

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 352 final

Brussels, 16 December 1993

Proposal for a
COUNCIL DIRECTIVE

on fiscal marking of gas oils

(presented by the Commission)

EXPLANATORY MEMORANDUM

INTRODUCTION AND CONSIDERATIONS OF SUBSIDIARITY

Article 99 of the Treaty requires the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to adopt such provisions for the harmonizing of indirect taxes as are necessary to ensure the establishment and functioning of the internal market.

Amongst these measures is Council Directive 92/81/EEC on the harmonization of the structures of excise duties on mineral oils¹. Here, Article 9 directs the Council, again acting unanimously on the basis of a proposal from the Commission, to adopt Community rules for the colouring or the marking of those mineral oils which are subject to a reduced rate of duty.

It is therefore clear that Member States have recognized that a common framework is needed for the enforcement of fiscal law in this area and that action at a Community level is required. Fraudulent misuse of the products concerned can involve important revenue losses for national exchequers. The ending of controls at internal frontiers now means that purely domestic control systems are no longer adequate. The proposed Directive contains those measures which are considered essential to restrict the use of gas oil which has not paid the full rate of duty to those uses for which it is authorised.

BACKGROUND

The origin of the problem which this Proposal addresses, lies in the practice, common to most Member States, of taxing gas oil at rates of duty which differ according to end use.

This practice is reflected in Council Directive 92/82/EEC on the approximation of the rates of excise duties on mineral oils². For the purpose of the Directive, three end use categories are established - gas oil used as a propellant (generally referred to as diesel), gas oil used for certain defined industrial or commercial purposes and gas oil used for heating purposes. These minimum rates which Member States must respect (subject to certain transitional measures) are:

gas oil used as a propellant	245 ECU per 1,000 Lt.
industrial gas oil	18 ECU per 1,000 Lt
heating gas oil	18 ECU per 1,000 Lt

For CN classification purposes, each type of gas oil falls within code 2710 00 69. This reflects the fact that in practice, the three different categories can be considered as a single commodity. There are some small differences in detailed specification, but for most purposes the products can be regarded as interchangeable.

The comparatively high rate of duty on diesel is naturally reflected in a higher final price. To protect this important source of revenue, there are severe restrictions on the use of industrial or heating gas oil as a substitute for diesel. In most Member States, gas oil which has been subject to excise duty at other than the full diesel rate is dyed to a distinctive colour and contains one or more tracer agents. These marking systems provide an efficient and cost-effective method of dealing with fraudulent misuse.

¹ O.J. No. L316, p. 12 of 31.10.1992.

² O.J. No. L316, p. 19 of 31.10.1992

Marking systems have been developed independently in Member States to meet national requirements. The range of suitable products has increased in recent years and national administrations have from time to time sought to improve the level of control. As a result, the combination of dyes and tracers in different concentrations has produced a situation where there is now little compatibility between the various approaches to gas oil marking.

This was not of any great significance as long as fiscal controls existed on intra-Community borders and the misuse of gas oil was a purely domestic matter. Until 31 December 1992, the measures contained in Council Directive 68/297/EEC³ imposed a limit on the quantity of road fuel which could be carried in the tanks of vehicles between Member States without suffering duty - for lorries this was 200 litres. Such a restriction, when combined with traditional border controls, minimised the risks of marked gas oil being used in a jurisdiction other than that where it had been released for circulation.

With the abolition of border controls at the beginning of this year and the concurrent ending of the provisions on excise duties in Directive 68/297/EEC, there is an increased risk that marked gas oil will be transported from one Member State to another for fraudulent purposes. Because of the range of marking standards, no legal restriction exists within most national jurisdictions on the use of gas oil marked to a specification other than that of the Member State concerned. This is a unsatisfactory situation and there is already evidence of unscrupulous operators seeking to profit from the resultant uncertainty. It was certainly not the intention that the creation of the internal market should provide an impetus to fraud.

In the absence of appropriate measures, the level of revenue from excise duty on gas oil in each of the Member States would be at risk. It is accepted that existing national controls can no longer provide an adequate control on fraudulent misuse. The purpose of this Directive is to provide a Community system to combat such fraud.

TECHNICAL CONSIDERATIONS

There are two separate elements in the use of gas oil marking systems as an anti-fraud measure. Firstly, provision must be made for the addition of a marker (dye and tracer), usually under fiscal control, to gas oil which has not borne the full rate of excise duty. This must be linked to a satisfactory detection procedure which will aid the identification of fraud.

Since 1 January 1993, Member States can no longer depend on purely national measures with the same confidence as heretofore. A marker added in one jurisdiction must now be capable of being detected in another. The misuse of marked gas oil must be clearly identified as a breach of law in the Member State of detection, no matter where the marker has been added in the Community.

To take no action would serve only to facilitate fraud. This leaves two options to be considered - either to provide for mutual recognition (and enforcement) of the existing national systems or to adopt a common system for use throughout the Community.

The former poses immediate practical problems. An easily administered road-side test for disclosure purposes is a vital part of any marking system. Mutual recognition could entail having to use as many detection procedures as there are marking specifications. A multiplicity of test kits would be cumbersome and likely to hamper the enforcement process. The risk also exists that the application of certain chemicals in the detection procedure for one marker could eliminate or mask the presence of another marker in a subsequent test. Furthermore, a change in standards by one Member State would entail corresponding alterations in the detection procedure for the other eleven. Taken together, these drawbacks make such an approach impractical.

³O.J. No. L175, 25.7.1968, p.15; Directive as amended by Directive 85/347/EEC (O.J. No L183, 16.7.1985, p22) and by Directive 92/12/EEC (O.J. No L76, 9.1 of, 23.3.1992).

A common system to be used in all Member States would have none of these disadvantages. Adding a specified dye and tracer to all gas oils, apart from diesel, will allow for a single identification procedure to be used by revenue officials throughout the Community. The use of marked gas oil can then be regulated, irrespective of where the marker was first added.

The Commission is therefore proposing that Member States adopt a common marking standard for all gas oil which has been released for consumption within the Community having suffered a rate of duty other than the full rate applicable to diesel. The detection of the presence of this marker in gas oil in use in road vehicles (other than in certain limited and clearly defined circumstances) is to be subject to the rules of national fiscal law within the Member State concerned.

All Member States (with the current exception of Denmark) operate a marking system and will already have control and enforcement procedures in existence. The inclusion of the proposed community gas oil marker within these procedures therefore will not involve any fundamental change. In the case of Denmark, it will be necessary for the Authorities to take whatever unilateral measures they consider necessary to combat revenue losses arising from the misuse of gas oil.

The measure proposed will not conflict with existing national marking practices. To this end, it is considered important that the chemical or other processes used in the detection process should not interfere or mask other markers which are currently in use in Member States. It will however be a matter for the national authorities to determine whether the retention of a parallel national marking system can be justified, bearing in mind the obligation on Member States to ensure that such markings do not create obstacles to the free movement of products subject to excise duty.

SELECTION OF A COMMUNITY MARKER

It is necessary for practical reasons to distinguish between the principle of introducing a Community marker and the purely technical question of selecting a particular system. The Commission's proposal reflects this and places the obligation on Member States to apply the marker to those gas oils which have not borne the full rate of duty. The actual selection of the marking system together with the definition of common standards for its use and detection are matters which are appropriate to the Commission assisted by the Committee on Excise Duties set up under Directive 92/12/EEC⁴.

So as to ensure that it has all necessary information at its disposal, the Commission is asking suppliers of marking systems to put forward products which could be considered suitable for use as a Community marker system for gas oil. This invitation, which has been published separately in the Official Journal, is set out in the Annex 1.

The competent authorities in the Member States will then be able to consider and assess the various systems on offer and to determine their suitability. On the basis of this examination and acting in accordance with the provisions set out in Article 3 of this Directive, the Commission will adopt such measures as are necessary to implement a Community marking system in accordance with the terms of this Proposal.

The date of implementation of the proposed Directive is 30 June 1994. This will allow sufficient time for a rigorous assessment procedure as well as time to ensure a satisfactory supply of the system selected and for Member States to have the necessary implementation measures in place.

⁴ O.J. No. L76, p.1 of 23.3.1992.

**PROPOSAL FOR
COUNCIL DIRECTIVE
ON FISCAL MARKING OF GAS OILS**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 99 thereof,

Having regard to the proposal from the Commission,¹

Having regard to the Opinion of the European Parliament,²

Having regard to the Opinion of the Economic and Social Committee,³

Whereas the Community measures envisaged by this Directive are not only necessary but also indispensable for the attainment of the objectives of the internal market and whereas these objectives cannot be achieved by Member states individually and whereas furthermore their attainment at Community level is already provided for in Directive 92/81/EEC⁴ and in particular Article 9 thereof; and whereas in consequence this Directive conforms with the principle of subsidiarity;

Whereas Directive 92/82/EEC⁵ lays down provisions in respect of the minimum rates of excise duty applicable to certain mineral oils and in particular to the different categories of gas oil;

Whereas the proper functioning of the internal market now requires that common rules be established for fiscal marking of gas oil which has not borne duty at the full rate applicable to gas oil used as propellant;

Whereas Directive 92/12/EEC⁶ lays down provisions on the general arrangements for products subject to excise duty and in particular Article 24 thereof provides for the establishment of an Excise Committee which may examine matters concerning the application of Community provisions on excise duties;

Whereas it is appropriate for certain technical matters relating to the specification of products to be used for fiscal marking of gas oil should be dealt with under the provisions of this Article;

Whereas it is necessary that the rules laid down in this Directive and their application be reviewed periodically on the basis of a Commission report;

HAS ADOPTED THIS DIRECTIVE.

¹ O.J. No.....

² O.J. No

³ O.J. No

⁴ O.J. No. L316, p. 19 of 31.10.1992

⁵ O.J. No L 316, p. 19 of 31.10.1992

⁶ O.J. No. L76, p.1 of 23.03.1992

Article 1

Except where specifically provided for, Member states shall apply a fiscal marker in accordance with the provisions of this Directive to all gas oil falling within CN code 2710 00 69 which has been released for consumption as defined by Article 6 of Council Directive 92/12/EEC and which has been subject to excise duty at a rate other than the rate of duty applicable in Article 5.1 of Council Directive 92/82/EEC.

Article 2

The marker shall consist of a well defined combination of chemical additive to be added under fiscal supervision before the gas oil concerned is to be released for consumption.

The marker to be used shall be established in accordance with the procedure laid down in Article 3.

Article 3

The Commission shall be assisted by the committee, laid down in Article 24 of Council Directive 92/12/EEC of 25 February 1992, composed of the representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 4

Except as shall be otherwise permitted in Community law, any vessel, delivery pump or other container or outlet which contains any gas oil marked in accordance with this Directive shall be clearly identified to the effect that such gas oil is not to be used for combustion in the engine of a road going motor vehicle or kept in the fuel tank of such a vehicle.

Member States shall provide that the use of marked gas oil in such circumstances is to be considered as an offence under the national law of the Member State concerned. Each Member State shall take the measures required to give effect to all the provisions of this Directive and shall, in particular, determine the penalties to be imposed in the event of failure to comply with those measures; such penalties shall be commensurate with their purpose and shall have adequate deterrent effect.

Article 5

No person shall add to any mineral oil any marker other than those provided for in Community law or in the national law of Member States.

Article 6

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 1994.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The method of making such a reference shall be laid down by the Member State.

2. The Member States shall inform the Commission of the main provisions of national law which they adopt to comply with this Directive.

Article 7

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council
The President*

ISSN 0254-1475

COM(93) 352 final

DOCUMENTS

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06 12 09

Catalogue number : CB-CO-93-691-EN-C

ISBN 92-77-62581-3

Office for Official Publications of the European Communities
L-2985 Luxembourg