

EXPLANATORY MEMORANDUM TO
THE HYDROCARBON OIL (MARKING) (AMENDMENT) REGULATIONS 2007
2007 No. 1416

1. This explanatory memorandum has been prepared by the Commissioners for Her Majesty's Revenue and Customs and is laid before Parliament by Command of Her Majesty.

2. Description

These Regulations amend the Hydrocarbon Oil (Marking) Regulations 2002 (S.I. 2002/1773) ("the principal Regulations") so as to -

(a) prescribe a maximum marking level for the common fiscal marker (as defined in regulation 2(1) of the principal Regulations)("the Euromarker") which must be added to hydrocarbon oil if a rebate of duty is to be allowed on oil delivered for home use that is not intended for use as road fuel; and

(b) correct two drafting errors in the principal Regulations.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Background

4.1 Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene ¹ as transposed into UK law by the principal Regulations requires gas oil and kerosene that is not intended for use as road fuel to be marked with chemical markers and colouring substances as a condition of being allowed rebates of duty. A Transposition Note is annexed to this memorandum. Section 11 of the Hydrocarbon Oil Duties Act 1979 (c.5) provides for rebates to be allowed at the time of delivery for home use.

4.2. Commission Decision 2001/574/EC² established a common fiscal marker and set a minimum marking level of at least 6 mg of marker per litre of mineral oil. However, it was subsequently decided that a maximum level of 9mg of marker per litre of mineral oil should be fixed in order to counter a number of fraudulent uses of mineral oils. Commission Decision 2001/574/EC was therefore amended by Commission Decision 2003/900/EC³. This Decision permits Member States to fix a marking level of at least 6 mg per litre and no more than 9 mg per litre.

4.3. Provisions for minimum levels of taxation of energy products (including hydrocarbon oil), and provisions for exemption from, or reduction of, taxation of those

¹ OJ No L 291, 6.12.1995, p 46.

² OJ No L 203, 28.7.2001, p 20.

³ OJ No L 336, 23.12.2003, p 107.

products are to be found in Council Directives 95/60/EC and 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity⁴ known as the Energy Products Directive or EPD. Directive 95/60/EC was examined in 1994 by the Scrutiny Committee of the House of Commons and House of Lords and cleared as not legally or politically important. The EPD was considered by the House of Commons European Scrutiny Committee on 27 November 2002⁵ and cleared by sub-Committee A of the House of Lords Select Committee on the European Union by letter dated 5 December 2002 to Dawn Primarolo, Paymaster General, HM Treasury⁶.

4.4. The correction of the two drafting errors is necessary in order to make the principal Regulations operate as originally intended.

5. Extent

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Hydrocarbon Oil Duties Act 1979, Directive 95/60/EC and the principal Regulations seek to control the fraudulent misuse of hydrocarbon oil on which a rebate has been allowed by the addition of fiscal dyes and markers to assist detection of any such misuse; and to facilitate legal action against transgressors. These Regulations fix an upper limit for the Euromarker as required by Commission Decision 2001/574/EC (as amended). They also correct two drafting errors in the principal Regulations.

7.2 As this is the first time the principal Regulations have been amended, the Commissioners do not, at present, intend to consolidate the legislation.

8. Impact

8.1. A full Regulatory Impact Assessment has not been prepared for this instrument as no impact on the private or voluntary sectors is foreseen.

8.2. The impact on the public sector is negligible.

9. Contact

Charles Markuss at the Commissioners for Her Majesty's Revenue and Customs, Tel: 0161 827 0320 or e-mail: Charles.Markuss@hmrc.gsi.gov.uk can answer any queries regarding the instrument.

⁴ OJ No L283, 31.10.2003, p 51.

⁵ 2nd Report of Session 2002-03, HC 63-ii.

⁶ Progress of Scrutiny, First Report for Session 2002-03, 9 December 2002, ISBN 010 490192 6.

TRANSPOSITION NOTE**COUNCIL DIRECTIVE 95/60/EC ON FISCAL MARKING OF GAS OILS AND KEROSENE (OJ NO L 291, 6.12.1995, p 46) (“the Directive”)**

1. The Directive provides for common rules for the fiscal marking of gas oil and kerosene that have not borne excise duty at the full rate applicable to such oils when used as a propellant.
2. The Commissioners of Customs and Excise are responsible for implementation of the Directive.
3. All references in this Transposition Note to “the Act” are to the Hydrocarbon Oil Duties Act 1979 (c.5). All references to “the Regulations” are to the Hydrocarbon Oil (Marking) Regulations 2002 (S.I. 2002/1773) (as amended by the Hydrocarbon Oil (Marking)(Amendment) Regulations 2007 (S.I. 2007/1416)..

Table showing manner in which the Directive is being implemented

<u>ARTICLE</u>	<u>PURPOSE</u>	<u>IMPLEMENTATION</u>
1(1)	<p>To require member states to apply a common fiscal marker to gas oil and kerosene that have not borne duty at the rate applicable to road fuel.</p> <p>The common fiscal marker in question and the proportion in which it is to be used were identified following the procedure set out in Article 2 of the Directive and are specified in Commission Decision 2001/574/EC establishing a common fiscal marker for gas oils and kerosene (OJ No L 203, 28.7.2001, p.20) (as amended).</p>	<p>Regulation 3 of the Regulations prescribes the common fiscal marker in the required proportions for gas oil and kerosene.</p> <p>Regulation 4 imposes a requirement to add the common fiscal marker to oil as a condition of allowing rebates of duty on gas oil and kerosene, under sections 11(1)(b), (ba), (c) and 13AA(1) of the Act. Such rebates do not apply to oils that are to be used as fuel for a road vehicle: section 12(1) of the Act.</p> <p>Regulation 5 imposes the addition of the common fiscal marker as a condition of permitting gas oil and kerosene to be relieved of excise duty under section 9 of the Act. Relief under section 9 only applies to oil that is to be put to a “qualifying use”. “Qualifying use” does not include its use as fuel for any engine, motor or other machinery: section 9(2) of the Act.</p>
Article 1(2)	<p>To permit member states to allow exceptions to the application of the common fiscal marker on grounds of public health, or safety or for other technical reasons, provided they take appropriate fiscal supervision measures</p>	<p>Regulation 6 of the Regulations permits the Commissioners to waive the marking requirements imposed by regulations 4 and 5 where they are satisfied that it is necessary for technical reasons or for reasons of public health or safety.</p> <p>Appropriate fiscal supervision measures already exist.</p>

		<p>If a rebate is allowed on the delivery to home use of gas oil or kerosene, it must not be used as fuel for a road vehicle or taken into a road vehicle as fuel unless an amount equal to the amount of the rebate has been paid to the Commissioners: section 12(2) of the Act. A payment made for the purpose of section 12(2) is only effective if made by a “licensed user”: regulation 4 of the Hydrocarbon Oil (Payment of Rebates) Regulations 1996 (S.I. 1996/2313). A “licensed user” is licensed by the Commissioners.</p> <p>No person may mix any rebated gas oil or kerosene or any oil which has been delivered for home use without payment of duty with any oil on which no rebate has been allowed unless he has a licence from the Commissioners or approval from the Commissioners under the terms of the Hydrocarbon Oil (Mixing of Oils) Regulations 1985 (S.I. 1985/1450): regulation 43 of the Hydrocarbon Oil Regulations 1973 (S.I. 1973/1311). Approval may be subject to conditions, including the giving of security. Unapproved mixing of rebated oil gives rise to a charge to duty in the circumstances and at the rates set out in section 20AAA of, and Schedule 2A to, the Act.</p> <p>Those who receive oil relieved of duty under section 9 of the Act must be approved by the Commissioners. Such approval may be subject to conditions, including the giving of security: the Hydrocarbon Oil (Industrial Reliefs) Regulations 2002 (S.I. 2002/1471).</p>
<p>Article 2</p>	<p>To require the common fiscal marker to be added before oil is released for consumption, although Member States may permit marking to take place after release for consumption, under fiscal supervision.</p>	<p>Regulation 8 of the Regulations requires marking to take place before delivery for home use, except where regulations made by the Commissioners provide otherwise.</p>
<p>Article 3</p>	<p>To require member states to take the necessary steps to ensure that marked oil is not used improperly. In particular, to ensure that they cannot be used as fuel in a road vehicle unless such use is permitted in</p>	<p>Existing provisions are sufficient.</p> <p><u>Misuse of oil relieved of duty under section 9 of the Act</u></p> <p>Section 10(1) of the Act imposes restrictions</p>

	<p>specific cases. Such improper use to be an offence and member states must determine the penalties to be imposed in the event of failure to comply with the measures.</p>	<p>on the use of oil that has been relieved of duty under section 9. Such oil must not be put to a use not qualifying for relief under that section or be acquired or taken into any vehicle, appliance or storage tank in order to be put to such use, except with the consent of the Commissioners.</p> <p>Section 10(3) and (4) imposes liability to a penalty under section 9 of the Finance Act 1994 (c. 9) if the provisions of section 10(1) are contravened in the circumstances set out in those subsections. Section 10(5) and (6) creates an offence if the provisions of section 10(1) are contravened in the circumstances there set out.</p> <p>Section 10(9) provides that any oil that has been acquired, taken into a vehicle, appliance or storage tank or supplied as mentioned in subsection (4) or (5) is liable to forfeiture. Accordingly, the vehicle is also liable to forfeiture: section 141(1)(a) of the Customs and Excise Management Act 1979 (c.2) (“CEMA”). Both the oil and the vehicle may be seized: section 139(1) of CEMA.</p> <p><u>Misuse of rebated oil</u></p> <p>Section 13(1) of the Act imposes liability to a penalty under section 9 of the Finance Act 1994 where any person uses heavy oil in contravention of section 12(2) of the Act or is liable for heavy oil being taken into a road vehicle in contravention of that subsection.</p> <p>Section 13(2) imposes liability to a penalty under section 9 of the Finance Act 1994 where any person supplies heavy oil in circumstances where he has reason to believe that it will be put to a particular use and that use would contravene section 12(2).</p> <p>Section 13(3) creates an offence where a person uses heavy oil or supplies heavy oil in the circumstances set out in that subsection with the intent that the restrictions imposed by section 12(2) should be contravened.</p> <p>Section 13(4) creates an offence where any person is liable for heavy oil being taken into a road vehicle in the circumstances set out in</p>
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	<p>that subsection where the oil was taken in with the intent that the restrictions imposed by section 12(2) should be contravened.</p> <p>Section 13(6) provides for forfeiture of oil taken into a road vehicle as mentioned in section 12(2), supplied as mentioned in section 13(2) or (3) or taken as fuel into a vehicle which subsequently becomes a road vehicle. Accordingly, the vehicle is also liable to forfeiture: section 141(1)(a) of CEMA. Both the vehicle and the oil may be seized: section 139(1) of CEMA.</p> <p><u>Misuse of marked oil</u></p> <p>Section 24A(1) prohibits the use of marked oil as fuel for a road vehicle. “Marked oil” means any hydrocarbon oil in which a marker is present which is designated by regulations made by the Commissioners as used for identifying oil that is not to be used as fuel for road vehicles: section 24A(2) and (3). Regulation 19 of the Regulations amends the Hydrocarbon Oil (Designated Markers) Regulations 1996 (S.I. 1996/1251) to designate the common fiscal marker as one such marker.</p> <p>Section 24A(5) imposes liability to a penalty for use of marked oil in contravention of section 24A(1). Section 24A(6) creates an offence where marked oil is used in contravention of section 24A(1) in the circumstances set out in subsection (6).</p> <p>Section 24A(7) provides that marked oil in a road vehicle as part of the fuel supply for the engine that propels the vehicle is liable to forfeiture. Accordingly, the vehicle is liable to forfeiture: section 141(1) of CEMA and both the oil and the vehicle may be seized: section 139(1) of CEMA.</p> <p><u>Requirements as to the proper application, storage etc of markers and marked oil and penalty for breach of, or failure to comply with, such requirements</u></p> <p>Regulations 8, 10, 11, 12 and 13 of the Regulations impose obligations as to the</p>
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		<p>proper application of markers, their storage, the storage of marked oil, the labelling of delivery points and the particulars to be recorded on delivery notes.</p> <p>Regulations 14, 15, 16 and 17 of the Regulations prohibit various activities in relation to markers and marked oil. They prohibit marking except as prescribed by the Regulations, the removal of markers from oil, the addition of any substance calculated to impede the identification of any marker and the importation of any oil containing such a substance, the addition of any other marker apart from those prescribed by the Regulations and the selling of dark oil as fuel for a heavy oil vehicle.</p> <p>Section 24(4) of the Act provides that where any person contravenes or fails to comply with any regulation made under that section, that contravention or failure to comply shall attract a penalty under section 9 of the Finance Act 1994. Regulation 15(2) provides for a penalty where a contravention of regulation 15.</p>
Article 4	<p>To permit Member States to add a national marker or colour in addition to the common fiscal marker.</p> <p>To prevent any person from adding any marker or colour other than those provided for in Community or national law</p>	<p>The UK has taken advantage of this: regulation 3 of the Regulations.</p> <p>Regulation 15 of the Regulations prohibits the addition of any chemical identifier or dye other than a marker to marked oil and provides for a penalty under section 9 of the Finance Act 1994 and for forfeiture of the oil.</p>

New King's Beam House
22 Upper Ground
London
SE1 9PJ
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