

THE SINGLE MARKET AND THE ENVIRONMENT

What kind of access after Brexit?

January 2018

A paper to stimulate discussion within Greener UK, without presupposing a Greener UK position

Nigel Haigh, Honorary Fellow, Institute for European Environmental Policy (IEEP)

nhaigh@btinternet.com

The Brexit negotiations are now moving into their second phase, with the UK Government considering what kind of eventual relationship with the EU it wants, and with the other 27 EU Member States considering the negotiating mandate they will give to the Commission. This paper is intended to stimulate discussion of the implications for the environment and environmental policy of the different kinds of access to the European Single Market that might be considered in the negotiations. Some of the problems that will arise have already been put under the spotlight by the attempt to avoid a hard border in Ireland. The paper discusses the meaning of the terms 'single market' (technically the 'internal market', concerning trade within the EU) and how it differs from the 'customs union' (dealing also with trade with third countries). Some items of EU environmental legislation are inextricably tied to the single market, others less so. The paper divides EU environmental legislation into five broad headings to clarify their relevance to the single market. It points up problems ahead, and ends with a summary and conclusions.

1 'Full alignment' - the Phase 1 Agreement on Brexit

The agreement to proceed to the second phase of the Brexit negotiations nearly foundered on the question of how to avoid a hard border between Ireland and Northern Ireland. Failure was only averted by last minute wording introduced into the joint EU/UK Agreement of December 2017.

One can only admire the gymnastics performed by those who drafted the following passages in an attempt to reconcile the apparently irreconcilable:

In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union, which now or in the future support North-South cooperation, the all-island economy, and the protection of the 1998 Agreement. (Para.49)

The United Kingdom also recalls its commitment to preserving the integrity of its internal market, and Northern Ireland's place within it, as the United Kingdom leaves the European Union's Internal Market and Customs Union. (Para.45)

Some commentators have argued that this must mean that Northern Ireland will remain part of the EU single market 'in the absence of agreed solutions', and that accordingly the rest of the UK must also remain part of it. Others deny this. The ambiguous words *full alignment* and *those rules ... which now or in the future support ... the all-island economy* will soon have to be given a clearer meaning.

These uncertainties have focussed attention on the integrity of the single market since '*full alignment with those rules of the internal market*' imply that some EU rules, but not all, will have to be followed. This raises the question: which rules? Will alignment apply to goods moving across the frontier such as recyclable materials, hazardous waste, industrial chemicals, pesticides, pharmaceuticals, endangered species, food (chlorine washed chickens for example) for which EU and UK standards may in time otherwise diverge? Will it apply to *any* traded products subject to *any* EU standards which could cross the border even if such products do not generally cross the border today?

Additionally, it is hard to see how the UK can stay 'aligned' with 'those rules of ...the customs union' (discussed in Section 4 below) if the UK has tariffs on goods imported from third countries which differ from the EU's external tariffs. If UK tariffs are higher, then any importer into the UK would be tempted to import products via Ireland and then across the border. If they are lower, the reverse could happen. What routinely crosses the border today may or may not be what crosses after Brexit.

It has taken the efforts of the Irish Government and the Democratic Unionist Party (DUP) in Northern Ireland to force the attention of ideological advocates of Brexit into realising just how hard it is to square a circle.

2 The 'common market', the 'internal market', and the 'single market'

The widely used term 'single market' appears nowhere in the EU treaties. The Brexit Phase 1 Agreement instead correctly uses the term 'internal market', which the treaties define thus:

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties (Art. 26 (2) Treaty on the Functioning of the EU) (TFEU)

The term 'single market' only came into general use as a convenient synonym for 'internal market' when the 1986 treaty known as the 'Single European Act' (SEA) was being adopted. The SEA defined the 'internal market' by introducing the wording quoted above, and also set the target date of 31 December 1992 for its completion. It did this by amending the 1957 Treaty of Rome that had created the European Economic Community (EEC) that evolved into the EU.

'Single market' is certainly easier to understand than 'internal market' but confuses some people into thinking that the Single European Act (SEA) created the 'single market'¹. The idea is of course much older. Establishing what was called the 'common market' was the main task of the EEC, which was often simply known as the 'Common Market'.

The term 'common market' is no longer to be found in the treaties and has been replaced by 'internal market'. 'Internal market' relates to trade between Member States, implying that the 'external market' relates to trade with third countries as governed by the EU's 'common commercial policy' (Arts.206/7 TFEU). No precise definition of 'common market' was given in the Rome Treaty, but the following requirements of its Article 3 show that it did not differ from what is now called the 'internal market':

- (a) *'the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect'*
- (c) *'the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital'*
- (f) *'the institution of a system ensuring that competition in the Common Market is not distorted', and*
- (h) *'the approximation of the laws of the Member States to the extent necessary for the functioning of the Common Market'.*

In short, the term 'single market' is an informal synonym for 'internal market' which has replaced 'common market'. While the objective has remained the same, the procedure for adopting the rules has changed. Ever since the SEA came into force in 1987, EU legislation relating to the 'internal market' could be adopted by "qualified majority" voting, whereas previously legislation relating to the 'common market' had to be adopted unanimously.

¹ The Single European Act (SEA) was given its name for the prosaic reason that it combined in a *single legal instrument* two texts that had different origins, one amending the Treaty of Rome, and one dealing with cooperation in the sphere of foreign policy.

3 The completion of the common/internal market

An early task in establishing the common market, when the EEC began in 1958, was the elimination of tariffs (customs duties) applied to goods traded between the Member States. This task was completed by the six original Member States before the UK joined the EEC in 1973 so is rather little known in the UK. It was completed in phases over a period of twelve years, and not without some difficulty.

During the early 1980s it was evident that the common market was in fact far from complete and there was much talk of 'eurosclerosis' when policies for transport and financial services, for example, became blocked. Any Member State maintaining or introducing a national standard different from standards in other Member States erected a potential barrier or distortion to trade - some known as 'technical' or 'non-tariff' barriers². These proliferated and the Commission accordingly embarked on a concerted effort to overcome them (for example relating to VAT, capital movements, public procurement, transport, services, safety of products, veterinary and phytosanitary controls, and protection of the environment). This was strongly promoted by the British Government³. The Commissioner for the Internal Market responsible for drawing up the 1985 EU White Paper on 'Completing the Internal Market' was Lord Cockfield (a former British Treasury Minister and Secretary of State for Trade). His White Paper listed around 300 items of proposed EU legislation that were needed to remove the barriers it had identified under three headings: physical; technical; and fiscal. By 1988 90% of the proposals had been tabled and about one third adopted by the Council. It was a busy period.

Lord Cockfield's strategy was to group the barriers together into a package so that each Member State could see which it was in its self-interest to maintain and which it wanted removed. This made it easier for Member States to compromise. A Member State losing one battle knew that it could win others, the expectation being that all Member States would benefit. To make it easier still to adopt the necessary legislation, the SEA changed the voting procedure in Council so that decisions could be made by qualified majority rather than unanimously. At the same time the European Parliament acquired a greater role in decision making, thus adding to the legitimacy of the final decisions.

The wording of the SEA could have meant that the internal market *had to be completed* by the end of 1992, but the Member States made a political declaration, when signing the SEA, that Art. 8A 'does not create any automatic legal effect' but is an expression of 'firm political will' to take the necessary decisions by the end of 1992. IEEP commented at the time⁴: '*The*

² Many such standards were introduced by Member States for legitimate reasons of public policy, but some were just concealed protectionist barriers to competition.

³ Replacing many national rules with a single EU rule was regarded by some as a form of deregulation since exporters only had to follow the EU rule without having to struggle to meet many different national rules. Others saw it as increasing EU regulation. Both views are tenable, but opponents of the EU like to emphasise the second while forgetting the first.

⁴ *Environmental Policy and 1992*: a report prepared for the British Department of the Environment on the consequences for environmental policy of the completion of the EC internal market'. N. Haigh and D. Baldock 1987 IEEP

internal market may therefore not be 'completed' by the end of 1992, and the question must arise whether it is something that can ever finally be completed and whether, if it is completed, it does not need to be maintained by vigilance on the part of the Commission in preventing national measures that impede the internal market'.

Experience shows that the Commission remains ever vigilant in defending the integrity of the single market. It is one of the EU's greatest achievements, and even a country such as Norway, which twice voted in a referendum not to join the EU, nevertheless decided that it is in its economic interest to have full access to the single market through membership of the European Economic Area (EEA).

4 The connection between the single market and the customs union

The EU single market and the customs union are two distinct but overlapping concepts. The customs union is largely concerned with tariffs (customs duties) whereas the single market is much broader. One element of the customs union is a precondition for the creation of the single market.

Under the EU customs union (as now set out in Arts.28 -37 TFEU) no customs duties are levied on goods moving between Member States. Without this there could be no single market. But in addition the customs union requires a common external tariff on goods entering the EU from third countries⁵. Trade with third countries is governed by the EU's 'common commercial policy' (Arts.206/7 TFEU) under which the Commission negotiates trade agreements, including tariffs. After the Commission has negotiated them they are agreed by the Council, that is, by the Member States acting collectively. Because of its collective economic clout, the EU has been able to negotiate more favourable tariffs than each individual Member State is likely to have achieved on its own. (The customs duties are collected on behalf of the EU by the Member State into which goods from third countries are first imported.)

The single market goes well beyond the removal of tariffs on goods traded within the EU, and relates to all the 'four freedoms' - for goods, persons, services and capital. Free movement of goods requires the elimination of both tariff and 'non- tariff ' barriers. We have shown (in Section 3 above) that the single market was for long incomplete, and even today becomes incomplete whenever an individual Member State introduces some new rule, which it may be entitled to do temporarily in certain circumstances for example for reasons of consumer safety or environmental protection before the EU has introduced a similar one (Art. 114 (4-10) TFEU). All four freedoms are likely to be incomplete - there are examples relating to services. Indeed the definition above includes the words 'in accordance with the provisions of the treaties' which allow for exceptions⁶. Art. 26(1)(TFEU) says that the EU shall adopt measures 'with the aim of establishing or ensuring the functioning of the internal market' which makes clear that a 'completed' internal market is a desired end state constantly to be worked towards, and maintained.

⁵ Norway, as an EEA member, is part of the single market but not of the EU customs union. With the exception of certain fish and agricultural products, trade between Norway and EU Member States is tariff free. However the external tariffs on imports of products from third countries set by Norway can differ from those set by the EU so there have to be customs checks on the frontier between Norway and Sweden.

⁶ Art.36 TFEU sets out certain exceptions including 'the protection of health and life of humans, animals or plants'. The best example in the environmental field concerns waste. In 1992 the ECJ (CaseC-2/90) held that wastes were 'goods' irrespective of whether they were to be reused, recycled or disposed of, but then went on to say that wastes are goods of a specific nature which may constitute a risk to the environment so that their free movement may be limited for reasons of environmental protection in accordance with existing legislation. A month later France issued a decree banning the import of household waste intended for landfill. Concerning free movement of persons, some Member States have more stringent rules than those in the UK relating to immigration of EU citizens, as allowed under EU legislation.

The 'four freedoms' are often referred to as 'principles'. They are not, by themselves, precise rules. These are set in legislation which fill in the detail and can provide exceptions.

The customs union and single market are both central to the EU, and the UK will automatically leave both if it leaves the EU. But it can try to negotiate an EU/UK customs union agreement, and can try to negotiate a free trade agreement giving access to the whole of the single market or to part of it. Turkey, for example, has a customs union agreement with the EU under which no duties are levied for certain goods traded between Turkey and the EU. Norway does not have a customs union agreement with the EU but has full access to the single market through its membership of the European Economic Area (EEA).

If there is a full EU/UK customs union agreement the UK cannot conclude trade agreements with third countries, but has the benefit of the tariffs already agreed between the EU and third countries which could be more beneficial than those it can negotiate on its own. Tariffs either have no implications for the environment and environmental policy, or only second order effects because of their influence on trade⁷. The customs union is therefore not discussed further in this paper.

⁷ For example, if more beef was to be imported into the UK, farmers might change what they produced which could affect the countryside.

5 What kinds of agreement could provide access to the single market?

On leaving the EU, the UK will automatically cease to be a member of the single market as defined in the EU treaties⁸, and will also lose the ability to participate in the making of new EU legislation. It can however achieve access to it by other means. Politicians who accept that the UK will leave the EU but call for it to 'remain' within the single market are using shorthand for a call for a negotiated agreement giving full access.

In theory there are several ways in which full, or some, access can be achieved. The UK could:

- a) like Norway, become a member of the European Economic Area (EEA) which gives it full access
- b) negotiate a special agreement which gives it access to the whole single market, perhaps with some exceptions, for example with tighter rules on the free movement of persons ('full access with opt-outs')
- c) negotiate a special agreement which involves following only some named rules of the single market, for example only those relating to traded goods ('access only for those opted into').

Becoming a member of the EEA, like Norway, involves a commitment to follow, not just all existing single market legislation, but also all new legislation, so that EU and UK legislation would not diverge over time. It would also require the UK to follow the judgements of the Court of Justice of the EU (CJEU) that interpret the legislation. A specially negotiated agreement need not necessarily involve such commitments. But if UK and EU legislation begins to diverge the problem of 'non- alignment' arises and some sort of checks, or border controls, then become necessary. The Irish border question has cast a spotlight on precisely these problems.

⁸ Anyone who doubts this should note that the treaty definition of the internal market (quoted in Section 2 above) uses the words 'in accordance with the provisions of the Treaties'. These provisions, including the legislation made under them, give greater precision as to the meaning of 'internal market'. Upon leaving the EU the UK would no longer be bound by those provisions and, unless there is another agreement, cannot therefore be part of the single market.

6 The current positions of the UK and EU

The UK Government has yet to reveal details of what kind of Brexit it wants, and confusion still prevails on its attitude to both the single market and the customs union, with different Ministers appearing to want different outcomes. The Prime Minister has set some 'red lines' - in particular the rejection of the authority of the CJEU - but her speeches have so far provided only the broadest of outlines.

In her **Lancaster House speech** in January 2017 she said this about the Single Market:

'We do not seek membership of the Single Market. Instead we seek the greatest possible access to it through a new comprehensive, bold and ambitious Free Trade Agreement. The Agreement may take in elements of current Single Market arrangements in certain areas - on the export of cars and lorries for example or the freedom to provide financial services across national borders - as it makes no sense to start again from scratch when Britain and the remaining Member States have adhered to the same rules for so many years.'

On the Customs Union she said she did not want to be bound by the EU's external tariffs as these:

'... prevent us from striking our own comprehensive trade agreements with other countries. But I do want us to have a customs agreement with the EU. Whether that means we must reach a completely new customs agreement, become an associate member of the Customs Union in some way, or remain a signatory of some elements of it, I hold no preconceived position.'

In her **Florence speech** in September 2017 she went further by ruling out both an agreement based on the EEA (or Norway) model, and a Canada style free trade agreement.

She ruled out the EEA arrangement because the UK would have to adopt new rules over which it would have little influence, and no vote (sometimes described as becoming 'a rule taker, not rule maker'). On the Canada style agreement she said this:

'We should recognise that this is the most advanced free trade agreement that the EU has yet concluded and a breakthrough in trade between Canada and the EU. But compared with what exists between Britain and the EU today, it would nevertheless represent such a restriction on our mutual market access that it would benefit neither of our economies.'

She then went on to talk about regulation:

'When it comes to trade in goods we will do everything we can to avoid friction at the border. But of course regulatory issues are crucial. We share a commitment to high regulatory standards. People in Britain do not want shoddy goods, shoddy services, a poor environment or exploitative working practices and I can never imagine them thinking those things to be acceptable. The government I lead is committed not only to protecting high standards, but strengthening them.'

In short, the current position of the UK Government, as stated by the Prime Minister, seems to be that it wants the 'greatest possible access to the Single Market' through a new Free Trade Agreement, but it does not want to accept new EU legislation. Nor does it want to be bound by the CJEU. It wants tariff free trade with the EU. It wants to maintain high standards and to strengthen them. It also has to abide by the two apparently inconsistent passages of the EU/UK Phase 1 Agreement relating to the land border in Ireland (quoted in Section 1). Of the three possibilities set out above in Section 5 it has ruled out (a), but seems to want something along the lines of (b) or (c). The latter (c) could be described as a 'harder' form of Brexit than (b)). Then there remains the possibility of 'no deal' which has not been ruled out.

The position of the EU will become clearer when its negotiating mandate is known. It will certainly defend the integrity of its single market and has already said that the UK cannot just 'cherry pick' the parts it wants. However it has also said that the ability for the UK to provide some financial services, as at present, will not be available. One of the EU's strongest cards is its ability to deny tariff free access, which is the core of both the single market and customs union. If there are tariffs there have to be border checks (and a hard border in Ireland). There is the possibility to agree mutual tariff free access for goods where it is in the economic interest of both the EU and UK to do so, but there could be resistance from the EU for access where there is a one sided economic advantage to the UK.

7 Single market access and the environment

EU environmental legislation is closely entwined with the single market. It can be divided into five broad headings⁹ when considering the extent of the connection. Some items are clearly 'single market measures', some appear to have nothing to do with the single market but can distort competition and so indirectly affect the single market. These headings are:

- A. standards for traded products
- B. operational standards
- C. procedural standards
- D. quality standards
- E. standards remote from the single market.

Some items fall under more than one heading. For example REACH - the EU Regulation concerning chemicals - requires all chemicals to be registered with the European Chemicals Agency (a procedure) before they are marketed. But it also restricts or bans the marketing of certain dangerous chemicals and articles containing them (traded products).

A. Traded products

The list of traded products subject to EU environmental standards is long and includes: cars and paints (emissions to air); domestic boilers and light bulbs (energy consumption); construction equipment and lawn mowers (noise). It should be in the mutual interest for the EU and UK to agree that trade in products should **continue** as at present, with the UK respecting EU standards. Since the Withdrawal Bill will carry over into UK law all existing EU legislation there should be no problem initially. Problems will arise only if UK and EU standards diverge over time so that they are no longer 'aligned' and this is discussed in Section 8 below. The UK is already free to set higher standards for products than the EU for its domestic market (as the Florence speech suggests it might wish to) but the EU would insist that EU products meeting EU standards can enter into the UK. UK manufacturers are unlikely to want lower standards for products manufactured in the UK as these could not be exported to the EU, although some politicians have said they do not want to be bound by, for example the EU ecodesign regulations relating to energy consumption of toasters and vacuum cleaners.

⁹ These five headings are a simplified version of a much more detailed classification prepared by IEEP for the Department of the Environment in 1997 when a number of Eastern European countries were negotiating accession to the EU. The argument was being advanced by some that, initially at least, such countries need only adopt single market measures, with environmental measures coming later. The IEEP report listed all the then items of EU environmental legislation under 6 broad headings: external trade; internal market measures; transboundary and global matters; nature conservation measures; underpinning measures; measures mainly affecting only the accession state itself. The heading 'internal market measures' was subdivided into: standards for products; emission standards in the manufacture or marketing of specific products; non-emission standards relating to products; standards relating to emissions which indirectly affect production costs; broader procedures which indirectly affect production costs; standards relating to environmental quality. An attempt was made to assess the effects of all these on the single market, and it was shown how difficult it sometimes is to identify which items do not affect the single market. *EU Enlargement: Classification of Environmental Legislation* N. Haigh and C. Coffey IEEP 1997 (In the end the accession countries accepted that they would implement the full *acquis* with only a few time limited derogations.)

B Operational standards

Operational standards, such as emission standards for industrial plant, may not directly affect trade in goods but can nevertheless distort competition by raising production costs which is why they are included in the list of legislation that EEA countries (such as Norway) have to follow. The EU treaties allow Member States to set higher operational standards than EU standards (Art. 193 TFEU) (unlike for products) but some in the UK might prefer the freedom to set laxer standards. The EU will resist this as it will be seen as undercutting EU producers. Emissions can also affect other countries.

C Procedural standards

Examples include: environmental assessment for development projects; and access to environmental information. The comments applying to operational standards also apply here. Assessing effects of projects, and consulting the public, are said by some to distort competition by delaying decision making.

D Quality Standards

The only land border between the EU and UK is in Ireland. The territory of the UK comprises one island and part of another, and so is separated from mainland Europe by sea. It is therefore argued by some that the quality of British rivers does not affect other EU Member States (Ireland excepted), and that therefore the UK should be free to set its own water quality standards, which could be lower than EU standards. There are two counter arguments: (a) persistent substances in rivers reach the sea and so affect other Member States, and (b) lower river quality standards could give some manufacturers a competitive advantage.

Ambient air quality is mostly affected by local sources of pollution such as road traffic. However the quality of air in the UK can be affected by air blown from other Member States, and given that the prevailing wind is West to East, other Member States are more often affected by UK air quality. Furthermore different controls over emissions to air can distort competition

The EU is accordingly unlikely to accept lower UK quality standards for water or air.

E Standards remote from the single market

Examples includes the Directives on birds, habitats, and bathing water. For that reason they do not have to be followed by Norway and the other EEA countries. The classification¹⁰ by IEEP in 1997 shows that deciding whether an item is a 'single market measure' is not straightforward but, for the purposes of the present discussion, the EEA list of those that relate to the single market provides an officially recognised starting point. However even nature protection legislation can indirectly affect the single market, as it can prevent a manufacturer building on a protected site. Meeting the EU bathing water standards involves

¹⁰ See footnote 9

adequate treatment of sewage which entail costs which fall on both the public and industries. Low standards accordingly can provide a competitive advantage.

The UK may well want to have the same freedom as EEA countries to set whatever standards for nature protection it likes (protecting named species; habitats) , but the EU may also resist weaker standards because of Natura 2000 which seeks to establish a network of protected sites.

7.1 Problem topics

Some EU environmental legislation, such as the EU Emissions Trading System (EU-ETS) relating to carbon emissions, and some relating to radiation made under the Euratom Treaty, will require special arrangements after Brexit. Not all such problem topics can be covered in this paper but two deserve special attention because they involve movements of 'goods' across borders and are therefore relevant to the land border in Ireland and the question of 'alignment'. (As this paper only discusses issues relating to the single market, it does not discuss other problems that flow from Brexit such as the UK's loss of influence with third countries over international or global environmental issues - climate change or marine pollution for example.)

7.1.1 Chemicals

Chemicals policy differs from any other area of EU environmental legislation in being governed by a specialised EU Agency. It was recognised by OECD, before the EU had an environmental policy, that evaluating the effects of chemicals is a difficult subject best shared between countries. The European Chemicals Agency (ECHA), created under EU legislation called REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals), performs tasks which would otherwise have to be carried out by each Member State individually. It receives information on the harmful effects of chemicals from manufacturers and importers to the EU, evaluates the information with the help of the Member States, and has the power to restrict or ban harmful chemicals. Only chemicals registered with ECHA can be marketed in the EU, and only an EU body can apply for a registration. (A Japanese company, for example, must appoint a representative based in the EU to register on its behalf). Only EU Member States have access to the ECHA database.

As well as being an environmental measure, REACH is also a single market mechanism since, once registered, a chemical, and articles containing it, have assured access to the whole of the single market. In the absence of a negotiated agreement, all the registrations of chemicals held by UK companies will become invalid upon the UK leaving the EU with the result that chemicals manufactured in the UK cannot be sold in the EU. Since the chemicals industry is the UK's second largest manufacturing exporter to the EU, this would be serious. The CEO of the Chemicals Industry Association was quoted in the *Financial Times* (10.12.17) as saying that being part of REACH 'was the best way of ensuring that "cars continue to run, planes continue to fly and medicines continue to work"'. This is because manufacturers of parts for cars and planes have to ensure that the chemicals included in those articles are registered with ECHA.

As well as facilitating trade, REACH also minimises the burden of testing and evaluating chemicals (thus also reducing the need for animal testing) since all Member States follow the same rules. In the absence of an agreement enabling the UK to be in REACH (as is Norway) the UK would have to create an expensive new system of its own which will be exceptionally difficult to do without access to ECHA's database.

The decisions taken by ECHA are subject to rulings of the CJEU and if the UK were to negotiate to stay in REACH it would have to accept them too.

7.1.2 Waste

Wastes count as 'goods' and are moved across borders for further processing. Annually, the UK exports around 3.5 MT of 'refuse-derived fuel' (RDF) to the EU, mainly to Denmark, Germany, the Netherlands and Sweden where it is burned in energy from waste facilities, providing electricity and heat. Around 2.8 MT of recyclable material (glass, metal, paper, plastic, wood) moves from the UK to the EU and about 2.1 MT travels in the opposite direction. A further 230 kT of hazardous waste is exported from the UK to other EU Member States for treatment, and in turn Portugal and Ireland send some of their hazardous waste material for treatment in the UK. Gibraltar relies on cross-border trade for most of its waste treatment, using recycling and landfill facilities in Spain. Finally many operators take recycling and waste across the Irish border regularly as part of their normal business. Altogether the UK's trade with the EU in recyclate and waste is worth more than £2.2 bn a year.

There is extensive EU legislation on waste and more is expected as the EU develops its policies for the 'circular economy' intended to reduce waste and treat it as a resource. EU legislation on the shipment of waste governs all the above described transfers, and effectively also bans the export of hazardous and household waste to non-EU countries. Non-EU countries exporting RDF and some recyclate materials to the EU are generally subject to WTO tariffs at 6.5%. A reduction in the UK's ability to participate effectively in the single market could lead to greater export to (potentially less well-protected) non-EU countries, more waste crime¹¹, or more landfilling in the UK. The nature of the UK's access to the single market post-Brexit is therefore crucial to understanding the consequences for this trade. The issues here are the same as set out elsewhere in this paper around 'alignment' of regulatory requirements and the role of the CJEU.

¹¹ Estimates suggest that the UK economy loses around £1bn a year to waste crime already

8 New legislation - divergence over time

The Withdrawal Bill, currently before Parliament, aims to ensure that all EU legislation is transposed into UK law so that on Brexit day EU and UK law, including that relating to the environment, are 'aligned'. The reason for this is to ensure continuity and prevent disruption for manufacturers and exporters (and also regulators). But as we have seen in Section 3 above, the single market evolves, and will require new legislation to ensure that it remains as complete as possible. Environmental policy also evolves. Any access to the single market that the EU agrees to is therefore bound to include a requirement that UK legislation continues to be 'aligned' with future EU legislation. The Irish border issue has highlighted this. UK Ministers and politicians who say they are happy to see UK and EU legislation diverging over time, or even want it to, are therefore effectively saying that they do not want to be part of the single market, notwithstanding the Prime Minister's Lancaster House speech in which she said that '*we seek the greatest possible access to it*' (quoted more fully in Section 6 above).

It is significant that the December Agreement on the Irish border question says the UK will maintain *full alignment* with those rules of the Internal Market which now or *in the future* support the all-island economy (quoted more fully in Section 1 above). What applies to Northern Ireland will have to apply to the whole of the UK.

One can conclude that the EU will insist that any access to the single market must involve a commitment that the relevant UK legislation remains aligned. Since EU legislation will continue to be interpreted by the CJEU, any UK legislation which is intended to be aligned with it will have to take account of future CJEU judgements.

9 Summary and Conclusions

The edges of the single market are not clearly defined. It is self-evident that it concerns trade despite touching on much else. It is therefore no surprise that the future economic prosperity of the UK is the main concern of politicians who wish the UK to 'remain' in the single market or customs union. The environmental consequences of leaving the single market have yet to become part of mainstream political discussion, but they could be considerable.

This paper is intended to stimulate that discussion by:

Attempting to clarify what the single market is; how it overlaps with the customs union yet differs from it; and how central it is to the EU; (Sections 2, 3 and 4)

Exploring the kinds of agreement between the UK and EU that could provide full or some access to the single market, and the current positions of the UK and EU; (Sections 5 and 6)

Dividing EU environmental legislation into five broad headings according to their relevance to the single market, while highlighting problem topics; (Section 7)

Discussing the difficulties for Brexit, as recently exposed by the EU/UK Agreement dealing with the Irish land border, should UK and EU legislation diverge over time. (Sections 1 and 8).

The UK is already committed to carrying over all EU environmental legislation into UK legislation via the Withdrawal Bill. UK environmentalists now need to consider which items they wish to see continue in 'alignment' with the EU beyond the proposed two year transition period, or which if any items of legislation they are prepared to see diverge. They also need to consider by what parliamentary procedures they wish 'alignment' to be assured, given the constraints of the parliamentary timetable. Furthermore, should Ministers be empowered, subject to effective parliamentary scrutiny, to keep UK legislation aligned by Statutory Instruments (analogous to the powers in the current European Communities Act 1972)?

Were the UK to achieve access to the whole of the single market, like Norway by virtue of its EEA membership, then it would be bound by most EU environmental legislation, including future legislation, with the exception of that relating to nature protection and bathing water (assuming that the EEA precedent is followed). The main question facing environmentalists is then whether they wish the UK to continue to remain aligned with future EU nature legislation.

Were the UK to achieve access to only a part of the single market as the Prime Minister has suggested ('*we seek the greatest possible access to it (the single market) through a Free Trade Agreement ... (which) may take in elements of current single market arrangements in certain areas*'), then environmentalists need to consider which these should be. Section 7 has provided five headings to help in considering that question. In all probability the UK and EU will want to ensure that legislation on *traded products* (heading A) will continue to remain

aligned. The same could apply to heading B (*operational standards*). Legislation falling under headings C,D and E are less obviously essential to the single market, but environmentalists may nevertheless wish UK legislation to remain aligned for the benefits it bring to the environment and the coherence of environmental policy.

Since the analysis above leads to the conclusion that even partial access to the single market will require alignment beyond the two year transitional period, which also means following the judgements of the CJEU, it is hard to see how any substantial access can be achieved without a considerable change in the Government's currently stated position. In the absence of such a change a 'no deal' becomes a real possibility with adverse consequences, not just for the economy, but for the environment. Examples include waste and chemicals, as discussed in Section 7.

Nor is it easy to see how a hard border in Ireland can be avoided without substantial access to the single market and being part of the customs union now and in the future. This will require continuing 'alignment' of UK with EU legislation. A Norway style solution should overcome the single market part of that problem - though not the customs union part - but leaves the UK a 'rule taker rather than rule maker' and for that reason has been rejected by the Prime Minister. It goes without saying that the only way the UK can stay a rule maker is to remain in the EU.

Acknowledgements

The following commented on drafts of this paper, while in no way being responsible for any errors of fact, and for the opinions expressed. To them I am most grateful.

Dr Colin Church, CEO of CIWM, the professional body for the resources and waste management sector

David Baldock, Senior Fellow at IEEP

Martin Nesbit, Senior Fellow at IEEP

Professor Maria Lee, Faculty of Laws, University College London, and

Adam Hopkins, author and journalist, who, by asking awkward questions, made the paper easier for the non-specialist to understand.

I am particularly grateful to Dr Church for contributing the passage on waste in Section 7.