

Brexit: REACHing compliance goals under evolving circumstances

On 14 November 2018, United Kingdom (UK) prime minister Theresa May announced that the cabinet of the UK Government had agreed upon a “Draft Brexit Withdrawal Agreement” and an “Outline of the Political Declaration Setting Out the Framework for the Future Relationship between the European Union (EU) and the UK.”

These documents can be regarded as the only substantive result of the UK-EU negotiations to date, and quite possibly represent the only basis for a Brexit outcome other than a “no-deal” or “disorderly” exit. These texts elaborate upon the practical consequences of Brexit for chemical companies engaged in commerce in UK and EU-27 markets. Critically, for the texts to hold legal relevance, approval is required from leaders of the EU-27 member states, the UK Parliament, and the European Parliament.

As of the date of this writing, 21 November 2018, Mrs. May is headed to Brussels to agree in final a Brexit deal prior to the summit of European leaders on 25 November 2018. Considering the uncertainty surrounding the Brexit process since its initiation and the resignation of several ministers in the UK in response to the above-mentioned texts, it cannot be assumed the documents will receive required approvals. This means a no-deal Brexit is still possible.

Chemical companies globally are affected by Brexit due to its potentially significant and widespread implications for compliance with the EU’s Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation. UK chemical manufacturers selling to the EU-27 market, EU-27 chemical manufacturers selling to the UK market, and chemical manufacturers established outside the UK and the EU-27 and engaged in either market must: (1) understand the impacts of the Draft Withdrawal Agreement and Political Declaration for their businesses, and prepare to adapt accordingly; and (2) prepare for a no-deal exit. Preparing for both scenarios appears vital to support market access and business success.

Under the Draft Withdrawal Agreement, although the UK would withdraw from the EU in March 2019, EU law would continue to apply to the UK during a transition period until 31 December 2020, unless extended once before 1 July 2020 for an unspecified time period. At the conclusion of the transition period, the UK would lose access to EU networks, information systems, and databases. Importantly, a no-deal Brexit could deprive interested parties of a transition period and potentially

result in chemicals chaos if appropriate measures are not taken soon.

The Draft Withdrawal Agreement does not include measures that decrease the regulatory implications of the fact that the UK will become a “non-Community” or “third” country in the context of EU REACH. As such, it would appear the following Brexit-driven practical changes in REACH will occur, among many others, either on 29 March 2019 or at the end of the applicable transition period:

- UK chemical manufacturers become non-Community manufacturers, and are required to appoint EU-27 based Only Representatives (OR) if they wish to address REACH compliance for their EU-27 based customers;
- exclusively UK-based ORs are considered outside the scope of EU REACH, and can no longer provide OR services from the UK; and
- UK-based Downstream Users under EU REACH are no longer required to inform UK- or EU-27-based suppliers of their uses.

Companies need to adopt and implement timely REACH compliance strategies that account for wide-ranging Brexit repercussions. Such “Brexitproofing” measures for companies globally could include:

- determining if legal entities addressing EU REACH compliance are established in the UK or EU-27, and transferring operations to an EU-27 entity if required (e.g., ORs);
- evaluating and re-negotiating contracts affected by Brexit; and
- requesting confirmations from key supply chain entities to document that Brexit-related measures are in place.

Brexit is a moving target from a political viewpoint, but many matters for regulatory compliance and product stewardship teams globally appear clearer than before. If entities have not already implemented REACH compliance programs that account for Brexit, they should start sooner rather than later. Simultaneously, it appears essential to follow closely ongoing political developments due to their possible consequences for staffing and budgets, among other matters. The clock is ticking; stay tuned and act now.

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