BREXIT AND CHEMICALS REGULATION: UK GOVERNMENT SETS OUT PLANS FOR A UK-REACH IN THE EVENT OF A HARD-BREXIT

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UK Antitrust, Competition and Trade Regulation Alert

Further to our previous alert (found here), which outlined the EU and the UK Government's general position on product regulation post-Brexit, on 24 September 2018 the UK Government released its latest Technical Notice, specifically addressing the way it envisages the regulation of chemicals in the event the UK leaves the EU on 29 March 2019 without agreeing on an exit deal.

The Technical Notice does not provide much in the way of detail but it is clear that (i) there will be a new UK-REACH regulatory regime, which will require that chemicals sold into or manufactured in the UK are registered in addition to any registrations required under the EU REACH regime, and (ii) there will be a transitional period for compliance with the new UK-REACH regime.

More specifically, the Technical Notice foresees that, in order to maintain access to the EEA market, a company established in the UK with registrations under REACH will need to either:

- transfer the REACH registrations to other entities in its corporate structure that are based within the EEA;
- transfer the REACH registrations to a separate entity based in the EEA that will hold the registration on its behalf i.e. an only representative; or
- ensure the REACH registrations are held by those customers in the EEA to whom it sells.

Where the company manufactures the chemicals in the UK or imports them from the EEA, it will also need to register them under the UK-REACH regime in addition to any EU-REACH registrations.

Companies established in the EU and already selling chemicals into the UK will need to register those chemicals under the new UK-REACH regime. In addition, first time importers seeking to trade chemicals from the UK into the EU or vice-versa will need to ensure chemicals are registered under both regimes.

The Technical Notice does not provide details on whether the new UK regime will treat manufacturers, importers and traders differently, nor does it confirm whether the UK regime will allow the use of UK-based only representatives by EU based manufacturers and importers. The Technical Notice is also silent on the costs (if any) of registration and on whether a lead registrant model will be used in the UK. The Technical Notice merely notes that the new UK regime "*would preserve REACH as far as possible*."

The Technical Notice confirms that a UK IT system similar to REACH-IT will be used for the purposes of the

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registration of chemicals under the UK regime. This system has been in development by the Department for Environment, Food and Rural Affairs for some time (our previous alert on this can be found here).

In addition to registrations, the Technical Notice also addresses authorisations. While it is envisaged that all existing authorisations to use higher-risk chemicals granted to UK companies by ECHA will be carried over into the new UK regime, UK downstream users of authorisations would no longer be able to rely on authorisation decisions addressed to EEA-based entities.

TRANSITIONAL PERIOD

For the purposes of continuity and to minimise disruption to industry, in the event of a hard Brexit, a transitional period is foreseen before the obligations imposed under the new UK-REACH regime would come into full force.

As stated above, UK-based manufacturers / importers and EEA-based entities exporting chemicals to the UK would be required to register chemicals they place on the UK market under the UK-REACH regime. Existing REACH registrations can be used for this purpose, carried across and adopted under the new UK system. To do this, the company would have to notify the UK Health and Safety Executive (which will carry out the UK equivalent function of ECHA) of the REACH registration that they would like to carry across. This would have to be completed within 60 days of the UK leaving the EU. The company must then, within two years of Brexit, provide the Health and Safety Executive with all technical data that supports the REACH registration it is seeking to carry over.

Businesses that import chemicals from the EEA into the UK before 29 March 2019 that do not hold a REACH registration for such chemicals, will not need to undertake a full registration with the Health and Safety Executive immediately. Instead, it is envisaged that these businesses will be required to provide "basic data" on the chemicals they would be importing within 180 days of the UK leaving the EU. However, the Technical Notice does not go into any detail on the practicalities of how this process would be managed, what is meant by "basic data" or on the expected cost of carrying over EU-REACH registrations into the UK regime.

GUIDANCE AND NEXT STEPS

With hard Brexit becoming more likely as the 29 March 2019 deadline approaches, chemicals companies should prepare for the scenario of a hard Brexit set out under the Technical Notice and envisaged by ECHA (further details can be found here). To ensure the continued and undisrupted trade of chemicals into the UK & EEA, it is advisable that businesses have an entity within both jurisdictions for the purposes of registering chemicals and maintaining access to both the UK and EEA markets. Alternatively, UK manufacturers should identify counterparts in the EEA that take the role of an only representative where they intend to continue trading into the EEA market. Other steps that chemical businesses can take to prepare for hard Brexit include inserting appropriate protections into contracts with those with whom they trade.

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UK entities holding REACH registrations that decide to transfer the registrations to an entity within the EEA will need to consider issues such as whether an intra-group transfer would be accepted by ECHA, the types of entity that is allowed to hold REACH registrations, the cost of transfer, documentation required to effect the transfer and the maintenance and health and safety obligations that will be passed on to the EEA entity. More importantly, where a UK based entity registered with ECHA acts as the lead registrant, considerations will have to be made on whether a new entity should take over such a role. There will also be a number of other considerations, including customs arrangements and tax that will need to be addressed as part of the transfer of the registration.

K&L Gates has experienced teams of lawyers in offices in London, Brussels and across the EU and is well placed to assist you with preparing for a hard Brexit, including establishing suitable corporate structures that will facilitate compliance with both REACH and the new UK chemicals regime and the transfer of REACH registrations from entities based in the UK to those in the EEA.

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