

Chapter 15 Competition law

Context for this chapter

Ilektriki Enérgeia (IE) is a (fictional) energy company from Greece, specialising in the provision of electricity to commercial and residential customers. Its primary focus has historically been on providing electricity in Greece and Bulgaria, but in the last decade, IE has expanded its activities to other European countries.

At the start of 2018, IE supplied electricity to 60% of the households in Greece and Bulgaria. In mid-2018, IE adopted a new pricing strategy, with the aim of consolidating and expanding its market share. The strategy entailed setting different pricing rates for residential customers depending on where they lived. In regions in Greece and Bulgaria where IE faced significant competition, residential customers paid on average 40% less for their electricity supply than residential customers did in regions in Greece and Bulgaria where IE was the only operating electricity utility. IE argues that its strategy is sensible, as it needs to respond to competition where it exists.

Separately, also in the summer of 2018, IE announced that it would shortly expand into the commercial utility sector in Romania. Magyar Hatalom (MH) is the largest electricity provider in Hungary and Romania, and has been quickly expanding its business southward into northern Bulgaria, with a particular focus on the non-residential market: it has found that commercial enterprises are more likely to switch energy providers than homeowners are.

Suddenly, in early 2019, MH announced that it was withdrawing from the commercial energy sector in Bulgaria. The company's press release indicated it was consolidating its activity and 'refocusing on its traditional Romanian and Hungarian business customers'.

Three weeks later, IE sent a memo to its shareholders noting that it was suspending its efforts to expand to the southern Romanian commercial utility sector, as the costs of doing so were higher than anticipated.

In March 2019, MH raised its prices for existing commercial customers in Romania by 10%.

Discussing the scenario

Imagine you are working for the Commission. Explain in what ways IE and MH are violating Articles 101 and/or Articles 102 TFEU, and what action you will take in light of it.

Approaching the scenario

This scenario takes the form of a fairly standard law exam question at university: it describes a factual scenario that has legal repercussions, and in your answer, you are expected to analyze whether the activities undertaken by IE and MH might violate EU competition law, and what would be the consequences of those violations.

Given that competition law is a very technical field, Chapter 15 provided you with two figures that set out how to tackle competition law questions—Figure 15.1 for Article 101 TFEU and Figure 15.2 for Article 102 TFEU. The ‘**Discussing the scenario**’ boxes throughout Chapter 15 will have taken you through these two approaches, and those are addressed here in turn—with a small conclusion on how to summarize your findings, as a Commission employee, on the compatibility of IE and MH’s behavior with Articles 101 and 102 TFEU.

Note: the chapter commences with a description of **undertakings** as ‘**key terms**’, and so you should be able to identify that IE and MH are both undertakings by relying on *Höfner v Macrotron*: these two bodies are clearly engaged in economic activity, and there is no reason to assume they are doing so in public service.

Tackling Article 101 TFEU

Tackling Article 101

1. Does the scenario involve **undertakings**? [And at least two of them—you cannot have an anti-competitive agreement with yourself!]
2. If so, does it involve an **agreement, decision of an association, or concerted practice** by undertakings?
3. If so, does that agreement (or decision/concerted practice) have the **object** or **effect** of preventing, restricting, or distorting competition?
4. And if it has the **effect** of harming competition, is this an **appreciable** effect? (Or a *de minimis* one?)
5. If so, does the agreement have an **effect** on the **trade between Member States**?

If yes: the scenario violates Article 101(1), and Article 101(2) makes the relevant agreement/decision/concerted practice void...

6. ... *unless* Article 101(3) applies, and the agreement/decision/concerted practice:
 - a. Improves the production or distribution of goods or promote technical or economic progress; AND
 - b. Ensures that consumers receive a fair share of the resulting benefits; AND
 - c. Does contain indispensable restrictions; AND
 - d. Does not substantially eliminate competition.

Figure 15.1 – Tackling Article 101 TFEU

Discussing the scenario

In the scenario at the start of the chapter, has IE engaged in any activity that might constitute an ‘agreement’, a ‘decision of associations of undertakings’, or ‘concerted practice’ with any other parties?

To answer this question, you need to have a good understanding of the CJEU's case law on these concepts—and, primarily, you need to be able to confirm that a physical 'written' agreement is not necessary for behavior to fall foul of Article 101 TFEU. Relying on *Suiker Unie* here, looking at IE's behavior with respect to the Romanian market suggests that it might be engaging in 'concerted practice' with MH (in the absence of written evidence of an agreement). Note that the burden of proof, however, would lie on the Commission—and it would have to prove 'concerted practice'.

Discussing the scenario

Consider what IE and MH appear to be doing. Are their practices likely to be restrictions of competition by **object** or by **effect**? Try to explain the difference—and make clear what the Commission would need to prove in order to establish a restriction of competition by **effect**.

If you think they are restricting competition by **effect**, do you think the effect is **appreciable** – does it satisfy the **de minimis** test?

Summarizing the facts, IE looked to be expanding into the commercial utility sector in Romania—while its competitor MH, already active in the commercial utility sector in Romania, looked to be expanding into the Bulgarian market. They then abruptly appeared to revert back to their 'home' markets, with IE focusing only on Bulgaria (and Greece) again, and MH focusing on Romania (and increasing prices there). What this situation describes looks like '**market sharing**': they appear to be splitting the market between them by agreement, rather than competing for customers in both Romania and Bulgaria.

Market sharing is anti-competitive **by object**, meaning that by design it will be anti-competitive and result in higher prices for consumers. An anti-competitive agreement **by effect** could potentially be acceptable. What the Commission would have to investigate, here, is if there are anti-competitive consequences, in the form of higher prices or fewer options for consumers.

As there is anti-competitive behavior **by object**, the Commission would not have to consider if the effects of the agreement are 'appreciable', and so the relevant market shares of IE and MH do not have to be considered here. (Their market shares in commercial electricity supply are also not made clear in the facts, which would make this impossible to answer. At most you could flag up that they are described as 'large' in the market, suggesting that they have a more than 10% market share together.)

Discussing the scenario

Do the practices of IE and MH have **an effect on trade** in electricity between Member States? (What kind of effect? Consider the *STM* definition.)

To satisfy this step, it is essential to know the *STM* definition of practices that have an 'effect on trade'. Does the agreement between MH and IE have an influence, 'direct or indirect, actual or potential', on trade between the Member States? There is no need to overthink this: IE was going to start 'trading' in Romania, but has decided not to; and MH

was going to start trading in Bulgaria, but decided not to. As these are all Member State territories, potential trade-off between the Member States is clearly affected by the agreement.

Discussing the scenario

Consider the behaviour of IE and MH. Do they qualify for an exemption in Article 101(3) TFEU? If not – what happens?

The only way to qualify for an exemption from Article 101 TFEU is through either a block exemption—which you are not expected to be aware of, but can assume does not exist here, as these are horizontal agreements—or by satisfying the conditions in Article 101(3) itself. To do the latter, an agreement must do the following, per the Treaty text:

- a. Improve the production or distribution of goods or promote technical or economic progress; AND
- b. Ensure that consumers receive a fair share of the resulting benefits; AND
- c. Contain indispensable restrictions; AND
- d. Not substantially eliminate competition.

As these are cumulative requirements, the fact that you know that MH is increasing prices in Romania as a consequence of the agreement is enough to find that the agreement will not qualify for an Article 101(3) TFEU exemption.

However, if you read the chapter closely, you will come to an even simpler conclusion: as the agreement was found to be anti-competitive **by object**, it is likely to be a ‘hardcore’ restriction of competition, and so automatically is disqualified from an Article 101 TFEU exemption. ‘**Market sharing**’ is such a ‘hardcore’ infringement, and so IE and MH’s behaviour will not be exempt from EU competition law.

The consequence of this is that, if there is an ‘agreement’, it is automatically void under Article 101(2) TFEU; and, if there is no agreement, a Commission decision finding a violation of Article 101 TFEU will require the concerted practices to be immediately ceased. As a Commission employee, you will at that point likely wish to fine IE and MH, and can do so for a maximum of 10% of total turnover of both undertakings for the preceding year under Council Regulation 1/2003. If they do not stop their concerted practices, periodic penalty payments can also be instituted, also under Council Regulation 1/2003.

Article 102 TFEU

Tackling Article 102

1. Does the scenario involve at least one **undertaking**?
2. Is that undertaking **dominant** in what we will call the **relevant market**?
 - a. First, what is the **relevant market**?
 - b. Second, what is the undertaking's **market strength**?
 - c. Third, what are the **barriers to entry** in the relevant market like?
3. If the undertaking is dominant in the relevant market, does that market cover (in geographical terms) at least a **substantial part** of the **internal market**?
4. If so, is the dominant undertaking engaging in **abusive** practices?
5. And finally, does the abuse **affect trade between Member States**?

If yes, the undertaking has violated Article 102 TFEU, unless it can provide a **justification** for its practices.

Figure 15.2 – Tackling Article 102 TFEU

Note: there are no ‘**Discussing the question**’ boxes that ask you to address these points, but in any Article 102 TFEU question, you need to ensure that you are dealing with an ‘**undertaking**’, and that when you find abusive behaviour, you assess if it ‘**affects trade between Member States**’ per the *STM* test.

Discussing the scenario

What is the **product market** in which IE is active? Consider what the Commission will want to argue, and what IE might argue in order to prove it is *not* dominant in a product market. Applying the substitutability test, who do you think will succeed in their argument?

The product is described as ‘energy’ or ‘electricity’ in different points of the problem question, with IE seeming to work primarily in the ‘residential energy’ sector. The Commission will want to argue that IE is a specialist ‘residential electricity’ supplier, because, the smaller the product market, the more likely it will be that IE is dominant *in* that market. IE, on the other hand, would argue it was active in the ‘energy’ market, which encompasses not only electricity but also gas, solar energy, wind energy, nuclear energy, and so on. (You are not expected to be an expert on the energy market, but mentioning one or two sources other than ‘residential electricity’ demonstrates that this is a bigger market *than* the electricity market.) On the ‘energy’ market, IE is an active player, but it may not be dominant.

United Brands gives us an idea of how the Commission might go about such an argument: applying the substitutability test, we have to consider if there are any specific properties to electricity that make it hard to switch away from when faced with price increases. Where the CJEU found, in that case, that the banana is a fairly bespoke fruit, here, too, we can argue that being an ‘residential electricity’ supplier is a fairly specialist enterprise, and one whose consumer base is unlikely to change. For example, we are not suddenly going to have electronic equipment that can run on something *other* than electricity, and so there is a constant need for that product, regardless of its price.

Discussing the scenario

From the facts given in the scenario, what do you think IE's **geographic market** is? And do you think a **temporal market** applies to the scenario?

Combine your answers to these questions with your definition of the **product market** and you have arrived at the **relevant market**.

On the **geographic market**, the facts give you various pieces of information. They tell you that, historically, IE has been active in Bulgaria and Greece—but also that it is starting to expand to other European countries. What do we do with that kind of information? *United Brands* tells us that the geographic market for competition law purposes is one 'where the objective conditions of competition applying to the product in question must be the same for all traders'. Do we know enough about the residential electricity market in the entirety of the EU to conclude that it is one single market? Not really. In this case, then, you could probably make the case that IE is active in the entirety of the EU in the 'residential energy' market, or you could argue that, as it is primarily active in Greece and Bulgaria, *those* countries are the geographic market in which IE is genuinely 'active'. The latter point is easier to argue. IE, however, will likely argue that it is active across the EU, again because its dominance would be harder to prove in that case.

There is no **temporal market** in electricity: it does not go out of season, unlike certain consumables.

Combining our assessments for these three markets, we are, as the Commission, likely to argue that the **relevant market** here is the residential electricity supply market in Bulgaria and Greece. (IE will protest that the **relevant market** is the energy market in the EU.)

Discussing the scenario

What is IE's market share? Can we presume it is dominant, or not? And do you think there are significant barriers to entry to the **relevant market** in which IE operates? Try to guess what these might be—we appreciate you are not an expert in the field of energy.

Then, complete the following:

IE is / is not in a dominant position in the relevant market, namely _____, as it holds a ____ market share and there are / are not substantial barriers to entry into that market.

If you, as a Commission employee, argued that IE's relevant market is that of residential electricity in Greece and Bulgaria, the facts state its market share to be 60%. (If you argued that the relevant market is that of residential electricity in the EU, you will have no idea what its market share is—and so cannot establish if IE is dominant or not, which effectively ends this question here for you.)

From *Akzo*, we know that presumptions of dominance commence at market shares over 50%, but that dominance has equally been found at market shares above 40% in numerous cases (like *Hoffman-La Roche* and *United Brands*). In Greece and Bulgaria's residential electricity market, IE thus appears to be dominant.

To be sure of its dominant status, however, we have to consider if there are significant barriers to entry in the ‘residential electricity supply’ market. Does this seem like a market in which new players could very quickly become active? You are not expected to be able to assess this in any kind of detail, but can probably make some assumptions about it requiring specific equipment and skills that are not easy to come by. As such, IE’s dominance in this market is likely to be stable.

These are likely to be your overall findings:

IE **is** in a dominant position in the relevant market, namely **the Greek and Bulgarian residential electricity supply market**, as it holds a **60%** market share and there **are** substantial barriers to entry into that market.

The ‘**Discussing the scenario**’ box does not specifically ask you to consider this, but in answering the problem question, you should specify that IE *is* dominant in a substantial part of the Single Market, per the test set out in *Suiker Unie*—as Greece and Bulgaria are both in the Single Market.

Discussing the scenario

Is IE engaged in any abusive pricing or non-pricing behaviour in the scenario?

Reading Chapter 14, you may be able to identify that IE charging different customers different prices for reasons that cannot be objectively justified is abusive pricing behaviour. This is known as **discriminatory pricing**. In order for the different prices charged to different consumers to *not* be abusive, there would have to be production reasons for these price differences. Helpfully, IE outright admits that it is trying to outprice its competitors, which is not a motivation that can be justified under Article 102 TFEU. As in *United Brands*, this will be considered abusive.

The facts of the scenario do not tell you enough about IE’s new pricing strategy for you to consider if it also is engaging in **predatory pricing**: while you know that the customers in the areas where it has competition get a 40% discount, it is not clear if that discount results in electricity prices that are ‘below cost’ for IE. You can suggest it *might* be engaging in predatory pricing, but you do not know.

From the facts, IE does not appear to be engaging in any abusive non-pricing behaviour in Greece and Bulgaria: there is no evidence that it is refusing to supply, tying/bundling products, or setting out exclusivity clauses.

Discussing the scenario

Consider in what ways IE has abused its dominance on the relevant market. Can this abuse be justified on any grounds, in your view?

There is no right or wrong answer to this question, but it is a matter that you, as a Commission employee, should consider. Is there a legitimate reason for IE to be engaging in price discrimination? It argues that it is doing so because its competition is *making* it do so—but this would be very hard to argue as a justification, not least of all because it is clear that not *all* consumers are benefitting equally from IE’s pricing strategy. If we

consider what, according to the CJEU, makes abuse of dominance ‘objectively necessary’, it is hard to see that the price discrimination is necessary for reasons *outside* of IE’s control (as per *CBEM*). It could, after all, offer all of its customers the same 40% discount. It thus seems likely that IE will not be able to justify its pricing strategy as ‘necessary’, but, if you can come up with a creative justification, do argue it!

Proportionality is very hard to consider as a non-expert on the residential electricity market, and with limited details on what IE and its competitors are actually charging. You only need to address this in detail if you think IE *can* justify its pricing strategy. Does a 40% discount seem reasonable to you, or excessive? What matters most is not what you conclude, but that you *address* the matter of proportionality.

Finally, while the ‘**Discussing the scenario**’ box does not ask you to do this, if you, as a Commission employee, find a violation of Article 102 TFEU, you are again likely to fine it for its behavior, as set out in Council Regulation 1/2003.

Summary

As a Commission employee, your findings are that:

- IE and MH are both undertakings (engaged in economic activity, *Höfner*), likely to be engaged in concerted practice in the absence of a written agreement (*Suiker Unie*) that is in violation of Article 101 TFEU. Their practice has the object of preventing competition, in that they are engaged in market sharing: IE is now only operating in the Bulgarian commercial electricity market, and MH is now only operating in the Romanian Bulgarian commercial electricity market. Market sharing is a ‘hardcore’ competition restriction, listed in Article 101 TFEU. This has a potential effect on trade between the Member States (*STM*) in that IE and MH are actively stopping trading their products to different Member States. If there is a written agreement between them, it is void under Article 101(2) TFEU; if not, the practices must be stopped. They cannot be justified under Article 101(3) TFEU, as they fail to ensure that consumers benefit from their practices—MH is actually increasing prices, not lowering them. The Commission will issue a decision to fine IE and MH to a maximum of 10% of their total turnover for the previous year.
- As established, IE is an undertaking. The relevant market in which it is active is the residential electricity supply market in Bulgaria and Greece. Electricity is a product with low substitutability as consumers cannot switch away from it easily, and as IE’s activities are focused on Bulgaria and Greece, conditions for operation there are likely to be similar. Its strength in this market is 60% according to the facts. According to *Akzo*, a presumption of dominance exists from 50%. Electricity supply also seems likely to be a market that has a high barrier to entry in terms of equipment/finance/specialization. IE is therefore dominant in the relevant market of residential electricity supply in Bulgaria and Greece. Bulgaria and Greece form a substantial part of the internal market (*Suiker Unie*). IE appears to be abusing its dominance in this market by engaging in price discrimination (*United Brands*), which will affect potential trade between Member States (*STM*). It is unlikely to be justifiable abuse of dominance, in that it appears unnecessary (or, if you argue that it might be justifiable, address if you think its behavior is proportionate).