

# Brexit

## Implications of the UK leaving the European Union: Waste Management

Article on behalf of UKELA's Waste Working Party

### Introduction and background to UK waste management law

The policy and legal frameworks for waste and resource management in the UK have over the past 40 years largely been driven by European Union (EU) law. In the waste management sector, EU law has provided a momentum for long term vision (e.g. recycling policy and targets, and the development of the waste hierarchy in the Waste Framework Directives), as well as requiring a step change in the management of environmental risk (e.g. the Groundwater Directives and Landfill Directive). In more recent times its overarching framework has assisted in allowing for the devolved nations of the UK to adopt different waste management strategies. So, although Scotland, Wales and Northern Ireland may have slightly different waste management laws, they still have to comply with the standards and requirements of EU law.

According to the UK Government's Balance of Competencies Review report of February 2014,<sup>1</sup> the prevailing views expressed by the waste management sector were that EU waste management legislation had significantly changed the UK's approach to waste management, reducing landfill and increasing recycling, and that EU law and targets had been responsible for increasing the level of ambition within the sector and had been a driver for changed working practices to a greater extent than if targets and goals had been set at the national level.<sup>2</sup> The report noted that not only had this improved environmental standards, but also that "EU targets on waste... were seen by many as providing greater certainty for investors and an important spur for growth"<sup>3</sup>

A contrary view in the Balance of Competencies Review report, however, questioned the impact of regulatory burdens of EU waste management law on Small and Medium-sized Enterprises (SMEs). The report cited the complexity of the European Waste Catalogue and the burden of waste carrier registration requirements and waste transfer notes as placing a high level of compliance burden on small firms which is disproportionate to the environmental risk they pose.

In its response to the European Commission's consultations on the Circular Economy and on the functioning of waste markets,<sup>4</sup> Defra has expressed a willingness to assist SMEs. Defra has suggested introducing limited exemptions for SMEs from some

waste management regulation.<sup>5</sup> Overall, these would not seem to constitute significant changes, nor to signal any substantive move away from the existing legislative regime. The European Commission in its latest EU Action Plan for a Circular Economy has also recognised the difficulties that some SMEs face and has included both R&D investment and deregulation proposals to assist them.<sup>6</sup> The Action Plan states:

*SMEs, including social enterprises, will make a key contribution to the circular economy: they are particularly active in fields such as recycling, repair, and innovation. However, they also face specific challenges, such as access to funding, and the difficulty of taking account of the circular economy if it is not their core business. As set out in the 2014 Green Action Plan for SMEs, the Commission is acting to support these companies, analyse the barriers they encounter to a better use of resources and waste management, and to encourage innovation and cooperation across sectors and regions. The Commission also provides access to finance for social enterprises.<sup>7</sup>*

Following the publication of the EU Better Regulation Initiative,<sup>8</sup> BIS launched a Cutting Red Tape programme in July 2015 for 5 key industry sectors, including the waste management sector.<sup>9</sup> The remit of this review was wider than the Red Tape Challenge, which the Government launched in 2011, in that it also sought views on cutting red tape on enforcement and the activities of the regulators. The Government's report on the review was published in March 2016.<sup>10</sup> One of the key actions is to amend domestic guidance to revise and clarify the definition of 'waste' and 'by-products'.

### Context of withdrawal (and uncertainty)

Waste management law and policy set environmental standards, but compliance with such standards impacts upon and is fundamental to the ability of the waste management sector to trade in what is increasingly an international market. This differentiates waste management law from other areas of UK environmental law. In 2014, 2.37 million tonnes of refuse derived fuel (RDF)<sup>11</sup> were exported from England and Wales to 12 EU Member States.<sup>12</sup> Although the figures for 2015 are still awaited, they are expected to exceed those of 2014 and may even reach 3.3 million tonnes.<sup>13</sup>

There are several reasons for the levels of exports of RDF and recyclates from the UK, but one reason is the shortage of facilities to treat such waste. This shortage is partly due to uncertainties involved in UK planning law and process, rather than uncertainties around EU waste management law. The Member States to which the RDF is exported (such as Germany and the Netherlands) have managed to build facilities under the same framework of EU waste management law and policy that applies to the UK.

Uncertainty regarding the legal and policy framework around waste, as well as around individual judicial, regulatory and planning decisions, deters investment and delays decision making. In 2013 the Environmental Services Association (a trade association for the waste management industry), in giving evidence to the House of Commons for its research paper on leaving the EU<sup>14</sup>, said that an EU exit:

*... would leave a huge void for the industry as it would be unclear to what degree we would retain any elements of the European path towards the higher levels of environmental sustainability [and] billions of pounds of fresh investment in green jobs and growth [could dry] up overnight.<sup>15</sup>*

It seems to be generally accepted that considerable uncertainty would prevail over the outcome of the UK leaving the EU. The process of withdrawal set out in Article 50 TFEU is untried and untested, but provides for a 2 year process to negotiate the terms of exit (i.e. the decoupling of existing arrangements with the EU). At the same time, separate negotiations and decisions would need to be made by the UK as to its ongoing trading relationship with the EU Member States. This needs to be seen in the context that over 50% of UK total exports (not just waste-related exports) are to EU Member States.

Goods traded into the EU Member States would need to comply with EU standards. Would the UK seek to join EFTA (whose members are Iceland, Switzerland and Norway) or the EEA (the latter being closer to the EU, whose membership comprises the EU and EFTA members but excludes Switzerland)? This assumes that EFTA or the EEA would want the UK to join. Alternatively, if the UK were not to seek membership of EFTA or EEA it could negotiate and enter into a separate Association Agreement with the EU, similar to that entered into with Ukraine. Article 290 of the Ukraine Association Agreement states that although Ukraine can maintain its own legislation, such legislation must provide a high level of environmental protection and strive to continue to improve. The polluter pays principle must apply and there is an obligation not to weaken environmental laws as a way of encouraging trade or investment.

What if the UK looked to new trading partners elsewhere in the world? What regulation would govern such trade? In the waste management sector, the UK currently trades heavily in recyclables with India and China. It would be likely that such trading arrangements would have to be based on international treaty arrangements or the World Trade Organisation, none of which have such well-developed legal enforcement mechanisms or courts compared to those within the EU.

On the day the UK were to finalise its exit from the EU, given the embedded nature of EU law in environmental law,<sup>16</sup> existing legislation would need to remain in force for a transitional period pending a review of what might subsequently be amended or repealed. Such a review would be time consuming, lengthy and complex. During the review period there would be continued uncertainty which would adversely impact on investment in the waste management sector and delivery of sustainable waste management solutions. Who would be deployed to undertake the legislative review? With the present Government's desire for a smaller Civil Service, would there be the necessary expertise and manpower available to conduct the review? If, for example, resources were allocated from the Environment Agency, how might this impact on enforcement of existing waste management laws pending any review? It should be noted that waste crime (e.g. fly-tipping, poor management of waste facilities) has a direct impact on the well-being of the public as well as on the environment.

## **Waste management legislation which might be subject to review**

It is pure speculation as to the extent of likely legislative reform of waste management law following Brexit. Some believe that little would in fact change based on views and evidence to date as to its effectiveness. In contrast, David Baldock said at a UKELA seminar on UK withdrawal from the EU that there would clearly be a temptation to revoke and amend some legislation, otherwise what would be the point of leaving the EU in the first place.<sup>17</sup>

Those calling for greater national competence in environmental law have identified REACH, land use planning, noise, soil protection, flooding, environmental crime and environmental justice as possible areas of reform. Reforms in these areas would have knock-on effects for the waste management sector – some positive, others negative. For example, a resolution of the question of what substances and materials REACH applies to and its application once end of waste status is achieved may be possible. Delivery of waste management infrastructure may be easier without having to deal with the EIA and the Birds and Habitats Directives. However, given public opinion and the general lack of public understanding

as to the operation of waste management facilities, any changes are unlikely to improve the public perception of the sector.

There could be some other changes in England as a result of the Government's deregulation initiative (and a similar initiative is also being undertaken at EU level), as outlined above, but Defra has indicated this would only happen if it is demonstrated to aid enforcement and did not detract from environmental performance standards.<sup>18</sup>

There is a view within some larger companies in the waste management industry that sound environmental performance, the market and the ability to trade are all linked. A group of 6 representative bodies<sup>19</sup> has recently lobbied the European Commission, in the context of the revised Circular Economy Package, stating the need for sound regulation to drive the markets.<sup>20</sup>

More specifically, following a UK exit from the EU there would be a need to consider some key pieces of waste management legislation and the potential for change. However, in so doing the overriding question in each instance would be to measure the effect any reform might have on the ability of the waste management industry to continue to trade with the EU.

Alternatively, if an argument could be pursued for creating a solely UK market for waste management,<sup>21</sup> what legislative and policy reforms would be required to deliver this? What would be the implications if Scotland were to secede and perhaps remain in the EU?

#### **a. The Waste Framework Directive<sup>22</sup>**

As a general comment, reform of this legislation within English law would be complex. Most of the Directive's requirements, and those of daughter directives, are imported into English legislation by referential drafting in the Environmental Permitting (England and Wales) Regulations 2010 (as amended). Once reformed, there could be issues of interpretation in terms of established jurisprudence based on EU law up to the date of the UK's leaving the EU. To what extent would the English courts be able to refer to this and what about any changes to EU law thereafter which might happen between the leaving date and the establishment of new national legislation?

Would the UK seek to revise the definition of "waste"?<sup>23</sup> It could, in theory, be possible to have one definition for waste that was traded only nationally within England and Wales while still applying the EU and Basel Convention definitions for waste exports. Would this result in a greater or lesser regulatory burden to industry?

What would happen to the "waste hierarchy"?<sup>24</sup> It could be applied more flexibly, or even abandoned.

Should waste management practice be governed by voluntary agreements and the market rather than hard law? Voluntary agreements have had mixed success. The Courtauld Commitment<sup>25</sup> has been successful at reducing food waste within the grocery sector, but a voluntary agreement in the aggregates sector on the increased use of secondary aggregates proved ineffective, as a result of which the Aggregates Levy was introduced.

Would the UK follow the Waste Framework Directive's proposals and requirements towards the Circular Economy? Would there be the same or better leadership on the policy direction and drivers for such policies at national level than at EU level?

#### **b. Producer responsibility legislation (for example, the WEEE, Batteries and the Packaging Waste Directives)<sup>26</sup>**

UK retailers have found the Waste Electrical and Electronic Equipment (WEEE) Directive challenging. Targets for the collection of WEEE by Member States are both ambitious and prescriptive. The obligation to take back in Article 5(2)(b) causes retailers concern as to space required, cost, planning issues, health and safety, permitting complications and reverse logistics. Neither should it be overlooked that WEEE is regarded as waste<sup>27</sup> and waste management legislation will apply to its carriage, storage and treatment. A relaxation of such rules would be welcomed by UK retailers, but that said, any changes to producer responsibility legislation at national level might impact on the ability of those businesses to undertake trade within the EU, if revised UK standards varied from those adopted in the EU.

It is noteworthy that the EU Circular Economy Action Plan refers to introducing better eco-design requirements on "reparability, durability, upgradability [and] recyclability".<sup>28</sup> Proposals are expected from the European Commission for Member States to have mandatory product design and marking requirements to make it easier and safer to dismantle, reuse and recycle electronic goods such as flat screen TVs and computer screens. The Commission is also "proposing to encourage better product design by differentiating the financial contribution paid by producers under extended producer responsibility schemes on the basis of the end-of-life costs of their products. This should create a direct economic incentive to design products that can be more easily recycled or reused."<sup>29</sup>

#### **c. Industrial Emissions Directive<sup>30</sup>**

It would seem unlikely that much amendment would be required to this legislation, except perhaps (so as to avoid confusion in the planning process) to take gasification and pyrolysis out of the definition of incineration and have a separate definition of incineration.

#### d. The Landfill Directive<sup>31</sup>

There is a view in the UK waste management industry that the EU has never fully accepted that, for geological reasons, well-managed landfill within the UK continues to be a sustainable waste disposal option. Would the UK be able to turn back the clock and amend or repeal domestic laws implementing the Landfill Directive? This is an area of waste management and disposal where EU policy has significantly changed national public opinion in the UK. The recycling drive has consistently been promoted by reference to the quantities of waste diverted from landfill. There is a public perception that landfill is bad. It would therefore be unlikely that there would be the political will to bring about the necessary legislative changes to reintroduce more landfill; equally in practical terms there are decreasing numbers of possible landfill sites in the UK. Even if landfill might be considered as a restoration solution for present and future quarry workings, to what extent would there be the political will or local support for the restoration of such quarries to a landfill use?

#### e. Transfrontier Shipment of Waste Regulations 2007<sup>32</sup>

These Regulations provide the basis for the trade of waste to and from the UK. Given the extent of the UK's export of waste into the EU and, more importantly, the fact that the Regulations also implement the UK's obligations as a signatory to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, it is unlikely that following an exit from the EU there could logically be any changes to the Regulations. The EU Action Plan refers to the illegal transport of waste (both within the EU and to non-EU countries) as being a barrier to higher recycling rates. The EU 2014 revised Regulation on Waste Shipments<sup>33</sup> introduced greater enforcement powers to detect illegal shipments and the Action Plan states that "the Commission will take further measures to help ensure it is properly implemented"<sup>34</sup>.

### Conclusions

EU policy and legislation have brought about sea changes in UK waste management practices. The certainty and long-term targets they provide have promoted investment in waste management infrastructure. Against this background, the unpredictability of planning application outcomes for waste infrastructure in the UK, the policy uncertainty surrounding the production of renewable energy from waste and the time taken to achieve outcomes has resulted in a significant waste export market (although such factors are not directly related to the UK's membership of the EU). To the extent that waste exports to and trade with the EU continued following an exit from the EU, there would be a need to comply with EU waste management law and EU definitions of waste/by-products etc.

With world population anticipated to rise, resource security and waste prevention will be increasingly important. It is unclear how effective the UK would be in driving its own waste management policies if it left the EU. Would it be able to develop its own policies and laws to deliver effective and sustainable waste management internally? What approaches would the devolved administrations adopt?

The UKELA Nature Conservation Working Party has said that "it will be a perilous and uncertain time for nature conservation" following a UK exit from the EU.<sup>35</sup> For the waste management sector, which could be described as the UK's fourth utility, the uncertainty during the transition to a new regulatory and legal framework could potentially stifle investment into the sector and delay decision making on waste management solutions and the delivery of waste management infrastructure. Changes in waste management law away from the EU model would not necessarily produce less regulation, but rather different regulation.

*The Waste Working Party is led by co-convenors Angus Evers, Partner and Head of the EUME Environment, King & Wood Mallesons and Peter Harvey, Editor, Practical Law Environment. More information is available on the [Waste Working Party's website](#).*

### Endnotes

- 1 Launched by the FCO in 2012.
- 2 HM Government, 'Balance of Competencies Review Report: Environment and Climate Change', February 2014.
- 3 Ibid.
- 4 UK response to European Commission public consultations on the circular economy and on the functioning of waste markets, October 2015.
- 5 Exemption for some SMEs from waste carrier registration for transporting small quantities of their own non-hazardous waste; removing the need to apply for environmental permitting exemptions for low risk activities (e.g. small scale composting by schools); exempting companies which collect smaller quantities of batteries from paying for battery recycling.
- 6 Closing the loop – An EU action plan for the Circular Economy COM(2015)614/2 final.
- 7 Ibid, p.19.
- 8 EU Better Regulation Initiative, May 2015.
- 9 The review looked at "the impact of regulations across the industry – from production to processing to collection, disposal and treatment... to identify and remove barriers to advancing the sector while ensuring human health and the environment remain protected."  
<https://www.gov.uk/government/news/review-into-regulation-and-enforcement-in-waste-sector-launches>.

- 10 <http://cutting-red-tape.cabinetoffice.gov.uk/wp-content/uploads/2016/03/Waste-Findings.pdf>.
- 11 RDF is a fuel made by shredding and dehydrating solid waste. It consists primarily of combustible materials in municipal waste, such as plastics and biodegradable waste.
- 12 <http://www.letsrecycle.com/news/latest-news/rdf-exports-hit-2-37m-tonnes-2014/>.
- 13 <http://www.letsrecycle.com/news/latest-news/uk-exports-of-rdf-in-2015-expected-to-reach-3-3m-tonnes/>.
- 14 Leaving the EU: Research Paper 13/42, House of Commons Library, 1 July 2013.
- 15 Ibid, p.61
- 16 ~80% of EU environmental law is imbedded in UK law and ~90% of Environment Agency prosecutions are based on EU law.
- 17 David Baldock Executive Director Institute for European Environmental Policy: UKELA conference 18 November 2015.
- 18 Defra: UK views on the Commission's public consultation on the functioning of waste markets, October 2015.
- 19 Anaerobic Digestion and Bioresources Association, Environmental Services Association, Chartered Institution of Wastes Management, Institution of Civil Engineers, Renewable Energy Association and Resource Association.
- 20 Extract from letter dated 9 November 2015: "the application of intelligent and proportionate regulation to boost demand for recycled materials ... should be seen as a noble exception to the Commission's general rule [of lighter touch regulation] ... because to deliver the strong environmental and economic benefits of a circular economy requires a long term regulatory framework and market interventions that will stabilise and enhance the viability of increased recycling", [https://www.esauk.org/TAG\\_letter\\_CE\\_Package\\_Timermans\\_NOV\\_2015.pdf](https://www.esauk.org/TAG_letter_CE_Package_Timermans_NOV_2015.pdf).
- 21 For example, if this arose as a result of the UK's definition of waste not matching that of EU legislation and hence the export of waste to the EU was no longer feasible.
- 22 2008/98/EC.
- 23 The most talked about definition is "material that is only fit for final disposal", but who would decide on what is final? What about materials which, whilst not yet only fit for final disposal, need some regulation to govern their holding or use due to inherent constituents of such materials?
- 24 The hierarchy to be applied as a priority order in waste prevention and management legislation and policy: prevention; preparing for re-use; recycling; other recovery, e.g. energy recovery; and disposal. See Article 4 of the Waste Framework Directive.
- 25 The Courtauld Commitment is a voluntary agreement aimed at improving resource efficiency and reducing waste within the UK grocery sector. For more information, see: <http://www.wrap.org.uk/content/what-is-courtauld>.
- 26 Directives 2012/19/EU, 2006/66/EC and 94/62/EC respectively.
- 27 But see the proposed amendment to the Waste Directive in the EU Circular Economy Action Plan and the proposed changed definition of "preparing for reuse", which in addition to referring to waste which has been collected also refers to "products or components of products which have been collected by a recognised preparation for re-use operator".
- 28 Closing the loop – An EU action plan for the Circular Economy COM(2015) 614, p.4.
- 29 Ibid.
- 30 2010/75/EU.
- 31 1999/31/EC.
- 32 Based on Regulation (EC) No 1013/2006 on shipments of waste.
- 33 Regulation( EU) No 660/2014.
- 34 Closing the loop – An EU action plan for the Circular Economy COM(2015) 614, p.10.
- 35 Wyn Jones: Convenor, UKELA Nature Conservation Working Party, 26 October 2015.