Abuse of Dominance: the EU approach

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Overview

- General principles
- Dominance
- Abuses
  - Exclusionary abuses:
    - Analytical Framework
    - Types of exclusionary conduct
  - Exploitative Abuses:
    - Analytical Framework
    - Types of exploitative conduct
- Antitrust procedure

Abuse of Dominance: the EU approach

General principles

Article 101 versus 102

- Article 101: prohibits agreement between independent firms if the agreement restricts or distorts competition
  - Prohibits agreement or restraints in the agreement: remedial action relatively simple
  - Efficiency defence under Article 101(3), burden of proof on parties
- Article 102: prohibits abuse of dominant position
  - Prohibits unilateral conduct: remedial action often more complex
  - Efficiency defence unclear until ECJ judgment of Post Danmark (2012)

Unilateral conduct

- Why is there a specific rule on unilateral conduct by dominant undertakings?
  - Structure:
    - Merger control insufficient
    - Limit use of market power obtained by internal growth
  - Exclusionary Conduct:
    - Distinguish competition on the merits versus anticompetitive conduct
  - Exploitative conduct
    - Limit customer exploitation
    - Problems: what is exploitation? Reasons to allow supra-competitive margins as incentive to compete?
- Distinguish from Market Regulation

Article 102

- "Any <u>abuse</u>
- by <u>one or more undertakings</u>
- of a <u>dominant position</u>
- within the <u>common market</u> or in a <u>substantial part of it</u>

  shall be prohibited as incompatible with the common market
- insofar as it <u>may affect trade between Member States</u>"

Abuses

- The list in Article 102: only examples

  a) Unfair pricing or other unfair trading conditions

  b) Limiting production, markets or technical developments to the prejudice of consumers

  c) Discrimination: “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”

  d) Tying: making conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such contracts (by their nature or according to commercial usage)

Guidance on Article 102

- Guidance on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct by Dominant Undertakings (2008)

- Scope
  - Focus on single dominance and exclusionary conduct
  - Enforcement priorities (v. interpretative notice): priority in dealing with conduct that is likely to harm consumer welfare

- Effects based approach in the implementation of Art 102
  - Ensure that companies in a dominant position do not exclude rivals by other means than competition on the merits
  - Protecting the competitive process, not competitors
  - Focus on anti-competitive foreclosure :
    - To ensure that dominant firms do not impair effective competition by foreclosing rivals in an anti-competitive way thereby having an adverse impact on consumer welfare
  - Anti-competitive effects to be balanced with efficiencies

Abuse of Dominance: the EU approach

Dominance

Dominance

"A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"

United Brands, Hoffmann-La Roche

Dominance

Concept of dominance linked to concept of market power

Market power = the power to influence market prices, output, innovation, variety or quality of products or other parameters of competition to the detriment of consumers

Dominance = substantial market power

Dominance

- The extent to which a firm can behave independently of its competitor relates to degree of competitive constraints exerted on this firm
- Competitive constraints :
  - Imposed by existing supply/position of actual competitors
  - By the threat of expansion of actual competitors and entry of potential competitors
  - By the bargaining strength of customers
- Dominance requires substantial market power over a period of time (two years)

Dominance

- Competitive constraint imposed by existing supply/position of actual competitors should be non-effective
- High market share of dominant firm is only a first indication
- Low market shares (below 40 %) are a good proxy for the absence of substantial market power (safe harbour)
- Difference in market share between dominant firm and competitors
- Stability of market share (differences)
- Evidence of actual competitive actions/price reductions
- Overall quality and strength of market positions including profitability

Dominance

- Competitive constraint imposed by the threat of expansion of actual competitors and entry of potential competitors should be non-effective
- No dominance if expansion or entry is likely, timely and sufficient
- Whether expansion/entry will be likely, timely and sufficient will depend on the expansion and entry barriers:
  - Legal barriers like tariffs, quotas, IPRs
  - Economies of scale and scope
  - Privileged access to essential inputs or natural resources
  - Privileged access to distribution networks
  - Network effects and switching costs
  - Spare capacity
  - Brand loyalty

Dominance

- Competitive constraint imposed by countervailing buyer power should be non-effective
- Requires large customers which are important for the dominant firm and which can switch quickly to competing offers/promote entry/integrate vertically
- To qualify as an effective constraint buyer power must not just obtain better/competitive conditions for the large buyer(s) but for the market in general

Market definition

- General rules on market definition apply
- Caution for cellophane fallacy: market defined too widely as a result of price already being increased and therewith wrongly suggesting substitutability with other products
- Caution for banana fallacy: market defined too narrowly where only a part of the customers cannot easily switch to substitute products

Abuse of Dominance: the EU approach

Abuses

Types of abuses

ABUSES			
	EXCLUSIONARY		EXPLOITATIVE
	INPUT FORECLOSURE	CUSTOMER FORECLOSURE	
INDIRECT FORECLOSURE	**exclusive supply, minimum supply obligations**	**tying, bundling, predatory pricing, rebates, exclusive purchasing**	**excessive pricing, price discrimination**
DIRECT FORECLOSURE	**refusal to supply, refusal to license, margin squeeze**	**refusal to buy**	

Abuses

Exclusionary abuses

Types of exclusionary abuses

- Indirect input foreclosure: dominant firm prevents/limits the access of competitors to third party upstream supplies
  - Scenario: firm is dominant on downstream market and uses its buying power to foreclose its competitors by restricting their possibilities to obtain supplies from upstream firms
  - Limited number of cases

- Indirect customer foreclosure: dominant firm prevents/limits the access of competitors to third party downstream customers
  - Scenario: firm is dominant on upstream market and uses its selling power to foreclose its competitors by restricting their possibilities to sell to downstream customers
  - Most cases

Types of exclusionary abuses

- Direct input foreclosure: dominant firm prevents/limits the access of competitors downstream to supplies of the dominant firm itself
  - Scenario: firm, dominant on upstream market, is also active on downstream market and (constructively) refuses to sell to its own downstream competitors
  - Limited number of cases

- Direct customer foreclosure: dominant firm prevents/limits the access of competitors upstream to downstream demand exerted by the dominant firm itself
  - Scenario: firm, dominant on downstream market, is also active on the upstream market and refuses to buy from its upstream competitors
  - No cases

Definition of exclusionary abuse

- *Conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition*

  (Hoffmann-La Roche, Post Danmark)

- Main message: conduct that forecloses not by supplying new or improved products or competitive prices, which benefits consumers, but by conduct that limits competition and harms consumers

Framework to assess exclusionary conduct

- Guidance proposes to apply in general an effects-based approach, but some tension with case law which allows for certain conduct a more form-based approach

- Focus on anticompetitive foreclosure.
  - Both likely and actual foreclosure effects
  - Consumer welfare standard – distinction between:
    - Foreclosure = harm to competitors, and
    - Anticompetitive foreclosure = foreclosure that is likely to harm consumers

- Need to assess whether access of actual or potential competitors to supplies or markets is hampered and, as a result, the dominant undertaking is likely to be in a position to profitably increase prices (or negatively affect other competition parameters) to detriment of consumers

Framework to assess exclusionary conduct

- Produce a convincing story of harm based on all relevant factors (see § 20 Guidance), such as the conditions of entry, economies of scale and scope, network effects, availability of counterstrategies to competitors and customers, market coverage, actual observed effects, intent etc

- Assessment criteria in general stricter for direct than for indirect foreclosure conduct (see later where refusal to supply is dealt with)

- Limited role for 'by object' abuses. However, if conduct can only hamper competition and not produce efficiencies, anticompetitive effects can be presumed. Examples from Guidance:
  - dominant company prevents customers from testing the products of competitors or
  - provides incentives to distributors or customers to delay the introduction of a competitor's product

The « as efficient competitor test »

- No particular test applied across all practices to identify anticompetitive foreclosure but "as efficient competitor test" as a useful benchmark when assessing price conduct
- Difficulty to distinguish price competition on the merits from abusive pricing conduct
  - ECJ: "recourse to methods different from those which condition normal competition"
  - The "as efficient competitor test" as a safe harbour: if an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking; conduct not likely to have adverse impact on consumers; Commission not likely to intervene

The « as efficient competitor test »

- Relevant cost benchmarks:
  - Average Total Cost (ATC): all long run variable and fixed costs divided by total output of the firm
  - Long Run Average Incremental Cost (LRAIC): all long run variable and fixed costs to produce a particular product divided by total output of that product, i.e. ATC minus common costs
  - Average Avoidable Cost (AAC): all variable and fixed costs that a firm can avoid by not producing a discrete (extra) output divided by that output
  - Average Variable Cost (AVC): all variable cost to produce a particular output divided buy that output, i.e. AAC minus the avoidable fixed costs

The « as efficient competitor test »

- Rule is to use the costs of the dominant firm; allows it to asses its own conduct
- Test useful indicator for capability to foreclose: result to be integrated in general assessment of anticompetitive foreclosure
- If effective price is above ATC/LRAIC, equally efficient competitor can compete: conduct in general not capable to foreclose in an anti-competitive way
- Safeguards:
  - Dynamic view of constraints exercised by less efficient competitors
  - Sufficiently reliable data
  - Where common costs are significant, they may have to be taken into account

The « as efficient competitor test »

- If effective price is below AAC/AVC, indicates that dominant firm is sacrificing profits and that equally efficient competitor can only compete at a loss: conduct expected to foreclose in an anti-competitive way (if sufficient market coverage etc)

- If effective price is between AAC/AVC and LRAIC/ATC, indicates that dominant firm is not recovering all costs and that an equally efficient competitor can be foreclosed in an anti-competitive way. Depends on counterstrategies available to competitors (can they also price low for only part of demand) etc

Objective necessity and efficiencies

- A dominant firm may justify conduct leading to anticompetitive foreclosure on the ground that it is objectively necessary or that efficiencies are sufficient to guarantee that consumers are not harmed
- The burden of proof is on the dominant firm to show that:
  - the efficiencies are the a result of the conduct;
  - the conduct is indispensable: there is no less anticompetitive way;
  - the efficiencies outweigh the negative effects for consumers;
  - the conduct does not eliminate effective competition: exclusionary conduct which maintains or creates a position approaching that of a monopoly can normally not be justified on the basis of efficiencies
- The Commission makes the ultimate assessment of whether, considering the efficiencies, the behaviour is likely to lead to consumer harm

Exclusionary abuses

- Guidance Paper applies general framework of assessment to most common forms of abuse:
  - Exclusive purchasing and conditional rebates
    - Single branding obligations
    - Incremental and retro-active rebates
  - Tying and bundling:
    - Technical and contractual tying
    - Pure bundling
    - Mixed bundling or multi-product rebates
  - Predation
  - Refusal to supply and margin squeeze
    - Refusal to supply or grant access to essential facility/network
    - Refusal to license IP rights or interface information
    - Margin squeeze

- Abuse of legal proceedings (not covered in Guidance Paper)

Exclusive purchasing

- Exclusive purchasing or single branding: obligation to purchase only from the company in dominant position
- Often achieved via fidelity or loyalty rebates: rebate in exchange of legal or de facto exclusive purchasing
- Presumption of illegality (Hoffman La Roche)

Exclusive purchasing: assessment

- Anti-competitive foreclosure is more likely if:
  - competitors are not yet present or cannot compete for the full supply of the customers (e.g. capacity constraints or the dominant firm is an unavoidable trading partner for at least part of demand)
  - significant part of market/customers covered
  - switching is hampered due to the duration of the obligations
  - But, if competitors are free to make offers for each customer entire demand, harm is unlikely.

- Efficiencies:
  - incentives to undertake relationship specific investments.
  - savings in transaction costs

Conditional Rebates

- Conditional versus unconditional rebates: rebate dependent/not dependent on purchasing behaviour
- Unconditional rebates:
  - Predation or, possibly, discrimination
- Conditional rebates: rebate granted if purchases over a defined reference period (e.g. year) exceed a certain threshold:
  - Either rebate on all purchases: retroactive rebate
  - Or only on additional purchases above the threshold: incremental rebate

Conditional rebates: assessment

Anticompetitive foreclosure:

- Possible without sacrifice: low marginal price while profitable average price
- Can rivals compete for the whole customer or is the dominant firm an unavoidable trading partner: in the latter case rebates can make it very unattractive to switch small amounts of demand
- How significant is the part of market/customers covered?
- Is the duration of the scheme hindering switching?
- How well is the rebate structure adjusted to incentivise loyalty: are the thresholds and rebates set different for each customer or is it a standard rebate scheme? The latter may more often indicate that transaction efficiencies are the goal.

Conditional rebates: assessment

- Can the rebate hinder entry or expansion of as efficient competitors?
  - Calculate the effective price over that part of demand for which rivals can compete and customers are willing to switch (the relevant range) and compare it to the dominant undertaking cost benchmark
  - If customers have to forego a high rebate while switching a small amount, the effective price will be low
  - Effective price above LRAIC/ATC: not capable to foreclose abusively
  - Effective price below AAC/AVC: capable to foreclose abusively
  - Effective price in between: examine other factors affecting entry or expansion by equally efficient competitors (e.g. counter-strategies by rivals to decrease their effective prices)

Conditional rebates: assessment

- Relevant range (RR):
  - for incremental rebates: the incremental purchases, i.e. purchases above threshold T
  - for retroactive rebates: part of customers demand (potential) rivals can compete for, estimated by analysing:
    - actual size of rivals
    - sales and fluctuations of sales to buyers
    - realistic scale of entry
    - historical growth patterns of new entrants
    - customers' willingness to switch

Conditional rebates: assessment

- P_e: calculated by spreading the rebate over the RR; the lower P_e is and the bigger the difference with domco's non-rebated price, the stronger the loyalty enhancing effect
- Incremental rebate: P_e is simply the price charged above T: list price (P_L) minus rebate
- Retroactive rebate: P_e is amount paid for the relevant range without rebate (P_L x RR) minus all the rebates obtained if buying T (rebate % x P_L x T), divided by RR

Conditional rebates: assessment

- Example: $T = 50$ units, $P_L = €100$, Rebate = 10%, RR = 10 units (20% of customer's demand)

$$P_e = ((P_L \times RR) - (10\% \times P_L \times T)) / RR$$
$$= ((100 \times 10) - (0.10 \times 100 \times 50)) / 10$$
$$= (1000 - 500) / 10 = €\ 50$$

Tying and bundling

Article 102	Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which (by nature or according to commercial usage) have no connection with subject of such contracts.
Tying	➔ Tying product A sold only together with B B can be purchased alone but not A
Pure bundling	➔ A and B only sold together
Mixed bundling (multiproduct rebate)	➔ A and B sold together at discount. Both A and B can be bought separately

Tying and bundling

- Forms:
  - Absolute contractual condition to buy a product
  - Refusal to supply a product separately
  - "Technological bundling" (compatibility, interface, enhanced versions)
  - Penalising acquisition of the products individually:
    - Ex: Withdrawing or reducing the duration or scope of some advantages (e.g. guarantee, refuse liability)

Tying and bundling: assessment

Conditions for anti-competitive foreclosure:

- Dominance in the tying market (not necessarily in the tied market)
- Concerns distinct products: customers would purchase the tying product without buying the tied product from the same supplier
- It leads to:
  - Harm in the tied market: exit or marginalisation of competitors in the tied market leading to higher prices
  - Harm in the tying market: tying complements in order to make entry in the tying market more difficult
  - Harm in both markets: avoid substitution and raise prices

- Multiproduct rebates: is the incremental price above the long run incremental cost of including the product in the bundle?
- Competition among bundles: predatory pricing standard

Efficiencies:

- reductions in transaction costs for consumers;
- reduction of distribution and packaging costs for suppliers

Mixed bundling: assessment

- Mixed bundling is multi product rebate:

  $P_A = 100 \quad P_B = 50 \quad P_{A+B} = 130$

  means a rebate of € 20 to buy the tied product B by buying the bundle
- Question: incremental price of B (P_{Bi}) above or below cost benchmark?

  P_{Bi} = 50 – 20 = € 30 > ? < cost
- To establish relevant cost benchmark and to assess foreclosure risk: why can rivals not counter with bundle competition?
- If relevant competition comes from single product firms, then P_{Bi} = 50 – 20 = € 30 > ? < LRAIC

Predation

- Lowering prices below costs to exclude competitors. Key elements economic literature:
  - sacrifice,
  - foreclosure
  - recoupment
- Case law: *Akzo, Wanadoo* – focuses on sacrifice (cost benchmark), intent or strategy and foreclosure effect. Proof of recoupment not necessary.

Predation: assessment

- Sacrifice: incurring losses that could have been avoided or foregoing profits in the short term
  - Pricing below AVC (Areeda &Turner test) or AAC (Guidance paper)
  - Pricing below ATC but above AVC if exclusionary strategy (Akzo)
  - Net revenues lower than what could have been achieved in a reasonable counterfactual

- Anticompetitive foreclosure:
  - Application of the “as efficient competitor test” (P still below LRAIC)
  - Factors reducing actual competition or preventing entry:
    - Reputation of aggressive commercial behaviour by the dominant company
    - Reduced access to finance by competitors
  - Consumer harm is likely if the dominant undertaking can expect that its market power is enhanced, i.e. if there is a benefit from the sacrifice. Harm can be proved by assessing the likely foreclosure effect and the existence of entry barriers. Proof of actual recoupment is not required.

- Efficiencies unlikely

Refusal to supply

- Starting point: companies can freely choose trading partners and exercise their property rights
- But, in specific circumstances refusal to supply may constitute an abuse of dominant position
- Examples of situations in which refusal *may* amount to abuse:
  - Access to essential facility (network, bridge)
  - Refusal to licence IPR right (patent, copyright)
  - Refusal to provide interoperability information (Microsoft)
  - Termination of existing supply/ licence relationship
  - Constructive‛ refusal: unreasonable access conditions

Margin squeeze

- Company dominant in upstream and present in downstream market.
- Charges access price in upstream market that does not allow as efficient rivals to compete profitably on downstream market.
- Examples:
  - DT: access to local loop; compete in retail fixed telephony
  - Telefonica: access to broadband capacity; retail broadband services

Refusal to supply and margin squeeze: assessment

- General right to choose trading partners. Concern that intervention on competition grounds (impose obligation to supply) may affect incentives to invest in tangible and intangible assets

- Specific framework requiring 3 cumulative conditions for intervention
  - Input needs to be objectively necessary (indispensable) to compete effectively in the downstream market: there is no actual or potential substitute to the input and replication would not be undertaken to a sufficient degree
  - Elimination of effective competition: immediately or over time
  - Consumer harm : a dynamic perspective. Do the negative consequences of the refusal to supply on competition outweigh the negative consequences on incentives to invest of imposing an obligation to supply ?

- No risk to investment incentives if supply obligations deriving from regulation or if upstream position deriving from monopoly rights or public subsidies.

Abuse of legal proceedings

- Misuse of Court proceedings:
  - Access to Court is a fundamental right. It can only be abusive if:
    - Not reasonable to assert own rights
    - Objective of harassing and excluding competitors (ITT Promedia)
- Misuse of regulatory proceedings:
  - Misrepresentations to patent offices (Astra Zeneca)

Abuses

Exploitative abuses

Exploitative abuses

- Why also exploitative abuses:
  - Text and background of Article 102
    - Text 102(a): unfair prices & conditions
    - History and case law:
  - Consumer welfare aim
  - Acquisition of dominance versus abuse of dominance
- However:
  - high profits incentive to enter and invest
  - enforcement possibly more difficult
  - better to prevent than to stop exploitation
- Therefore favour intervention against exclusionary conduct over action against discrimination and excessive pricing

Excessive pricing

- "Unfair" selling prices within meaning of Art. 102 (a)
- BUT: Commission reluctant to investigate
  - Intervention may dampen entry and competition
  - Pragmatic reason: complicated to calculate what amounts to an unreasonably high price and what is a correct price level and costly to monitor
- Intervention only where market will not solve it in foreseeable future
  - Very high and long lasting barriers to entry and expansion
  - For instance legal and natural monopolies

What is excessive?

- United Brands provides test with two limbs:
  - Price/cost difference must be excessive

And

  - Price must be “either unfair in itself or when compared to competing products”

What is excessive?

- First limb: Very high <u>profit margin</u>, for instance by comparing:
  - Profit margin between products or with competitors (Napp)
  - Return on capital between products or sectors

- Second limb: High profits result not from low costs/higher efficiency but from high/unfair prices, for instance by comparing dominant firm’s <u>prices</u> with :
  - its own prices in other markets (SACEM, Tournier,Napp)
  - costs of next most profitable competitor (Napp)
  - those of undertakings in other comparable competitive markets (Bodson)
  - prices over time

Price discrimination

- Price discrimination (PD) difficult area with remaining questions on approach
- Definition of PD: same product sold to different customers at different prices:
  - Not PD if similar products are sold at different price/cost ratios while same choice available to all customers
  - Not PD if price differs between own downstream daughter company and third party firm (dealt with as margin squeeze)
  - Not PD if cost differences justify price variations

Price discrimination

- PD may have exclusionary effects:
  - it may foreclose upstream competitors (examined before: selective predation, conditional rebates)
  - It may put certain customers at a competitive disadvantage downstream (102(c)) and cause foreclosure downstream:
    - Unlikely scenario if dominant supplier: no incentive to limit competition downstream
    - Possible scenario: dominant buyer: incentive to require most/more favoured customer conditions
    - Abusive only if anticompetitive foreclosure (see Post Danmark)
    - But special category: Discrimination by nationality:
      - Usually result of state measure (airport cases)
      - Per se approach

Price discrimination

- PD may have exploitative effects:
  - Dominance in the market where the high price is charged
  - Application of excessive pricing test to high price market?

The economics of PD

- First degree price discrimination in general bad for consumer welfare, but largely irrelevant in practice

- In practice third degree price discrimination: effect on output is crucial for effect on (consumer) welfare
  - Counterfactual is output under uniform pricing
  - Robinson (1933), Schmalensee (1981), Katz (1987), Varian (1989), Vickers (2001), Levine (2001), Stole (2003)

The economics of PD

- Reduction in output or output unchanged or only slightly increased: decrease in consumer welfare expected
- Reason: loss of total welfare, transfer of consumer welfare resulting in extra profits and extra costs to implement PD and prevent arbitrage
- This can for instance be expected where:
  - under uniform price both groups would also be served
  - rivals have symmetrical 'strong' and 'weak' markets: no poaching (Fudenberg & Tirole (2000), Asplund (2002))

The economics of PD

- Significant increase in output: increase in consumer welfare can be expected
- This can for instance be expected where:
  - under uniform price low price group would not be served
  - rivals have asymmetrical ‘strong’ and ‘weak’ markets: poaching

Antitrust Procedure

(Applies to Arts. 101 and 102)

Legal sources

- Council Regulation 1/2003, on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty
- Commission Regulation 773/2004, relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 of the EC Treaty
- Commission Notices:
  - Handling of complaints
  - Informal guidance (guidance letters)
  - Cooperation within the ECN
  - Access to the file

Initiation of proceedings

- Complaint
  - Form C; Notice on complaints
- Ex officio
  - Sources: Press, informants,....
  - Sector investigation (Art 17, Reg 1/2003)
- Leniency application
  - Notice on leniency (relevant for cartels)

Fact-finding powers

- Requests for information-Art. 18
    - simple requests
    - requests by decision
- Statements-Art.19
- Inspections-Art. 20
    - home searches, with prior judicial consent (Art 21)
- Fines for non respect or misleading information: up to 1% of turnover. Art 23

Types of proceedings

- Negative decisions (Art 7)
  - Finding and termination of infringements
  - Sanction (fines)
- Interim measures (Art 8)
  - Urgency due to the risk of serious and irreparable damage
- Commitments (Art 9)
  - Eliminate grounds for action
- Positive decisions (Art 10) (Exceptional)

Negative decisions: due process

- “The right of <u>the parties concerned and of third parties</u> to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law.”
- “The Commission must ensure that that right is guaranteed in its competition proceedings”:
  - Right of access to the file
  - Right to make their views know <u>on objections raised against them</u> (Article 27, Reg 1/2003)
  - Oral Hearing
- Hearing officer appointed to guarantee due process

The statement of objections (SO)

- SO: Preliminary views on facts evidence and legal assessment

Purpose:

- to address the Commission`s objections in writing to the notifying parties and other involved parties
- … in order to enable them to make their views known

Legal implications:

- Objections not included in the SO cannot be used in the final decision
- If Commission departs from SO in final decision it must explain the reasons ?

Negative decisions

- Finding of infringement
  - Past and terminated infringement, if there is legitimate interest
- Termination of infringement
  - Remedies: necessary and proportionate
  - Behavioral or structural
  - Structural only if no equally effective behavioral or behavioral more burdensome
- Sanctions
  - Fines (Art 23): up to 10% turnover
  - Periodic penalties (Art 24): up to 5% daily turnover. To put an end to an infringement.

Commitments: procedure

- Preliminary assessment:
  - Intention to adopt a negative decision
- Submission of commitments by the parties
- Publication of summary of the case and commitments (Art 27.4)
- Opinions by third parties
- Opinion of Advisory Committee
- Adoption of final decision

Commitments decisions

- Legal effect:
  - No formal finding of an infringement
  - Commitments are binding
    - If not respected, Commission may:
      - Impose fines
      - Impose penalty payments
      - Reopen infringement proceedings

Positive decisions

- Positive decisions:
  - Finding of inapplicability
  - Public interest motives;
  - initiative of the Commission
  - Obligation to publish summary and give third parties opportunity to comment (Art 27.4)
- Guidance letters:
  - Whereas clause 38: where cases give rise to genuine uncertainty, due to novel or unresolved questions, companies may wish to seek informal guidance from the Commission.
  - Commission can provide guidance letter.

Judicial review

- Commission decisions can be appealed (Art 230 EU Treaty) before the General Court by:
  - Parties
  - Other concerned third parties
- Appeal to General Court decision by reasons of law possible before the ECJ
- Judicial review standard:
  - Law: unlimited
  - Economic appreciations: manifest error
  - Fines: unlimited (Art 31, Reg 1/2003): Court may cancel, reduce or increase the fine.