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POLICY PAPER

A Code of Practice for Grocery Goods Undertakings and an Ombudsman: How to Do a Lot of Harm by Trying to Do a Little Good

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Abstract: The Department of Enterprise, Trade and Employment in its August 2009 Consultation Paper, *Code of Practice for Grocery Goods Undertakings*, argues that a Code governing grocery supplier/retailer relations, enforced by an Ombudsman, should be introduced. The Code constrains the behaviour of the retailer with respect to certain practices that, for example, shift risk from the retailer to the supplier as well as those that result in unexpected costs to suppliers. The rationale for the Code appears to be that due to the devaluation of sterling, combined with the recession, retailers are able to put increased pressure on local suppliers for lower prices, which in turn squeezes suppliers' margins. The paper argues that the Consultation Paper does not present a sound rationale for the Code, in reality the Code is a form of protectionism occasioned by the inflow of lower priced imports. Local suppliers should adapt through developing better products and becoming more efficient, rather than seeking shelter from market forces. The impact of the Code will likely be to lead to: higher consumer prices lowering consumer welfare and thus inconsistent with the declared aim of the Code; increased costs of doing business with local suppliers thus leading to an incentive for retailers to use more imports; and, perhaps, a less competitive grocery sector. It is argued that the Consultation Paper should be withdrawn and reissued, but in a manner consistent with the government's better regulation agenda which is currently ignored. To the extent that the issue of concern is excessive buyer power of retailers then that should be addressed directly: by liberalising the Retail Planning Guidelines as the Competition Authority has been arguing for sometime; and/or sponsoring entry of new retailers; and/or amending competition law, if a problem exists and can be demonstrated to exist, but retain the competition test. The answer, based on the evidence presented in the Consultation Paper, is not the Code.

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I INTRODUCTION

On 11 August 2009 the Minister for Enterprise, Trade and Employment ("the Minister") launched a public consultation with the publication of a Consultation Paper, *Code of Practice for Grocery Goods Undertakings* (DETE, 2009a). The consultation exercise is concerned with the details of the Code of Practice for Grocery Undertakings ("the Code"), not whether there should or should not be a code.[1] The consultation exercise is thus seeking views on, for example, whether the Code should be voluntary or statutory and how enforcement of, and compliance with, the Code should be funded. In other words, the decision to establish the Code and an enforcement mechanism – an Ombudsman[2] – has already been taken; the consultation exercise is thus designed to "… seek the views of all stakeholders in relation to the details of the provisions of such a Code" (DETE, 2009b, p. 3).

This is, however, an unduly narrow focus for consultation. Prior to any discussion of the details of the Code, attention needs to be paid to the rationale and justification for the Code. This is an essential prerequisite for sound public policy. It is recognised in the government's better regulation agenda, the first principle of which is necessity, "is the regulation necessary?" (Department of the Taoiseach, 2004, p. 2). Increased regulation through, for example, the imposition of the Code without considering whether or not it has a sound rationale, has the potential to impose unnecessary costs on the economy. These costs may be multiplied if the Code is used as a model for other parts of the economy without careful consideration. The vintners, for example, are already calling for an ombudsman to ensure that financial institutions are operating "… fairly and transparently in offering credit facilities to SMEs" (VFI, 2009).

A sound rationale is also needed in order to identify the correct solution, on the assumption that there is a problem in the first place. The rationale for increased regulation should answer the question: what is the market failure

[1] There was neither prior consultation on the question of whether or not the Code is warranted nor any report setting out the case for the Code. However, it should be noted that the Consultation Paper does not entirely ignore the issue of whether or not the Code is needed, since there is a reference to welcoming "… comments and observations in relation to any aspect or issue in relation to the introduction of a Code, including whether or not a Code is needed" (DETE, 2009b, p. 4). However, this is not one of the eight consultation questions posed in the Consultation Paper.
[2] It should be noted that although the Code envisages an Ombudsman, the Consultation Paper proposes other alternatives for the enforcement of the Code such as the merged Competition Authority/National Consumer Agency (DETE, 2009b, pp. 6-7). For the purposes of this paper we will assume that a separate Ombudsman is preferred, unless otherwise stated.

that merits government intervention?[3] Once a failure is identified then an appropriate solution can be designed to address the market failure. Consultation can then take place as to whether or not it is the best solution. The costs and benefits of the solution can be considered, together with whether or not the solution is proportionate, given the problem. A sledgehammer should not be used to crack a nut.

This paper is primarily concerned with whether or not the Code is justified and whether the Code is an appropriate response to the perceived market failure. Little attention is paid to the eight consultation questions concerned with the fine detail of the Code (DETE, 2009b, pp. 3-4). Nevertheless, we will deal with those consultation questions concerned with the balance between grocery undertakings, the impact of the Code on prices and the provisions of the Code itself.

Section II of the paper sets out the Minister's proposals and and makes some preliminary observations. Section III conducts a critical examination of the stated rationale for the Code, while Section IV asks, given the stated rationale, if the Code is the most appropriate instrument. Attention turns in Section V to whether or not the objectives of the Code are consistent. Section VI considers the impact of the Code, while Section VII examines the reliance on the UK experience. The Code is redolent with phrases that might be found in competition law, so Section VIII examines the relationship between the Code and competition law. The conclusion to the paper is presented in Section IX.

II THE MINISTER'S PROPOSALS: THE CODE, THE OMBUDSMAN AND A QUESTION OF BALANCE

Preamble

The preamble to the 'Draft Code of Practice for Grocery Goods Undertakings' states that the Code is designed "… to provide for fair trade between grocery undertakings" (DETE, 2009b, p. 14). It is also stated that the key objective of the Code is to "… achieve a balance in the relationships between grocery goods undertakings, taking into account the need to enhance consumer welfare and the need to ensure that there is no impediment to the passing-on of lower prices to consumers" (DETE, 2009b, p. 14).

[3] This is the appropriate frame of reference in view of the government's regulatory impact analysis ('RIA') approach to examining the likely effects of proposed new regulations (Department of the Taoiseach, 2005). The RIA is part of the government's better regulation agenda. There is no reference to either the government's better regulation agenda or the regulatory impact analysis in the Consultation Paper.

The Code

The Code requires that its provisions be incorporated into contracts (i.e. Business Agreements) between grocery goods undertakings for the production, supply or distribution of grocery goods. [4] The Code states that certain business matters can only be addressed in – as opposed to outside – a contract between grocery undertakings, including:[5]

- *No variation in contractual terms and conditions* unless specifically agreed in the contract;
- A retailer is prohibited from requiring a supplier *to make any payment*[6] *towards a shrinkage* unless agreed in the contract;
- A retailer is prohibited from requiring a supplier *to make any payment towards covering wastage* unless agreed in the contract;
- Unless there is unambiguous agreement in the contract that full compensation is not appropriate, retailers *are required to compensate suppliers for erroneous forecasts unless the retailer can demonstrate that the forecasts have been prepared in good faith and in consultation with the supplier*. Retailers are required to communicate to suppliers the basis on which forecasts of supply have been prepared; and,
- A retailer is prohibited from requiring a supplier *to make any payment towards a retailers' marketing costs* unless agreed in the contract.

In these instances the Code constrains the behaviour of the retailer rather than the supplier.

The Code further limits the behaviour of the retailer with respect to the payments the retailer can seek or require from the supplier:

> Unless provided for in the Terms of Business Agreements, a Retailer may not seek payment from a supplier to secure a better positioning or an increase in shelf space unless such payment is in relation to a promotion[7] (DETE, 2009b, p. 16); and,

[4] Grocery goods are defined as "… any food or drink for human consumption that is intended to be sold as groceries" (DETE, 2009b, p. 14), while a grocery goods undertaking is defined as "… an undertaking that is engaged for gain in the production, supply or distribution of grocery goods, whether or not the undertaking is engaged in the direct sale of those goods to the public" (DETE, 2009b, p. 14).

[5] The bullet points follow closely DETE (2009b, pp.15-16).

[6] Payments are defined as "… any compensation or inducement in any form (monetary or otherwise) and includes more favourable contractual terms" (DETE, 2009b, p. 15).

[7] Promotion is defined as "… any offer for sale at an introductory or a reduced retail price or with some other benefit to consumers that is intended to subsist for a specified period of time" (DETE, 2009b, p. 15).

> A retailer is prohibited from requiring payments as a condition of listing a supplier's products unless such payments are made in relation to a promotion or the payments reflect the reasonable risk run by the retailer in listing new products (DETE, 2009b, p. 16).

Thus a retailer may not seek or require a payment from a supplier for a better product positioning in a retail store or an increase in shelf space or the listing of a supplier's products, unless it is in relation to a promotion or risk sharing with respect to new product(s).

In terms of advertising or display of grocery goods:

> A retailer shall not directly or indirectly require a supplier to make any payment or grant any allowance for the advertising or display of grocery goods (DETE, 2009b, p. 17).

Finally, the Code, as with erroneous forecasts, is proscriptive with respect to the allocation of risk when a retailer orders grocery goods for a promotion from the supplier:

> Where retailers and suppliers have agreed to participate in a promotion in relation to certain grocery goods, the retailer is obliged [to] take reasonable care when ordering those grocery goods at a promotional wholesale price not to over order and to ensure that the basis on which any order is made in relation to promotional products is transparent. Where a retailer fails to take such steps, the retailer must compensate the supplier for any product over ordered and which it subsequently sells at a higher nonpromotional retail price (DETE, 2009b, p. 17).

Thus while the preamble to the Code talks in general terms of 'balance' and 'fair trade' between grocery undertakings, without any reference as to where an imbalance or unfairness may exist, it is clear from the actual provisions of the Code that the current imbalance is considered to be in favour of the retailer, not the supplier.

The Grocery Ombudsman

The Code is to be enforced by the Grocery Ombudsman ("the Ombudsman") who is responsible for "[I]nvestigations, complaints and disputes between grocery undertakings in relation to the provision of this Code …" (DETE, 2009b, p. 17). The Ombudsman will be appointed by and report to the Minister. The Ombudsman has, as alluded to above, a number of different

roles: to investigate complaints; to arbitrate between grocery undertakings; to publish guidance; to make recommendations as to how compliance with the Code can be improved; and, to advise the Minister on the operation of the Code. This is a wide remit.

No Evidence or Justification to Support Code's Provisions

There is no justification or reasoning in the Consultation Paper or any of the associated documentation with respect to the particular provisions of the Code. This is a major shortcoming. How can comments sensibly be made on proposals in these circumstances? Are, for example, the forms of conduct identified above extensively employed by retailers in an abusive way with respect to suppliers that also adversely affects the welfare of consumers? If these forms of conduct are prohibited or restricted, are there other forms of conduct which will have the same or similar effects? The Consultation Paper fails to explain not only why restrictions are required but also detail how prevalent are the practices listed in the Code. If these practices are not occurring to any material extent at present, then enacting the Code is wasting valuable administrative resources.

Is There a Need to Rebalance?

The Code assumes that the current imbalance favours the retailer. It is thus the retailer's market power that needs to be constrained, rather than the suppliers. However, no evidence is offered in support.[8] In this respect a distinction can usefully be drawn between the retailers own brand or private label products (e.g. Dunne's 300g rashers) and brand label products (e.g., Denny's 300g rashers). In the former instance it appears that the markets are competitive with retailers frequently holding auctions or quasi auctions in order to allocate contracts. In the case of branded products, however, the market power of the retailer vis-à-vis the supplier is likely to be far less; indeed, the supplier may have market power. In a number of merger cases the Competition Authority has concluded that the merger between branded grocery products will lead to a substantial lessening of competition, despite the presence of retailers, with the result that the merger has been prohibited – in the rashers and non-poultry cooked meats markets[9] – or the merging

[8] Apart that is from repeating certain contentions made by retailers and suppliers. See footnote 12 below.

[9] The Competition Authority prohibited Kerry from acquiring Breeo because it found that there would be a substantial lessening of competition in these two markets. This determination was successfully appealed by Kerry to the High Court, and is currently under appeal by the Competition Authority to the Supreme Court. However, for reasons set out in Gorecki (2009a) it is felt that the High Court erred.

parties have offered to divest themselves of certain brands – gravies.[10] In other markets, the evidence indicated that suppliers had strong brand presence and consistently high market shares, such as the stout market where Guinness consistently has a market share of at least 85 per cent.[11] This is not to deny that retailers may exert market power over suppliers in markets, but the Consultation Paper can all too easily be interpreted as meaning that the retailer is all powerful. That is not the case; suppliers with strong brands will be able to take care of themselves.

III THE RATIONALE FOR THE CODE AND THE OMBUDSMAN: DOES IT STACK-UP?

The rationale for the Code and the Ombudsman contained in the Consultation Paper is terse. It is presented in Box 1 below, together with the background and objective of the Code, both of which are discussed further below.

The rationale for the Code is that retailers can import grocery products either from the UK or elsewhere at lower prices than comparable products are available from suppliers and distributors in Ireland.[12] As a result, the margins of suppliers and distributors are squeezed because retailers have resort to lower priced imports. This gives rise to an alleged imbalance in the relationship between, on the one hand, retailers and, on the other hand, suppliers and distributors. In other words, retailers can threaten to import lower priced comparable grocery products from outside of Ireland in order to secure lower prices from locally sourced products. As we saw in Section II above, the Code attempts to redress this alleged imbalance by constraining the behaviour of the retailer.

[10] For details see Merger Notification M/06/098 – Premier Foods/RHM. This may be accessed at: http://www.tca.ie/MergersAcquisitions/MergerNotifications.aspx?selected_item=319. Accessed 22 September 2009.

[11] For details see Merger Notification M/08/011 – Heineken/Scottish & Newcastle. This may be accessed at: http://www.tca.ie/MergersAcquisitions/MergerNotifications.aspx?selected_item=398. Accessed 22 September 2009.

[12] It is, of course, recognised that the rationale presented here is based on the reported contentions of suppliers and retailers as set out in the Consultation Paper. However, the rationale advanced is consistent with the events leading up to the proposals for the Code and Ombudsman which are discussed further below. The Consultation Paper does not itself articulate a rationale for the Code.

Box 1: *The Code and the Ombudsman: Background, Rationale and Objective*

Interest in proposals to introduce a Code of Practice for the grocery sector has its genesis in the context of the wider debate in relation to prices and in particular the differential in prices between this jurisdiction and Northern Ireland and the UK.

Since the publication of the Forfás report on the *Cost of Running Retail Operations in Ireland* in December 2008, the focus of the debate in relation to grocery prices and the differential in prices between here and Northern Ireland and the UK has shifted to issues in relation to the cost of sourcing products and distribution/supply arrangements attaching to the supply of products.

Retailers have strongly contended that the cost of sourcing grocery goods products is much dearer in Ireland than the cost of sourcing such products in the UK and elsewhere. On the other hand, suppliers and distributors have contended that there is a significant imbalance in the relationship between retailers and suppliers, which is giving rise to suppliers being squeezed by the increasingly difficult demands being made by retailers.

The Government, for its part, is concerned to ensure that Ireland continues to have vibrant and successful food and retail sectors, given the important role these sectors play in the national economy.

With this in mind, the Tánaiste and Minister for Enterprise, Trade and Employment has announced her intention to introduce a Code of Practice which will have as its key objective the need to achieve a balance in the relationships between grocery goods undertakings, taking into account the need for a fair return to both suppliers and retailers, the need to enhance consumer welfare and the need to ensure that there is no impediment to the passing-on of lower prices to consumers.

While contractual agreements between suppliers and retailers are essentially matters for themselves, subject to compliance with the provisions of the Competition Act 2002 and the Competition (Amendment) Act 2006 as these apply to the grocery retail sector, the justification underlying the introduction of a Code of Practice in this area is to provide a framework in which the different elements of the retail chain can enter into negotiations and agree contractual arrangements between themselves which will help to ensure that those arrangements are balanced and fair and ultimately ensure that the interests of all parties, including consumers, are respected.

Source: DETE (2009b, pp. 2-3).

Governments normally intervene in markets where there are market failures relating to market power, externalities and information problems.[13] These market failure rationales do not apply in the case of the Code. Here the rationale put forward reflects the view that imports are cheaper than comparable domestically produced grocery products, with no suggestion that imports are inappropriately advantaged in some such way such as subsidies, exchange rate manipulation and so on. Under these conditions the supplier should be encouraged to adapt and compete with imports, not be protected through the Code.[14] The conduit or manifestation of these lower priced imports is the retailer; it is not the cause. Thus there appears to be no market failure justifying the Code and the Ombudsman; indeed, the market appears to be working as it should as lower priced imports replace more expensive uncompetitive Irish products. This puts pressure on local suppliers to improve their performance in terms of price, efficiency and innovation; protectionism is unlikely to create such incentives.

An examination of the events leading up to the Minister's proposals for the Code and the Ombudsman provide valuable context with respect to the rationale. After the rapid decline in the value of Sterling against the Euro at the end of 2008 due to the UK recession, Irish shoppers increasingly turned to Northern Ireland for their groceries.[15] There was a concern amongst consumers, the media and elected representatives that the strong Euro was not translating into lower prices in Ireland.[16] For example, the Minister in a speech on 27 January 2009 stated, "Unfortunately, a significant number of retailers, including retailers in the grocery sector, have yet to reflect the benefits of the Euro's sustained appreciation in value by way of lower prices to consumers and have failed to give any credible reasons for these price differentials" (DETE, 2009c).

The Competition Authority was asked by the Minister in February 2009 to examine the issue. The Competition Authority reported relatively weak competition amongst grocery product retailers and concluded that this "… might be limiting price reductions to consumers" (Competition Authority, 2009a, p. vi). However, it also reported that where "… retailers have not

[13] These grounds are consistent with the regulatory impact analysis referred to in footnote 3 above.

[14] To the extent that price differences reflect higher costs across many sectors of the economy, then those should be addressed directly. For further discussion on these points see Forfás (2008) and Competition Authority (2009a, pp. 13-15).

[15] For further discussion of these developments see Revenue Commissioners/Central Statistics Office (2009).

[16] There are, of course, likely to be lags in the transmission of lower prices because of exchange rate movements. For a discussion see Competition Authority (2009a, pp. 15-21).

achieved sufficiently lower prices with existing suppliers, retailers have looked for alternatives" (Competition Authority, 2009a, p. viii). In the case of Tesco, for example, the leading grocery retailer in Ireland, "… it is by-passing Republic of Ireland offices of international brands and third party distributors by moving to the UK for direct supply for many grocery items" (Competition Authority, 2009a, p. viii). Indeed, the Competition Authority (2009a, p. 45) observed that these pressures have "… led some retailers and suppliers to completely alter their business strategy" in Ireland. The Competition Authority recommended that the government remove certain size restrictions in the Retail Planning Guidelines on supermarkets as a way of increasing retail competition (Competition Authority, 2009a, p. ix).[17]

Retailers in Ireland eventually reacted to the strong Euro by reducing prices, evidenced by Tesco's announcement on 5 May 2009 (Tesco, 2009). Grocery prices both for brand and own-brand grocery products fell considerably in the first half of 2009, according to surveys conducted by the National Consumer Agency (2009). There were also signs of increased competition for branded grocery products, while one leading retailer lowered its own brand grocery product prices so that the gap with the 'hard' discounters, Aldi and Lidl, was significantly narrowed, according to the National Consumer Agency. These price reductions and increased retailer competition, in turn, put pressure on food processor margins and farm gate prices.

While these developments provide the background to the introduction to the Code, they do not provide a justification in terms of market failure.[18] They do, however, provide an explanation as to why the Code has been proposed by the Minister. Both grocery suppliers (FDII, 2009a)[19] and farmers (IFA, 2009a) requested the Minister to introduce a Code, which also had the support of the Minister for Agriculture, Fisheries and Food, who argued that retailers had a responsibility beyond consumers and shareholders – to suppliers (DAFF, 2009; DETE, 2009a).[20] However, while there are many demands for government regulation and intervention, only in instances where there is a market failure is government intervention merited.

[17] This has been a longstanding recommendation of the Competition Authority. See, for example, Competition Authority (2003), but also Competition Authority (2009a, p. 38). To date the recommendation has not been implemented by government.

[18] They do, however, provide a justification in terms of public choice theory. For further discussion see Gorecki (2009b). Public choice is about explaining the actions of public representatives based on the assumption that politicians make choices that they think will get them re-elected.

[19] The FDII also called for other measures such as greater links between third level institutions and industry, an increase in credit availability, workable export guarantees and so on.

[20] In addition, unions expressed concerns over possible job losses (SIPTU, 2009).

In sum, on the basis of the arguments made in the Consultation Paper there is not a valid justification for the Code and the Ombudsman. On the available evidence the answer to the question asked in the government's better regulation guidance, is the regulation necessary, is no.

IV RATIONALE AND INSTRUMENT: DO THEY MATCH?

As noted above the rationale for government regulatory intervention identifies the market failure for which a solution can then be designed. Abstracting from the discussion in Section III, in this section the rationale put forward for the Code is accepted and the question posed whether the Code is the most appropriate instrument to address the "problem" of imports from the UK and elsewhere.

The most obvious solution to lower priced imports of grocery products adversely effecting local suppliers is to raise the price of imported grocery products vis-à-vis locally supplied grocery products. This could be achieved by either raising tariffs or erecting non-tariff barriers. Tariffs might be set at a level to offset the devaluation of sterling, while non-tariff barriers such as quotas could be set at the level of imports in mid-2008, with some allowance for change in overall demand in the economy. However, raising tariffs and placing quantitative constraints on another EU Member State is not an option for Ireland, given the imperative of the single European market and the fact that setting a common external tariff is an EU responsibility.[21]

Another alternative is that grocery products suppliers could be given financial and other assistance in order that they can compete more effectively with imported grocery products. However, grocery suppliers are already in receipt of substantial funding to improve their competitiveness.[22] Under the National Development Plan, 2007 to 2013, the Food Industry Sub-Programme "… will invest €289 million in capital infrastructure and marketing" (Ireland, n.d., p. 177). Immediately prior to the current National Development Plan, in 2006, the government announced a €50 million investment grant package to beef and sheep meat processors (DAF, 2006). Grocery suppliers can also avail of the €250 million Employment Subsidy Scheme (Temporary) covering 2009 and 2010 which is designed to "… provide an employment subsidy to

[21] Even if Ireland had the remit to impose tariffs on UK imports, consideration would need to be given to any retaliation that might follow such a move.

[22] Any additional assistance would also have to ensure that EU state aid rules were not contravened.

vulnerable but viable manufacturing and/or internationally traded services enterprises that are currently engaged in exporting to maintain their full-time workforce."[23] In addition, many grocery suppliers are large firms with a proven track record and strong brands,[24] so it is not at all clear why these firms cannot borrow funds on the capital market to fund investment to improve their competitiveness.[25] Hence, like tariffs, there are good reasons why financial assistance is not an appropriate instrument to address the problem of lower priced imports.

The last instrument selected to address the problem of lower priced imports is the Code. It is not at all clear how the Code addresses the problem of lower priced imports; if anything the Code may exacerbate the problem. To the extent that the Code curtails the opportunity for retailers to bargain down prices and other terms and conditions with local suppliers and means that retailers have to turn to less efficient methods of obtaining lower priced grocery goods from local suppliers, then this *increases* rather than *decreases* the attractiveness of imported grocery products. In essence, the Code places a 'tax' or 'levy' on the use of local suppliers. Both the Code and a tax/levy raise the cost of using local suppliers relative to imports. This provides an incentive for retailers to increase the use of imported grocery products.[26]

In sum, given the rationale for the Code – to prevent or discourage lower priced imports of grocery products – the instrument selected is likely to have the opposite effect. Superior instruments – trade barriers or financial support – are either infeasible or are already being employed.

V OBJECTIVES: ARE THEY CONSISTENT/INCENTIVE COMPATIBLE?

The key objective of the Code, subject to several important caveats or qualifications, is set out as follows:

[23] For details see http://www.employmentsubsidy.ie/schemeinformation.aspx. Accessed on 23 September 2009.

[24] This is consistent with an examination of the top 10 suppliers of grocery suppliers in Ireland, which include many well known names such as Kerry Foods, Unilever Ireland, Cadbury Ireland, Coco Cola, and Procter & Gamble. For details see Competition Authority (2009a, Table 5, p. 39).

[25] Of course, it could be argued at the present time there are difficulties accessing credit. However, presumably that applies to all firms not just suppliers in the grocery sector.

[26] To the extent that the Code applies to other relationships involving grocery undertakings besides retailer/supplier relationships, the Code might lead to suppliers who currently contract out production to local firms switching to firms in the UK and elsewhere. Equally, the discussion is likely to apply to international suppliers which either have a local operation or use a local agent.

> [the] Code of Practice … will have as its key objective the need to achieve a balance in the relationships between grocery goods undertakings, taking into account the need for a fair return to both suppliers and retailers, the need to enhance consumer welfare and the need to ensure that there is no impediment to the passing-on of lower prices to consumers (DETE, 2009b, p.2).

Balance is akin to equilibrium, imbalance to disequilibrium.

One characterisation of recent events is that there was arguably a certain balance or equilibrium in the relationship between grocery undertakings – retailers and suppliers – in mid-2008.[27] The appreciation of Sterling in late 2008 against the Euro combined with the recession created an imbalance or disequilibrium. The status quo became untenable: consumers in large numbers switched to shopping in Northern Ireland, while the Minister and the media berated retailers for not reflecting the appreciation of the Euro in lower local prices. Retailers responded by lowering prices and, given the change in UK/Irish relative prices increased imports, put further and extra pressure on suppliers to reduce prices.[28] Thus we are in the process of reaching a new equilibrium or balance between suppliers and retailers.

Viewed in this context the key objective of the Code is to restore, in part at least, the status quo ex ante; in short, the old equilibrium. The Code permits the restoration of the status quo by reducing the freedom of manoeuvre and discretion of the retailer through the adoption of explicit and transparent contracts and restricting the availability of certain discounting mechanisms. This is meant to increase the bargaining power of the supplier vis-à-vis the retailer and thus increase the return to suppliers. Such an interpretation is consistent with the favourable response to the Minister's proposals from the suppliers (IBEC, 2009a) and primary producers (IFA, 2009b), and a much more non-committal response from retailers (IBEC, 2009b). It is also consistent with the views of the Minister for Agriculture, Fisheries and Food, who had been consulted closely on the development of the Code, that supermarkets have a responsibility beyond shareholders and consumers to suppliers (DAFF, 2009).

If the above characterisation is accepted as reasonably accurate, then grocery prices are very likely to be higher under the Code than without the

[27] It should be noted that the call for a Code and an Ombudsman appears to be relatively recent. The Food and Drink Advisory Group (2004) in a report to the Enterprise Strategy Group (2004), list a number of recommendations and challengers facing the sector. Although there is mention of increased buying power putting pressure on margins, no recommendations or mention is made concerning a Code.

[28] No evidence has been adduced that quantifies the magnitude of any increase in imports.

Code. However, there will be a limit to which prices can rise, since consumers and retailers, as they have already demonstrated, will switch to purchasing grocery products from Northern Ireland and elsewhere. Thus it appears that the impact of the Code will damage consumer welfare by raising grocery prices and will create rather than remove impediments to the passing-on of lower prices to the consumer. There is nothing in the Code to protect the consumer interest; there is not, for example, a consumer welfare test that needs to be satisfied before the provisions of the Code are invoked.[29]

It could, of course, be argued that grocery prices need not rise and that retailers will accept lower returns, since as pointed out above the Competition Authority argued that competition amongst retailers is weak and hence they may be earning excess returns. However, this line of argument suffers from a number of difficulties. *First,* subsequent to the Competition Authority report there are signs that competition has increased at the retail level, so any rents may have been competed away. The fall in the price of groceries in Northern Ireland due to the devaluation of Sterling meant that retailers in Northern Ireland became more attractive to southern consumers. The price difference outweighed the travel costs. At the same time the recession caused consumers to become more price conscious, so that existing retailers are competing for a more limited consumer demand. *Second*, if the retail sector is uncompetitive then it is much more preferable to increase competition in that sector. The Competition Authority has recommended the liberalisation of the Retail Planning Guidelines restrictions on the size of grocery stores, while John Fitz Gerald of the Economic and Social Research Institute has suggested that the government put together a set of sites and invite a large retailer into Ireland.[30]

In sum, the objectives of the Code are inherently contradictory. The Code's stated purpose is to achieve balance between grocery undertakings, while at the same time increasing consumer welfare and ensuring that there is no impediment to lower prices being passed-on to the consumer. However, in achieving balance the Code proposes to constrain the behaviour of retailers in favour of suppliers so that the Code is likely to lead to a rise in prices for suppliers with no mechanisms or tests for considerations of consumer harm to be taken into account.

[29] See discussion of Competition (Amendment) Act 2006 below.
[30] Great care would be needed to ensure that such an intervention did not conflict with either EU state aid rules and/or competition law.

VI THE IMPACT OF THE CODE

Introduction

It is difficult to be precise about the impact of the Code and the Ombudsman on prices, competition and competitiveness in grocery products. The details of the Code have to be decided in view of the various consultation questions some of which were discussed above. Once those decisions have been made, there will be issues surrounding the propensity of suppliers to complain and the Ombudsman to initiate its own inquiries, by, for example, carefully examining the contract between grocery undertakings. In view of these uncertainties any conclusions must, of necessity, be somewhat tentative.

Administrative and Compliance Costs

Costs can be divided into several categories. There are the costs of the Ombudsman's office and the compliance costs of grocery undertakings. In both cases there will be initial set-up costs and on-going day to day administrative and compliance costs. An example of set-up cost would be ensuring that all supplier-retailer contracts conform to the Code; an ongoing cost would be investigations by the Ombudsman of complaints from suppliers. Consideration also needs to be given to opportunity costs of the resources used to administer the Code, since these could be employed, for example, to enforce competition law.

There are no reliable estimates of the costs of the Ombudsman and compliance costs of grocery suppliers and retailers. In the UK it has been estimated that the Ombudsman's office would cost £5 million.[31] In terms of compliance costs this very much depends in the propensity of suppliers to bring complaints to the Ombudsman and the degree to which the Ombudsman undertakes investigations/inquiries on their own initiative. In any event, in view of the possibility of a complaint being made by a supplier, there may be much greater propensity for communications between retailers and suppliers to be in written format, possibly reviewed by lawyers in order to ensure no inappropriate language is used. This will raise the transaction costs of doing business. Suppliers may be reluctant for reasons discussed above to make complaints, but there is likely to be no such inhibitions on the Ombudsman undertaking investigations into, for example, the degree to which supplier/retailer contracts conform to the Code.

[31] This estimate is taken from Clarke (2009) based on an unpublished work by Cathryn Ross of the Competition Commission.

In sum, it is difficult to come to a conclusion on the magnitude of the administrative cost of the Ombudsman or the costs of compliance of business. In any event whatever the cost it will be borne in part at least by consumers,[32] since the Ombudsman is to be funded by a levy on grocery undertakings,[33] while the compliance costs are also borne by grocery undertakings.

Restraining Buyer Power: Impact on Competition and Prices

The impact of the Code on grocery prices depends to a considerable extent on the way in which competition can be characterised. The assumption underlying the Code and the Ombudsman is that the retailers exercise buyer power in an excessive or abusive manner, although no evidence is provided to support this viewpoint nor why existing competition law cannot deal with the problem. This implies that retailers are getting low prices, perhaps even below the supplier's costs, albeit temporarily. Accepting that premise, if it is concluded, particularly in light of recent events in grocery pricing in Ireland, that competition in the downstream retail market is vigorous, then it is reasonable to assume that some or all of these low prices are passed-on to the consumer.

Under this scenario then the impact of the Code depends on how successful the Code is in identifying the marketing and other practices through which retailers are able to exert their market power over suppliers. If the Code is successful in doing so then the bargaining power between supplier and retailer will change, with the result that retailers will over time pay higher prices to supplier which will be passed on to the consumer in whole or in part by the retailer. However, this argument needs to be somewhat nuanced.

The Code does not do away with the market power of the retailers. What it does is prohibit or restrict or control the way in which retailers exert that market power. Hence, given the ingenuity of business persons, we can expect retailers to design alternative methods to exercise their market power. In the US, for example, the Robinson-Patman Act passed in 1936, prohibited suppliers from "… offering differing prices to different purchasers of 'commodities of like grade and quality' where the difference injures competition" (US Antitrust Modernisation Commission, 2007, p. 311). The legislation was designed to protect small retailers so-called "mom and pop" grocery stores from larger more efficient retailers. However, "[O]ver time,

[32] Of course, if instead of a separate Ombudsman's office, the Code were to be administered by the merged Competition Authority/National Consumer Agency then an alternative funding mechanism might be used, taxes.

[33] It seems clear from the Consultation Paper that this will be the funding mechanism rather than funding from the public purse.

many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs – and thus increase costs to consumers – but do nothing to protect small business" (Ibid, p. 311).

There is no reason to assume that retailers in Ireland will not be able to similarly find alternative channels to exercise any market power that they may have. One obvious option is to import more from the UK and elsewhere where the remit of the Code and the Ombudsman is likely to be much less effective. However, as noted above, this is likely to be a more expensive method of extracting the rent and hence this will increase the costs of retailers. Furthermore, of course, there will then be pressure by suppliers to prohibit these new forms of rent extraction which will in turn encourage even more costly methods of exercising any market power.

The provisions of the Code might also be expected to mean that retailers become less aggressive in dealing with suppliers for fear of the Code being invoked and the possibility of adverse publicity hurting their brand. In other words, the Code and the Ombudsman would have a chilling effect on competition, which would lead to an upward pressure on prices. It would also lead to the retailers putting less pressure on suppliers to improve efficiency and innovation with the result that the food sector would lose this valuable stimulus to improve its competitiveness.

In sum, the impact of the Code and the Ombudsman will be to increase consumer prices of grocery products. If there is a concern over the market power of retailers then that should be addressed directly by regulatory reform of the Retail Planning Guidelines and/or the government sponsoring entry and/or amending competition legislation. Second (or even third) best solutions are just that.

Recessions and Bespoke Protection

It could be argued that the Code and the Ombudsman is an example of bespoke protection.[34] Many markets in Ireland suffered from the increase in import competition from the UK because of the devaluation of sterling, but only grocery undertakings have been protected by specific regulation. A number of recent papers have examined the impact of granting bespoke protection to markets in economies suffering a recession. They suggest that bespoke protection slows the speed of recovery and damages long-term economic performance.[35] In the US under Roosevelt's New Deal policies

[34] This is protection provided to a specific sector or market, in contrast to universal protection programmes such as social assistance for those who are unemployed.
[35] The rest of this paragraph follows Gorecki (2009b).

certain sectors were made exempt from antitrust laws and cartels were allowed to be formed provided that wages were raised. Cole and Ohanian (2004) in a careful study of the effects of these policies conclude that "New Deal cartelisation policies are an important factor in accounting for the failure of the economy to recover back to trend" (p. 779). Equally, in Japan certain sectors were shielded from competition using a variety of instruments including "weak antitrust enforcement, legalised cartels, subsidies, protection and cooperative R&D" (Porter *et al.*, 2000, p. 117). The evidence suggests that these sectors did not fare well in, for example, export markets. As a result Porter and Sakakibara (2004, p. 47) conclude that unless the "… serious impediments and distortions" that developed in the 1990s are addressed then "… the period of Japanese economic stagnation will be unnecessarily protracted."

In sum, great care needs to be given in awarding bespoke protection to grocery suppliers through sector specific set of regulations designed to protect one group from competition. Protectionist policies are likely to damage competitiveness; the corollary is that current circumstances are more likely to drive efficiency enhancing reorganisation of the grocery sector so that it can compete internationally.

VII HAVE THE RIGHT LESSONS BEEN LEARNT FROM OTHERS?

Apples and Oranges?

Ireland is a small open economy and thus relies on learning from the experience of other jurisdictions across whole series of policy issues. The OECD is regularly asked by government to draw on this experience to assist policy making in Ireland. The Consultation Paper in formulating the Code refers to the UK experience. In this section we consider the relevance of that experience and contrast it with that of the US.

Why Follow the UK Experience and Model?

The Code is based on the UK's Groceries (Supply Chain Practices) Market Investigation Order 2009 ("UK Code") which also sees the establishment of an Ombudsman (UK Competition Commission, 2009a, 2009b). However, the UK Code has been, according to the Consultation Paper, "… amended to suit Irish conditions" (DETE, 2009b, p. 12). The UK Code reflected the results of extensive market investigation by the Competition Commission into the supply of groceries which determined that certain practices adversely affected competition (UK Competition Commission, 2008). "One of these features was the excessive buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that

transfer excessive risk and unexpected costs to these suppliers" (UK Competition Commission, 2009b, p.1). The Competition Commission argued that these practices "… could lead to reduced capacity, reduced product quality and fewer new product offerings, and ultimately, to a detriment to consumers" (UK Competition Commission, 2008, p. 157).

A number of points can be made with respect to Ireland adopting the UK model for its Code and Ombudsman.[36] *First*, in Ireland the Competition (Amendment) Act 2006 already addresses the competitive problems that afflict retailer/supplier relationships in the grocery market, so arguably lessening, if not eliminating the need for a Code and an Ombudsman. *Second*, the UK proposals reflected a thorough market investigation which carefully sifted the evidence. As noted above no such study has been commissioned by the Minister so there can be no assumption that the same problems will be as important and prevalent in Ireland. The Competition Authority would be in a position to conduct such a study given its involvement in the enforcement of the Competition (Amendment) Act 2006 and the various reports it has conducted on the grocery sector.[37] *Third*, there are many differences between the UK and Ireland that would need to be taken into account before concluding that the UK experience is relevant to Ireland. For example, Ireland is a much smaller open economy than the UK and hence may have fewer degrees of freedom in policy terms since retailers can readily source products abroad, while the pricing of groceries is different in Ireland compared to the UK.[38] It would, therefore, have been of considerable assistance if the Consultation Paper has specified how and why the UK Code had been adapted to suit Irish conditions.

In sum, the Minister needs to specify why the UK model of a Code and Ombudsman is the relevant one for Ireland.

Why Not Follow the US Experience and Model?

There is no Code or Ombudsman in the US. Here in respect of grocery retailer /supplier interaction, attention has focused on slotting allowances[39] –

[36] There may, of course, some differences, such as whether the Code in Ireland will be voluntary or statutory or how the Ombudsman will be funded.

[37] Of course, it could be argued that precisely because the Competition Authority enforces the Competition (Amendment) Act 2006, may mean that gathering evidence certain practices may prove difficult.

[38] The Competition Authority (2009b, pp. 2-3) notes that the "… pricing of groceries in Ireland tends to take the form of 'high-low pricing', at both retailer and supplier levels, in that everyday prices are high but there are regular promotions at low prices (e.g. 33 per cent off, 3 for 2 offers and so forth). This is different to the UK where there tends to be 'every day low pricing', which is a form of longer term price promotions/price cuts."

[39] Some of these considerations would also be relevant with respect to some of the provisions of the Code mentioned above.

"… one-time payments a supplier makes to a retailer as a condition for the initial placement of the supplier's product on retailer's store shelves or for initial access to the retailer's warehouse space" (FTC, 2003, p. i). It can be argued that there are both efficiency-enhancing reasons and anti-competitive arguments in favour and against such practices which are summarised in Box 2 below. It is an empirical question which set of reasons best explains the presence of slotting allowances.

Box 2: *Slotting Allowances: Efficiency-Enhancing or Anti-Competitive?*

The major *efficiency arguments* cited in favor of slotting allowances are:

(1) that they serve to efficiently allocate scarce retailer shelf space to the most valuable (profitable) new products; (2) that they serve to allocate risk of new product failure in a balanced manner between manufacturers and retailers; (3) that they serve to signal private information that manufacturers may have about the potential success of the new product to the retailer; and (4) that manufacturers use them to induce retailers to accept the product and increase distribution by mitigating the effects of retail competition. The main *anti-competitive explanations* for slotting allowances are: (1) they are a means for retailers to mitigate retail competition to increase their own profits by facilitating retail collusion and (2) they are the result of retailers exercising retail power, adversely affecting smaller manufacturers and reducing consumer access to these products. The retail power argument suggests that in many local markets, high retail concentration results in few retailers controlling retail shelf-space, enabling them to demand slotting allowances.

Source: Sudhir and Rao (2006, p.1, emphasis supplied).

The Federal Trade Commission conducted a study of slotting allowances in the retail grocery industry in five product categories. The findings are more suggestive of the efficiency enhancing explanations (US FTC, 2003). Subsequently, Sudhir and Rao (2006) found little support, across a large number of new product introductions, for the anti-competitive rationale and instead found support for the efficiency rationales for slotting allowances.

While it is obviously accepted that the US, like the UK, is different from Ireland in many important respects, these findings demonstrate the importance of not only conducting research that is specific to Ireland, but also carefully explaining why the results and experience of other jurisdictions are especially relevant to Ireland.

VIII THE COMPETITION (AMENDMENT) ACT, 2006: IS THE CODE NECESSARY?

The objective of the Code is to create balance between suppliers and retailers. The question of balance can be interpreted as the degree to which one party can take advantage of another. Suppliers and retailers operate across various grocery markets.

In that context the ability of retailers to take advantage of suppliers, to treat them unfairly, implies that retailers have market power over suppliers. They can dictate the price as well as other terms and conditions. Indeed, sufficient market power would permit the retailer to depress supplier's price below the competitive level, albeit only temporarily.

The Competition Act 2002 contains general provisions that cover the whole of the economy that are designed to prevent retailers either collectively or individually exerting excessive market power (i.e. buyer power) [40] with respect to suppliers that damages competition. Competition law, as the Supreme Court has recently pointed out, has as its object the promotion of consumer welfare.[41] If retailers were to form an agreement to prevent, restrict, or distort competition, through, for example, agreeing to pay no more than €x per 750 g package of a grocery product to a supplier, then that would be an infringement of competition law. Equally, if a dominant firm were to exert its market power paying a price below the cost[42] of the supplier then that might be an abuse of a dominant position and thus a breach of competition law.[43] When considering abuses of a dominant position, the pro-competitive effects of buyer power must also be considered. Finally, mergers that lead to a substantial lessening of competition are prohibited. Thus within the Competition Act 2002 are mechanisms to protect against anti-competitive imbalance in the relationship between retailer and supplier.

Apart from these general provisions of the competition law, the Competition (Amendment) Act 2006 contains provisions which relate specifically to grocery goods. The Competition (Amendment) Act 2006 prohibits certain conduct or practices, which had previously been prohibited

[40] There is one reference to retailer buyer power (DETE, 2009b, p. 14).

[41] For details see the Supreme Court judgment in the appeal by the Irish league of Credit Unions against an earlier High Court judgment in favour of the Competition Authority. For details of the case see Gorecki (2008a): the judgment may be accessed at: http://www.courts.ie/Judgments.nsf/288acee47cb5c08780256eb70031e0ea/c693841275fd3e1f802572d50035d296?OpenDocument. Accessed on 21 September 2009.

[42] There is some debate about the relevant definition of cost. For a discussion see Whish (2009, pp. 706-708).

[43] Of course, the dominant firm might have an objective justification for saying it will accept no more than €x since the imported price is €x and so the fact that this cost is below the current cost of the local supplier can be justified.

under the Groceries Order,[44] which are summarised in Box 3 below. Some of the conduct is remarkably similar to the Code. However, in contrast to the Code there is a competition test in the legislation – the conduct must "… have as its object or effect the prevention, restriction or distortion of competition in trade in any grocery goods in the State or in any part of the State." Such a competition test protects the interests of the consumer. Hence, the Code can be viewed as akin to the Competition (Amendment) Act 2006, but without a competition test.

This raises the issue of whether or not competition law does not already adequately address the issue of imbalance between suppliers and retailers, both in general and in the grocery sector in particular. Some of the provisions of the Code could, if a compelling case is made, be included as part of the Competition (Amendment) Act 2006, which has the advantage of having a competition test to protect consumer welfare. However, the Consultation Paper does not raise this possibility at all, with discussion of the Competition (Amendment) Act 2006 being largely relegated to an Annex.[45]

In the Annex, however, are a couple of observations concerning the enforcement of the Competition (Amendment) Act 2006, which may hold the key as to why the Minister does not favour amending this legislation. *First*, suppliers "… have argued that they are loath to make complaints to the Authority, as they fear that this would result in their products being delisted by retailers" (DETE, 2009b, p. 20). The evidence suggests that business is the most important source of investigations under the Competition Act 2002 (Gorecki, 2008b, Table 1, p. 406). Hence, if it is the case that grocery suppliers are reluctant to make complaints under the Competition (Amendment) Act 2006, then a potentially valuable source of information of breaches of competition law is lost. This suggests that it is important to determine if this is the case[46] and whether grocery suppliers are in some sense different from suppliers in other sectors of the economy. *Second*, retailers, not surprisingly,

[44] The Groceries Order had criminalised cutting prices below invoice cost. The Competition (Amendment) Act, 2006 abolished the Groceries Order. For further discussion of the Groceries Order see DETE (2005).

[45] It is true, however, that reference is made to the fact that if the Code is put on a statutory basis then the Code's obligations could be set out in a similar manner to the Competition (Amendment) Act 2006 obligations for grocery undertakings (DETE, 2009b, p. 5). However, there is no suggestion that a competition test be applied to the Code's provisions in the Consultation Paper.

[46] Such an exercise might involve asking suppliers, on a confidential basis, for complaints that they would like to make to the Competition Authority but are reluctant to do so because they might be delisted by the retailer; if such complaints appear to be prima facie breaches of competition law; and, what mechanisms can be put in place to encourage complainants to come forward (e.g., through a trade association). It is clear that the fear of delisting is likely to occur in those cases where the retailer has market power and hence are likely to be of interest from a competition point of view.

Box 3: *Competition (Amendment) Act 2006: Prohibited Conduct*

The Competition (Amendment) Act, 2006 prohibits certain practices:

- the imposition of resale price maintenance in regard to the supply of grocery goods (resale price maintenance is the practice whereby manufacturers or suppliers specify the minimum prices at which their goods may be resold);
- unfair discrimination in regard to the supply of grocery goods (this is a reference to a supplier offering preferential terms to one buyer over another even though the transactions involved are equivalent in nature);
- retailers or wholesalers of grocery goods from compelling or coercing suppliers into payment of advertising allowances (e.g. where a retailer seeks payment from a supplier in order to advertise the supplier's goods as a means of attracting customers to the retailer's premises); and
- Retailers from compelling or coercing suppliers into payment of "hello" money (i.e. where a retailer demands a payment from a supplier before agreeing to stock that supplier's products). The circumstances in which the practice is prohibited include on the opening of a new store, an extension to an existing store or a change of ownership of a store.

In all four instances the conduct or behaviour had to have the object or effect of the prevention, restriction or distortion of competition.

Source: DETE (2009b, p. 19).

disagree that they unfairly exercise buying power and point to the lack of prosecutions under the Competition (Amendment) Act 2006.[47] However, these reasons apply, *mutatis mutandis*, to the Code and hence do not provide a reason why amending the Competition (Amendment) Act 2006 was not put forward as an option in the Consultation Paper instead of the Code.

In sum, it is not clear why the Consultation Paper did not put forward the option of amending the Competition (Amendment) Act 2006 to include some if

[47]The Consultation Paper does not attempt to distinguish between these two points positions as to why there have been no cases under the Competition (Amendment) Act 2006. However, it is of vital importance that some attempt be made to determine which explanation is correct and under what conditions. If the former then unless it is resolved the Competition (Amendment) Act 2006 is unlikely to be effective; if is the latter then the Competition (Amendment) Act 2006 has not been infringed.

not all of the provisions of the Code, but subject to the competition test, which would protect the interests of consumers.

IX CONCLUSION

The food and drink sector is important to the Irish economy. It accounts for over 8 per cent of Irish GDP and 18 per cent of gross value added in manufacturing, employing 46,000 persons and accounts for 66 per cent of exports by indigenous manufacturers (FDII, 2009b, p. 4). Ill-thought out government intervention can have unintended adverse consequences for the competitiveness of the sector. It is for this and other reasons that the government's better regulation agenda sets a framework within which regulation should be introduced. The framework, amongst other things, requires that the question of necessity be addressed. In other words, is the regulation necessary? The framework also requires that "… regulations be more rigourously supported in terms of information, analysis and assumptions that underpin them" (Department of the Taoiseach, 2004, p. 11). This reflects the concern that the impact of a regulation may not always be clear and in the case of "… regulations which affect particular markets, the implications can be far-reaching" (ibid., p. 11).[48]

What is striking about the Minister's proposals is the way in which the issue of necessity is completely side-stepped. The decision has already been taken to implement a Code and establish an Ombudsman; the consultation process is over the details, such as whether the Code should be voluntary or statutory. However, there was no prior consultation exercise or policy paper setting out the necessity of introducing the Code and the Ombudsman.

Furthermore, there is no rigorous support or explanation for the provisions contained in the Code with respect to the adoption of certain supply chain practices that transfer risk from the retailer to the supplier and lead to unexpected costs being imposed on suppliers by retailers. While it is true that the proposed Code is largely borrowed from the UK, it nevertheless remains

[48] It could, of course, be argued that the better regulation agenda applies to new regulations that are brought about by the legislative process and hence it is not clear that the Code and the Ombudsman is covered. However, it should be noted that one of the consultation questions concerns whether or not the Code should be voluntary or statutory. Second, as the Taoiseach points out the better regulation agenda is an essential part of achieving improved competitiveness (Department of the Taoiseach, 2004, p. 1). Hence just because the Code may be voluntary does not mean that the better regulation agenda should not be followed, given the importance of the food and drink sector to the economy. Finally, addressing questions such as necessity and providing supporting evidence should be a routine part of any new set of policy proposals subject to consultation.

the case that the Consultation Paper does not explain why the UK experience is more relevant to Ireland than (say) that of the US.

Instead of a Consultation Paper that presents a set of arguments that are rigorously supported in terms of information, analysis and assumptions that underpin them, the Consultation Paper expresses the views of retailers and suppliers with no attempt to evaluate them, even where they give diametrically contradictory view points. For example, why have there been no prosecutions under the Competition (Amendment) Act 2006? The Consultation Paper states the views of the suppliers – making a complaint may result in the retailer punishing the supplier by delisting the supplier's product (s) – and retailers – who reject the charge and point to lack of prosecutions as proof. No attempt is made to determine which view is correct by, for example, asking for the views of the Competition Authority. This is important because it has implications for the Code where the same arguments can be made.

As a result of these gaps in the Consultation Paper the consultation process becomes a somewhat limited exercise. How can comments on a Consultation Paper be made when vital issues are not addressed? If the rationale underlying the Code and its provisions are not set out, how can it be argued that the arguments are excellent or fallacious? Furthermore, it sets a dangerous precedent if policy changes in this and other areas of government activity can be introduced by essentially ignoring the government's own better regulation approach.[49] However, we are where we are; what should be done next?

It is the firm view of this paper that the proposals should be withdrawn by the Minister and a new Consultation Paper prepared for discussion. A fresh Consultation Paper should be prepared in conformity with the better regulation agenda. In this paper we have set out questions and concerns with respect to the Code and the Ombudsman which we hope will be useful in redrafting the Consultation Paper. However, if the Minister decides to press on with this flawed process, what should be done?

The thrust of this paper is that the introduction of the Code does not appear to be based on a sound rationale: it is in reality protectionism for the grocery supply sector because of the squeeze on margins due to a rise in the value of the Euro against Sterling, exacerbated by the recession. Evidence from the experience of the US in the 1930s and Japan in the 1990s suggests that shielding sectors from the impact of competitive forces makes any subsequent recovery from a recession more difficult and that the protected sectors do not fare well in export markets.

[49] This reflects a wider concern over the adherence to the better regulation agenda based on recent an operational review of regulatory impact analysis, an integral part of the agenda. For details see Goggin and Lauder (2008).

Although the object of the Code discusses the need to enhance consumer welfare and ensure that there is no impediment to the passing-on of lower prices to consumers, there is no provision in the Code that ensures that these conditions are satisfied. This contrasts with the Competition (Amendment) Act 2006, which includes a competition test. This omission is important because the Code is likely to lead to higher prices for consumers, which will *lower* not *raise* consumer welfare.

The Code is also likely to lead to less efficient methods of retailer/supplier interaction because, without justification, the Code constrains the behaviour of the retailer in relation to the supplier. In addition there are, of course, the compliance costs associated with the Code. As a result the cost for the retailer of doing business with local suppliers will increase rather than decrease. This is likely to lead to more not less imports of grocery products and possibly a less competitive grocery sector.

The solution is simple. If the perceived problem is excessive buyer power of retailers then liberalise the Retail Planning Guidelines as the Competition Authority has been arguing for some time and/or sponsor entry and/or amend competition law, if a problem exists and can be demonstrated to exist, but retain the competition test. The answer, based on the evidence adduced in the Consultation Paper, is not the Code and an Ombudsman.

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