
Treaties and EU Matters

European Union Hallmarking

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1 Introduction

The hallmarking of items made of precious metal is a practice common to all twelve Member States of the European Union, though the precise rules governing the practice vary considerably at present. France, for example, applies a much higher minimum standard of fineness than the United Kingdom; Denmark and Italy, for example, permit marking by the manufacturer, whereas in both the United Kingdom and France marking must be carried out by an independent third party.

These variations in rules have resulted in obstacles to the free movement of such articles between Member States, because Member States have not always been prepared to accept that their consumers are adequately safeguarded by a foreign hallmark applied according to different rules and under different conditions.

Below will be discussed first the nature of the problem itself, and then the alternative solutions available. Next the legislative proposal now put forward will be described, and finally the implications of the proposal for those dealing in cultural property will be assessed.

2 The Problem: Hallmarking as an Obstacle to the Free Movement of Goods

Articles 30 to 36 of the European Community Treaty¹ lay down the principle of the free movement of goods between Member States of the European Union.

These articles and their interpretation by the European Court of Justice have already been described to some extent in a previous issue of this Journal in the context of the free movement of works of art generally.² However, the focus in that case was article 34, which prohibits barriers to *exports*. Hallmarking on the other hand raises the problem of barriers to *imports*. Barriers to imports are prohibited by article 30:

“Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States”.

* Baker & McKenzie, Brussels.

However, consumer protection and the fairness of commercial transactions need to be ensured and article 30 has been interpreted in the jurisprudence of the European Court of Justice as permitting, under certain conditions, restrictions which protect these and other so-called “mandatory requirements”.³

It has therefore been open to Member States to argue that their hallmarking legislation consists of legitimate measures ensuring consumer protection and the fairness of commercial transactions, and so does not infringe the Treaty rules on the free movement of goods. On the basis of such arguments, certain precious metal articles have been prevented from circulating freely within European Union territory.

3 Alternative Solutions

At first it was hoped that this problem could be resolved without recourse to a specific legislative measure. In particular, in the light of the current political importance of the subsidiarity doctrine,⁴ the Commission’s preference was to avoid proposing new legislation if possible.

3.1 Mutual Recognition

The Explanatory Memorandum attached by the Commission to its proposal states that “proceedings have been instituted against the Member States to make them comply with the principles of article 30 *et seq* of the Treaty. These proceedings were designed to bring about mutual recognition of national practices, and Member States were asked to authorize the placing on the market of articles of precious metal lawfully produced in other Member States, provided that those Member States’ laws ensured an adequate level of consumer protection”.

However, the Memorandum goes on to explain that mutual recognition proved not to be a feasible solution. Although the various laws in question served the same purposes, they were too different for Member States to accept other Member States’ systems as providing equivalent guarantees to their own systems. Given that the Commission formed the view that the technical barriers to trade resulting from the existence of these different systems were justified under the Treaty rules on the free movement of goods as described above, it became clear that harmonizing legislation was in fact necessary.

3.2 Harmonizing Legislation

At the end of 1993 the European Commission put forward a “proposal for a Council Directive on articles of precious metal”.⁵

The new rules will provide common rules throughout the European Union for the fineness standards, testing and marking of articles made from precious metals, and only articles satisfying those rules will be able to be sold within the Union territory. There will therefore be some types of article, which may be currently legally on sale in some Member States, which will in the future not be able to be sold at all within the European Union. Conversely, some other types of articles, which have until now been prevented from being marketed in certain Member States, will be able to circulate freely in all twelve Member States of the European Union. The important point is that, provided an article satisfies the requirements of the Directive it must be permitted to circulate freely in all Member States and, conversely, if it does not satisfy those requirements it will not be permitted to be put on the market in any Member State.

The fact that there is such a Directive in force will in future prevent Member States from claiming that their national legislation is necessary for reasons of consumer protection or ensuring the fairness of commercial transactions: the very existence of the Directive will render any diverging national rules unnecessary under European Community law.

4 The Proposed Directive

4.1 Scope of Application

The proposal covers rules relating to hallmarking of items of precious metal, finished or semi-finished, intended for the final consumer and not to articles for wholesale or industrial use. These may be, for example, jewellery, clocks, watches, cutlery or ornaments. The items may include more than one precious metal and may include other materials also. The precious metals covered are platinum, gold, palladium and silver, both pure and in alloy form. Articles merely plated with precious metal are excluded, as are articles used for medical, dental, scientific or technical purposes, musical instruments or their parts, coins used as legal tender, collectors' coins and medals and ingots or granules for banking use.

Only those articles complying with the Directive's provisions will be able to be placed on the market, and Member States will not be able to prohibit, for reasons relating to standards of fineness, the placing on the market of articles complying with those provisions. Compliance will be presumed in the case of articles which conform to the relevant national standards which express the requirements of the Directive.

4.2 Standards of Fineness

The proposal lists a limited number of nominal standards of fineness, which will be the only ones permitted. The relevant standard will

be shown by use of a mark or, where an article is too small or fragile to be marked, or is semi-finished, by a special certificate of conformity.

4.3 Testing

Manufacturers have a choice of three different conformity assessment procedures.

“Product quality assurance” requires the manufacturer to put in place a quality system for final product control to ensure that the articles conform to the Directive’s requirements. The system must be officially approved by an independent body, and will subsequently continue to be checked by that body to ensure it remains up to standard.

Use of the “EU declaration of conformity” means that the manufacturer will keep available technical documentation showing what measures are taken to ensure conformity, and appoint an independent body to carry out random product inspection.

The third option is “third party verification” under which the manufacturer submits each article, or a statistical sample, to an independent body for both testing and certification.

4.4 Marking

Two marks must appear on each article (unless a certificate of conformity is used instead). The fineness mark states the nominal standard of fineness and is applied by the manufacturer in the case of the first two certification systems described above, and by the independent body in the case of the third; the sponsor’s mark is a mark allowing identification of the manufacturer (or person responsible for placing the article on the market) and the independent body responsible for checking the conformity of the article.

4.5 Implementation

As the proposal stands, the Directive would be required to be implemented by 30 June 1995, with those implementing measures to take effect from 1 January 1996.

However, during a transitional period lasting until the end of 1997, Member States would be required to permit the placing on the market of articles conforming with the rules in force in their jurisdictions on the date on which the Directive is adopted.

5 Assessment of the Proposed Directive

Perhaps the most important point for those dealing in precious metal articles of cultural interest, many of which are old or antique, is that

the proposal as it stands will not normally cover such older articles. Member States are required to enact legislation ensuring that “only articles complying with this Directive may be placed on the market”, and this is intended to be interpreted as referring to a *first* placing on the market. This is the effect of article 1(2)(m): “Placing on the market is the first time that an article is made available on the Community market whether by way of payment or free of charge, with a view to distribution and/or use on Community territory”.

The question arises therefore as to what rules are to apply to these older articles which are being placed on the market for a second or subsequent time. Presumably the old national rules continue to apply, which means that the barriers to trade which this Directive is supposed to abolish will subsist with respect to such articles. Another possibility would be that these goods are not subject to any such rules, but this would leave the consumer completely unprotected and so could not be accepted as a solution, given that, in proposing this Directive, the Commission has expressly recognized the need for such rules to exist. The result therefore is apparently that second-hand and antique articles will continue to be subject as at present to the twelve different national regimes. In this case, within the European Union, only new articles, coming onto the market for the first time, will be subject to the new regime.

A more difficult question arises with respect to antiques and second-hand articles arriving from non-Member States: the Directive on a literal interpretation apparently applies to them, and this raises various problems: for example, they may well not conform to the permitted standards of fineness. It is to be hoped in any case that the Directive as finally adopted will clarify the position in respect of these latter types of article.

Notes

- 1 As a result of the entry into force of the Treaty on European Union on 1 November 1993, the European Economic Community has been renamed as the European Community.
- 2 (1992) 1 IJCP 219–225.
- 3 Case 120/78 *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, better known as “*Cassis de Dijon*”. For a full discussion of the law in this area see Oliver’s *Free Movement of Goods in the EEC*, 2nd edn., Chapter VIII.
- 4 Now expressly enshrined in the European Union Treaty which entered into force on 1 November 1993.
- 5 COM(93) 322 final – SYN 472, 14 October 1993.

