Chapter Nine
Regulations in Other Jurisdictions

9.1 Introduction

It has been submitted that Ireland's Groceries Order is not unique and that most other EU countries have similar provisions in place. Many of the submissions received have referred to the existence of prohibitions on below cost selling in other EU countries.

There is, however, a wide disparity of views in this regard. For example, IBEC states in its submission that 10 of the EU 15 have bans on below cost selling, RGDATA state that 12 of the 15 have "measures of equivalence to the Groceries Order" or are actively considering introducing same, while Musgraves indicate that 7 of the EU 15 have bans or "equivalent measures".

We sought information on the position in the 15 pre-Accession EU member states primarily through contacts with the Irish embassies in the relevant countries. The information is as complete and accurate as possible, insofar as is permitted by the constraints outlined below.

A critical difficulty in ascertaining what below cost selling restrictions apply in other countries arises due to the varying nature of the legislative provisions in force. Furthermore, our research has shown that a number of countries have more than one relevant piece of legislation.

This chapter is confined to outlining the legislative provisions in the EU 15 and we have not sought to examine or analyse the economic climate, market structure or trading practices existing in the Member States concerned. It was considered that an analysis of this nature would go far beyond the intended scope of this report.

Nonetheless, we acknowledge that these factors would all have a key bearing on how the provisions identified are impacting on the retail trade in any given jurisdiction and excluding them from our analysis limits the validity of this comparison between Member States,

Furthermore, the research involved the interpretation of national laws which are, for the most part, framed in languages other than English. This required the translation of the various national statutes, and in order to avoid loss of meaning, the language may at times appear stilted.

Obviously, as the parent text of the legislation is the only authentic version, the assessments that follow cannot be taken as definitive legal interpretations. Our comparisons are intended to be indicative only.

9.2 Positions in the EU 15 Member States:

1. Austria:

There is currently no general prohibition in place in Austria on the sale of groceries at below cost price. Current relevant Austrian legislation is:

- The Competition Act of 2002,
- The Cartel Act of 1988,

Austrian competition law, which is based primarily on the Competition Act of 2002 (Wettbewerbsgesetz 2002), and the Cartel Act of 1988 (Kartellgesetz 1988) - as amended most recently in 2003 - contains a number of provisions on covering abuse of a dominant position.

In particular, Section 35 of the Cartel Act contains a non-exhaustive list of examples of abusive practices by dominant firms. The list includes the sale of goods below cost price without justification. A burden of proof is placed on the dominant undertaking to show practice is not anti-competitive.

In addition, the Neighbourhood Supply Act of 1977 (Nahversorgungsgesetz 1977), as originally conceived, provided inter alia for a ban on the sale of certain products at or below cost price. However, in 1990, the Federal Constitutional Court found the relevant Article of the Neighbourhood Supply Act to be unconstitutional, leading to the deletion of that provision from the Act. So, while the Act remains in force, it no longer provides for a ban on below cost sale of goods.

2. Belgium

Below cost selling in Belgium is prohibited by the Law on Trade Practices and Consumer Information and Protection. Notable exceptions apply.

Article 40 of the Law states that

> *"All traders are forbidden to offer for sale or to sell a product at a loss. Below cost selling consists of all sales with a price that is not at least equal to the price at which the product was invoiced at the time of supply, or that which would be invoiced in the case of restocking. "*

Article 41 provides for a number of exemptions to the ban in Article 40, which are as follows:

- Products sold in liquidation;
- Products sold in a sale;
- Products with a rapid deterioration and whose preservation cannot be assured;

- in the case of products offered for sale in response to a short-lived consumer need, at the end of the event giving rise to the need if it is evident that these products can no longer be sold in normal trading conditions;
- Products whose commercial value has severely diminished;
- in order to bring prices into line with those offered by competitors.

The law is not confined to the grocery trade, nor does it seem to be confined to the retail sector.

3. Denmark

There is no general prohibition on below cost selling in Denmark.

However, if a company is dominant it may be illegal to sell below cost under certain circumstances. The practice from the Danish Competition Authorities in this respect is in line with the practice of the European Court of Justice on predatory pricing.

The Danish Competition Act has been in force since 1997. There have been some amendments to the law (the latest was in December 2004) but the ban on predatory pricing has not changed.

4. Finland

There is no general prohibition on below cost selling in Finland, nor are there plans to introduce a ban.

Article 6 of the Finnish Competition Act (in force since 1992) prohibits the abuse of a dominant position by one or more undertakings or an association of undertakings. Article 6 of the Act mirrors Article 82 of the EU Treaty in setting down the type of activities that constitute an abuse of dominance. One form of an abuse is imposing unfair purchasing or selling prices. Predatory pricing may constitute an abuse of this nature.

5. France[1]

There have been prohibitions on below cost selling in France for some considerable time. However, the issue did not come into full focus until the introduction of the Law of 1 July 1996, known as the *Loi Galland* or Galland Law (after its author, Mr Yves Galland who was Minister of State for Trade in the centre-Right Government of Prime Minister Alain Juppé).

The *Loi Galland* is one of a number of related pieces of legislation passed in the 1990's and earlier, aimed at protecting smaller, traditional retail outlets

[1] This explanation of French law is based on material kindly supplied by the Irish Embassy in Paris.

against the growing dominance of larger out-of-town hypermarkets and from their allegedly predatory pricing practices.

We are informed that it is difficult to establish whether or not the *Loi Galland* has succeeded in its primary aim of stemming the decline in the number of smaller outlets. According to the OECD, by 2001, the five largest firms controlled 80% of the French market.

However, most commentators agree that there is some evidence that the law has distorted competition leading to higher prices and has thus eroded the purchasing power of consumers. Consequently, the *Loi Galland* has been and remains one of the most politically controversial acts of commercial legislation in recent times.

In practice, the *Loi Galland* prevents retailers from selling below invoice price, but permits suppliers to pay retailers what are termed "back margins" (*marges arrières*) in return for special promotional services or prominent shelf spacing that stores may offer. These seem to us to be very similar to off-invoice discounts which are a feature of the Irish grocery trade.

Article 32/1 stipulates that:

> *"any retailer selling, or announcing the resale of a product at a price below its real cost is punishable by a fine of 500,000 Francs* [circa €80,000]*….The real cost is the price per unit as it appears on the invoice including taxes".*

Because of their considerable market dominance, large retailers can demand significant back margins from suppliers. Suppliers complain of a lack of transparency contending that large outlets are employing such tactics to bring down wholesale prices thereby shifting costs back on to them (i.e. the suppliers).

Some retailers complain, in turn, that savings thus obtained, or obtained through general economies of scale, cannot be passed on to consumers in the form of lower prices.

The *Loi Galland* makes provision for some exceptions to the general principle of forbidding below cost selling. For example, the rule is relaxed to permit "sales" on particular, specified dates meaning that outlets must schedule their promotions at the same time. This prevents one retailer gaining advantage over another.

Moreover food retailers with outlets smaller than 300m² may sell at below cost if it brings prices in line with neighbouring competitors. This latter provision has led to the growth in German-style discount stores which combine small outlets with economies of scale obtained through the sheer number of such outlets. According to one study, the market share of such discount stores in France (*Aldi, Lidl* etc.) has grown from just 0.7% in 1992 to 6.2% in 2003.

Because of it's perceived negative effects, in particular the impact on prices, the *Loi Galland* has been the target of much criticism. It has been alleged by some commentators that prices for a typical basket of household items have risen by 13% on average since the law was introduced.

Suppliers, large retailers and consumer groups alike, have called for a relaxation of the rather mechanistic provisions of the *Loi Galland*.

The former Minister for Finance and the Economy and current President of the ruling UMP party, Nicolas Sarkozy, introduced *extra-legislative* measures in 2004 aimed at forcing down prices in the face of consumer concerns over diminishing purchasing power. In June, 2004, the major retail outlets were persuaded to reduce prices by 2% across a range of thousands of daily household purchases with effect from September 2004. Price reductions of between 1.5% and 3% were registered by the end of 2004.

In parallel, Mr Sarkozy undertook the first steps in reforming the *Loi Galland*.

In November, 2004 he secured the agreement in principle of the retail sector to introduce a number of important changes. <u>While the principle of forbidding below cost pricing was to be retained</u>, its definition was refined and the calculation of "cost" changed. So-called back margins were to be integrated into the calculation of the real cost of products and thus reduce the threshold for below cost selling. It was hoped that consumers would benefit from lower prices but that the ultimate aims of the *Loi Galland* in terms of outlawing predatory or cartel-like practices would continue to be upheld.

The proposed reform of the Loi Galland was one element of a wider draft law on Small and Medium Enterprises. In mid-June, 2005 the Minister for Small & Medium Enterprises, Mr. Renaud Dutreuil, presented the new bill before the Senate where it was adopted on 16-17 June. The lower house of the French parliament subsequently passed the law in July 2005. (It is understood that the new law will come in effect on 1st January, 2006).

The deputies approved a measure to limit the fees paid by manufacturers to retailers to 20% of the shelf price from 2006. At the moment, these "back margins" can reach up to 50% of the net price. This ceiling will then be reduced further to 15% from 2007.

The final text retains the government's principle of a ban on selling below cost while reducing the size of supplier rebates. Any rebates that exceed the new limits can be deducted from the shelf price, with the aim of stimulating consumer spending. The Government is putting in place a transitional period of six months during which time there will be a progressive move towards the new limit of 20%. The measure is intended to bring about a reduction in prices paid by the consumer.

The new provisions mean that financial advantages enjoyed by the distributor/retailer (i.e. back margins from suppliers/producers) exceeding 20% of the net price of the product must now be incorporated into the calculation of the real net price. This would have the effect of (a) lowering the price to consumer and (b) discouraging the continuation of a practice that has had negative effects.

The Minister acknowledged that he had been the object of intense lobbying by various interest groups. The "balance" which the Minister claims to have achieved has satisfied neither producers nor distributors. However, some observers have claimed during the process that the changes don't go far enough and that tinkering with the notion of "cost" fails to address more fundamental issues of competition.

According to the former Managing Director of the IMF, Michel Camdessus, the outright abolition of the *Loi Galland* would reduce prices by a full 5%.

6. Germany

There is no general prohibition on selling below cost in Germany.

Retail competition, including sales below cost, are regulated under Section 20.4 of the GWB (the Competition Act).

The Act provides that a "dominant retailer" cannot abuse their position through below cost selling with a view to reducing the competition in the marketplace. "Dominant retailers" are nonetheless allowed to sell below cost in an effort to increase market share, in particular in emerging markets or new products – i.e. specific areas where dominance is not yet established, or in areas where pricing is very aggressive.

7. Greece

The below cost selling of grocery goods is prohibited Under Article 24 of Law 2941/2001.

The cost price is considered to be the price per unit mentioned in the invoice provided by the supplier. Any discounts must be deducted from the cost price, while VAT and any other tax, including transport cost must be added, if not mentioned in the invoice.

If the supplier gives a deduction to the total cost of the invoice, then this deduction is proportionately divided to all products described in the invoice.

The prohibition does not apply where:

- products are close to their expiry date;
- there is a big amount in stock and the supplier has reduced its prices in the meantime;

- in the case of sales accompanied by money off vouchers financed by the suppliers;
- the company or a certain part of the company is closing down.

8. Ireland

The Restrictive Practices (Groceries) Order, 1987 prohibits the sale of grocery goods at below net invoice price. The prohibition does not cover fresh fruit and vegetables, fresh meat, fresh and frozen fish and seasonal goods.

The Competition Act 2002 prohibits abuse by a firm of a dominant trading position. Imposing unfair selling or purchase prices would represent such an abuse.

9. Italy

Under Decree No. 218/2001, there is, in effect, a general prohibition on persistent below cost selling in Italy.

However, Decree No. 218/2001 allows below cost selling where certain criteria are met regarding the number of sales (no more than 3 per year), the duration of such sales (not more than 10 days), the range of goods sold (max 50 products may be sold) and the intervals between sales (must be at least 20 days except for first sale of the year.)

The 2001 Decree also provides for a range of exceptions to the prohibition, namely:

- Perishable goods;
- Food products close to their expiry date;
- Food products leftover after local feasts;
- Obsolete goods
- Damaged non-food goods, which are safe for sale;
- Where retailer opens new shop or renovates existing shop.

Below cost selling is also prohibited where the undertakings concerned hold in excess of 50% of the relevant market in Italy.

The 2001 Decree was introduced pursuant to Decree No. 114/1998 on the Reform of wholesale and retail trade. The 1998 Decree defines below cost selling as *"the sale to the public of one or more products at price below that resulting from purchase invoices increased by value added tax and any other tax or duty applicable to the product and decreased by any discounts or contributions related to the product, provided they are documented".*

Below cost selling may also be illegal under Article 3 of the Italian Competition Law 287 of 1990 if practiced with the intention of restricting competition or where seller abuses its dominant position engaging in predatory pricing. In addition, the practice is illegal when considered to be unfair competition under Article 2598 of the Civil Code.

10. Luxembourg

Below cost selling of goods and services is prohibited under the Act on Commercial Practices, Unfair Competition and Comparative Advertising (July 2002). Notable exceptions apply.

Section 3 of the Act defines below cost selling of goods and services as any sale of a good, which is not at least equal to the invoice price when supplied, or the future invoice price. Net invoice price is defined as the purchase price, less any rebates and other discounts received from the supplier at the time of billing.

Section 20(4) exempts the following
:

- Perishable goods
- State of the art goods (whose value diminishes over time)
- Event-specific goods
- Re-alignment of prices to match market prices for identical goods/services
- Liquidation, public auction or sales.

Further, a law on e-commerce, passed in 2004 exempted “goods and services which are offered or sold by electronic means” from the prohibition.

The law is not confined to the grocery trade.

11. The Netherlands

There is no general prohibition of below cost selling in the Netherlands.

The question of whether such a ban should be introduced was the subject of a number of detailed recent studies, carried out on behalf of the Ministry of Economic Affairs and the Ministry of Agriculture, at the request of the Dutch parliament. The reports recommended against a ban, saying it would not help consumers.

While there is no general ban in place in the Netherlands, below cost selling is banned where there is an abuse of a dominant position under the Dutch Competition Act, 1956.

12. Portugal

Below cost selling is prohibited by Decree- Law 370/93 which provides that it is forbidden to offer for sale or to sell goods at a price lower than their effective purchase price, taking into account taxes and transportation costs. Notable exceptions apply.

The effective purchase price is defined as the price indicated on the purchase invoice price, after deducting invoices which are directly related to the transaction in question and which are identified on the invoice itself.

The prohibition does not apply to:

- Perishable goods;
- Obsolete goods;
- Goods whose replacement cost will be lower, in which case the effective purchase price becomes the price listed on the new purchases invoice;
- Below cost selling designed to match a competitors prices;
- Goods sold in sales or on liquidation.

The law is not confined to the grocery trade.

13. Spain

Below cost selling is prohibited in Spain although notable exceptions apply.

Article 17 of the Law on Unfair Competition deals with Selling at a Loss and provides that vendors may freely set their prices. However, below cost selling shall be construed as unfair competition (and therefore unlawful) in the following cases:

- When it may cause consumers to err about the level of prices of other products or services in the same establishment or

- When it may have the effect of discrediting the image of another product or establishment, or

- When it forms part of a deliberate strategy to eliminate a competitor or group of competitors from the market.

In addition, the Act on the Regulation of Retail Sales, 1996, prohibits certain practices where the buyer is a consumer, including sales at below invoice price. However, the prohibition does not apply in respect of perishable or obsolete goods, where the goods are being sold in a liquidation sale, or for the alignment with competitor’s prices when sales are significantly affected by the competitor’s practice.

14. Sweden

There is no general prohibition on below cost selling in Sweden.

The Swedish Competition Act (Article 19) prohibits the abuse of a dominant position. In assessing cases of below cost selling, the Authority applies a competition test i.e. there must be an intention to restrict competition, but where a dominant company sells below the Average Variable Cost,[2] intention is presumed.

15. United Kingdom

There is no prohibition on below cost selling in the UK.

However, under the Competition Act 1998, the abuse of a dominant position is prohibited, and such abuse includes unfair purchase or selling prices.

9.3 Other Countries

1. Australia

There is no general prohibition on below cost selling. Predatory pricing is unlawful under Section 46 (1) of the Trade Practices Act, which prohibits businesses that have substantial market power from taking advantage of that power to eliminate or substantially damage a competitor, prevent the entry of a person into a market, or deter or prevent a person from engaging in competitive conduct in a market.

2. Canada

There is no general prohibition. Section 78 of the Canadian Competition Act lists practices that are considered anti-competitive when engaged in by a dominant firm. These include: "…*selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;".*

3. New Zealand

The situation in New Zealand is very similar to Australia. No general prohibition on below cost selling exists but predatory pricing is probably captured by section 36 of the Commerce Act, 1986, which prevents a company from unfairly taking advantage of market power.

[2] An economic measurement of cost deriving from the Areeda-Turner model (see Paragraph 7.9 above).

4. United States

No general prohibition exists. The Robinson-Patman Act of 1936 provides that it shall be an *offence "…to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."*

9.4 Conclusions

The view expressed by some parties that a majority of the EU 15 has measures similar or equivalent to the Groceries Order does not appear to be supported by the foregoing analysis, from which we draw the following conclusions:

- Of the EU 15, seven countries, other than Ireland, have a prohibition on below cost selling. These countries are Belgium, France, Greece, Luxembourg, Portugal, Spain and Italy.

- The relevant legislation in six of these seven countries (Belgium, France, Luxembourg, Portugal, Spain, and Italy) provides for a wider range of exceptions than are provided under the Groceries Order.

- In particular, Belgium, Portugal, Luxembourg and France all allow promotional below cost selling and below cost selling for the purpose of matching competitors' prices. In addition, Spain allows below cost selling for the purpose of matching competitors' prices.

- Italy allows up to three below cost sales of up to 10 days duration each year in addition to other exceptions.

- We are not in a position to judge how tightly exceptions in other countries are circumscribed or in what circumstances they apply. Nonetheless, we believe that they are very important exemptions and, potentially, allow for price competition beyond what is permitted under the Groceries Order.

- The remaining seven countries only prohibit the practice of below cost selling where it constitutes unfair competition, or an abuse of a dominant position.

- The French *Loi Galland* has been modified recently following criticism that it was not working in the interests of consumers. We are uncertain how the changes will be enforced in so far as concerns the application of back margins (similar to our off invoice discounts). We would be opposed to the introduction of similar changes in Ireland (see in particular Chapter 6.12 above).

- No conclusions can be drawn as to their appropriateness to Ireland of provisions obtaining in Other Member States – particularly in the absence of a detailed study of market conditions and trading practices.

Table 19 Summary of Below Cost Selling Laws in 15 EU Member States

Country	Relevant Legislation	Prohibited/Allowed	Exemptions
Austria	Cartels Act 1988, as amended	Allowed - except in case of the abuse of dominance (articles 34 & 35).	N/a
Belgium	Art 40 and 41 of the Law of 14th July, 1991	Prohibited - with exceptions	Goods sold in liquidation & seasonal sales; goods liable to deteriorate; obsolete goods; and for purpose of matching competitors.
Denmark	Competition Act, 1997	Allowed - except in case of the abuse of a dominant position	N/a
Finland	Competition Act, 1992	Allowed - except in case of the abuse of a dominant position	N/a
France	Loi Galland of 1ST July,1996	Prohibited - See detailed notes above.	Yes
Germany	Act against Restraints on Competition (GWB) (1999)	Allowed - except in cases of abuse of dominance, market power or when practiced to the detriment of smaller companies.	N/a
Greece	Law 2941/2001 Law 146/191 & amend. 313/35	Prohibited - with exceptions Allowed – unless considered as unfair competition	Perishable goods; large stock; liquidation sales

		Prohibited/Allowed	
Ireland	Restrictive Practices (Groceries) Order 1987 Competition Act, 2002	Prohibited (with exceptions) in case of groceries Article 5 prohibits abuse of a dominant position	Fresh fruit, fresh vegetables, fresh and frozen fish/ meat, and seasonal goods
Italy	Decrees No. 114/1998 & 218/2001 Art. 2598 Civil Code Art. 3 of Law 287/1990	Allowed – Where certain criteria are met regarding number, duration and scope of sales. Allowed -except in cases where it constitutes unfair competition, abuse of dominance.	Perishable goods; food products close to their expiry date, food products leftover after local feasts, obsolete goods, damaged non-food goods, which are safe for sale, or where retailer opens new shop or renovates existing shop.
Luxembourg	Act on Commercial Practices, Unfair Competition and Comparative Advertising, 2002, as amended	Prohibited - with exceptions	Goods deteriorated in value, clearance sales and for purpose of matching competitors.
Netherlands	Economic Competition Act of 1956, as amended	Allowed – except in the case of an abuse of a dominant position.	N/a

Country	Specific Legislation	Prohibited/Allowed	Exemptions
Spain	Unfair Competition Act (Law of 10/1/1991, Art. 17)	Allowed – unless considered as unfair competition in following circums: -if it misleads consumers about the price of retailer's other products or services; -if it discredits the image of a third party's goods or service -when part of strategy to eliminate competitors.	
	Act on Regulation of Retail Sales, 1996, as amended	Prohibited - with execeptions	Perishable goods, liquidation sales, and for purpose of matching competitors.
Sweden	Competition Law 1993, Art. 19	Allowed – except in the case of the abuse of dominant position.	N/a
United Kingdom	Competition Act 1998	Allowed – except in case of the abuse of a dominant position.	N/a