5th December 2018

Dear Gillian

I am writing in response to your correspondence of 3rd December concerning the REACH (Amendment) (EU Exit) Regulations 2019. Your letter posed a number of questions on a variety of themes. In the time available I have provided high level answers for each theme and I understand that the Minister for Rural Affairs and the Natural Environment, Mairi Guogeon MSP will attend the committee on the 18th December which will allow these matters to be explored in more detail if required.

Please see below an annex which provides responses to the questions raised by the Committee.

Yours

ROSEANNA CUNNINGHAM
Parliamentary procedure and reasons for not using joint procedure—

1. What parliamentary procedure will the UK SI be subject to?

2. Why did the Scottish Government rule out using the joint procedure for these Regulations given the complex nature of chemicals regulation and intertwining of reserved and devolved interests?

This instrument is subject to the affirmative procedure and the decision was taken to lay a single instrument in the Westminster parliament as this is consistent with previous practice in this area.

Common framework—

3. What stage are discussions at on the “common framework” referred to?

Discussions at official level to date have been very constructive and we plan to explore a number of areas in greater detail early in the new year when the relevant legislation has been laid. The work is focused on how the future regulation of Chemicals and Pesticides will be governed and on the practicalities of giving effect to the proposed new framework for Ministerial decision-making.

The Scottish Government hosted the latest discussion in Edinburgh on 21st November and we have agreed that these discussions should alternate around all of the nations of the UK, which reflects the view that there is a ‘marbled’ mixture of devolved and reserved competence at play in the wider Chemicals regulatory regime and no one organisation should lead or dominate these discussions or the regulatory regime.

HSE currently carry out a number of functions in the regulation of Chemicals as a result of agency agreements between them and the various administrations. We anticipate that the framework discussions will lead to updated agency agreements which allow for a greater role for all of the governments, particularly the Devolved Administrations, in the oversight of the UK’s Chemicals regulatory regime. These agency agreements are likely to supplemented by Memoranda of Understanding where Ministers agree on the overall aim and approach to Chemicals regulation.

Timing and readiness—

4. The notification states that there are three further notifications being prepared that will “exist as a package”. Will the committee be able to consider all notifications together ahead of the laying date?

The committee have already received a notification on both Persistent Organic Pollutants and Mercury, as well as this notification on REACH. There is one other SI which we intend to notify the committee of as soon as possible.
Scope of devolved competence—

5. What areas of the proposed SI does the Scottish Government consider to be within devolved competence?

6. Are the devolved competences in the area of chemicals regulation greater than, the same as, or less than the functions held by Scottish Ministers as a Competent Authority? If greater, please describe how.

There is a complex mixture of reserved and devolved competence engaged under both the existing EU REACH and the proposed UK REACH regimes which is impossible to separate without changing the structure of the regime, as the functions can be used in different contexts. The overall ambition is to protect human health and the environment, which is devolved, however the REACH model also engages regulation for the purposes of consumer protection, trading standards and health and safety at work, all of which are reserved.

The Scottish Ministers’ functions under the proposed SI are greater than those held by them as Competent Authority, and we have secured a requirement for the consent of the Scottish Ministers should there be a need for UK wide decisions which interact with devolved competence.

How will ‘consent of the Devolved Administrations’ work?—

The notification states that Ministerial powers will transfer to the UK Secretary of State, who will require the consent of the Devolved Administrations to take decisions in areas of devolved competence.

7. What decisions by the UK Secretary of State/HSE will require the consent of Scottish Ministers? For example, will these include all decisions to evaluate, authorise and restrict chemical substances.

8. Will that consent be a statutory requirement, and if not, how will the Scottish Parliament have the opportunity to scrutinise such decisions? What is the Scottish Government’s position on the role of the Scottish Parliament in decisions to authorise or restrict chemical substances under this SI?

9. Similarly, the notification states that the devolved administrations will be able to take urgent provisional action in relation to a substance of concern in their own nation. How will such decisions be effected? Will the Scottish Parliament have the opportunity to scrutinise the exercise of such powers?

10. Will the Scottish Government or SEPA be a voting member of any management or oversight board for HSE’s chemical regulation functions?

11. Will the Scottish Government or SEPA be a voting member of any technical or regulatory board for HSE’s chemical regulation functions?

The requirement for consent is written into the draft instrument. Decisions currently taken by the European Commission under EU REACH will transfer to the Secretary of State for the Department for the Environment, Food and Rural Affairs (Defra) who will require the consent of the Devolved Administrations before taking any decision which interacts with devolved
competence. These include decisions on restrictions, additions to the list of substances subject to authorisation, granting of authorisations, fees structures, and other implementing measures. With the exception of decisions to grant authorisations to individual company applicants, the decisions will be given effect through Statutory Instruments. We intend to be as transparent as possible and recognise that the Scottish Government will be accountable to parliament for any decisions that it makes.

More technical decisions, such as decisions on dossier and substance evaluations, which are currently taken by the European Chemicals Agency will pass to HSE as the UK Agency. As these decisions are not currently subject to the Commission’s consent they will not be subject to consent of Ministers from any administration.

In Scotland, the Scottish Ministers may take urgent action by regulations to restrict a chemical substance using their powers under section 140 of the Environmental Protection Act 1990, as was recently done to ban microbeads in the Environmental Protection (Microbeads) (Scotland) Regulation 2018. Such regulations would be subject to the usual process of scrutiny by the Scottish Parliament.

The specific makeup of the various governance structures that will play a role in the operation of the UK REACH system is the subject of ongoing work as part of the development of a framework agreement.

Engagement—

12. Which stakeholders has Scottish Government consulted on post EU Exit proposals for the REACH regime?

13. What are the key concerns that have been raised by stakeholders?

The Scottish Government has focused its efforts on understanding and addressing the deficiencies arising from the UK’s withdrawal from the EU, which has prevented any formal stakeholder engagement.

The UK Government has undertaken informal engagement with UK-wide industry bodies as well as regulators and Non-Government Organisations. Our understanding of the key areas of concern include:

1. access to data currently held elsewhere within EU REACH and the timeframes for doing so;
2. duplication and complication for industry having to comply with both UK and EU regulatory regimes simultaneously and;
3. potential lowering of standards of environmental protection caused by falling behind EU REACH.

These are similar to the issues that the Scottish Government has identified in moving from an EU system to a separate UK system and our aim is for the new UK REACH system to mirror the EU regime as closely as possible.
Appeals—

14. The notification states that the SI will transfer the role of hearing appeals against HSE decisions to the First Tier Tribunal. Can the Scottish Government confirm:

(a) which Chamber of the First Tier Tribunal will hear these appeals; and

(b) whether the SI extends the jurisdiction of the First Tier Tribunal?

15. Is the Scottish Government satisfied with the proposal that the Regulations will not establish an appeal body?

Appeals against HSE decisions will be heard under the First Tier Tribunal in the General Regulatory Chamber which already has some appeal responsibilities with regard to environmental decisions.

The EU REACH regime contains a Board of Appeal within the ECHA structure. Although the Board of Appeal acts independently in practice, the aim under UK REACH is to reinforce the independence of the appeal process by use of the First Tier Tribunal

Regulatory autonomy and capacity of HSE and Scottish agencies—

16. How will SEPA’s functions change as a result of this SI?

17. How will functions of local authorities change as a result of this SI?

18. Under this proposed SI, will it be possible to make different authorisation or restriction decisions in Scotland compared with other parts of the UK (other than “urgent provisional action”)?

19. Has the Scottish Government considered what additional resources may be required by bodies taking on additional duties (e.g. SEPA, local authorities)?

No practical change is anticipated to the autonomy, capacity or resource requirements of Scottish Public bodies under the UK REACH regime.

The position with regards to making different restriction or authorisation decisions is as set out in the notification.

Devolved Administrations can take separate action on a provisional basis to restrict a chemical if they have justifiable grounds for believing that urgent action is essential to protect human health and the environment, this is known as safeguarding. Such action culminates in a decision to be made on whether UK wide action is required. When a decision has been made on a UK wide basis the taker of the provisional measure must revoke the measure.
Costs for affected companies—

20. What are the estimated costs to Scottish companies of complying with the additional requirements to provide data to populate a UK database?

We are not aware of UKG having made an estimate of the compliance costs for business of the separate UK regime.

Impacts on non-UK based companies—

The notification sets out the proposed process for UK based companies with existing REACH registrations transferring their registrations into a UK system.

21. What are the implications for non-UK based companies (that operate within the REACH system) that have registrations that are relevant to the UK?

22. Will non-UK based companies that currently operate within the REACH system and export chemicals into the UK be able to continue to access the UK market?

23. Is there a process to enable the transfer of existing REACH registrations held by non-UK based companies?

In the event of a no deal scenario requiring a UK REACH regime in place of the existing EU REACH, non-UK based companies wishing to comply with UK REACH will have to register their substance(s) or appoint a UK based Only Representative to fulfil their obligations and there may be a cost attached but this is not possible to estimate with any certainty at this stage. It is not possible for non-UK based companies to transfer existing EU REACH registrations to UK REACH.

Information-sharing and consumer information—

24. What will replace the EU arrangements for sharing information about the properties and safe use of chemicals with users and manufacturers in the UK?

25. What will replace RAPEX, the EU rapid alert system for dangerous non-food products?

26. Will the same information be available to Scottish consumers about chemicals in products as under the current system (including in the 2-year transitional period)?

The primary duty on economic operators to understand the hazards and risks of chemicals, and to identify, recommend and apply appropriate risk management measures will remain unchanged and unbroken at exit. The ability to meet this duty, or its enforcement, is not dependent on the submission of registration information to the UK Agency.

The duties to pass information down the supply chain will remain unchanged. The consumer right to request information about the presence of Substances of Very Concern in the products they buy will also remain unchanged from Day 1.