

# Chapter Twelve

## Legal Status of Order

### 12.1 Introduction

The 1987 Groceries Order is a Statutory Instrument made by the Minister for Industry and Commerce (now Enterprise, Trade & Employment) under powers granted to him by the Restrictive Practices Act, 1972. In normal circumstances, if it was necessary to amend an Order such as this, it would be done by means of a new Order made by the Minister under the same set of powers.

The position in regard to the 1987 Order is not so simple. In the event that it is decided to amend or repeal the Order as a result of the recommendations contained in this Report, it is necessary to examine the means by which this should, or could, be done.

A number of other legal issues have come to our attention as a result of the present review and these too are addressed in this chapter.

### 12.2 Background

Section 8 of the Restrictive Practices Act, 1972, provides that the Minister may make an Order prohibiting restrictive practices. Section 8(3) provides that an Order made under the section shall not have effect unless it is confirmed by an Act of the Oireachtas. Once confirmed, however, the Order has the full force of law in accordance with its terms.

The 1987 Groceries Order is such an order made under Section 8 of the 1972 Act.

It was signed by the Minister for Industry & Commerce on 25 May, 1987 but did not come into effect until the enactment of the Restrictive Practices (Confirmation of Order) Act, 1987 on 11 December that year.

The Attorney General has advised that, because the 1987 Order was confirmed by an Act of the Oireachtas, the Order is in force in law as if it were itself an Act of the Oireachtas.

The Restrictive Practices Act, 1972 was repealed by the Competition Act, 1991, as were all Orders that had been made under Section 8. The exception was the 1987 Groceries Order. This was specifically saved as were any relevant provisions of the 1972 Act that were necessary for the continued operation of the Order.

The Competition Act 1991 was replaced, in turn, by the Competition Act, 2002. Section 49 of the 2002 Act includes a specific provision purporting to allow the Minister to repeal or amend the 1987 Groceries Order.

The various options available to the Minister are set out below:

### 12.3 Repeal the Order

The Attorney General has advised that, because the Order has the status of an Act of the Oireachtas, it can only be repealed by repealing the Restrictive Practices (Confirmation of Order) Act, 1987. This cannot be done by Ministerial Order. It follows that the only way of repealing the Order is by means of primary legislation.

Independent legal advice obtained from Senior Counsel by the Competition Authority suggests that in so far as Section 49 of the 2002 Act purports to allow the Minister to repeal or amend the 1987 Order by means of another Order, that section may well be unconstitutional.

### 12.4 Amend the Order

The same situation applies to amending the Order. If it has the status of an Act of the Oireachtas, it cannot be amended by Ministerial Order. It must be amended by primary legislation. However, the situation may be a little more complicated and cumbersome.

The 1987 Order was made pursuant to powers granted to the Minister under Section 8 (1) of the Restrictive Practices Act 1972. Section 8 (1) reads as follows:

*“The Minister, having considered a report of the Commission under Section 5 (other than a report of an enquiry under section 5 (1) (b), may, if he thinks that the exigencies of the common good so warrant, after consultation with any other Minister concerned, by order do, in relation to any goods or services to which the report relates, all or up of me (sic) following—*

*( a ) prohibit restrictive practices including arrangements, agreements or understandings which prevent or restrict competition or restrain trade or the provision of any service or which involve resale price maintenance;*

*( b ) prohibit unfair practices or unfair methods of competition (whether or not relating to price);*

*( c ) make such provision as the Minister thinks necessary to ensure the equitable treatment of all persons in regard to the supply or distribution of goods or the provision of services;*

*( d ) make such other provision in regard to restrictive practices or unfair practices or unfair methods of competition (whether or*

*not relating to price) affecting the supply and distribution of goods or the provision of services as he thinks fit.”*

This Section of the Act was repealed by the 1991 Competition Act. Consequently there are no policies, principles or procedures laid down in law to enable the Minister to make an amending Order.

Consequently, the starting point for introducing any amendment would be the adoption of new primary legislation which would restate the policies, principles and procedures for making a new Order. It has not been the practice to include in primary legislation a requirement for Ministerial orders to be confirmed by an Act of Oireachtas.

In our view, the most sensible way to amend the 1987 Order is to repeal it and then restate its provisions, amended as required, and to do this by means of an amendment to the Competition Act 2002.

## **12.5 Retain the Order**

The option exists, however, to do nothing – to simply retain the order in its current form. However, even if the desire is to retain the existing provisions of the Order, we would favour doing so by amending the Competition Act 2002 to restate the Order within that legislative framework.

## **12.6 Implications of Current Status**

The 1987 Order is something of a hybrid in legislative terms. The practice of distinguishing between primary legislation (an act of the Oireachtas) and secondary legislation (a Statutory Instrument or Order made by the Minister) is very common. It is assumed that one of the reasons for allowing Ministers discretion to introduce rules and regulations by Order is to ensure flexibility in the legislative system and to allow for those rules to be adapted to a changing environment without the need to amend primary legislation. Examples might include the amendment of fees or charges to be levied in certain circumstances or adding (or subtracting) to a list of prescribed bodies to which a piece of primary legislation might apply.

Whatever the intention of legislators when enacting the 1972 Restrictive Practices Act, the 1987 Groceries Order enjoys none of the flexibility that might normally be associated with secondary legislation.

## **12.7 Recent High Court Decision**

Grocery goods are defined by the 1987 Order as goods for human consumption (excluding fruit and vegetables, and fresh & frozen meat and fish), intoxicating liquor, and “household necessities as are ordinarily sold in grocery shops”.

The latter definition – “household necessities” – is vague but Ms Justice Finlay-Geoghegan’s decision provides us with an interpretation of what this definition actually means. It is an extremely important decision in terms of understanding which products are covered by the Order and which are not.

On 2 December 2003, Dunne’s Stores announced that it was reducing the price of disposable nappies by 40% for one day only. On that day, an inspector from the Office of the Director of Consumer Affairs purchased three packets of nappies from Dunne’s Stores and then sought information as to the invoice price paid by the company for the product in question. That information was refused. Dunne’s Stores then sought a declaration of the Court that disposable nappies were not “grocery goods” as defined in the Order.<sup>1</sup>

Ms Justice Finlay-Geoghegan’s decision is that for a product to be considered a “household necessary” within the meaning given to the term by the Order, it must be a product which is “commonly” used by all members of the household.

On the face of it, this decision would seem to significantly limit or restrict the range of products covered by the Order. It also highlights the uncertainty facing the Director of Consumer Affairs, whose job it is to enforce the Order, in determining whether or not a particular product is covered, and thus whether or not an offence may have been committed in any particular circumstance.

Additionally, in our view, issues arise in regard to the composition of a common household, the purpose for which a product is purchased, and the type of store in which it is purchased. As the range of product lines sold by grocery stores increases with the evolution of consumer trends, and given the increasing difficulty in distinguishing between some large grocery stores and department stores stocking a wider range of household products, many of these difficulties and uncertainties may become exacerbated over time.

The Director of Consumer Affairs in her submission has highlighted the lack of clarity in the definition of grocery goods as a difficulty in the context of enforcement. She points to the fact that in the past items such as sausages and light bulbs have been deemed not to be subject to the Order. The Director has suggested that if changes are to be made, these should include a clear delineation of the classes of items to which the Order applies.

Clearly a solution lies in amending the 1987 Order to introduce greater certainty into the definition of products covered. In addition, a number of submissions made as part of the Public Consultation Process have advocated extending coverage of the Order to include fresh fruit, vegetables, meat and fish. This is favoured by IBEC, the combat poverty agencies, and the Irish Farmers’ Association but opposed, for the time being at least, by others such as the Oireachtas Joint Committee.

---

<sup>1</sup> Such a declaration was sought pursuant to s. 15 (3) of the Restrictive Practices Act, 1972 which remains in force for the purposes of the 1987 Order.

However, it is clear that no such clarifications or amendments can be introduced, now or in the future, other than by means of primary legislation. This, in our view, underlines the inflexibility arising as result of the current legal status of the Order.

It follows that such uncertainty may well result in the Courts, whose job it is to determine these issues, spending an increasing amount of time deciding the application of the Order to particular products or product lines.

The Attorney General's Office has been consulted in regard to these issues and has broadly confirmed our views in regard to the uncertainties in regard to product coverage.

## 12.8 Other Issues Arising

### Article 13 - General

We have already seen how Article 13 of the 1987 Order requires a "supplier" to prepare and maintain a statement of the terms and conditions upon which he sells grocery goods. The article says that a supplier must sell to a wholesaler or retailer on those terms.

Article 2 defines a "supplier" as a "manufacturer or importer of grocery goods for sale to wholesalers or retailers"

"Wholesaler" is defined separately as a person who purchases from a supplier for resale to a retailer.

It appears to us that the implication of these provisions is that a "wholesaler", who is not a supplier within the meaning above and who is selling directly to the retail trade, is **not** required by the Order to prepare a statement of terms and conditions.

This is further complicated by the provision of Article 14 (3) which requires both wholesalers who negotiate supplementary terms with suppliers, and large retailers who negotiate supplementary terms with suppliers, to provide details of these terms to the Director of Consumer Affairs. There is, however, no obligation on wholesalers who negotiate supplementary terms with retailers to supply details to the Director.

We do not know why the Order was designed in this way. However, we would be surprised if it was the intention, either of the Minister or of the Oireachtas, that this should be the case.

We are concerned that this represents a serious anomaly that could, in certain circumstances, inhibit the effective enforcement of the Order. In particular, certain elements of the trade may act as both suppliers and wholesalers

within the meaning of the Order and they may be required to prepare a statement of terms and conditions only when they act as a supplier.

This also casts serious doubt, in our view, on the powers of the Director of Consumer Affairs to secure details of the supplementary terms offered to retailers by those persons from whom they buy their goods. This has been suggested by the Joint Oireachtas Committee on Enterprise and Small Business, amongst others, as a means by which the level of off-invoice discounts in the trade might be established. This issue is referred to in Paragraph 6.9 above.

The Attorney General's office has been consulted and has broadly confirmed our view of these provisions.

### **Article 13 (1) (c)**

This states:

*“(The requirement to prepare and maintain a written statement of terms and conditions)...does not apply to the sale of goods that have been processed, blended, canned, packed or otherwise prepared in accordance with the specification and requirements of the purchaser, and, for the purposes of resale, are **not** given the name or a brand name of the **purchaser**.”*

This was clearly intended to exempt generic or own label goods from the requirement to prepare a statement of terms and conditions. However, the provision was clearly drafted erroneously as it should read:

*“...**are** given the brand name of the **purchaser**”, or in the alternative –*

*“...**are not** given the brand name of the **supplier**.”*

Again, we are not aware of any particular problem having arisen as a result of this error although, clearly, it could give rise to difficulties in enforcement in certain circumstances.

Once again we believe that these anomalies serve to highlight the inflexible legislative status of the Order on account of the fact that it cannot be amended other than by means of primary legislation.

## **12.9 Conclusion**

The order can only be repealed by primary legislation.

An amendment to the Order requires the introduction of primary legislation, which would provide comprehensive enabling powers to the Minister.

We have identified a number of anomalies in the drafting of the 1987 Order as well as difficult issues of interpretation.

These could give rise in the future to difficulties for the Director of the Consumer Affairs in seeking to enforce specific terms of the Order. They also raise issue relating to the even-handed application of the terms of the Order to all elements in the grocery trade.

On this basis alone, there seems to be substantial grounds for concern about the capability of the Order to do the things it was designed to do.