

## Written submission from Dr Annalisa Savaresi

As numerous reports and experts have pointed out already, Brexit is likely to have several implications for environmental law and governance in the UK<sup>1</sup> and Scotland.<sup>2</sup> The nature of these implications largely depends on the mode of Brexit and will vary between areas of environmental governance. This note provides some early reflections on what these implications may be, drawing on examples from selected areas of environmental law and policy.

### The implications of Brexit for Scottish environmental law and governance

Brexit may significantly affect the exercise of the powers of devolved administrations, casting uncertainty over their ability to achieve objectives embedded in existing environmental laws and policies. For example, in the past the implementation of Scottish climate change and renewable energy policies benefited from supportive EU legal frameworks and financial assistance. Without such support, Scotland will have to find new means to achieve its objectives. The Scottish Government has already announced that, notwithstanding Brexit, it intends to maintain a high level of ambition in environmental protection. Its successfulness in doing so largely depends on future environmental governance arrangements within and outwith the UK. Three elements seem to be of particular importance: 1) Scotland's future relationship with the EU; 2) differences between areas of EU environmental law and policy; and 3) international environmental cooperation post-Brexit. These three matters are considered in turn below.

### Scotland's future relationship with the EU

The Scottish Government has expressed a preference for joining/remaining part of the **European Economic Area (EEA)**, either autonomously or together with the rest of the UK.<sup>3</sup> Conversely, the UK Government seems to have discarded this option.<sup>4</sup> To date no subnational entities have ever joined the EEA. Therefore, whether Scotland will manage to join the EEA, or indeed the EU,<sup>5</sup> remains to be seen. Be that as it may, joining the EEA would have far-reaching consequences for Scottish environmental law and policy.

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<sup>1</sup> See House of Lords, European Union Committee, Brexit: Environment and Climate Change, HL 109, 2017, available at:

<https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/109/109.pdf>

<sup>2</sup> See Cardesa-Salzmann and Savaresi (eds) The Implications of Brexit for Environmental Law in Scotland, SULNE, 2016, available at: <https://sulne.files.wordpress.com/2016/12/environment-paper-sulne-20161214.pdf>

<sup>3</sup> Scottish Government, Scotland's Place in Europe, 2016.

<sup>4</sup> UK Government, The United Kingdom's Exit from and New Partnership with the European Union, 2017.

<sup>5</sup> Some early reflections on this are provided in: Kirsty Hughes and Tobias Lock, An Independent Scotland and the EU: What Route to Membership?, 2017, available at:

<http://www.europeanfutures.ed.ac.uk/article-4667>

EEA States who are not EU Members – i.e. Iceland, Luxembourg and Norway – enjoy some of the privileges associated with EU membership, including preferential access to the Single European Market. As a condition of access, they are subjected to most EU law – with the important exclusion of the Common Agriculture Policy (CAP) and the Common Fisheries Policy (CFP). As a result of this arrangement, for example, the import into the EU of some fish and fish products from Iceland and Norway is subjected to tariffs.<sup>6</sup>

Should the UK/Scotland become part of the EEA post-Brexit, they would be required to implement EU law on several environmental matters, with the exclusion of the CAP, CFP and protected areas. Even if not obliged to do so, the UK/Scotland could opt to act jointly with EU Member States, for example on climate change – as Iceland, Luxembourg and Norway presently do. Within the EEA, the UK/Scotland would furthermore be subjected to the jurisdiction of the European Free Trade Association Court on questions of enforcement, and make financial contributions to EU programmes they participate in on matters such as, for example, research (like [Horizon 2020](#)) or regional economic development (like the [Northern Periphery and Arctic Programme](#)).<sup>7</sup> It is in this connection important to note that Iceland, Luxembourg and Norway do not all have the same arrangements concerning EU research and development cooperation, and that no standard EEA approach to this issue exists.<sup>8</sup>

Should the UK or Scotland decide not join the EEA, they would remain under pressure to continue aligning with EU regulations on products and services – for example in relation to chemicals – in order to continue exporting into the EU.<sup>9</sup> In other areas, instead, they would be free to regulate environmental matters as they see fit, with the only constraint of the UK's commitments under international law, as further discussed below.

### **Different areas of EU environmental law and policy**

The impact of Brexit will greatly vary across areas of environmental law and governance. This is so primarily because EU law regulates environmental matters in different ways, and with a varying degree of involvement of EU institutions.<sup>10</sup> For example, the regulation of chemicals and emission trading is markedly EU centric. The regulation of these areas may therefore significantly change post-Brexit. Conversely, EU law leaves much discretion to Member States on other environmental matters, such as protected areas. In the latter connection, the impact

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<sup>6</sup> As reported in House of Lords, Select Committee on the European Union Energy and Environment Sub-Committee Inquiry on Brexit, 2016, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/brexit-fisheries/oral/38445.html>

<sup>7</sup> See e.g. data on Norway, available at : [http://www.eu-norway.org/eu/financial-contribution/#.WK\\_7FxicZ3k](http://www.eu-norway.org/eu/financial-contribution/#.WK_7FxicZ3k)

<sup>8</sup> Further details are available at: <http://www.efta.int/eea/eu-programmes>

<sup>9</sup> See Joanne Scott, Trade & Brexit: The Long Arm of EU Regulation, 2017, available at: <http://environmenteuref.blogspot.co.uk/2017/02/trade-brexit-long-arm-of-eu-regulation.html>

<sup>10</sup> For a comprehensive account, see: Apolline Roger, Types of EU Environmental Legislation and Competence Allocation, in Cardesa-Salzmann and Savaresi, supra note 2.

of Brexit is likely to be comparatively smaller. This section looks at these examples in further detail.

On **chemicals**, after Brexit the UK will no longer play an active part in regulatory EU procedures, institutions and systems of cooperation for registering chemicals and planning their assessment.<sup>11</sup> Even so, the UK and Scotland will be under considerable pressure to continue complying with EU rules in order to export chemicals into the EU.<sup>12</sup>

With regard to **emission trading**, instead, two main options may be envisioned. On the one hand, if the UK or Scotland join the EEA, they may follow the example of Iceland, Luxembourg and Norway, and implement their commitments under international climate treaties jointly with the EU. This would enable keeping the UK and Scottish installations in the EU Emission Trading System (ETS), and, therefore continue with present arrangements. On the other hand, if they do not join the EEA, the UK and/or Scotland may decide to establish independent emission trading schemes, and link these with the EU ETS. The EU has in the past considered linking its ETS with that of Australia – though eventually no deal on this was reached – and recently concluded a linking agreement with Switzerland – even though the latter has not entered into force yet. The Swiss agreement provides an important precedent for linking a UK/Scottish emission trading scheme with that of the EU. When compared with Switzerland, the UK has the clear advantage of having been part of the EU ETS since its establishment.

However, the desirability of continuing with emission trading post-Brexit should not be taken for granted.<sup>13</sup> At a recent hearing of the House of Commons' Business, Energy and Industrial Strategy Committee, expert witnesses expressed mixed views on whether continued adherence to the EU ETS is desirable in the long run.<sup>14</sup> Witnesses were, nevertheless, unanimous in suggesting that leaving the EU ETS before the end of the current trading period (i.e. 2020) would be detrimental. I subscribe to this view: if the UK/Scotland wish to terminate their involvement in the EU ETS, the end of the present trading period would be the most convenient time to do so, thus minimizing disruption to investors. Should they decide to go for this option, the UK/Scotland should urgently consider policy alternatives to emission trading, in order to maintain a regulatory environment conducive to decarbonisation in the most emission intensive industries post 2020. In this regard, the preparation of the UK's nationally determined contribution under the Paris Agreement – which may

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<sup>11</sup> Apolline Roger, Chemicals, in Cardesa-Salzman and Savaresi, supra note 2.

<sup>12</sup> Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 2009, available at: <https://papers.ssrn.com/abstract=1333685>

<sup>13</sup> On the effectiveness of EU ETS as a means to tackle climate change, see for example: Grantham Institute, *Evaluating the EU Emissions Trading System: Take it or leave it? An assessment of the data after ten years*, 2016 [https://www.imperial.ac.uk/media/imperial-college/grantham-institute/public/publications/briefing-papers/Evaluating-the-EU-emissions-trading-system\\_Grantham-BP-21\\_web.pdf](https://www.imperial.ac.uk/media/imperial-college/grantham-institute/public/publications/briefing-papers/Evaluating-the-EU-emissions-trading-system_Grantham-BP-21_web.pdf)

<sup>14</sup> See House of Commons, Business, Energy and Industrial Strategy Committee. Oral evidence: Leaving the EU: Energy and Climate Negotiation Priorities, HC 909, 2017, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/leaving-the-eu-energy-and-climate-negotiation-priorities/oral/46851.pdf> .

well have to take place before Brexit<sup>15</sup> – could trigger a UK-wide conversation on how to deal with climate change outside of the EU. This conversation should be started as soon as possible, and become a forum for central and devolved administrations to discuss what they intend to do to reduce emissions after Brexit. As exemplified by the US and its federated states, differentiated arrangements between parts of the UK on emission trading would in principle be possible.<sup>16</sup>

Conversely, post-Brexit the UK and Scotland will be free to regulate other environmental matters, such as **protected areas**, as they see fit, with the only limitation of the UK's commitments under international law. In this connection it is often remarked that, since EU law often reflects obligations enshrined in international environmental treaties, Brexit will be a zero sum game, as far as environmental protection standards are concerned. This assertion is inaccurate for two main reasons. First, international obligations are not assisted by the same enforcement mechanisms assisting EU law. Therefore, international obligations will survive, but they will not be overseen by the EU law enforcement apparatus, comprising of the EU Commission and Court of Justice.<sup>17</sup> As a result, the UK and Scottish authorities' compliance with international law obligations will be subjected to reduced scrutiny. Second, EU law is often more ambitious than the international environmental treaties it implements. The EU unilateral commitment to reducing emissions from **aviation** is a case in point.

Post-Brexit, therefore, the relationship between obligations under EU law and international law will have to be assessed on a case by case basis, distinguishing in as much as possible what the UK is required to do under international law, on the one hand, and EU law, on the other. Only after this exercise has been carried out will it be possible to determine whether and how the UK intends to depart from the approach presently embedded in EU environmental laws. **Fisheries** are a case in point. Whilst currently fisheries are an exclusive EU competence, this will change with Brexit. As a recent House of Lords report explains, however, leaving the EU Common Fisheries Policy and the related agreements will hardly present the UK and Scotland with a *tabula rasa* scenario.<sup>18</sup> Quite to the contrary, post-Brexit the UK will, for example, need to work out how to replace the so-called Northern Agreements, and how to treat historic access rights.<sup>19</sup> The repatriation of powers over fisheries will furthermore raise complex international legal personality questions for devolved administrations, which will be discussed further below.

In sum, the outlook on environmental governance arrangements post-Brexit delivers a very composite picture. A set of cross-cutting issues ought to be considered:

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<sup>15</sup> Annalisa Savaresi, Early Brexit Questions: The Paris Agreement and Climate Policy, 2016, available at: <http://www.europeanfutures.ed.ac.uk/article-4292>

<sup>16</sup> See the data available at: <https://www.c2es.org/us-states-regions/policy-maps>

<sup>17</sup> See Cardesa Salzmänn and Savaresi, Law and Enforcement Implications, in Cardesa-Salzmänn and Savaresi, supra note 2.

<sup>18</sup> House of Lords, European Union Committee. Brexit: Fisheries, HL 78, 2016, available at: <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldecom/78/78.pdf>

<sup>19</sup> Ibid., at 37-46, and 188-191.

- EU's oversight and enforcement procedures have long provided an additional layer of scrutiny over the UK's alignment with environmental laws and policies.<sup>20</sup> With Brexit, therefore, both central and devolved administrations should consider avenues to strengthen the enforcement of environmental law, for example, through the establishment of specialist bodies, such as an environmental ombudsman or court.
- The loss of the EU long-term policy horizon and stable regulatory frameworks<sup>21</sup> faces UK and Scottish law-makers with the challenge to establish an equally stable and reliable regulatory environment, which encourages investment in clean technologies, as well as deterrence against pollution and environmental degradation.
- Brexit raises questions on the scope of devolved administrations' powers over the environment, following their repatriation from Brussels.<sup>22</sup> A corollary question is how much the exercise of devolved administrations' powers will be constrained by the need to ensure cohesion within the UK internal market.<sup>23</sup> The experience of federal states, such as the US, shows that divergence in environmental standards is not *ex se* a hindrance to a functioning internal market.<sup>24</sup> Even though the impact of divergent environmental standards on the internal UK market should not be overplayed, it clearly needs to be taken into account.

### **International legal capacity**

Leaving the EU will entail the repositioning of the UK in international and regional environmental cooperation. The role of devolved administrations in this new constellation remains to be determined. Under present constitutional arrangements foreign policy is within the exclusive remit of Westminster. As mentioned above, however, post-Brexit the repatriation of competences presently exercised by the EU may lead to a rearrangement of the powers of devolved administrations on matters with clear transboundary implications, such as fisheries. It is here submitted that the meaningful exercise of these powers would require devolved administrations to exercise at least some international legal personality. These additional powers would enable protecting Scottish interests, even when these are not aligned with those of the rest of the UK. It is therefore in principle possible that post-Brexit devolved administrations demand international legal capacity to meaningfully engage in

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<sup>20</sup> See House of Lords, Select Committee on the European Union, Energy and Environment Sub-Committee, Brexit: Environment and Climate Change, Oral and Written Evidence, 2016, available at: <http://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-environment-climate-change/Brexit-Environment-Climate-Change-Written-Oral-Evidence-Volume.pdf> - especially oral evidence by Andrew Jordan, Maria Lee, and Richard Marjory. See also Maria Lee, Brexit: Environmental Accountability and EU Governance, 2016, available at: <https://blog.oup.com/2016/10/brexit-environment-eu-governance/>

<sup>21</sup> As noted for example in Colin Reid, Environmental Law Outside the EU, 2016, available at: <http://www.journalonline.co.uk/Magazine/61-7/1021967.aspx>

<sup>22</sup> As noted for example in Mark Lazarevic, Will Brexit Mean More Devolution to Scotland?, 2017, available at: <http://www.europeanfutures.ed.ac.uk/article-4654>

<sup>23</sup> See Jo Hunt, Bringing Powers Back from Brussels - But to Where?, 2017, available at: <http://environmenteuref.blogspot.co.uk/2017/02/bringing-powers-back-from-brussels-but.html>

<sup>24</sup> See the discussion of the California and Delaware effects in: David Vogel, Trading Up: Consumer and Environmental Regulation in a Global Economy, Harvard University Press 2009, at 248 ss.

international cooperation on at least some devolved environmental matters. This international legal capacity would play a crucial role also in shaping Scotland's future relationship with the EU.

In this connection, Scotland may helpfully draw upon the precedents established by the Faroes Islands.<sup>25</sup> Even though they are a subnational entity outside the EU, the Faroes have managed to successfully negotiate bilateral agreements with a number of states, as well as the EU, and also joined international organisations working, for example, on fisheries. These powers were obtained gradually: at first the Faroes negotiated external self-governance with the Danish Government on an *ad hoc* basis – and only eventually assumed formal international legal personality under Danish law. Subnational entities' membership of international treaties and organisations depends on two main variables: a) constitutional power to exercise external self-governance; and b) international treaties and organisations' rules and practice concerning subnational entities.<sup>26</sup> There is no standard approach to either issue, but the Faroes' experience clearly shows that both can be handled with some flexibility. Scotland could follow a similar path, and acquire external self-governance progressively. Its most immediate strategic interests in the environmental field would appear to be regional cooperation on fisheries, protected areas and energy.

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<sup>25</sup> This issue is discussed in Jacques Hartmann, *The Faroe Islands: Possible Lessons for Scotland in a New Post-Brexit Devolution Settlement*, 2017, available at:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2909543](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909543)

<sup>26</sup> *Ibid.*, at 6-8.