

DISCUSSING THE IMPACT OF BREXIT ON THE IMPLEMENTATION OF REACH REGULATION

On 23 June 2016, the citizens of the United Kingdom voted on whether their country should stay in or leave the European Union. With a participation rate exceeding 71%, 52% of voters were in favour of "Leave", while 48% voted to remain. This result raises a number of questions as to the consequences of the vote, in particular as regards the future status of the United Kingdom (UK) and its relation with the European Union (EU).

This newsletter provides a preliminary overview of the effects and legal consequences were the UK to leave the EU. It presents the withdrawal process, the principles governing the internal market, the main scenarios for the future relationship of the UK with the EU, and the specific consequences regarding the implementation of the REACH regulation.

editorial

Stéphane Hautbourg
Partner

Withdrawal process. There is no comparable precedent of a Member State leaving the EU. The relevant provisions of the European treaties have never been implemented or interpreted by the European Court of Justice.

Article 50 of the EU Treaty provides for a two-year negotiation period from the date of the notification by the Member State of its decision to withdraw from the EU. This period may be extended on a unanimous decision by the Member States. Depending on the exact time of notification and the length of negotiations, the withdrawal could be implemented by the end of 2018.

A Member State that decides to withdraw from the EU must notify its intention to the European Council. The EU then negotiates with and enters into an agreement with this State, setting the conditions of its withdrawal. The agreement is entered into by the Council in the name of the EU. The Council adopts its position with a qualified majority (72% of the 27 remaining Member States, representing 65% of the population), after obtaining the consent of the European Parliament.

The details of the negotiation procedure between the UK and the EU still need to be clarified. The Council has excluded any form of pre-negotiation and has declared waiting for the triggering of Article 50. To lead the negotiations, the Council has appointed Mr Didier Seeuws, and the Commission has appointed Mr Michel Barnier. The question nonetheless remains of the role and influence these two institutions will respectively have in the negotiation process.

Common market and withdrawal scenarios. The EU's internal market is a single market in which goods, services, capital and people can move freely (the "four freedoms") and within which European citizens may live, work, study or conduct business freely.

Were it to withdraw from the EU, the UK would become a “third country”. Such a status could impact its ability to access this internal market. British citizens would no longer be European citizens, and the exercise of the four freedoms between the EU and the UK could therefore be brought into question. A new status governing the application of the four freedoms could be negotiated by the UK, and may be inspired by one of the following models.

Norway (EEA model). The Norwegian model is the closest to full EU membership. It provides access to the EU common market, but also requires the State to adopt all European legislation relating to the internal market, without however being a part of the EU decision-making process. This model relies on reciprocity and mutual recognition, enabling citizens, companies and capitals to benefit from free movement.

Switzerland (EFTA model). The Swiss model provides for more limited rights as compared with the Norwegian model. Like Norway and other countries of the EEA, it benefits from the free circulation of goods. Services, however, are not included in the agreement with Switzerland, and bilateral sector-specific agreements are necessary for Swiss companies to be able to access the European single market.

Association or free-trade agreements. Several third countries have established their relationship with the EU on the basis of association or free-trade agreements. These agreements may be customs union (Turkey) or free-trade agreements (South Korea, Canada, Mexico). Emphasis is generally placed on goods, rather than services.

International agreements. Another approach would consist in implementing international agreements, such as those of the World Trade Organisation (WTO). Under the principle known as most-favoured-nation treatment, the UK would have to apply its lowest customs duties to all WTO countries, but without mandatory reciprocity by them. This approach does not take account of several aspects, in particular regulatory ones.

Impact on the REACH regulation. European institutions, as well as British authorities, have confirmed that European legislation (rights and obligations) will continue to apply until the effective withdrawal of the UK from the EU. Until then, the implementation of European legislation continues as usual.

However, ultimately and depending on the withdrawal conditions, the British legislative framework may be modified. European regulations such as REACH (Regulation 1907/2006), the regulation on biocidal products (Regulation 528/2012), the regulation pertaining to the classification, labelling and packaging of substances and mixtures (Regulation 1272/2008), and a certain number of implementing measures (known as “Level 2” measures) may no longer be applicable, unless the UK opts for the Norwegian model (in the context of which the REACH regulation, for instance, is applicable).

Regulatory impact in the UK. Norms and standards developed within the EU as regards the regulation of the chemical sector are considered as an international reference, since they simplify the assessment of chemical product safety and commercial exchanges within the EU. Moreover, access to the EU single market is subject to that country’s application of such norms. It is therefore highly unlikely that the UK will backtrack on these norms or simply ignore them. The main question will consist in determining *how* to apply REACH rules in future.

Impact on the application of REACH rules. The REACH Regulation provides for a certain number of provisions pertaining to third countries, for instance covering the participation of third countries in the work of the European Chemicals Agency (ECHA, Article 106) and the cooperation with third countries and international organisations (Article 120) to guarantee the exchange of information. Unless it agrees to a specific agreement, the UK would participate in the ECHA work on the basis of these “third country” provisions.

In addition, REACH is a complex framework, with several statuses regarding its scope, differentiating for instance between manufacturer, importer, distributor and user, as well as between substance, mixture and substance of very high concern. Thus, the assessment of the potential consequences of Brexit on the implementation of REACH requires a case-by-case analysis, which may begin with answering the following questions:

- What types of products are exported to the EU/UK? Single substance or mixture, with or without an authorisation or an exemption, or substances of very high concern?
- Are the substances/products exported to the EU/UK exempt or registered pursuant to REACH rules?
- Would importers and distributors of substances be required to register in view of the above?
- Would it be relevant to appoint an “only representative” for the EU? (cf. Article 8 of REACH)

This analysis would help identify the challenges posed by Brexit and enable better preparation for post-Brexit transition, irrespective of the potential transition measures that may result from the negotiation process.

A second step, of reflection and preparation, could consist in identifying the scenario that would represent the ideal or best transition for manufacturers, importers, distributors and users of chemical products, and then in approaching the competent intermediaries (ECHA, European institutions and British authorities, negotiation teams) early on in the process in order to raise awareness regarding the impact on the chemical industry.

Lastly, in the event of information exchange or discussions between operators present on the chemical products markets, it will be important to continue ensuring that competition rules are complied with, particularly Articles 101 and 102 of the Treaty on the Functioning of the European Union, which will continue to apply to British undertakings even post-Brexit.

For further information on this newsletter, please get in touch with your usual Gide lawyer.

CONTACTS

STÉPHANE HAUTOUBOURG

hautbourg@gide.com

ROMAIN RARD

romain.rard@gide.com

You can also find this legal update on our website in the News & Insights section: [gide.com](https://www.gide.com)

This newsletter is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department (privacy@gide.com).