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AN BILLE BIA (CÓIRTHRÁDÁIL AGUS FAISNÉIS) 2009
FOOD (FAIR TRADE AND INFORMATION) BILL 2009

Mar a tionscnaíodh
As initiated

ARRANGEMENT OF SECTIONS

Section

1. Short title.
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ACTS REFERRED TO

Competition Acts 2002 to 2005
Consumer Protection Act 2007

2007, No. 19



AN BILLE BIA (CÓIRTHRÁDÁIL AGUS FAISNÉIS) 2009
FOOD (FAIR TRADE AND INFORMATION) BILL 2009

BILL

entitled

5 AN ACT TO PROVIDE, IN THE INTERESTS OF THE COM-
MON GOOD, FOR THE PROHIBITION OF ACTIVITIES
WHICH PREVENT, RESTRICT OR DISTORT FAIR
TRADE IN GROCERY GOODS IN THE STATE, AND TO
10 PROVIDE FOR INFORMATION ON THE GROCERY
TRADE IN IRELAND TO BE GATHERED AND PUB-
LISHED, AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—This Act may be cited as the Food (Fair Trade and Short title.
Information) Act 2002.

15 **2.**—This Act shall come into operation on such day or days as the Commencement.
Minister may appoint by order or orders either generally or with
reference to any particular purpose or provision and different days
may be so appointed for different purposes or different provisions.

3.—(1) In this Act, unless the context otherwise requires— Interpretation.
20 “Act of 2002” means the Competition Act 2002 and 2005;

“Act of 2007” means the Consumer Protection Act 2007;

“Agency” means the National Consumer Agency;

“Allowance” includes any discount, rebate, price concession or other
advantage that is collateral to a sale or purchase of grocery goods
25 but is not applied directly to the selling or purchase price;

“Authority” means the Competition Authority;

“Bord” means An Bord Bia;

“contravention” includes, in relation to any provision, a failure to
comply with that provision and “contravene” shall be construed
30 accordingly;

“director” includes a person in accordance with whose directions or instructions the directors of the undertaking concerned are accustomed to act but does not include such a person if the directors are accustomed so to act by reason only that they do so in advice given by the person in a professional capacity; 5

“grocery goods” means any food or drink for human consumption or any household necessary that is intended to be sold as groceries, and includes—

(a) any substance or thing sold or represented for use as food or drink for human consumption, 10

(b) any substance or thing sold or represented for use as an additive, ingredient or processing aid in the preparation or production of food or drink for human consumption,

(c) household necessities, and

(d) intoxicating liquors; 15

“grocery goods undertaking” means, 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;

“Minister” means the Minister for Enterprise, Trade and Employment; 20

“multiple retailers” means a retail undertaking that owns or controls four or more retail outlets;

“retailer” means a grocery goods undertaking that sells or resells grocery goods directly to the public; 25

“statements of supply” are the statements that are required to be prepared and maintained under *section 6*;

“undertaking” means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service. 30

Prohibited practices.

4.—(1) A retailer shall not directly or indirectly demand, compel or coerce, whether by threat, promise or any like means another grocery goods undertaking to make any payment or grant any allowance to the retailer and any such arrangements shall be prohibited and void— 35

(a) for the advertising or display of grocery goods,

(b) for the providing of selling space for grocery goods in a retail outlet, or

(c) for any matter connected with (a) or (b).

(2) Nothing in this section shall prevent a grocery goods undertaking from agreeing with a retailer to engage in a joint advertising promotion in relation to grocery goods, where the costs of such advertising promotion are shared equally at the ratio of 50 per cent each as between them provided that such a joint promotion is not secured by compulsion or threat, is achieved by negotiation between 40 45

the parties and is provided for in the statement of supply which is agreed between them and maintained in accordance with *section 6*.

5 (3) For the purposes of *subsection (2)* advertising shall not be deemed to include the provision of selling or display space for the grocery goods.

(4) A grocery goods undertaking that purchases goods from another grocery goods undertaking shall comply with any terms or conditions as to credit in relation to the purchase, contained in the statement prepared by both undertakings pursuant to *section 6*.

10 **5.—An undertaking which—**

Offences in respect of breach of *section 4*.

(a) enters into or implements an agreement or arrangement,

(b) makes or implements a decision, or

(c) engages in an activity

15 that is prohibited by *section 4(1)* or *section 4(4)* shall be guilty of an offence.

6.—(1) Subject to *subsection (5)* all grocery undertakings that are not retailers shall maintain a statement in writing detailing the terms and conditions upon which the undertakings supply grocery goods to retailers in the State. Statement of supply.

20 (2) All multiple retailers in the State shall maintain a statement in writing detailing the terms and conditions upon which they purchase grocery goods from each grocery undertaking in the State.

25 (3) The statements required by *subsections (2)* and *(3)* shall be kept at the registered place of business of that undertaking in the State or a premises nominated for that purpose by the undertaking in an accessible format for a period of six years.

(4) The statements required by this section shall contain details of the terms and conditions of supply of grocery goods by grocery goods undertakings to retailers and shall include details of—

30 (a) allowances (if any),

(b) applicable credit terms between the grocery goods undertaking and the retailer.

(5) This section shall not apply to the supply of grocery goods to a retailer that is not a multiple retailer.

35 (6) Where a request is made by the Authority to a grocery undertaking or a multiple retailer for access to a statement prepared under this section, the relevant undertaking shall comply with that request by furnishing the statement of supply to the Authority within seven days of the request.

40 (7) Failure to comply with the provisions of this section shall be an offence.

Provision of information in relation to grocery undertakings.

7.—(1) The Authority, shall in each annual report required under section 42 of the Act of 2002, specifically express an opinion on the operation of competition in the grocery sector.

(2) In addressing the issues raised in *subsection (1)*, the Authority shall provide details of the turnover, and gross and net profit of each multiple retailer operating in the State in aggregate form in respect of its operations within the State, which the Authority shall request from each such undertaking for the purposes of the performance of its functions under this Act or the Act of 2002. 5

(3) In the event of a multiple retailer not providing the details required in *subsection (2)*, the Authority shall be entitled to use the powers conferred by Section 31 of the Act to secure such information. 10

Provision of information on product sourcing.

8.—(1) In addition to the existing powers conferred on the Agency by the Act of 2007, it shall on an annual basis publish a report providing consumers with details of the extent of sourcing by multiple retailers of food products produced in the State. 15

(2) In preparing this report, the Agency shall consult, the Board, the Minister for Agriculture and grocery undertakings in the State.

(3) The agency shall seek the co-operation of multiple retailers and other grocery undertakings in the preparation of the report required under *subsection (1)*, but if necessary, the Agency shall appoint an authorised officer under Section 30 of the Act of 2007 to seek the necessary information for the purposes of the aforesaid report. 20
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(4) The report shall be in such form as the Agency decides; following the consultations required by *subsection (2)* above and shall make such recommendations as may be necessary to improve the provision of information to consumers in relation to sourcing patterns of multiple retailers. 30

(5) Nothing in this section shall be regarded as imposing an obligation on any multiple retailers operating in Ireland to source any specific percentage of grocery goods from producers within Ireland.

Penalties.

9.—(1) A grocery undertaking that engages in a prohibited practice under *section 4(1)* or *4(4)* or *section 6* shall commit an offence. 35

(2) A person guilty of an offence under this Act shall be liable—

(a) on summary conviction—

(i) in the case of an undertaking that is not an individual, to a fine not exceeding €3,000, or

(ii) in the case of an individual, to such a fine or to imprisonment for a term not exceeding 6 months or to both such a fine and imprisonment; 40

(b) on conviction on indictment—

(i) in the case of an undertaking that is not an individual to a fine not exceeding whichever of the following amounts is the greater, namely €4,000,000 or 10 per 45

cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction, or

5 (ii) in the case of an individual, to a fine not exceeding
whichever of the following amounts is the greater,
namely €4,000,000 or 10 per cent of the turnover of
the individual in the financial year ending in the 12
10 months prior to the conviction or to imprisonment
for a term not exceeding 5 years or to both such fine
(that is to say a fine not exceeding the greater of the
foregoing monetary amounts) and such
imprisonment.

(3) Where an offence referred to in *subsection (1)* has been committed by an undertaking and the doing of the acts that constituted
15 the offence has been authorised, or consented to, by a person, being
a director, manager or other similar officer of the undertaking, or a
person who purports to act in any such capacity, that person as well
as the undertaking shall be guilty of an offence and shall be liable to
be proceeded against and punished as if he or she were guilty of the
20 first mentioned offence.

(4) Where a person is proceeded against as aforesaid for such an offence and it is proved that, at the material time, he or she was a
director of the undertaking concerned or a person employed by it
25 whose duties included making decisions that, to a significant extent,
could have affected the management of the undertaking or a person
who purported to act in any such capacity, it shall be presumed until
the contrary is proved, that that person consented to the doing of
the acts by the undertaking which constituted the commission by it
of the offence concerned under *section 4(1)* or *4(4)* or *section 6*.

30 (5) Summary proceedings in relation to an offence under *sections 4(1)* or *4(4)* or *section 6* of this Act may be brought by the Authority.

(6) A person indicted for an offence under *section 4* or *section 6* shall be tried by the Central Criminal Court.

35 **10.—(1)** Any person, who is aggrieved in consequence of any agreement or arrangement that is prohibited under *section 4* shall have a right of action under this subsection against either or both of the following, namely—

Right of action for breach of *section 4*.

(a) any undertaking which is or has at any material time been a party to such an agreement, or arrangement;

40 (b) any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to, as the case may be, the entry by the undertaking into or the implementation by it of the agreement or arrangement.

45 (2) The Authority shall have a right of action under this subsection in respect of an agreement or arrangement which is prohibited under *section 4*.

(3) An action under *subsection (1)* may be brought in the Circuit Court.

(4) The reliefs provided under subsection 1 shall be in addition to or as an alternative to the reliefs available to any person, or the Authority under Section 15C of the Act of 2002.



**AN BILLE BIA (CÓIRTHRÁDÁIL AGUS FAISNÉIS) 2009
FOOD (FAIR TRADE AND INFORMATION) BILL 2009**

EXPLANATORY MEMORANDUM

Purpose of Bill

The objective of this Bill is to identify specific practices which are harmful to employment and investment in the food industry and from which consumers derive no benefit. It is also designed to produce regulation that is simple, does not impose an excessive burden of business and is proportionate in terms of its impact on compliance. The regime also needs to be capable of being enforced in a simple and effective way.

The food sector is of critical importance to the Irish economy and is responsible for significant numbers of employment, both in terms of production, but also value added food processing. It is a sector that has seen significant change and consolidation in recent years, particularly at retail level. In particular there is increased concentration at retail level as producers, suppliers and distributors seek to get their goods to retail markets.

Both internationally and domestically there are concerns that there is disproportionate power in the hands of retailers and the nature of the trading relationship between retailers and suppliers, being unbalanced, often leads to demands by retailers of suppliers which are reflective of the disproportionate power.

The Restricted Practices (Groceries Order) 1987 contained certain provisions to prevent abusive behaviour by retailers towards suppliers and expressly outlawed certain practices whereby retailers were able to seek preferential terms, or cash payments from suppliers in circumstances which are not directly linked to the sale of goods at a particular volume of specified level. The Groceries Order was repealed in 2006 and the express prohibitions against abusive behaviour such as the demanding of “Hello Money” or the abuse of credit terms were repealed.

The Competition Act 2006 did contain provisions specific to the grocery sector when it was introduced to repeal the Groceries Order. It attempted to address some of the practices but was wholly inadequate, as it made enforcement a civil matter rather than a criminal matter but also left it primarily to the parties to enforce the legislation. Given the close dependency between the suppliers and retailers, self regulation has not proved to be an option as suppliers

are worried about invoking the protections in the Act for fear of retaliation. Similarly the ban on such practices was not absolute but conditional and regarded as highly complex in terms of enforcement. It is indicative of an absence of effectiveness of this legislation that despite continued complaints about “Hello Money” and abuse of credit terms, no cases were taken under the Competition Act, either by the Competition Authority or individual food companies.

A number of Oireachtas Committees have heard the evidence of suppliers and supplier representatives of the unfair demands by retailers of suppliers and producers. There has been an increased focus on curbing excessive retail power. There has also been a concern about inadequate information about the retail grocery sector in Ireland. In particular, the large food retailers are taking inordinate steps to conceal details of their turnover and profitability. This is surprising in circumstances where some of the retailers operating in the Irish market do provide quite detailed data about their store operations and profitability in other jurisdictions. It is regarded as in the public interest that policy makers, retailers, suppliers and consumers are made aware of the turnover and profitability of specific retailers. It will enable the consumers and policy makers to make better assessments of the competitive dynamic in the marketplace if retailers above a certain level are obliged to report details of their profitability and turnover.

Similarly concern has been expressed by producers that some retailers have stated a commitment to sourcing Irish products but that commitment has not been audited or checked. There is sufficient evidence that loyalty to Irish produced food is a determining factor influencing consumers where they shop and the goods that they purchase.

This Bill provides a regulatory regime that recognises the significant importance of the food trade to Ireland and the need to ensure that the considerable market power of the large retailers is not exercised in a manner that is harmful to consumers, producers or the wider economy.

The Competition Act 2006 has already recognised the special position of the food sector by making specific provisions for the sector. This Bill adapts those distinctions and applies them in a fair trade context.

Provisions of Bill

Section 1 provides the standard form for the short title of the Bill.

Section 2 provides for the commencement of the Bill.

Section 3 sets out the main definitions associated with the Bill.

Section 4 outlines the prohibited practices which are forbidden under the Bill.

It provides that a retailer shall not demand a grant or payment of any allowance to the supplier for the advertising or display of grocery goods or the providing of selling space for grocery goods in a retail outlet or any connected matter.

The section provides that it is allowable for a retailer and a supplier to agree joint advertising and promotion in relation to grocery goods provided the promotion is not secured by compulsion or threat. The section also provides that a grocery goods undertaking must comply with statutory conditions in relation to credit terms contained in a statement required under Section 6.

Section 5 details offences arising as a consequence of a breach of Section 4.

Section 6 requires all grocery undertakings that are not retailers to maintain a statement in writing detailing the terms and conditions upon which they supply goods to retailers in the State. It also imposes an obligation on multiple retailers to maintain a similar statement and requires that they should be kept at their registered place of business in the State. The section sets out the details required in the statement and provides for a retailer or supplier to give access to the statement where required to the Competition Authority for enforcement of the Act.

Section 7 imposes on the Competition Authority an obligation to address in their annual report each year the details of the turnover, gross net profit for each multiple retailers in the State in aggregate form. This section confirms that the Authority should have authority under the Competition Act 2002 to use such powers to secure information in the event that it is not being provided.

Section 8 empowers the National Consumer Agency, in consultation with the An Bord Bia and the Minister for Agriculture to publish a report on an annual basis detailing the extent of sourcing by multiple retailers of food products produced in the State. This section aims to improve the provision of information in relation to sourcing patterns of multiple retailers. It outlines the penalties that apply for breaching any of the provisions of the Act.

Section 9 provides for penalties for breaches of the legislation.

Section 10 provides that a right of action for a breach of Section 4 is conferred on any person and is an addition to such rights as maybe conferred by the Competition Act 2002.

Financial Implications

There are no direct implications arising from this bill. It is expected that the National Consumer Agency and the Competition Authority could fulfil the roles envisaged for them under this bill without any additional staff and from existing resources.

*Deputies Michael Creed and Andrew Doyle,
Nollaig, 2009.*