



# Government Legal Department

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By email only

Your ref: TGY/TWS/198230/1

Our ref: Z1909845/MBJ/B5

2 July 2019

Dear Sirs

## **CHEM Trust v Secretary of State for Environment, Food and Rural Affairs**

Dear Ms Day and Mr Short,

We act on behalf of the Secretary of State for Environment, Food and Rural Affairs ("the Secretary of State"). We write in response to your letter of 4 June 2019, and refer also to our letter dated 18 June 2019.

The Secretary of State denies the claim outlined in your letter.

### **Proposed Claimant**

We note the Proposed Claimant's details at sections I and III of your letter.

### **Proposed Defendant**

The Secretary of State may be contacted via the Government Legal Department, at the following address:

One Kemble Street, London WC2B 4TS

### **Reference Details**

Our reference: Z1909845/MBJ/QAC/ B5

Lee John-Charles - Head of Division  
Gary Howard - Deputy Director, Team Leader Litigation B5



Please cite the above reference number on all future pre-action correspondence. Michael Jeremiah is the Government Legal Department pre-action contact on behalf of the Defendant.

### **Details of the matter being challenged**

The Claimant claims that the Secretary of State acted in breach of a legitimate expectation, and outside the powers in section 8 of the European Union (Withdrawal) Act 2018 ("EUWA"), in making:

- i. the REACH etc. (Amendment) (EU Exit) Regulations 2019 (SI 2019/758) ("the REACH SI"); and
- ii. the Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556) ("the Plant Protection Products SI").

### **Legislative framework: Section 8 EUWA**

Section 8 EUWA provides a power for a UK Minister to make secondary legislation to address deficiencies in retained EU law:

*"(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—*  
*(a) any failure of retained EU law to operate effectively, or*  
*(b) any other deficiency in retained EU law,*  
*arising from the withdrawal of the United Kingdom from the EU."*

The deficiencies are further defined by reference to seven categories listed in section 8(2) EUWA. Section 8(3) EUWA provides that deficiencies not on the list but which are "of a similar kind" to those on the list in subsection (2) are within the scope of the correcting power. Paragraph 21(b) of Schedule 7 provides that supplementary and incidental matters are within the scope of the power.

We will not repeat the legislative framework relating to the REACH Regulations and the Plant Protection Products Regulations set out in your letter.

### **Response to the proposed claim**

#### ***Legitimate expectation***

1. We do not accept that your client has a legitimate expectation in the manner claimed. While the Government will continue to ensure high levels of protection for human health and the environment, there has been no commitment to replicate precisely the same structure and regulation as found in European Union instruments, and the legislation introduced to achieve these high levels of protection will not necessarily be identical to those under the EU REACH framework.
2. Paragraph 41 of your letter claims that there will be a dilution of regulatory standards, and that such dilution is contrary to Government assurances. For the reasons outlined below, the Secretary of State does not accept the contention that the REACH SI brings about a dilution in environmental standards.

#### ***Vires of the SIs***

3. The Secretary of State rejects the claims made at paragraphs 46-49 of your letter. The Secretary of State does not consider that the powers in section 8 of EUWA are limited in the manner claimed. Section 8(1) is a broad power which enables a UK Minister to make such provision in secondary legislation as he considers appropriate to prevent, remedy or mitigate any deficiency in retained EU law. The EUWA does not contain any provision which limits the scope of the power in section 8(1) in the manner you have claimed. While the Secretary of State does not believe that the SIs in issue dilute environmental protections as claimed, in any event the Secretary of State's powers are not limited to prevent the introduction of the requirements provided in the REACH SI and the Plant Protection Products SI.

## ***The REACH SI***

4. You allege that specific elements of this SI fall outside the power contained in section 8 EUWA. This allegation is not accepted. The SI is within the powers conferred by section 8 of the EUWA. There are deficiencies in retained EU law which the REACH SI addresses. The SI provides continuity of regulation after the UK's exit from the EU, to the same high level that is provided by the relevant directly applicable EU instruments that apply before the UK exits the EU. The Secretary of State decided on the manner in which the deficiencies in retained EU law were to be prevented, remedied or mitigated. The particular means chosen by the Secretary of State were properly matters within his discretion.
5. The Secretary of State does not accept that ECHA processes and its constitutional framework must be exactly replicated. That is not required by section 8. The Secretary of State has decided what is appropriate to remedy the deficiencies, and has done so. In particular, the Health and Safety Executive ("HSE") is the appropriate body to take on the role of ECHA given its existing expertise in relation to chemicals. The HSE acts as the competent body for Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals and establishing a European Chemicals Agency ("the EU REACH Regulation"). Regulation 3 of the REACH (Appointment of Competent Authorities) Regulations 2007 (SI 2007/1742) confers this function on the Secretary of State and devolved administrations. That function was delegated to the HSE via an Agency Agreement. The HSE also acts as the lead enforcement authority for all offences under the REACH regime.
6. The EU REACH Regulation provides a mechanism for controls over the use of chemicals within the single market. It places the primary duty on industry to ensure that chemicals do not adversely affect human health or the environment, as well as placing duties and powers on regulatory authorities in their oversight of industry, and in taking steps to control dangerous chemicals.
7. The REACH SI provides for an independent chemicals regulatory regime in the UK, in the event of no agreement being reached with the EU on the terms of the UK's withdrawal from the EU. The Minister considered it appropriate, in the exercise of his discretion, to make this SI in order to prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU, as ECHA, the EU body that regulates EU REACH, will no longer have functions in relation to the UK after the UK's exit from the EU. Without these deficiencies being prevented, remedied or mitigated by the REACH SI, there would no longer be an entity in the UK regulating chemicals under REACH. Section 8(1)(b), (2)(a),(b),(c),(d),(e),(g) and paragraph 21(b) of Schedule 7 are all relevant in making the provisions referred to in your letter.
8. The REACH SI does not significantly alter the substance of the regulation of chemicals in the event that the UK leaves the EU. It does not lead to a reduction of the level of environmental protection in the UK.
9. You have raised numerous points of detail regarding the REACH SI. We will address the principal matters raised by you.
10. Your claim in relation to participation in the current regulatory regime overseen by ECHA is without foundation. The REACH SI sets out the provisions required to ensure an independent chemicals regulatory regime in the event of no agreement being reached with the EU on the terms of the UK's withdrawal from the EU. Without such an agreement, the REACH SI cannot unilaterally provide for ECHA to exercise functions in relation to the UK. The Government currently intends to seek a future relationship with ECHA. However, that is subject to the outcome of any future negotiations with the EU. The REACH SI provides a contingency measure in the event of no agreement being reached with the EU, to ensure that chemicals continue to be effectively regulated in the UK.
11. Your claim that the REACH SI will result in a significant reduction in the level of experience, expertise and participation in the UK's chemical regulatory regime is not correct.

12. Your letter states that Regulations 63 and 65 of the REACH SI omit Articles 78-82 and 84-97 of the EU REACH Regulation. Articles 78–82 of the EU REACH Regulation relate to the ECHA Management Board. You claim that the effect of the new regulations is to transfer functions and powers from the Management Board and voting mechanisms of ECHA to the Secretary of State. Under the REACH SI, the functions of ECHA are passed to the relevant UK agency, the HSE. The Defendant did not regard these provisions to be necessary given the HSE's existing structures.
13. The agency to which the functions of ECHA are passed, HSE, already has a board management structure, which comprises of the HSE Board and Management Board. It is appropriate for the Secretary of State to decide to rely on HSE's existing Board structure. The Secretary of State considered that it would create unnecessary duplication to establish a new Management Board specifically for the purposes of UK REACH, when HSE already has an existing board management structure, which can appropriately provide this function.
14. As to concerns regarding open-ness, the EU REACH Regulation does not set out how or when stakeholders are able to participate in meetings of the ECHA's Committees. This is, instead, set out in their rules of procedure. Therefore, the Secretary of State considered that it would not be appropriate to insert this kind of additional provision into the EU REACH Regulation through the REACH SI.
15. Articles 84-86 of the EU REACH Regulation relate to the structure of ECHA. In the domestic UK system, ECHA's regulatory functions are transferred to the HSE, an established body. We do not accept that there will be a reduction in standards or environmental protections because of the HSE taking on ECHA's functions.
16. The Secretary of State does not agree with the allegation made in relation to Article 79 of the EU REACH Regulation. Under the REACH SI, it is the HSE, not the Secretary of State, who takes over regulatory functions currently carried out by ECHA. In exercising their functions, the HSE is required in particular by Article 2B, (inserted by paragraph 3 of Schedule 1 to the REACH SI) and Article 77(A1) (inserted by paragraph 62(2) of Schedule 1 to the REACH SI), to take environmental and scientific knowledge and advice into account.
17. Further, the Management Board within ECHA oversees organisational management issues, with a supervisory role with general responsibility for budgetary and planning matters. It does not supply technical or scientific expertise on risk management. The absence of a separate Management Board within the REACH SI will not reduce standards, nor levels of environmental protection.
18. Your letter raises concern over the role of "the devolved agencies". The REACH SI requires the HSE to seek advice from the Environment Agency under Article 2B, inserted by paragraph 3 of Schedule 1 to the REACH SI. The Environment Agency must collaborate with the environmental regulators for Wales, Scotland and Northern Ireland in providing this advice. Where functions have been transferred to the Secretary of State from the European Commission, the REACH SI provides for the devolved administrations to have a role, primarily by reference to the consent requirement in Article 4A inserted by paragraph 5 of Schedule 1 to the REACH SI.
19. You have raised a further issue that the REACH SI does not reference recitals in the Preamble to the EU REACH Regulation. EU law is retained on exit day "as it has effect in EU law immediately before exit day": see section 3(2)(a) EUWA. While recitals in such a Preamble do not have substantive effect, incorporated EU law will be read in light of appropriate interpretative tools, which can include recitals in preambles to instruments. UK domestic courts will be able to have regard to such recitals when interpreting retained EU law.
20. Paragraphs 21-27 of your letter relate to the ECHA Committees: the Committee for Risk Assessment, and the Committee for Socio-economic Analysis. These Committees are made up of nominees from each of the Member States. This committee structure is not suitable or necessary in the context of UK REACH after exit day. The ECHA Committees are relevant to the manner in which ECHA carries out its duties, not the substantive content of those duties. The REACH SI preserves and transfers to the HSE the duties which ECHA must carry out under EU REACH. As

you refer to in your letter, the REACH SI also preserves the requirement for the HSE to take account of scientific knowledge and advice in exercising its functions.

21. Similarly, the Secretary of State does not see that there is any weakening of transparency and participatory safeguards in the REACH SI. Nor is there any relevant loss of stakeholder engagement in the REACH SI. The legislative provisions in the REACH SI and the related administrative arrangements that will be put in place will not undermine the opportunities for public participation and stakeholder engagement in the REACH system in place after exit day.
22. Paragraphs 28 and 30 of your letter refer to Preamble 95 to the EU REACH Regulation, and Article 77(1) of the same Regulation. The duty in Article 77(1) of the EU REACH Regulation is transferred to the UK agency. Article 77 is modified by the REACH SI, to take account of the different manner in which the system will operate after exit day. There is no basis for alleging that there will be a reduction in standards or protection of the environment.
23. Paragraphs 32-36 of your letter raise issues with data-sharing and decision-making. The Secretary of State considers these concerns to be misplaced. He does not agree with the impression sought to be conveyed of widespread failures by UK companies in adhering to the required standards. The compliance checking of registration dossiers which ECHA carries out pursuant to Article 41 of the EU REACH Regulation will be undertaken by the UK agency (the HSE) under the REACH SI. The importance of ensuring that registrations are accurate and compliant will continue to be reflected in the UK regime pursuant to the REACH SI. Under the transitional provisions, the REACH SI requires UK companies to submit the full technical information relating to their registrations within two years of exit. This will enable the UK agency to provide the necessary assurance checks.

### ***The Plant Protection Products SI***

24. Your client also seeks to challenge aspects of the Plant Protection Products SI. This SI relates to Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market. The Plant Protection Products SI amends Regulation (EC) No 1107/2009 to ensure that the existing Regulation is operable after the UK exits the EU.
25. Paragraphs 38-40 of your letter refers to a drafting issue relating to paragraphs 3.6.5 and 3.8.2 of Annex II to Regulation (EC) No 1107/2009. The omission of these paragraphs was previously brought to the Secretary of State's attention by a stakeholder before your pre-action protocol letter was sent. Our client acknowledged that it did not intend for the material in paragraphs 3.6.5 and 3.8.2 to be omitted and, therefore, again before your pre-action protocol letter, committed to changing this by a further statutory instrument as soon as was practicable. To this end on 19 June 2019 the Pesticides (Amendment) (EU Exit) Regulations 2019 was laid before Parliament. This will amend regulation 14(3) of the Plant Protection Products SI. It will reverse the omission of paragraphs 3.6.5 and 3.8.2 of Annex II to Regulation (EC) No 1107/2009. The new draft SI can be found at the following link:

[https://assets.publishing.service.gov.uk/media/5d0b4850ed915d0939f84806/The\\_Pesticides\\_\\_Amendment\\_\\_EU\\_Exit\\_\\_Regulations\\_2019\\_-\\_SI.pdf](https://assets.publishing.service.gov.uk/media/5d0b4850ed915d0939f84806/The_Pesticides__Amendment__EU_Exit__Regulations_2019_-_SI.pdf)

The issue raised by your client is currently being addressed.

### **Details of any other Interested Parties**

Given the issues you have raised, the Health and Safety Executive should be named as an Interested Party.

We also note Walker J's observation as to whether "industries whose activities are subject to the relevant EU regulations are directly affected so as to be interested parties". Walker J stated that it was desirable that "this order and the material lodged thus far [is] sent by the claimant's solicitors to appropriate industry representative bodies, inviting their views on what if any further interested parties should be specified and on whether, in any event, they would wish to apply to intervene". We

presume you will comply with this observation by Walker J. It appears to us that, amongst others, appropriate industry representative bodies who may have an interest in this matter are –

- The Chemical Industries Association,
- The Chemical Business Association and
- The British Coatings Federation.

Based on your pre-action protocol letter, we think this matter should be brought to the attention of the devolved administrations. We do not at this stage think they are Interested Parties. However we will send them a copy of your letter and this reply, so they are aware of the issue.

### **Aarhus costs**

We accept that this is a claim to which the Aarhus costs principles in CPR 45.41 apply. In the event that, notwithstanding this response, your client decides to issue a claim, we will consider matters further in the light of any evidence from your client as to the appropriate costs cap.

### **Action Defendant is expected to take**

For the above reasons, the Secretary of State does not intend to take any action in response to your letter.

### **Alternative dispute resolution**

It is agreed that alternative dispute resolution is not appropriate.

### **Request for information and documents**

No disclosure is sought.

### **Address for further correspondence and service of court documents**

All future pre-action correspondence should be sent to, and in the event that proceedings are later issued, documents should be served on, the following address:

Government Legal Department, One Kemble Street, London WC2B 4TS

Please note that we do not accept service by fax or by electronic means.

Yours faithfully



**Michael Jeremiah**  
**For the Treasury Solicitor**

**0207 210 3421**