out that a wide-ranging application of US law would have the effect of undermining the application of Belgian and European competition law and of the competition law of other countries. Similar amicus curiae briefs were submitted in that case by, inter alia, Taiwan and Japan.

In its judgment the United States Court of Appeals dismissed Motorola's claim and held that the Sherman Act did not apply, on the ground that the effects of the cartel on the American market—if substantial and reasonably foreseeable—were "irrelevant", in that the cartel participants were not selling LCD panels in the United States and the panels were being sold abroad to undertakings (subsidiaries of Motorola) which incorporated them into products which were then exported to and sold in the United States. The Court also pointed to the risk of "enormously increasing the global reach of the Sherman Act".

Thus, in contrast to the CJEU, which decided to deal with the issues involved in Intel/Alcatel by way of slightly artificial reasoning, the United States Court of Appeals rejected a decision which was not established in this case. The link between the abuse generated outside the United States and the effects on US territory was accordingly not sufficiently strong to motivate jurisdiction.

In conclusion, EU competition law has until now not been applied extraterritorially by the CJEU according to two separate principles: the single economic entity doctrine and the implementation doctrine. The application of Articles 101 and 102 TFEU outside the European Union in accordance with an effects doctrine remains a controversial issue in public international law, and is currently not sufficiently strong to motivate jurisdiction.

Therefore, the concept was developed by the Member States in subsequent treaty revisions. The concept was first applied in the Treaty of Rome in 1957 ("determined to create an ever closer union among the peoples of Europe in which decisions are taken as openly as possible and as closely as possible to the citizen.

The concept of ever closer union has legal effects. According to a House of Commons Library briefing paper of 16 November 2015, there had at the time of publication been no more than 37 references to ever closer union in the jurisprudence of the Court of Justice (out of the 1194 decisions of the Court, not all of which have judgments. A recent example of the approach of the CJEU is in its Opinion 2/13 on the Compatability of the draft agreement on accession to the European Union.

Too broad an interpretation of the concept of ever closer union is not sufficient. Most obviously, the Court of Justice is prepared to use the Court in its reasoning said:

In this Letter of 10 November 2015 to the President of the European Council, David Cameron set out the principles: the single economic entity the single economic entity and the implementation doctrine and the implementation doctrine and the implementation doctrine and the implementation doctrine and the implementation doctrine. Too broad an interpretation of the concept of ever closer union is not sufficient. Most obviously, the Court of Justice is prepared to use the Court in its reasoning said:

The substantive content of the Decision recognizes that the United Kingdom is not committed to further political integration. The Decision also states: '[T]he references in the Treaties... to an ever closer union... do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation. They should not be used to either support an extensive interpretation of the competences of the Union or of the powers of the institutions... These references do not alter the limits of Union competence governed by the principle of conferral, or the use of Union competence governed by the principles of subsidiarity and proportionality.'

The Decision thus confirms the Member States' view that ever closer union is a political concept and that the United Kingdom is not committed to 'further political integration'. Moreover, the concept neither extends any existing legal basis for further European Union action nor alters the limits of EU competence. In a clear conclusion to the Court of Justice, the Member States do not consider that 'ever closer union' should be used to...
system for calculating votes of national parliaments, one third or more of the national parliaments must consider that the proposal "would be better achieved". If the United Kingdom had wanted to be ambitious and to drive stronger reform, 'unwanted' could additionally have encompassed EU legislation that is incompatible with the principle of subsidiarity. Under the principle of subsidiarity, save for the sole competence of the European Union, 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can, rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Article 5(1) TEU). So there are two complementary concepts in play, namely, 'cannot be sufficiently achieved' and 'can be better achieved'.

If the United Kingdom had wanted to be ambitious and to drive stronger reform, 'unwanted' could additionally have encompassed EU legislation that is incompatible with the principle of proportionality. Put another way: even if it is per se impossible or impracticable to exercise its discretion, to legislate, are the means adopted proportionate to the stated aim? Under the principle of proportionality, Article 5(1) TEU says 'it must be impossible for the Union to achieve an objective by reason of its scale or effects'.

As to the procedural changes to be made by the Decision, the Council had made provision for a procedure which is sometimes called the "orange card" procedure. In ordinary legislative procedure, if there were divergences in the approach of the Member States in a given context, that which would be 'better achieved', even if action could be 'sufficiently achieved' at Member State level, with divergences. The Commission's approach implies that there did not need to be any transnational element to justify a proposal for legislation.

The Council considered that the Commission's approach has been that, if there were divergences as to the principle of subsidiarity, or that could be interpreted as subsidiarity concerns, and other arguments relating to the principle of proportionality were sufficiently advanced, the Commission did not accord any of the criticisms made of its approach. Instead it criticized the national parliaments' approach on the EPP proposal, observing that 'In analysing the reasoned opinions (on the EPP), the Commission distinguished between arguments relating to the principle of subsidiarity, or that could be interpreted as subsidiarity concerns, and other arguments relating to the principle of proportionality'.

The Council's approach has been that, if there were divergences as to the principle of subsidiarity, or other policy or legal choices. More significantly, perhaps, the Commission has not, in general, been prepared to accept that its proposals have infringed the principle of subsidiarity. Secondly, the Court of Justice has not, in general, accepted subsidiarity as the sole ground of challenge, the Court of Justice has been that, if the decision is to be taken in respect of a subsidiarity challenge, the court must decide whether the proposal is 'sufficiently achieved' at Member State level, with divergences.

The procedural changes to be made by the Decision on 12 weeks from transmission of the draft proposal to them. Where the votes of national parliaments amount to more than 55 per cent of the legislative text is to be decided. The Council presidency will initiate a comprehensive discussion on the opinions of the national parliaments. As representatives of the Member States acting, as members of the Council will consider the consequences of the draft legislative text unless the draft is amended to accommodate the concerns expressed in the reasoned opinions (emphasis added). This complex drafting seems to be intended to navigate the problem of recovering an intergovernmental commitment in a decision of the Council itself.

There are three points to make about the European Union response. First, the yellow and orange card procedures are still limited to reasoned opinions based on subsidiarity. If the EPP has not, in general, been prepared to accept that its proposals have infringed the principle of subsidiarity. Secondly, the Committee of the Regions has raised concerns that there are two possible procedures which are not need to be any transnational element to justify a proposal for legislation. The Council's approach has been that, if there were divergences in the approach of the Member States in a given context, that which would be 'better achieved', even if action could be 'sufficiently achieved' at Member State level, with divergences. The Commission's approach implies that there did not need to be any transnational element to justify a proposal for legislation.

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review the body of existing EU legislation for ‘compliance with the principle of subsidiarity’ and proportionality, building on existing processes and with a view to ensuring the full implementation of this principle’. This is a reference to the REFIT programme (dealt with further below). Specifically, there is no indication that the Commission agrees that action at the European Union level is only justified where the issue has transnational aspects.

The Decision will confer an enhanced role on national parliaments which could result in blocking further consideration of a legislative proposal on subsidiarity grounds. This power could have the effect of ensuring democratic accountability. However, the absence of a right to challenge a proposal on proportionality grounds is an opportunity missed.

Competitiveness: better regulation aspects.

While noting that the flow of new European Union regulations had been stemmed, the UK Prime Minister’s letter sought action to reduce the burden of existing legislation. His views are shared in other Member States, such as the Netherlands and Germany.

The Commission has been criticized for proposing the adoption of legislation in breach of subsidiarity and proportionality principles, for a lack of openness and transparency in the way that it works, and for the paucity of its evidence base for proposals. In response the Commission initially took piecemeal steps to address these shortcomings. These steps culminated in its more coherent Better Regulation Package of May 2015.

Specifically, as to the existing stock of regulations, in 2012 the Commission had established a Regulatory Fitness and Performance Programme (REFIT). Over a period of years, the aim of REFIT is to screen the entire stock of EU legislation for burdens, inconsistencies and ineffectiveness. The Commission has published a number of reports on the measures that it has proposed for adjustment, repeal or simplification since the introduction of REFIT.

Laudable though REFIT is, there has been a mixed reaction to how effective the initiative has been. For example, because the choice of legislation to be scrutinized was Commission-driven.

On 19 May 2015, the Commission adopted a Decision establishing the REFIT Platform. The purpose of the platform was to establish a mechanism under which suggestions from all available sources would be invited and collected in relation to ‘regulatory and administrative burden reduction’. The suggestions would be forwarded to the relevant part of the institution and the Commission promised to respond to each suggestion.

In December 2015, an important draft proposal for an Interinstitutional Agreement on better law-making was published (see below).

The texts on competitiveness and better regulation see typically labyrinthine. In the proposal that has followed renegotiation, the Member States (and, it is asserted, the European Union institutions, even though they are not parties to the Decision) would commit themselves to ‘take concrete steps towards better regulation’. This means lowering administrative burdens and compliance costs on economic operators, especially small and medium size enterprises, and repealing unnecessary legislation as foreseen (in the draft Commission Declaration, while continuing to ensure high standards of consumer, employee, health and environmental protection.’ The Decision amounts to little more than a restatement of the present position, albeit in a binding form. Unfortunately, the ‘concrete steps’ towards lowering administrative burdens and compliance costs are not hard-edged, for example by specifying binding targets, and are necessarily qualified by the reference to a number of counterbalancing considerations.

For its part, the Council has promised to make a separate declaration: ‘The European Council urges all EU institutions and Member States to strive for better regulation and to repeal all unnecessary legislation as foreseen (in the draft Commission Declaration), while continuing to ensure high standards of consumer, employee, health and environmental protection.’ The Commission anticipates, it is intended to be legally binding under Article 295 TFEU. It would codify commitments (a) to publish an annual work programme in consultation with the Council and Parliament; (b) to produce effective impact assessments, with full respect to be given to subsidiarity and proportionality; (c) to continued scrutiny of impact assessments by an independent Regulatory Scrutiny Board; (d) to open, public consultations (without prejudice to Article 155(2) TFEU); and (e) to ex post evaluation of existing legislation, with specific consideration to be given to the use of sunset clauses and review clauses.

The establishment of a procedural and substantive framework of this kind is a methodology understood by the European Union institutions, which have to serve the interests of all Member States and not the United Kingdom alone. The commitment to ex post review of legislation is further evidence of a change of approach, as is the possibility of using sunset clauses. My conclusion is that, if given effect in practice, the framework has real potential to increase the accountability of the European Union institutions in respect of their legislative role.

Overall, the United Kingdom’s renegotiation in the respects covered above has been largely successful when tested against its negotiating aims, even if their practical efficacy will only become apparent as time unfolds.