Outstanding area of concern not resolved by the UK-EU Trade and Cooperation Agreement

Updated 27th April 2021

1. UK testing centres cannot certify products for the EU market

- The EU has stated that it will not accept test reports (existing or new) issued by UK testing bodies, however, they contradict this by also stating that acceptance of test reports etc. is a decision to be made by individual organisations.
- Under the Northern Ireland Protocol UK Approved Bodies can act as UK Notified Bodies enabling CE marking for products destined for Northern Ireland which lies within the EU area for conformity assessment. However, these same test reports from the same bodies are not recognised in the rest of the EU - strange anomaly.
- New products developed by UK companies will have to use an EU Notified Body to enable affixing of the CE marking for placing products on the EU market. This means a duplication of testing and conformity assessment for the UK and the EU markets.

2. Problem with AVCP System 3

- Under AVCP System 3, a manufacture must have an Initial Type Test (ITT) report issued by a Notified Test Laboratory.
- All other activity is undertaken by the manufacturer.
- The test report is a snapshot in time so it can be argued that historic data from any laboratory was at the time of testing Notified, should continue to be accepted regardless of any subsequent change in the laboratories status.
- UK Test reports are no longer recognised by the EU thus unilaterally invalidating all existing AVCP System 3 testing carried out in the UK and those for the future.
- So tests must be repeated at an EU-27 Notified Body.
- We definitely know that UKAS and MHCLG are close to providing a workable approach for the UK market.

Example from the rooflight industry

Rooflight manufacturers are unable to transfer their existing test reports under AVCP System 3 because no EU Notified Body will accept them. Also, although BSI now has a 'sister' organisation within the EU which potentially can re-issue certificates, this route is only open to products manufactured under AVCP Systems 1+, 1 and 2+. BSI have advised the reason for this is that the testing facilities must be within the country where you seek accreditation. BSI does not have any testing facilities in the Netherlands and therefore cannot gain system 3 notification.

Thus, any product under AVCP System 3 still has to undergo re-testing to enable the CE marking to be affixed.

3. UK test houses do not have the ability to undertake specific tests. These can only be undertaken by an EU laboratory.

- UK manufacturers are compelled to switch to an UK Approved Body that has a functioning partner in the EU so that UKCA markings can be affixed for the UK market.

Example from the glass industry

From 1st January 2022 if there is no UK Approved Body able to undertake some of the testing this leaves only EU test houses able to undertake this work. How will this work from 1st January 2022 when only UK Approved bodies have to be used to enable manufacturers to affix the UKCA marking when the updated Memorandum of Understanding between the Government and UKAS states that the Secretary of State will only recognise accreditation of conformity assessment bodies by UKAS?

4. Lack of capacity of UK Testing House for some products

- For the sealants sector there is only one approved body which is causing issues as the number of EU manufacturers who need to have products re-tested is more than the current testing capacity. Thus UK manufacturers who want to launch new products cannot have testing undertaken due to these extended lead in times.

5. UKAS

- Despite UKAS' continued membership of European Accreditation (EA), the International Accreditation Forum (IAF) and International Laboratory Accreditation Cooperation (ILAC), the EU no longer recognises the UK's National Accreditation Body.
    - While European Accreditation states "As signatory to the EA Multilateral Agreement (MLA) the accreditation system operated by UKAS continues to be accepted by the other signatories as equivalent to their own accreditation system and declare, when requested, conformity assessment results (e.g. reports and certificates) issued by conformity assessment bodies accredited by UKAS for the relevant scope to the EA MLA, to the ILAC Multilateral Recognition Arrangement and to the IAF Multilateral Recognition Arrangement as reliable as those issued by conformity assessment bodies accredited by themselves."
    - This contrasts to the EU's statement that "UKAS certificates will no longer be considered as proof of accreditation within the meaning of Regulation (EC) No. 765/2008 and certificates and reports issued by conformity assessment bodies accredited by UKAS are no longer recognised with respect to the EU Regulatory system as of 1st January 2021 e.g. regarding Notified Bodies for the purpose of CE marking, EU

Emission Trading System, EU Food and Feed regulations, EU Cybersecurity act and other EU legislation."

- UKAS cannot recognise EU certificates etc. from EU Notified Bodies for conformity assessment to affix the UKCA marking. This seems to stem from the updated Memorandum of Understanding signed between UKAS and the UK government. This states "In line with UKAS' appointment as the sole national accreditation body for the UK … the Secretary of State will only recognise accreditation of UK conformity assessment bodies by UKAS in the voluntary and mandatory sectors." This would fit in with statements reported to have come from UKAS that they will no longer recognise EU certificates etc. from EU Notified Bodies for conformity assessment to affix the UKCA marking.
    - This issue will be compounded from 1st January 2022 when the UK ceases to recognise CE marking in Great Britain and EU products will have to switch to applying the UKCA marking. At this stage it is not clear whether EU test reports can be used to support UKCA marking.
    - MHCLG is investigating this situation to determine whether this is a legal position or a policy choice.

6. Unlevel playing field

- For the GB market in 2021 we are accepting both UKCA and CE marking while on the EU market (with the exception of the market in Northern Ireland) manufacturers who have a UK Notified Body test report do not conform and cannot apply CE marking. Thus they have to either retest with an EU Notified Body or transfer the test report to an EU Notified Body (rebadging) which is by no means certain to be accepted.
    - The EU has stated that this is an issue they do not want to deal with and that it is up to local enforcement. Also, conformity assessment bodies have said it is nothing to do with them. In particular, in AVCP System 3, a Notified Body is only involved in the determination of the product type with the manufacturer carrying out the factory production control - see item 2.
    - What happens where no UK test body can undertake some of the tests and those tests will have to be carried out by an EU notified Body which has a relationship with a UK Approved Body? - see item 3.

7. Formation of the UK Group Technical Assessment Bodies (Replacement for EOTA)

- This is now in train, however, numerous questions are arising which require answering.
- The Group of UK TABs are in discussions with EOTA over a future relationship. The initial 'observer' status offer would allow some limited engagement with EOTA activities but would not permit involvement in drafting EADs.
- MHCLG has put in a formal request for EOTA to share EADs with both UK TABs and MHCLG. The intention is to publish or 'designate' existing EADs so that UK TABs can issue UK Assessment Documents but there is no formal path yet in place for this to happen. The UK has

also enquired about the sharing of EAD documents and this request is to be considered at the EOTA Executive Board meeting for 12th May.

- If granted, how these EADs could be used for the GB market will need to be ironed out in the UK TABs Working Group and with MHCLG. While UK regulations allow for UK Assessment Documents to be used in support of a fresh UK Technical Assessment to be issued but the purpose and benefit of going down this route which exists in the EU no longer exists in GB now that we have left the EU.
- There appears to be little appetite among UK TABs for a direct equivalent to EOTA being established in the UK.

8. Formation of the Group of UK Approved Bodies

- The formation of the UK Group of Approved Bodies (UKGAB) is well underway with MHCLG having produced a document that will allow the UKGAB to start work on the required position paper etc.

  Kevin Frewin (BSI) who is the former joint Chair of the UK Group of Notified Bodies will, ASAP, call a meeting of the UKGAB so that a new Chair can be elected and the organisation can move forward. Once a mandate has been received from MHCLG this will overcome any issues with the Competition Act and the potential for a manufacturer to challenge the UKGAB's legitimacy.

  A meeting is being arranged for Tuesday, 4th May.

9. UK REACH

- The text of the UK-EU Trade and Cooperation Agreement (UK_EU TCA) does not address data concerns which could lead to possible divergence.
    - In the draft chemical annex in Mat 2020 it was proposed that parties would agree to share data, risk assessments, scientific information, priority substance information and assessment methodologies where appropriate. The final text mentions neither the European Chemicals Agency (ECHA) nor data sharing. Instead it states that parties "commit to facilitate the exchange of non-confidential information between responsible authorities, including through cooperation on electronic formats and tools used to store data". Thus access to EU held data sets may be impossible or prohibitively expensive to achieve.
- EU REACH applies in Northern Ireland so the so-called UK REACH should more accurately be referred to as GB REACH
- Extended registration deadlines set by government are still too short:
    - 1st March 2021 - Deadline for GB-based holders and downstream users of existing EU-REACH authorisations to provide information to HS&E on their authorisations
    - 30th April 2021 - Date by which companies must complete initial GB REACH grandfathering of EU held registrations

- 27th October 2021 - Deadline by which companies can submit downstream user import notifications

- The cost to industry of establishing a parallel system to that of the EU-REACH model is prohibitively high with registration fees not proportionate to the size of the national market.
- How will the regulator approach compliance checks and controls?
- Lack of official guidance on the new rules and regulations.
- A sizable number of industry bodies have written to the government proposing a break from the EU approach of registering data for every substance and suggesting instead a lighter touch approach where only chemicals of greater concern would need full registration.
- This would have EU officials complaining there is no longer a level playing field under the UK-EU Trade and Cooperation Agreement. Also this move would require primary legislation within Parliament.
- The Environmental Bill would also be problematic as it promises to retain the fundamental principles of REACH including mandatory registration of all substances while allowing flexibility on how this can be achieved.
- Downstream users of chemicals that do not hold an EU registration and became importers must submit a new registration to the UK Health and Safety Executive within set timeframes. This will prove arduous to those that have not undertaken this before.

10. Mutual Recognition

- Of product testing carried out by EU Notified Bodies & UK Approved Bodies.
- UK/EU agreement on mutual recognition would overcome most of these issue immediately for the UK and from 1st January 2022 for the EU.
- If mutual recognition is not agreed then EU manufacturers will be forced to use UK Approved Bodies to enable them to comply with mandatory UKCA marking as from 1st January 2022.
- The UK does not have the test capacity to meet this demand so disruption to EU exports to the UK will ensue.
- EU recognition of existing European Technical Assessments issued by UK bodies and new UK Technical Assessment Certificates is required now.

11. Future potential areas of concern

- Divergence of standards.
- Status on use of sub-contractors.
- UKAS limitation on acting as an accreditation body recognized by the EU.
- Review of the CPR - any changes to legislation.