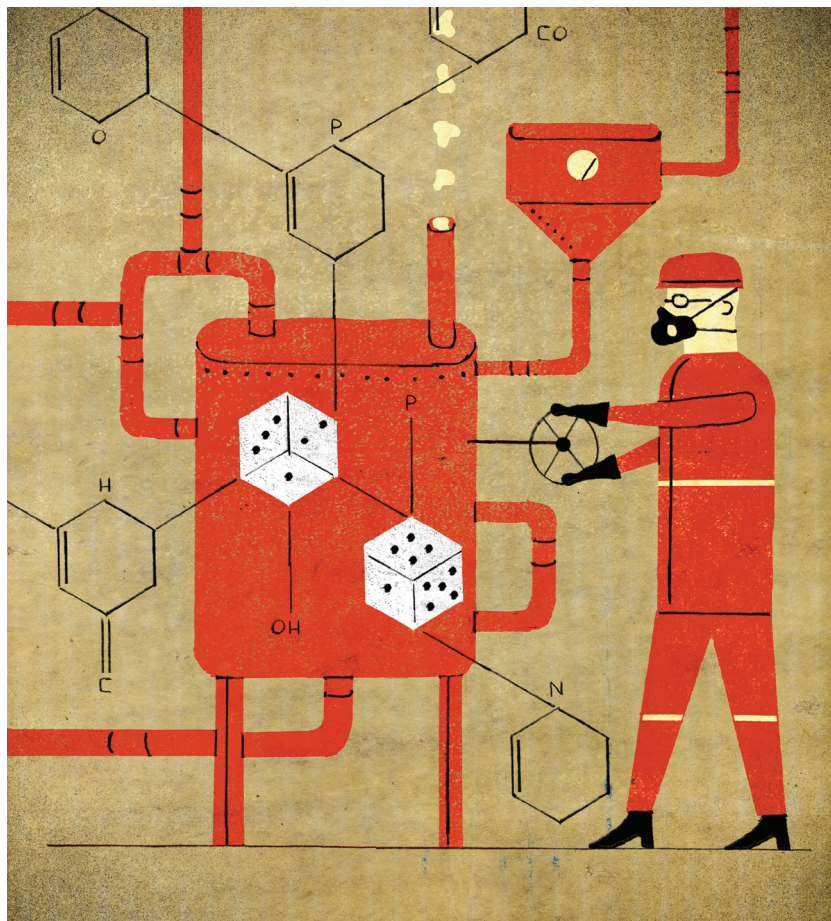


**T**HE EUROPEAN COMMISSION ADOPTED ITS Chemicals Strategy for Sustainability (CSS) in 2020. The strategy is part of the EU's zero-pollution ambition, a key commitment of the European Green Deal. One of the pledges of the CSS is to revise the main EU law for the handling and reporting of potentially harmful chemicals, a set of rules known by its acronym, REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals). This regulation was issued for the first time in 2006 and a revision is needed to align the EU chemical rules with the ambition for a toxic-free environment implied in the Green Deal.

The revision is behind schedule. Initially announced for early 2023, it hasn't yet seen the light of day. The Commission has been flooded by an unprecedented number of comments during the stakeholder consultation process, with NGOs and consumer and environmental associations sometimes pulling in opposite directions, while the industry pushes back on the new rules that could have a potentially seismic effect on business.

What is the destiny of this cornerstone of EU sustainable chemicals strategy in the new political cycle and what should companies do to prepare? We talked with Darren Abrahams, Partner at the



# Is REACH Toxic?

international law firm Steptoe. Darren is recognized across Europe for his expertise and knowledge of chemicals law. He supports clients throughout the chemicals and life sciences supply chain to get and keep their products on the European market, both in the UK and the EU.

At Steptoe's Brussels office, Abrahams told us that the industry implications of REACH are huge. "Lots of people initially predicted it would be the end of chemicals in Europe," he said. Such fears have lessened but have not disappeared. Companies that have already begun to adapt to a changed landscape are emerging as clear winners. But the exact topography of that landscape remains speculative.

"I don't think that the current REACH rulebook is going to be ripped up," Abrahams says. "We're not going to see a radically different approach to chemicals regulation, but it's very clear that the direction

of travel is to place greater demands on industry in order to achieve certain green goals."

**What specific changes in the revision of REACH are causing concern among industry stakeholders? How might these changes impact businesses, and to what extent?**

The obvious thing that comes to mind is the change of basic information requirements. Millions of euros have been spent generating datasets. There is a fear that the revised regulations will ask them to do something totally new in terms of generating data, and cooperating to generate that data. That's one source of alarm. Another is that each company is required to update their registrations; there is a fear the Commission could cancel the registration of a chemical substance if it hasn't been updated. Does that mean companies might suddenly find that they

Both the EU and UK are delaying passage of regulations on chemicals, creating a minefield for companies in many sectors. Brunswick's **LIDIA FORNASIERO** and **NICK BLOW** spoke to expert **DARREN ABRAHAMS**, Partner at international law firm Steptoe.

no longer have access to the EU market? The thing about regulation is that those who are able to comply do so, and they pull up the ladder, but that leaves behind those who aren't able. So there are always going to be winners and losers out of this process.

**Where do you expect the most significant disruptions to happen? What scenarios should companies prepare for?**

I'm not being facetious when I say, anyone who's using chemicals will be affected. In particular, the shift towards hazard being a trigger for restrictions is going to have a great impact on consumer-facing uses of chemicals. The existing restrictions consider risk as a trigger, rather than simply hazard. Do I have a lion in my bedroom or do I have a lion in a cage? The hazard is the same but the risk is very different. The shift toward hazard that is being discussed could impact consumer products where no one would immediately say "oh, you know there is a chemical regulation issue here."

There is also this new concept of "essential use"—even though it's not explicitly incorporated in any legislation currently, essentiality is clearly the sort of leitmotif of lots of initiatives that are being developed even before the law has actually caught up with that. As a lawyer, that's problematic for me. Even if the mood music changes a little bit, the greening of the economy is not going to suddenly evaporate with the new Commission. President von der Leyen's successful reelection campaign included a commitment to stick to the targets of the Green Deal.

The dividing line for industries will be: Is your product really essential, and how do you define that? It becomes context-specific rather than just chemistry-specific. If a company can show that it is part of the solution rather than what would be characterized as part of the problem, there is a future and there is a market. If not—well, draw your own conclusions.

**With the REACH revision stalling, the Commission seems nevertheless determined to restrict some categories of chemicals through hazard-based measures. Should we expect more of that, as a way around the REACH stalemate?**

Yes. We are getting a taste of what a revised REACH regime might look like before the law is actually in place. These restrictions are being rolled out under the guise of existing legislation, where actually there may not be the power to do so. We're probably going to see those approaches continuing to drift in under the radar. It's not my job to say which chemicals should or shouldn't be on the market, but I get very

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troubled when the decision-making processes don't seem to be mandated by the law. That's where I think the legal profession is part of the discussion.

**You are working both in the UK and the EU.**

**The UK government has announced a new UK REACH, which, if adopted, could significantly diverge from the EU. How can that happen, given largely the same data in both markets?**

The UK shifted all EU laws into domestic law after Brexit, but it didn't get the right to shift all the data held by the European Chemicals Agency (ECHA) into the domestic regime. The cost to fill this gap is estimated around £2 billion to backfill the missing dataset. This is an enormous cost to industry, just to get everyone back to the point where we were before the UK left the EU. The government is proposing a solution to try and cut 70% of those costs by inviting registrants to pull the information that is publicly available on the ECHA website and use it in the UK dossiers. That's probably not going to go over well with the people that invested money to generate that data, so there will likely be some hiccups.

The UK wants its own understanding of how chemicals are used and so presumably it would demand different information on use and exposure. The EU is looking at that as well, on a different timescale under the separate EU review of REACH that is ongoing. It's hard to imagine that, without any coordination, they will magically arrive at the same point—timelines, goals and available resources aren't aligned.

I'm afraid the fact that they will move apart is just a natural consequence of the UK being an independent legislator and regulator. Companies will have to build a strategy to navigate all those rules on a pan-European basis, otherwise the costs of trying to individually address both sets of regulations will likely be disproportionate to the benefits.

**Can we draw any conclusions from this divergence?**

We now have a situation under the classification of substances in the UK where authorities are mandated to review the opinions of ECHA's Risk Assessment Committee. What if they get a different result? We're working on a number of files in the chemical sector at the moment where the same basic laws, at least for the time being, apply both in the EU and in the UK; the same data are in principle available to regulators on both sides, but different conclusions are being reached. What are the EU authorities going to make of another authority looking at the same





data and applying exactly the same legal framework with different results? If it was the US or Japan or China or somewhere else you could accept that they have different rules; with the UK however, being a former part of the EU, it's a much more nuanced discussion and that will be fascinating from an advocacy point of view.

#### **Could the UK exploit this divergence as a competitive advantage?**

The UK can't possibly expect to be able to do as much as they could when they were part of a larger club sharing larger resources; they will always have to choose how and if they want to support the strategic independence of the UK industry. How critical is it to have the resources domestically in case barriers come up or, as we've seen in the last few years, wars break out or epidemics arise? Those are political choices, not necessarily about what is the most optimal model in terms of chemical regulation.

**Environmental campaigners warn the UK's regulations are behind the EU's and will expose Britons to more toxic chemicals. Meanwhile the industry fears the chemicals review will push them out of business. Where do we stand in trying to address the concerns of civil society on the one hand and industry interests on the other?**

The Office of Environmental Protection in the UK

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said the government is largely "off track" on environmental goals, including chemicals, and we have been waiting for a UK chemical strategy for a very, very long time. In the EU, we are at a fork in the road where there is a great recognition that the sustainability challenges do need to be seriously addressed. It's no longer just the NGOs pushing it. I think industry is in many ways leading the change because it can see that there are advantages in focusing on a greener economy and there are obviously commercial advantages to being at the forefront of that. But even with that, it's not going to happen unless conditions are created which give regulatory certainty and economic support to local industries so that they can deliver those benefits which are good for them and good for everyone else.

In the Antwerp Declaration, drawn up last year, over 800 companies in dozens of sectors called for a European Industrial Deal to match the Green Deal. That's an acknowledgement that the world is at an inflection point. It's no longer the sterile characterization of either bad industry or good NGOs, there is actually a viable mid-point where the interests of both can be aligned to deliver on the goals that need to be reached.

#### **As a legal expert, what advice would you offer to companies navigating the evolving landscape of chemicals regulation? Should they abide, adapt or fight?**

I wouldn't say fight. I would certainly say, engage. You need to engage with policymakers and you need to engage at the earliest moment possible. And the best moment to do so is before anything has been written down and published. That's the moment that most companies never see: They're waiting for legislation to be published and then it's like moving a tanker: very slow and very difficult. Be someone that brings information and insight and reason to the policymakers and helps shape their thinking so they really have a full picture before they put pen to paper.

Going back to abide, I am a lawyer, all I can tell my clients is to comply with the law. But if you have engaged properly, you'll be abiding with something that actually works and works for you. Adapt, yes. If you've done your abiding and you've done your engagement and you've helped shape the conversation, then you'll move as the regulation moves and hopefully it will move in a way that is favorable to your goals and favorable to society more generally. ♦

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