

BACK TO THE DRAWING BOARD: BREXIT TO RESULT IN UK-REACH. HOW CAN UK IMPORTERS AND MANUFACTURERS BEST PREPARE?

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On 6 February 2017, Simon Johnson from the EU Exit Team at DEFRA confirmed to the attendees of a Metal Events Ltd's Forum on REACH that the UK Government is taking a robust line on chemicals regulation as the negotiations on a trade deal with the EU commence; the UK would not be part of the EU customs union nor would any entity or person based in the UK be subject to REACH or the jurisdiction of the European Chemicals Agency ("ECHA") and the Court of Justice of the EU. This reiterated the position previously stated by the junior environment minister Thérèse Coffey in the 1st February parliamentary debate on Brexit.

Instead, Mr Johnson said the intention was to establish a separate UK regulatory system for chemicals, including a UK-specific equivalent to the REACH-IT platform (anticipated to cost £5.8 million to set up) which will hold registrations for chemicals manufactured in or imported into the UK. DEFRA assured that there would be no reduction of environmental standards and that the same precautionary principle approach to chemicals regulation as employed under REACH would be adopted.

According to Mr Johnson, the government wants existing UK registrations, authorisations and approvals to remain valid post-Brexit, though it remains unclear how this can be achieved. Mr Johnson noted that there were a number of regulatory models that the UK may follow, citing chemicals regulation in Switzerland and South Korea specifically, both of which take heavily from REACH. Going forward, he welcomed input from the industry on their views on the best way to transpose the REACH regime into the UK.

Attendees of the event shared concerns raised by one of the panellists, Raminta Dereskeviciute, Special Counsel of K&L Gates, that businesses have to address the uncertainty surrounding the validity of their registrations as soon as possible. Given the hard stance on a separate regime for the UK chemicals industry, ECHA's position is that registrations held by entities based in the UK are to become invalid while those same entities will inevitably also have to file very similar registrations under the new UK system.

The apparent dilemma for businesses wishing to continue uninterrupted chemicals trading in the EU is how to maintain their REACH registrations without having to incur further costs or losing the rights to registration data. While a few companies, acting as importers based in the UK, have already started transferring their REACH registrations to entities based in other EU jurisdictions to ensure that they benefit from free trade in the EU, the vast majority of participants present at the event admitted they were already too busy with trying to meet the last

REACH registration deadline (Sandra Carey's presentation "A tick list of what you should be doing before the deadline" can be found [here](#)).

REACH and available guidance limit industry's options on how REACH registrations could be transferred to other entities without having to register with ECHA for a second time. First, only entities with "legal personality" can be REACH registrants, so simply having a post box in Germany or France to take over REACH registrations made out of the UK will not suffice. Secondly, only certain changes in legal personality of a company (such as change of shareholding of the registrant, change in the type of ownership, absorption, asset transfer, etc.) are allowed in relation to the registration transfer. Simply establishing a new entity to act as the only representative ("OR") or an importer for a REACH compliant UK entity would require a new registration. To further complicate matters, REACH only allows non-EU *manufacturers* to appoint an OR. UK REACH importers as a result have fairly limited options: either import via a new EU country and a new entity [(which may require a new registration)] or rely on customers' registration(s). Lastly, the concept of an importer is not straightforward: REACH requires companies to be able to demonstrate responsibility for their imports.

The panellists and the trading companies present at the event agreed that a lot of thought will have to go into trying to figure out this maze: review of supply chain arrangements, ability to justify corporate changes for purposes of registration, consideration of tax regimes and ability to maintain a new entity just to comply with REACH. To add to this uncertainty, legitimate rights to REACH data currently held by the UK entities (and any contractual arrangements in relation to such rights) will also need to be reviewed in light of Brexit. Companies should start using Brexit clauses in REACH contracts (such as letters of access, licenses to use, etc.) to ensure that liabilities and costs are addressed where a Lead Registrant is based in the UK.

The EU and UK Government may yet agree a system whereby UK and EU registrations can be mutually recognised (hopefully circumventing many of the issues set out above). However, given that such a system is yet to be announced, chemicals businesses in the UK looking to continue trading in the EU post-Brexit need to consider their options carefully and make preparations so as to minimise the potential costs and interruptions to business, particularly where the aim is to maintain existing commercial relationships.