

# Chapter Thirteen

## Conclusions and Recommendations on Below Cost Selling

### 13.1 Introduction

We have concluded in Chapter Seven that Articles 11, 12 and 13 of the 1987 Order should be repealed in their entirety.

In the absence of these provisions predatory pricing will continue to be prohibited by Section 5 of the Competition Act 2002.

However, in Chapter Seven, we also concluded that the practice of persistent below cost selling of grocery products, when operated in a manner that does not meet the definition of predatory pricing, is not prohibited by the 2002 Act.

Such practice may act against the public interest if its effect is, or is likely to be, an alteration in market structure resulting in less choice for consumers.

This raises in turn the question as to whether or not it is necessary to strengthen the provisions of the 2002 Competition Act as a means of preventing instances of such practices.

### 13.2 Preventing Persistent Below Cost Selling

The difficulty in identifying an appropriate regulatory mechanism to tackle such practices is not new and is reflected in the finding of the UK Competition Commission in their 2000 report that such measures would:

*“...require monitoring and intervention that would be disproportionate to the adverse effects they were designed to remedy. Therefore we make no recommendations for remedial action.”*

We do not believe that that case is proven that instances of persistent below cost selling are likely to emerge to such an extent and in a way so harmful to the public interest as to justify the introduction of regulatory measures beyond the prohibition on abuse of dominance already contained in Section 5 of the 2002 Competition Act.

Consistent with findings elsewhere in this Report, we believe that any regulatory measures which would be designed to prevent instances of persistent below cost selling would be a serious interference with the freedom to trade and could only be justified by demonstrating conclusively that either competition or consumers would be seriously harmed by their absence.

In particular, we are deeply concerned at the very real danger that any regulatory measure will fail to draw an adequate distinction between such practices and vigorous, pro-competitive pricing practices which benefit consumers.

On balance, our view is that this would be more harmful to the public interest than is the threat of persistent below cost selling (loss-leading) in the grocery trade.

The fear that the removal of the Groceries Order will herald the emergence of large scale hypermarkets at the expense of the small independent retailer is, we consider, unfounded and suggests a misplaced faith in both the intention and scope of the Order. The prohibition of selling below net invoice price does not prevent multiple supermarket chains from opening large-scale stores. It simply prevents them from selling product below a specified minimum price.

Limiting the size of individual retail outlets is a function of the planning process. This is borne out by our research of the Ghost Town Britain Reports in the UK, which identify local planning guidelines as critical to halting the alleged decline of local communities.

### **13.3 Recommendations**

We therefore make the following recommendations:

1. We recommend that no amendments be made to the Competition Act consequent upon the repeal of Articles 11, 12 and 13 of the 1987 Order.
2. We recommend also that the Competition Authority, with the assistance of the Director of Consumer Affairs, be asked to review and monitor the structure and operation of the grocery trade on an ongoing basis over the next number of years to assess the impact of the new regulatory environment. The scope and extent of such a programme can be agreed between the Authority and representatives of the trade at a later stage.
3. Such a programme should be undertaken by a Monitoring Unit within the Authority which shall be resourced as appropriate to the task.
4. We also acknowledge the concerns of the combat poverty groups (see Chapter Eleven) to ensure that less well off sections of the community have easy access to healthy and nutritious foods. We do not believe that the Groceries Order is capable of ensuring such an outcome nor is it a proportionate response to these concerns.
5. Nonetheless, we recognise that the objective of the agencies is valid and we recommend that the Competition Authority in reviewing the

structure and operation of the grocery trade should be asked to comment and make recommendations on guaranteeing access for all sections of society to as wide a range of grocery products as possible.

6. We also draw attention to the recommendations of the High level Inter-departmental Group on the Implementation of the Recommendations of the Consumer Strategy Group in regard to the planning process. (see Appendix Twelve)
7. In particular we recommend that the guidelines and the planning process generally be operated in such a way as to ensure the existence of an appropriate mix of small and large retail development throughout the country so as to stimulate consumer choice of their preferred shopping environment.
8. Objections to new retail development should be based on sound planning principles and vested interests should not be allowed to use the process to prevent the emergence of competition and damage the interests of consumers.