Revija za evropsko pravo: XIII (2011) 1.
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UDK: 339.142:368.212
pp. 65-94.

ENSURING THE CORRECT IMPLEMENTATION OF THE STABILISATION AND ASSOCIATION AGREEMENT IN SERBIA: A CASE STUDY ON THE IMPORTS OF SECOND-HAND VEHICLES

Keywords: European Union, Serbia, Stabilisation and Association Agreement, free movement of goods, industrial products, imports, custom duties and measures having equivalent effect, standstill clause, internal discriminatory or protective taxes, second-hand cars.

1. Introduction

Based on strong political conditionality, the European Union's Stabilisation and Association Process for the Western Balkans offers a framework for trade liberalization, financial assistance and new contractual relations in the form of Stabilisation and Association Agreements, an extensive part of which relate to internal market issues. The Stabilisation and Association Agreement (SAA) concluded between the European Communities and their Member States, on

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the one hand, and the Republic of Serbia, on the other, will in a few months' time enter into force.[1] An Interim Agreement on trade and trade-related matters has been in place since 1 February 2010.[2] Under the terms of the SAA, the parties have agreed to a progressive abolition of trade barriers so as to guarantee the free movement of goods between Serbia and EU Member States and thus gradually create a free trade area between them. Throughout the European integration process, the free movement of goods has been a challenging aspect of trade liberalization. It entails a huge amount of reforms aimed at the abolition of laws, administrative and other practises that hinder the free flow of goods, and the adoption of new legal and administrative measures which stimulate trade in products among the states entering this phase of economic integration. Trade liberalisation is a moving target, as states engaged in the process must be cautious not to enact new laws or create new practices which discriminate goods imported from states participating in the free trade area, for instance by levying duties or imposing taxes higher than those levied on similar domestic goods. Implementing the SAA obligations on the free movement of goods is not only an essential precondition for the future accession of Serbia to the European Union, it also represents a crucial element in the preparation of the Serbian market for the competitive pressures of the Union's internal market.

The purpose of this article is not to analyze the state of trade liberalization between the EU and Serbia. Rather, this paper offers a practical insight in the functioning of the SAA's chapter on the free movement of goods. It examines the limits imposed by the S AA on Serbia with regard to the taxation regimes applicable to the importation of second-hand cars from EU Member States, a practice with potentially big economic consequences considering the volume of used vehicles imported into Serbia from the European Union.[3] Potential

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1 The SAA is available as document no. CE/SE/en on the website of DG Enlargement of the European Commission: http://ec.europa.eu/enlargement/pdf/serbia /key._docurnent/saa__.en.pdf. On 1 April 2011, seventeen EU Member States had ratified the SAA. With the entry into force of the Lisbon Treaty on 1 December 2009, the European Communities have ceased to exist. In this article, we therefore only speak of the European Union, except when reproducing names of or quotes from official documents which use the pre-Lisbon terminology and treaty numbering.

2 ***Official Journal of the EU*** L 28, 30.1.2010, p. 2-397. For the scope of application, see infra section 2.2.

3 See the annual statistical bulletins produced by the Customs Administration of the Republic of Serbia, available in Serbian and English at: http://www.carina.rs/

breaches of the Stabilisation and Association Agreement could materialise in the unjustified distinction posed by the tax regimes applicable to the importation of second-hand cars from the EU into the Republic of Serbia, on the one hand, and the domestic sale of (such) cars, on the other. In order to determine whether an infringement of SAA provisions really exists, this paper will first determine whether the Serbian tax provisions make a distinction between the import and sale of used vehicles as applied to second-hand cars originating in Serbia and in the EU (section 2). Before coming to a conclusion whether the perceived distinction does in fact breach the SAA (section 4), the paper will offset the analysis in section 2 with an examination of the relevant jurisprudence of the European Court of Justice on the taxation of second-hand vehicles imported from an(other) EU Member State (section 3). Arguably, the Court's case-law offers clear guidance for the Serbian authorities in their future Grafting and enactment of legal measures and administrative practices in the area of free movement of goods, as indeed more generally. As such, the case study on the taxation over used cars imported from the EU into Serbia offers an illustration of the need for the proper approximation of Serbia's and other (potential) candidate countries' existing legislation to that of the European Union and for the effective implementation of the former in one of the key operative areas of the SAA. By the same token, this article offers guidelines for members of the Serbian judiciary how to interpret and apply provisions of the Stabilisation and Association Agreement in contentious cases.

2. The taxation regimes over imported second-hand vehicles

2.1. The SAA regime on free movement of goods

The SAA aims to support the efforts of Serbia to strengthen its democracy, the rule of law and regional cooperation, and to complete the transition to a functioning market economy.[4] Like those of other Western Balkan countries, Serbia's reform agenda under the SAA is impressive, covering areas ranging from political dialogue, regional cooperation, justice and home affairs to the liberalisation of the flow of goods, services, workers and capital.[5] Through its

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cvr/lnformacije/Stranice/Statistika.aspx. Imports of second-hand cars were on the 4th place of imported goods 2010 and on the 3rd place for the years 2009 and 2008.

4 See Article 1(2) of the SAA.

5 See Y. Zahariadis, The Effects of the Serbia-EU Stabilization and Association Agreement:

provisions, its Annexes and Protocols, the SAA prescribes an asymmetric and gradual trade liberalization focused on different categories of products in favour of the associated country, i.e. Serbia. The liberalization of trade is set to occur on the basis of a pre-determined timetable, whereby custom duties, charges having equivalent effect, quantitative restrictions or measures having equivalent effect are to be abolished over a transitional period of maximum 6 years from the moment of the entry into force of the Agreement (cf. Articles 8 and 18 SAA). Apart the abolition of all tariff barriers, the SAA enshrines substantial provisions intended to produce non-tariff trade liberalization, such as those in the areas of competition, intellectual property, standards, and customs administration (cf. Articles 73, 75, 77 and 99 SAA).

2.2 The SAA in the Serbian legal order

According to Article 194 of the Serbian Constitution, international agreements ratified by the Republic of Serbia are binding and prevail upon the domestic legislation from the moment they enter into force. Thus, the SAA will be an integral part of the Serbian legal order from the moment it enters into force.[6] The Serbian legal order represents the monist constitutional system, by which international agreements become part and parcel of the domestic legislation and their binding force in the hierarchy of norms is below the Constitution and above laws and administrative acts. This means that the SAA as an international agreement ratified by the Serbian Parliament is binding from the moment it enters into force and that all existing and future domestic legislation should comply with it.[7]

The free movement of goods is enshrined in Title IV of the SAA and more specifically regulated in the annexes and protocols, which form an integral part of the Agreement. Free movement of industrial product is foreseen in Articles 19 to 23 of the SAA. With regard to the latter, the SAA singles out one specific category of products for which another regime than that of the SAA applies: products falling within the realm of the Treaty establishing the

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Economic Impact and Social Implications, *ESAU Working Paper* 17, Overseas Development Institute London, February 2007.

[6] See supra, note 1.

[7] See already S. Samardžić and D. Lopandić, 'Serbia and Montenegro', in A.E. Kellermann, J. Czuczai, S. Blockmans, A. Albi and W.Th. Douma (eds.), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)Candidate Countries - Hopes and Fears* (The Hague, T.M.C. Asser Press 2006), 143-177.

European Atomic Energy Community (cf. Article 19(2) SAA. For all other industrial products the trade liberalization prescribed by the SAA is as follows:

- from the date of entry into force of the Agreement, industrial products originating from Serbia will be imported into the EU:
  - free from custom duties and charges having an equivalent effect (Article 20(1) SAA);
  - without any quantitative restriction or any measures having an equivalent effect (Article 20(2) SAA);
- upon the date of entry into force of the SAA, industrial products originating from the EU will be imported into Serbia:
  - free from custom duties (Article 21(1) SAA), except for products listed in Annex l(a-c) of the SAA. The latter are products which are deemed sensitive for the Serbian economy (e.g. salt suitable for human consumption, petroleum gases and other gaseous hydrocarbons, various kinds of chemical substances, tubes, pipes, fittings, wires, cables and (semi-) precious stones and metals, soap, oils and shampoo) and their liberalization will be implemented progressively, according to the timetable mentioned in the Annex (Article 21(3) SAA);
  - free from charges having an equivalent effect (Article 21(2) SAA)
  - without quantitative restrictions or any measures having equivalent effect (Article 21 (4) SAA).

This legal framework is binding and shall apply to products originating in the EU or in Serbia listed in Chapters 25 to 97 of the Combined Nomenclature (Article 19 SAA). Chapter 87 of the Combined Nomenclature of Goods of 2011 classifies the different means of transportation, as well as their additional and functional parts. In this chapter, motor cars and other motor vehicles principally designed for the transport of persons, including station wagons and racing cars hold the code 8703. All the vehicles included under this list are classified as falling under a regime whereby duty rates will (generally) be reduced as follows:

a) on the date of entry into force of this Agreement, the import duty will be reduced to 70% of the basic duty;

b) on 1 January of the first year following the date of entry into force of this Agreement, the import duty will be reduced to 40 % of basic duty;

c) on 1 January of the second year following the date of entry into force of this Agreement, the remaining import duties will be abolished.[8]

In short, with the entry into force of the SAA the level of custom duties to the imports into Serbia of vehicles originating from the EU Member States will be quickly phased out. In fact, this work has already started prior to the effectuation of the timetables prescribed by the SAA. Since 1 February 2010, provisions of certain parts of the SAA, in particular those relating to the free movement of goods (Title IV) as well as Articles 73, 74 and 75 (and the Protocols), are put into effect by means of the Interim Agreement between the European Community and Serbia (Article 139 SAA).[9] While this system grants Serbia more time for the envisaged liberalization than the 6 years prescribed in Article 8 of the SAA, the duty of loyal implementation of the international agreements does already now pose limits on the customs and tax regimes upheld by the Serbian government. In fact, according to Article 72(2) SAA, the approximation process should have already started on the date of signing of the SAA, i.e. on 29 April 2008. This obligation is clearly reflected in the National Programme for Integration with the European Union (NPI), as adopted by the Government of the Republic of Serbia in October 2008.[10]

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[8] Annex I (a). It should be noted that Annexes I (b) and (c) gives specific customs codes and may therefore provide both the precise percentage reductions for import duties and different timetables used for the calculation of the customs rates. The same regimes apply to other vehicles, e.g. motor vehicles for the transportation often or more persons, including the driver (8702) and (heavier) motor vehicles for the transport of goods (8704).

[9] Law on Ratification of the Interim Agreement on trade and trade-related matters between the European Union, on the one side, and the Republic of Serbia on the other side, ***Official Gazette of Republic of Serbia*** No. 83/08.

[10] The NPI is available at http://kzpeu.seio.gov.rs/dokumenti/npi/npi october2008 en.pdf.

2.3. Serbian taxation regimes pertaining to imports and internal sales of used cars

2.3.1. Introduction

According to Article 5(1), point (8) of the Serbian Customs Law,[11] 'import duties' are custom duties and other charges having equivalent effect, which are paid when importing goods. The custom authorities have the competence to calculate and collect import duties and other duties, taxes and fees, unless otherwise determined by international agreement.[12] The duties that one should pay on the import of used vehicles from the EU into the Republic of Serbia are import duties and VAT. Both will be discussed in turn.

2.3.2. Import duties

Import duties on the importation of used motor vehicles in Serbia shall be determined on the basis of the customs tariff, regulated by the Customs Tariff Law,[13] which comprises the nomenclature of goods and customs rates. According to this law and the provisions laid down on the basis of this law, motor vehicles should be classified in the tariff heading 8703. Customs rate for all types of motor vehicles, except motor vehicles in unassembled state, is reduced from 20% to 12.5%. For the purpose of customs proceedings, customs authorities first have to determine the value of the good and then to apply the adequate custom rate. Serbian Customs Law provides that the customs value of the vehicle equals the transaction value,[14] if all conditions have been met. The customs authorities are authorized to estimate whether the conditions are fulfilled or not. If the customs authorities estimate that transactional value cannot be determined or that it does not fulfil the stipulated conditions and therefore is not acceptable, then the customs value will be the transactional

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11 Customs Law, ***Official Gazette of Republic of Serbia*** No. 18/10.

12 Article 16 and 17(1) of the Customs Law.

13 Customs Tariff Law, ***Official Gazette of the Republic of Serbia*** No. 62/2005, 61/2007 and 5/2009. Customs tariff nomenclature of goods, which is regulated by the Customs Tariff Law, is in compliance with the Combined Nomenclature of the European Union for the year 2011. See The Regulation on the Harmonization of the Custom Tariff Nomenclature for the year 2011. ***Official Gazette of the Republic of Serbia*** No. 90/2010.

14 According to Article 39 of the Customs Law, the transaction value is the actually price paid for the good, which will be taken into consideration by the customs authorities if it fulfils all stipulated requirements.

value of an identical good or similar good or the value which is determined by other methods provided by the Law.[15]

For the import of the used vehicles originating from the European Union, the rates of duties shall be determined in accordance with the dynamics of lowering the rates of duties provided for by the Interim Agreement. According to Article 21(1) and (2) SAA, customs duties on imports into Serbia of industrial products originating in the Community other than those listed in Annex I and charges having equivalent effect to customs duties shall be abolished upon the entry into force of this Agreement. Therefore, customs duties on imports into Serbia of used vehicles originating in the Community which are listed in Annex I(b) and Annex I(v) shall be progressively reduced and abolished in accordance with the following timetable:

- pursuant to Article 6 of the Interim Agreement and Annex I(b), for the vehicles classified under tariff codes 8703 22 10 90, 8703 22 90 00, 8703 23 19 90, 8703 23 90 00, 8703 32 19 90, 8703 32 90 00, duty rates will be reduced for the year 2011 to 40% of the basic duty (for the import of used vehicles: 12,5%), for the year 2012 to 20% of basic duty, and for the year 2013 the remaining import duties will be abolished.
- Furthermore, duty rates for the motor vehicles classified in Annex I(v) under tariff codes 8703 21 10 90, 8703 21 90 00, 8703 24 10 90, 8703 24 90 00, 8703 31 10 90, 8703 31 90 00, 8703 33 19 90, 8703 33 90 00, will be reduced for the year 2011 to 55% of basic duty, for the year 2012 to 40%, for the year 2013 to 20% and for the year of 2014 the remaining import duties will be abolished.

The following table shows duty rates on imports of motor vehicles into the Republic of Serbia for the year 20II.[16]

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15 The methods of determining the customs value are provided in the Articles 39-45 of the Customs Law.

16 See N. Petrović, ***Stope carine novih i polovnih putničkih motornih vozila*** [***Customs rate for new and used passenger motor vehicles***], Stručni komentar e-Press, Paragraf Lex 2009. The table is in compliance with the Regulation on the Harmonization of the Custom Tariff Nomenclature for the year 2011. 'Rate of duty' means the basic duty to which is referred above. 'IA EC 2011' means reduced duty rate in accordance with the Interim Agreement.

Tariff code	type	Rate of duty	IA EC 2011	Description
8703 21 10 90 8703 21 90 00	new used	12,5	6,9	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity not exceeding 1000 cm3
8703 22 10 90 8703 22 90 00	New used	12,5	5	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 1000 cm3 but not exceeding 1500 cm3
8703 23 19 90 8703 23 90 00	new used	12,5	5	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 1500 cm3 but not exceeding 3000 cm3
8703 24 10 90 8703 24 90 00	New used	12,5	6,9	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 3000 cm3
8703 31 10 90 8703 31 90 00	New used	12,5	6,9	Other vehicles, with compression–ignition internal combustion piston engine (diesel or semi–diesel) of a cylinder capacity not exceeding 1 500 cm3
8703 32 19 90 8703 32 90 00	new used	12,5	5	Other vehicles, with compression–ignition internal combustion piston engine (diesel or semi–diesel) of a cylinder capacity exceeding 1500 cm3 but not exceeding 2500 cm3
8703 33 19 90 8703 33 90 00	new Used	12,5	6,9	Other vehicles, with compression–ignition internal combustion piston engine (diesel or semi–diesel) of a cylinder capacity exceeding 2500 cm3

According to Article 5(1), point 10, of the Customs Law, a debtor is every person which is liable to pay customs debt. However, the law provides for certain customs exemptions,[17] of which one should be emphasized in the light of the future application of the SAA. Article 216(1), point 1, of the Customs Law provides that Serbian nationals and foreign nationals with permanent residence in the Republic of Serbia are exempt from custom duties on items

[17] Articles 216-220 of the Customs Law.

inherited abroad (including motor vehicles). The Law on Foreigners[18] stipulates the conditions for granting a permanent residency in the Republic of Serbia to a foreigner.[19] For instance, the application of such provision upon the entry into force of the S AA could lead to a discriminatory regime against a foreigner with a temporary residence[20] in the Republic of Serbia who wants to import inherited used vehicle from an EU Member State, because he is not entitled to benefit from customs duty exceptions even though he constantly resides in the Republic of Serbia for a couple of years, but not yet fulfilled conditions for permanent residency permission. However, in this case, the customs authorities could grant the foreigner with temporary residence in the Republic of Serbia a customs duty relief for the temporary import of used vehicle.[21] The temporary import is a customs procedure whereby foreign goods are used in the country under the condition of re-export in an unaltered state, except of the regular depreciation of the goods due to their use. The goods that are temporarily imported shall be fully or partially relieved from the payment of customs duty, and shall not be a subject of commercial policy measures (foreign trade restrictions), unless it is provided otherwise by specific regulations.

2.3.3. VAT

2.3.3.1. General rules

In addition to customs duties, the import of used vehicles is subject to VAT, currently at a rate of 18%. Pursuant to Articles 3 and 7 of the Value Added

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18 Law on Foreigners, ***Official Gazette of the Republic of Serbia***, No. 97/2008.

19 According to Article 37(1) of the Law on Foreigners, permanent residency may be permitted to a foreigner: 1) who has stayed with no interruptions in the Republic of Serbia for at least five years on account of the permission for temporary residence before applying for permanent residence permit; 2) who has been married to a citizen of the Republic of Serbia, or a foreigner with permanent residence, for at least three years; 3) who is an underage person in temporary residence in the Republic of Serbia if one of his/her parents is a citizen of the Republic of Serbia or a foreigner with permanent residence, subject to the consent of the other parent; 4) who has ancestral links to the territory of the Republic of Serbia.

20 Article 24 of the Law on Foreigners prescribes the types of stay of foreigners in the RS: 1) stay of up to 90 days, 2) temporary residence and 3) permanent residence.

21 Article 325(1) point 1 of Regulation of customs-approved treatment for goods, ***Official Gazette of the Republic of Serbia***, No. 93/2010.

Tax Law imports of goods into the Republic of Serbia shall be liable to VAT.[22] 'Import of goods' means any entry of goods into the customs territory of the Republic of Serbia. The customs territory of the Republic of Serbia comprises the territory, territorial waters and airspace over Serbia.[23] Therefore, every entry of used vehicles into the Republic of Serbia is subject to taxation, except for certain types of imports that have been granted tax exemption. When it comes to imports of used vehicles, VAT shall according to Article 26 not be paid for the import of the following:

1) Entry of goods into the free zone, except the goods for end consumption in the free zone;
2) Goods and services intended to meet: a) official needs of diplomatic and consular representative offices; b) official needs of international organizations, if that is provided for by international contract; c) personal needs of expatriate staff of diplomatic and consular representative offices, including members of their families; d) personal needs of expatriate staff of international organizations, including members of their families, if that is provided for by international contract;
3) The goods exported and returned to the Republic unsold or not meeting the requirements from the contract, i.e. business relation under which they were exported;
4) The goods temporarily imported and then exported again in the course of the customs procedure, as well as the goods undergoing active refinement and following the disposal principle;
5) The goods temporarily imported and then exported again in an unaltered condition in the course of the customs procedure;
6) The goods for which refining under customs control has been granted in the course of the customs procedure;
7) Transit of goods in the course of the customs procedure; and

22 Value Added Tax Law, ***Official Gazette of the Republic of Serbia***, Nos. 84/04, 86/04 and 61/05.

23 Article 5 of the Customs Law.

8) The goods for which customs storage has been granted in the course of the customs procedure.

In case of imports of used vehicles, pursuant to Article 19, the tax base shall be the goods' value determined under customs regulations, that shall also include the following: customs duties and other import duties, as well as other public revenues, except VAT and all secondary costs incurred until reaching the first destination in the Republic (the place indicated in the dispatch note or other transport document, and if not indicated, the place of the first transit of goods in the Republic).

When one considers that nearly every entry of used vehicles is subject to VAT taxation, then questions arise as to who is obliged to calculate and pay VAT, and whether the current tax regime in Serbia constitutes a discriminatory regime under the S AA.

2.3.3.2. Taxation regimes for imports and domestic sales of second-hand cars

Pursuant to Article 10(1) of the VAT Law, the tax debtor shall be the person who imports goods, whether it is a legal entity, entrepreneur or individual, foreigner or not. The tax debtor is liable to pay VAT, but the calculation of the amount due falls within the competence of the customs authorities. One should bear in mind that the import of used vehicles is by and large performed by a single person on an occasional basis. Thus, tax liability is neither related to the permanence of economic activity, nor to the performance of such activity. This means that • no matter who imported used vehicles, the customs authorities shall calculate VAT. According to Article 8, a 'taxpayer' shall be a person who independently and in the course of his/her activity performs a sale of goods or services. The activity referred to above, shall be any permanent activity of a manufacturer, salesman or service provider for the purpose of gaining income, including the activities such as: exploitation of natural resources, agriculture, forestry and independent activities. A taxpayer shall also be considered to perform activities within a business unit. Moreover, a taxpayer shall be a person on behalf and for the account of whom services are rendered, or goods are delivered, and a person who renders services or delivers goods, on his own behalf and for the account of another person. Furthermore, Serbian governmental bodies, bodies of territorial autonomy and local self-government, as well as legal entities legally founded for the purpose of performing government activities, shall be considered as taxpayers if they

perform sales of goods and services outside the body's activities or outside the government activities, taxable in accordance with this Law (Article 9).

Since the VAT is a consumption tax, the tax burden should be borne ultimately by the final consumer. Having this in mind, a taxpayer is not considered as a final consumer because he is entitled to deduct from his VAT liability the input tax - the VAT amount paid at the moment of importation, if he fulfils all the conditions set by the Law. Despite this general rule, when importing passenger vehicles, a tax payer is not entitled to deduct input tax, unless he performs the following activities: 1) sale and renting of the vehicle; 2) transportation of passengers and goods; or 3) driver training.[24] In addition to this provision, it is stipulated that the sale of passenger cars for which at the time of purchase the VAT taxpayer did not enjoy the right for deduction of input tax fully or proportionally is not subject to VAT.[25] This provision abolishes the possibility of double taxation that may otherwise arise in this case. Therefore, if a taxpayer imports passenger cars which are needed for the performance of his economic activity other than one of the above-mentioned activities, he will bear the VAT tax burden as a final consumer, although he would be entitled, under the general rule, to deduct the input tax.

To conclude, a taxpayer that uses imported passenger cars exclusively for the aforementioned activities does not bear the VAT tax burden, while other taxpayers and other tax debtors are considered as a final consumers and thus do face the VAT tax burden.

2.3.3.3. Further legal classification

In order to get a complete picture of the treatment of imported used vehicles, it should be compared with the treatment of internal trade of used vehicles. It is worth pointing out still that the supply of used vehicles (hereinafter: sales of used vehicles) carried out by a taxpayer in the Republic of Serbia in return for a compensation and in the course of performing activities, shall be liable for payment of VAT.[26] Also, the 'transfer tax on absolute rights' shall be paid

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[24] Articles 27-29 of the VAT Law.

[25] But it is subject to the Tax on Transfer of Absolute Rights (see infra, section 2.3.3.3).

[26] Article 3(1) point 1 of the Value Added Tax Law.

on the transfer against compensation of property rights in relation to a second-hand motor vehicle.[27]

1. Pursuant to the VAT Law, a special tax regime is provided for the taxpayers that are dealing with sales of used vehicles. According to Article 36, they shall assess the tax base as a difference between the selling and purchase price of the goods (hereinafter: taxation of difference), with deduction of VAT included in that difference. It should be noted that this base shall be applied if, at the time of acquisition of the goods, the supplier was not liable for VAT or used taxation of the difference referred above. In this case the taxpayer shall not be entitled to state the VAT in the invoices or other documents, or to deduct the input tax. Therefore, if the supplier was liable to VAT and did not use the taxation of the difference, the general rule is applicable. Moreover, the use of motor vehicles is subject to 'tax on the use of motor vehicles' according to the Law on Tax on the Use, Possession and Carrying of Goods.[28]

2. Transfer of property rights in relation to second-hand motor vehicles is liable for tax on the transfer of absolute rights carried out in the territory of the Republic of Serbia under a tax rate of 2.5%. For the purpose of this Law, 'second-hand motor vehicle' means a motor vehicle, which had been registered at least once in the territory of the Republic of Serbia in conformity with regulations.[29] The person who pays the tax on the transfer of absolute rights shall be the seller or transferor of the rights referred to above. The tax base shall be the market value of transferred second-hand motor vehicles as determined by the competent tax office. Tax exemptions are provided for the transfer against compensation of special motorcars with built-in devices for transporting patients, special driving school motorcars with dual controls and motorcars for taxi and rent-a-car service specially marked as such.

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[27] Article 23(1) point 4 of the Property Tax Law (***RS Official Gazette***, Nos. 26/01, 45/02, FRY Official Gazette, No. 42/02, RS Official Gazette, Nos. 80/02, 135/04, 61/07, 5/09, 101/2010). According to Article 24a of the Property Tax Law, 'transfer against compensation' shall not be understood as the transfer of an absolute right on which the value-added tax is payable pursuant to the law governing the value-added tax.

[28] Law on Tax on the Use, Possession and Carrying of Goods, Official Gazette of the Republic of Serbia, Nos. 26/01,80/02,43/04, 132/04, 112/05, 114/06, 118/07, 114/08, 31/09 and 101/2010.

[29] Article 14(5) of the Property Tax Law.

3. According to Article 2 of the Law on Tax on the Use, Possession and Carrying of Goods, a tax on the use of motor vehicles shall be paid annually at the registration of the motor vehicle, including passenger cars. The notion 'passenger car' shall according to the regulations governing road safety be considered as meaning a vehicle used for passenger transport which has no more than nine seats including the driver's seating position. Under this Law, a 'tax payer' is a legal or physical person on whose name the vehicle will be registered, unless otherwise provided by the law. Therefore the provisions do not make a distinction between imported used vehicles and used vehicles already registered in the domestic market. Article 4 of the Law prescribes that tax shall be paid according to engine capacity of passenger cars. The amounts for 2011 are the following:[30]

1) up to 1150cm3- 950 dinars
2) over 1150 to 1,300 cm3 -1,860 dinars
3) over 1,300 to 1,600 cm3 - 4,110 dinars
4) over 1,600 to 2,000 cm3 - 8,430 dinars
5) over 2,000 to 2,500 - 41,630 dinars
6) over 2,500 to 3,000 - 84,370 dinars
7) over 3,000 cm3 - 174,370 dinars

The prescribed amount of tax on the use of the motor vehicles shall be reduced to vehicles over the age of five years of age, for:

1) 15% - for vehicles over five to eight years of age;
2) 25% - for vehicles over eight to ten years of age;
3) 40% - for vehicles over ten years of age.

Notwithstanding the mentioned provision, for passenger cars of more than 20 years of age, the tax on the use of motor vehicles shall be 20% of the prescribed amount of taxes on motor vehicles. Pursuant to Article 5(3) of the Law, the prescribed amount of the tax on the use of motor vehicles, in

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30 The amount of tax is provided for the year 2011 and is adjusted with a growth rate of retail prices for the previous twelve month, according to Article 27a of the Law on Tax on the Use, Possession and Carrying of Goods. At the time of writing, the exchange rate was approximately 1 EUR = 103 dinars.

addition to reductions in accordance with Article 4 of this Law, shall be further reduced by 50% for passenger vehicles that perform taxi services and for special passenger vehicles for driver training with dual controls.[31]

2.3.4. Conclusion: discriminatory regimes

On the basis of the preceding overview, the following picture emerges:

I

Public revenue to be paid when importing used vehicles amount to:

1) A customs duty (hereinafter: CD) at a rate of 6,9% or 5%, until its abolition pursuant to Interim Agreement; and
2) VAT at a rate of 18%[32]
   - VAT taxpayer performing stipulated activities is not treated as a final consumer
   - VAT taxpayer not performing stipulated activities is bearing a tax burden (treatment of a final consumer)
   - a tax debtor other than a VAT taxpayer is bearing a tax burden (treatment of a final consumer)
3) A tax on the use of motor vehicles which is paid with the registration of the motor vehicle (hereinafter: TU)

II

Public revenue to be paid on the sale of imported used vehicles (I) in the Republic of Serbia:

1) If the taxpayer referred to above under point I.2(a) sells an imported used vehicle, he is entitled to deduct the input tax from his VAT liability. He does not bear a VAT tax burden. (His burden I+II = CD+TU)

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31 Alongside with the tax reductions, the Law provides tax exemptions that, in view of the scope of the current analysis, have not been mentioned.

32 The tax base includes customs duties and other import duties, as well as other public revenues, except VAT and all secondary costs incurred until reaching the first destination in the Republic of Serbia.

2) If the taxpayer referred to above under point I.2(b), sells an imported used vehicle, he is paying tax on the transfer of absolute rights (hereinafter: TTAR) carried out in the territory of Republic of Serbia at a tax rate of 2.5%, because it is stipulated that the sale of passenger cars for which at the time of purchase the VAT taxpayer did not have the right to deduct input tax fully or proportionally is not subject to VAT. (His burden I+II = CD + VAT 18% + TU + TTAR 2.5%)
3) If a tax debtor other than the VAT taxpayer referred to above under point I.2(v) sells an imported used vehicle, he is obliged to pay a tax on the transfer of absolute rights at a rate of 2.5%. (His burden I+II = CD + VAT 18% + TU + TTAR 2.5%)

For internal sales of used vehicles there are two possibilities:

1) A VAT taxpayer should pay VAT with a right to deduct it from his VAT liability or use taxation of difference with deduction of VAT included in that difference.
2) A non-VAT taxpayer is obliged to pay TTAR 2.5% (in case of importation of used vehicles he will pay CD + VAT 18%). Moreover, having in mind that the imported used vehicle is considered as new, because it has never been registered in the Republic of Serbia, when selling the unregistered imported used vehicle (after paying CD + VAT 18%) he would not be obliged to pay any tax (because the subject of taxation of TTAR is a second-hand vehicle and not new one).

In short, one can conclude that, even though the black letter of the Serbian tax regulation does not distinguish between treatment of used vehicles in relation to its origin and treatment of foreign and domestic taxpayer, it nevertheless in practice imposes a heavier tax burden on imported used cars. The question then arises whether this distinction is justified under the rules and obligations imposed on Serbia under the Interim Agreement and, ultimately, the Stabilisation and Association Agreement.

Before jumping to a conclusion on this matter, it is instrumental to examine the relevant jurisprudence of the European Court of Justice applicable to the taxation of second-hand vehicles imported from an(other) EU Member State, especially those judgments rendered in similar (pre-)accession contexts. This jurisprudence is mutatis mutandis applicable to the SAA. By virtue of the integral character of the agreement in the legal order of the European

Union,[33] the Serbian authorities and judiciary cannot afford to implement the agreement in a different fashion.

3. ECJ case-law concerning taxation of imported second-hand vehicles

3.1. Guiding principles

In the ***Brzenzinzski*** case the Court reiterated the purpose of Article 90 TEC (now Article 110 TFEU):

> "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 discriminate against products from other Member States (Joined Cases C-393/04 and C-41/05 ***Air Liquide Industries Belgium*** [2006] ECR 1-5293, paragraph 55, and the case-law cited, and ***Nädasdi and Nemeth***, paragraph 45).
>
> As far as the taxation of imported second-hand vehicles is concerned, the Court has also held that Article 90 EC seeks to ensure the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products (see Case C-3 87/01 ***Weigel*** [2004] ECR 1-4981, paragraph 66, and the case-law cited)."[34]

In line with the guiding principles of non-discrimination and the non-protective nature of Article 110 TFEU, the Court has consistently held that a Member State is not prohibited from levying a vehicle tax on the first registration of a vehicle in that Member State, provided that products originating from other Member States are not charged in excess of the taxes imposed on similar domestic products.[35] Advocate General Sharpston in ***Brzezinski*** held that:

> "It may be distilled from that case-law that, in order to be compatible with the first paragraph of Article 90 EC, a national tax levied once only on

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[33] As provided by the ECJ in relation to international agreements concluded by the European Community: Case 181/73 ***Haegeman*** [1974] ECR449 and Case 104/81 ***Kupferberg*** [1982] ECR 3641.

[34] Case C-313/05 ***Brzezinski v Dyrektor hby Celnej w Warszawie*** [2007] ECR 1-513, paragraphs 27 and 28.

[35] See case C-345/93 ***Fazenda Publica and Ministerio Publico v America João Nunes Tadeu*** [1995] ECR 1-479.

> each vehicle, on its first registration in a Member State, must, in so far as it affects second-hand vehicles, be calculated in such a way as to avoid any discrimination against such vehicles from other Member States. Such a tax must therefore not impose on imported second-hand vehicles a burden which exceeds the burden of residual tax included in the cost of an equivalent vehicle first registered in the same Member State at an earlier stage in its existence".[36]

So the first point to be taken into consideration when the Serbian authorities introduce a tax for imported second-hand vehicles is that it should be imposed without distinction, irrespective of the origin of the cars (limited, of course, to the parties to the SAA). However, the same question arises: with which category of products should the comparison with the level of the tax be made, since Serbia is not (i.e. no longer) a manufacturer of vehicles?[37]

Here, the judgment of the Court in ***Commission v Denmark*** is instructive.[38] The case concerned a tax registration on imported second-hand vehicles in Denmark, a country which does not manufacture its own brand of vehicles. The tax registration was calculated on the basis of a flat-rate taxable value. The tax base of imported used vehicles was equal to 100% of the price of the new vehicle in case it was less than six months old, and 90% of that price when more than six months old. On the other hand, the sale of vehicles already registered in Denmark did not give rise to payment of a further registration duty. Since the tax was manifestly of a fiscal nature and was charged not by reason of the vehicle crossing the frontier of the Member State which introduced the charge, but upon first registration of the vehicle in the territory oft hat state, the charge had to be regarded as part of a general system of internal dues on goods and thus examined in the light of Article 95 EEC (later Article 90 TEC, now Article 110 TFEU).[39] Both the Danish authorities and the European Commission agreed in this respect. Yet, the Danish authorities claimed that there was no violation of Article 95 EEC and that there no real discrimination existed in favour of Danish products, since

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[36] Paragraph 11 of the Opinion.

[37] When Fiat took over the Zastava plant in Kragujevac, the last of the Serbian car manufacturers disappeared.

[38] Case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509.

[39] See also Case C-383/01 ***De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen*** [2003] ECR I-6065.

Denmark did not produce cars and that thus all used cars were of foreign origin. The Court decided differently:

> "It must be observed at the outset that, as the Commission has correctly observed, the fact that there is no Danish production of motor vehicles does not signify that Denmark has no used-vehicle market. 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 95 therefore applies to the registration duty charged on the importation of used cars."[40]

While the Serbian market of second hand vehicles is structured in a similar fashion as the one described above, the Serbian "Tax on the use of motor vehicles" is to be paid annually by any "legal or physical person on whose name the vehicle will be registered". While Serbian law does therefore not apply higher tax rates on imported used vehicles than on similar used vehicles which have been already registered on the domestic market, it nevertheless in practice imposes a heavier tax burden on imported used cars.[41] The question thus still remains whether this distinction is justified under the rules and obligations imposed on Serbia under the Interim Agreement and, ultimately, the Stabilisation and Association Agreement. According to settled case-law of the European Court of Justice, Article 110(1) TFEU is infringed when the tax charged on the imported product and that charged on a 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.[42]

3.2. Tax rates and impediments to free movement of goods

With regard to tax rates it must be noted that as long as taxes imposed indiscriminately on domestic and imported products, even very high tax levels are compatible with EU law. The European Court of Justice has ruled in ***Commission v Denmark*** that Article 95 EEC (now Article 110 TFEU) does not serve to censure the excessiveness of taxation levels and that Member States

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40 Case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509, paragraph 17.

41 See our conclusions in Section 2.3.4, supra.

42 See Case C-313/05 ***Brzezinski v Dyrektor hby Celnej w Warszawie*** [2007] ECR 1-513, paragraph 40 and the case-law cited therein (***Haahr Petroleum***, paragraph 34, and Case C-375/95 ***Commission v Greece*** [1996] ECR 1-5981, paragraph 29).

can set the tax rates at the levels they see fit.[43] In the ***Bergandi*** case the Court gave a wide interpretation to the concept of excessiveness of tax rates according to Article 95 EEC:

> "As the court held in its judgments of 27 February 1980 (case 168/78 ***Commission v France*** [1980] ECR 347; case 169/78 ***Commission v Italy*** [1980] ECR 385; and case 171/78 ***Commission v Denmark*** [1980] ECR 447), within the system of the EEC Treaty, Article 95 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. Thus Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products. The Court stated in the same judgments that Article 95 ***must be interpreted widely so as to cover all taxation procedures which, directly or indirectly, conflict with the principle of equality of treatment of domestic products and imported products; the prohibition contained in that article must therefore apply whenever a fiscal levy is likely to discourage imports of goods originating in other member states to the benefit of domestic production.***"[44]

The Court reiterated its position in the early ***Stier*** judgment and applied it even to cases in which no similar or competitive domestic products existed to the ones imported:

> "(...) Article 95 does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product or other domestic product capable of being protected. (...) Nevertheless it ***would not be permissible*** for them to impose on products which, in the absence of comparable domestic production, would escape from the application of the prohibitions contained in Article 95, ***charges of such an amount that the free movement of goods within the common market would be impeded as far as those products were concerned.*** "[45]

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[43] Case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509, paragraph 10.

[44] Case 252/86 ***Bergandi*** [1988] ECR 1343, paragraphs 24 and 25 (emphasis added).

[45] Case 31/67 ***Stier*** [1968] ECR 235, paragraph 21.

Furthermore, in order to assess the compatibility of a given tax with the second paragraph of Article 95 EEC, it was necessary to determine "whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products."[46] For the second paragraph of Article 95 EEC to apply, it was not necessary that protective effect should be shown statistically; it was sufficient if it were shown "that a given tax mechanism is likely, in view of its inherent characteristics, to bring about the protective effect referred to by the Treaty."[47]

3.3. The basis for assessment and the rules for levying the tax

According to well-established case-law of the Court it follows that "in order to apply Article 95 of the [EEC] Treaty, not only the rate of direct and indirect internal taxation on domestic and imported products but also the basis of assessment and detailed rules for levying the tax must be taken into consideration."[48] As a rule, the Treaty is violated "where the taxation on the imported product and that 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."[49] However, states may impose differential taxation on similar, yet different, products on the basis of objective criteria in pursuit of objectives compatible with EU law. In principle, it is not contrary to EU law for a Member State to levy registration taxes on motor vehicles the amount of which may differ depending on objective criteria - like the type of fuel used, emission standards or in some cases engine capacity, when this differentiation aims at encouraging the purchase of less polluting cars and preserving the environment, provided of course that Article 110 TFEU is respected. In the absence of harmonizing measures at the EU level, Member States are free to distinguish among different levels of pollution for the purposes of car registration tax and thus set the tax level as they see fit.[50]

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46 Case 356/85 ***Commission v Belgium*** [1987] ECR 3299, paragraph 1.

47 Case 170/78 ***Commission v United Kingdom*** [1980] ECR 417, paragraph 10.

48 Cas-3 74/76 ***Iannelli v Meroni*** [1977] ECR 557, paragraph 21.

49 Case 20/76 ***Schoettle v Finanzamt Freudenstadt*** [1977] ECR 247, paragraph 20.

50 Illustrative is Petition 0331/2007 before the European Parliament, by Mr loan Päun Cojocariu (Romanian), on problems with the registration in Romania of a vehicle

In a string of cases, the Court decided that a registration tax paid on a new vehicle forms a part of its market value and that Member States must take the car's actual depreciation value into account when calculating the registration tax.[51] In ***Commission v Denmark***, the defending Member State was condemned for applying to imported used cars an assessment rate of 90%, thereby limiting the depreciation to 10%, irrespective of the age or condition of the vehicle. In the Court's view, the levying of a registration duty for which the basis of assessment is at least 90% of the value of a new vehicle constitutes a manifest surcharge of such vehicles in comparison with the residual registration duty to be paid for previously registered second-hand cars bought on the national market, whatever their age or condition.[52] In ***Gomes Valente***, the car tax varied according to the cylinder capacity and was assessed in accordance with the tables annexed to the Decree-Law in which the calculation of the tax was enshrined.[53] The Court found that the Portuguese legislation in force at the material time was calculated without taking the vehicle's actual depreciation into account:

> "The first paragraph of Article 95 of the [EEC] Treaty does not permit a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the actual value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales determined by a legislative provision, a regulation or an administrative provision, unless those criteria or scales are capable of guaranteeing that the amount of the tax due does not

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bought in Germany. This Romanian gentlemen had bought a 2000 Seat Ibiza in Germany, but when trying to register it in Romania he was asked to pay a high registration fee as the Romanian authorities considered that the vehicle only met the EURO 2 standards and not the EURO 4 ones as specified in its German identity card. The petitioner wondered if, indeed, there was a difference between Romania and Germany as regards the setting of pollution standards of vehicles. He considered himself a victim of an abuse designed to have him pay a higher registration tax and requested the European Parliament to look into his case.

51 See case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509; case C-345/93 ***Fazenda Publica and Ministerio Publico v America João Nunes Tadeu*** [1995] ECR 1-479; and case C-375/95 ***Commission v Greece*** [1997] ECR 1-5981.

52 Case C-47/88 ***Commission v Denmark*** [1990] ECR 1-4509, paragraph 20.

53 Case C- 393/98 ***Ministem Publico and Gomes Valente v Fazenda Publica*** [2001] ECR 1-1327.

exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory."[54]

In this ruling the ECJ established two general points to judge if a system of taxation of imported used vehicle is compatible with Article 95 EEC (now Article 110 TFEU):

- the degree of precision with which the fixed scale reflects the actual depreciation of the vehicle; and
- the opportunity for the owner of an imported second-hand vehicle to bring an action challenging the application to his vehicle of a scale based on general criteria.

Regarding the first point, apart from the age of the car, other factors of depreciation, such as the brand, the model, the mileage, the method of propulsion, the mechanical state or the state of maintenance of the vehicle, is likely to result in the fixed scale reflecting the actual depreciation of vehicles much more precisely and permits the aim of ensuring that the tax charged on imported second-hand vehicles does not in any case exceed the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory to be achieved much more easily.[55]

Regarding the second point, referring to its judgment in ***Lütticke v Hauptzollamt Saarlouis***,[56] the Court held that even when the system to evaluate the depreciation is imprecise, the system of taxation might still be compatible with the Treaty, if the owner of an imported vehicle had an opportunity to challenge the application of that scale to his vehicle before a court, which would prevent any possible discriminatory effects of a system of taxation based on such a scale.[57]

In its judgment in ***Commission v Greece***, the ECJ held that by applying a single criterion of depreciation (based on age) for the purpose of determining the taxable value of second-hand vehicles transferred from another Member State into Greece in order to establish the registration tax, and by adopting a

54 ***Ibid.***, paragraph 44.

55 Ibid., paragraph 28.

56 Case 57/65 ***Lütticke v Hauptzollamt Saarlouis*** [1966] ECR 205.

57 Case C-345/93 ***Fazenda Publica and Ministerio Publico v America João Nunes Tadeu*** [1995] ECR 1-479.

reduction in value which may lead, even if only in certain cases, to a discrimination of second-hand cars from other Member States, Greece failed to fulfil its obligations under Article 90 TEC (now Article 110 TFEU).[58]

Also in its judgement in ***Nadasdi***, the Court held that certain provisions of the Hungarian legislation on registration taxes, in its version in force between 1 May 2004 and 31 December 2005, were contrary to Article 90 TEC, in that the tax was calculated without taking into account the true depreciation of second-hand vehicles.[59] The tax applied to second-hand vehicles from other Member States exceeded the residual tax incorporated in the value of similar used vehicles already registered in Hungary. Hungary introduced, following the judgment in ***Nadasdi***, the individual tax assessment procedure which provides the importer with the option of requesting a case-by-case assessment of the car registration tax of his vehicle, taking account of its individual features.[60]

In neither of these judgments, nor in Commission v Hungary, did the Court rule that the national authorities were obliged to assess imported used cars individually. It does not follow from those judgments that Article 110 TFEU requires that Member States evaluate on the basis of an individual assessment of the value of imported used cars. Advocate General Fennelly stated in his opinion on ***Gomes Valente***, that Member States may adopt general criteria for assessing the amount of car tax due on the importation of used vehicles, on condition that these are such as to guarantee that this amount does not exceed, even if only in certain cases, the residual tax in comparable vehicles on the domestic market:

> "It is inherent in the recognition by the Court of the direct effect of the first paragraph of Article 95 [EEC] that an individual should be able to challenge the scale for the assessment for tax on his imported used car. I should add that the practical difficulties of determining precisely the value of an individual used car do not preclude Member State authorities' relying as a guideline on average values of used cars recognised as such

58 Case C-74/06 ***Commission v Greece*** [2007] ECR 1-7585.

59 Joined cases C-290&333/05 ***Nadasdi*** [2006] ECR 1-10115.

60 European Commission, press release no. IP/09/1643, 29 October 2009.

in the domestic market, subject to the requirements of Article 95 referred to above."[61]

The Court, when rendering judgment in this case, followed AG Fennelly's rationale.[62] So, in order for the Member State to set the general criteria for calculating the value of the tax, it should borne in mind that those criteria should reflect the real depreciation value of the used car, to escape the scope of discriminatory taxation.

3.4. Objective justification (imperative requirement)

General objective justification used by the national authorities in the cases referred to above are: (i) the protection of the environment; ii) the necessity to avoid illegal practices in the price declaration of second-hand vehicles; iii) to necessity to restore equal treatment qua pricing between domestic and imported second-hand vehicles; iv) roadworthiness test. We will now deal with each of these issues in turn.

3.4.1. The protection of environment

In the ***Brzezinski*** case, Advocate General Sharpston opined that the objective justification at hand, i.e. the protection of the environment, should be accepted only if it passes the test of proportionality and non-discrimination: "A tax does not escape that prohibition simply because, in addition to its fundamental purpose of raising revenue, it seeks to favour environmentally-friendly products or habits. On the contrary, if it pursues such an aim, it. must do so in a manner which does not burden domestic products less than those imported from other Member States."[63] Following this rationale, the ECJ stated that it is settled case-law that a system of taxation may be considered compatible with Article 90 TEC (now Article 110 TFEU) only if it is so arranged so as to exclude any possibility of imported products being taxed

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61 Opinion of Mr Advocate General Fennelly delivered on 21 September 2000 in Case C-393/98 ***Gomes Valente***.

62 Case C-393/98 ***Ministerio Publico and Antonio Gomes Valente v Fazenda Publica*** [2001] ECR 1-1327, paragraphs 20 and 21.

63 Case C-313/05 ***Brzezinski v Dyrektor Izby Celnej w Warszawie*** [2007] ECR1-513, paragraph 53.

more heavily than similar domestic products, so that it cannot in any event have discriminatory effect.[64]

3.4.2. The roadworthiness test

Member States may require, as part of the car registration procedure, a roadworthiness test, the objective of which is to verify - for purposes of protecting the health and life of humans, that the specific motor vehicle is actually in a good state of repair at the moment of registration.[65] However, the ECJ has ruled that a roadworthiness test is contrary to the Treaty, if, in same circumstances, it is not required for the vehicles of a national origin. The test can be justified on the basis of the Article 30 of the TEC (now Article 36 TFEU) if the imported vehicle has been in use in another Member State before the registration. Then the test has to be done in similar conditions without distinction between national origin and imported vehicles.[66]

Apart from the non-discrimination and the mutual recognition principle that the roadworthiness testing procedure should respect in order not be contrary to the Treaties, the Commission is of the opinion that it must also concern a test that is readily accessible and can be completed within a reasonable time. To restrict roadworthiness testing for imported vehicles to specific and separately designated control stations can constitute an obstacle to trade between Member States.[67]

3.4.3. The under-declaration problem

As considered above, there will be a breach of Article 110 TFEU if the scale of depreciation of the car does not reflect the real value of it. Member States apply different methods in order to find an evaluation system which is in compliance with the Treaty. The Polish administration in ***Brzezinski*** had chosen the system of reference in order to calculate the tax basis, similar with

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[64] Ibid., paragraph 40.

[65] Communication from the Commission, "Interpretative communication on procedures for the registration of motor vehicles originating in another Member State", SEC(2007) 169 final, Brussels, 14 February 2007.

[66] See Case 50/85 Bernhard Schloh v Auto controle technique SPRL [1986] ECR 1855.

[67] Communication from the Commission, "Interpretative communication on procedures for the registration of motor vehicles originating in another Member State", SEC(2007) 169 final, Brussels, 14 February 2007, at 9.

the Serbian situation so far. The Polish argument for using the reference system, and not the price of the purchase of the second-hand vehicle, was because of the belief (or rather suspicion) that in many if not all cases the purchase price declared to the authorities was significantly less than the actual price paid. According to the Polish government this justified a higher duty, so as to compensate for its presumed declaration at an artificially low level. Both the Advocate General and the Court refused to accept this argument as a reasonable and proportional one.[68]

It is of course quite possible that the problem of under-declaration exists, in the absence of any means of verifying the true price paid. To deal with that problem, however, it is necessary to find an objective means of assessing the true value of vehicles, or at least a good approximation ofthat value which may, if appropriate, be challenged.

3.4.4. The equality of prices

In ***Gomes Valente*** the Portuguese government argued at the hearing that the system of taxation of imported second-hand cars was in fact intended to restore equality of treatment in principle between the commercial value of domestic second-hand vehicles and that of imported second-hand vehicles. The Court did not accept that argument. A national tax system which is liable to eliminate a competitive advantage held by imported products over domestic products would be manifestly incompatible with Article 90 TEC (now Article 110 TFEU), which seeks to guarantee that internal charges have no effect on competition between domestic and imported products.[69]

4. Concluding remarks

Serbia is making progress on the path towards future accession to the European Union. The road map of its success is drawn up for an essential part by the timely and correct implementation of the Stabilisation and Association Agreement. Trade liberalization and the approximation of national legislation to EU law are important elements thereof, tied to a

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[68] See further, Opinion of Advocate General Sharpston delivered on 21 September 2006, Case C-313/05, Made] ***Brzezinski v. Dyrektor Izby Celnej w Warszawie*** [2007] ECR 1-513, paragraph 55.

[69] Case C-393/98 ***Ministerio Publico and Antonio Gomes Valente v Fazenda Publica*** [2001] ECR 1-1327, paragraph 43.

gliding timescale laid down in the Agreement itself. The Serbian authorities should be mindful of the fact that, in the approximation process, the legal concepts, guiding principles and operational tests are often not laid down in the 'black letter' law. One cannot just take the SAA, not primary and secondary EU law at face value, but should attach great importance to the interpretation thereof by the Court of Justice.

Through a case study on the approximated legislation on custom duties and taxes charged over the importation of used vehicles from the EU into the Republic of Serbia, this article has exposed the complex, multi-layered legal framework in which the authorities of (potential) candidate countries are operating when implementing the provisions on the free movement of goods contained in the SAA. As shown, Serbia has the right to maintain customs duties on the importation of goods from the EU, but it is also under the obligation to progressively lower customs rates in accordance with a timetable provided by the SAA, until their final abolition six years after the moment of entry into force of the Agreement. Apart from the customs duties that will eventually be phased out, there should be no further distinction between imported vehicles and vehicles that are already registered in the domestic market. In this paper, we have found that, whereas the black letter of the Serbian tax legislation does not make a distinction on the basis of the origin of the car or the taxpayer, the value of the imported used vehicles is nonetheless increased solely for tax purposes. Firstly, customs authorities have the right to determine the value of the vehicle for the purpose of customs proceedings, which directly impacts the amount of customs duties and the amount of VAT to be paid. Secondly, provisions that regulate the value of used vehicles for the purpose of the 'Tax on the use of motor vehicles' also lead to increases in the value of those vehicles. Notwithstanding the mentioned overestimation of the value of the used vehicles for the purpose of the 'Tax on the use of motor vehicles', the provisions do not distinguish between imported used vehicles and used vehicles already registered in the domestic market, since this tax is to be paid annually at the registration of the motor vehicles by the legal or physical person on whose name they will be registered. Furthermore, our analysis has shown that the tax burden is lower if one buys used vehicles present on the domestic market (and pay TTAR 2,5%) than import used vehicles (and pay CD and VAT 18%), even though, as it is mentioned before, the black letter of the Serbian tax legislation does not make a distinction on the basis of the origin of the car or the taxpayer. It goes without saying that this practice directly and negatively affects these imported goods' competitiveness with the same goods already

registered in the domestic market and is unjustified under the provisions of the Stabilisation and Association Agreement.

In crafting their national law and administrative practice, Serbia and its neighbouring countries can benefit from the experiences of old and new EU Member States alike. The rulings for non-discriminatory treatment of used vehicles originating from EU, settled in the case law analyzed in this paper, give an illustrative picture of the proper ways of overcoming the practical issues that could otherwise lead to a breach of the SAA. A similar logic applies to other economic policy areas falling under the umbrella of the SAA and should be heeded by the Serbian authorities and judiciary responsible for the proper implementation and enforcement of the Stabilisation and Association Agreement.