



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

19 December 2013*

(Internal taxation — Article 110 TFEU — Registration duty — Similar domestic products —
Neutrality of the tax between imported used automobile vehicles and similar vehicles already present
on the national market)

In Case C-437/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof 's-Hertogenbosch (Netherlands), made by decision of 27 September 2012, received at the Court on 1 October 2012, in the proceedings initiated by

X

THE COURT (Eighth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Eighth Chamber, acting as President of the Chamber, A. Ó Caoimh and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 September 2013,

after considering the observations submitted on behalf of:

- X, by M.M. de Jong, advocaat,
- the Netherlands Government, by C. Schillemans, C. Wissels and M. Noort, acting as Agents,
- the Finnish Government, by J. Heliskoski, acting as Agent,
- the European Commission, by C. Barslev and by R. Troosters and R. Lyal, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 110 TFEU.

* Language of the case: Dutch.

- 2 The request has been made in proceedings initiated by X, a legal person, concerning the passenger-car and motorcycle tax (belasting personenauto's en motorrijwielen) ('the BPM') that X had to pay when registering in the Netherlands a motor vehicle originating from another Member State.

Legal context

- 3 Article 1 of the 1992 Law on the Taxation of Cars and Motorcycles (Wet op de belasting personenauto's en motorrijwielen 1992), in the version thereof applicable to the facts in the main proceedings ('the BPM Law'), provides:

'1. A tax called [the BPM] shall be charged on passenger cars, motorcycles and vans.

2. The tax shall become chargeable when a passenger car, a motorcycle or a van is registered in the register of issued registration numbers maintained pursuant to the 1994 Road Traffic Law (Wegenverkeerswet).

...'

- 4 From 2006 to 2009, under Article 9 of the BPM Law, the BPM was calculated as a percentage of the 'net list price' of the vehicle concerned, subject to increases and decreases as provided for in that provision.

- 5 Article 9(3) and (6) of the BPM Law provides as follows with respect to the net list price:

'3. The net list price shall mean the list price less the turnover tax (VAT) included therein.

...

6. For a used passenger car ... the applicable list price is that which applied at the time that the passenger car ... was first put into service. ...'

- 6 The basis of assessment of the BPM was amended with effect from 1 February 2008. It is no longer calculated solely on the basis of the net list price, but also includes an amount based on the carbon dioxide (CO₂) emission rate, measured in accordance with Council Directive 80/1268/EEC of 16 December 1980 on the approximation of the laws of the Member States relating to the fuel consumption of motor vehicles (OJ 1980 L 375, p. 36). Accordingly, in the basis of assessment of the BPM, the share relating to the net list price decreased gradually, whilst the share relating to the CO₂ emission rate increased.

- 7 In the years 2006 to 2009, the percentages of the net list price taken into account in the basis of assessment of the BPM were as follows:

— from 2006 to 31 January 2008: 45.2%;

— as from 1 February 2008: 42.3%, and

— in 2009: 40%.

- 8 During the period from 1 February 2008 to 31 December 2009, under the transitional provisions, used vehicles imported and registered during that period which were first put into service before 1 February 2008 were not subject to the BPM calculated on the basis of CO₂ emissions.

- 9 As from 1 January 2010, the BPM, calculated on the basis of both the net list price and the CO₂ emission rate, applies to the registration of all vehicles, including those which were first put into service before 1 February 2008.
- 10 Article 10 of the BPM Law provides as follows with respect to the amount of the BPM for used vehicles:
- ‘1. ... the amount of tax applicable to [the vehicle] shall be calculated taking into account a reduction.
2. The reduction referred to in the first paragraph is the depreciation, expressed as a percentage of the purchase value in the Netherlands at the time that the vehicle was first put into service. ...
- ...’
- 11 The BPM Law allows the taxpayer to opt for a reduced BPM, provided that the amount of the BPM which ought to have been applied when the vehicle was first put into service in the Netherlands as a new vehicle, under the legal provisions relating to the taxable amount and rate as in force at that date, is lower than the amount calculated for 2010.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 12 On 11 January 2010, with a view to registering a passenger car in the Netherlands, X submitted a tax return for the BPM in the amount of EUR 5 766 and paid that amount. The vehicle had been put into circulation for the first time in Germany on 30 May 2006 and at the time bore a German registration plate.
- 13 X lodged an objection against the amount of the BPM owing and paid. After the voorzitter van het managementteam van het onderdeel Belastingdienst/Z van de rijksbelastingdienst (the chairman of the management team of the section Tax Office/Z of the national tax office) had dismissed that objection, X lodged an appeal before the Rechtbank Breda. That court upheld the appeal in part and granted a refund of EUR 1 233 of the BPM.
- 14 X appealed against the judgment of the Rechtbank Breda before the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch). X submits that, for the calculation of the amount of the BPM owing, the starting point should be the amount of tax still levied on similar used vehicles registered during the period from 1 February 2008 to 31 December 2009, the basis of assessment of which did not include the share relating to CO₂ emissions. X requests a refund of EUR 2 809 of the BPM paid.
- 15 X submits that the BPM is incompatible with EU law. The amount of the BPM is higher than the amount still levied on similar used vehicles put into service for the first time before 1 February 2008 and which, unlike the vehicle at issue in this case, were imported and registered during the period from 1 February 2008 to 31 December 2009. Used vehicles imported after that period are thus taxed more heavily than comparable vehicles registered during that period.
- 16 The voorzitter van het managementteam van het onderdeel Belastingdienst/Z van de rijksbelastingdienst takes the view that, for the calculation of the amount of the BPM owing, the starting point should be the amount of tax still levied on similar vehicles which, like the vehicle in the present case, were first put into service in 2006 and were registered as new vehicles in the Netherlands in that year.

- 17 The referring court has some doubts as to the compatibility of the BPM with Article 110 TFEU. It is uncertain as to whether the charging of the BPM upon registration of the vehicle at issue in the main proceedings in the vehicle registry should be disallowed on the ground that it is based on CO₂ emissions. It is also uncertain as to whether the amount of the BPM claimed at the time of registration of that vehicle in 2010 should be compared with the residual amount of the BPM, still included in 2010 in the value of similar vehicles which were imported and registered in the Netherlands in 2006 as new vehicles, or also with the residual amount of the BPM incorporated in 2010 into the value of vehicles which, like the vehicle in the present case, were first put into service in 2006 and subsequently imported and registered as used vehicles during the period from 1 February 2008 to 31 December 2009.
- 18 In those circumstances the *Gerechtshof 's-Hertogenbosch* decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
1. In the appraisal of the question – to be answered in the context of Article 110 TFEU – as to whether the amount of the levy in 2010 in respect of the registration of the passenger car [vehicle in question] is (not) higher than the residual amount of the levy which is incorporated into the value of similar used passenger cars already registered within national territory, should the following be considered to be similar for purposes of determining that residual amount:
 - a comparable [vehicle] which, in the year in which the [vehicle in question] was first put into service (2006), was registered as an unused passenger car, or
 - also the (other) [vehicles] which were available on the market for used [vehicles] in 2010, and which, like the [vehicle in question], were first put into service on 30 May 2006 and are otherwise comparable, but which were (imported and) registered as used [vehicles] after 30 May 2006 (after 30 May 2006 and up to 2009), and/or
 - also the (other) [vehicles] which were available on the market for used [vehicles] in 2010, and which, unlike the [vehicle in question], were first put into service after 30 May 2006, but are otherwise comparable, and which were (imported and) registered as unused or used [vehicles] after 30 May 2006 (after 30 May 2006 and up to 2009)?
 2. In the appraisal of the question as to whether Article 110 TFEU precludes the levying of BPM in respect of the registration of the [vehicle in question] in 2010 in so far as that levy is based on the CO₂ emission ..., should that part of the levy be deemed to be a new tax, to be distinguished from the BPM up to 1 February 2008, which was based solely on the [net] list price, with the result that, to the extent to which the levy is based on the CO₂ emission, a comparison with (similar) used [vehicles] which were registered before 1 January 2010 is not relevant?
 3. If there is no question of a new tax as contemplated in Question 2: is the levying of BPM in respect of the registration of the [vehicle in question] in 2010, in so far as that levy is based on the CO₂ emission ..., precluded by the fact that, pursuant to Article 110 TFEU, the levy based on the CO₂ emission ... was not imposed in respect of [vehicles] comparable to the [vehicle in question] which were first put into service before 1 February 2008 and which, in the period from 1 February 2008 to 31 December 2009, were imported and registered as used [vehicles], whereas that levy based on the CO₂ emission was imposed in respect of the registration, in the aforementioned period, of [used vehicles] which were first put into service after 1 February 2008 but were otherwise comparable to the [vehicle in question] ...?

Consideration of the questions referred

- 19 By its questions, which it is appropriate to consider together, the referring court asks, in essence, first, for the purposes of applying Article 110 TFEU, which are the similar domestic products which are comparable to used vehicles which were first put into service before 1 February 2008 and were imported and registered in the Netherlands in 2010 and, secondly, whether Article 110 TFEU must be interpreted as precluding a tax such as the BPM in force in 2010.

Similar domestic products

- 20 It should be observed, as a preliminary point, that a tax levied by a Member State on the registration of motor vehicles in its territory for the purpose of being placed in circulation is an internal tax and must therefore be examined in the light of Article 110 TFEU (see, to that effect, Case C-402/09 *Tatu* [2011] ECR I-2711, paragraph 32 and the case-law cited).
- 21 To that end, the first paragraph of Article 110 TFEU prohibits all Member States from imposing on products of the other Member States internal taxation in excess of that imposed on similar domestic products.
- 22 Moreover, it must be borne in mind that motor vehicles present on the market in a Member State are ‘domestic products’ of that State within the meaning of Article 110 TFEU (see *Tatu*, paragraph 55).
- 23 When those products are placed for sale on the used vehicle market of that Member State, they must be considered ‘similar products’ to imported used vehicles if their characteristics and the needs which they serve place them in a competitive relationship. The degree of competition between two models depends on the extent to which they meet the same requirements of price, size, comfort, performance, fuel consumption, durability, reliability and so forth. The reference vehicle must be the one whose characteristics are closest to those of the imported vehicle, which implies that account must be taken of the model, type and other characteristics such as drive and equipment, age and mileage, general condition and brand (see, inter alia, Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487, paragraphs 75 and 76, and Case C-74/06 *Commission v Greece* [2007] ECR I-7585, paragraphs 29 and 37).
- 24 The list of criteria in the previous paragraph is not exhaustive and nor are those criteria imperative. The reference vehicle may of course vary, depending on the individual characteristics of the imported vehicle. Two vehicles first put into service on the same date are not necessarily similar, as their wear and tear may differ, for example. It is for the national court, taking into consideration characteristics such as those referred to in the previous paragraph, to determine which domestic products are the ones whose characteristics are closest to those of the imported vehicle in question.
- 25 It follows that the similar domestic products which are comparable to a used vehicle such as the one at issue in the main proceedings, which was first put into service before 1 February 2008 and was imported and registered in the Netherlands in 2010, are the vehicles already present on the Netherlands market whose characteristics are closest to those of the imported vehicle in question.

The compatibility of the BPM with Article 110 TFEU

- 26 The aim of Article 110 TFEU is to ensure free movement of goods between the Member States in normal conditions of competition. It is intended to eliminate all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States (see *Tatu*, paragraph 34 and the case-law cited).

- 27 Thus, as indicated in paragraph 21 of this judgment, the first paragraph of Article 110 TFEU prohibits all Member States from imposing on products of the other Member States internal taxation in excess of that imposed on similar domestic products.
- 28 According to settled case-law, a system of taxation can be considered compatible with Article 110 TFEU only if it is proved to be so structured as to exclude any possibility of imported products being taxed more heavily than domestic products, so that it cannot in any event have discriminatory effect (judgment of 19 March 2009 in Case C-10/08 *Commission v Finland*, paragraph 24 and the case-law cited).
- 29 The Court has thus held that, as far as the taxation of imported used cars is concerned, Article 110 TFEU seeks to guarantee the complete neutrality of internal taxation as regards competition between products (Case C-47/88 *Commission v Denmark* [1990] ECR I-4509, paragraph 9, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 66).
- 30 The Court has also stated that, when a tax on registration is paid in a Member State, the amount of that tax is incorporated into the value of the vehicle. Thus, if a vehicle registered in the Member State in question is subsequently sold as a used vehicle in that Member State, its market value, including the residual registration tax, will be equal to a percentage of its original value, determined by depreciation of the vehicle (Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paragraph 54).
- 31 There is thus a breach of Article 110 TFEU where the amount of tax levied on a used vehicle originating from another Member State exceeds the residual tax incorporated into the value of similar used vehicles already registered on national territory (Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, paragraph 20; Case C-393/98 *Gomes Valente* [2001] ECR I-1327, paragraph 23; and *Tulliasiamies and Siilin*, paragraph 55).
- 32 If the amount of registration tax levied on used imported vehicles exceeds the residual registration tax incorporated into the value of similar used vehicles already registered on the national market, this is liable to favour the sale of domestic used vehicles, thereby discouraging the import of similar used vehicles.
- 33 Nevertheless, Article 110 TFEU is not intended to prevent a Member State from introducing new taxes or from changing the rate or basis of assessment of existing taxes (*Nádasdi and Németh*, paragraph 49, and *Tatu*, paragraph 50).
- 34 However, the Member States' powers to make new tax arrangements or to change the basis of assessment of existing taxes are not unlimited. The prohibition laid down in Article 110 TFEU applies whenever a fiscal charge is liable to discourage imports of goods originating in other Member States in favour of domestic goods (see, to that effect, *Tatu*, paragraph 52 and the case-law cited).
- 35 Thus, Member States may not introduce new taxes or make changes to existing taxes which have the purpose or effect of discouraging the sale of imported products in favour of the sale of similar products available on the domestic market which had been placed on that market before those taxes or changes entered into force (see, to that effect, *Tatu*, paragraph 53).
- 36 As regards the BPM, it is apparent from the file submitted to the Court that that tax is owing and paid only when a vehicle is registered for the first time on Netherlands territory. The Netherlands legislation has been amended on a number of occasions since 2006. Before 1 February 2008, the BPM was calculated based on a percentage of the net list price. As from that date, the taxable amount for it also includes an amount linked to the CO₂ emission rate. In that taxable amount, the share relating to the net list price has thus gradually decreased, whilst the share relating to the CO₂ emission rate has increased.

- 37 As observed by the Netherlands Government and the European Commission, it appears that, despite the change made to the method of calculating the BPM, the event triggering the BPM, namely the first registration of a vehicle on Netherlands territory, remains the same, both before and after the change in question. In the present case, it is therefore the same tax as previously.
- 38 Even if it were a new tax, the total prohibition laid down in Article 110 TFEU applies whenever a fiscal charge is liable to discourage imports of goods originating in other Member States in favour of similar domestic goods, as noted in paragraph 34 of this judgment.
- 39 In the main proceedings, it is apparent from the file submitted to the Court that, due to an exemption relating to the share of the BPM linked to the CO₂ emission rate, used vehicles which were first put into service before 1 February 2008 but which were imported and registered in the Netherlands between 1 February 2008 and 31 December 2009 were subject to a lower BPM than similar used vehicles which were imported and registered from 1 January 2010 onwards.
- 40 In that scenario, there are, on the Netherlands market, similar used vehicles which are comparable to the one at issue in the main proceedings, the residual BPM of which still incorporated into their value is lower than the amount of the BPM levied on the vehicle in question.
- 41 If the latter amount exceeds the lowest residual amount still incorporated into the value of similar used vehicles already registered on national territory, then it has not been established that the BPM Law is so structured as to exclude any possibility of imported products being taxed more heavily than domestic products, so that it cannot in any event have discriminatory effect.
- 42 Such discriminatory effect can be avoided only if it is possible to opt for the lowest registration tax amount still incorporated into the value of similar used vehicles already registered on national territory.
- 43 It is for the national court to ascertain whether or not the amount of the BPM levied on a used vehicle, such as the one at issue in the main proceedings, exceeds the lowest residual amount of the BPM still incorporated into the value of similar used vehicles already registered on national territory.
- 44 It follows that Article 110 TFEU precludes a tax such as the one provided for by the BPM Law, if and in so far as the amount of that tax levied on used imported vehicles upon their registration in the Netherlands exceeds the lowest residual amount of BPM incorporated into the value of similar used vehicles already registered in that same Member State.
- 45 Having regard to all the foregoing considerations, the answers to be given to the questions referred are as follows:
- for the purpose of applying Article 110 TFEU, the similar domestic products which are comparable to a used vehicle such as the one at issue in the main proceedings, which was first put into service before 1 February 2008 and was imported and registered in the Netherlands in 2010, are the vehicles already present on the Netherlands market whose characteristics are closest to those of the vehicle in question;
 - Article 110 TFEU must be interpreted as precluding a tax, such as the BPM, if and in so far as the amount of that tax levied on used imported vehicles upon their registration in the Netherlands exceeds the lowest residual amount of BPM incorporated into the value of similar used vehicles already registered in that same Member State.

Costs

- ⁴⁶ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

For the purpose of applying Article 110 TFEU, the similar domestic products which are comparable to a used vehicle such as the one at issue in the main proceedings, which was first put into service before 1 February 2008 and was imported and registered in the Netherlands in 2010, are the vehicles already present on the Netherlands market whose characteristics are closest to those of the vehicle in question

Article 110 TFEU must be interpreted as precluding a tax, such as the passenger-car and motorcycle tax (belasting personenauto's en motorrijwielen) as in force in 2010, if and in so far as the amount of that tax levied on used imported vehicles upon their registration in the Netherlands exceeds the lowest residual amount of BPM incorporated into the value of similar used vehicles already registered in that same Member State.

[Signatures]