

The Superyacht Captains Report

187
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FLEET

63.5 HOURS

Average weekly hours of rest for chefs

71.8 HOURS

Average weekly hours of rest for engineers

TECHNOLOGY

The latest in radar tech and whether IMO regulations are a handbrake on the technological development of radar for superyachts.

DESIGN

We evaluate how the design of the mooring deck has such a profound effect on crew safety.

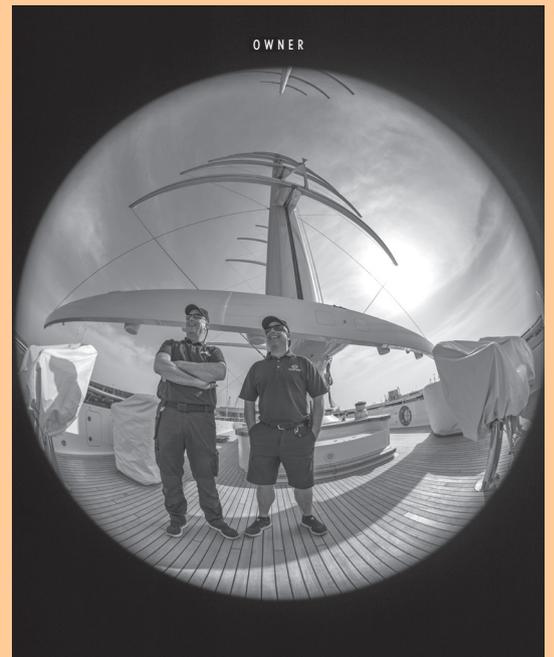
BUSINESS

Does a prestigious career at sea maketh the manager, and should it be a prerequisite when appointing one? *TSR* speaks to those who have made a success of the transition ashore.

OPERATIONS

“The captain is responsible for the safety and well-being of the vessel and guests on board, so it is highly advisable to respect their authority and recommendations from both a safety and enjoyment standpoint.”

OWNER



BUYER

“When you look at the amount of investment required nowadays to keep up with compliance and digital developments, it’s hard to see how the mid-sized companies will survive.”

Ocean Independence managing partner Peter Hürzeler dissects brokerage business models

Following our evaluation of leasing structure legitimacy in issue 185, we invited Alison Vassallo, partner at Maltese law firm Fenech & Fenech, to provide clarification on a raft of recent legislative developments.

SUPERYACHT LEASING STRUCTURES UPDATE

Leasing structures in the superyacht world – clarifying recent developments

BY ALISON VASSALLO

The latter months of 2017 were characterised by the publication of a spate of articles in the international press which shone a spotlight on the VAT treatment of yachts in Europe. The most recent development was the reporting of a Letter of Formal Notice being issued on 8 March by the EU Commission to Malta, Cyprus and Greece.

It needs to be clarified that there are currently no infringement proceedings against Malta. What Malta was requested to do by the Commission was to reply to the points raised within a two-month deadline. A task force was immediately set up by the Maltese government to provide technical and legal replies to the questions posed by the Commission. In the meantime, the Maltese government committed itself to ensure continuity of service in the application of the Guidelines regarding the VAT Treatment of Yacht Leasing that were introduced in Malta more than 10 years ago and which today encapsulate the most effective tried and tested mechanism for a yacht to be conferred VAT-paid status.

What was put to question is the legitimacy of a particular mechanism, enshrined within Article 59a of the VAT

Directive, applicable to all EU member states and applied in practice by a number of them, that allows superyacht owners to pay VAT on their yachts on the basis of what is referred to, in legal terms, as the “principle of effective use and enjoyment”.

Given that it may be difficult to predetermine the actual percentage of use of a yacht in any particular area, with yachts being, by their very nature, assets that are intended to move with ease from one jurisdiction to another, and to cross international waters in so doing, the percentage of time that a yacht is deemed to spend in EU waters may be determined according to its size and propulsion, with larger yachts being deemed to spend much more time outside EU waters. This conveys certainty to both the tax payer and to the authorities in assessing the percentage of tax that is to be collected from the leasing of the yacht. This also reflects the economic reality of the industry where lease payments are paid in advance.

When this mechanism was introduced by the Maltese authorities, Italy was already offering a similar product on which the Maltese Guidelines were,

in fact, modelled. Cyprus and Monaco followed Malta several years later with the introduction of mechanisms based on the same principle. French law, in similar acknowledgement of the difficulty of pre-determining the percentage of time a yacht is actually used in EU waters due to the fact that the lessee effectively has operational control of the yacht, allows commercial yachts to benefit from a 50 per cent reduction on VAT on the charter fee, irrespective of the category of the particular yacht, where there is difficulty in determining actual use. Malta is of the view that none of these interpretations infringe the current legislative system and that its application of the Guidelines is within the parameters of the law.

The Letter also made reference to the European Court of Justice's (ECJ) decision in the Mercedes case, delivered in October 2017, which provided guidance on situations where leasing arrangements are to be deemed to constitute a supply of a good as opposed to a supply of a service. The Malta Guidelines were, in fact, updated in November 2017 to ensure observance of the tenets of the judgement and to provide further clarity on the application of the Guidelines. This continued to ensure full compliance with the Court's findings in the setting up of operational leases, which for VAT purposes constitute a supply of a service.

It is undeniable that leasing structures have, over the years, proved themselves as a catalyst for potential yacht owners to take that final step towards making an entry into the superyacht world. Provided they are based and modelled on the applicable European legislative framework and ECJ judgements, there is no reason for them not to find their place in this industry in the same manner that they find their place in the world of other luxury assets such as jets and automobiles. This is supported by ECJ case law that has found that under EU law there is nothing to preclude a person from opting for a leasing arrangement rather than a direct acquisition of the asset.

At the time of Commissioner Joe Borg spearheading the Green Paper on an EU maritime policy back in 2006, the marine leisure industry was identified as one of the key facets in the development of a competitive EU maritime sector. Given the above, coupled with the fact that the Maltese structure is EU-law compatible, it is rather difficult to comprehend why the Commission has taken issue with a legitimate, pan-European activity. Ultimately, a concerted effort needs to be made at European level to allow this sector to continue to flourish by offering potential owners legitimate alternatives with a view to continue to build on Europe's maritime dimension. **AV**

Alison Vassallo heads the yachting department at Fenech & Fenech Advocates and is a partner in the marine litigation department. She chairs the executive committee of the Yachting Services Trade Section in the Malta Chamber of Commerce.