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Brexit: Environmental Law Implications for the Chemicals Sector

This note addresses the possible legal impact of Brexit on the chemicals sector. It is one of a series of *GTM Alerts* designed to assist businesses in identifying the legal issues to consider and address in response to the UK's referendum vote of 23 June 2016 to withdraw from the European Union.

While Brexit has the potential to impact significantly upon the regulatory environment within which companies in the chemical sector operate, it is too early to determine with any certainty the precise nature of that impact. It is important to note, however, that the UK will remain a member of the EU, and all existing and future EU laws will apply in the UK, until the date of the UK's exit. UK-established companies will continue to be subject to EU law at least until the UK's formal withdrawal from the EU is complete. This will take some time, for the reasons set out below.

The Implementation of the Brexit Result

There is presently little doubt that the UK will eventually exit the EU. The referendum result itself was only advisory - it produced a political, as opposed to legal, obligation for the UK to leave the EU – but it seems clear that the UK government continues to be committed to honouring the wishes of the British electorate.

Before exiting, the UK needs to go through the exit procedure set out in Article 50 of the Treaty on European Union, starting with notification to the European Council of its decision to leave the EU. The new UK Prime Minister, Theresa May, appointed on 13 July 2016, has clearly stated that, while "Brexit means Brexit," there should be no rush to serve the Article 50 notification. She and David Davis, the Secretary of State for the new government department in charge of managing Brexit, have supported the view that notification should not take place before the end of 2016. The situation remains fluid, with the EU institutions and the remaining 27 EU Member States increasing the pressure for formal negotiations to commence swiftly. However, it is likely that notification will be delayed for some time to allow consideration of the UK's preferred exit terms and model for its future relationship with the EU, and also to resolve three

court actions aimed at ensuring that the government does not serve the Article 50 notification without first giving Parliament the opportunity to vote on it.

When the notification is served, it will trigger a two-year, extendible period of negotiation with the EU. These negotiations will be on the UK's terms of exit only. At this time, it is not clear if negotiation of new arrangements with the EU will be conducted in parallel, or at a later stage. It is, however, clear that the UK intends to start negotiating trade terms with non-EU countries as soon as possible. For more information on the timeline for Brexit, please see our previous Alert, "Brexit: The Timeline," available at: <http://www.gtlaw.com/News-Events/Publications/Alerts/196418/Brexit-The-Timeline>.

Once the UK's exit terms have been settled, they have to be approved by the other EU Member States and ratified by both the EU and UK parliaments. Therefore, once Article 50 is triggered, given the likely practical complexities of negotiating the UK's withdrawal, the UK is likely to remain a member of the EU for at least two years, although if agreement is reached within two years, the UK's withdrawal could happen earlier.

The UK/EU Relationship Post-Brexit

The potential legal and regulatory impact on companies with a UK presence and/or UK customers following the UK's formal withdrawal is, at this stage, unclear because there is presently no certainty in relation to the nature of the UK/EU relationship post-Brexit.

Various forms of relationship between the UK and the EU have been mooted. These range from, on the one hand, a bilateral agreement between the UK and EU setting out the specific terms of a unique UK/EU relationship (as in the case of Canada) to, on the other hand, the UK joining (as in the case of Norway) the European Economic Area (EEA). The main options for the UK's future arrangements with the EU will be addressed in a separate *GTM Alert*.

Despite the uncertainty, at this early stage it is nonetheless possible to set out a number of potential implications of Brexit on companies in the chemicals sector with respect to particular environmental issues. These are set out below.

Chemicals

The EU's 2006 REACH Regulation (Registration, Evaluation, Authorisation and Restriction of Chemicals) applies directly in the UK and imposes a wide range of financially and administratively onerous obligations on EU manufacturers and importers of chemical substances in the EU. Members of supply chains are also required to provide information relating to the chemical substances which they use.

Whichever model the UK chooses for its future relationship with the UK, UK-established chemicals businesses will still have to comply with REACH requirements if they export chemical substances into the EU.

The impact of Brexit on the UK domestic manufacturing and distribution activities of UK-established chemicals businesses is more complex. If the UK opts for membership of the EEA, those chemical firms will continue to be bound by REACH with regard to their UK domestic manufacturing and distribution activities. This is because REACH applies throughout the EEA. This would also give the UK a formal role, as it has now, in the EU process of evaluating whether substances need to be authorised or restricted under REACH.

If the UK opts for a non-EEA arrangement, it may decide to substitute a different regulatory regime for REACH, leading to differing obligations for companies manufacturing, importing, or using chemicals in the UK. It is possible that any such regime could formally interact with REACH (for example by allowing REACH registrations and authorisations to be "passported" into the UK and vice-versa) - this would make sense in terms of avoiding legal complexity and conflicts. Equally, it is possible that a new UK chemicals regime would be entirely independent and freestanding (in which case lobbying in respect of the treatment of chemical substances would need to be directed to London rather than Brussels or Helsinki).

When designing any independent UK regime to replace REACH, the UK may decide to implement a system which takes account of concerns raised by many businesses with regard to REACH, *i.e.*, that the regime is administratively onerous, imposes a significant cost burden and can make manufacturing in the EU a less feasible option compared to manufacturing outside of the EU where there may be less of a regulatory burden (since REACH applies only to chemical substances when they are placed on the EU market, and does not control chemical manufacturing outside of the EU). The UK may therefore try to encourage, through the design of any REACH replacement, manufacturing facilities to locate in the UK.

Non-EEA membership could have further implications. Following Brexit, UK manufacturers may have to restructure their supply chains in order to comply with REACH. Additionally, UK-based companies may, like non-EU companies currently, have to appoint an "Only Representative" in the EU to meet their REACH compliance obligations, unless they can pass these obligations on to a subsidiary in the post-Brexit EU.

Existing chemical supply agreements may also contain clauses by which the parties agree that they will comply with certain laws including REACH. Such agreements may need to be reviewed to take account of any change in the UK's position with regard to these laws.

Pan-EU companies which currently use a UK subsidiary as their importer for REACH purposes (with the UK company therefore holding the REACH registrations/pre-registrations in respect of supplies to all of that pan-EU company's subsidiaries in the EU) would, following Brexit, no longer be in compliance with REACH. One or more of the company's EU subsidiaries would need to register under REACH in place of the UK company.

Labelling and Packaging of Chemicals

The UK regime for the classification, labelling and packaging of chemicals is currently based on the United Nations' Globally Harmonized System of Classification and Labelling of Chemicals (GHS).

While this regime was implemented in the UK as a result of EU law, following Brexit it is likely that the UK would retain it since the GHS is widely used internationally. Further, the UK would need to continue to comply with EU labelling and packaging rules, which include the use of the GHS, in order to continue to export to the EU.

Waste

UK policy in relation to waste is currently heavily influenced by the EU, particularly concerning the regulation of recycling, hazardous waste and landfilling. However, Brexit would not, in itself, lead to current waste targets being lowered since these (like other elements of EU environmental law) have been implemented in UK domestic legislation.

Were the UK to join the EEA following Brexit, then the EU's regulatory regime for waste would continue to apply in UK territory. If the UK opted not to join the EEA, a future UK government would be able to adopt independent, UK-specific, waste regulations and lower waste targets. However, the UK would, in order to continue exporting to the EU, have to comply with certain waste rules applicable to exports to the EU. These would include, for example, product design standards introduced under the EU's Circular Economy Package.

Air and Water

As with waste, air and water quality requirements in the UK are currently heavily influenced by the EU. For example, EU law impacts on water quality because effluent discharge limits are set pursuant to the UK's implementation of the Water Framework Directive. In respect of air quality, the UK has repeatedly failed to meet European air quality targets and has faced EU enforcement action.

Following Brexit, the UK could choose to alter these requirements, potentially by relaxing them and, in the context of discharge limits, the UK would be free to adopt new discharge limits to be imposed on industry. However, were the UK to join the EEA following Brexit, the EU's regulatory regime for air and water would continue to apply to the UK, including the Water Framework Directive.

Product Safety

To continue to export to the EU, following-Brexit and irrespective of whether the UK remained a member of the EEA, UK-established businesses would have to comply with the product safety standards applicable in the EU.

While the UK could adopt different standards if it were not to join the EEA, it is unlikely to do so given the undesirability of requiring businesses to have to comply with two sets of regulations, one for the domestic UK market and one for the EU.

Contaminated Land

The UK's contaminated land regime is currently largely independent from the EU. One aspect, however, which is derived from the EU, is the enhanced liability for environmental harm caused by certain industrial processes, or to protected species and habitats. Following Brexit, this could be subject to change, although this may not be the case if the UK joins the EEA.

Climate Change

Unless it was to become a member of the EEA, following Brexit the UK would no longer be part of the EU's Emissions Trading Scheme (ETS). A replacement scheme would in all likelihood be implemented in order to enable the UK to meet its climate change commitments under the Climate Change Act 2008 and the UK's other international obligations under, for example, the Kyoto Protocol and the Paris Agreement (although the latter agreement has not yet entered into force). Whether any such new scheme would be based on, or form part of, the ETS is currently unclear.

Further information on issues relating to Brexit can be found [here](#).

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