

# Brexit & Environment Policy briefs 1/2022

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## *The known unknowns of the Retained EU Law (Revocation and Reform) Bill in Northern Ireland*



### Executive summary

- The Retained EU Law (Revocation and Reform) Bill raises profound questions for the future of environmental policy in the UK, with clear risks of regulatory gaps.
- This is particularly the case in Northern Ireland, due to the complex, and still uncertain interplay between the REUL Bill, the NI Protocol and the NI Protocol Bill, but also NI's place in the UK internal market and the difficulties the REUL Bill may pose for North-South Cooperation on the island of Ireland.
- These fundamental decisions for the future of environmental action in Northern Ireland will put government administrative capacity under huge stress and come at a time where NI has no functioning Executive or Assembly, raising profound concerns for democratic accountability.

### Introduction

To consider the implications of the Retained EU Law (Revocation and Reform) Bill (REUL Bill) in the context of Northern Ireland, is to play a game of 20-questions. Whilst the [technical complexity](#) of the Bill has been considered by Prof Maria Lee, and the [devolved implications](#) by Dr. Viviane Gravey and Prof Colin Reed, here, we seek to focus in on the uniquely multidimensional context of the REUL Bill in Northern Ireland.

From a specific legislative exclusion, to nuances around the Protocol and the NI Protocol Bill, the overshadowing absence of functioning political institutions, and the implications for the environment across the island of Ireland, the REUL Bill in Northern Ireland is quite simply a headache. As departments and experts come to terms with the scope and implications of this Bill, we believe it is pertinent to set out several fundamental questions. These are the known unknowns of the REUL Bill in Northern Ireland, which provide a starting point from which the complexities of the Bill can, we hope, be untangled.

## Scope of the REUL Bill in Northern Ireland

The first question relates to the scope of the REUL Bill in Northern Ireland, specifically **to what extent does the Clause 1(1) apply in Northern Ireland?**

Clause 1(5) stipulates that “Northern Ireland legislation” is not caught by the automatic revocation, with a definition of this *exclusion* found in s24(5) and Schedule 1 of the [1978 Interpretation Act](#). Read together this suggests that Acts of the Northern Ireland Assembly, older Acts of the Northern Ireland Parliament, and various Northern Ireland Orders in council – made under the authority of Acts of Westminster – are excluded from the sunset clause, but the plethora of statutory rules (SRs) from Northern Ireland departments are not. However, neither the sum of these SRs, nor the sum of [UK retained EU law](#) with implications in NI are known.

## The REUL Bill and the Northern Ireland Protocol

Debate surrounding the Protocol on Ireland/Northern Ireland (Protocol) is ongoing, but whether it remains as written, slightly amended, or significantly altered it will directly interact with the REUL Bill.

Clause 4(1) of the REUL Bill proposes to insert new section (A1) to [section 5](#) of the EU Withdrawal Act 2018 (EUWA 2018) to provide that, after the end of 2023, the “principle of the supremacy of EU law is not part of [UK] domestic law.” This conflicts with provisions in the UK-EU Withdrawal Agreement and related provisions in the Northern Ireland Protocol Bill ([Clause 14](#)); with the latter proposing to limit EU law principles (only) to the extent of their application to aspects of the Protocol that are to become ‘excluded’ provisions under the NIP Bill (discussed further below).

Under [Article 4\(1\)](#) of the EUWA 2018, any EU laws that apply to the UK under the Withdrawal Agreement (WA) (and its Protocols) are to have the same effect as they would in an EU Member State.

[Article 4](#) of the Withdrawal Agreement states:

- 1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member State*
- 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.*

3. *The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law*

Following [s7A\(1\)](#) of the EUWA 2018, the WA (and Protocol), any EU laws made applicable have legal force in the UK on the terms set out in Article 4 i.e., enjoying direct effect, supremacy and the general principles of EU law. So, the introduction – via the REUL Bill - of new section 5 (A1) to the EUWA 2018 would (presumably) change this by disapplying ‘supremacy’ from the UK statute, thus undermining section 7A of the current provision (EUWA 2018) for the implementation of the Protocol and EU laws it makes applicable on the terms of Article 4 of the WA with supremacy and general principles of EU law having effect.

We therefore ask, **how would the disapplication of ‘supremacy and general EU law principles’ in REUL Bill effect the application of supremacy and general EU law principles under the UK-EU Withdrawal Agreement and Protocol (given effect in EUWA 2018)?**

A further complexity – in relation to scope and the Protocol – is borne out of the fact that some instruments of EU law made applicable to Northern Ireland under the Protocol only partially apply. This includes, under Article 5 Annex 2, the single use plastics directive (Directive (EU) 2019/904), a regulation (Regulation (EU) No 536/2014), and directive (Directive 2009/35/EC) on clinical trials for medicines, two regulations on the organisation of agricultural markets (Regulation (EU) Nos 1308/2013 and 1306/2013), as well as rules on the regulation of energy and electricity markets (including EU ETS) under Article 9 and [Annex 4](#) of the Protocol.

This begs our third question: **are instruments of EU law that partially apply under the Protocol subject to clause 1(1) sunset? If yes, how does this work in respect to UK(NI) – can these laws that currently (presumably) apply as a ‘mixture’ of REUL and Protocol applicable law be ‘split’?**

## The REUL Bill and the NI Protocol Bill

Due to the Protocol, (former and current) EU law in the UK already existed differently in NI compared to the rest of the UK. The conjunction of the REUL Bill and the NI Protocol Bill is further complexifying the situation in NI, with yet more categories of laws with different enforcement mechanisms (Figure 1).

In addition to the added complexity both Bills propose to bring to the legal status quo in NI, we need to contend with tensions between the two. For example, to consider how the disapplication of ‘supremacy’ under clause 4 of the REUL Bill and proposed new section 5(A1) of the EUWA 2018 play out in relation to the ‘[extraordinary](#)’ NI Protocol Bill ([NIP Bill](#)).

Contrary to some interpretations, the NIP Bill (as it entered the HL) does not provide for the full revocation of the Protocol in UK law. Instead, it provides UK Ministers with the powers to disapply and/or reapply large sections of it. Some articles of the Protocol are, however, ‘protected’ from disapplication (or

‘exclusion’) under the NIP Bill as drafted. What this means is that ‘protected’ provisions (which include Article 2 (on rights of individuals), Article 3 (on the CTA) and Article 11 (on N-S cooperation) of the Protocol) are to apply, as UK law currently provides, according to the terms of the UK-EU Withdrawal Agreement and Protocol albeit read together with the rest of the NIP Bill and changes it proposes to make regarding CJEU jurisdiction and enforcement provisions.

**Figure 1. New categories of Law in Northern Ireland**

Status Quo		Status Quo + NIP Bill		Status Quo + NIP Bill + REUL Bill		
UK laws that apply in NI						
		primary	secondary			
UK(NI) devolved laws						
		primary	secondary			
Protocol-applicable EU law		NIP Bill ‘protected’ provisions		NIP Bill ‘protected’ provisions		
Devolved	Not Devolved	Article 2; Article 3; Article 11		Article 2; Article 3; Article 11		
		NIP Bill ‘excluded’ provisions		NIP Bill ‘excluded’ provisions		
		Article 5(1), 5(2), 5(3), 5(4); Article 10; [Article 12(1); 12(5)-(7) Article 13 and WA Articles: 4 and 170-181]*		Article 5(1), 5(2), 5(3), 5(4); Article 10; [Article 12(1); 12(5)-(7) Article 13 and WA Articles: 4 and 170-181]*		
		NIP Bill: not excluded/protected provisions		NIP Bill: not excluded/protected provisions		
		Article 4; Article 6; Article 7; Article 8; Article 9; Article 12(2), 12(3), 12(4); Articles 14-19.		Article 1; Article 4; Article 6; Article 7; Article 8; Article 9; Article 12(2), 12(3), 12(4); Articles 14-19.		
UK REUL		UK REUL		UK <i>previous</i> REUL		
EU-derived legislation	direct EU legislation	EU-derived legislation	direct EU legislation	‘sunset’	‘exempted’	‘assimilated’
				UK primary [REUL] not subject to Bill		
UK(NI) REUL		UK(NI) REUL		UK(NI) <i>previous</i> REUL		
EU-derived legislation	direct EU legislation	EU-derived legislation	direct EU legislation	‘sunset’	‘exempted’	‘assimilated’
				UK(NI) primary [REUL] not subject to Bill		

NB: [Protocol](#) Articles 12(1); 12(5)-(7) and Article 13; as well as Withdrawal Agreement Articles 4 and 170-181 are excluded (under NIP Bill [c14](#)) to the extent they relate to other excluded provisions; Under EUWA 2018 [s1B](#)(7) ‘EU-derived domestic legislation’ means any UK legislation made under s2(2) of ECA 1972 or for related purpose; ‘direct EU legislation’ means under EUWA 2018 [s3](#) any EU regulation, decision, or EU tertiary legislation that had effect in EU law immediately before IP completion day and/or has effect in domestic law by virtue of WA Article 4.

On that issue, the NIP Bill provisions are complex. As drafted the NIP Bill provides for those aspects of the Protocol that confer jurisdiction on the CJEU to be ‘excluded’ from UK law (clause 13(1)) as well as those aspects of the Withdrawal Agreement and Protocol that require compliance with general principles of EU law (as per WA Article 4) and relevant CJEU case law (clause 14(1)-(2)) to be excluded. *However*, the NIP Bill also grants UK Ministers, in effect, the power to reverse these ‘exclusions’ (under clause 14(4); 15(4); 20(3); 20(4)) by regulations if they ‘considered it appropriate’ to do so.

As has been [highlighted](#) by NI rights and equality bodies, there is a lack of clarity, on the face of the NIP Bill, regarding the implications of its ‘protection’ of some elements, its explicit ‘exclusion’ of others, and the expansive powers it gifts UK Ministers to exclude/include the ‘non-protected’ elements of the Protocol by discretion.



But the crucial point in considering the REUL Bill is that under the NIP Bill *some* parts of the Protocol and EU laws it makes applicable to and in Northern Ireland, *could* (without the REUL Bill) still be subject to the principle of supremacy and general principles of EU law and a continued (albeit much more distant) role for the CJEU. This leads to our fourth question: **What are the implications of the disapplication of ‘supremacy’ principle under the REUL Bill for the operation of the NIP Bill [Act] given the latter provides for the potential continuation of the principle of supremacy, general EU law principles and the applicability of CJEU case law?**

Moreover, under the NIP Bill Article 11 of the Protocol – requiring the Protocol to be “implemented and applied” in such a way as to ensure “necessary conditions” for N-S cooperation are maintained in 14 areas (including environment and agriculture) – is a protected provision. This informs our fifth question: **How does NIP Bill ‘protection’ of Article 11 work with clause 1(1) ‘sunsetting’ of many aspects of REUL that currently make N-S cooperation possible?** (e.g., habitats, water framework, air quality, noise pollution, some waste directives etc... not to mention all the other policy areas affected).

## The REUL Bill and North-South Cooperation

North-South Cooperation [relies](#) to a significant extent on REUL. Our sixth question thus asks **How then, will REUL Bill provisions/processes (including sunsetting, exclusions, restatement etc.) account for and accommodate N-S cooperation on the island of Ireland?**

Of the 142 areas of N-S cooperation [identified](#) in 2017 by the UK and EU as being underpinned by EU law and policy frameworks, 61 areas of cooperation are *not* fully provided for in the Protocol and those EU laws it makes applicable to the UK in respect of Northern Ireland (see Table 1). Ongoing cooperation in these 61 areas – of which almost half have environmental implications – therefore relies to a large extent on the lingering equivalence of law and policy in Ireland and Northern Ireland that arises from, EU law/policy on one side of the land border and retained EU law/policy on the other.

Removing or ‘sunsetting’ REUL in respect of Northern Ireland in these 61 areas of existing cooperation will make its continuation much more difficult and create significant environmental risk. Such a scenario could, if realised undermine:

- N-S cooperation through divergence of standards, regulations, and consequential administrative burden;
- Political [commitment](#) to upholding and continuing N-S cooperation; and,
- Legislative provision for the protection of N-S cooperation including through:
  - Domestic law: EU Withdrawal Act 2018 [section 10](#) provision that Ministers making provisions re REUL (under s8 of the Act) cannot do anything to “diminish any form of North-South cooperation provided for by the Belfast Agreement”
  - International law: the Belfast (Good Friday) Agreement that provides for the [environment](#) as one of twelve areas of N-S cooperation and creates cooperative bodies to facilitate discursive forums. And the Withdrawal Agreement/Protocol.

**Table 1: Areas of existing North-South Cooperation that were directly or indirectly underpinned by EU law and policy frameworks pre-Brexit and which are not covered or are only partially covered by the Protocol (Whitten, 2022).**

PARTIALLY COVERED	NOT COVERED
SEUPB; PEACE IV programme; INTERREG funding Biodiversity Border People Project Loughs Agency; Waterways Ireland Cross-border Enterprise Rail Service Operation of cross-border taxis Major emergencies and A&E planning cooperation North-West Cancer Centre; All-Island Congenital Heart Disease Network; Middletown Centre for Autism Ltd Mutual Recognition of professional qualifications for doctors and clinicians Export Licensing Controls (dual use goods, military goods) Teacher qualifications and professional development Plant health and regulatory checks for quarantine pests; Transmissible Spongiform Encephalopathies & Animal By-Products Animal health and welfare working groups Checks on third country products of animal origin; Checks on products of animal origin Checks on Live animals Checks on food not of animal origin Waste Management [ii] Natural Gas Road network Intertrade Ireland Engagement & Information Exchange DAERA & DAFM Invest NI & Enterprise Ireland cooperation Environmental protection reporting and research Sport; Statistics Cross-border academic partnerships (in agriculture)	Child protection Commercial vehicle roadworthiness enforcement and concerted checkpoints Vehicle and driver safety checks Cabotage Motor Insurance Driver and Vehicle Licensing International Authorisations for bus & coach services Ferries Road Haulage Water pollution and water catchment work; Water quality; Water regulation Common Agricultural Policy All-Island Pollinator Plan Air quality issues Strategic Environmental Assessment River Basin Management Plans Flood Risk Management Habitats and Wild Birds Directive All-Ireland Marsh Fritillary Group EU LEADER cooperation EURES Cross Border Partnership Benefit fraud cross-border cooperation Irish Language Broadcasting Mobile Roaming Cross-border cooperation on criminal justice matters (including work of Organised Crime Task Force) All-Island Public Procurement Steering Group Landscape Monitoring

## The REUL Bill and the UK Internal Market Act

Under [s46](#) of the UK Internal Market Act 2020 any UK Minister making arrangements/regulations that relate to the movement of goods within the UK “must” have “special regard” for the “integral place” of Northern Ireland in the UK internal market and the “need to facilitate the free flow of goods” between GB and NI.

Our 7<sup>th</sup> and 8<sup>th</sup> questions are thus: **How do provisions/processes in the REUL Bill ensure that UK Ministers can/will uphold their obligations under s46 of the UKIM Act to facilitate the free flow of goods GB-NI and NI-GB (i.e., not introducing more barriers as consequence of difference in standards)?**

**What does this mean for Northern Ireland’s place in UK Internal Market if REUL bill pushes for deregulation in GB, which cannot be followed in areas covered by Protocol in NI?**

There is a very real risk of undercutting of UK(NI) businesses and producers who are required (under the current Protocol) or who choose (under a revised Protocol / NIP Bill) to follow EU standards on goods in

areas where UK(GB) businesses and producers (under the REUL Bill) opt to deregulate. If s46 of the UKIM is upheld, it *could* mitigate the potential ‘undercutting’ effect in NI.

## The REUL Bill with no NI Assembly and Executive

The stalemate at Stormont creates a further unique complication to both scrutiny of the Bill, and realisation of its core purpose. This has been a year of political [firsts](#) and [absence](#) for Northern Ireland, with the introduction of legislation at Westminster providing for cycles of caretaking Ministers and elections [to avert prolonged periods of absent government](#). However, as neither the Executive nor Assembly have been formed following the elections in May this year, ongoing political uncertainty and the impending [call](#) for an election loom large over the mounting and all-too-real list of problems facing ‘caretaker’ Ministers, to which the REUL Bill is now added.

During this period of political restriction, established processes of law-making, including Executive meetings, Assembly debates, Committee hearings and public scrutiny more generally have been halted. Our ninth question thus asks: Should this political vacuum continue – a seemingly real [possibility](#) – **how will the REUL Bill be scrutinised? how can the UK Government seek consent from Northern Ireland?** Whilst such consent is normally a matter of [convention](#), the implications for legislating in such a breadth of devolved areas (including the environment) without consent creates its own [challenges](#). The REUL Bill could force upon Northern Ireland a legislative cliff-edge that fundamentally cannot be overcome due to absent political institutions.

Our tenth and final question that political instability raises is – **how will the process of reviewing and revoking, replacing, or restating retained EU law by 2023 be carried out in Northern Ireland?** The Bill will create a huge bureaucratic demand on departments, committees, and external stakeholders. Considering only the realisation of the legislative intent within Northern Ireland, we are faced with the very real concern of how departments will have the time to complete the revocation or reform of some hundreds of pieces of legislation. As has been noted, [“these are sums that even the most numerate policy makers cannot make work”](#) and this is before considering the implications of the absence of mechanisms for scrutiny and review in Northern Ireland.

These unanswered questions regarding the capacity (or lack thereof) of officials and politicians in Northern Ireland to scrutinise the REUL Bill and the (extensive) legislative processes it would catalyse (regarding review, revocation, replacement, restatement) would be the latest addition to an ever-growing list of unaddressed legislative and policy issues in the absence of fully functioning government. This is also why, taken together, the extent of discretionary powers granted to UK Ministers under the REUL Bill and under the NIP Bill is so concerning. For Northern Ireland, it is very difficult to conceive of how, if enacted, these two pieces of legislation, as drafted, can be conducive to good governance and effective policy-making but, unfortunately, this is the harsh political reality we face.

# The REUL Bill and Northern Ireland in 10 questions

- 1) To what extent does the Clause 1(1) apply in Northern Ireland?
- 2) How would the disapplication of 'supremacy and general EU law principles' in REUL Bill effect the application of supremacy and general EU law principles under the UK-EU Withdrawal Agreement and Protocol (given effect in EUWA 2018)?
- 3) Are instruments of EU law that partially apply under the Protocol subject to clause 1(1) sunseting? If yes, how does this work in respect to UK(NI) – can these laws that currently (presumably) apply as a 'mixture' of REUL and Protocol applicable law be 'split'?
- 4) What are the implications of the disapplication of 'supremacy' principle under the REUL Bill for the operation of the NIP Bill [Act] given the latter provides for the potential continuation of the principle of supremacy, general EU law principles and the applicability of CJEU case law?
- 5) How does NIP Bill 'protection' of Article 11 work with clause 1(1) 'sunseting' of many aspects of REUL that currently make N-S cooperation possible?
- 6) How then, will REUL Bill provisions/processes (including sunseting, exclusions, restatement etc.) account for and accommodate N-S cooperation on the island of Ireland?
- 7) How do provisions/processes in the REUL Bill ensure that UK Ministers can/will uphold their obligations under s46 of the UKIM Act to facilitate the free flow of goods GB-NI and NI-GB (i.e., not introducing more barriers as consequence of difference in standards)?
- 8) What does this mean for Northern Ireland's place in UK Internal Market if REUL bill pushes for deregulation in GB, which cannot be followed in areas covered by Protocol in NI?
- 9) How will the REUL Bill be scrutinised? How can the UK Government seek consent from Northern Ireland?
- 10) How will the process of reviewing and revoking, replacing, or restating retained EU law by 2023 be carried out in Northern Ireland?