

THE EU REACH CHEMICALS REGULATION AND BREXIT NEGOTIATIONS:

The critically important benchmark for many industries is the EU REACH Chemicals Regulation, from chemicals to those dependent on complex international supply chains, including the automotive and aerospace sectors. Compliance with REACH will remain a requirement for businesses exporting to the EU, and REACH is, to an increasing extent, the model for comparable regimes in chemicals regulation elsewhere in the world. UK trade associations have therefore been lobbying hard to ensure that post-Brexit, the UK either retains a system of ‘mutual recognition’ between UK law and REACH, or at least the closest possible ‘equivalence’.

Through 2017, little information was emerging from the negotiating process on the kind of regime that the UK envisaged would follow on from REACH after Brexit. Industry was, at the same time, being told to ensure that registrations of chemical substances were made on time for the 2018 deadline for the lowest tonnage band; and, by postings on the website of the European Chemicals Agency ‘ECHA’ from September 2017 that all such Registrations by UK-based companies would become “non-existent” after Brexit.

Pressure from industry bodies resulted in a CBI Report on 21 December 2017 that clearly identified key bodies and regimes, including ECHA for REACH, where close alignment was crucial to business.

The Prime Minister’s Speech on Trade Negotiations:

On 2 March 2018, in her Major Speech on trade negotiations, Prime Minister Theresa May noted these concerns, stating –

“We will also want to explore with the EU, the terms on which the UK could remain part of EU agencies such as those that are critical for the chemicals, medicines and aerospace industries: the European Medicines Agency, the European Chemicals Agency, and the European Aviation Safety Agency.

We would, of course, accept that this would mean abiding by the rules of those agencies and making an appropriate financial contribution.”

The Prime Minister listed the advantages of such associate membership, for the UK and the EU, as including products only needing one set of approvals, in one country; UK contributions of technical expertise to the critical role of these agencies in setting and enforcing relevant rules; dispute resolution in national courts rather than the CJEU; and UK capacity in contributing to the regulatory workload and scientific expertise available.

European Council President Donald Tusk, when introducing the EU's draft negotiating guidelines for the next phase of talks on 7 March 2017, replied –

“A pick-and-mix approach for a non-member state is out of the question... The Union will preserve its autonomy as regards its decision-making, which excludes participation of the United Kingdom as a third country to EU institutions, agencies or bodies.”

Prime Minister May anticipated these objections in her own speech, noting that –

“The fact is that every Free Trade Agreement has varying market access depending on the respective interests of the countries involved. If this is cherry-picking, then every trade agreement is cherry picking.”

UK-EU Withdrawal Agreement:

Negotiations now move on to finalising the text of the Draft Withdrawal Agreement between the UK and EU, announced on 19 March 2018 and considered at the European Council Meeting of 22 March, and from that to the continuing negotiations on a Trade Agreement.

For the purposes of REACH, the continued validity of REACH Registrations held by UK-based companies for the duration of the Transition Period may be intended to be achieved through Article 4 of the Draft Withdrawal Agreement, but confirmation of that from the UK government and ECHA would be welcome.

As negotiations progress to the next stage of a proposed Trade Agreement between the UK and EU, the question remains of how the UK would deliver, in law, associate membership of the EU agencies that it identifies as being of critical importance.

The European Union (Withdrawal) Bill

The European Union (Withdrawal) Bill, presently going through Parliament, would repeal the European Communities Act 1972 and the basis for supremacy of EU law in the UK; whereas the Prime Minister is proposing that the UK would abide by the same rules as EU Member State participants in ECHA, which are, of course, ultimately enforced by the European Commission and the Court of Justice of the European Union. Even amendments to the European Union (Withdrawal) Bill to achieve what might be agreed political objectives are anything but straightforward, with the present Parliamentary arithmetic.

If, on the other hand, the UK takes the line that it must be a ‘rule maker’ and not a ‘rule taker’, or if a different agreement on a relationship with ECHA, EASA and the European Medicines Agency is not achieved in the trade negotiations, then the REACH Regulation would need to be re-enacted into UK law to achieve ‘equivalence’.

In such a case it is clear that the general provisions of the European Union (Withdrawal) Bill will not suffice, which would demand a long, complex and politically sensitive Statutory Instrument made with reference to the much debated Henry VIII clauses of the European Union (Withdrawal) Bill, making

necessary changes to the REACH Regulation to correct what would otherwise be “deficiencies” in its application in UK law.

This secondary legislation would need to establish the HSE, or some other body, as a UK equivalent to the European Chemicals Agency; to resolve the issues arising from the devolution of powers to make environmental legislation to the devolved Parliaments; and to address how the UK equivalent to REACH would keep track of future developments in the REACH Regulation (and the CLP Regulation and other related chemicals legislation) instead of continuing to diverge from it (which might well in turn have implications for trade agreements with the EU).

William Wilson, Prospect Law Ltd

William Wilson is a specialist environmental, regulatory and nuclear lawyer with over 25 years experience in government, private practice and consultancy. He worked as a senior lawyer at the UK Department of the Environment/DETR/Defra, and helped to build up the environmental and nuclear practices at another major law firm, as well as running his own environmental policy consultancies. William has experience of all aspects of environmental law, including water, waste, air quality and industrial emissions, REACH and chemicals regulation, environmental protection, environmental permitting, litigation, legislative drafting, managing primary legislation, negotiating EU Directives and drafting secondary legislation.

Prospect Law is a multi-disciplinary practice with specialist expertise in the energy and environmental sectors with particular experience in the low carbon energy sector. The firm is made up of lawyers, engineers, surveyors and finance experts.

This article remains the copyright property of Prospect Law Ltd and Prospect Advisory Ltd and neither the article nor any part of it may be published or copied without the prior written permission of the directors of Prospect Law and Prospect Advisory.

For more information please contact William Wilson on 020 7947 5354 or by email on: wew@prospectlaw.co.uk.

Prospect Law Ltd
23 Berkeley Square, London W1J 6HE
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle
Donington, Derbyshire DE74 2TZ
T +44 (0)1332 818 785

 @prospectupdate
E info@prospectlaw.co.uk
www.prospectlaw.co.uk