EUROPEAN COMMISSION
ENTERPRISE AND INDUSTRY DIRECTORATE-GENERAL

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Guidance document[1]

The application of the Mutual Recognition Regulation to articles of precious metals

1. INTRODUCTION

The purpose of this document is to clarify the application of Regulation (EC) No 764/2008[2] (the 'Mutual Recognition Regulation' or 'the Regulation') to the marketing of articles of precious metals ('APM') within the EU. This document is an evolving document and will be updated to take account of experiences and information from the Member States, from competent authorities and businesses.

2. THE MUTUAL RECOGNITION REGULATION (EC) 764/2008

The Regulation applies to administrative decisions addressed to economic operators, on the basis of a technical rule, in respect of any product lawfully marketed in another Member State, where the direct or indirect effect of that decision is the prohibition, modification, additional testing or withdrawal of the product (Article 2.1). The competent authority which intends to take such decision must follow the procedural requirements established by the Regulation.

The Mutual Recognition Regulation will apply when all the following conditions are met:

2.1. The (intended) administrative decision must concern a product lawfully marketed in another Member State

The principle of mutual recognition applies where a product lawfully marketed in one Member State is placed on the market in another Member State. It establishes that a Member State cannot forbid the sale on its territory of products which are lawfully marketed in another Member State, even if they were manufactured

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2 Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, OJ L 218, 13.8.2008, p. 21.

according to different technical rules. Both actual and possible denials of mutual recognition are governed by the Regulation. Hence, when a Member State intends to ban the access to its market it should follow the procedural requirement established in Article 6.

2.2. The (intended) administrative decision must concern a product which is not subject to harmonised EU law

The Regulation operates in the non-harmonised area, in relation to products for which there is either no harmonisation of laws at EU level, or for aspects not covered by partial harmonisation.

2.3. The (intended) administrative decision must be addressed to an economic operator

Any restrictive decisions taken by a competent national authority and addressed to any natural or legal person who is not an economic operator do not fall within the scope of the Mutual Recognition Regulation.

2.4. The (intended) administrative decision must be based on a technical rule

Within the meaning of the Regulation[3] a technical rule is any provision of a law, regulation or other administrative provision of a Member State, not harmonised at EU level:

(1) which prohibits in its territory the marketing of a product (or type of product) lawfully placed on the market in another Member State, or compliance with which is compulsory for the marketing of such product in the territory of that Member State where the administrative decision is or will be taken, and

(2) which lays down the characteristics required of that (type of) product, such as levels of quality, performance or safety, or dimensions, including requirements as regards the name under which it is sold, terminology, symbols, testing and test methods, packaging, marking or labelling, or

(3) which imposes on the (type of) product, for the purpose of protecting consumers or the environment, any other requirement which affects the life-cycle of the product after it has been placed on the market, such as condition of use, recycling, re-use or disposal, where such conditions can significantly influence the composition, nature or marketing of the (type of) product.

2.5. The direct or indirect effects of the (intended) administrative decision must be any of the following:

(a) The prohibition of the placing on the market of that (type of) product;

(b) The modification or additional testing of that (type of) product before it can be placed or kept on the market;

(c) The withdrawal of that (type of) product from the market.

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[3] Article 2 (2) of the Regulation.

Any such (intended) decision must be taken in accordance with the Regulation[4] .

3. ARTICLES OF PRECIOUS METALS — TYPES OF TRADE BARRIERS

APM are usually items made of gold, silver, platinum (and, in some Member States, palladium) and certain alloys.

National regulations on APM differ substantially. Generally speaking, APM lawfully marketed in one Member State could encounter three main categories of trade barrier before they can be marketed in another Member State:

(2) A procedure controlling the product before it is put on the national market. In several Member States, this control is performed by an 'Authorised Assay Office' (see point 4).

(3) The compulsory marking of the product, by the Authorised Assay Office to indicate that it has been satisfactorily assayed, or by the manufacturer or a third party to indicate the manufacturer, the nature of the metal and its standard of fineness (see point 5).

(4) The obligatory 'standard of fineness', which is the measure of purity for gold, silver and platinum (see point 6).

4. THE TERMS OF THE MUTUAL RECOGNITION REGULATION: THE EXISTENCE OF A NATIONAL CONTROL PROCEDURE FALLS OUTSIDE THE SCOPE OF THE REGULATION

Pursuant to Article 2(1), the Regulation applies to (intended) administrative decisions on the basis of a 'technical rule' as defined in Article 2(2) of the Regulation. As regards APM specifically, a technical rule is any legal or administrative provision of a Member State which:

(1) prohibits the marketing of APM lawfully marketed in another Member State in the territory of the Member State where the administrative decision is or will be taken, or compliance with which is compulsory when APM are marketed in the territory of that Member State, and

(2) lays down the characteristics required of APM, such as levels of quality, performance or safety, or dimensions, including requirements as regards the name under which it is sold, terminology, symbols, testing and test methods, packaging, marking or labelling.

These technical rules may provide for the compulsory marking of the product (see point 5 below) and/or obligatory standards of fineness (see point 6 below). In procedural terms, it is important to distinguish two different kinds of action which competent authorities may take when Member States require APM to be approved by a control body (such as an Authorised Assay Office) before they can be lawfully marketed as APM in their territories.

[4] Article 2 (1) of the Regulation.

4.1. Application of prior authorisation procedures to APM

On the one hand, where such a system of 'prior authorisation' exists, the main task of the control body is to verify that APM submitted to it comply with national technical rules: if they comply, prior authorisation is granted. When an Authorised Assay Office has the power to mark the product and/or to allow or refuse an APM access to the national market on the basis of a technical rule, it will be a 'competent authority' making an administrative decision as described in Article 2(1) of the Regulation and will therefore have to apply the Regulation (see the second sentence of Recital 12).

On the other hand, under a prior authorisation system products may be excluded from the market if the required application for prior authorisation has not been made in respect of them, or if they have been refused prior authorisation. Where competent authorities exclude APM from their markets solely because they have not been granted a valid prior authorisation, they are not taking a decision on the basis of a technical rule, to which the Regulation applies (see the first sentence of Recital 12).

4.2. Conclusion — the application of the Regulation to APM

Since the mere obligation to submit APM to a control body does not lay down characteristics which are required of the APM within the meaning of Article 2(2)(b), there is no decision within the meaning of Article 2(1) when APM are excluded from a national market only because they were not submitted to the control body. The competent authority's action in such cases therefore falls outside the scope of the Regulation. The duration of the prior authorisation procedure, its cost and other exclusively procedural requirements are also excluded from the scope of the Regulation.

However, the operation of prior authorisation procedures must comply with Articles 34 to 36 TFEU (Articles 28 to 30 EC) (Recital 11), and if a competent authority removes APM from the market on the grounds that they do not meet the obligatory standards of fineness to be marketed as APM, its decision is based on a technical rule and will be subject to the Regulation.

4.3. Jurisprudence of the Court of Justice

The Court of Justice of the European Union stated in the *Houtwipper* case (Case-293/93)[5], that, in the absence of EU rules, the Member States had a wide discretion, and it was for them to choose the appropriate measures to deal with the risk of fraud. The choice between prior control by an independent body and a scheme permitting hallmarking by manufacturers, backed up by quality rules, penalties and training was a matter for the legislative policy of the Member States; the Court would review that choice only where there had been 'a manifest error of assessment.'

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[5] Judgment of the Court of Justice of 15 September 1994, Criminal proceedings against Ludomira Neeltje Barbara Houtwipper, Case C-293/93, paragraph 27.

5. COMPULSORY MARKING OF THE PRODUCT

5.1. Introduction: types of mark on precious metals

Several different types of mark on precious metals currently exist in the EU. The four most frequent marks are:

- The Assay Office Mark, i.e. the mark struck to indicate that the APM has been tested by a particular Authorised Assay Office;

- The responsibility mark (or the sponsor's mark) of the manufacturer. Responsibility marks usually have to be registered in the country where APM are controlled and, in many cases, which applies the common control mark ('CCM');

- The fineness mark (or the metal mark) indicating the nature of the metal and its standard of fineness;

- The CCM was established by the Hallmarking or Vienna Convention[6] that entered into force in 1975. The Convention was signed by Austria, Finland, Norway, Portugal, Sweden, Switzerland, the United Kingdom, Cyprus, the Czech Republic, Denmark, Hungary, Ireland, Israel, Latvia, Lithuania, the Netherlands, Slovakia and Poland (15 EU Member States). Slovenia is likely to accede soon. The CCM indicates the precious metal and its fineness. Only designated national assay offices under the terms of the Convention may apply the CCM to articles of gold, silver and platinum after having tested their fineness in accordance with agreed testing methods. Each Contracting State allows goods marked with the CCM to be imported without further testing and marking (if such articles qualify for the domestic market: in such cases, the importing Member State effectively delegates the process of granting prior authorisation to the control body in the exporting country). The marking of APM with the CCM is carried out on a voluntary basis; compulsory hallmarking is not required of Contracting States to the Convention. This means in practice that an exporter has the choice between asking his domestic assay office for the CCM or sending the goods without CCM to the importing State. In the latter case, the Convention allows the latter to require that APM meet its requirements. In addition, the responsibility mark has to be registered in the importing country.

Articles bearing the four Convention marks (the CCM, the Assay Office Mark, the responsibility mark and the fineness mark) are accepted without further testing or marking by the Contracting States of the Hallmarking Convention.

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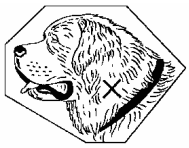
[6] Convention on the Control and Marking of Articles of Precious Metals, signed in Vienna on 15 November 1972 and amended on 18 May 1988. See http://www.hallmarkingconvention.org/.

COMMON CONTROL MARK



ASSAY OFFICE MARK

RESPONSIBILITY MARK

750

FINENESS MARK

5.2. The stamping of the 'Assay Office Mark'

The marking of APM by an authorised assay office with an 'Assay Office Mark' indicates that it has been satisfactorily assayed, and normally also indicates the nature of the metal and its standard of fineness.

Compulsory marking is a requirement to modify the 'product or type of product before it can be placed or kept on the market' (Article 2(1)(b) of the Regulation). Therefore, the Regulation applies.

Moreover, the refusal of an authorised assay office to apply the 'Assay Office Mark' is a 'prohibition of the placing on the market of that product or type of product' on the basis of a technical rule for the purposes of Article 2(1)(a) of the Regulation. Thus, when an authorised assay office refuses to apply an 'Assay Office Mark' to APM lawfully marketed in another Member State, it must always apply Articles 4 to 6 of the Regulation.

5.3. The obligatory 'responsibility mark'

A national rule requiring APM to bear a 'responsibility mark' is a technical rule under Article 2(2) of the Regulation.

A decision to refuse the marketing of APM due to the absence of a responsibility mark is a refusal pursuant to Article 2(1)(b) of the Regulation.

During the prior authorisation procedure, the authorised assay office must always apply Articles 4 to 6 of the Regulation to APM lawfully marketed in another Member State but not bearing a responsibility mark.

5.4. The obligatory 'fineness mark'

A national rule requiring APM to bear a 'fineness mark' is a technical rule under Article 2(2) of the Regulation.

The decision to refuse the marketing of APM due to the absence of a fineness mark is a refusal pursuant to Article 2(1)(b) of the Regulation.

In that case, the authorised assay office must always apply Articles 4 to 6 of the Regulation to APM lawfully marketed in another Member State but not bearing a fineness mark.

6. THE OBLIGATORY 'STANDARD OF FINENESS'

6.1. The 'standards of fineness'

The carat used to be a measure of the purity of gold and platinum alloys, specifying purity by weight. One carat is 1/24 purity by weight. Therefore 24 carat gold is pure (100% Au w/w), 18-carat gold is 75% gold, 12-carat gold is 50% gold, and so on.

The carat system is increasingly being complemented or superseded by the 'millesimal fineness system' in which the purity of precious metals is denoted by parts per thousand of pure metal in the alloy. For example, an alloy containing 75% gold is denoted as '750'.

Common carats and millesimal finenesses used for gold in APM are:

CARAT	MILLESIMAL FINENESS
24	999
22	916
20	833
18	750
15	625
14	585
10	417
9	375

Throughout the EU, there are currently 18 different standards of fineness for gold: 333, 375, 417, 500, 583, 585, 750, 800, 833, 835, 840, 900, 916, 958, 960, 986, 990 and 999. Only two standards are common to all Member States (585 and 750). The standards of fineness applied under the Hallmarking Convention are 999, 916, 750, 585 and 375.

For silver, there are 15 different national standards of fineness in the EU. Only 800 and 925 are accepted in all Member States. The standards of fineness applied under the Hallmarking Convention are 999, 925, 830 and 800.

There are five different standards of fineness for platinum in the EU. The standards of fineness applied under the Hallmarking Convention are 999, 950, 900 or 850. According to our information, Bulgaria, Cyprus and Germany do not include platinum among precious metals.

Moreover, there are national differences in soldering methods, permitted tolerances in the standards of fineness and methods used to establish fineness.

6.2. The obligatory 'standard of fineness' falls within the scope of the Regulation

In most cases, national technical rules specify which standard of fineness should be met by APM before they can be put on the market.

The Hallmarking Convention leaves each contracting party free to determine the standards of APM that can be manufactured or put on sale within its borders.

A national rule requiring APM to meet a specific standard of fineness is a technical rule under Article 2(2)(a) of the Regulation. The decision to refuse the marketing of APM due to non-compliance with a national standard of fineness is a refusal pursuant to Article 2(1)(b) of the Regulation.

GOLD	SILVER	PLATINUM
		
Hallmarking Convention Standards of fineness: 999-916-750-585-375	Hallmarking Convention Standards of fineness: 999-925-830-800	Hallmarking Convention Standards of fineness: 999-950-900-850

7. THE JURISPRUDENCE OF THE COURT OF JUSTICE ON ARTICLES 34 TO 36 TFEU (28 -30 EC TREATY)

The Regulation does not affect the jurisprudence of the Court of Justice on APM in relation to Articles 34 to 36 TFEU (28 – 30 EC). This jurisprudence reflects the diversity of the different national legislations and can be summarised as follows:

7.1. Jurisprudence about the 'Assay Office Mark'

When APM do not bear a hallmark struck by an independent body in another Member State equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State, the Court of Justice indicated that 'where national rules require the hallmark to be affixed by an independent body, the marketing of articles of precious metal imported from other Member States may not be prohibited if those articles have in fact been hallmarked by an independent body in the Member State of exportation'[7].

When APM already bear a hallmark struck by an independent body in another Member State equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State, obligatory stamping of the 'Assay Office Mark' by the authorised assay office is not justified[8].

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7 Judgment of the Court of Justice of 15 September 1994, Criminal proceedings against Ludomira Neeltje Barbara Houtwipper, Case C-293/93, paragraph 27.

8 Judgment of the Court of Justice of 21 June 2001, Case C-30/99, Commission v. Ireland, paragraphs 69 and 70.

7.2. Jurisprudence about the 'responsibility mark'

The Court of Justice has held that obliging a manufacturer or importer to stamp articles with a responsibility mark indicating the manufacturer is in principle capable of affording effective protection to consumers and promoting fair trade[9].

There is, however, no need for such protection, according to the Court, where APM 'are imported from another Member State in which they have been lawfully marketed, if they are already hallmarked in accordance with the legislation of that State, on condition however that the indications provided by the hallmarks prescribed by that State, in whatever form, contain information which includes indications equivalent to those provided by the hallmarks prescribed by the Member State of importation and intelligible to consumers of that State.'[10]

The requirement to register the responsibility mark in the Member State of destination is not justified in most cases. It is only justified if APM from other Member States do not already bear hallmarks which fulfil the same purpose, that is to say, in this case, the identification of the person who is responsible[11].

7.3. Jurisprudence about the 'fineness mark'

The Court of Justice accepted that the fineness mark is in principle of a nature such as to ensure effective protection for consumers and to promote fair trade. Since the consumer is not able to determine, by touch or by eye, the exact degree of purity of APM, he may, in the absence of a hallmark, easily be misled when purchasing such an article[12].

However, a Member State cannot require a fresh hallmark to be affixed to products imported from another Member State in which they have been lawfully marketed and hallmarked in accordance with the legislation of that State, where the information provided by that hallmark, in whatever form, is equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State[13].

7.4. Jurisprudence about the obligatory 'standards of fineness'

The Court of Justice has declared that reserving the term 'gold' for articles of a fineness of 750 parts per thousand, whilst those of a fineness of 375‰ or 585‰ are termed 'gold alloy', infringes Article 34 TFEU (28 EC Treaty)[14].

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9 Judgment of the Court of Justice of 21 June 2001, Case C-30/99, Commission v. Ireland, paragraph 49; Judgment of the Court of Justice of 22 June 1982, Criminal proceedings against Timothy Frederick Robertson and others, Case 220/81, paragraph 11.

10 Judgment of the Court of Justice of 22 June 1982, Criminal proceedings against Timothy Frederick Robertson and others, Case 220/81, paragraph 12.

11 Judgment of the Court of Justice of 21 June 2001, Case C-30/99, Commission v. Ireland, paragraph 50.

12 Judgment of the Court of Justice of 15 September 1994, Criminal proceedings against Ludomira Neeltje Barbara Houtwipper, Case C-293/93, paragraph 14; Judgment of the Court of Justice of 22 June 1982, Criminal proceedings against Timothy Frederick Robertson and others, Case 220/81, paragraph 11.

13 Judgment of the Court of Justice of 21 June 2001, Case C-30/99, Commission v. Ireland, paragraphs 29 and 30.

14 Judgment of the Court of Justice of 8 July 2004, Case C-166/03, Commission v. France; See also Judgment of 14 June 2001, Case C-84/00, Commission v. France.

Therefore, a national prohibition on marketing APM lawfully marketed in other Member States with the description and indication of fineness which they bear in the Member State of origin but not complying with the provisions concerning standards of fineness in the Member State of destination is very likely to constitute an infringement of Article 34 TFEU (28 EC Treaty).