

Chapter Two

The Case for a Ban on Below Cost Selling – 1956 to 1987

2.1 Introduction

The prohibition introduced into Irish legislation for the first time in the 1987 Groceries Order is usually referred to as the “ban on below-cost selling”.

This term is commonly, but mistakenly, taken to mean that retailers cannot sell products to consumers for less than the amount that they (the retailers) paid for them.

This erroneous description has given rise to much confusion and it is important as a starting point to any discussion on this issue to understand the nature of the prohibition in the 1987 Order.

In simplified form, what Article 11 of the Groceries Order actually says is as follows:

“...a retailer shall not sell grocery goods...at a price that...is less than the net invoice price of the goods (including value added tax).”¹

However, Article 2 (2) of the Order stipulates precisely how the “net invoice price” is to be calculated and it specifically provides in that regard that:

“...no account shall be taken of discounts, rebates or other deductions which are not entered on the invoice in cash terms as deductions from the sum due to the supplier or wholesaler.”

The type of discounts described in this provision are known as “off-invoice discounts” and have long been a feature of the trade. They would typically include volume and loyalty discounts given by the supplier to the retailer at the end of a trading period (perhaps the end of a quarter or even the end of the year). And because of them, the invoice which a manufacturer or wholesaler gives to a grocery retailer often does not reflect the true cost of the goods being supplied.

A simple example would be where a retailer buys a box of breakfast cereal from a supplier and is handed an invoice showing the cost of that cereal as €1. The law stipulates that the retailer cannot now sell that cereal on to the consumer for less than €1.

¹ This is an extract from Article 11 of the Restrictive Practices (Groceries) Order, 1987, S.I. No 142 of 1987. Readers who require a fuller understanding of the Article are advised to read it in full (see appendix One). However, in this context “invoice price” means the price shown on the invoice from the supplier to the retailer in respect of the goods in question.

However, if next week, the supplier gives the retailer a rebate of 15c on the box of cereal, then the box has only cost him 85c. Under the law as it stands, however, that retailer is still not allowed to sell the box of cereal for less than €1.

And so the prohibition in the 1987 Order is more correctly referred to as a ban on selling below the net invoice price.

Although the ban was first introduced in 1987, its origins go back some way beyond that – to 1955 in fact when the then Fair Trade Commission began its enquiry into the supply and distribution of grocery products. This enquiry was to lead to the making of the first Groceries Order in 1956.

2.2 Resale Price Maintenance

The 1956 Report of the Fair Trade Commission was in large part concerned with the issue of resale price maintenance (RPM), a practice which was prevalent in the industry at the time and which involved manufacturers, suppliers or retail associations setting minimum prices below which certain grocery products could not, or would not, be re-sold - either by the wholesaler to the retailer or by the retailer to the consumer.

The FTC found that the practice restricted price competition and that it was “*not in the public interest.*”² They recommended its prohibition.

The FTC did not recommend a ban on retailers selling below cost on the basis that it “*is not necessary at present.*”³ Nonetheless, the Commission did suggest “*having regard....to conditions generally in the trade,*” that suppliers be entitled to withhold supplies from any retailer who sold goods below cost.

The abolition of resale price maintenance as a consequence of the 1956 Report was a major milestone in the history and development of the grocery trade in Ireland. The practice has been outlawed ever since and is currently prohibited in all sectors of the economy by the provisions of the Competition Act 2002.⁴ In the UK, the practice of resale price maintenance was finally abolished by the Resale Prices Act of 1964 but only following a bitter political debate on the subject that had raged since virtually the end of the Second World War. RPM is also prohibited in most developed and western economies as an anti-competitive practice.⁵

A measure of the extent to which things have changed in the past 50 years is that, under Irish law, persons engaging in such activities today may well be guilty of a criminal offence.⁶

² FTC Report of Enquiry, 1956, Pg 123, Para 182.

³ FTC Report of Enquiry, 1956, Pg 125, Para 183.

⁴ Section 4 (1) (a) of the Competition Act, 2002 (No 14 of 2002) prohibits practices which “directly or indirectly fix purchase or selling prices or any other trading conditions.”

⁵ When we speak of resale price maintenance in this context we refer to minimum resale price maintenance – i.e., the practice of specifying a minimum price below which a product should not be offered for resale.

⁶ Section 8 of the Competition Act 2002

Nonetheless, it has been argued that the existing ban on selling below net invoice price amounts to a form of legalised resale price maintenance. This argument is examined in Paragraph 6.6 below.

2.3 Submissions to the 1956 Enquiry

We examine in some detail below the findings and conclusions of the FTC's 1956 Enquiry on the subject. Obviously, this examination must be tempered with an understanding that economic circumstances and the structure of the grocery trade are both very different now to what they were in the 1950s. Nonetheless, the underlying economic principles will have changed little in the intervening period and, if anything, the ever-increasing importance of competition to the functioning of a modern economy only serves to strengthen the arguments against resale price maintenance.

Of the thirty-four manufacturers who gave evidence to the 1956 Enquiry, six "*suggest(ed) or recommend(ed)*" prices at which wholesalers should sell their products to retailers. By contrast, twenty-seven of them indicated "*...in one way or another the prices to be charged by retailers....*" to consumers.⁷ (underlining added).

The extent to which such "suggested" or "recommended" prices (particularly retail prices) were regarded as "fixed" prices seems to have varied but a number of manufacturers included in their invoices a condition requiring retailers to observe their specified prices. One manufacturer allowed retailers a "substantial discount" for sticking to the recommended prices.⁸

The Retail Grocery, Dairy and Allied Trades Association (RGDATA),⁹ on the other hand, seems to have made strenuous efforts to ensure the maintenance of retail prices. These efforts are described in some detail in the 1956 Report. These measures included expulsion of members who failed to adhere to the Association's price maintenance policy and lobbying manufacturers to boycott those retailers who engaged in price-cutting.

⁷ FTC Report of Enquiry, 1956, P.67.

⁸ FTC Report of Enquiry, 1956, Para. 99, P. 68.

⁹ RGDATA was founded in Dublin in 1942 and, according to the FTC Report (P.39) was, in 1956, "*one of the largest trade associations of retailers in the country.*"

Under the heading of “*Maintained Prices Protect Consumers*”, RGDATA submitted to the FTC that “*Quality and service should be the determining factor*” and then they stated as follows:

“...if there is no standard or maintained price, then the price payable will fluctuate from seller to seller and from place to place. This results in a further phase or step being interposed, in the mind of the consumer, between his comparing and selecting the product and its purchase. The potential consumer will, consequently, seek to locate where the article is sold at the cheapest price. In such circumstances, considerations of quality and service must, of necessity, be relegated to a secondary position as an influence on the consumer, who will now the more be motivated by cheapness of price in the making of his choice.”

The Association’s submission to the 1956 Enquiry made it clear that they only advocated price maintenance in regard to “*proprietary goods*” which they described as “*...those goods which, mostly foodstuffs, are manufactured or processed, are of standard size, weight or quality, and have a published or advertised price.*”¹⁰

The FTC Report notes at paragraph 120 (P.84) that while RGDATA readily accepted that there should be price competition on other products (“*free*” goods, as they were called), they did so subject to the reservation that there should be no loss-leader selling and that “*...it would be considered unfair, for instance, to sell imported brands below the wholesale price...*”

The forgoing policies were reflected in the suggested fair trade rules which RGDATA submitted to the FTC Enquiry for consideration. These included the legalisation of resale price maintenance and a provision that “*No grocer may engage in “loss-leader” selling by which is meant the retailing of goods at cost, less than cost, or at a price less than that which would include a reasonable profit for the distributor.*”

RGDATA’s submission to the 1956 enquiry makes it clear that they viewed RPM as essential to ensuring the continued existence of the family grocer. Price cutting, they argued, “*particularly effects the medium-sized or family grocers, who have not the advantage of strong financial backing and, therefore, cannot afford to suffer the loss of (sic) reductions in their meagre profits.*”¹¹

According to the 1956 Report, the Association had also claimed that there were “*too many retail outlets for groceries and provisions in Ireland*” and they proposed a system of State registration of grocery shops whereby existing traders would be allowed to stay in business provided they met the necessary

¹⁰ RGDATA submission to the FTC, as published in Appendix III to the FTC Report of Enquiry, 1956, P.140

¹¹ RGDATA submission as published in the FTC Report of Enquiry, 1956, P.148.

hygiene regulations but that future entry to the trade would be based on *“training, knowledge, skill and financial stability.”*¹²

There was a second organisation representing the retail grocery trade in Ireland in 1956 and that was the Cash Grocers' Association. Their position on RPM was very different to that of RGDATA. The Association had been formed in January, 1955 to combat opposition to their own policy of reducing the prices of a wide range of goods *“in the interests of their business.”*¹³

The policy of the Cash Grocers Association was that *“the individual retailer should determine his retail prices on the basis of the nett (sic) cost of the goods to him having regard to such factors as demand and rate of turnover.”*

¹⁴ The FTC did, however, conclude that the members of the Association had not been engaging in below cost selling but had been taking a slender margin on sales.¹⁵

2.4 Conclusions & Recommendations of the 1956 Enquiry

The Fair Trade Commission, in considering the various submissions made to it, had regard to the fact that such price competition as existed in the grocery trade at the time, was, not surprisingly, largely concentrated on “free goods”, in other words those not subject to resale price maintenance.

On the other hand, products with fixed retail prices were considered attractive to shopkeepers and the FTC concluded: *“Hence resale price maintenance is a factor making for an increase in the number of outlets....”*

In effect, the FTC concluded that while resale price maintenance allowed, and perhaps even encouraged, the opening of new stores, it all but eliminated price competition in the marketplace and, ironically, made it harder to earn a living in the trade as a result of the dispersion of turnover among a greater number of outlets.

The Commission rejected arguments that price competition was bad for the trade and would put many grocers out of business. They took the view that if the scope for price competition *“...were extended by the abolition of resale price maintenance to include a much wider range of goods than at present, the pressure of price competition by being more diffused would tend to become less severe on particular groups of commodities.”*¹⁶

The FTC concluded: *“...The Commission are of opinion that the enforcement of resale price maintenance in the grocery trade by collective action restricts*

¹² FTC Report, 1956, P.45

¹³ FTC Report, 1956, P.51

¹⁴ FTC Report, 1956, P.52

¹⁵ FTC Report, 1956, P.117

¹⁶ FTC Report, 1956, P.122

*competition and operates against the public interest and they recommend that it should be prohibited.*¹⁷

The FTC went on to reject RGDATA's claim for legislative sanction for the practice (as it did their claim for a State system of registration for grocery shops).

The Commission did, however, acknowledge the need for some safeguards to provide against the risk of "*extreme price competition*" in the market following the prohibition of resale price maintenance.¹⁸

While the Commission concluded that below cost selling did not appear to have been practiced "*to any significant extent,*"¹⁹ and they went on to reject calls for a ban on below cost selling as "*not necessary at present*",²⁰ they did recommend "*...that a supplier ... be allowed to withhold supplies from any retailer who sells a [branded] product...at a price lower than its price to retailers...before the deduction of any additional quantity discounts which may be applicable to the product.*"²¹

In hindsight, this recommendation might now be seen as the first step towards a ban on below cost selling.

The FTC's recommendations were implemented by means of the 1956/58 Groceries Orders (see Chapter One). Sean Lemass, then Minister for Industry & Commerce, in concluding his second stage Dáil speech on the Bill to confirm the Orders, said:

*"It has been strongly urged that resale price maintenance at the retail level should not only be permitted but be made enforceable by law, or, alternatively, that the law should provide that all retailers must take a minimum margin of profit on wholesale prices. I must make it clear that I reject both of these proposals. I think that the case for resale price maintenance in the grocery trade has been thoroughly demolished by the Fair Trade Commission and I agree entirely with the commission's view that this practice is contrary to the public interest and that it should be prohibited. I am satisfied also that the notion of a legal mark up on wholesale prices is completely impracticable. I cannot conceive of any system to be enforced by law which would work and which would be fair to all concerned."*²²

The abolition of Resale Price Maintenance in the 1956 Order was one of the most important policy initiatives of its time and has proved a seminal moment in the evolution of the Irish grocery trade. It opened the way to increased price competition, encouraged efficiencies at all levels of the distribution chain, provided greater choice to consumers and allowed the industry to

¹⁷ FTC Report, 1956, P.123.

¹⁸ FTC Report, 1956, P.124.

¹⁹ FTC Report, 1956, P. 117.

²⁰ FTC Report, 1956, P. 125.

²¹ FTC Report, 1956, P.125.

²² Dáil Debates, Vol 171, Col 652, 12 November, 1958.

adapt, modernise and develop in a way that would not otherwise have been possible.

2.5 The 1966 Enquiry

Over the next ten years there were many developments in the sector.

When H. Williams opened their first supermarket in Ireland, in Henry Street in Dublin, in 1959, press reports at the time suggested that it was sheer lunacy, that self-service would never catch on and that products would be stolen off shelves left, right and centre.

By 1966, 10 years after the FTC Report and the making of the first Groceries Order, supermarkets had become an important feature of the retail business. One of the consequences of this development was the emergence of purchasing groups established by wholesalers and retailers to combine their buying power, negotiate with suppliers and so improve their ability to compete. Indeed such a model had begun trading in Dublin as early as 1954. Allied Dublin Merchants (ADM) had 70 plus members operating 85 retail shops and had been formed as a co-operative society to operate as a wholesale grocery provider. Membership of ADM was only open to members of RGDATA. Later, the Merchant's National Co-operative Ltd (MNC) was established to cater to the needs of grocers outside the capital.²³

The “cash & carry” model also appeared during this period by which keen prices were offered to retailers who in return paid cash and made their own delivery arrangements.

In 1966, the FTC decided, in view of such developments, that it would be opportune to review the operation of the Groceries Orders.

In their resulting submission to the Commission, RGDATA argued that the 1956 Order had been ineffective because manufacturers were reluctant to withhold supplies from retailers who sold at “*unduly low prices.*” Together with the two wholesale associations that made submissions,²⁴ RGDATA again argued for a ban on the sale of groceries at “*below the wholesale price.*”

2.6 Conclusions & Recommendations of the 1966 Enquiry

The FTC carried out its own research and concluded that “...*the frequency of sales of groceries below wholesale prices is low, and...such sales are usually confined to a limited range of products.*” And it added: “*If firms were to engage for an indefinite period in the sale of an extensive range of groceries at uneconomic prices, the financial consequences would be bound to be serious, and the firms would ultimately become insolvent.*”

²³ FTC Report of a Review, 1966, Para. 11, P.9.

²⁴ The Association of Wholesale Grocers, Importers & Distributors and The Wholesale Grocers' Association of Ireland.

Consequently, there was, in the opinion of the FTC, “...no necessity at the present time to consider the adoption of further measures in relation to excessive price competition.”²⁵

Thus, the 1966 review of the operation of the Groceries Orders again rejected the notion of a ban on below cost selling and no changes to the 1956 or the 1958 Orders were made.

2.7 The 1970 Enquiry and the 1972 Fair Trade Commission Report

Over the following years, the FTC continued to get a range of complaints from a variety of sources regarding unfair practices, including unfair price competition, in the retail grocery trade. In October 1970, the Commission initiated a fresh public enquiry into the supply of “grocery goods for human consumption.” This culminated in a Report to the Minister for Industry & Commerce dated May, 1972.

By 1972, supermarkets had become multiples (defined by the FTC as organisations having more than three outlets)²⁶, shopping centres had arrived in Ireland, hypermarkets and discount stores had become a feature of the trade in overseas markets and the symbol (or franchise) style operation had begun to emerge with the launch by buying group ADM of the Londis operation in Ireland.²⁷

This latest FTC Enquiry received numerous complaints about the practice of sales below cost and the FTC looked at the matter in some detail.

The great majority of witnesses at the Enquiry (other than the multiples but including manufacturers, retailers and trade associations) were opposed to below cost selling and urged that it be prohibited by law. RGDATA and buyers group MNC suggested that sales below purchase price plus a margin of 5% ought to be prohibited²⁸ on the basis that sales below this level were just as damaging to small retailers as were sales below cost.²⁹ Manufacturers in particular considered the powers granted to them by the 1956 Order to withhold supplies to be inadequate and the definition of “wholesale price” to be “...unreasonable and contrary to the interests of the consumer...”³⁰

²⁵ FTC Report of a Review, 1966, Para. 8, P.8 & Para. 12, P.9.

²⁶ FTC Report of Enquiry, 1972, Para 52, P.29.

²⁷ The FTC Report of Enquiry, 1972 notes at Para. 69, P.34 that “At the time of the launching of the Londis operation, the members engaged in a vigorous campaign of promotion and advertising, including the sale of certain goods below purchase price.”

²⁸ FTC Report of Enquiry, 1972, Para. 203, P.87.

²⁹ FTC Report of Enquiry, 1972, Para. 215, P.91.

³⁰ FTC Report of Enquiry, 1972, Para. 204, P.87.

Multiples defended below cost selling to the Enquiry as a legitimate marketing tool, rather like expenditure on advertising and promotion.³¹ The Irish Housewives' Association favoured "no below cost selling" and "fix(ed) maximum retail prices."³² The submission on behalf of the Consumers Association of Ireland did not refer to the matter.

2.8 Conclusions & Recommendations in the 1972 Report

The conclusions of the FTC³³ on the issue of below cost selling are important and worth noting.

The FTC believed that enforcing a ban would present "...formidable and possibly insuperable, problems..."³⁴ They added: "In assessing a net purchase price..." (i.e. to the retailer), "...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..."

They also said: "It would be reasonable to assume that a prohibition on sales below any price, however established, would be followed by pressure to have that price raised one way or another. This is strongly suggested by the proposal of RGDATA for the fixing of a margin of 5%."³⁵

Of particular importance to our current examination of this issue is the FTC view that:

*"Any officially prescribed margin would in effect constitute official resale price maintenance. Indeed it is arguable that the prohibition of sales below any base price would represent resale price maintenance; it would at least represent a first step towards its reintroduction. This would amount to a major reversal by the State of a policy which prepared the way for rapid progress in the trade, which was beneficial to the consumer."*³⁶

The FTC went on to extol the virtues of the abolition of resale price maintenance arguing that a ban on below cost selling would limit "competition in prices which is vital to trade."³⁷

Notwithstanding all of the forgoing, the FTC went on to recognise that the practice of below cost selling did have some undesirable features, not least that of conveying a misleading impression of prices in the outlet concerned.

³¹ FTC Report of Enquiry, 1972, Para. 210, P. 89.

³² FTC Report of Enquiry, 1972, P. 170.

³³ The Members of the FTC at this time were Mr. John J Walsh, Chairman, Mr. Patrick M Lyons (who was later to become Chairman) and Miss Mary P Beirne, a temporary member appointed by the Minister for the purposes of the Enquiry.

³⁴ FTC Report of Enquiry, 1972, Para. 218, P.91.

³⁵ FTC Report of Enquiry, 1972, Para.219, P.92.

³⁶ FTC Report of Enquiry, 1972, Para.221, P.92.

³⁷ FTC Report of Enquiry, 1972, Para.223, P.93.

They had already observed that: *“The selling of items below purchase price loses much of its impact unless such prices are widely advertised.”*³⁸

Building on that the FTC went on to recommend the imposition of a ban on a retailer advertising (not selling) a commodity for sale at a price less than the net purchase price he paid for it.

According to the FTC recommendation, the net purchase price was to include tax but no mention was made of any special consideration of future rebates.³⁹ However, when the 1973 order giving effect to the recommendation was made, Article 6 provided that the retailer should not advertise goods for sale at a price which was less than the price *“after the deduction of any discount...”* at which he purchased them. How that provision might be applied, if at all, in the case of discounts offered retrospectively was not clear.

The 1973 Groceries Orders applied a ban on below cost advertising only to foodstuffs. And, from this point forward, the power to withhold supplies under the 1956 and 1958 Orders applied only to non-food groceries. This suggests that a ban on advertising below cost and the power to withhold supplies for selling below cost were regarded as mutually exclusive or, at least, one was seen as unnecessary where the other applied.

For the third time in less than 20 years, the Fair Trade Commission had rejected calls for a ban on below cost selling.

2.9 The 1975 Enquiry and the First 1978 Order

In 1972, the matter became the responsibility of the Restrictive Practices Commission (RPC), which replaced the FTC by virtue of the Restrictive Practices Act of that year.

In 1974 the Examiner of Restrictive Practices, Mr Austin Kennan, recommended to the RPC that they carry out an enquiry into the operation of certain sections of the Groceries Orders, in particular those relating to the definition of groceries and the terms and conditions of supply. The RPC's resulting Report of Enquiry, which was presented to the Minister in December 1975, did not refer in any way to the issue of below cost selling.

As acknowledged in Chapter One, the recommendations made in the 1975 Report were only given effect in an amending order made in the early part of 1978.

³⁸ FTC Report of Enquiry, 1972, Para. 201, P.87.

³⁹ FTC Report of Enquiry, 1972, Para. 225, P.94

2.10 1978 Informal Report of the Restrictive Practices Commission

Later, on 28 November, 1978, the Chairman of the RPC, Mr. Niall McLiam, wrote to the Minister for Industry & Commerce, Desmond O'Malley, TD, enclosing a note entitled "SITUATION IN THE GROCERY TRADE". This note is not a published document and it can therefore be found at Appendix Five to this Report.

During 1978, an Irish food manufacturer refused to withhold supplies from a supermarket who was alleged by others in the trade to have been selling below cost. This resulted in a dispute, which culminated in a boycott of that manufacturer by wholesalers and independent retail groups. The intervention of the RPC managed to secure a moratorium on the boycott pending negotiations involving the parties to the dispute.

Part of the difficulty that gave rise to the boycott seems to have related to the fact that, as mentioned in Paragraph 2.8 above, the power to withhold supplies no longer existed in the case of food products as a result of the amendments made to the Groceries Orders in 1973. One of the solutions identified in negotiations between the RPC and the parties to the dispute was *"an amendment of the Groceries Orders to make it legal again for manufacturers to withhold supplies from outlets selling at or below cost."*⁴⁰

It is equally clear from the RPC's report on the matter that such a change was the minimum sought by the trade by way of a solution to what had become something of a crisis. However, it seems the trade also made it clear that they wished to see effective enforcement of the law on below cost advertising.

2.11 Recommendation for use of "Net Invoice Price" as a Definition of Cost

The RPC recommended certain changes to the Minister. Referring to the power to withhold supplies from an outlet that sold below cost, the RPC said: *"In this connection, 'cost' to be defined as net invoice price plus VAT."*

This was a critical recommendation. No explanation is given for it in the RPC's note to the Minister. Nonetheless, the recommendation was accepted and the term "net invoice price" was introduced into the amending order.⁴¹ The Dáil and Seanad debates on the Bill⁴² confirming the Order do not

⁴⁰ See Appendix Five.

⁴¹ The Restrictive Practices (Groceries) (Amendment) (No 2) Order 1978, S.I. No 336 of 1978.

⁴² Restrictive Practices (Confirmation of Order) (No 3) Bill, 1978 - Dail Debates Vol. 310 of 12 December, 1978 and Seanad Debates, Vol. 90 of 13 December, 1978.

mention the amendment relating to “net invoice price” and offer us no clue as to the reasoning for its inclusion.

It is probable that the main purpose for the amendment was to achieve some degree of certainty about what was meant by cost and so facilitate prosecutions in respect of below cost advertising. That view is certainly consistent with the insistence on the part of elements of the trade that the ban be more vigorously enforced. However it is not possible to say to what extent the trade might have influenced the use of the term, if at all.

Taking things out of sequence for a moment, this explanation would seem to be borne out by the RPC’s comments in the Report of their 1980 Enquiry when they dealt with the arbitrary nature of any definition of cost and they stated as follows:

“We stress the matter of arbitrariness, however, in order to make the point that arguments that such and such a matter in strict logic be taken into account are less compelling than considerations of ascertainability, practicality and general fairness.”

It was with these considerations in mind that we recommended informally to the Minister in November, 1978 that the “net invoice price plus VAT” of goods should be taken to be the cost price of the goods for the purpose of the Orders.”

2.12 The Second 1978 Order

In any event, the new Groceries Order, which came into effect in December 1978, included for the first time a reference to the “net invoice price”. This was the yardstick by which cost was to be measured - both in terms of the power available to manufacturers to withhold supplies from retailers who sold below cost and to the ban on below cost advertising.

2.13 The 1979 Court Case

Less than twelve months later, in October, 1979, another series of events unfolded which have an important bearing on the so-called ban on below cost selling that exists today. RGDATA and the Irish Association of Distributive Trades Ltd (IADT)⁴³ applied to the High Court under Section 19 of the

⁴³ In 1978 an alliance of wholesalers and independent retailers was formed. Its early activities included seeking to compel manufacturers to take action to prevent below cost selling of their products by retailers. This alliance was replaced in 1979 by the more formally constituted IADT.

Restrictive Practices Act, 1972⁴⁴ for an injunction to prevent 3 Guys Ltd (an Irish multiple operated by UK giant Tesco) advertising goods below cost.

The facts of the case were not in dispute. 3 Guys acknowledged that they had advertised goods for sale at a price that was less than the net price shown on the invoice they received from their supplier when they purchased them. They argued, however, that “net invoice price” for the purposes of the Groceries Order ought to be equated with the real purchase price of the goods in question. As such, they believed that account should be taken of discounts and rebates subsequently paid to them by their supplier but which were not shown on the invoice.

The evidence available to us in compiling this Report confirms that the view of the Department of Industry & Commerce at the time coincided with that of the plaintiffs in the case, RGDATA and IADT – in other words that the term “net invoice price” excluded off-invoice discounts.

2.14 Court Ruling on Meaning of “Net Invoice Price”

In his judgement delivered on 20 December, 1979, Mr Justice Ronan Keane granted the injunction sought and stated:

“I cannot accept the submission on behalf of the defendants that the net invoice price is to be equated to the real purchase price. If this were correct, it would mean that at the date the goods were advertised for sale, it could not be said with any certainty that the goods were in fact being advertised for sale at a price equal to or greater than the net invoice price since a period of up to a year might elapse before the “real purchase price” could be ascertained. Unless the language used coerced one to that conclusion, one could hardly suppose that either the legislature or the Minister intended to create a situation in which it would be impossible to say, at any given time, whether a crime was being committed by the publication of a particular advertisement.”

Justice Keane went to confirm that the Minister had acted entirely within his powers under the Act in seeking to prohibit sales at a price below the yardstick of the net invoice price.

2.15 The 1980 Report & the 1981 Order

Back in July 1979, the Minister for Industry & Commerce had requested the RPC to carry out a further enquiry into the grocery trade – this time

⁴⁴ Section 19 states that: “It shall be lawful for a court of competent jurisdiction to grant an injunction on the motion of the Minister or of any other person to enforce compliance with the terms of an order under Section 8 for the time being in force...”

specifically in regard to the issue of below cost selling. This was the result of continuing unease in the trade notwithstanding the events of 1978 and the amendments made to the Order in the latter part of the year.

The RPC's ensuing Report of Enquiry was presented to the Minister on 14 November, 1980.

The Commission looked in particular at the possibility of the outright prohibition of below cost selling. Their conclusion is important:

*"We see no reason to depart from the views in the 1972 Report...that apart from giving rise to numerous practical points of difficulty, a ban on below cost sales would constitute a form of official resale price maintenance, representing up to a point a reversal of State policy which had brought rapid progress to the trade and benefits to the consumer."*⁴⁵

The RPC also expressed the following views:

*"...so radical an interference with the freedom to trade would require to be justified by demonstrating that grave damage to the common good would result from its absence."*⁴⁶

*"Our conclusion is that the present and foreseeable circumstances of the Irish food manufacturing industry do not justify the prohibition of the practice of below cost selling."*⁴⁷

*"There is nothing in the consumer interest which would justify the prohibition of below cost selling at this stage"*⁴⁸

The Commission did however look in some detail at the already existing ban on below cost advertising, which they believed limited the value of below cost selling since the existence of low prices could not be brought to the attention of so many customers. They also concluded that *"...prohibiting a trader from advertising goods below cost is a far less constrictive rule than prohibiting him from selling them below cost, and the existence of some unevenness in its application is more tolerable."*⁴⁹

Thus the RPC recommended that the ban on below cost advertising should be retained in preference to the introduction of a ban on below cost selling. They did however, recommend that the terms of the ban be strengthened. They examined the issue of defining cost and this brought them, inevitably, to the High Court judgment of the previous December (1979). They looked at the matter in some detail in paragraphs 4.12 *et seq.* of their Report but only in the context of a ban on below cost advertising.

⁴⁵ RPC Report of Enquiry, 1980, Para. 3.16, P.29

⁴⁶ RPC Report of Enquiry, 1980, Para. 3.16, P.29

⁴⁷ RPC Report of Enquiry, 1980, Para.3.33, P.35

⁴⁸ RPC Report of Enquiry, 1980, Para.7.8, P.69

⁴⁹ RPC Report of Enquiry, 1980, Para.3.67, P.49

The Commission's conclusion was in effect to accept the status quo and to recommend the use of the term "net invoice price" as the basis for determining the cost of an item, thus confirming their recommendation to the same effect of November 1978. However, they now went one step further and recommended changing the Groceries Order to incorporate the definition assigned to the term "net invoice price" by the Court ruling. This would finally remove any possible ambiguity as to what was meant by cost.

The term "net invoice price" was, thus, introduced into the Groceries Order solely as an administrative convenience, almost certainly with agreement and encouragement of the trade, in order to make it easier to enforce a ban on below-cost advertising.

The definition of the term, which was added to the 1981 Order, was based on the High Court's interpretation of the meaning to be ascribed to the words "net-invoice price."

Thus we can conclude that the term as it exists today, in the very different context of selling below cost, has no economic rationale whatsoever.

Other changes were also recommended to strengthen the ban such as the specific prohibition of advertising special promotional offers ("two for one" and such like) that might be tantamount to below cost advertising and also measures to deal with delivery charges not shown on the invoice and the treatment of invoices in a foreign currency.

The completion of the RPC's 1980 Report of Enquiry, and the making of the 1981 Order to give effect to its recommendations, brought to an end the sixth such review of trading conditions in the Irish grocery trade in the previous 25 years. Each of those six reviews had either not looked at or had declined to recommend an outright ban on below cost selling.

In the next Chapter, we will look at the 1987 Report of Review of the 1981 Order.