

## Gus Lewis comments on red diesel battle

There are two principal elements to the issue of red diesel and EU law: firstly, whether the continued availability of marked diesel in the UK for use in private pleasure craft complies with the EU Energy Products Directive and the EU Marking Directive and, secondly, whether it is lawful for member states to penalise individual yachtsmen for having marked diesel in their yachts' fuel tanks.

On the first element, we have sought specialist taxation law advice and we have been advised that the continued availability of marked diesel in the UK for use in private pleasure craft does not infringe either the EU Energy Products Directive or the EU Marking Directive. We understand that Mr Andrew Duff MEP has expressed the view that the UK is in breach of the EU Marking Directive but he appears to have based his view on the correspondence he has received from the European Commission rather than conducting his own independent analysis of the relevant Directives.

The specific issue relating to the EU Marking Directive (on the fiscal marking of gas oils and kerosene) turns on Article 3 of that Directive, which provides that "Member States shall take the necessary steps to ensure that improper use of the marked products is avoided". Article 3 goes on to suggest that the use of marked fuel for "combustion in the engine of a road-going motor vehicle" is to be regarded as "improper use" but no mention is made of use in private pleasure craft.

The key question is therefore whether the use of duty-paid marked diesel for propelling private pleasure craft amounts to "improper use" for the purposes of the Directive. The UK and Irish Governments take the view that the use of duty-paid marked diesel for propelling private pleasure craft does not amount to "improper use" (and there is no jurisprudence to the contrary) whereas the Belgian Government and individuals within the European Commission take the view that it does.

However, interpretation of EU Directives is the responsibility of the European Court of Justice, not the Commission, and it is certainly not the case that the European Court always supports the Commission's view. As such, the Belgian Government and the European Commission simply reiterating their view does not serve to give that view any greater validity and the only way in which this question can be answered conclusively is for the matter to be referred to the European Court of Justice. The European Commission has taken the first steps towards such a referral by indicating that it intends to take infraction proceedings against the UK.

On the second element, my understanding is that the Belgian Government made it illegal to use marked diesel in private pleasure craft in Belgian waters shortly after the Belgian derogation from the Energy Products Directive expired in December 2006. However, there are a number of circumstances under EU law (including the Energy Products Directive itself) and international law (such as the 1990 Istanbul Convention on Temporary Admission) in which the main fuel tanks of a private pleasure craft navigating in Community waters might legitimately contain marked diesel. We have again sought specialist legal advice and we have been advised that the penalisation of individual yachtsmen for the mere presence of marked fuel in a pleasure craft's fuel tanks is contrary to the basic principles of EU law. This advice is consistent with the letter from the European Commission available on our website and this issue is not, as

far as we are aware, the subject of the European Commission's infringement proceedings against the UK (the details of these proceedings being confidential between the Commission and the UK Government).

The RYA continues to lobby the European Commission and the Belgian Finance Ministry, both directly and through the European Boating Association. We are also working with colleagues in the Royal Belgian Yachting Federation, who are similarly lobbying their Government (the Belgian authorities are penalising Belgian yachtsmen who take on marked diesel perfectly legitimately outside the EU, such as in the US, the Channel Islands or Norway). In addition, the RYA is supporting the UK Government's opposition to the European Commission's infraction proceedings. However, infraction proceedings can be protracted so, in the meantime, we are working with the UK Government to explore ways in which the Belgian Government might be persuaded not to penalise UK yachtsmen visiting Belgium for the mere presence of marked diesel in their yachts' fuel tanks.

Stuart Carruthers commented:

Noting Gus's reply there is a considerable amount on this on the RYA web site at: <http://www.rya.org.uk/infoadvice/boatingabroad/Pages/reddieselabroad.aspx> which might make useful reading in the meantime and hopefully shows that the RYA has been fully engaged with this particular problem.

The Belgians are simply stating their national interpretation of the EU Directive as they see it, which is the basis for this particular problem in the first instance. As the Belgian response correctly states, this issue is about the use of dyed (red) diesel in boats, not the tax applied since the ending of derogation. The much quoted infringement proceedings concerns the marking of fuel not the tax paid on it.

The Commission would appear to agree with the Belgian position and is of the opinion that the European system of marking has been applied incorrectly and is therefore commencing infringement proceedings against the UK as a consequence. The RYA acknowledges that Article 3 of the Marking Directive requires member states to take the necessary steps to ensure that improper use of the marked products is avoided and, in particular, that the mineral oils in question cannot be used for combustion in the engine of a road-going motor vehicle or kept in its fuel tank.

Although the Marking Directive requires member states to mark fuel that is subjected to a rebated rate of duty, the Marking Directive does not prohibit member states from permitting the use of a marker in fuel that is duty paid at the full rate. While Article 3 specifically requires member states to prohibit marked fuel from being used in road vehicles, no such mention is made of private pleasure craft.

Gus has stated to the EU Commission that in the RYA's view, there appears to be confusion in the Commission's mind between supply and consumption. Whether or not the continued supply of marked diesel in the UK for propelling private pleasure craft is consistent with the provisions of the Marking Directive is a matter between the Commission and the UK Government, which we trust will be resolved one way or another as a result of the infringement proceedings. However, given that there are a number of circumstances under EU and international regulation in which the main

fuel tanks in a private pleasure craft in the EU might legitimately contain marked diesel, we consider the penalisation of yachtsmen for the mere presence of marked fuel in a pleasure craft's fuel tanks to be iniquitous and contrary to the basic principles of EU law.