

**EU Antitrust Procedure**  
**Recent Developments**  
**Case Law & Legislation**  
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# I. FUNDAMENTAL RIGHTS

## A. Accession of the EU to the ECHR

18 Dec 2014	Opinion 2/13 Accession EU to ECHR	<p><b>Accession EU to ECHR :</b></p> <p>draft Agreement on EU accession to ECHR is not compatible with Article 6(2) TEU and with Protocol No 8 EU</p>
		<p><b>Interpretation and application of fundamental rights within the EU :</b></p> <p>"The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of [the] fundamental rights [recognised by the Charter of Fundamental Rights of the EU] be ensured within the framework of the structure and objectives of the EU." (§ 170)</p> <p>"Fundamental rights, as recognised in particular by the Charter must [...] be interpreted and applied within the EU in accordance with the [EU] constitutional framework [...]." (§ 177)</p>
		<p><b>Nature of the Treaty provisions on competition :</b></p> <p>"The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the <i>raison d'être</i> of the EU itself." (§ 172)</p>

## B. Compatibility of EU antitrust procedure with fundamental rights

<p>dated 13 June 2014</p> <p>published 18 Dec 2014</p>	<p>View of AG Kokott Opinion 2/13 <i>Accession EU to ECHR</i></p>	<p><b>Accession EU to ECHR</b> does not require any systemic adjustments in relation to the imposition of fines for competition law infringements:</p> <ul style="list-style-type: none"> <li>• institutional system (role Commission) is compatible with ECHR (§§ 146-150)</li> <li>• <i>ne bis in idem</i> not affected by accession (§ 152)</li> <li>• problem reasonable duration of proceedings does not require institutional changes (§§ 153-155)</li> </ul>
<p>15 July 2015</p>	<p>Judgment T-406/10 <i>Emesa-Trefilería</i> (AT.38344 <i>Prestressing Steel</i>)</p>	<p><b>Compatibility administrative system with ECHR :</b></p> <p>system compatible with ECHR (§§ 113-128)</p> <p>≈ C-501/11 P <i>Schindler</i> (18 July 2013)</p>
<p>18 June 2015</p>	<p>Judgment C-583/13 P <i>Deutsche Bahn</i></p> <p>following Opinion AG Wahl (12 February 2015)</p>	<p><b>Inspections – judicial review – Articles 7 and 47 Charter and Article 8 and 6(1) ECHR :</b></p> <p>existing system judicial review compatible with fundamental right to effective judicial review and ECtHR case law</p> <p>(§§ 18-48; Opinion AG Wahl, §§ 30-48)</p>
<p>15 July 2015</p>	<p>Judgment T-389/10 and T-419/10 <i>SLM and Ori Martin</i> (AT.38344 <i>Prestressing Steel</i>)</p>	<p><b>Principle that offences and penalties must be defined by law – new Fining Guidelines:</b></p> <p>replacement 1998 Guidelines by 2006 Guidelines was reasonably foreseeable → no violation Art 7 ECHR and Art 49 Charter (§§ 83-112)</p>

22 Oct 2015	Judgment C-194/14 P <i>AC-Treuhand</i> (AT.38589 <i>Heat stabilisers</i> )	<b>Principle that offences and penalties must be defined by law – cartel facilitation services :</b>  application of Art 101 TFEU to a consultancy firm that actively contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel was reasonably foreseeable (§§ 40-44)
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## C. Reasonable duration of proceedings

### 1. Commission proceedings

15 July 2015	Judgment T-413/10 and T-414/10 <i>Socitrel and Companhia Previdente</i> (AT.38344 <i>Prestressing Steel</i> )	<b>Reasonable duration of administrative procedure :</b>  8 years <i>in casu</i> not unreasonably long, given the particular complexity of the case and the diligence with which Commission conducted the investigation (§§ 158-170)
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9 Sept 2015	Judgment T-82/13 <i>Panasonic</i> (AT.39437 <i>TV and Computer Monitor Tubes</i> )	<b>Reasonable duration of administrative proceedings :</b>  more than 5 years, including 3 years between SO and decision, <i>in casu</i> not unreasonably long, given the complexity of the case and the diligence with which Commission conducted the procedure (§§ 206-218)
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15 July 2015	Judgment T-47/10 <i>Akzo Nobel</i> (AT.38589 <i>Heat Stabilisers</i> )	<b>Unreasonable duration of administrative procedure – consequences :</b>  unreasonable duration would only be a ground for annulment if adverse effect on the undertaking's ability to defend itself is proved;  in the presence of sufficient written evidence, the lost chance of gathering sworn testimony is not sufficient (§§ 301-318)  ≈ oral evidence plays only a minor role in Commission competition investigations (§ 316)
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## 2. General Court proceedings

12 Nov 2014	Judgment C-580/12 P <i>Guardian</i> (AT.39165 Flat glass)	<b>Reasonable duration of proceedings before General Court :</b>  finding of unreasonable duration (four years and seven months between written procedure and hearing) ; action for damages to be brought before General Court as to harm and causal link (§§ 17-20)  ≈ C-58/12 P <i>Groupe Gascogne</i> (26 Nov 2013)
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6 Jan 2015	Order T-479/14 <i>Kendrion v Court of Justice of the European Union</i>	<b>Action for damages for unreasonable duration of proceedings before General Court :</b>  Court of Justice, not Commission, is the right institution representing the EU as defendant
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## II. EUROPEAN COMPETITION NETWORK (ECN)

### A. Commission enforcement priorities not binding on NCAs

6 Oct 2015	Judgment C-23/14 <i>Post Danmark II</i>	<b>Commission Guidance on enforcement priorities Article 102 TFEU exclusionary conduct</b>  not binding on national competition authorities (NCAs) and courts (§ 52)
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## B. Commission investigation after NCA commitments decision

25 Nov 2014	Judgment T-402/13 <i>Orange</i>	<p><b>Commission investigation after NCA commitments decision :</b></p> <ul style="list-style-type: none"> <li>• Commission can always investigate even if already commitments decision by NCA (§§ 18-27) ≈ C-344/98 <i>Masterfoods</i></li> <li>• no <i>bis in idem</i> because NCA cannot find non-infringement (§§28-30) ≈ C-375/09 <i>Tele2 Polska</i></li> <li>• Commission large discretion to prioritize use of Art 11(6) Reg 1/2003 → non-use does not imply agreement with NCA decision (§§35-39)</li> </ul>
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## C. Rejection of a complaint by the Commission after NCA investigation

17 Dec 2014	Judgment T-201/11 <i>SI.MOBIL</i>	<p><b>Rejection of complaint - case allocation ECN – interpretation of Article 13 Reg 1/2003 :</b></p> <p>Commission enjoys broad discretion when applying Article 13 of Regulation 1/2003 (§ 43)</p>
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21 January 2015	Judgment T-355/13 <i>easyJet</i> (AT.39869 <i>easyJet/Schiphol</i> )	<p><b>Rejection of complaint - case allocation ECN – interpretation of Article 13 Reg 1/2003 :</b></p> <p>Article 13(2) interpreted in the light of Article 13(1) : decisive is that NCA has reviewed the matter in the light of EU competition law, not the outcome of that review; hence also covers rejection of complaint by NCA on priority grounds (§§ 27-48)</p>
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## D. ECN Model Leniency Programme

10 Sept 2015	Opinion AG Wathelet C-428/14 <i>DHL</i>	<b>ECN – Model Leniency Programme :</b> <ul style="list-style-type: none"><li>• ECN Model Leniency Programme not binding upon NCAs (§ 41)  ≈ ECN has no legislative power, cannot adopt acts binding upon NCAs (§43)</li><li>• NCAs not obliged to have leniency programme <u>but</u> if they do, must comply with EU law, including Charter, and not undermine effectiveness 101 &amp; 102 TFEU (§ 45)</li><li>• NCA leniency programmes can be more generous than ECN Model <u>but</u> if so, must comply with EU law, including Charter, and not undermine effectiveness 101 &amp; 102 TFEU (§ 88-89)</li><li>• Commission / NCA leniency programmes and leniency requests are autonomous and independent (§ 66)</li><li>• no obligation for NCA to interpret summary application in light of Commission application, nor to contact the Commission (§§ 75-78)</li></ul>
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## E. Access to correspondence between Commission and NCAs

<p>12 May 2015</p>	<p>Judgment T-623/13 <i>Union de Almacenistas de Hierros de España</i></p>	<p><b>Public access (Regulation 1049/2001) – correspondence between Commission and NCAs under Article 11(4) of Reg 1/2003:</b></p> <ul style="list-style-type: none"> <li>• general presumption that access would undermine protection of purpose of investigations and protection of commercial interests</li> <li>• also after closure of proceedings</li> <li>• right to bring action for damages does not constitute overriding public interest, because relevant documents in NCA file</li> </ul>
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## III. POWERS OF INVESTIGATION

### A. Requests for information

<p>15 Oct 2015</p>	<p>Opinions AG Wahl C-247/14 P <i>HeidelbergCement</i>, C-267/14 P <i>Buzzi Unicem</i>, C-268/14 P <i>Italmobiliare</i>, C-248/14 P <i>Schwenk Zement</i>  (<i>AT.39520 Cement</i>)</p>	<p><b>Request for information (Art 18(3) Reg 1/2003) – choice of addressee :</b> (C-268/14 P, §§ 29 -51)</p> <ul style="list-style-type: none"> <li>• RFI can be addressed to any undertaking holding relevant information, regardless of its involvement in the alleged infringement</li> <li>• discretion as to choice of addressee limited by general principles, including proportionality, legal certainty and good administration (reasoning)</li> <li>• unacceptable <i>in casu</i> to address RFI to financial holding company instead of industrial subsidiaries that were earlier inspected and to whom earlier (draft) RFIs were addressed</li> </ul>
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		<p><b>Request for information – choice between simple request or request by decision :</b></p> <p>wide discretion, but not unlimited (principle of proportionality) (C-248/14 P, §§ 27-37)</p> <hr/> <p><b>Investigative measures – right to be heard:</b></p> <p>no right to be heard before adoption of investigative measure (RFI or inspection) (C-268/14 P, §§ 119-120)</p> <hr/> <p><b>Request for information (Art 18(3) Reg 1/2003) :</b></p> <ul style="list-style-type: none"> <li>• <b>statement of reasons as to the purpose of the request / scope of investigation :</b> <i>in casu</i> insufficiently clear (C-247/14 P, §§ 32-51)</li> <li>• <b>necessity of information requested :</b> not if information already obtained or publicly available (C-247/14 P, §§ 70-94)</li> <li>• <b>formatting requirements :</b> Commission cannot request reformatting of information existing in a different format or publicly available (C-247/14 P, §§ 98-122)</li> <li>• <b>principle of legal certainty :</b> vagueness of questions (C-247/14 P, §§ 142-145)</li> <li>• <b>proportionality :</b> <i>in casu</i> excessive burden (C-267/14 P, §§ 98-112)</li> <li>• <b>existence of sufficient indicia :</b> applicant could have asked General Court to verify but failed to do so (C-267/14 P, §§ 55-57)  ≈ T-296/11 <i>Cementos Portland Valderrivas</i>, §§ 24-26, 41</li> </ul>
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		<p><b>Right to avoid self-incrimination - test :</b> (C-247/14 P, §§ 149-164)</p> <p>test is whether the answer to the question might involve an admission of the existence of an infringement;</p> <p>whether the question requires the undertaking only to give factual information is an important element but not necessarily determinative</p>
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## B. Inspections

25 Nov 2014	<p>Judgment T-402/13 <i>Orange</i></p>	<p><b>Inspections :</b></p> <ul style="list-style-type: none"> <li>• in a case where Commission investigation follows NCA commitments decision: regrettable that Commission did not first examine NCA file but inspections <i>in casu</i> justified because NCA had not carried out inspections (§§ 55-61)</li> <li>• 4-day inspection <i>in casu</i> not disproportionate (§ 73)</li> <li>• non-arbitrariness can be reviewed by Court not only by examining indicia which Commission had, but may be apparent from reasoning of inspection decision, as <i>in casu</i> (§§ 83-93)</li> </ul>
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18 June 2015	<p>Judgment C-583/13 P <i>Deutsche Bahn</i></p> <p>following Opinion AG Wahl (12 February 2015)</p>	<p><b>Inspections – information provided to inspectors concerning another complaint outside the subject-matter set out in the inspection decision :</b></p> <p>information provided to inspectors, immediately before the inspection was conducted, concerning another complaint outside the subject-matter set out in the inspection decision = violation of the obligation to state reasons and the rights of defence of the undertaking concerned (§§ 61-66)</p>
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		<p><b>Inspections – judicial review – Articles 7 and 47 Charter and Article 8 and 6(1) ECHR :</b></p> <p>existing system judicial review compatible with fundamental right to effective judicial review and ECtHR case law (§§ 18-48; Opinion AG Wahl, §§ 30-48)</p>
10 Dec 2014	<p>Judgment T-90/11 <i>Ordre national des pharmaciens (ONP)</i> (AT.39510 – LABCO/ONP)</p>	<p><b>Judicial review of inspections (§§ 214-236) :</b></p> <p>questions whether inspection non-arbitrary and whether inspection decision sufficiently reasoned must be raised in application for annulment of the inspection decision</p> <p>↔ question whether documents collected beyond scope of inspection decision can be raised in application for annulment of the final decision using those documents</p>
16 June 2015	<p>Order T-274/15 R <i>Alcogroup &amp; Alcodis v Commission</i> (AT.40054 Oil and Biofuel Markets / AT.40244 AQUAVIT)</p> <p>confirmed by Order C-386/15 P(R) (17 Sept 2015)</p>	<p><b>Inspection – Legal Professional Privilege – Interim measures :</b></p> <p>request for interim measures to the General Court against a refusal by the Commission to suspend proceedings following an alleged violation of LPP during an inspection = inadmissible</p>
26 Nov 2014	<p>Judgment T-272/12 <i>Energetický a průmyslový</i> (AT.39793 – EPH and Others)</p>	<p><b>Fine for refusal to submit to inspection :</b></p> <p>Commission Decision of 28 March 2012 imposing 2.5 million € fine for negligently allowing access to a blocked e-mail account and intentionally diverting e-mails to a server = confirmed</p>

## IV. RIGHTS OF THE DEFENCE

### A. Beneficiaries of procedural safeguards

15 July 2015	Judgment T-47/10 <i>Akzo Nobel</i> (AT.38589 <i>Heat Stabilisers</i> )	<b>Beneficiaries of procedural safeguards :</b>  limitation periods, like other procedural safeguards, apply individually to legal persons ↔ undertakings (§ 126)
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### B. Obligation to keep records

9 Sept 2015	Judgment T-92/13 <i>Philips</i> (AT.39437 <i>TV and Computer Monitor Tubes</i> )	<b>Rights of defence – non-investigation of former joint-venture partner – obligation to keep records : (§§ 90-98)</b>  <ul style="list-style-type: none"> <li>• no violation rights of defence in that former JV partner not also investigated</li> <li>• general duty of care: obligation to keep records, also after dissolution of JV</li> </ul>
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9 Sept 2015	Judgment T-82/13 <i>Panasonic</i> (AT.39437 <i>TV and Computer Monitor Tubes</i> )	<b>Rights of defence - no obligation to involve subsidiary in administrative proceedings – obligation to keep records :</b>  <ul style="list-style-type: none"> <li>• C-286/11 P <i>Tomkins</i> case law (derivative nature of parental liability) does not imply obligation to involve subsidiary in administrative proceedings, only that parent cannot be held liable for period for which no evidence of infringement by subsidiary (§§ 81-82)</li> <li>• general duty of care: obligation parent company to keep records (§§ 86-89)</li> </ul>
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### C. Right to be heard

9 Sept 2015	Judgment T-82/13 <i>Panasonic</i> (AT.39437 TV and <i>Computer Monitor Tubes</i> )	<b>Right to be heard: statement of objections / correspondence between final decision and SO / need for supplementary SO or letter of facts</b> : reminder of the principles (§§ 48-62)
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9 Sept 2015	Judgment T-104/13 <i>Toshiba</i> (AT.39437 TV and <i>Computer Monitor Tubes</i> )	<b>Right to be heard : use of another party's response to the SO on which the applicant has not been heard :</b>  <i>in casu</i> no breach of rights of defence because sufficient other evidence supporting decision, and other party's response not claimed to be exculpatory (§§ 126-132)
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### D. Access to the file

9 Sept 2015	Judgment T-92/13 <i>Philips</i> (AT.39437 TV and <i>Computer Monitor Tubes</i> )	<b>Access to the file – parental liability of other cartel participants :</b>  no right of access to documents concerning parental liability of other cartel participants (§§ 239-251)
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15 July 2015	Judgment T-47/10 <i>Akzo Nobel</i> (AT.38589 <i>Heat Stabilisers</i> )	<b>Access to file – replies other parties to SO :</b>  refusal of access to statement by Mr S in reply to SO by another party: no problem because probative value would have been more than suspect given Mr S's central role in the infringement (§§ 335-358)
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5 Aug 2015	Commission Communication 2015/C256/03 Amendments to Notice on access to the file	<p><b>Amendment to Notice on access to the file :</b></p> <p>documents obtained by the Commission (not only in inspections) that prove to be unrelated to the subject matter of the case may be returned and will no longer constitute part of the file (new paragraph 9)</p> <p>≈ C-204/00 P <i>Aalborg Portland</i>, § 126</p>
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### E. Oral hearing

15 July 2015	Judgment T-406/10 <i>Emesa-Trefilería</i> (AT.38344 <i>Prestressing Steel</i> )	<p><b>Presence Commissioners at oral hearing :</b></p> <p>no problem that Commissioners only informed of the outcome of the hearing by persons appointed to conduct it (§ 120)</p> <p>≈ 44/69 <i>Buchler</i>; T-372/10 <i>Bolloré</i> , §§ 56-61</p>
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3 Sept 2015	Opinion AG Wahl C-154/14 P <i>SKW Stahl-Metallurgie</i> (AT.39396 <i>Calcium Carbide</i> )	<p><b>No fundamental right to an oral hearing</b> (§§ 49 and 58)</p>
		<p><b>Oral hearing: <i>in camera</i> hearing (closed session) :</b></p> <ul style="list-style-type: none"> <li>• "granting an <i>in camera</i> hearing is at the Hearing Officer's discretion" (§ 57)</li> <li>• Court could only censure "in case of misuse of powers, insufficient reasoning (including no response at all), incorrect factual assessment or perhaps even manifest error of assessment" (§ 65)</li> </ul>
		<p><b>Right to be heard: timing :</b></p> <p>"The right to be heard is intended to give undertakings the opportunity of being heard, not necessarily of being heard at the time of their best convenience" (§ 71)</p>

## F. Final report of the Hearing Officer

9 Dec 2014	Judgment T-90/10 <i>Ferriere Nord</i> (AT.37956 <i>Reinforcing bars</i> )	<b>Final report of Hearing Officer – language versions :</b>  submission of final report to College of Commissioners in French, German and English but not Italian (authentic language of decision) is no ground for annulment (§§150-161)
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## V. SPECIAL PROCEDURES FOR CARTELS

### A. Leniency

3 Aug 2015	Commission Regulation (EU) 2015/1348 amending Regulation (EC) No 773/2004	<b>Amendment to Commission Regulation 773/2004 :</b> new Article 4a :  legal basis for Commission's leniency programme
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20 May 2015	Judgment T-456/10 <i>Timab Industries</i> (AT.38866 <i>Animal feed phosphates</i> )	<b>Leniency:</b>  chronological order and speed of cooperation are fundamental elements of leniency system (§184)
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24 June 2015	Judgment C-294/13 P <i>Commission v Fresh Del Monte Produce</i> (AT.39188 <i>Bananas</i> )  following Opinion AG Kokott (11 Dec 2014)	<b>Leniency – reply to simple request for information :</b>  reply to simple request for information under Article 18(2) of Regulation 1/2003 does not merit fine reduction under leniency; otherwise purpose and incentive effects of leniency provisions would be undermined  (§§180-187; Opinion AG Kokott, §§ 232-251)
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6 Oct 2015	<p>Judgment T-250/12 <i>Corporación Empresarial de Materiales de Construcción (AT.38695 Sodium Chlorate)</i></p>	<p><b>Leniency – interruption of limitation period:</b></p> <p>decision granting conditional immunity to leniency applicant constitutes an action interrupting the limitation period for the imposition of fines for all cartel participants within the meaning of Article 25(3) Reg 1/2003 (§ 97)</p>
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## B. Settlement

20 May 2015	<p>Judgment T-456/10 <i>Timab Industries (AT.38866 Animal feed phosphates)</i></p>	<p><b>Cartel settlement procedure – nature:</b></p> <ul style="list-style-type: none"> <li>• aim = simplify and speed up administrative procedures + reduce number of cases before EU judicature (§60, 65)</li> <li>• Commission has wide discretion to choose settlement or not (§64)</li> <li>• voluntary procedure (§76)</li> <li>• discussions, exchange of views during settlement procedure (§117)</li> </ul>
		<p><b>Return to standard procedure – hybrid case:</b></p> <ul style="list-style-type: none"> <li>• after return to standard procedure: 'tabula rasa': Commission not bound by fine range + no more onerous obligation to state reasons (§§104, 96, 106)</li> <li>• hybrid case: separate procedures, but principle of equal treatment must be respected, also by Court in exercise of unlimited jurisdiction (§§71-72, 216)</li> </ul>

## VI. PUBLICATION OF DECISIONS

<p>28 Jan 2015</p>	<p>Judgments T-341/12 <i>Evonik Degussa</i> T-345/12 <i>Akzo Nobel</i> (<i>AT.38620 Hydrogen Peroxide</i>)</p>	<p><b>T-198/03 <i>Bank Austria</i> test for protection against publication confirmed</b> (T-345/12, § 65):</p> <p>3 cumulative conditions:</p> <ol style="list-style-type: none"> <li>1. known only to a limited number of persons</li> <li>2. disclosure is liable to cause serious harm to information provider or third parties</li> <li>3. interests liable to be harmed by disclosure are, objectively, worthy of protection</li> </ol> <p>Fact that <b>information disclosed during procedure to other parties because of right to be heard</b> does not make first <i>Bank Austria</i> condition unfulfilled (T-345/12, §§ 66-68)</p> <p><b>Information older than 5 years</b> is not confidential, unless the applicant demonstrates that exceptionally still an essential element of the commercial position of the applicant or a third party (T-341/12, § 84)</p> <p><b>Publication of decisions – Article 30 Reg 1/2003 – information provided by leniency applicants :</b></p> <ul style="list-style-type: none"> <li>• no rule prevents Commission from including in published decision information provided by leniency applicants (↔ protection against divulgation of documents corporate statements)</li> <li>• Commission has broad discretion under Article 30 (T-345/12, §§ 122-124)</li> </ul>
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		<p><b>Relationship with Regulation 1049/2001 on public access :</b></p> <p>general presumption allowing refusal of access under Reg 1049/2001 does not imply impossibility to publish under Article 30 Reg 1/2003 (T-345/12, §§ 63-64)</p>
		<p><b>Article 8 ECHR :</b></p> <p>ECtHR case law: Article 8 ECHR does not protect against reputational harm flowing from one's own behaviour (T-341/12, § 125)</p>
		<p><b>Competence of Hearing Officer under Article 8 of Decision 2011/695/EU :</b></p> <ul style="list-style-type: none"> <li>• HO only competent for (all) rules specifically aimed at protecting against the divulgence of information or documents (T-341/12, §§ 42-43), not alleged violation of principles of equal treatment or legitimate expectations</li> <li>• reasoning for matters outside remit of HO is found in DG COMP letters and can be reviewed by Court in action against HO decision (T-341/12, §§ 60-61 and 132-133)</li> </ul>

<p>15 July 2015</p>	<p>Judgment T-462/12 <i>Pilkington</i> (AT.39125 Car Glass)</p>	<p><b>Publication of decisions – Article 30 Reg 1/2003 :</b></p> <p>Commission discretion to publish non-confidential information: can adjust over time to needs of competition policy (§ 77)</p>
		<p><b>Information exchanged between cartel members</b> may for that reason no longer be known to a limited number of persons and hence not be protected against publication (§§ 56, 60-61, 66)</p> <p>because "<b>confidentiality has to be assessed in relation to the circles that normally deal with the kind of information concerned</b>" (§63)</p>

		<p><b>Publication – personal data – identity of staff :</b></p> <ul style="list-style-type: none"> <li>• company can raise arguments in interest of its staff (§ 81)</li> <li>• correct to remove only information directly identifying staff (§§ 82-84)</li> </ul> <hr/> <p><b>Publication of decisions – competence Hearing Officer under Art 8 Decision 2011/695/EU :</b></p> <ul style="list-style-type: none"> <li>• HO cannot reject confidentiality request already accepted by DG Competition (§§ 30-34)</li> </ul>
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<p>14 Oct 2015</p>	<p>Judgment  Court of Appeal (U.K.)  <i>Air Canada and Others v Korean Airlines and Others</i>  [2015] EWCA Civ 1024  (AT.39258 AirFreight)</p>	<p><b>Disclosure of Commission decision – confidentiality – presumption of innocence – T-474/04 Pergan protection :</b></p> <ul style="list-style-type: none"> <li>• T-474/04 <i>Pergan</i> protection (confidentiality of materials suggesting infringement by persons other than the addressees of the decision) also applies to addressees of the decision as to materials in the decision that are not essential basis for the operative part (§§ 69, 58)</li> <li>• <i>Pergan</i> protection equally applies to national courts deciding on disclosure in the context of follow-on actions for damages (§§67-68, 79)</li> <li>• Art 4(3) TEU obligation of sincere cooperation between national court and Commission (§§ 73-74)</li> </ul>
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## VII. FOLLOW-ON ACTIONS FOR DAMAGES

### A. Directive 2014/14/EU on actions for damages for competition law infringements

<p>26 Nov 2014</p>	<p>Directive 2014/104/EU of the European Parliament and Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU</p>	<p><b>Legal base and scope</b> (Articles 1 and 2(3) and recital 10) :</p> <p>legal base = Articles 103 and 114 TFEU → ordinary legislative procedure</p> <p>≈ scope: infringements of EU competition law and national competition law affecting trade between Member States (Article 3(1) Regulation 1/2003)</p> <hr/> <p><b>Right to full compensation</b> (Article 3) :</p> <p>"shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages" (Article 3(3))</p> <hr/> <p><b>Disclosure of evidence</b> (Articles 5 to 8) :</p> <ul style="list-style-type: none"> <li>• upon reasoned justification : proportionate disclosure from defendant, claimant or third party (Article 5); Member States may provide for wider disclosure (Article 5(8))</li> <li>• special rules on disclosure of evidence included in the file of a competition authority (Article 6) :             <ul style="list-style-type: none"> <li>- only where no party or third party is reasonably able to provide that evidence (Article 6(10))</li> <li>- never leniency statements and settlement submissions (Article 6(6))</li> <li>- information specifically prepared for competition authority (CA) proceedings only after closure of proceedings (Article 6(5))</li> </ul> </li> </ul>
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		<ul style="list-style-type: none"> <li>• limits on use of evidence obtained through access to the file of a CA (Article 7): <ul style="list-style-type: none"> <li>- can only be used by that person, legal successor, or part of same undertaking (Article 7(3) and recital 31)</li> <li>- restrictions mirroring Article 6(6) and (5) (Article 7(1) and (2))</li> </ul> </li> </ul>
		<p><b>Effect of NCA decisions</b> (Article 9) : infringement "irrefutably established" before national courts of same Member State ↔ "at least prima facie evidence" in national courts of other Member States</p>
		<p><b>Limitation periods</b> (Article 10) : at least 5 years + suspension for CA action</p>
		<p><b>Joint and several liability</b> (Article 11) : limitations for immunity recipients and SMEs</p>
		<p><b>Passing-on of overcharges</b> (Articles 12 to 16):</p> <ul style="list-style-type: none"> <li>• avoid overcompensation (Article 12(2))</li> <li>• rebuttable presumption for indirect purchaser (Article 14(2))</li> <li>• Commission to issue guidelines (Article 16)</li> </ul>
		<p><b>Consensual dispute resolution</b> (Articles 18 and 19):</p> <ul style="list-style-type: none"> <li>• suspension of limitation period (Article 18(1))</li> <li>• CA may consider compensation paid as mitigating factor for fine (Article 18(3))</li> </ul>
		<p><b>Transposition and temporal application</b> (Articles 21 and 22) :</p> <p>transposition by 27 December 2016 ;</p> <p>not applicable to actions brought before 26 December 2016</p>

7 July 2015	Judgment T-677/13 <i>Axa Versicherung</i>	<b>Directive 2014/104/EU</b> does not affect access to documents under <b>Regulation 1049/2001</b> (§ 135)
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### B. Amendment of Commission Regulation 773/2004

3 Aug 2015	Commission Regulation (EU) 2015/1348 amending Regulation (EC) No 773/2004	<p><b>Amendment to Commission Regulation 773/2004</b> : new Article 16a :</p> <p>permitted use of information obtained in the course of Commission proceedings :</p> <ul style="list-style-type: none"> <li>• only in administrative and judicial proceedings for the application of Articles 101 and 102 TFEU</li> <li>• leniency corporate statements and settlement submissions can only be used for the exercise of rights of defence in Commission proceedings, before EU Courts reviewing Commission decision and in national court proceedings concerning the allocation between cartel participants of a fine imposed jointly and severally on them by the Commission</li> </ul> <p>↔ not in follow-on actions for damages</p> <ul style="list-style-type: none"> <li>• information specifically prepared by other persons or by the Commission for the Commission proceedings can only be used in national courts after closure of the Commission proceedings</li> </ul> <p>≈ Art 7 Directive 2014/104</p>
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### C. Regulation 44/2001 on jurisdiction

<p>21 May 2015</p>	<p>Judgment C-352/13 <i>Cartel Damages Claims (CDC) Hydrogen Peroxide (AT.38620 Hydrogen peroxide and perborate)</i></p>	<p><b>Regulation 44/2001 on jurisdiction – follow-on action after Commission cartel decision:</b></p> <ul style="list-style-type: none"> <li>• centralisation of jurisdiction under Article 6(1) of Regulation 44/2001 can apply even if the applicant has withdrawn its action against the sole defendant domiciled in the State of the court seised, unless at the time the proceedings were instituted the applicant and the defendant had colluded to artificially fulfil or prolong the fulfilment of that provision's applicability</li> <li>• each victim can under Article 5(3) of Regulation 44/2001 choose to bring an action before the courts of the place in which the cartel was definitively concluded or the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or before the courts of the place of its own registered office</li> <li>• jurisdiction clause under Article 23(1) of Regulation 44/2001 must refer to disputes concerning liability incurred as a result of an infringement of competition law; clause which abstractly refers to all disputes from contractual relationships does not suffice</li> </ul>
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