

**THE IMPACT OF THE RESTRICTIVE PRACTICES (GROCERIES) ORDER ON COMPETITION IN THE
IRISH GROCERY TRADE***

Gerry Donnelly

*Principal Officer, Competition & Consumer Policy Unit, Department of Enterprise, Trade &
Employment*

(read before the Society, 23 March 2006)

Abstract: This paper analyses the history and key provisions of the Restrictive Practices (Groceries Order) since its inception in 1956 and demonstrates how the most recent incarnation of the Order in 1987 was fundamentally different from its predecessors. The Paper concludes that the provisions of the 1987 Order were self-defeating and contradictory, and, because they re-introduced a form of resale price maintenance into the grocery trade, represented a reversal of Government policy of the previous 30 years and served only to encourage rather than prevent anti-competitive pricing. Statistical and economic evidence is used to demonstrate how the Order eliminated price competition from the trade and encouraged vertical integration between suppliers and retailers that resulted in increased market concentration. In this way, the paper establishes a chain of cause and effect between the Order and higher grocery prices in Ireland. The evidence also points to the fact that the Order was incapable of achieving any of its stated objectives – including those of protecting suppliers from the buying power of large multiple retailers and guaranteeing the continued existence of small independent grocers.

The conclusion is drawn, based on an analysis of market trends and structures, that the Irish grocery trade is segmented in two niche markets serving respectively the convenience and “one-stop” customer and that there is no reason to believe that revoking the Order will damage competition or result in any consumer detriment.

Keywords: Restrictive practices, anti-competitive pricing

JEL Classifications: D4

1. BACKGROUND

The Groceries Order was first introduced in 1956¹ and applied rules and regulations to the operation of the grocery trade in Ireland with the objective of ensuring fair trading conditions. The most recent Order, the Restrictive Practices (Groceries) Order, 1987, introduced the so-called ban on below cost selling, something for which trade representatives had lobbied hard for more than 30 years. As a result particularly of this ban, the 1987 Order was an immediate cause of controversy. Depending on one’s point of view, the Order was either a model of State intervention that allowed all participants in the grocery trade to compete with one another on a fair and equitable basis – or it was an old-fashioned piece of protectionist legislation that resulted in Irish consumers paying more for their grocery goods than might otherwise have been the case. By 2005, the Groceries Order had been subject to 14 independent reviews over 49 years and, in the period up to 1987, had been amended on seven separate occasions. Notwithstanding this extensive analysis and modification, consensus on the Order remained elusive and it is apparent that opposing views became more polarised over time. A 15th review conducted by the Department of Enterprise, Trade & Employment was published in November 2005 has resulted in the repeal of the Order in its entirety.

* The views expressed in this paper are those of the author and should not be taken to represent the views of the Department of Enterprise, Trade & Employment or of any other organ of Government)

¹ See Appendix 1 for a full list of Groceries orders made in the period 1956 to 1987

2. THE HISTORY OF THE GROCERIES ORDER

2.1. *The 1956 Order*

Between April and June 1955, the then Fair Trade Commission (FTC)² held a public enquiry into “*the conditions which obtain in regard to the supply and distribution of grocery goods...*” The FTC reported the outcome of their Enquiry to the Minister for Industry and Commerce in June 1956 and recommended the introduction of statutory rules, the first of their kind, designed to guarantee fair trading in the grocery sector.

The 1956 Groceries Order prohibited a range of activities, many of which could be broadly described as vertical constraints imposed by suppliers and wholesalers on the retail trade. Activities prohibited included resale price maintenance, the collective fixing of prices by suppliers and wholesalers, the fixing of recommended minimum retail prices and the withholding of supplies from retailers because of dissatisfaction at the prices being charged to the consumer. The Order also required suppliers to set down standard terms and conditions of sale and to apply these in an equitable manner across the trade.³

The FTC was opposed to a ban on below cost selling but they did recommend that suppliers be legally allowed to withhold supplies from retailers who sold goods at below the wholesale price at which they had bought them. This was a power that was never considered by the trade to be a satisfactory deterrent to below cost selling because suppliers were invariably reluctant to bite the hand that fed them. In other words, it was not in their interests to withhold supplies from their biggest customers.

It is worth noting that trade representatives lobbied hard in 1956 for the legalisation of resale price maintenance. The lobby failed and resale price maintenance was instead prohibited because the then Fair Trade Commission took the view that it would “*...restrict competition and operate against the public interest...*”. Sean Lemass, in a commentary on the 1956 Order said, “*...the case for resale price maintenance in the grocery trade has been thoroughly demolished...*” (1958 Dáil Debates)

Despite this damning indictment, and for reasons that will become clear, resale price maintenance has ever been central to the debate on the Groceries Order.

2.2 *The 1958 Order*

The 1956 Order was amended in 1958 “*to render a number of its provisions more equitable.*” (1958 Dáil Debates). One such provision allowed suppliers to divide their customers into different classes for the purpose of applying different terms and conditions. Those who bought in bigger quantities were able to secure a better deal.

The FTC reviewed the operation of the Orders in 1966 but no changes were recommended.

² Or the Restrictive Practices Commission as it was sometimes called. The abbreviations FTC and RPC are used interchangeably in this paper. The FTC was replaced in 1991 by the Competition Authority as a result of the Competition Act, 1991.

³ The Order giving effect to these recommendations was signed by the Minister, William Norton, on 31 December 1956. It did not have immediate effect. Indeed it has been a feature of that Order, and all subsequent Orders that they did not have effect until such time as they had been confirmed by an Act of the Oireachtas. This was a requirement originally of the Restrictive Trade Practices Act, 1953 (No 14 of 1953) under which the 1956 Order was made.

2.3 *The 1973 Orders*

The FTC conducted a review of the grocery trade in 1972, which resulted in the making of a new Groceries Order in 1973 that set new rules in regard to the terms and conditions for the supply of “*grocery goods for human consumption*”.

The FTC continued to believe that an outright ban on selling below cost was not justified and that enforcement of such a law would present “*formidable and possibly insuperable problems.*” And so the 1973 Order established for the first time a ban on a retailer advertising goods for sale at “*a price that is less than the price...at which he purchased the goods*”. The logic of this position was that below cost selling as a sales tactic lost much of its impact if those prices could not be advertised.

The 1973 Order also introduced important changes in regard to the way in which the grocery trade set its terms and conditions of sale. The 1956 Order had required suppliers to set out standard terms, which had to be applied in an equitable manner. The 1973 Order retained this concept but, critically, introduced a new provision allowing a supplier to vary the terms of any transaction by implementing what were called supplementary terms. These supplementary terms, which were already a feature of the trade before the 1973 Order legitimised them, were to become known as ‘off-invoice discounts’ and, as we shall see later, were fundamental to the impact the Order would have on the trade

Additional minor changes were made as a result of a second 1973 Order.

2.4 *The 1978 Orders*

In December 1975, the Restrictive Practices Commission (RPC) submitted a further Report to the Minister in regard to the operation of certain provisions of the Groceries Orders. The RPC did not, on this occasion, examine the issue of below cost selling in the grocery trade or make any recommendation in that regard. Following protracted consideration of the 1975 Report, a new Order was signed by the Minister on 15 March 1978. It introduced new provisions in regard to payment of bills on time, own label goods, and the exclusion of fresh and frozen meat and vegetables from the scope of the Order. It also introduced important changes to allow greater discretion to suppliers in the application of supplementary terms and conditions of sale. The Order was confirmed by an Act of the Oireachtas later that year and came into effect on 20 June, 1978

2.5 *Introduction of ‘Net Invoice Price’ Provision*

Later in 1978, a group of wholesalers and retailers initiated a boycott of an Irish manufacturer who had failed to take action against a retailer who, it was alleged, was selling grocery goods below cost. The trade demanded more effective enforcement of the prohibition on retailers advertising groceries below cost. Consequently, in November 1978, the Examiner of Restrictive Practices recommended changes to the Order so as to introduce the notion of selling below “the net invoice price”. The reason for this was to introduce some certainty into what was meant by “cost” and to facilitate the prosecutions demanded by the trade. A new Order was signed by the Minister on 7 December 1978, was subsequently confirmed by an Act of the Oireachtas and came into effect on 19 December 1978. The Orders made up to this point were not mutually exclusive and co-existed in what must have been a very confusing regulatory environment. There were now in force no less than six groceries orders - 1956, 1958, 1973, 1973 (amendment), 1978 and 1978 (amendment) - each applying different provisions to different elements of the trade.

2.6 1979 Court Case defines 'Net Invoice Price'

In October 1979, RGDATA⁴ and the IADT⁵ applied to the High Court for an injunction to prevent 3 Guys Ltd (an Irish multiple operated by 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. 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.

In his judgement delivered on 20 December 1979, Mr Justice Ronan Keane rejected the 3 Guys argument, 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."

2.7 The 1981 Order

In November 1980, the RPC reported on yet another enquiry, this time into the specific issue of the "*Retail Sale of Grocery Goods Below Cost.*" The RPC again took the view that a ban on below cost selling would not be justified. The Report did, however, recommend some strengthening of the ban on below cost advertising and a revocation of all previous orders still extant and their consolidation into one new Order. The Minister for Industry, Commerce & Tourism signed this Order on 4 March 1981. It was confirmed by an Act of the Oireachtas and came into effect on 7 April, 1981.

2.8 The 1982 Order

In July 1986, the Minister requested the RPC to carry out a special review of the operation of the 1981 Order "*with particular reference to the issue of below cost selling*". The RPC's Report was submitted to the Minister in January 1987. The Report recommended a number of critical changes to the 1981 Order. Most critical of all was the recommendation that the practice of below cost selling be prohibited for the first time. In that latter regard, the term "net invoice price", which was first introduced into the 1978 Order, was retained as a definition of cost. The Minister for Industry & Commerce signed a new Order giving effect to these recommendations on 25 May 1987. It was confirmed by an Act of the Oireachtas and came into effect on 11 December 1987. The provisions of the 1987 Order are examined in more detail below.

⁴ The Retail Grocery, Dairy and Allied Trades Association was founded in Dublin in 1942 and quickly became one of the largest trade associations in the country.

⁵ Irish Association of Distributive Trades Ltd. 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.

In recent years, representatives of the grocery trade have claimed that the ban on below cost selling was introduced into the 1987 Order as a result of the closure of the H Williams supermarket chain which allegedly went out of business following a bitter price war with its main competitors. The Department of Enterprise Trade & Employment (November 2005) has shown this to be untrue. H Williams was still trading when the Minister, acting on the recommendation of the RPC, signed the Order in May 1987. Furthermore, available evidence suggests that the firm's closure was as much the result of its long-standing weak financial position as it was of any price war with competitors.

2.9 The 1991 FTC Report and Subsequent Reviews of the Order

The 1987 order was reviewed by the FTC in 1991 and a report of that review was submitted to the Minister in August of that year. By a majority of 2 to 1 the Commission recommended that the ban on below cost selling, introduced only four years previously, should be revoked on the grounds principally that it had not operated as intended and that anti-competitive practices in the trade had been adequately covered in the meantime by the Competition Act, 1991. The then Minister decided not to act on this recommendation immediately and opted to keep the matter under review pending the settling in of the new Act.

There were two internal Departmental reviews of the Order in 1993 and 1995 each of which supported the ultimate the repeal of the Order.

The Competition and Mergers Review Group in its Final Report in March 2000 recommended that the ban on below cost selling be repealed on the basis that such a move would enhance the pace and intensity of competition in the trade.

In 2001, the OECD, in its Report on "Regulatory Reform in Ireland" recommended that the Order be repealed.

The National Competitiveness Council in its "Competitive Challenge" Report published in October, 2004, recommended that the Government "*reconsider the ban on below-cost selling*" and stated that "*...there is evidence that the ban has undermined vigorous price competition between retailers at the expense of consumers.*"

In 2005, the Oireachtas Joint Committee on Enterprise & Small Business published its report into the operation of the grocery trade in Ireland. They recommended that: "*A ban on below cost selling be retained.*"

None of the foregoing recommendations for repeal of the Order was accepted. Then in April 2005, the Government appointed Consumer Strategy Group, in its Report, *Make Consumers Count*, recommended that the Order be revoked in its entirety. In response, the Government initiated a Public Consultation Process before deciding the future of the Order. In November 2005, the Department of Enterprise, Trade & Employment published its "*Review & Report of Public Consultation Process*" on the 1987 Order. The Government announced at the same time that the Order was to be repealed in its entirety.

3. DEVELOPMENTS IN THE IRISH GROCERY TRADE 1956 – 1987

3.1 *Abolition of Resale Price Maintenance*

In 1955 the total weekly cost of running a household in Ireland was of the order of €12 (216 shillings) per week, the State operated statutory price control on a wide range of everyday products and the structure and operation of the grocery trade was a far cry from today's modern, streamlined supermarket business. At that time it was common for grocery goods to be sold on credit and delivered to the customer's home. There were many grocery stores to choose from but not much price competition. According to the FTC, this was because resale price maintenance, a practice whereby the manufacturers and suppliers set retail prices, was common in the trade. Consumers could be sure that they would pay the same price for a pot of jam no matter where they shopped.

The 1956 Order stimulated competition by prohibiting resale price maintenance thus effectively removing the vertical control that manufacturers and suppliers exercised over the retail trade. Retailers were suddenly free to set their own prices. It became worthwhile for retail grocers to find new ways of doing business so as to offer greater choice and value to consumers. By encouraging consumers not only to collect their own groceries, but also to serve themselves and pay cash, grocers found that they could sell produce more cheaply, something they could not have done if resale price maintenance had still been allowed. By the mid 1960s large self-service supermarkets offering a much wider choice of products had become an important feature of the retail landscape.

3.2 *New Ways of Doing Business*

Larger stores brought big benefits for consumers. They offered a bigger choice of produce. They also bought in bigger quantities and were able to achieve economies of scale not available to the small independent grocer. Because manufacturers and wholesalers could no longer fix retail prices, these economies could now be passed on to the consumer in the form of lower prices. Of course, price cutters would have been seen as mavericks by the majority of those in the trade who had energetically lobbied for the legalisation of resale price maintenance.

One consequence of these developments 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 who had been one of the principal advocates of resale price maintenance. Later, the Merchant's National Cooperative Ltd (MNC) was established to cater to the needs of grocers outside the capital. The "cash & carry" model also appeared during this period. Keen prices were offered to retailers who in return paid cash and made their own arrangements for delivery of the products to their store. Again, retailers were free to pass on the benefits of these cheaper wholesale prices to consumers.

While all these changes were certainly facilitated by the removal of resale price maintenance, the

real driving force behind new shopping trends was undoubtedly changes in consumer habits and lifestyle. Not least of these developments would have been the increasing use of the motor car.

4. STRUCTURE OF IRISH GROCERY TRADE 1987 – 2006

4.1 Market Concentration

In 1990, the FTC estimated market shares among the main participants in the trade as follows:

Table 1 Market Share – Ireland 1990

Quinnsworth	20.9%
Dunnes Stores	20.4%
Musgraves	14.2%
SPAR	4.6%
Superquinn	4.2%
Mace	2.8%
L&N	2.5%
Roches Stores	1.7%
Others	28.7%
4CR	60.1%

Using the most basic measure of market concentration, the Four Firm Concentration Ratio (“4CR”),¹ the above figures reveal a concentration level in the grocery trade at that time of 60.1%. Table 2 shows the estimated market shares of the main participants in the Irish grocery trade in 2005 together with corresponding figures for Great Britain. We see that the level of market concentration in Ireland measured according the 4CR Rule has increased to 77.3%. Furthermore, the market share of the two largest multiples has grown from 41.1% in 1990 to 47% today. But perhaps more interesting is the fact that the Irish market today is more concentrated than in Britain where no Groceries Order exists.

¹ This simple calculation is the percentage of the value of total sales accounted for by the four largest firms in an industry. If the 4CR is greater than 60%, the market is deemed to be oligopolistic - essentially a market dominated by a few large players.

Table 2 Market Share – Ireland & the Great Britain 2005

Ireland	%	Great Britain	%
Tesco	25.0	Tesco	30.3
Dunnes Stores	22.0	Asda	16.4
Musgraves (SuperValu/Centra)	21.7	Sainburys	15.9
Superquinn	8.6	Morrisons	11.7
BWG (SPAR/Mace)	7.5	Somerfield	5.8
Marks & Spencer	1.9	Waitrose	3.7
Others	13.3	Iceland	1.9
		Others	14.3
TOTAL	100.0		100.0
4CR	77.3		74.3

Source: Ireland – March 2005 Interim Report of Joint Oireachtas Committee on Enterprise and Small Business on the Impact of Grocery Multiples on the Grocery and Retail Markets and its Effects on Consumers, Small Grocery Retailers and Small Grocery Suppliers. Great Britain – TNS Till Role Data, June 2005).

An alternative and more sophisticated measure of market concentration is the Herfindahl-Hirschman Index (HHI) which is generally regarded as being a better measure of market concentration than the 4CR. We can only use a limited application of the HHI analysis but nonetheless the test would suggest a concentration figure in the Irish market in 1990 of less than 1,200 as compared to an estimated 1,700 plus today.² Furthermore, the HHI test confirms the 4CR finding by revealing that the British market (with an estimated HHI below 1,700) is less concentrated than the Irish market where the HHI is over 1,700. This allows us to conclude that the grocery market has become more concentrated since 1990.

4.2 Store Numbers

This rise in concentration is driven not just by having more sales in larger stores but as shown in **Table 3**, we also see a dramatic decline in the number of stores - from 20,971 in 1966 to 10,670 in 1988 and 8,335 in 2002. Within these totals, the number of independents has declined by 2,351 stores over the period since 1987 representing a decline of more than 22%.

² In order to apply this test successfully, it is necessary to know the market share of all firms in an industry. That information is not available to us particularly for the British Market. For example, in **Tables 1 & 2** above, we have aggregated the market share for Musgraves (SuperValu & Centra). To compare like with like, we would have had to analyse the “others” category in Britain and similarly aggregate the market share of symbol groups in common ownership.

Table 3 Store Numbers 1966 – 2002

STORE TYPE	1966	1977	1983	1988	1991	1994	1996	1998	2000	2002
Grocers	16968	11352	9213	7848	7087	6827	6231	5747	5280	5076
TSNs/Kiosks	4003	2428	2357	2149	1864	1863	1942	1812	1717	1612
Garages with shop				673	1186	979	1282	1449	2121	1647
TOTAL	20,971	13,780	11,570	10670	10137	9669	9455	9008	9118	8335
Of which Multiples				145(e)						161
Of which Independents*				10525(e)						8,174

Source: AC Nielsen³ (e) = estimated based on data from the Restrictive Practices Commission's 1987 Report

* For the purpose of this exercise, any trader not a multiple is considered independent

Clearly, over-time grocery sales have become increasingly concentrated into a lesser number of bigger stores. Furthermore, the decline in store numbers seems to represent a trend that began some time before the 1987 Order came into effect and that has continued to the present day.

4.3 The Convenience Sector

What the table above does show is a startling increase in the number of garage forecourt retailers. This suggests a significant growth in the convenience sector in the intervening years and is no doubt a reflection, amongst other things, of increasing car usage. If we analyse the figures by outlet type we get the results shown in Table 4

Table 4 Store Types 1994 - 2002

Store Type	1994	1996	1998	2000	2002
Multiples	160	149	157	155	161
Symbols	1015	1084	959	975	955
Garages with Symbol Group			193	249	221
Independents	5652	4997	4631	4150	3970
TSNs	1863	1942	1812	1717	1602
Garages with Indpt Shop	979	1282	1256	1872	1426
TOTAL	9669	9454	9008	9118	8335

Source: AC Nielsen

The number of multiple outlets has remained fairly static over the period while symbols (including symbols on garage forecourts) have grown by about 160 stores to 1,176 in 2002. Meanwhile, while independents (including TSNs⁴ and independents on garage forecourts) have declined from

³ AC Nielsen indicates that the decline in the number of garages with a shop in 2002 is attributable to a change in methodology and the use of more external data. The figures for 2000 are believed to be too high but they will not be restated. The figures for 1966, 1977 and 1983 are taken from the Restrictive Practices Commission's 1987 Report, Appendix IV, Table 3, P.108.

⁴ Stores selling Tobacco, Sweets & Newspapers

8,494 stores in 1994 to 6,998 stores in 2002. Again, the very striking trend within these totals is a very significant increase in the number of convenience stores attached to garages – up from 979 to 1426 stores.

Independent research agency, IGD (2006) identifies the convenience sector as a key growth area in Ireland over the next five years driven mainly by changing lifestyles and demographic trends – including increased female participation in the workforce, a strong increase in grocery spend in the under 34 age bracket and increased time pressures on consumers leading to a decline in the importance of the weekly shop. IGD predicts that increased competition in the sector is likely to lead to increased consolidation among symbol groups as smaller operators endeavour to achieve economies of scale as a means to gaining competitive advantage.

Empirical evidence of the growth in this sector in the UK is available from the IGD Convenience Retailing Report 2004. According to IGD, the UK convenience market is worth £23 billion, which represents a 7.3% increase on the previous year – representing 20% of the overall UK grocery market. Indeed the convenience sector is outperforming the total grocery market, which grew by 3.3% over the same period. IGD forecasts that by 2009 the market will have grown to £29 billion.

This analysis is supported by considerable anecdotal evidence in the Irish market with the biggest convenience store operators reporting double digit sales growth in the most recent financial years and announcing major investment programmes in new store infrastructure. The country's largest multiple retailer, Tesco, has also emerged as a player in the convenience market with its Tesco 'Express' brand and garage forecourt outlets.

4.4 *'Dualism' in the Irish Grocery Trade*

Against this backdrop of growth, the convenience sector is seen as being clearly identifiable from the grocery trade as a whole. This is confirmed by Walsh & Whelan (1999) who concluded that a mature and efficient dual market structure had evolved in urban areas with multiples and convenience stores operating in separate, clearly identifiable market niches. According to this research, the "convenience" niche of the market provides, amongst other things, greater locational convenience for the consumer and tends to specialise in a range of products which can be described as non-routine items purchased on impulse such as confectionery, daily routine purchase items such as newspapers, and other non-routine "top-up" items bought at irregular hours in small quantities between supermarket visits. On that basis, multiples are seen as offering an entirely different product and as targeting a different consumer base – hence the reason for Tesco developing their Express brand.

This is borne out by price surveys undertaken by the Office of the Director of Consumer Affairs which have tended to show that convenience stores are more expensive than supermarket outlets in all cases. A 2005 study (Insight Research, UK) revealed a perception among Irish consumers that convenience stores are more expensive than supermarkets generally rating up to 4 on a scale of 1-5 compared with just over three for supermarkets. Further anecdotal evidence from September 2004 (shoppingbill.com) demonstrated that the lowest price for a list of branded products in convenience stores was more expensive than corresponding prices in supermarkets.

This suggests that consumers are willing to pay a premium to shop in convenience stores. This is interesting because if all the prices were the same in all types of store, it would be impossible to draw any conclusion. The explanation could be that there was no competition or there was huge competition, which had caused prices to converge to the lowest possible level. However, the fact that prices were universally found to be more expensive in convenience stores is significant. That of itself suggests that they are operating in a different market niche. This would not be the case if

both types of store were servicing the same market.

4.5 Regional Variations

A further level of market segmentation is demonstrated in **Table 5** which examines market structure market across four regions, Dublin, Rest of Leinster, Munster and part of Ulster/Connaught, respectively.

There are far less grocery stores in Dublin per 1 million people (Row 10). Yet, there is a much higher number of multiple outlets per million of the population in Dublin than in regional locations (Row 6). Clearly, this is driven by population density and the fact that multiples are attracted to those areas with a sufficiently large catchment market to justify their presence. Not surprisingly based on the dual market structure which has evolved in urban areas, multiples and symbols/independents co-exist both within Dublin and within the wider Leinster region – much of which now operates as a suburb of the capital.

As might be expected, what **Table 5** also shows (Rows 7, 8 & 9) is that there is a greater number of symbol and independents per million people in regional locations. Because multiples have not entered many regional areas, symbols and independents in those areas are catering for both “one-stop” and “convenience” shopping.

Table 5 Regional Variations in Store Numbers

1	Category	Dublin	Rest of Leinster	Munster	Ulster/Connaught
	Region				
2	Population	1.12m	0.98m	1.10m	0.71m
3	All Multiples	58	41	43	19
4	All Symbols	249	256	333	336
5	All Independents	973	1652	2512	1861
6	Multiples per 1m People	52	42	39	27
7	Symbols per 1m People	222	261	302	474
8	Independents per 1m People	865	1680	2282	2626
9	All Symbols & Independents per 1m People	1087	1941	2584	3100
10	All Grocery Stores per 1m People	1139	1983	2623	3127

Source: A.C. Nielsen

Consequently, outside of Dublin and the main urban areas of the country, the multiples and the symbols/independents are not competing because they are simply not located in the same areas.

4.6 Vertical Integration of the Grocery Trade

Comparisons in store numbers as indicated by **Tables 3** and **4** above are subject to changes in methodology over the years and need to be treated with care. However the analysis would suggest that much of the increased market concentration since the introduction of the Groceries Order has taken place below the level of the multiples and, particularly since 1994, would seem to have been driven by consolidation in the symbol/independent sector. This is borne out by an examination of the store numbers operated by the main symbol groups.

SuperValu (operated by Musgraves) grew from having 30 stores in 1980 to 80 in 1987. Today Musgraves, who operate the Centra chain as well, supply a total of 530 stores across Ireland and market share has grown by 50% from an estimated 14.2% in 1990 to almost 22% today.

ADM Londis were described by the RPC in 1987 as having 110 stores in 1987 and now operate over 300 stores. BWG, which was formed in the early 1970's by the amalgamation of four independent wholesale companies, now operates in excess of 550 SPAR and Mace stores.

These three symbol groups between them operate almost 1,400 stores. Other symbol operators¹ are estimated to operate a combined 550 stores bringing the total number of such stores in the country to close to 2,000. This compares to 1,175 symbol group stores in total in 2002 suggesting that the growth of this sector is continuing at a rapid pace.

5. GROCERY PRICES AND FOOD PRICE INFLATION

5.1 *Grocery Prices*

The National Competitiveness Council in their Statement on Prices and Costs, published in September 2004, concluded that Ireland was, at that time, the most expensive country in the Eurozone for food and non-alcoholic beverages. An examination of Eurostat's "Purchasing Power Parities and Related Economic Indicators" survey for 2002 and 2003 also leads to the conclusion that Ireland is among the more expensive countries in Europe for food. More recent surveys have also come to a similar conclusion. However, there are so many factors that might influence price differentials between Ireland and other parts of the EU – not least input costs, consumer behaviour, spending power, overall economic performance and so on – that it would simply not be possible to isolate out the impact, if any, of the Groceries Order. The present Paper makes no attempt to do so.

5.2 *Food Price Inflation*

It is similarly difficult to identify the impact of the Order on food price inflation. On the face of it, Irish food price inflation in the period since 1987, as shown in **Table 6** overleaf, has not been excessive. However, the table is inconclusive unless compared against other indicators.

¹ Gala, Costcutters, Vivo and XL Stop & Shop

Table 6 Food Price Inflation 1987 – 2005

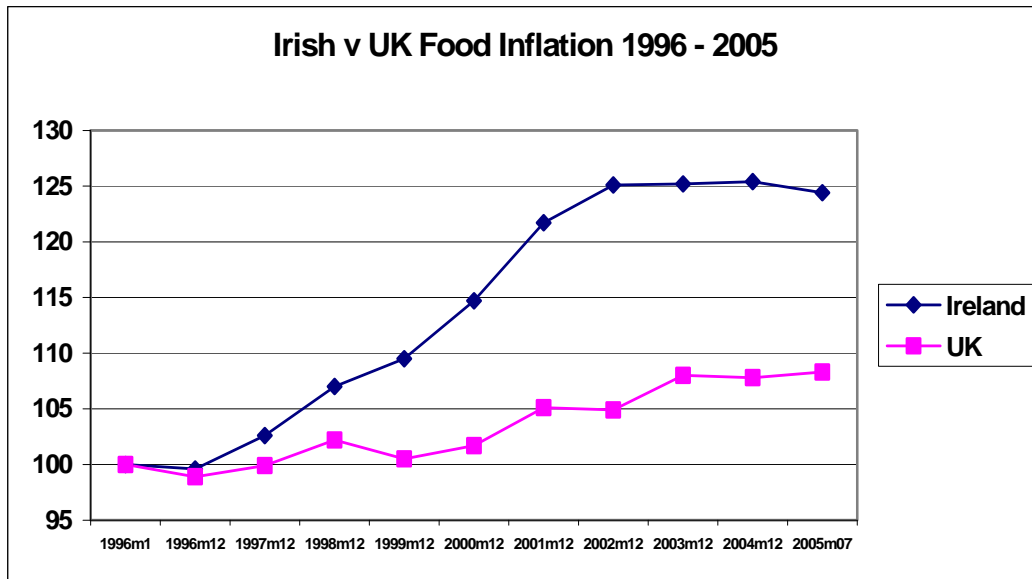
Year	Index	Annual % Change
1987	100.0	
1988	101.9	1.9
1989	106.2	4.3
1990	109.5	3.3
1991	109.2	-0.3
1992	111.8	2.6
1993	109.8	-2.0
1994	115.0	5.2
1995	117.8	2.8
1996	119.9	2.1
1997	121.3	1.4
1998	127.3	6.0
1999	130.6	3.3
2000	133.8	3.2
2001	142.6	8.8
2002	147.1	4.5
2003	150.6	3.5
2004	150.8	0.2
2005	149.1	-1.7

Source: CSO

Thus Table 7 compares the rate of Irish food inflation with that in the UK for the period between 1996 and 2005.² The Table shows that Ireland's rate of food inflation over the period, at nearly 24.4% is virtually three times that of the UK where the rate is 8.3%. The UK, of course, has no prohibition on selling below cost.

² The analysis of market concentration suggests a consolidation in the convenience/symbol group market from 1994 onwards and it is therefore valid to examine the impact such consolidation might have had on inflation rates in the period since the mid-nineties.

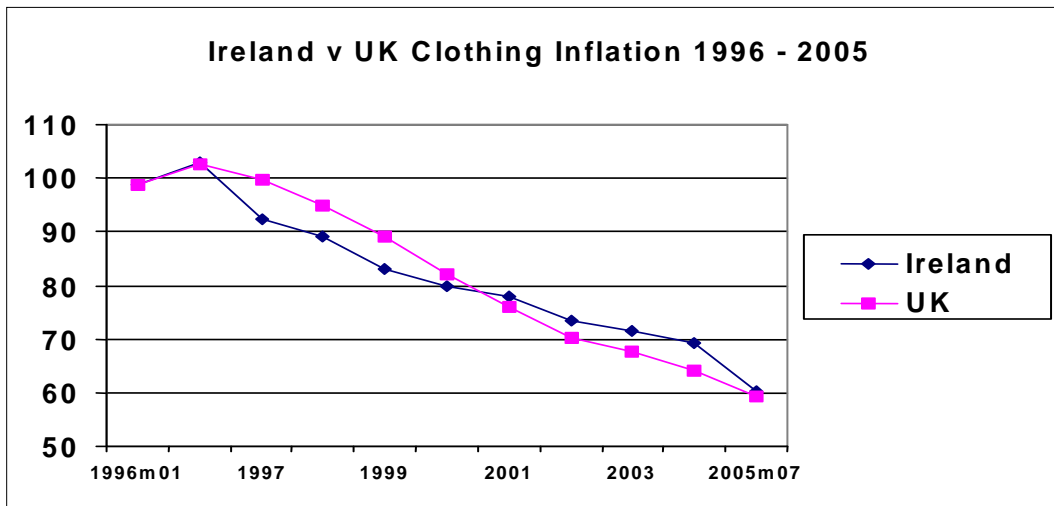
Figure 1 – Irish Food Inflation v UK Food Inflation 1996 – 2005 (1996 = 100)



Source: Eurostat

It could still be argued that this divergence in the rate of food inflation between our nearest trading partner and ourselves might be the result of higher input costs. If that were so, one would expect to see the trend replicated in other retail sectors. In fact, the opposite is the case. *Figure 2* shows the comparative rates of inflation between Ireland and the UK in the clothing sector over the same period – 1996 to date.

Figure 2 – Irish v UK Clothing Inflation 1996 to 2005 (1996 = 100)

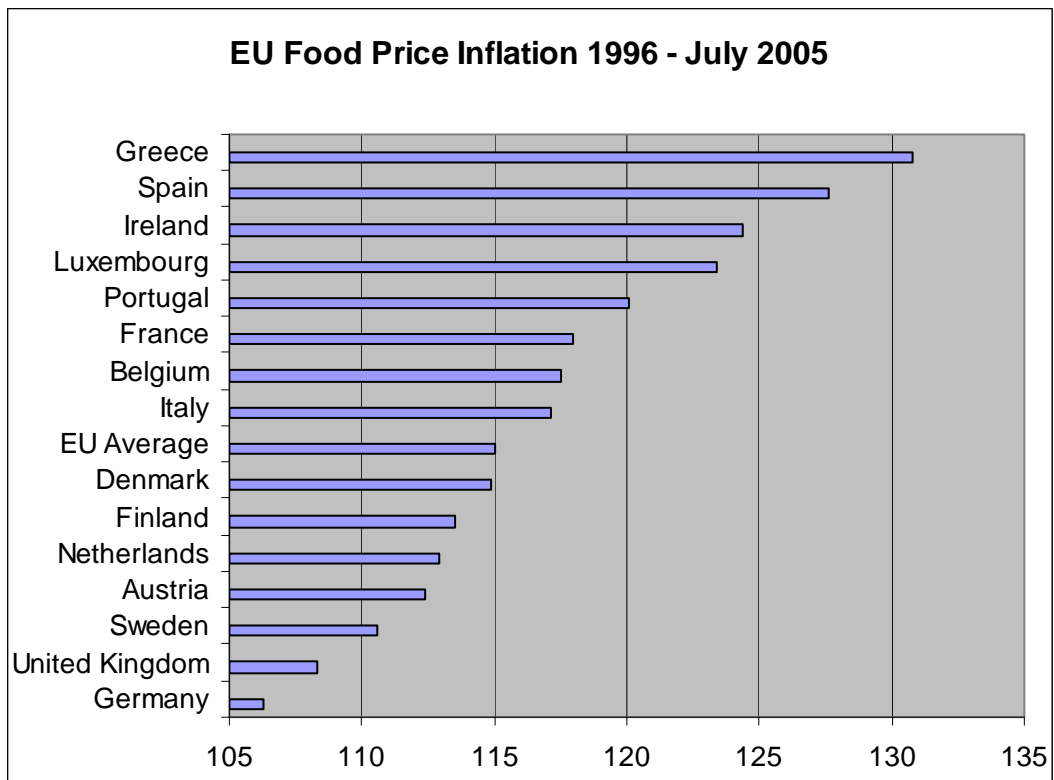


Source: Eurostat

This represents a startling contrast. Whereas inflation in food in Ireland diverged widely from the beginning of the period to end up at three times the UK rate, the rate of inflation in clothing is almost identical. This difference in trends is not readily explained. If, for example, differences between food price inflation in Ireland and inflation in other sectors are due to imports of clothing and footwear from low cost economies, we would have expected to see similar differences in UK trends. That we do not means that these differences in Irish rates are unlikely to be adequately explained by an import substitution argument.

Figure 3 broadens the analysis of food price inflation to compare rates across the EU 15 in the period 1996 to 2005. In considering this Table it is worth bearing in mind that all of the eight countries whose rate of food price inflation is shown in Table 9 as exceeding the EU average operate vertical price restrictions in the sense of prohibitions on sale below cost.³

Figure 3– EU Food Price Inflation 1996 – July 2005



Source: Eurostat

³ A wide variety of legislative regimes make direct comparisons difficult but it is clear that most countries do not operate a blanket ban and allow exceptions to their rules on below cost selling which make them different to the Groceries Order in terms of likely economic impact.

5.3 *Conclusion*

Something has been driving Irish food inflation to be three times the rate in the UK (and almost twice the EU average) and input costs in the retail sector do not seem to be the answer. This is highly suggestive of the Irish retail food sector being protected from competition. The implications of this in a broader macro-economic context should not be overlooked. Inflation is one of the key indicators of economic performance and influences policy and decision making at all levels of Government as well as determining relationships between Government and key stakeholders in society. In a situation in which interest rates are decided at European-wide level, competition in markets remains one of the few mechanisms available to national governments by which control can be exercised over inflationary trends.

6. OBJECTIVES & IMPACT OF THE 1987 ORDER

6.1 *Below Cost Selling*

The fundamental justification for the 1987 Order was that below cost selling was an anti-competitive tactic used by powerful retailers to confuse consumers and put smaller competitors out of business. Frankly, throughout the debate on the Groceries Order over a period of fifty years, the harm caused to the competitive process by selling below cost was presumed to exist in all cases. Yet no empirical evidence to support this case has ever been produced. In the most recent debate on the future of the Order, below cost selling has become confused with a very different phenomenon – that of predatory pricing.

Predatory pricing is a business strategy intended to damage or eliminate a competitor. While it is generally taken to involve selling certain key products at a price that is below some measure of cost, a whole range of other criteria must be satisfied before predation can be considered to exist. In particular, the predator must enjoy significant market power in the first place, as well as the prospect of permanently eliminating the competition so as to be in a position to unilaterally impose prices on the market and thus recoup the losses incurred.⁴

There are many legitimate business reasons for selling below cost, even on the part of a powerful firm. Industry might sell below cost when absorbing start-up costs, when test marketing new products, when seeking to dispose of old stock or when it is necessary to match a competitor's prices. Furthermore, losses incurred as a result of selling below cost may be recouped in ways other than through the elimination of competitors. This is achieved when loss-making products are cross-subsidised by other lines on which the retailer takes a higher margin.

Walsh and Whelan (1999) demonstrated that the practice of loss leading does not have to be predatory in intent or effect and can be a natural outcome of competition, particularly in a multi-product retail business where consumers have imperfect information in regard to the prices of all products in a store. This economic model demonstrates that loss leading in the retail industry can have a competitive outcome, in other words it is a practice that is unlikely to distort the market or result in any consumer detriment.

And because there are legitimate business reasons for selling below cost, a general policy that prohibits the practice must, de facto, be anti-competitive.

⁴ Further analysis of predatory pricing in the context of the Irish grocery trade is contained in Chapter Seven of the Department of Enterprise, Trade & Employment's Review of the Groceries Order (November 2005).

Even if below cost selling was harmful of itself, the 1987 Groceries Order never operated as a ban on below cost selling in any event. The Order stated that a retailer could not sell grocery goods at a price that was less than the net invoice price of those goods. However, the Order also stipulated precisely how the net invoice price was to be calculated and it specifically provided that no account could be taken of discounts, rebates or other reductions, which were not entered on the invoice in cash terms. Consequently, the invoice that a manufacturer or wholesaler gives to a grocery retailer rarely, if ever, reflects the true cost of the goods being supplied. And so the prohibition in the 1987 Order was actually a ban on selling below the net invoice price – something else entirely.

The term “net invoice price” had no economic rationale or justification whatsoever. It was introduced into the Order in the 1970’s as a substitute for “cost” simply because, when trying to establish what was meant by “below cost”, the invoice would represent easy proof before a court. This legal certainty was considered more important than whether or not the term actually bore any relationship to cost.⁵ As an administrative convenience, it was very effective. As an instrument of market intervention, it left something to be desired.

Thus, while a ban on selling below cost can be considered anti-competitive in itself, the actual provisions of the Groceries Order were considerably more pernicious. By prohibiting sales below the invoice price, the Order was preventing sales to consumers at prices that could not possibly have caused any competitive harm in the market. It is an inescapable logic that this provision kept grocery prices at an artificially high level for almost two decades.

6.2 *Preventing High Grocery Prices in the Long Term*

Supporters of the Order argued that the prevention of ‘below cost’ selling in the short term would guarantee that the grocery trade would remain exposed to healthy competition and that Irish consumers would not end up paying higher prices in the long term. In fact, the inflation trends identified in this paper suggest that the Irish grocery market has been *protected* from competition for more than a decade causing Irish grocery prices to increase more rapidly here than in other parts of Europe where no vertical price constraints exist. Ireland is now one of the most expensive countries in Europe in which to buy groceries.

6.3 *Preventing Unfair Discrimination in the Grocery Trade*

That the invoice price provision was meaningless as a measure of cost and was not even an approximation of cost was due entirely to the practice of off-invoice discounting. However, off-invoice discounts were not some inadvertent complication that came about as if by accident. Off-invoice discounts were deliberately facilitated and actively encouraged by the Groceries Order.

The 1987 Groceries Order required that every supplier to the retail trade publish their standard terms and conditions of trade and suppliers had to be prepared to sell on those terms and no other. The intention was to prevent unfair discrimination. However, the Order also allowed suppliers to produce *supplementary* terms and conditions of trade (effectively off-invoice discounts) and these

⁵ This in-exactitude was perhaps tolerated because prior to 1987 the Groceries Order did not prohibit sales below cost. It only prohibited advertising such sales. The fact that the invoice price bore little relationship to cost was recognised by the Restrictive Practices Commission in 1987 when they recommended the introduction of the prohibition on selling below cost. To get over this problem, they recommended to the trade that all discounts and rebates should thenceforth be placed on the invoice. Any failure to do this would have, in the Commission’s view, amounted to an abuse of the legislation. Their recommendation was not heeded by the trade.

did not have to be published and did not have to be disclosed to anyone else in the trade other than the buyer himself.⁶ The impact of this extraordinary provision was succinctly explained by the Restrictive Practices Commission in 1987 when they remarked that “*There is in most cases token compliance with the Order....discrimination in terms now takes place largely by way of off-invoice discounts.*”

In so far as the Order was designed to encourage openness and transparency and provide a level playing pitch for all participants in the trade, the provision facilitating supplementary terms was entirely self-defeating.

6.4 Curbing Buying Power of the Largest Retailers.

Another key claim made for the Groceries Order is that it protected vulnerable suppliers and primary producers from the buying power of the largest retailers. The provision regarding supplementary terms/off invoice discounts was entirely self-defeating in this respect also. Certainly, a large retailer was discouraged from negotiating a lower invoice price because, under the law as it stood, the same price would then have to be made available to each of his competitors. Instead the retailer put the squeeze on suppliers by demanding a higher discount.

Unfortunately, the fact that the Order encouraged negotiations between supplier and retailer to shift from invoice price to discounts made most difference to the consumer. The retailer was free to pass on a lower invoice price in the form of a lower retail price. Unfortunately, the law did not allow him to pass on the benefit of a higher discount.

6.5 Preventing Market Concentration

When the 1987 Order was introduced it was argued that the ban on below cost selling would prevent concentration of the market in the hands of just a few participants. The analysis of market structure then and now reveals that the Order has failed to achieve this key objective, albeit that the concentration in the market that has occurred has been in the independent/symbol sector.

6.6 Protecting Small Independent Grocers

A further claim made for the 1987 Order is that of protecting small independent grocers. But the sharp decline in the number of independent grocers (down more than 22% in 15 years) does not suggest that the Order has succeeded in this regard either.

It has also been argued that the Order particularly protected independent grocers in rural locations who are most at risk from the predatory multiples. Given current market and location structures, which suggest that multiples are attracted by population density, this risk is clearly overstated. Furthermore, there is no reason to believe that if multiples did decide to enter the regional market in a significant way that a dualistic structure would not develop in much the same way as it has in urban areas.

Proponents of the Order have suggested that without the Order, up to 70% of towns and villages in Ireland would be left without a local shop. This, it was claimed, was the fate of the UK where no restriction on below cost selling exists. The Department of Enterprise Trade & Employment (November 2005) has demonstrated forensically that this statistic has no basis in fact and that

⁶ The Order did require that details of supplementary terms to be made available to the Director of Consumer Affairs on request. This proved unworkable in practical terms, not least because of technical flaws in the way the Order was drafted. Further detailed analysis of the provisions of the Order in regard to terms and conditions of trade and ‘off invoice discounts’ are at Chapters Four and Six of the Department of Enterprise, Trade & Employment’s Review of the Groceries Order (November 2005).

claims that a similar fate awaits Irish towns and villages are utterly without foundation.

6.7 *Possible Distortions in Consumer Price Index*

Trade representatives who made submissions to the Government's Public Consultation Process argued that income earned by retailers through off-invoice discounts are passed on to consumers by means of reductions in the retail price of products *not* covered by the Groceries Order. On the face of it, this seems to be a tacit admission that products which *were* covered by the Order (in particular foodstuffs) were more expensive than they needed to be. This has implications for less well off sections of society for whom these products would have formed the bulk of their weekly shopping basket.

Furthermore, on the basis that the more expensive items in shopping basket would have a higher weighting in the CPI, the Order may have had a negative distorting effect the Consumer Price Index.

6.8 *Re-introduction of Resale Price Maintenance*

In the 1950s it was quite common for manufacturers and wholesalers to specify minimum prices at which retailers could sell grocery products to the general public. Such a condition could be enforced in a variety of ways including the threat of withholding supplies from, or worse still a trade boycott of, retailers who refused to comply. The practice was, as we have seen, prohibited by the 1956 Order and this opened the way to greater price competition in the trade.

The prohibition was continued into the 1987 Order. Article 3 of the Order clearly stated that a supplier or wholesaler could not specify minimum retail prices for their products. However, Article 11 of the 1987 Order was a complete contradiction because it stated that a retailer could not sell below the price shown on the invoice. This means that the supplier determined the minimum retail price for the product by the very act of putting a price on an invoice. That is the very essence of resale price maintenance. It has been argued that Article 11 facilitated a form of legalised resale price maintenance. In reality, Article 11 was incapable of producing any outcome *other* than resale price maintenance.

Thus, the 1987 Order represented a fundamental reversal of a Government policy that had contributed so much to the development of the Irish grocery trade over the previous 30 years. What is most unfortunate is that this reversal of policy seems to have been almost inadvertent, at least on the part of the policy makers, and to have been put in place without any real analysis of the likely impact. It came about through the interaction of four separate events over a period of 15 years. The 1973 Order legitimised the practice of off-invoice discounting in the grocery trade. The 1978 Order introduced the term 'net-invoice price' into the statute for the first time. In 1979, the High Court determined what was meant by the term 'net invoice price'. And finally, in 1987, the Groceries Order prohibited sales below the net-invoice price. Those trade representatives who had lobbied so hard in 1956 for the legalisation of resale price maintenance could not have contrived a more fortuitous sequence of events.

6.9 *Resale Price Maintenance as a Driver of Market Concentration*

The immediate impact of the 1987 Order was to subject the industry to a vertical restraint that allowed manufacturers and suppliers to determine minimum resale prices and thus restrict price competition. This would have encouraged retailers to rely more heavily on other forms of expenditure (for example on loyalty schemes, advertising or improving the store environment) as a

means of attracting customers. John Sutton (1991) tells us what to expect in this type of competitive environment. The normal relationship between market size and market concentration breaks down and the greater dependence on endogenous sunk costs acts as a barrier to entry, which in turn drives market concentration. In the context of the Irish grocery trade, this new barrier to entry would, intuitively, be more likely to impede the arrival of new independent grocers rather than international multiples like Aldi and Lidl and indeed we have seen both of these latter operators enter the Irish market in recent years. On the other hand, consolidation witnessed in the Irish grocery trade in the symbol/independent sector is not alone consistent with Sutton's reasoning but demonstrates just how robust his model is. It is difficult for small independent grocers when survival depends on an ability to make considerable non-price related investment in order to gain competitive advantage. Thus, it is reasonable to conclude that the Groceries Order has made it more attractive and beneficial for independent stores to belong to a symbol operation. It follows that increased concentration in the market was an inevitable outcome of the 1987 Groceries Order. The emergence and growth of these symbol groups has had a positive impact by allowing significant economies of scale to be built into the independent sector. However, if the Groceries Order encouraged the growth of these groups, it also undermined the potential benefits to the consumer because the vertical constraint imposed on the market by the imposition of resale price maintenance prevented the emergence of real competition between retailers in the period after 1987. Thus the impact of the combined buying power of the symbols has been diluted by restricting the extent to which economies of scale could be reflected in lower retail prices.

This paper's analysis of market concentration in the grocery trade (Tables 1 & 2 above) is arrived at by aggregating the market share of individual stores within the same symbol operation. Each of these groups will argue the individual stores within the Group are independent businesses – more often than not family owned and operated. This claim does not stand up to analysis, however. While individual symbol group stores may be independently *owned*, they are certainly not independent *operated*. Indeed, it is difficult to make any objective assessment of the true environment in which they operate because the franchise rules are not available. While some groups may well support individual store owners by means of investment in infrastructure and so on, the main benefit of participation in a symbol group is access to the centralised buying power of the wholesaler - who also happens to be the franchiser. This clearly limits the ability of individual store owners to operate independently because when they buy from an independent supply chain, always assuming that the rules of the franchise will allow them to do so, they lose the benefit of the centralised buying power.

Furthermore, all retailers within a symbol group can be expected to benefit from national advertising of the brand name to which they belong. In a market devoid of any real price competition, this is critical to securing competitive advantage. But the independence of the individual store owners was undermined in a much more fundamental way by the very existence of the Groceries Order. No store owner was free to determine the minimum retail price at which he could sell his groceries. That price was fixed at the price placed on the invoice by the wholesale supplier. The store owner was not free to decide that he would sell milk and bread a bit more cheaply to cater to local market conditions – even if that cheap price was above cost and represented a profit on the deal. That control amounted to a severe restriction on the freedom of individual storeowners to trade. But it also represented a fundamental interference in the competitive process.

The control exercised by symbol group operators over individual retailers means that the aggregation of market share for all stores within a group, indeed within a number of groups in common ownership, when computing market concentration is entirely valid. This vertical integration in the market is further exacerbated by the fact that the main symbol groups operate a

delivered wholesale service to retailers outside their group, in particular to truly independent retailers and to the main garage forecourt stores. They also operate large cash & carry style operations supplying many of the remaining truly independent retailers in the country. In such cases, the wholesaler can, by means of the invoice price, dictate the minimum retail price for the products being supplied thus making it very difficult for a truly independent store owner to compete aggressively with a store within his supplier's symbol group. Indeed, it is likely that when sales to truly independent retailers are taken into account, the effective market share of the main symbol group operators is significantly greater than this paper demonstrates (*Table 2* above). For example, the largest symbol group's own estimate of their share of the wholesale market is 33%. This would mean that one company is controlling the minimum retail prices charged by one-third of the Irish retail trade. Therein lies the true power of the Groceries Order. The margins earned by the wholesale trade were protected from competition by the provisions of the Order and could not be undercut. Put another way, the Order was less effective at curbing the power of large retailers and considerably more effective at protecting the power of the wholesalers

7. Conclusion

The 1987 Groceries Order was intended to regulate the horizontal relationships between grocery retailers to ensure that more powerful participants could not undermine the legitimate trading interests of smaller players.

In fact, the Order had a much more fundamental impact on the vertical relationship between suppliers and their retail customers. In particular, in a fundamental reversal of what had been Government policy for the previous 30 years, the 1987 Order reintroduced resale price maintenance into the Irish grocery trade and allowed suppliers to determine minimum retail prices. The direct result of this was to cause grocery prices to be set at an artificially high level rather than at a level determined by competitive market forces.

By eliminating price competition at retail level, the Order encouraged the market to become more concentrated through a process of vertical integration in which it was more attractive for independent retailers to be affiliated with one of the franchise groups operated, in the main, by the biggest wholesalers, who in turn determined minimum retail prices. This further diminished competition and contributed to higher rates of food price inflation. The effect has been a vicious circle of artificially determined prices causing diminished competition causing higher prices.

Furthermore, by encouraging and facilitating a secretive, discriminatory and arbitrary system of off invoice discounts, the Order failed to create a fair trading environment or to protect vulnerable suppliers, manufacturers and producers from the buying power of the largest retailers.

Removing the Order means removing the discretion afforded to suppliers and wholesalers to determine minimum retail prices and will result in grocery prices in the future being cheaper than they would be if the Order remained in existence.

Undoubtedly, removing the Order will cause greater competition in the Irish grocery trade. There is no reason to believe that efficient business, which is capable of adapting to the new regulatory environment, has anything to fear from such a development.

It is certainly not the function of competition policy to protect participants in any sector of the economy from such competition.

Acknowledgements

Many people have contributed a great deal to my understanding of the provisions of the Groceries Order and its impact on the trade. I would like to thank, in particular, the staff of the Department of Enterprise, Trade & Employment, particularly those in the Competition & Consumer Policy Unit whose input was critical at all times and without whom the research would never have been concluded. I would like to thank also members and staff of the Competition Authority and the Office of the Director of Consumer Affairs. The advice and support of Paul Walsh of Trinity College was invaluable throughout. AC Nielsen was extremely helpful in providing the statistics without which analysis of the structure of the grocery trade in Ireland would have been so much the poorer. The same goes for IGD and Insight Research and all those who made their analysis and research available to the Department. This includes those participants in the trade and other interested parties whose contributions to the Department's public consultation process are available on the Department's website. And then there are those too many to mention who listened patiently to my ramblings of the past 9 months and who were always willing to offer a constructive word. Any faults remaining are all my own work.

References

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

Dáil Debates, Vol 171, (12 November 1958), Col 650-652 (Sean Lemass, Minister for Industry & Commerce).

Fair Trade Commission (1966) Report of a Review of the Operation of Orders relating to the Supply and Distribution of Groceries (Stationery Office, Dublin, Pr 8896).

Fair Trade Commission (1972) Report of Enquiry into the conditions which obtain in regard to the supply and distribution of Grocery Goods for Human Consumption (Stationery Office, Dublin, Prl 2517).

Restrictive Practices Commission (1975) 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, Prl 5274).

Restrictive Practices Commission (1980) Report of Enquiry into the Retail Sale of Grocery Goods Below Cost (Stationery Office, Dublin, Prl 9428).

Restrictive Practices Commission (1987) Report of Review of Restrictive Practices (Groceries) Order, 1981 (Stationery Office, Dublin, Pl 4678).

Fair Trade Commission (1991) Report of the Review of the Restrictive Practices (Groceries) Order, 1987 (Stationery Office, Dublin).

The Final Report of the **Competition & Mergers Review Group** (2000) (Stationery Office, Dublin, PN 8487).

OECD (2001) Regulatory Reform in Ireland.

National Competitiveness Council (2004) Annual Policy Statement of the National

Competitiveness Council The Competitiveness Challenge (Forfás).

Joint Committee on Enterprise & Small Business, Third Report, Interim Report on the Impact of Grocery Multiples on the Grocery and Retail Markets and its effect on Consumers, Small Grocery Retailers and Small Grocery Suppliers (Houses of the Oireachtas) (2005).

Forfas (2005) Report of the Consumer Strategy Group “Make Consumers Count” (Forfás) (2005).

The Department of Enterprise, Trade & Employment (2005) The Restrictive Practices (Groceries) Order, 1987: A Review & Report of Public Consultation Process.

www.thelocalshop.com, website of the UK Association of Convenience Stores.

A Suppliers’ Guide to Trading in Ireland (2006) IGD (UK) <http://www.igd.com>

Walsh, PP & Whelan, C (1999) A Rationale for Repealing the 1987 Groceries Order: (The Economic and Social Review, Vol. 30, No. 1 pp.71-90).

Walsh, PP & Whelan, C (1999) Loss Leading and Price Intervention in Multi-product Retailing: International Review of Law and Economics.

Insight Research (2005) Behaviour & Attitudes in Irish Grocery 2005 (Insight Research, UK) (2005).

www.shoppingbill.com/special_report_convenience.html.

Musgrave Group (2005) submission to Public Consultation Process (Department of Enterprise, Trade & Employment) <http://www.entemp.ie/commerce/consumer/groceriesorder/submissions.htm>.

BWG Group Ltd (2005) submission to Public Consultation Process (Department of Enterprise, Trade & Employment) <http://www.entemp.ie/commerce/consumer/groceriesordersubmissions.htm>.

ADM Londis Group (2005) submission to Public Consultation Process (Department of Enterprise, Trade & Employment) <http://www.entemp.ie/commerce/consumer/groceriesordersubmissions.htm>.

National Competitiveness Council (2004) Statement on Prices and Costs (Forfás).

Eurostat, (2002 & 2003) Statistical Office of the European Communities Purchasing Power Parities & Related Economic Indicators.

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

APPENDIX 1

LIST OF GROCERIES ORDERS

- The Restrictive Practices (Groceries) Order, 1956, S.I. No. 332/1956
- The Restrictive Trade Practices (Groceries) Order, 1956 (Amendment) Order, 1958, S.I. No. 163 of 1958
- The Restrictive Practices (Groceries) Order, 1973, S.I. No. 49 of 1973
- The Restrictive Practices (Groceries) (Amendment) Order, 1973, S.I. No. 287 of 1973
- The Restrictive Practices (Groceries) (Amendment) Order, 1978, S.I. No. 82 of 1978
- The Restrictive Practices (Groceries) (Amendment) (No2) Order, 1978, S.I. No. 336 of 1978
- The Restrictive Practices (Groceries) Order, 1981, S.I. No. 69 of 1981
- The Restrictive Practices (Groceries) Order, 1987, S.I. No. 142 of 1987

**VOTE OF THANKS PROPOSED BY MS. CAROL BOATE ADVOCACY DIVISION MANAGER,
COMPETITION AUTHORITY**

INTRODUCTION

I am delighted that the Statistical and Social Inquiry Society of Ireland has asked me to comment on Gerry Donnelly's paper "*The impact of the Restrictive Practices (Groceries) Order on Competition in the Irish Grocery Trade.*" This paper, and the larger related report produced by the Department of Enterprise Trade and Employment in 2005, represents one of the most comprehensive reviews of a piece of legislation ever undertaken in Ireland.

The paper makes a compelling case for the recent abolition of the Restrictive Practices (Groceries) Order via the Competition (Amendment) Act 2006, which came into force on Monday 20th March 2006. The paper clearly shows that the introduction of a ban on "below invoice price selling" in the 1987 version of the Restrictive Practices Groceries Order created a perverse situation. The 1987 Order simultaneously outlawed the anti-competitive practice of Resale Price Maintenance, as was its original purpose when first introduced in 1956, and, at the same time, created a situation whereby grocery retailers were statutorily obliged to sell groceries above the prices invoiced by wholesalers and manufacturers. These prices which were above the true cost of the goods to the retailer.

So compelling is the paper's analysis and evidence that it raises a number of important questions of particular interest to an advocate against anti-competitive laws and regulations such as myself.

What can the abolishment and subsequent re-introduction of Resale Price Maintenance ("RPM") to the groceries trade by successive Groceries Orders teach us about the anti-competitive effects of RPM? Why did it take 20 years for the decision to introduce a ban on below invoice price selling to be reversed when the harmful effects are so clear? What happens next?

This comment briefly addresses each of these questions in turn.

1.1 Resale Price Maintenance and consumer choice

Gerry Donnelly's paper shows that the 1956 Groceries Order's abolishment of Resale Price Maintenance (RPM) had a profound effect on the groceries trade, both in terms of reducing prices for consumers and increasing consumer choice.

In the 1950s when RPM was endemic in the Irish grocery trade, the manufacturers and wholesalers chose the retail price that maximised their profits. This meant that competition at the retail level was limited to quality of service - opening hours, free delivery, credit terms etc. - as the price of a pot of jam did not vary from shop to shop.

The outlawing of RPM in 1956 then allowed retailers to choose the retail price that maximised *their* profits. They also began offering their customers a range of options: collecting their own groceries, self service, and paying in cash. Thus retailers were able to respond to their customers' time-money preferences, and discriminate between customers with different preferences, in a way which maximised their profits.

This new business model had significant advantages for consumers. Not only did prices fall but consumers were now able to exercise choice over whether they preferred to spend time or money on obtaining their groceries. Those who preferred to have their groceries delivered and pay later

could continue to do so, others could opt to save money by spending time selecting their own groceries and paying in cash. Moreover, the introduction of price competition to the 1950s groceries retail market had a dynamic effect which brought even greater benefits to consumers over the longer term. Moves at retail level towards cash and self-service led to a similar model at wholesale level – hence the emergence of “cash and carry” style wholesalers. This further evolved into bulk buying by larger grocery retailers, who were now free to pass the savings from bulk buying on to their customers, and eventually the emergence of the dualistic market structure we see in today’s grocery retailing – the supermarkets and the convenience stores. Nowadays consumers have an even wider spectrum of choices in terms of the time and money they wish to spend on grocery shopping.

Although it would be foolish to attribute this change entirely to the advent of the 1956 Groceries Order - obviously the motor car and other societal factors played a large part – it is an interesting example of how introducing competition to a previously sheltered sector of the economy brings both price reductions and more choice for consumers. Typically this choice relates to a variety of price-quality offerings (as was the case in airlines, for example) but in the case of the grocery sector it manifested itself in terms of a variety of price-convenience offerings. The 1956 abolishment of RPM in the Irish grocery sector also shows how competition is dynamic, and the full benefits of introducing competition to a sector are reaped, through innovation, over the long term.

The imposition of a ban on below invoice price¹ selling in 1987 essentially re-introduced RPM, through the back door, by allowing manufacturers and wholesalers to dictate the retail price by giving all discounts “off-invoice”. This had the effect of dampening price competition between grocery retailers and increasing grocery prices at every level of convenience.

1.2 Advocacy and the importance of evidence

While the harmful effects of RPM are abundantly clear to any economist, the arguments used in favour of retaining the 1987 Groceries Order held sway for almost 20 years. This is in spite of the fact that no empirical evidence was ever offered to show that below cost selling was bad. Supporters of the Groceries Order consistently lobbied to maintain a law which sheltered them from competition and it was only when sound evidence against the Order was presented that the tide changed.

Gerry Donnelly points out in his paper that, in the debate leading to the introduction of the 1987 Groceries Order, the harm from below cost selling was simply “assumed” to exist. The Dáil debates at the time show that arguments in favour of a ban on below cost selling were produced and even patronising. For example:

“Measures like this help the business sector and any improvement in this area is welcome.”²

“the housewife was induced into the supermarket in order to buy a number of goods that she recognised were exceptional value only to find that the total shopping basket was in fact a lot dearer than it should have been.”³

¹ This was the price used by the Order to define the term “cost” for the concept of “below cost selling”.

² Deputy Lynch Dáil Éireann - Volume 374 - 29 October, 1987, Restrictive Practices (Confirmation of Order) Bill, 1987: Second Stage.

³ Deputy Yates, Dáil Éireann - Volume 374 - 29 October, 1987, Restrictive Practices (Confirmation of Order) Bill, 1987: Second Stage.

The last argument ignored the fact that the way people shop for their groceries had moved on since 1957. Consumers no longer know the price of every grocery item they buy: there is a much larger range of grocery items available than in the 1950s, too many to keep track of, and people shop at supermarkets to avail of this range and also parking facilities. Instead, consumers know the price of their regular items, such as bread and milk, and notice increases in the cost of their overall shopping basket.

Over time, it became apparent that the 1987 Groceries Order was not a ban on below cost selling, as was its stated intention, but rather facilitated the practice of RPM – a practice made illegal in every other sector of the economy under the Competition Act, 1991. The arguments made by those in favour of retaining the Order were emotive and without any basis in fact.

One lobbyist suggested that the logical outcome of allowing supermarkets to price as they wished would be one giant supermarket in Portlaoise and everyone in Ireland driving to Portlaoise to buy their groceries.⁴ Another painted the following picture of rural life without the Groceries Order:

“Picture a small town in the west of Ireland in five years. What was once a bustling town centre with a number of local village shops now has buildings with boarded-up windows. The younger people with families have moved out to be nearer the large town with the superstore, and the older generation are left with no option but to get a taxi to travel the 10 miles to the nearest supermarket to buy their loaf of bread and pint of milk.”⁵

A particular mantra - that “in Britain, where [there is no ban on below cost selling] 42 per cent of villages no longer have a local shop”⁶ turned out to be a complete misrepresentation of a study of rural life in Britain.

I’m not sure why this sector was so successful in retaining this restriction on competition with such arguments. Certainly the debate about the Groceries Order tapped into genuine fears about societal change in Ireland. Supporters of the Order seemed to believe that it was imbued with mystical properties that would prevent all sorts of social ills.

This situation is not peculiar to Ireland, however. Across the EU, Governments and Competition Authorities deal with constant campaigns by the small retailer lobby groups for “fairness” in their relationships with suppliers and against supermarkets. In the Netherlands, for example, a number of factors sparked a supermarket price war in 2003 and farmers and smaller retailers began to complain in large numbers to the Netherlands’ Competition Authority (the NMa) and to lobby Government for regulatory intervention to outlaw sales below cost.⁷ Hungary has recently brought in a new Trade Act (2006) to regulated supermarkets’ buyer power. Across the UK, “Tesco-itis” is spreading as retailers, wholesalers and manufacturers complain that Tesco is just too big and is “exploiting its buyer power”.⁸

That is why this paper, and, in particular, the statistical evidence within it is vital. The paper

⁴ Tara Buckley of RGDATA, on the Orla Barry show, Newstalk 106, Thursday 1st September 2005.

⁵ Rosemary Garth of IBEC, in *The Irish Times*, 1st April 2005.

⁶ Rosemary Garth of IBEC, in *The Irish Times*, 1st April 2005.

⁷ “Experiences with buyer power in The Netherlands”, a presentation by Raymond de Rooj of the NMa to a TAIEX Workshop on “Supermarket related problems such as buyer power and sales below cost”, 21st April 2005. The NMa investigated complaints of predatory behaviour and found that consumers were benefiting from the price war and that there had been no breaches of competition law.

⁸ See for example, Dobson, P.W. (2005), “Exploiting Buyer Power: Lessons from the British Grocery Trade”, *Antitrust Law Journal*, Vol. 72, pp. 529-562.

shows how price increases in Ireland could not be explained by rising costs. It has been interesting to see how, in the immediate aftermath of the Government decision to prepare legislation to abolish the Groceries Order, Irish economists announced that they revised downwards their estimates of inflation figures as a result of the ending of the Groceries Order.⁹

The factual evidence and quantification of the issues presented in this paper was vitally important in debunking the many myths that surrounded the Groceries Order. Economists to date had, in general, adopted a first principles approach to the Groceries Order – reasoning that it was a restriction on competition and harmful to consumers. The quantitative evidence was far more powerful than reasoned argument in counteracting the claims of the producer interests and shows the value of such evidence in policy analysis.

1.3 What happens next?

The Competition Authority is currently putting in place measures for evaluating any complaints which it may receive regarding the new prohibitions contained in the Competition (Amendment) Act 2006. The Act prohibits a non-dominant “grocery undertaking” from attempting to coerce another grocery undertaking to practice the following: RPM, price discrimination, advertising and slotting allowances or hello money.¹⁰

Also, as requested by the Minister for Enterprise Trade and Employment at the time of the commencement of the Act, the Competition Authority will monitor the Irish groceries sector over the coming years regarding the effect of the abolition of the Order.

It will be interesting to see whether/how the trends identified in Gerry Donnelly’s paper will continue. The commencement and abolition of the Groceries Order 1987 has provided Ireland with a natural experiment in the effects of Resale Price Maintenance on a market. Will the abolition of the Groceries Order lead to persistent below cost selling by supermarkets on particular items? If so, will this result in market distortions such as have been alleged in the UK, where the persistent below cost selling of bread has allegedly contributed to a perception among UK shoppers that bread is a low value item.¹¹ How long will it take for the food processing sector – which was singled out by Enterprise Strategy Group¹² as showing little growth – to be under pressure to innovate and be more competitive? Certainly, the debate will continue.

The abolition of the Groceries Order was a good day for the Irish consumer. The consumer interest won out over well-organised and well-resourced producer interests. Much thanks for this goes to the good work of Gerry Donnelly and his vital assessment of the arguments being presented and the evidence needed by policy makers to make a decision.

⁹ The Government announced that the Groceries Order was to be abolished in November 2005.

¹⁰ In many respects the Competition (Amendment) Act 2006 could be called the new Groceries Order, as it applies only to the groceries trade and contains aspects of successive Groceries Orders.

¹¹ Dobson, P.W. TAIEX Workshop on “Supermarket related problems such as buyer power and sales below cost”, 21st April 2005.

¹² The Enterprise Strategy Group was appointed by the Minister for Enterprise, Trade and Employment to prepare an enterprise strategy for growth and employment in Ireland up to the year 2015. Its Report “*Ahead of the Curve, Ireland's Place in the Global Economy*” was published on 7 July 2004 and is available at <http://www.forfas.ie/esg/>