

UK position on Extra-territorial marking of Convention Marks under the Convention on the Control and Marking of Article of Precious Metals.

Summary

- It is the UK's view that the Convention does not permit the application of Convention Marks outside the national borders of the Contracting State.
- This is shown both by the language and purpose of the Convention itself and the circumstances in which the Convention was concluded.

Introduction

1. The UK acknowledges that there is nothing within the Convention that deals expressly with sub-offices operating outside the jurisdiction of the Contracting State. We have therefore considered whether the language of the Convention can be interpreted as permitting or prohibiting extra-territorial marking and whether the history behind its conclusion assist in the interpretation.

Text of the Convention

2. The purpose of the Convention is to provide a system of mutual recognition of hallmarked goods for the benefit of countries that are a party to it. The language of the Convention, taken together, is designed to achieve that purpose.

Article 1

3. Article 1 sets out the basic obligation imposed on contracting States by the Convention, which is to treat their own national hallmarking requirements as satisfied “in respect of articles of precious metals imported *from the territory of another Contracting State* if such articles have been controlled and marked in accordance with the provisions of this Convention.”(italics added). The obligation does not extend to articles imported from the territory of non-Convention countries, even if those articles bear a Convention mark applied by an assay office of a Convention State.

4. It is our view that this shows the purpose is to provide protection in respect of goods where the CCM is struck in a contracting State and goes no further than that.

Article 5

5. Article 5(1) states:

“1. Each Contracting State shall appoint one or more assay offices which shall be the only bodies *authorized in its territory* to carry out the control of precious metals provided for in this Convention and to apply its own appointed assay office mark and the Common control mark.” (italics added)

6. This Article contemplates that the system of marking under the Convention is territorial. Article 3(1)(a) requires that in order to benefit from Article 1, articles of precious metal must be “submitted to an authorized assay office appointed in accordance with Article 5”. Since the

authorisation of the assay office under Art.5(1) relates to the territory of the contracting State, it suggests that any activities of an assay office outside the territory of that State are not “authorized” activities in terms of the Convention. It is therefore hard to read Art. 3(1)(a) as extending to articles marked by an assay office of a contracting State outside of its own territory.

7. It is acknowledged that Article 5(1) does not explicitly say that assay offices can only operate for Convention purposes within the territory of their host State. However, the literal wording would for example prohibit the assay office of Contracting State A operating in the territory of contracting State B, because the assay offices of State B must by, the terms of Art. 5(1), be the only offices authorized to carry out control of precious metals and apply marks in the territory of State B. It is a rather puzzling result if the Convention permits the assay offices of contracting States to apply Convention marks in the territory of a third State, but prohibits them from doing so in another contracting State.

Article 8

8. Article 8 requires each Contracting State to have and maintain legislation prohibiting forgery or misuse of the Common Control Mark (CCM) and each contracting State undertakes to take action to institute proceedings where there is evidence of forgery/misuse. The purpose of this provision is to protect the integrity of the CCM. However, if the CCM is struck outside the jurisdiction of a contracting State, the ability of the contracting State to act effectively in relation to forgery or misuse of the CCM by persons other than the assay office is very restricted. Had it been contemplated that the CCM was to be struck in a territory other than that of a contracting State, we submit that further provisions would have been included to protect the integrity of the CCM. This article goes to show that the purpose of the Convention is to provide mutual recognition in respect of CCM's struck in contracting State only.

9. We recognise that the revised wording of the Convention (not yet ratified by all) omits the references to territory in article 1(1) and 5(1) and we accept that this leads to greater ambiguity in the text on this point. However, it is our view that extra-territorial marking would have been expressly dealt with in the Convention if contracting States were to be required to allow the goods into their territory without further compulsory testing.

Background to the Convention

10. The context in which the Convention was drafted also points to the conclusion that Convention marks cannot validly be applied to articles outside the territory of the contracting State that authorises the assay offices concerned. The Convention began life under the auspices of the European Free Trade Area (EFTA) as an initiative to liberalise the trade in article of precious metals between EFTA Countries. EFTA is a free trade area rather than a customs union. The structure of a free trade area is that free trading rules apply to goods that originate within contracting States, and not to goods which originate elsewhere and are merely imported through the territory of a contracting State.

11. Since the Convention was originally drafted under the auspices of EFTA, one would expect its primary focus to be assisting the free flow of goods within the free trade area, i.e. goods which originate within the contracting State as distinct from goods which are merely imported into one State from a third country. The Convention, in our view, does clearly cover the case where articles are imported into State A from a third country, are hallmarked within State A by

State A's assay office and then exported to contracting State B. There is no additional requirement that the articles must undergo a manufacturing operation in State A. However, there is no policy reason in the context of a free trade area to extend the protection of the Convention to articles which are both manufactured and hallmarked in a third State and imported to a contracting State or transit through a contracting State to another contracting State.

12. The fact that the Convention is silent on the issue of extra-territorial marking suggests that it cannot have been the intention of the contracting States to agree to the practice. In all other issues related to the control and marking of articles of precious metal - issues which at the time it was clearly considered important to cover, and which were clearly intended to be covered - the Convention and the supporting documents are explicit and, where necessary, detailed in their coverage. Indeed, there is no evidence to suggest that extra-territorial marking was an issue for the industry at all at the time of signing.

Additional Points

13. Another issue, which we think adds to the case for deciding that extra-territorial marking is not currently accounted for under the Convention, is the requirement that the Standing Committee should examine whether the arrangements, i.e. assay offices, of prospective new members comply with the conditions of the Convention. This in our view does not sit well with the notion of unilaterally dividing the assaying and marking processes between the contracting State and a third country. It is also not clear what would happen if the third country wanted to accede to the Convention.

14. It is clear from the report of the 5 April 2005 meeting of the Convention Standing Committee (PMC/SR 1/2005 p.7-8) that there was certainly no unanimity on the subject of extra-territorial marking and that the Standing Committee agreed that this question must be further scrutinised. In the absence of unanimity on interpretation of the provisions of the Convention, contracting States are obliged not to Act unilaterally in applying the Convention.

Conclusion

15. These considerations lead us to the irrevocable conclusion that extra-territorial marking is not permitted until such time, and if, the Standing Committee to the Convention explicitly agrees that such marking is permitted, and agrees the conditions under which such marking is permitted.

The Future

16. The possibility for, and desirability of, extra-territorial marking is a recent development and is an issue which carries with it significant risk to the guarantees currently provided by marking according to the Convention. It is an issue which demands detailed and considered debate by the Standing Committee which must, in our view, reach fresh, unanimous, agreement before Convention Marks can be struck outside of the home territory of any contracting State.

17. The UK recognises that there is a demand for local hallmarking from jewellery manufacturers based in the Far East, including a number of UK companies which have begun operations there. This demand described above, and the need for a suitable regime to enable contracting States to meet this demand were not foreseen, contemplated or discussed at the

time the Convention and the current amendments were drafted. The UK is willing to play a positive role in creating a regime for the recognition of marks struck extra-territorially, so that the demand can be met and adequate consumer protection assured.

18. We envisage that such a regime, established by agreement of the Convention members, would deal with key issues arising from sub Offices established in locations outside the home territory of the contracting State, especially provisions for:

- independence of the sub Office from the host manufacturer
- regimes for testing - location and method - and marking
- application of certification and accreditation regimes
- enforcement - inspections by local authorities under local law, and local law enforcement to deter fakes
- distinguishing marks for such sub Office operations if necessary.

19. The UK views the approach proposed above as providing a firm basis on which to recognise goods marked by member States in, and imported from, third countries. Such a basis does not currently exist.

Kevin Davis
Policy Manager
Department of Trade and Industry
United Kingdom
Kevin.davis@dti.gsi.gov.uk
44 (0)207 2150329

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