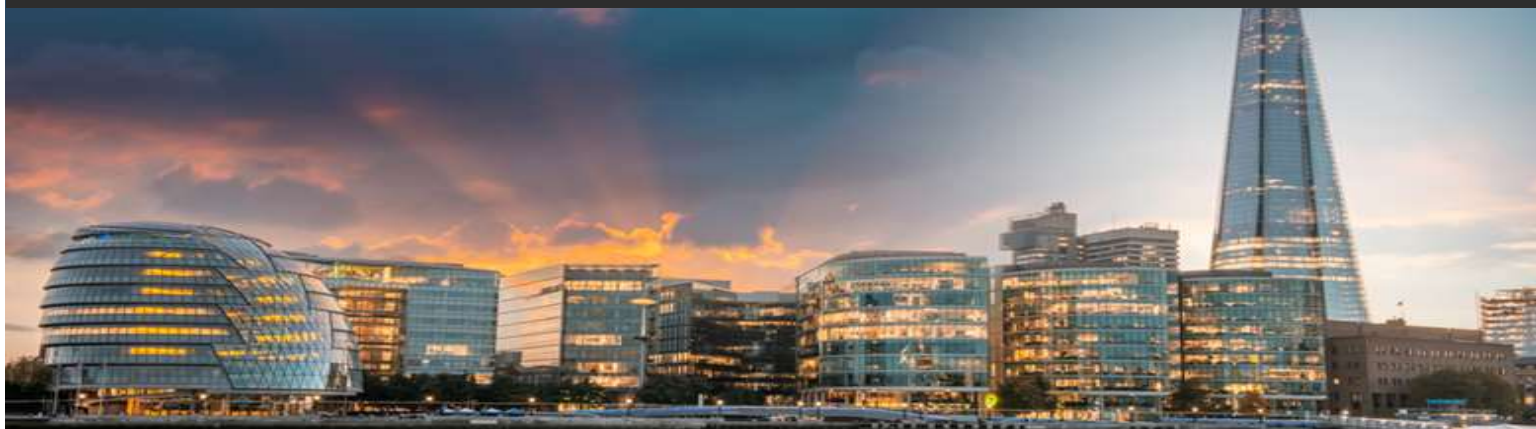


Alert | Environmental



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The UK's Position Paper on the Post-Brexit Availability of Goods – Implications for Chemicals

The UK government has recently published a series of position papers outlining its thinking on a range of potential issues resulting from the June 2016 **Brexit** vote. The papers cover matters such as dispute resolution, cross-border arrangements on the Irish island, the treatment of European Union citizens, and data protection.

The EU's Brexit negotiating team and many of the other EU member states have reacted to the publication of these papers with some scepticism. Nonetheless, the papers provide insight into the opening negotiating positions that the UK may adopt when the substantive terms of the UK's future relationship with the EU comes to be discussed. Such discussions are currently timetabled for October, but only if sufficient progress is deemed by the EU to have been made in the ongoing round of preliminary talks. Currently, there are **indications** that this October deadline will be missed.

One of the papers, "*Continuity in the availability of goods for the EU and the UK*" (the Paper), sets out the UK's proposals as to the availability and regulation of goods and products post-Brexit. The Paper highlights the very significant amount of trade in goods between the UK and the EU (in 2016, the EU exported €127.9 billion of consumer goods to the UK and imported €62.3 billion of consumer goods from the UK) and the key role of UK businesses in many pan-EU supply chains. Further, the Paper notes the "deep integration" of the UK's and EU's existing regulatory systems, although it would likely be more correct to say that many of the UK's regulatory systems are actually pan-EU regulatory systems.

The Paper sets out various objectives which the UK believes should inform the discussion on the availability of goods post-Brexit in the UK and EU markets. Four key objectives are:

- ensuring legal certainty and the avoidance of disruption for businesses and consumers;
- the maintenance of consumer confidence that goods placed on the market and in use across the UK and the EU comply with relevant product legislation;
- that enforcement authorities should have access to information about unsafe products such as medicines and food and mechanisms to take action with respect to non-compliant goods; and
- ensuring that goods can be lawfully marketed in both the UK and the EU.

To meet these objectives, the Paper sets out four principles which the UK considers should be reflected in the outcome of its withdrawal negotiations with the EU:

1. to ensure the continued availability of products on EU and UK markets at the date of withdrawal, goods placed on the Single Market before Brexit should continue to circulate freely in the UK and the EU without additional requirements or restrictions;
2. to avoid unnecessary duplication of activities and to provide legal certainty, where businesses have undertaken compliance activities prior to Brexit they should not be required to duplicate these activities in order to place goods on the UK and the EU market after Brexit;
3. to ensure that goods in circulation continue to comply with product legislation and market surveillance authorities can ensure the necessary action is taken with respect to non-compliant products, the eventual UK/EU withdrawal agreement should facilitate the continued oversight of goods; and
4. where goods are supplied with services, there should be no restriction to the provision of these services that could undermine the agreement on goods.

In the context of the EU's Registration, Evaluation, Authorisation and Restriction of Chemicals regime (REACH), the Paper notes that "businesses will have undertaken a number of complex, lengthy and often costly procedures to ensure that goods and business practices are compliant with [EU] legislation and production requirements" including "collecting and submitting data on the hazards and risks of a chemical substance".

The Paper envisages that existing EU REACH authorisations will be sufficient to meet the UK's post-Brexit regulatory requirements. Further, where a person responsible for REACH compliance, such as a nominated REACH representative, will be, post-Brexit, based outside of the EU; however, in the UK, the Paper proposes that such a person should continue to carry out their REACH compliance functions in respect of substances placed on the market in the EU pre-Brexit (and without, for example, any requirement for them to relocate to the EU from the UK). Essentially, for substances placed on the market pre-Brexit, the existing REACH regime would continue to apply, irrespective of whether or not the entity legally responsible for such substances is based in the UK or the EU.

Under the UK's proposals, the REACH regime, as opposed to a new UK regime, would also apply to REACH applications in progress, but not completed, at the date of Brexit (although it is conceivable that a certain 'threshold' in the application process would need to be satisfied by applicants in order to be able to take advantage of this).

For substances which fall within, or which potentially fall within, the scope of both EU and UK chemicals regulation post-Brexit, the UK's proposals contemplate the mutual recognition of authorisations between the UK and the EU. While this would no doubt be welcomed by businesses, the Paper nonetheless appears to envisage that a new regulatory regime will be put in place in the UK. In practical terms, while any new UK regulatory body's authorisations would, under the UK's proposals, be recognised by the EU (and vice-versa), the UK's proposals offer no guarantee that the application process for UK authorisations would be any less onerous than the existing REACH application processes (which many deem to be administratively burdensome, time-consuming, and expensive).

It is likely that the EU, in seeking to protect its citizens and environment from harmful substances, would only contemplate the mutual recognition of authorisations which were granted under a regime which was at least as rigorous as REACH. The EU might also, for example, only agree to recognise authorisations granted in the UK by businesses actually established there (as opposed to recognising authorisations from pan-EU businesses formally established in the EU, but using the UK, and any potentially lighter UK regulatory regime, as a way of avoiding the REACH regime).

Therefore, it is questionable whether, instead of pursuing mutual recognition as the Paper proposes, the UK should instead consider seeking to remain part of the existing REACH regime (as unpalatable as that may be to some businesses). This is especially so given that the UK's proposals contemplate businesses potentially having to comply with REACH for some substances (*i.e.*, those placed on the market pre-Brexit or for which an application is pending under REACH at the date of Brexit), but with a new UK regulatory regime for others (*i.e.*, potentially those substances to be placed solely on the UK market post-Brexit or where those businesses are established in the UK even if their products are sold across the EU).

Further, questions can be asked in relation to whether the UK has sufficient time prior to Brexit to implement a new standalone chemicals regime and whether it has, after being subject to REACH for years, sufficient domestic expertise to actually do so.

More broadly, it is impossible to divorce the UK's proposals in one area – such as the availability of goods – from its proposals in other areas, particularly those in relation to post-Brexit customs arrangements, the related issue of the UK's border with Ireland, and the UK's eventual relationship with the EU internal market. Outcomes affecting one area will invariably impact others. Were the UK to remain in the EU internal market post-Brexit, perhaps as a member of the European Economic Area, the UK may continue to be subject to REACH and the proposals contained in the Paper would be rendered largely irrelevant. Similarly, any solution in respect of the UK/Irish border which does not impose border checks could require the UK to adhere to existing EU product regulations and standards so as to avoid the UK/Irish border acting as a “backdoor” into the EU internal market. This would also render at least some of the proposals in the Paper irrelevant.

As always when it comes to Brexit, it is important that businesses continue to closely monitor developments and seek to identify those areas that are likely to be affected by new or amended legislation and arrangements in order to consider how impacts in affected areas can be mitigated or where lobbying and advocacy efforts can best be directed.

The UK's Brexit Position Papers are available [here](#).

For more on Brexit, click [here](#).

Author

This GT Alert was prepared by **Aonghus Heatley**. Questions about this information can be directed to:

- **Aonghus Heatley** | +44 (0) 203.349.8759 | heatleya@gtlaw.com
- Or your **Greenberg Traurig** attorney

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