Brexit, food law and the UK's search for a post-EU identity

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Brexit, food law and the UK’s search for a post-EU identity

Keywords: Brexit; food law; internal market; international trade; retained EU law; common frameworks

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Abstract

Food law has played a central, contested role in defining the UK’s post-Brexit identity as a regulating and trading nation. Mapping reforms to key areas of food law across retained EU law, the UK internal market, and UK trade law and policy reveals profound reforms, and an emerging, distinct UK approach to law-making. We identify three themes: increased conferral of regulatory powers and functions to UK Ministers, coupled with an expansion of so-called ‘non-legislative’ approaches to regulation and policy-making and increased scope for divergence between UK nations. These reforms have achieved core aims of the UK Government: autonomy from the EU, a fully frictionless internal market within Great Britain, and streamlined regulatory reform. However, the achievement of these aims has come at a price. Food law reveals that post-Brexit legislative processes have been shaped by, but also entrench, unilateral executive decision-making, lessened transparency and disunity between UK nations.

Introduction

Leaving the EU was predicated on ‘taking back control’ in the UK: re-shoring and re-setting legal and decision-making powers previously managed at the EU level. This process has revealed divided opinions about the UK’s future regulatory direction, reflecting divisions within the Union itself, and forcing existential questions about the relationship between the UK nations. Food law, which establishes how risks to food safety are assessed and sets out animal welfare and environmental requirements for food production, has been deeply implicated in these divisions. The different priorities and positions of the four nations of the UK are starkly evident. Whilst Northern Ireland remains part of the EU Single Market for food law, Scotland has recently passed legislation affirming wide powers to maintain alignment with EU legislation, including for food law.

Under pressure from Free Trade Agreement (FTA) negotiating partners to move away from EU-inherited food law and the precautionary approach that underlies it, ‘chlorinated chicken’ became symbolic of post-Brexit lowering of consumer protection standards. Food law has also revealed the contradiction between the ‘oven ready Brexit’ advertised by Boris Johnson ahead of his re-election campaign, and the technical complexity of leaving the EU’s regulatory union. New agri-food border checking requirements have proven challenging for UK exporters, causing food and drink exports to the EU to reduce sharply.

In this article we examine post-Brexit food law from a multi-level regulatory perspective. We focus on the UK’s general food risk regulatory framework, which forms the impetus for controversy about post-Brexit deregulation. We also examine pesticides, food hygiene (‘chlorinated chicken’) and labelling as examples of product, process and presentation rules respectively, and areas in which the EU’s precautionary risk management approach has been challenged in international fora. Foregrounding these key areas of food law, we examine how EU law has been retained and amended in the UK, how the four UK nations are working together in an area of devolved regulatory perspective. We focus on the UK’s general food risk regulatory framework, which forms the impetus for controversy about post-Brexit deregulation. We also examine pesticides, food hygiene (‘chlorinated chicken’) and labelling as examples of product, process and presentation rules respectively, and areas in which the EU’s precautionary risk management approach has been challenged in international fora. Foregrounding these key areas of food law, we examine how EU law has been retained and amended in the UK, how the four UK nations are working together in an area of devolved policy and how the UK Government is positioning itself in the international trade arena.

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3 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s 1.
Due to the history of conflict, the Northern Ireland Protocol (NIP) has been the primary focus of attention regarding post-Brexit food law. While recognising its significance, here we examine food law within Great Britain (GB), where steep challenges to intergovernmental cooperation have perhaps been less widely appreciated. In so doing, we aim to contribute to an emerging understanding of the UK’s post-Brexit regulatory landscape. Changes to retained EU law are an expected feature of leaving the EU, but after a period of rapid amendment there has been little stocktaking of how specific regulatory areas have been reformed and the implications across the internal market and external trade negotiations. How far UK regulations remain aligned with the EU has been identified as a crucial question going forward.\(^6\) Some analyses, both in academia and the media, have suggested that the UK is not thus far making much use of its new regulatory freedoms.\(^7\) But change to specific standards – such as allowing chlorinated chicken or approving new pesticides – is not the only source of meaningful reform.

Though it is not possible to replicate EU food law exactly, due to differences in governance structures, reforms to policy-making and decision-making powers have been profound. We identify three cross-cutting trends. **Consolidation** refers to an increase in ministerial authority over food law; **omission** the corresponding omission of certain functions set out in EU law and the expansion of non-legislative approaches to regulation and policy-making. **Fragmentation** signifies a shift away from a UK-wide approach. These trends manifest differently in each of the areas we examine, as set out in Table 1.

At first glance, consolidation and fragmentation contradict one another. However in context of their application, the overriding trend is toward consolidation of authority in the central UK Government. Devolved nations have limited ability to oppose central Government changes, in ways that reflect and exacerbate legislative and market power asymmetry. Post-Brexit food law need not yield weaker levels of consumer, environmental or animal welfare protection simply because it hinges on executive decision-making or regulatory processes not formalised in legislation, however a more informal approach decreases transparency and accountability. More profoundly, it entrenches conflict between the nations of Great Britain by forcing a new, more centralised approach to intergovernmental relations, calling into question the basis of the Union itself.

Table 1: Trends in post-Brexit food law

<table>
<thead>
<tr>
<th>Retained EU law</th>
<th>Consolidation</th>
<th>Omission</th>
<th>Fragmentation</th>
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<tr>
<td>Extensive use of delegated powers to confer authority to GB Ministers</td>
<td>Failure to approximate or replicate EU legal and institutional frameworks in legislation</td>
<td>Removal of harmonised product standards</td>
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<td>Non-consensual Internal Market Act overrides consensual common frameworks</td>
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The article is structured in three parts. The first part outlines the UK’s approach to retained EU law and identifies issues for post-Brexit food governance. The second part examines how the UK has reconfigured its internal market through the parallel processes of the Common Frameworks Programme and the UK Internal Market Act 2020 and assesses how these might resolve the governance issues arising. The third part draws out the implications of our analysis for UK trade negotiations and the role of devolved nations in changes to food law pursuant to trade agreements.

**Part I – The UK’s approach to EU law post-Brexit**

Before the UK left the EU, it was estimated that approximately 90 per cent of UK food law and policy was made at EU level.\(^8\) As an EU Member State, the UK was integrated into a highly developed multi-level governance system with extensive legislative frameworks, and well-established institutions, scrutiny mechanisms and enforcement procedures. In the UK, responsibility for food policy is devolved,\(^9\) but historically the precedence of EU law over national law constrained the ability of UK devolved nations to regulate independently of each other. The nations of the UK transferred many regulatory functions to EU bodies, with roles divided between Member States, the European Commission, scientific agencies and standing committees. Detaching UK food law from EU regulation and regulatory bodies required the UK to develop capacities and procedures that have not been available domestically for many years. How UK nations coordinate legislation absent EU law also had to be determined.

As a starting point, the UK Government determined that EU law would be retained. The legal basis for its incorporation is the European Union (Withdrawal) Act 2018. The Act at once removed the effect of EU law in the UK and incorporated EU law, as it stood at the end of the Implementation Period. The Act provided ministers with extensive powers to make secondary, or delegated, legislation to amend retained EU law\(^10\) and set out rules on how retained EU law takes precedence over domestic law going forward.\(^11\) Under the Act, delegated powers to amend retained EU law were to be used only for ‘technical changes’, for example to remove reference to EU bodies no longer relevant. A commitment to introduce primary legislation to ‘make major policy changes or establish new legal frameworks’ was given.\(^12\) The UK Government argued that delegating powers to ministers was necessary due to the sheer volume of EU-associated law needing revision to make sense in the imminently independent UK. The claim that such changes do not affect policy direction or constitute major legal reform serves to minimise the perceived impact of withdrawal on UK regulatory processes.

A body of commentary has expressed concern about the use of delegated legislation to implement Brexit. During the passage of the 2018 Act, the Lords Constitution Committee described the Bill as introducing ‘unprecedented and extraordinary executive powers raising fundamental constitutional questions about the separation of powers between Parliament and Government.’\(^13\) Craig described the

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\(^8\) National Audit Office, Ensuring food safety and standards (June 2019) HC 2217, 11.
\(^11\) Ibid, s 5.
\(^12\) Ibid, Explanatory Memorandum, paras 13 and 14.
approach as providing ‘very considerable power to the executive in making regulations and limiting legislative oversight.’\textsuperscript{14} King suggested the key question was whether delegated powers are being used to make ‘major policy change’ that would otherwise be made through primary legislation.\textsuperscript{15} A Bingham Centre report critiqued the approach on the basis of the public law principle that Parliament should have adequate opportunity to hold Government to account for changing the law.\textsuperscript{16} And, the Public Law Project’s report found the volume of EU Exit secondary legislation unmanageable for Parliament, and also raised concerns about the increasing use of ‘skeleton’ or ‘framework’ primary legislation.\textsuperscript{17} This extensive use of delegated powers to implement Brexit has exacerbated longer-term concerns over the inherent weak scrutiny of delegated legislation in the UK.\textsuperscript{18}

Below we examine how food law has been transformed through its retention, demonstrating that the Government’s distinction between ‘technical’ or process changes, and substantive reforms, is untenable. The task of incorporating EU law into domestic law is challenging, in part because the EU hierarchy of norms does not map neatly onto that of the UK. The EU instruments examined here are ‘regulations.’ As retained EU law under the 2018 Act, EU regulations are categorised as ‘direct EU legislation.’\textsuperscript{19} During the passage of the Act, the Lords Constitution Committee recommended that all ‘direct EU legislation’ be incorporated as primary legislation, providing greater levels of parliamentary scrutiny and debate.\textsuperscript{20} In response the Government introduced a subdivision of the category to include ‘direct principal EU legislation’ (EU regulations) and ‘direct minor EU legislation’ (EU decisions and tertiary legislation), with additional constraints on amending direct principal retained EU law. In practice this distinction may have little effect: direct principal retained EU legislation may be amended via primary legislation, pre-existing Henry VIII powers, delegated powers conferred by post-Brexit enactments and secondary legislation by virtue of ‘any other provision’ made by or under the Withdrawal Act or by primary legislation passed before, in the same session as, or after the passing of the Withdrawal Act.\textsuperscript{21}

At the time of writing, the UK Government has proposed to remove the special status of and comprehensively review retained EU law, including developing ‘a tailor made mechanism for accelerating its repeal or amendment.’\textsuperscript{22} According to the associated report on regulatory reform, food law is likely to be a priority area in this review.\textsuperscript{23} While at first glance this appears to be a profound reform, our analysis suggests that the legislative protection this would remove has not functioned to safeguard retained EU law against major, and substantive, amendment. It is already possible for

\textsuperscript{14} P Craig, ‘Constitutional principle, the rule of law and political reality: the European Union (Withdrawal) Act 2018’ (2019) 82(2) MLR 319, 345.
\textsuperscript{16} J Simson Caird and E Patterson, Brexit, delegated power and delegated legislation: a rule of law analysis of parliamentary scrutiny (Bingham Centre for the Rule of Law 2020), 4.
\textsuperscript{17} A Sinclair and J Tomlinson, Plus ça change? Brexit and the flaws of the delegated legislation system (Public Law Project 2020).
\textsuperscript{19} European Union (Withdrawal) Act 2018, s 3(2).
\textsuperscript{20} Constitution Committee, European Union (Withdrawal) Bill (Jan 2018) HL Paper 29, para 52.
\textsuperscript{23} D Smith, T Villiers, G Freeman MPs, Taskforce on Innovation, Growth and Regulatory Reform (May 2021).
ministers to introduce secondary legislation that implements major policy changes by means of the powers delegated to them in EU Exit legislation.

**Legislative reform to key areas of retained EU food law**

As set out above, enhancement of ministerial powers through the extensive use of delegated legislation, which we have termed *consolidation*, formed the foundational approach to the retention of EU law. We identify two additional trends. First, EU legal and institutional processes are not fully replicated in legislation (*omission*); second, these ministerial powers are devolved, increasing the scope and potential for divergence in food standards (*fragmentation*). This approach also complicates the analysis of retained EU law. Numerous amendments to retained EU law, some significant, have been undertaken in the areas we examine. For example, with respect to food hygiene, initially there was provision for the use of substances other than potable water for washes (known to many in the form of debates about ‘chlorinated chicken’) only on Food Safety Authority approval. This was repealed and replaced by delegating this power to GB Ministers for the whole of the UK. Thus the Food Safety Authority was first required to authorise such substances, presumably to approximate the EU procedure which delegates this power to the Commission, but this requirement was subsequently removed. Tracking these changes is a challenging process. There is no central repository, and we relied upon Westlaw (not freely available to the public) as well as drawing from tracking efforts of other academics and policy analysts. These research challenges highlight transparency concerns.

To select specific legislative areas for analysis to demonstrate these trends, we apply van der Meulen and Wernaart’s ‘systematic interpretation’ of EU and international food law. This analytical framework understands the overall structure of food law to confer powers on public authorities and create obligations for food businesses, and makes a conceptual division between product, process and presentation rules. We apply this framework to the UK context by examining the location and scope of powers for the UK Government, the devolved administrations and food agencies. We first consider the EU’s overall food regulatory framework. We then utilise the division between product, process and presentation rules to select representative areas of food law. As an example of product legislation, we take the regulation of maximum residue levels of pesticides in foods. For process requirements, we consider food hygiene rules, including food washes. We take food labelling as a key area of presentation legislation. Prior to Brexit, these regulatory regimes were led at EU-level: EU institutions have responsibility for setting permitted pesticides residue levels in food, for approving disinfectant treatments for meat and vegetables, and for setting out procedures and requirements for food labels. A unified approach to risk management and assessment, while allowing for Member State decision-making in some cases, functions to harmonise EU food law in many areas.

**The General Food Law**

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29 We do not deal in depth with public powers of enforcement and incident management or obligations for food businesses, although we recognise these are significant issues. See, for example, National Audit Office, Ensuring food safety and standards (June 2019) HC 2217.
The most significant single legislative source setting out EU food law is accurately described as its General Food Law. This 2002 legislation set out a new legal and institutional framework in response to two major developments. First, the WTO Agreement on Sanitary and Phytosanitary Measures set out rules and principles to ensure that national regulation on human, animal and plant life or health (encompassing food law) does not erect unjustified barriers to international trade. Second, the BSE crisis revealed profound human and economic costs of disregarding food safety risks, underscoring the urgency of ensuring consumer protection in regulatory processes.\(^{31}\) The General Food Law thus mediates between aims that may be in tension where countries’ assessment of risk differs: facilitating trade, including between EU Member States, and upholding consumer safety, animal health and environmental protections.\(^{32}\) To pursue protection of human health, the EU utilises scientific risk assessments to inform risk management decision-making.\(^{33}\) But risk management can be based on the precautionary principle when ‘scientific uncertainty persists’, allowing regulators to introduce restrictions on a temporary basis, an issue to which we return below in the context of the UK’s approach to international trade.\(^{34}\)

While the EU Exit statutory instruments (EU Exit SIs) pertaining to the General Food Law\(^{35}\) retain its general principles, they omit key elements of the regulatory regime that determine how food law is made. One of the functions of the General Food Law is to set out processes for delegation of legislation. As the EU is a consortium of twenty-seven countries, legislative processes clearly differ from the UK, but concerns about executive overreach through delegated legislation, which we documented above in the UK context, are common to both. Indeed, such concerns have been central to the development of EU food law. Most recently, after the 2018 Fitness Check of the EU General Food Law,\(^{36}\) amendments increased the transparency of the EU Food Safety Authority and updated procedures for making delegated legislation.\(^{37}\) Those reforms responded to criticism of the lack of transparency and accountability of EU legislative and risk assessment processes. Delegation is thus set out in detail in EU law and includes how the Commission will consult the European Food Safety Authority and standing committees, and gain approval from the European Parliament and Council.

In the retained General Food Law, these rules on the exercise of delegation are largely omitted.\(^{38}\) This detail is substituted simply by powers for Ministers to make secondary legislation.\(^{39}\) The General Food Law chapters setting up the European Food Safety Authority (the EU body primarily responsible for risk assessment) are also omitted.\(^{40}\) The UK food standards agencies, the Food Standards Agency and Food Standards Scotland, play a similar role to the European Food Safety Authority, but their roles are not explicit in the EU Exit SIs. It is only acknowledged in the

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34 Ibid, Art 6(3), Art 7.
35 General Food Law (Amendment etc) (EU Exit) Regulations 2019 SI 2019/641 as amended by Food and Feed Hygiene and Safety (Miscellaneous Amendments etc) (EU Exit) Regulations 2020 (SI 2020/1504).
38 SI 2019/641 (as amended), reg 21(a).
39 Ibid, reg 10(14).
40 Ibid, regs 20(b) and (c).
explanatory memorandum to a later SI that the agencies ‘will have a role in providing food and feed safety advice to Ministers.’41 Relevant legislation on the functions of the agencies is not referenced.

This less formalised approach to delegated legislation processes does not of course mean that UK agencies will not be involved, but it lessens transparency and accountability. Increased ministerial discretion over UK law-making reveals the omission of formalised procedures and consolidation of powers to ministers to be two sides of the same coin. Fragmentation is also evident: the repatriation of powers is effected by transferring EU powers and functions to the ‘appropriate authority.’ Where the matter is devolved, this is the Secretary of State for England, Welsh Ministers for Wales and Scottish Ministers for Scotland (together GB Ministers); reference to Northern Ireland has been omitted to comply with the Northern Ireland Protocol. How Ministers will work together to ensure a unified approach to risk assessment remains unspecified.

In sum, although the general principles of EU food law are retained, the nature of governance within Great Britain has changed. Regulatory processes and functions are delegated to GB Ministers, and the role of key regulatory bodies, the Food Standards Agency and Food Standards Scotland, are not set out in legislation. The conferral of extensive discretionary power on GB Ministers and/or the Secretary of State consolidates power to the executive and raises questions as to the mechanisms for scrutiny. These same questions recur in examination of specific food law areas.

**Product, process and presentation legislation**

**Product rules**

Product legislation in the EU is focused mainly on approval requirements for food supplements, additives, novel foods and GMOs, and on safety limits for microbiological treatments and maximum residue levels of pesticides, veterinary drugs and contaminants. We take the example of legislation for maximum residue levels of pesticides in food (pesticide MRLs), which was established as a unified EU regime in 2005,42 replacing numerous directives fixing MRLs for specific active ingredients.

In EU law the process of setting MRLs is delegated and roles are formalised. The Commission is responsible for setting MRLs; the European Food Safety Authority provides scientific risk assessments, as do Member States. The Standing Committee on Plants, Animals, Food and Feed, composed of representatives from Member States, may be consulted by the Commission or issue an opinion on Commission proposals. In the UK, the Health and Safety Executive is responsible for UK-wide regulation of pesticide approvals and MRLs; the Expert Committee on Pesticides advises the Health and Safety Executive; and the Expert Committee on Pesticide Residues monitors pesticide residues. These roles are not set out in retained EU law.

In amending EU law on pesticide MRLs, EU Exit SIs43 replace the roles of the European Food Standards Agency, the Commission and the Standing Committee with delegated powers for GB Ministers to revoke or amend pesticide regulations. This confers power to Ministers, for example, to specify concentration factors and sampling methods for MRLs, and to amend or remove an entry from the MRL register.44 Significantly, provision in EU law for the use of scientific assessment is replaced

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41 SI 2020/1504, Explanatory Memorandum, 3.
44 Ibid, regs 5(5)(b) and 3(6)(c).
with discretion for Ministers on whether to obtain independent assessment or advice.\textsuperscript{45} The potential for divergent standards is created by conferring power to GB Ministers. EU regulatory procedure provides for participation and scrutiny by Member States and EU bodies, forming a basis for coordination and harmonisation of standards. In the UK, with powers repatriated to GB Ministers, and the absence of a clear mechanism for cooperation, divergence in permitted MRLs introduced by the devolved nations under retained EU law would give rise to a fragmentary regime.

**Process rules**

Food hygiene and official controls are examples of process regulation. Following the BSE crisis and the adoption of the General Food Law, the EU introduced an updated set of hygiene regulations in 2004\textsuperscript{46} and a comprehensive update of official controls came into force in December 2019.\textsuperscript{47} In the EU, food hygiene obligations for food businesses – ie microbiological criteria for foodstuffs, required procedures, and temperature control requirements, maintenance of the cold chain, and sampling and analysis – are laid down in the context of a similar regulatory regime to that of MRLs. Key to food business obligations is the stipulation that businesses must not use any substance other than potable or clean water to remove surface contaminants from products of animal origin unless the use of such a substance has been approved by the Commission under regulatory procedures.

Multiple EU Exit SIs have incorporated and amended EU regulations.\textsuperscript{48} EU regulatory procedures have been replaced by delegated powers for GB Ministers to amend requirements for food businesses.\textsuperscript{49} As noted above, amendments to hygiene rules for businesses, including washes, are at the discretion of Ministers.\textsuperscript{50} The interaction between GB ministers and devolved agencies is not set out. In this way, power is conferred to the executive of the devolved nations and, without established mechanisms for intergovernmental cooperation, the potential for fragmentation of food standards is created.

**Presentation rules**

Presentation rules include requirements for labelling, publicity and risk communication. EU labelling rules are detailed and largely harmonised, specifying mandatory and voluntary food information, and procedures for additional Member State controls. Crucially, national labelling measures authorised by EU law shall not give rise to restrictions on the free movement of goods.\textsuperscript{51} But additional labelling controls on specific categories of food by Member States may be justified on several grounds, including protection of public health and consumers.\textsuperscript{52} The 2011 EU Regulation\textsuperscript{53}, which consolidated

\textsuperscript{45} Ibid, reg 9(2).


\textsuperscript{48} General Food Hygiene (Amendment) (EU Exit) Regulations 2019 (SI 2019/642) and Specific Food Hygiene (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/640) (as amended).

\textsuperscript{49} SI 2019/642 (as amended), reg 4(c).

\textsuperscript{50} SI 2019/640 (as amended), reg 6.


\textsuperscript{52} Other grounds are prevention of fraud, protection of industrial or commercial property rights, registered designations of origin and prevention of unfair competition. Reg 1169/2011, Art 39(1).

\textsuperscript{53} Reg 1169/2011. It is noted that separate rules apply to nutrition and health claims as well as food containing genetically modified ingredients.
previous rules on labelling including controls on nutrition labelling, is amended by three EU Exit SIs. ⁵⁴

EU Exit SIs substitute implementing powers for the Commission with powers for GB Ministers to make secondary legislation throughout. Provision for additional controls for Member States is substituted in the EU Exit SI by powers for Ministers to make two types of regulations: type A regulations to be made by the devolved nations and type B regulations for Great Britain. ⁵⁵ Ministers therefore have discretion in amending the grounds for additional labelling controls and the potential for divergent regulation on labelling under retained EU law is evident. These omissions, as they are found here without reference to new arrangements, confer roles for the multiple bodies involved in EU scrutiny mechanisms to GB Ministers.

**The Agriculture Act**

If retained EU food law leaves uncertainties regarding the operation of regulatory processes post-Brexit, we might look for resolution in primary legislation on food law. The Agriculture Act 2020, primary legislation for England, also confers extensive discretionary powers to the Secretary of State in respect of ‘marketing standards.’ Broader than labelling rules, marketing standards are here understood to ‘establish detailed rules with regard to the quality of agricultural products and provide information to consumers.’ ⁵⁶

The relationship between marketing standards and EU Exit SIs remains unclear. Some categories of marketing standards appear to overlap and provide another route for the UK Government to amend these and other areas of food law. These include ‘restrictions as regards the use of certain substances and practices’ and ‘specific substances used in preparation’, which appear to overlap with pesticide regulation and food hygiene, as well as ‘presentation, labelling and packaging.’ ⁵⁷ Section 37 allows the Secretary of State to amend or revoke marketing standards in retained EU law, and domestic legislation, as well as introduce new standards, and add or remove or alter the description of a product from those listed in the Annex. ⁵⁸

The Delegated Powers Committee found this primary legislation would enact ‘a major transfer of powers from the EU to Ministers of the Crown, bypassing Parliament and the devolved legislatures in Wales and Northern Ireland’ and suggested the section on marketing standards warranted ‘a bill in its own right.’ ⁵⁹ The delegated powers to amend retained EU law are subject to a sunset clause in the Withdrawal Act, but the Agriculture Act does not contain such a constraint. In this case therefore, primary legislation does not resolve concerns about consolidation, omission and fragmentation arising in EU Exit SIs, but exacerbates them.

**Part II – Addressing fragmentation via a new internal market settlement**

As documented above, retained EU food law replaces requirements for harmonised standards with provision for Ministers to amend regulation on a devolved basis with no clear basis for cooperation between the four nations. The difficult issue of how to maintain frictionless intra-UK trade is not addressed. If, for example, Scotland allows lower levels of pesticide residues than other UK nations, it may wish to ban food from these nations that does not meet its requirements, and/or conduct

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⁵⁵ SI 2019/529 (as amended), reg 5(20).
⁵⁷ Agriculture Act 2020, s37(2)(d), (f) and (k).
⁵⁸ Relevant marketing standards are contained in a non-exhaustive list in Schedule 4.
inspections to ensure this food conforms with Scottish requirements. Diverging requirements for pesticide MRLs, food hygiene, or labels, among other areas, may result in UK producers or exporters to the UK having to create different product lines in order to access different UK nations.

The repatriation of powers and responsibilities from the EU to the UK and devolved administrations became a critical issue immediately after the vote to leave the EU. The European Union Committee wrote in 2017 that the EU has been ‘part of the glue holding the United Kingdom together.’60 Inherent weaknesses of UK intergovernmental cooperation – a political, rather than legal, framework; ad hoc and consultative, rather than regular decision-making, meetings; the ultimate reservation of power for the UK Government – were exposed.61 The key constitutional convention underpinning the devolution settlement – the Sewel Convention, that the UK Government will not normally legislate without the consent of the devolved legislatures – has been tested in the Brexit process. The 2018 Withdrawal Act was passed without consent of the Scottish Government; the EU (Withdrawal Agreement) Act 2020 did not receive consent from Wales, Scotland and Northern Ireland; and the Scottish and Welsh legislatures withheld consent for the UK Internal Market Act 2020.

It is useful at this stage to revisit the functionality of the EU internal market, which provided for largely frictionless trade not only between EU Member States, but also between the four nations of the UK. For goods, EU single market rules eliminate the need for tariff duties or customs checks, and Member States do not have to undertake regulatory compliance or certification procedures beyond what is required domestically. For food products, free movement has been achieved through harmonisation of product standards, with product-focused provisions set out either in a system of positive lists of substances approved for use in food, such as additives, or in limits on harmful substances in food, such as contaminants, toxins, pesticide residues and veterinary drugs. The fragmentation we identified in the legislation examined above results from the removal of these harmonised EU standards.

In areas where Member States can diverge, they are obliged to mutually recognise each other’s goods as achieving an equivalent level of protection, subject to some exceptions.62 In his overview of the influence of international and EU law on English food law, MacMaoláín argues that this imperative of eliminating trade barriers between EU Member States is largely determinative of both EU and Member State food law.63 The difficult question of how to balance national law-making with the need to facilitate internal trade now confronts the UK anew. Rawlings rightly emphasises this is not simply a legal matter, rather it will be ‘a thoroughgoing test of the UK’s territorial constitution’ and, as it has been in the EU, heavily reliant on political and administrative cooperation mechanisms.64 This process of creating new regulatory regimes has taken place along two tracks in post-Brexit UK, which are conceptually distinct and only partly concomitant: the Common Frameworks Programme and the UK Internal Market Act 2020.

**Common frameworks: a four-nation approach to the GB internal market**

In 2017, the UK, Scottish and Welsh Governments agreed, via the Joint Ministerial Committee on EU Negotiations, to establish ‘common frameworks’ for areas of retained EU law within the competence

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60 European Union Committee, Brexit: devolution (July 2017) HL Paper 9, para 2.
64 R Rawlings, Brexit and the territorial constitution: devolution, reregulation and intergovernmental relations (The Constitution Society 2017).
of devolved administrations; the Northern Ireland Executive endorsed the process in June 2020.\textsuperscript{65} Common frameworks are agreed UK, or GB, approaches to certain policy areas, implemented via legislative or ‘non-legislative’ frameworks. One key aim is to ‘enable the functioning of the UK internal market, while acknowledging policy divergence’; key principles include ‘respect for the devolution settlement’, that devolved competences will ‘not normally be adjusted without consent’, ‘equivalent flexibility for divergent policy-making as afforded by current EU rules as a minimum’ and a ‘significant increase in decision-making powers for the devolved administrations.’ The first ‘common frameworks analysis’ identified 154 potential areas for common frameworks, however in many areas it was agreed no further action beyond existing arrangements was required and currently 32 areas are being worked on.\textsuperscript{66}

Three provisional common frameworks relating to food standards have been published.\textsuperscript{67} Here we examine just one: the provisional Food and Feed Safety and Hygiene (FFSH) common framework.\textsuperscript{68}

The scope of the FFSH framework corresponds most closely with the General Food Law, and thus forms the foundation of the UK’s approach to risk assessment, impacting upon all other areas of food law, as well as, potentially, its trade negotiation strategy. Whilst it promises to fill gaps on intergovernmental cooperation we identified in our analysis of the General Food Law above, the framework is distinctly unclear and subject to further development. The policy area set out initially is that of retained EU food and feed law, described in the framework as an ‘overarching and coherent framework that covers all stages of food and feed production, risk analysis, food safety labelling, distribution, incident handling and food and feed law enforcement.’\textsuperscript{69} Areas of food law identified as outside scope or subject to future discussion, however, are those where EU law allowed for Member State competences – monitoring and enforcement, incident handling and risk management – although it is noted that EU law sets out general approaches to these key functions of food law.\textsuperscript{70} Our analysis of retained EU law showed how EU provision for these areas, for example procedures for risk analysis and delegation of powers, were omitted or consolidated in the EU Exit SIs; these issues are not resolved in the provisional common framework.

The FFSH framework makes reference to a process to identify areas to introduce ‘concurrent powers’, ie powers for the Secretary of State to amend retained EU law by means of a UK-wide SI with consent of the devolved ministers.\textsuperscript{71} In several places, the need for the development of governance structures is noted.\textsuperscript{72} In relation to policy development, a new risk analysis process is proposed, but the focus is on managing divergence rather than risk assessment, management or communication. As such the process by which a four-nation approach is achieved is reliant on commitments to sharing information and regular engagement, rather than governance structures or statutory duties. Further, it is difficult to discern exactly how divergence will be managed before being considered a dispute. Current proposals for dispute resolution are arguably inadequate: it is unclear how far ‘evidence-based

\textsuperscript{68} Department of Health and Social Case, Food and Feed Safety and Hygiene Common Framework: Provisional framework outline agreement and concordat (Nov 2020).
\textsuperscript{69} Ibid, para 1.1.
\textsuperscript{70} Ibid, paras 4.16–4.17.
\textsuperscript{71} Ibid, para 4.6.
\textsuperscript{72} For example: ‘Governance arrangements are needed for how the appropriate authorities take decisions based on joint recommendations from food safety bodies. While Ministers ultimately retain the right to take individual decisions for their nation, as with officials, for areas within the scope of the framework, a consensus should first be sought, and efforts made to resolve any disputes.’ Ibid, para 17.
approaches’ can contribute to resolving disputes, how far transparency is appropriate, how timescales are to be applied and how compliance with decisions can be achieved.

The FFSH will be implemented through a ‘non-legislative agreement’: a concordat between the four nations and a revised Food Standards Authority-Food Standards Scotland Memorandum of Understanding. Thus provision for policy-making, decision-making on scope, principles for collaboration, management of divergence, dispute resolution and review is shifted to a non-legislative basis. This contrasts with the legislative basis for these functions in EU law and begs the question of how non-legislative frameworks for food law are to interact with legislative ones, notably retained EU law and the UK Internal Market legislation discussed below. The FFSH framework states that ‘[t]here are no areas of retained harmonised EU FFSH legislation where it has been identified as undesirable to maintain shared ways of working for the development of FFSH policy’, however the category of ‘retained harmonised EU FFSH legislation’ arguably does not exist. Retained EU food law may currently be harmonised, but the EU Exit SIs provide for divergence rather than cooperation and/or harmonisation. The Common Frameworks Committee found that common frameworks enjoyed ‘widespread support’ and ‘should be used as a model to reset UK intergovernmental relations and build a cooperative Union.’ As it stands, the FFSH framework lacks solutions to the governance gap and potential divergence introduced by EU Exit SIs. This certainly does not bar the Food Standards Agency and Food Standards Scotland from effective cooperation, but provides another manifestation of a trend toward omission: cooperation mechanisms are more informal in contrast to food regulatory procedure in the EU.

**UK Internal Market Act 2020: reservation of powers to the UK Government**

The FFSH’s non-legislative approach contrasts sharply with the UK Internal Market Act 2020. It was passed in parallel to the Common Frameworks Programme, and without the consent of Scotland or Wales, to ‘guarantee the continued seamless functioning of the UK Internal Market.’ Indeed, it provides a mandatory ‘legislative underpinning’ for the UK internal market. In so doing, it takes on a significant, even constitutional, function, by replacing some arrangements made as a result of the 1972 European Communities Act when the UK joined the EU. While the Act applies to goods imported from Northern Ireland into Great Britain, it does not apply to goods exported from Great Britain into Northern Ireland. Instead, regulatory requirements for these goods are found in the Northern Ireland Protocol, which requires that they conform with EU requirements.

The rationale for the late and swift introduction of the 2020 Act was set out at length in the UK Internal Market White Paper. The UK Government argued that common frameworks did not address economic or sectoral ‘spill over’ effects from divergence and did not offer a ‘comprehensive safety net for businesses and consumers.’ In short, common frameworks were insufficient to avoid new barriers to intra-UK trade. Unlike common frameworks, the UK Internal Market Act ensures that intra-UK regulatory trade barriers do not occur. But it approaches the functioning of the internal market differently to either the common frameworks or the EU Single Market, through so-called ‘market access principles’: mutual recognition and non-discrimination.

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73 Ibid, para 6.2.
75 Department for Business, Energy and Industrial Strategy, UK Internal Market (July 2020) CP 278, 10.
76 Ibid, 21.
78 UK Internal Market Act 2020, s 11.
79 Department for Business, Energy and Industrial Strategy, UK Internal Market (July 2020) CP 278, para 93.
Mutual recognition, in the 2020 Act, applies to rules on the production, composition and presentation of goods, categories which encompass the product, process and presentation framework we utilise above. The principle ensures that goods made in or imported into one part of the UK can also be lawfully sold in other parts of the UK. In parallel, regulations that apply in the UK nation to which the good is exported will be disapplied and supplanted by the rules of the exporting UK nation.\(^{80}\) As long as regulatory requirements of either Wales, Scotland or England are met, the product can circulate freely between them.

Non-discrimination applies to selling arrangements, which encompass advertising regulations, licensing requirements or requirements for display of goods. This is less influential to our examples than the mutual recognition principle, but would further inhibit devolved nations from treating goods from other UK nations less favourably, either by formal differentiation, or through rules that appear neutral but have an adverse market effect on these goods.\(^{81}\) For example, once Scotland admits foods from other UK nations meeting different standards from those permitted domestically, it would not be able to segregate and display them in a less favourable position, for example, either on the basis of their nationality or their regulatory characteristics.

Harmonisation and mutual recognition are sometimes characterised respectively as positive and negative integration; the difference between the UK Internal Market Act and the EU Single Market is the balance between them.\(^{82}\) In the UK Internal Market Act, mutual recognition (negative integration), rather than harmonisation (positive integration), acts as the primary basis for frictionless trade. Thus the UK’s approach both embeds, but also supersedes, the fragmentation of the internal market, preserving GB nations’ ability to regulate separately but overriding their regulatory preferences where necessary to facilitate free movement.

Exceptions to mutual recognition are also narrower. In the EU, Member States may come to an ‘administrative decision’ that imported goods should not be mutually recognised on certain grounds. These are set out in Article 36 of the Treaty on the Functioning of the European Union and include ‘public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property’, or additionally ‘overriding reasons of public interest.’ Case law of the European Court of Justice also clarified that countries do not need to mutually recognise other products if they contravene mandatory requirements for consumer protection\(^{83}\) and the protection of the environment.\(^{84}\) In contrast, exclusions to the mutual recognition principle set out in Schedule 1 of the 2020 Act are limited to ‘threats to human, animal or plant health’, covering movements of pests, outbreaks of foodborne illness or product recalls due to safety concerns. They also include chemical regulation, fertilisers and approval of new active substances for pesticides.\(^{85}\)

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\(^{80}\) UK Internal Market Act 2020, s 2. Note that, pursuant to the Northern Ireland Protocol, the mutual recognition does not apply when Scotland, Wales or England export their goods to Northern Ireland. Art 5(4); Annex 2.

\(^{81}\) UK Internal Market Act 2020, s 8.

\(^{82}\) V Gravey, ‘The Internal Market Bill: why negative integration is causing such negative feelings’ (Brexit and Environment, 16.10.20). At https://www.brexitenvironment.co.uk/2020/10/16/internal-market-bill-why-negative-integration-is-causing-such-negative-feelings/ (last visited 5 Oct 2021).


\(^{84}\) C-302/86 Commission of the European Communities v Kingdom of Denmark ECLI:EU:C:1988:421.

\(^{85}\) This last category is curious as it does not extend to maximum residue levels. This means that England, Scotland and Wales will still be required to import food from one another, even if it contains higher pesticide residues than they permit domestically. UK Internal Market Act 2020, s 10.
While the mutual recognition principle preserves devolved powers, rather than requiring that devolved nations conform with a wide range of harmonised standards (as they did in the EU), the Act undermines devolution simply because devolved legislation will no longer apply to all relevant activity in the devolved territory. When coupled with asymmetric market power, this can drive down standards. For example, if England decided to permit substances other than water for washing animal carcasses, it could competitively undercut producers in other UK nations who maintain a prohibition on this practice and undermine permitted divergence as well as food safety standards.

The mutual recognition principle also prohibits unilateral introduction of labels as a means to uphold domestic standards. If one UK nation imposed labelling requirements on products imported from another, this would constitute an additional import requirement and thus be prohibited. Food Standards Scotland, for example, expressed concern about a hypothetical example that one GB nation might omit nutritional food labelling whilst other UK nations maintain the existing system, yet still export its unlabelled products to other GB nations.

Devolution is also undermined by the asymmetry of legislative authority. As Dougan et al note, the UK Internal Market Act is a protected enactment, which devolved administrations are unable to appeal or modify, but which the UK Parliament will be able to modify when legislating for England. They conclude that ‘[t]he substance of the Bill and the manner of its introduction have reduced relations between the Scottish and Welsh Governments on the one hand, and the UK Government on the other, to the worst level we have known.’

The Act was passed hastily, with an abbreviated consultation period. The Welsh Government stated that ‘it is wholly unacceptable that we now seem to be faced with a solely UK Government generated proposal.’ The Scottish Government argued that the Act ‘directly constrains’ devolution and the common frameworks process ‘is all that is needed to manage the practical regulatory and market implications of the UK leaving the EU.’ The Constitution Committee questioned the need for the Act on similar grounds, pointing out that retained EU law and common frameworks together provided the basis for an ‘effective UK internal market.’

The Internal Market White Paper identified a role for common frameworks in internal market governance but did not take account of specific frameworks or their progress. The Bill itself initially made no mention of common frameworks. An amendment was later introduced that allows the list of exclusions from the market access principles to be extended if agreed upon as part of a common framework. Common frameworks therefore act as potential exclusions from the UK Internal Market Act, rather than the default system of managing the Internal Market as a whole, making plain their status as subsidiary to market access principles.

87 E Millstone, T Lang, T Marsden, Chlorinated chicken: Is the UK being softened up to accept lower food standards? (Food Research Collaboration, Sept 2019).
89 Dougan et al n 86, 7.
91 Scottish Government, After Brexit: The UK Internal Market Act and devolution (Mar 2021), para 61.
92 Constitution Committee, United Kingdom Internal Market Bill (Oct 2020) HL Paper 151, para 62.
93 UK Internal Market Act, s 10(3)(a).
In addition, UK Ministers act as gatekeepers: the Secretary of State may amend the schedule of exemptions via an affirmative statutory instrument.94 Whilst they should seek consent from Scotland, Wales and Northern Ireland, if consent is not forthcoming within a month, the Secretary of State may proceed anyway.95 As Armstrong notes, ‘if UK ministers do not wish to trigger the process for excluding a common framework agreement, they are not obliged to do so – power and authority rest with the UK Government’.96 This approach replicates the legislative asymmetry underpinning the Act, and contributes to what Davies characterises as ‘the failure of soft law’, or non-binding intergovernmental agreements, as a basis for the internal market.97 Rather than complementary, Armstrong characterises common frameworks and the Internal Market Act as rivals, concluding that the Act ‘represent[s] a choice to pursue economic unionism through a competitive rather than a collaborative ‘mode’ of governance.’98 In this competitive mode, producers can determine which GB nation provides the most favourable regulatory conditions and move accordingly, sometimes known as regulatory forum shopping. In sum, the Act is a counterexample to the overall trend toward the expansion of non-legislative approaches post-Brexit, which works to ensure that consolidation of power in the central UK government overrides increased scope for divergent regulation in devolved nations.

Part III – Trade law and policy

Internal tensions about how, and where, food law is made are subject to external pressures, which in turn help define the UK’s post-Brexit identity. More specifically, one argument for Brexit was to leave behind the constraints of EU membership in favour of an outward looking ‘Global Britain’.99 This puts a political premium on new trade agreements, not only to recoup lost EU market access but also to showcase Brexit’s foreign policy dividends. As summarised by an Institute for Government report, ‘one thing is clear: the UK will come under pressure to amend its regulations in trade negotiations’100 The US sought to change the UK’s approach to food law in now suspended UK FTA negotiations,101 a position which prompted concern in the UK.102 As part of a broader ‘Indo-Pacific tilt,’ the UK Government has also applied to join the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP),103 whose provisions on risk assessment for food law were drafted by the US

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94 Ibid, s 10(2).
95 Ibid, s 10.
100 J Kane, Trade and regulation after Brexit (Institute for Government 2020), 21.
103 Department for International Trade, ‘UK position on joining the CPTPP trade agreement’ (22.06.21). At https://www.gov.uk/government/collections/uk-position-on-joining-the-cptpp-trade-agreement (last visited 5 Oct 2021)
before its withdrawal from the Agreement, and explicitly reduce Parties’ ability to use a precautionary approach to food law.

As set out in the context of the General Food Law, EU food law has attempted to balance imperatives of international trade, EU free movement and consumer protection. But its reliance on the precautionary principle to safeguard the latter has been controversial, including in areas we examine. Low permitted EU pesticide MRLs have attracted criticism from a wide range of EU trade partners. The WTO Sanitary and Phytosanitary (SPS) Committee, which establishes how countries can apply food safety measures, has provided a forum for this criticism. In 2017 EU pesticide MRLs were, according to the WTO Secretariat, on ‘top of the agenda’, with Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Nigeria, Peru and the United States arguing that these were more trade restrictive than necessary. The EU ban on so-called ‘chlorinated chicken’, which falls under the food hygiene regulations outlined above, has also been challenged both in the SPS Committee and through a dispute initiated by the US against the EU in 2009 that was resolved before reaching the Panel stage. The US has held the lack of scientific risk assessment and reliance on ‘precaution’ responsible for a range of EU bans and restrictions on US food products.

Thus the UK must decide if it will maintain not just specific EU standards but also its approach to risk management. In the EU Exit legislation discussed above, the precautionary basis of legislation, including references to the precautionary principle, has been retained. However, precaution is made operational through regulatory approval processes and the underlying approaches to regulating the food system. The ‘repatriation of powers’ is not simply a technical process and does not automatically provide an equivalent regime. Legislative frameworks crystallise policy decisions on, for example, collaboration between different levels of government, the use of scientific evidence, the extent of public consultation in policy-making and requirements for monitoring and reporting. If they wanted to do so, it is easier for GB Ministers to avoid a precautionary basis for UK standard setting because regulatory processes have become less transparent.

Consolidation of power is evident in the Government’s reluctance to reform treaty ratification processes despite their newfound significance in post-Brexit FTA negotiations. Under the Constitutional Reform and Governance (CRAG) Act 2010, which sets out procedures for international treaties, the UK Parliament does not have the power to approve, reject or amend treaties made by the Government. Instead, it can simply postpone their ratification in a procedure the Constitution Committee has described as ‘anachronistic and inadequate.’ In a 2019 command paper, the UK Government argued that major procedural reform, including giving Parliament the ability to inform

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negotiating positions or vote against UK FTAs, is not necessary. This resistance to reform is based in part on the fact that, under the UK’s dualist system, Parliament has powers to pass legislation required to bring treaties into effect. However, as outlined above, much of the body of food law is not set out in primary legislation. The Trade Act 2021 affirms that Ministers, including devolved authorities, can make any ‘provisions the authority deems appropriate’ to implement an FTA, including amending direct principal retained EU law, the category we examine above.

Fragmentation is also evident. The Trade Act prohibits such changes if they lower the UK’s statutory level of protection in food law areas including human, animal or plant life or health, environmental protection and animal welfare. As regulation across these areas is devolved, this statutory duty is open to multiple, and conflicting, interpretations of what constitutes lowering level of protection. Indeed, a core argument of critics of precaution is that it does not increase consumer protection. Listing pesticides and food hygiene alongside other food regulation, the US Government has written, ‘the United States believes there are instances where the EU should recognise current US food safety measures as equivalent to those maintained by the EU because they achieve the same level of protection.’ Further, if food law diverges between devolved nations, it is unclear whose regulation defines the UK level of protection.

The CRAG Act does not provide any formal role for devolved nations in treaty negotiation, even where treaties engage areas of devolved policy. In 2013, guidelines on how devolved administrations will be involved in treaty-making were agreed via the non-binding intergovernmental Devolution Memorandum of Understanding. Here, the UK Government committed to information-sharing and consultation when treaties cover devolved areas; devolved administrations can also hold discussions with foreign governments and be invited to join negotiating teams, advancing a unified UK negotiating position to which they can provide input. These arrangements are currently under review and, as is the case for its commitments to improved parliamentary scrutiny of trade agreements, the UK Government does not consider any new arrangements require legislative change. The FFSH Common Framework recognises international trade policy and agreements are the province of the UK Government, offering a further non-legislative commitment to involve the devolved administrations in the formulation of policy.

Where trade agreements touch on areas of devolved competence, legislation may need to be passed by the devolved legislatures – or at Westminster with their consent – to reflect any new international obligations. The Scottish Government passed its own Withdrawal Act in January 2021; the so-called Continuity Act sets out ‘keeping pace’ powers for the Scottish Government to maintain alignment with EU regulation, including for food law. If FTA implementation requires a change to food regulation, against Scotland’s will, it will presumably be able to maintain existing devolved regulation. However, the UK Internal Market Act’s mutual recognition principle covers not only goods produced in one particular UK nation, but also goods imported into that nation. This amplifies

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111 Ibid, s 2(1), (9).
112 Ibid, ss (6), (7).
113 R Lighthizer, 2018 National Trade Estimate Report on Foreign Trade Barriers (Office of the US Trade Representative), 165.
115 Department for International Trade, above at n 110, 8 and 11.
116 FFSH Common Framework, para 2.4.
117 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s 1.
regulatory competition from market flows, which are globally and not just nationally determined, and underscores the asymmetry of relative influence over the political and legislative process of negotiating UK trade relationships.

**Conclusion**

Post-Brexit regulatory reform is an ongoing process, and a fundamental manifestation of the drive to ‘take back control’ from the EU. Its early phases have been undertaken hastily in an effort to maintain a functional body of law, despite the removal of critical EU-based regulatory processes and functions. This approach will likely define the future direction of UK food law, and acts as a case study for its law-making more generally. In mapping key developments across food law, we argued that consolidation of centralised power constituted the overriding trend. The UK has done this through the extensive use of secondary legislation, elevating the UK Internal Market Act over common frameworks, and limiting the formal oversight of Parliament and devolved nations over trade negotiations.

It is important to set out these regulatory changes as they have been framed as minimal and imperative, rather than structural and strategic. The Explanatory Memorandum of the Withdrawal Act limits permitted amendments to minor and necessary technical changes to regulatory processes, and not major policy or legislative reform. Similarly, the UK Internal Market Bill White Paper argued that the Act was necessary to maintain the status quo (minus Northern Ireland of course) of frictionless trade in Great Britain. Subsequent reform is easier to identify, such as the proposed overhauling of gene editing regulation,¹¹⁸ but the changes to regulatory processes we document are the basis upon which such reforms can be made so nimbly.

Yet we have also argued that these centralising moves have another legacy: they overlay an internal market that is much more fragmented. Two of four UK nations, Northern Ireland and Scotland, will maintain legislative alignment with the EU. While the Northern Ireland Protocol provides a bilateral EU-UK treaty basis for alignment of food law with the EU, Scotland undertakes this unilaterally pursuant to its Continuity Act. Though required to comply with UK internal market regulation, Scotland is however unable to receive what Northern Ireland does: formal EU recognition of food law harmonisation, and the resultant elimination of border and regulatory barriers. The consolidation of centralised authority over an increasingly divergent body of law seems set to embed conflict and contestation as the core of the internal market, exacerbating the poor state of intergovernmental UK relations.

At the time of writing, this is an incomplete story. There is an important role for the courts in interpreting the legislation we outline herein and indeed the authority of the courts is in itself a significant locus of contestation.¹¹⁹ Substantive reform and the restructuring of governance mechanisms are in development. Certainly, among these reforms lies the possibility for a move toward a less centralised approach. The UK Government and devolved administrations could pass primary legislation encompassing core product, process and presentation standards, bringing greater parliamentary scrutiny to bear on this legislation. The UK Government could elevate devolved nations in regulatory co-formation by formalising the primacy of common frameworks, and increase the scope of permitted exceptions to the UK Internal Market Act’s market access principles. A mandatory role for Parliament in evaluating UK negotiation objectives and voting up or down UK FTAs, and


veto power for the devolved administrations over regulatory changes pursuant to new FTAs they did not approve, would improve the legitimacy of UK trade negotiations.

Because Scotland seeks EU legislative alignment, such procedural reforms may yield a very different Brexit. A more consultative and collaborative Brexit would likely have been a ‘softer’ one, keeping the UK more closely aligned with EU bodies and standards, and requiring acceptance of greater barriers to internal trade in Great Britain. The longer-term consequences for law-making processes that result from the central UK Government’s attainment of its immediate Brexit goals are significant, meriting both attention and reform.