

Dave Gordon, Environmental partner in the Chemicals Industry Group, highlights some of the key questions and implications of the vote to leave the European Union (EU) from a chemical regulatory law and policy perspective.

Most chemical regulatory legislation in the UK and other member states is derived from the EU. Originally, this came largely from directives that were implemented by UK domestic secondary legislation, such as the Dangerous Substances Directive and the Dangerous Preparations Directive.

Increasingly, however, the EU has regulations in this area of law, such as REACH, the Classification, Labelling and Packaging (CLP) Regulation and the Biocidal Products Regulation. Unlike directives, these regulations are directly applicable, with national law only having to deal with enforcement and penalties.

This makes a break with the EU particularly pertinent to this area of law because a large number of directly applicable EU laws would cease to have effect in the UK after Brexit, so positive steps would certainly be needed to replicate or replace those in domestic law.

So, what could happen to chemical regulation from a practical and policy perspective following the UK decision to exit the EU?

- **The legal framework of REACH is an EU Regulation.** As such, it is directly applicable in each EU member state without needing national implementing legislation, except in relation to enforcement and penalties. So, in the UK, the only domestic legislation currently in force relating to general chemical registration/restriction, etc., is the REACH Enforcement Regulations 2008.
- **As such, as and when the UK were to leave the EU** (and assuming it does not immediately join the EEA – see below), **the REACH Regulation would cease to have direct legal effect in the UK.** Unless prior to that date the UK had put some domestic legislation in place to specifically deem REACH to apply, or to create a new chemical regulatory law, that would leave a major gap in regulation – and it seems unlikely that would happen. Similarly, it also seems unlikely that the UK government would have time to come up with its own bespoke chemical regulatory law in the transitional period leading up to the UK exiting the EU.
- So, even if EU law ceased to apply in the UK, given the huge list of UK laws that would need to be reviewed, both environmental laws and every other type of EU-based law, **it is highly unlikely that new legal regimes would be finalised prior to the exit taking effect** and it seems more likely that these laws would be gradually reviewed and that some sort of interim legislation would need to be put in place.

- That throws up some particular questions and issues in the context of REACH:
  - **How does this all impact the 2018 REACH registration deadline?** The deadline is 31 May 2018, and considerable preparatory work is required for registration. The EU exit process is likely to take at least two years, if not much longer. Until the exit process is complete, there is no change in the effect of EU law in the UK. So, REACH and the May 2018 registration deadline would still apply legally until the UK leaves the EU, which seems quite unlikely to happen before May 2018. Therefore, we must assume that UK companies will still have to meet the 2018 REACH deadline.
  - **However, would REACH be actively enforced in the UK and/or would the enforcement rules be changed prior to EU exit?** Even if the May 2018 still applied, would the UK authorities actively enforce this if the UK was about to dis-apply REACH? The UK does already have some flexibility on enforcement, so it could even expressly change the enforcement position.
  - **What would be the status of existing REACH registrations by UK companies** with the European Chemicals Agency (ECHA) if the UK wanted to deem REACH to still apply in the UK after exit, even for a temporary period? Would UK companies still be able to access ECHA and REACH IT? What if a dossier needed updating – would the UK need to have its own mirror registration system?
  - **What about Only Representatives (OR) in the UK after exit?** If a non-EU company has appointed an OR in the UK, that arrangement is unlikely to be valid and the non-EU company would need to appoint a new OR in a different EU country or risk its EU customers all being considered as importers under REACH (see below).
  - **How would sales between the UK and the EU be treated under REACH after exit?** When the substance is “exported” from the UK to the EU, the EU importing entity would be treated as an “importer” for REACH purposes. That could trigger registration requirements for EU entities that had previously been downstream users, and that would not have previously been expecting to register.
  - **How would sales between the UK and (for example) the US be treated after exit for REACH purposes?** The UK importer would not be an EU importer, so as noted above, onwards sales to other EU countries would be imports for those EU countries; so the US company would not have satisfied REACH requirements simply on the export to the UK. Conversely, the US company would not need to comply with REACH to export to the UK, but would of course, need to comply with whatever domestic regime applied in the UK instead of REACH. This could add complexity to managing exports to Europe, since different rules may apply in the UK.

- **What aspects of REACH would the UK want to keep/get rid of/change?** If all/most existing substance registration had happened before exit, then the UK may wish to maintain an equivalent system. Similarly, the UK may be supportive of many of the restrictions and authorisation SVHC for reasons of health, safety and environmental protection. However, the UK would be able to change its own rules in that regard going forward, and so, if for example, there were a restriction that the UK did not feel was necessary, then it could remove it.
- **Would a new trade deal with the EU require the UK to continue to apply REACH?** See comments below about the EEA, but a bespoke trade deal with the EU may also include REACH being applied. The application of common standards to products is a key part of trade cooperation. Whatever a trade deal may or may not require, in practice, UK companies would be unlikely to be able to sell products into the EU containing substances that fall foul of REACH because their EU customers (as importers) would be in breach of REACH when they placed those products on the EU market, so they are unlikely to want to buy them.
- **If the UK left the EU, and immediately join the European Economic Area (like Norway),** then REACH would still apply as before. Part of the terms of being in the EEA includes adhering to REACH, and also the Only Representative provisions of REACH apply across the EEA. For example, if a chemicals company had a UK-based OR, that OR arrangement would still be valid if the UK went from the EU into the EEA.

**In summary,** it is all very much up in the air and likely to be so for some time. REACH will continue to apply until the UK exits the EU, which is likely to be at least two years away, and REACH or REACH-type requirements may continue to apply afterwards depending upon the agreements the UK reaches with the EU. However, **companies affected by REACH should be thinking about the potential ramifications so they are ready to react and take any necessary steps as and when the future becomes clearer.**

*If you have any questions, please contact one of the lawyers listed in this publication.*

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