Brexit and UK Chemical Compliance law

With the UK having voted on 23 June 2016 to leave the European Union, it will be some time before the terms of the UK’s future relationship with the EU are known. In the meantime there are issues that businesses should be aware of, as well as plan for now, to help protect their interests. There is scope for businesses to be involved, on their own or with their trade bodies, to influence the outcomes of the EU/UK negotiations.

Much of our Environmental law originates from the EU. This includes EU Regulations such as REACH which are directly applicable in the UK, without the need for any UK implementing legislation. Other examples relevant to chemicals are the Biocidal Products Regulation (BPR) and the CLP Regulation (Classification, Labelling and Packaging).

This briefing considers what happens next, as well as the exit process and some potential impacts of that exit from a UK Chemical Compliance law perspective.

What happens next?

There is a mechanism in the Treaty on European Union for a Member State to withdraw from the EU (Article 50). Clear notice of the UK’s intention to leave must be given to the European Council. Once that notice is given (and a legal challenge is underway as to whether Parliamentary approval is needed for the Article 50 notice to be given), 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.

The general consensus is that two years is the likely minimum period before the UK will actually leave the EU. The complex issues involved suggest that a longer period may be necessary. Exit will take place at the earliest on signing the withdrawal agreement or two years after notice is given. The notification under Article 50 is completely within the control of the British government, so there is no certainty as to when this two year period will start.

Uncertainty therefore is likely to prevail for some time. 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 if it leaves?

Post Brexit, the UK’s relationship with the EU could take one of a number of forms.

One example is the Norwegian model, in which the UK could leave the EU but have a relationship with it through remaining part of the European Economic Area (EEA). In those circumstances, the UK would remain bound to implement and apply much of EU law, including regulations such as REACH, but would have lost its ability to influence it.

In other circumstances, the UK would not be bound by EU law unless it agreed otherwise, maybe as part of a deal to secure continued access to the European Single Market. Other models include the Swiss model with the UK re-joining the European Free Trade Association (EFTA) and entering into a bilateral trade agreement with the EU. If no trade deal is agreed within the relevant time frame, then the UK will leave the EU and (like China and the US) trade with the EU under the terms of the WTO (World Trade Organisation).

The bottom line is that no-one knows. For businesses in the UK who import from or export to the EU, or are part of an EU corporate group, planning is difficult if not impossible. Businesses should look at the various models and consider their implications.

How will UK Chemical Compliance law be affected by exit from the EU?

There will be a comprehensive review of all law, including relating to Chemical Compliance, to identify what is derived from the EU, and what should be repealed in whole or in part or changed. The UK’s scope for this will depend on the nature of the post-Brexit UK/EU relationship. This is likely to be a significant task.

EU Regulations and EU Directives

If the UK were to follow the Norwegian model and join the EEA, it would continue to be bound by EU laws. In those circumstances, practically not much may change e.g. under REACH, UK companies would still have registration obligations.

If however the UK is not required to comply with any EU laws as part of the withdrawal agreement, EU Regulations such as REACH, CLP and the BPR will no longer have effect in the UK unless the UK Parliament introduces UK legislation or amends the European Communities Act 1972 to the contrary. This might look like an appealing opportunity to be rid of some burdensome regulation. However, UK companies exporting to the EU and their EU customers would still have to ensure that their products comply with existing EU regimes including REACH, biocides and CLP. Depending on the terms of the UK’s relationship with the EU post-exit, it may no longer be possible for UK companies to undertake certain compliance tasks (e.g. REACH registration). This may result in EU companies choosing an alternative supplier rather than facing additional burdens themselves under these regimes.

Equally, EU Directives which have been implemented by secondary legislation will no longer have effect in the UK unless the UK Parliament decides otherwise. Much of UK law relating to waste, such as WEEE, batteries, packaging waste and waste management, as well as RoHS, falls into this category. Another example is the environmental permitting regimes of large industrial facilities in sectors such as energy, waste, water, manufacturing and mining. 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.
Careful consideration will be needed as to which EU laws should continue to be applicable in the UK. What about the EU ETS (Emissions Trading Scheme) – will the UK leave the EU ETS, and what measures will there be to ensure that the UK complies with its international and domestic climate change commitments? As time goes on there could be increasing divergence between EU and UK law. It means that UK businesses that wish to continue trading with the EU may have to comply with two sets of laws.

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

Judgments of the CJEU which have been reflected in subsequent UK law, including in UK court judgments, will continue to apply until the UK Parliament or UK courts decide otherwise. Post exit 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 the recent CJEU ruling regarding the threshold for substances of very high concern (SVHCs) in articles had been determined after a Brexit the UK would potentially be imposing different requirements from the rest of the EU. This will be 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. The UK will have to consider how its obligations will be covered when the UK leaves the EU. These 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

Depending on the terms of the post-exit UK/EU relationship

- Any pan-EU business sourcing products from outside the EU which has organised its supply chain so that its UK legal entity is "importer" for REACH purposes (so holds the REACH registrations/pre-registrations for supplies to all group members in the EU), may have a compliance problem on exit. Once the UK leaves the EU, one or more of its EU group members may need to re-register under REACH. It may not be possible simply to transfer registrations from the UK entity to a non-UK entity.

  This should be considered early, along with issues such as data access for any new registrations/registrations which can be transferred, and also overall 2018 registration strategy. This could result in additional costs, not only in terms of registrations, but also 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.

- REACH registrations by Only Representatives (OR) based in the UK may no longer be valid. Query whether it makes sense going forward for a manufacturer outside the EU to appoint a UK-based OR, in case REACH should fall away. Supply chain discussions will be essential for any company in the EU which relies on an OR in the UK for its REACH compliance.

- A different regulatory approach in the UK from the EU could result in different compliance obligations for companies manufacturing, importing or using chemicals in both the UK and EU (and wider markets for which similar regulation to REACH is increasingly the trend). 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 to enable EU customers to comply with REACH.

- Will the UK adopt the equivalent of current EU Chemical Compliance law? Some requirements of those 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 COSHH. From a practical perspective, any reduction in standards of environmental and safety protection 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 may not be able to include the UK in any EU-wide biocidal product permitting under the BPR. The approval process in 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).

- In practice, any gaps in UK legislation due to EU requirements no longer being applicable are likely to be “plugged” as soon as possible.
Conclusions

Some models for the UK/EU relationship post-exit present an opportunity to reappraise and possibly simplify environmental regulation. Whilst this might make the UK an attractive place to do business, any reduction in environmental standards is unlikely to be accepted by the public and NGOs.

What is important is that businesses should keep abreast of developments, so that they are well positioned to assess the likely consequences on their compliance strategy.

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