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# International Obligations and Devolved Powers – Ploughing through Competences and GM Crops

Annegret Engel and Ludivine Petetin\*

## Abstract

This paper analyses the impact of Brexit on devolved competences in environmental protection. It maps the post-Brexit division of the United Kingdom (UK)'s internal (devolved) and external (international) competences and how this may shift when competences are returned from the European Union (EU). Crucially, the paper suggests that certain of these EU powers do not simply derive from the EU but are in fact already held by the devolved regions in accordance with the principle of subsidiarity. Consequently, devolved competences are under threat of being pre-empted, as the UK seeks to harmonise otherwise fragmented policies and legislation in order to comply with obligations at international level. This conundrum is illustrated here using a case study on genetically modified crop cultivation, which identifies the conflicts in the UK's proclaimed strategy post-Brexit between international obligations and devolved competences and the legal challenges this entails.

## Keywords

Devolution, competences, subsidiarity, pre-emption, multi-level governance, genetically modified organisms

## Introduction

The UK is striving to 'regain powers' previously lost to Brussels by withdrawing from the European Union (EU).<sup>1</sup> A common presumption is that such powers are external competences currently administered by EU institutions, which are due to be reintegrated into the UK legal framework post-Brexit.<sup>2</sup> However, as this paper will show, this assumption is a rather over-simplified picture which does not show the true complexity of legal obligations both internal and external to the UK.

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<sup>1</sup> See generally, M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges* (Insentia: Cambridge, 2017).

<sup>2</sup> The slogan 'take back control' was widely used by Leave campaigners leading up to the referendum in June 2016, see e.g. <[http://www.voteleavetakecontrol.org/briefing\\_control.html](http://www.voteleavetakecontrol.org/briefing_control.html)>.

Internally, according to the UK's devolution settlements,<sup>3</sup> certain competences (for example environmental protection and agriculture) have been transferred to the devolved administrations of Scotland, Wales and Northern Ireland, which have thus become direct beneficiaries of rights derived from EU law under the principle of subsidiarity.<sup>4</sup> Arguably, such rights should be returned to the devolved regions after Brexit with the help of internal instruments, meaning that the devolved regions would regain those powers. However, recent policy developments indicate that these competences could well be repatriated centrally to Westminster, in order to support and strengthen the UK single market and the establishment of UK-wide frameworks in these areas. These changes could, however, be undertaken to the detriment of sensitive region-specific concerns, such as the environment or agriculture.

Externally, competences are closely intertwined between the EU and other international organisations, such as the World Trade Organization (WTO) which continues to impose international obligations on the UK beyond its EU membership. In addition, trading at international level requires close cooperation and an alignment of certain standards with other countries. In particular, any post-Brexit trade deal with the EU will require the UK's compliance with European standards.<sup>5</sup> In addition, even other non-European countries may have aligned their trading requirements to those of the EU which could determine further legal constraints on the UK's external trading.<sup>6</sup>

This paper uses a case study on genetically modified (GM) crop cultivation to illustrate the complexity of the issues raised by Brexit and how to disentangle the relevant international, EU and (sub-)national provisions and mechanisms. Brexit talks have reignited public concerns over the UK governance of genetically modified organisms (GMOs).<sup>7</sup> Importantly, the flexibility built into the EU GMO framework was amongst the reasons why some commentators identified this framework as the archetype example of multilevel governance characteristics.<sup>8</sup> To this extent, GMOs could provide further insights on how governance within the UK could develop.

It is well known that genetic modification causes controversy. Such modification is said to produce superior crops by eliminating undesirable traits, passing on desirable ones through successive generations and improving crop and yield.<sup>9</sup> However, GMOs could have potentially negative consequences too and the economic, environmental and societal

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<sup>3</sup> The Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Acts 1998 and 2006 (hereinafter the devolved settlements).

<sup>4</sup> Art 5 Treaty on European Union (TEU). This will be explained in more detail further below.

<sup>5</sup> See e.g. the international trade agreement between the EU and Canada, Comprehensive Economic and Trade Agreement. Full consolidated version of the text can be found online <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>>.

<sup>6</sup> So-called 'Brussels effect'. This is further discussed below.

<sup>7</sup> The Independent, 'Brexit: Government to review GM crop regulations in preparation for leaving EU' (26 October 2016) <<http://www.independent.co.uk/news/uk/home-news/government-review-gm-crop-regulations-preparation-brexit-european-union-a7381276.html>>.

<sup>8</sup> See in particular M. Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology* (Edward Elgar: Cheltenham, 2008). More generally on new modes of governance, see G. de Búrca and J. Scott, *Law and New Governance in the EU and the US* (Hart Publishing: Oxford, 2006).

<sup>9</sup> See e.g. Consensus Study Report by US National Academies of Sciences, Engineering, and Medicine: 'Genetically Engineered Crops: Experiences and Prospects' (2016).

benefits must be balanced against the possible risks – which is not an easy task given that many of the variables are uncertain or unknown.<sup>10</sup> GMOs raise further issues beyond scientific uncertainty, including ethical, moral and cultural factors. Some consumers consider GMOs to be ‘unnatural’ or resulting in ‘Frankenfoods’ which ought to be labelled from the moment they are cultivated until they reach the table.<sup>11</sup> The whole issue surrounding GMOs is brilliantly summarised by Davies: ‘it is not just the risk, or degree of risk, that is the issue in GMO debates but the absence of sufficiently good reasons for taking the risk’.<sup>12</sup> Hence, it is not just about ‘risk’ in a technical or scientific sense. Notwithstanding the prospects for significant environmental and societal improvements, public and governmental discourses remain principally fixed on the challenges and concerns over environmental and safety assessments of GMOs and how to manage and regulate them.

Different approaches towards GMOs at internal and external level could prove problematic during the UK’s exit process and beyond due to the difficulty in disentangling the various competence and obligations. This paper will first assess the more obvious EU-UK relationship and to which extent the UK will be required to comply with certain EU standards post-Brexit. The main focus of this paper will be on the second section, which will discuss the issues arising in relation to the devolved regions with the UK’s withdrawal from the EU. The third section will consider some additional particularities under international law. The paper will conclude with the claim that ‘taking back control’ does not simply imply regaining competences from Brussels but also the possibility of pre-empting devolved powers by Westminster, which can be seen as a rather unfortunate side-effect of Brexit.

## Compliance with EU Standards

Despite the UK’s withdrawal from the EU, the requirement to comply with certain EU standards will not automatically cease with its membership. Instead, EU legislation will continue to influence the UK legal framework beyond Brexit and, depending on the relationship the UK decides to have with its European neighbours post-Brexit, this will determine the level of compliance required.<sup>13</sup> In particular, any trading with the EU will only be possible if the UK agrees to be bound by certain obligations, irrespective of whether this is supported by an additional free trade agreement.

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<sup>10</sup> More specifically, there are disputed adverse effects of GMOs. First, in relation to humans because of the unknown long-term effects of consuming GM foods (including nutritional differences and allergic reactions). Second, there are environmental impacts both in relation to the environment per se (the development of super weeds, out-competition of native plants, biodiversity reduction) and effects to other organisms within the ecosystem. For instance, crops modified to kill certain pests could be toxic to non-target species. See e.g. the following US case, *In re StarLink Corn Products Liability Litigation* 212 F Supp 2d 828 (ND Ill 2002); A Coghlan, ‘Enter the Superweed’ *New Scientist* (27 August 2005) 17; and L.L. Wolfenbarger and P.R. Phifer, ‘The Ecological Risks and Benefits of Genetically Engineered Plants’ (2000) 290 *Science* 2088.

<sup>11</sup> See G. Gaskell et al., ‘Europeans and Biotechnology in 2010: Winds of change?’ (European Commission, Oct 2010).

<sup>12</sup> G. Davies, ‘Morality Clauses and Decision Making in Situations of Scientific Uncertainty: The Case of GMOs’ (2007) 6(249) *World Trade Review* 249, 253.

<sup>13</sup> The main options include: access to the single market by means of a Norway-model or similar, an EU-UK free trade agreement similar to the EU-Canada agreement, or trading under WTO rules.

In general, the UK will of course be able to set different standards<sup>14</sup> from the rest of the EU post-Brexit. However, this development may not be obvious immediately but rather take some time according to the European Union (Withdrawal) Bill (hereinafter Withdrawal Bill).<sup>15</sup> The Withdrawal Bill suggests that all EU legislation will initially be retained by being incorporated into the national legal framework once the UK has left the EU.<sup>16</sup> After the UK's exit, it will be for the national courts (by means of judicial interpretation)<sup>17</sup> and the Government (through new legislation)<sup>18</sup> to amend and/or repeal those laws on an *ad hoc* basis if they are no longer desired. Given the example of environmental protection, this would mean that existing EU environmental law will initially continue to have effect in the UK, thus ensuring legal certainty in the short term after exit. In the long term however, the UK could choose to depart from the European framework, by setting its own standards for protection. Further, principles of EU environmental policy will not be part of retained EU law. This means that a so-called 'cornerstone' of EU environmental policy will be absent.<sup>19</sup> Principles, such as the precautionary principle, which is of central relevance to the EU governance of GMOs, would not necessarily continue to play a role in UK environmental protection. Hence, despite giving the impression of a slow and considered departure from the EU, the Withdrawal Bill in effect means all EU-derived laws can be repealed at any time after the UK's EU exit. The domestication of EU legislation could therefore be seen as some form of 'window dressing' and ultimately with no legal weight, resulting in a lack of legal certainty which may have significant implications on businesses and individuals alike.

Any actual divergence in legal standards between the UK and the EU will become more visible in the next decade or so. The extent of this and the exact particularities will have important ramifications for a potential trade deal with the EU after Brexit. Any such agreement with the Union will *inter alia* require compliance with high environmental standards. The UK could strengthen its environmental protection standards and establish itself as a leader in the field. At the bare minimum, UK standards have to be similar to those of the EU. For example, this can be seen with the most recently negotiated international free trade agreement between the EU and Canada (the Canada-EU Comprehensive and Economic Trade Agreement, otherwise referred to as CETA). Here, Canada was able to guarantee the protection of European standards in agriculture and environmental law which was one of the essential aspects for the agreement's successful conclusion. For example, according to Article 25.2 of the agreement, the parties merely agree to cooperation and information exchange in relation to biotechnological products, including GMOs, which does not undermine the EU's high standards in this area. In contrast, the failure of negotiations for a free trade agreement with the US (Transatlantic Trade and Investment Partnership,

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<sup>14</sup> Most likely this will amount to lowering standards in areas, such as environmental protection and agriculture, see e.g. C. Hilson, 'The Impact of Brexit on the Environment: Exploring the Dynamics of a Complex Relationship' (2017) *Transnational Environmental Law* (in press).

<sup>15</sup> Bill to Repeal the European Communities Act 1972 and make other provisions in connection with the withdrawal of the United Kingdom from the EU, 2017, available online <<https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>>.

<sup>16</sup> *Ibid*, clause 3.

<sup>17</sup> *Ibid*, clause 6.

<sup>18</sup> *Ibid*, clause 7.

<sup>19</sup> See in particular, Art 191(2) TFEU which sets the five principles of EU environmental policy: a high level of protection, the preventive principle, the precautionary principle, the proximity principle and the polluter pays principle.

otherwise referred to as TTIP)<sup>20</sup> can be largely attributed to the risk of non-compliance with and therefore potential undercutting of such EU standards on the American market, which has faced significant opposition before being abandoned.<sup>21</sup> Therefore, it can be presumed that any potential trade agreement between the UK and the EU will require compliance with EU standards irrespective of the UK's development in certain areas. Access to the EU single market can and will be restricted if such a compliance cannot be guaranteed or seems uncertain from a European perspective.

However, even if the UK is able to guarantee compliance with certain EU standards post-Brexit, the negotiation of a potential free trade agreement with the EU is far from being straight-forward. In general, EU competences in the areas of agriculture and environment are shared with the Member States according to Article 4(2) Treaty on the Functioning of the EU (TFEU). While this means that the Union is able to pre-empt Member States' competences according to Article 2(2) TFEU,<sup>22</sup> and that it has extended exclusive competences in the external sphere to conclude international (trade) agreements according to Article 3(2) TFEU, the Court of Justice recently held in its *Opinion 2/15*<sup>23</sup> that complex free trade agreements covering a multitude of different policy areas can only be concluded jointly with the Member States.<sup>24</sup> The significance of this cannot be overstated as a joint action between the Union and its Member States requires the latter's ratification of such an agreement by approval in their national parliaments, governments, or even regional parliaments and chambers. As was seen in the initial veto against CETA of the regional parliament of Wallonia in Belgium *inter alia* due to concerns over environmental standards,<sup>25</sup> a single region may very well jeopardise years of complex trade negotiations with a third country. In particular in the area of environmental protection, Member States are allowed to adopt more stringent measures than in the rest of the EU territory according to Article 193 TFEU and in compatibility with wider treaty obligations. Subsequently, Member States have an interest in ensuring their standards are not being undermined by non-EU countries.

Therefore, as can be expected, a potential UK trade deal with the EU will certainly face some opposition within the Member States which may also be politically motivated in the immediate aftermath of the UK's exit. An involvement of Member States can be

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<sup>20</sup> See the negotiating texts in TTIP, available online

<<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>>.

<sup>21</sup> See the European Citizens' Initiative 'STOP TTIP' which the Commission initially refused to register in 2014. This refusal was successfully challenged in Case T-754/14, Michael Efler and Others v European Commission, EU:T:2017:323, where the court held that the Commission should have allowed the registration of this initiative. On 10 July 2017, the initiative has been formally registered, <[http://europa.eu/rapid/press-release\\_IP-17-1872\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1872_en.htm)>.

<sup>22</sup> Under the EU's shared competences, Member States can exercise their competences only 'to the extent that the Union has not exercised its competence' or 'to the extent that the Union has decided to cease exercising its competence', art 2(2) TFEU.

<sup>23</sup> Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore (EUSFTA), EU:C:2017:376.

<sup>24</sup> It has to be noted though that the court found aspects of social and environmental protection of the EUSFTA agreement to be covered by the EU's exclusive competence under Art 3(1)(e), see para 166 of the opinion.

<sup>25</sup> 'Stop CETA: IEW salue la détermination du Gouvernement wallon', Fédération Inter-Environnement Wallonie des associations au service de l'environnement (20 Oct 2016) <<http://www.iewonline.be/spip.php?article7913>>.

circumvented by concluding (multiple) less complex agreements focusing on specific aspects and policy areas only, therefore falling under the EU's exclusive competences as was held in *Opinion 3/15* in relation to the Marrakesh Treaty.<sup>26</sup> Here, the agreement concerned a relatively narrow area of law – the access to published works for persons who are blind, visually impaired, or otherwise print disabled – as opposed to the broader scope of international trade agreements. The court was therefore able to deduce an exclusive competence for the Union according to Article 3(2) TFEU as other shared competences were not affected.<sup>27</sup> In any case, such an agreement still requires consent of the European Parliament and the Council for its ratification in order to ensure that EU standards are being sufficiently protected and complied with, or otherwise it might not withstand judicial scrutiny by the European courts.<sup>28</sup>

## Devolved Issues

### *Decentralisation or further Centralisation?*

The repatriation of powers from the EU to the UK on matters of environmental protection and agriculture poses certain problems as these constitute sectors where powers have been devolved to the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales.<sup>29</sup> By means of the EU's principle of subsidiarity,<sup>30</sup> the devolved regions have become direct administrators and beneficiaries of the EU's common policies in these areas.<sup>31</sup> Subsidiarity stipulates that action should be taken closer to citizens, which is at the lowest possible level and at the highest level as necessary in order to be efficient.<sup>32</sup> This meant that during the UK's EU membership, certain EU powers falling under the devolved areas of agriculture or environmental protection were in fact exercised by the devolved regions. Arguably, the UK's exit should not have any greater implications on the current status of devolution as the devolved settlements remain intact unless amended, since they are not dependant on the UK's membership within the EU. Powers in the areas of agriculture and environmental protection should therefore remain with the devolved

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<sup>26</sup> Opinion 3/15, Marrakesh Treaty, EU:C:2017:114.

<sup>27</sup> *Ibid.*, at para 129.

<sup>28</sup> See, most recently, the European court's decision on exchange of passenger data between the EU and Canada, Opinion 1/15, Draft agreement between Canada and the European Union, EU:C:2017:592.

<sup>29</sup> See the devolved settlements and the Devolution Memorandum of Understanding and Supplementary Agreements (2012). See more generally, e.g. J. Hunt, 'Devolution' in M. Dougan (ed.), *The UK After Brexit: Legal and Policy Challenges* (Insentia: Cambridge, 2017) 35.

<sup>30</sup> Art 5 TEU. The principle of subsidiarity was implemented by the Maastricht Treaty.

<sup>31</sup> See e.g. R. Hrbek, 'The role of the regions in the EU and the principle of subsidiarity' (2003) 38(2) *The International Spectator* 59.

<sup>32</sup> According to Article 5 TEU, 'in areas which do not fall within its exclusive competence, 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, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'. For more on subsidiarity, see e.g. A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press: Oxford, 2002); and L. Hooghe and G. Marks, *Multi-level Governance and European Integration* (Rowman & Littlefield: Lanham, 2001).

administrations. However, it is questionable whether the UK government will take the risk of a fragmented British market after Brexit which could weaken the economy even further.

The dynamics and relationships between the different levels of governance within the UK suggest different scenarios. Under a first scenario of agricultural/environmental federalism, certain competences will need to remain centralised in order to guarantee minimum thresholds. This is a situation where the central government of the UK would effectively substitute itself to the EU. For instance, reporting obligations deriving from multilateral environmental agreements that are currently undertaken by the EU (on behalf of the Member States) would then be carried out by the central government.<sup>33</sup> Under a second scenario, powers currently shared between the EU and the devolved administrations should rightfully come back to the devolved administrations. Here, the governments and administrations of the devolved administrations would be under the duty to carry out actions and obligations (including the full reporting). In the latter case, the devolved administrations could face a lack of financial, human and time resources to adjust to these new obligations. Thus, a centralisation to maximise the powers of the UK government would strengthen UK integration,<sup>34</sup> whilst decentralisation could be detrimental to UK interests in the short term.

According to paragraph 2 of schedule 2 of the Withdrawal Bill, ‘no regulation may be made (...) by a devolved authority unless *every provision* of them is within the *devolved competence* of the devolved authority.’<sup>35</sup> The idea of qualifying and distinguishing within competences could prove difficult. Creating sectors and divisions within a single power that is devolved would be problematic. On the question of whether a power is devolved, the Supreme Court is limited to a ‘yes’ or ‘no’ answer.<sup>36</sup> In other words, even if a regulation’s content merely touches upon powers held by the central UK government, devolved administrations would be denied their competence in the matter. Essentially, this could lead to a potential shift in competences in the course of the repatriation of powers from the EU if the central UK government fails to fully return them to the devolved regions. Ultimately therefore, devolved powers may be pre-empted in a post-Brexit UK to the very detriment of sensitive region-specific concerns, such as the environment or agriculture. As could be argued, it is rather likely that this will cause lengthy battles over the delimitation of competences in these domains to the ultimate detriment of the devolved areas,<sup>37</sup> and thus their current status as beneficiaries under EU law.

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<sup>33</sup> Reporting requirements are present for instance in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the 1992 United Nations Framework Convention on Climate Change; and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.

<sup>34</sup> Please see a similar point made in relation to the EU Commission acting as a ‘competence maximiser’ to ensure EU integration. See F. Randour, C. Janssens and T. Delreux, ‘The Cultivation of Genetically Modified Organisms in the European Union: a Necessary Trade-Off?’ (2014) 52 JCMS 1307, 1307.

<sup>35</sup> Emphases added.

<sup>36</sup> Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales [2014] UKSC 43. For a comment of the case, see e.g. A. Sherlock, ‘Supreme Court ruling on Welsh legislation’, UK Constitutional Law Blog (30 July 2014) <<https://ukconstitutionallaw.org/2014/07/30/ann-sherlock-supreme-court-ruling-on-welsh-legislation/>>.

<sup>37</sup> See e.g. short commentary by R. Percival, ‘How Brexit could break devolution’ (2017) The Conversation, available online <<https://theconversation.com/how-brexit-could-break-devolution-74106>>.



## *Devolution and the new Article 26b*

As noted above, powers for agriculture and environmental protection have been devolved to the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales. A clear illustration of these powers resides in the ability for the devolved regions to seek restrictions on the cultivation of GMOs within their territories under the Deliberate Release Directive.<sup>38</sup> There are three provisions dealing with the exclusion or restriction of GMO cultivation available to Member States: the safeguard clause under Article 23, which allows a Member State to ban GMOs if there are risks to human health and the environment based on new scientific evidence; Article 26a on coexistence; and the new Article 26b on the restriction or prohibition of GM cultivation (also called the opt-out clause). Article 26b was introduced by Directive 2015/412 and shall be the focus of discussion here as it exemplifies the different approaches towards GMOs across the UK.<sup>39</sup>

Directive 2015/412 came into force in April 2015 and solved a profound division among the Member States as well as within Member States. The newly established Article 26b provides a distinctive and original solution to the deadlock for approving GMOs. It gives flexibility and a certain autonomy to Member States and their regions to decide on whether to ban the cultivation of GMOs on (part of) their territory.<sup>40</sup> The new article is in accordance with the principle of subsidiarity and the 2000 White Paper on Governance<sup>41</sup> without jeopardising the functioning of the authorisation procedure at EU level. The new article gives ‘rights to local and regional self-determination – with regard to their landscapes, ecosystems, agricultural practices, food traditions and future economic development’.<sup>42</sup>

Under the new Article 26b, Member States have been given the rights to restrict or prohibit the cultivation of GMOs on their territory under two specific steps: a pre- and a post-authorisation stage. Under the new ‘pre-authorisation geographical scope restriction’ stage, a Member State is able, before the authorisation of a GMO or during the renewal of its authorisation, to request the applicant company, via the Commission, to specify in the application that a specific GMO cannot be cultivated on all or part of its territory – without having to provide any justification.<sup>43</sup> This is why, under this first stage, the Commission has been tasked with encouraging the dialogue between the Member States and the applicant.

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<sup>38</sup> See Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and repealing Council Directive 90/220/EEC [2001] OJ L106/1 (hereinafter the Deliberate Release Directive). Further, the GMO framework is complemented by the Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed [2003] OJ L268/1; Regulation (EC) 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the Traceability and Labelling of Genetically Modified Organisms and the Traceability of Food and Feed Products produced from Genetically Modified Organisms and amending Directive 2001/18/EC [2003] OJ L268/24.

<sup>39</sup> Directive 2015/412 amended the Deliberate Release Directive. See art 26b as amended by Directive (EU) 2015/412 of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory [2015] OJ 68/1.

<sup>40</sup> See e.g. M. Lee, ‘GMOs in the internal market: new legislation on national flexibility’ (2016) 79 MLR 317.

<sup>41</sup> European Commission, ‘White Paper on European Governance’ COM (2001), 428 final.

<sup>42</sup> L Levidow and K Boschert, ‘Coexistence or contradiction? GM crops versus alternative agricultures in Europe’ (2008) 39 *Geoforum* 174, 185.

<sup>43</sup> Art 26(b)(1), Deliberate Release Directive.

As such, the Commission becomes an intermediary between the biotech company and the Member States. Importantly, it can be wondered whether this is actually the role the Commission should undertake as it appears to be more of a lobbying role than acting as ‘Guardian of the Treaties’ and promoting the general interest of the EU. The amendment has been called a win-win deal by the Commission and certain Member States.<sup>44</sup>

The option to adjust the geographical scope of the authorisation system constitutes a major and decisive change in EU policy for GMOs. For the first time, Member States are given the opportunity to restrict partially or completely trade in GMOs without having to substantiate their decision – especially without having to base their decision on scientific evidence. The first stage has received a wide uptake from Member States and their regions. As of yet, nineteen Member States (or their regions) have used this opt-out clause.<sup>45</sup> Wales, Scotland and Northern Ireland have taken this option straight away – albeit under the similar transitional Article 26c.<sup>46</sup> In contrast, England has not adopted the same policy choice in relation to GMO cultivation. The divergent decisions between the four nations of the UK seem to have been supported by a more environmentally-friendly approach to farming, food and environmental protection in the devolved areas.<sup>47</sup> As stated at the time by the Wales’ Deputy Minister for Farming and Food, the ban will allow the protection of the ‘significant investment we have made in our organic sector and safeguard the agricultural land in Wales that is managed under voluntary agri-environment schemes’.<sup>48</sup> However, these decisions could be considered as protectionist as they restrict trade in GMOs.

Quite controversially, still under this first step, the biotech company can either accept or reject to adjust the scope of its application according to the Member State’s request.<sup>49</sup> Schimpf, a food campaigner for Friends of the Earth Europe, noted that governments should not have to ask the permission to ban unwanted GM crops from the

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<sup>44</sup> Euractiv, ‘MEPs Approve National Ban on GM Crops Cultivation’ (13 January 2015) <<http://www.euractiv.com/sections/agriculture-food/meps-approve-national-ban-gm-crops-cultivation-311221>>.

<sup>45</sup> For the opt-outs of Member States (and regions), see European Commission, ‘Restrictions of Geographical Scope of GMO Applications/Authorisations: Member States Demands and Outcomes’ <[https://ec.europa.eu/food/plant/gmo/authorisation/cultivation/geographical\\_scope\\_en](https://ec.europa.eu/food/plant/gmo/authorisation/cultivation/geographical_scope_en)>.

<sup>46</sup> Ibid.

<sup>47</sup> Since 2010, Defra has authorised seven GM crops to be released for research and development purposes under the Deliberate Release Directive. See UK Government, ‘Genetically Modified Organisms: List of Current Consents’ (2017), available online <<https://www.gov.uk/government/publications/genetically-modified-organisms-list-of-current-consents>>. In the UK, since the election of the Conservative Government in 2010, a pro-biotech stance has developed. For more see, e.g. L. Petetin, ‘The Revival of Modern Agricultural Biotechnology by the UK Government: What Role for Animal Cloning?’ (2012) 7 *European Food and Feed Law Review* 296.

<sup>48</sup> Farmers Weekly, ‘Wales Bans GM crops “to protect organic farming”’ (5 October 2015) <<http://www.fwi.co.uk/arable/wales-bans-gm-crops-to-protect-organic-farming.htm>>. See e.g. BBC, ‘GM Crop-growing Banned in Northern Ireland’ (21 September 2015) <<http://www.bbc.co.uk/news/world-europe-34316778>>; and Guardian, ‘Scotland to Issue Formal Ban on Genetically Modified Crops’ (9 August 2015) <<https://www.theguardian.com/environment/2015/aug/09/scotland-to-issue-formal-ban-on-genetically-modified-crops>>.

<sup>49</sup> Art 26(b)(2) Deliberate Release Directive.

companies who profit from them.<sup>50</sup> Here, it is evident that the regulatee becomes the regulator. Schimpf added that ‘it is unacceptable that companies like Monsanto will be given the first say in any decision to ban their products’.<sup>51</sup> To a certain extent, she argued that this step undermined EU law and subsidiarity: ‘from now on, multinational biotechnology companies will discuss directly with states and negotiate the conditions of putting their products on the market’.<sup>52</sup> In contrast, for the then EU Commissioner for Health and Consumer Policy, Tonio Borg, ‘it’s a not carte blanche’ to applicants because they still have to go through the entire approval process under the Deliberate Release Directive.<sup>53</sup> Nonetheless, it feels as if much of the regulatory power has been transferred to the biotech applicant.

Under the post-authorisation opt-out, which is the second stage, Member States are able, by adopting an opt-out measure, to have the final say not to cultivate an EU authorised GMO on their territory – independent of the applicant’s views. Member States may adopt, restrict, or prohibit the cultivation of a GMO, if their measures are based on a non-exhaustive list of grounds.<sup>54</sup> This clause creates a balance between an authorisation procedure at EU level based on scientific risk assessments and the possibility for Member States to simply say ‘no’ and express the concerns of their own citizens without having to rely on scientific evidence or to take into account other Member States. Thus, by allowing Member States to protect their national interests, the amendment strengthens the democratic process for GMO approvals.<sup>55</sup>

Overall, the opt-out clause allows Member States to impose restrictions unilaterally. This new procedure provides a ‘diversification through decentralisation’,<sup>56</sup> and gives greater power to the devolved regions. However, regions like the devolved administrations ‘remain without any independent powers under Article 26b’ because ‘under the national constitutional frameworks [they] remain reliant upon their Member States’ support in availing of Article 26b’.<sup>57</sup> This can be seen in the UK where the central government, through

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<sup>50</sup> Euobserver, ‘EU Ministers Agree Rules Allowing Choice on GM Crops’ (12 June 2014) <<http://euobserver.com/environment/124582>>.

<sup>51</sup> K.R. Lewis, ‘Mixed Reaction to Council’s Agreement on GMO Cultivation’ (13 June 2014) <<https://www.theparliamentmagazine.eu/articles/news/mixed-reaction-councils-agreement-gmo-cultivation>>.

<sup>52</sup> Euractiv, ‘France Wins Greater Control over GMOs, but Comes under Fire from Greens’ (12 June 2014) <<http://www.euractiv.com/sections/agriculture-food/france-wins-greater-control-over-gmos-comes-under-fire-greens-302796?>>>.

<sup>53</sup> Euobserver (n 50).

<sup>54</sup> Art 26(b)(3) Deliberate Release Directive. The list of grounds is non-exhaustive and includes the following: environmental policy objectives, land use, socioeconomic impacts and public policy. Under the post-authorisation stage, claims must be substantiated under art 36 TFEU and the case-law on overriding reasons of public interest; and be proportional. Further, any opt-outs justified under ‘environmental policy objectives’ must not be contrary to the EFSA environmental assessment of the specific GMO under authorisation.

<sup>55</sup> The amendment is in line with President Juncker’s commitment ‘to give the democratically elected governments at least the same weight as scientific advice when it comes to important decisions concerning food and environment’. See Euractiv, ‘EU Agreement Opens Door for new GMO Cultivation in 2015’ (5 December 2014) <<http://www.euractiv.com/sections/agriculture-food/eu-agrees-bring-back-gmos-2015-310620>>.

<sup>56</sup> M. Geelhoed, ‘Divided in Diversity: Reforming The EU’s GMO Regime’ (2016) 18(20) CYELS 20, 27.

<sup>57</sup> M. Dobbs, ‘Attaining Subsidiarity-Based Multilevel Governance of Genetically Modified Cultivation?’ (2016) 28(2) J. Env. L. 245, 266.

Defra, took upon itself to support the demands of the devolved administrations. However, there is no legal obligation on Defra to do so.<sup>58</sup>

### *UK Single Market*

Another pathway for the government to intrude into the devolved settlements is to ensure the maintenance and functioning of the UK single market to what might seem at almost any cost – including taking powers away from the devolved areas by establishing common frameworks. Previously, because of the very existence of the EU single market, the UK single market existed in and of itself. Divergences between the four nations of the UK could only go as far as the boundaries and restrictions set under EU law. As the three-dimensional relationship that existed between the EU, the UK and the devolved administrations evolves into a two-dimensional one, issues of competences are becoming more potent. In a post-Brexit world, with the ‘liberties’ given to the devolved nations to set their own specific standards, trade within the UK could be disrupted and restricted due to the potential expansion of non-trade barriers. This is evident in the following statement from the House of Lords European Union Committee: ‘maintenance of the integrity and efficient operation of the UK single market must be an over-arching objective for the whole United Kingdom’.<sup>59</sup>

To solve these issues, the UK Government could effectively trump devolved powers by relying on key reserved powers: trade policy and external relations. The drive towards different or even higher standards in environmental protection and animal welfare wanted by the government possesses both internal impacts and elements of external-relations; the latter being a UK competence. When entering trade talks with other Heads of States, the government will have to ensure that goods (and services) entering the UK will not be submitted to different policies and regulatory regimes. It is crucial for the government to ensure harmonisation and unity within the UK single market. This practically means that no barriers to trade should be created within the UK territory. By having recourse to such an encompassing power, this could impact on the actual scope of devolved powers to the detriment of devolved areas, which could end up with ‘empty’ powers. Such a situation recalls how, for example in the US, the federal state can intervene and regulate when required either under the Commerce Clause<sup>60</sup> or the doctrine of pre-emption found in the Supremacy Clause.<sup>61</sup> Such a change would effectively favour GMO cultivation and the trade of GM crops within the UK. Thus, as could be argued, the autonomy of the devolved administrations is under threat in a post-Brexit UK single market.

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<sup>58</sup> The Concordat on GMOs indicates that responsibility for the regulation of GMO deliberate releases and transboundary movements of GMOs belongs to the devolved administrations within Northern Ireland, Scotland and Wales. See Concordat on the Implementation of Directive 2001/18/EC and Regulation 1946/2003/European Commission, 3 April 2007. However, this concordat, like the Sewel Convention, is not legally binding. It is only a soft-law instrument that could come to an end with the establishment of a UK-wide framework on agriculture.

<sup>59</sup> House of Lords European Union Committee, *Brexit: devolution* (4<sup>th</sup> Report of Session 2017-19) HL Paper, Summary of Conclusions and Recommendations, para 26. See, e.g. Department for Exiting the European Union, ‘Legislating for the United Kingdom’s Withdrawal from the European Union’ (March 2017) 27.

<sup>60</sup> Art 1, Section 8, Clause 3 of the US Constitution.

<sup>61</sup> *Ibid*, Art VI, clause 2.

## *UK-wide Frameworks*

To maintain and support the UK single market, the central government has asserted that UK-wide frameworks must be established to thereby guarantee the free trade of services and goods across the four nations of the UK. When looking at the literature on Brexit, there seems to be a general consensus regarding the UK-wide frameworks are needed to support and maintain the very own existence of the UK single market. However, when scrutinising the literature further, there are big discrepancies between the Westminster approach (which could controversially be termed an English-focused perspective) and the views of the devolved areas, in particular when the relevant powers have been devolved. Supporters of the Westminster approach argue that any new legislative framework for agriculture should be coordinated across the UK to ensure not only policy coherence but also the effective functioning of the UK single market. The Welsh and Scottish Governments agree that common frameworks ‘may be needed in some areas’ but add that ‘the way to achieve these aims is through negotiation and agreement, not imposition. It must be done in a way which respects the hard-won devolution settlements’.<sup>62</sup> This would entail that the devolved administrations have to adjust their policies accordingly and follow the approach taken by Westminster. The Agriculture Bill could set minimum standards and thresholds which would still allow the devolved administrations to impose higher standards. This situation could be similar to the current relationship that exists between the EU and the UK. Questions, such as: How much divergence from the central government would be allowed? And would such a centralisation of power benefit the environment?, remain to be answered.

In contrast, the UK-wide framework on agriculture could impose duties and obligations on the four nations of the UK. In this instance, the four nations of the UK would not be able to depart from the established absolute standards and rules. Such a strict and restrictive framework would mean that powers, which are currently devolved, such as agriculture and environmental protection, would no longer belong to the devolved authorities but to the central government. Practically, the devolved administrations would not be able to legislate on or amend provisions and matters that do encroach on previously devolved powers if these fall under the remit of this UK-wide bill on agriculture. Further, Schedule 3 of the Withdrawal Bill creates restrictions on the powers of the devolved administrations concerning secondary legislation. Under this provision, the central government has the power to pass legislation that would introduce new ways of regulating farming – for instance creating a new system of supporting farmers. The devolved administrations have no equivalent power.<sup>63</sup>

It seems that devolution will be significantly impacted on during and after the Brexit process. The convention states that the UK government will not ‘normally’ legislate in the devolved areas without the consent of the relevant devolved legislature.<sup>64</sup> Since the Brexit

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<sup>62</sup> The Scottish Government, ‘Joint statement on the EU (Withdrawal) Bill’ (13 July 2017) <<https://news.gov.scot/news/eu-withdrawal-bill>>.

<sup>63</sup> Moreover, it is a provision that does not include a sunset clause.

<sup>64</sup> Memorandum of Understanding and supplementary agreements between the UK Government, Scottish Ministers, the Cabinet of the National Assembly for Wales, and the Northern Ireland Executive Committee

referendum, the voluntary nature of the convention as come to the fore. It is simply a constitutional, political convention and accordingly non-justifiable. The (weak) legal nature of the Sewel (or legislative consent) convention was confirmed in the UK Supreme Court 'Article 50' or *Miller* case,<sup>65</sup> where the court decided that the convention remained a political convention and therefore not enforceable by the courts, despite being incorporated into the relevant devolved statutes.<sup>66</sup> The statutory recognition, enshrinement of the convention in these recent pieces of legislation, did not change its substance. As such, Sewel seems to be recognised by Westminster as merely voluntarily binding as a constitutional matter, but not legally enforceable – preventing the devolved administrations from having a say in any UK-wide framework or other related Brexit consequences more generally. To do so, the government requires a legislative consent motion. In the current context, it could be argued that Brexit creates an 'abnormal' situation giving right to the UK Government to legislate in previously devolved areas which complicates the repatriations of powers and creates legal uncertainty.

Those wanting a full return of powers to the devolved areas as enshrined in the devolved settlements call for the competences that currently belong to the EU institutions to be transferred automatically to the devolved areas after Brexit. However, following the release of the Withdrawal Bill, Nicola Sturgeon, the Scottish First Minister and Welsh First Minister Carwyn Jones confirmed this perspective when they issued a joint statement asserting that the Withdrawal Bill was 'a naked power-grab' that returned EU powers to Westminster instead of sharing them with Scotland and Wales.<sup>67</sup> The category of 'retained EU law' established by the Withdrawal Bill proposes that 'all such EU law revert to Westminster'<sup>68</sup> – not to Wales, Scotland or Northern Ireland. To undertake this, the Withdrawal Bill unilaterally – albeit indirectly – revises the devolution statutes for Scotland, Wales and Northern Ireland so that powers will pass over to Westminster. The category of 'retained EU law' modifies the competences of the devolved administrations and highlights the voluntary nature and legal status of the Sewel Convention. Once the central government will have retained powers that should have been returned to the devolved administrations, the government will have a wider umbrella of powers available to draft and put in place the various UK-wide frameworks.

Under the pending Agriculture Bill, it is further feared that English farmers would be the main beneficiaries of the framework if drafted by the central government with English farmers in mind, for instance with the population based Barnett calculation.<sup>69</sup> This would

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(December 2001) (Sewel Convention). See e.g. Wordpress, 'Devolution Matters', available online <<https://devolutionmatters.wordpress.com/the-sewel-convention/>>.

<sup>65</sup> R. (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.

<sup>66</sup> The convention is now enshrined in statutes both in Scotland following enactment of the Scotland Act 2016 and in Wales following enactment of the Wales Act 2017.

<sup>67</sup> The Scottish Government, 'Joint statement on the EU (Withdrawal) Bill' (13 July 2017) <<https://news.gov.scot/news/eu-withdrawal-bill>>.

<sup>68</sup> The Constitution Unit, 'To devolve or not to devolve? The European Union (Withdrawal) Bill and devolution' (25 July 2017) <<https://constitution-unit.com/2017/07/25/to-devolve-or-not-to-devolve-the-european-union-withdrawal-bill-and-devolution/>>.

<sup>69</sup> See e.g. UK Parliament (House of Commons Library), 'The Barnett formula', <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7386>>.

negatively impact on policies strongly entrenched in the devolved administrations, such as family farming and rural development in Wales. Any lack of policy differentiation between the four nations will have practical consequences, particularly in relation to agriculture support, meaning farming subsidies. In addition, the UK-wide agricultural framework could drive the production and cultivation of GMOs forward. This could be highly detrimental to the farming industry in Wales and Scotland due to the territorial proximity with England and the issue of cross-pollination between GM and conventional crops. In such an event,<sup>70</sup> coexistence measures between GM and conventional (including organic) agriculture would need to be put in place at the borders to avoid contamination between the different types of agriculture.<sup>71</sup> Cooperation and political dialogue between the four nations will be crucial here.

Therefore, it can be argued that the UK-wide framework on agriculture, like the Withdrawal Bill, appears to recentralise powers that were previously devolved.<sup>72</sup> The resulting asymmetric, but unequal, relationships between competing UK and devolved administrations could be detrimental to the future of the UK. Competition between national values and policy preferences could prevent further integration within the UK. Thus, a UK-wide framework could be beneficial for as long as it allows for differentiation and guarantees the autonomy of the devolved administrations.

## International Obligations

Agriculture and environmental protection are transnational and sometimes global matters by their own specific nature,<sup>73</sup> and as such have been addressed by various international conventions and treaties which will continue to impose obligations on the UK beyond Brexit.<sup>74</sup> In fact, EU Member States are often independent signatories of international treaties alongside of the EU, which thereby establishes bilateral obligations irrespective of a continued EU membership. Therefore, the effects of giving up its EU membership status could be rather minimal for the UK with regard to current obligations towards third countries. These international obligations in areas such as agriculture or environmental protection will continue to bind the UK in relation to its international partners. Of course, the UK may unilaterally withdraw from such treaties imposing certain obligations that it no longer wishes to fulfil without additionally being bound through EU membership, as is already happening with the 1964 London Fisheries Convention.<sup>75</sup> However, such a step

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<sup>70</sup> See e.g. in relation to cross-pollination, Case C-442/09, *Karl Heinz Bablok and Others v Freistaat Bayern* [2011] ECLI:EU:C:2011:541.

<sup>71</sup> See Commission Recommendation 2003/556/EC on guidelines for the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic farming, [2003] OJ L189/36.

<sup>72</sup> Clause 11 and Schedule 2 paras 3 and 15 of the Withdrawal Bill.

<sup>73</sup> G. Handl, 'Transboundary Impacts', in D. Bodansky et al. (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press: Oxford, 2007).

<sup>74</sup> See in relation to GMOs, the 1992 Convention on Biological Diversity and the 2001 Cartagena Protocol on Biosafety.

<sup>75</sup> See e.g. M. Dickie, 'UK begins to row back from fisheries convention' (2017), *Financial Times*, <<https://www.ft.com/content/12451e48-5db5-11e7-9bc8-8055f264aa8b>>.

would have severe consequences for the UK as it would entail the risk of further isolation on the international scene and possible negative effects on the environment.

Beyond the EU, membership of the UK under the WTO could be problematic if GMO cultivation would be restricted. In particular, the question of the compatibility of any maintained opt-outs with WTO Agreements is raised. Any new regime not relying on 'sound science' could result in another challenge at WTO level, as in the *EC-Biotech* case.<sup>76</sup> In this dispute, the WTO ultimately condemned an EU *de facto moratorium* on the approval of GM products because it established barriers to trade. In light of the UK commitments and obligations under the WTO system, any regime that establishes barriers to trade may not pass muster under the General Agreement on Tariffs and Trade (GATT)<sup>77</sup> and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>78</sup>

A regime restricting trade in GM crops could lead to a violation of UK obligations under Article XI of the GATT on the general elimination of quantitative restrictions, including outright bans. However, in a potential dispute under the GATT, the UK could invoke Article XX of GATT, dealing with the general exceptions to the GATT system, as a justification. If the measure fulfils the conditions and tests of the article, compatibility with GATT law would ensue. In particular, a justification under Article XX g) based on the preservation of the environment could be invoked following the relatively broad interpretation of the environmental exception.<sup>79</sup> Alternatively, Article XX b) is the exception which relates to the protection of human, animal, plant life or health. It could be used by the UK to ensure the protection of the environment and public health. Finally, exception a) of Article XX could be invoked by the UK to defend the measures as 'necessary to protect public morals' if demonstrably a large majority of British citizens are against GMOs.<sup>80</sup>

Further, under the SPS Agreement,<sup>81</sup> any restriction not based on scientific evidence would be hardly defensible because the agreement relies on scientific justification to assess the legality of a measure.<sup>82</sup> Therefore, the very fact that currently opt-out measures allow devolved administrations not to rely on non-scientific considerations could raise future issues as to their compatibility with the SPS Agreement. This could be the case despite the fact that states can impose a higher level of protection.<sup>83</sup> Effectively, this higher level of protection must be scientifically justified.

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<sup>76</sup> EC-Biotech: Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R and WT/DS293/R, 29 September 2006.

<sup>77</sup> 1994 General Agreement on Tariffs and Trade, 1867 UNTS 187.

<sup>78</sup> 1994 Agreement on the Application of Sanitary and Phytosanitary Measures 1867 UNTS 493.

<sup>79</sup> See e.g. US-Shrimp I: Import Prohibition of certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998. In the case, the Appellate Body ruled that Article XX g) 'must be read in the light of contemporary concerns of the community of nations about the protection and conservation of the environment, and not as it was understood in 1947' and the words must be treated as 'by definition, evolutionary'; see para 130.

<sup>80</sup> See the role of Article XX a) and its application to environmental trade measures in the EC-Measures Prohibiting the Importation and Marketing of Seal Products WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014.

<sup>81</sup> Under the agreement, SPS measures aim at the protection of human, animal or plant life or health. The agreement elaborates on GATT Article XX b). See Preamble, SPS Agreement

<sup>82</sup> Arts 2.2 and 5.2 SPS Agreement. Without sufficient scientific evidence, SPS measures cannot be maintained. However, provisional measures based on insufficient scientific evidence can be maintained under Article 5.7 – indicating certain presence of precaution within the agreement. See e.g. 2006 EC-Biotech case.

<sup>83</sup> Arts 3.3 and 4.1 of the SPS Agreement.



As can be seen, disentangling from the broader EU obligations will by no means generate unlimited freedom for the UK with regard to its international obligations. Nevertheless, the international architecture of environmental and agricultural related laws does not compare to the rather detailed and legally enforceable framework provided under the EU. Therefore, regarding its future obligations, the UK will be more flexible to define its own agenda without the formal constraints of EU membership. Introducing lower standards in agriculture or environmental protection could render the UK more attractive as a trading partner for some countries such as the US or China, which consider high EU standards (in particular in relation to GMO exports to the EU) an obstacle for trade negotiations and the successful conclusion of international agreements.<sup>84</sup> However, such an approach could alienate other existing trading partners which rely on a continued upholding of higher standards with their investments and trade.

In addition, the so-called 'Brussels effect' by which international partners tend to align their standards to those of the EU,<sup>85</sup> may ultimately influence the UK's behaviour to the extent that the UK might be unable to deviate too far from the much-contended EU approach.<sup>86</sup> In fact, this might play a role not only when negotiating a trade deal directly with the EU, but also when trading with other third countries under WTO rules for instance. This concept of extraterritoriality of EU legislation and standards can also be viewed in other areas<sup>87</sup> and highlights the EU's influence and market power on a global scale. Therefore, the UK's positioning after Brexit cannot be seen as an isolated figure following an anti-EU approach at all cost, but rather has to reflect a sensitive alignment to such customs and constraints at international level within the margins available in order to ensure a successful trading strategy can be applied.

## Concluding Remarks

Originally, many thought that Brexit would lead to further powers coming back from the EU to the UK and increased UK sovereignty.<sup>88</sup> Indeed, the slogan 'take back control' became the symbol of the Brexit campaign. However, the complexity and inter-connections between legal norms at national and international level reject such an over-simplified picture. Rather, in an attempt to disentangle the various competences and obligations a much more nuanced conclusion has to be drawn.

Externally, 'taking back control' will not provide the UK with unlimited freedom on its strategy in international trade, agriculture or environmental protection. International

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<sup>84</sup> See e.g. the failed TTIP.

<sup>85</sup> A Bradford, 'The Brussels Effect' (2015) 107(1) *Northwestern University Law Review* 1.

<sup>86</sup> See discussion in I. Hadjiyianni, 'The UK and the World: Environmental Law', in P. Birkinshaw and A. Biondi (eds.), *Britain Alone! The Implications and Consequences of the UK Exit from the EU* (Kluwer Law International, 2016).

<sup>87</sup> See e.g. in relation to financial regulation, J. Scott, 'The new EU "extraterritoriality"' (2014) 51(5) *CMLR* 1343.

<sup>88</sup> See L. Fisher, 'Sovereignty, Red Tape ... and the Environment', *Political Studies Association (PSA) blog*, 17 June 2016, see e.g. <<https://www.psa.ac.uk/insight-plus/blog/sovereignty-red-tape%E2%80%A6and-environment>>.

obligations will continue to impose restrictions on the UK irrespective of its membership within the EU, albeit in a perhaps less enforceable form. In addition, potential trading partners will require the UK to comply with certain standards, for example in agriculture or environmental protection. This will be the case not only with the EU but also other non-EU countries which have closely aligned their standards to those of the EU as a result of the so-called 'Brussels effect'. The anticipated positive effects of applying lower standards of protection in order to attract new trading partners therefore have to be carefully weighed considering both existing obligations as well as possible negative effects on the environment which could lead to a race to the bottom if no legally binding and clearly defined minimum standards are established in such areas.

Internally, the effect of devolved subsidiarity, which is the EU principle of subsidiarity applied to the devolved regions of the UK, is under threat in a post-Brexit UK, which undermines multilevel governance. As has been observed, powers which the central government is claiming back from Brussels effectively come from the devolved administrations. The devolved settlements with the devolved regions are separate and independent from EU membership and therefore should not be affected by the UK's exit from the EU. Nevertheless, it remains questionable whether such competences will ultimately be returned to regional level or rather remain at national level. Essentially, this could lead to a pre-emption of devolved powers which would render certain competences granted to the devolved regions under the devolved settlements 'empty' provisions. This is further evidence of the legal uncertainty resulting from the lack of a written constitution in the UK. Overall, Brexit offers an opportunity to renationalise policy choices – but not towards the devolved administrations, only towards the central government.

With the example of GMO cultivation, this paper has shown that the utilisation of various mechanisms, like the UK-wide agricultural framework, in order to strengthen the UK single market is rather controversial. These frameworks suggest that any differentiation between the four UK nations is unwanted by the central government both internally and externally. Essentially, this means that devolution is currently seen as a restriction to trade and economic growth within the UK after Brexit. Therefore, in the interest of a 'strong and stable' UK single market,<sup>89</sup> Brexit has the potential to undermine devolution with the actual loss of powers thus to be experienced in the devolved regions.

Crucially, the current presence of the subsidiarity principle through the prism of EU law enables the EU regions to re-establish regional powers that were previously lost to the EU and multilevel governance. With a UK-wide framework possibly favouring GMO cultivation, however, it appears that the devolved administrations could ultimately have to adjust their policies and could lose recently regained powers. However, it is to be hoped that when dealing with GM crop cultivation, the devolved areas will be able to maintain their opt-out clauses, maintain the protection of their environment and be sensitive to citizen preferences.

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<sup>89</sup> Drawing an analogy to the 'strong and stable' slogan used by Theresa May during her election campaign, see e.g. The Conversation (4 May 2017), 'Strong and stable leadership: inside the Conservatives' election slogan', <<https://theconversation.com/strong-and-stable-leadership-inside-the-conservatives-election-slogan-77121>>.

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