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The Inspections carried out by Customs and Tax Authorities on board of Superyachts: powers of Customs Authorities and Owner's legal recourse against intrusive inspections

I. INSPECTION BODIES

The Italian authorities that have powers to perform inspections on yachts sailing in the Italian territorial sea are military corps (*Carabinieri, Polizia, Guardia di Finanza, Guardia Costiera*) or administrative entities that are entitled to inspect and verify the compliance of a yacht with Italian laws as well as with international regulations.

The following are the main bodies entitled to perform controls on yachts sailing in Italy:

Guardia Costiera is a military organization that is part of the Italian Navy (*Marina Militare*) and that supervises on the "civil use" of the sea. The tasks of the *Guardia Costiera* include the protection of those who are on board of vessels at sea, navigation and transportation safety, environmental protection, supervision on fishing activities, inspections on commercial or pleasure vessels, including those on yachts. *Guardia Costiera* offices are located at the *Capitaneria di Porto* (Harbour Master) that is an organization based in most Italian ports.

The control of crimes committed on board of vessels, including

Main contacts:

Gianfranco Puopolo

Head of Yacht Team

E: g.puopolo@palegal.it

Milan

Via Sant' Andrea, 3

20121 Milan

tel: +39 02 760 13359

fax: +39 02 760 27478

Rome

Via Ombrone, 14

00198 Rome

tel: +39 06 884 1535

fax: +39 06 884 2094

**Also in Naples and
Genoa**





on illegal immigration into the Italian territory, is assigned to special units of *Polizia di Stato* (the State Police which is a paramilitary organization that is part of the Ministry of the Interiors) and to the *Unità Navali* of the *Carabinieri* (a military body that the Ministry of Defence oversees). Such special units of the *Polizia di Stato* and *Carabinieri* are often involved in on board inspections of yachts, mainly to assure the enforcement of the law and public order.

Guardia di Finanza is the main authority that has broad powers in relation to the compliance of yachts with customs and tax matters. *Guardia di Finanza* has established certain operational units that are dedicated to controls and inspections on yachts sailing in Italian waters or at anchor in Italian bays or moored in Italian ports. Such special units are called *Sezioni Operative Navali* and are based in areas of particular importance for the navigation. For example, one very well-known *Sezione Operativa Navale* is the one based on the island La Maddalena. Such Operational Naval Unit has “jurisdiction” or inspection powers on vessels that sail or stay in the North Sardinian sea, particularly with regards to places such as Porto Cervo, Cala di Volpe that are very well known to captains and yacht owners. Other *Sezioni Operative Navali* are based in the main Italian ports and may have secondary offices in certain locations (i.e., Capri, Ischia, Rapallo etc).

II. WHAT IS CONTROLLED

Routine inspections by *Guardia di Finanza* are controls that – in principle – may (and should) be limited to verifying the documents at the captain's disposal such as (by mere way of example):

- Certificate of registration of the yacht;
- Data concerning the owner of the yacht, whether a natural person or a company;
- Documents concerning the captain, such as the captain's recruitment and appointment documents, the captain's licenses or certificates;
- Documents supporting the presence of any crew on board, such as employment contracts;
- fiscal documents regarding the yacht's operations



(commercial utilization);

- customs documents (such as T2L or T2LF) proving that the vessel has been duly imported in the EU and that it is admitted for free circulation in the European customs area;
- VAT certificate or VAT status of the yacht (if the yacht is in temporary admission and how long can she stay in the European customs area);
- documents supporting the presence of persons on board (lease, guests, etc., depending on the fiscal regime of the yacht, i.e. commercial or personal utilization);
- documents concerning the VAT exemption on the purchase of fuel or supplies, if the vessel is operated for commercial purposes.

Such inspections rarely go beyond the above documents. Therefore, it is usually sufficient to prepare comprehensive and adequate documentation to satisfy the requests of the officials who are performing the controls.

If the captain is duly instructed, controls should be swift and limited to such documents. In our view, the captain of the vessel and/or the organization entrusted with the management of the vessel (especially in the case of charter yachts) should be as cooperative as possible during inspections in order to prevent more intrusive controls and the extension of the duration of the on board inspection.

However, the *Guardia di Finanza* may decide to conduct more thorough inspections if they suspect that the yacht owner or captain is violating other laws, such as provisions regulating the transport of works of art, cash on board, weapons etc.

In such cases, inspections may take longer and can be rather intrusive. Inspections in relation to weapons or works of art can be carried out also by the special units of the *Polizia di Stato* and/or *Carabinieri*.



i. Supplies/Fuel

According to Article 252 et seq. of the *Testo Unico delle Leggi Doganali* (Consolidated Text on Customs Laws - "TULD"), the vessel may transport on board supplies required for the normal operation of the vessel.

For customs purposes, supplies on board may include any consumer products necessary to ensure:

- the satisfaction of the passengers' and crew's primary needs;
- the proper supply and functioning of the propulsion system and other on-board machineries;
- the maintenance and the repair of the vessel, including the related equipment;
- the processing, preservation and packaging of the transported goods.

The consummation on board of the above supplies on board a vessel flying the flag of a non-EU Countries may benefit from the exemption from customs duties during the stationing period of the vessel.

However, it is necessary to point out that, according to Italian laws and regulations (inter alia, Legislative Decree 504/95, Ministerial Decree 577/95 and Ministerial Decree 225/15, Revenue Agency Decision no. 10/D of 2014), the fuel used by a vessel with commercial use cannot benefit from the exemption of customs duties if the vessel is sailing under the temporary admission regime.

ii. Transport of Cash or Cash on Board

With regard to the transport of cash in Italian waters, reference must be made to the Italian Legislative Decree no. 195/2009 as amended by Italian Law Decree no. 16/2016.

Pursuant to the above Decree any person who enters in Italy carrying cash for an amount equal or greater than Euro 10.000 shall provide a declaration to the Customs Authority.

This declaration may be provided:

- Electronically, in advance of a border crossing;



- In writing, at the border crossing point. In this case the Customs Authority shall issue a receipt which the interested person shall keep.

Pursuant to Article 4 of Legislative Decree no. 195/2008, both Customs and the *Guardia di Finanza* are entitled to verify the possible infringement of the above provisions.

In essence this means that if a person on board of a vessel carries an amount lower or equal to Euro 10.000 no customs declaration is required. If the amount is greater, the declaration is required. The Euro 10.000 threshold is to be considered per person and not aggregate.

In case of infringement, Customs or the *Guardia di Finanza*, shall deliver a copy of the minutes containing the alleged violation, the seizure and the representations of the controlled person to the latter.

In case of infringement, a monetary sanction shall be imposed for an amount:

- From 10% to 30% of the cash exceeding the amount of Euro 10.000, if the entire amount owned is less than Euro 20.000;
- From 30 to 50% of the cash exceeding the amount of Euro 10.000, if the entire amount owned is more than Euro 20.000.

The minimum sanction imposed shall be equal to an amount of Euro 300.

Infringement also allows the seizure of an amount up to:

- 30% of the cash exceeding the amount of Euro 10.000, if the entire amount owned is less than Euro 20.000;
- 50% of the cash exceeding the amount of Euro 10.000, in all other cases.

The controlled person may be entitled to pay a reduced sanction (5% of the cash owned exceeding the amount of Euro 10.000, if the entire amount is less than Euro 20.000; 15% of the cash exceeding the amount of Euro 10.000, if the entire amount owned is less than Euro 50.000) under the following condition:

- Payment shall be made at the time of the inspection or within ten days;
- The cash exceeding the amount of Euro 10.000 is less than



- Euro 40.000;
- The controlled person has not been admitted to the reduced payment for an infringement of the same type in the last five years.

iii. Transport of art works

The circulation of works of art between among countries is allowed only if it complies with the relevant laws of the State of provenance of the goods (pursuant to, *inter alia*, Article 1 of Directive 93/7/CEE, Chapter 1 of UNIDROIT Convention, Articles 3 and 4 of UNESCO Convention).

Hence, Italian Authorities may request evidence of the lawful provenance of the goods and verify all documents relevant for this purpose (for example, *inter alia*, the original purchase invoice, record of auction sale, deed of sale, any documents/authorization required by the State of provenance of the goods to allow the exit of cultural goods from this State) in order to fight the illicit traffic of works of art.

It is important to bear in mind that under Italian Criminal law, the illegal import of works of art, or rendering false representations to the authorities, is a serious crime.

In light of the above, if the works of art comply with the State of provenance requirements, no authorization is required for the transit in Italian waters.

However, according to Italian case law and practice, works of art that transit in the Italian territory are subject to the Italian laws on the protection of cultural items (*beni culturali*) (see, *inter alia*, Decision of the Ministry for Cultural Heritage no.5071/2009).

The application of Italian law may have significant consequences for the owner (for example, a possible re-export prohibition issued by the Ministry after the control on board).

The "temporary admission regime" for works of art is provided for, *inter alia*, Article 72 of Legislative Decree no. 42/04 (the "Code of Cultural Goods" – *Codice dei Beni Culturali*). Under the temporary admission regime, the law of the country of provenance may continue to apply to the goods although they



are in the Italian territory provided that the owner offers evidence of the lawful provenance and export of the goods through official documents, as required by the State of origin.

Nevertheless, the goods shall be subject to customs controls in Italy provided by, inter alia, Articles 160 et seq. of Italian regulation no.363/1913. Moreover, the owner shall file a request to obtain application of the temporary admission regime according to the Article 170 of the above regulation.

The certificate of temporary admission issued by the Exportation Office at the end of the above proceedings, has a validity of five years.

iv. Transport of weapons

Italian law allows ships, as defined under the Italian Navigation Code, to carry arms for defence purposes. A yacht over 24 meters, whether operated commercially or as a private vessel, qualifies as a ship under the Navigation Code and as such, it would be possible to carry arms on board or equip the yacht with defence arms. Under Italian law, arms are all the weapons that may harm a person with the exclusion of war weapons.

The captain and/or the owner of the yacht flying a foreign flag (i.e., non Italian registered yacht) must file an application for authorization to carry arms on board with the local *Prefettura* (i.e., the Police Authorities) of the first port of arrival of the vessel. The application shall contain, inter alia, the following information:

- 1) The personal data of the vessel owner. If the case the owner is a company, it may be necessary to provide information on the directors of the company owning the vessel. It may not be excluded that the Police Authorities may request the yacht's ultimate beneficial owner's data;
- 2) name of the vessel;
- 3) last port of departure before arrival to Italy;
- 4) date of arrival to Italy;
- 5) list of other Italian ports that may be visited by the vessel with scheduled dates of arrival. Indication of whether instead the vessel shall leave Italy after visiting the port of arrival and indication of destination abroad;
- 6) type of arms;
- 7) registration numbers of the arms;



- 8) exact number of ammunition for each arm;
- 9) all data concerning the vessel (ownership, flag, Register) with copy of related documents.

The application shall be filed only once one week before the scheduled date of arrival to the first Italian port and it is effective for the whole period the vessel is in the Italian territorial waters.

The request may be filed also through a maritime or customs agent operating in Italy. Upon departure from the Italian territory for a destination abroad, the authorization issued by the *Prefettura* shall be delivered back to the border police of the last Italian port visited by the vessel.

The arms carried on board that have received the *Prefettura's* authorization of the cannot be carried on shore and must be kept in a safe and isolated place on board at all times under the custody and liability of the Captain of the vessel.

The Italian Police authorities are authorized to perform inspections on board of the vessel to ensure that the law provisions regulating the carrying and storage of arms on board are fully complied with.

III. INSPECTION POWERS OF THE ITALIAN AUTHORITIES

Generally speaking, tax assessment activities are performed in accordance with the provisions of Article 52 of Presidential Decree no. 633 of 26/10/1972 as amended and supplemented (with respect to VAT), and Article 33 of Presidential Decree no. 600 of 29 September 1973 that confers upon the *Guardia di Finanza* the power to have access, conduct inspections, verifications, searches and any other checks that may be deemed necessary.

As the case may be, such inspection power may be subject to progressively increasing limitations.

Precisely, it should be noted that any inspection must be preceded by a motivated measure and it is usually limited to the request to exhibit documents that are relevant for the inspection.

Personal searches or the forced opening of sealed envelopes,



bags, safes and locked closets are possible only upon the Public Prosecutor's additional and specific authorization.

i. Powers of inspection of the Italian customs authority

Inspections of foreign flagged yachts sailing in EU waters must be for customs purposes.

In such a context, Articles 15 and 51 of the new Uniformed Customs Code ("UCC") – that entered into force as of 1 May 2016 – establish the general powers vested upon the customs authorities and the obligations of the party subject to the assessment.

With specific reference to the case at hand:

- Article 15 of the UCC obliges the interested party to provide at the request of the customs authorities "all the required documents and information, in an appropriate form, and all assistance necessary for the completion of those formalities or controls";
- Article 51 of the UCC obliges the person concerned to keep the above documents and information for a period of **three years from the date of the control**.

As far as the search powers of the *Guardia di Finanza* within domestic territorial waters are concerned, reference must be made to the TULD.

Specifically, Chapter I, Section III of the TULD grants customs officers the power to inspect means of transportation and baggage within the customs area (Article 19).

Such inspections are compared to the so-called inspections "*in itinere*" and Article 20 bis of the TULD provides that:

"In order to assure compliance with the rules on customs and currency matters also outside of customs areas, the provisions under Articles 19 and 20 above apply against persons, their baggage and means of transportation that cross the land borders of the Republic as well as against vessels and aircrafts, their crew and passengers and their baggage when there are reasons to believe that the said vessels or aircrafts are leaving for abroad or arriving from abroad. In such cases, customs officers are replaced by the tax police."



In these cases, the Guardia di Finanza is vested with broader operational powers.

As a matter of fact, Article 19 of the TULD provides that:

“Whenever there are grounded suspects of irregularities, the above means of transportation may also undergo accurate technical inspections and controls to discover any concealed goods”.

Instead, Article 20 of the TULD that deals with personal inspections provides that:

“In order to assure compliance with the laws on customs matters and with other laws customs must apply, customs officers may request persons that circulate within customs areas for any reason whatsoever to exhibit the goods and currency carried by the person. In case of refusal and if there are grounded suspects, the chief of the service may, by way of a motivated measure in writing, conduct a personal search over the interested persons. A report of the search must be drafted and transmitted, along with the measure, to the competent Public Prosecutor within forty-eight hours. If the Public Prosecutor finds the provision to be lawful, it is validated within the following forty-eight hours.”

Therefore, if access on board is justified to “assure compliance with the laws on customs and currency matters”, the tax police's search powers are particularly broad and there appear to be no limitations to accessing the yacht or any of its locked closets or premises. Instead, in case of a refusal, personal inspections may occur only upon a duly motivated measure in writing.

In particular, pursuant to Article 324 of the TULD, customs officers are compared to of criminal police officers while conducting a search in order to assure compliance with the laws on customs matters and with other laws customs must apply. Hence, the provision of the Italian Code of Criminal Procedure shall be applied with regards to personal inspection matters.

According to Article 249 of the Italian Code of Criminal Procedure, before the performance of any personal inspection a copy of a duly motivated decision shall be delivered to the



person subject to such inspection, and the Italian Authority shall inform such person of his right to be assisted by a lawyer, as long as he can be easily contacted.

Inspections carried out in the absence of the above requirement shall be considered unlawful and null and no elements found during such inspections may be used in a potential criminal proceeding against the person subject to the inspection.

This is particularly relevant in relation to cash on board that is an issue when the sums exceed the thresholds set forth by Italian law (currently euro 10.000 per person) and such cash has not been duly declared to the Italian customs.

The same applies to goods, including items such as works of art or weapons, that are carried on board and that are subject to specific declarations to or approvals by the Italian authorities.

ii. Typical steps of an inspection

Generally and broadly, on board inspections by the *Guardia di Finanza* are carried out according to the following principal steps:

- **Initial boarding:** in this initial phase, the *Guardia di Finanza* controls, in principle, the documents at the captain's disposal; the control procedure may stop at this stage or may continue for a more accurate verification;
- **Additional controls:** as already pointed out, the *Guardia di Finanza* is vested with broader operational powers in order to assure compliance with the rules on customs and currency matters; in such context, the *Guardia di Finanza* may control vessels, baggage, and passengers when there are reasons to believe that vessels are arriving from abroad. The control proceedings are not required to be completed within any specific time frame. However they shall be carried out in compliance with the individuals rights (dignity) and the minimal possible restriction of the freedom of the person(s) on board during such controls;
- **Personal inspections:** In case of suspected irregularities, personal inspections may be carried out according to the procedure described above upon the issuance of a motivated measure in writing;
- **Drafting and delivery of the minutes:** the minutes of access shall contain a detailed description of the verification



activities carried out on board as well as the representations of the controlled person(s) is any. The minutes shall be signed by the controlled person(s) and by the officers.

If the inspection was performed outside of the customs area, the minutes showing the violation shall be transmitted to the Customs Authority responsible for that territory.

It is important to underline that, according to recent Italian case law, for each territory there is only one Customs Office which has customs jurisdiction; hence any sanction imposed by any different Customs Office is null and void.

Once the inspection is concluded and the minutes of the operations are signed, it is possible to provide additional clarifications or documentation, as may be required.

On the basis of the provisions of the applicable EEC regulation, the *Guardia di Finanza* is entitled to perform **post inspection controls** by contacting directly the equivalent tax authorities of the vessel's country of registration. Among EU countries, customs authorities cooperate on a regular basis also to control the VAT status of vessels, application of importation procedures, payment of duties etc.



Milan

Via Sant' Andrea, 3
20121 Milan
tel: +39 02 760 13359
fax: +39 02 760 27478

Rome

Via Ombrone, 14
00198 Rome
tel: +39 06 884 1535
fax: +39 06 884 2094

Also in Naples and Genoa



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