



Brexit

How would a “no deal” Brexit impact UK Chemicals?

Whilst the UK is now ready to begin negotiations with the EU on a future trade relationship and transition, after making “sufficient progress” in the withdrawal talks, we are some way from knowing what kind of Brexit will be negotiated – hard and non-aligned or soft and convergent. As we know, nothing is agreed until everything is agreed.

Inevitably, there has been increasing discussion around a “hard” or “no deal” Brexit and what its impact may be. Last month, Elizabeth Shepherd, Environment Partner, was invited to speak to MPs and peers on “Brexit: What does No Deal really mean for key sectors?” at a panel session in the House of Commons.

Elizabeth pointed out that for the chemical sector, immediate concerns include the imposition of tariffs upon supplies of chemicals, and impact on the supply chain through customs-related disruption. This is a real concern, with 60% of chemical exports destined for the EU.

But what other aspects of a “no deal” Brexit are likely to place additional cost on UK chemicals and place it at a competitive disadvantage?

On exit, any REACH registrations held by UK entities would no longer be valid. It means an immediate compliance problem for any of their EU based customers who have previously been treated as downstream users (so didn’t need their own REACH registrations on a single market basis). The additional cost burden in terms of data access and administration costs for customers making their own REACH registrations will inevitably place UK chemicals at a competitive disadvantage.

This could be mitigated potentially in the case of UK manufacturers through appointment of Only Representatives in the new EU to register substances under REACH for them, but this is not likely to be cost-free. In addition the right to appoint an Only Representative would only kick in on Brexit (as it only applies to non-EU manufacturers) and so would have timescale impacts.

Pan-EU businesses, where a UK group member has prior to exit operated as an import hub for REACH purposes for all EU group members, potentially face additional cost in having to re-register under REACH in the new EU.

This could be mitigated by transfers of UK registrations inter group pre-exit on the basis of a “legal entity change” if applicable. However this requires forward planning to take other relevant considerations, including tax, customs and logistics fully into account. Many companies are reflecting on their options, including looking at whether their data access arrangements extend to their affiliates in the new EU.

HSE faces a huge challenge of “tooling up” to take on all the functions currently performed by ECHA, the European Chemicals Agency, (and its committees) and the European Commission. It remains to be seen whether the additional costs of this will be passed on to industry.

Over time there is a real risk of divergence between UK and EU chemical regulation, which could mean businesses supplying to the new EU having to comply with two sets of laws.

Many data access agreements entered into for REACH/BPR purposes provide access for REACH only. In those circumstances, UK businesses requiring access to data for the purpose of UK REACH are likely to have to pay additional data access costs.

What regulatory framework would likely apply in the event of a “no deal” Brexit?

REACH, BPR, CLP, PICs and other EU regulations applicable to the chemical industry will be converted into UK law on exit day (under the EU Withdrawal Bill). This will fill the regulatory vacuum caused by the repeal of EU laws.

The Government will exercise its powers in the EU Withdrawal Bill to remedy any “deficiencies” (note that we can expect these powers to be subject to detailed scrutiny/possible amendment as the Bill goes through the Parliamentary process). As part of this, HSE is likely in our view to replace ECHA’s current functions .

The rules of UK REACH, UK BPR etc would apply. HSE would likely be the regulator administering, managing and enforcing these regimes. HSE would not have access to the ECHA database, nor the REACH IT platform, so would be very much “on its own” in carrying out its functions.

It is possible that all UK entities manufacturing in or importing substances into the UK would be required to re-do their registrations for UK REACH. However this has cost and administrative implications, and a sensible approach would be for HSE to deem REACH registrations held by UK entities on exit day to be valid for UK REACH.

For new substances (i.e. those without an EU REACH registration on exit day), there would need to be a full dossier submitted to HSE. The downside is that it would place manufacturers/importers of rare substances in a worse position (likely SMEs).

It is possible that HSE could decide to make a list of all substances which have REACH registrations on exit day, and regard these as “approved” substances for the purposes of UK REACH. The list could be added to as further substances get EU REACH registrations, or amended if any REACH registrations are lost.

There are numerous downsides to this, including the fact that HSE would not have access to the ECHA database, so would not have the information necessary to assess and ensure compliance. Nor does this consider the other REACH specific process of authorisation and restriction.

Should businesses be preparing for a “no deal” Brexit?”

This should certainly be factored into the thinking as businesses prepare to REACH register substances to comply with the last registration deadline on 30 May 2108. Now is a good time to consider what registration options are available in terms of which company makes the registration.

Maximum flexibility in data sharing arrangements is essential, to allow data access across a group of family companies.

With Brexit only 16 months away, it is prudent for businesses to consider now how they would approach a “no deal Brexit”. This is relevant to any business supplying into or out of the UK, which would be impacted by lack of single market-type arrangements/invalidity of UK registrations post Brexit.

This could include assessment of whether UK REACH registrations should be transferred, where to, and when, bearing in mind the various “satellite” issues including tax which in our experience take time to resolve. We are considering with a number of clients other options to safeguard their compliance position.

Read more: Elizabeth Shepherd comments on preparing for “no deal”: <https://www.icis.com/resources/news/2017/10/19/10155473/insight-prepare-for-disruption-of-a-no-deal-brexite/>

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