Brexit and UK Chemical Compliance law
October 2016 update

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

We also outline some of the current uncertainties facing the chemical sector, including how EU Regulations such as REACH, the Regulation on Classification, Labelling and Packaging (CLP) and the Biocidal Products Regulation (BPR) will convert into UK law when we leave the EU. There are issues that businesses should be aware of and plan for now, to help protect their interests. There is scope for businesses to be involved, on their own or with their trade bodies, in influencing the outcomes of the EU/UK negotiations.

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, including the chemical sector. 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 Chemical Compliance law?**

Much of our UK law which regulates the chemical industry originates from the EU. This includes Single Market-related EU Regulations such as REACH which are currently directly applicable in the UK, without the need for any UK implementing legislation. Other examples relevant to chemicals are CLP and the BPR.

**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, 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.

**EU Directives**

Equally, 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 however 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.
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?

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.

Potential Impact of the UK leaving the EU on Chemical Compliance

Based on the Government’s latest position, and depending on how the negotiations develop:

- Any pan-EU business sourcing products from outside the EU which has organised its supply chain so that its UK legal entity is the “importer” for REACH purposes (and so holds the REACH registrations/pre-registrations for supplies to all group members in the EU), will have a compliance problem on exit. Unless a process of mutual recognition is implemented once the UK leaves the EU, one or more of its EU group members will need to re-register under REACH, unless it can transfer registrations from the UK entity to a non-UK entity as a “legal entity change” or as a term of the UK’s withdrawal from the EU.
- Even if we replicate the provisions of REACH in UK law, agreements with ECHA/modifications so UK registrations are made through HSE will be necessary for the system to function. In addition, UK registrations made through HSE may not be recognised for EU REACH purposes unless some system of mutual recognition for registrations in both EU and non-EU Member States could be agreed as part of the withdrawal arrangements. There is currently no "equivalence" recognition under REACH which could be used. These are issues which should be raised in sector discussions with Government.

- REACH, CLP and the BPR will inevitably need some changes to allow their effective application in the UK. Government may look for a transitional period post Brexit in which, for example, ECHA will continue to administer REACH for the UK, whilst the HSE gears up to take over. This is however at odds with Theresa May’s conference speech in which she said “The authority of EU law in Britain will end”.

- With the upcoming 2018 REACH deadline, any UK company preparing for registrations should review its strategy. This includes consideration of SIEF agreements, Consortium Agreements and Letters of Access to data, to see whether rights can be included to facilitate transfer to an entity in the new-EU. The aim should be to build flexibility into new agreements, to avoid the costs of a different legal entity purchasing access to required data. Just because the UK legal entity has the right to refer to data does not mean it can grant access to that data to a third party.

Similar concerns apply to existing SIEF agreements, Consortium Agreements and Letters of Access. Do they allow group member companies, including based outside the new-EU, to have access to data and other rights? Remember many SIEF Agreements/Letters of Access limit the usage of data to REACH purposes. Query what data will be required by any UK REACH and whether business will be required to purchase access to data for UK REACH where access has already been purchased for EU REACH purposes.

- REACH registrations by OR based in the UK will no longer be valid. Again, unless some type of mutual recognition system can be negotiated with the EU, these registrations will need to be transferred to a company in the new-EU. Going forward, any manufacturer outside the EU which is considering appointing a UK-based OR should consider what alternative options may be available. Supply chain discussions will be essential for any company in the EU which relies on an OR in the UK for its REACH compliance.

- There is real risk of increasing divergence between EU and UK law. A different regulatory approach in the UK from the EU (with no formal opportunity for the UK to influence EU law) would mean that UK businesses that wish to continue trading with the EU may have to comply with two sets of laws. Meeting EU environmental and safety standards will in any event be a pre-condition for sales into the EU market. This will include ongoing provision of Safety Data Sheets, labelling and packaging in line with CLP, and the supply of information on SVHCs over 0.1% w/w in articles to enable EU customers to comply with REACH.

- Some requirements of EU Chemical Compliance laws, for example Safety Data Sheets providing essential information on hazards, handling, storage and emergency measures, are essentially bound up with the UK’s own health & safety legislation, including Control of Substances Hazardous to Health (COSHH). From a practical perspective, any reduction in standards of environmental and safety protection is unlikely and could meet with public opposition. It is possible that industry may choose to continue to voluntarily apply EU standards to avoid reputational issues.

- Businesses operating across the EU will not be able to include the UK in any EU-wide biocidal product permit under the BPR. The approval process in the UK’s implementation of the BPR will need to be considered in order for it to continue functioning. Query how the UK will ensure consistent approval of active substances post Brexit unless some form of mutual recognition is adopted. The UK’s Control of Pesticides Regulations will continue to be relevant for biocidal products proposed to be advertised, sold, supplied, stored or used in the UK. Any UK business supplying biocidal products into the EU will still need to be mindful of BPR requirements to ensure compliant supplies of product into the EU (including Article 95 BPR).
Conclusions

With the Government’s latest indications on Brexit, now is the time for the chemical sector and individual businesses to take stock and consider the likely impact on the UK’s regulatory framework for chemicals, as well as their own legal compliance obligations. The UK remains bound by REACH and other EU legislation whilst we remain in the EU, including the legal obligation to register substances by the May 2018 deadline. How UK chemical 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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