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Welcome to the latest edition of Compecon's Competition and Regulatory E-Zine.
The first article in this edition analyses the EU Commission's announcement of 27th February that it was blocking Ryanair's latest attempt to acquire control of Aer Lingus.

Our second articles analyses a September 2012 judgment by the US Court of Appeals for the Third Circuit in relation to loyalty rebates. Such rebates have generally been considered illegal under EU law and it is interesting to compare the US Court's approach with that taken under EU law.

Recent newspaper reports alleging escalating grocery prices and a lack of competition in the retail grocery trade are discussed in our third article.

Our final article considers the decision in Budget 2013 to increase excise duties on wine by €1 a bottle. It notes that EU law prohibits Member States from setting excise duties in a way that discriminates against imports in favour of domestically produced alcohol products.

Patrick Massey

Director

EU Commission Blocks Latest Ryanair Bid for Aer Lingus.

1: Introduction.

The EU Commission announced on 27th February that it had decided to block Ryanair's latest bid to acquire control of Aer Lingus. The announcement is hardly surprising. Recent newspaper reports had indicated that the Commission had informed Ryanair of its intention to prohibit the company's latest attempt to acquire full control of Aer Lingus.[1] Ryanair has indicated that it intends to appeal any refusal decision to the EU General Court.

This is Ryanair's third attempt to acquire full control of Aer Lingus. Its first attempt was prohibited by the EU Commission in a decision dated 27th June 2007.[2] The Commission's decision was upheld by the EU General Court on appeal in a judgment that was handed down on 6th July 2010. Ryanair subsequently launched a second bid for Aer Lingus but subsequently withdrew this offer.

Despite repeated optimistic statements by Ryanair that it expected its latest bid to be approved by the Commission, the financial markets remained unconvinced.

2: The Commission's 2007 Decision.

The Commission's 2007 decision prohibited Ryanair's original bid for Aer Lingus on the grounds that it would reduce competition on flights in and out of Ireland. The Decision noted that those routes where the Merging Parties' activities overlapped included 8 out of the 10 most important routes to/from Dublin (one of the remaining two most important routes was the long-haul route to New York). The parties combined market shares were very high on all those eight markets.

The 2007 Decision found that the two airlines overlapped on 35 routes. In the case of 22 of those routes, Ryanair and Aer Lingus were the only operators giving them a combined market share of 100%. The Commission found therefore that the merger would create a monopoly on those 22 routes. In the case of the remaining 13 routes, Aer Lingus and Ryanair had a combined market share in excess of 60%.

It also pointed to the fact that passenger numbers in 2006 on the 32 "overlap routes" to/from Dublin accounted for around 70% of all passengers carried on intra-European routes to/from Dublin.

Ryanair argued strongly at the time of the 2007 bid that it did not compete with Aer Lingus. These claims were strongly refuted by the Commission.

Significantly the Commission's 2007 Decision found that any anti-competitive effects of the merger on air routes to and from Ireland were unlikely to be offset by new entry or expansion by other existing operators. It accepted that there were no significant regulatory barriers in the market but, according to the Commission, "the strength of both airlines at the same airports combined with their low frills/low cost business model would increase the already high

[1] *Irish Times*, 13th February 2013.
[2] Case M.4439.

barriers to entry or expansion for actual and potential competitors."

The Decision noted that there had been numerous unsuccessful attempts at entry on routes, and numerous examples of other airlines pulling out of routes, in and out of Ireland. It highlighted the fact that there was no example of entry by a third carrier on a Dublin route where Ryanair already operated. The Commission also pointed out that:

> "In contrast to other competitors, Aer Lingus has 'survived' on a number of routes against Ryanair." (Para 512)

The Commission's conclusions regarding the impact of the proposed merger on competition were summarised in para 491.

> "…Aer Lingus and Ryanair are in competition with each other and constrain each other when it comes to determining fares for flights on the overlap routes. The proposed merger would eliminate this actual competition between the Merging Parties, giving the merged entity significantly increased market power with the likely consequence of increased fares and/or a reduction of the number flights for passengers wishing to travel to or from Ireland."

In addition to finding that the merger would lead to higher prices, the Commission also found that it was likely to lead to lower quality service and less consumer choice. It also found that it would lead to a reduction in potential competition with less pressure on the merged entity to establish new routes.

3. The Appeal Judgment.

Ryanair advanced five main arguments in its appeal against the decision claiming that the Commission had made manifest errors of assessment regarding:

1. The competitive relationship between Ryanair and Aer Lingus;
2. Barriers to entry;
3. Route-by-route analysis;
4. Efficiencies; and
5. Commitments offered by Ryanair to offset any competition concerns.

The Court dismissed all of Ryanair's arguments.[3]

Ryanair claimed that the Commission had operated on a false premise that Ryanair and Aer Lingus were "like for like" in concluding that the two airlines were each other's closest competitors. It argued that the parties were not competitors due to differences in their costs and fares, differences in service levels and the fact that Ryanair operated to secondary airports while Aer Lingus used primary airports. The Court rejected these arguments.

The Court also rejected Ryanair's claims that the Commissioned had erred in finding that new entry would constrain any price increase post-merger, due to barriers to entry. Although Ryanair had cited a number of examples of entry, the Court noted that many of those entrants were no longer present one year later.

4: The 2013 Decision.

The Commission's Decision blocking Ryanair's latest bid for Aer Lingus states:

> "The Commission concluded that the merger would have harmed consumers by creating a monopoly or a dominant position on 46 routes where, currently, Aer Lingus and Ryanair compete vigorously against each other. This would have reduced choice and, most likely, would have

[3] *Ryanair v Commission*, [2010] ECR 3457.

led to price increases for consumers travelling on these routes."[4]

Interestingly the Commission identified 46 routes where the merger would have created a monopoly or dominant position compared with 35 such routes at the time of the 2007 bid. The Commission pointed out that the market positions of Aer Lingus and Ryanair had become even stronger since 2007 with their combined market share having risen from 80% in 2007 to 87% in 2012. It identified 28 routes where the merge entity would have a monopoly, compared with 22 in 2007. On a further 11 routes the only competition came from charter airlines.

The Commission also stated:

"The market investigation showed that there was no prospect that any new carrier would enter the Irish market after the merger, in particular, by the creation of a base at the relevant Irish airports, and challenge the new entity of a sufficient scale."

5: Remedies Rejected.

The conclusions of the Commission and the General Court with respect to Ryanair's original 2007 takeover proposal suggested that the airline faced a hard task in trying to persuade the Commission to take a more favourable approach to its latest proposal.

It would appear from media reports that Ryanair had pinned its hopes on offering remedies to address the competition concerns. The Commission states that Ryanair offered several sets of remedies on this occasion. The final remedy offered by Ryanair, according to the Commission, consisted of the divestiture of Aer Lingus' operations on 43 overlap routes to Flybe and the cession of take-off and landing slots to IAG/British Airways at London airports, so that IAG/British Airways would operate on 3 routes from London to Dublin, Cork and Shannon. Flybe and IAG committed to operate the routes for three years.

These remedies were rejected by the Commission which found that Flybe "was not a suitable purchaser capable of competing sufficiently" with the merged entity. It also concluded that IAG/British Airways would not constrain the merged entity to a sufficient degree and would have little incentive to remain on the routes beyond the three years to which they had committed.

Viewed from the outside there appeared to be a number of problems with Ryanair's proposed solution. Divestment as a remedy is most likely to be successful where the divestment involves an ongoing business, or at least a recognisable business unit. Divestiture of assets that do not constitute an ongoing business tends to be far more problematic. Establishing whether the divestment of what is an untested combination of assets will be sufficient to redress competitive concerns is extremely difficult and would appear to go well beyond the competence of competition agencies. Ryanair's remedy effectively involved splitting the Aer Lingus short-haul business in two, raising obvious questions as to whether these operations would prove viable.

Further questions arise regarding Flybe's credibility as a viable long-term competitor. Ryanair's reported offer to provide it with €100 million in cash to cover start-up costs would appear to recognise this problem. The report that Ryanair would guarantee Flybe a profit of €20 million in year one also raises some fundamental questions.

[4] Commission statement of 27th February 2013.

The Commission, in its 2007 decision, had noted there had been numerous unsuccessful attempts at entry on routes, and numerous examples of other airlines pulling out of routes, in and out of Ireland. It highlighted the fact that there was no example of entry by a third carrier on a Dublin route where Ryanair already operated. The fact that no airline apart from Aer Lingus has successfully competed with Ryanair on routes to and from Ireland raises obvious questions about the adequacy of the proposed remedies.

US Appeals Court Rules on Loyalty Rebates.

1: Introduction.

It has often been pointed out that there are significant differences between EU and US competition law when it comes to the treatment of abuse of dominance. The Commission and European Courts have frequently found that loyalty rebates by dominant firms constitute an abuse of a dominant position. In *Hoffman-LaRoche*, for example, the European Court of Justice held that discounts which were conditional on customers obtaining all or most of their requirements from a dominant undertaking were unlawful.[1] The General Court's judgment in *Michelin II* appears to indicate that all rebate schemes are abusive, with the possible exception of strictly linear quantitative rebates.[2]

The issue of loyalty rebates was addressed in a September 2012 judgment of the US Court of Appeals for the Third Circuit.[3] The case involved loyalty rebates included in long term agreements (LTAs) which Eaton, a manufacturer of transmission systems for large trucks, had entered into with the four manufacturers of such trucks in the US.

It should be noted at the outset that section 2 of the Sherman Act is fundamentally different to Article 102 in that it has never been construed as providing a remedy against most forms of exploitative conduct. Rather it is concerned with prohibiting the acquisition and/or maintenance of monopoly power.

The plaintiff in the case alleged that the loyalty rebates included in Eaton's LTAs effectively meant that they constituted exclusive dealing agreements which foreclosed the market. The original trial jury found in favour of the plaintiffs but Eaton appealed the decision. The Appeal Court by a 2 to 1 majority (Greenberg, J. Dissenting) ruled in favour of the plaintiffs.

[1] *Hoffman LaRoche v. Commission*, [1979] ECR 461.

[2] *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II 4082.

[3] *ZF Meritor LLC and Meritor Transmission Corporation v. Eaton Corporation.*3rd Circuit, 28th September 2012.

2: The Facts of the Case.

The parties agreed that the relevant market was heavy-duty truck transmissions ("HD transmissions") in North America. Heavy-duty trucks included 18-wheeler "linehaul" trucks, which are used to travel long distances on highways, and "performance" vehicles, such as cement mixers, refuse trucks, and dump trucks. The Court was told that there were three types of HD transmissions: three-pedal manual, which use a clutch to change gears; two-pedal automatic; and two-or-three-pedal automated mechanical, which engages the gears mechanically through electronic controls. Linehaul and performance transmissions, which comprised over 90% of the market, typically use manual or automated mechanical transmissions.

The Court noted that Eaton had long been a monopolist in the market for HD transmissions in North America.[4] It began making HD transmissions in the 1950s, and was the only significant manufacturer until Meritor entered the market in 1989 and began offering manual transmissions primarily for linehaul trucks.

There were only four direct purchasers of HD transmissions in North America: Freightliner, LLC ("Freightliner"), International Truck and Engine Corporation ("International"), PACCAR, Inc. ("PACCAR"), and Volvo Group ("Volvo"). The judgment refers to these companies as the Original Equipment Manufacturers ("OEMs"). The ultimate consumers of HD transmissions, truck buyers, purchased trucks from the OEMs.

Truck buyers had the ability to select many of the components used in their trucks, including the transmissions, from OEM catalogues called "data books". Data books listed the alternative component choices, and included a price for each option relative to the "standard or preferred offerings". The standard offering was the component that was provided to the customer unless the customer expressly designated another supplier's product, while the preferred or preferentially-priced offering was the lowest priced component in the data book among comparable products. The court noted that data book positioning was a form of advertising, and standard or preferred positioning generally meant that customers were more likely to purchase that supplier's components. Although customers could, and sometimes did, request components that were not published in a data book, doing so was often cumbersome and increased the cost of the component. Thus, data book positioning was essential in the industry.

By 1999, Meritor had obtained approximately 17% of the market for sales of HD transmissions, including 30% for linehaul transmissions. In mid-1999, Meritor and ZF Friedrichshafen ("ZF AG"), a leading supplier of HD transmissions in Europe, formed a joint venture known as ZF Meritor, and Meritor transferred its transmissions business to the joint venture. Aside from Meritor, and then ZF Meritor, no significant external supplier of HD transmissions had entered the market in the previous 20 years.

One purpose of the ZF Meritor joint venture was to adapt ZF AG's two-pedal automated mechanical transmission,

[4] Eaton had claimed that it was not a monopolist in the original trial but did not appeal the lower court's finding that it was.

ASTronic, which was used exclusively in Europe, for the North American market. The redesign and testing took 18 months, and ZF Meritor introduced the adapted ASTronic model into the North American market in 2001 under the new name FreedomLine. FreedomLine was the first two-pedal automated mechanical transmission to be sold in North America.

When FreedomLine was released, Eaton projected that automated mechanical transmissions would account for 30-50% of the market for all HD transmission sales by 2004 or 2005.

In late 1999 through early 2000, the trucking industry experienced a 40-50% decline in demand for new heavy-duty trucks. Shortly thereafter, Eaton entered into new LTAs with each OEM. The Court noted that, although long-term supply contracts were not uncommon in the industry, and had been used by Meritor in the 1990s, Eaton's new LTAs were unprecedented in terms of their length and coverage of the market. Eaton signed LTAs with every OEM, and each LTA was for a term of at least five years.

Although the LTAs' terms varied somewhat, the key provisions were similar. Each LTA included a conditional rebate provision, under which an OEM would only receive rebates if it purchased a specified percentage of its requirements from Eaton. Eaton's LTA with Freightliner, the largest OEM, provided for rebates if Freightliner purchased 92% or more of its requirements from Eaton.

Under Eaton's LTA with International, Eaton agreed to make an up-front payment of $2.5 million, and any additional rebates were conditioned on International purchasing 87% to 97.5% of its requirements from Eaton. The PACCAR LTA provided for an up-front payment of $1 million, and conditioned rebates on PACCAR meeting a 90% to 95% market-share penetration target. Finally, Eaton's LTA with Volvo provided for discounts if Volvo reached a market-share penetration level of 70% to 78%.[5]

The Court noted that the LTAs were not true requirements contracts because they did not expressly require the OEMs to purchase a specified percentage of their needs from Eaton. However, the Freightliner and Volvo LTAs gave Eaton the right to terminate the agreements if the share penetration goals were not met. Additionally, if an OEM did not meet its market-share penetration target for one year, Eaton could require repayment of all contractual savings.

Each LTA also required the OEM to publish Eaton as the standard offering in its data book, while two of the four LTAs required the OEM to remove competitors' products from its data book entirely. Freightliner agreed to exclusively publish Eaton transmissions in its data books during 2002, but reserved the right to publish ZF Meritor's FreedomLine through the life of the agreement. In 2002 Freightliner and Eaton revised the LTA to allow Freightliner to publish other competitors' transmissions, but the revised LTA provided that Eaton had the right to renegotiate the rebate schedule if Freightliner chose to publish a competitor's transmission. Subsequently, Freightliner agreed to a request by Eaton to remove FreedomLine from all of its data books. Eaton's LTA with International also required that International list exclusively Eaton transmissions in its electronic data book.

[5] The lower targets for Volvo reflected the fact that it manufactured some transmissions itself.

International did, however, publish ZF Meritor‘s manual transmissions in its printed data book. The Volvo and PACCAR LTAs did not require that Eaton products be the exclusive offering, but did require that Eaton products be listed as the preferred offering. Both Volvo and PACCAR continued to list ZF Meritor‘s products in their data books. In the 1990s, Meritor‘s products had been listed in all OEM component data books, and in some cases, had preferred positioning.

The LTAs also required the OEMs to "preferential price" Eaton transmissions against competitors' equivalent transmissions. Eaton claims that it sought preferential pricing to ensure that its low prices were passed on to truck buyers. The Court noted, however, that there were no express requirements in the LTAs that savings be passed on to truck buyers (i.e., that Eaton‘s prices be reduced) and there was evidence that the "preferential pricing" was achieved by both lowering the prices of Eaton‘s products and raising the prices of competitors' products.

Eaton argued that it was "common" for price savings to be passed on to truck buyers, and a Volvo executive testified that some of the savings from Eaton products were passed on while others were kept to improve profit margins. The plaintiffs argued that according to an email sent by Eaton to Freightliner, the Freightliner LTA required that ZF Meritor‘s products be priced at a $200 premium over equivalent Eaton products. Likewise, International agreed to an "artificial penal[ty]" of $150 on all of ZF Meritor‘s transmissions as of early 2003, and PACCAR imposed a penalty on customers who chose ZF Meritor‘s products.

Finally, each LTA contained a "competitiveness" clause, which permitted the OEM to purchase transmissions from another supplier if that supplier offered the OEM a lower price or a better product, the OEM notified Eaton of the competitor‘s offer, and Eaton could not match the price or quality of the product after good faith efforts. The parties disputed the significance of the "competitiveness" clauses. Eaton maintained that Plaintiffs were free to win the OEMs' business simply by offering a better product or a lower price, while the Plaintiffs argued and presented testimony from OEM officials that, due to Eaton‘s status as a dominant supplier, the competitiveness clauses were effectively meaningless.

By 2003, ZF Meritor determined that the Eaton's LTA's had effectively limited it to just 8% of the market, far less than the 30% that it had projected at the beginning of the joint venture. ZF Meritor officials concluded that the company could not remain viable with a market share below 10% and decided to dissolve the joint venture. After ZF Meritor‘s exit, Meritor remained a supplier of HD transmissions and became a sales agent for ZF AG to ensure continued customer access to the FreedomLine. However, Meritor‘s market share dropped to 4% by the end of fiscal year 2005, and Meritor exited the business in January 2007.

3: The Appeal Court Judgment.

The majority held that "the most significant issue" in the case was whether the plaintiff's claims "are subject to the price-cost test or the 'rule of reason' applicable to exclusive dealing claims."

The US Supreme Court has ruled in a judgment involving alleged predatory

pricing that prices that are above cost cannot be considered anti-competitive.[6]

Eaton had argued that the case was a "pricing practices" case, i.e., a case in which price was the clearly predominant mechanism of exclusion and therefore urged the court to apply the price-cost test. According to Eaton the Plaintiffs' claims were, "at their core, no more than objections to Eaton offering prices, through its rebate program, which Plaintiffs were unable to match."[7] It contended that the Plaintiffs had identified nothing, other than Eaton's pricing practices, that incentivised the OEMs to enter into the LTAs. Eaton argued that the Plaintiffs had failed to establish that Eaton had engaged in anticompetitive conduct because the Plaintiffs had not proved - or even attempted to prove - that Eaton had priced its transmissions below an appropriate measure of its costs. In support of their arguments Eaton cited several Supreme Court judgments which had applied the price-cost test regardless of the way the plaintiff had cast its case, on the grounds that price itself constituted the exclusionary tool.

The Court accepted that even if a plaintiff framed its claim as one of exclusive dealing, the price-cost test might be dispositive. Nevertheless they rejected Eaton's argument that the "price-cost" test was the appropriate test. The majority held that the Plaintiffs had consistently argued that the LTAs, in their entirety, constituted *de facto* exclusive dealing contracts, which improperly foreclosed a substantial share of the market, and thereby harmed competition. Consequently the majority concluded that Eaton's conduct had to be evaluated under the "rule of reason". For an exclusive dealing agreement to be considered unlawful under the rule of reason standard, its probable effect must be to substantially lessen competition in the relevant market, not merely to disadvantage rivals.[8]

The Court rejected Eaton's claims that the LTA's did not constitute an exclusive dealing agreement. It noted that it was not necessary for an agreement to explicitly include an exclusivity provision or for it to apply to 100% of sales to be regarded as constituting an exclusive dealing agreement. According to the Court the high percentage of their requirements that the OEM's were required to purchase from Eaton's, (in excess of 90% in most cases) resulted in the foreclosure of a large proportion of the relevant market such that they served to prevent new entry.

In addition the majority held that "the LTAs were replete with provisions that a reasonable jury could find anticompetitive."[9] These included the data book provisions; the "preferential pricing" provisions and the "competitiveness" clauses. Interestingly the majority concluded that the "competitiveness" clauses "were of little practical import because Eaton's conduct ensured that no rival would be able to offer a comparable deal."[10]

Disagreeing with the majority verdict, Greenberg J. held *inter alia* that the appropriate test was the price-cost test:

> "...the [Supreme] Court's unwavering adherence to the general principle that

[6] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993).
[7] Judgment at p.27.
[8] *Tampa Electric Coal Co. v. Nashville Coal Co.*, 365 U.S. 320, (1961).
[9] Judgment at p.58.
[10] Judgment at p.60.

> above-cost pricing practices are not anticompetitive and its justifications for that position lead me to conclude that this principle is a cornerstone of antitrust jurisprudence that applies regardless of whether the plaintiff focuses its claim on the price or non-price aspects of the defendant's pricing program."

In his dissenting judgment Greenberg, J. also noted that the LTA's did not require the OEM's to purchase anything from Eaton, much less 100% of their transmissions. On that basis the judge concluded that the LTA's did not foreclose competition in any share of the market because the OEMs were free to walk away from the LTAs at any time.

4: Comment.

The decision in this case, and the point on which the Court disagreed, hinged on the question of whether the loyalty rebates should be regarded as an effective price reduction rather than constituting an exclusive dealing arrangement. EU case law has always tended to view loyalty rebates as involving exclusivity. The Court's view of Eaton's "competitiveness" clause is also worth noting. Eaton argued that this provision meant that customers were free to switch to other suppliers. The Plaintiff and the majority view of the Court was that Eaton's practices effectively meant that there were no alternative suppliers that customers could switch to so that the clause was meaningless. Under EU law such "English" clauses are themselves regarded as infringements.

Grocery Prices - Much Ado About Nothing?

1: Introduction.

On 12th February the main newspapers reported on a survey of grocery prices carried out by the Consumers Association of Ireland. It was reported that some items had risen sharply in price over the previous two years. The *Irish Times*, for example, reported that "the cost of a typical basket of groceries" had risen by "more than 12 per cent in less than two years." The report went on to state that "the sharp rise in the cost of what are basic food necessities does require some explanation". The Irish Independent stated that the survey found that supermarkets typically "matched" each other's prices and were therefore not competing with one another. Similar reports were carried on radio news reports.

2: Grocery Prices – Some Facts.

The first thing to note about the reported survey is that it included just 19 items. Such a limited sample could hardly be considered representative. The typical supermarket would stock well in excess of 10,000 items. Inevitably the prices of some items will rise by more than those

of others. It is also not unusual for some items to rise by more, possibly significantly more, than the overall rate of inflation.

The CAI survey did not include Aldi and Lidl outlets, presumably because they do not carry the full range of branded products included in the survey.

The most accurate indicator of trends in consumer prices and grocery prices in particular is the CSO's Consumer Price Index (CPI). It is based on monthly surveys of prices of 632 item headings in a fixed panel of retail and service outlets located across the State. It includes all goods and services purchased by households and not just grocery prices. Over 50,000 prices are collected by CSO inspectors every month. The products included in the CPI and the weights attached to each of them reflect consumer spending patterns and are updated at regular intervals. Thus, if we want to know what is happening to "the cost of a typical basket of groceries" then we should look at food prices as measured by the CPI.

Table 1 gives details of changes in the CPI and its main components over the past four years.

The table shows that the price of food and non-alcoholic drinks increased by just 0.5% in 2012 having fallen for the previous three years. The price of food and non-alcoholic drink fell by 6.3% over the past four years. These figures do not suggest that there is any great need for concern regarding grocery prices.

The prices of some other product categories have fallen even further reflecting the sharp downturn in the economy. Clothing and footwear prices, for example, have fallen by almost 22% over the past four years. Household equipment and furniture costs have declined by over 11%. Hotel and restaurant prices have fallen by just 3%.

Table 1: Annual % Price Changes of Various Items

	2009	2010	2011	2012	2009-12
Food & non-Alcoholic Drinks	-3.5	-4.5	-1.1	+0.5	-6.3
Alcoholic Drinks & Tobacco	+6.3	-2.6	-0.1	+3.5	+7.2
Clothing & Footwear	-11.7	-9.4	-1.8	-0.2	-21.7
Housing, Water, Electricity, Gas & Other Fuels	-22.0	+1.3	+9.7	+0.6	-12.8
Furnishings, Household Equipment & Routine Household Maintenance	-3.1	-4.1	-2.3	-2.5	-11.4
Health	+3.5	+0.6	+3.4	+0.5	+8.2
Transport	-4.0	+3.1	+3.4	+5.8	+8.2
Communications	+0.5	+1.4	+2.3	-1.5	+2.7
Recreation & Culture	-0.3	-1.8	-0.8	-1.2	-4.1
Education	+6.4	+6.4	+0.7	+8.4	+23.4
Restaurants & Hotels	-	-2.6	-0.7	+0.4	-3.0
Misc Goods & Services	+7.6	+1.1	+6.5	+4.8	+21.5
All Items	**-4.5**	**-1.0**	**+2.6**	**+1.7**	**-1.3**

Source: CSO.

The table also indicates that some prices have increased quite significantly in recent years. For example, the price of education services and miscellaneous goods and services increased by 23% and 22% respectively over the past four years. Prices of health and transport services have both increased by over 8% over the past four years.

3: Competition in the Grocery Trade.
There was some suggestion in the media reports that the price survey indicated that there was a lack of competition in the Irish grocery trade. One cannot draw any meaningful conclusions about competition in the sector on the basis of a survey of the prices of 19 items.

Budget 2013 – Unfair to Wine Drinkers?

1: Introduction.
Budget 2013 provided for an increase in excise duty of €1 on a 75cl bottle of wine. This compared with a 10 cent increase in excise duty on a pint of beer and on a standard measure of spirits with pro-rata increases on other alcohol products. Wine drinkers may perhaps be wondering why they were hit so hard by Minister Noonan.

Taxation policy is largely a matter for member State governments. However, in setting excise duties for alcohol products, Governments need to ensure that they do not discriminate against imported products. There is EU case law to the effect that excise duties which discriminate against imported drinks products in favour of domestically produced products infringe EU Treaty rules.

Obviously virtually all wine sold in Ireland is imported while beer and spirits are largely domestically produced. Interestingly discrimination may occur even in respect of different drinks products which would not generally be regarded as substitutes for one another from a competition law perspective.

2: Relevant Case Law.
The European Court of Justice has ruled that UK excise taxes discriminated against wine in favour of domestically produced beer.[1] The Court observed:

> "The only retail outlets in which the prices to consumers of wine and beer are of a neutral character and therefore relatively transparent are supermarkets and specialist outlets."[2]

The Court found that it was "apparent that precisely those wines which, in view of their price, are most directly in competition with domestic beer production are subject to a considerably higher tax burden."[3] The Court of Justice went on to state:

> "It is clear, therefore, following the detailed inquiry conducted by the Court - whatever criterion for

[1] *Commission v United Kingdom*, [1983] ECR 2265.
[2] *Ibid.* p.2272.
[3] *Ibid.,* p.2292.

comparison is used, there being no need to express a preference for one or the other - that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production, inasmuch as beer production constitutes the most relevant reference criterion from the point of view of competition. Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage."[4]

In a subsequent case, the Court of Justice rejected claims that Sweden's excise tax regime discriminated against imported wines in favour of domestically produced beers.[5] However, this was largely on the basis that even if beer and wine had been taxed on the same basis the impact on wine prices would not have been sufficient to affect consumer purchases.

Interestingly the Court regarded wine and beer as being in competition with one another, although from a competition perspective, wine and beer would generally not be considered to be part of the same market. The SSNIP test that is normally applied to define markets in competition cases is generally concerned with establishing whether a firm or firms have sufficient market power to impose a small but significant price increase generally of the order of 5%. In other words from a competition perspective it is not necessary for firms to have sufficient market power to impose a substantial increase in price for there to be a problem. Substantial price increases, however, are likely to cause consumers to switch to alternative products even though such alternatives are not close substitutes.

3: Comment.

Could the increased excise duty imposed on wine in Budget 2013 be regarded as discriminating against imported wine in favour of domestically produced beer and spirits? Presumably if it were the Commission would have pointed this out to the Minister when they offered their comments on his Budget proposals.

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[4] *Ibid.*, p.2292.
[5] *Commission v Sweden,* Case C-167/05, judgment of 8th April, 2006.