

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY THE CONNÉTABLE OF GROUVILLE
ANSWER TO BE TABLED ON TUESDAY 12th APRIL 2016**

Question

Could H.M. Attorney General advise the Assembly under what circumstances it is proportionate and human rights compliant to require users of red diesel to sign a document that gives customs officers the right to make random, un-announced visits on property that could be part of a user's home, given that there is little or no evidence that abuse of the red diesel tax free concession has been taking place?

Answer

Diesel ordinarily attracts duty under the Customs (Jersey) Law 1999, but by an Order made under Article 41 of that Law, seven million litres of fuel are supplied duty free for agriculture, construction, aircraft marine and other prescribed uses.

Paragraph 9(3) of the Excise Duty (Relief and Drawback) (Jersey) Order provides for the Agent D'Impots to give directions for the administration of the relief. The question relates to a compliance measure ("the document") introduced in December 2015 by the Customs and Immigration Service under that power. The measure follows a 2015 review of the administration of red diesel. Previously, the only compliance measure was to make random roadside checks – set out in the answer of the Minister for Home Affairs to a written question tabled by the Connétable of Grouville on 8th March 2016.

When considering the proportionality of the measure and the extent to which it affects the privacy rights of individuals, it must be stressed that signing the document is voluntary. Red diesel may be obtained directly from seven approved garages in Jersey. Agreeing to the document enables end users to receive large supplies which can be stockpiled. In return for being permitted to receive such substantial supplies, the end user must agree to compliance measures.

It is difficult to see how such a voluntary measure can be a violation of the human right of privacy.

The relevant part of the document that the question refers to is this:

*"In order to benefit from the relief of excise duty on hydrocarbon oil the 'End User' must abide by the following **TERMS AND CONDITIONS**;...*

7. To agree as a condition of this relief, that Customs Officers will be granted access to properties where duty free fuel is stored to take samples of the contents of any drum, storage tank or other container or the fuel tank of any vehicle or appliance belonging to the End User or their business in order to determine whether or not there has been a contravention of, or failure to comply with, any provision of Part 2 of the Excise Duty (Relief and Drawback) (Jersey) Order 2000 or any contravention of, or failure to comply with, the Terms and Conditions.

NB: Article 52 (1) (C) of the Customs and Excise (Jersey) Law 1999 relates to the power to search vehicles or vessels and allows officers to search any vehicle, regardless of its owner, on the premises of an End User if they have reasonable grounds to suspect an offence has been committed."

The Terms and Conditions add a measure which is targeted to the specific area where non-compliance is most likely to be detected, that is, where the fuel is stored in large quantities.

Human rights and proportionality

Even if the voluntary nature of the agreement is not immediately fatal to human rights claims, taking a sample from a petrol tank targeted at end user premises involves a low level of invasion of privacy rights under Article 8 of the European Convention. As such, a court would give a broad margin of discretion to Customs and Immigration as to whether the measure is proportionate and thus a justified restriction on privacy.

The only suggestion that the measure is disproportionate is that, because there is “little or no evidence” of non-compliance, either: (a) there is no legitimate end in terms of securing compliance as compliance is already secure; or (b) the measure fails to strike a fair balance as it authorises searches but brings no advantage.

However, the margin of discretion given by human rights law is such that it is difficult to see a court disagreeing with the professional judgment of an enforcement agency that the detection of existing non-compliance, or the deterrence of future non-compliance, would be best served if the receipt of large quantities of fuel were made contingent on agreeing to random sampling where the fuel is held. It may be that there is “little or no evidence” of current abuse because the present random roadside measures are inadequate.

Even if there is in fact no current abuse, the potential for abuse is well known from the United Kingdom, and it is most unlikely that a court would condemn a measure on the basis that it is not justifiable to act before a foreseeable risk becomes a reality. These are matters on which a court, in the language of human rights jurisprudence, would apply a “broad margin of discretion” and “defer” to the judgment of the enforcement authority.