

**A SUBMISSION TO THE DEPARTMENT OF  
JOBS, ENTERPRISE AND INNOVATION ON  
THE PROPOSED STATUTORY CODE OF  
PRACTICE FOR DESIGNATED GROCERY  
GOODS UNDERTAKINGS**

By

**PAUL K GORECKI\***  
**THE ECONOMIC & SOCIAL RESEARCH  
INSTITUTE & THE DEPARTMENT OF  
ECONOMICS, TRINITY COLLEGE DUBLIN**

**31 AUGUST 2011**

---

\* The author is a research professor at the Economic and Social Research Council and Adjunct Professor, Department of Economics, Trinity College Dublin. The usual disclaimer applies.

The Minister of Jobs, Enterprise and Innovation (“the Minister”) launched a public consultation the proposed statutory Code of Practice for Grocery Goods Undertakings (“the Code”) on 6 July 2011. At the same time the Minister published the report by John Travers, who had been charged with determining whether agreement was possible on a Voluntary Code of Practice for Grocery Goods Undertakings (“the Voluntary Code”) between the key stakeholders – Retail Ireland, representing the retailers, and Food and Drink Ireland, representing the suppliers. The report concluded that “it is very unlikely that a Voluntary Code of Practice will be agreed between the bodies concerned at this time” (Travers, 2011a, p. 15). As a result the Minister has decided to proceed with a statutory Code.<sup>1</sup>

The Minister in launching the consultation on the proposed statutory Code placed great stress on creating jobs and improving competitiveness:

Jobs are the number one priority of this government, and if we are to achieve the employment growth we so badly need, we must have an efficient grocery goods sector that encourages innovative suppliers and provides a stable environment for small and growing businesses to make investments and expand their activities.

Ireland needs a strong indigenous food sector and a pathway for producers to export. Retailers must understand that this is a national need, in which they can play an enormous part. (DJEI, 2011, p. 1)

At the same time the Minister expressed strong support for promoting consumer welfare:

Prices are already too high in this sector, and consumers deserve choice and the chance to buy high quality products at keen prices. My job in large part is to protect consumers and enhance employment across the entire economy. I will ensure that job-creation and the consumer interest – strongly complementary goals – are at the forefront of this debate (*ibid*, p. 1).

Thus the proposed statutory Code by improving competitiveness will also result in a better deal for consumers – a virtuous circle.

---

<sup>1</sup> The Code was prepared by John Travers (Travers, 2011b).

The issue thus becomes whether the proposed statutory Code will improve competitiveness and raise consumer welfare. In this respect the current public consultation exercise follows a similar one almost two years ago by the then Minister. On that occasion, on the 11 August 2009, the Minister launched a public consultation with the publication of a Consultation Paper, *Code of Practice for Grocery Goods Undertakings* (DETE, 2009a, 2009b). In my submission on the earlier consultation exercise, I set out my concerns about the Minister's proposals, a summary of which is presented in Box 1 below.<sup>2</sup> These comments, which apply, *mutatis mutandis*, to the proposed statutory Code, argue that the Code will likely adversely affect the competitiveness of the grocery sector and harm consumers – a vicious circle.

### **Box 1: Code of Practice for Grocery goods Undertakings: A Response**

The food and drink sector is important to the Irish economy. It accounts for over 8% of Irish GDP and 18% of gross value added in manufacturing, employing 46,000 persons and accounts for 66% 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 rigorously supported in terms of information, analysis and assumptions that underpin them" (Department of the Taoiseach, 2004, p. 11). This reflects the concern that 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).

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 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

---

<sup>2</sup> See also Gorecki (2009b).

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 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. However, we are we are; what should be done next?

It is the firm view of this submission 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 submission 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 submission 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.

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 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 of associated with the Code. As a result the cost for the retailer of doing business with local suppliers will increase rather than decreasing. 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 planning regulations as the Competition Authority has been arguing for sometime 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.

Source: Gorecki (2009a, pp. 26-29).

The report by John Travers provides a useful basis for the way forward.<sup>3</sup> The report documents the considerable difference in view between the retailers and the suppliers. While the suppliers largely agree with the Minister's views, the retailers take the opposite view.<sup>4</sup> It is therefore important that the issue of whether the retailers or the suppliers are correct as to the impact of the proposed statutory Code, since if the retailers are correct then competitiveness and consumer welfare will both suffer. However, the report by John Travers also outlines the view of four stakeholders/groups "who are not themselves part of the grocery supply chain but have a good knowledge of its operation."<sup>5</sup> Such stakeholders/groups might thus be seen in some sense as informed objective knowledgeable outsiders whose views might be especially useful for policy purposes.

In this respect, I should particularly like to draw attention to the competition specialist from a leading law firm involved with the grocery sector who felt that while a Code was needed, nevertheless "advocated that the underlying justification for such a Code should first be articulated on the basis of a robust investigation and research on supplier/retailer relationships."<sup>6</sup> This proposal has considerable merit. It seems to me that a major shortcoming of the Code in its various incarnations is the lack of a firm analytical basis that addresses:

- whether there is a market failure in retailer/supplier relationships in the grocery goods sector, through, for example, the exercise of buyer power by retailers; and,
- if there is a problem, then is the proposed statutory Code a proportionate and appropriate response and if not what would be?

---

<sup>3</sup> The report by John Travers did not consider the merits or otherwise of the Code, but rather, as noted in the text, was designed to see if agreement could be reached on a voluntary Code.

<sup>4</sup> The views of the suppliers and retailers are summarised in Travers (2011a, paragraphs 5.2.2 and 5.2.3 respectively).

<sup>5</sup> Travers (2011a, paragraph 5.3.4). The four were: Competition Authority; the National Consumer Agency; Dr Paul Gorecki/ESRI; and a competition specialist from a leading law firm involved with the grocery goods sector.

<sup>6</sup> Travers (2011a, paragraph 5.3.4).

Public policy should be made on the basis of careful definition of the problem and consideration of alternative solutions. To introduce the proposed statutory Code without undertaking such an exercise has the potential not only to damage the grocery products sector but also lower the standard of evidence needed for future regulatory proposals, neither of which is in the public interest.

## REFERENCES

- DEPARTMENT OF ENTERPRISE, TRADE & EMPLOYMENT ('DETE'). 2009a. "Tánaiste Launches Public Consultation on Code of practice for doing Business in Grocery Goods Sector." Press release. 11 August.
- DEPARTMENT OF ENTERPRISE, TRADE & EMPLOYMENT ('DETE'). 2009b. *Code of Practice for Grocery Goods Undertakings*. Consultation Paper. Dublin: DETE.
- DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION. 2011. "Jobs and Consumers must be priorities in regulation of grocery goods sector – Bruton." Press release. 6 July.
- DEPARTMENT OF THE TAOISEACH. 2004. *Regulating Better*. A Government White Paper Setting Out Six Principles of Better Regulation. Dublin: Department of the Taoiseach
- FOOD & DRINK INDUSTRY IRELAND ('FDII'). 2009. *The Food and Drink Industry in Ireland. Closing the Gap. Competitiveness Indicators*. Dublin: IBEC.
- GORECKI, P. K. 2009a. "Submission to the Department of Enterprise, Trade and Employment on the Consultation Paper, Code of Practice for Grocery Undertakings." Dublin: ESRI.
- GORECKI, P. K. 2009b. "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." *Economic and Social Review*. Vol. 40. No. 4, Winter, pp. 461-488.
- TRAVERS, J. 2011a. *Exploration of the Possibilities of the Agreement of a Voluntary Code of Practice for Grocery Goods Undertakings*. Report of the Facilitator. Dublin: Department of Jobs, Enterprise and Innovation.
- TRAVERS, J. 2011b. *A Code of Practice for Designated Grocery Goods Undertakings*. Dublin: Department of Jobs, Enterprise and Innovation