JUDGMENT OF THE COURT (First Chamber)

3 June 2010 *

In Case C-2/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Varhoven administrativen sad (Bulgaria), made by decision of 13 November 2008, received at the Court on 6 January 2009, in the proceedings

Regionalna Mitnicheska Direktsia – Plovdiv

v

Petar Dimitrov Kalinchev,

* Language of the case: Bulgarian

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: E. Sharpston,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 10 February 2010,

after considering the observations submitted on behalf of:

— P.D. Kalinchev, by M. Ekimdžiev, advokat,

— the Bulgarian Government, by A. Ananiev and T. Ivanov, acting as Agents,

— the Commission of the European Communities, by D. Triantafyllou and S. Petrova, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 25 EC, the first paragraph of Article 90 EC, and Article 3(3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).

2 The reference was made in the course of proceedings between Mr Kalinchev and the Regionalna Mitnicheska Direktsia – Plovdiv (Regional Customs Directorate, Plovdiv) concerning the latter's refusal to grant a reduction of the excise duty imposed on Mr Kalinchev when his vehicle was imported.

Legal context

European Union legislation

3 Article 3(1) and (3) of Directive 92/12 provides:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

— …

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty.'

National legislation

4 In accordance with Article 2 of the Law on excise duties and tax warehouses (Zakon za aktsizite i danachnite skladove, DV No 91 of 15 November 2005), as amended by the Law DV No 6 of 23 January 2009 ('the ZADS'), excise duty is levied on alcohol and alcoholic drinks, tobacco products, energy products and electrical energy and motor vehicles.

5 Under Article 4(16) of the ZADS:

'A "new motor vehicle" is a motor vehicle in respect of which, at the date of importation or the date of the lodging of the declaration to the customs authorities pursuant to Article 76d, one of the following conditions is fulfilled:

(a) since the date of its first registration (which may be abroad), no more than six months have elapsed; or

(b) it has travelled no more than 6 000 km.'

6 Under Article 18 of the ZADS, 'motor vehicles' are defined as new or used 'passenger vehicles', 'mixed-use vehicles' and 'racing cars' for the transportation of up to nine persons including the driver, with an engine output of more than 120 kW by the DIN standard or 126 kW by the SAE standard, under code number 8703 of the Combined Nomenclature.

7 Article 19 of the ZADS provides:

'(1) Goods within the meaning of Article 2 are, if not subject to the procedure for suspension of excise duty, subject to excise duty:

1. on their manufacture in Bulgaria;

2. on their introduction into Bulgaria from the territory of another Member State;

3. on their importation into Bulgaria.

(2) "Importation of goods subject to excise duty" means the introduction into Bulgaria of non-Community goods subject to excise duty and the introduction of Community goods subject to excise duty from non-Community territories forming part of the customs territory of the Community.

(3) Irrespective of paragraph 2, if the goods are placed under a customs procedure on their introduction into Bulgaria, importation is deemed to have taken place when they were released into free circulation.'

8 Under Article 30 of the ZADS, the basis of assessment for motor vehicles is as follows:

'(1) for used vehicles – Kilowatt number in accordance with engine output;

(2) for new vehicles – Kilowatt number in accordance with engine output in excess of 120 kilowatts (kW) by the DIN standard or 126 kilowatts (kW) by the SAE standard.'

9 Article 40 of the ZADS provides:

'(1) In the case of used vehicles, the following rates of excise duty shall apply:

1. for vehicles with an engine output of between 120 kW and 150 kW by the DIN standard – BGN 35 per 1 kW;

2. for vehicles with an engine output of over 150 kW by the DIN standard – BGN 60 per 1 kW;

3. for vehicles with an engine output of between 126 kW and 157.5 kW by the SAE standard – BGN 33.33 per 1 kW;

4. for vehicles with an engine output of over 157.5 kW by the SAE standard – BGN 57.14 per 1 kW.

(2) For new vehicles, the rate of excise duty shall be:

1. BGN 700 + BGN 90 per 1 kW in excess of 120 kW by the DIN standard;

2. BGN 700 + BGN 85.71 per 1 kW in excess of 126 kW by the SAE standard.'

10 Article 76d of the ZADS provides:

'(1) A person who introduces goods subject to excise duty within the meaning of Article 2(5) into Bulgaria from the territory of another Member State is required to submit a declaration in accordance with the model specified in the implementing regulations to this Law.

(2) The declaration under paragraph 1 is to be submitted within 14 days of the introduction of the goods to the customs authority having jurisdiction in accordance with the relevant person's permanent address or place of establishment. The declaration is to be submitted before the first registration of a motor vehicle in the Republic of Bulgaria.

(3) The customs authorities may require the goods to be produced together with the declaration in accordance with paragraph 2.

(4) On the basis of the declaration submitted, the competent customs authority shall determine the amount of excise duty owing and notify it to the person concerned.'

11 Article 72a of the regulation concerning the application of the ZADS, adopted by the Minister for Finance (DV No 42 of 23 May 2006), provides:

'(1) In the circumstances referred to in Article 76d of the Law, a declaration relating to excise duties in accordance with the model specified in Annex 13a must be submitted before the first registration of a motor vehicle in the Republic of Bulgaria, within 14 days of the introduction of the goods to Bulgaria.

(2) On the basis of the information in the declaration relating to excise duties and the documents submitted, the customs authorities shall determine and establish the excise duty in the customs declaration. The second copy of the declaration referred to in paragraph 1 is information within the meaning of Article 44(1)(5) of the Law.'

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

12 On 13 February 2007, the applicant bought in France a BMW 530 D car, with an engine output of 140 kW, first registered on 6 January 1999, with a mileage of 160 000 km.

13 In February 2007, he imported that vehicle into Bulgaria and presented it to the Bulgarian traffic police for registration on 21 February 2007.

14 On 19 June 2007, the applicant, in accordance with Article 76d of the ZADS, presented a declaration which is required when goods subject to excise duty under Article 2(5) of the ZADS are introduced to Bulgaria from another Member State. On making that declaration, he was charged excise duty amounting to BGN 4 900, calculated in accordance with the rules in Article 40(1)(1) of the ZADS.

15 By letter of 29 June 2007, the applicant lodged an objection to the amount of the excise duty calculated, arguing that it should be reduced by BGN 2 400, as that amount was, in his opinion, discriminatory and constituted an infringement of Article 90 EC.

16 By decision of the Director of the Plovdiv customs service, confirmed by the Director of the Regionalna Mitnicheska Direktsia – Plovdiv, the applicant was refused the reduction of the excise duty on his vehicle. It was confirmed that the excise duty payable amounted to BGN 4 900, calculated in accordance with Article 40(1)(1) of the ZADS.

17 The administrative measure of the customs administration was challenged before the Administrativen sad – Plovdiv (Administrative Court, Plovdiv), which annulled that decision in so far as it related to the difference between BGN 2 500 and the total amount of BGN 4 900, upholding in its decision the applicant's objection that the amount of BGN 2 400 was discriminatory.

18 The Administrativen sad – Plovdiv considered it discriminatory to assess excise duty on the introduction of a used vehicle into Bulgaria in accordance with Article 40(1)(1) of the ZADS, and an infringement of the first paragraph of Article 90 EC. According to that court, discrimination lay in the amount exceeding the excise duty which would be calculated on the introduction of a new vehicle of 140 kW into Bulgaria, the amount of which would be only BGN 2 500.

19 The Regionalna Mitnicheska Direktsia – Plovdiv appealed against that decision on a point of law to the Varhoven administrativen sad (Supreme Administrative Court), the court of final instance.

20 In those circumstances, the Varhoven administrativen sad stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 3(3) of [Directive 92/12] allow Member States to lay down provisions levying excise duty on the introduction of used motor vehicles into their territory, if that duty is not directly payable on the second-hand purchase of such vehicles which are already in the country and on which excise duty has been paid on first introduction into the territory of the Member State?

(2) Does the expression "similar domestic products" in the first paragraph of Article 90 EC mean:

(a) products which have their origin in the Member State which lays down specific domestic duties; or

(b) products which, independently of their origin, are already in the territory of that Member State?

(3) Having regard to the answers to the questions above: Are Article 25 EC and the first paragraph of Article 90 EC to be read as a prohibition on the differing rules on the levying of excise duty on motor vehicles which the Republic of Bulgaria has laid down in Articles 30 and 40 of the ZADS according to the criteria of year of manufacture and mileage?'

The questions referred

The first question

21 By its first question, the referring court essentially asks whether Article 3(3) of Directive 92/12 precludes national legislation, such as Articles 30 and 40 of the ZADS, which establishes the basis of assessment and the rate of excise duty levied on the introduction of used motor vehicles into the territory of a Member State, although

excise duty is not payable on the second-hand purchase of such vehicles which are already in that country and on which excise duty has been paid on first introduction into the territory of that country.

22 First of all, it should be noted that the scope of Directive 92/12 is defined in Article 3(1) of the directive by reference to three categories of products constituting an exhaustive list, which correspond, as is clear from the third recital in the preamble to the directive, to goods which are treated as subject to excise duty 'in all the Member States'. That list does not include motor vehicles, which are thus excluded from the scope of that directive (Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 36).

23 Next, concerning products other than those referred to in Article 3(1) of Directive 92/12, in accordance with the first subparagraph of Article 3(3), Member States retain the right to introduce or maintain taxes which are levied on those products provided that those taxes do not give rise to border-crossing formalities in trade between Member States (Joined Cases C-145/06 and C-146/06 *Fendt Italiana* [2007] ECR I-5869, paragraph 44).

24 As was stated by the Bulgarian Government in its written observations, the only formality relating to the taxation of vehicles introduced into Bulgaria from other Member States is that provided for in Article 76d of the ZADS, in particular the obligation that a person who introduces goods subject to excise duty into Bulgaria from the territory of another Member State is required to submit a declaration in accordance with the provisions of the law in question.

25 It should be noted that the first subparagraph of Article 3(3) of Directive 92/12 could apply only if the requirement to submit a declaration were to be regarded as a 'border-crossing formality' giving rise to the levying of excise duty (Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 45).

26 The Bulgarian Government contends that that formality is not a border-crossing formality, but rather a formality concerning the subsequent calculation of the amount of the excise duty at the time when it becomes payable.

27 It is for the referring court to ascertain whether the legislation as a whole at issue in the main proceedings may be interpreted in the sense advocated by the Bulgarian Government. Although the declaration had to be submitted at the time of the intra-Community acquisition of the vehicle, and thus at the time of crossing a border, that formality would, however, relate not to that 'crossing' for the purposes of the first subparagraph of Article 3(3) of Directive 92/12, but to the obligation to pay the excise duty. In that case, the purpose of that declaration being to ensure payment of the debt corresponding to the excise duty, that formality would thus relate to the event giving rise to the excise duty (*Brzeziński*, paragraphs 47 and 48).

28 It follows from all the foregoing considerations that the answer to the first question is that the first subparagraph of Article 3(3) of Directive 92/12 does not apply to a case such as the main proceedings and cannot therefore preclude a Member State from laying down provisions levying excise duty on the introduction of used motor vehicles into its territory, if that duty is not directly payable on the second-hand purchase of such vehicles which are already in the country and on which excise duty has already been paid on first introduction into the territory of the Member State, provided that such a system does not give rise to border-crossing formalities in trade between Member States.

The second question

29 By its second question, the referring court essentially asks whether the first paragraph of Article 110 TFEU must be interpreted as meaning that used vehicles imported into Bulgaria must be considered as similar products to used vehicles which were imported into that State as new vehicles independently of their origin, since there is no domestic automobile manufacture in Bulgaria.

30 It is apparent from settled case-law, first, that Article 110 TFEU prohibits the imposition on products from other Member States of internal taxation in excess of that imposed on similar domestic products or internal taxation of such a nature as to afford indirect protection to other products (Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 8).

31 Secondly, in relation to the taxation of imported used vehicles, Article 110 TFEU seeks to ensure the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products (Case C-426/07 *Krawczyński* [2008] ECR I-6021, paragraph 31).

32 Thirdly, it should be noted that domestic manufacture of motor vehicles in Bulgaria is not a condition for a finding that a market for used vehicles exists in that Member State. A product becomes a domestic product as soon as it has been imported and placed on the market. Imported used cars and those bought locally constitute similar or competing products. Article 110 TFEU therefore applies to the registration duty charged on the importation of used cars (see *Commission* v *Denmark*, paragraph 17).

33 Consequently, the answer to the second question is that the first paragraph of Article 110 TFEU must be interpreted as meaning that used vehicles imported into Bulgaria must be considered as similar products to used vehicles already registered in that State which were imported into that State as new vehicles, independently of their origin.

The third question

34 It should be noted, in the main proceedings, that Articles 30 and 40 of the ZADS provide for the calculation of the single basis of assessment of excise duty levied on new and used vehicles, and the rate of that excise duty, in accordance with the engine output of those vehicles. According to Article 4(16) of the ZADS, the criteria for distinguishing between new and used vehicles are the time elapsed since the date of their first registration (which may be abroad) and the mileage. Vehicles are considered to be new which, at the date of their importation into Bulgaria, have not been in circulation for more than six months since their first registration, regardless of their origin, or which have travelled no more than 6 000 km.

35 Accordingly, the referring court's question should be understood as asking essentially whether Article 30 TFEU and the first paragraph of Article 110 TFEU preclude a Member State from applying differing rules on the levying of excise duty on motor vehicles where that excise duty is levied differently on used vehicles imported from other Member States and used vehicles already registered in that State which were imported into that State as new vehicles.

36 As a preliminary point, it must be noted that an excise duty such as that imposed by the national legislation at issue in the main proceedings comes under the general system of internal taxation on goods and must therefore be examined solely in the light of Article 110 TFEU (*Krawczyński*, paragraph 29).

37 The Court has held that Article 110 TFEU supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States (*Brzeziński*, paragraph 27, and *Krawczyński*, paragraph 30).

38 Furthermore, a system of taxation may be considered compatible with Article 110 TFEU only if it is so established and arranged as to exclude any possibility of imported products being taxed more heavily than similar domestic products, so that it cannot, in any event, have discriminatory effect (*Brzeziński*, paragraph 40; order in Case C-134/07 *Kawala* [2007] ECR I-10703, paragraph 29; and *Krawczyński*, paragraph 32).

39 According to settled case-law, the first paragraph of Article 110 TFEU is infringed where the tax charged on the imported product and that charged on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product (Case C-393/98 *Gomes Valente* [2001] ECR I-1327, paragraph 21; Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 67; *Brzeziński*, paragraph 29; and Case C-74/06 *Commission* v *Greece* [2007] ECR I-7585, paragraph 25). In that respect, it must be borne in mind that, in order to apply Article 110 TFEU, not only the rate of direct or indirect internal taxation on domestic and imported products but also the basis of assessment for levying that tax must be taken into consideration

(see Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraph 21, and *Commission* v *Denmark*, paragraph 18).

40 Consequently, it is necessary to establish whether the excise duty at issue in the main proceedings is levied in the same way both on a used vehicle imported into Bulgaria and on a used vehicle of the same type, with the same characteristics and in the same condition, imported as a new vehicle into Bulgaria and already registered in that country, as those two categories of vehicles constitute 'similar' products within the meaning of the first paragraph of Article 110 TFEU.

41 In making such a comparison, it should be noted that the excise duty at issue in the main proceedings is charged only once, on new and used vehicles, in respect of all vehicles intended for registration in Bulgaria.

42 In that regard, the Court has acknowledged that, in order to avoid any discrimination, it is necessary that fixed scales determined by statute, regulation or administrative provision and calculated on the basis of criteria such as a vehicle's age, mileage, general condition, propulsion method, make or model produce the desired outcome that the tax charged on imported used vehicles in no case exceeds the amount of the residual tax incorporated in the value of similar used vehicles already registered in the State (see, to that effect, *Weigel*, paragraph 75). Such a calculation is in particular necessary in order to ensure that the excise duty in question is neutral for tax purposes in relation to imported used vehicles.

43 It is clear that a fixed scale of engine output such as that at issue in the main proceedings does not allow a neutral calculation of excise duty for imported used vehicles.

44 In particular, such a system, for the purposes of the calculation of the excise duty for used vehicles imported from other Member States, does not take account either of the year of manufacture or the mileage of vehicles at the time of their importation into Bulgaria. The time elapsed since the date of their first registration (which may be abroad) and the mileage act, according to that system, merely as criteria to distinguish between a new and a used vehicle.

45 In a case such as the main proceedings, the basis of assessment and the rate of excise duty are calculated solely according to the engine output which is a fixed characteristic of a vehicle, independent of its actual condition. Used vehicles are however taxed according to different criteria from new vehicles.

46 Taking into account the fact that the excise duty is levied on imported goods once only, in accordance with that system, the calculation of excise duty for new vehicles is always more favourable than for used vehicles. Since used vehicles already in circulation in Bulgaria, namely vehicles which were imported as new vehicles, are taxed at the time of their entry into Bulgaria as new vehicles, it is relatively more expensive to import a used vehicle from another Member State than to purchase a vehicle of the same type, the same engine output and mileage, that is to say in the same condition, in Bulgaria. That fact is likely to influence the choice of consumers.

47 Consequently, the answer to the third question is that the first paragraph of Article 110 TFEU precludes a Member State from applying differing rules on the levying of excise duty on motor vehicles in circumstances such as those in the present case where that excise duty is levied differently on used vehicles imported from other Member States and used vehicles already registered in that State which were imported into that State as new vehicles.

Limitation of the temporal effects of the answer given by the Court

48 In its written observations, the Bulgarian Government asked the Court, should it find national legislation such as that at issue in the main proceedings to be incompatible with the first paragraph of Article 110 TFEU, to place a temporal limit on the effects of the judgment to be delivered.

49 In support of its request, it referred to the uncertain nature of the calculation of the amounts which should be repaid and the precarious financial situation of the Republic of Bulgaria. In the light of that situation, the Court could place a temporal limit on the effects of the present judgment.

50 It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 51, and *Brzeziński*, paragraph 56 and the case-law cited).

51 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or

the Commission may even have contributed (see, inter alia, Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 42, and *Brzeziński*, paragraph 57).

52 It is also settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 52; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 68; and *Brzeziński*, paragraph 58).

53 The present reference for a preliminary ruling raises the question of the compatibility with the first paragraph of Article 110 TFEU of excise duty which is levied on used vehicles imported into Bulgaria.

54 At the hearing, the Bulgarian Government produced figures relating to the amount presumed owing following a possible unfavourable judgment by the Court. However, the Court has not been provided with a breakdown of those figures, which would have afforded the opportunity to assess what proportion of that total would give rise to reimbursement. Moreover, only the excise duty amounts exceeding those corresponding to the residual duty included in similar used vehicles originating from the Member State concerned must be reimbursed (*Brzeziński*, paragraph 59).

55 Consequently, the Court finds that the risk of serious economic difficulties, as contemplated in the case-law referred to in paragraphs 50 to 52 of this judgment, such as to justify placing a temporal limitation on the effects of this judgment, has not been established.

56 In those circumstances, it is not necessary to determine whether the criterion relating to the good faith of those concerned is fulfilled.

57 Accordingly, there is no need to limit the temporal effect of this judgment.

Costs

58 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 (First Chamber) hereby rules:

1. **The first subparagraph of Article 3(3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products does not apply to a case such as the main proceedings and cannot therefore preclude a Member State from laying down provisions levying excise duty on the introduction of used motor vehicles into its territory, if that duty is not directly payable on the second-hand purchase of such vehicles which are already in the country and on which excise duty has already been paid on first introduction into the territory of the Member State, provided that such a system does not give rise to border-crossing formalities in trade between Member States.**

2. **The first paragraph of Article 110 TFEU must be interpreted as meaning that used vehicles imported into Bulgaria must be considered as similar products to used vehicles already registered in that State which were imported into that State as new vehicles, independently of their origin.**

3. **The first paragraph of Article 110 TFEU precludes a Member State from applying differing rules on the levying of excise duty on motor vehicles in circumstances such as those in the present case where that excise duty is levied differently on used vehicles imported from other Member States and used vehicles already registered in that State and which were imported into that State as new vehicles.**

[Signatures]