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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Greece

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Economic analysis and evidence in abuse cases

– Contribution from Greece* –

1. Economic analysis plays a central role in competition law enforcement in the HCC. In most competition cases, the Commission employs an economic qualitative assessment and, in some cases, quantitative economic analysis in their investigations and overall decision making. This economic reasoning is employed in order to develop in a consistent manner or, conversely, to rebut because of its inconsistency, economic evidence and arguments in a given case and supports the assessment of the anticompetitive or pro-competitive effects.

2. In many cases, whenever feasible, the HCC formulates testable hypotheses that are checked against the actual data of each case using quantitative econometric analysis, i.e. the economic reasoning is accompanied by an appropriate empirical model capable of testing the relevant hypotheses given the data available. All the necessary data are usually collected from dawn raids and several information requests addressed to investigated companies, competitors and customers. Recently, the HCC introduced the use of consumer surveys in order to address the issue of data limitations in different types of cases.

3. The HCC has also used in several cases external economic experts in order to assist it with more specialised quantitative economic analysis, and has put in place a specific unit for Economic Research at the authority in order to engage with new topics that are of relevance for its enforcement action, such as the issue of common ownership¹, computational competition law and economics², ecosystems and competition law³. On the basis of powers conferred by a new legislative amendment (Art. 21A of Law 3959/2011), the HCC proceeded to the advertisement of positions of chief economist and a chief economist team in August 2021 and the specific process will be completed by the end of the year. The team will initiate an extensive and systematic effort of mapping of the state of competition in selected Greek markets and sectors and the preparation of various indexes that would enable the Competition Commission to identify “problem markets” in order to start investigations or employ the market investigation reference tool (Art. 11 of Law 3959/2011) and to better prioritize its enforcement activity in the context of Art. 101, 102 TFEU and their national equivalents (Art. 1 & 2 Law 3959/2011).

* The note has been drafted by I. Lianos, N. Lionis, .M Rantou (HCC).

¹ See, <https://www.epant.gr/en/enimerosi/publications/media/item/1232-jcle-conference-common-ownership-interlocking-directorates-competition-a-transatlantic-perspective.html>.

² See, the HCC, Inception Report on Computational Competition Law and Economics, January 2021, available at <https://www.epant.gr/en/enimerosi/publications/research-publications/item/1414-computational-competition-law-and-economics-inception-report.html> and the workshop organised on the same topic, available at <https://www.epant.gr/en/enimerosi/publications/media/item/1401-the-promise-of-computational-competition-law-and-economics-issues-prospects.html>.

³ See, <https://www.epant.gr/en/enimerosi/publications/media/item/1596-ecosystems-competition-law.html>.

4. There is a wide range of quantitative methods that have been used as a means to produce or support evidence in antitrust cases mostly in abuse/ monopolisation cases but also in the context of mergers or market investigations and sector inquiries. These can vary from fairly uncomplicated descriptive statistics to advanced structural econometric models of demand and supply.

1. Economic analysis in abuse cases

5. In the last 20 years, the HCC has used different types of economic quantitative methods in the context of its investigations in abuse/ monopolisation cases. Such examples include:

1.1. Decision 520/2011 concerning the salty snacks market in Greece

6. The case concerned two complaints alleging that the company Tasty SA had implemented a targeted policy on a systematic basis, seeking to exclude its competitors from the market by means of exclusivity and discrimination.

7. In the course of the ensuing investigation, the HCC gathered an extensive set of data from the dawn raid which took place at Tasty's premises and from several information requests addressed to competitors and customers, with a view to establishing whether Tasty held a dominant position on the market and whether it had engaged in anti-competitive practices. Extensive economic analysis was also conducted for the purpose of defining the relevant product market, after the submission of economic reports and testimony by both Tasty and the complainant.

8. In particular, the quantitative tests performed and thoroughly discussed in the context of the market definition were a **SSNIP test**, **critical loss analysis**, **price correlation analysis** and **cointegration analysis** (see paras. 95-105 of the Decision). The HCC assessed the economic analyses brought forward by the company and, without however performing additional quantitative tests, dismissed them and adopted a narrower market definition.

9. The company under investigation also submitted an **AEC test** but the HCC dismissed it as irrelevant in the circumstances of the case (see paras. 317-324 of the Decision).

10. The Administrative Court of Athens, which heard the case on appeal (Decision 869/2013) upheld the HCC's analysis.

1.2. Decision 581/2013 concerning the retail market for baby diapers in Greece

11. In that case, the HCC found that Procter & Gamble (P&G) Greece had infringed Articles 1 and 2 of the Greek Competition Act and Articles 101 and 102 TFEU, by engaging in anticompetitive commercial practices in the retail market for baby diapers in Greece and imposed a fine of EUR 5.3 million. The case was opened following an *ex officio* investigation.

12. According to the HCC decision, the evidence gathered throughout the investigation (including contracts between P&G and the supermarkets concerned; interviews of the undertakings concerned; supermarkets' scorecards; shelf plan-o-grams, instructions to merchandisers and other internal documents and emails) proved that P&G adopted and implemented anticompetitive practices aimed at maintaining and/or strengthening its dominant position in the market for baby diapers, thereby excluding competitors and limiting their growth possibilities. The alleged abusive conduct included, in particular, individualised target rebates and rebates conditional upon the commitment of excessive shelf space for P&G baby diapers products, as agreed between the latter and major retail chains between 2003 and 2011.

13. In order to define the relevant market, the HCC considered the price elasticities of the company under investigation (own price elasticity of demand and cross price elasticity of demand) using a **Log-Log model** (see paras. 76-88 of the Decision). It is noted that the HCC considered whether a **SSNIP test** would also be appropriate but eventually concluded that such a test would not be relevant in the circumstances of the case (see para. 67 of the Decision).

14. In addition, it is noted that the company under investigation argued that the HCC should have run an economic analysis in order to establish the anti-competitive effects of its behaviour. This approach was not accepted by the HCC, however two HCC members expressed a dissenting opinion arguing that such analysis was necessary in the case at hand (para. 336 of the Decision).

15. The Administrative Court of Athens, which heard the case on appeal ([Decision 2458/2017](#)) upheld the HCC Decision as regards the above issues and, *inter alia*, dismissed the applicant's argument that the HCC was under the obligation to run an economic analysis in order to assess the effects of the company's behaviour on the market. The Court found that the HCC has broad discretion to this effect and it was sufficient that the HCC had considered that the analysis brought forward by the company under investigation during the administrative procedure was not relevant in the circumstances of the case (see para. 24 and para. 27 *in fine* of the Court judgment).

1.3. [Decision 590/2014](#) concerning the market for the production and distribution of beer:

16. The case concerned an investigation (*ex officio* and following a complaint by Mythos Brewery S.A.), into whether Athenian Brewery S.A., a subsidiary of Heineken N.V. active in the production and distribution of beer in Greece, abused its dominant position, thereby infringing Articles 2 of the Competition Act and 102 EU Treaty.

17. According to the HCC, the dominant company Athenian Brewery S.A. has adopted and implemented a single and targeted policy that sought to exclude its competitors from the on-trade consumption market (e.g. HORECA chains and other retail outlets) and to limit their growth possibilities, over a period of fifteen years. To achieve this objective, Athenian Brewery S.A. employed various commercial practices aimed at exclusivity, including significant payments conditional upon exclusivity and/or the foreclosure of competitive brands, loyalty and target rebates. Furthermore, Athenian Brewery S.A. was found to have engaged in restrictive practices at the wholesale level, by providing wholesalers with significant economic motives that promote exclusivity and by exercising pressure on them not to trade or introduce competing products. A fine totalling EUR 31.451.211 was imposed on Athenian Brewery S.A.

18. In that case, the company under investigation had brought forward a **SSNIP test** and carried out a **critical loss analysis** in the context of the market definition (see paras. 166-177 of the Decision). The HCC assessed the economic analyses brought forward by the company and dismissed them. The HCC, contrary to the company's submissions, adopted a broader market definition without however running an additional SSNIP test (see paras. 178-184 of the Decision).

19. In addition, the company under investigation submitted a detailed economic analysis (based on the **Almost Ideal Demand System -AIDS model**) in order to rebut the HCC's assumption that it held a dominant position in the relevant market (see paras. 274-291 of the Decision). The HCC assessed these arguments and dismissed them, finding that the company held a dominant position based on a number of factors that established

that dominance and considered that the economic analysis brought forward by the company was not sufficient to overturn such conclusion (paras. 299-324) of the Decision).

20. The company under investigation also submitted an **AEC test** in order to prove that its behaviour did not have anti-competitive effects on the market. However, the HCC dismissed it as irrelevant in the circumstances of the case, as the anti-competitive behaviour in question concerned non-pricing practices (see paras. 687-699 of the Decision).

21. The Administrative Court of Athens, which heard the case on appeal ([Decisions 62/2016](#) and [4055/2016](#)) upheld the HCC's analysis.

1.4. [Decision 610/215](#) concerning the market for detergents and cosmetics:

22. That case concerned an *ex officio* investigation in the market for detergents and cosmetics which resulted in an infringement decision with fines totalling EUR 10,450,000 total imposed on Colgate Palmolive (C-P) and chains of super markets for anticompetitive clauses in the supply agreements that led to the prevention of importing C-P products from other Member States that constituted violation of Articles 1 and 2 of the Greek Competition Act and 101 and 102 TFEU.

23. The company under investigation had brought forward a theoretical econometric model to test whether the contractual clauses in question affect negatively the domestic prices and consumer welfare. The HCC assessed the company's proposed model and concluded that the econometric model is based on methodological assumptions that are reasonable to lead to different and misleading conclusions, noting, *inter alia*, that it does not take into account the important role price elasticity of demand plays out.

24. The Administrative Court of Athens, which heard the case on appeal ([Decisions 2572/2018](#), [2574/2018](#) and [2578/2018](#)) upheld the HCC's analysis.

1.5. [Decision 663/2018](#) concerning the market for the production and sale of margarine and butter:

25. That case concerned the *ex officio* investigation conducted by the Directorate-General for Competition regarding the potential violation of Articles 1 and 2 of the Greek Competition Act as well as Articles 101 and 102 TFEU by the company ELAIS-UNILEVER HELLAS in the market for the production and sale of margarine and butter. The HCC found that ELAIS-UNILEVER HELLAS SA had adopted and implemented abusive practices aimed at maintaining and/or strengthening its dominant position in the market for margarines, thereby excluding competitors and limiting their growth possibilities. The alleged abusive conduct included, *inter alia*, target rebates, as well as the imposition of unfair trading conditions by banning the promotion of competitive brands, in breach of Article 2 of the Greek Competition Act and 102 TFEU from 2002 to 2008. Also HCC found that ELAIS-UNILEVER HELLAS SA engaged in anticompetitive vertical practices. The HCC imposed a fine totalling EUR 27 561 704,69.

26. In that case, the company under investigation (ELAIS-UNILEVER HELLAS) submitted an **AEC test** before the HCC in order to prove that its behaviour did not have anti-competitive effects in the relevant market. The HCC considered that the AEC test was not relevant in view of the circumstances of that particular case (see pages 127-130 of the Decision), however it ran, for completeness, an AEC test based on the methodology suggested by the company under investigation. Upon the basis of this analysis, the HCC concluded that an as efficient competition would have been excluded from the relevant market for the period under investigation (pages 131-132 of the Decision).

27. The Administrative Court of Athens, which heard the case on appeal (Decision 1611/2020) upheld the HCC Decision on the above issues and considered in particular that the HCC's reasoning in the Decision was not flawed in this respect, given that the AEC test was carried out by the HCC only on a subsidiary basis and it had not altered the HCC's main conclusions as regards the effects of the company's behaviour on the market (see paras 22-23 of the Court judgment).

2. Economic analysis in other cases

28. It is also worth noting that the HCC employs such economic models and tools in other types of competition law enforcement, such as mergers, sector inquiries and market investigations. In the field of merger control, some examples include the following⁴:

- In its [Decision 515/2011](#) (DELTA/ MEVGAL) concerning the Greek dairy market, the HCC ran a **SSNIP test** and a **cointegration analysis** in order to proceed with the market definition (see para. 65 of the Decision as well a full Annex accompanying the decision and setting out the relevant econometric analyses). In order to consider the possible effects of the merger, the HCC took into account the **Buying Power Index – BPI** (see paras. 253-256 of the Decision) and based on this economic analysis concluded that remedies were necessary so as to approve the merger.
- In its [Decision 606/2015](#) (MYTHOS/ OLYMPIC BREWERY) concerning the Greek beer market, the HCC carried out a **switching analysis** and reviewed the relevant diversion ratios in order to establish whether the merging parties could be considered as “close competitors” (see paras. 105-114 of the Decision) in order to evaluate the effects of the concertation in the relevant market.

29. More recently, the HCC has used complex economic models in the context of its Sector Inquiries and its Market Investigations (Regulatory intervention under Article 11 of the Greek Competition Act). More specifically:

- In the context of its [Sector Inquiry into Basic Consumer Goods](#), the HCC applied specific methodologies for assessing both horizontal and vertical competition (see section 5 of the HCC's Final Report). For the assessment of vertical market power, the HCC utilized innovative indicators, that have their origins in the differential dependency theory of social exchange theory and the notion of centrality of network analysis, and identify the important role of a company's central position in a value chain or network/ecosystem, especially with regard to different capabilities and different possibility of unequal access to essential resources. Using data from the Greek supermarket sector collected in the context of the sector inquiry, the HCC applied the Share of Square Betweenness Centrality (**SSBC**) indicator and the **Vertical HHI** indicator to assess suppliers and retailers' levels of vertical power for 11 product categories in the Greek supermarket sector in years 2015 to 2019. In addition to the above analysis, the sector inquiry also undertook an econometric analysis (**Fixed Effects Regression Model**) of horizontal competition using collected panel data, in order to examine the interactions between companies operating supermarket chains and their suppliers in the formulation of supply conditions as a result of negotiations between them, which is linked to the supply price as a measure of bargaining power, mostly focusing on horizontal effects (horizontal competition) on specific markets. Both empirical analyses used in this sector inquiry attempted to approach the same issue, i.e. the measurement of

⁴ A table summarising the types of economic test used by the HCC in different cases is included as [Annex I](#).

vertical market power, from a different perspective and both concluded that supermarkets with a larger market share achieve improved bargaining conditions, i.e. a lower purchasing price.

- In the context of the on-going [Market Investigation in the Press Distribution Sector](#) (Regulatory intervention under Article 11 of the Greek Competition Act) the HCC engaged external experts to apply vGUPPIs to the Hellenic publishing market in order to assess vertical foreclosure concerns due to the fact that some of the shareholders in Greece's sole press distribution agency are also active in the vertically connected publishing market (vertical common ownership)⁵. Based *inter alia* on this economic analysis, the HCC found in its Interim Report that the structure of the single press distribution agency with the participation of publishers-shareholders in its share capital may create incentives for potential coordination and possible unilateral behaviour benefiting the publishers-shareholders over rival shareholders. The experts also discussed the two-sided nature of the newspapers and magazines publishing market (in view of advertising), taking into account this dimension in the analysis of the possible pro- or anticompetitive effects of the specific market configuration.
- Similarly, in the context of the recently launched [Market Investigation in the Construction Sector](#) the HCC focused on the structure of the sector and proceeded to the application of the theory of (horizontal) common ownership. In particular, it was considered that the joint horizontal participation of a specific fund in the two largest construction undertakings in Greece may lead to unilateral and coordinated effects. To this effect and in order to evaluate the market concentration, the HCC's external experts used a modified Herfindahl–Hirschman Index (MHHI), which extends the standard HHI index, by taking into consideration common ownership between firms in a specific market. The experts employed two alternative specifications for MHHI, the **proportional** and the **Banzhaf controls**. The former control assumes that the effect of common ownership is proportional to the respective shares of each shareholder in competing firms, while the Banzhaf control assumes that the effect of common ownership is dependent on the effective voting power of each shareholder.

30. Moreover, the HCC has recently introduced the use of [surveys](#) in order to address the issue of data limitations in different types of case (ie not only in abuse/ monopolisation cases). In particular:

- In the context of the recently launched [Market Investigation in the Press Distribution Sector](#) the HCC launched a consumer survey in order to collect information and data on press readers' preferences so as to assess price elasticity between different competing newspapers.
- Similarly, in the context of its on-going [Sector Inquiry into E-Commerce](#), the HCC's Directorate of Media, Online Services and E-Infrastructure designed and conducted a pan-hellenic online consumer survey, with the aim of maximising the participation of all stakeholders concerned, including consumers. The HCC set up an online platform, to which 1,973 online consumers responded. Through this survey, the HCC gathered relevant data on consumer behaviour and preferences with regard to e-commerce in Greece.

⁵ The vertical gross upward pricing index (vGUPPI) framework used is a modification of the gross upward pricing index (GUPPI) framework, which is a well-established approach to quantifying price effects of a horizontal merger. The vGUPPI framework (Salop and Moresi, 2012) defines and measures specific economic incentives that may arise post-merger in a vertical transaction.

3. The difficult task of assessing economic evidence

31. Although there is no clear theoretical framework developed in order to assess economic evidence, and this is performed by the HCC Board on a case-by-case basis, taking into account the specificities of each case, we consider that some important lessons emerge from the previous practice of the HCC, as well as other competition authorities assessing increasingly complex economic evidence. Certainly, the HCC attaches to the various pieces of evidence a probative value, based on the reliability of that evidence. Yet, the approach is holistic rather than atomistic: judgments of plausibility are rendered not on propositions of facts viewed individually and in isolation, but —the truth of any particular proposition of fact (including a fact on the economic phenomenon examined) will have to be assessed in the context of a larger hypothesis or story or narrative account⁶. This does not however mean that plausibility reduces itself to probability. The assessment of the evidence or more generally fact-finding should not focus on abstract probabilities but on the relative plausibility of well identified competing hypotheses. Legal proof thus becomes a form of inference to the best explanation that examines the comparative plausibility of different hypotheses—ending in the question whether one is justified in believing (or treating) any of them as the true (or most plausible) account⁷. The approach followed involves two steps: first, it is important to generate potential explanations of the evidence; second, it is important to select the best explanation from the list of potential ones (which will be the actual explanation). Choosing among competing explanations depends on the *relative* plausibility of each narrative/story, as measured by reference to a number of criteria: the degree of coverage (that is —the greater the portion of the evidence a story is able to account for the higher its plausibility), the completeness/consilience of the story (it explains more facts and has less gaps), the coherence of the narrative (that is —the added quality of the individual elements integrating well together to yield a smooth and convincing narrative of events) and finally its probative force (that is —the positive support it receives from the evidence)⁸. It is submitted that such an approach may work for any type of evidence, including complex economic evidence.

⁶ Ioannis Lianos, —Judging Economists: Economic expertise in competition litigation: a European view, in Ioannis Lianos & Ioannis Kokkoris (ed.), *The Reform of EC Competition Law - Towards an Optimal Competition law System*, Kluwer International, The Hague, 2009, pp. 185-320.

⁷ Ronald J. Allen, —The Nature of Juridical proof, (1991) 13 *Cardozo L Rev* 373; Ronald J. Allen, —Explanationism all the way down, (2008) *Episteme* 320; Michael S. Pardo & Ronald J. Allen, —Juridical Proof and the Best Explanation, (2008) 27 *Law and Philosophy* 223.

⁸ Ho Hock Lai, *A Philosophy of Evidence Law* (OUP, 2008), 164; Ioannis Lianos & Christos Genakos, Econometric evidence in EU competition law: an empirical and theoretical analysis, in I. Lianos & D. Geradin (eds.), *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013), 1-137.

Annex I. Table summarising the type of economic tests used in HCC cases

Type of test	Market definition				Behavioural/ effects analysis					
	Elasticity analysis	SSNIP/ Critical Loss	Cointegration Analysis	Price correlation	BPI	Diversion ratios/ GUPPI/ IPR/ CPPI	AEC	Effects analysis on the market	vGUPPI	MHHI
Cases in which it was applied	Case 515/2011 (DELTA/MEVGAL)	Case 515/2011 (DELTA/MEVGAL)	Case 515/2011 (DELTA/MEVGAL)	Case 515/2011 (DELTA/MEVGAL)	Case 515/2011 (DELTA/MEVGA L)	Case 574/2013 (PIRAEUS BANK/ CYPRIOT BANKS)	Case 520/2011 (TASTY)*	Case 640/2015 (Colgate-Palmolive)*	Market Investigation in the Press Distribution Sector	Market Investigation in the Construction Sector
	Case 573/2013 (LOTTERY/ OPAP)	Case 573/2013 (LOTTERY/ OPAP)	Case 573/2013 (LOTTERY / OPAP)	Case 573/2013 (LOTTERY/ OPAP)		Case 606/2015 (MYTHOS / OLYMPIC BREWERY)	Case 590/2014 (Breweries)*			
	Case 581/2013 (Procter & Gamble)*	Case 520/2011 (TASTY)*	Case 520/2011 (TASTY)*	Case 520/2011 (TASTY)*			Case 663/2018 (ELAIS-Unilever)*			
	Case 590/2014 (Breweries)*									
	Case 640/2015 (Colgate-Palmolive)*									

Cases indicated with an asterisk () are abuse cases