



Irish Government abolishes a below-cost pricing regulation (Groceries Order)

ANTICOMPETITIVE PRACTICES — Unilateral practices — Predatory pricing — Prices — Minimum prices (DISTRIBUTION)

On 8 November 2005, the Irish government announced that it would revoke the much maligned Restrictive Practices (Groceries) Order 1987 (“*Groceries Order*”) legislation that was enacted to tackle anti-competitive below-cost pricing conducted by large retailers. In its place, the government proposes introducing new legislative measures that will further fortify already existing competition law provisions which, the government argues, represent the most effective and proportionate means of dealing with anti-competitive behaviour.

The Groceries Order was created with the express intent of deterring predatory pricing in the food retail sector. Indeed one of the main inspirations behind its introduction was the fear that below-cost selling by larger retailers would be detrimental to the interests and long term viability of smaller competitors. In short, it meant to guard against the retail market becoming overly concentrated in the hands of a few large retailers and, as such, represented as much a policy preference in favour of a certain socio-economic way of life as it did a genuine concern over anti-competitive behaviour.

However critics of the Groceries Order (including the Irish Competition Authority) have suggested that this legislation does not actually deal with harmful below-cost pricing but, instead, prohibits the resale of grocery goods at prices below the net invoice provided. Such a ban on below invoice price selling does not take account of the discount or rebate arrangements that retailers might (and often do) receive from suppliers but which, in turn, they are prohibited from passing on to consumers. For example, if a retailer is supplied with a product and invoiced at a certain amount, the law currently holds that the retailer may not sell that product for less than the invoiced amount even if he/she subsequently receives a rebate or a discount for the product in question from the supplier. As one commentator notes, it effectively amounts to a ban on passing on discounts to consumers; preventing rebates and discounts commonly enjoyed by retailers from being directly reflected in retail prices.

This mechanical formulation (*i. e.* banning below invoice selling) was settled upon for reasons of “*administrative convenience*” yet clearly does nothing to serve the interests of consumers who ultimately have to foot the bill of artificially high prices. Thus the government has arrived at the view that the legislation is at best redundant as its stated purpose has been superseded by more recent competition law provisions which offer more appropriate and proportionate means of dealing with the targeted competition concerns. At worst it has produced counter-productive and anti-competitive outcomes; acting to the

detriment of Irish consumers rather than to their benefit by facilitating and encouraging harmful resale price maintenance at the supply level.

Finally the Groceries Order has done little to stop consolidation in the retail sector as witnessed by the notable decline in the numbers of independent retailers (2,500 in the first 15 years after the legislation came into effect) and the corresponding proliferation and success of large multi-national retailers (resulting in a more concentrated market than in the UK where no such below-cost ban exists).

In announcing the Groceries Order's abolishment, the government has stated that it also intends to strengthen existing competition law provisions as set out in the Irish Competition Act 2002 ("Act"). This will be done through the Competition (Amendment) Bill 2005 which will insert new provisions into the Act including the following:

- Expressly banning all forms of resale price maintenance by suppliers;
- Prohibiting suppliers from imposing different conditions for equivalent transactions with retailers and other trading parties who may be put at a competitive disadvantage by such a discriminatory approach;
- Banning suppliers making payments to retailers in respect of the provision of particular selling space in stores or advertising (so called "hello money").

It should be noted that the new legislation is not expected to come into force until early Spring as primary legislation (which is required in order to revoke the Groceries Order and amend the Act) is currently being drafted. Until that time the Groceries Order remains in force.

For more details on the Groceries Order, one can find the legislation at the following link: **Restrictive Practices (Groceries) Order 1987**.

See also, O. Lynskey, The Irish Competition Authority calls for the repeal of the Restrictive Practices (Groceries) Order, contending that it facilitates retail price maintenance and hinders effective competition, **e-Competitions, September 2005, Volume I, n° 250**.

For an overview of below cost regulations in Europe in the distribution sector, see **P. Kirch**, The regulation of commercial cooperation agreements: French paradox?, *Concurrences* n° 1-2006, Tendances.

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