

**Supplementary written evidence submitted by Dr Viviane Gravey, Senior Lecturer in European Politics Queen's University Belfast, and co-chairs of Brexit & Environment, an ESRC funded network of academics investigating the impact of Brexit on the environment (REULB32)**

**Evidence to the Public Bills Committee - Retained EU Law (Revocation and Reform Bill)**

*This written evidence is written by Dr Viviane Gravey, Senior Lecturer in European Politics Queen's University Belfast and co-chairs of Brexit & Environment, an ESRC funded network of academics investigating the impact of Brexit on the environment. It builds on Brexit & Environment series of blogs and report on the impact of the REUL Bill on the environment<sup>1</sup>, devolution<sup>2</sup> and Northern Ireland.<sup>3</sup> It supplements oral evidence given to the Committee on 8/11.*

**Summary**

- ✓ The REUL Bill debate is a strong case of déjà vu: we have already debated what to do with EU law after Brexit in 2016-2017 which led to the creation of REUL with an aim to maintain certainty; we have already debated the need to update EU law to make it fit better the UK system – which is why over 100,000<sup>4</sup> amendments to EU law were made through Brexit SIs agreed up to 2020 mobilising very large amount of civil service time to do so; we have already seen the tensions that changing large swathes of UK law through subordinate legislation had on the territorial constitution, which is why the 2018 European Union (Withdrawal) Act came together with a MoU with the Welsh government to create new path for consent.
- ✓ The problems of accountability (both to Parliament and stakeholders), legal certainty and civil service capacity which clearly exist in England cut through even more deeply in the devolved administrations (which sees REUL Bill as huge workload imposed by London) and especially in Northern Ireland where the issues are both more complex (interaction with Protocol, with Protocol Bill) and more difficult to address (no sitting Assembly or functioning Executive).
- ✓ Focusing on delivering policy change in areas of priority, with a robust parliamentary process, would be preferable to this general approach of updating the whole statutes book under very short deadline. If the REUL Bill is to continue it needs at a minimum to bring intergovernmental negotiations at the heart of the process, to offer guarantees that REUL forgotten and not listed on dashboard will not fall by default, to protect areas of REUL which are central to the UK's international commitments and to give enough time to Parliament and stakeholders to meaningfully engage in the REUL revision process.

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<sup>1</sup> <https://www.brexitenvironment.co.uk/2022/09/29/retained-eu-law-revocation-and-reform-bill/>

<sup>2</sup> <https://www.brexitenvironment.co.uk/2022/10/10/reul-bill-devolution/>

<sup>3</sup> <https://www.brexitenvironment.co.uk/2022/10/17/ten-questions-for-the-reul-bill-in-northern-ireland/>

<sup>4</sup> [https://publications.parliament.uk/pa/bills/cbill/58-03/0156/REUL\\_Bill\\_Delegated\\_Powers\\_Memorandum\\_20-09-22.pdf](https://publications.parliament.uk/pa/bills/cbill/58-03/0156/REUL_Bill_Delegated_Powers_Memorandum_20-09-22.pdf)

## A misguided sunset?

1. **Discussions of a sunset on the EU's influence on the UK statutes book are not new.** What to do with EU law after Brexit was intensely debated in 2016 and 2017. The proposal of a Great Repeal Bill, what became the European Union (Withdrawal) Act 2018, already put forward a solution to this problem: EU law would become a new category of UK law, retained EU law, and would thus be much easier to reform. Far from having to convince other member states of the value to change EU policy, the UK government now only needs to convince its Parliament of the value of doing so. This position was clearly articulated by Andrea Leadsom MP, then DEFRA Secretary, talking to the House of Commons EAC in October 2016:  
"I am absolutely in step with the Prime Minister's decision that we will, through the Great Repeal Bill, bring all of that body of EU legislation into UK law so far as we are able to. Then it will be UK law and we will be able to change, amend, repeal, strengthen it at our leisure."<sup>5</sup>
2. **Retained EU law was a lesser evil** – creating REUL through the Brexit SIs provided legal certainty on Brexit day, but at the cost of normalizing wholesale revisions of law through subordinate legislation with very little oversight or stakeholder engagement. What the Public Law Project called a "tsunami of delegated legislation"<sup>6</sup> throughout the Brexit process has gone hand in hand with a very limited scope for Parliamentary oversight, stakeholder involvement, and indeed no legal requirement for consent from the devolved parliaments as the Sewel convention does not apply to SIs.<sup>7</sup> Changes, sometimes technical, sometimes critical, have been made to EU law as it became retained EU law,<sup>8</sup> leading to Retained EU law being described as "Zombie legislation"<sup>9</sup>, "pickled in time"<sup>10</sup>.
3. **Imposing a sunset clause on retained EU law negates the whole point of creating retained EU law:** it undermines legal certainty and business confidence, all the while taking away from Parliament the control to revise and amend this body of UK law. This is a profoundly worrying development - Laws will be struck from the statute book, as the RSPB open letter to Jacob Rees Mogg MP states, "not because they are "bad" but solely because they are derived from the EU."<sup>11</sup>

## Capacity in and beyond Westminster

4. Beyond the accountability alarm the REUL Bill triggers, going through the process outlined in the Bill is likely to take over critical civil servant time. How much is still uncertain: **we do not know the extent of Retained EU Law.** The Retained EU Law dashboard published in June is still not complete: it does not for example have data on whether Defra's REUL stock is primary legislation

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<sup>5</sup> Andrea Leadsom MP in <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/the-future-of-the-natural-environment-after-the-eu-referendum/oral/42022.html>

<sup>6</sup> <https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf>

<sup>7</sup> <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf>

<sup>8</sup> Jordan, A., & Moore, B. (2020). *Regression by Default? An Analysis of Review and Revision Clauses in Retained EU Environmental Law*. Brexit & Environment. [https://www.brexitenvironment.co.uk/wp-content/uploads/dlm\\_uploads/2020/05/BrexitenvRegressionbyDefault.pdf](https://www.brexitenvironment.co.uk/wp-content/uploads/dlm_uploads/2020/05/BrexitenvRegressionbyDefault.pdf)

<sup>9</sup> Prof Andrew Jordan, in <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-energy-and-environment-subcommittee/The-potential-implications-of-Brexit-on-environmental-policy/oral/35297.html>

<sup>10</sup> Caroline Lucas MP, in <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/the-future-of-the-natural-environment-after-the-eu-referendum/oral/42022.html>

<sup>11</sup> <https://www.rspb.org.uk/our-work/rspb-news/rspb-news-stories/jacob-rees-letter/>

(outside the scope of the Bill) or secondary (within scope), the 1400 rules as identified by the National Archives are not included, and devolved SIs or SRs are not listed, nor is it clear which UK SIs apply to devolved matters. *The retained EU law Dashboard should identify whether retained EU laws which are within the scope of the Bill are devolved or reserved, and should allow devolved administrations to update on their mapping of REUL too. Time is needed to build a much more extensive, cooperative and accessible dashboard. If no extra time is granted, unidentified REUL needs to be protected from being lost by inadvertence.*

5. This, as explained below, has a further highly **concerning devolution dimension**, with civil servants in devolved administrations expected to spend considerable time to deliver a policy objective which is not shared by their governments. In a recent article on the UK internal market, Prof Nicola McEwen and colleagues took inspiration from Pierre Trudeau's quip that the relationship between the US and Canada was like "sleeping with an elephant... one is affected by every twitch and grunt"<sup>12</sup>. In the UK context, that elephant is England, and the REUL bill sees the elephant put fire to the bedding. Whether the devolved administrations had other plans or not, their priority now has to be dealing with the REUL fire.
6. Is there **sufficient capacity** within the devolved authorities to identify all the retained EU laws which are within the scope of the Bill and whether they fall within areas of devolved competence? It depends what we mean by sufficient – is there enough capacity if officials were to drop everything else? Of course. Should they have to? No. There is not enough capacity in Westminster – as Greener UK reports<sup>13</sup>, only 3 FTE staff have been working on REUL in DEFRA – devolved counterparts would be even more understaffed. In NI, work is underway to build a list (e.g. in DFI, where officials have identified 500 already, in DAERA 600 already) but lack of functioning executive means it is unclear whether this is at behest of specific ministers or cross-government effort, passing the buck to NIO.

### **A deregulatory bent**

7. In effect the Bill puts a **ceiling on policy ambition**, notably in an area highly affected like the environment. The Bill has a strong pro-deregulation slant. In order to ensure an instrument stay in the statute book, it needs to be restated. As it is restated, it can be revoked or replaced or indeed updated. But revoking and replacing can only be done if this diminishes or maintain the regulatory burden – the REUL Bill allows for reduced burden, but not greater burden. It defines burden in a very expansive manner: cost, administrative inconvenience, obstacles to trade or innovation, to efficiency, productivity or to profitability. It is very unlikely that any instrument reformed to increase environmental ambition would escape this burdensome definition of burden. This means in effect not only that devolved administrations are asked to put on hold their own domestic agenda to work on REUL in 2023, but they will not be able to use REUL powers to deliver on their environmental priorities – such as keeping pace with EU development in Scotland, or raising standards post-Brexit in Wales.

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<sup>12</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4018581](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4018581)

<sup>13</sup> [https://greeneruk.org/sites/default/files/download/2022-10/Greener\\_UK\\_and\\_Link\\_REUL\\_Bill\\_second\\_reading\\_briefing.pdf](https://greeneruk.org/sites/default/files/download/2022-10/Greener_UK_and_Link_REUL_Bill_second_reading_briefing.pdf)

8. This ceiling could be problematic in view of the **level-playing field provisions under the UK-EU Trade and Cooperation Agreement** – as such, at the very least, areas covered under the trade and sustainable development chapter of the TCA should be exempted, or looked at very carefully to avoid creating further tensions with the EU unintentionally.
9. It is also highly problematic considering both the **NI Protocol** and the **NI Protocol Bill** commitments on furthering North/South cooperation on the island of Ireland. REUL underpins a lot of the existent cooperation in environment and agriculture (e.g. Water Framework Directive).

#### **Impact on the UK internal market and the exercise of devolved competence**

10. The REUL Bill raises profound issues of **regulatory divergence within the UK internal market** and whether the structures currently in place will be sufficient to manage it.
  - **The ghost of divergence past:** Consider cases where the four UK administrations did not transpose together – sometimes using primary legislation, sometimes secondary legislation. For example, the Strategic Environmental Assessment directive was transposed via primary legislation in Scotland (thus not concerned by REUL bill) but via secondary legislation elsewhere (Environmental Assessment (Scotland) Act 2005 (replacing interim SSI 2004/258), and SI 2004/1633 (England), SI 2004/1656 (Wales), SRO 2004/280 (NI)). A decision made by the Scottish Government in 2005 thus puts Strategic Environmental Assessment outside the scope of the REUL Bill in Scotland, while it is in scope for the rest of the UK.
  - **The ghost of divergence future.** Consider an EU directive which was jointly transposed by a single UK Statutory Instrument, or similarly an EU regulation incorporated into UK with a single UK Exit SI, even if it was in an area of devolved competence. Does the fact that devolved ministers then did not avail of the possibility to adopt their own instrument mean they are now bound by the decision of Ministers of the Crown? Can different ministers reviewing the same piece of Retained EU law come to different decisions?
11. Schedules 2 and 3 cover consent in depth – but it focuses on either (a) ministers complying with parliamentary oversight in their respective jurisdictions or (b) devolved ministers obtaining consent from Ministers of the Crown before they can amend REUL in areas where the provision, if contained in a devolved act, would require the consent of a Minister of the Crown. What is missing **is consent from the devolved parliaments, or indeed the devolved governments**, if Ministers of the Crown decide to unilaterally revise or revoke REUL that falls within devolved competence. While the Sewel Convention does not apply to delegated legislation, there is an important (if not perfect) precedent: In the 2018 MoU between the Welsh and UK Governments (*Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks*) the UK Government thus committed to the following restrictions:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new

policy in devolved areas; the primary purpose of using such powers will be administrative efficiency”<sup>14</sup>

*At the very least this precedent should be used, and a new MoU should be agreed. Alternative arrangements may be needed for NI in the absence of a functioning executive.*

### **Coordination and cooperation on dealing with REUL**

12. **Differences in powers** – such as in power to extend sunset – between Ministers of the Crown and devolved ministers risks making the timeline of dealing with REUL even more complex for devolved administrations with need to restate a large body of legislation at very last minute to ensure it does not fall. Again, as this is additional work created by the UK government for the devolved administrations it is odd that the UK government is not giving the devolved administrations the powers to deal with it.
13. In the absence of a NI executive all REUL in NI should be restated or sunset extended – already highly problematic that these decisions would be taken with very limited oversight, but to do so without an Executive in place would be even worse.
14. What is needed is **communication and cooperation between the four administrations**. This is rendered difficult by a) only 3 out of 4 administrations are functioning b) rapid change in leadership in London c) breakdown in trust (yet again) with very different preferences in what to do with REUL between on one hand Scotland and Wales, and on other hand Westminster. This makes coordination difficult: will e.g. UK government accept that same piece of legislation is restated in Scotland and Wales and not in England? Or will it impose same approach across the board?
15. Some institutions and structures already exist but they are **not sufficient in scope**, and differ widely in how they work: e.g. most of the DEFRA REUL fall outside the scope of either legislative or non-legislative Common Frameworks, instead the most recent Frameworks Analysis from 2021<sup>15</sup> states that governments agreed there were already pre-existing ways of keeping in touch and/or low risk of divergence and thus no need to create frameworks. Will these pre-common frameworks ways to cooperate also be considered as necessary hoops to jump through before cutting REUL unilaterally? Will risk of divergence now lead to change mapping of where common frameworks are needed?
16. What about the Internal Market Act? An option under the Internal Market Act is for one of the four government to task the CMA with producing a report on the impact of a proposal ‘in the light of the significance of its potential effects on the operation of the internal market in the United

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<sup>14</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/702623/2018-04-24\\_UKG-DA\\_IGA\\_and\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1031808/UK\\_Common\\_Frameworks\\_Analysis\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf)

Kingdom’. While this may be needed in many cases it is **not practical to overload the CMA with such a wide range of reports.**

### The REUL Bill and Northern Ireland?<sup>16</sup>

17. **Scope of REUL Bill in NI is more complex to grasp than in GB.** Clause 1(5) is only a technical amendment to make sure that similar to GB, primary legislation is exempt – in NI that category ‘NI Legislation’ also covers direct rule exercise (such as Northern Ireland Orders in Council). It does not mean that the REUL Bill does not apply to subordinate REUL in NI – it does, and some NI Departments have already started mapping it: 600 for DAERA, 500 for DFI. But the REUL Bill does not apply to Protocol law – those elements of direct EU law that are in the annexes of the NI Protocol.
18. The scope and application of REUL Bill in NI further raise questions of how REUL Bill will work with the Protocol and the Protocol Bill. In short – the boundaries of what is covered or not in the REUL Bill for NI, and thus what SIs or SRs need to be restated depends also on what is agreed through the NI Protocol Bill and how powers laid out in that Bill are used. In particular, clarity is needed on how different approaches to the supremacy of EU Law which is disapplied under REUL Bill, but reaffirmed in the Protocol/Protocol Bill will work. Clarity is also needed on what happens to law that currently co-exists as both REUL and Protocol Applicable Law. E.g. only parts of 2009 Directive on clinical trials for medicine is covered in Protocol, but the whole is found in REUL – what happens if ministers take different decisions re revoking REUL or disappling Protocol Law? What happens if a piece of legislation that in NI is Protocol Law is disapplied after December 2023 – does the REUL equivalent of this piece of legislation arise to replace it? Or has that been revoked and lost to sunset already?
19. Furthermore, Article 11 of NI Protocol Bill aims **to protect areas of North South Cooperation**, of which environment and agriculture are central. What happens to that ‘protection’ if REUL in these areas are allowed to fall through?
20. NI experience during previous Brexit SIs work highlights difficulties of meaningful consent. Even when the Executive and Assembly came back after January 2020 experience is that of DAERA and AERA not getting sight of Brexit SIs (or only in part) affecting NI. This was a much more thought through process and even then consent was not seriously addressed. Current absence of Assembly and Executive should not be held as bar to setting up mechanism for devolved consent – 2018 MoU was set up when there was no government in NI. But it does mean that multiple avenues for NI consent have to be investigated: through Departments private secretary (although their powers have been curbed), through House of Commons NI Affairs Committee, etc.

November 2022

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<sup>16</sup> This section builds on our B&E brief Clarke, J, Gravey, V., Whitten, L-C (2022) *The known unknowns of the Retained EU Law (Revocation and Reform) Bill in Northern Ireland* <https://www.brexitenvironment.co.uk/policy-briefs/>