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The Ambiguity of Multi-Level Governance and (De-)Harmonisation in EU Environmental Law

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Abstract

This chapter explores the ambiguous allocation of authority in the governance of two areas of environmental protection: industrial pollution and genetically modified organisms. Ambiguity, that is, a difficulty in asserting that any single actor has the final word on a subject, is inevitable in the EU's multi-level governance system and is not necessarily undesirable. These two examples demonstrate that even in the face of concerted efforts to introduce a formal hierarchy, the need for collaboration around softer norms persists.

I. INTRODUCTION

THIS CHAPTER EXPLORES the blurred lines between centralisation and decentralisation, and harmonisation and de-harmonisation in EU environmental law, specifically in the regulation of genetically modified organisms (GMOs)[1] and industrial pollution.[2] The two areas are politically very different. The authorisation of GMOs provokes highly

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[1] Directive 2001/18 of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L106/1 (the Deliberate Release Directive); Regulation (EC) 1829/2003 on genetically modified food and feed [2003] OJ L268/1 (the Food and Feed Regulation).

[2] I will refer to the original IPPC Directive: Council Directive 1996/61/EC of 24 September 1996 concerning integrated pollution prevention and control OJ [1996] L257/26 and Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control) OJ [2010] L334/17.

visible political debate in many Member States. The precise nature of the disagreement is complicated, but extends over the existence and acceptability of the risks posed to human health and the environment; over the nature and acceptability of the distributive impacts of GMOs; and over the nature and acceptability of other ethical implications.[3] Control of industrial emissions is important and often locally contested, but is generally a routine administrative task, only occasionally capturing high-level political interest. These two areas also illustrate very different patterns of EU and national authority, as we will see. But in both cases, notwithstanding their differences, authority is strikingly ambiguous, in the sense, first, that there is no simple division between the Member State and the EU institutions, and, second, that efforts to assert a clear allocation of authority are fraught with difficulty. No pejorative implication is intended in the observation that authority is ambiguous; I hope it becomes clear that an absence of clear lines of authority is often necessary and can be positive. But overlooking ambiguity impedes understanding.

Any effort to explore who has (or should have) authority in EU law goes to the heart of the study of EU integration and EU policy and decision making,[4] and so sits, unsurprisingly, in a theoretically crowded and diverse field. Most significantly for current purposes, the evolution of EU 'governance' in a 'new' direction towards (broadly) less rather than more hierarchy, the involvement of a wider range of public and private actors in decision making, and the use of a wider range of techniques of governance (including softer, more flexible measures)[5] highlights the complexity of authority in EU environmental law.[6] Multi-level governance,[7] with its roots

[3] For discussion, see M Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology* (Cheltenham, Edward Elgar, 2008).

[4] Including the most fundamental debates about EU federalism, constitutionalism and pluralism.

[5] Whilst concerned with these common themes, I will not attempt to compare or draw lines between the different approaches to and types ('new', 'experimental', 'networked') of 'governance'; for discussion, see K Armstrong, 'The Character of EU Law and Governance: From "Community Method" to New Modes of Governance' (2011) 64 *Current Legal Problems* 179. For discussion on the appearance and proliferation of the term 'governance', see also J O'Mahony and J Ottaway, 'Travelling Concepts: EU Governance in the Social Sciences Literature' in B Kohler-Koch and F Larat (eds), *European Multi-Level Governance* (Cheltenham, Edward Elgar, 2009).

[6] See, eg, G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Oxford, Hart Publishing, 2006); CF Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford, Oxford University Press, 2010).

[7] Some prefer the language of multi-centred or polycentric governance to avoid any implication of hierarchy in the language of 'levels'. See L Hooghe and G Marks, 'Unraveling the Central State, But How? Types of Multi-Level Governance' (2003) 97 *American Political Science Review* 233; H Hofmann and A Türk, 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13 *European Law Journal* 253.

in structural funding and its links with federalism scholarship,[8] originally centred not on the EU, but on how policy escaped the nation state, in particular the ability of interest groups and sub-national authorities to look beyond the state and interact directly with the EU institutions. Many other areas of scholarship also examine the dispersal of authority formerly held by states, not just up (for example, to the EU), but also down (to sub-national authorities) and horizontally out (to other states and non-state actors).[9] Also significant to the ambiguity of authority is the study of 'flexibility' or 'differentiation' in EU law,[10] which stretches from constitutionalised differentiated participation in whole policy areas to variations in the precise obligations undertaken in particular sectors or particular pieces of legislation.[11] The political stakes are especially high at the moment, with the Eurozone crisis prompting reconsideration of the settlement reached at Lisbon, and the promise (or threat) from the UK Prime Minister to 'renegotiate' the treaties and 'repatriate' rights.[12] At an apparently more banal level, variation in the responsibilities of Member States, often on a temporary basis, is more or less routine in EU environmental legislation, as is an inherent and more persistent flexibility in the implementation of EU environmental policy. Industrial emissions regulation demonstrates this inherent flexibility especially well, although the sometimes unpredictable implementation flexibility that is built into safeguard clauses and what used to be called the 'environmental guarantee' under Article 114(5) of the Treaty on the Functioning of the European Union (TFEU) has played an important role in the allocation of authority over GMOs.[13] Both industrial emissions and

[8] See H Enderlein, S Walti and M Zurn (eds), *Handbook on Multi-Level Governance* (Cheltenham, Edward Elgar, 2010). The introduction to this handbook asserts that the interconnectedness of different layers distinguishes multi-level governance from federalism; I think that the federalism scholarship is diverse enough to embrace such interconnections.

[9] On 'decentred' or 'post-regulation', see J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103.

[10] For a discussion of the 'excess of metaphorical terminology' ('multi-speed', 'variable geometry' 'a la carte'), as well as the long history of differentiation, see AC-G Stubb, 'A Categorisation of Differentiated Integration' (1996) 34 *Journal of Common Market Studies* 283, 291.

[11] See, eg, N Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 *European Law Journal* 355; J Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy' (1998) 4 *European Law Journal* 63.

[12] The opposition of the UK government to the proposed de-harmonisation (discussed below) of GMO cultivation highlights the complexity of the relationship between sovereignty and authority in a multi-level system.

[13] Discussed in detail in M Lee, *EU Environmental Law, Governance and Decision Making* (Oxford, Hart Publishing, 2014, forthcoming); M Lee, 'EU Multi-level Governance of GMOs: Ambiguity and Hierarchy' in M Cardwell and L Bodiguel (eds), *Regulation of GMOs* (Oxford, Oxford University Press, 2010).

GMOs demonstrate the substantive significance and political sensitivity of implementation.

In short, a vast and diverse, sometimes ill-defined and often competing literature emphasises the complexity of authority in the EU, and confirms that any full account of environmental law requires an assessment of the varying interdependence between different levels of formal and informal actors. Both industrial emissions and GMOs are subject to elaborate regulatory regimes in the EU. The Industrial Emissions Directive (the IED, or the Directive) was agreed in 2010 and replaces the Integrated Pollution Prevention and Control (IPPC) Directive[14] as well as a number of directives applying to specific sectors (large combustion plants, waste incineration and co-incineration plants, installations and activities using organic solvents, and installations producing titanium dioxide). Installations and activities that are covered by the IED (mainly major industrial activities, such as chemical and energy installations, as well as certain intensive farming operations) need a permit from the national regulator, and the Directive provides detailed information on the sorts of things that must be considered for inclusion in the permit. GMOs have been subject to an authorisation process in the EU since 1990, but public alarm at the prospect of their widespread marketing meant that between 1998 and 2004, the EU essentially abandoned its regulatory framework. Rather than insisting that the earlier legislation be implemented, the pause in authorisations was used to negotiate a new process for the authorisation of GMOs at the EU level, which was put in place in the early years of the twenty-first century.[15]

These two cases illustrate many of the dimensions of complex authority in EU environmental law. I consider the complexity of authority at three stages in this chapter. First, in respect of both industrial emissions and GMOs, there is an initial sharing of authority rather than a binary allocation of authority to *either* the EU *or* the Member State. 'Integrated' administration is a pervasive feature of EU law[16] and a familiar (if perhaps under-explored) phenomenon in EU environmental law.[17] In the case of GMOs, authority is shared through a collaborative dynamic that is formally built into the legislative framework and is arguably central to the role of the established institution of comitology. In the case of industrial pollution, collaboration initially evolved in less formal institutions, beyond the terms of legislation.

[14] Above n 2.
[15] Above n 1.
[16] Hofmann and Türk (n 7). For a discussion of 'shared' administration, see also P Craig, *EU Administrative Law*, 2nd edn (Oxford, Oxford University Press, 2012).
[17] J Scott and J Holder, 'Law and New Environmental Governance in the EU' in de Búrca and Scott (n 6) 236 reject the notion that there is 'zero sum game' between the Member State and the EU.

Each of the two examples of GMOs and industrial pollution provide an indication of what can happen when the initial sharing of authority 'fails'.[18] The perceived failure of cooperation smokes out authority, in the sense of forcing an assessment of who has the final word. But at this second stage of the story, the attempt to exercise that authority, in both cases discussed here, remains contested, ambiguous and, to some extent, ineffective. This leads to a further chapter in the story, in which there is a formal effort to alter the distribution of authority through legislation. The IED purports to enhance centralisation and proposed changes to the rules on GMO cultivation purport to de-centralise authority. Neither of these self-conscious efforts to change the allocation of authority is straightforward, and simple lines between central and national authority remain elusive. In what follows, I explore in turn each of these (somewhat stylised) three stages: the collaborative elements of the governance of industrial emissions and of GMOs; the efforts to assert exclusive authority in both cases; and, finally, the efforts to re-distribute that authority through legislation. The differences and similarities between the two areas selected allow for tentative comparative conclusions to be drawn around the persistence (and necessity and desirability) of ambiguous authority, and the response of different actors (especially the Commission) in the governance regime. I conclude below with a brief review of some of the implications of these two case studies. Ambiguous authority is a necessary and not undesirable aspect of EU environmental law, and any attempt to eliminate it seems likely to fail.

II. COLLABORATIVE GOVERNANCE AND AMBIGUOUS AUTHORITY

The regulation of both GMOs and industrial pollution relies on institutions that enable collaboration, learning and discussion. Without wishing to add further to the complexity and contestation in the 'naming' of governance,[19] by 'collaborative governance' in the current context, I mean the provision of a forum in which a range of public and private actors are able to work closely and intensively on solving, or even identifying, a common problem.

[18] MA Pollack and GC Shaffer, *When Cooperation Fails: International Law and Politics of Genetically Modified Foods* (Oxford, Oxford University Press, 2009). What we mean by failure might be open to question.

[19] Above n 5. B Karkainnen, '"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping' (2004–05) 89 *Minnesota Law Review* 471 refers to 'contestation over naming rights'. There is an emerging literature on 'collaborative governance', more or less independent of the lines of literature referred to in n 5; see, eg, C Ansell and A Gash, 'Collaborative Governance in Theory and Practice' (2007) 18 *Journal of Public Administration Research and Theory* 543. Jody Freeman sees collaborative governance as an escape from an adversarial model of interest representation in a specifically US context: 'Collaborative Governance in the Administrative State' (1997–98) 45 *University of California at Los Angeles Law Review* 1. There are obvious distinctions between that context and the current chapter.

It implies something more than mere consultation, given the potential for deliberation and interaction; and something less than public participation, given that participation is not open to all.

The shape of the governance regime is different for GMOs and industrial pollution. The collaborative governance in respect of industrial pollution puts flesh on the bones of a framework standard ('best available techniques' (BAT)), which the Directive requires national (or local) regulators to impose, through their permitting system, on regulated activities. GMOs are goods, and so internal market rules are central, and parties collaborate around the decision to authorise (or not) any particular GMO at EU level. In the case of industrial emissions, multi-level collaboration mediates a local decision; in the case of GMOs, multi-level collaboration mediates an apparent centralisation of authority.[20] Whilst it will not be discussed here, it is useful to note at this stage the important but uncertain role of the 'local': sub-national authorities have strongly asserted their stake in the regulation of GMOs[21] and whether the regulator enjoying the flexibility of BAT is national, regional or local depends largely on national constitutional and institutional arrangements.

A. GMOs

All GMOs must be authorised before they are released into the environment or placed on the market in the EU. The detail of the authorisation process varies depending on whether the GMO in question is to be used in food or (animal) feed, or not, and whether the applicant wishes to seek authorisation for cultivation. Most applications so far have been for GM animal feed, authorised under the 2003 Food and Feed Regulation, subject to some provisions of the 2001 Deliberate Release Directive if cultivation is included in the application.[22] The legislation builds in multiple opportunities for collaboration and deliberation between the Member States, and between the Member States and the central institutions.[23]

The applicant prepares a risk assessment of its GMO, which is the subject of an Opinion from the European Food Safety Authority (EFSA). EFSA's technical risk assessment role represents a certain centralisation

[20] Going back a step, the GMO legislation cited above (n 1) was a 'centralising' response to the dramatic collapse of the 'mutual recognition' approach in the earlier legislation.

[21] J Hunt, 'Ploughing their Own Furrow: Subnational Regions and the Regulation of GM Crop Cultivation' (2012) 13 *Cambridge Yearbook of European Legal Studies* 135.

[22] Above n 1. See Joined Cases C-58/10 to 68/10 *Monsanto v Ministre de l'Agriculture et de la peche* [2011] ECR I-7763. Those rare applications that are made under the Deliberate Release Directive alone are also subject to collaborative arrangements. For detail, see Lee (n 3).

[23] For detailed discussion of the opportunities, see P Dabrowska, 'EU Governance of GMOs: Political Struggles and Experimentalist Solutions?' in Sabel and Zeitlin (n 6). See also Lee (n 13) 2010.

of scientific authority at the EU level. Its Management Board, Scientific Committee and scientific panels are all independent of the Member States: there is no sense, for example, of an even-handed national 'representation' on the 19-member GMO panel.[24] There is, however, significant national involvement in the EFSA. First, an Advisory Forum,[25] described by Elen Vos as an 'inter-Member-State platform where information about possible risks is exchanged and knowledge pooled' and composed of representatives of national regulators, is supposed 'to advise … to constitute a mechanism of exchange of information, and to ensure close cooperation'.[26] Second, EFSA is required to promote 'the European networking of organisations',[27] with the potential to forge links between national actors and EU actors. Consistently with the early approach to multi-level governance, this could side-step the national government, subject to the existence and status of independent regulators in the Member State.[28] In the context of GMOs, EFSA has formed the 'GMO ExtraNet', members of which are provided by relevant national agencies or ministries.[29] 'Network members provide comments and questions on applications', which EFSA claims 'have assisted the EFSA GMO panel to pinpoint weaknesses and strengths in applications and have been useful in the context of the risk assessment'.[30] And, third, EFSA is required to 'exercise vigilance' in respect of 'any potential source of divergence' between its scientific opinions and those of other bodies.[31] It has to contact the body in question to ensure the sharing of scientific information. EFSA and this body must either resolve the divergence or prepare and publish a joint document 'clarifying the contentious scientific issues and identifying the relevant uncertainties in the data'. Positively, this process exposes disagreement and uncertainty to public and expert scrutiny

[24] Four members of the GMO panel are British. See, eg, www.efsa.europa.eu/en/gmo/gmomembers.htm. Members of the scientific panels are appointed for a three-year renewable period and so maintain their close connections with their employers; most members of the GMO panel are based in universities or research institutes, or in national regulatory authorities.

[25] Regulation (EC) 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 1/1 (General Food Law), art 27.

[26] E Vos, 'Responding to Catastrophe: Towards a New Architecture for Food Safety Regulation?' in Sabel and Zeitlin (n 6) 155; General Food Law (n 25) recital 44. See also D Chalmers, '"Food for Thought": Reconciling European Risks and Traditional Ways of Life' (2003) 66 *MLR* 532.

[27] General Food Law (n 25), arts 36 and 23(g).

[28] Note the formal legislative status of these networks. See B Eberlein and AL Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union' (2008) 21 *Governance* 25.

[29] EFSA, Decision concerning the establishment and operation of European Networks of scientific organisations operating in the fields within the Authority's mission (2010). Available at: www.efsa.europa.eu/en/gmo/gmonetworks.htm.

[30] EFSA, Scientific Network for Risk Assessment of GMOs (2009). Available at: www.efsa.europa.eu/en/gmo/gmonetworks.htm.

[31] General Food Law (n 25) art 30.

and comment, as well as providing an opportunity for consensus. Sabel and Zeitlin interpret the publication of continued disagreement as an incentive to reach agreement, since either side 'could lose the debate in full public view'.[32] This highlights the danger, running through all encouragement of scientific consensus,—that premature agreement (in this case for reputational reasons) could mask uncertainty.[33] Admittedly, premature agreement seems a rather distant danger in respect of GMOs.

These interventions in any centralisation that might be inherent in the empowerment of an EU agency are supplemented by obligations applying specifically to GMOs. Depending on the precise content of the application, national risk assessors either may or must be consulted on the risk assessment, or are requested or required to carry it out.[34] This provides another important opportunity for the incorporation of national perspectives on risk assessment and could blur the boundaries between 'central' and 'national' institutions. EFSA is required to state the reasons for its opinion, explicitly including the information on which the opinion is based, in turn including the responses of consulted competent authorities.[35]

Following this risk assessment stage, the final decision on authorisation is taken by the Commission with comitology committees. The Commission submits a draft decision to the comitology committee, 'taking into account the opinion of the Authority [EFSA], any relevant provisions of Community law and other legitimate factors relevant to the matter under consideration'.[36] In fact, the Commission relies very heavily on EFSA decisions.[37] Comitology is a classic institution of multi-level governance in the EU: 'new old governance',[38] a 'building block of networked deliberation'.[39] GMOs have, however, been a challenge for comitology and seem to resist its

[32] CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' in Sabel and Zeitlin (n 6) 13. Vos (n 26) notes that this provision has never been used.

[33] It should not be thought that Sabel and Zeitlin are naively pro-consensus: deliberation is as much about the 'elaboration of difference' as it is about consensus: CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271, 274.

[34] Food and Feed Regulation (n 1) art 6(3). EPEC Report to DG Sanco, 'Evaluation of the EU Legislative Framework in the Field of Cultivation of GMOs under Directive 2001/18/EC and Regulation (EC) No 1829/2003 and the placing on the market of GMOs on or in products Under Directive 2001/18'; the Final Report (2010) found 'broad acceptance that it would be helpful to widen [Member State] participation in the risk assessment process' (20). But note that EFSA has not always found willing national risk assessors: European Commission, 'Report on the Implementation of Regulation 1829/2003 on Genetically Modified Food and Feed' COM(2006) 626 final, 10.

[35] Food and Feed Regulation (n 1) art 6(6).

[36] Ibid art 7(1).

[37] Not just in respect of GMOs: see Vos (n 26).

[38] J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1, 2.

[39] Sabel and Zeitlin (n 33) 279.

qualification as an institution for collaboration or indeed for 'deliberative supranationalism'.[40] The Member States have been consistently unable to reach a qualified majority either to support or reject the Commission's draft decision. To the extent that networking by and within EFSA is expected to lead to a consensus (in the sense of a decision that everyone can live with rather than a decision that everyone likes) around EFSA's Opinion, collaboration has failed. Nor is there consensus on the appropriate response to that Opinion. Between 2004 (the first GMO authorisation after the collapse of the system in 1998)[41] and the post-Lisbon changes to comitology, all authorisations of GMOs were granted by the Commission in the absence of a decision from either the Committee or the Council. Further opportunities for discussion have now been built into comitology, and the role of the Council has been replaced with a supposedly less political 'Appeal Committee'.[42] But so far, authorisations have all been granted in the absence of a decision from either the Committee or the Appeal Committee.[43] In the absence of such a decision, the Commission 'may' adopt its draft decision.[44] But the contested nature of the Commission's exercise of authority is vividly apparent, as discussed below.

B. Integrated Pollution Prevention and Control

The predecessor to the IED, the IPPC Directive, was held up as exemplary of a general and purposeful flexibility in the local implementation of EU standards, reflecting the highly diverse environmental conditions around the EU.[45] The flexibility in the IPPC Directive was constrained both by procedural requirements on regulators and by some fixed environmental

[40] C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Process: The Constitutionalisation of Comitology' (1997) 3 *European Law Journal* 273. This conclusion does not mean that comitology is incapable of instituting such deliberation in other areas: see, eg, P Craig, 'Integration, Democracy and Legitimacy' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011).

[41] Discussed in Lee (n 3).

[42] Regulation (EU) 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13, especially art 5.

[43] The Lisbon Treaty approach applied from 2012. Authorisation decisions can be found on the GMO register: http://ec.europa.eu/food/dyna/gm_register/index_en.cfm. See, eg, Commission Implementing Decision 2012/82/EU of 10 February 2012 as regards the renewal of the authorisation for continued marketing of products containing, consisting of, or produced from genetically modified soybean 40-3-2 (MON-Ø4Ø32-6) pursuant to Regulation (EC) 1829/2003 OJ [2012] L40/14, recital 19.

[44] Regulation (EU) 182/2011 (n 42) art 6.

[45] J Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU' in J Scott and G de Búrca (eds), *Constitutional Change in the European Union* (Oxford, Hart Publishing, 2000).

quality and emissions standards, but the principle of local diversity was significant.

The central requirement of the IPPC Directive was that regulators ensure that installations comply with and meet the emission standards achievable by BAT. BAT was an open-ended standard:

> [T]he most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and the impact on the environment as a whole.[46]

The Directive indicated the sorts of things that national regulators should take into account when requiring regulated parties to comply with BAT, but not how they should be weighed up or what would be an appropriate response in any particular case.[47] However, a process for the more detailed specification of BAT emerged, beyond the terms of the legislation. BAT reference notes (BREFs) set out BAT for particular sectors or issues, and are written by committees composed of representatives of the Member States, industry and environmental interest groups. The BREF writing process (the Seville process, so called for the location of the IPPC Bureau)[48] broadened the range of participants in environmental norm generation or, at least, if these actors would always have been consulted, engaged them in a different and more direct, probably more deliberative[49] way.

The Seville process has produced a large number of BREFs and to that extent might be deemed a success, a demonstration of high levels of collaborative problem definition and problem solving.[50] Under the IPPC Directive, the BREFs were not formally binding on the Member States, but were simply a factor to take into account when determining BAT in any particular case.[51] The explicit role of the Seville process was information exchange, which in turn generated agreement on the meaning of BAT in particular contexts. Another implicit aim seems to have been to coordinate national approaches to industrial pollution (BAT) when straightforward harmonisation seemed unworkable. In this respect, Seville was not a success.

[46] Council Directive 96/61 (n 2) art 2(11); 'best', 'available' and 'techniques' are also defined in art 2(11).

[47] Scott (n 45).

[48] http://eippcb.jrc.es.

[49] Bettina Lange's study of the workings of the Bureau suggests a mixture of private interest bargaining and public interest deliberation: B Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge, Cambridge University Press, 2008) ch 5.

[50] The BREFs are generally adopted by consensus, although there is provision for 'split views' to be recorded: see, eg, Reference Document on Best Available Techniques in Common Waste Water and Waste Gas Treatment/Management Systems in the Chemical Sector (February 2003).

[51] Council Directive 96/61 (n 2) Annex IV. On soft law within hierarchical legislation in other sectors, see C Scott, 'The Governance of the European Union: The Potential for Multi-Level Control' (2002) 8 *European Law Journal* 59.

The Commission is concerned, as discussed below, by the failure of Member States to apply BREFs consistently in a common European approach to BAT.

C. Collaborative Governance: Conclusions

'Collaborative governance' is not presented here as a new or free-standing theory of governance; it is intended simply to describe and highlight the potentially productive implications of ambiguous authority. The two cases of collaborative governance discussed in this section are very different (the actors involved, the formality of the forum, the nature of the decision sought) and I would not want to over-state the similarities. But in their own ways, the elaboration of BREFs and the authorisation of GMOs provide models of governance that might be characterised as new, collaborative or experimental. They include diverse (although restricted) actors, in a non-hierarchical framework, and provide multiple opportunities for collaboration, even if those opportunities are not always taken. Learning—the sharing of knowledge and information for decision making—is crucial. The sharing of authority and the difficulty of asserting the 'European' or 'national' identity of a process is resonant of multi-level governance. In one case, this is in a context of centralisation, in the other of de-centralisation. In neither case does the collaboration provide for any easy consensus over implementation. The intention here is not to critique or condemn the theories of collaboration, or to assert the disintegration of integrated administration;[52] on the contrary, Seville would appear to have been rather effective at sharing knowledge and generating norms, and the persistence of disagreement over GMOs by no means undermines the capacity of collaboration and deliberation in less fraught areas. But the perceived failure of collaboration in these cases provides the opportunity to explore what happens next.

III. A REVERSION TO HIERARCHY?

The difficulties of sharing authority forces us to face squarely the dilemma of authority. In both cases, the apparent failure of the collaborative frameworks led to an effort to revert to hierarchy, in the sense of first identifying the allocation of ultimate authority embedded in the treaties and the legislative regime, and then attempting to assert that authority. In the case of industrial emissions, this has involved the Commission trying to enforce its own interpretation of BAT; in the case of GMOs, the Commission has

[52] Above n 16.

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attempted to enforce its own formal capacity to take final decisions. For current purposes, hierarchy speaks to the ability of one party or institution to assert its authority (politically and legally) over another—an exclusivity of authority that does not need to be negotiated or shared, but can simply be asserted. Hierarchy, and the exercise of exclusive authority, has not been straightforward or unambiguous in respect of either GMOs or industrial emissions.

In the case of GMOs, as discussed above, the Commission takes the final decision, notwithstanding disagreement. But the sensitivity of the marketing and cultivation of GMOs to various publics in some Member States means that decisions on GMOs remain slow, contested and inconclusive. First of all, the Commission (and possibly industry) avoids putting the Member States to the test in respect of applications for the cultivation of GMOs: only one GMO has been authorised for cultivation in the EU since 2004, a potato (Amflora) for industrial use. Five years passed between EFSA Opinion and authorisation, which was finally granted under the threat of legal action.[53] Similarly, the Commission simply allowed the deadline for rejecting Portugal's notification of restrictions on the cultivation of GMOs in Madeira to pass, with the result that Portugal was able to introduce its restrictions.[54] Second, decisions seem not to be treated as final, with a number of Member States applying barriers to the use of GMOs.[55]

The failure of attempts to rely on hierarchy in the case of industrial emissions is a little less dramatic, but is also revealing. If the aim of the Seville process had been to share dispersed learning at the EU level and contribute to problem solving, then it has arguably been successful. But if the objective was the common implementation of BAT around the EU, it has fallen short. Whatever the success of the collaboration at the EU level, the softer approach to harmonisation failed to stimulate the loyalty of national regulatory actors.

[53] EPEC (n 34) 51. See also Commission Decision 2010/135 of 2 March 2010 concerning the placing on the market, in accordance with Directive 2001/18/EC of a potato product (Solanum tuberosum L. line EH92-527-1) genetically modified for enhanced content of the amylopectin component of starch [2010] OJ L53/11.

[54] The Commission requested more scientific information from the EFSA: Commission Decision 2009/828/EC of 3 November 2009 relating to the draft regional legislative decree declaring the autonomous region of Madeira to be an area free of Genetically Modified Organisms, notified by the Republic of Portugal pursuant to Article 95(5) of the EC Treaty [2009] OJ L294/16. The period within which the Commission could object expired on 4 May 2010.

[55] Six countries are listed as applying safeguard clauses on the Commission's website (http://ec.europa.eu/food/plant/gmo/safeguards/index_en.htm). The restrictions introduced by Poland and Italy are referred to below, but have not taken the form of safeguard measures and so do not appear on this list. Many Member States have implemented coexistence measures, some of which are highly restrictive. Some of these restrictions are legally questionable.

Those who collaborate in Seville are perhaps not always well connected with those expected to apply the shared learning.[56]

Prima facie, authority for the application of BAT lay with the Member States under the IPPC Directive: BREFs were not binding, but BAT, as defined in the legislation (vaguely, and as much procedurally as substantively), was. The IPPC Directive was not intended to provide uniform substantive environmental standards, but acknowledged the principle that varied local conditions require varied local environmental regulation. This national authority was resisted (or at least its exercise in good faith was doubted), and the Commission asserted its own authority to bring enforcement action against standards lower than those set out in the BREFs.[57] It expressed concern that 'permits issued for implementing the IPPC Directive often include conditions that are not based on BAT as described in the BREFs with little, if any, justification for such deviation'.[58] The Commission did indeed possess the authority to ensure that BAT was implemented in the Member States, and its interpretation of BAT was heavily dependent on the technical Seville process (just as the Commission depends heavily on EFSA in the regulation of GMOs). But establishing a breach of the obligation to apply BAT required not just establishing a failure to apply a BREF, but a sophisticated analysis of the Member State's actual interpretation and application of BAT.[59] The structure of the legislation, with open-ended norms and deliberate flexibility for the regulator, made the Commission's exercise of authority very difficult.

Importantly, we should not be surprised that these efforts to call on authority are problematic. The dispersal of authority and provision of opportunities for collaboration and deliberation are precisely an effort to overcome the limitations of a strictly hierarchical approach. Turning back to a single site of uncontested authority is difficult. This resonates with Weiler's observation that the hierarchy of norms in EU law, of EU law trumping national law, 'is not rooted in a hierarchy of normative authority

[56] There is an interesting empirical question as to the circumstances in which those represented in Seville apply BREFs even in the absence of permit obligations.

[57] N Emmott, S Bar and RA Kraemer, 'Policy Review: IPPC and the Sevilla Process' (2000) 10 *European Environment* 204.

[58] European Commission, 'Proposal for a Directive on industrial emissions (integrated pollution prevention and control) (Recast)' COM(2007) 843 final, 9; European Commission, 'Report on the implementation of Directive 2008/1/EC concerning integrated pollution prevention and control and Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations' COM(2010) 593 final, 4.

[59] Whilst there are no cases on failure to apply BREFs, the Commission has brought a number of actions against a failure to impose authorisation requirements under the Directive by the deadline: see, eg, Case C-48/10 *Commission v Spain* ECR I-151.

or in a hierarchy of real power'.[60] Even the legal hierarchy is complicated: contested in the case of GMOs by the national application of safeguard clauses and Article 114 TFEU, and to at least some degree legislatively allocated to local regulators under the IED. The 'surprisingly stable political polity' that Weiler remarks upon is apparent in the routine disagreement over industrial pollution; there is greater potential for disruption in the rare, more threatening case of GMOs.

IV. AN AMBIGUOUS SHIFT IN AUTHORITY

The limitations of a reversion to hierarchy might suggest a need to return to shared authority and to try harder at collaboration. We might indeed imagine an intensive process in which national regulators are convinced of the value of BREFs, effectively extending the Seville collaboration into the national regulators. Equally, however, it is hard to imagine that more deliberation will lead to an outbreak of peace over GMOs. But the next step in both of these stories is legislative, an explicit alteration of the allocation of authority. The successor to the IPPC Directive, the IED, makes BREFs a mandatory element of national permitting. And a proposed amendment to the GMO legislation grants Member States the option to restrict cultivation of an authorised GMO. These hard law responses may be seen as a failure of new governance. But, equally, they could be seen as 'experimentalism' in action, in which 'soft' law turns out to have been a 'first step on a path to … hard law'.[61] Without wishing to suggest any superiority of 'hard' over 'soft' law (or indeed the clarity of any line between the two), in the case of industrial emissions, the apparently successful negotiation of BREFs means that they can now become a mandatory aspect of regulatory approvals. The chaos of post-authorisation national resistance to GMOs can only euphemistically be described as 'soft' law; nevertheless, that resistance is purportedly formalised through legislative change. In neither case, however, and in keeping with the theme of this chapter, is the claimed harmonisation or de-harmonisation quite as simple as it seems.[62] Authority remains ambiguous.

[60] J Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg' in K Nicolaidis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (Oxford, Oxford University Press, 2001). From a different perspective, see M Kumm, 'Beyond Golf Clubs and the Judicialisation of Politics: Why Europe Has a Constitution Properly so Called' (2006) 54 *American Journal of Comparative Law* 505, 517: 'Focussing on the Schmittian question—who has the final say?—misses the point. It obscures the remarkable fact that in Europe the everyday enforcement of European law is guaranteed by national constitutional provisions and their interpretation by national courts.'

[61] DM Trubek, P Cottrell and M Nance, '"Soft Law", "Hard Law" and European Integration: Toward a Theory of Hybridity' University of Wisconsin Legal Studies Research Paper No 1002/2012.

[62] See also G de Búrca, 'Setting Constitutional Limits to EU Competence' Francisco Lucas Pires Working Papers Series on European Constitutionalism, Working Paper 2001/02, on the limits of Treaty allocation of authority.

A. Industrial Emissions and Increased Harmonisation

Article 11 of the IED, like the IPPC Directive before it, requires BAT to be applied in the Member States. But Article 14(3) provides that the BREF (specifically the 'BAT conclusions' set out in the BREF), are '*the* reference' for setting permit conditions rather than simply one factor.[63] In addition, Article 15(3) requires that 'emission limit values' (ELVs) are at least as strict as those associated with the BAT conclusions.[64] Important local flexibility, however, survives the IED. First, the harmonised norms remain open-ended in certain respects.[65] In particular, it is not always easy to read across from BAT conclusions to permit conditions, meaning that their mandatory legal status does not remove regulatory discretion, or make the implementation or enforcement of BAT a simple technical matter. The BAT conclusions on iron and steel production, for example, contain some clear, quantitative ELVs, which provide a hard-edged standard for regulators.[66] But even these are expressed as ranges, which 'may reflect the differences within a given type of installation (e.g. differences in the grade/purity and quality of the final product, differences in design, construction, size and capacity of the installation)', demanding regulatory judgment in respect of the particular regulated party. The BAT Conclusions also contain qualitative standards, for example, as to environmental management within the organisation, which could be directly incorporated into a permit. But in other cases, for example, on appropriate energy efficiency techniques, the specific requirement 'depends on the scope of the process, the product quality and the types of installation'.[67] Furthermore, different methodologies might be applicable at the EU and national levels. For example, 'average acidification potential' is used at the EU level, but that is explicitly not appropriate 'when the location of the proposal is known'.[68] So BAT conclusions using average acidification potential cannot be simply applied, but need to be judged on a case-by-case basis.

[63] Article 14(3). A regulator can set permit conditions on the basis of BAT not found in the BAT conclusions without breaching the Directive, provided that environmental protection is at least as high as under the BAT conclusions (arts 14(5) and 15).

[64] The hardened legal status of the BREFs has led to an increased legislative focus on the way in which they are drawn up, and hence greater formality of the Seville process. The final decision on BAT Conclusions is subject to comitology.

[65] The European Environmental Bureau, 'New Features under the Industrial Emissions Directive' (2011) 10 criticises the BREFs on the basis that it is 'difficult to derive ELVs for permit writers'; Lange (n 49) ch 6 distinguishes between 'open' and 'closed' standards.

[66] Commission Implementing Decision 2012/135/EU of 28 February 2012 establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions for iron and steel production [2012] OJ L70/63.

[67] Ibid 70.

[68] BREF on Economics and Cross-Media Effects (2006) [2.5.4]; see also [2.6.4] on general 'screening for local effects'.

Second, the Directive provides explicitly for local derogation. Article 15(4) provides for derogation if applying the ELVs associated with BAT conclusions would lead to 'disproportionately higher costs compared to the environmental benefits', because of the 'geographical location', the 'local environmental conditions' or the 'technical characteristics' of an installation. The derogation is subject to compliance with statutory harmonised environmental quality standards and statutory harmonised EU emission limit values. Article 15(4) also demands that there be 'no significant pollution' and 'a high level of protection of the environment as a whole'. With the exception of the quantitative environmental standards, the conditions for the operation of Article 15(4) are potentially difficult to pin down and enforce. The Commission will consider whether to issue guidance to 'further clarify … the criteria to be taken into account'.[69] The use of Article 15(4) is also subject to procedural constraints: the exercise of regulatory discretion must be publicly justified.[70] Notwithstanding these constraints, a good deal of flexibility survives in Article 15(4).

The shift of emphasis in the IED, by enhancing the mandatory legal status of the BREFs, may well in some cases simplify the implementation of BAT and achieve some increased harmonisation; I would not want to suggest that hierarchy is redundant. But for the current purposes, the IED demonstrates that simply making a standard mandatory does not necessarily achieve the exclusive allocation of authority. National regulators still have a crucial and difficult evaluative role under the IED, and monitoring and enforcement is still likely to be challenging. This is because some ambiguity in authority is a necessary part of adequately sophisticated and flexible EU environmental norms. The likelihood is that the hard law revision introduced by the IED will only have the intended effect if further collaborative and learning techniques are used alongside it; the users of the EU level norms (regulators, regulated parties and third parties such as environmental interest groups) need to be convinced that those norms are valuable.

B. GMOs and De-harmonisation

In principle, a GM seed authorised in the EU can be grown anywhere in the EU, and food or feed can be sold anywhere. In 2010, the Commission announced a 'new approach' to national freedom of action in respect of the cultivation of GMOs. This was explicitly framed around the problematic

[69] Article 15(4).
[70] Articles 15(4) and 24(2)(f). There is also periodic reporting to the Commission: see especially art 72(1).

authorisation process for GMOs in the hope that national autonomy after authorisation will reduce disagreement and make authorisation easier.[71]

The Commission proposal is to introduce a new Article 26b to the Deliberate Release Directive.[72] Even if the proposal never makes it through the legislative process,[73] it provides interesting insights into the nature of harmonisation and autonomy in the EU. Under the current legislation, authorised GMOs, including seeds, prima facie enjoy free movement around the EU and, in principle, an authorised seed can be grown anywhere.[74] Proposed Article 26b, headed 'cultivation', allows, apparently, the Member States greater freedom to restrict the cultivation of GMOs in their territory:

> Member States may adopt measures restricting or prohibiting the cultivation of all or particular GMOs authorised in accordance with … this Directive or [the Food and Feed Regulation] … in all or part of their territory, provided that:
>
> (a) those measures are based on grounds other than those related to the assessment of the adverse effect on health and environment which might arise from the deliberate release or the placing on the market of GMOs; and,
> (b) that they are in conformity with the Treaties.

Measures must be 'reasoned' and communicated in advance.[75]

There are a number of limitations to the proposed 'de-harmonisation'. First, the proposal applies only to cultivation. Cultivation is certainly the area in which the Member States have the greatest concerns, but this ignores the bulk of applications, which currently exclude cultivation from their scope and which are also subject to stalemate in comitology.[76] Second, restrictions on cultivation can only be based on non-environment, non-health-related concerns.[77] Therefore, the undoubtedly significant disagreements over the risk assessment process are not addressed by proposed Article 26b. The Member States disagree (between themselves and with EFSA and the Commission) about the interpretation of scientific evidence

[71] European Commission, 'Freedom for Member States to decide on the cultivation of genetically modified crops' COM(2010) 380 final.

[72] European Commission, 'Proposal for a Regulation amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory' COM(2010) 375 final.

[73] No agreement was reached at the 3152nd Council Meeting Environment, 9 March 2012.

[74] It is a little more complicated than that, in particular with respect to coexistence between organic, conventional and GM crops. For discussion, see Lee (n 13).

[75] The 'standstill period' in Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services [1998] OJ L204/37 does not apply.

[76] All GMO authorisations in 2012, none of which were for cultivation, were made by the Commission, following a failure to reach a qualified majority either way in committee or appeal committee.

[77] It may be arguable that because art 26b refers to the 'assessment' of environment and health, anything not covered in the EFSA risk assessment could be revisited.

and the significance of risks and uncertainties in terms of which uncertainties are worth bearing in mind, as well as which risks are worth bearing.[78] National action on environment or health will have to go through the very restrictive safeguard clause in the Food and Feed Regulation (which according to the Court in Monsanto (France) has nothing to do with national autonomy)[79] or Article 114 TFEU, which is also narrowly interpreted in the context of GMOs. Article 26b would, however, capture important questions that are not related to environment or health protection, for example, around interference with nature, enhanced corporate control over the food sector, and economic dislocation for small or organic farmers.[80] Concern that an EU insistence on the cultivation of GMOs implies a capital-intensive agricultural system that disadvantages traditional small, family farming or organic production, whilst needing to be argued and evidenced, is not simply irrational. Countries like Austria have so far been unable to find a space for these sorts of concern in the regulatory system. The Commission's legal opinion on its proposal describes Article 26b as being 'designed to tackle the issue of safeguard clauses adopted to address concerns not related to health and/or environmental protection'.[81]

The third, and most significant, limitation on national autonomy is the need to comply with internal market law. There are some difficult judgments in respect of when restrictions on the use of goods fall under Article 34 TFEU.[82] However, a complete ban on cultivation in a region or a whole national territory would have 'a considerable influence on the behaviour of consumers', such as to 'greatly restrict' the use of GM seeds,[83] and so would probably fall straightforwardly within Article 34. In these circumstances, the exercise of national autonomy under Article 26b depends, first, on the legitimacy of the (non-environmental, non-health) objective pursued

[78] EPEC (n 34) 52 notes continued 'frustrations with the current risk assessment practice' and concern that 'regional specific circumstances and conditions regarding environment, health and long term effects are not sufficiently acknowledged by EFSA'.

[79] Above n 22. For discussion, see Lee (n 13).

[80] See Lee (n 3).

[81] European Commission, 'Considerations on Legal Issues on GMO Cultivation raised in the Opinion of the Legal Service of the Council of the European Union of 5 November 2010 (Staff Working Document)' SEC (2010) 1454 final [20]. The EPEC (n 34) 52 found that 'there is a general understanding amongst most Member States and consultees that the use of national safeguard measures, while presented as having a scientific justification, is sometimes an expression of non-scientific objections to GMO cultivation and of political circumstances'.

[82] See, eg, S Weatherill, 'The Road to Ruin: "Restrictions on Use and the Circular Lifecycle of Article 34 TFEU' (2012) 2 *European Journal of Consumer Law* 359; C Barnard, *The Substantive Law of the EU* (Oxford, Oxford University Press, 2010) 139–41.

[83] Case C-142/05 *Åklagaren v Mickelsson and Roos* [2009] ECR I-4273 [26] and [28] on Swedish restrictions on the use of jet skis.

by the Member State, either under Article 36 TFEU or the *Cassis de Dijon* mandatory requirements doctrine.[84]

Without always distinguishing clearly between the open-ended 'public morality' and 'public policy' limbs of Article 36 and the mandatory requirements doctrine,[85] the Court's case law does suggest that a wide range of objectives can be legitimately pursued by the Member States. The Sunday Trading cases, for example, established that rules that 'reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics' pursued legitimate objectives.[86] Restrictions on gambling might legitimately aim at protecting consumers (and specifically reducing gambling addiction) and controlling fraud, or even preventing 'private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune'.[87] The abolition of the Austrian nobility was found to be 'an element of national identity', as well as seeking the 'equality of Austrian citizens', and so the relevant legislation pursued 'legitimate interests'.[88] Two decisions are especially pertinent with respect to GMOs. First, in Ospelt, Austrian restrictions on the ownership of agricultural land were challenged in respect of the free movement of capital. The Court was sensitive to the 'social objectives' of:

> [P]reserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters.[89]

[84] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)* [1979] ECR 649. The European Commission (n 81) provides examples of the sorts of issues that might be at stake: 'public order … preserving cultural and social tradition or … ensuring feasibility of controls or balanced rural conditions'. There is no obvious legal effect to these lists, since they are non-exhaustive, and in any event any measure still has to comply with the treaties.

[85] See, eg, Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505, where the Court moved swiftly between the litigants arguments about public morality and public policy to international legal instruments on the rights of the child. See also P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford, Oxford University Press, 2011) 680.

[86] Case 145/88 *Torfaen BC v B&Q plc* [1989] ECR 385 [14] (pre-dating the line of case law arising out of Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 on whether 'selling arrangements' are captured by art 34 TFEU).

[87] Joined Cases C-447/08 and C-448/08 *Sjoberg* [2010] ECR I-6921 [43]; S Van den Bogaert and A Cuyvers, 'Money for Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48 *CML Rev* 1175.

[88] Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693 [83].

[89] Case C-452/01 *Margarethe Ospelt v Schlössle Weissenberg Familienstiftung* [2003] ECR I-9743 [39]. Note also the public goods associated with organic farming by the European Commission, 'European Action Plan for Organic Food and Farming' COM(2004) 415 final, section 1.4.

And the Commission in the same case 'sees no reason to conclude that preserving, strengthening or creating a viable farming community are less important objectives than regional planning or protection of the environment'.[90] A careful application of this approach could be significant if the limitation on cultivation of GMOs is designed to protect the viability of family farms, or organic farming, bearing in mind the basic principle that economic considerations cannot justify an interference with the free movement of goods, even if the protected national industry provides other public (for example, environmental) benefits.[91] In the second case, Poland tried to rely on ethical and religious requirements to defend a ban on GM seeds against Commission enforcement action, and the Court explicitly left open the question of whether that would be possible in principle.[92]

Whilst possible legitimate objectives extend broadly, their use by the Member States is subject to further restrictions. First, the main significance of the fudging between Article 36 and 'mandatory requirements' is that mandatory requirements in principle apply only to non-discriminatory measures. Determining whether bans on GMOs are discriminatory will raise in particular the question of whether (restricted, 'foreign') GM seeds are 'like' (unrestricted, national) conventional seeds. Given that EU law regulates GMOs as if they are meaningfully different from conventional seeds, it is likely that national measures applying equally to domestic and imported GM seeds are indistinctly applicable.[93] Moreover, the Court applies the requirement for non-discrimination inconsistently, often avoiding it, notably, although not exclusively, in environmental cases.[94]

Second, it is clear that a simple assertion of public morality or ethical concerns would not suffice. The Court rejected Poland's purported religious and ethical justification for a ban on GMOs on the basis that Poland had failed to establish that ethics and religion were the real reason for its measures.[95] The Commission anticipates that the Member States will devote

[90] Ibid, AG's Opinion [96].

[91] Case C-120/95 *Decker* [1998] ECR I-1831 [39]; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV v Minister Van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075 [44].

[92] Case C-165/08 *Commission v Poland* [2009] ECR I-6943 [51]. A Von Bogadandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *CML Rev* 1417 suggest that the religious and ethical concerns associated with GMOs could form part of the Polish 'national identity', protected under art 4(2)TEU; see also *Sayn-Wittgenstein* (n 88).

[93] The situation could be different in WTO law.

[94] F Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18 *Journal of Environmental Law* 185. See also Case C-54/05 *Commission v Finland* [2007] ECR I-2473 regarding road safety, cited by C Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge Law Journal* 575 at note 156; Case C-531/07 *LIBRO* [2009] ECR I-3717, cited in R Craufurd Smith, 'Culture and European Union Law: Always the Bridesmaid, Never the Bride?' in Craig and de Búrca (n 40).

[95] Above n 92.

'more resources and time' to public participation following the introduction of Article 26b: 'Social, economic and ethical aspects are expected to be put on the table and provide the platform for the respective decisions at national, regional or local level.'[96] Whilst it should not be the only acceptable form of evidence, evidence on public opinion may contribute to establishing the genuine connection between, for example, national identity or cultural specificity and restrictions on the cultivation of GMOs. This is not likely to be easy or inexpensive. But the Member State is subject to obligations to articulate the reasons for a decision, supported with good evidence.[97] A consistent approach to the objective pursued, for example, the support of a particular farming structure (small, family farms), is also relevant to the genuineness of the Member State's motivations.[98]

Third, if a Member State establishes that it has legitimate and genuine public interest objectives, it must establish that its measure is proportionate. The precise stringency of 'proportionality' in internal market cases is not clear.[99] The Member State will have to establish, first, a link between the measure introduced and the objective pursued (that is, its effectiveness) and, second, its necessity (that is, the unsuitability of less restrictive measures). The Member State would need to satisfy the Court that its restrictions on GM cultivation would actually contribute to the maintenance of traditional forms of farming (for example) and that no lesser measures would suffice.

In this section, I have tried to articulate a space for national autonomy under the proposed new Article 26b of the Deliberate Release Directive; I think it crucial that we make something like Article 26b work. It should already be clear, however, that this de-harmonisation is anything but straightforward. Cases like *Viking* and *Laval*, which famously condemned national provisions on strikes and collective bargaining on labour conditions because of their impact on treaty economic freedoms, remind us that there is no guarantee of judicial sensitivity to distinctive social values.[100] More pertinently, *Pioneer (Italy)* suggests that proportionality could be a major hurdle to national or regional bans on the cultivation of GM crops. Italy banned cultivation, pending the agreement of measures to ensure the coexistence of conventional and organic crops with GM crops. Whilst AG

[96] European Commission (n 72) [2.2.2].

[97] See also Craufurd Smith (n 94).

[98] The Council Legal Service (5 November 2010, Interinstitutional File 2010/0208 (COD)) goes too far in arguing that it would be difficult to establish that a ban on cultivation is motivated by ethical concerns if the Member State nevertheless allows the sale of meat from animals raised on GM feed. There may be good reasons for a different approach, not least the limitations of art 26b.

[99] The stringency of the approach can vary: see, eg, Jacobs (n 94). In preliminary references, the ultimate finding on proportionality is generally left to the national courts.

[100] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779; Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

Bot agreed that it is 'not inconceivable' that sometimes there will be a need to prohibit cultivation in parts of the national territory to ensure coexistence, 'in accordance with the principle of proportionality, such a possibility would be subject to the provision of strict proof that other measures would not be sufficient to control the presence of GMOs in neighbouring conventional or organic crops in that location'.[101]

Finally, we should note that the EU itself is not wholly autonomous on these issues and that the free trade disciplines of the WTO also limit the reality of national autonomy.[102] Pursuing the current theme, significant and ongoing efforts at transatlantic and international deliberation and collaboration over GMOs have not reconciled the disagreeing parties.[103] The WTO background provides some explanation of both the Commission's drastic, de-harmonising response to the refusal of some Member States to accept GMOs and the limits that this imposes on that 'de-harmonisation'. I do not want to attempt a detailed consideration of the WTO rules here.[104] As with the EU internal market, the WTO in principle allows some space for the pursuit of social values, but as with the internal market, that space is highly constrained and will not be simple to use. Pragmatically, it is likely that allowing national autonomy will increase rather than decrease the EU market for GMOs by allowing some Member States to press ahead. Any insistence that countries and regions cannot respond to the concerns of their citizens about the implications of GMOs may contribute to challenges to the legitimacy and authority of EU and international trade law.

V. THE AMBIGUITY OF AUTHORITY IN EU ENVIRONMENTAL LAW: CONCLUSIONS

The theoretical landscape for this discussion is, as noted above, crowded. The diversity of theoretical perspectives indicates not only the difficulty of accounting for the shape of EU integration, but also the importance of

[101] Case C-36/11 *Pioneer Hi Bred Italia Srl v Ministerio dell Politiche agricole, alimentary e forestali*' [2012] ECR I-000 [61]. Note that new Commission guidelines on coexistence do envisage restrictions on cultivation that cover 'large areas': European Commission, 'Recommendation on guidelines for the Development of National Co-existence measures to Avoid the Unintended Presence of GMOs in Conventional and Organic Crops' [2010] OJ C200/1.

[102] European Commission (n 72) recital 8; European Commission, 'Complementary Considerations on Legal Issues on GMO Cultivation Raised in the Opinions of the Legal Service of the Council of the European Union of 5 November 2010 and of the Legal Service of the European Parliament of 17 November 2010—WTO Compatibility (Staff Working Paper)' SEC (2011) 551 final.

[103] Pollack and Shaffer (n 18).

[104] There is an enormous literature since the Panel decision on GMOs. See, eg, Pollack and Shaffer (n 18); J Peel, 'A GMO by Any Other Name … Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement' (2007) 17 *European Journal of International Law* 1009.

accounting for different approaches in different areas. Given the absence of any very neat way of understanding the dynamics of EU harmonisation, this chapter contributes fresh case studies, raising specifically the question of what is done when opportunities for collaboration do not lead to a common approach. One might feel a little overwhelmed by the proliferation of case studies in this area. Some conclusions, if tentative, must be drawn.

First, any remaining enthusiasm among environmental lawyers for overly clear dichotomies falters in the face of a close consideration of practice. Some might enthusiastically seek the death of new or multi-level governance in these case studies. But industrial emissions and GMOs also demonstrate the limitations of hierarchy. This is not to say that we are anywhere near the end of hierarchy, of course; sometimes, hierarchy may be exactly what is needed. But to describe authority as ambiguous is not a negative judgment. Some ambiguous sharing of authority may well be inevitable; even when we create a framework that looks like a traditional form of hierarchical law, the 'new' governance aspects persist. And ambiguity has positive characteristics, in many cases increasing the opportunities for decisions with which all parties can feel comfortable and allowing for norms that reflect the diversity of ecological, economic and social conditions around the EU.

Second, concerns about legitimacy and accountability are recurring themes when we assess novel approaches to governance.[105] For example, there are real concerns about the process by which BREFs are agreed, which have not been discussed here, in particular the ability to scrutinise adequately the exercise of private power in Seville.[106] And the central role of the Commission in the authorisation of GMOs is at least incongruous when set against the high democratic stakes of the decision. These problems are not different in kind from those we find elsewhere. More specifically, the Commission's misrepresentation of the nature of authority in the cases discussed here is, to say the least, unhelpful. The difficulty of holding actors to account for substantive outputs, when authority is ambiguous, is apparent both in the difficulty of enforcing BAT and in the continued non-application of the law on GMOs. But these case studies suggest that a solution will not be found in a lawyerly search for clear and exclusive authority. Acknowledging the ambiguity of authority means that the role of traditional forms of law is rather more modest. A call for transparency can seem pro forma and banal, and transparency can have its own pathologies.[107] But law should ensure transparency, as well as adequate inclusion in decision-making processes. Information on who takes decisions, and how, is the crucial starting

[105] See, eg, D Curtin, P Mair and Y Papadopoulos, 'Special Issue: Accountability and European Governance' (2010) 33(5) *West European Politics*.

[106] Lee (n 13).

[107] E Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 *Current Legal Problems* 272.

point for any form of legal accountability or, equally importantly here, for political debate and contestation.

Third, the cases discussed here allow us to start to think through the similarities and distinctions between areas of high politics and more routine matters. The industrial emissions example both highlights and qualifies the exceptionalism of GMOs. Yes, GMOs are anomalous in their high political stakes. But ambiguity around authority and harmonisation manifests even in routine and relatively unproblematic areas such as industrial emissions. If GMOs indicate the limits of both cooperation and assertions of hierarchy, industrial emissions suggest the possibility of important stability notwithstanding disagreement and false starts. Failure need not be disastrous, but can form part of an iterative process of learning from experience; ambiguity, far from being rejected, should be embraced.

And, finally, we might go back to the question of what is done when cooperation is perceived to have failed. In both of these cases, authority is initially shared, avoiding single sites of authority and emphasising space for collaboration, discussion and negotiation. But, on the one hand, the problem-solving capacity of collaborative governance does not automatically percolate down to regulators on the ground. And, on the other hand, deliberation can indeed be 'a hothouse flower that flourishes only under restrictive conditions', so that 'the sharp disagreements, intense politicisation and distributive conflicts' around GMOs prevent consensus.[108] But when a common approach does not emerge out of collaboration, the perception that decisions are needed leads to an effort to revert to hierarchy, in the sense of formal direction from the centre. This is no more straightforward, for precisely the reasons that authority was shared in the first case. But the inadequacy of hierarchy in both of the cases here has led to an even more determined effort at the exclusive allocation of authority through legislation. In neither case is legislation alone likely to have the desired effect. People often press for a 'solution' to the GMO impasse; I doubt that there is one. Further deliberation is important, but is not likely to lead to a situation that everyone is content to accept. Enforcing a hierarchical solution, in the sense of exclusive EU authority, will continue to be deeply uncomfortable, raising genuine concerns about the legitimacy and authority of liberalised trade. National authority (reversing the hierarchy if you like) may turn out to be important, and the Commission's proposal, for all its inherent limitations, should be made to work. In the case of the IED, there are greater prospects for success through collaboration. Given the continued necessity for regulatory judgment, a common approach will only follow if regulators

[108] Pollack and Shaffer (n 18), in the context of international, especially transatlantic, efforts at collaboration.

and other national actors (regulated parties, environmental interest groups and local people) are convinced of the value of the BREF.

Searching for clear lines of authority is unhelpful and is bound to be frustrating, precisely because of the reasons for the evasion of clear allocations of authority in the first place.[109] In the case of the IED, context-specific evaluation that defies uniformity remains a necessary part of good decision making. And in the case of GMOs, the political stakes are too high to risk creating clear losers, at least for now.

[109] See also above n 60.

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