

The REACH etc. (Amendment etc.) (EU Exit) (No. 3) Regulations 2019

1. Name of instrument:

The REACH etc. (Amendment etc.) (EU Exit) (No. 3) Regulations 2019 (hereafter referred to as the third UK wide REACH regulations) make adjustments to two earlier instruments regarding the UK REACH Regulations 2019:

1. The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 – Hereafter referred to as the first UK wide REACH regulations.
2. The REACH etc. (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 – Hereafter referred to as the second UK wide REACH regulations.

This notification should be read together with the notifications provided on the first and second UK wide REACH regulations which were issued to the Scottish Parliament Environment Climate Change and Land Reform Committee on 27 November 2018 and 2 April 2019 respectively. The Scottish Parliament agreed with Scottish Ministers' intention to consent to the first UK wide REACH regulations on 19 December 2018 and agreed with Scottish Ministers' intention to consent to the second UK wide REACH regulations on 1 May 2019. The first UK wide REACH regulations were laid at Westminster on 5 February 2019. The second UK wide REACH regulations were laid at Westminster on 12 April 2019.

2. Explanation of law that the proposals amend and summary of the proposals

Controls on the use of chemicals in the EU are set out in Council Regulation (EC) 1907/2006, which provides for the registration, evaluation, authorisation and restriction of chemicals (the EU REACH Regulation). The EU REACH Regulation will be retained EU law after EU Exit and a UK REACH system put in place which mirrors as closely as possible the EU REACH system at the point at which the UK leaves the EU.

Under the EU REACH authorisation procedure, Substances of Very High Concern (SVHCs) are listed in Annex XIV and are subject to sunset dates, after which companies must stop using them, unless they have applied for and been granted an authorisation for a specific use. Each sunset date is preceded by a latest application date. If a company applies by the latest application date it can continue to use the chemical until a decision is made on the authorisation application, even if such a decision is made after the sunset date. There are a number of substances for which the sunset date has passed, but where use is still permitted as there are EU authorisation applications currently awaiting decision. Where the sunset date for a substance expires before exit day (31 Oct in current no-deal planning) it would not be able to be used in the UK without an authorisation granted under UK REACH.

Under the proposed UK REACH system a new application must be made to the UK Agency (the Health and Safety Executive) for a UK REACH authorisation if, at the time of exit, an EU authorisation application has not been determined by the European

Commission. Where an EU authorisation application was at the final decision stage before exit day, the UK REACH system has a truncated transitional procedure. In this context, final decision stage means that ECHA has provided its final opinions on the application but the Commission has not made a final decision to either grant or refuse the application. In such instances, the application would go straight to the Secretary of State for a decision rather than going through HSE. The decision of the Secretary of State is subject to the consent of the Devolved Administrations.

However, although the UK REACH system provides for the UK to take decisions on outstanding authorisation applications, it does not provide for continued use after the sunset date where the application was made to ECHA before the latest application date. The extension to Article 50 affects the transitional arrangements established in the previous Sis and these now need to be adjusted to take account of the new circumstances.

The approach taken in the third UK wide REACH Regulations is to amend UK REACH by setting new sunset and latest application dates for relevant SVHCs as listed in Annex XIV of UK REACH. The solution is future proofed for any 'no-deal' exit date by moving the latest application and sunset dates to 18 months after exit day. The effect is that UK companies would have 18 months to apply for authorisations, and would be able to continue to use the substances until their applications were determined. UK companies that did not apply for an authorisation would not be able to use the substances after 18 months. This ensures that only those companies who have an application in train with HSE can continue to use the substances after 18 months.

The approach will apply to any substances which fall within defined criteria, rather than listing all the relevant chemicals. This will mean that it will not be necessary to make further amendment in the event of Article 50 being extended again and more substances and applications falling within the situation outlined.

Defra also intend to make some technical amendments to the first UK REACH Regulations. The third UK REACH Regulations will amend cross-references inserted by recent amendments to the EU REACH Regulations to make them operable in a domestic context.

Defra also intend to make a further minor amendment to some of the transitional provisions under the first and second UK REACH regulations. UK companies which transfer their EU REACH registrations to EU-27 entities before exit in order to retain access to the EU market can still be automatically "grandfathered" into UK REACH. This "relevant past connection" to the UK is defined as a registration held by a person established in the UK in the period of two years before exit.

The effect of the extension to Article 50 is that some registrations that would, as originally intended, having fallen within scope of "relevant past connection" now fall out of scope. To avoid a change in the rights attached to an existing registration it is necessary to redefine the period in which the registrant was established in the UK. The period of two years before exit will be replaced by a period starting on 29 March 2017.

Defra also intend to make some other minor amendments where the first UK REACH regulations placed a duty on the UK regulators which has to be completed by a fixed point after exit, e.g. the first rolling action plan on substance evaluation by 31 May 2020. With the extension of Article 50 the time allowed to carry out these duties has become very short so the fixed dates will be replaced by a requirement to fulfil the duties within a year after exit.

3. Why are these changes necessary?

Following the decision to delay the UK's departure from the EU, with a new end date of 31 October 2019, there is a need to amend the proposed UK REACH regime to stay aligned with EU REACH until the point of departure. The instrument will also ensure that UK-based manufacturers or users of SVHCs which are dependent on an EU application for authorisation where the decision was still outstanding at the time of exit can continue to manufacture or use these substances under the same terms as their EU27 based counterparts. This will avoid a situation where they have to cease their activities after exit until a decision is made under the UK REACH system.

4. Scottish Government categorisation of significance of proposals

Category A. The overall intention of the approach taken by the UK Government in drafting the original amending regulations was to replicate the existing EU regime within the UK and to avoid introducing any substantive policy changes. There has been a clear and consistent desire to ensure that existing mechanisms are adapted in the simplest and most practical form in order to ensure as smooth as possible a continuation of the current chemicals regulatory regime. The amendments made by the new amending regulations are aimed at smoothing the transition in light of an extension of the Article 50 date rather than changing any of the objectives of the new regime.

5. Impact on Devolved Area

Chemicals policy, including in relation to REACH, engages a complex mixture of reserved and devolved competence. Environmental protection, waste management and public health are devolved while product safety, animal testing as well as health and safety at work are reserved.

The decision to approve an application for an authorisation under UK REACH is taken by a UK Secretary of State, but requires the consent of all devolved administrations, and this adequately protects devolved competence. There are no significant impacts on devolved competence envisaged as a result of the new amending regulations.

6. Stakeholder engagement/consultation

We have continued to engage with stakeholders to set out the general approach we are taking to correcting deficiencies in environmental legislation. However, these measures are aimed solely at maintaining equivalence with the existing EU regime into a domestic UK context and we have not undertaken any focussed engagement on this basis.

7. Any other impact assessments

On the basis that the proposals transfer existing policy into a domestic context and do not constitute a policy change, no impact assessment has been prepared. These specific measures are aimed at easing the transition for business.

8. Summary of reasons for Scottish Ministers proposing to consent to UK Ministers legislating

This instrument addresses an issue which would always exist within the UK REACH regime but the precise nature will vary depending on what authorisation decisions are pending at the point the UK officially leaves the EU and at which stage they are at in the EU process. The approach taken in the third UK REACH Regulations is to use generic criteria rather than using a list of the relevant chemicals which might become out of date and need further amendment.

The existing REACH provisions operate at EU level and the supporting domestic provisions were made at the UK level to reflect overlapping reserved and devolved responsibilities. In light of this, and the UK-wide nature of the proposed regime, it is most effective to make the changes to address deficiencies at UK level. Officials have worked with Defra to ensure the drafting delivers for our interests and respects devolved competence in Scotland.

9. Have Scottish Ministers had regard to the guiding principles on animal welfare and the environment?

Yes. The guiding principles on the environment as set out in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union are relevant to these proposals. The existing EU REACH regulation and the domestic legislation relating to it are already in line with these principles, and it is considered that these amendments are in adherence with these principles.

10. Are there governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

Scottish Ministers have consulted on the governance gaps that will be created once the UK leaves the EU, and will bring proposals back to the Scottish Parliament on environmental governance arrangements once the future relationship is clear.

We remain engaged in framework discussions with all the administrations of the UK and the relevant regulators specifically looking at the regulation of chemicals and pesticides in the UK outside of the EU and its existing regimes.

The Scottish Government's position remains that future arrangements should be based on staying closely aligned with the EU chemicals regulatory regime and maintaining existing standards of protection for human health and the environment.

11. Intended UK laying date

This instrument is subject to the negative procedure and will be laid for sifting at Westminster on 18 June. Defra have agreed that no EU Exit SIs subject to the negative procedure will be made until after they have been through the consent process agreed with the Scottish Parliament.

12. Does the Scottish Parliament have 28 days to scrutinise?

Yes.

13. Information about any time dependency associated with the proposal?

These Regulations should be in force on Exit Day in the event of a no deal scenario to ensure that the chemical supply chain continues uninterrupted and that business have certainty about their obligations in the event of a no deal exit.

14. Any significant financial implication?

There are no significant financial implications for the Scottish Government associated with these proposals.

As set out in the notification on the original amending regulations, there is likely to be increased costs for stakeholders who have to re-register a substance in the UK REACH regime, having already met the associated costs in EU REACH.

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