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I. INTRODUCTION

The question of the compliance of the framework and the procedures for the enforcement of the EU competition rules with human rights' rules has been a vexed subject for many years. In that context, whether and how the European Union ("EU") should become a party to the European Convention on Human Rights ("ECHR") has been also hotly discussed.

In 2013, following a complex period of negotiations, a Draft Accession Agreement was submitted to the Court of Justice of the EU to obtain an opinion pursuant to Article 218(11) TFEU. The Draft Agreement had envisaged a series of arrangements designed to address issues of passive standing of the Union before the European Court of Human Rights and the possible involvement of the EU judiciary in respect of claims involving the Union and lodged in Strasbourg.

However, the CJEU ruled at the end of 2014 that the agreement, as it stood, did not comply with a number of founding principles of EU law, namely the principle of supremacy of EU law over domestic norms, the rules governing the inter-institutional architecture enshrined in the Founding Treaties, and—in that context—the judicial independence enjoyed by the same Court of Justice, especially in discharging its role vis-à-vis the domestic courts in the context of the preliminary reference procedure.

This brief paper aims to investigate some of the implications of accession for the public enforcement of the EU competition rules. It will review the 2014 Opinion and consider how the human rights' scrutiny of inspections ordered by the Commission and carried out either directly or via the assistance of the competent NCAs could be conducted post-accession. It will argue that any future arrangements should encompass robust mechanisms to ensure that the "Union interests" are taken into account and the primacy and coherence of Union law is maintained, even in cases involving domestic authorities acting within the scope of EU law.

II. FUNDAMENTAL RIGHTS' PROTECTION IN THE EUROPEAN UNION: FROM GENERAL PRINCIPLES, TO THE CHARTER AND TO ACCESSION TO THE ECHR—FINDING THE MISSING LINK?

The limited remit of this contribution does not allow for a consideration of the complex path that has led to the emergence of human rights' guarantees within the scope of EU law and for their evolution. Today, this legal landscape is notably characterized by a commitment to a

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"Union's own" human rights' catalogue, i.e. the EU Charter of Fundamental Rights, which forms part of the primary law of the Union, namely of the "EU constitution" and enjoys a relationship of continuity not just with the CJEU's case law, but also with the ECHR, which has constantly provided special "inspiration" for the Court in Luxembourg.[2]

The central role played by the Convention, and the fundamental rights' protection standards enshrined in EU law, were regarded as extremely relevant by the European Court of Human Rights.[3] In its *Bosphorus* decision[4] the Court acknowledged that the duty to meet obligations arising from international law arrangements did not exonerate the Member States from respecting the Convention principles.[5] Nonetheless, it held, after reviewing the status quo as regards the Union's fundamental rights, that the latter were afforded a level of protection that could be considered "equivalent" to that provided in the ECHR,[6] unless the applicant in an individual case could satisfy the Strasbourg Court that there had been a "breakdown" in those safeguards.[7]

The 2006 judgment was therefore a turning point since it confirmed the robustness of the mechanisms provided by the EU Treaties for the protection of human rights.[8] However, it exposed how difficult it would be in practice to seek redress of infringements arising from Union action before the Court in Strasbourg in the manner depicted in *Bosphorus*.[9] It was therefore clear that the accession of the Union to the ECHR would have provided the "missing link" in this picture.

As is well known, the CJEU had ruled in 2001 that absent an express legal basis to this effect, accession to the ECHR would not have been possible for the Union without amending the Treaty.[10] The Treaty of Lisbon saw eventually such a bespoke provision being introduced to this end.[11] However, the Union could not have made way for accession without putting in place appropriate arrangements designed to maintain the coherence of its own legal system, by now enriched by the EU Charter, and, at the same time, secure the meaningful application of the same ECHR, especially in policy areas in which the domestic authorities acted as "proxies" for the Union.[12]

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[2] *See* case C-386/10 P, *Chalkor v Commission*, judgment of 8 December 2011, nyr, ¶ 51. *See* also case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR I-1125, ¶¶ 3-4.

[3] *See* e.g. appl. No 24833/94, *Matthews v United Kingdom*, [1999] 28 EHRR 1, ¶ 33-35.

[4] Appl. No 45036/98, *Bosphorus v Ireland*, [2006] 42 EHRR 1, ¶ 155-156.

[5] *See* e.g. *application No.13258/87, M & Co v Germany, Comm. Dec. 09.02.1990.*

[6] Appl. No 45036/98, *Bosphorus v Ireland*, [2006] 42 EHRR 1, ¶ 155-156.

[7] *Id.*

[8] *See,* inter alia, Parga, *Bosphorus v Ireland and the protection of fundamental rights in Europe*, 31(2) EUR. L. REV. 251 at 256-257 (2006).

[9] For commentary, *see* e.g. Jacque' *The accession of the European Union to the European Convention on Human Rights and Fundamental freedoms,* 48 COMMON MKT. L. REV. 995 (2011*),* especially at 1016-1018*; see* also Lock, *EU accession to the ECHR: implications for the judicial review in Strasbourg,* 35(6) EUR. L. REV. 777 at 780-781 (2010).

[10] Opinion 2/94, [1996] ECR I-1759.

[11] *See,* inter alia, Jacque', *supra* note 9 at 1019-1020.

[12] *See* Opinion 2/13, Full Court, 18 December 2014, not yet reported, e.g. ¶ 161. For commentary, *see,* inter alia, Lock, *Walking on a tightrope?,* (2011) 48 (4) COMMON MKT. L. REV. 1025 at 1030-31 (2011).

The Draft Agreement envisaged that individuals could "take the Union to court" in Strasbourg subject to the fulfilment of the requirement of the "exhaustion of domestic remedies," just with any other contracting party. If any such challenge was brought, however, there was the possibility, subject to a decision on the part of the Strasbourg Court, for the CJEU to be called upon to rule on the validity of EU measures in light of the Convention on which it has not ruled thus far, so as to maintain the integrity of the Court's role of "ultimate judge" as to the validity of Union acts and pursuant to the principle of subsidiarity.[13]

The Draft agreement also provided that the Union could be involved as co-respondent with the Member State/contracting party which was alleged to have infringed ECHR rights on account of action taken to fulfill EU law obligations either by accepting an "invitation" to this end or by decision of the European Court of Human Rights.[14]

However, in its Opinion 2/13[15] the CJEU doubted that the Draft Treaty would ensure the continuing interpretation of human rights' standards in light of the purpose, structure, and objectives of the Union,[16] due to the absence of rules governing the coordination between the ECHR and the EU Charter of Fundamental Rights.[17] The Court also found that the residual possibility for a Member State to take another contracting party—that was also a member of the Union or, indeed, the Union itself—to court in Strasbourg would have undermined the relation of trust on which the very Treaty was based,[18] and weakened its own "monopoly" over the adjudication of inter-state disputes.[19]

Furthermore, leaving it to the Strasbourg court to decide on whether the Union should be "invited" as co-respondent in cases where contracting states' action was allegedly originating from compliance with EU obligations would have been incompatible with the division of powers between the Union and the Member States.[20]

Finally, the CJEU held that, to allow the Strasbourg court to decide whether the Court of Justice had already been given the opportunity to rule over the same question as that in issue in the proceedings before it, would have deprived it of the possibility to decide whether EU measures complied with human rights' rules which, after accession, had become part of the Union *acquis*.[21] In addition, it would be questioning its relationship with the domestic courts, enshrined in the preliminary reference procedure.[22]

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[13] *See,* inter alia *Handyside v UK*, Ser. A/24, [1979-80] 1 EHRR 737, ¶ 48; for commentary, inter alia Jacque', *supra* note 9 at 1018-1019.

[14] *Id.*

[15] *See* Lambrecht, *The sting is in the tail: CJEU Opinion 2/13*, EUR. HUMAN RIGHTS L. REV. 185 at 192-194 (2015).

[16] *Id.*, *see* ¶ 157-162; *see* also ¶¶ 183-189.

[17] *Id.*, ¶ 169; *see* also ¶ 186, 192.

[18] *Id.*, ¶ 199-200; *see* also ¶ 202-208.

[19] *Id.*, ¶ 207; *see* e.g. also case C-459/03, *Commission v Ireland*, [2006] ECR I-4635, ¶ 169. For comment, inter alia, Lambrecht, *supra* note 15 at 189.

[20] *Id.*, ¶¶ 222-225; *see* also ¶¶ 229-232.

[21] *Id.*, ¶¶ 238-239; *see* also ¶¶ 242-246.

[22] Opinion 2/13, ¶¶ 197-198; *see* also Lambrecht, *supra* note 15 at 186, 190.

The next section will query the direction in which the debate on the future accession arrangements may go, having regard to EU competition law investigations.[23]

III. EU COMPETITION ENFORCEMENT AS A "LABORATORY" FOR ACCESSION ARRANGEMENTS CONCERNING THE ECHR: THE CASE OF INSPECTION DECISIONS

The previous section provided a short overview of the status quo concerning human rights' protection in EU law. This section will explore some of the questions that could flow from accession having regard to the EU Commission's powers of competition inspection. More than ten years after the Modernisation reforms[24] the NCAs have become increasingly proactive in applying these rules and rely on the ECN as an informal cooperation framework, with the Commission remaining competent to take on cases for which a decision adopted at Union level may be required in the interest of the Union.[25] Nonetheless, despite the "assumption" made in the Preamble of the Modernisation regulation—that the rights of defense enjoyed by investigated undertakings across the Union can be considered "sufficiently equivalent"—significant differences exist in this area.[26]

Having regard to inspection powers, Article 20 of Council Regulation No 1/2003 confers to the Commission the power to conduct such inspections on the basis of a "letter of authorisation" or, if the investigated party objects to the measure, upon a formal decision which is binding and challengeable before the CJEU. Furthermore, Article 20(5) allows Commission officials to request assistance from officers of the national authorities to enable them to inspect premises owned or used by the investigated undertakings. Article 22 of Regulation 1/2003 also empowers both the Commission and the NCAs to rely on their fellow Network members for the purpose of carrying out inspections "by proxy" in other jurisdictions. Officials, according to, respectively, Articles 20(6) and 22(2), are obliged to obtain the necessary authorizations to carry out the inspection, including those of a judicial nature, and to respect domestic law.

As to the timing of a judicial remedy against a Commission's inspection decision,[27] Article 20 of the Modernisation Regulation allows the concerned firm to challenge it *ex-post*. The CJEU's case law, which has been confirmed also in the vigor of the EU Charter,[28] indicates that the lack of an *ex ante* remedy would not infringe the undertaking's right to the inviolability of its "home." This confirmation is based on the grounds that a number of other safeguards designed

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[23] Recital 16, Preamble to Regulation No 1/2003.

[24] *See* e.g., most recently, case T-355/13, *EasyJet v Commission*, [2015] ECR II-36; T-201/11, *si. mobil and another v Commission*, [2014] ECR II-1096; case C-375/09, *Tele.Polska and others*, [2011] ECR I-270. For commentary, *seem* inter alia, Botta, *Testing the decentralisation of competition law enforcement*, 38(1) EUR. L. REV. 107 at 108-110 (2013).

[25] *See* e.g., Cengiz, *Multi-level governance in competition policy the European Competition Network*, 35(5) EUR. L. REV. 660 at 663-665 (2010).

[26] *See,* inter alia, Andreangeli, *The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings*, 31(3) EUR. L. REV. 342 at 348, 357-358 (2006).

[27] *See* inter alia, most recently, Andersson, *Dawn raids under challenge*, 35(3) EUR. COMPETITION L. REV. 135 (2014).

[28] Case C-583/13, *Deutsche Bahn and others v Commission*, judgment of 18 June 2015, nyr, ¶ 19; *see* also ¶¶ 30-32.

to protect the former from arbitrary or disproportionate investigative measures were in place;[29] namely, *inter alia*, the obligation imposed on the Commission to specify the subject matter of the investigation (including the essential features of the suspected infringement) and the existence of an *ex-post* remedy before the EU Courts.[30]

The EU position may however be contrasted with the position adopted in several domestic jurisdictions where ordering inspections is a matter for the courts, and not for the NCAs, such as in Germany.[31] It was therefore queried to what extent, if the Commission required assistance in carrying out such inspections in a jurisdiction where, as in Germany, a "judicial warrant" was necessary, these measures can be challenged *ex ante*.

In *Roquette Freres*[32] it was held that this "review (…)[could] not go beyond an examination (…) to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation (…)."[33] Thus, Article 20(8) of Regulation No 1/2003 states that the national judge must "(…) satisfy itself that there exist reasonable grounds for suspecting an infringement of the competition rules (…)." if necessary by demand that the Commission provide it with "(…) explanations showing, in a properly substantiated manner (…)" that it has sufficient information showing such "reasonable suspicion."[34] If serious doubts emerge as to the legitimacy of the Commission's measure, a preliminary reference must be made to the Luxembourg court that is the "ultimate judge" of the validity of these measures.[35]

It is legitimate to query whether accession to the ECHR is likely to affect this approach. In respect of the question of the ECHR compliance of the inspection regime enshrined in Articles 20 to 22 of Regulation No 1/2003, it may be suggested that the CJEU seems to have "fallen in line" with current approaches enshrined in the case law of the European Court of Human Rights. According to these approaches the absence of *ex ante* judicial control on inspection decisions adopted in similar proceedings would not be fatal to their legality under Article 8 of the Convention if the decision was both accompanied by other non-judicial safeguards and was also open to an *ex-post* challenge before a court enjoying full jurisdiction on all matters of fact and law.[36] It is, however, argued that accession to the Convention may open complex, procedural questions, which will be considered in the following section.

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[29] *See* e.g. case 97-99/87, *Dow Iberica and others v Commission*, [1989] ECR 1865, ¶ 26; see also ¶ 45. More recently *see,* inter alia, case T-135/09, *Nexans France SAS v Commission*, [2013] 4 CMLR 6, ¶¶ 43-45.

[30] *See* e.g. *Dow Iberica*, cit. (fn. 28), ¶¶ 44-45; *see* also, mutatis mutandis, case C-94/00, *Roquette Freres*, [2002] ECR I-9011, especially ¶¶ 67, 80-82.

[31] *See* Section 105, Code of Criminal Procedure; also, *see* Report submitted to the ICN Subgroup on Enforcement Techniques on 24 June 2013, *available at*: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Leaflet-ICN_Anti-Cartel_Enforcement_Template.pdf?__blob=publicationFile&v=8, pp. 15-17.

[32] Case C-94/00, cit. (fn. 29), especially ¶ 54 ff.

[33] *Id.*, ¶ 60.

[34] *Id.*, ¶¶ 60-61.

[35] *Id.*, ¶ 68.

[36] Case C-583/13, cit. (fn. 27), ¶ 26; *see* e.g. appl. 56716/09, *Harju v Finland*, judgment of 15 February 2011, nyr, *available at*: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103397; *see* especially ¶¶ 41-45; also

IV. THE CJEU OPINION 2/13 AND THE DRAFT ACCESSION AGREEMENT: BACK TO SQUARE ONE? THE EXAMPLE OF COMPETITION INSPECTIONS AND THE WAY FORWARD…

It was anticipated in Section II that according to the Draft Agreement's Article 3(2), the EU could become a co-respondent in proceedings brought against any of the Member States that appeared to "call into question the compatibility of the rights" enshrined in the ECHR with a provision of Union law, "including decisions taken under" the TEU and the TFEU, "notably where that violation could have been avoided only by disregarding" one of the duties bestowed upon the member state by EU law.[37] However, the decision as to whether to allow the Union (or any of the Member States if an action was brought against the EU, in accordance with Article 3(3)) would have rested with the European Court of Human Rights.[38]

As to the involvement of the CJEU, Article 3(6) of the Draft Agreement merely stated that the Luxembourg judiciary would have to be "afforded sufficient time" to allow it to examine these issues and only if the latter were "novel."[39] However, this opportunity should not affect the powers of the European Court of Human Rights, which could still assess whether associating the CJEU with a specific case was required in light of the conditions listed in the same provision,[40] nor would have been relevant when assessing the admissibility of individual applications.[41]

It is not surprising therefore that these provisions were found to be incompatible with the TFEU.[42] The CJEU was not only concerned with the lack of coordination between the ECHR and the Union's Charter but also at the "optional" nature of the co-respondent mechanism, which was subject to the Strasbourg court's appreciation in each case and was therefore regarded as undermining the integrity of the rules governing the division of powers between the Union and the Member States.[43]

Similarly, in respect of the Draft rules regarding the Luxembourg court's own involvement,[44] the solution envisaged by the Draft agreement was seen as adversely affecting the CJEU's function of "ultimate judge" of the validity of all measures adopted "within the scope of Union law" whether directly or via the preliminary reference procedure.[45] It is acknowledged that the European Court of Human Rights' "supervisory jurisdiction" aims at verifying that the rights

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appl. No 71302/01, *Smirnov v Russia*, judgment of 7 June 2007, *available at*: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80953, especially ¶¶ 44-45.

[37] Article 3(2), Draft Accession Agreement, 3-5 April 2013, *available at*: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf.

[38] *Id.*, Article 3(3).

[39] *Id.*, Article 3(6).

[40] *Id.*, *see* also ¶ 43, 47-48 of the Report accompanying the Draft, *available at*: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf, pp. 23-24.

[41] *Id.*, ¶ 40, p. 23.

[42] Opinion 2/13, *see* e.g. ¶¶ 157-162; *see* also ¶¶ 183-189.

[43] *Id.*, ¶¶ 222-225.

[44] *Id.*, ¶¶ 238-239.

[45] *Id.*, ¶¶. 242-246.

granted to individual applicants by the ECHR are not unduly restrained.[46] However, this scrutiny should occur consistently with the essential principles of the EU institutional framework and preserving the integrity of the Union judiciary's function,[47] ultimately in order to uphold the primacy and coherence of Union law and the integrity of the EU's institutional structure.[48]

It is therefore argued that the co-respondent mechanism, far from being an "optional device" for "novel cases" should become an indispensable feature for alleged ECHR infringements arising from action occurred "within the scope of Union law."[49] Allowing the Court to "have a say" in these cases would also reconcile the unity of Union law with the effectiveness of the Convention and respect both the supervisory jurisdiction of Strasbourg and the concept of "margin of appreciation" which the Union enjoys.[50]

It is submitted that these considerations are extremely relevant for the enforcement of the EU competition rules which is increasingly left to the NCAs acting "within the scope of Union law" and thus prompts the likelihood of "Convention questions" arising in domestic courts.[51] It is doubted that, if serious questions arise as to the lawfulness of these investigative measures vis-à-vis Convention principles, the latter could avoid making a preliminary reference to Luxembourg, since to hold otherwise would potentially imperil the unity and coherence of EU law taken as a whole as well as threaten the integrity of the CJEU's jurisdiction.[52]

It may even be suggested that a "wider ranging" view of the requirement of "exhaustion of domestic remedies" would have to be adopted to encompass the condition that the competent court hearing these cases make a preliminary reference to the CJEU.[53] Consequently, it is concluded that a mechanism securing a merely "optional" involvement of the EU Court of Justice, such as the one provided in the Draft Agreement, could not be sufficient to allay these concerns.[54]

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[46] *See* e.g., mutatis mutandis, *Handyside v UK*, Ser. A/24, [1979-80] 1 EHRR 737, ¶ 48; for commentary, inter alia, Jacque', *supra* note 9 at 1018-1019.

[47] *See Bosphorus*, *supra* note 4 at ¶¶ 155-156. *See* also, inter alia, case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR I-1125, ¶¶ 3-4. For commentary, *see,* inter alia, Platon, *The "equivalent protection test": from European Union to United Nations, from Solange II to Solange I*, 10(2) EUR. COMPETITION L. REV. 226 at 235-236 (2014).

[48] *See,* inter alia, Lock, *supra* note 12 at 1032, 1035.

[49] *See* e.g. Lock, *EU accession to the ECHR: implications for judicial review in Strasbourg*, 35(6) EUR. L. REV. 777 at 780-781 (2010).

[50] For commentary, *see,* inter alia, Jacque, *supra* note 9 at 1020-21; also case C-94/00, *supra* note 30 at ¶ 54.

[51] *See,* inter alia, case C-94/00, *supra* note 30 at ¶ 51.

[52] *See id.*; *see* also, mutatis mutandis, case C-583/13, *supra* note 28 at ¶¶ 30-32.

[53] *See* Costa, *The relationship between the European Court of Human Rights and the national courts*, 3 EUR. HUMAN RIGHTS L. REV. 264 at 266-267 (2013).

[54] Opinion 2/13, ¶ 240-248; *see* also, mutatis mutandis, ¶ 90. *See*, inter alia, Lock, *supra* note 12 at 1032-1033.

V. EU ACCESSION TO THE ECHR AND COMPETITION INVESTIGATIONS: A "HUMAN RIGHTS LABORATORY" WITH UNCERTAIN OUTCOMES? TENTATIVE CONCLUSIONS

The previous sections attempted to address some of the issues arising from the impact of ECHR accession on the rules governing the enforcement of the EU competition rules across the ECN in light of the recent Opinion of the CJEU on the Draft Agreement; in particular, having regard to challenges concerning the proportionality and non-arbitrariness of inspection decisions. It was suggested that the application of these principles, whether pre- or post-accession, should always be subjected to the framework of objectives of the Treaties and occur in the respect of the Union's institutional and judicial architecture.[55]

Thus, it was argued that allowing the Union to appear as co-respondent in all cases involving the application of Convention standards to measures adopted within the scope of Union law would not just be merely desirable, but should be compulsory to manifest the legitimate interest to the effective application of the EU competition rules.

It is added that, in these cases, the prior involvement of the CJEU should always be allowed for the integrity of the Court's jurisdiction within the TFEU. It is therefore hoped that a new accession agreement will allow the Union to appear as co-respondent in all cases concerning allegations of human rights' infringements arising from the Member States' fulfilment of their Treaty obligations and permit the Court of Justice of the EU to rule on these allegations, for the purpose of fulfilling the condition of the "exhaustion of domestic remedies."

[55] *See*, inter alia, case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR I-1125, ¶¶ 3-4.