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## **Competition enforcement and human rights after the Treaty of Lisbon: the state of play and the (near) future prospects**

### **Introduction**

EU Competition enforcement has undergone major changes over the past decade, ranging from the enactment of the Modernisation Regulation, seeking to establish greater cooperation across the EU as well as to boost private enforcement, to the identification of new priorities and novel, more economics based approaches to the application of the substantive competition rules. Whereas these reforms have left intact the “integrated agency model” governing the Commission’s role, subject to the judicial review of the EU Courts, they have resulted in stronger investigative, decision-making and remedial powers. Consequently, while it is clear that the Commission’s role has been strengthened, no specific measure has been adopted in order to deal with the long standing criticism, brought against the current institutional structure and concerning its alleged lack of compliance with the due process rules enshrined in European human rights catalogues, such as the European Convention on Human Rights (hereinafter referred to as ECHR).

These concerns have become more significant due to the implications of the Treaty of Lisbon for human rights’ protection: the 2009 Treaty on the Function of the European Union (hereinafter referred to as TFEU) has not only made the rules contained in the EU Charter of Fundamental Rights binding on the EU agencies as well as on the domestic authorities acting within the scope of EU law; it has also created an express legal basis for the accession of the Union to the ECHR, thus envisaging the possibility that EU action be subject to the scrutiny of the European Court of Human Rights.

Against this background, a number of questions emerge. From a substantial point of view, it may be wondered whether these more pervasive investigation and decision-making powers are adequately counterbalanced by the applicable standards of due process in a way which is compatible with the Convention. The paper will consider the existing degree of protection provided by EU law to the right to “privacy” of business premises against inspections and examine them in the light of the corresponding rules contained in Article 8 of the ECHR; it will also examine the possible divergences between the EU right to remain silence and the Convention’s own standards of protection against self-incrimination. Against this background, it will be argued that these two cases may well offer the opportunity for individual claimants to mount a “challenge” against the fairness of the Commission’s competition investigations under the Convention.

Thereafter, the paper will illustrate the existing interpretation given by both the Commission and the EU Courts to the principle of *ne bis in idem* in the context of competition enforcement; it will be submitted that although Article 50 of the EU Charter of Fundamental Rights echoes the high standards of protection against double jeopardy already affirmed by the European Court of Human Rights, the same principle does not appear to apply with the same intensity in competition proceedings across the European Competition Network, thus openly questioning the extent to which the safeguard of this right in the EU legal system may be considered “equivalent” to that offered by the ECHR.

Accession to the ECHR on the part of the EU also raises serious procedural questions, ranging from how individuals can seek the protection of their rights within the Convention framework against actions of the Union institutions or indeed of domestic agencies implementing EU law, to how the unity, autonomy and consistency of EU law can be safeguarded once the Union itself agrees to be bound by external normative standards and to be subject to scrutiny exercised by an external court. These questions appear even more urgent and complex in the context of EU competition enforcement, since Council Regulation No 1/2003 relies on

the close cooperation of the NCAs with the Commission and with each other and is based on the principle of concurrent jurisdiction in the application of Articles 101 and 102 TFEU.

Although the “delegated implementation” of EU law is a feature common to many policy areas, it will be suggested that identifying the respondent in these cases, i.e. whether an action should be brought against the EU or the Member State, is especially important not only for the individual applicant but also, more generally, for the scope of review exercised by the European Court of Human Rights, which may be called to scrutinise issues of allocation of competences at admissibility stage. This paper will discuss the existing proposal for a co-respondent mechanism, made in the Draft Accession agreement currently being negotiated by the EU institutions and the Member States; it will be argued that this solution, coupled with the involvement of the Court of Justice of the EU (hereinafter referred to as ECJ) via the preliminary reference proceedings in appropriate cases, may strike the right balance between effective human rights’ protection and preserving the unity and autonomy of EU law.

The possibility to bring individual challenges against the EU raises further questions for the role of the ECJ: it will be argued that the involvement of the Luxembourg Court may be indispensable for the purpose of exhausting the domestic remedies, in accordance with the admissibility requirements laid down by Article 35 of the Convention itself, as well as being required by the need to safeguard the role of the Court itself as the “guardian of the Treaty”. However, it will also be suggested that while meeting this condition may be relatively straightforward when the measure under challenge is imputable to the European Commission, it may be more problematic when national competition agencies are involved, ranging from the timeliness of individual actions to the possibility that, due to the rules governing the preliminary reference procedure, domestic courts avoid making such a reference in specific cases.

The paper will conclude that the Treaty of Lisbon has brought about extremely significant changes to the framework for human rights’ protection in the EU, whose impact is widely felt also in the context of competition enforcement and which throws into question hitherto established assumptions. It will be argued that while the ECHR is likely to introduce stronger human rights’ safeguards, it also raises a number of complex questions as to how these rights can be enforced by individual claimants and with what consequences for the role of the Commission and its domestic partners as well as, more generally, for the inner coherence and the institutional balance of the EU as a whole.

## 2. Of companies, human rights and due process: a tale of two jurisdictions?

### *2.1. Human rights protection and EU competition investigations: brief introductory remarks*

An examination of the issues concerning human rights’ protection in the EU, whether generally or in the specific context of competition enforcement, goes beyond the remit of this contribution. It is however indispensable to note that these matters have been at the forefront of the debate since the early days of the EEC, having constituted a “bone of contention” for domestic courts concerned with the consequences of the supremacy of EU law. These questions also struck at the core of the interplay between the implementation of the Treaty obligations, very often through domestic authorities’ actions, and the observance of Europe-wide human rights’ guarantees, such as those provided by the European Convention on Human

Rights.<sup>1</sup> As is well known, the ECJ succeeded in developing autonomous EU human rights principles, inspired by and centred upon the rules of the ECHR, principles which were later "consolidated" into the EU Charter of Fundamental Rights.<sup>2</sup>

At the same time, the European Court of Human Rights recognised in a number of judgments that the level of fundamental rights' protection offered by EU law could be "presumed" to be equivalent to that of the Convention, in consideration of their substance and of their means of enforcement.<sup>3</sup> The Strasbourg Court famously held in *Bosphorous* that unless the applicant proved that these guarantees had been "manifestly deficient" in the circumstances of a particular case, individual Contracting States could not be held to account for infringements arising from EU action.<sup>4</sup> The centrality of the Convention within the EU human rights' principles was confirmed by both the EU Charter, whose "horizontal clauses" aim at ensuring consistency with it, and by the Treaty of Lisbon, which provides an express legal basis for accession.<sup>5</sup>

In this specific respect it should be emphasised that negotiations are currently in progress to ensure that this objective is achieved consistently with the principles of consistency, autonomy and supremacy of EU law and in the respect of the inter-institutional balance of the EU framework as a whole.<sup>6</sup> These developments were

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<sup>1</sup> See e.g. case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide und Futtermittel*, [1970] ECR 1125; cf. the adverse position of the German Constitutional Court, described, *inter alia*, in CROSSLAND, "Three major decisions given by the Bunderverfassungsgericht (Federal Constitutional Court)", (1994) 19 *ELRev* 202, and reversed only in case 69/85, *Wunsche Handelsgesellschaft*, [1986] ECR 947; also case C-5/88, *Wachauf v Bundesamt fur Ernaehrung und Fortwirtschaft*, [1989] ECR 2609, para. 19; see also case C-260/89, *ERT AE v DEP and Sotirios Kouvelas*, [1991] ECR I-2925, para. 42-43. See e.g. DOUGLAS-SCOTT, *The Constitutional Law of the European Union*, 2002: Longman, p. 432; also WEILER, "Eurocracy and distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities", (1986) 61 *Wash. Law Rev.* 1103 at 1111; see also DAUSES, "The protection of Fundamental Rights in the Community Legal Order", (1985) 10 *ELRev* 398 at 400.

<sup>2</sup> Case 4/73, *Nold v Commission*, [1974] ECR 491, para. 13. Also, see e.g. case C-112/00, *E. Schmidberger, Internationale Transporte und Planzuge v Austria*, [2003] ECR I-5659, para. 56-57, 60 and 64, also case C-540/03, *European Parliament v Council*, judgment of 27 June 2006, [2006] ECR I-5769, para. 38. For commentary, see, *inter alia*, BIONDI, "Free trade, a mountain road and the right to protest: European economic freedoms and fundamental individual rights", (2004) *EHRLR* 51 at 58-59. For commentary, *inter alia*, HARTLEY, *The Foundations of European Community Law*, 5<sup>th</sup> Ed., 2003, Oxford University Press, p. 137; also DeBURCA & ASCHENBRENNER, "The development of European constitutionalism and the role of the EU Charter of Fundamental Rights", (2003) 9 *Colum. J. Eur. L.* 355 at 379.

<sup>3</sup> See appl. No. 40302/98, *Matthews v United Kingdom*, [1999] 28 EHRR 361, para. 33. Also, *mutatis mutandis*, appl. No 26083, *Waite and Kennedy v Germany*, [1999] 30 EHRR 261 at para. 68. For commentary, *inter alia*, SCHERMERS, *Matthews v United Kingdom*, judgment of 18 February 1999, case comment, (1999) 36 *CMLRev* 673 at 679. See also appl. No 45036/98, *Bosphorous Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1, para. 160-164; see also separate Opinion of Judge Ress, para. 3. For commentary see e.g. CALLEWAERT, "The European Convention on Human Rights and EU Law: a long way to harmony", (2009) *EHRLR* 768 at 777; also HARMSEN, "National responsibility for European Community acts under the European Convention on Human Rights: recasting the accession debate", (2001) 7 *EPL* 625 at 645-647.

<sup>4</sup> Appl. No 45036/98, *Bosphorous Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1, para. 155.

<sup>5</sup> See Article 6(2) TEU; cf. Opinion 2/94, on *Accession of the Community to the ECHR*, [1996] ECR I-1759, para. 27. See, *inter alia*, YOUNG, "The Charter, Constitution and human rights: is this the beginning or the end for human rights protection by Community law?", (2005) 11 *EPL* 219 at 226-227; also SYRPIS, "The Treaty of Lisbon: much ado...but about what?", (2008) *ILJ* 219 at 232-233.

<sup>6</sup> See First Draft agreement on the accession of the EU to the Convention, CDDH-UE (2011) 04; revised agreements, CDDH-UE(2011) 06 and 10; for commentary, see e.g. Lock, "Walking on a

welcomed as a means of “filling the gaps”, substantial and procedural, resulting from the approach adopted by the European Court of Human Rights in *Bosphorus*.<sup>7</sup>

It was emphasised that, after accession, the EU would be held responsible for human rights’ breaches occurring within its jurisdiction, regardless of whether there had been an involvement of the authorities of the Member States and of the nature of that involvement.<sup>8</sup> Formal accession would also allow the EU institutions to participate to the proceedings before the Strasbourg Court, in the forms prescribed by the accession agreement, thereby ensuring that the “Union interest” be adequately represented during these proceedings.<sup>9</sup> At the same time, however, it is undeniable that accession would have a number of significant implications for integrity of the human rights acquis of the Union and for the role of the ECJ itself vis-à-vis the courts of the Member States and in respect to the scrutiny exercised by the Human Rights’ court.

Having regard especially to the EU competition enforcement framework, the growth and the consolidation of this acquis into the EU Charter has fuelled the debate on the question of whether the nature of proceedings and the intensity of the investigative and decision-making powers enjoyed by the Commission and by the NCAs in this area complied with the basic “due process” guarantees enshrined in the Convention.<sup>10</sup> Commentators argued that the observance on the part of the Union of the principles enshrined in the rule of law, and especially of the values of personal and economic freedom and of democracy,<sup>11</sup> justified the extension of fundamental rights-type safeguards to commercial actors, whether natural or legal persons.<sup>12</sup> Although it was recognised that the degree of protection assigned to entities active on the market and more generally in a “commercial context”, could be weaker than that applied to natural persons acting within, for instance, the political arena, it was accepted that undertakings could claim the respect of basic guarantees, such as the right to a “fair trial” and to a “fair procedure” and a limited “right to privacy”.<sup>13</sup>

These arguments appear even more pressing if regard is had to the features of competition proceedings before the Commission: the all-encompassing nature of the concept of “undertaking”, which spans from incorporated entities to natural persons,<sup>14</sup> and the ostensibly punitive nature of the sanctions that can be imposed on those responsible for competition infringements have strengthened the view that these

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tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order”, (2011) 48 CMLRev 1025, especially pp. 1028 ff.

<sup>7</sup> Lock, cit. (fn. 6), p. 1027-1028.

<sup>8</sup> Ibid. See also, inter alia, Syrpis, cit. (fn. 5), pp. 225-226. See e.g. appl. No 73274/01, *Connolly v 15 Member States*, judgment of 9 December 2008; cf., more recently, appl. No 30696/09, *MSS v Belgium*, judgment of the Grand Chamber, 21 January 2011, [2011] 53 EHRR 2, para. 338-340, 347-349.

<sup>9</sup> Jacque’, “The accession of the European Union to the European Convention on Human Rights and Fundamental freedoms”, (2011) 48 CMLRev 995 at 1007-1008.

<sup>10</sup> For a detailed assessment of these issues, see EMBERLAND, *The human rights of companies*, 2005: OUP; see especially pp. 180 et seq.; see also ANDREANGELI, *EU competition enforcement and human rights*, 2008: E Elgar, pp. 18 et seq.; Merola et al. (Ed.), *Toward the optimal enforcement of the competition rules in Europe*, 2010: Brussels, Bruylant, Ch. 5.

<sup>11</sup> See e.g. case 249/83, *Parti Ecologiste Les Verts v European Parliament*, [1986] ECR 1339, para. 22-23.

<sup>12</sup> See e.g. Appl. No 13710/88, *Niemitz v Germany*, Ser. A No 251-B, [1993] 16 EHRR 17, para. 29; also Appl. No 37971/97, *Ste Colas Est and others v France*, judgment of 16 April 2002, [2004] 39 EHRR 17, para. 40-41; Appl. No 10572/83, *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989, Ser. A No 165, [1990] 12 EHRR 161, para. 26, 35.

<sup>13</sup> See e.g. Emberland, cit. (fn. 10), p. 180-182; see e.g. appl. No 14369/88, *Noviflora Sweden AB v Sweden*, Commission Decision, [1993] 15 EHRR CD6; para. 2(b) and 4.

<sup>14</sup> See e.g. case C-309/99, *Wouters and others v Algemene Raad van der Nederlandsen Ordre van Advocaten*, [2002] ECR I-1577, para. 48-49.

proceedings have a “criminal law character” and should therefore be regarded as falling within the remit of the Convention.<sup>15</sup>

On this point, the European Court of Human Rights has constantly held that demands of “flexibility” and “efficiency” could justify conferring decision making powers to non-judicial bodies<sup>16</sup> in matters that in principle required a hearing before an “independent and impartial tribunal”.<sup>17</sup> In these cases, however, to meet the Convention requirements of due process, the contracting states would have to ensure, at a minimum, that the decision adopted by such non-judicial bodies be subjected to “full” judicial control as regards all aspects of law, fact and merits, by a “court of law”.<sup>18</sup> Although the ECJ had initially denied that Article 6 of the Convention would be applicable to EU competition enforcement action, on the ground that the Commission was entrusted with a merely administrative function in this area,<sup>19</sup> it later came to accept that a number of fairness principles should be considered as relevant also for these proceedings, such as, *inter alia*, a limited right to silence in the face of incriminating questioning, to resist disclosure of certain privileged communications and to challenge the validity of compulsory investigative measures before the General Court.<sup>20</sup>

However, the Commission’s practice and the EU Courts’ case law have shown that, despite the Union’s commitment to the respect of human rights to a standard inspired by the ECHR, significant divergences remain between the Convention’s and the EU law’s notion of specific features of what constitutes a “fair procedure”. Although the “integrated agency model” characterising the Commission’s framework, is not per se incompatible with the Convention, the impact of its extensive fact-finding powers has led to outcomes that are not easy to reconcile with the safeguards of its Article 6.<sup>21</sup> In addition, the push toward greater cooperation with and

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<sup>15</sup>See appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, para. 56-61; also appl. No 73053/01, *Jussila v Finland*, [2007] 45 EHRR 39, para. 43. For commentary, *inter alia*, WILS “The combination of the Investigative and prosecutorial function and the adjudicative function in EC Antitrust enforcement: a legal and economic analysis”, (2004) 27 *W. Comp.* 201 at 208. See also, *mutatis mutandis*, appl. No 7598/76, *Kaplan v United Kingdom*, Commission Decision, [1982] 4 EHRR 64, para. 150; also appl. No 15523/89, *Schmautzer v Austria*, [1996] 21 EHRR 511, para. 28; appl. No 8544/79, *Ozturk v Germany*, [1984] 6 EHRR 409, para. 55-56.

<sup>16</sup>Appl. Nos. 6878/75 and 7238/75, *LeCompte, Van Leuven and de Meyere v Belgium*, [1982] 4 EHRR 1, para. 51. See also appl. No 9273/81, *Ettl v Austria*, [1988] 10 EHRR 255, paras. 38 and 41; appl. No 19178/91, *Bryan v United Kingdom*, Commission report, [1996] 21 EHRR 342, paras. 37-38.

<sup>17</sup>*Inter alia*, appl. No. 8544/79, *Ozturk v Germany*, [1984] 6 EHRR 409 at paras. 49-50.

<sup>18</sup>Appl. Nos. 7299/75 and 7496/76, *Albert & LeCompte v Belgium*, [1983] 5 EHRR 533, para. 29.

<sup>19</sup>*Inter alia*, cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] ECR 1825, per AG Slynn, p. 1920.

<sup>20</sup>See e.g. case T-67/00, *JFE v Commission*, [2004] ECR II-2501, para. 177-178; Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Goothandel op Elektrotechnisch Gebied v Commission*, Opinion of AG Kokott, delivered on 8 December 2005, [2006] ECR I-8725, para. 107-108.

<sup>21</sup>For a consideration of the human rights’ implication of the action of the Commission as “integrated agency see e.g. case 41/69, *ACF Chemiefarma v Commission*, [1970] ECR 661; case 45/69, *Boehringer Mannheim v Commission* [1970] ECR 769; case C-62/86, *AKZO v Commission*, [1991] ECR I-3359; cases T- 10, 11, 12 and 15/92, *SA Cimenteries CBR & others v Commission*, [1992] ECR II-1571; cases 142 & 156/84, *BAT & Reynolds v Commission*, [1987] ECR 4487; see also case T-156/94, *Siderurgica Aristrain Madrid SL v Commission*, [1999] ECR II-645, para. 109; joined cases C-189/02, 202/02, 205-208/02 and 213/02, *Dansk Rorindustri and others v Commission*, [2005] ECR I-5425. For commentary, see e.g. BAILEY, “Scope of judicial review under Article 81 EC”, (2004) 41 *CMLRev* 1327. For the position of the European Court of Human Rights see *inter alia* appl. No 9749/82, *W v United Kingdom*, [1988] 10 EHRR 29, para. 64; also *mutatis mutandis*, appl. No 11761/85, *Obermeier v Austria*, [1991] 13 EHRR 290, para. 69; appl. No 19178/91, *Bryan v United Kingdom*, [1996] 21 EHRR 342, para. 46. For commentary, see e.g. POUSTIE, “The rule of law or the rule of lawyers? *Alconbury*, Article 6(1) and the role of courts in administrative decision-making”, (2001) 6 *EHRLR* 657 at 663; also ANDREANGELI, cit. (fn. 10), p. 64 et seq.

decentralised enforcement by the NCAs, on the basis of a principle of parallel, shared jurisdiction, has questioned the extent to which the Union's commitment to the protection against double jeopardy, enshrined not just in the Convention's Protocol VII, but also in Article 50 of the EU Charter, is truly upheld in the context of competition enforcement.

It is emphasised that these issues are all the more pressing today, with accession to the ECHR getting underway and therefore, paving the way toward potential challenges of these practices and procedures before the Strasbourg Court. Consequently, the next sections will briefly address the "substantial" questions arising from the perceived "shortcomings" of the EU competition enforcement framework: the right to remain silent and to maintain a degree of "privacy" of commercial premises vis-à-vis inspections and the limited scope for the application of the principle of *ne bis in idem* will be illustrated at this juncture.

## 2.2. The Commission fact-finding powers and the rights of the investigated parties: when "effectiveness" prevails over "fairness"—the case of the right to silence

Section 2.1 provided a brief and non-exhaustive prologue to the discussion of the "substantial" questions arising from the interplay of the ECHR safeguards with the effective enforcement of the EU competition rules by the Commission either on its own or in partnership with the NCAs and argued that any divergence in the standards applicable, respectively in the EU and the Convention framework could herald the possibility for a direct challenge of the lawfulness of these proceedings. For this reason, this section will consider the extent to which the exercise of individual investigative powers conferred to the Commission by Council Regulation No 1/2003 remains compatible with the Convention.

According to Article 18 of the Regulation the Commission may ask any undertaking for "all the necessary information" pursuant to a "simple request" or of a binding decision, both indicating the legal basis and the purpose of the request, the nature of the information and the time limit within which to provide it.<sup>22</sup> On this point, the ECJ made clear that while there is an expectation that the addressee of a "simple request" will cooperate with the investigating officers, cooperation following a simple request remains non-compulsory; should the undertaking concerned decide not to cooperate, however, the Commission may issue a binding decision, backed by pecuniary sanctions for non-compliance.<sup>23</sup> Article 19 further empowers the Commission to interview natural or legal persons, with their consent, on any matter under investigation and with the assistance of the competent domestic authorities. Thus, unlike with Article 18 requests of written information, Article 19 allows the interviewees both to object to being questioned *tout court* and to refuse to answer specific questions.<sup>24</sup>

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<sup>22</sup> See *inter alia*, RILEY, "Saunders and the power to obtain information in Community and United Kingdom competition law", (2000) 25(3) *ELRev* 264 at 266; also, *mutatis mutandis*, BERGHE and DAWES, " 'Little pig, little pig, let me come in': an evaluation of the European Commission's powers of inspection in competition cases", (2009) 30(9) *ECLR* 407 at 410-11; CALLEWAERT, "The European Convention on Human Rights and EU Law: a long way to harmony", (2009) *EHRLR* 768 at 775-776.

<sup>23</sup> See e.g. case 136/79, *National Panasonic v Commission*, [1980] ECR 2033, para. 11-13; case 374/87, *Orkem v Commission*, [1989] ECR 3283, para. 11, 13-14; case C-301/04 P, *Commission v SGL Carbon*, [2006] ECR I-5915, para. 40 and 44.

<sup>24</sup> For the implications of Article 19 in respect to leniency applicants, see Commission Notice on immunity from fines in cartel cases, [2006] OJ C298/17 (also referred to as Leniency Notice), para. 32. For commentary, see e.g. FORT, "Access to evidence –the conflict between leniency and private antitrust litigation", (2008) 1(1) *GCLR* 24 at 30; also RILEY, "The modernisation of EU anti-cartel enforcement: will the Commission grasp the opportunity?", (2010) 31(5) *ECLR* 191 at 193.

Against this background, it was often queried whether investigated parties to which Article 18 decisions are addressed can refuse to provide answers leading to a de facto admission of responsibility for an alleged infringement. The right to remain silent in the face of actually or potentially self-incriminating questioning is recognised as an essential component of a “fair trial” by the European Court of Human Rights, according to which it should be for the prosecution to prove their case against the defendant;<sup>25</sup> the Court added that this principle also seeks to protect the integrity of the will of any accused natural person against “improper” forms of coercion in the taking of evidence, whether in judicial or merely “investigative” proceedings.<sup>26</sup>

At the core of any assessment of the scope of this right in individual cases should be an appraisal of the nature and intensity of the coercion applied on the concerned party: thus, in *Saunders* the Strasbourg court took the view that the right to silence could be invoked to avoid answering “improper” questions, but not the handing over of evidence whose existence was “independent” of the will of the accused, such as written documents.<sup>27</sup> Perhaps more importantly, the same Court held in *O’Halloran* that the existence of appropriate safeguards attending the taking of the evidence within a regulatory framework established to achieve public interest goals could justify a certain degree of coercion upon the investigated party, without completely jeopardising her right to a “fair procedure”.<sup>28</sup>

In light of the above, it is apparent that the right to refuse to answer inculpatory questions was originally framed to protect natural persons against improper “oppression” during questioning.<sup>29</sup> It is nonetheless suggested that although the intensity of its protection cannot be as extensive for legal entities as it is for natural persons, its applicability to regulatory processes, including competition investigations, is consistent with the rule of law.<sup>30</sup> Accordingly, it could be argued that its remit should be determined in relation to the nature of the coercion exerted on the investigated undertaking, to the features of the proceedings, including the involvement of the competent courts and the concurrent need to preserve the effectiveness of the regulatory structure concerned.<sup>31</sup>

The Convention’s solution to these questions may however be contrasted with the notion of right to silence fashioned by the ECJ for competition investigations. It was anticipated that the Commission may compel undertakings to answer “all the necessary” questions on threat of pecuniary sanctions, including “incriminating” questions. However, in the notorious *Orkem* decision the Court declined to recognise a right to silence as extensive as that provided under the ECHR, albeit within the limits imposed on it by the features of a regulatory framework. It was held that while a limited degree of protection against potentially incriminating questioning

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<sup>25</sup> Appl. No 10828/84., *Funke v France*, ser. A-256/A, [1993] 16 EHRR 297; for commentary, see *inter alia* MacCULLOCH, “The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications”, (2006) 26 (1) *LS* 211 at 231.

<sup>26</sup> Case 43/1994/490/572, *Saunders v United Kingdom*, [1997] 23 EHRR 313, para. 68-69. See also appl. Nos. 15809/02 and 25624/02, *O’Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para. 47. For commentary, *inter alia*, TRAINOR, “A comparative analysis of a corporation’s right against self-incrimination”, (1994-1995) 18 *Fordham Int’l L J* 2139 at 2165-66.

<sup>27</sup> Case 43/1994/490/572, *Saunders v United Kingdom*, [1997] 23 EHRR 313, para. 69. See e.g. RILEY, “Saunders and the power to obtain information in Community and United Kingdom competition law”, (2000) 25(3) *ELRev* 264 at 270-271.

<sup>28</sup> Appl. Nos. 15809/02 and 25624/02, *O’Halloran and Francis*, cit. (fn. 48), para. 55 and 57.

<sup>29</sup> MacCULLOCH, “The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications”, (2006) 26 (1) *LS* 211 at 234-236.

<sup>30</sup> See e.g. TRAINOR, “A comparative analysis of a corporation’s right against self-incrimination”, (1994-1995) 18 *Fordham Int’l L J* 2139 at 2165-66 and 2185-2186.

<sup>31</sup> See e.g. appl. Nos. 15809/02 and 25624/02, *O’Halloran and Francis v United Kingdom*, [2008] 46 EHRR 21, para. 47. For commentary, *inter alia*, TRAINOR, loc. ult. cit.

<sup>31</sup> EMBERLAND, cit. (fn. 10), p. 42-43; also TRAINOR, loc. ult. cit.



was available to all investigated parties since the early stages of an investigation, in order to avoid frustrating their rights of defence,<sup>32</sup> this right could only go as far as to allow them to refuse an answer to “leading questions”, namely to questions whose answer may “involve an admission of the existence of an infringement which it is incumbent upon the Commission to prove.”<sup>33</sup>

Although later cases seemed to hint at the application of less rigid standards of protection, based on the nature and intensity of the coercion exercised on the concerned parties,<sup>34</sup> the exclusion from the privilege of information concerning facts that could be known to them even though the evidence so gathered may be used to establish the existence of an antitrust infringement,<sup>35</sup> has been criticised as undermining the effective protection of an already weak right to silence. Some commentators pointed out that even merely factual answers may be just as damning as an admission of responsibility.<sup>36</sup> By contrast, other authors suggested that this approach could represent an acceptable compromise between the need to uphold the effectiveness of Articles 101 and 102 TFEU and the protection of the rights enjoyed by investigated undertakings, in a framework characterised by the clear willingness of the EU legislature to strengthen the powers of the Commission.<sup>37</sup>

It is suggested that the EU notion of privilege remains difficult to reconcile with the corresponding standards of protection laid down by the ECHR: although it is accepted that any solution as to the scope of the right to silence should be inspired by a “balancing exercise” between effective enforcement and the respect for what constitutes a “fair procedure” in a regulatory context,<sup>38</sup> this stark distinction between “factual” and “leading” question would place very little restraint on the Commission’s powers to compel the provision of incriminating evidence.<sup>39</sup> Although the *O’Halloran* decision could be read as suggesting that the scope of the privilege may be somehow less extensive in “regulatory” contexts, it should be borne in mind that, according to the Strasbourg court’s case law, any limitation cannot go as far as to impair this right in its essence.<sup>40</sup>

In this specific respect it should also be reminded that, according to the 2011 Best Practices’ Guidelines, adopted by the Commission and concerning the conduct of competition investigations, the investigating officers are obliged to give the undertakings’ staff and representatives a “Miranda type warning” during the preliminary stages of the investigations and especially before requesting

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<sup>32</sup> Case 27/88, *Orkem v Commission*, [1989] ECR 3355, para. 28.

<sup>33</sup> *Id.*, para. 35.

<sup>34</sup> Case C-238/99, *LVM NV and others v Commission*, [2002] ECR I-8375, para. 275, 279-282. See also case C-301/04 P, *Commission v SGL Carbon*, [2006] ECR I-5915, para. 40, 43.

<sup>35</sup> *Id.*, para. 34.

<sup>36</sup> See case T-112/98, *Mannesmannrohren Werke v Commission*, [2001] ECR II-729, para. 66. For commentary, see *inter alia*, RILEY, “Saunders and the power to obtain information in Community and United Kingdom competition law”, (2000) 21 *ELRev* 264 at 269; also WILLIS, “‘You have the right to remain silent...’ or do you? The privilege against self-incrimination following *Mannesmannrohren-Werke* and other recent decisions”, (2001) 22 *ECLR* 313.

<sup>37</sup> Appl. 8225/78, *Ashingdane v United Kingdom*, [1985] 7 EHRR 528, para. 57. See, *inter alia*, WILS, “Self-incrimination in EC antitrust enforcement: a legal and economic analysis”, (2003) 26 *W. Comp.* 567 at 575.

<sup>38</sup> See, *mutatis mutandis*, case C-60/92, *Otto v Postbank*, [1993] ECR I-5683, para. 16-20. For commentary see RILEY, *cit.* (fn. 36), p. 269.

<sup>39</sup> HOGAN, “The use of compelled evidence in European competition law cases”, in HAWK (Ed.), *International Antitrust Law and Policy, Annual Proceeds from the Fordham Corporate Law Institute*, 2005: New York, Juris Publishing, p. 659 at 672-673.

<sup>40</sup> See e.g., *mutatis mutandis*, appl. No 54810/00, *Jalloh v Germany*, [2007] 44 EHRR 32, para. 117.

information.<sup>41</sup> However, it must be emphasised that no similar warning must be given in the course of inspections and that in any case, the right of investigated undertakings to resist questioning remains limited to the *Orkem* concept of privilege. It is added that, in any event, this requirement is only laid down in an administrative statement which, despite giving rise to legitimate expectations vis-à-vis the Commission, does not appear to have been sanctioned by the ECJ so far. Against this background, it could be doubted whether the EU concept of right to silence, which places more emphasis on the nature of what is asked than on the type of coercion exerted on the investigated parties could be compatible with the Convention's principles and especially with the continuing need to strike a balance, in accordance with the principle of proportionality, between its protection and the attainment of goals of public interest, whenever one of the rights granted by the Convention is limited.<sup>42</sup>

In light of the above, it is contended that such a restrictive and relatively rigid reading of the right to silence in EU competition cases may become less and less tenable in the context of the changing landscape for human rights' protection in the EU, resulting from the Treaty of Lisbon, i.e. the direct applicability of the EU Charter as a binding source of human rights rules and the forthcoming accession to the Convention itself. Thus, it is concluded that these developments are very likely to prompt a new discussion on these issues and to offer the opportunity for a challenge of the substance of the EU fundamental rights' guarantees before the Strasbourg Court. These issues will be examined in more detail in section 3.

### 2.3. Commission inspections—the right to “privacy” of commercial premises and the involvement of domestic courts

Section 2.2 considered some of the questions arising from the EU law concept of right to silence, especially in light of the corresponding ECHR rules. This section will, instead, be concerned with the question of whether investigated parties, whether natural or legal persons, can claim the respect of the right to “privacy” of their commercial premises against competition investigations. The power of the Commission to launch “dawn raids” of business premises, land and means of transport owned or occupied by investigated undertakings, according to Article 20 of Council Regulation No 1/2003, represents perhaps one of the most famous features of its detection powers; as with Article 18 the Commission may proceed either upon a simple request or via a formal decision to which the investigated parties are obliged to submit, on pain of financial sanctions for refusal to cooperate.<sup>43</sup> The case handling officers are obliged to consult with the competent agencies before adopting a formal inspection decision and entitled to receive assistance from them.<sup>44</sup>

In addition, if it is so required by national law, the case handling officials must apply for judicial authorisation to conduct the inspection. The court will be entitled to scrutinise the authenticity of the decision and to check that the latter is not “arbitrary” or “excessive” given the subject matter of the investigation.<sup>45</sup> Whilst not being able to

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<sup>41</sup> See Commission best Practices Guidelines on the conduct of Articles 101 and 102 TFEU investigations, available at:

[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/best\\_practice\\_articles.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf), para. 14.

<sup>42</sup> *Inter alia*, see, *mutatis mutandis*, *R v Hertfordshire CC ex parte Green Environmental Industries Ltd*, [2002] 2 AC 412, per Lord Hoffmann, p. 423.

<sup>43</sup> *Inter alia*, BENJAMIN, “The application of EC competition law and the European Convention on Human Rights”, (2006) 27(12) *ECLR* 693 at 694-695.

<sup>44</sup> See e.g. PERRIN. “Challenges facing the EU network of competition authorities: insights from a comparative criminal law perspective”, (2006) 31(4) *ELRev* 540 at 549-550.

<sup>45</sup> *Id.*, p. 411. See also RILEY, “The modernisation of EU anti-cartel enforcement: will the Commission grasp the opportunity?”, (2010) 31(5) *ECLR* 191 at 198.

“call into question the necessity for the inspection nor demand that it be provided with the information in the Commission’s file”, the court can make inquiries with the Commission on the grounds of suspicion for the infringement, on its gravity and on the “nature of the involvement of the undertaking concerned”.<sup>46</sup>

In light of so extensive powers, a question has therefore emerged as to whether investigated parties can claim the protection of the “privacy” of their “home”, i.e. of their business premises. This question has acquired particular importance since the European Court of Human Rights recognised the existence of a corresponding right under Article 8 of the Convention for professionals in respect to their offices in *Niemitz*.<sup>47</sup> In its earlier case law the ECJ refused to extend this principle to commercial property owned or occupied by undertakings suspected of having infringed the competition rules, on the ground that the notion of “home” could not be stretched as far as to encompass this type of premises.<sup>48</sup> In its view, the procedural safeguards and the basic requirements as to the content of the decision ordering an inspection were sufficient to meet the basic threshold of protection of the rights of defence granted by EU law.<sup>49</sup>

Later developments of the case law of both the Strasbourg Court and of the ECJ have however contributed to the emergence of a different view on this question. After affirming in the *Niemitz* decision that Article 8 ECHR should extend to business premises, since activities of a “professional or business nature”,<sup>50</sup> the Human Rights’ Court held in *Ste Colas Est* that due to the breadth and to the correspondingly limited safeguards assisting their exercise, such as the absence of ex ante judicial control, the French competition authority’s investigative measures had infringed the applicant’s Article 8 rights.<sup>51</sup>

In this context, it was explained in *Wieser* that whether the search had been ordered by a judge, whether the warrant ordering that search placed reasonable limits over the scope of the search and provided sufficient information as to the basis for the “reasonable suspicion” entertained by the investigating authorities constituted key safeguards against arbitrariness,<sup>52</sup> not only when the inspection affected the ‘homes’ of natural persons but also business premises.<sup>53</sup> As to the nature of the judicial scrutiny exercised by the domestic courts, the Strasbourg Court made clear in *Ravon* that a review limited only to points of law would not be sufficient to afford the individual or legal entity concerned an “effective judicial remedy”, pursuant to Article 6(1) ECHR. A more substantive examination of the grounds for suspicion and of the proportionality of the inspection, in light of the circumstances of the case, would have to be conducted by the judge.<sup>54</sup>

Thus, it could be argued that more recent case law of the Strasbourg court supports the view that not only is a right to “privacy” available to commercial entities as well as to natural persons; any measures interfering with the exercise of this right should also be open to appeal before the competent judicial authorities and be subjected to judicial control going beyond “formal” aspects of the decision ordering an inspection and extend to the grounds of suspicion for the infringement.<sup>55</sup> This approach may be contrasted with the position adopted by the ECJ in its more recent case law. In the *Roquette Freres* preliminary ruling the Court of Justice recognised

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<sup>46</sup> See *inter alia* GRAHAM, *EU and UK Competition law*, 2010: Pearson, pp. 241-242.

<sup>47</sup> Appl. No 13710/88, *Niemitz v Germany*, [1992] 14 EHRR 80, para. 29-31.

<sup>48</sup> Case 46/87, *Hoechst v Commission*, [1989] ECR I-2859, para. 10, 14-18.

<sup>49</sup> *Id.*, para. 19-23, 31-33. See also case 85/87, *Dow Benelux v Commission*, [1989] ECR I-3137, para.18 et seq.; case T-66/99. *Minoan Lines v Commission*, [2003] ECR II-5515, para. 53-56.

<sup>50</sup> *Id.*, para. 29.

<sup>51</sup> *Id.*, para. 44-48; see also para. 28.

<sup>52</sup> Appl. No 74336/01, *Wieser and another v Austria*, [2008] 46 EHRR 54, para. 57.

<sup>53</sup> See *Buck*, cit. (fn. 95), para. 45; also *Wieser*, cit. (fn. 96), para. 58; see also para. 62.

<sup>54</sup> Appl. No 18497/03, *Ravon and others v France*, judgment of 21 December 2008, unreported.

<sup>55</sup> See also appl. No 41604/98, *Buck v Germany*, [2006] 42 EHRR 21, para. 46 et seq.

that EU law should protect the right to the inviolability not only of the ‘homes’ of natural persons, but also of business premises, in accordance with the general principle that ‘everyone’ be protected against the arbitrary or disproportionate exercise of public power.<sup>56</sup> Consequently, it took the view that before authorising the NCA to inspect these premises on behalf of the Commission, the domestic courts should be allowed to “verify whether the Commission had acted in a way which was arbitrary or excessive having regard to the subject matter of the investigation”.<sup>57</sup>

As to the nature of this scrutiny, the Court reiterated that national courts could not review the “expediency” of the inspection or access confidential evidence<sup>58</sup> but could only examine whether the case officials had established “reasonable grounds of suspicion” for the infringement and the involvement of the undertaking, if necessary by seeking assistance from the Commission.<sup>59</sup> Importantly, this position was transposed almost verbatim by the EU legislature in Council Regulation No 1/2003, whose Article 20(8) states, *inter alia*, that “(...) the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection (...)”. The same provision confirms also that domestic courts are not empowered to question either the expediency of the investigation or the lawfulness of the decision ordering the inspection, an issue which falls within the exclusive jurisdiction of the Court of Justice.

It is difficult to underplay the importance of *Roquette Freres*. Commentators argued that, without subjecting the Commission’s powers of investigation to requirements of national law, the Luxembourg Court sought to ensure that the Commission did not overstep the boundaries of its coercive powers by ordering inspections in cases in which a formal decision would be clearly disproportionate to the aim pursued or patently unjustified having regard to the grounds of suspicion entertained by the case handling officials.<sup>60</sup> At the same time, the Court limited the powers of the domestic court to exclude a consideration of the “merits” of the investigation.<sup>61</sup>

As to the question of whether this position is consistent with the relevant Article 8 ECHR standards, it emerges that, along similar lines as the standards laid down by Strasbourg Court, the Court of Justice has allowed domestic courts to review the proportionality and non-arbitrariness of inspection decisions, when granting the authorisation to carry it out to the competent authorities. Thus it could be argued that whilst not empowered to rule on the “expediency” of the inspection,<sup>62</sup> domestic judges can scrutinise the *prima facie* seriousness of the Commission’s allegations, going beyond a merely “formal” control of the decision<sup>63</sup> and therefore acting as a check against arbitrary or disproportionate measures.<sup>64</sup> It should however be emphasised that the Court of Justice remains the ultimate judge of the legality of the Commission’s investigative measures, consistently with its function within the Treaty’s institutional framework and with the principle of unity and consistency of EU

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<sup>56</sup> Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes and Commission of the European Communities*, [2002] ECR I-9011, para. 21, 27-29.

<sup>57</sup> *Id.*, para. 52-53; see also paras. 61 and 71.

<sup>58</sup> *Id.*, para. 60-61, 70.

<sup>59</sup> *Id.*, para. 71, 75 and 79.

<sup>60</sup> BERGHE and DAWES, “‘Little pig, little pig, let me come in’: an evaluation of the European Commission’s powers of inspection in competition cases”, (2009) 30(9) *ECLR* 407 at 410-411.

<sup>61</sup> *Id.*, p. 411-412.

<sup>62</sup> Appl. No 18497/03, *Ravon and others v France*, judgment of 21 December 2008, unreported; see *Buck*, cit. (fn. 95), para. 45-46, 50.

<sup>63</sup> See *Wieser*, cit. (fn. 96), para. 57.

<sup>64</sup> See e.g. BENJAMIN, “The application of EC competition law and the European Convention on Human Rights”, (2006) 27(12) *ECLR* 693 at 698.

law as a whole. Consequently, it is suggested that in the event of allegations as to the infringement of the ECHR being raised against the Commission in this area, it would be necessary to consider the extent to which the integrity of the ECJ's jurisdiction can be maintained while at the same time upholding the Convention's safeguards in individual cases.

#### 2.4. Modernisation and parallel jurisdiction: limiting the scope of the principle of *ne bis in idem* too much?

The previous sections considered a number of problematic issues arising from the impact of the Commission's investigative powers on the rights to "due process" and, albeit within limits, to the "privacy" of business premises enjoyed by investigated undertakings. The purpose of this section is to examine another question arising from the involvement of NCAs in the enforcement of the Treaty competition rules, namely the extent to which the parallel competence enjoyed, at least in principle, by the Commission and the NCAs in respect to alleged infringements taking place within their respective jurisdiction is compatible with the Convention's protection against double prosecution and punishment, enshrined in Article 4 of its Protocol VII.

It is clear from Regulation No 1/2003 that this principle of parallel jurisdiction, allowing also for joint action by NCAs and the Commission, constitutes one of the centrepieces of the current Implementing Regulation, albeit subject to limits: in this respect, Article 11(6) states, in fact, that the Commission can seize jurisdiction in respect to individual cases currently investigated by other agencies if it considers that it would be in the "Community interest" to do so.<sup>65</sup> It should however be emphasised that, as is apparent from more recent judicial decisions, the centrality of the Commission within the enforcement framework is likely to reinforce its right to expect "loyal cooperation" from other ECN members.<sup>66</sup>

In *France Telecom* the General Court held that the jurisdiction of individual NCAs would be merely contingent on the Commission's taking action in respect to specific cases.<sup>67</sup> Consequently, the domestic agencies can still be relieved of their jurisdiction even when they have already started their own investigations.<sup>68</sup> The Court also confirmed that there would be no "clearing house" for new cases and that these would be subjected to flexible and not binding rules as to their allocation across the Network.<sup>69</sup> It is difficult to downplay the *France Telecom* judgment: the General Court made clear that the "parallel jurisdiction" which all ECN members enjoy would not undermine the "general competence" conferred to the Commission and its "preponderant role" in EU competition enforcement,<sup>70</sup> a competence which is not subject to a "veto" on the part of the domestic agencies but only to a general obligation to "inform" and "consult" with them.<sup>71</sup>

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<sup>65</sup> Commission 2004 Notice on the ECN, para. 5-6; see also para. 8 and 34.

<sup>66</sup> See RIZZUTO, "Parallel competence and the power of the EC Commission under Regulation No 1/2003 according to the Court of First Instance", (2008) 29(5) *ECLR* 286 at 288-289.

<sup>67</sup> Case T-340/04, *France Telecom v Commission*, [2007] ECR II-573, para. 79-80.

<sup>68</sup> *Id.*, para. 78.

<sup>69</sup> *Id.*, para. 80.

<sup>70</sup> RIZZUTO, "Parallel competence and the power of the EC Commission under Regulation No 1/2003 according to the Court of First Instance", (2008) 29(5) *ECLR* 286, p.290-291.

<sup>71</sup> *Id.*, p. 296-297; also, see case T340/04, cit. (fn. 64), para. 81. See e.g. Article 13, Council Regulation No 1/2003; *mutatis mutandis*, 2004 Network Notice, para. 21-22. See also case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR 1, para. 3-4, 11; also cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to 252/99, C-254/99, *Lymburgse Vinyl Maatschappij and others v Commission*, [2002] ECR I-8375, para. 59. For commentary, see e.g. EISMANBERGER and THYRI, "Third-country antitrust sanctions and EC law—Comments on the Advocate General's Opinion in C-308/04 P *SGL Carbon/Commission*", (2006) 27 *ECLR* 397 at 399; also, more generally, KERSE and KHAN, *EC Antitrust Procedure*, 3<sup>rd</sup> Ed., 2005: London, Sweet and Maxwell, p. 431.

It has been suggested that the possibility of “parallel filings” is likely to be limited<sup>72</sup> and, according to the Commission itself, even capable of boosting deterrence, via the threat exercised by multiple enforcers.<sup>73</sup> However, the joint responsibility of the Commission and the NCAs raises questions as to its compatibility with the principle of *ne bis in idem*. According to Article 4, Protocol VII to the ECHR, no one can be tried or punished twice for the same offence;<sup>74</sup> despite being originally applicable within the same national jurisdiction, the principle is recognised by Article 50 of the EU Charter as extending “within the Union”.<sup>75</sup>

It is added that the absence of binding criteria for the allocation of cases across the ECN may lead to outcomes that are inconsistent with the principle of legal certainty.<sup>76</sup> It is in fact clear that the decentralisation of EU competition enforcement, sought by Council Regulation No 1/2003, has not been accompanied by the harmonisation of the procedural rules governing competition cases in each Member State.<sup>77</sup> Accordingly, some commentators argued that the “flexible” case allocation could expose individual undertakings to considerable uncertainty as to the applicable law<sup>78</sup> and could eventually lead to a “watering down” of the safeguards enjoyed by the investigated parties in individual jurisdictions.<sup>79</sup>

It is concluded that despite a push toward decentralised competition enforcement, the Commission retains its prime role within the enforcement structure, a role which is reflected in the “asymmetrical” relationship with the NCAs. It is also clear that the principle of parallel jurisdiction underpinning Regulation No 1/2003 can

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<sup>72</sup> *Inter alia*, WILS, “The EU network of competition authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU”, in EHLERMANN and ATANASIU (Eds.), *European Competition Law Annual 2002*, p. 433 at 449.

<sup>73</sup> See e.g., *mutatis mutandis*, case T-224/00, *Archer Daniels Midland Co and another v Commission*, [2003] ECR II-2597, para. 89-90. For commentary, *inter alia*, GAUER, “Due process in the face of divergent national procedures and sanctions”, paper presented at the International Bar Association 2005 Conference: “Decentralisation of EC Competition Law: a year in practice”, p. 7-8.

<sup>74</sup> *Inter alia*, appl. No. 37/950/97, *Franz Fischer v Austria*, judgment of 29 May 2001, not yet reported, para. 22, 25, 29; cf. *Oliveira v Switzerland*, judgment of 30 July 1998 (HUDOC Reference No 84/1997/868/1080), [1998] 28 EHRR 289, para. 27. See, *inter alia*, WILS, *Principles of European Antitrust enforcement*, 2005: Oxford, Portland, Oregon, Hart Publishing, p. 96.

<sup>75</sup> See case C-328/05, *SGL Carbon v Commission*, [2007] ECR I-3921, para. 29, 93. Also, *mutatis mutandis*, joined cases C-187/01 and C-385/01, *criminal proceedings against Husein Gozutok and Klaus Brugge*, [2003] ECR I-1345, para. 27-28, 35; also case C-150/05, *Van Straaten v Staat der Nederlanden und Republiek Italie*, [2006] ECR I-9327, para. 53, 57. See also COMMISSION of the EUROPEAN COMMUNITIES, *Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings*, 23 December 2005, SEC(2005) 1767, COM(2005) final 696, p. 8-9.

<sup>76</sup> See e.g., *mutatis mutandis*, appl. No 28342/95, *Brumarescu v Romania*, [2001] 33 EHRR 35, para. 61-62; also appl. No 37201/97, *K-H W v Germany*, decision of 22 March 2001, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=%22legal%20certainty%22%20%20%22article%206%22&sessionId=75297994&skin=hudoc-en>, per J Cabral Barreto (partly dissenting), para. 4-5.

<sup>77</sup> See e.g., *mutatis mutandis*, case T-224/00, *Archer Daniels Midland Co and another v Commission*, [2003] ECR II-2597, para. 89-90. For commentary, *inter alia*, GAUER, “Due process in the face of divergent national procedures and sanctions”, paper presented at the International Bar Association 2005 Conference: “Decentralisation of EC Competition Law: a year in practice”, p. 7-8; see also GARZANITI, GUDOFISKY and MOFFAT, “Dawn of a new era? Powers of investigation and enforcement under Regulation 1/2003”, (2004-2005) 72 *Antitrust L J* 159 at 203-204.

<sup>78</sup> See *inter alia* Andreangeli, “The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings”, (2006) 31(3) *ELRev* 342, especially pp. 344-345 and 348-349.

<sup>79</sup> See e.g. GAUER, “Due process in the face of divergent national procedures and sanctions”, paper presented at the International Bar Association 2005 Conference: “Decentralisation of EC Competition Law: a year in practice”, p. 18; cf., *inter alia*, Andreangeli, “The protection of legal professional privilege in EU law and the impact of the rules on the exchange of information within the European competition network on the secrecy of communications between lawyers and client: one step forward, two steps back?”, (2005) 2(1) *Comp L Rev* 31, especially pp. 42-45.

lead to outcomes that appear inconsistent with key Convention principles, namely the *ne bis in idem* rule as well as the principle of legal certainty, both of which can be linked to the respect of the rule of law, inspiring all EU action.

Although the Commission and the EU legislature have sought to explain the current status quo in light of the need to boost cartel detection, it is submitted that the development of the human rights acquis initiated with the Treaty of Lisbon may soon prompt a reconsideration of the existing rules, either “spontaneously”, as a response to the impact of the EU Charter of Fundamental Rights, or “reactively”, as a response to possible and potentially successful challenges before the Strasbourg Court. The next sections will consider the implications arising from, respectively, the direct applicability of the Charter and the accession to the ECHR on the part of the Union and concentrate on the problems especially arising from possible challenges of the lawfulness of competition enforcement on the part not only of the Commission but also of the NCAs, when acting within the remit of the ECN.

### 3. The Treaty of Lisbon and its impact on the human rights acquis of the EU: internal checks and external scrutiny of Union action—the case of competition enforcement

#### 3.1. The EU Charter of Fundamental Rights as a “binding” human rights’ instrument: toward a rethinking of competition proceedings?

The previous section briefly discussed some of the consequences of the Treaty of Lisbon for the existing human rights acquis of the EU and highlighted a number of substantial issues arising from the apparent divergence between the standards of “privacy” and “due process” granted to “everyone” by the ECHR (including commercial entities) and the corresponding safeguards offered by EU law to those undertakings suspected of having infringed the Treaty competition rules.

This section will, instead, be concerned with considering some of the more direct implications of the changed scope of the human rights acquis of the EU resulting from the Treaty of Lisbon for competition enforcement proceedings. It was anticipated in section 2.1 that the Treaty of Lisbon has taken two key steps toward more “visible”, if not outright stronger, human rights safeguards in the EU, by providing an express legal basis for Union accession to the ECHR as well as by conferring binding legal force to the EU Charter of Fundamental Rights. This subsection aims to illustrate, albeit in brief, some of the possible consequences of the application of the Charter to competition enforcement proceedings before the Commission as well as within the ECN.

It was noted earlier that the Charter constitutes the “point of arrival” of the process of “consolidation” of fundamental rights’ guarantees within the EU legal framework.<sup>80</sup> Inspired by the general principles of EU law providing for fundamental rights’ protection, the Charter makes explicit a number of rights and principles, ranging from “classic” civil liberties, such as the right to privacy, enshrined in Article 9, to rights that are more “specific” to the Union, such as the right to “good administration”, provided by Article 41.<sup>81</sup>

Perhaps more important are the “horizontal clauses” of the Charter: according to Article 51(1), its provisions are applicable to the action not only of the EU institutions and bodies, but also of the national agencies that act within the scope of EU law. Article 52(3) adds that whenever the Charter caters for rights that correspond to safeguards contained in the ECHR, the Convention will provide the

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<sup>80</sup> Supra, section 2.1, fn. Xx and accompanying text. See e.g. SYRPIS, “The Treaty of Lisbon: much ado...but about what?”, (2008) *ILJ* 219; also CALLEWAERT, “The European Convention on Human Rights and EU Law: a long way to harmony”, (2009) *EHRLR* 768.

<sup>81</sup> Inter alia, see Weiss, “Human rights in the EU: rethinking the role of the European Convention on Human Rights”, (2011) *ECLRev* 64, pp. 66-67.

“minimum standard” for their protection, thus leaving the Union free to establish more generous safeguards for these rights.<sup>82</sup> Although both the EU institutions and several commentators have stressed the relationship of continuity existing between the Charter and the ECJ’s case law on fundamental rights, of which the ECHR has represented a key source of inspiration,<sup>83</sup> it is undeniable that Article 52(3) has brought about a significant change in the status of the Convention within EU law. On this point, Weiss argued that this provision “goes beyond a mere interpretational guideline” and instead “speaks in favour of an incorporation of Convention standards” which as a result will become binding on the EU institutions for those rights that are common to both the Charter and the ECHR.<sup>84</sup>

Although it is undeniable that the interpretation of the Charter, just as that of the Treaty, will remain entrusted with the ECJ, as “guardian” of the unity and autonomy of EU law, the new position of the Convention within the EU human rights’ *acquis* is likely to have significant consequences for the overall fairness standards governing competition enforcement. It should be emphasised that safeguards of “fair procedure” in non-judicial proceedings have been read by the European Court of Human Rights within the Convention, which also encompass other rights, including the right to the privacy of business premises and the *ne bis in idem* rule. Importantly, these safeguards find a counterpart in the EU Charter: its Article 41 enshrines a right to “good administration” to everyone that is affected by the activity not only of the EU agencies, but also of domestic authorities acting within the scope of EU law. Furthermore, Article 48 sanctions the respect of the “rights of defence” and of the presumption of innocence as EU fundamental rights and Article 50 adds that the principle of *ne bis in idem* should be enjoyed by everyone in respect to any “offence for which [they] have already been finally acquitted or convicted within the Union in accordance with the law.”

Against this background, it could legitimately be questioned whether the divergence existing between the Convention and EU law as regards specific aspects of these rights remains justifiable in light of the Charter and especially of its horizontal provisions. On this point, it should be emphasised that in her Opinion in the *Toshiba* appeal case Advocate General Kokott defined the principle of *ne bis in idem*, as applicable in EU law, as a “general principle of law at EU level” which now also “enjoys the status of a fundamental rights”, by virtue of being enshrined in Article 50 of the EU Charter.<sup>85</sup> On that basis, she took the view that this principle would be applicable to “cross border situations” and consequently to “proceedings for the imposition of a fine in antitrust law because of their similarity to proceedings at criminal law”,<sup>86</sup> subject to the “threefold condition of identity of the fact, unity of offender and unity of the legal interest protected (...)”.<sup>87</sup> Although on the merits she

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<sup>82</sup> *Id.*, p. 69-70; see also Weiss, “Human rights and EU antitrust enforcement: news from Lisbon”, (2011) ECLR 186, pp. 187-189.

<sup>83</sup> See e.g. case C-112/00, *E. Schmidberger, Internationale Transporte und Planzuge v Austria*, [2003] ECR I-5659, para. 56-57, 60 and 64; see also C-540/03, *European Parliament v Council*, judgment of 27 June 2006, [2006] ECR I-5769, para. 38. For commentary, see inter alia LEMMENS, “The relation between the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights—Substantive aspects”, (2001) 8 *Maastricht J. of Euro. And Comp. L.* 49 at 54. Also ARNULL, “From Charter to Constitution and beyond: Fundamental Rights in the new European Union”, (2003) *PL WINTER* 774 at 786; DeBURCA & ASCHENBRENNER, “The development of European constitutionalism and the role of the EU Charter of Fundamental Rights”, (2003) 9 *Colum. J. Eur. L.* 355 at 379.

<sup>84</sup> Weiss, *cit.* (fn. 80), pp. 69-70.

<sup>85</sup> Case C-17/10, *Toshiba Corporation and others*, Opinion of AG J. Kokott, 8 September 2011, not yet reported, para. 99.

<sup>86</sup> *Id.*, para. 101.

<sup>87</sup> *Id.*, para. 114.



found that these requirements had not been satisfied,<sup>88</sup> her advice to the Court may be read as a clear endorsement of the applicability of this principle as a result of which it may be envisaged that individual competition agencies may have to discontinue proceedings on the ground that a sanction has already been imposed in relation to the same alleged breach.<sup>89</sup>

In respect to the right to “good administration”, Article 41 makes clear that this safeguard comprises an entitlement to “have [one’s] affairs being treated fairly, impartially and within a reasonable time” by the EU institutions and bodies. According to a number of commentators, Article 41 should be intended as a cluster of “fair procedure” safeguards applicable to administrative action<sup>90</sup> and, as a result of Article 52(3) should be read as encompassing at a minimum the components of a “fair procedure” established by the Strasbourg court in its “substantive” (as opposed to “formalistic”) interpretation of Article 6 ECHR.<sup>91</sup> As was aptly put by Lord Millett, “the right to good administration is analogous to the right to a fair trial guaranteed by Article 6 ECHR in providing an umbrella for a non-exhaustive list of procedural guarantees” encompassing (but not limited to) the right to be heard, to have access to the evidence gathered by the institution concerned and to have the matter decided within a reasonable time.<sup>92</sup>

Thus, bearing in mind the implications of the Charter’s horizontal provision, it could be argued that a “practical and effective” application of Article 41 to individual cases may soon call in question existing standards of protection of individual components of this right to “administrative due process” in the context of EU competition proceedings, such as, *inter alia*, the right to resist requests for potentially incriminating information.<sup>93</sup> Although it is acknowledged that the ECJ has often dealt with questions requiring the interpretation of the ECHR in a markedly “autonomous” manner *vis-à-vis* the Strasbourg Court’s approaches, it is contended that the Charter demands greater consistency between the EU and the Convention’s human rights safeguards.<sup>94</sup> As a result, it could be argued that existing limitations to the scope of due process guarantees, such as the distinction, for the purpose of the right to silence in competition cases, between “factual” and “leading” questions, may soon have to give way to a more flexible, less rigid and more “coercion-focused” view of this right.<sup>95</sup>

The direct applicability of the EU Charter is, however, likely to give rise to more pressing questions having regard to the principle of parallel jurisdiction on which the functioning of the ECN is based. As was anticipated, all the members of the Network enjoy joint competence to deal with infringements having their “centre of gravity” within their jurisdiction. On this specific point, the Network Notice expressly contemplated the possibility that two or more agencies could investigate and sanction the same infringement, on the ground that, although the factual elements may be identical, the effects of the allegedly unlawful practice are going to be felt within different territories and with varying consequences.<sup>96</sup> This outcome was expressly allowed by the ECJ as far back as the late 1960s, in the *Walt Wilhelm* judgment, and has been constantly reiterated out of a concern for upholding the effective

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<sup>88</sup> See *id.*, para. 134-136, 143-146.

<sup>89</sup> See e.g. para. 130-131.

<sup>90</sup> See e.g. Lord MILLETT, “The right to good administration in European Law”, (2002) *PL SUMMER* 309 at 318; also KANSKA, “Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights”, (2004) *ELJ* 296 at 306.

<sup>91</sup> *Inter alia*, see Andreangeli, *EU Competition enforcement and human rights*, 2008: E Elgar, pp. 29 ff..

<sup>92</sup> Lord MILLETT, “The right to good administration in European Law”, (2002) *PL SUMMER* 309 at 318.

<sup>93</sup> *Inter alia*, Weiss, *cit. (fn. 81)*, pp. 189-190.

<sup>94</sup> *Id.*, p. 191; also Andreangeli, *cit. (fn. 85)*, pp. xx.

<sup>95</sup> Weiss, *cit. (fn. 81)*, p. 192; also Riley, *cit. (fn. 36)*, pp. 269-270.

<sup>96</sup> Commission 2004 Notice on the ECN, para. 5-6; see also para. 8 and 34.

enforcement of the EU competition rules.<sup>97</sup> Its application is, however, subject to the “contingent” power of the Commission to tackle specific allegations of competition breaches.<sup>98</sup>

It is therefore clear that, as was illustrated in section 2.4, the principle of concurrent jurisdiction, even within the limits of Article 11(6), is not consistent with the rules on *ne bis in idem* dictated by the EU Charter. It should be emphasised that its Article 50 upholds the protection against double jeopardy for everyone within the Union<sup>99</sup> and, in accordance with Article 52(3), should be read consistently with the standards provided by the ECHR, whose Article 4, Protocol VII prohibits not only a second sanction, but also a fresh investigation and prosecution in respect to *prima facie* unlawful behaviour.<sup>100</sup> It is contended that the Commission and the EU legislature may soon be prompted to reconsider the features of the ECN and especially the nature of the principles and rules governing its operation in order to ensure compliance with the Charter.

It is added that even if Article 52(3) of the Charter was read rather “conservatively, as requiring the EU courts only to interpret Article 50 consistently with the Convention, the case may well arise in which an individual claimant could contest the legality of fresh sanctions imposed by the Commission in respect to a case already punished at domestic level.<sup>101</sup> As was suggested by AG Kokott in her opinion in *Toshiba*, the court hearing a similar challenge be required to assess whether there is “identity” as to the facts and the party or parties involved in allegedly anti-competitive practices and, if those requirements were met, it would have no choice but to allow the appeal.<sup>102</sup> Similar considerations may also be made when a second sanction is imposed by a domestic competition authority: it was anticipated that this measure would fall “within the scope of EU law” and would therefore be subject to the Charter’s standards.

Consequently, it is argued that, where a challenge brought before the competent national courts, the latter would have to scrutinise its lawfulness in accordance with the Charter rules, if necessary by seeking the assistance of the Court of Justice via the preliminary reference procedure, and, if it found that the facts for which the sanction had been imposed were the same as in an earlier case decided within the ECN, would have to strike down the NCA’s decision. On this point, it is suggested that this outcome, consistent though it could be with the need to adhere to the Charter’s safeguards, questions key features of the enforcement framework established by Council Regulation No 1/2003, thus suggesting that stricter

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<sup>97</sup> See e.g., *mutatis mutandis*, case T-224/00, *Archer Daniels Midland Co and another v Commission*, [2003] ECR II-2597, para. 89-90. For commentary, inter alia, GAUER, “Due process in the face of divergent national procedures and sanctions”, paper presented at the International Bar Association 2005 Conference: “Decentralisation of EC Competition Law: a year in practice”, p. 7-8.

<sup>98</sup> See e.g. Rizzuto, cit. (fn. 67), p. 296-297; also, see case T340/04, *France Telecom v Commission*, [2007] ECR II-573, para. 81. See e.g. Article 13, Council Regulation No 1/2003; *mutatis mutandis*, 2004 Network Notice, para. 21-22. See also case 14/68, *Walt Wilhelm v Bundeskartellamt*, [1969] ECR I, para. 3-4, 11; also cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to 252/99, C-254/99, *Lymburgse Vinyl Maatschappij and others v Commission*, [2002] ECR I-8375, para. 59. For commentary, see e.g. EISMANBERGER and THYRI, “Third-country antitrust sanctions and EC law—Comments on the Advocate General’s Opinion in C-308/04 P *SGL Carbon/Commission*”, (2006) 27 *ECLR* 397 at 399; also, more generally, KERSE and KHAN, *EC Antitrust Procedure*, 3<sup>rd</sup> Ed., 2005: London, Sweet and Maxwell, p. 431.

<sup>99</sup> See e.g. case C-328/05, *SGL Carbon v Commission*, [2007] ECR I-3921, para. 29, 93.

<sup>100</sup> See e.g. appl. No 15963/90, *Gradinger v Austria*, judgment of 23 October 1995, Ser. A, no 328-C (HUDOC Reference No 33/1994/480/562), paras. 53-54-55.

<sup>101</sup> Inter alia, Weiss, cit. (fn. 81), pp. 193-194; also Anderangeli, cit. (fn. 10), pp. xx.

<sup>102</sup> Case C-17/10, *Toshiba Corporation and others*, Opinion of AG J. Kokott, 8 September 2011, not yet reported, para. 130-131.

limitations on the exercise of joint jurisdiction enjoyed by the ECN members may be required.

Although the limited purvey of this work does not allow for a more detailed examination of these issues, it should be noted that an interpretation of the principle of *ne bis in idem* which is more “generous” to the individual has already prevailed in respect to the issues arising from the consequences of criminal investigations and prosecutions for the exercise of the right to freedom of movement enjoyed within the single market. According to Article 54 of the Convention implementing the Schengen Agreement into the EU legal framework:

“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

The ECJ has interpreted this provision as precluding a fresh investigation and punishment in respect to matters whose merits have already been decided upon either via a judicial decision (i.e. a decision condemning or acquitting the same defendant) or after, *inter alia*, plea bargaining procedures.<sup>103</sup>

It is acknowledged that it is not clear whether it would be justifiable to apply this reading of the *ne bis in idem* rules tout court to competition proceedings, especially taking into consideration the relative nature of the right to a “fair trial” and to a “fair procedure” within the ECHR itself.<sup>104</sup> However, it is contended that interpreting Article 50 of the EU Charter in a manner which respects the Convention standards as a “minimum benchmark” could justify the recognition of limited force of “administrative *res judicata*” to decisions adopted not just by the Commission but also by the NCAs, so as to prevent fresh proceedings being initiated against the same investigated parties.<sup>105</sup>

In light of the above, it is argued that the provision, via the EU Charter, of certainly more “visible”, if not altogether more extensive human rights’ safeguards within the legal system of EU may have direct consequences for the legality of competition enforcement proceedings. It was illustrated that the direct applicability of the Charter rules to individual cases may soon lead to challenges, either direct, through annulment actions, or indirect, via the preliminary reference procedure, before the EU courts, against the Commission’s investigative measures, whether implemented directly or through the medium of the NCAs. It was added that similar challenges could occur also in respect to parallel or joint investigations initiated within the ECN, in light of the more stringent safeguards against double jeopardy provided by the Charter. Consequently, it is concluded that, due to its impact on the legal status of the EU Charter of Fundamental Rights, the Treaty of Lisbon has confronted the Commission and the EU legislature with an “internal challenge” as to the legality of the existing enforcement framework thereby strengthening the case for more extensive safeguards of the rights of the investigated parties not just vis-à-vis the Commission’s investigations but against proceedings brought by domestic agencies.

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<sup>103</sup> *Id.*, para. 27-28. See also case C-150/05, *Van Straaten v Staat der Nederlanden und Republiek Italie*, [2006] ECR I-9327, para. 53, 57; case C-469/03, *criminal proceedings against Filomeno Mario Miraglia*, [2005] ECR I-2009, para. 28.

<sup>104</sup> WILS, “The principle of *ne bis in idem* in EC antitrust enforcement: a legal and economic analysis”, (2003) 26(2) *W. Comp.* 131 at 146. Cf. GARZANITI, GUDOFKY and MOFFAT, “Dawn of a new era? Powers of investigation and enforcement under Regulation 1/2003”, (2004-2005) 72 *Antitrust L J* 159 at 203-204.

<sup>105</sup> See, *mutatis mutandis*, case C-150/05, *Van Straaten v Staat der Nederlanden und Republiek Italie*, [2006] ECR I-9327, para. 44-45; for commentary, *inter alia*, Andreangeli, *cit.* (fn. 10), pp. 239 ff.

### 3.2. Accession to the ECHR and competition enforcement: questions of fairness with more general implications

Section 3.1 considered some of the questions arising from the impact of the changed legal status of the EU Charter of Fundamental Rights under the Treaty of Lisbon on the legality of some of the features of competition proceedings before the Commission as well as of the rules governing the functioning of the ECN. The purpose of this section will be to examine some of the implications of the accession of the EU to the ECHR. The limited remit of this paper does not allow for any detailed consideration of these questions, which strike at the core of key principles governing the status of EU law and of its fundamental rights standards as well as of the institutional and judicial architecture established by the Treaties. The issue of whether the EEC/EC/EU could accede to the Convention, for the purpose of going beyond its general commitment to human rights, democracy and the rule of law and effecting the consolidation of the ECHR guarantees into EU law, has been widely discussed in institutional and scholarly circles.

As is well known, the ECJ in 1996 ruled that the Community could not become a party to the Convention: in its view, since the Treaty did not confer on the Community the power to take action, either internally or externally, in the field of human rights protection, the EC could not negotiate accession without an ad hoc amendment to the Treaty.<sup>106</sup> It was also emphasised that while respect for human rights remained a condition for the lawfulness of its action, stemming from the EC's commitment to these principles, as enshrined, inter alia, in the ECHR itself,<sup>107</sup> accession would have determined overarching changes in the institutional framework for their protection.<sup>108</sup> The ECJ pointed out that, as a result of its signing up to the ECHR, the Community would have become integrated in a different institutional set up, i.e. the machinery for the enforcement of the Convention provided by the Council of Ministers and the European Court of Human Rights in Strasbourg, with far-reaching implications for the overall constitutional structure established by the Treaties.<sup>109</sup> Accession would have also resulted in the tout court transposition of the ECHR rules into Community law,<sup>110</sup> thus potentially subjecting the role of the ECJ as ultimate "guardian" of EU law, to the powers of interpretation of the Convention enjoyed by the Strasbourg court.<sup>111</sup>

As was anticipated in section 2.1, the 1996 Opinion did not quell the debate on these issues and was also followed by a number of rulings in which the Human Rights' Court affirmed that the Contracting States could not escape their obligations under the Convention when acting within the spectrum of a distinct international organisation, such as the UN or the Union itself.<sup>112</sup> At the same time, however, by

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<sup>106</sup> Opinion 2/94, Re: Accession to the European Convention on Human Rights, [1996] ECR I-1753, para. 36; see also para. 24, 26-28; 29-30.

<sup>107</sup> *Id.*, para. 34.

<sup>108</sup> *Ibid.*; see also para. 35.

<sup>109</sup> *Id.*, para. 34.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*; see e.g. WETZEL, "Improving fundamental rights protection in the European Union: resolving the conflict and confusion between the Luxembourg and Strasbourg Courts", (2003) 71 *Fordham L. Rev.* 2823; also CANOR, "Primus inter pares. Who is the ultimate guardian of Fundamental Rights in Europe", (2000) 25 *ELRev* 3.

<sup>112</sup> See e.g. appl. No 24833/94, *Matthews v United Kingdom*, [1999] 28 EHRR 361; also appl. No 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1. For commentary, inter alia, COSTELLO, "The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred boundaries in Europe", (2006) 6 *Hum. Rts. L. Rev.* 87; also HARMSSEN, "National responsibility for European Community acts under the European Convention on Human Rights: recasting the accession debate", (2001) 7 *EPL* 625.

laying down a “presumption of equivalent protection” for human rights within the EU vis-à-vis the standards dictated by the Convention,<sup>113</sup> the Court sought to ensure that these “indirect challenges” would only be entertained in exceptional circumstances, namely when it could be shown that there had been a clear “breakdown” in the safeguards provided for fundamental rights within the international organisation.<sup>114</sup>

It is therefore clear that the Treaty of Lisbon, by laying down an express legal basis for the EU to accede to the Convention, has cleared up perhaps the major “formal” hurdle standing in the way of the ECHR becoming an integral part of EU law as well as of the Union itself becoming a respondent in individual actions brought before the Strasbourg court. However, it is also clear that the Treaty has not resolved many of the structural and institutional problems that accession is likely to raise: for instance, what type of relationship should exist between the ECJ and the Strasbourg court in respect to the interpretation of the Convention? Should the Union be involved in proceedings brought against Member States in respect to measures adopted “within the scope of Union law”, and if so, in what position? And to what extent should the ECJ itself, as “guardian of the Treaty”, be involved in challenges brought against EU acts?

It is acknowledged that many of these issues will be settled in the course of the accession negotiations. However, it is equally clear that becoming a party to the Convention poses significant challenges for EU competition investigations, both before the Commission and within the ECN. The remainder of this section will attempt to speculate on these challenges, especially in respect to the scrutiny of investigative measures and of competition infringement decisions adopted by the Commission and by the NCAs in individual cases and to consider how any problems arising from them are likely to be dealt with by the agencies involved. In respect to the former, it is however indispensable to draw a distinction between measures adopted directly by the Commission and measures adopted by its domestic partners in compliance with their duties of cooperation within the ECN.

It was illustrated in section 2.2 that investigated undertakings enjoy a very limited right to remain silent in the face of potentially incriminating questioning on the part of the Commission; consequently, it was contended that after accession this perceived divergence between the standards applied under the Convention and those recognised by the ECJ may well give rise to a direct challenge in Strasbourg, especially given the “criminal nature” assigned to competition cases under the ECHR. In this specific respect, it is suggested that the possibility of such a challenge is not likely to give rise to particularly “complicated” procedural outcomes: in the event of a decision requesting self-incriminating information from an undertaking, the latter will be able to challenge it before the EU Courts on the ground that such a request violates its Article 6 rights, on the ground of the nature of the information and to the coercive nature of the decision itself. If the challenge is unsuccessful both on first instance and on appeal before the ECJ, the applicant will be able to bring a direct challenge against the decision before the Strasbourg court, its “domestic remedies” having been exhausted as required by Article 35 of the Convention.<sup>115</sup>

It is suggested that this outcome is fully consistent with Protocol 8 to the Lisbon treaty, which expressly envisages for the accession treaty negotiations to encompass the establishment of a mechanism for the direct action brought against the Union before the Convention organs. However, it is unclear what outcome such a challenge would have on the investigation and on the decision concluding it: would a

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<sup>113</sup> See e.g. appl. No 45036/98, *Bosphorus*, cit. (fn. 103), para. 154-155, 160, 164. For commentary, see *inter alia* PHELPS, “Reflections on Bosphorus and human rights in Europe”, (2006) 81 *Tul. L. Rev.* 251 at 271-272.

<sup>114</sup> See e.g. appl. No 30696/09, *MSS v Belgium*, judgment of the Grand Chamber, 21 January 2011, cit. (fn. 8), para. 338-340.

<sup>115</sup> See e.g., *mutatis mutandis*, Jacques’, cit. (fn. 9), pp. 1008-1010.

successful challenge before the Strasbourg court result in the automatic invalidity of the final Commission decision, finding, for instance, an infringement of the competition rules? And if that was the case, would the Commission be allowed to take a fresh action against the undertaking in question?

Two solutions can be envisaged: on the one hand, the Commission may have to restart its investigations afresh and in the course of these new proceedings avoid seizing the evidence that the Strasbourg court had ruled to be “inadmissible” on due process grounds. If, on that basis, the Commission found the existence of an infringement, then it would not be precluded from sanctioning the investigated undertaking. On the other hand, it could be suggested that the Commission be no longer empowered to take action against the investigated undertaking, unless new evidence pointing to the existence of a competition infringement, independent from that giving rise to the infringement of the due process rules, was later uncovered.

It is acknowledged that the former solution appears consistent with existing standards governing competition investigations: on this point, it bears recalling that, according to, *inter alia*, the General Court in *Re: Soda Ash*, the final decision would be invalid on the due process grounds only if the Commission had relied on “inadmissible” evidence in reaching its conclusions as to the existence (or otherwise) of an infringement.<sup>116</sup> Thus, if the Commission was able to establish, to the requisite level of proof, that an infringement had been committed without relying on unlawfully obtained evidence, the final decision would be valid.<sup>117</sup> However, it is questionable whether this outcome would still be acceptable in light of Article 50 of the EU Charter, which, similarly to Article 4, protocol VII to the ECHR, affords to everyone the right not to be prosecuted and sanctioned twice for the same course of unlawful behaviour within the Union. On this point, it could be suggested that preventing tout court fresh investigations, on the one hand, would ensure the closest adherence to the Convention’s own reading of *ne bis in idem*: on the other hand, however, it would have the drawback of “straightjacketing” the Commission by preventing action even when the “admissible” evidence would be enough to establish the existence of a breach.

Against this background, it is argued that allowing the Commission to derogate from the protection against double jeopardy only when it could, on the basis of “admissible” evidence, establish an infringement, would represent perhaps the most “acceptable” solution, both for the purpose of ensuring effective competition enforcement and for the observance of the ECHR. In fact, on the one hand, it would leave to the Commission a limited “space for manoeuvre” to prosecute the alleged infringement, subject, however, to new, lawfully acquired evidence of the infringement being gathered<sup>118</sup> and thereby maintain the effectiveness of its enforcement powers. On the other hand, it would ensure that infringements be only based on “lawfully acquired” evidence, thus limiting the scope for the abuse of the investigated parties’ enforcement rights.

Similar considerations may be made when an undertaking alleges that, as a result of an infringement decision adopted by the Commission or by a NCA, its right not to be investigated and sanctioned twice for the same alleged competition breach was infringed: it is suggested that in this case the applicant would have to exhaust the domestic remedies available to it, either in the domestic or in the EU legal framework, depending on who adopted the allegedly unlawful decision and thereby petition the Strasbourg court, in accordance with Article 35 ECHR.<sup>119</sup>

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<sup>116</sup> Case T-30/91, *Solvay SA v Commission*, [1995] ECR II-1775, para. 77.

<sup>117</sup> *Ibid.*; see also, *inter alia*, *mutatis mutandis*, appl. 36822/06, *Ebanks v United Kingdom*, [2010] 51 EHRR 2, para. 76-78 and 80-82.

<sup>118</sup> See e.g., *mutatis mutandis*, appl. No 50178/99, *Nikitin v Russia*, [2005] 41 EHRR 10, para. 45-48.

<sup>119</sup> See e.g. Weiss, *cit. (fn. 81)*, p. 189-190.

Different questions arise when an investigative measure is carried out by a NCA on behalf of the European Commission. It was illustrated in section 2.3 that, according to the ECJ in *Roquette Freres*, the domestic judiciaries retain limited powers of scrutiny over the execution, on the part of the competition agencies, of Commission's investigative decisions.<sup>120</sup> However, in that preliminary ruling the Court emphasised that the power to rule over the validity of these measures rested ultimately with the ECJ itself and that consequently domestic courts should seek assistance from Luxembourg if any such dispute arose.<sup>121</sup> It is equally apparent that, as agencies of the Contracting States, NCAs remain in any event subjected to the Convention rules and to the scrutiny exercised by the Strasbourg Court.

As a result, the question emerges as to the possible implications of accession for those cases in which the NCA is merely an "agent" for the Commission: should the contracting state be the defendant in the event of a direct challenge? Or should the EU be called to respond to any allegations of ECHR infringement stemming from investigative activity conducted only by proxy by the NCAs? Several commentators argued that this question is extremely relevant, first of all, for individual applicants, since it determines who should stand in judgment against them in these circumstances.<sup>122</sup> Secondly, it raises a key issue for the integrity and autonomy of EU law, since it would suggest the possibility for the Strasbourg court, in substance, to rule over issues related to the division of competences between the Union and the Member States. And thirdly, it poses the problem of whether, and if so, how, the ECJ should be "involved" in these proceedings before the Strasbourg court.<sup>123</sup>

It is suggested that one answer to the more general problem of determining the identity of the defendant could be to allow an individual applicant to sue the EU directly, just as it would have been possible if the Commission had both issued and executed the investigative measure: it could be argued that while Contracting States cannot be "excused" from respecting the ECHR while acting within the framework of other international organisations, including the EU, in these cases they would be acting entirely as proxies to the Commission.<sup>124</sup> Thus, absent any discretion on their part, the Union should be held liable for any infringement allegedly resulting from the implementation of an act of its institutions.

This solution was, however, criticised: Lock argued that, first of all, it is often difficult to appraise the scope of discretion enjoyed by domestic agencies implementing EU law measures; and secondly, the individuals concerned may have been in contact only with the domestic agencies, and not with the Commission.<sup>125</sup> It should be emphasised that the drafters of the accession agreements were clearly mindful of these problems and therefore envisaged the creation of a "co-respondent mechanism", according to which the EU should stand in judgment together with the Member State concerned in every case in which the domestic authorities had no significant discretion as to the way in which the EU measure should be implemented and therefore had no other option but to take a course of action which was inconsistent with the Convention.<sup>126</sup> This solution was welcomed as a means to avoiding "gaps" in the human rights' scrutiny of the Union's "delegated" action as well as being consistent with the principle, enshrined in *Matthews* and *Bosphorus*,

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<sup>120</sup> Case C-94/00, *Roquette Freres*, cit. (fn. 56), para. 76-80.

<sup>121</sup> *Id.*, para. 96.

<sup>122</sup> See e.g. Lock, "Walking on a tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order", (2011) 48 *CMLRev* 1025 at 1038-1039.

<sup>123</sup> *Id.*, pp. 1036-1037; see also Weiss, cit. (fn. 81), pp. 88-91.

<sup>124</sup> See Lock, cit. (fn. 122), p. 1039; also Weiss, loc. ult. cit., p. 90.

<sup>125</sup> Lock, loc. ult. cit. See also Lock, "EU accession to the ECHR: implications for judicial review in Strasbourg", (2010) 35(6) *ELRev* 777 at 780-781.

<sup>126</sup> Draft accession Agreement, CDDH-UE(2011), see para. 9 and 37; for commentary see Lock, cit. (fn. 122), pp. 1039-1040.

according to which Member States cannot avoid liability for Convention infringements when acting within the scope of Union law.<sup>127</sup>

However, adopting the co-defendant mechanism leaves unresolved the further question of whether allowing the Strasbourg court to decide, in substance, over the validity of a Union measure, albeit in a specific case and within the respect of the limits dictated by the “margin of appreciation” doctrine, remains consistent with the principle of autonomy and internal consistency of EU law.<sup>128</sup> It is noteworthy that later versions of the draft accession agreement have sought to “mellow down” the “normative conflict” requirement as to allow the Union to stand as co-respondent when “it appears that [an] allegation [of infringement of the ECHR] calls into question the compatibility” of Union provisions or measures with the Convention rights.<sup>129</sup> It is acknowledged that this draft provision is less likely to prove “controversial”, since it only asks the Strasbourg court to identify, via a superficial scrutiny of individual applications, the existence of any such *prima facie* “conflict”.<sup>130</sup>

However, it still “leaves the door open” for the Strasbourg court to rule (albeit indirectly) over the validity of EU law via the medium of domestic action and therefore without the prior involvement of the EU agencies in the controversy between the Member State and the individual concerned. Although it could be argued that the co-defendant mechanism could allow for this involvement after a direct challenge has already been brought, it could be queried whether creating a mechanism allowing the ECJ to “have a say” on the allegations before a decision is adopted in Strasbourg may be a more appropriate way of reconciling the unity and consistency of EU law with the effectiveness of the ECHR guarantees.<sup>131</sup>

It could be argued that empowering the Luxembourg court to review the offensive EU measure (or a domestic measure adopted within the scope of EU law) prior to a pronouncement of the Human Rights’ court would allow for an “internal”, more timely and, since the ECJ could strike down the impugned act, more immediate redress of the applicant’s interests.<sup>132</sup> In addition, according to the 2010 Discussion Document, published by the Court’s Presidency, allowing for this form of control would be indispensable to maintain the unity and consistency of EU law and the “necessary coherence” of the EU system of remedies.<sup>133</sup> The Discussion Document emphasised that domestic courts do not enjoy the power to strike down an EU act as invalid, a “prerogative” which, instead, rests exclusively with the ECJ. Consequently, it was argued that “the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity” of Union measures with the ECHR without the ECJ having been allowed to entertain the question of the validity of the same measure in light of the EU fundamental rights’ principles.<sup>134</sup>

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<sup>127</sup> *Id.*, pp. 1040-1041; see appl. No. 40302/98, *Matthews v United Kingdom*, [1999] 28 EHRR 361, para. 33; also appl. No 45036/98, *Bosphorous Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, [2006] 42 EHRR 1, para. 154-155.

<sup>128</sup> See *inter alia* Lock, *cit.* (fn. 125), (2010) at 782.

<sup>129</sup> Draft Accession agreement, revised version, CDDH-UE (2011) 10, Article 4(2); see e.g. Lock, *cit.* (fn. 122), p. 1042-1043.

<sup>130</sup> See e.g. Lock, *loc. ult. cit.*

<sup>131</sup> See e.g. Jacques’, *cit.* (fn. 9), p. 1014-1015. See also discussion document of the ECJ on Accession, available at: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf), pp. 3-4.

<sup>132</sup> See e.g. Jacques’, *cit.* (fn. 9), pp. 1016-1017; also Lock, *cit.* (fn. 125) (2010), p. 782-783.

<sup>133</sup> See discussion document of the ECJ on Accession, available at: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf), p. 4.

<sup>134</sup> *Ibid.* See also Joint Communication of the Presidents of the Court of Justice and of the European Court of Human Rights, available at: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjue\\_english.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf), p. 2.



However, some commentators argued, not without merit, that the prior involvement of the ECJ may not always be necessary or indeed justifiable in light of the type of scrutiny carried out by the Strasbourg court and especially of its consequences: for instance, Lock argued that since the European Human Rights' Court's decision could not lead to the "invalidation" of the EU measure in question, but only to a finding of infringement and to the award of damages no danger for the "unity" of EU law would arise.<sup>135</sup> It was also contended that, in any event, it would be difficult for the ECJ to "enforce" on the national courts, even those "of last resort", an obligation to refer similar questions to it within the preliminary reference procedure even within the limits placed on the ability of "higher" courts to decline to make a reference.<sup>136</sup> Thus, it was suggested that the "co-respondent mechanism" would provide a "residual" avenue for the EU organs to become involved in human rights' disputes involving Member States on account of their fulfilment of EU obligations even when no such reference has been made.<sup>137</sup>

Other authors questioned whether this intervention would be required for the purpose of the admissibility of an individual complaint: Jacques', for instance, contended that it would be "unfair" to rely on the requirement of exhaustion of domestic remedies to frustrate an individual applicant's right to access the Strasbourg court if a domestic court had declined to make a reference to Luxembourg (for instance on grounds of *acte clair*<sup>138</sup>) or to follow the preliminary ruling in its decision.<sup>139</sup> It is argued that this question is even more relevant in the context of competition investigations carried out by ECN members: in fact, both the ECJ in *Roquette Freres* and the EU legislature in Council Regulation No 1/2003 expressly provide that domestic courts should seek the assistance of the Court, via the preliminary reference procedure, when the validity of an investigative measure issued by the Commission and implemented in a domestic jurisdiction was at stake.<sup>140</sup> It is added that allowing the ECJ to decide over these questions before a dispute reaches the Strasbourg court, besides ensuring that the function of the Court as "guardian of the Treaties" remained intact, would allow the Court to decide on the issue in light of Union law and therefore to secure human rights' compliance "internally",<sup>141</sup> consistently with the "subsidiary" nature of the adjudication function exercised by the Strasbourg Court on the action of the Contracting Parties.<sup>142</sup>

It is however beyond question that this view leaves open the question of how such a mechanism should be structured, especially in cases when no such reference has been made. On this point, several commentators raised the concern that an individual complaint may be declared inadmissible for want of a preliminary reference, even if the domestic court had declined to seek the assistance of the ECJ, for instance on *acte clair* grounds.<sup>143</sup> It should be recalled that the preliminary reference does not constitute a "remedy" in light of the established case law of the

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<sup>135</sup> Lock, cit. (fn. 122), p. 1046-1047.

<sup>136</sup> See case 283/81, *CILFIT*, [1982] ECR 3415, para. 13, 16-20.

<sup>137</sup> Lock, cit., (fn. 122), p. 1048.

<sup>138</sup> See case 283/81, *CILFIT*, [1982] ECR 3415.

<sup>139</sup> Jacques', cit. (fn. 9), p. 1017-1018.

<sup>140</sup> *Supra*, section 2.3, fn. 49 and accompanying text; see case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes and Commission of the European Communities*, [2002] ECR I-9011, para. 21, 27-29.

<sup>141</sup> See Joint Communication of the Court of Justice and of its Presidency, available at: [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjeu\\_english.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjeu_english.pdf), p. 2; also Jacques', cit. (fn. 9), p. 1017-1018.

<sup>142</sup> *Id.*, p. 1018-1019.

<sup>143</sup> Jacques', cit. (fn. 9), p. 1017-1018.

ECJ regarding, for instance, the issue of what is the “court of last resort” for the purpose of determining when an obligation to refer arises under Article 267 TFEU.<sup>144</sup>

This view was confirmed by the Presidents of the ECJ and of the European Court of Human Rights when discussing the question of whether the requirement of “exhaustion of domestic remedies” should be made conditional upon seeking and obtaining a preliminary ruling from the ECJ.<sup>145</sup> They suggested that a “flexible procedure” allowing the ECJ to carry out an “internal review” before the Strasbourg Court can entertain a specific case, should be put in place: in the words of the Presidents of the Courts, such a procedure would not require an amendment to the Convention and should be framed to take into account the features of the decision-making of both courts<sup>146</sup> as well as the need to avoid undue delays—for instance, by allowing the ECJ to deploy its accelerated procedure.<sup>147</sup> In light of the forgoing, Jacques’ suggested that a revision by the ECJ itself of its *Foto Frost* case law in the sense of requiring expressly the domestic courts to refer a question when allegations as to the infringement of the ECHR had been made could already offer a reliable answer to these issues.<sup>148</sup>

It may be concluded that Article 6(2) of the TFEU, which expressly confers to the Union the competence to become a party to the ECHR, poses pressing questions as to how to accommodate the consequences of accession with well-established constitutional principles informing the unity and the internal coherence of the EU legal system as well as the relationship of the ECJ with “external” judiciaries, such as the Strasbourg court. This section argued that direct challenges brought in relation to allegations arising from measures adopted by the Union agencies, such as the Commission, are likely to give rise to relatively few difficulties; it was added that when Union measures are implemented by domestic agencies, the “co-respondent mechanism” envisaged in the negotiations is likely to ensure a degree of “participation” and of “sharing of responsibility” between the EU and the national authorities involved.

However, it was also argued that more complex issues, striking at the core of the notion of unity and consistency of EU law, lie at the core of this debate, as was illustrated in relation to the question of whether and to what extent the ECJ should be involved in the external human rights’ scrutiny of Union action. This section argued in favour of the creation of a mechanism to allow for the Court in Luxembourg to “have a say” on the human rights’ dispute before the latter reaches the Strasbourg court, on the ground that it would be consistent with existing principles and legislative rules as well as potentially beneficial to individual applicants. The form which this scrutiny is likely to take and the way in which it can be reconciled with the existing admissibility requirements provided in the ECHR remains, however, left to the accession negotiations.

#### 4. EU competition enforcement after the Treaty of Lisbon’s impact on the Union’s human rights acquis—a story still (largely) unwritten? Tentative conclusions

The Treaty of Lisbon has brought about a number of momentous changes in the human rights’ acquis of the EU: from conferring binding force to the EU Charter of Fundamental Rights to creating an express legal basis for the accession to the ECHR, the Member States have pushed human rights’ protection up on their agenda for reform. The previous sections have illustrated that this momentum is likely to

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<sup>144</sup> See e.g. case C-99/00, *Criminal proceedings against Kenny Roland Lyckeskog*, [2002] ECR I-4839, para. 14-18.

<sup>145</sup> Joint Communication, cit. (fn. 126), pp. 2-3.

<sup>146</sup> Ibid.

<sup>147</sup> Id., p. 3.

<sup>148</sup> Jacques’, cit. (fn. 9), pp. 1019-1020. See case 314/85, *Foto Frost*, [1987] ECR 4199.

have significant and far-reaching consequences for the status quo characterising competition enforcement, both before the EU Commission and within the European Competition Network at large. It was argued that the legally binding value recognised to the EU Charter could already provide the engine for a number of changes in the existing due process standards, ranging from the scope of the right to silence from the meaning to be ascribed to the principle of *ne bis in idem* in antitrust investigations conducted across the Union.

It is however equally apparent from the above commentary that ECHR accession is likely to give rise to potentially more serious procedural and institutional implications not just for competition enforcement but for the Union's institutional framework as a whole. Section 3.2. illustrated how Article 6(2) TFEU did not provide any "practical" answers to the question of how to reconcile the effective application of the Convention with equally important concerns, such as that for maintaining the unity and consistency of EU law vis-à-vis the external judicial scrutiny exercised by the Human Rights' Court. It was shown that the issue of the involvement of the ECJ in this external scrutiny actually harbours more general issues arising from the interplay of the principle of subsidiarity, which should remain at the basis of the ECHR review machinery, with the principle of coherence and of autonomy of EU law. The above analysis has also raised strong concerns for the division of jurisdiction between the ECJ and the Human Rights' court in the appraisal of individual complaints lodged, directly or via the co-respondent mechanism, against the Union: it was argued that although more recent versions of the draft accession agreements have sought to limit the scope for scrutiny of individual complaints at admissibility stage by "mellowing down" the "normative conflict" requirement, governing the co-respondent mechanism, they have not answered the core question of the scope and intensity of the scrutiny powers exercised by the Human Rights' court over EU action.

It was added that these questions are likely to become even more serious in cases in which the ECJ has had no prior involvement. Although it was argued that the involvement of the Court of Justice may remain necessary in the context of the human rights scrutiny of competition investigations to comply with existing legal principles and legislative norms, how it can actually be accommodated with the need to apply the Convention both practically and without "undue delay" remains an open question. It is therefore hoped that, in the course of the ongoing accession negotiations, the Union's and the ECHR's representatives will take into consideration the broad array of views and of suggestions made by all relevant stakeholders with a view to fashioning arrangements that are capable to reconcile effective human rights' protection with the integrity of the existing institutional and constitutional arrangements of the EU, for the purpose of maintaining the Union legal system's inner coherence and increasing, through the medium of the adherence to the Convention, its legitimacy.