Institute for European Environmental Policy UK

Motives for and against divergence by the UK from EU environmental laws

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Summary

In their 'initial reflections' that launched the IEEP post Brexit divergence project, David Baldock and Michael Nicholson touched briefly on the motivation of those interested in diverging from EU legislation, or in staying aligned. This paper adds to that by identifying a number of groups with an interest in divergence and analysing what their motives might be and why they may differ. It also discusses how divergence for reasons of trade and for reasons of environmental protection are intertwined but have to be thought about separately. Additionally, it discusses the different levels at which environmental policy is made and how the UK's freedom to 'take back control of its laws' is circumscribed both by international commitments and by the views and powers of the devolved administrations.

A. Groups with an interest in divergence[1]

1. **The UK Government:** The last general election was won by the political party promising to 'get Brexit done', a Brexit that involved 'taking back control of our laws' (which can mean having higher or lower standards). The UK Government therefore has an obvious interest in divergence, but attitudes within the party and the Government have varied from not wanting to diverge 'for the sake of it' to wanting to get rid of all 'EU red tape'. The attitude of the Government under its present Prime Minister, Rishi Sunak, could become clearer when the Retained EU Law (Revocation and Reform) Bill 2022 is more fully debated (see Section 5 below).

2. **Ideological Brexiters:** These will favour divergence for the reasons given in Section.5 below. They are the drivers of REUL (see Section 5).

3. **Ideological Rejoiners:** These will favour continuing alignment in anticipation of the day when EU law applies in the UK again (see Section 5).

4. **EU Member States and the EU Institutions:** The Trade and Cooperation Agreement (TCA) between the UK and EU requires a level playing field so the EU Member States and EU Institutions

[1] This list of groups ' having an interest in' divergence may be incomplete. IEEP would like to hear of significant omissions. The list does not include people interested in knowing about divergence. Groups 'with an interest in divergence' is here taken to mean those who for economic or other reasons want divergence to happen or to prevent it happening.

(in particular the Commission) have an interest in the UK not lowering standards that affect competition (see Sections 2, 4 and 7).

5. **Neighbouring countries and their publics:** These will object to the lowering of standards if they affect environmental quality in their territory or waters in which they have an interest (North Sea, Irish Sea, English Channel) (see Section 4,7).

6. **Scotland and Wales:** The present Scottish Government aspires to join the EU if it achieves independence and so will be inclined to stay aligned with EU legislation. Wales sees itself as environmentally progressive and will be inclined to favour high standards. There is considerable trade between both Scotland and Wales and the rest of the UK so Scottish and Welsh industrialists will object if any lowering of operating or procedural standards in the rest of the UK leads to distortion to competition (see Section 6).

7. **Northern Ireland:** Under the Northern Ireland Protocol, Northern Ireland remains in the EU single market and all relevant EU legislation has to be followed. Any GB divergence from EU law could provide obstacles to trade between Northern Ireland and Great Britain (see Section 6).

8. **International organisations and the parties to international conventions:** Increasingly environmental policies, both global and regional, are formulated by international organisations and embodied in conventions. The parties to these pronouncements and conventions will need to be satisfied that UK legislation adequately fulfils the commitments made (see Section 4).

9. **UK exporters of products to the EU:** These will not welcome UK product standards diverging from EU standards. They are resisting the replacement of the CE mark with the UKCA mark (see Section 7A).

10. **UK operators of installations subject to operating standards:** These may welcome lower standards in order to reduce costs and gain a competitive advantage (see Section 7B).

11. **EU industries:** These do not want UK competitors to gain a competitive advantage by reducing standards to reduce costs. The EU chemical industry wanted the UK to remain associated with EU REACH (see Sections 7A, B, C).

12. **Governments and industries of countries exporting to both EU and UK:** These will be inconvenienced if standards differ between the EU and UK (see Section 2).

13. **Environmental NGOs, environmentalists and the public:** Environmental NGOs, environmentalists, and possibly even the general public wish to maintain high environmental standards and do not want to see them reduced if that were to be the result of divergence from EU standards (see Sections 4 and 7 particularly 7B,C, D, E).

B. Analysis of the motives of the groups above

1. Links between the UK and EU

There are two main reasons why nation states engage with other nation states to agree environmental policies:

- to deal with issues that transcend national boundaries; and
- to reduce impediments to trade or distortions to economic competition.

These were the main justifications for the EU adopting an environmental policy in the first place, but they still apply now that the UK has left the EU. The UK remains geographically and environmentally linked to the continent of Europe, and the EU remains the UK's single biggest market for goods.

UK legislation will continue to affect its relationship with its neighbouring countries for both these reasons. There are two differences now: the UK is free to set its own laws, though within the constraints of its other international commitments; and it has no say in the making of EU laws.

In order to overcome the criticism that the EU was interfering too much in matters that could perfectly well be handled within the Member States (whether by the national government, or sub-national units of government) the EU espoused the principle of 'subsidiarity' now enshrined in the EU treaties[2]. The principle provides a guide for apportioning responsibility between different levels of authority (global, regional, national, local).

Subsidiarity is discussed more fully in Section 3 below, since it is very relevant to the relations on environmental matters between the UK Government and the devolved administrations and to what extent their legislation can diverge. But subsidiarity remains relevant to the continuing relationship between the UK and EU since both collaborate with higher levels of authority such as international organisations.

When handling environmental matters that transcend national frontiers - and these include the major global issues of climate change, biodiversity loss and the nexus of chemicals/ waste/ pollution (which affect the 'circular economy') - the EU is a major player. The UK will have to collaborate with the EU on details of policy not least because the EU and UK are both parties to international conventions covering these issues.

Since leaving the EU, the UK Government has been so insistent on having 'taken back control' that it has avoided admitting that for many environmental matters it cannot, on its own, be entirely in control. It needs to be acknowledged that for many matters responsibility is shared among different levels of authority, and that there exist higher levels of authority exemplified by international conventions (with their secretariats and 'conferences of the parties') as well as international organisations (such as UNEP, WHO, OECD, UNECE) which formulate environmental policies often in some detail. In these the EU plays a key role partly because of the size of its population and its large market, but also because of the maturity of its environmental legislation and the possession of agencies that are the repository of data that the UK does not have the means to replicate (European

[2] For a discussion of how subsidiarity was stated in the First Action Programme on the Environment of 1973, before being stated in the treaties, and its effect on EU environmental legislation see the chapter on 'Allocating tasks- subsidiarity' in my book *EU Environmental Policy – its journey to centre stage* (Routledge 2016).

Environment Agency, European Chemicals Agency, European Integrated Pollution Prevention and Control Bureau). The UK could actively collaborate with these agencies and the more it diverges from EU legislation the harder that will be. The Labour opposition party has stated that its policy in government would be 'to make Brexit work', and while it is not yet clear what that means, it could yet include greater collaboration with such agencies.

The UK can diverge from the EU by setting higher than EU standards, but that was always possible when the UK was a member of the EU (with the exception of product standards – see Section 7A). Now it can set lower standards and that is the kind of divergence mostly discussed in this paper.

2. Environmental protection and trade

The link between environmental protection and trade is perfectly obvious in the case of some legislation but much less so in others. Some items of EU environmental legislation are clearly also ' EU single market measures' (as they were adopted under the Articles in the treaty relating to the functioning of the EU internal market) while others, though primarily environmental, may have been adopted also for trade reasons.

This link became a matter of particular interest when a number of former communist Eastern Bloc countries began negotiations to accede to the EU in the 1990s. Many of these countries would have had considerable difficulty in assimilating all the EU environmental legislation that then existed and the argument was made that all that was necessary, initially, would be for these countries to adopt only single market measures, with environmental legislation coming later. To contribute to this debate IEEP was commissioned by the Department of the Environment in 1997 to assess which items of environmental legislation affected the EU single market[3]. The IEEP report showed just how difficult it is to identify which items do not affect the single market, and the same applies today.

Had the Brexit negotiations resulted in the UK having unconstrained access to the EU single market it would have had to continue to stay aligned with all single market measures. Having decided not to, the UK is free to diverge, but the more it does, particularly for product standards, the greater obstacles it creates for trade with the EU.

The level playing field provisions of the EU-UK Trade and Cooperation Agreement also mean that the European Commission has an interest that any divergence does not give the UK an unfair competitive advantage.

One consequence of the linkage between trade and environment is of importance when Government officials, in anticipation of REUL (see S.5 below), come to consider retained EU environmental law. They must ask themselves two questions, not just one. It is not sufficient to ask: is this item of legislation (for example setting noise levels for lawnmowers) important enough to retain for environmental reasons or is it an example of unnecessary 'EU red tape'? They also have to ask: will retaining it make it easier to export lawnmowers to the EU by allowing them to carry the CE mark (see Section 7A)? If the EU standard is retained for trade reasons, then the implication is that the UK legislation must continue to remain aligned with EU legislation as it evolves.

[3] *EU Enlargement: Classification of Environmental Legislation* N. Haigh and C. Coffey IEEP 1997. Eventually the accession countries accepted that they would implement the full corpus of EU legislation (the *acquis*) with only a few time-limited derogations – the position always insisted upon by the European Commission.

Divergence between the EU and UK will be of interest to other countries and industries within them that export to both. A classic example is Latin American exporters of commodities which will be affected by new environmental due diligence laws linked to deforestation. Both the EU and UK are introducing legislation but with differing requirements.

3. Apportioning tasks between different levels of government – subsidiarity

From its beginnings in the 1970s, the EU used the two reasons given above (see Section 1) to justify environmental legislation. Only rarely did EU legislation fall outside the headings of trade and transnational effects, the Directives on drinking and bathing waters being possible examples.

In 1992, when subsidiarity was being introduced into the Maastricht Treaty, the Presidency of the Council (which happened to be the UK) set out three guidelines to answer the question whether the EU should legislate in any particular case:

- Issues having transnational aspects;
- actions by Member States that distort competition;
- action at Community level producing clear benefits by reason of scale or effects compared with action at national level.

The words 'by reasons of scale or effects' now appear in the treaties[4]. This third guideline is more problematic than the other two, because it is entirely a matter of judgement. The drinking water Directive hardly falls under the first two guidelines but it can be justified under the third.

Drinking water is a matter of environmental policy because it can transfer pollutants from the environment to humans. It is not a traded product, except when bottled, but is delivered to domestic taps after treatment. It can only be said to distort competition very indirectly. However, there can be no doubt about 'scale' and 'effects' since water is drunk, or consumed in food, every single day by every single person in the EU including travellers and tourists who want reassurance that they can safely brush their teeth at the tap. There may be few calls today for drinking water standards in the UK to diverge from EU standards post Brexit, particularly since they are based on World Health Organisation guidelines, but if there were to be, one argument against is that it could deter inward tourism[5].

At the time of the Maastricht Treaty there was a review to check whether all EU environmental legislation conformed with the subsidiarity guidelines [6]. None were repealed, though some proposals were modified. There should therefore be no retained EU law in the UK for which there is not already a good justification. This will be relevant when retained EU law is reviewed under REUL. That is not to say that the same objectives cannot be obtained with some divergence from EU texts. Deficiencies in EU retained law seen from a UK perspective can now be corrected in the UK without significant divergence.

[4] Article 5(3) TEU. See also footnote 2.

[5] Before the adoption of the drinking water Directive the law in the UK required drinking water to be 'wholesome' which was interpreted as 'clear, palatable and safe'. The WHO guidelines were used as such and the Directive then made the guidelines mandatory. The UK could now revert to its pre-Directive position but it should be remembered that mandatory standards for lead and nitrates, for example, provided powerful pressure for improving water quality.

[6] See footnote 2.

4. Environmental issues transcending national boundaries

The UK is a party to many international conventions covering a range of environmental issues to which the EU is also a party[7]. To accede to these conventions the EU will have adopted legislation, and in many cases the UK legislation that enabled the UK to accede is based the EU's. Some is 'retained EU law' (see Section 5 below).

If the UK chooses to modify the law that enables it to be a party to a convention in order deliberately to diverge from the EU law, it will have to ensure that it remains adequate to fulfil the obligations in the convention. The UK is not therefore completely free to 'take back control' of its laws if it wants to play the international role that it claims it wants. The other nation states that are parties to the conventions will have an interest in seeing that the UK legislation remains adequate, as will the secretariats of the conventions. Brexit has not freed the UK from all international ties.

The countries affected by transboundary effects emanating from the UK, whether the subject of conventions or not, will have an interest in ensuring that these are acceptably controlled. The fact that such countries are watching has been demonstrated by the protests made by politicians from other countries about the discharge of British sewage to sea (see 'Operational standards' in Section 7 below). The public in other countries will also be watching.

5. The Retained EU Law (Revocation and Reform) Bill 2022 – REUL

This Bill is not necessary for good government but was introduced so that all EU law that was retained under the EU (Withdrawal) Act 2018 in the form of SIs will lapse unless 'saved'. If it is enacted unamended it will require the many items of retained EU law to be reviewed against a tight deadline. Those that are not 'saved' (there are powers for Ministers to 'save' named SIs) will automatically lapse so that, unless they are replaced by something comparable, there will immediately be divergence from EU law[8]. One can therefore describe those promoting and supporting the Bill as 'Ideological Brexiters'. Their motives are not to improve the content of UK legislation since that can be done anyway, but to create a symbol that the UK is 'taking back control'. The former Prime Minister Liz Truss even called it 'the end of EU red tape'. The rushed timetable may mean that the merits of each SI may not be properly assessed so that some items which deserve to be saved will simply lapse. This will automatically create divergence.

The attitude of the Government under its present Prime Minister, Rishi Sunak, is presently unclear about when the UK will choose to stay aligned with EU laws, as opposed to having to stay aligned. In a recent speech he said 'the UK will not pursue any relationship with Europe that relies on alignment with EU laws…' This could still mean that in some circumstances it will choose to stay aligned but without stating what those circumstances might be. The circumstances could become clearer when

[7] Including: OSPAR (protection of the Nort East Atlantic), Bonn (trans-boundary air pollution), Basel (transboundary movement of hazardous waste) UNFCCC (climate change), Vienna (ozone layer), Stockholm (persistent organic pollutants), Rotterdam (export of hazardous chemicals), Berne (European wildlife and habitats), Rio (biological diversity).

[8] For environmental critiques of RUEL see:
-The future of environmental protection: law, process and the Retained EU Law (Revocation and Reform) Bill - Brexit & Environment (brexitenvironment.co.uk);
-Retained EU Law Bill and Devolution: reigniting tensions in post-Brexit intergovernmental relations - Brexit & Environment (brexitenvironment.co.uk)
-IEEP UK blog | Retained EU Law & the legitimacy of environmental law

the Bill is debated. The Government could yet decide whether to proceed with RUEL as it is, or to amend or even withdraw it.

'Ideological Brexiters' can be contrasted with 'Ideological Rejoiners' who will resist divergence in anticipation of the day when the UK will again be following all EU law. No mainstream political party in the UK is yet committed to joining the EU again, with the exception of the Scottish National Party (SNP). But since the current SNP Government in Scotland wishes to join the EU, should Scotland become independent, it could well resist diverging from EU law for those matters for which it has competence, just when REUL could be speeding the ability of the UK to diverge. The result will be to increase divergence between Scotland and England.

6. Divergence between the four nations of the UK

The Acts of Parliament that devolved powers to Wales, Scotland and Northern Ireland in the 1990s were passed when there was no thought of the UK leaving the EU. All powers, including over the environment, were devolved except those 'reserved' (among which are traded products).

So long as the UK was in the EU, its extensive environmental legislation ensured that that the legislation in the four nations was closely aligned with the EU's and hence with each other. Since Brexit, the four nations have great freedom to go their own ways, except where there are international obligations embedded in conventions, or for 'reserved' matters. Environmental product standards have to be decided at UK level to ensure the integrity of the UK internal market but should be agreed with the involvement of the devolved administrations[9].

The approach to divergence will be different in each of the three devolved administrations. Scotland may want to stay aligned with EU legislation as its government wants to join the EU should it achieve independence. Under the Northern Ireland Protocol to the EU-UK Withdrawal Agreement, Northern Ireland remains in the EU single market for named items of EU legislation (mainly products including chemicals under REACH). Relevant NI legislation therefore cannot diverge from EU legislation. Wales is free to diverge for those matters within its competence, and as the Senedd has passed Acts with high ambitions for environmental protection it can be expected not to fall behind the EU or to be even more ambitious.

7. Five types of EU environmental legislation

EU environmental legislation can be divided into the following five broad headings when considering their effects on trade[10]. Divergence in standards for products (heading A) can create 'non-tariff' or 'technical' barriers to trade. As one moves down the list the standards can distort competition but to a smaller extent. When considering whether to diverge or not from EU standards, the UK Government needs to consider both the possible effects on trade and the effects on the environment

A. Standards for traded products
B. Operational standards
C. Procedural standards
D. Quality standards
E. Standards remote from the EU single market

[9] See What are the lessons from the EU for the UK's own internal market? – Inside track (greenallianceblog.org.uk)
[10] This list is taken from my 2018 paper Brexit: Single Market, Customs Union, and the environment (ieep.eu)

A. Traded products

The list of traded products subject to EU environmental standards is long and includes cars, paints (emissions to air); domestic boilers, light bulbs (energy consumption); construction equipment, lawn mowers (noise), food contact materials (harmful chemicals) not to mention food standards and chemicals generally. UK products which do not meet EU standards cannot be exported to the EU. The UK has always been free to set higher than EU standards for its own market but could not exclude EU products meeting EU standards. During the Brexit negotiations some politicians were saying that they did not want to be bound by, for example the EU eco-design Directive covering energy consumption of toasters and vacuum cleaners. There may be exceptional circumstances - rather than purely ideological ones - why the UK might want to set lower standards for its own market, but in general, exporting manufacturers will not want lower than EU product standards since it means excluding the sizeable EU market or running two production lines[11].

Chemicals are traded products of a special kind as they can only be marketed in the EU if they are first registered with the EU Chemicals Agency (ECHA). Only an entity in the EU can register a chemical, and UK exporters of chemicals therefore had to find a partner in the EU to do so if they were to continue exporting. The UK, under the SI known as UK REACH (which is retained EU law) has set up its own scheme under which all chemicals sold in GB (N. Ireland remains bound by EU REACH) have to be registered with HSE. UK exporters to the EU and EU exporters to the UK therefore have to register twice. ECHA and HSE separately propose restrictions on sale and use, and the EU restrictions are beginning to diverge from those in UK. Both the UK and EU chemicals industry wanted the UK to remain associated with EU REACH and ECHA to avoid the costs of having to register twice, but as the UK stayed out of the EU single market that was not possible.

The CE mark (*Conformité Européenne)* is mandatory for certain goods (toys and electrical equipment, for example) sold in the EU and EEA (and also in N. Ireland). It is also found on products sold elsewhere and indicates that the manufacturer affirms the product's compliance with the relevant EU legislation. The UK Government wants to stop accepting the EU's CE mark and replace it with a new mark UKCA ' *UK Conformity Assessed'* for goods sold in the UK but this has been delayed more than once. If the CE mark is replaced it would mean a UK exporter having to pass one set of tests for the EU and another for the UK. Some manufacturers are arguing for the CE mark to continue to be recognised. If UK product standards diverge from EU standards, then the CE mark and UKCA mark would have different meanings and the customer would be confused: the marks will have diverged (which after all is the only point of having separate marks).

B. Operational standards

Operational standards, such as emission standards for industrial plant, or for the management of a waste site or sewage works, may not directly affect trade in goods but can nevertheless distort competition if lower standards reduce costs. Operators of such plants or sites may welcome lower

[11] There may be good reasons why products differ for different markets. Motor cars in the UK are built with the driving seat on the right instead of the left-hand side but may in all other respects be identical to the models sold in other countries. The market for cars is large enough for it to be worth designing cars so that the steering wheel and other necessary equipment can be bolted onto the right or left sides. For other products this may not be so with the result that EU producers may choose to ignore the smaller UK market thus reducing consumer choice.

standards though they may prefer not to say so publicly. The EU could resist this as it will be seen as undercutting the level playing field set out in the Trade and Cooperation Agreement.

Some commentators have been saying that industrialists do not favour divergence, but this fails to recognise that the interest of exporters of products are not the same as that of operators of polluting industrial installations (oil refineries, sewage works, steel works etc).

Emissions from industrial plants can also affect the environment of other countries which will thus have an interest in the UK maintaining high operating standards, as does the public in those countries. An example of this is the complaints recently expressed by some French politicians and MEPs about the discharge to sea of storm water from sewage works. Although it is improbable that faecal bacteria will survive crossing the North Sea or the English Channel, sewage works also discharge persistent chemicals. Both OSPAR and the regular North Sea conferences provide a forum for such discharges to be discussed and pressure applied.

Since the prevailing wind in Europe is West to East, European countries will always have an interest in UK emissions to air. Historically, UK emissions of sulphur dioxide creating 'acid rain' were one of the drivers for the large combustion plants Directive (now absorbed into the industrial emissions Directive). That problem is now largely being solved but the general point remains that these countries would object to any lowering of emission standards.

C. Procedural standards

Examples of procedural standards include: environmental assessment of development projects; and access to environmental information. The comments applying to operational standards also apply here. Assessing effects of projects, and consulting the public, are said by some to distort competition by delaying decision making. The Levelling Up and Regeneration Bill 2022 brings into question the current environmental assessment legislation, with potential risks arising[12].

D. Quality standards

The only land border between the EU and UK is in Ireland. The territory of the UK comprises one island and part of another, and so is separated from mainland Europe by sea. It is therefore argued by some that the quality of British rivers does not affect other EU Member States (Ireland excepted), and that therefore UK water quality standards is of no concern of other countries. There are two counter arguments: (a) persistent substances in rivers reach the sea and so affect other countries, and (b) lower river quality standards could give some manufacturers a competitive advantage.

Ambient air quality is mostly affected by local sources of pollution such as road traffic. However, the quality of air in the UK can be affected by air blown from other countries and given that the prevailing wind is West to East, other countries are more often affected by UK air quality. The biggest source of heavy metals entering the North Sea is air borne. Furthermore, different controls over emissions to air can distort competition.

It goes without saying that environmentalists do not want to see lower quality standards, a view widely shared by the public.

[12] See evidence from the Office for Environmental Protection to the Levelling Up and Regeneration Bill Committee, September 2022:
https://publications.parliament.uk/pa/cm5803/cmpublic/LevellingUpRegeneration/memo/LRB53.htm

E. Standards remote from the EU single market

Examples of standards remote from the EU single market include the Directives on birds, habitats, and bathing water which is the reason they do not have to be followed by Norway and the other EEA countries. Drinking water, described in S.3 above is another example. However even the birds and habitats Directives can indirectly affect competition, as it can prevent a manufacturer building on a protected site. Meeting the EU bathing water standards involves adequate treatment of sewage which entail costs which fall on both the public and industrialists. Lower standards accordingly can provide a competitive advantage.

C. Conclusions

This paper set out to identify those groups having an interest in the UK diverging, or not, from EU environmental laws. Thirteen such groups have been identified and are listed in Section A. Their motives pull them in different directions.

The wide ranging analysis above, required to shed light on the motives of these groups, draws attention to the following points:

- Despite Brexit, the UK remains geographically and environmentally linked to the continent of Europe, and the EU remains the UK's single biggest market for goods. The UK's legislation therefore has to respect both its environmental obligations to its neighbours, and also, in its own self-interest, its need to minimise barriers to trade with its neighbours. Respecting EU environmental legislation is the main way EU Member States fulfil their obligations to ensure that activities within their territory does not harm the environment of other states.
- The prominence to the phrase 'taking back control' has focused the Government's attention on legislation and policy affecting only the UK at the risk of neglecting its responsibility to uphold its other international commitments, both as a party to many international conventions, and as a member of numerous international organisations.
- Product standards differ from all the other headings in that they can create 'non-tariff' barriers to trade, whereas the others can only distort competition less directly. UK manufacturers exporting to the EU will have to follow EU standards anyway and generally do not want UK standards to diverge. There are therefore strong arguments that it is in the UK's own interest for UK product standards to stay aligned with EU standards. The Government is free to choose which course of action benefits the UK most and if alignment with EU product standards meets this criterion it would not undermine the position that the UK is committed to freedom in adopting its own laws.
- When reviewing each item of retained EU environmental law under REUL, it is necessary to consider both its environmental importance and its effects on trade. What may appear a minor item from an environmental point of view (standards for lawnmower noise for example) may make it easier to sell lawnmowers into the EU market.
- Environmental policy is devolved to Scotland, Wales and Northern Ireland with the exceptions of 'reserved' matters such as product standards. Some environmental standards may well therefore diverge between the four nations, but the Government must still ensure that collectively the UK fulfils its international obligations. The principle of subsidiarity, long accepted in the UK (though the word is not often used in a UK context despite the UK having promoted its adoption in the EU), continues to have a role.