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# SUBMISSION TO THE HOUSE OF COMMONS' ENVIRONMENTAL AUDIT SELECT COMMITTEE CONCERNING THE FUTURE OF CHEMICALS REGULATION AFTER THE EU REFERENDUM

## 1. INTRODUCTION

1.1 Allen & Overy LLP is a major international law firm with 44 offices in 31 countries. We employ over 2700 lawyers worldwide. We advise large commercial organisations on the full range of international commercial law. We have, for many years, worked with clients on chemicals law including REACH.

1.2 This Submission is made by Allen & Overy on its own behalf. It represents our views and not those of our clients.

1.3 For any further information about this Submission please contact Matthew Townsend, Partner and Head of Allen & Overy's Environmental and Regulatory Group in London.

## 2. TRANSPOSITION

***What particular challenges will the UK Government face when it seeks to transpose REACH into UK law through the "Great Repeal Bill"?***

2.1 We understand that the Great Repeal Bill is intended to implement existing EU legislation into national law wherever possible.[1] However, it is seemingly recognised by the UK Government that up to one-third of the EU's environmental legislation (including the REACH Regulation) cannot simply be "copy pasted" into UK law.[2]

2.2 The precise legal mechanics of how the UK would adopt its own REACH regime will, in large part, depend upon the terms of the future relationship between the UK and the EU-27. For the purposes of our comments below, we have assumed a 'hard Brexit' i.e. the UK would not be a member of the EEA/EFTA nor would there exist any other trade agreement that would govern issues concerning the adoption of EU law, standards or jurisprudence. We have also assumed that the UK would be operating on the basis of the WTO's tariff regime having adopted its own schedule of commitments (for goods).

2.3 At its simplest, the key challenges for the UK in implementing REACH into UK law are (a) adapting the provisions of the current EU REACH Regulation to the UK context (b) creating the domestic legal architecture to effectively manage and enforce REACH and (c) creating an orderly transition for those UK business which currently export products to the EU.

2.4 As with many pieces of environmental law, REACH contains a number of definitions, concepts and references which assume organisations falling under the regime are established within the EU. A failure to address these as part of a Brexit transition may be highly disruptive to UK business. In this regard, a mere 'cut and paste' of the existing law will not be appropriate.

2.5 Most significantly, the REACH Regulation's key definitions of "manufacturer", "importer", "distributor", "downstream user", "producer of articles" and "only representative" would each have to be re-defined to include reference to UK persons (at present they all link back to persons "established in the Community"). If left untouched, the regime would not make legal sense in a

[1] https://www.gov.uk/government/speeches/exiting-the-eu-next-steps-ministerial-statement-10-october-2016

[2] http://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2015/future-chemicals-regulation-inquiry-launch-16-17/

purely UK context as certain UK businesses which are registrants may only be UK based. Whether through the Great Repeal Bill or another mechanism, these detailed adjustments will need to be provided for in order to ensure the regime is workable in the new context.

2.6 Consideration also needs to be given to how a UK REACH Regulation would cross refer to other pieces of EU law and bodies. For example, a number of the substances identified within Annex XIV of the REACH Regulation have been listed by virtue of criteria set by the CLP Regulation. A decision will need to be taken as to whether the CLP Regulation 1272/2008 is implemented directly into UK law alongside REACH. If not, the specific cross-references in REACH will need to be reviewed and addressed (i.e. re-created) on a case-by-case basis unless the Government wished to continue to refer to other EU laws and standards (assuming this would be legally possible).

2.7 By way of further example, the scope of the REACH Regulation is limited by various exemptions, many of which are created by reference to other pieces of EU legislation.[3] Each of these will need to be addressed so as to ensure the UK REACH regime is workable from Day-1.

2.8 Similarly, clarity is required over the status (under a UK stand-alone regime) of current EU REACH registrations made by UK based entities. Technically, given the definitions set out in REACH, there is an argument that such registrations will no longer be valid given that the registrant will not, as at Day-1, be an EU entity and it will therefore fall outside the strict legal definition of manufacturer or importer (as applicable). Without some form of transitional arrangement agreed with the European Commission and/or ECHA, such entities would need to review (and possibly adapt) their supply chain arrangements and potentially obtain fresh registrations with the significant cost and time implications this may bring. From a purely UK perspective, consideration also needs to be given as to how to treat existing ECHA registrations within a new UK regime. For instance, will these be deemed to be valid registrations for the purposes of the UK regime or will fresh applications need to be made?

2.9 A similar issue arises for UK-based Only Representatives (**OR**s) under REACH. The regime allows non-EU exporters to appoint an EU person to act as their representative in the EU and, in law, such representatives are deemed to be substance importers. To fall within the definition of "importer", the Only Representative needs to be an EU person. As such, for these arrangements to continue post-Brexit, current UK established ORs may need to transfer registrations to an EU entity. UK companies will not, as the law currently stands, be able to assume the role of an OR. This is an area where transitional arrangements with the EU could be put in place.

2.10 The creation of a standalone UK-equivalent of the REACH regime would also require the development of the necessary administrative infrastructure. The Health and Safety Executive (**HSE**), the Health and Safety Executive for Northern Ireland and a number of other agencies currently act as enforcement bodies for REACH in the UK. However, this is a very different role to that performed by ECHA which administers registrations, authorisations and many other aspects of the REACH regime across Europe.

2.11 The UK regulators would be responsible for a wide range of administrative tasks including, but not limited to, receiving and assessing the UK specific registrations, facilitating the UK regime's data-sharing processes, evaluating the testing proposals that are submitted by registrants, receiving authorisation requests, and providing general scientific and technical advice. The UK regulators would also, presumably, have to take responsibility for many of the obligations under REACH that are otherwise placed upon the European Commission and Member States (for example, determining authorisation requests and having responsibility for developing and implementing a UK-specific "rolling action plan" of some kind). Again, the Great Repeal Bill (or associated primary or secondary legislation) may need to acknowledge precisely what tasks had been allocated in this way.

[3] See, for example, Article 2(5), REACH Regulation.

2.12 A decision will also need to be made as to whether Parliament would incorporate some form of transitional arrangements for UK businesses to secure necessary UK specific registrations and authorisations. The REACH Regulation provided a series of phase-in periods for business to obtain registrations to manufacture substances. The deadline for obtaining a registration largely depends on the volume of the substance produced. In the interim period, the manufacture, and placing on the market, of substances has been permitted. An alternative, worst case scenario, for UK businesses is to present a requirement to obtain REACH approvals from Day-1.

2.13 A further consideration is how (if at all) the UK will deal with the considerable body of soft-law that exists in the REACH regime through ECHA guidance. This forms a considerable and important part of the overall legal framework of REACH. There is a serious question as to whether this could be replicated in the UK context given the time available. It would also need to be adapted to the UK context. The alternative would be to address this as part of a transitional agreement with the EU such that the guidance remains available (in the broadest sense) to UK businesses for a defined period after Day-1.

2.14 Overall, therefore, we do not consider that, put simply, a "cut and paste" exercise of the existing EU REACH Regulation would suffice. Adaptation for domestic UK law purposes is required. This will be a detailed exercise and will need to allow UK businesses (and regulators) time to prepare. There may be an argument to support the delay of any introduction of a domestic UK REACH regime (whether in whole or part) until such time as these detailed issues have been adequately addressed and sufficient capacity has been built with the relevant regulators. This would not affect the need for UK businesses to comply with the EU REACH regime to the extent it applies to their operations (as is the case today). We recognise this has wider policy implications which need to be fully considered.

***How far will the UK's ability to effectively transpose REACH depend on negotiations with other Member States and the nature of the UK's future relationship with the EU (e.g. Single Market membership)?***

2.15 The UK could, as noted above, transpose a UK version of the REACH Regulation directly into UK without further negotiations. The more significant issue is how orderly (or otherwise) the exit would be for UK businesses currently supplying or manufacturing substances in, or into, the EU assuming the existing EU REACH regime remains untouched as a result of Brexit.

2.16 This will be highly dependent on the terms of the UK's exit and any new UK/EU trading terms. For instance, a simpler transposition (for REACH purposes at least) would be achieved if the UK was part of a framework that is equivalent to the EEA arrangements followed by Norway, Iceland and Liechtenstein. In such a scenario, UK operators would continue to remain a part of, and be subject to, the REACH Regulation's requirements (i.e. as if they were EU entities). This, in turn, would make the transposition far simpler for the purposes of the Great Repeal Bill as many of the issues described above would simply fall away.

2.17 Alternatively, it may be possible for the UK and EU to agree a position that is somewhere between the two scenarios described above, but which otherwise makes transposition easier. Such a position could take many forms, but all of them would see the UK continue to participate in the EU's REACH regime in some way. This could, for example, see the UK:

(a) remain obliged to comply with, and have the benefit of, the REACH regime for a transitional period or some form of associated agreement at law following Day-1;

(b) seek mutual recognition of equivalent elements of the UK and EU regimes (for example, allowing for a REACH Regulation registration to be recognised as itself constituting a registration for the purposes of the UK regime and vice versa); and/or

(c) try to establish areas of potential EU/UK dual regulation, which could involve seeking continued access to ECHA's regulatory experience for certain activities in the short term (for example, effectively using ECHA to discharge some of the duties that would otherwise be placed on the UK regulator, such as the examination of testing proposals).

2.18 At present, a REACH registration or authorisation acts as a 'product passport' across the EU/EEA. It allows substances covered under the registration to circulate freely. Without a valid registration/authorisation, substances cannot be manufactured/placed on the market/used (as applicable). The lack of a negotiated transitional arrangement with the EU would mean the loss of that product passport. Businesses would need to look at a possible transfer of existing registrations, securing new registrations/authorisations and/or, worst case, adapting their supply chains. They may also need to secure new rights to technical data needed to support registrations/authorisations. This has the potential to be adversely disruptive to UK business and will take time to implement. As such, the precise point at which these arrangements become clear (as against the Article 50 'cliff edge') will be critical in allowing businesses sufficient time to respond to the new terms of the UK's relationship with the EU.

2.19 We also note the question of how to apply (or otherwise) ECHA guidance documents as discussed in paragraph 2.13.

***What role should the devolved administrations play in setting the regulatory environment in this area? How should any divergences in policy be managed?***

2.20 Given the complexity of REACH, to the extent permitted under current policy, Parliament and the Government may wish to ensure that REACH is a UK regime with little or no regional divergences. From a purely regulatory perspective, there seems limited benefit in potentially having multiple distinct REACH regimes each applying slightly different standards and approaches.

## 3. ADMINISTRATIVE, POLICY AND REGULATORY IMPLICATIONS

***How should administrative and enforcement responsibilities, which are currently being carried out by the European Commission or EU Agencies (such as ECHA), be transferred to domestic bodies? Does the UK Government have the requisite expertise and resources to take on these tasks?***

3.1 The primary *enforcement* mechanics for REACH have already been established and lie within the REACH Enforcement Regulations 2008. Responsibilities sit with various bodies, most notably, the HSE.

3.2 The position concerning the *administrative* responsibilities is more challenging. The precise nature of the administrative duties that will need to be undertaken by the UK regulators post-Brexit will depend, in the first instance, on the precise nature of any agreement that is reached between the UK and the EU during the Brexit negotiations. That said, planning for any potential new bodies or responsibilities should begin as soon as possible assuming the UK is to adopt its own REACH regime from Day-1.

3.3 Assuming a 'cliff edge' Brexit, the UK regulatory authorities would likely have to adopt many, if not all, of the responsibilities currently allocated to ECHA and the European Commission by the REACH Regulation. Additional support would need to be allocated to the regulator to perform its new functions. This will very likely have to include, in particular, the creation of an equivalent to REACH-IT (i.e. the central IT system that supports ECHA with the submission, processing, and management of registration dossiers). Although there is clearly already relevant expertise within the HSE, we would anticipate the need for further (and material) organisational capacity building.

3.4 The transfer of responsibility may need to be phased in order to avoid regulatory gaps in the UK and cause additional uncertainty to registrants, importers and exporters (for example, it could be acknowledged that, as a matter of principle if not law, the UK's regime will continue to match the REACH Regulation's Annex XIV substances until such time as sufficient expertise has been gathered to form a UK committee for evaluating candidate substances).

## 4. FUTURE OF CHEMICAL INDUSTRY

***What scope is there for the UK to pursue a divergent approach to chemicals regulation from the EU once the process of leaving has been completed? What are the likely practical implications of having a UK-only chemicals regulatory policy?***

4.1 There is clearly scope for the UK, post-Brexit, to develop a divergent chemicals regime to that of the EU. However, it should be noted that the flow of the raw materials and semi/finished products that REACH would typically cover is highly international and the supply chains are complex. UK businesses would, as they do today, have to comply with the laws of their export destinations/transit locations (including REACH). In practice, therefore, it may prove challenging to have a domestic chemicals policy which is materially different to our major export markets. There is evidence that, in certain sectors, export countries will adopt laws and standards similar to their major export markets and hence obtain some form of equivalence.

4.2 A key consequence arising from the creation of UK-specific REACH regulation would be that businesses conducting operations in both the UK and the EU post-Brexit would need to ensure their compliance with both UK and EU chemicals regimes. The precise implications of this would be dependent, in the first instance, on the precise nature of the relationship between such regimes. The greater the divergence, the more significant the associated compliance costs will likely be. On the other hand, if there remain a strong correlation between the regimes, the greater the possibility that mutual recognition-type concepts could be put into place (i.e. potentially reducing associated compliance costs and facilitating the creation of a 'product passport' type arrangement).

4.3 The UK is party to a number of international Conventions relating to the control of chemicals. Examples include the import restrictions imposed by the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and restrictions on the production of certain chemicals under the Stockholm Convention on Persistent Organic Pollutants. The UK will need to be cognisant of its international obligations as it develops a UK chemicals regulatory regime.

***What principles should a UK chemicals regulation regime follow?***

4.4 This is largely a policy question. It will also depend on the terms of trade (and associated arrangements) between the UK and EU. In the short term at least, there are strong arguments to support a regime equivalent to REACH/CLP.

**Allen & Overy LLP**

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Matthew Townsend
Partner - London

Contacts
Tel +44 20 3088 3174
Mob +447909 684 728
matthew.townsend@allenovery.com