Regression by Default?

An Analysis of Review and Revision Clauses in Retained EU Environmental Law

May 2020

Professor Andrew Jordan &
Dr Brendan Moore

BREXIT & ENVIRONMENT

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By Professor Andrew Jordan and Dr Brendan Moore

Cover picture courtesy of Irina Gromovataya

Acknowledgements

Viviane Gravey, Maria Lee, Colin Reid, Ruth Chambers and James Craske kindly provided useful comments on an earlier version of this brief. We, the authors, are solely responsible for any remaining errors and misinterpretations. Funding for this report was kindly provided by Research England's Higher Education Innovation Fund (HEIF) which aims to support knowledge-based interactions between higher education providers and the wider world, which results in benefits to the economy and society.

This brief should be cited: Jordan, Andy & Moore, Brendan. (2020) Regression by Default? An Analysis of Review and Revision Clauses in Retained EU Environmental Law. Brexit and Environment.

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Executive Summary

- There are around 500 separate items of EU environmental law and policy. UK policy practices have been heavily influenced by, and often directly derive from, these EU laws and policies. If these EU laws and policies are not fully retained after Brexit (i.e. transferred into UK law) it will produce a substantial gap in UK environmental policy.
- The Government claims that it has prevented this potential policy gap from appearing by 'retaining' all relevant EU laws and policies and transferring them onto the UK statute book. In some cases, during the retention process the Government used statutory instruments – a form of delegated legislation – to amend an original EU law to reflect the fact that the UK left the EU in January 2020, and thus the ambit of EU bodies such as the European Commission. Section 8 of the European Union (Withdrawal) Act (2018) gave the Government relatively wide discretion to use statutory instruments to make these amendments to retained EU law in order to "prevent, remedy or mitigate" any failure of retained law to "operate effectively" or to correct "any other deficiency in retained EU law" arising from Brexit.
- But an important question arose on 31 January when the UK formally left the EU: how will the retained laws be updated outside the governance framework of the EU? Review and revision clauses are a little known, but vitally important feature of EU policy making which ensure that EU policies are regularly evaluated ('reviewed') and/or updated ('revised') to ensure they remain relevant and

effective in light of changing economic circumstances and new scientific evidence. Within the EU, the European Commission is responsible for ensuring that these clauses are implemented. So have these clauses been modified in retained EU laws and what does this imply for the continuing relevance and effectiveness of UK environmental policy and governance?

- A detailed comparison of 24 EU environmental laws and the 20 Brexit-related statutory instruments that were used to modify them reveals that the vast majority of the instruments removed the review and revision clauses in the original EU laws. This change, made at relatively great speed with little democratic scrutiny, appears to have escaped the attention of many observers, including many parliamentarians.

- The removal of so many clauses means there is a significantly greater risk that the retained environmental policy protections will gradually succumb to what the Parliamentary Environmental Audit Committee has termed zombification, i.e. they will formerly exist on the UK statute book, but will gradually become outdated and thus environmentally less effective over time (2017).

- The removal of these clauses from so many retained EU laws has potentially important, long-term policy consequences. It is an open question whether the apparent scale of the changes uncovered in this report is in keeping with the spirit of the 2018 Act, which was presented as a means to make relatively small 'technical' amendments at speed to prevent policy gaps from appearing.

- DEFRA maintains that when it is finally adopted, the new Environment Act will facilitate a "green transformation" post-Brexit (2019). Yet the apparent disappearance of so many review and revision clauses offers a reminder that the UK lacks a public plan for what to do with all the retained EU law, which at the end of

January effectively became an entirely new and substantial category of UK environmental law.

- There is an opportunity for the UK to demonstrate continuing international environmental leadership outside the EU, by explaining how retained EU laws will not just be preserved in their current state, but will be progressively built upon and improved over time. At present, however, a more likely scenario is that they will soon become outdated and thus succumb to zombification.
- The risk of zombification is directly relevant to the trade talks between the UK and the EU and especially the maintenance of a 'level playing field' after the Brexit transition concludes in January 2021. One way in which UK standards could conceivably 'regress' after Brexit is via an open and explicit process of deregulation ('cutting red tape'). Our analysis, however, points to another possibility – a 'back door' form of regression that happens by default through a lack of timely review and revision.
- There are several steps that the Government could take to mitigate the risk of regression by default. For example, it could use its executive powers to amend the original SIs to restore the review and revision clauses. It could also grant the new Office for Environmental Protection (foreseen under the new Environment Act) stronger powers to oversee and report on the status of retained EU law (Section 19) and/or it could ensure that retained EU law is fully integrated into the new Environmental Improvement Planning process (also to be provided for in the Environment Act) (Section, 7).

1. Introduction

There are around 500 separate items of EU environmental law and policy. UK policy practices have been heavily influenced by, and often directly derive from, these EU laws and policies (European Environment Agency, 2019). If these EU laws and policies are not fully retained after Brexit (i.e. transferred across into UK law) it will produce a substantial gap in UK environmental policy.

In March 2017, the Government adopted the general principle that in order to maintain regulatory certainty, the same body of rules should apply immediately after the UK left the EU as it did when it was a Member State (DExEU, 2017, 9). In June 2018, this principle was implemented via a new Act of Parliament – the European Union (Withdrawal Act) 2018 (see Institute for Government, 2018). In the Foreword to the accompanying White Paper, David Davis, the then Secretary of State for Exiting the EU, wrote that the country should welcome the Bill's "pragmatic but principled approach to maximising certainty, providing clarity and allowing for parliamentary scrutiny as we leave the EU" (Davis, 2017 8).

The Government initially claimed that the retention process would ensure that all the prevailing environmental standards would be maintained after Brexit, satisfying one of the core demands made after the referendum by the Greener UK coalition of environmental NGOs. The then Prime Minister, Theresa May, went even further (May, 2017, 5):

> *"[Our] approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate".*

This policy report summarises the results of a novel analysis of the retention process, specifically the fate of the environmental protections that were provided by EU policy before Brexit day. Moreover, it analyses the fate of the

'review' and 'revision' clauses that are an important but little known feature of EU legislation. All policies, be they national or EU-derived eventually become outdated and ineffective as time passes. The review and revision clauses were originally inserted by EU-level policy makers into specific Directives and Regulations with the aim of ensuring that EU laws remain relevant and effective over time. Our working assumption is that the retention of these clauses in post-Brexit UK law will help to guard against legislation becoming outdated, or succumbing to what the House of Commons Environmental Audit Committee termed 'zombification' (EAC 2017).

The remainder of our analysis is organised as follows. Part 2 outlines the background to the retention process and Part 3 provides a brief introduction to the revision and review clauses as they are currently employed at EU level. Part 4 summarises our methods and Part 5 outlines our main findings. Part 6 explains why our findings are policy relevant and Part 7 describes the policy implications and explores some policy options that relate specifically to the fate of the clauses.

2. The challenge of retaining EU law

Most casual observers probably assumed that after the UK left the EU on 31 January 2020 it would rapidly and fully disentangle itself from all aspects of EU law. But not so. During the 47 years that the UK was a member, the EU's gradual penetration into national policy and legal systems was so deep-seated that a rapid and sudden disentanglement risked creating legal uncertainty and policy gaps. This is why the May Government rapidly embarked upon a significant, cross-Whitehall exercise after the referendum, which aimed at identifying the most important elements of EU policy and retaining them to create an entirely new and substantial category of domestic UK law, known as 'retained EU law' (Cowie, 2019).

The role of secondary legislation

However, from the outset, it became abundantly clear that retaining so much EU law represented a huge logistical challenge; the 2017 White Paper estimated that there were around 12,000 laws on the EU's statute book (DExEU, 2017, 14). Not only did the Withdrawal Act make provisions to retain relevant EU laws on Brexit day, it also gave the Government the power to 'correct' the sections that would no longer be 'functionally appropriate' after Brexit using a form of secondary (or delegated) legislation known as statutory instruments. For example, references to a particular EU institution (such as the Commission) or to the UK being an EU Member State would self-evidently no longer be applicable once the UK left the EU. Using the Withdrawal Act, the widespread assumption was that statutory instruments would repeal or otherwise amend such references without affecting the main substance of the policy in question.

One area that was immediately identified as a priority for retention and possibly correction was environmental protection – a very significant area of EU policy activity. The European Environment Agency has estimated that around 500 EU laws and policies relate to the environment (EEA, 2019). In the White Paper, the Government fully accepted that these EU environmental laws had delivered "tangible environmental benefits" and undertook to (DExEU, 2017, p17):

> *"ensure that the whole body of existing EU environmental law continues to have an effect in UK law. This will provide businesses and stakeholders with maximum certainty as we leave the EU" (our emphasis).*

However, it continued:

> *"We will then have the opportunity, over time, to ensure our legislative framework is outcome driven and delivers on our overall commitment to improve the environment within a generation."*

And it added that it:

> *"recognise[d] the need to consult on future changes to the regulatory frameworks, including through parliamentary*

scrutiny."

In principle, this is how the process of retention was supposed to have operated. In practice, the scale of the challenge and the perceived need to act quickly to maintain regulatory certainty, meant that the White Paper (DExEU, 2017) did not explain how each and every EU law would be corrected (see Section 3.2). Rather, the Government gave itself the power to make specific changes using statutory instruments, but established procedures for Parliamentary scrutiny and stakeholder dialogue. In general, any changes would, it promised, be strictly limited to correcting so-called "deficiencies" in EU law (DExEU, 2017, 22):

> *"Crucially, we [the Government] will ensure that the power [to correct] will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU derived law arising out of our exit from the EU" (emphasis added).*

The same commitment also appeared in an accompanying fact sheet published by the Department for Exiting the EU (DExEU) in July 2017, which explained that each SI would include an explanatory memorandum giving an overview of precisely which aspects of EU law would (not) be corrected and why (DExEU, 2018).

Policy versus technical changes

Nonetheless, eminent commentators such as the House of Lords Select Committee on the Constitution warned of the risk that relatively significant policy changes could be quietly slipped through via the delegated procedure of statutory instruments under the guise of small, 'technical' amendments. They wrote (2017, 3):

> *"It is vital that a distinction be drawn between … two discrete processes: the more mechanical act of converting EU law into UK law, and the discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence. The [Act] is intended to facilitate the first aspect of the process. The second should be achieved through normal parliamentary procedures."*

Their Lordships repeated the same warning a year later (2018)

In the environmental sector, Client Earth's CEO, James Thornton, warned that the White Paper was "far too ambiguous and fails to guarantee existing environmental laws will be safely kept on our statute books as primary legislation" (Thornton, cited by Kaminski 2017). In its very first Brexit risk tracker (published in June 2017 and covering the period 2016–2017), Greener UK flagged its concerns and reminded readers that in his Foreword to the White Paper, David Davis had actually only undertaken to retain EU legislation wherever and whenever it was "practical and sensible" to do so (2017, 8). In other words, they warned that some EU legislation and policy functions may not be retained. These fears were compounded when the then Secretary of State for the Environment, Andrea Leadsom, warned that around a third of EU legislation was too complicated to convert fully into UK law (Edie, 2016). At that point, fears began to grow that some important policy functions could be jeopardised or even lost entirely during the retention process.

Retention: job done?

After the adoption of the EU Withdrawal Act in June 2018, the UK Government devoted a great deal of time and effort to ensuring EU law was adequately retained. The challenge weighed particularly heavily on DEFRA, historically one of the smallest departments in Whitehall (by headcount) but one that is still shouldering a huge burden of EU exit work. Given that 80% of the Department's day-to-day work was framed by EU legislation prior to the EU Referendum and 25% of all EU laws related in some way to its core activities, it was not surprising that it calculated that around 100 new SIs would be required to get the job done – one of the largest quantities identified by any Whitehall department (National Audit Office, 2018). In November 2018, the House of Commons Public Accounts Committee warned that DEFRA faced "enormous challenges" in drafting so much secondary legislation and "in its efforts to rush through the drafting [of the SIs]" members highlighted their concerns "about the risks to quality … [and] … the level of scrutiny (2018, 3)".

When the individual draft SIs were published and scrutinised, Parliament

and NGOs uncovered a number of deficiencies and some eventually had to be withdrawn and modified (House of Lords Secondary Legislation Scrutiny Committee, 2019). In the environmental sector, the SIs relating to chemicals and nature policy proved to be especially challenging to retain correctly (Simkins, 2019). But in the Foreword to one No-Deal Readiness Report, the Prime Minister, Boris Johnson, claimed that in the referendum, voters had voted to "take back control of their laws, money, trade and borders" (2019, 3). He continued: "there are many rules and procedures described in the following pages that have been laid down by the EU, but which – without Brexit – the UK on its own would have no power to vary in any way". The report itself implied that the creation and modification of EU retained law had been completed, stating that "we have transposed current EU environmental regulations into the UK statute book" (HM Government, 2019, 65). It also implied that there was no more for individuals and businesses to do, other than prepare themselves for the adoption of the new Environment Bill which will provide an "opportunity to lead an environmental transformation that will help our country – and the planet – to thrive". In other words, the job had been done.

3. Keeping policy effective and up to date: the role of review and revision clauses

In this report, we dig beneath the headline targets and standards embodied in retained EU law and examine if and how the UK Government's "technical corrections" are likely to lead to substantive policy changes in how the original laws are henceforth reviewed and revised. We focus on two components of the EU laws in question: review clauses and revision clauses.

Review clauses

A study undertaken for the European Parliamentary Research Service defined review clauses as "provisions for a review, an evaluation or an implementation report", in this case within EU legislation (Kristo, Ivana Kiendl with Poutouroudi, 2019). A typical example of such a clause can be

found in Article 19 of the 2017 EU Mercury Regulation (2017), which states:

> *"By 31 December 2024, the Commission shall report to the European Parliament and to the Council on the implementation and the review of this Regulation, inter alia, in the light of the effectiveness evaluation undertaken by the Conference of the Parties to the [Mercury] Convention and of the reports provided by the Member States …"*

The *ex-post* review of EU law, often undertaken according to the requirements of review clauses, is a key component of the EU's Better Regulation agenda, strongly advocated by the UK when it was a Member State. Review clauses are widespread, especially in legislation adopted after 2000. A European Parliament study of 225 EU laws adopted between July 2014 and December 2017 found that the majority (65%) contained some type of review clause, including 67% of those handled by the Parliament's environment committee (Regulation EU, 2017). However, the EU's independent financial auditor, the European Court of Auditors, found that there was "a lack of common guidelines" and clauses were "frequently unclear" in their requirements (2018).

Revision clauses

Revision clauses have received less specific attention than review clauses; in the European Parliament study cited above, they were often included as part of review clauses because they are commonly found in the same legal article. In this report, we define revision clauses as "provisions that bring forward legislative proposals to update the law in question". Returning to the example of the 2017 Mercury Regulation introduced above, immediately following the review clause Article 19 states that:

> *"[t]he Commission shall, if appropriate, present a legislative proposal together with its reports referred to in paragraphs 1 and 2."*

EU revision clauses are often optional (e.g. "shall, if appropriate"), giving the Commission the option to introduce a new proposal if it deems it appropriate or not if it does not. Again, the European Court of Auditors has

underlined the need for them to be applied more systematically in EU legislation.

4. Methods and main findings

Methods

Our analysis encompasses the subset of statutory instruments that are focused on the environment. In March 2020, the UK Government (2020) listed 280 SIs laid under the provisions of the EU Withdrawal Act using the negative procedure, under which an SI can only be blocked if either the House of Commons or the House of Lords actively votes against it. Of these SIs, 107 were labelled as "Environment". Additional searches were carried out for environmentally relevant SIs laid by DEFRA, the Department for Business, Energy and Industrial Strategy and the Department for Transport. This resulted in an initial list of 117 environmentally related SIs.

Our analysis focused on UK-wide SIs; we therefore excluded 56 SIs that only addressed England, Wales, Scotland, or Northern Ireland (as well as those that have been withdrawn by the government). This left 61 UK-wide environmental SIs, many of which amended multiple items of EU retained law at the same time. For example, the Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2018 amended no less than 31 items of EU legislation. Together, these 61 SIs amended 72 major EU laws (e.g. directives, regulations and decisions) and 166 implementing EU laws (e.g. Commission implementing regulations). We then excluded 23 SIs that amended only domestic UK legislation or EU implementing legislation. This left 38 environmental SIs that were UK-wide, were in force, and which directly amend major items of EU legislation.

For pragmatic reasons, amongst these 38 SIs we sampled 24 EU laws (amended by 20 of the SIs) to determine if they included review and revision clauses and, if so, whether and how the clauses were amended. To be as systematic as possible we sampled EU laws and SIs that covered a broad range of environmental topics, including biodiversity, water, agriculture,

ozone, climate change, waste, pesticides, chemicals, air quality, mercury, and fisheries.

Main findings

Our first major finding is that both review and revision clauses were very common in the 24 EU laws we analysed (see Table 1). Fully 88% (21/24 laws) contained review clauses and 79% (19/24) contained revision clauses. Our second main finding is that the statutory instruments removed the review clauses from all but 6 (25%) of the equivalent retained EU laws and removed revision clauses from all but 5 (21%). The Government removed the clauses across a number of topic areas, spanning climate change, waste, agriculture, and heavy metals. Clauses were removed regardless of whether the original EU law was a directly effective Regulation or a Directive (typically requiring the adoption of additional national legislation to have legal force). Our full analysis can be found in Annex I.

Our findings (see Table 1) may actually understate the extent to which review and revision clauses have been removed. For example, four of the five retained EU laws that maintained revision clauses appear to be drafting errors (in SIs on the Common Agricultural Policy, Air Quality, and Trade in Endangered Species). The relevant SIs do not amend the articles containing the revision clause at all, despite the fact that these clauses are self-evidently deficient according to Section 8 (2) (2b), e.g. they refer to the European Commission.

Table 1 Review and Revision Clauses in 24 EU Environmental Laws and as Modified by Statutory Instruments.

EU Legislation	SI Number	EU Legislation		Statutory Instrument	
		Review clause	Revision clause	Review clause	Revision clause
Car CO2 Regulation (2009)	2019/550	Yes	Yes	No	No
Car CO2 Regulation (2019)	2019/550	Yes	Yes	No	No
Common Agricultural Policy (Direct Payments to Farmers)	2019/207	Yes	Yes	No	Yes*
Common Fisheries Policy (Basic Regulation)	2019/739	Yes	No	No	N/A
Common Fisheries Policy (Bottom Fishing Gears)	2019/739	Yes	Yes	No	No
Common Fisheries Policy (Vulnerable Ecosystems)	2019/739	Yes	Yes	No	No
Energy Labelling Regulation	2019/539	Yes	No	No	N/A
European Pollutant Release and Transfer Register	2018/1407	Yes	Yes	No	Yes*
Fertilizers Regulation	2019/601	No	No	N/A	N/A
FLEGT and Timber Imports Regulation	2018/1025	Yes	Yes	No	No
Fluorinated Greenhouse Gases	2019/583	Yes	Yes	Yes	No
GMO Labelling	2019/90	Yes	Yes	No	No
Heavy Duty Vehicles CO2 Monitoring	2019/846	No	No	N/A	N/A

EU Legislation	SI Number	EU Legislation		Statutory Instrument	
		Review clause	Revision clause	Review clause	Revision clause
Invasive Species Regulation	2019/223	Yes	Yes	Partial	No
Mercury Regulation	2019/96	Yes	Yes	No	No
Monitoring of CO2 from Maritime Transport Regulation	2018/1388	Yes	Yes	Partial	No
Nagoya Protocol Regulation	2018/1393	Yes	No	Yes	N/A
Ozone-Depleting Substances Regulation	2019/583	Yes	Yes	No	No
Persistent Organic Pollutants Regulation	2018/1045	Yes	Yes	No	No
Pesticides Regulation (Maximum Residue)	2019/557	Yes	Yes	No	No
REACH Regulation	2019/758	Yes	Yes	Yes	Yes
Trade in Endangered Species Regulation	2018/1408	No	Yes	N/A	Yes*
Waste Shipments Directive	2019/590	Yes	Yes	No	No
Water Framework Directive	2019/558	Yes	Yes	Yes*	Yes*
Number of clauses (percentage of total)		**21 (88%)**	**19 (79%)**	**6 (25%)**	**5 (21%)**

* Clause retained, but relevant sections of EU law have not been modified to remove e.g. references to the European Commission.

See Annex I for full analysis.

5. Policy Relevance

Why are these apparently small changes so important?

Statutory instruments rarely make headline news. They are the stuff of mundane, day-to-day governance. As a result, review and revision clauses removed by specific SIs may not, at first glance, appear to be terribly important either. But in fact their widespread disappearance from the retained EU legislation that we analysed has significant policy relevance.

First of all, *policies that are not regularly reviewed and revised are at much greater risk of zombification over time*. Policies are designed at a certain point in time. But as the world around them changes – as new technologies are developed, as new international agreements are signed and as new scientific information emerges – they run the risk of slowly regressing or 'drifting' over time. The phenomenon of 'policy drift' is well known in other policy fields and is arguably why the UK advised the EU to employ review and revision in the first place, as part of its Better Regulation philosophy.

Second, the risk of "zombie legislation" has mostly been discussed in relation to the development of new environmental legislation, i.e. new legislation that weakens the existing level of protection and/or fails to keep up with what other countries are doing. At the end of the Brexit transition (i.e. 1 January 2021), retained EU law will be the UK's responsibility – the European Commission will not oversee their implementation. And crucially, it will no longer evaluate them and/or draft new legislation to prevent policy drift. Our analysis reveals that other things being equal, *zombification may also arise if existing legislation is not regularly and thoroughly updated*.

Third, the UK is under pressure from the EU to ensure that post-Brexit UK environmental policy standards are not weakened ('non-regression'). The EU maintains that the new trading relationship with the UK "should ensure that the common level of environmental protection provided by laws, regulations

and practices is not reduced below the level by the common standards applicable… at the end of the transition period" (European Council, 2020). In its approach to the negotiations, the UK also maintains that the new agreement should "not weaken or reduce the level of protection afforded by the environmental laws" but it also pointedly refers to its sovereign "right" to "set its own environmental priorities and adopt or modify its environmental laws". The potential for regression to occur has become a significant flashpoint during the EU-UK trade relations. There is a live debate around whether the UK should go further still and peg its policies to those of the EU ('dynamic alignment') (Jordan 2020). One way in which UK standards could conceivably 'regress' after Brexit is via an open and explicit process of deregulation ('cutting red tape'). *Our analysis, however, points to another, more 'back door' form that environmental regression could take: the gradual zombification of retained EU laws and policies through a lack of timely review and revision*.

Are these 'technical' or 'policy' changes?

The Government originally maintained that SIs would only be used to make 'technical' changes to EU laws to ensure they were correctly retained. Thus Section 8 of the European Union (Withdrawal) Act 2018 gave the Government the right to make amendments via SIs as "the Minister considers appropriate to prevent, remedy or mitigate: (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU". Section 8 (2) provided a long list of circumstances in which the Minister may consider that there may be potential deficiencies in retained EU law, including that it:

a) "Contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant";

b) "Confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it";

c) "Contains EU references which are no longer appropriate";

In other words, the Act gave the relevant Minister a great deal of discretion to determine which aspects of EU law to retain or jettison.

Why have the clauses been jettisoned?

Individual review and revision clauses are undoubtedly technical in nature. Had one or two been removed and/or the functions of performing *ex post* reviews and revising laws been transferred to a domestic body (either existing or new), it would arguably correspond to what the Government originally described as 'technical change'. It is an open question as to whether their wholesale disappearance from so much retained legislation corresponds to something more than that. As noted above, the Act gave the relevant Minister(s) a great deal of discretion in relation to determining this matter.

In the course of our research we have found it difficult to determine whether these changes were intentional. There were certainly no references to review and revision clauses in the Government's 2017 White Paper or in, as far as we can determine, the various Parliamentary reports that covered the retention process. The civil servants that were tasked with producing the SIs may have decided to remove the clauses because the regular review of legislation is not a standard UK practice, i.e. reviewing and revising EU law was seen as an "EU-specific" procedural requirement rather than part of the substantive content of UK law.

The possibility that their removal was unintended cannot, however, be definitively ruled out. If true, it would be consistent with the errors discovered in other SIs and perhaps confirm concerns that have been expressed about the speed at which they were drafted and adopted.

6. Policy Options

What could the Government do to address the disappearance of revision and review clauses from so much environmentally relevant retained legislation?

- *First of all, the Government could explain its policy on review and revision clauses in general, and specifically in retained EU law*. The Government is eager to 'transform' environmental protection after Brexit. But after Brexit day, retained EU law now constitutes a significant proportion of UK environmental law and policy. If it is allowed to zombify, it will be harder – not easier – to address new and existing environmental challenges. And it will be correspondingly more difficult to convince the EU that the UK is not regressing its domestic environmental standards. These issues moved centre stage in early March 2020, when the UK and the EU began to negotiate a new trading agreement.

- If the disappearance of the clauses is indeed an administrative oversight and should not have happened, then *the Government could address these errors by amending the relevant SIs*. In theory, this could be achieved relatively quickly via what in Parliament is known as the 'negative procedure', meaning it would only be debated in committee if parliamentarians raise an objection. However, there are three practical difficulties. First of all, as the law currently stands there is only a two-year window in which to make the change; the relevant provisions of the European Union (Withdrawal) Act 2018 (section 8 (8)) that permit the Minister to issue new SIs lapses two years after exit day (i.e. in January 2022). Any changes made after that point in time will require new primary legislation to be adopted. Second, the department – DExEU – charged with overseeing the retention process no longer exists – it was dissolved on 31 January 2020 when the UK left the EU. The responsibility would therefore have to be assumed

by a line department, presumably DEFRA for all environment-related laws. And third, Parliament is still recovering from the covid-19 outbreak.

- Review and revision clauses are a feature of modern environmental policy and originally arose from the UK's desire to promote forms of Better Regulation within the EU. Now it is no longer a Member State, the UK Government has an opportunity to demonstrate that it is as committed to Better Regulation outside the EU as it was inside, by *issuing cross-departmental guidance to promote the use of review and revision clauses, informed by the experience of using them at EU level*. The European Court Auditors has identified the need to improve on how these clauses are currently employed. What could the UK do to become a world leader in their use? The Environment Bill, which is currently being scrutinised in Parliament, could be amended to place the Government under a general duty to ensure that all new environmentally relevant policies are adequately future proofed, and that the role of retained law in the new Environmental Improvement Plans is fully explained and accounted for. The Bill could also be amended to place a duty on the Office for Environmental Protection, which is scheduled to begin work on 1 January 2021, to undertake regular reviews of retained EU law to assess its 'fitness for purpose'. At present, Section 20 of the Bill only requires the Secretary of State to provide two yearly reports on "significant" developments in international environmental protection legislation.

- From a wider governance perspective, the disappearance of review and revision clauses is another reminder that the *UK appears to lack a clear public plan for managing the many hundreds of laws it retained from the EU*. There is undoubtedly an opportunity for the UK Government to show environmental leadership by demonstrating how retained EU laws underpin what the former Environment Secretary, Michael Gove (2018), referred to as the "boldest

possible environmental policies" anywhere in the world. In order to do that, the retained laws would need to be regularly reviewed and, where relevant, updated. Currently, Section 19 of the Environment Bill requires the Government to issue a statement to Parliament alongside any proposals for new items of environmental legislation that demonstrates that it will "not have the effect of reducing the level of environmental protection provided for by any existing environmental law". Section 19 could be amended to make it clear that existing law includes retained EU law.

Annex 1: Analysis of Review and Revision Clauses in 24 EU Laws Modified by 20 Environment-related Statutory Instruments

EU Legislation Name	EU Number	Statutory Instrument	SI Number	EU Legislation		Post-Brexit Statutory Instrument	
				Review Clause	Revision Clause	Review Clause	Revision Clause
2009 Car CO2 Regulation	Regulation (EC) No 443/2009	2019 No. 550 The Road Vehicle Emission Performance Standards (Cars and Vans) (Amendment) (EU Exit) Regulations 2019	2019/550	Article 13	Article 13 (mandatory)	Removed, Regulation 2(15)(c)	Removed, Regulation 2(15)(c)
2019 Car CO2 Regulation	Regulation (EU) 2019/631	2019 No. 550 The Road Vehicle Emission Performance Standards (Cars and Vans) (Amendment) (EU Exit) Regulations 2019	2019/550	Article 15	Article 15 (optional)	Removed by default. SI relates only to "current arrangements", i.e. 2009 Regulation, so does not address new targets etc.	Removed by default. SI relates only to "current arrangements", i.e. 2009 Regulation, so does not address new targets etc.
Common Agricultural Policy (Direct Payments to Farmers)	Regulation (EU) 1307/2013	Common Agricultural Policy (Direct Payments to Farmers) (Amendment) (EU Exit) Regulations 2019	2019/207	Article 15	Articles 46(1) and 69(1), 69(3)	Removed, Regulation 4(9)	Partially Retained, Article 46(1) removed (Reg. 5(24)); Articles 69(1) & 69(3) not removed, but paragraph references Commission etc.

Common Fisheries Policy (Basic Regulation)	Regulation (EU) No 1380/2013	2019 No. 739 The Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019	2019/739	Article 49 and 50	No	Removed, Regulation 3(29).	N/A
Common Fisheries Policy (Bottom Fishing Gears)	Council Regulation (EC) No 734/2008	2019 No. 739 The Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019	2019/739	Article 13	Article 13 (optional)	Removed, Regulation 26(12).	Removed, Regulation 26(12).
Common Fisheries Policy (Vulnerable Ecosystems)	Regulation (EU) 2016/2336	2019 No. 739 The Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2019	2019/739	Article 19(1)	Article 19(3) (optional)	Removed, Regulation 27(13)	Removed, Regulation 27(13)
Energy Labelling Regulation	Regulation (EU) 2017/1369	Ecodesign for Energy-Related Products and Energy Information (Amendment) (EU Exit) Regulations 2019	2019/539	Article 19	No	Removed, Regulation 14	N/A
European Pollutant Release and Transfer Register	Regulation (EC) No 166/2006	Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018	2018/1407	Article 17	Article 18	Removed, Regulation 2(16)	Paragraph not amended, but has reference to comitology etc.
Fertilizers Regulation	Regulation (EC) No 2003/2003	Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2019	2019/601	No	No	N/A	N/A

FLEGT and Timber Imports Regulation	Council Regulation (EC) No. 2173/2005	Timber and Timber Products and FLEGT (EU Exit) Regulations 2018	2018/1025	Article 9	Article 9	Removed, Regulation 4(8)	Removed, Regulation 4(8)
Fluorinated Greenhouse Gases	Regulation (EU) No 517/2014	Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc.) (EU Exit) Regulations 2019	2019/583	Article 21	Article 21(6)	Retains review report on same date Regulation 53(3b-3c)	Removed, Regulation 53(6)
GMO Labelling	Regulation (EC) No 1830/2003	Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2018	2019/90	Article 12	Article 12	Removed, Regulation 4(9)	Removed, Regulation 4(9)
Heavy Duty Vehicles CO2 Monitoring	EU Regulation 2018/956	Heavy Duty Vehicles (Emissions and Fuel Consumption) (Amendment) (EU Exit) Regulations 2019	2019/846	No	No	N/A	N/A
Invasive Species Regulation	Regulation (EU) No 1143/2014	2019 No. 223 The Invasive Non-native Species (Amendment etc.) (EU Exit) Regulations 2019	2019/223	Article 24(1)	Article 24(3) (optional)	Partially Retained, Regulation 10(2)(c): "responsible authorities must... publish a report" (vs. Commission reporting to Council/EP)	Removed, Regulation 10(2)(c)

Mercury Regulation	Regulation (EU) 2017/852	2019 No 96 The Control of Mercury (Amendment) (EU Exit) Regulations 2019	2019/96	Article 19 (1) & (2)	Article 19(3) (optional)	Removed, Regulation 22	Removed, Regulation 22
MRV of CO2 from Maritime Transport Regulation	Regulation (EU) 2015/757	Merchant Shipping (Monitoring, Reporting and Verification of Carbon Dioxide Emissions) (Amendment) (EU Exit) Regulations 2018	2018/1388	Article 21(5) & 22	Article 22	Partially Retained, Article 21(5) removed, review after international agreement in A22 retained, Regulation 3(17-18)	Removed, Regulation 3(18)
Nagoya Protocol Regulation	Regulation (EU) No 511/2014	Nagoya Protocol (Compliance) (Amendment) (EU Exit) 2018	2018/1393	Article 16	No	Retained, Commission replaced by Secretary of State, Regulation 3(15)	N/A
Ozone-depleting substances	Regulation (EC) No 1005/2009	Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc.) (EU Exit) Regulations 2019	2019/583	Recital, Paragraph 24	Recital, Paragraph 24	Removed, statutory instrument only addresses articles ("enacting terms" in EU law).	Removed, statutory instrument only addresses articles ("enacting terms" in EU law).
Persistent Organic Pollutants Regulation	Regulation (EC) No 850/2004	Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018	2018/1045	Recital, Paragraph 15 & Article 15(2)	Recital, Paragraph 15 & Article 15(2)	Removed, Regulation 22	Removed, Regulation 22

Pesticides Regulation (Maximum Residue)	Regulation (EC) NO 396/2005	2019 No. 557 The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019	2019/557	Article 47	Article 47 (optional)	Removed, Regulation 9(5)	Removed, Regulation 9(5)
REACH Regulation	Regulation (EC) No 1907/2006	2019 No. 758 The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019	2019/758	Article 138	Article 138 (optional)	Retained, Regulation 95 (Secretary of State)	Retained, Regulation 95 (Secretary of State)
Trade in Endangered Species Regulation	Council Regulation (EC) No 338/97	Trade in Endangered Species of Wild Fauna and Flora (Amendment) (EU Exit) Regulations 2018	2018/1408	No	Article 19	N/A	Retained. Paragraph not amended, but has reference to Commission etc.
Waste Shipments Directive	Regulation (EC) No 1013/2006	The International Waste Shipments (Amendment) (EU Exit) Regulations 2019	2019/590	Article 60	Article 60	Removed, Regulation 99	Removed, Regulation 99
Water Framework Directive	Directive 2000/60/EC	2019 No. 558 The Floods and Water (Amendment etc.) (EU Exit) Regulations 2019	2019/558	Article 18 and 19(2)	Article 19(2) (optional)	Retained. Paragraph not amended, but has reference to Commission.	Retained. Paragraph not amended, but has reference to Commission.

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By Professor Andrew Jordan and Dr Brendan Moore

This brief should be cited: Jordan, Andy. & Moore, Brendan. (2020) Regression by Default? An Analysis of Review and Revision Clauses in Retained EU Environmental Law. Brexit and Environment.

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