Kapellmann
Rechtsanwälte

Practical information on product safety and standardization: Brexit and CE marking

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The UK left the EU on 31 January 2020. However, according to the Withdrawal Agreement pursuant to article 50 TEU, a transitional period was set until 31 December 2020, with no possibility of further extension. Until the end of this period, all EU law is still applicable. This means that trade in the UK-EU market will continue according to the Union law without any changes. However, after this transitional period, one of the two following outcomes will emerge.

- A new UK-EU trade deal is concluded and enters into force. If such a deal is concluded, it could apply, in the best case, as soon as the transitional period ends.
- The transitional period ends with no UK-EU trade deal. Under this scenario, the UK-EU trade will be governed by the WTO rules, which means many goods will be subject to tariffs until a free trade deal is concluded.

Without an agreement on the mutual recognition of product assessments and harmonised labelling requirements, access of products imported from the UK to the EU,

and vice versa, will be on the same terms as products from any other third country. In the following we give an overview of the effects of an unregulated Brexit on product labelling, CE markings and conformity assessments by notified bodies.

I. When do the changes due to Brexit take affect?

Until 31 December 2020, the rules on CE marking will remain the same. Products with a CE marking can continue to circulate freely between the UK and the EU in accordance with the respective harmonisation legislation. Additionally, products that are already in circulation on the UK or the EU markets may remain in circulation until they reach the end consumer. However, if no trade deal between the UK and the EU is reached, products placed on the market as from 1 January 2021 will be treated as products from any other third country.

II. Consequences of Brexit for labelling obligations?

Brexit will affect the packaging of many products imported into the European Economic Area (EEA), in particular where the products are shipped from third countries (e.g. China or the U.S.) and have been indicating the address of an "importer" in the UK, i.e. a company that is now outside the block. For a large part of the products imported into the EEA, Union law requires marking them with the name and address of a company (the manufacturer, his authorised representative or an importer) established within the Union. This is to ensure that the product can be assigned as accurately as possible to an economic operator within the EEA. The product shall be identifiable for the purpose of traceability. This applies basically to all consumer products but also to many other goods, e.g. construction products. As a consequence, many third county manufacturers that have been indicating a UK importer will need to state the name and address of a company within the EEA on their products if they wish to continue to import into the EEA.

III. Consequences of Brexit for CE marking?

1. Background: What is the meaning of CE markings and notified bodies?

When manufacturers affix the CE marking on their products, they declare that their products meet the relevant legal requirements imposed by the Union law and they can sell this product throughout the EEA. However, the mere fact that a product bears a CE marking does not guarantee that it actually meets the requirements. Nonetheless, Member States are prevented, in principle, to prohibit, restrict or impede the placement of products bearing a CE marking.

For construction products, the CE marking has a different meaning. According to the Construction Products Regulation (CPR), when manufacturers affix CE markings on their product, they take responsibility that the construction product in question complies with the declared performance and with all the relevant harmonisation legislation. Also, a CE marking on a construction product does not guarantee that the declared performance will correspond with the requirements for use in Member States.

Furthermore, the conformity assessment, which is necessary for CE markings, sometimes requires the involvement of a notified body. The main role of these notified bodies is to assess the conformity of products that are intended to be placed on the market. They can be found throughout the EEA and are designated by the Member States. Their function is particularly important for products that can cause major damage if they are incorrectly manufactured. It is up to the manufacturers to find and select a legally designated notified body to carry out the conformity assessment procedure. Interested parties may find a list of notified bodies on the › **NANDO database**, which is maintained by the European Commission. However, it is the responsibility of the Member States to notify these bodies within their jurisdiction. All notified bodies must be based in the EU.

2. What happens to notified bodies in the UK?

As from the end of the transitional period, UK notified bodies will no longer be considered as EU notified bodies and will subsequently be removed from the NANDO database. They will also cease to perform conformity assessments under the EU legislation. Companies need to take the necessary steps to ensure that they hold a certificate issued by a notified body established within the EU.

The UK has indicated that all UK notified bodies shall become UK approved bodies. The UK notified bodies will automatically be allowed to certify British standards without the need for a special application. In addition, they will be listed in a UK database, which will act as a counterpart to the NANDO database of the EU.

3. Which notified bodies must manufacturers contact for a CE marking?

If EU law requires a notified body to be involved in the conformity assessment of a product, manufacturers must contact a body in one of the Member States. After Brexit, manufacturers will not be able to contact notified bodies in the UK. There are currently twelve notified bodies in the UK, however, once the transitional period expires, most of these bodies will automatically be converted into UK approved bodies, which means that they will be able to carry out conformity assessments for products being placed on the UK market. While existing certificates of UK notified bodies will continue to be valid

in the UK for products fully manufactured and ready to be placed on the market before 1 January 2021, assessments of UK notified bodies will no longer be accepted in the EEA. Therefore, in order to place UK products in the EEA, the conformity assessment will need to be carried out by an EU recognised conformity assessment body.

If a CE marking currently relies on a UK notified body, the company needs to either to

- transfer the files from a UK notified body to an EU-27 notified body or
- obtain a new certificate which has been issued by an EU-27 notified body.

4. Which marking can be used in the UK?

The UK has introduced an equivalent to the CE marking, called UKCA (United Kingdom Conformity Assessed) marking, which will be required instead of the CE marking. The UKCA marking will apply to most goods currently subject to the CE marking and can be used from 1 January 2021. It indicates that the product complies with British standards and may be marketed in the UK. A UKCA marking is to be placed on the product by the manufacturer or its authorised representative. In this document the manufacturer (or its authorised representative) declares that the product complies with the relevant statutory requirements and must make sure to include the name and address of the manufacturer (or its authorised representative) as well as information about the product and the conformity assessment body.

To allow businesses to adjust to the new requirements, it will be possible to use the CE marking in the UK until 1 January 2022. After 1 January 2022 placing products on the UK market will require UKCA marking. However, CE markings will only be valid in the UK for areas where the UK and EU rules remain the same. If the EU changes its rules and a product is marked on the basis of those new rules, the product cannot be sold in the UK, even before 1 January 2022.

5. Which marking can be used in the EU?

Products currently requiring a CE marking will still need a CE marking in the EU after 1 January 2021. Without an agreement on the mutual recognition, the UKCA marking will not be recognised in the EEA.

6. What must be considered when exporting products from the EU to the UK?

First, it must be noted that, when the UK leaves the EU and becomes a third country, this will have an impact on the status of the economic operators (i.e. manufacturer,

importer or distributor). This distinction is important because under both the EU and the UK regulatory regimes, each economic operator will have different regulatory obligations.

A document called the UK Declaration of Conformity must be drawn up for most products carrying UKCA marking. In this document the manufacturer should declare that the product is in conformity with the relevant UK statutory requirements applicable to the specific product. For the rest, the information required on the UK Declaration of Conformity will largely be the same as what is currently required on the EU Declaration of Conformity.

On 1 January 2021 the UK standards will be the same in substance and with the same reference as the standards used in the EU. A difference will be the prefix 'BS' given to UK standards in order to specify that they are adopted by the UK's national standard body (the British Standards Institute).

From 1 January 2022, the CE marking will not be recognised in the UK. Consequently, from this date onwards, a product that bears the CE marking will also require the UKCS marking to show that it complies with the relevant UK rules. Construction products will be covered by the UKCA marking but will be subject to special rules.

7. What needs to be considered when importing products from the UK into the EU?

Importing products from the UK into the EU will become more difficult as the UKCA marking will not be recognized in the EU. Manufacturers in the UK could affix a CE marking in accordance with the general conditions. However, where a notified body needs to be involved in the conformity assessment, it has to be an EU notified body (see point 3).

CE markings for products from the UK may also be required in order to successfully participate in a public procurement tender. According to EU public procurement law, public purchasers can refer to EU standards, quality marks or certifications when tendering for contracts. In its "*Guidance on the participation of third country bidders in the EU procurement market*" (published 24 July 2019) the Commission pointed out that the use of European standards, quality marks or certifications is preferable. This would help to ensure that the products comply with EU regulations on safety, public health protection, environmental protection, etc. However, for products with other certifications or labels, manufacturers must demonstrate equivalence.

8. Special effects of Brexit for construction products: Which Technical Assessment Body is responsible?

The European Technical Assessment (ETA) is an alternative mechanism for construction products that fall outside of EU harmonised standards. The Construction Products Regulation (CPR) sets the procedure for issuing an ETA. By following the ETA procedure, manufactures can draw up a declaration of performance and affix a CE marking on their products, even when the product is not covered by a harmonised standard. The manufacturer needs to address its requests for an ETA to one of the Technical Assessment Bodies (TAB) established in the EU Member States.

Most TABs in the UK will automatically have their status converted under the new UK framework. Accordingly, UK based TABs will become UK-recognised TABs. However, the UK TABs will lose their TAB status in the EU and, therefore, will no longer carry out assessments in the framework of the CPR.

For further information please contact our › **EU law team.**

AUTHORS

Dr Christian Wagner

Office Brussels

+32 2 23411-60

christian.wagner@kapellmann.de