

# Brexit: Implications for Waste and Resources Legislation





## Contents

Foreword .....	4
Introduction .....	5
Analysis of EU waste law .....	6
Recommended approach post-Brexit .....	10
Acknowledgements .....	11



## Foreword

B P Collins LLP has advised companies in the waste sector for over 30 years, so we were delighted when approached by the Environmental Industries Commission's Waste and Resource Management Working Group, to assist in preparing this brief on the possible consequences and implications for laws relating to the waste sector arising from the UK leaving the European Union.

During the years that we have been advising clients in this sector, there have been many changes in the legislative landscape, however, generally speaking, the direction of travel was well signposted and people knew the likely impact of these changes. When the referendum result in June 2016 indicated that the UK would leave the European Union, that degree of certainty was lost.

We did achieve some clarity on 17 January 2017, when the Prime Minister, Theresa May, provided an insight into the government's intentions around leaving the European Union and its planned approach to negotiations. We now know that a 'hard' Brexit has been chosen and the UK will leave the single market, but what this means for the waste sector has not been disclosed.

Regardless of what happens, this brief serves a useful role in providing the waste management industry with an overview of the important EU legislation which has shaped the UK's current legislation.

In this brave new world to come, there will be challenges ahead, but undoubtedly there will also be huge opportunities. We hope that this brief will initiate further discussions between the waste sector and the UK government and help to confirm what the government's key waste management priorities should be during Brexit negotiations and beyond. We would like to thank the companies that were involved in inputting into the preparation of this report. Being at the coalface every day, their contribution and insight was absolutely vital in helping to shape the future direction of this industry.



## Introduction

Waste and material resource management in the UK<sup>1</sup> has been transformed by EU environmental legislation. The UK's exiting of the EU could therefore have a significant impact on how resources are managed in the future and on the waste and resources sector itself. This short brief has been drafted by the Environmental Industries Commission's Waste and Resource Management Working Group with support from law firm B P Collins. It seeks to summarise the impact of EU legislation in this area and highlight issues that could arise if the UK is no longer subject to EU waste law.

This brief summarises the key elements of EU waste law and the broad impact they have had on the way waste management has been carried out in the UK. Each major piece of legislation is then analysed against key criteria, and the report concludes with recommendations for how we can ensure we have coherent and effective waste regulation post-Brexit.

### Key pieces of EU legislation<sup>2</sup>

Packaging and Packaging Waste Directive (94/62/EC) – sets escalating targets for reducing packaging waste and for better labelling of packaging's recycling needs.

Landfill Directive (1999/31/EC) – outlines the rules for landfilling and sets targets to reduce the amount of municipal waste going to landfill

Waste Framework Directive (2008/98/EC) – the overarching EU policy on waste covering recycling targets, a definition of waste and national waste management plans as well as creating the "Waste Hierarchy"

Controls on Animal By-Products Regulation (EC) 1069/2009 – sets rules for the disposal of animal carcasses and other animal parts.

Industrial Emissions Directive (2010/75/EU) – introduces a holistic approach to environmental permitting in industrial activity.

WEEE Directive (2012/19/EU) – sets targets for electronic waste recycling and lays out rules for recycling electronic waste.

## Overall impact of EU Waste legislation

For geological reasons, including the prevalence of quarrying, the UK had traditionally relied on landfill as its primary means of waste management, and the waste industry was principally focused on the economics of collecting and disposing of waste at landfill sites. In 1975, 90% of UK waste was landfilled. Northern Europe however had a stronger culture of recycling and incineration with electricity and heat recovery linked to district heating rather than landfill, and EU waste policy encouraged development in this direction.

The overall impact of four decades of EU waste policy on the UK could be summarised as:

**♻️ A depoliticisation of waste policy:** Until the early 2010s, there was a cross-party consensus on the drive to move away from landfill and boost recycling. However, this focus on broad compliance with the specific targets in the Directives was arguably a factor behind the lack of an overarching government agenda for managing waste as a resource across the whole supply chain.

**♻️ Reduced landfilling:** The Landfill Directive set absolute targets for sharply cutting volumes of waste sent to landfill. To meet these targets, successive governments introduced the Landfill Tax, Landfill Tax escalator and the LATS trading scheme to drive up the price of landfilling.

**♻️ Recycling up from 10% to 40%:** Faced with meeting challenging recycling targets from a low base and the impact of the landfill tax on local authority budgets, successive initiatives to encourage public participation in recycling were introduced, leading to a culture change.

**♻️ Renaissance of Energy from Waste (EfW):** Recycling could not increase quickly enough to meet the landfill diversion targets by itself, so a shift from landfilling to energy from waste plants also took place. Without an existing culture of EfW, some EfW proposals proved controversial among local communities. In addition, EU regulations allowing cross-border trade in treated waste, created a North European market in Refuse Derived Fuel (RDF).

**♻️ Growth of 'circular economy' concept:** while not purely an EU concept, the EU has encouraged eco-design and waste prevention concepts and has made proposals for circular economy approaches.

<sup>1</sup>This paper discusses waste/resource legislation that emerged from Europe and impacts the UK. However, the focus of this report is primarily on England and Wales.

<sup>2</sup>This brief does not cover Sewage Sludge Directive, End of Life of Vehicles Directive or Mining Waste Directive due to their highly specific nature.

## Issues that have arisen from EU waste law implementation

The implementation of EU waste law in a UK context has not always been straightforward. Issues that have arisen have included:

**♻️ Definition of waste:** To enable a continent-wide system of waste regulation the EU needed to create a way of defining what was and was not a waste in legal terms. The resultant definition, based on any item, or material, that was 'discarded' by its legal owner, has proved sometimes problematic in areas such as industrial by-products.

**♻️ Tonnage based targets:** EU waste targets are measured in terms of tonnages of waste diverted or recycled. This has been very effective in driving action on recycling but has, on occasion, created incentives to focus recycling on heavier materials whether or not they are the highest environmental priority.

**♻️ Separate collection:** To ensure minimum contamination in recycling, the revised Waste Framework Directive (WFD) specified that certain waste materials were to be collected separately from homes and businesses, subject to various caveats. However ambiguity in the detailed wording in the WFD, combined with a Judicial Review and a subsequent lack of clarity from Defra, means there is still much uncertainty in the market as to what this means in operational terms for both commercial and domestic kerbside collections.

## Analysis of EU waste law

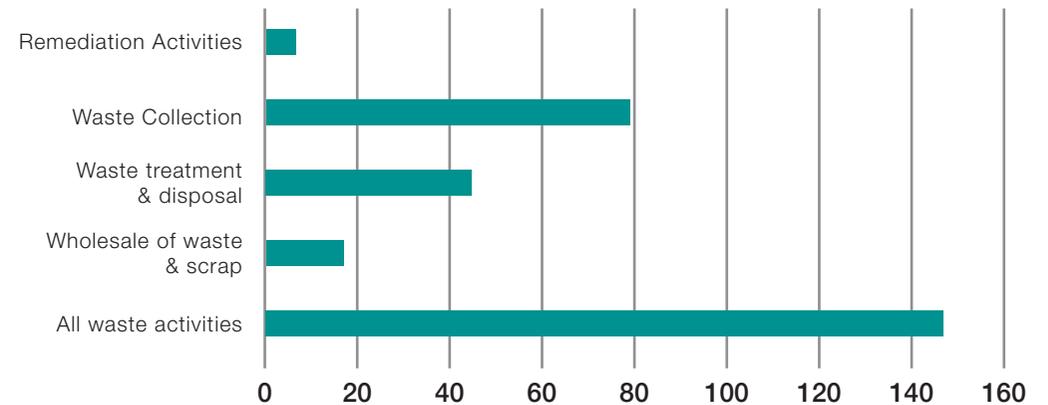
The majority of EU waste management law has been transposed into domestic law in the UK by way of statutory instrument. This means that the relevant legislation will not be automatically or immediately affected by the UK's exit from the EU as the legislation will remain in place in the UK.

The bulk of EU environment law still applies in non-EU member states that are members of the EEA (European Economic Area). So, if the UK were to leave the EU but remain a member of the EEA, compliance with existing legislation would be necessary.

It is worth mentioning the EU's Circular Economy Roadmap that was published by the European Commission in May 2015. The document confirms the Commission's proposals for revision of its waste policy and initiated a review of legislation, aimed at improving the implementation of existing requirements. The EU has published four draft directives that will amend, amongst others, the Waste Framework Directive and the Landfill Directive.

The four draft Directives that make up the roadmap are interconnected and set out complex amendments to EU waste legislation including proposals to set even more challenging targets. Defra currently expects the package to apply to the UK as it will likely be made an active directive before the March 2019 Brexit negotiation deadline. However, some uncertainty still surrounds this issue.

Employment figures in the waste industry (thousands)



Source: ONS

The following table spans the next few pages and it lists the legislation that has the greatest impact on waste and resources in the UK, explains its aims and provisions, gives the transposing legal instruments and summarises our recommendation for the future retention (or otherwise) of that particular piece of legislation. A more complete list of our recommendations follows this section.

Table: Analysis of EU waste law

Legislation	Broad aim of EU legislation	Key provisions	Where implemented in UK law?	Impact in UK	Recommendation
<b>Waste Framework Directive (2008/98/EC)</b>	To create a legislative framework for the collection, transport, recovery and disposal of waste, including a waste management hierarchy in each member state	<p>Legal concept of a definition of waste and when material can cease to be waste</p> <p>Created waste hierarchy</p> <p>Included extended producer responsibility.</p> <p>Recycling targets to be set by member states so that by 2020: 50% recycling for household waste; 70% for non-hazardous construction/demolition with reports to be made to the commission on progress every three years</p> <p>Requires permitting of any establishment or undertaking that recovers or disposes of waste</p> <p>Required member states to draw up waste management and waste prevention programmes</p>	Waste (England and Wales) Regulations 2011 (amended by Waste (England and Wales) (Amendment) Regulations 2012 and Environmental Permitting (England and Wales) Regulations 2010 implemented much of the directive. Targets are established in waste prevention programmes	<p>Spurred the Landfill Tax escalator (as a way of encouraging increase in recycling) and government pro-recycling policies</p> <p>This in turn led to investment by waste industry increasing to meet new targets/ requirements</p> <p>Consultancy in waste prevention also grew</p>	<p>Consult on new targets for 2025 to supersede 2020 targets</p> <p>Replace separate collection provisions to allow co-mingling with glass excluded</p>
<b>Landfill Directive (1999/31/EC)</b>	Requires reduction in volume of waste sent to landfill and stringent technical requirements for landfills to protect the environment	<p>Creates three categories of landfill (hazardous waste, non-hazardous waste and inert waste landfills) and specifies what can be disposed of in each class. Bans co-disposal of hazardous and non-hazardous waste</p> <p>Bans disposal of certain types of waste in landfills</p> <p>Requires treatment of all waste before accepted at a landfill</p> <p>Member states must implement national strategies to reduce waste and introduced a permitting system</p> <p>By 2020, reduce the biodegradable municipal waste (BMW) landfilled to 35% of that produced in 1995</p> <p>Defines waste acceptance criteria (WAC) and minimum environmental standards</p>	<p>Since 2008 permitting requirements of the Directive have been implemented under the environmental permitting regime (EPR)</p> <p>Environmental Permitting (England and Wales) Regulations 2010</p> <p>2010 Regulations deal with regulation of landfill sites</p> <p>Targets of BMW for 2020 have been set by The Landfill (Maximum Landfill Amount) Regulations 2011. This is higher than the EU target. Renegotiation of targets is expected to conclude when the Circular Economy Package is agreed</p>	The Landfill Directive was the driver for the domestic Landfill Tax	Retain but targets superseded by new 2025 recycling targets as above

Legislation	Broad aim of EU legislation	Key provisions	Where implemented in UK law?	Impact in UK	Recommendation
<b>Basel Convention on the transfer &amp; disposal of hazardous waste (agreed by the EEC on behalf of members) 1989</b>	In introducing a system for controlling the export, import and disposal of hazardous wastes and their disposal, it aims to reduce the volume of such exchanges so as to protect human health and the environment	<p>Establishes the principle that no signatory state can transfer hazardous waste to non-signatories of the convention unless they meet the convention's requirements</p> <p>Transfers of hazardous waste can only occur where they represent an environmentally sound solution. States importing hazardous waste must give 'prior informed consent' to the exporting state and be made aware of the contents and transit of the waste</p>	Direct from EU Council Decisions 93/98/EEC and 97/640/EC as well as Regulation (EC) N° 1013/2006	Prevents the dumping of hazardous wastes in, particularly in developing countries	<p>The EU is a signatory to this international agreement on the UK's behalf. The UK should remain signatories to this convention post-Brexit.</p> <p>Some legal effort will need to be made to re-sign the treaty by the UK</p>
<b>WEEE Directive (2012/19/EU)</b>	Prevent/reduce WEEE (Waste Electrical and Electronic Equipment). Improve the environmental performance of all operators involved in the life cycle of electrical and electronic equipment by placing financial responsibilities on producers and distributors of EEE to pay for collection and disposal schemes for WEEE	<p>Covers rules for recycling most electrical and electronic goods</p> <p>Member states required to collect 45% of the weight of all electrical products entering the market from 2016; escalating to 65% from 2019</p> <p>Simplifies reporting obligations</p>	The Waste Electrical and Electronic Equipment Regulations 2013 (SI 2013/3113) (WEEE Regulations 2013)	<p>All producers who place EEE on the UK market in a particular compliance period (one calendar year) are responsible for financing the costs of the collection, treatment, recovery and environmentally-sound disposal of WEEE</p> <p>A producer is obliged to be a member of a producer compliance scheme (PCS). Importantly, once the producer becomes a member of a PCS, it becomes exempt from its obligation to finance costs of recovery and collection which passes to the PCS</p> <p>Specialist companies have been founded on the back of this regulation, creating a market in its own right. It has also driven a sizeable investment in circular practices</p>	Retain

Legislation	Broad aim of EU legislation	Key provisions	Where implemented in UK law?	Impact in UK	Recommendation
<b>Packaging and Packaging Waste Directive (94/62/EC)</b>	This directive provides for measures aimed at limiting the production of packaging waste and promoting recycling, reuse and other forms of waste recovery. Their final disposal should be considered as a last resort solution	<p>Set a series of targets for the incineration (at incineration plants with energy recovery) or recycling of packaging waste and for materials' use in packaging to be decreased</p> <p>Introduced packaging information to be displayed on products</p> <p>Required that member states keep databases on the amount of packaging used and wasted and send the information to the Commission</p>	The Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2016	Has led to British regulations on packaging waste that establish PRNs (Packaging Recovery Notes) which are issued by accredited reprocessors when they have recovered and recycled a tonne of packaging material. The accredited reprocessor can sell the PRN to obligated companies or Compliance Schemes who use the Packaging Recovery Note to prove that a tonne of packaging material has been recycled on their behalf. This in turn has led to the development of PRN trading markets	Retain
<b>Controls on Animal By-Products Regulation (EC) 1069/2009 and accompanying implementation Regulation (EC) 142/2011</b>	Aims to prevent the spread of disease as a result of the disposal of animal by-products, to increase consumer confidence and to protect the environment and biodiversity	<p>Determines the circumstances under which animal by-products are to be disposed of, in order to prevent the spreading of risks for public and animal health</p> <p>Specifies under which conditions animal by-products may be used for applications in animal feed, in cosmetics, medicinal products and technical applications.</p> <p>Lays down obligations for operators to handle animal by-products within establishments which are subject to official controls</p>	Directly applicable in member states	Some impact on food waste collection and treatment	Retain
<b>Industrial Emissions Directive (2010/75/EU)</b>	To encourage heavy industry (including the waste management sector (landfills and incinerators)) to view the environmental impact of their activities more holistically. The directive includes air, water, land and waste issues	<p>Permitting of installations</p> <p>Setting and updating of emission limit values (ELVs) to be based on Best Available Techniques (BAT)</p> <p>Establishment of BAT reference documents (BREFs)</p>	This has been largely implemented through the Environmental Permitting Regulations (EPR)	Tightens waste management of industrial sites as well as the environmental management of waste operators' sites	Retain – continuing to use new BREF post Brexit

## Recommended approach post-Brexit

The government has decided that at the point at which the UK leaves the EU, all EU legislation which has not already been transposed into UK law will be transferred to UK statute. From then on all the EU environmental legislation will remain in force as part of UK law but (unless the UK becomes an EEA member or has made specific commitments to apply such law as part of negotiating a new arrangement with the EU), it can then be repealed or amended at the will of the UK Parliament (or the devolved parliaments where they have power to do so). If the UK is free to decide the future of its waste policy and laws, our recommendations would be as follows:

**♻️ Consult on new recycling targets in England for 2025:** EU waste policy targets have provided investor confidence in the sector and drive investment decisions for many years. Post-Brexit existing or future targets will not apply in the UK. We need to develop new UK targets that reflect stakeholder consensus on what is ambitious but credible. Brexit is also an opportunity to consider whether tonnage targets could be made more nuanced by incorporating measures focused on wider environmental goals such as CO<sub>2</sub> impacts.

**♻️ Retain the EU definition of waste:** Despite its flaws, UK industry has got used to working with the existing definition. A wholesale change post-Brexit could create years of confusion and legal uncertainty. Retaining the EU definition could also help with Anglo-European trade in recycle.

**♻️ Review the Separate Collection provisions of the revised Waste Framework Directive:** The current wording has led to too much ambiguity. A more pragmatic approach, focused on clear operational guidelines that enable high quality recycle to be delivered should be developed instead.

**♻️ The concept of Best Overall Environmental Option (BOEO) should be used alongside the waste hierarchy:** Under EU law the waste hierarchy (reduce, reuse, recycle, energy from waste, landfill) has legal force. The hierarchy should remain as an overall framework for policy making, but it should also be recognised that there may be cases, such as with some types of hazardous waste, where options such as disposal in a regulated hazardous landfill may be the best option.

**♻️ Industrial strategy:** Circular economy approaches should be prioritised around a resources strategy linked to the government sectors prioritised in the new industrial strategies.

**♻️ Circular Economy Package:** EU Ecodesign regulations that derive from the forthcoming EU Circular Economy Package should be adopted by the UK to help facilitate UK-EU trade as well as for environmental reasons

**♻️ Devolved Nations:** Regulatory commonality across the nations/regions of the UK should be encouraged even while targets and policy initiatives may diverge

Except as set out in the above recommendations all other EU waste law should be retained.



## Acknowledgements

This report was written with members of EIC's Waste Management and Resource Efficiency Working Group.

The authors are grateful for all their input but would like to particularly acknowledge insights from:

**AECOM** - [www.aecom.com](http://www.aecom.com)

**Anthesis** - [www.anthesisgroup.com](http://www.anthesisgroup.com)

**Augean** - [www.augeanplc.com](http://www.augeanplc.com)

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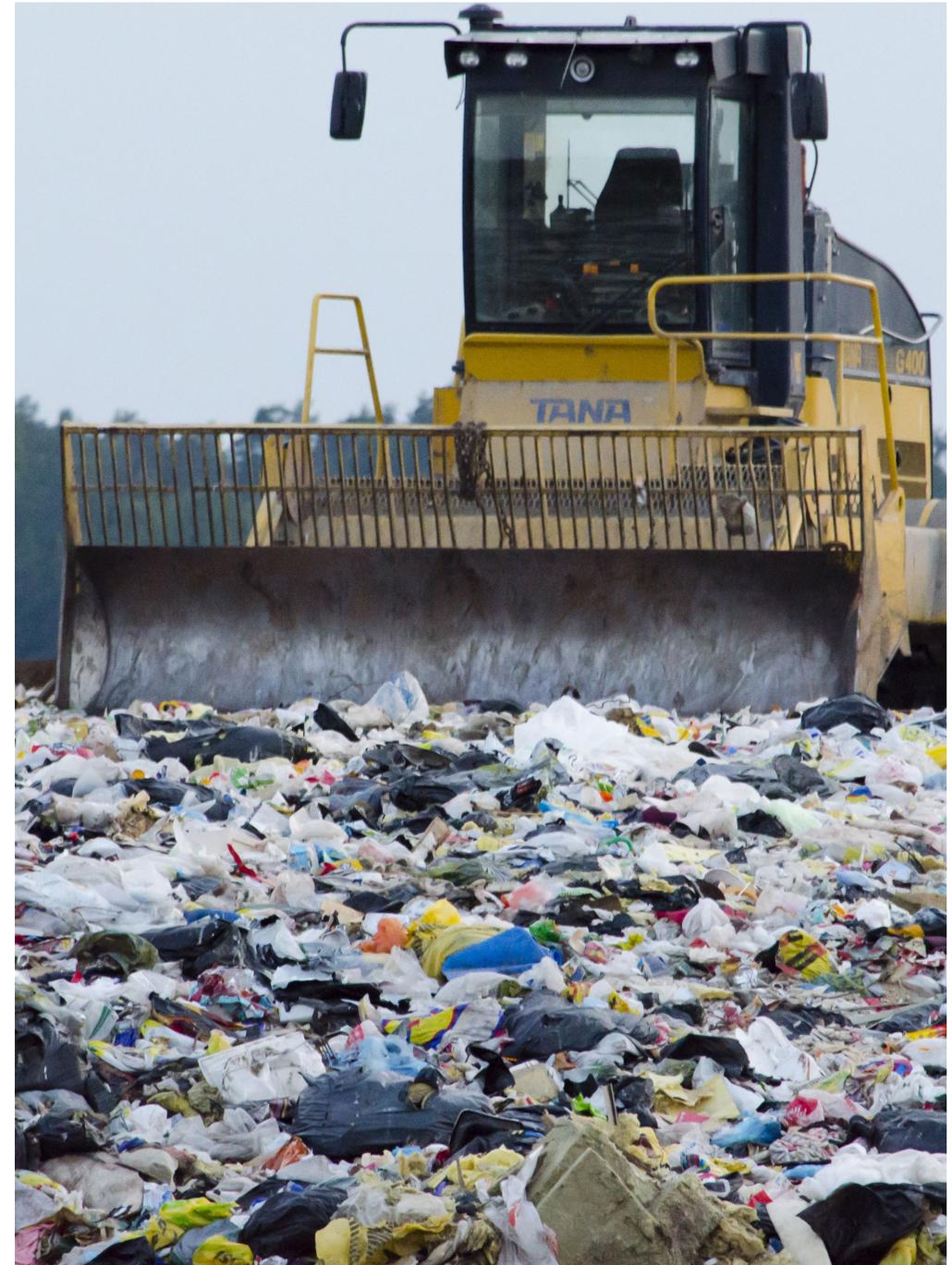
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The Environmental Industries Commission (EIC), founded in 1995, represents the businesses which provide the technology and services that deliver environmental performance across the economy. In short, we are the voice of the green economy. Our members are innovative and the leading players in their field, and include technology manufacturers, developers, consultancies, universities, and consulting engineers.

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## About B P Collins LLP

B P Collins has a cross-practice environment team with industry knowledge across the sector, particularly in waste, recycling, renewables and efficiency. It has forged trusted, successful and long-standing relationships with clients in this area for over 30 years and its work has been awarded the highest ranking by legal bibles, Chambers UK and Legal 500. The firm regularly hosts and participates in round table discussions focusing on the most pressing issues in the environmental and waste sectors and has been appointed sole legal advisor for all members of the British Metal Recycling Association.

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