

**Integrating and Assessing Economic Evidence under Cyprus Competition Law:  
Case Comment on the Cyprus Commission for the Protection of Competition  
Decision No. 42/2014<sup>\*,\*\*</sup>**

Stephanie Theodotou<sup>±</sup> and Sofronis Clerides<sup>a</sup>

<sup>a</sup>Department of Economics, University of Cyprus

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## Abstract

It is indisputable that economics has become an essential parameter in modern competition law enforcement, with the result that the analysis of a competition law case is virtually impossible without the integration and assessment of economic evidence in reaching the final decision. Best practice across the European Union (“the EU”) in applying competition law clearly recognises the critical correlation between the proper selection, presentation and content of the relevant economic evidence and its appropriate interpretation and assessment by the decision-making body. In the case of Cyprus, this body is the Cyprus Commission for the Protection of Competition (“the Commission”).

This paper is a case comment aiming to present the reader with an insight into the manner the Commission has handled and assessed economic evidence in the process of reaching its decision No. 42/2014, with particular reference to part 11.4.2 of its decision, which is the relevant economic analysis of the Commission. It begins with an exposition of the material facts, the decision and the economic dimensions of the case. It then focuses on the critical aspect of how the Commission dealt with and analysed the economic evidence before it in order to decide the case. The paper ends with a section on the approaches taken in competition law and practice both in Cyprus, with reference to the case in question, the United Kingdom (“the UK”) and the wider EU framework.

To the best of our knowledge, this paper is the first attempt to evaluate a competition case in Cyprus from an economics perspective. Providing that there is a significant gap in public discourse in this area, even among competition and economics experts, this paper marks the

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\* Republic of Cyprus, Commission for the Protection of Competition (2014). *Ex officio investigation against the PanCyprian Organisation of Cattle Farmers (POCF) Public Ltd for alleged violations of Articles 3 and/or 6 of the Law no.13(I)/2008, and Articles 101 and/or 102 of the TFEU*. [Online]. Available from: [http://www.competition.gov.cy/competition/competition.nsf/All/48E9E591D181CB42C2257DB300318A45/\\$file/Dec.42-2014\\_11.17.012.08\\_ExOfficioPOA\\_nonconfidential.doc.pdf?OpenElement](http://www.competition.gov.cy/competition/competition.nsf/All/48E9E591D181CB42C2257DB300318A45/$file/Dec.42-2014_11.17.012.08_ExOfficioPOA_nonconfidential.doc.pdf?OpenElement) [Accessed: 14 October 2015]. Hereinafter referred to as “the case”.

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<sup>±</sup> Corresponding author. Address: P.O. Box 24565. Email: [stephanietheodotou@hotmail.com](mailto:stephanietheodotou@hotmail.com).

beginning towards the narrowing and the bridging of gap therein, and is accordingly of crucial importance to competition law and practice in the Republic of Cyprus.

**Keywords:** competition economics, economic evidence, Cyprus Commission for the Protection of Competition, price fixing, excessive pricing, exclusivity and restriction of supply.

## 1. Introduction

There was a step-change in the importance attached to competition law by the Cyprus' government in the period preceding its entry into the EU<sup>1</sup>, which similar to the USA, views competition law as a key element in safeguarding consumer welfare.<sup>2</sup> Cyprus' competition legislation gives the Commission all the necessary powers and means to maintain a "healthy competitive market".<sup>3</sup> Competition economics is a critical component in this process,<sup>4</sup> since it provides the underlying rationale of competition law in general.<sup>5</sup> Indeed, the contemporary integration of science into the law<sup>6</sup> reflects contemporary society's willingness to bring science under the control of the law. Hence, the role of economic evidence is an essential element of the integration of economics within competition law and policy.<sup>7</sup>

This paper sets out to examine the role and assessment of economic evidence in the enforcement of competition law in Cyprus through Decision No.42/2014. It will consider whether the Commission approached the case in a more "formalistic"<sup>8</sup> manner, or whether its approach was more economics-oriented. Moreover, it will be argued, *inter alia*, that on the whole the Commission conducted an adequate economic assessment of the evidence that was relevant to decide the case and that the economic evidence that was relied on by the Commission in order to decide the case was largely accurate. It will further be submitted that the firm integration of sound economic analysis of the quantitative data collected, during the Commission's legal analysis and decision-making process has arguably increased the efficiency and the effectiveness with which it dealt with the issues raised by the case.

This paper is divided into four sections, excluding the introduction and the conclusion. The first part comprises a brief overview of the facts that were material to the Commission's economic evaluation, while the second elaborates on the Commission's decision. The third section, which accounts for the greatest proportion of this paper, comprises an analysis and case commentary, providing a critical viewpoint into the use and legal analysis of economic evidence by the Commission regarding part 11.4.2 of its decision, which is the relevant economic analysis of the

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<sup>1</sup> Christoforou, C., and Neocleous, M. (2010) Competition. In Andreas Neocleous (ed.). *Neocleous's Introduction to Cyprus Law*. 3<sup>rd</sup> Ed. Limassol: Andreas Neocleous & Co LLC, 661.

<sup>2</sup> Glader, M. (2006) *Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law*. UK: Edward Elgar Publishing Limited, 9.

<sup>3</sup> Christoforou and Neocleous (n.1) 682.

<sup>4</sup> Niels, G., Jenkins, H., and Kavanagh, J. (2011) *Economics for Competition Lawyers*. United States: Oxford University Press Inc, 580.

<sup>5</sup> *Ibid*, 2.

<sup>6</sup> Jasanoff, S. (1995) *Science at the Bar: law, science, and technology in America*. Cambridge: Harvard University Press, 4.

<sup>7</sup> *Ibid*, 7.

<sup>8</sup> Decker, C., and Yarrow, G. On the discovery and assessment of economic evidence in competition law. *RPI Europe*. [Online] Available from:

[http://www.rpieurope.org/Publications/Studies\\_New\\_Series/Economic\\_Evidence\\_in\\_Competition\\_Law.pdf](http://www.rpieurope.org/Publications/Studies_New_Series/Economic_Evidence_in_Competition_Law.pdf) [Accessed: 11<sup>th</sup> October 2015], 17.

Commission.<sup>9</sup> The fourth section evaluates the stance taken in competition law and practice both in Cyprus, the UK and the EU as a whole.

## 2. Facts

The case concerned an *ex officio* investigation<sup>10</sup> by the Commission with the purpose of evaluating the extent to which the Pancyprian Organisation of Cattle Farmers Public Ltd (POCF) violated sections of the Protection of Competition Law (“the Law”)<sup>11</sup> as amended by The Protection of Competition Law 2014 (N. 41(I)/2014)<sup>12</sup> and Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU)<sup>13</sup> with its practices in the market of raw cow’s milk.<sup>14</sup> In the wider context, the Commission investigated the potential existence and/or implementation of decisions and/or practices and/or behaviour by the POCF in relation to the sale and delivery prices of fresh cow’s milk during the period between 1 January 2009 and 28 May 2012, which may have had as their purpose or effect the prevention, distortion and restriction of competition,<sup>15</sup> contrary to Sections 3 and 6 of the Law. The Case revolved around three key competition aspects: price fixing, excessive pricing, and exclusivity and restriction of supply of fresh cow’s milk.<sup>16</sup> These aspects were crucial in evaluating the economic impact of the prices charged by the POCF to the dairy industry and, ultimately, to consumers.

In order to apprehend the nature of the alleged violations, a brief description will follow into the structure of the product market and the facts in the instant case, which has been derived from publically-available information in the Commission’s official website. The relevant product market in the instant case was fresh cow’s milk. It is the main input in the production of various final products, primarily pasteurized milk, cheese products and ice cream. Milk from other animals (mainly goats and sheep) is used in the production of halloumi cheese and for some niche products.<sup>17</sup>

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<sup>9</sup> Case, 128.

<sup>10</sup> Christodoulou, L. (2015) The European Antitrust Review 2015: Cyprus: Commission for the Protection of Competition. *Global Competition Review*. [Online] Available from: <http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2473/cyprus-commission-protection-competition/> [Accessed: 11<sup>th</sup> October 2015].

<sup>11</sup> Cyprus Bar Association (2008). *The Protection of Competition Law 13(I) of 2008*. [Online]. Available from: [http://www.cylaw.org/nomoi/enop/non-ind/2008\\_1\\_13/full.html](http://www.cylaw.org/nomoi/enop/non-ind/2008_1_13/full.html) [Accessed: 14 October 2015]. Hereinafter referred to as “the Law”.

<sup>12</sup> Republic of Cyprus, Commission for the Protection of Competition (2014). *The Protection of Competition (Amending) Law 41(I) of 2014*. [Online]. Available from: [http://www.competition.gov.cy/competition/competition.nsf/All/8C7125E7D5A5A2AAC2257CAF003203EA/\\$file/ProtectionofCompetition-Amendment-Law.41-2014.pdf?OpenElement](http://www.competition.gov.cy/competition/competition.nsf/All/8C7125E7D5A5A2AAC2257CAF003203EA/$file/ProtectionofCompetition-Amendment-Law.41-2014.pdf?OpenElement) [Accessed: 14 October 2015]. The amendments purported to increase the effectiveness and the efficiency of the State’s competition enforcement, see European Competition Network, *Cyprus: Amendments to Protection of Competition Law enter into Force (ECN Brief 02/2014)*. [Online]. Available from: [http://ec.europa.eu/competition/ecn/brief/02\\_2014/brief\\_02\\_2014\\_short.pdf](http://ec.europa.eu/competition/ecn/brief/02_2014/brief_02_2014_short.pdf) [Accessed: 14 October 2015].

<sup>13</sup> Consolidated version of the Treaty on the Functioning of the European Union (EC) C 115/47 [26.10.2012] OJ L0J C 326.

<sup>14</sup> Case, 58-9.

<sup>15</sup> *Ibid*, 1-2.

<sup>16</sup> Christodoulou (n.10).

<sup>17</sup> Case, 157.

It is important to note that the importation of fresh cow's milk in the geographic region of Cyprus is impractical for long-distance purposes and there is no substitute for fresh, locally produced milk. Production of fresh milk takes place in dairy cattle farms. The milk is then transported to the industrial users who will transform it into pasteurized milk for consumption (45% of production), halloumi (38%), other cheeses, or ice cream. In the EU, the Common Agricultural Policy (CAP) regulates the production of milk. Each country is assigned a production quota, which is in turn distributed among the country's producers. In the case of Cyprus, the Ministry of Agriculture, Rural Development and the Environment sets production quotas.<sup>18</sup>

There were about 210 cattle farmers in Cyprus in the period under investigation and about 80% of them were members of POCF. The POCF purchases milk from its members and sells it to the final users. Its market share of 65-75%<sup>19</sup> made it the primary intermediary between producers and users of fresh milk. Milk producers that were not POCF members sold their milk directly to industrial users or used it themselves. The POCF's dominant position as a milk seller meant that it had a substantial bargaining power in its dealings with buyers. Milk buyers that have been surveyed by the Commission claimed that the POCF essentially dictated prices and there was no room for negotiation.<sup>20</sup> The POCF also held a significant bargaining power with respect to its own members. It set a single price for milk that was paid to all its members and purchased all the milk for each member, provided the amount produced was within the member's production quota. POCF members were not permitted to sell milk to other buyers. Once a new member joins the POCF, it must stay with the organisation for at least three years. If a member decides to leave, it must relinquish its production quota and thus effectively go out of business.

It is also important to discuss the Smooth Milk Production (SMP) measure relating to the instant case. Both the demand and the supply of milk are seasonal and the patterns are not in sync. The production of milk production tends to exceed demand between January and April annually. In order to address this repeated imbalance, the POCF had initiated the SMP measure according to which during the period between January and April, the POCF paid a price of *zero* for any quantity delivered by a milk producer that was in excess of the producer's daily quota. Given that producers were not allowed to sell their milk elsewhere, this meant that they received no income from any production exceeding their daily quota.<sup>21</sup> Producers received a price of *zero* regardless of whether the POCF was able to sell the milk.

In relation to milk prices across the EU, according to data provided by the Commission the price of milk in Cyprus was noted to be the highest in the EU by far and was about twice the EU average price. Furthermore, the data demonstrated that the gap between prices in Cyprus and elsewhere had increased sharply in 2008.<sup>22</sup> The price of animal feed increased steeply in the second half of 2007 and gradually reverted back to its previous levels during 2008. Accordingly milk prices rose in

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<sup>18</sup> The Cyprus Milk Industry Organization (CMIO) had been responsible for proposing the distribution of quotas to the Minister up until its dissolution on March 21, 2014. Its competences were transferred to the Department of Agriculture.

<sup>19</sup> Case, 70.

<sup>20</sup> *Ibid*, 156.

<sup>21</sup> The EU-mandated production quota is annual and is binding at that level. On a daily basis producers may under- or over-produce relative to the corresponding daily "quota" (the annual quota divided by 365).

<sup>22</sup> Case, 148-150.

many EU countries in 2007 and whilst milk prices returned to their previous levels everywhere in the EU, this did not happen in Cyprus, where milk prices remained at their peak levels during the early stages of 2008.<sup>23</sup>

Taking into consideration the aforesaid facts, the Commission observed that cow's milk has peculiar characteristics that make it a product lacking close substitutes and noted the product's use to make traditional types of cheeses.<sup>24</sup> Hence, charging an excessive price on cow's milk can have a pronounced impact on consumers.<sup>25</sup> This is important because consumer welfare, along with "producer surplus and total welfare",<sup>26</sup> is a core rationale for the proper implementation and practical enforcement of competition law.<sup>27</sup> Consumers must be protected from unfair and abusive terms. The interplay of competition law with economic concepts, theories and ideas have an enormous influence in this process;<sup>28</sup> the ultimate goal is a "competitive, dynamic market economy"<sup>29</sup> at a level sufficient to uphold consumer welfare. Hence, in collecting and analysing economic and econometric evidence, the Commission's decision-making process was fully consistent with the underlying principle of consumer protection enshrined in Section 4 of the Law.<sup>30</sup>

Overall, the instant case, along with its rather peculiar facts, demonstrate the invaluable importance of the law in targeting practices that harm the efficiency and effectiveness of competition law and policy.<sup>31</sup> For coherency purposes, the Commission's decision will be the focus of the following section.

### 3. Decision

The Commission concluded that the POCF violated Sections 3(1)(a)-(b) and 6(1)(a) of the Law. In particular, in performing its functions as a producer association, the POCF violated Section 3(1) of the Law. There were two specific provisions in the POCF's contracts with cattle farmers that were in violation of the Law. The imposition of standardized prices on fresh milk to all producers constituted price fixing, which is a prohibited practice under Section 3(1)(a) of the Law.<sup>32</sup> The conclusion of exclusive contracts with cattle farmers and the inclusion therein of no-competition clauses amounted to a violation of Section 3(1)(b) of the Law.<sup>33</sup> Moreover, the decision of the POCF to implement the SMP was also found to be anti-competitive because it limited the production of raw cow's milk contrary to Section 3(1)(b) of the Law.<sup>34</sup>

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<sup>23</sup> *Ibid*

<sup>24</sup> *Ibid*, 157.

<sup>25</sup> *Ibid*, 159.

<sup>26</sup> Van den Bergh, R.J., and Camesasca, P.D. (2006) *European Competition Law and Economics: A Comparative Perspective*. 2<sup>nd</sup> Ed. London: Sweet & Maxwell, 51.

<sup>27</sup> Guidelines (EC) Guidelines on the application of Article 81(3) of the Treaty [2004] OJ L101/08, [13]

<sup>28</sup> Niels, Jenkins and Kavanagh (n.4) 586.

<sup>29</sup> Kroes, N. (2005) *European Competition Policy – Delivering Better Markets and Better Choices*. [Speech] London: 15<sup>th</sup> September 2005.

<sup>30</sup> Case, 61, 66-69, 128, 157, 159, 169.

<sup>31</sup> European Commission. (2005) *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*. [Online] Available from: <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> [Accessed: 11<sup>th</sup> October 2015], [8]

<sup>32</sup> Case, 103-105.

<sup>33</sup> *Ibid*, 105-110.

<sup>34</sup> *Ibid*, 110-111.

The Commission also ruled that the POCF violated Section 6(1)(a) of the Law by exploiting its dominant market position to impose excessive prices on buyers of milk. According to the Commission's findings, the POCF was operating as a price maker rather than a price taker because of the power it possessed over setting the price of fresh cow's milk.<sup>35</sup> It had abused its dominant position in the market of production and marketing of fresh cow's milk.<sup>36</sup> Specifically, the POCF used a positional bargaining stance to impose rigid and inflexible, rather than negotiable,<sup>37</sup> prices on its traders and industrial clients that were excessively high and potentially unfair.<sup>38</sup> Moreover, the Commission highlighted the significance of fresh cow's milk in that it provides a source for producing other consumer products such as ice cream, yoghurt, halloumi and anari cheeses<sup>39</sup> and it is a vital daily source of food<sup>40</sup> to the relevant geographical market of the Republic of Cyprus.<sup>41</sup> Henceforth, excessive pricing had the effect of escalating the prices charged down the chain to adversely impact on consumers,<sup>42</sup> thereby violating Section 6(1)(a) of the Law.

The sanction imposed by the Commission highlights the enormous power vested in the hands of the Commission to impose fines in cases where it finds a violation of the law intended to maintain a healthy competitive market in Cyprus. It imposed administrative fines of €2.1 million for the violations;<sup>43</sup> such a rather "hefty"<sup>44</sup> fine highlights that the nature of competition law is perhaps punitive, and that the fine was intended to deter the POCF from violating competition law provisions in the future, and to deter others from doing the same.<sup>45</sup> Overall, probably the best competition law enforcement results from a qualitative integration of economic assessment, working alongside the legal assessment, of evidence that is presented to competition authorities.<sup>46</sup> The following section attempts to establish whether economic principles were used in a coherent and effective manner<sup>47</sup> in this case.

#### 4. Assessment

This was an important decision for the Commission for several reasons. The fine imposed was one of the largest in the Cyprus domain; in particular, it was one of the five largest fines imposed by the Commission between 2014-15. Milk and its by-products are highly visible as they are basic goods that are consumed in every household. Milk prices had been regulated in Cyprus even before the country's accession into the EU and many consumers of milk remember clearly that pasteurized milk prices had seen a substantial increase following the market's liberalisation. Comparisons with prices in other EU countries have appeared on

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<sup>35</sup> *Ibid*, 52, 158.

<sup>36</sup> *Ibid*, 68.

<sup>37</sup> *Ibid*, 129, 156.

<sup>38</sup> *Ibid*, 159.

<sup>39</sup> *Ibid*, 66-67.

<sup>40</sup> *Ibid*, 159.

<sup>41</sup> *Ibid*, 69.

<sup>42</sup> *Ibid*, 159.

<sup>43</sup> *Ibid*, 176-177.

<sup>44</sup> Christoforou and Neocleous (n.1) 682.

<sup>45</sup> Christodoulou (n.10).

<sup>46</sup> Decker and Yarrow (n.8) 1.

<sup>47</sup> Niels, Jenkins and Kavanagh (n.4) 568.

several occasions in the press during the past years<sup>48</sup> and this case was definitely one of them.<sup>49</sup>

Two aspects of the Commission's decision are worth highlighting. The first one relates to the Commission's handling of a potential conflict between competition policy and the CAP. In its defence, the POCF argued that the formation of producer associations, which market their member's products, is allowed under CAP and overrides competition law. The Commission surfaced a counter argument that the POCF's contracts with its members were more stringent than CAP requirements. In particular, CAP rules stipulated that a producer association may allow its members to sell up to 15% of their production to other buyers.<sup>50</sup> However, the POCF instead imposed strict exclusivity; its members were not allowed to sell *any* of their production to other parties. The Commission ruled that this was unnecessarily strict and constituted a restriction of trade.

The second key aspect of the Case's decision was the Commission's ruling with respect to data provided by the POCF. In response to a request made by the Commission, the POCF submitted data on the cost of milk production. The Commission found that the costs submitted by the POCF were unrealistically high, noting that the reported cost even exceeded the price paid to producers in certain periods. It further argued that dairy farms would be unable to survive financially with such costs and prices. In this regard, the Commission took the bold step of contacting the Agricultural Research Institute ("the ARI"), which runs a model dairy farm, and requesting cost estimates.<sup>51</sup> In response to the Commission's request, the ARI supplied the Commission with cost estimates on milk production, demonstrating the costs for milk production as 25-30% lower than the costs applied the POCF. The Commission found that those cost estimates were more realistic and adopted them for its excessive pricing calculation. Moreover, the Commission firmly rejected the POCF's argument that the costs of the ARI's model farm were not representative given that the ARI is not a commercial enterprise.

### *Economic Evidence: Collection and Analysis*

It is notable that there was no mention of a particular standard of proof of the legal system in this case, or the requisite "degree of confidence"<sup>52</sup> through which the Commission reached a substantial conclusion based on the economic evidence collected. Pursuant to EU competition law, the required standards of proof in competition law cases depend on the national law of each EU Member State. This is evident by looking at Recital 5 to Council Regulation (EC) No 1/2003 which stipulates that "... This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are

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<sup>48</sup> See for example:

[http://www.stockwatch.com.cy/nqcontent.cfm?a\\_name=announce\\_view&ann\\_id=102015](http://www.stockwatch.com.cy/nqcontent.cfm?a_name=announce_view&ann_id=102015)

<sup>49</sup> Michael, C. (2016) The five big fines of the CPC for 2014-15 (in Greek). *InBusiness News*. [Online] Available from: <http://www.inbusinessnews.com/inbusiness/news/financials/cyprus/ta-pente-megala-prostima-ths-epa-gia-to-2014-15> [Accessed 29<sup>th</sup> October 2016].

<sup>50</sup> Case, 42.

<sup>51</sup> *Ibid*, 133-135.

<sup>52</sup> Neven, D.J. (2006) Competition economics and antitrust in Europe. *Economic Policy*. 742-791, 764.

compatible with general principles of Community law.”<sup>53</sup> In common law jurisdictions, such as the UK, the standard of proof in competition cases is the “preponderance or balance of probabilities” as applicable in the civil law cases;<sup>54</sup> this also seems to be the position under Cyprus competition law cases albeit this had not been expressly stated in the instant case.

Furthermore, it seems that the evidence collected by the Commission may not have been entirely “factually accurate, reliable and consistent”<sup>55</sup> since the economic data collected from the POCF, concerning issues like the retail prices of cow’s milk, did not match the Commission’s calculations.<sup>56</sup> It is important that the evidence collected is “precise and coherent”<sup>57</sup> and comprehensive enough as to provide the national competition authority the ability to draw well-reasoned and substantive decisions.<sup>58</sup> It could be argued that having such a high standard of the prerequisite economic evidence is not impractical,<sup>59</sup> because the nature of competition law enforcement is such that it requires economic evidence and the equivalent standard to analyse that evidence in great depth.

### *EU Member State Pricing Comparison*

The Commission compared milk prices, productivity and the income of cattle farmers per cow in other EU Member States<sup>60</sup> for the purpose of making its research more comprehensive and to use it as an indicator in its investigation.<sup>61</sup> On one hand, this perhaps made the economic analysis of pricing much more comprehensive but, since the Commission was not going to use such comparisons as proof of any violation,<sup>62</sup> one could argue that there was no practical need to proceed for such a comparison. Nevertheless, the Commission illustrated its findings through a table chart<sup>63</sup> and a graph,<sup>64</sup> which indicated that in Cyprus (2009) the price of milk was far higher than any other EU Member State.<sup>65</sup> However, in the graph showing the difference in prices between Cypriot and other European producers<sup>66</sup> the Commission used a wider time frame to indicate its findings (from 2003 until 2012). The year 2009 was the sole year to conduct its relative findings regarding the price of raw cow’s milk, productivity and the income of cattle farmers per cow of other EU Member States.<sup>67</sup> This perhaps lessens the comprehensiveness that the Commission intended to establish through this investigation, since it did not consider the years 2010-2012 that were at the core of the investigation.

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<sup>53</sup> Council Regulation (EC) No 1/2003, O.J. L 1/1 (2003). For a more detailed analysis of the standard of proof in competition law cases, see Eric Gippini-Fournier, 'The Elusive Standard of Proof in EU Competition Cases' (2010) 33 *World Competition*, Issue 2, pp. 187-207.

<sup>54</sup> 1022/1/1/03 *JJB Sports Plc v Office of Fair Trading* [2004] CAT 17; [2005] Comp. A.R. 29 at [104]-[109] and [195] affirmed [2006] EWCA Civ 1318; and *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch) at [392].

<sup>55</sup> Case C-12/03 *Commission v Tetra Laval* [2005] ECR I-00987, [39].

<sup>56</sup> Case, 137-142.

<sup>57</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-02969, [7].

<sup>58</sup> Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, [89].

<sup>59</sup> Decker and Yarrow (n.8) 19.

<sup>60</sup> Case, 148.

<sup>61</sup> *Ibid*, 58.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*, 149.

<sup>64</sup> *Ibid*, 150.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*, 151.

<sup>67</sup> *Ibid*, 148.

### *Good Faith in Data Requests*

The Commission used evidence through answers collected from questionnaires and data requests it made to the POCF, the Agricultural Research Institute (ARI) and the Cyprus Milk Industry Organization (CMIO). It is important that these organisations provide the information requested by the Commission in good faith with diligence, accuracy and in accordance with the specifications of Data Requests.<sup>68</sup> For instance, the Commission took into account information provided in a letter from the CMIO indicating that at the time of an increase in grain prices that the European producers passed on by way of increases in milk prices, the POCF maintained its milk manufacture prices at a high level.<sup>69</sup> Such a method arguably adds to the proficiency of the economic analysis<sup>70</sup> and ultimately to the decision-making process, by providing a platform on which the Commission could base its evaluation proving that the POCF's pricing strategy was unlawful.<sup>71</sup>

### *Tackling Excessive Pricing: Healthy Competition and/or Consumer Welfare?*

The argument that "economic welfare cannot be restricted to pure price concerns"<sup>72</sup> does not render price concerns unimportant. For this reason, the Commission began its economic analysis with consumer complaints of high retail prices in pasteurised milk. The mere fact that the POCF has a dominant position in the market of production and marketing of fresh cow milk is not unlawful *per se*; what is needed in order to show illegality is anticompetitive behaviour,<sup>73</sup> which in the case under consideration, was associated with the excessive pricing on the part of the POCF.

The proposition that competition law should as such prohibit excessive pricing and if so, the means by which it should be prohibited is open to debate.<sup>74</sup> However, it could be argued that to answer this question, one has to look to the rationale of competition law; if that is consumer welfare the question can surely be answered in the affirmative, using the policy and enforcement of competition law itself.<sup>75</sup> In the instant case the Commission, in evaluating the prices charged, found that POCF's pricing was excessive, namely illegitimate and/or unfair,<sup>76</sup> contrary to the Law. Excessive pricing is arguably a practice that ultimately results in the exploitation of consumers and runs contrary to one of the core aims of competition law; consumer welfare. Indeed, charging goods at prices that go beyond that which is considered as proportional by consumers, means that consumers have to, in turn, pay that disproportional amount in order to obtain the particular goods. In the instant case, the consumers seem to have been the targeted victims of such practice, since they were compelled to pay, in order to obtain the relevant dairy product(s), a final price

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<sup>68</sup> European Commission. (2010) *DG Competition: Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases*. [Online] Available from:

[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/best\\_practice\\_submissions.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf) [Accessed: 11<sup>th</sup> October 2015], 3.4.1.

<sup>69</sup> Case, 130-131.

<sup>70</sup> European Commission (n.68) 3.4.1.

<sup>71</sup> Case, 131.

<sup>72</sup> Glader (n.2) 16.

<sup>73</sup> *Verizon Communications Inc. v Law Offices of Curtis V. Trinko LLP* 540 US 398, 416 (2004). [Online]. Available from: <http://transition.fcc.gov/ogc/documents/opinions/2004/02-682-011304.pdf> [Accessed: 14 October 2015], 7.

<sup>74</sup> Niels, Jenkins and Kavanagh (n.4) 268.

<sup>75</sup> *Ibid.*

<sup>76</sup> Case, 128.

that was unilaterally and conveniently configured by the POCF to their detriment. Henceforth, given the Commission's imposition of an administrative fine of €800,000 for violating Section 6(1)(a) of the Law,<sup>77</sup> notably the highest of all administrative fines imposed in the case totalling to €2.1 million, clearly suggests that consumer welfare is one of the core rationales, if not the ultimate rationale, of Cyprus' competition law and thus a healthy competitive environment is necessary.

### *The Composition of the Commission: Economists and Lawyers*<sup>78</sup>

Economists are vital to complement competition lawyers and legal decision-makers who have substantially less knowledge in the scientific field than economists do.<sup>79</sup> This is arguably important to improve the regulation and enforcement of competition policy, since competition policy was itself founded based on economic concepts and theories.<sup>80</sup> The fact that the Commission in Cyprus is composed of both economists and lawyers<sup>81</sup> helps to "accumulat[e] economic expertise"<sup>82</sup> and apply economic evidence analysis to determine compatibility within the scope of the Law.<sup>83</sup> Such a combination builds on the effectiveness of the economic analysis in the case under consideration,<sup>84</sup> since it ensures that the economic evidence is given due weight. In particular, when it came to applying economic theories and observing price variations, the gravity of the economic evidence was adequate and the Commission achieved an appropriate measure of "weight and credibility" in assessing the economic evidence presented to it.<sup>85</sup>

## **5. A new era for competition law: evaluating approaches to competition law in Cyprus and beyond**

### *An Inclination Towards an Economics-Oriented Approach in Competition Cases*

Although competition economics is merely a branch of competition policy and enforcement, it is an area of vast scope and coverage.<sup>86</sup> The answer to the question of the extent to which the Commission approached the case in a more "formalistic"<sup>87</sup> manner or on a basis that was more economics-oriented, is important for the role of economic evidence in the practical enforcement of competition law. The Commission used economic theories throughout its analysis of the economic and econometric evidence collected. For instance in the instant case the Commission, in its data collection and analysis of the production of cow's milk, used economic theories to

<sup>77</sup> *Ibid*, 176-7.

<sup>78</sup> A recent judgment by the Administrative Court has rendered the composition of the Commission problematic and consequently, overthrows the function of the Commission as a whole. See Recourse No. 5651/2013, judgment handed down on 26 January 2016. This judgment falls outside the core purpose of the instant research paper and will therefore not be discussed herein.

<sup>79</sup> Jasanoff (n.6) 5.

<sup>80</sup> Glader (n.2) 9.

<sup>81</sup> Republic of Cyprus. (2015) *Commission for the Protection of Competition, Structure*. [Online]. Available from:

[http://www.competition.gov.cy/competition/competition.nsf/structure\\_en/structure\\_en?OpenDocument](http://www.competition.gov.cy/competition/competition.nsf/structure_en/structure_en?OpenDocument) [Accessed: 11<sup>th</sup> October 2015].

<sup>82</sup> Neven (n.52) 780.

<sup>83</sup> Glader (n.2) 9.

<sup>84</sup> Niels, Jenkins and Kavanagh (n.4) 568.

<sup>85</sup> *Ibid*.

<sup>86</sup> Kaplow, L., and Shapiro, C. (2007) *Chapter 15: Antitrust*. [Online] Available from: <http://faculty.haas.berkeley.edu/shapiro/antitrust2007.pdf> [Accessed: 11<sup>th</sup> October 2015], 1077

<sup>87</sup> Decker and Yarrow (n.8) 17.

evaluate how the average cost of production of cow's milk decreases as the producer's effectiveness and productivity increase.<sup>88</sup> This arguably suggests an inclination towards an economics-oriented approach, which ultimately highlights the evolving nature of competition law in incorporating economic aspects and theories.<sup>89</sup> In other countries, notably the UK, the Supreme Court has, in a recent merger case,<sup>90</sup> favoured the taking of an economic stance to competition law, stating that competition authorities should concern themselves with the economic substance of the relevant transactions made in the case besides their legal form<sup>91</sup> and firmly highlighted the significance of looking at the economic rationale of the legislation in the case concerned.<sup>92</sup> It could be argued that the overall decision suggests the supremacy of economic substance over legal form. However, a heavy shift towards the economic approach could have implications in cases where econometric and economic evidence contradict one another.<sup>93</sup> Even the Supreme Court has hinted in its recent judgment that a rather formalistic approach may be deemed necessary to give the law its prescribed legal boundaries and the correct interpretation thereof. As a consequence, this begs the question as to which of those economic analyses should prevail, and whether the ultimate analysis to be preferred is expressed in a clear, succinct and reasoned manner for such a preference.

Over the years, the field of competition law has seen an influence of economics in the decision-making process of competition cases that is so significant, ultimately leading to current worldwide debates of, including, whether there should be specialised tribunals or courts hearing competition cases, whether judges should have a background in economics to decide on competition cases, and the extent to which judges should rely on economics experts' opinions as witnesses in competition cases in order to reach their final decision. It is subsequently submitted that in modern competition law and practice, the approach taken by competition authorities in competition cases pursuant to EU competition law, should not be formalistic, being entirely or excessively adherent to prescribed approaches to competition law. Conversely, the approach of such authorities should tilt towards an economics-oriented approach, because such an approach is more reflective of modern competition practice and of the nature of competition law as such, which contains economic concepts and theories. Therefore, economic evidence and the analysis thereof have, and should continue to have, an important role to play in how competition law is practiced, interpreted and enforced in today's society.

#### *Guidelines on presenting economic evidence in competition cases under Cyprus competition law*

Competition authorities across the globe have, over the past years, put together guidelines regarding the best practices on the use of economic evidence in competition cases. In the UK, the UK Competition Commission has prepared guidelines on the best practices in submitting technical economic analyses, using the underlying principles of clarity in the economic evidence being presented, transparency of the economic theories and assumptions used to reach results,

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<sup>88</sup> Case, 153.

<sup>89</sup> Decker and Yarrow (n.8) 17.

<sup>90</sup> *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75.

<sup>91</sup> *Ibid* [38].

<sup>92</sup> *Ibid* [35].

<sup>93</sup> Case T-168/01 (n.57) [303].

methodology used, provision of a complete description of the relevant economic assessment and the robustness of the results.<sup>94</sup> Similarly, the European Commission has prepared a guidance document<sup>95</sup> on remarkable practices in submitting economic evidence but also in collecting data in competition cases. The guidance highlights the importance of using economic principles, methodology and analysis in order to “address rather than minimize uncertainty”<sup>96</sup> in a given competition case. Addressing that uncertainty however, arguably requires clarity and transparency in the entire process.

It is proposed that the Commission should aim in the near future to prepare and promote guidance on how to present economic evidence in competition cases and how the Commission deals with and analyses such information presented to it. This should include best practices evident in Cyprus, but also in Europe since the essence of Law is, in effect, a translation of the EU competition law. Such guidelines could arguably help in complex competition cases such as the instant one, because it would clarify to the parties in presenting their case what they need to include in the evidence being submitted and at what standard (if applicable) the economic evidence needs to be proved in various competition cases. Furthermore, providing guidelines on best practice in presenting economic evidence and how different competition authorities have integrated the two fields of study and interpreted the evidence to reach their decision would, to a significant extent, add clarity and transparency to the decision-making process. However, it is understandable that this might be difficult to be achieved, because there are confidentiality issues at stake. In the instant case for instance, significant pieces of information concerning, *inter alia*, pricing strategies have been removed from the published decision. This is evident in cases where pieces of the information contained in the decision are highly sensitive in nature and, upon the Commission’s approval this information remains undisclosed from the publishable version of the decision; this is possibly what had happened in the case herein.

## 6. Conclusion

Has the incorporation of economics into competition law worked with respect to the theory and its practical enforcement by the national competition authority in this case?

The Competition Appeal Tribunal has characteristically stated, “competition law is not an area of law in which there is much scope for absolute concepts or sharp edges”<sup>97</sup>. Given the inherent complexity of the field of competition law, economists are essential in guiding lawyers through competition cases by helping them understand the application of competition law to the commercial markets.<sup>98</sup> The fact that the Commission consists of a combination of both lawyers and economists is important because it suggests that the national implementation of competition law in

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<sup>94</sup> UK Competition Commission. (2009) *Suggested Best Practice for Submission of Technical Economic Analysis from Parties to the Competition Commission*. [Online] Available from: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284388/best\\_practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284388/best_practice.pdf) [Accessed: 3<sup>rd</sup> February 2016].

<sup>95</sup> European Commission (2010) (n.68).

<sup>96</sup> *Ibid*, 2.6.

<sup>97</sup> Cases 1035/1/1/04 and 1041/2/1/04, *Racecourse Association and British Horseracing Board v OFT* [2005]. CAT 29, [167].

<sup>98</sup> Niels, Jenkins and Kavanagh (n.4) 7.

Cyprus is gradually becoming “more economics-friendly”.<sup>99</sup> This helps to strengthen the enforcement of competition law<sup>100</sup> while it further emphasises how, in the implementation and enforcement of modern competition law, economists complement the work of competition lawyers and vice versa.<sup>101</sup>

The case that has been discussed herein marks one of the most important decisions in the history of the Commission. The long-established importance of milk as a consumable product that lacks close substitutes, the economic parameters of the case, the heavy fine imposed as well as the publicity given by the media in relation to the subject-matter in question, all highlight the immense importance of the Commission in maintaining a healthy competitive market whilst ensuring consumer welfare. The integration of economics in the practical enforcement of competition law in the instant case has arguably shown an enhanced enforcement of competition law,<sup>102</sup> because of the enhanced economic assessment and analysis of the economic evidence at hand at the necessary stages of the case's decision-making process. This is important because although science and the law are extremely different fields, they nevertheless have similarities; both seek to evaluate evidence in an “authoritative capacity”<sup>103</sup> to reach a viable, substantive and well-reasoned decision. In the case under review, the analysis of economic evidence was an essential factor in the Commission’s decision, which in turn arguably highlights how Cyprus’s national competition legal framework is tailored to incorporate economics into competition law.<sup>104</sup>

Consequently, it is submitted that in the case concerned, the integration and examination of economic evidence has signalled a success, rather than a failure, to “rise to the challenge”<sup>105</sup> of providing a clear, specific and adequate evaluation of the economic evidence that the Commission was presented with in order to reach a consistent decision.

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<sup>99</sup> Neven (n.52).

<sup>100</sup> Niels, Jenkins and Kavanagh (n.4) 585.

<sup>101</sup> *Ibid*, 568.

<sup>102</sup> Decker and Yarrow (n.8) 1.

<sup>103</sup> Jasanoff (n.6) 8.

<sup>104</sup> Kaplow and Shapiro (n.86) 1213.

<sup>105</sup> Decker and Yarrow (n.8) 1.

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