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 'indirect', 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 *InnoLux* by way of slightly artificial reasoning, the United States Court of Appeals recognized that jurisdiction 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 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 as well as in EU competition law. While Advocates General and the General Court have taken on the issue, the CJEU has not yet indicated where it stands. It is likely that the CJEU will recognize some form of a 'qualified effects doctrine' when it considers the appeal in *Intel*, but it would be appropriate for the Court to take a restrictive view of such a doctrine. Too broad an interpretation of the territorial scope of EU competition law would encroach on a more traditional view of the territoriality principle as recognized in public international law, sit uneasily with the wording of Articles 101 and 102 TFEU and entail the risk of conflicts of jurisdiction with foreign competition authorities. □

Three EU offers

Christopher Muttukumaru CB of Monckton Chambers provides a legal analysis of three areas of the renegotiation where change was sought by the United Kingdom

In his letter of 10 November 2015 to the President of the European Council, David Cameron set out the subjects on which the United Kingdom was seeking European Union reform. Three of those renegotiation aims are now covered by the European Union's offers in a suite of documents attached to the Council's Conclusions at its meeting on 18 and 19 February 2016. The three offers are: exemption from ever closer union; an enhanced role for national parliaments to block unwanted legislation; and tackling the stock of existing EU regulation. This article examines these offers and the legal aspects of the perceived problems which underpinned them.

National sovereignty was a constant theme of the renegotiation, reflecting the political climate in the United Kingdom. The question whether there exists an unnecessary excess of EU regulation was equally politically significant, reflecting concerns in the United Kingdom and other Member States.

Sovereignty: ever closer union. The United Kingdom argued that it should be exempt from the requirement to work towards 'ever closer union'. The concept is not new. It appeared in the Preamble to the Treaty of Rome in 1957 ('determined to lay the foundations of an ever closer union among the peoples of Europe').

Thereafter, the concept was developed by the Member States in subsequent treaty texts. Reflecting these developments, the current terminology appears in the Preamble to the Treaty on European Union, which provides: 'Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.' In Article 1 TEU, the signatories say: 'This Treaty marks a new stage in the process of creating 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.'

Whilst the concept has symbolic political significance within the United Kingdom, the first key question is whether 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 57 references to ever closer union in the jurisprudence of the Court of Justice (0.19 per cent of the total), not all in court judgments. A recent example of the approach of the CJEU is in its Opinion 2/13 on the Compatibility of the draft agreement on accession of the European Union to the ECHR. The Court's opinion was in part based on its view that the EU legal framework arose from the Treaties and that this framework reflected a common desire to adhere to a common set of values (including respect for human rights) within the scope of the EU rules. The Court held that the proposed agreement did not adequately address the risk that accession would subvert the autonomy and exclusivity of the EU legal regime. In reaching this view, the Court in its reasoning said:

> These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in [Article 1(2)] TEU, in a process of creating an ever closer union among the peoples of Europe.

To test the weight attached to the concept, a question to consider is: if the concept of ever closer union had not been referred to, would it have made any difference to the outcome? It is true that a coherent EU law framework is the way in which legal effect has been given to the political consensus among European Union Member States to work closely together within the scope of EU competence and that the Court was keen to avoid the possibility that this consensus might be subverted. But it seems reasonably clear that the reference to ever closer union was simply contextual (and probably superfluous) since the Court seems to be doing no more than recognizing the concept as an aspirational political aim. Even if ever closer union had not been mentioned, the Court would still have wished to protect the integrity of the EU law framework.

There is a line of cases concerning access to documents of the European Union institutions which refer to ever closer union. For example, in Case C-506/08P *Sweden v My Travel Group plc*, the Court (First Chamber) considered the proper approach to reliance on the derogations from the duty of openness contained in Regulation 1049/2001. It expressly referred to ever closer union by saying: 'as a preliminary observation, it should be noted that … [the] regulation reflects the intention [in Article 1 (ibid)] … of marking a new stage in the process of creating an ever closer union … in which decisions are taken as openly as possible and as closely as possible to the citizen'. The Court goes on to emphasize the need, since it was construing the derogations from the principle that there should be the widest possible access to the documents of the European Union institutions, to interpret and apply them strictly. This is no more than an expression of the normal EU law approach that derogations are interpreted strictly against the person relying upon them. The reference to ever closer union is expressly contextual (a 'preliminary observation'). It forms no part of the Court's subsequent reasoning.

In Case C-364/10, *Hungary v Slovak Republic*, Advocate General Bot suggested that the diplomatic competence of a Member State ought not to be exercised 'in a manner that might lead to a lasting break in diplomatic relations between two Member States. Such a break would be incompatible with the integration process aimed at … creating "an ever closer union" … and would [undermine] the aim of … promoting peace'. In its judgment, the Court did not refer to ever closer union. If the Court had had expansionist ambitions, it could have done so.

Having regard to the aspirational language of Article 1(2) and the current state of the Court's jurisprudence, it is reasonable to conclude that the concept is primarily a political one. Moreover, having regard to the scheme of the Treaties which clearly signal law-making functions where they are intended, it is not a legal basis for the adoption of EU legislation.

'National sovereignty was a constant theme of the renegotiation.' (Johnny Greig/iStock)

But that does not mean that the concept has no legal weight. Most obviously, the Court of Justice is prepared to use general principles as an interpretative tool. If faced with a lack of clarity, for example, it has been willing to choose an interpretative route which supports what it regards as a common European Union outcome and accordingly could rely on aspirational language such as a commitment to ever closer union to develop its jurisprudence. Some commentators would understandably regard this as evidence of a centralising focus. But, while the Court is often prepared to adopt a teleological approach, its legal impact in the relevant case law hitherto has been limited.

As to the European Union's response to the United Kingdom, a draft Decision ('the Decision') is attached to the Conclusions of the European Council. The Conclusions state that the Decision is 'legally binding, and may be amended or repealed only by common accord of the … Member States'. The Decision will take effect on the date when the United Kingdom notifies the EU Secretary General that it has decided to remain a member of the European Union. The substance of the Decision will be incorporated into the Treaties when they are next amended in accordance with the procedures in the Treaties and in line with the constitutions of the Member States. This language reflects the requirements of the revision procedures for the Treaties in Article 48 (TEU).

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 either to 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, collective signal to the Court of Justice, the Member States do not consider that 'ever closer union' should be used to

support an expansive interpretation of EU competence.

The Decision will not be a decision of the European Council. Rather it is an intergovernmental agreement which, if deposited at the United Nations and ratified by each Member State (as necessary under each Member State's laws), would have binding effect in public international law. Specifically, as to the section of the Decision on the meaning of ever closer union, Article 31(1) of the Vienna Convention on the Law of Treaties states that a treaty is to be interpreted according to its context. An agreement of all the parties relating to a treaty made between the same parties is to be regarded (Article 31(2)) as part of the context leading to the making of that treaty. Moreover Article 31(3)(a) expressly requires that a subsequent agreement between the same parties about the interpretation of an earlier treaty between them should be taken into account. It is true that the Decision, until its substance is incorporated into the EU Treaties, neither binds the Court of Justice nor the European Parliament. Even so, the Decision would, in the light of the Vienna Convention, carry persuasive weight in any proceedings in which the limits of the concept of ever closer union were litigated before the Court of Justice.

It may also be noted that the Court of Justice, in Case C-135/08 *Rottmann*, has itself accepted that a Declaration of the Member States on nationality of a Member State was to be taken into account as an aid to the interpretation of the EC Treaty.

The conclusion is that this part of the Decision represents a positive outcome for the United Kingdom Government.

Sovereignty: the role of national parliaments. There is frequent criticism of the European Union institutions for creating unnecessary new EU legislation. As the Duchess said in *Alice in Wonderland*, "If everybody minded their own business, the world would go round faster than it does."

To strengthen democratic accountability for EU legislation, the United Kingdom Government argued that national parliaments should be able to work together to block unwanted European legislation. To understand the European Union's response, it is necessary briefly to describe the current position.

The Decision confirms that 'unwanted' legislation is legislation that is not compatible with the principle of subsidiarity. Under the principle of subsidiarity, save where a proposal for legislation is within 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(3) 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 permissible for the European Union, in the exercise of its discretion, to legislate, are the means adopted proportionate to the stated aim? Under the principle of proportionality, Article 5(4) TEU says that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

The procedural changes to be made by the Decision build on the changes first made under the Lisbon Treaty, in which provision was first made for national parliaments to undertake a scrutiny role in the EU legislative process.

In Protocol No 2 on the application of the principles of proportionality and subsidiarity (introduced by Lisbon), Article 5 states that draft legislative acts must be justified as regards subsidiarity and proportionality. The draft act should contain a statement 'making it possible to appraise compliance with ... subsidiarity and proportionality', as well as some assessment of the financial impacts of the proposal.

Within eight weeks of the transmission of a proposal, a national parliament has the right to submit a reasoned opinion to the European Union institutions stating why it considers that a proposal is not compatible with subsidiarity.

The European Union institutions are bound to consider any reasoned opinions submitted. But if, under the Treaty's system for calculating votes of national parliaments, one third or more of the national parliaments object by reasoned opinion, the Commission is bound to conduct a more formal review. It has to give reasons for its decision to maintain, amend or withdraw the proposal. This is the so-called 'yellow card.

The Commission reports annually on the reasoned opinions submitted by national parliaments. In one case in 2013, on the Regulation establishing a European Public Prosecutor's Office (EPP), 13 reasoned opinions were submitted, representing 18 votes out of a possible 56. Therefore the threshold for a yellow card had been crossed. In response, the Commission did not accept 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, to policy choices unrelated to subsidiarity, or to other policy or legal choices.'

More significantly, perhaps, the Commission's approach has been that, if there were divergences in the approach of the Member States in a given context, that alone would justify EU action ('would be better achieved'), even if action could be 'sufficiently achieved' at Member State level, albeit with divergences. The Commission's approach implies that there did not need to be any transnational element to justify a proposal for legislation.

The Lisbon Protocol also made provision for a procedure which is sometimes called the 'orange card' procedure. In the ordinary legislative procedure, if the number of negative reasoned opinions by national parliaments represent a simple majority of the votes of national parliaments but if the Commission nevertheless decides to maintain its proposal, the Council and the European Parliament are bound to consider the reasoned opinions. If 55 per cent of Council members or a simple majority of the European Parliament consider that the proposal does not comply with the principle of subsidiarity, the proposal 'shall not be given further consideration'.

Under the European Union's February 2016 offer to the United Kingdom, national parliaments may (as now) submit reasoned opinions on the ground of subsidiarity, but within an extended period of 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 votes allocated, the Council presidency will initiate a comprehensive discussion on the opinions and the consequences to be drawn from them. Consistently with the procedural requirements under the European Union Treaties, 'the representatives of the Member States acting ... as members of the Council will discontinue the consideration 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 reconverting an intergovernmental commitment into 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 alone (yet hitherto the Commission has not, in general, been prepared to accept that its proposals have infringed the principle of subsidiarity). Secondly, the current operative block on legislation under the Treaties is applied by the Council or by the Parliament. The Decision has had to be drafted on that basis. The question whether a draft proposal has been amended to accommodate national parliaments' concerns will be determined by the Council, not by the national parliaments. Finally, and helpfully, the Decision states that legislative action, if it is to comply with the principle of subsidiarity, must have 'transnational aspects which cannot be satisfactorily regulated by action by Member States and on whether action at Union level would produce clear benefits by reason of its scale or effects compared with actions at the level of Member States'.

As to the first of these points, subsidiarity as the sole ground of challenge, the opportunity has been missed in the Decision to extend the yellow card procedure to encompass challenges by national parliaments on the ground of proportionality, as well as subsidiarity.

As the House of Lords EU Committee, in its report on The Role of National Parliaments (11 March and 24 March 2014) rightly concluded, 'the two concepts are clearly closely related, and explicitly extending the procedure to include proportionality would avoid sterile disputes about whether a particular concern about a proposal fell under one heading or the other'.

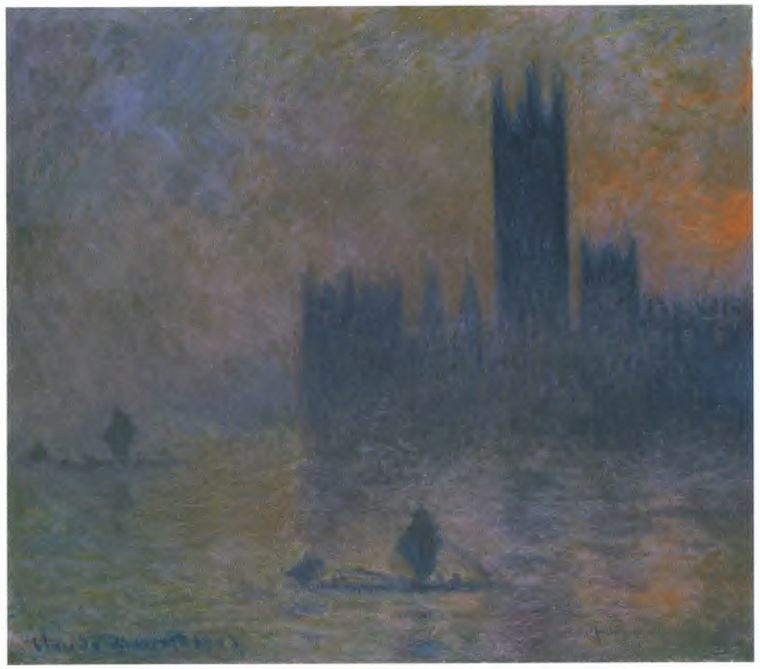
Even as it stands, if the Council were to use its powers to cease consideration of a proposal at the behest of the national parliaments, there could be cases where a decision to 'discontinue' could be challenged in the Court of Justice on the basis that the reasoned opinions of national parliaments had not been properly based on subsidiarity grounds. In view of the Commission's approach until now, this is not a fanciful prospect.

As to the second point, national parliaments' right to block, the United Kingdom Government has achieved its key aim, albeit indirectly, through the procedure anticipated by the Decision. But is the power illusory or real? The obvious question is whether it would be possible for 55 per cent of the national parliaments to club together within twelve weeks to submit reasoned opinions, properly based on subsidiarity grounds. Twelve weeks is undoubtedly an improvement on the current eight-week deadline. But an extension of the time limit is not deliverable without a change to the European Union Treaties.

The Decision also requires that the members of the Council should first be satisfied that the draft legislative proposal had not been amended to accommodate the concerns of the national parliaments. If so satisfied, the representatives of the Member States must apparently act at the behest of the national parliaments, even if the governments of the Member States might have voted differently .

The new proposed procedure has to '[respect] the procedural requirements of the Treaties' (Article C3 (ibid)). This presumably means that the Commission (rightly) should have an opportunity to respond to the opinions of the national parliaments and that the views of the Parliament will be taken into account.

A separate Commission declaration 'on a subsidiarity implementation mechanism and a burden reduction implementation mechanism' (EUCO 7/16) ('the draft Commission declaration') is to be made at the same time as the Decision takes effect. A declaration is not legally binding. The reference to subsidiarity in the draft Commission Declaration is no more than a promise to establish a mechanism to



Houses of Parliament, Westminster. Oil on canvas (*c* 1903) by Claude Monet. (Metropolitan Museum, New York)

European Parliament, Brussels. (Rolf Richardson / Age / Alamy)

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 improving 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 Commission 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 are 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 text. 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 in order to enhance EU competitiveness while having due regard to the need to maintain high standards of consumer, employee, health and environmental protection.'

In what appears to be a notable development, the Council has also foreshadowed the following: '[To this end] the European Parliament, the Council and the Commission *have agreed the Interinstitutional Agreement on better law-making. Effective cooperation in this framework is necessary in order to simplify Union legislation and to avoid over-regulation and administrative burdens*' (emphasis added). This is a change from an earlier draft of the declaration, dated 2 February 2016.

The Council also declares that it is committed 'to regulatory simplification burden reduction, including through withdrawal or repeal of legislation where appropriate, and a better use of impact assessment and *ex post* evaluation throughout the legislative cycle, at the EU and national levels'.

The Commission's supporting declaration is regrettably little more than a restatement of the status quo ante. It recommits itself to the 2015 Better Regulation package; to the REFIT programme; to cooperation as part of the REFIT platform; and to simplification and burden reduction, consistently with the balancing considerations outlined above. It does, however, say that it will work towards establishing specific targets for burden reduction.

A new Interinstitutional Agreement on better law-making would be a very useful development even if it seems bureaucratic. If adopted, as the Council's Declaration anticipates, it is intended to be legally binding under Article 295 TEU. 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 consultation (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. □