This briefing considers the latest developments in relation to Brexit, including their likely impact on the chemical sector and what businesses should consider now, to protect their interests.

It seems clear that the UK will leave the EU by the end of March 2019, two years after the Government’s Article 50 notification. There seems to be broad agreement in Government to look for a transition period commencing at the point of exit and taking us through to our new trading relationship with the EU. But what is not yet clear is what the UK’s relationship with the EU will be during or after that period, nor how long a transition period would last. The ultimate arrangements will depend on the UK’s negotiations with the EU.

In the meantime, the Government has begun to issue a series of position papers setting out its thinking on various aspects of the withdrawal arrangements and the UK’s future relationship with the EU.

The European Union (Withdrawal) Bill

This Bill (also known as the Repeal Bill) was published 13 July 2017. As expected, the Bill provides for the repeal of the European Communities Act 1972 on exit day. All EU-derived law will be retained as part of UK law, i.e. mainly laws which the UK has passed to implement EU Directives, such as the IPPC Directive, which would otherwise fall away when the 1972 Act is repealed. All EU law which applies directly in the UK without any implementing law will be converted into UK law i.e. EU Regulations such as REACH, CLP (Classification, Labelling and Packaging) and the BPR (Biocidal Products Regulation) which would also disappear unless expressly converted into UK law. The aim is to prevent a regulatory vacuum on day 1 of the UK’s exit from the EU.

The Bill does not deal with any possibility of transitional arrangements.

The real challenge lies in how to adapt this converted law so that it works for the UK post Brexit. The Bill seeks to give the Government sweeping powers, for two years post Brexit, to prevent, remedy or mitigate any “deficiencies” in retained EU law which arise from the UK leaving the EU. The Bill provides a non-exhaustive list of “deficiencies”, which include transferring a function currently exercisable by an EU entity to a UK public authority, whether existing or set up for the purpose.
For some time, industry has raised the concern that much of the EU law which regulates the chemical sector has dynamic elements which require the involvement of EU institutions, notably ECHA (the European Chemicals Agency) in the case of REACH and the European Commission in the case of the BPR. These powers could potentially be used to address this, possibly introducing HSE (Health and Safety Executive) or another body in place of ECHA.

It remains to be seen how these powers, which grant the ability to amend legislation to a Minister of the Crown and so take it away from Parliament, will be exercised. This is a really contentious part of the Brexit process. There are concerns that they could be used to make changes to policy, rather than operational detail. However, the Bill is clear that where these powers are exercised in some circumstances, including to create a new public authority or to confer on an existing authority a function currently exercised by the EU, the approval of both Houses of Parliament must be obtained.

UK courts must apply CJEU (Court of Justice of the European Union) case law decided before exit, though the UK Supreme Court is given the right to depart from it. They do not have to follow post Brexit CJEU decisions, but can do so if they consider it appropriate.

The first debate on the Bill in Parliament will take place on 7 September 2017. In order to become law, the Bill must be passed by both Houses of Parliament and the Government’s small majority could make the Bill vulnerable. With politics at the heart of the debate, it seems likely that there will be changes to the text of the Bill as it progresses through Parliament.

A transition period

The idea that the Government will seek a transition period of potentially up to three years post Brexit has been welcomed by industry. The CIA (Chemical Industries Association) has commented that “it’s a priority the CIA has been highlighting for some time now.” We do not however know what this transition period will entail, as nothing has been published or set out by the Government, and it will need to be negotiated with the EU. The idea will be that it will smooth the path between where we are now and a future treaty-based relationship with the EU. Whether it will take the form of temporary EEA/EFTA membership, or some bespoke transition arrangement remains to be seen.

The CIA is pushing for greater predictability for business and employment during the transition period. With the EU market remaining by far the most critical for chemical imports and exports, the CIA believes that staying in the single market for that period would be the best way to guarantee no adverse disruption to business and trade and only one adjustment before reaching a final agreement with the EU. It sees this as preferable to some form of interim customs arrangement with the EU Customs Union which the Government outlined in its position paper “Future customs arrangements: a future partnership paper”, published 15 August 2017, which still leaves key questions around regulatory continuity, tariff and non-tariff impacts.
What does the UK’s future relationship with the EU look like?

It’s too early to say, save that the Government continues to stress that the UK wants to build a new, deep and special partnership with the EU. Whilst the current political situation presents a number of challenges, it has given the opportunity for the UK’s approach to Brexit to be reassessed and repositioned. The Government’s position papers, outlining its position and principles on various aspects of Brexit, give us the clearest indication yet of the direction it proposes to take on those aspects in negotiations with the EU.

It has been reported that the UK will offer to pay the EU for ongoing participation in the EU’s science and research programmes after Brexit. These would include Horizon 2020, the EU’s biggest Research and Innovation programme, and any equivalent scheme which replaces it post 2020.

There is still no suggestion that the UK will seek a “Norway model”, involving membership of the European Economic Area (EEA) or a “Switzerland model”. What does seem clear however is that the Government is inclined to a “softer” Brexit than was the case before the election in June 2017.

Continuity in the availability of goods for the EU and the UK

A key concern is to minimise supply chain disruption by ensuring that goods available at the date of withdrawal continue to be available post Brexit. The Government’s current thinking is set out in its position paper “Continuity in the availability of goods for the EU and the UK”, published 21 August 2017.

The Government proposes:

− that goods placed on the Single Market before we leave should continue to circulate freely in the UK and the EU, without additional requirements or restrictions. Currently available definitions of what is meant by goods “placed on the market” will apply.

  This principle is consistent with an earlier position paper published by the European Commission “Goods placed on the Market under Union law before the withdrawal date”; and

− where businesses have undertaken compliance activities prior to exit, they should not be required to duplicate them in order to place goods on the UK and the EU market after exit, regardless of where the activities took place. This includes approvals, certificates and registrations issued prior to exit being recognised for both UK and EU markets.

The Government gives pre-exit collecting and submitting data on the hazards and risks of a chemical substance as an example of such activities. This would avoid a need for significant duplicative compliance activity after exit, for example collecting and submitting data again.
Impact on the chemicals sector

− Progress has been made since the House of Commons Environmental Audit Committee inquiry in April 2017 into the Future of Chemicals Regulation after the EU Referendum. Concepts discussed at that inquiry, including the importance of a transition period, mutual recognition and regulatory consistency are now being incorporated into the UK’s agenda for negotiation.

− Regulatory equivalence between the UK and EU may be achievable in the short term through the Bill, but is likely to be difficult for the UK to maintain over time without any formal opportunity to input into and influence EU law. The UK will lose its seat at the EU table post Brexit, along with its right of UK representation on Member State Committees, including the Biocidal Products Committee which carries out peer reviews in the evaluation process for active substances under the EU Review Programme.

− The situation around movement of workers is still unclear. Whilst the UK and the EU have both released position papers on citizens’ rights, there is some way to go before any consensus is reached.

− HSE looks set to lose its current insights and input into biocidal regulation at EU level when the UK leaves the EU. It seems that the European Commission does not envisage any ongoing role for the HSE post Brexit in risk assessment and other procedures for biocidal products, plant protection products and medicinal products. It has stated that the Withdrawal Agreement must ensure that any which are ongoing at the withdrawal date are transferred where appropriate to the competent authority of another Member State.

This second proposal suggests that the Government is looking for some form of “mutual recognition” for pre-exit compliance activities. This is a welcome development for the chemical sector as it would appear to include REACH registrations made pre-exit. It could mean, for example, that the EU importer of a substance from a UK manufacturer which holds a REACH registration in respect of that substance should be treated as a downstream user and not liable to make a further REACH registration as importer. The same would apply to a UK importer of a substance from an EU manufacturer which holds a REACH registration in respect of that substance. Where this ends up will depend on the outcome of the UK’s negotiations with the EU.

Therese Coffey, Environment Minister, has already indicated the importance of regulatory equivalence with the EU, and that the Government is hoping to secure an early “mutual recognition” agreement on chemicals policy with the EU before the UK exits the EU. She acknowledged that the REACH registration process is “complex” and said that there was no need for companies to go through it again. She told the UK Chemicals Stakeholder Forum in July 2017 that the Government is not trying to “cherry pick” elements of the EU single market, but is “trying to ensure that we have an ongoing effective relationship and mutual recognition of regulations is a key part of that”.

This seems to confirm that the Government would not require businesses which have obtained REACH registrations before exit to repeat the exercise of collecting and submitting data for the purpose of UK REACH, whatever form it takes.
Equally UK HSE has indicated that it can’t say whether it can commit to any new substance evaluation or risk management option analysis until the negotiations are finalised.

With the upcoming 2018 REACH registration deadline, many companies are considering their options, including in the case of pan-European businesses how best to structure their registrations. Questions frequently asked include whether pre-registrations can be transferred to another group company in advance of the deadline, as well as whether it makes sense to have a UK company as Lead Registrant, or to appoint an “Only Representative” in the UK.

Although mutual recognition is on the agenda from the Government’s perspective, it’s too soon to say how this will be resolved in negotiations with the EU. A key priority now is consideration of SIEF Agreements, Consortium Agreements and Letters of Access, to see whether rights can be included to facilitate transfer to an entity in the new-EU/rights are sufficient to allow access for UK REACH purposes. The aim should be to build flexibility into new agreements, to avoid the costs of a different legal entity having to purchase access to data required for REACH and BPR purposes.

Another priority is to consider now what biocidal products may be affected by Brexit, and what specific issues will need to be addressed. An important issue for UK BPR is whether the UK will continue to recognise substances already approved by the European Commission and the EU Review Programme generally. There is also the Article 95 BPR list for biocidal products to consider.

It’s not too early for businesses to have supply chain discussions where they have customers or suppliers in the UK, to minimise any risk of market disruption when the UK leaves the EU in March 2019.

The CIA has stressed three key Brexit priorities for UK growth: frictionless tariff-free trade, regulatory consistency so as to ensure continued access to the market place, and access to skilled people. The Government has confirmed that it will continue to engage with businesses and consumer organisations to understand more about their concerns, in view of the UK’s objective to provide legal certainty and avoid business disruption. It’s essential for the chemical sector to stay close to Government with a view to influencing the Brexit process.

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