

By email and post

FAO: Michael Jeremiah
Government Legal Department
One Kemble Street
London WC2B 4TS

Michael.Jeremiah@governmentlegal.gov.uk

Direct Dial: 020 7650 1093

Email: tshort@leighday.co.uk
cday@leighday.co.uk

Your Ref:

Our Ref: TGY/TWS/198230/1

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SECOND LETTER

Dear Sirs,

RE: CO/2390/2019 - CHEM Trust v Secretary of State for Environment, Food and Rural Affairs

1. We write further to our first letter of today, and refer to the pre-action protocol letter sent on behalf of our client, CHEM Trust, dated 4 June 2019 and to the Secretary of State's response dated 2 July 2019.
2. In our letter of 4 June, we set out our client's concerns regarding the REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 (the "REACH SI" made on 29 March 2019) and the Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (the "PPP SI" made on 20 March 2019), which provide for a regulatory regime in the event that that the UK leaves the EU without a deal.
3. We maintain that our client and the public at large have a legitimate expectation that the UK Government should ensure that current environmental protections will not be weakened as a result of the UK leaving the EU. It is of the utmost importance that, as Lord Gardiner of Kimble stated in March this year, the Government works to "*continue to ensure the highest levels of protection for human health and the environment, based on robust evidence and strong scientific analysis*", and as the Secretary of State has himself promised "*we will not weaken environmental protections when we leave the EU*".

Leigh Day postbox@leighday.co.uk - www.leighday.co.uk

Priority House, 25 St John's Lane, London EC1M 4LB

T0207 650 1200 - F0207 253 4433

DX53326 Clerkenwell

Central Park, Northampton Road, Manchester M40 5BP

T0161 393 3600 - F0207 253 4433

REACH

4. CHEM Trust firmly believes that the highest levels of protection for human health and the environment would be best secured by the UK remaining part of the EU REACH Regime. Our client welcomes the confirmation in your letter that the REACH SI represents a “contingency arrangement” and that the UK Government “intends to seek a future relationship with ECHA”.
5. We are aware that the Secretary of State’s function under Regulation 3 of the REACH Regulations 2007 has been delegated to the HSE under an agency agreement. Your letter confirms that, under the REACH SI, in the event of a no-deal Brexit, the HSE will be at center of the new regulatory regime as the UK chemicals agency.
6. The fact that the HSE has been acting as the UK’s competent body within the EU REACH regime overseen by ECHA does not of itself ensure that the HSE is adequately prepared or equipped to be the sole central regulatory body in an entirely new UK chemicals regime. Quite clearly significant additional funding, staffing and training, as well as extensive collaboration with other agencies, will be required if the HSE is to be expected to “take on the role of ECHA”. That is the case whether or not the HSE’s existing Board structure is adequate or will need reform in order for the HSE to perform its new extensive role.
7. You suggest in your letter that the Committee for Risk Assessment and the Committee for Socio-economic Analysis are relevant only to the manner in which ECHA carries out its duties rather than to the substantive content of those duties. To the contrary, the important role that the Committees have played in the EU REACH regime is widely recognised. In the event that the UK leaves the EU with no deal and those duties are transferred to the HSE, our client believes it vital that adequate arrangements are put in place to ensure that the HSE is supported in performing its new duties. The input currently provided by Committees in relation to risk and socio-economic impacts must not be lost.
8. CHEM Trust welcomes the Secretary of State’s commitment that public participation and stakeholder engagement will not be undermined after the UK leaves the EU. You refer to the Secretary of State’s intention to put in place “administrative arrangements” to ensure this is the

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case. In his letter dated 16 May 2019 to CHEM Trust, the Secretary of State made a clear commitment to “*work with stakeholders to develop [...] transparency arrangements*”. Our client would welcome sight of the Secretary of State’s proposals for these arrangements, and trusts that they will be open to public comment well in advance of 31 October.

9. Similarly, while CHEM Trust recognises that the REACH SI sets out a requirement for the HSE to take account of environmental and scientific knowledge and advice in exercising its functions, the detail of any arrangements that the Secretary of State intends to put in place will be of utmost importance. For example, we would anticipate that rules and/or guidance will be published clarifying the process for the commissioning by the HSE of knowledge and advice under Article 77.
10. On the issue of compliance checks, we directed you previously to a report detailing widespread non-compliance by UK companies in respect of data safety standards and dossiers under the REACH Regulations 2007. The HSE’s role in checking the compliance of data will expand under UK REACH. Again, the need to ensure that the HSE is adequately supported in this role, and that the details of policies and procedures are made public at the earliest opportunity, cannot be overstated.
11. We noted in our letter of 4 June that our client’s concerns regarding data sharing arrangements arise in circumstances where the Government failed to meet its previous public assurances to put in place adequate practical arrangements by 31 March. While you state in your letter at paragraph 23 that these concerns are misplaced, it is notable that the Government does not appear to have finalised (far less published) practical arrangements for the sharing of data in the event of a no-deal Brexit.
12. Your letter places clear emphasis on the central role that the HSE will play in the regulatory regime the Secretary of State has created through the REACH SI. Our client fully expects that the Secretary of State will consult on the terms of reference for the delegation of powers to the HSE, including in particular with regards to public participation, stakeholder engagement and transparency, and we should be grateful for your confirmation that he intends to do so.

13. CHEM Trust will continue to closely observe what measures are put in place to ensure that the Secretary of State makes good his promises that his Government “will not weaken environmental protections when we leave the EU”, and that the HSE is indeed able to “provide the necessary assurance checks”, as stated in your letter. CHEM Trust will not hesitate to take legal action if necessary to ensure that the Government fulfils its commitments on the protection of the environment and of human health if the UK leaves the EU.

PPP

14. Paragraphs 38 to 40 of CHEM Trust’s pre-action protocol letter dated 4 June 2019 set out its serious concerns regarding the effect of the Plant Protection Products SI to remove existing protections against the approval of products with endocrine disrupting properties. The Pesticides (Amendment) (EU Exit) Regulations 2019 published on 20 June 2019 have now addressed those concerns (assuming they are made by the Secretary of State in their current form) and reinstated the relevant paragraphs which are absolutely essential for the protection of human health. We understand that the Pesticides (Amendment) (EU Exit) Regulations 2019 has been laid for sifting by the Sifting Committees, with that process anticipated to conclude on 8 July 2019.

Yours faithfully,



Leigh Day