
Brexit: The UK's withdrawal from the EU

A commentary on the Only Representative Implications

January 2018

Background:

The issue of Chemical Registrations under REACH presents a key challenge for companies in the UK, the European Union (EU) and outside the EU. The Only Representative Organization (“ORO”) represents its 34 members, more than 2,500 non-EU companies and almost 20,000 EU based importersⁱ. The ORO is an Approved Stakeholderⁱⁱ within the ECHA dialogue process and represents a particular field of competence. In addition to providing support to members, the organisation has also published a Best Practice Guide which is available through the ORO webpagesⁱⁱⁱ or from ECHA^{iv}

Members of ORO are committed to continue to provide market access to the EU on behalf of its non-EU clients (“Principals”).

ORO's main objectives:

- Set up common Only Representatives guidance and quality standards
- Develop a common understanding of REACH requirements for Only Representatives
- Represent Only Representatives and non-EU manufacturers
- Cooperate with regulators and other stakeholder in the REACH process

The recent publication by ECHA on this topic on the ECHA pages^v is based on a premise of Hard Exit and the UK taking on the role of a Third Country. As such, the ORO is revising its prior position of July 2016.

Below, we present two Scenarios which describe the current formal position, consistent with that reflected on the ECHA website, and also a more optimistic potential outcome for consideration.

As an organisation, we have prepared this document in good faith and with the intention of supporting the dialogue on this important matter and to provide guidance to our Principals, (Non EU Manufacturers and their EU based importers (“Downstream Users”).

In line with the ECHA position, as the withdrawal process evolves, the ORO will update this document accordingly.

General Recommendations:

1. Those with an obligation for Registration for the 2018 deadline should continue to act on these obligations independent of the outcome of the withdrawal talks to ensure continued market access.
2. The withdrawal talks are dynamic and may impact your supply chain. Remain in close contact with ECHA, your trade groups for updates on progress as it applies to chemical regulations
3. Communicate actively within your supply chain to ensure that actions are being prepared to allow for your continuous supply after March 2019^{vi}, regardless of the outcome

Scenario 1: UK becomes a Third Country from 30th March 2019 and is outside the scope of REACH

ECHA Brexit Q&A 1416 and 1417 respectively^{vii} outline:

Q: My UK-based company has successfully registered a substance, and ECHA has provided my company with a registration number. How will the UK withdrawal from the EU affect my registration?

“After 30 March 2019, the UK will no longer be a Member State of the EU. Hence, any UK-based registrant can no longer be a registrant. For the purpose of the EU’s REACH Regulation, any registration by such a registrant will therefore be regarded as non-existent, as your company will, after the UK withdrawal, be based in a “third country” outside the EU/EEA. ... you will need to either relocate to the EU-27/EEA or to appoint an Only Representative situated within the EU-27/EEA.”

Q: My UK-based company is currently acting as an Only Representative of a non-EU manufacturer. Once the United Kingdom leaves the European Union, how will that affect our status of Only Representative?

“The REACH Regulation is very clear in this regard. According to its Article 8, Only Representatives shall be legally established within the EU. After the UK withdrawal, this will mean the territory of the EU-27/EEA. The manufacturer having appointed you as Only Representative will need to involve an Only Representative based in one of the EU-27 Member States or the three EEA Member States, and you will need to change the Only Representative in REACH-IT.”

Implications for Only Representatives and Importers:

- REACH does not apply in the UK, hence REACH Registrations for UK companies are not required
- Existing substance Registrations submitted by UK companies will become “non-existent” at 30th March 2019
- UK based Only Representatives (ORs) will no longer meet the REACH Article 8 criteria and hence will cease to exist as registrants under EU-REACH and will not be able to fulfil the importer obligations for those importers based in the EU-27 as defined in Article 8
- Registrations submitted by a EU-27 OR for a UK importer will no longer apply. The relationship to the UK based importer will cease

Recommendations:

Principals (non-Community manufacturers):

Engage with your UK-based OR to determine their plans to establish an EU-27 based OR entity to take on the duties currently performed in the UK. However, there is no necessity at this current time for the establishment of such an entity, nor for communication to UK Importers regarding their future status.

Importers:

UK Importers:

Irrespective of the outcome of the withdrawal discussions, the 2018 registration deadline still applies. Confirm with your supply chain that the import of your substances will be in compliance.

EU-27 Importers:

If the OR is UK-based, communicate with your supply chain if there are plans in place to ensure continued OR coverage by a suitable entity after withdrawal of the UK from The European Union.

Scenario 2: A negotiated position where UK establishes a UK REACH-equivalent and a Transition period applies

Despite the current stated position above, the UK does see continued access to certain bodies, ECHA among them, as being “*economically crucial and financially sensible*”^{viii}. As such, it is likely that a negotiated settlement will be achieved. While it may not be sensible to speculate on the outcome, the below position is based on a transition window after 30th March 2019 and a duplication of the REACH regulation in the UK (“BREACH”)^{ix}. While this will not change the ability for an OR in the UK to provide services to the EU-27 after this date, it may provide ability for recognition of Registrations and their suitability for use in the other jurisdiction.

Continued Membership of the EEA is not considered in the Scenario below.

Implications:

- REACH does not apply to the UK; hence REACH Registrations for UK companies are not required. However, BREACH places similar REACH Registration obligations on UK companies. UK based OR’s are likely to be required to provide coverage for UK based importers
- There may be a period of time within which existing substance Registrations submitted by UK companies may remain “live” to allow for repatriation to a suitably structured EU-27 entity after the Withdrawal date of 30th March 2019. It is conceivable that EU-27 Registrations may be acceptable for BREACH Registrations. Flexible terms for this should be explored
- UK based Only Representatives will no longer meet the REACH Article 8 criteria but parallel obligations may be imposed under BREACH requiring a UK based OR to cover UK importers and to Register on their behalf.
- As in Scenario 1 above, Registrations submitted by an EU-27 OR for a UK importer will no longer apply. The relationship to the UK based importer will cease.

Recommendations:

Principals (non-EU manufacturers):

Engage with your OR to determine plans to establish suitably structured and staffed Legal Entity in the EU-27 and/or the UK as appropriate to support your ongoing obligations in one or both future jurisdictions.

Importers:

UK Importers:

Continue to track developments through your trade groups, Chemical Industry Association (CIA) and the ECHA UK withdrawal webpages. Ensure that requirements under the 2018 deadline are met and communicated to you regardless of the outcome of the negotiations.

EU-27 Importers:

As for scenario 1, if the OR is UK-based, enquire from your supplier if there are plans in place to ensure continued OR coverage by a suitable entity after withdrawal. If the OR is based in the EU-27, then no action is necessary at this time

GENERAL

Recommended practical steps to be considered by Stake-holders in the Withdrawal Process:

Consider practical steps during the transition planning window for:

- **Equality:** Dossiers submitted in the UK or the EU-27 are of indistinguishable quality and should be allowed to transfer to other entities with minimal effort and cost
- **Splitting:** of Registrations submitted by a Legal Entity or Only Representative should be permitted to allow for a low cost, low effort duplication of Registrations into the EEA or EU27 for a limited period of time to ensure continuity in supply, both in the EU-27 and the UK
- **Flexibility:** is required to allow for a time-limited transfer of dossiers in ways which may not be permitted in the current system and without the necessary requirement for transfer of assets as exists today.
- **Transfer Costs:** should be minimised via a reduced Submission Fee and ability to use the same Test and Analytical data
- **Transition Period:** two-year period during which time special abilities to enable uninterrupted coverage and transfers to occur as the administrative and commercial efforts are significant
- **Version Flexibility:** Dossiers submitted under prior IUCLID versions should be transferrable without the requirement to update during the transition period
- **Only Representative opportunities:** Creative, time-limited possibilities should be considered to use the OR vehicle for transferability of REACH-IT assets. Manufacturers and Importers, in the UK or EU-27, should be allowed to appoint an OR and transfer assets free of ECHA charges during Transition
- **Joint Submissions:** Given a high probability that Joint Submission Members for a substance will end up in both jurisdictions (EU-27 and UK) a solution for this will be needed, requiring collaboration of the Commission/ECHA and industry, as well as the UK chemical authorities.

ⁱ <http://www.onlyrepresentative.org/about-oro/facts-figures>

ⁱⁱ <https://echa.europa.eu/about-us/partners-and-networks/stakeholders/echas-accredited-stakeholder-organisations>

ⁱⁱⁱ <http://www.onlyrepresentative.org/>

^{iv} <https://echa.europa.eu/reach-2018/in-your-language/european-organisations>

^v <https://echa.europa.eu/uk-withdrawal-from-the-eu>

^{vi} March 2019 is the anticipated date for the United Kingdom, formally leaving the European Union; however, this date could eventually become postponed, depending on the agreements between the UK and the remaining EU member states.

^{vii} <https://echa.europa.eu/advice-to-companies-q-as/reach>

^{viii} <http://www.cbi.org.uk/cbi-prod/assets/File/The%20Room%20Where%20It%20Happens.pdf>

^{ix} <https://chemicalwatch.com/62757/>