the Competition Act as was intended to be the case.”<sup>1</sup>*

And in 1995, the then Minister referred to the intention to strengthen the provisions of the 1991 Act and said;

*“When this legislation is on the statute books and in operation, I will then consider revoking the Groceries Order...I am convinced that the Groceries Order is not the best instrument for dealing with competition in this sector in the long-term...”<sup>2</sup>*

Some proponents of the Order argue that if it is removed, we will lose more than a ban on selling below the net invoice price but also important provisions dealing with issues such as resale price maintenance and “hello money”.

### **14.3 The Competition Act 2002**

Sections 4 and 5 of the Competition Act 2002 detail the anti-competitive practices that are prohibited by the Act. A copy of the full text of these Sections is included at Appendix Thirteen to this Report.

In summary they provide as follows:

**Section 4** prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Specific practices that are prohibited include fixing purchase or selling prices and applying dissimilar conditions to equivalent transactions.

**Section 5** prohibits abuse of a dominant position “...in the State or in any part of the State...” by one or more undertakings. A similar non-exhaustive list of specific abuses includes imposing unfair purchase or selling prices and applying dissimilar conditions to equivalent transactions.

We will examine each of the main provisions of the Groceries Order and examine how they are dealt with by the Act.

### **14.4 Resale Price Maintenance and Power to Withhold Supplies**

Resale Price Maintenance (RPM) is undoubtedly a practice which involves either “*directly or indirectly fix(ing) purchase or selling prices or any other trading conditions*”. These are the precise words of s. 4 (1) (a) of the 2002 Act.

---

<sup>1</sup> See Chapter 3.11 above

<sup>2</sup> See Chapter 3.12 above

This section of the Act prohibits “...all agreements,...decisions by associations,...and concerted practices...” which have the above effect.

However, there are two types of RPM – individual and collective (See Paragraph 6.6 above).

The only question to occur, therefore, is whether or not s. 4 (1) is worded in such a way as to prohibit individual RPM. In other words can an agreement between undertakings be assumed to exist when an individual supplier seeks to impose a fixed resale price on his buyer?

There is some European case law which suggests that unilateral action can be considered to be part of an agreement when “concurrence of wills” is established, e.g., if the buyer acquiesces in the pricing arrangement proposed by a supplier. However, acquiescence cannot always be presumed in such circumstances.

We have examined legislative provisions in other jurisdictions<sup>3</sup> that leave very little room for doubt that resale price maintenance can occur when one party seeks to impose a minimum resale price on another.

We consider that such avoidance of doubt would be desirable in the context of the 2002 Act. We set out later in this Chapter an amendment to significantly strengthen the Act in this respect.

As we do not believe that the power granted to suppliers to withhold supplies is either much used or necessary for the proper functioning of the industry, this provision can also be repealed.

We recommend that Articles 3 & 4 of the 1987 Order be repealed and replaced with the suggested amendment to the 2002 Act.

## **14.5 Price Fixing Arrangements**

We consider it self-evident that that the provisions of Articles 5 & 6 of the 1987 Order are captured by Section 4 of the 2002 Act.

Consequently we recommend that Articles 5 & 6 be repealed.

## **14.6 Unfair Discrimination**

The type of unfair discrimination prohibited by Articles 7 to 10 of the 1987 Order includes discrimination on grounds that a person is not a member of a trade association, coercing others to withhold supplies, any agreement to limit or restrict entry to the trade, and efforts to secure a boycott of any person.

---

<sup>3</sup> See for example, the Australian Trade Practices Act, 1974 which is very specific in this regard. Also s. 38 of the Commerce Act, 1986 (New Zealand).

Once again, we consider that such unfair or discriminatory practices would be captured by Section 4 of the 2002 Act and, indeed, by section 5 if undertaken by a dominant firm.

Consequently Articles 7 to 10 of the 1987 Order can be revoked with little difficulty.

## 14.7 Statement of Terms and Conditions

We have already recommended that Article 13 of the Order be repealed. Articles 14 and 15 will, in consequence no longer be required and can be repealed also.

Sections 4 (1) (d) and 5 (1) (d) of the Competition Act make it an offence to apply dissimilar conditions to equivalent transactions, which is one of the principal intentions behind these Articles. Indeed, the Act is far more effective in this regard as the anomaly of supplementary terms will be less egregious in the absence of the provisions of the Order.

One issue to arise in our view is the question of whether or not the provisions of Article 4 of the Act are adequate to prohibit any attempt by an *individual* undertaking to apply dissimilar terms to similar transactions.

We consider that it would be desirable to significantly strengthen the 2002 Act to ensure that such action by an individual is prohibited. We set out below the type of amendment to the Act, which we believe would have this effect.

## 14.8 Credit Terms

Provisions regarding prompt payment of bills are included in prompt payments legislation introduced in 2002.<sup>4</sup>

This provision of Article 16 is no longer needed.

## 14.9 Imported Goods

The provisions of Article 17 are, in our view, incompatible with EU Treaty provisions on free movement of goods and should be repealed.

## 14.10 Advertising allowances and “hello money”

Such practices are an abuse of buyer power and are, in the view of the Competition Authority, outlawed by Section 5 of the 2002 Act when exercised by a dominant firm.

---

<sup>4</sup> The European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. 388 of 2002)

However, we believe that Section 4 of the Act should be strengthened to specifically prohibit such practices regardless of dominance or buying power and to ensure that they do not become prevalent in the trade. We suggest below the type of amendment, which we believe would have this effect.

### **14.11 Proposed Amendment to the Competition Act 2002**

It is proposed that Section 4 of the Competition Act 2002 be amended to insert the following new sub-section (2):

*“No person or undertaking shall seek to do any of the following:*

- (a) require, whether by threat, inducement, coercion, agreement or otherwise, any other person to resell or offer for resale any goods at a fixed price or at a price above a specified minimum price;*
- (b) impose, whether by threat, inducement, coercion, agreement or otherwise on any other person a term in a contract which might have the effect of requiring that person to resell or offer for resale any goods at a fixed price or at a price above a specified minimum price;*
- (c) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage*
- (d) make payment to any person to whom he is supplying goods for the purposes of resale in respect of the advertising of such goods or in respect of the provision of selling space, additional selling space or particular selling space for the goods which are being supplied for resale.*
- (e) receive payment from any person from which he is purchasing goods for resale in respect of the advertising of such goods or in respect of the provision of selling space, additional selling space or particular selling space for the goods which are being purchased for resale.”*

Consequential amendments will be required to other sub-sections of section (4).

All amendments should be subject to formal legal drafting by the Parliamentary Draftsman’s Office.

### **14.12 Conclusion**

Having already recommended in Paragraph 7.14 above that Articles 11, 12 and 13 of the Groceries Order be repealed, we now recommend that all remaining provisions of the Order be repealed in their entirety and replaced with the suggested amendment to the Competition Act 2002 (see Paragraph 14.11)