

Policy implications of Brexit for the UK resource & waste management sector





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Jo Caulfield is a stand-up comedian, host, and comedy writer. She has worked on some of the biggest shows, and with some of the biggest names, in British comedy.

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Timeline

Following the referendum on 23 June 2016, the UK Government formally triggered Article 50 of the Treaty on European Union ('TEU'), the process for a Member State to leave the EU, on 29 March 2017. Unless the European Council and the UK agree otherwise, the UK will leave the EU at midnight Central European Time on 29 March 2019¹. Given the need for Member State and European Parliament agreement to the final package, negotiations need to be concluded by around October 2018 (see Figure 1).

The EU has adopted papers² setting out its negotiating position. The UK has produced a white paper on Brexit³.

Formal negotiations have started, with Michel Barnier leading for the EU. The agenda⁴ has been agreed and the first issues to be tackled are citizens' rights, the financial settlement and the Irish border and other territorial matters (the 'divorce settlement')⁵. Only when enough (in the view of the EU) progress has been made on these can attention turn to the future arrangements ('the deep and special relationship'). The EU has repeatedly said that any future free trade agreement will⁶:

- a. be a close partnership, but with fewer benefits
- b. not cherry pick sectors
- c. have any transitional deal subject to Court of Justice of the EU (CJEU)/European Commission (EC) jurisdiction
- d. not permit any social, fiscal or environmental dumping.

The UK Government has stated that ending freedom of movement, exiting the single market and the customs union (see Figure 2) and stopping the jurisdiction of the CJEU are 'red lines' (that is, points that cannot be surrendered in the negotiations). However, there is some question as to whether this will remain quite so firm following the result of the June 2017 General Election as there is now greater political debate about the right direction.

There are three layers of potential impact on the UK resource & waste management sector – general economic & political; and legal and policy both in terms of general, environmental & product law and resource & waste law. The rest of this paper examines what we know about these potential impacts.

For the sector in the Republic of Ireland, the impacts are likely to be either because of the arrangements around the Common Travel Area and the Northern Ireland-Republic of Ireland border (and/or the UK-EU border), or because of knock-on (positive and negative) impacts of economic developments in the UK.

General economic & political impacts

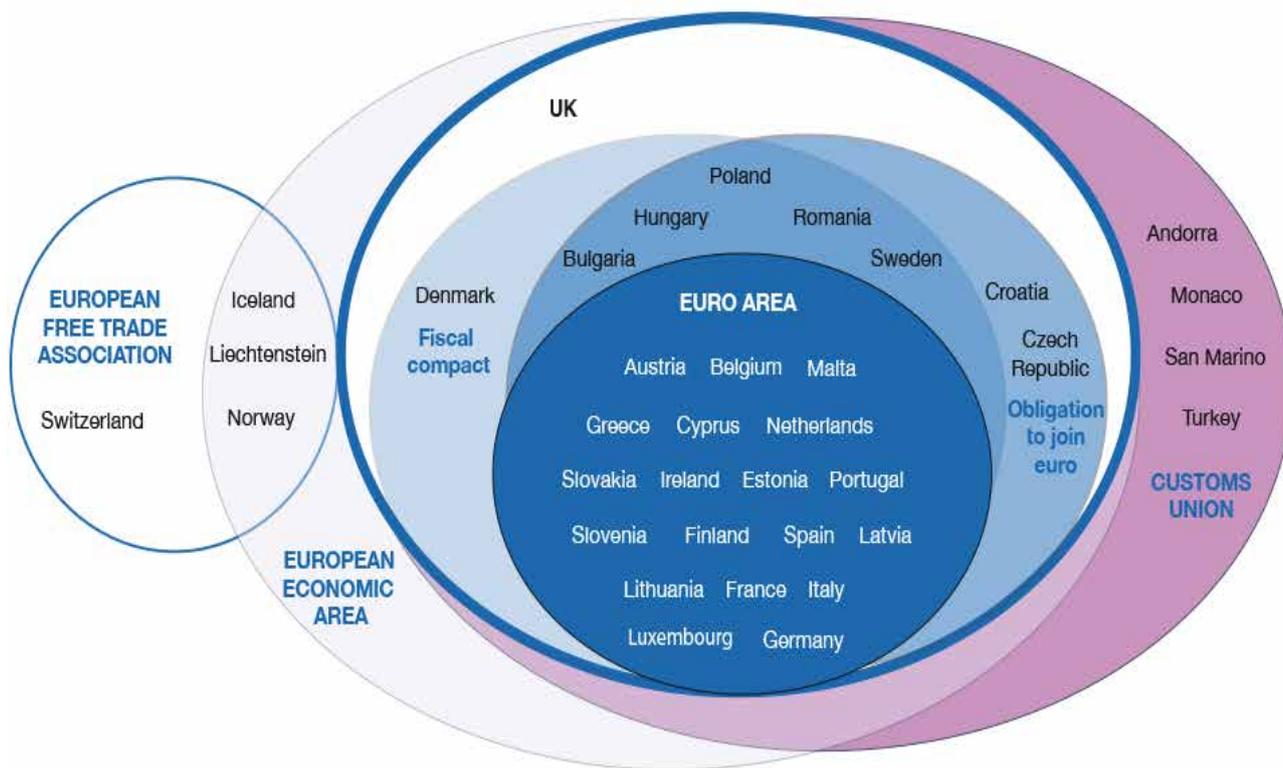
Any change to the **sterling exchange rate** impacts directly on the costs/profits from international trade, including in refuse-derived fuel (RDF) and scrap materials for recycling. The drop in sterling immediately after the referendum meant an immediate ca 20% increase in the cost of RDF export where denominated in euros or US dollars, and a corresponding increase in the price of scrap materials. Any future exchange rate fluctuations whether arising from Brexit-related concerns or from changes to the economic position of the UK will also impact these prices.

Alongside the exchange rate impacts on exports of RDF and scrap materials, a change in the **terms of trade** with the EU and other trading partners could result in higher tariffs and more border crossing bureaucracy, especially if we revert to WTO trade terms with the EU and the rest of the world (one NI firm recently estimated an increase of £250k in costs for its business through tariffs alone in this scenario).

The impacts on **economic growth** are disputed, but most economists consider they will be negative as so much of our trade is currently with the EU (44% of exports and 53% of imports in 2016)⁷.



Figure 1: Brexit Outline Timeline



Source: Department for Exiting the European Union Policy Paper 'The United Kingdom's exit from, and new partnership with, the European Union' (updated 15 May 2017)

Figure 2: The European Union Agreements

Depending on the final position on the free movement of people/immigration, it may be significantly harder to bring in both **unskilled and skilled labour** to the UK from the EU; this could impact on a range of activities in the sector from construction of energy from waste (EfW) facilities to running materials recovery facility (MRF) picking cabins. It is also unclear what the future will be for the current arrangements on mutual recognition of **qualifications** between Member States, which enable prospective employers to more easily understand whether to accept a foreign qualification or not.

Foreign direct investment (investment by overseas companies in activities in the UK, including buying British companies and building new facilities) could become more attractive as sterling weakens and purchases here are cheaper; or less attractive if access to the EU market is more restricted (one estimate is that the UK's EU membership has boosted FDI by a quarter)⁸.

Threats to the **integrity of the UK** seem to have abated post-Election, but Gibraltar, NI and Scotland all voted 'remain' in the referendum so this is still a potential issue, especially depending on the solutions found for the NI/UK-Rol and Gibraltar/Spain borders.

As resource and waste policy is almost entirely devolved in the UK, losing a common EU framework could mean **greater policy and regulatory divergence** across the four countries. The UK Government has recognised this risk and is

proposing to require the devolved administrations to respect the retained EU legal framework. In turn, the Scottish and Welsh First Ministers have expressed significant disquiet at what they see as a reduction in devolved competence in the approach currently being proposed.

Finally, there will be a change in **funding** availability for social enterprises, businesses, LEPs, local authorities and academic institutions with the ending of EU money. This is currently mainly available through the European Structural and Investment Fund (ESIF), the EU Framework Programme for Research and Innovation (Horizon 2020), the LIFE Programme and the European Investment Bank (EIB). The Government has promised to respect some EU financial support commitments after Brexit to 2020 (the end of the current EU budget period) or 2022 (for farming subsidies) but there is currently no certainty beyond that.

Legal & policy impacts: general, environmental & product law

Exiting the EU requires repeal of the European Communities Act 1972, which is the instrument under which much EU law is incorporated into national legislation. The UK Government has committed to converting the 'acquis' – the body of existing EU law – into British law, 'wherever practical, on exit day'⁹. The proposed vehicle for this is the **European Union (Withdrawal) Bill**^{10,11}, (formerly the Great [European] Repeal Bill, affectionately known as the GERBILL). This was



published in draft on 13 July 2017 and sets out how this incorporation will work. It creates the concepts of 'retained EU law', 'retained EU case law' and 'retained general principles of EU law' and grants Ministers extensive (and controversial) powers to make regulations to handle the inevitable problems of incorporation. It will have its second reading in the Westminster Parliament in September. It may require the consent of the Scottish Parliament and the Welsh Assembly (and if it is constituted, the Northern Ireland Assembly), which given the concerns over its approach to handling devolution, could add significant uncertainty.

EU policy and law is not only shaped by decisions, regulations and directives¹². There are also relevant principles in the Treaties themselves, such as the precautionary and polluter pays principles (Article 191 of the Treaty on the Functioning of the EU, TFEU); CJEU case law; and Commission guidance.

On the **principles**, the Withdrawal Bill says retained EU law not subsequently modified must be interpreted in line with 'any retained general principles of EU law' (which in turn must have been recognised by the CJEU before exit day). However, it goes on to say these retained general principles cannot in themselves be used as a basis for action in domestic law after exit day. As an example, one could not argue against a course of action purely on the basis it didn't accord with the retained EU principle of precaution.¹³

The UK Government proposes to make **CJEU case law** that exists on Brexit day binding on UK Courts as if it were a Supreme Court¹⁴ judgement (but therefore not binding on the Supreme Court itself). After then, Courts will be entitled – but not required – to have regard to new case law where they consider it appropriate. This means that key case law such as that elucidating the definitions of waste, recovery, etc will remain but does leave open the possibility of 'drift' over time.

There is currently still no clarity as to what status **Commission guidance** will have post-Brexit. Currently, unless the governing legislation provides otherwise, Courts may have regard to it in interpreting EU law (and usually do), but are not bound by it.

It is likely that there will be a significant call for **reductions in regulatory controls** across a range of policy areas such as the environment, health and safety and so on (though recent events may make that a less strong argument now). This might impact on the resource and waste sector, since many changes were ruled out in previous red tape challenges as being an EU requirement. However, one company's over-burdensome red tape can be an environmental receptor's essential protection.

Over half of UK **environmental** law is EU in origin; the former Defra Secretary of State said that 66-75% of that is 'easily' transferable into national law (with minor changes for operability, reporting to the Commission, etc). The remainder (such as the industrial chemicals regime REACH) will be hard or impossible to incorporate without significant effort. How the transfer is done may have implications for the resource and waste management sector in the short term, but of greater

concern is the scope for changes over time. This could happen by discrete action by the UK (or, given its devolved nature, England, Northern Ireland, Scotland or Wales) to alter the regimes away from the EU approach or by lack of action to keep the regime here in line with developments in the EU¹⁵.

In his first keynote speech on the environment¹⁶, the current Defra Secretary of State, Michael Gove, described Brexit as 'the unfrozen moment', offering 'a once in a lifetime opportunity to...recast our ambition for our country's environment, and the planet. In short, it means a Green Brexit'. He has also recommitted the Government to producing the long-awaited 25 year plan for the environment, which is expected to include plans for the English resource and waste management sector post-Brexit.

Almost all **product legislation and standards** are EU in origin, including toy safety, electrical safety, the CE mark, etc. The intention is for these too to transfer into national law. Any divergence between the UK and EU standards could have significant implications for trade and so are likely to be the focus of much attention in any future EU-UK trade agreement. Given the so-called 'Brussels effect'¹⁷ (whereby international companies adopt EU regulations across their global operations to simplify matters), UK firms exporting to the EU are likely to want to continue to apply EU standards across their product ranges. However, companies based outside the UK and EU may want to lobby for lower product standards if they see the UK market as sufficiently lucrative, which could then complicate reuse, repair and remanufacture in the UK.

For both sets of law a key question will be the future **governance arrangements** and how implementation is overseen. At the moment, anyone can alert the European Commission to a perceived shortcoming and it will investigate (it can also do so on its own initiative). If it finds a problem and the Member State concerned doesn't remedy it, matters can proceed to the CJEU (the so-called 'infractions' process)¹⁸. The result of this can be significant fines (the minimum lump sum fine for the UK is current £8.9m, plus a daily fine of up to £211k) for

Case study: The Industrial Emissions Directive

Situation: Under the Industrial Emissions Directive (IED, which includes the old Waste Incineration Directive, WID), many industrial installations must have a permit. The permit conditions including emission limit values must be based on Best Available Techniques (BAT), which are defined at EU level by the Commission and experts from Member States, industry and environmental organisations. This process results in BAT Reference Documents (BREFs); the BAT conclusions contained are adopted by the Commission as Implementing Decisions. The IED requires that these BAT conclusions are the reference for setting permit conditions. It also requires permits to be reviewed within four years of new BAT conclusions being adopted. Under the Withdrawal Bill, the IED will be retained in UK law.

Issue: How is the requirement to update permits for new BAT conclusions going to work when the latter are established at EU level without UK involvement post-Brexit?



Case Study: Air Quality

In 2011, Client Earth took the UK Government to court for failing to meet the 2010 air quality standards on nitrogen dioxide. Defra conceded it had breached Article 13, so the argument was about the consequences. High Court Justice Mitting ruled that enforcement was a matter for the European Commission and decided not to force the Government to do anything. This was upheld by the Appeal Court in 2012. At the Supreme Court in 2013, the matter was referred to the CJEU, which in turn ruled in late 2014 that national courts could not simply stand aside and had to be involved. The Supreme Court’s judgement in 2015 (one week before the General Election) therefore ordered the Government to revisit its approach. The new plans were published at the end of 2015; Client Earth took the Government back to court in 2016 on the grounds that the plans were inadequate and won once more. The Government published its further set of plans on 26 July 2017.

failure to comply with EU law. Historically, this has acted as a significant spur to action in the UK on environment issues – with ambient air quality being a very current example.

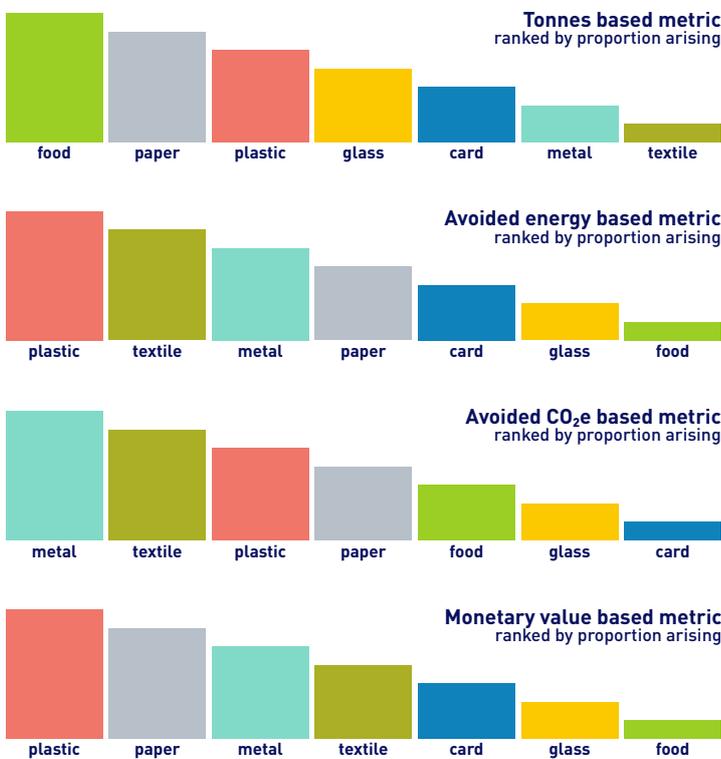
Once the UK has left the EU, this process will cease. Currently, the UK Government’s position is that the existing system of judicial review, along with Parliamentary scrutiny, is a sufficient replacement, but many in the environmental space don’t agree (especially given recent changes that make accessing judicial review harder, more expensive and riskier). This is likely to be a significant part of the debate on the Withdrawal Bill.

Legal & policy impacts: resource & waste law

Most of the policy and regulatory context for the resource and waste sector in the UK is EU in origin. Whilst policy outside England (and in Wales in particular, with significantly higher-than-EU recycling targets) has developed significantly greater

ambition, in England this is largely not the case and the various original EU waste targets¹⁹, most of which have 2020 as their target date, remain the principle drivers. Brexit therefore offers additional **policy uncertainty** to this sector.

This uncertainty is further exacerbated by the current negotiations at the EU level over the proposed ‘**Circular Economy Package**’. Alongside some non-legislative actions around eco-design and waste prevention, this includes legislative proposals to make the suite of EU targets on recycling and landfill diversion more ambitious for 2025 and 2030. The UK Government has not yet stated whether it intends to incorporate the package into UK law when it is agreed (expected this December). If it doesn’t, then divergence with EU policy will start from exit day. This is likely to cause disquiet in Northern Ireland and the Republic of Ireland and may encourage further policy differentiation in Scotland and Wales.



There is unlikely to be an immediate waste-specific issue with **export**, since the regulatory framework will continue to be governed by the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*¹⁶. There is though a twist, as the EU implementation of this goes further than the Convention, especially in requiring Member State competent authorities to co-operate and it isn’t yet clear how that will be handled.

Moving away from the requirement to agree policy across 28 Member States does open up opportunities for the UK (and/or its constituent parts) to change how things are done and develop approaches more suited to our environmental, geographic, economic and social context.

The UK has traditionally been at the forefront of work on **end of waste**, developing many sets of criteria. This could be taken further, opening up space for significant innovation. The **definition of waste** itself could be nuanced to support this too. The role of **energy from waste** might also be re-examined – the EU is increasingly negative about the role this technology should play in resource management; the UK could diverge from this or go further post-Brexit.



Figure 3: Moving away from weight-based targets (courtesy of Suez)



Another potential change might include moving away from **weight-based recycling targets** to some other approach (see Figure 3), or doing away with recycling targets altogether and instead having targets based on economy-wide resource efficiency and per capita residual waste.

Mr Gove has announced he wants 'to improve incentives for reducing waste and litter, and review the penalties available to deal with polluters – all part of a renewed strategy on waste and resources that looks ahead to opportunities outside the EU.'

Conclusions

There are many potential impacts on the UK's resource and waste management sector from Brexit, ranging from macro-economic impacts such as currency rates and investment decisions through to future policy developments on recycling targets. Some of these are likely to be largely negative and some largely positive, but for most it is difficult to predict for now. CIWM will continue to seek to ensure the interests of the sector and the wider environment are promoted and protected by active participation in the debate at EU, UK and devolved levels, providing solutions where possible. CIWM will also ensure that its members have access to as much good quality information about the implications of Brexit as it develops as possible through the *CIWM Journal*, events, Special Interest Groups and other channels.

Endnotes

1. There is a nice legal discussion around whether the UK can withdraw its notification to withdraw, and if so whether it needs the agreement of the EU to do so.
2. https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en
3. <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>
4. https://ec.europa.eu/commission/sites/beta-political/files/eu-uk-art-50-terms-reference_agreed_amends_en.pdf
5. <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/>
6. http://www.consilium.europa.eu/en/meetings/european-council/2017/04/29-euco-guidelines_pdf/
7. Commons Briefing Paper 7851: Statistics on UK-EU trade <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7851>
8. The impact of Brexit on foreign investment in the UK <http://cep.lse.ac.uk/pubs/download/brexit03.pdf>
9. <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>
10. <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf> (draft Bill)
11. <https://www.publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> (Explanatory Notes)
12. European Union law is based on primary and secondary legislation. Primary legislation is made of the Treaties, general principles established by the CJEU and international agreements. Secondary legislation is made of all the acts which enable the EU to exercise its powers. The instruments listed in Article 288 TFEU are:
 - regulations: these are binding in their entirety and directly applicable in all EU countries;
 - directives: these bind the EU countries as to the results to be achieved; they have to be transposed into the national legal framework and thus leave margin for manoeuvre as to the form and means of implementation;
 - decisions: these are fully binding on those to whom they are addressed; and
 - recommendations and opinions: these are non-binding, declaratory instruments.
 Article 290 TFEU introduces the possibility for the European legislator to delegate to the Commission the power to adopt non-legislative acts of general scope which supplement or amend non-essential elements of legislative acts.
13. This is something Greener UK (<http://greeneruk.org/> – a coalition that CIWM supports, which is lobbying for environmental protections post-Brexit to be at least as high as they are now) and others will argue against in their campaign on the Bill
14. Or High Court of Justiciary in Scotland in certain criminal cases
15. See the House of Lords EU Energy and Environment Sub-Committee report on Brexit and the environment for more <http://www.parliament.uk/brexit-environment-climate-change>
16. The Unfrozen Moment - Delivering A Green Brexit 21 July 2017 <https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexit>
17. Financial Times 12 July 2017 <https://www.ft.com/content/fd5ca278-6654-11e7-8526-7b38dcaef614>
18. For an outline of the process, see <http://www.gov.scot/Topics/International/Europe/Legislation/Infractions>
19. EU targets by 2020: recycle 50% of household waste; reduce biodegradable municipal waste to landfill to 35% of 1995 levels; recover 70% of construction & demolition waste. Ongoing EU target: recover 60% (recycle 55%) of packaging waste
20. <http://www.basel.int>. Despite its name, this also covers household waste and incinerator bottom ash.





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