This briefing considers the latest insights into the Government’s thinking on how the Article 50 process for leaving the UK will unfold, the plans for a “Great Repeal Bill”, and what the UK will seek from its negotiations with the EU. We also outline the potential impact from a UK environmental law perspective.

How will the Article 50 process unfold?

The Government has indicated that it will trigger the Article 50 mechanism in the Treaty on European Union for the UK to withdraw from the EU by giving notice to the European Council by the end of March 2017. Once that notice is given (and a legal challenge is underway as to whether Parliamentary approval is needed), negotiations between the UK and the rest of the EU to agree a withdrawal agreement will commence. That agreement will also take into account the framework for their future relationship.

This means that the UK will leave the EU by March 2019, unless the Article 50 process is extended by unanimous consent of all Member States (which currently seems highly unlikely).

During the negotiation period, the UK will remain a full EU Member State. It will continue to take part in all EU decision-making except in relation to the withdrawal agreement. In the meantime it will be business as usual in terms of compliance with EU law. Nothing changes until the UK actually leaves the EU.

What type of relationship might the UK have with the EU when it leaves?

The Government has made it clear that the UK will seek a bespoke free-trade deal with the EU. It will not seek a “Norway model” (which involves membership of the European Economic Area (EEA)) or a “Switzerland model”. To quote Theresa May in her speech at the Conservative Party conference, “It’s going to be an agreement between an independent, sovereign United Kingdom and the European Union”.

The UK will seek to negotiate with the EU:

- free trade in goods and services with British companies having the maximum freedom to trade with and operate in the Single Market, and EU businesses able to do the same in the UK;
- the ability for the UK to decide for itself how it controls immigration; and
- protection of the rights of UK citizens living in the EU.

This gives the best indication to date of the Government’s proposed direction. It still leaves many unanswered questions for many sectors. It is essential for businesses in the UK who import from or export to the EU, or are part of an EU corporate group, to consider the implications and plan their strategy accordingly.

What will happen to EU law?

The Government will soon put before Parliament a Great Repeal Bill which will repeal the European Communities Act 1972, the legislation which gives direct effect to all EU law in Britain. EU law will no longer apply from the date on which we formally leave the EU, and all EU law in force immediately prior to this date including case law, will be converted into UK law.
Going forward, that UK law can then be amended, repealed or improved by Parliament, following full Parliamentary scrutiny and debate. However, query to what extent secondary legislation, which does not require full Parliamentary scrutiny and debate, can be relied on to amend that UK law?

**What is the potential impact on UK Environmental law?**

Much of our Environmental law originates from the EU, including law on water, chemicals, air quality, waste, noise, climate change and energy efficiency. Most of it comes from EU directives, for example the Industrial Emissions Directive (IED) and the Waste Electrical and Electronic Equipment (WEEE) Directive, which the UK has implemented into our national law.

Some of it is derived from regulations which are directly applicable in the UK, without the need for any implementing legislation here. This includes Single Market-related EU Regulations such as REACH governing chemicals. Other examples are the Regulation on Classification, Labelling and Packaging (CLP), and the Biocidal Products Regulation (BPR).

**EU Directives**

Law which implements EU Directives relating to waste, such as WEEE, batteries, packaging waste and waste management, as well as Restriction of Hazardous Substances (RoHS) will be adopted officially into UK law when we leave the EU. The same will apply to environmental permitting, applicable to large industrial facilities in sectors such as energy, waste, water, manufacturing and mining, and public access to environmental information. Equally, the requirement for comprehensive Environmental Impact Assessments (EIA) on the development of large or environmentally significant facilities derives from an EU Directive on EIA.

These regimes are already administered and enforced by UK based bodies (e.g. the UK Environment Agency and/or Local Planning Authorities), so the conversion into UK law should be relatively straightforward.

Going forward, post Brexit, the situation will be reviewed. Looking at areas such as producer responsibility, the UK has spent time and money setting up complex arrangements to deal with ever increasing waste streams such as WEEE. Any lowering of compliance standards seems unlikely, although there may be some scope for simplification. So far as legislation relating to product compliance is concerned, e.g. the RoHS Directive, it seems even less likely there would be major change. The whole of the electronics industry has moved on in response to the RoHS legislation. Given the global supply arrangements it is unlikely, in practice, that the UK would be able to go back to lead soldering even if it wanted to do so.

Careful consideration will need to be given to the EU ETS (Emissions Trading Scheme) in terms of conversion into UK law. The timing is challenging, with the UK leaving the EU before Phase III of the EU ETS expires, and with negotiations underway for Phase IV (commencing on 1 January 2021). We assume that the UK will establish its own EU-equivalent emissions trading scheme, potentially linked transitionally to the EU ETS. This is likely to be complex and could add further red tape and cost to ensure compliance. Query if an equivalent scheme is not adopted what measures will there be to ensure that the UK complies with its international and domestic climate change commitments?

**EU Regulations**

Conversion of REACH, CLP and the BPR into UK law, with effect from the date we leave the EU, presents a challenge.

Much of the EU law which regulates the chemical sector has dynamic elements which require the involvement of EU institutions, notably the European Chemicals Agency (ECHA) in the case of REACH, and the European Commission in the case of the BPR. This will not be available post Brexit and we run the clear risk of “zombie” laws which the UK cannot apply or interpret effectively. Detailed consideration is needed of the changes which will be required The required changes will need detailed consideration, not least to introduce HSE (or another body) in place of ECHA. As part of the exit negotiations, the UK may look to incorporate some transitional provisions into the withdrawal agreement, allowing a continued role for ECHA at least in the short term.
Another significant concern is that if the EU refuses to recognise UK REACH-equivalent registrations going forwards, additional registrations will need to be made by the importer of the substance or mixture in the new-EU, or an Only Representative (OR) company in the new-EU appointed by the UK manufacturer/formulator of the substance/mixture. This may result in EU customers choosing an alternative supplier rather than facing additional burdens themselves under these regimes.

Query what our UK REACH will ultimately look like, whether it will be more or less rigorous than EU REACH and what the associated compliance costs will be? Any reduction in UK environmental and safety standards is unlikely, set against a backdrop of global harmonisation of standards and public safety concerns. UK companies exporting to the EU and their EU customers will still have to ensure that their products comply with EU regimes going forward. This raises the spectre of additional compliance costs, at least in the short term, a particular burden for companies which have already incurred significant REACH compliance costs pre-Brexit. A further concern is the impact of these additional costs on the UK chemical industry in terms of its competitiveness with other non-EU manufacturers, particularly when issues such as energy costs are taken into account.

What about rulings of the CJEU (Court of Justice of the European Union)?

The Government is clear that on Brexit, the European courts will no longer have jurisdiction in the UK. Judgments of the CJEU which are already reflected in EU law immediately prior to Brexit will continue to apply until the UK Parliament, Government and/or UK courts decide otherwise. Post Brexit CJEU decisions will remain persuasive where decided on equivalent law.

Any material difference between the interpretation of EU based laws by UK courts from interpretations of similar laws in EU jurisdictions could present challenges. For example, if last year’s CJEU ruling regarding the threshold for substances of very high concern (SVHCs) in articles had been determined post Brexit the UK would potentially be imposing different requirements from the rest of the EU. This is particularly relevant to businesses operating on a pan-European basis.

International Conventions

The UK is a party to several UN environmental conventions which are currently implemented through EU legislation. Any EU-derived law will again be converted into UK law on Brexit. These conventions include matters such as climate change (the Framework Convention and Kyoto Protocol), access to justice in environmental matters (Aarhus Convention), habitat protection, and the protection of endangered species.

Others will not be affected, where EU legislation does not implement the UK’s obligations e.g. The OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic) whose implementation is coordinated by Defra (the Department for Environment Food and Rural Affairs).

What about EU-derived technical guidance, standards etc?

Technical guidance, research, and standards are coordinated by the European Commission. They underpin EU and current UK environmental policy and legislation, and promote best practice. By way of example Best Available Techniques Reference Documents under the IPPC and the IED Directives are key reference documents used by UK environmental regulators when setting permitting conditions for UK installations. Following the UK’s exit from the EU, the UK may have to bear the cost of developing its own documents or potentially rely on EU policies/documents without having a seat at the table.

Domestic laws

Where UK domestic law has not been enacted due to an EU requirement, the UK leaving the EU is unlikely to significantly impact this legislation. The Contaminated Land regime is now so imbedded in UK law it seems unlikely there would be any impetus to change this.
Conclusions

With the Government’s latest indications on Brexit, now is the time for businesses to take stock and, with their trade associations, consider the likely impact on the UK’s environmental regulatory framework, as well as their own legal compliance obligations. The UK remains bound by EU legislation whilst we remain in the EU, including for example the legal obligation to register substances under REACH by the May 2018 deadline. How UK policy and regulation develop from there depends in part on the outcome of the EU/UK discussions on matters such as the Single Market. Government is encouraging businesses to come forward with their views, and early engagement is essential.

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