

Taxes on passenger cars and motor vehicles in the Netherlands and Belgium and their compatibility with the EU provisions on free movement of goods and taxation.

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Introduction

Free trade is one of the spearheads of the European Union (EU). The aims of the EU and the means to achieve them are described in Article 3 TEU. Paragraph 3 of Article 1 TEU provides '*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union. Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community*'. This leaves case law unaffected. The European Community realized a customs union (CU) and a common customs tariff (CCT) which made an internal market inevitable. The internal market is an area in which trade barriers shall be eliminated. Article 26 (2) TFEU describes the internal market as '*an area without internal borders*'. The physical borders between Member States are just one of the barriers of free trade. When importing a product the importer may face various barriers such as quantitative restrictions, import permits, inspections and so on. These barriers have in common that they hinder trade between Member States. The internal market would be more efficient without these barriers, so that the aims of Article 3 TEU are achieved. Therefore, when judging national measures in the CU, the way in which these measures affect trade between Member States has to be examined.

The Netherlands imposes an indirect tax on passenger cars and motor vehicles called 'BPM' ('*Wet op de belasting van personenauto's en motorrijwielen 1992*'). 'BPM' is levied by the Dutch government on passenger cars and motor vehicles when registered in the Netherlands. 'BPM' is a registration tax levied when the owner of a passenger car or motor vehicle, whether domestically or foreign produced, applies for registration in the Netherlands. Such treatment, however, may be susceptible to violate the free movement rules. This has been shown in multiple cases of the European Court of Justice (ECJ). For example: *Ioan Tatu*¹, *Commission v. Greece*² and *Weigel*³. Therefore, my research goal is to examine the conformity of Dutch and Belgian registration tax and VAT schemes on passenger cars and motor vehicles to EU free movement of goods and taxation. Herewith, my central research question is: to what extent are the taxes on passenger cars and motor vehicles, in the Netherlands and Belgium compatible with the EU provisions on free movement of goods and taxation? This question is important because, although an advanced internal market has been reached there are still barriers within that internal market for consumers and producers. This is shown by the European Commission in a proposal for a Council Directive on passenger car related taxes.⁴ In the explanatory memorandum the Commission explains that due to different tax systems on passenger cars within the EU, consumers can face double registration taxation, extra costs and multiple other barriers to free movement of their passenger car. Producers can not take full advantage from the internal market because of these differences in tax systems. Pre-tax car prices differ in the Member States. The more options fitted in a car, the higher the pre-tax price. In order to keep pre-tax prices low for sales in Member States that maintain high taxation, car producers leave out options in cars destined for sale in these Member States. This prevents producers to benefit from economies of scale. Not all taxes on passenger cars and motor vehicles of the Netherlands and Belgium will be tested nor will renting cars or company cars be described. In this Master Thesis the emphasis lies on taxes which are similar in both Member States, which are registration taxes and VAT. To find an answer to the research question a description of the EU provisions on free movement of goods and taxation and taxes that exist in the

¹ Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 61.

² Case C-74/06 *Commission v. Greece* [2007] ECR I-7585, para 61.

³ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 89.

⁴ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 2.

Netherlands and Belgium need to take place. These taxes will be tested for their compatibility with EU law.

In chapter 1 free movement of goods will be discussed. Chapter 2 will elaborate on the current situation regarding taxes on passenger cars and motor vehicles in the EU. Chapter 3 elaborates on an existing proposal for a Council Directive on passenger car related taxes. Chapter 4 describes the different types of taxes on passenger cars and motor vehicles of the Netherlands and case law regarding their compatibility with EU law. After that, the same will be discussed with regard to Belgium. In chapter 6 a comparison will be made between each Member State (MS) and EU law and between the Member States themselves. Finally there will be a conclusion.

Chapter 1: free movement of goods: duties, charges and taxes

After the short information provided in the Introduction about free movement of goods, this chapter will elaborate on this subject. Articles 34 and 35 TFEU will not be elaborated as these comprise the non-fiscal trade barriers.

1.1: Internal Market

The EU internal market comprises 4 freedoms; 1) free movement of goods, 2) free movement of persons, 3) freedom to provide services and 4) free movement of capital. These 4 freedoms overlap. The focus lies on free movement of goods. Basically there are two rights which can be derived from the 4 freedoms;

1) the right of free cross-border movement and

2) the prohibition on discrimination based on country of origin or nationality.

The first right indicates that even when a measure does not discriminate, it may still be prohibited if it hinders free movement without justification. This became clear in *Cassis de Dijon*⁵. The ECJ also prohibits non-discriminatory measures if the effect of these measures seriously hinders the free movement. Hence, even non-discriminatory measures cannot always be EU-proof!⁶ Because of this, the scope of the free movement provisions is wide and could concern any part of the national legal systems of the Member States. With regard to the free movement of goods there are charges (Article 30 TFEU), taxes (Articles 110-113 TFEU) and Quantitative Restrictions (Articles 28-37 TFEU) which may hinder this freedom. The charges and taxes will be discussed in this chapter. Quantitative Restrictions are non-fiscal trade barriers which are not part of this research. If a measure hinders free trade then it could also impinge on free movement. The Commission, in TAXUD/255/02, expresses its view that an indirect infringement on the rights of free movement due to unjustly levied taxes on cars and motor vehicles is unacceptable, as these means of transport are mostly used to exercise the right of free movement. Also, all taxes on passenger cars and motor vehicles need to be interpreted in the light of the free movement principles.⁷

1.2: Free movement of goods

One of the essential thoughts was to fully liberalize trade internally, notably with respect to trade in goods. The CU is the main base of the EU. Free movement of goods is therein important and it contains the following aspects:

- Remove tariff barriers within the territory of the EU by banning all custom tariffs and any measure having equivalent effect (Articles 28-32 TFEU);
- Remove non-tariff barriers within the territory of the EU by prohibiting Quantitative Restrictions and measures having equivalent effect (Articles 28-37 TFEU).⁸

These prohibitions of restrictions on the free movement of goods have direct effect⁹. Direct effect means that individuals and companies can rely upon these prohibitions before national courts. The first aspect of the free movement of goods, '*forbids any unilateral pecuniary charge on the border-crossing of goods*'¹⁰, regardless if the goal of this charge is to protect

⁵ Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8.

⁶ B.J.M. Terra & P.J. Wattel, *European Tax Law (hereinafter Terra & Wattel 2008)* Student edition, Deventer: Kluwer 2008, p. 28.

⁷ European Commission 'taxation on cars transferred within the community or used regularly on cross-border journey's' TAXUD/255/02 of 9 September 2002, p. 3.

⁸ Terra & Wattel 2008, p. 30.

⁹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 00001, para II.B.

¹⁰ Terra & Wattel 2008, p. 30.

domestic production. Decisive is if intra-EU trade is restricted. According to *Dassonville* the second aspect outlaws;

*'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade...'*¹¹

This definition was later amended by the ECJ in *Keck*¹². The ECJ concluded that national selling arrangements fall outside the scope of Article 36 TFEU whenever the required mode of sale has an equal effect on trade regarding domestic or imported goods. The impact of such requirement is too generic and remote to fall within the scope of the Treaty Freedoms.¹³ This is called the rule of remoteness. There are two other exemptions from the prohibition of restrictions on the free movement of goods: Article 36 TFEU and the rule of reason¹⁴, which allows for unwritten restrictions created by the ECJ, for example in *Cassis de Dijon* in which the ECJ ruled that;

*'Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.'*¹⁵

Restrictions on intra-EU trade are, according to Article 36 TFEU, allowed if one of the justifications mentioned in Article 36 TFEU applies. This however is only applicable to Articles 34 and 35 TFEU.

1.3: Taxation competences

The ECJ has more than once decided that national tax measures can infringe free movement, for example in *Weigel*¹⁶ and the *first Art Treasure* case¹⁷. The ECJ ruled that national tax provisions of Member States which restrict or have a restrictive effect on free movement are prohibited, with the exception of the ones which can be justified.¹⁸ This was shown by the cases; *Dassonville*¹⁹, *Cassis de Dijon*²⁰ and the *Italian Vinegar* case²¹. The TFEU does not contain provisions for taxes on passenger cars or motor vehicles and it is commonplace²² that taxation competences lie with the Member States.

¹¹ Case 8/74 *Dassonville* (1974) ECR 837, para 5.

¹² Joined cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, para 16.

¹³ Terra & Wattel 2008, p. 31.

¹⁴ In literature the rule of reason is also referred to as 'mandatory requirements' or imperative requirements.

¹⁵ Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8.

¹⁶ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 89.

¹⁷ Case 7/68 *Commission v. Italy* [1968] ECR 423, para B.3.

¹⁸ M. Hilling, *Free Movement and Tax Treaties in the Internal Market*, Uppsala: lustus Förlag 2005, p. 19.

¹⁹ Case 8/74, *Dassonville*, (1974) ECR 837, para 9.

²⁰ Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 14-15.

²¹ Case 788/79 *Italian State v. Gilli and Andres* [1980] ECR 02071, para 8.

²² http://www.laweuropa.com/English/index.php?d=vergi&mod=Ab_Vergi_Introduction

This competence is not unlimited as the Member States still have to comply with EU Law, such as the different indirect tax Directives, Treaty tax provisions (Article 110-113 TFEU) and free movement rules. Member States have exclusive competences with regard to direct taxation.²³ Hence, Member States must refrain from creating tax provisions which directly or indirectly discriminate. However they may, in exceptional circumstances, restrict free movement. These exceptional cases concern public health, consumer protection or the environment. Risk full situations can be minimised through harmonization so as to '*minimise risks and ensure legal certainty across Member States*'²⁴. Low-risk sectors rely on mutual recognition. This provides that when a product is legislatively marketed or produced in a MS, that product must circulate freely within the territory of the EU.²⁵ Part of the legislation on means of transport²⁶ has been harmonized. These however only cover temporary import and import of personal property. VAT has been harmonized completely. Further harmonization has failed.

1.4: Fiscal trade barriers Articles 28-30 TFEU

For free movement of goods to be applicable, the term 'goods' needs to be defined. The term 'goods' was defined in the first *Art Treasures* case as

*'...products which can be valued in money and which are capable, as such, of forming the subject of a commercial transaction.'*²⁷

In the second *Art Treasures* case²⁸ the ECJ ruled that the effect of the duty or charge which is levied is important and not the purpose in deciding if Article 30 TFEU is applicable. This was reaffirmed in other cases, for example in *Cassis de Dijon*^{29,30}. In the second *Art Treasures* case the ECJ also defined charges having equivalent effect as;

*'...any pecuniary charge, however small and whatever designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier, and which is not a customs duty in the strict sense...'*³¹

The ECJ ruled in *Diamantarbeiders*³² that even without the goal of protectionism the Treaty provisions apply.³³ Because of the internal market it is easier for goods to move to the consumers than for the consumers to move to the goods.³⁴ The ECJ ruled in *Gaston Schul* that the goal of the free movement provisions is;

²³ http://www.laweuropa.com/English/index.php?d=vergi&mod=Ab_Vergi_Introduction

²⁴ http://ec.europa.eu/internal_market/top_layer/index_18_en.htm

²⁵ http://ec.europa.eu/internal_market/top_layer/index_18_en.htm

²⁶ Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105 and Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105.

²⁷ Case 7/68 *Commission v. Italy* [1968] ECR 423, para B.1.

²⁸ Case 24/68 *Commission v. Italy* [1969] ECR 193, para 7.

²⁹ Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8.

³⁰ Craig & De Búrca, *EU Law. Text, Cases and Materials* (hereinafter *Craig & De Búrca 2008*) Oxford: University Press 2008, p. 640.

³¹ Case 24/68 *Commission v. Italy* [1969] ECR 193, para 9.

³² Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders v. SA Ch. Brachfeld & Sons* [1969] ECR 211, para 15-18.

³³ Craig & De Búrca 2008, p. 640-641.

³⁴ C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (hereinafter *Barnard 2007*) Oxford: University Press 2007, p. 10.

‘...the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.’³⁵

Article 28 (1) TFEU stipulates in this regard that; *‘the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries’.*

The free movement of goods has an internal and an external dimension. The internal dimension of the free movement of goods holds that goods that originated within the EU have the right to circulate freely between Member States. The external dimension is about goods which originated outside the territory of the EU. These goods can only circulate freely between the Member States once the CCT has been paid.³⁶ Article 29 TFEU on free movement was not sufficient to ensure that trade would take place on a level playing field, therefore Article 30 TFEU provides that; *‘customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature’.* Also the implementation of new customs duties or charges having equivalent effect is prohibited. Article 30 TFEU is an absolute prohibition, hence no need to prove discrimination. When a duty or charge fulfils the requirement of Article 30 TFEU it is immediately unlawful as there is no derogation. Nonetheless, the ECJ explained that there are certain charges which do not fall under the scope of Article 30 TFEU,³⁷ such as charges levied for a mandatory inspection or charges made when providing a commercial service.³⁸ The derogations of Article 36 TFEU are only applicable to Articles 34 and 35 TFEU.

1.5: Difference between Articles 30 and 110 TFEU

There is a difference between Article 30 TFEU and Article 110 TFEU. Article 30 TFEU deals with trade barriers levied at the border, while Article 110 TFEU addresses internal fiscal rules of a MS.³⁹ These Treaty Articles are mutually exclusive⁴⁰. The distinction between these two provisions is not always clear. That was made clear, for example, in *Commission v. Denmark*⁴¹, in which a Danish law applied a tax to vehicles, based on the price of the vehicle. By adding 105% on the first 20,000 Danish kroner and 180% on the remaining amount, the tax was calculated. The ECJ concluded that Article 110 TFEU could not be used to criticise the exorbitant amount of taxation. Exorbitant taxes could hamper the free movement of goods. Nevertheless, when the Danish Car Importers Association called upon this ruling to establish that the amount of taxes levied on imported vehicles into Denmark was exorbitant, the ECJ concluded that the free movement of goods was not hampered.⁴² Both Articles have direct effect⁴³, so that traders or individuals can call upon these rights before the national

³⁵ Case 15/81 *Gaston Schul Douane Expeditie BV v. Inspecteur der Invoerrechten en Accijnzen Roosendaal* [1982] ECR 1409, para 33.

³⁶ Barnard 2007, p. 27.

³⁷ Before these derogations can be applied, certain requirements have to be fulfilled. These requirements will however not be explained in this Master Thesis since the taxes to be researched are not for a mandatory inspection or for the provision of a commercial service. Cf K. Davies, *Understanding European Union Law*, 2007, p. 111.

³⁸ Davies 2007, p. 111.

³⁹ Barnard 2007, p. 45.

⁴⁰ Case 10/65 *Deutschmann v. Germany*, [1965] ECR 469, p. 473.

⁴¹ Case C-47/88 *Commission v. Denmark* [1990] ECR I-4509, para 10.

⁴² Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, para 40.

⁴³ Art. 30 TFEU has direct effect according to *Van Gend & Loos* (Case 26/62), while Art. 110 TFEU has direct effect based on *Humblot* (Case 112/84).

courts of the applicable MS.⁴⁴ The consequence of direct effect is that national measures which are in conflict with a directly effective EU provision are rendered inapplicable.⁴⁵ Article 110 TFEU complements Article 30 TFEU.⁴⁶ The aim of Article 110 TFEU is to preclude circumvention of Articles 28-30 TFEU via the use of discriminatory internal taxation.⁴⁷

⁴⁴ Davies 2007, p. 113-114.

⁴⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629 paras 17-18, 21-22.

⁴⁶ Davies 2007, p. 112.

⁴⁷ Case 77-72 *Carminio Capolongo v. Azienda Agricola Maya* [1973] ECR 00611; Joined Cases C-441/98 & C-442/98 *Michailidis* [2000] ECR I-7145; Case 193/85 *Co-frutta* [1987] ECR 2085; Case 87/75 *Bresciani* [1976] ECR 129.

Chapter 2: EU taxation

Previously, free movement of goods was discussed. EU taxation will be elaborated in this chapter. Vehicle taxation is a current topic in the EU. The European Commission commissioned TiS.PT⁴⁸ to do a study on vehicle taxation in the Member States. This study evaluates the hindrances caused by the different vehicle taxation systems and develops an illustrative understanding of the systems currently existing in the EU. The study focuses on registration taxes and annual circulation taxes (ACT) in 9 Member States, amongst which the Netherlands. The study takes into account national revenue and the effects of the different vehicle taxes for EU citizens and the internal market. According to this study there should be 'budget neutrality'. This means that every change of national registration taxes must be compensated by ACT and fuel taxes. In this study became apparent that the car retail prices are adapted by the car industry to decrease the influence which high registration taxes have on the volume of sale. In order to increase the volume of sale, car dealers lower their margins.⁴⁹ By decreasing the registration tax, retail prices could be decreased, which would result in higher volumes of sale and thus an increased income of registration tax and ACT for the Member States.⁵⁰ The researchers nicely stated the following; *'With regard to the functioning of the internal market, the existing strong differences of car taxation levels in the 9 studied countries certainly may be seen as a market distortion from the consumers' point of view.'*⁵¹

2.1: Article 110 TFEU

Articles 110-113 TFEU do not deprive the autonomous internal tax power of Member States because these tax powers are used to collect general revenue. Internal taxes are lawful if the domestic fees are imposed on a regular basis, to a certain category of goods, concurrent with objective criteria, regardless of where the goods originated.⁵² Internal taxation should thus be non-discriminating. Art 110 TFEU states;

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

To prove similarity, according to *Fink-Frucht*⁵³, the goods need to be in the same tax classification. However, products do not need to be the same⁵⁴. Certain characteristics⁵⁵ as

⁴⁸ <http://www.inovacao.net/dotnetnuke/turblog/TheProject/Consortium/TISPT.aspx>

⁴⁹ European Commission 'Vehicle Taxation in the Member States of the European Union' a study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, p. 71.

⁵⁰ European Commission 'Vehicle Taxation in the Member States of the European Union' a study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, p. 85.

⁵¹ European Commission 'Vehicle Taxation in the Member States of the European Union' a study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, p. 5.

⁵² Davies 2007, p. 112.

⁵³ Case 27/67 *Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse* [1968] ECR 223, p. 232.

⁵⁴ In case 170/78 *Commission v. UK* two products, beer and wine, could compete as these were declared sufficiently similar because consumers would substitute beer with wine when the price of beer would increase.

physical characteristics, usage of consumers and composition could give an indication of similarity. When products are not considered to be similar, products can still be in competition ex the second sentence of Article 110 TFEU. Article 110 TFEU makes sure that there is *'complete neutrality of internal taxation as regards competition between domestic products and products imported from other Member States'*⁶⁶ to guarantee the free movement of goods between the Member States.⁵⁷ Article 110 TFEU is broadly interpreted. The ECJ explained in *Bergandi* that Article 110 TFEU applies;

*'...whenever a fiscal levy is likely to discourage imports of goods originating in other Member States to the benefit of domestic productions.'*⁶⁸

Hence, Article 110 TFEU applies to taxes levied on imports, exports⁵⁹ and usage of goods.⁶⁰ Member States that levy internal taxes which are discriminatory can be investigated by the European Commission.⁶¹ Article 110 TFEU is breached when the tax levied on imported used passenger cars and motor vehicles transgresses the residual tax included in the price of a similar used passenger car or motor vehicle registered in that MS.⁶² Article 110 TFEU is supported by Article 113 TFEU which states the possibility to harmonize

'...legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.'

To harmonize this legislation there needs to be a unanimous vote in Council accompanied by a consultation of the European Parliament.⁶³ Harmonization has not occurred in the area of taxes on passenger cars and motor vehicles. VAT⁶⁴ however is harmonized.⁶⁵ Article 113 TFEU only considers indirect taxation seeing that *'indirect taxes may create an immediate obstacle to the free movement of goods and the free supply of services within an Internal Market'*⁶⁶.

2.2: EU taxes on passenger cars and motor vehicles

Taxes on passenger cars and motor vehicles are an important source of internal tax revenue for the Member States. This tax revenue is approximately 5% of the GNP.⁶⁷ Because taxation lies within the autonomy of each MS, tax systems differ. Generally taxes on passenger cars and motor vehicles are;

- 1) A one time tax settlement when acquiring and registering a motor vehicle;
- 2) Recurrent tax charges for owning or leasing a motor vehicle or

⁵⁵ Case 168/78 *Commission v. France* [1980] ECR 347, para 5; Case 45-75 *Rewe-Zentrale des Lebensmittel-Großhandels GmbH v Hauptzollamt Landau/Pfalz* [1976] ECR 00181, para 12.

⁵⁶ Case 193/85 *Co-frutta* [1987] ECR 2085, para 25.

⁵⁷ Case 252/86 *Bergandi* [1988] ECR 1343, para 24.

⁵⁸ Case 252/86 *Bergandi* [1988] ECR 1343, para 25.

⁵⁹ Case 142/77 *Staten Kontrol v. Larsen* [1978] ECR 1787, para 24.

⁶⁰ Case 252/86 *Bergandi* [1988] ECR 1343, para 27.

⁶¹ Davies 2007, p. 113.

⁶² Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, para 20; Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 39.

⁶³ Barnard 2007, p. 49.

⁶⁴ Council Directive 77/388/EEC on the harmonization of the laws of the Member States relating to turnover taxes, OJ L 145.

⁶⁵ The following taxes are also harmonized; excise duties, tobacco, alcohol and mineral oils.

⁶⁶ http://ec.europa.eu/taxation_customs/taxation/gen_info/tax_policy/article_6759_en.htm

⁶⁷ U. Kunert & H. Kuhfeld, 'The diverse structures of passenger car taxation in Europe and the EU Commissions proposal for reform' (*hereinafter Kunert & Kuhfeld 2007*) Elsevier 2007, p. 306.

- 3) Fees depending on the usage, while not use-dependent, as these might result in improper use by the owner of the motor vehicle.⁶⁸

Currently, there exist two Council Directives on consumption taxes applied to vehicles which restrict the autonomy of the Member States.⁶⁹ These Council Directives are;

- 1) 83/183/EEC on tax exemptions applicable to permanent imports from a MS of the personal property of individuals⁷⁰ and
- 2) 83/182/EEC on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another.

Summarized the first Council Directive contains the following; Article 1 (1) describes the scope of this Directive which is an exemption from levying turnover taxes, excise duties and other consumption taxes for all Member States on permanent personal property imported by private individuals from another MS. Article 1 (2) exempts specific and periodic taxes levied with regard to motor vehicle registration taxes, road taxes and television licences from the scope of this Directive. Hence, the Dutch 'BPM' and Belgian 'BIV' fall outside the scope of these Directives. Temporary importation⁷¹ will not be further discussed. At first both Directives were also applicable to VAT levied on passenger cars and motor vehicles. However, since the VAT Directive came into force, these Directives are not applicable to VAT on passenger cars and motor vehicles anymore. Not only the Directives but also case law forms a significant part of passenger car legislation. Paragraph 2.4 will further elaborate on the ECJ case law on registration taxes.

2.3: EU VAT

The EU aims to approximate tax law between Member States as this is important for the functioning of the internal market. EU tax policy aims to remove barriers for intra-EU money transfers and to simplify the tax rules.⁷² VAT is a general consumption tax on the value that is added to every bought or sold good and service for consumption use in the EU.⁷³ VAT is ultimately paid by the consumer and varies from MS to MS. Different VAT tariffs influence the internal market because it can lead to price differences. For example; if MS A applies a lower VAT tariff than MS B, MS A would have a stronger competition position in comparison to MS B which can in the end result in unequal economical relations between these two Member States. Unequal economical relation is an infringement of EU competition.⁷⁴ This is why the EU harmonized VAT rules and obliges the Member States to apply a minimum common VAT tariff to goods and services.⁷⁵ Hence, Member States have to comply with the VAT Directive⁷⁶. The advantage of a Directive is that it lays down the rules while the Member States are free to decide the execution.⁷⁷ No VAT is levied over goods and services sold outside the EU. On the contrary, goods and services which are imported into the EU are subjected to VAT. This so that EU producers and dealers are equally competitive as non-EU producers and dealers. Therefore, VAT is due as soon as goods or services are imported into the EU. This puts them immediately on equal grounds with equivalent EU produced

⁶⁸ Kunert & Kuhfeld 2007, p. 306.

⁶⁹ http://ec.europa.eu/taxation_customs/taxation/other_taxes/passenger_car/index_en.htm

⁷⁰ This Directive has been amended by Directive 89/604/EEC.

⁷¹ Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105.

⁷² http://www.europa-nu.nl/id/vg9pil5lzcq/fiscaal_beleid

⁷³ http://ec.europa.eu/taxation_customs/taxation/vat/consumers/buying_motor_vehicles/index_en.htm

⁷⁴ <http://www.europa-nu.nl/id/vh7doshlcbzz/btw>

⁷⁵ The common minimum VAT tariff is currently set on 15%. For more information please see the following website; http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm

⁷⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1.

⁷⁷ <http://www.europa-nu.nl/id/vh7doshlcbzz/btw>

goods and services.⁷⁸ In the EU there are no customs so no VAT is levied when crossing intra-EU borders. VAT is levied in the MS of destination.⁷⁹ Herewith, double VAT levying is precluded.⁸⁰

As far as cars and motor vehicles are concerned, VAT is only levied when these are considered “new”. Cars and motor vehicles are “new” when the car or motor vehicle has not been used for at least 6 months, or if the car or motor vehicle has not been used for more than 6.000 Km. If an individual purchases such a “new” car or motor vehicle the seller in the MS of purchase is entitled to a partial VAT restitution, while the buyer has to pay VAT in the MS of destination. This should prevent buyers to obtain their car or motor vehicle in the MS that charges the lowest VAT rate. Low VAT rates combined with various retail prices per MS lead to price differences within the EU.⁸¹ Generally the MS of destination is the MS in which the passenger car or motor vehicle is registered.⁸² According to Article 97 (1) VAT Directive, the minimum VAT rate is 15%. Ex Article 99 (1) VAT Directive a reduced VAT rate of 5 % can be applied to certain goods and services compiled in an exhaustive list. Because only a minimum VAT rate is stated, VAT varies from MS to MS.⁸³

2.4: ECJ case law in relation to national registration taxes

6 of the most recent cases on registration taxes will be addressed in this paragraph. It is important to make sure that when comparing the compatibility of registration taxes and VAT with EU taxation and free movement of goods, ECJ case law is incorporated.

In *Ministério Público*⁸⁴ the ECJ determined that Article 90 (1) TEC (currently Article 110 TFEU) does not preclude a MS to levy registration taxes on used cars and motor vehicles imported from another MS. According to the European Commission the Member States may choose to levy registration taxes because there is no EU provision prohibiting this.⁸⁵ The taxable value must be established on the actual value and on fixed criteria which establish the depreciation of the car or motor vehicle which guarantees that the payable tax never exceeds those taxes that remain on a similar car or motor vehicle that is already registered in the MS. In following case law, for example *Weigel*⁸⁶, *Commission v. Greece*⁸⁷, *Ioan Tatu*⁸⁸ and so on⁸⁹, the ECJ came to a similar conclusion. Hence, Member States are not allowed to apply a registration tax which is discriminatory against similar vehicles, imported or not.

⁷⁸ http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm

⁷⁹ [https://globalvatonline.pwc.com/uk/tls/gvol2/gvol2.nsf/AllByCode/RJAI-74MDTH/\\$File/Executive%20summ.pdf](https://globalvatonline.pwc.com/uk/tls/gvol2/gvol2.nsf/AllByCode/RJAI-74MDTH/$File/Executive%20summ.pdf)

⁸⁰ http://ec.europa.eu/taxation_customs/common/faq/taxation/faq_cartax_en.htm#5

⁸¹ European Commission ‘taxation on cars transferred within the community or used regularly on cross-border journey’s’ TAXUD/255/02 of 9 September 2002, p. 4.

⁸² [https://globalvatonline.pwc.com/uk/tls/gvol2/gvol2.nsf/AllByCode/RJAI-74MDTH/\\$File/Executive%20summ.pdf](https://globalvatonline.pwc.com/uk/tls/gvol2/gvol2.nsf/AllByCode/RJAI-74MDTH/$File/Executive%20summ.pdf)

⁸³ http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm

⁸⁴ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

⁸⁵ http://ec.europa.eu/taxation_customs/common/faq/taxation/faq_cartax_en.htm#3

⁸⁶ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 71, 81, 87, 89.

⁸⁷ Case C-74/06 *Commission v. Greece* [2007] ECR I-7585, para 28.

⁸⁸ Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 39.

⁸⁹ Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, para 20; Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-1327, para 23; Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487, para 55.

The ECJ acknowledges in *Weigel*⁹⁰ that a registration tax on passenger cars and motor vehicles does hamper the free movement of persons and workers rights. It also states that the Treaty gives no guarantee that the individual that moves residence from one MS to another does not encounter taxes in the MS of destination. According to the ECJ these taxes are not in contradiction to Article 39 TEC (currently Article 45 TFEU), if the worker does not experience any disadvantage compared to workers who already bear these taxes.⁹¹ The ECJ concluded that the registration tax levied on cars and motor vehicles falls outside the scope of Article 1 (1) Directive on tax exemptions for permanent import from a MS of personal property.⁹² This is also applicable on individuals that move residence to another MS.⁹³ As a result, every MS is allowed to decide whether to impose a registration tax.⁹⁴

In *De Danske Bilimportører*⁹⁵ the ECJ ruled that the registration taxes are part of the national and thus internal tax systems and should therefore not be examined against Article 28 TEC (currently Article 34 TFEU) for compatibility with the TFEU but against Article 90 TEC (currently Article 110 TFEU). The ECJ also ruled that a registration tax is not a customs duty or a measure having equivalent effect ex Articles 28 and 30 TFEU.⁹⁶ The same conclusion was made in *Nádasdi and Németh*⁹⁷ and *Ioan Tatu*⁹⁸.

Summarizing according to the ECJ Member States have latitude regarding registration taxes.

⁹⁰ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 54.

⁹¹ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 54-55, 60.

⁹² Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 47.

⁹³ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 49.

⁹⁴ This was concluded in Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 47, 49.

⁹⁵ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, paras 35, 39-43.

⁹⁶ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, para 34.

⁹⁷ Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paras 38-41.

⁹⁸ Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 32.

Chapter 3: The proposal of the European Commission for a Council Directive

In this chapter the proposal for a Council Directive on passenger car related taxes will be explained. Herein The European Commission draws up suggestions for introduction with regard to taxes levied on passenger cars and motor vehicles. This is part of the EU strategy for tax policy to abolish tax barriers for free movement. The European Commission does not want to deprive the Member States of their taxation competences. It merely wants to guarantee the achievement of the EU aims. The proposal for a Council Directive was made because every MS has its own tax system for passenger cars. Hence, there are 27⁹⁹ different tax systems on passenger cars and motor vehicles in the EU. Different tax systems create tax barriers that hamper the internal market. According to the impact assessment¹⁰⁰ of the proposal continuing to use 27 different tax systems in the EU creates tax barriers which hamper the internal market. Examples of such barriers are *'double taxation, tax-induced cross-border transfer of cars, distortions and inefficiencies'*¹⁰¹. European citizens encounter double registration taxes and extra administrative procedures which take time and create additional costs.¹⁰² This accumulation results in barriers to the free movement of goods, persons and workers for European citizens who want to take their car when exercising their right of free movement.¹⁰³ Not only European citizens encounter disadvantages from the 27 different tax systems, but also the car industry which cannot enjoy the full benefits that an internal market should have.¹⁰⁴ The impact assessment also describes that if the EU does not take action with regard to the different tax systems on passenger cars, the internal market concerning passenger cars will not improve and the goals of the EU in this area will not be fully achieved. Until the EU harmonizes passenger car related taxes these disadvantageous will continue.¹⁰⁵

3.1: The proposal

The proposal for a Council Directive on passenger car related taxes has two purposes;

- 1) Improve the current operation of the internal market and
- 2) Administer the strategy of the EU for reducing the level of CO₂-emissions to 120 g CO₂ per Km.¹⁰⁶

This proposal is meant to restructure the existing taxes. In this proposal the European Commission acknowledges that taxes on passenger cars create problems for the operation of the internal market. The registration taxes which are currently applied by the Member States are very diverse ranging from 0% to 180% of car-prices before the levying of taxes. The majority of the Member States levy registration taxes. Currently, when citizens encounter

⁹⁹ The Council Directive and the Annex are dated 05-07-2005. The EU at that time had 25 Member States instead of the current 27. In this research the current amount of 27 Member States will be used.

¹⁰⁰ European Commission 'Annex to the: Proposal for a Council Directive on passenger car related taxes' SEC(2005) 809 of 7 May 2005.

¹⁰¹ European Commission 'Annex to the: Proposal for a Council Directive on passenger car related taxes' SEC(2005) 809 of 7 May 2005, p. 3.

¹⁰² European Commission 'Vehicle Taxation in the Member States of the European Union' a study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, p. 62.

¹⁰³ C-138/2004 *Commission v. Denmark* [2004] of 16 June 2005 which is not published.

¹⁰⁴ European Commission 'Annex to the: Proposal for a Council Directive on passenger car related taxes' SEC(2005) 809 of 7 May 2005, p. 3.

¹⁰⁵ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 3.

¹⁰⁶ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 2.

problems with registration taxes, they can resort to ECJ case law because there is a lack of EU legislation in this area.¹⁰⁷ The use of fiscal measures is fundamental in order to achieve the strategy of the EU since fiscal measures can be used as an incentive to persuade consumers to buy more fuel efficient cars.

The only currently existing EU rules in the area of passenger cars and motor vehicles are a Council Directive on tax exemptions applicable to permanent imports from a MS of the personal property of individuals¹⁰⁸ and a Council Directive on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another¹⁰⁹. However, these Directives are about very specific subjects of taxes on passenger cars and motor vehicles. The European Commission is of the opinion that taxes on passenger cars can create hinder for free movement since the Commission states; *'a passenger car is the means of transport used by many citizens willing to exercise their right of free movement within the Community. Tax obstacles pose problems to citizens who wish to exercise this right.'*¹¹⁰ This was also ruled, with regard to registration taxes, by the ECJ in *Commission v. Denmark*¹¹¹. The Commission Directive is based on the opinions of the consulted Member States, the car industry and the consumer associations.¹¹² Approximately 95% of this consulted group is of the opinion that using distinctive tax systems on passenger cars within the EU hampers the operation of the internal market. These consulted groups were in agreement about the gradual abolition of registration taxes including the possibility of refunding the paid registration tax when using the right of free movement. This should also include a new tax based on CO₂-emission.¹¹³

In the proposal there are four suggestions for introduction of taxes on passenger cars and motor vehicles;

- 1) The do-nothing approach;
- 2) Introducing a registration tax refund system;
- 3) Adopting a policy concerning taxation on passenger cars for the EU market and abolish all registration taxes and reforming taxes on passenger cars to involve CO₂-emission;
- 4) Adopting an EU passenger car policy and reduce the registration taxes.¹¹⁴

The first suggestion means that every decision should be made by the Member States and the ECJ. However, this means that the two purposes of this Commission Directive would not be achieved. The second possibility would prevent the occurrence of double taxation. But this option does not fully address the goals set by the European Commission. The third suggestion should be achieved over a transitional period of 10 years. Within those 10 years the Member States should restructure both the registration tax and the ACT. This should include a refund system for registration taxes and an element of CO₂-emission. Suggestion 3 has important benefits for the achievement of the goals of this Directive. These benefits will include; improvement of the functioning of the internal market, reduced bureaucracy, increase in transparency, increase in legal certainty. Together this will result in the reduction

¹⁰⁷ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 2.

¹⁰⁸ Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105.

¹⁰⁹ Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105.

¹¹⁰ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 3.

¹¹¹ C-138/2004 *Commission v. Denmark* [2004] of 16 June 2005 which is not published.

¹¹² European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 3.

¹¹³ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 4.

¹¹⁴ European Commission 'Proposal for a Council Directive on passenger car related taxes' COM(2005) 261 final of 7 May 2005, p. 5.

of free movement barriers for goods and persons. The abolition of registration taxes does not mean that the amount of tax revenue for the MS will decrease. Registration tax can be replaced by an ACT. ACT is a more secure base for revenue because it is levied annually while registration taxes are only levied when the passenger car is registered. The final suggestion will have the same environmental effects as the previous suggestion. However, the internal market barriers will not be eliminated nor decreased. European citizens will still have to cope with administrative procedures which generate extra costs and time loss.

Chapter 4: The Netherlands

In the previous two chapters, the EU provisions on free movement of goods and taxation were elaborated. In this chapter the Dutch 'BPM' and VAT on passenger cars and motor vehicles will be described.

The Netherlands knows a couple of taxes levied on passenger cars and motor vehicles, such as;

- customs duties;
- registration tax (*'Belasting op Personenauto's en Motorvoertuigen'*);
- ACT and
- VAT.

Since the change of 'BPM' in 2010 the Netherlands levies an emission tax which is part of the 'BPM'. Time changes and with that society changes which will eventually result in a change of law. I am stating this because while I was writing this Thesis the legislation which was my driving force for writing about this topic changed immensely. The 'BPM' rate was namely firstly lowered from 45,2% of the catalogue price to 40%, in 2010 to 27,4% plus a surcharge according to the CO₂-emissions per kilometre and lately to 19% plus this surcharge. The differences between 'BPM' percentages are huge and 45,2% is extremely high compared to other Member States, such as Ireland, Austria, Germany and the United Kingdom.¹¹⁵ However, extremely high registration taxes are not contrary to EU law as EU law does not impose regulations on the standard of car registration taxation. The ECJ ruled in *Commission v. Denmark*¹¹⁶ that Article 110 TFEU is not meant to prevent extremely high registration taxes. Whenever a passenger car or motor vehicle is imported into the Netherlands the following taxes need to be paid;

- 'BPM';
- VAT;
- Customs duties (only when imported from outside the EU).¹¹⁷

The first two mentioned taxes will be subject to this research.

In the following 2 paragraphs the Dutch taxes levied on passenger cars and motor vehicles will be elaborated. In paragraph 4.1 'BPM' will be discussed and in paragraph 4.2 the Dutch VAT will be explained.

4.1: Registration tax on passenger cars and motor vehicles ('BPM')

In the Netherlands a consumer tax on passenger cars and motor vehicles exists since 1954. Since then different rates applied. Following the implementation of the Sixth Council Directive¹¹⁸ a separate law was created. 'BPM' was introduced in which special consumer taxes on passenger cars and motor vehicles are laid down.¹¹⁹ 'BPM' *'is levied on the registration of passenger cars and motor vehicles in the Netherlands, as well as on vehicles registered abroad but available for use in the Netherlands.'*¹²⁰ 'BPM' is a tax which is levied only once and must be paid by the person who firstly registers a passenger car or motor vehicle in the Netherlands. 'BPM' will come into play when;

¹¹⁵ European Commission 'Vehicle Taxation in the Member States of the European Union' a study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, p. 62.

¹¹⁶ Case C-47/88 *Commission v. Denmark* [1990] ECR I-4509, para 8.

¹¹⁷ <http://www.belastingdienst.nl/variabel/bpm/>

¹¹⁸ Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes, OJ L 145.

¹¹⁹ R.P.C.W.M. Brandsma e.a., *'Cursus Belastingrecht. Europees Belastingrecht'* (hereinafter *Brandsma e.a. 2008*) Deventer: Kluwer 2008, p. 153.

¹²⁰ http://ip-online2.ibfd.org/data/gii/Country_Analyses/Gii-net.doc.p0017.html

- a person has bought a car or a motor vehicle in a foreign country,
- when a delivery van is converted into a passenger car or a camper or
- when a person with a passenger car or motor vehicle carrying a foreign licence plate drives in the Netherlands.¹²¹

The amount of BPM that has to be paid is calculated as a percentage of the original catalogue price plus a surcharge depending on the CO₂-emission of the passenger car or motor vehicle. The percentage used for the calculation depends on the actual value. In order to determine the actual value, the age and kilometres driven as well as the general condition of the passenger car or motor vehicle is decisive. Therefore, the older the car the lower the 'BPM' rate. It is therefore possible that no 'BPM' needs to be paid.¹²² Because, 'BPM' is just applicable on passenger cars and motor vehicles, the definition of passenger cars and motor vehicles is significant. Article 3 (1) Dutch 'BPM' law defines passenger cars as; a motor vehicle on three or more wheels including campers, but with the exception of auto busses, delivery vans and lorries (motor vehicles which are not designed to transport persons with a maximum mass of more than 3,500 kilograms). Mopeds, *'some types of electrically powered passenger cars'*¹²³ depending on their CO₂-emission (Article 9a Dutch 'BPM' law), Cars and motor vehicles with an internal combustion engine which have a CO₂-emission less than 95 grams per kilometre and cars and motor vehicles with other types of power source with a CO₂-emission of less than 110 grams per kilometre are excluded from 'BPM'. As 'BPM' is a registration tax, the definition of registration is important. Article 2 Dutch 'BPM' law defines registration as; admission of the data accompanying a motor vehicle in the licence plate record. The applicant has to pay 'BPM' in order to obtain a Dutch licence plate. The applicant can be an importer or a consumer. When the importer of the vehicle pays 'BPM', the 'BPM' is passed on to the consumer who is thus ultimately paying 'BPM'. There are situations however in which the consumer is directly liable for the payment of 'BPM'. For example;

- when a consumer buys a passenger car or motor vehicle outside the Netherlands and registers it in the Netherlands;
- when a private person owns a passenger car or motor vehicle with a foreign licence plate, while living in the Netherlands and wants to use that passenger car or motor vehicle on the Dutch public road;
- when a private person living in the Netherlands lends, rents or leases a passenger car or motor vehicle with a foreign licence plate. There is an exemption for 'BPM' since 1 February 2007 for short-term use. The short-term exemption entails that for a maximum of two weeks, as of the moment that passenger car or motor vehicle is used on the Dutch public road, no 'BPM' will be levied.¹²⁴

There is a possibility that, next to paying 'BPM', the applicant needs to pay customs duties¹²⁵ and VAT. Customs duties are only levied when a third country good enters EU territory for the first time. VAT will be further discussed in paragraph 4.2.

4.1.1: 'BPM' exemptions

There are 'BPM' exemptions for owners of passenger cars and motor vehicles living in the Netherlands. The owner needs to apply for the exemption, it is thus not an exemption by rights. The exemptions are as follows;

¹²¹ http://download.belastingdienst.nl/belastingdienst/docs/belasting_personeneautos_motorrijwielen_bpm0211z20fd.pdf

¹²² For the exact reduction rates I refer to the website of the Dutch Revenue Services; http://www.belastingdienst.nl/variabel/bpm/bpm-33.html#P848_63941

¹²³ http://ip-online2.ibfd.org/data/gii/Country_Analyses/Gii-net.doc.p0017.html

¹²⁴ Brochure from the Dutch Tax Revenue Services on the tax on passenger cars and motor vehicles (BPM), p. 5.

¹²⁵ Customs duty will not be elaborated in this research. For more information see the website of the Dutch tax authorities; <http://www.belastingdienst.nl/download/989.html> and download the BPM brochure in which all the information on 'BPM' is conveniently arranged.

- when a person uses the passenger car or motor vehicle with a foreign licence plate from his or her employer (employees exemption);
- when a person owns a passenger car or motor vehicle with a foreign licence plate and owns a company in the MS of that licence plate (employers exemption);
- when EU citizens move residence to the Netherlands (inventory exemption);
- when a person has a delivery van with an adjusted loading platform in order to transport a wheelchair. If it is clear that the wheelchair will only be transported as cargo than no 'BPM' needs to be paid (wheelchair-transportation exemption¹²⁶).¹²⁷

For these exemptions to be applicable some prerequisites need to be fulfilled;¹²⁸

- employees exemption;
 - the passenger car or motor vehicle has been provided to an employee residing in the Netherlands by an employer established in another MS. In the exemption permit the indwelling family members can be mentioned who are allowed to use that passenger car or motor vehicle;
 - the employee needs to show a written declaration of the employer in which is stated that the passenger car or motor vehicle is mainly intended for the exercise of the employee's job outside the Netherlands;
 - the employee does not have any say in where the passenger car or motor vehicle will be registered.¹²⁹
- employers exemption;
 - the employer needs to live in the Netherlands and one of the following conditions need to be fulfilled;
 - the employer is the head of a sole proprietorship established in another MS;
 - the employer is a member of an in another MS established partnership;
 - the employer is the director, partner or shareholder of a partnership established in another MS and the owner of the passenger car or motor vehicle is not an employee at that partnership. At the same time the passenger car or motor vehicle may only be used by the owner and his or her indwelling family;
 - from the kilometre-registration needs to appear that the passenger car or motor vehicle has been used for business outside of the Netherlands for at least 50% of the driven kilometres. The commuting distance is herewith not calculated.¹³⁰
- inventory exemption;
 - when persons move from another MS to the Netherlands and take their passenger car or motor vehicle with them. The passenger car or motor vehicle belongs to the inventory;
 - the passenger car or motor vehicle has to be used for the same purpose as for what it was used in the country of origin;
 - the passenger car or motor vehicle was bought and used for at least 6 months prior to the migration-date;
 - the migrant has been living in another MS for at least 12 months.

When a person received an exemption that person may not sell, rent out or lend out that passenger car or motor vehicle within 12 months after registration in the Netherlands. Otherwise the migrant will need to pay 'BPM' for which it initially was exempted. The migrant needs to apply for this exemption within 12 months from the migration-date.¹³¹

¹²⁶ This exemption is only applicable for delivery vans which were put into use before 1 July 2005 and have been registered in the Netherlands before that date. For more information see website; <http://www.belastingdienst.nl/variabel/bpm/bpm-43.html>

¹²⁷ <http://www.belastingdienst.nl/variabel/bpm/bpm-43.html>

¹²⁸ <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/wanneer-betaal-ik-belasting-op-personenauto-s-en-motorrijwielen-bpm.html>

¹²⁹ http://www.belastingdienst.nl/variabel/bpm/bpm-40.html#P1224_83774

¹³⁰ http://www.belastingdienst.nl/variabel/bpm/bpm-41.html#P1235_85142

¹³¹ http://www.belastingdienst.nl/variabel/bpm/bpm-42.html#P1248_86326

- wheelchair-transportation exemption;
 - a delivery van is adapted to be able to transport a wheelchair. There has to be a partition between the loading space and the cabin. If that partition is taken out 'BPM' needs to be paid. However, if an invalid can only enter the cabin through the loading space, the partition may be taken out and no 'BPM' has to be paid.¹³²

There is a possibility that over time a person and their car or motor vehicle do not fulfil the prerequisites anymore. In that case rest-'BPM' needs to be paid.¹³³ Persons who use passenger cars or motor vehicles with a foreign licence plate on Dutch roads for only a short period of time may also be exempted from 'BPM'. This exemption will only be applicable for a maximum of two weeks, starting from the moment the passenger car or motor vehicle is used on the Dutch roads. This exemption applies to the entire indwelling family.¹³⁴ There are other BPM exemptions, such as when;

- a person has obtained a passenger car or motor vehicle with a CO₂-emission of 0 gram per kilometre;
- a person obtains a passenger car which was used firstly on or after 1 January 2009 with a petrol-engine of maximum 110 grams per kilometre CO₂-emission or with a diesel-engine of maximum 95 grams per kilometre CO₂-emission.
- the passenger car or motor vehicle is 25 years old or older.

A partial or entire 'BPM'-refund occurs when an entrepreneur¹³⁵;

- owns a special motor vehicle, for example a taxi or an ambulance;
- exports a used passenger car or motor vehicle;
- has its passenger car or motor vehicle over which 'BPM' was paid demolished;
- transports an invalid with his or her wheelchair or other aids.¹³⁶

Refund on BPM for entrepreneurs and private persons is only possible when exporting the passenger car or motor vehicle to another MS, Norway or Liechtenstein and when the passenger car or motor vehicle is registered for use on or later than 16 October 2006. For a private person lengthy and time consuming procedures have to be fulfilled for receiving restitution of BPM when exporting a passenger car or motor vehicle to another MS¹³⁷;

- The owner has to visit the Dutch vehicle authority ('RDW')¹³⁸ in order to verify his or her Identity, fill out official papers for deregistration and to determine if the passenger car or motor vehicle is in technical good shape to be used on the public road;
- Request a licence plate number for export (validity 14 days);
- Within 13 weeks after exporting the passenger car or motor vehicle a formal request for restitution of 'BPM' along with a proof of registration in another MS must be submitted to customs.

4.1.2: 'BPM' case law

Until now there is no case law about the Dutch 'BPM' and its compatibility with free movement of goods. However, there are cases about the Dutch 'BPM' and another freedom. There was a case in 2005, with regard to the freedom to provide services, from which we can

¹³² <http://www.belastingdienst.nl/variabel/bpm/bpm-43.html>

¹³³ <http://www.belastingdienst.nl/variabel/bpm/bpm-86.html>

¹³⁴ <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/wanneer-krijg-ik-vrijstelling-van-bpm.html>

¹³⁵ http://overheidsloket.overheid.nl/index.php?p=product&product_id=11302

¹³⁶ <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/wanneer-betaal-ik-belasting-op-personenauto-s-en-motorrijwielen-bpm.html>

¹³⁷ <http://www.rdw.nl/nl/particulier/auto/uitvoeren/Pages/Eenautouitvoeren.aspx> and <http://www.bpmberekenen.com/bpm-teruggave-bij-export.html>

¹³⁸ 'The Dutch government appointed authority for testing, homologation approval and certification of motor vehicles and their components acc. to ECE regulations and EU (EEC) directives.' Website; http://nl.kompass.com/profile_NL212204_nl/rdw-ps-en.html

learn about the way in which the ECJ came to its conclusion and use that line of thinking in examining the Dutch 'BPM' and its compatibility with the free movement of goods. The party concerned lived and worked in the Netherlands and used a passenger car carrying a Belgian licence plate. The car was rented from a Belgian firm. Because, repeatedly was established that the party concerned was driving the rented Belgian car in the Netherlands, the tax inspector levied a retrospective collection of 'BPM' and imposed a fine of 25%. The question was; if the retrospective collection of the Dutch 'BPM' needs to be nullified because Article 1 (5) Dutch 'BPM' law infringes Articles 49 to 55 TEC (now Articles 56 to 62 TFEU).¹³⁹ The Dutch court asked preliminary questions to the ECJ. The Dutch court qualified the passenger car rental as a service ex Article 40 TEC (now Article 57 TFEU). Pursuant to Article 1 (5) Dutch 'BPM' law, he or she who has the disposal of a motor vehicle with a non-Dutch licence plate must pay 'BPM' commencing the use of this motor vehicle in the Netherlands. When calculating the Dutch BPM, the rental period was not taken into account and the full amount of 'BPM' had to be paid. Although, it can be postponed for a maximum of two days ex Article 4 (3) Dutch 'BPM' implementing order, if a motor vehicle with a foreign registration is rented in another MS. In this case the rental period was longer.¹⁴⁰ The Dutch court acknowledged that there exists doubt about the levying of 'BPM' and its compatibility with the EU proportionality principle and the freedom to provide services.¹⁴¹ Because, the total amount of 'BPM' is due it is impossible for an inhabitant of the Netherlands to freely choose where to rent a motor vehicle. According to the ECJ there is no common good which could justify the possible incompatibility of 'BPM' with the freedom to provide services. The ECJ concludes that Articles 49-55 TEC (currently Articles 56-62 TFEU) do not allow these national laws, without taking into account the duration of the use of the roads in that MS and without the possibility for an exemption or restitution.¹⁴² The European Commission announced in a press release dd. 7 July 2005 that it would start an infringement procedure¹⁴³ against the Netherlands. According to the European Commission the Dutch 'BPM' hinders businesses established outside the Netherlands, to offer their services to inhabitants of the Netherlands since a passenger car or motor vehicle that is registered in another MS can merely be used in the territory of the Netherlands without having to pay 'BPM' during two days.¹⁴⁴ Because of this case and because of the threat of the European Commission, the Dutch government adapted its 'BPM', with regard to renting cars, into a tax dependent on the duration of use in the Netherlands.

4.1.3: Gradual change of 'BPM'

Originally 'BPM' was calculated over the catalogue-price of the passenger car or motor vehicle. Between 2009 and 2013 'BPM' will gradually transform into a tax levied based on the CO₂-emission per kilometre. This change is intended to increase the sale of environmentally friendly cars and therewith reducing the fuel-use and thus the CO₂-emission. A second objective is to burden the use of the car instead of the ownership. On request of the Ministry of Finance, the Netherlands Environmental Assessment Agency researched the effect of the change of CO₂-standards of the EU on CO₂-emission. How much effect on the environment the change of 'BPM' has depends on the swiftness in which the calculation of the tax rate will change. The Dutch cabinet aims to abolish 'BPM' entirely before the year 2018. This should

¹³⁹ Case C-242/05 *G. M. van de Coevering v. Hoofd van het District Douane Roermond van de rijksbelastingdienst* [2006] ECR I-05843, para 17.

¹⁴⁰ Case C-242/05 *G. M. van de Coevering v. Hoofd van het District Douane Roermond van de rijksbelastingdienst* [2006] ECR I-05843, paras 3-7.

¹⁴¹ Case C-242/05 *G. M. van de Coevering v. Hoofd van het District Douane Roermond van de rijksbelastingdienst* [2006] ECR I-05843, para 16.

¹⁴² Case C-242/05 *G. M. van de Coevering v. Hoofd van het District Douane Roermond van de rijksbelastingdienst* [2006] ECR I-05843, para 33.

¹⁴³ Article 256 TFEU

¹⁴⁴ Brandsma e.a. 2008, p. 154.

give a price incentive to buy more fuel-efficient cars.¹⁴⁵ As of the year 2018, the Dutch government wants to levy taxes pro rata the use of passenger cars or motor vehicles. The tax rate to be paid will depend on the CO₂-emission per driven kilometre.¹⁴⁶ The decrease of the 'BPM'-rate in the year 2010 and again in 2011 seems promising for consumers. However according to a Dutch newspaper article from *'De Telegraaf'* on 19 June 2010, the created tax advantage does not reach the consumers. The reduction of 'BPM', and because of that the proportional elevation of the ACT, until 2013 has been laid down in the Dutch 2009 tax plan. Since 1 January 2010 the 'BPM' is partially based on CO₂-emission.¹⁴⁷ Therewith, the First step of the 'BPM'-conversion from levying the tax based on the catalogue price towards levying the tax based on the absolute CO₂-emission is made. The change in the way in which 'BPM' will be levied is just in regard to passenger cars. For other motor vehicles the catalogue price will remain the basis for 'BPM'.¹⁴⁸

The European Parliament wishes that the Netherlands abolishes its 'BPM'.¹⁴⁹ It can however not force the Netherlands to do so. According to the EU, the Netherlands should abolish the 'BPM' gradually within 10 years in order to implement a tax based on CO₂-emission in order to stimulate the sales of more environmentally friendly passenger cars and motor vehicles.¹⁵⁰ According to the ECJ, car rental by an EU citizen in another MS than the MS of residency falls under the scope of EU free movement of goods and free movement of services.¹⁵¹ In that case no 'BPM' may be levied as the rented car is registered in another MS. Because of this ruling the Dutch Ministry of Finance changed the 'BPM'. Now the 'BPM'-rate is calculated in accordance with the duration of lease. Up till now the Dutch treasury makes approximately 3,2 billion euros per year on 'BPM' alone.¹⁵² Therefore, it is highly unlikely that the Dutch government will abolish registration tax entirely. It will however adapt the tax in order to comply with EU legislation.

4.2: VAT

VAT is a tax which a national government levies over the sale of products and services. Eventually VAT is paid by the consumer. The current Dutch VAT system is based on the European VAT Directive.¹⁵³ Article 1 Dutch VAT law (*'Wet op de omzetbelasting 1968'*) describes that VAT is levied;

- when entrepreneurs supply goods and services;
- when entrepreneurs acquire goods intra-EU in the Netherlands;
- when anyone acquires a new means of transportation and
- when anyone imports goods.¹⁵⁴

At first instance the entrepreneur carries the VAT burden. However, in the end the consumer pays VAT as the producers and suppliers increase the price of the product or service with the VAT rate that they paid. The Netherlands introduced VAT in 1934. It was the intention of Dutch government to use the revenue to counteract the economic crisis. The Dutch government at that time said that VAT would be temporary. However VAT still exists because the success of VAT was immense which made it more important in the national tax system.

¹⁴⁵ <http://www.rivm.nl/bibliotheek/rapporten/500076012.pdf>

¹⁴⁶ <http://www.rivm.nl/bibliotheek/rapporten/500076012.pdf>

¹⁴⁷ From 1 February 2008 until 31 December 2009 the 'BPM' rate was already calculated on the basis of the CO₂-emission of very polluting passenger cars and motor vehicles.

¹⁴⁸ http://belastingplan.prinsjesdag2010.nl/belastingplan-2011/aDU1021_52-Stilzetten-afbouw-BPM.aspx

¹⁴⁹ <http://auto-en-vervoer.infonu.nl/auto/12294-auto-zelf-importeren-tot-40-goedkoper.html>

¹⁵⁰ <http://auto-en-vervoer.infonu.nl/auto/12294-auto-zelf-importeren-tot-40-goedkoper.html>

¹⁵¹ C-242/05 *Van de Coevering v. Hoofd van het District Roermond van de rijksbelasting* (2006) ECR I-05843, para 19.

¹⁵² <http://auto-en-vervoer.infonu.nl/auto/12294-auto-zelf-importeren-tot-40-goedkoper.html>

¹⁵³ <http://www.europa-nu.nl/id/vh7doshlcbzz/btw>

¹⁵⁴ <http://wetboek.net/Omzetbelasting-1968/1.html>

Ex Article 9 (1) Dutch VAT law 19% VAT is levied on most products. The reduced VAT rates are 6% and 0% (Article 9 (2) Dutch VAT law). Which VAT rate applies is dependent on the type of product or service.¹⁵⁵

For imported new passenger cars and motor vehicles in the Netherlands the VAT rate is 19%. VAT only needs to be paid for a new passenger car or new motor vehicle. A passenger car or motor vehicle is considered “new” when the passenger car or motor vehicle did not reach the threshold of 6.000 km or the passenger car or motor vehicle has not been used for at least 6 months.¹⁵⁶ Hence, a passenger car which is 8 months old with 4.000 Km on the clock that will be imported is considered “new”. In the case that in the country of purchase VAT has already been paid, the Netherlands will still levy VAT at importation when the passenger car is regarded “new”. It is possible to prevent this 'double taxation' within the EU by buying a “new” passenger car at a net-price (0% VAT) and only pay the VAT levied in the MS of destination. Although, this is only possible when the buyer has a valid VAT-number. When this is done by a consumer intra-EU, the individual can ask for a VAT restitution at customs when the VAT is stated on the receipt ex Article 30 (1) jo. 17b (2) Dutch VAT law.¹⁵⁷

¹⁵⁵ http://www.belastingdienst.nl/zakelijk/ondernemen_btw/ondernemen_btw-03.html

¹⁵⁶ Brochure from the Dutch Tax Revenue Services on the tax on passenger cars and motor vehicles (*BPM*), p. 5-6.

¹⁵⁷ http://www.dasimport.nl/uw_voordeel.asp?p=BTW

Chapter 5: Belgium

In the previous chapter the tax law on passenger cars and motor vehicles of the Netherlands has been elucidated. This chapter will focus on the same tax law of Belgium. Paragraph 5.1 will describe the Belgian registration tax followed by a description of the Belgian VAT.

The Belgian registration tax 'BIV' (*'Belasting op de Inverkeerstelling'*) is the equivalent of the Dutch 'BPM'. As the Dutch 'BPM', the Belgian 'BIV' is levied on registration of passenger cars and motor vehicles. As the Netherlands, Belgium also has more taxes on passenger cars and motor vehicles. Belgium levies customs duties when a passenger car or motor vehicle, enters EU territory via Belgium. Belgium also levies an ACT. As in the Netherlands 3 taxes need to be paid when importing a passenger car or motor vehicle into Belgium;

- 'BIV';
- VAT;
- Customs duties (only when imported from outside the EU).

Belgium is subdivided in 3 regions, Flanders, Brussels and Walloon. These regions have their own budget and therefore collect their own taxes. Mostly the Federal Government of Finance levies taxes. The collected tax revenue will be redistributed to the appropriate regions.

5.1: Registration tax on motor vehicles ('BIV')

Motor vehicles need to be registered by their owner at the service of road transport, directorate for vehicle registration. For registration 'BIV' needs to be paid.¹⁵⁸ Belgium started levying 'BIV' on 1 June 1992. 'BIV' is a national tax which is levied upon registration of road vehicles, aircrafts and boats which are used on the Belgian infrastructure.¹⁵⁹ With regard to road vehicles taxable are:

- passenger cars;
- cars for double use¹⁶⁰;
- mini-busses and
- motor cycles registered under a normal licence plate.

The 'BIV' tax scales are based on the power of the engine expressed in horse-power (pk) and in kilowatt (kW). Provided that one engine in fiscal pk and in kW indicate a different tax scale, the highest tax scale is due. Moreover, the amount of tax due depends on the age of the motor vehicle. This table shows how much tax is due for new vehicles not older than 12 months.¹⁶¹

Amount of Horse power	Amount of Kilowatt	Amount of taxes levied in euro's
From 0 till 8	From 0 till 70	€ 61,50
9 and 10	From 71 till 85	€ 123,00
11	From 86 till 100	€ 495,00
From 12 till 14	From 101 till 110	€ 867,00
15	From 111 till 120	€ 1.239,00
16 and 17	From 121 till 155	€ 2.478,00
Above 17	Above 155	€ 4.957,00

¹⁵⁸ J.J. Couturier, B. Peeters & N. Plets, *'Belgisch Belastingrecht. In Hoofdpijnen (hereinafter Couturier, Peeters & Plets 2010)* Antwerpen - Apeldoorn': Maklu 2010, p. 742, paragraph 517.

¹⁵⁹ Couturier, Peeters & Plets 2010, p. 747, paragraph 526.

¹⁶⁰ A car for double use means that these cars are used professionally as well as for private use.

¹⁶¹ Couturier, Peeters & Plets 2010, p. 749, paragraph 528.

For vehicles older than 12 months the following percentages of the amount shown in the above table should be paid;

- between 1 and 2 years 90%;
- between 2 and 3 years 80%;
- between 3 and 4 years 70%;
- between 4 and 5 years 60%;
- between 5 and 6 years 55%;
- between 6 and 7 years 50%;
- between 7 and 8 years 45%;
- between 8 and 9 years 40%;
- between 9 and 10 years 35%;
- between 10 and 11 years 30%;
- between 11 and 12 years 25%;
- between 12 and 13 years 20%;
- between 13 and 14 years 15%;
- between 14 and 15 years 10%.¹⁶²

Since 1 January 2002 a fixed lump sum of €61,50 needs to be paid for passenger cars and motor vehicles which are 15 years old or older. Since 1 April 2008 Walloon applies a 'BIV' tax-system which deviates from the federal system. In Walloon, just as in the Netherlands, the 'BIV' tax-system takes also into account the CO₂-emission (Articles 97-97octies Belgian tax law equated to income tax).¹⁶³ 'BIV' is due the moment the motor vehicle is used in Belgium by the registering individual.

5.1.1: 'BIV' exemptions

In the 3 Belgian regions 'BIV' does not need to be paid when the ownership of a motor vehicle is transferred because of a divorce. Again Walloon has a deviating rule. In Walloon, a private individual does not need to pay 'BIV' when he or she gets a divorce and when he or she legally separates from the one who he or she was cohabitating with.¹⁶⁴ If the motor vehicle is permanently transferred and registered to another MS within 6 months after registration it is possible to get exempted from paying 'BIV'.¹⁶⁵ Belgium 'BIV' has no exemptions for private persons and entrepreneurs. However, it is possible to receive a deduction on 'BIV' if the motor vehicle complies with the Euro 4¹⁶⁶ emission norm or is equipped with LPG.¹⁶⁷ The Communities, Regions, Provinces, Agglomeration and the Municipalities are not allowed to levy centimes on top of the general 'BIV'.¹⁶⁸

¹⁶² http://koba.minfin.fgov.be/commande/pdf/Fold_verkeersbelast_2010_2011.pdf

¹⁶³ Couturier, Peeters & Plets 2010, p. 750, paragraph 528.

¹⁶⁴ Flemish Decree of 24 May 2002, Brussels Ordinance of 13 June 2002 and the Walloon Decree of 8 July 2002.

¹⁶⁵ The Belgian Court of Arbitration decided that this rule does not infringe Arts. 10, 11 and 172 of the Belgian Constitution (Belgian Court of Arbitration nr. 136/2005, 19 July 2005, *B.S. (Belgian Bulletin of Acts)*, 2 September 2005). For the text of the Belgian Constitution I refer to the following website; http://www.const-court.be/nl/basisteksten/basisteksten_grondwet.html

¹⁶⁶ European Parliament and Council Directive 98/69/EC of 13 October 1998 relating to measures to be taken against air pollution by emissions from motor vehicles and amending Council Directive 70/220/EEC, OJ L 350. This Directive was amended by Commission Directive 2002/80/EC of 3 October 2002 adapting to technical progress Council Directive 70/220/EEC relating to measures to be taken against air pollution by emissions from motor vehicles, OJ L 291.

¹⁶⁷

<http://www.verzekeringenpyfferoen.be/acrobad%20reader/Belasting%20op%20de%20Inverkeerstellin g.pdf>

¹⁶⁸ Couturier, Peeters & Plets 2010, p. 752, paragraph 531.

5.2: VAT

Belgium has been levying VAT according to EU legislation since 1 January 1971. Article 4 (1) Belgian VAT law ('BTW-wetboek') describes a taxpayer as; everyone who autonomously and regularly carries out an economic activity, principally or supplementary, with or without the aim for profit and who supplies goods or services which are stated in Belgian law, regardless of where the economic activity is carried out.¹⁶⁹ Taxpayers are not consumers however they do carry the tax burden.¹⁷⁰ Article 8bis jo. Article 39bis Belgian VAT law describes that everyone who incidentally supplies a new means of transportation within the territory of the EU is considered an incidental tax payer. This is an arrangement that exists to insure that the VAT in that case needs to be paid to the MS of destination. Ex Article 8bis (2) sub 2 Belgian VAT law means of transport are land vehicles equipped with a motor with a cylinder over 48cc or with a pk over 7,2 kW. New means of transportation has the same meaning in Belgium as in the Netherlands. A means of transportation is "new" ex Article 8bis (2) last sub Belgian VAT law when the supply hereof takes place within 6 months after the date of first usage or has not been used for more than 6000 kilometres.¹⁷¹ According to Article 25ter (2) Belgian VAT law VAT on "new" means of transportation is levied in the MS of destination. The intra-EU supply of "new" means of transportation is exempted from VAT in Belgium (Article 39bis (1) sub 2 Belgian VAT law).¹⁷² Article 25ter (2) Belgian VAT law prescribes that the competence for levying VAT belongs to the MS in which the "new" means of transportation will be registered. This means that the supply of "new" means of transportation to Belgium is exempted from VAT in the MS of purchase. VAT will be levied in Belgium. Since 1 June 1993 the minimum VAT rate has been regulated in Belgian Royal Decree nr. 17, which has been changed multiple times because of rulings by the ECJ¹⁷³. Now the standard VAT tariff in Belgium is 21%. Belgium also has two reduced VAT tariffs; one of 6% and one of 12%.¹⁷⁴ Ex Article 38 (1) sub 1 Belgian VAT law the tariff which has been set on the moment of import or supply of goods is the tariff that needs to be paid.

There are VAT exemptions¹⁷⁵ In some cases export and intra-EU acquisition of goods are exempted from VAT, namely;

- if the goods concerned are supplied by an internal tax-payer (Article 40 (1), sub 1a Belgian VAT law);
- if the goods fall under the scope of goods which have a permanent exemption from paying VAT according to proclaimed EU regulation (Article 40 (1), sub 1b Belgian VAT law);¹⁷⁶
- if a tax-payer in Belgium imports goods which are intended for another MS and which are not placed under a transit system, but are entering the free circulation in Belgium. This way of importation has been exempted from VAT when the intra-EU supply is

¹⁶⁹ Couturier, Peeters & Plets 2010, p. 837, paragraph 861.

¹⁷⁰ Couturier, Peeters & Plets 2010, p. 841, paragraph 865.

¹⁷¹ Couturier, Peeters & Plets 2010, p. 844-845, paragraph 866.

¹⁷² Couturier, Peeters & Plets 2010, p. 863, paragraph 891.

¹⁷³ C-324/82 *Commission v. Belgium* [1984] ECR 01861; C-391/85 *Commission v. Belgium* [1988] ECR 00579. *General Fiscal Magazine (A.F.T.)*, 1988, 223, annotation P. WILLE, 'Fiscale Koerier', 1988, 136, annotation J. THILMANY; ECJ, 9 July 1992, 'Fiscale Koerier', 1992, 461-461, annotation D. GAZAGNES, *General Fiscal Magazine (A.F.T.)*, 1992, 248-252, annotation P. WILLE; M. EULAERTS and H. VAN DEN KEYBUS, 'De verkoopprijs als maatstaf van heffing bij verkoop van tweedehandswagens tussen BTW-plichtigen', 'Fiskoloog Internationaal', 192, nr. 104, 3-5; M. EULAERTS and H. VAN DEN KEYBUS, 'Enkele beschouwingen inzake BTW en inschrijvingstaks na het K'line arrest van 9 juli 1992', *Magazine for Fiscal Law (T.F.R.)*, 1993, p. 95-115.

¹⁷⁴ Couturier, Peeters & Plets 2010, p. 858-859, paragraph 885.

¹⁷⁵ <http://www.vatdesk.be/content/view/53/62/lang.english/>

¹⁷⁶ For a summary of these goods I refer to Art. 12 *et seq* of the Belgian VAT law. This list for example exempts personal goods which are imported because of the migration of its owner from the normal place of residence, from a third country to Belgium or from one of the Member States of the EU to Belgium.

exercised by the importer based on Article 39*bis* Belgian VAT law, because the good is followed by an intra-EU acquisition in the MS of destination. Therefore, in Belgium those goods are not burdened with the levying of VAT, as the levying of VAT falls within the competence of the MS of destination;

- if it concerns the re-importation of goods which were exported out of the EU because these goods needed to be altered (Article 40 (1) & (2) Belgian VAT law).

In Belgium VAT on cars can only be refunded partially (50%) to entrepreneurs. A private individual can henceforth not get refunded on its paid VAT on a car. Nor a private individual nor an entrepreneur can get refunded for the paid VAT on other motor driven vehicles.¹⁷⁷

¹⁷⁷ <http://www.vatdesk.be/content/view/53/62/lang.english/>

Chapter 6: Compatibility with EU law

In this chapter the researched taxes will be tested for their compatibility with EU free movement of goods and taxation. The paragraphs are divided into subparagraphs in order to make a clear overview for comparing the two Member States and answer the central research question in the conclusion. Each subparagraph will pose the same questions per to be researched tax.

6.1: The Netherlands and its compatibility with the EU provisions on free movement of goods: duties, charges and taxes

Free movement barriers hinder trade between Member States. The EU has an internal market with free trade (Article 3 TEU). Trade barriers are thus unacceptable. The internal market would be more efficient without these barriers. Taxes on passenger cars and motor vehicles are not harmonized in the EU. Member States are entitled to exert their fiscal competences regarding these taxes. Albeit that Member States have to comply with EU law.¹⁷⁸ According to the European Commission, all taxes on passenger cars and motor vehicles need to be interpreted in the light of free movement which makes this research of the utmost importance.¹⁷⁹

6.1.1: 'BPM'

6.1.1.1: What is subject to free movement?

*'All products which cross an EU border for the purpose of a commercial transaction.'*¹⁸⁰ As the internal market is created for consumers to have a larger choice in products and therefore creating a bigger level playing field for producers, it is possible to buy and sell passenger cars and motor vehicles across Member States borders. Thus assuring that passenger cars and motor vehicles are subject to the provisions on free movement within the EU.

6.1.1.2: Does the product fall within the scope of the definition 'goods'?

According to *Commission v. Italy* goods are;

*'...products which can be valued in money and which are capable, as such, of forming the subject of a commercial transaction.'*¹⁸¹

Passenger cars and motor vehicles fall within the scope of the definition of goods, as passenger cars and motor vehicles can be valued for money and they can be subject to a commercial transaction. The value can be shown by the sales price of a passenger car or motor vehicle. Passenger cars and motor vehicles can be bought and sold and can thus be subject of a commercial transaction. Because passenger cars and motor vehicles both fulfil the requirements of the definition 'goods', these goods can be tested against the free movement of goods provisions.

¹⁷⁸ W. Hamstra, 'Europese Fiscale Studies' Erasmus, '*Buitenlandse huurauto's en de heffing van BPM*' (study) (*hereinafter Hamstra 2008/2009*) Rotterdam: Erasmus p. 7.

¹⁷⁹ European Commission 'taxation on cars transferred within the community or used regularly on cross-border journey's' TAXUD/255/02 of 9 September 2002.

¹⁸⁰ Davies 2007, p. 107.

¹⁸¹ Case 7/68 *Commission v. Italy* [1968] ECR 423, para B.1.

6.1.1.3: Is the Dutch 'BPM' a measure having equivalent effect or a tax?

In multiple cases¹⁸² the ECJ decided, for instance in *De Danske Bilimportører*¹⁸³, that registration taxes are internal taxes ex Article 110 TFEU. The definition of a tax is according to case law as follows;

*'A general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.'*¹⁸⁴

'BPM' complies with the criteria of this definition as 'BPM' is an internal tax which is applied to 'the registration of passenger cars and motor vehicles in the Netherlands, as well as on vehicles registered abroad but available for use in the Netherlands'¹⁸⁵. The 'BPM' rate is based on the same objective criteria for each passenger car or motor vehicle. It is therefore systematically applied irrespective of the origin of the product. Because the Dutch 'BPM' is a tax, Articles. 28-30 and Article 110 TFEU are applicable. Not Articles. 34-36 TFEU as these Treaty Articles address non-fiscal and non-tariff trade barriers.¹⁸⁶ Articles 28-30 and Article 110 TFEU will therefore be used as part of the testing framework to find an answer to the main research question.

6.1.1.4: What are the rules which national tax measures need to comply with to be compatible with EU free movement of goods?

'BPM' is an internal tax which will be tested for its compatibility with Articles 28 and 30 TFEU. Article 29 TFEU will not be taken into account as that only regards products coming from third countries. Article 28 (1) TFEU *'forbids any unilateral pecuniary charge on the border-crossing of goods. It is irrelevant whether or not the charge is aimed at protecting domestic production. The decisive question is whether there is a restrictive effect on EU trade. The second prohibition outlaws'*¹⁸⁷ according to *Dassonville*;

*'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade...'*¹⁸⁸

As 'BPM' is not levied when crossing a border, but when registering a passenger car or motor vehicle for usage on the infrastructure in the Netherlands. 'BPM' does not fall under the scope of this provision. There is no research that proves that 'BPM' has a restrictive effect on trade. At the same time it complies with the second prohibition as 'BPM' is not a trading rule because the tax only needs to be paid when registering a passenger car or motor vehicle in the Netherlands. Article 28 (2) states that Article 30 TFEU could be applicable as well. But, because Article 30 TFEU and Article 110 TFEU are mutually exclusive, there needs to be tested first under which scope 'BPM' falls. As 'BPM' is not levied when crossing the Dutch border 'BPM' can not be seen as a customs duty on import or export.

¹⁸² C-47/88 *Commission v Denmark* [1990] ECR I-4509, paras 12-13; Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 32; Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paras 38-41.

¹⁸³ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, paras 34, 42.

¹⁸⁴ Case 158/82 *Commission of the European Communities v Kingdom of Denmark* [1983] ECR 03573, para 11; Case 90/79 *Commission v. France* [1981] ECR 283, para 14.

¹⁸⁵ http://ip-online2.ibfd.org/data/gii/Country_Analyses/Gii-net.doc.p0017.html

¹⁸⁶ Barnard 2007, p. 28.

¹⁸⁷ Terra & Wattel 2008, p. 30.

¹⁸⁸ Case 8/74 *Dassonville* [1974] ECR 837, para 5.

The definition of a measure having equivalent effect was created in the second *Art Treasure* case. According to the ECJ in this case a measure having equivalent effect was defined as;

*‘...any pecuniary charge ... imposed ... on domestic or foreign goods by reason of the fact that they cross a frontier...’*¹⁸⁹

‘BPM’ does not fall within the scope of this definition. ‘BPM’ is levied on every national and foreign passenger car and motor vehicle which is registered for use within the Netherlands. Not because the passenger car or motor vehicle crosses the Dutch border. Hence, Article 30 TFEU regards border issues and ‘BPM’ is not levied when crossing EU borders this Treaty Article will further be disregarded. Thus, ‘BPM’ needs to be tested for its compatibility with Article 110 TFEU. This test will be described in paragraph 6.2.1.

The exemptions mentioned in Article 36 TFEU are not applicable as Article 36 TFEU is only applicable in the context of Articles 34 and 35 TFEU. Articles 34 and 35 TFEU are only applicable to quantitative restrictions. These Treaty provisions are not applicable. Quantitative restrictions are defined in *Geddo v. Ente as*;

*‘The prohibition on Quantitative Restrictions covers measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.’*¹⁹⁰

‘BPM’ is an internal tax levied on all passenger cars and motor vehicles registered for usage in the Netherlands. ‘BPM’ does not amount to a numerical limit on importation or exportation of passenger cars and motor vehicles. ‘BPM’ is therefore not a quantitative restriction. ‘BPM’ is levied on each individual passenger car or motor vehicle and is not a restriction on the importation or exportation of a certain quantity of these goods. According to the ECJ in *De Danske Bilimportører*¹⁹¹, *Breziński*¹⁹² and *Ioan Tatu*¹⁹³ Article 34 TFEU is not applicable to internal taxes, such as registration taxes. Registration taxes can not be seen as Quantitative Restrictions nor as measures having an equivalent effect.

6.1.1.5: Does the Dutch ‘BPM’ comply with the proportionality principle?

According to the ECJ in *Cassis de Dijon*¹⁹⁴ and *Beer purity*¹⁹⁵ a measure is proportional when it is effective and when it does not go beyond what is necessary to achieve the intended goal. According to the website of the Dutch government¹⁹⁶ the goal of levying ‘BPM’ is the stimulation of the purchase of more environmentally friendly cars. Environmentally friendly cars have less CO₂-emission. According to the ‘RDW’¹⁹⁷ the market share of new passenger cars with an A or B energy label¹⁹⁸ has strongly increased in the years 2008 and 2009. This increase is a consequence of the Dutch fiscal policy to stimulate the sale of environmentally

¹⁸⁹ Case 24/68 *Commission v. Italy* [1969] ECR 193, para 9.

¹⁹⁰ Case 2-73 *Riseria Luigi Geddo v Ente Nazionale Risi* [1973] ECR 00865, para 7.

¹⁹¹ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, para 32.

¹⁹² Case C-313/05 *Maciej Breziński* [2007] ECR I-513, para 50.

¹⁹³ Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 33.

¹⁹⁴ Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8.

¹⁹⁵ Case 178/84 *Beer purity* [1987] ECR 01227, para 28.

¹⁹⁶ <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/betaal-ik-minder-bpm-bij-de-aanschaf-van-een-zuinige-auto.html>

¹⁹⁷ ‘The Dutch government appointed authority for testing, homologation approval and certification of motor vehicles and their components acc. to ECE regulations and EU (EEC) directives.’ Website; http://nl.kompass.com/profile_NL212204_nl/rdw-ps-en.html

¹⁹⁸ For more information on the EU energy labels see; <http://www.energy.eu/focus/energy-label.php>

friendly cars.¹⁹⁹ This shows the effectiveness of the change in the levying of 'BPM' for the stimulation of the sale of more environmentally friendly cars. 'BPM' also does not go beyond what is necessary to achieve the set goal as there is no realistic alternative in stimulating consumers to buy more environmentally friendly passenger cars. Making environmentally friendly cars less expensive is not possible as this does not lie within the competences of national government. Thus, 'BPM' complies with the proportionality principle. The ECJ expanded this principle in *Van de Coevering*²⁰⁰. The tax levied also needs to take into consideration the duration of usage of the passenger car or motor vehicle. After *Van de Coevering* the Netherlands adapted its 'BPM' into a tax which takes into account the duration of usage in the Netherlands.

6.1.1.6: *What is the opinion of the ECJ on registration taxes in regard to free movement and does the Dutch 'BPM' comply with that opinion?*

From ECJ case law²⁰¹ appears that national measures which form barriers for freedom to provide services are only acceptable if these measures are justified by general overriding rules and if the measure complies with the proportionality principle. This case law is also applicable to free movement of goods because the ECJ tries to apply the four freedoms similarly to improve legal certainty. There is no harmonization in the area of registration taxes. There are just a couple Directives²⁰² which only cover part of the registration tax. Therefore, Member States are allowed to levy their own registration tax. With regard to the general overriding rules the Dutch government is of the opinion that the reason for levying 'BPM' has nothing to do with the urge of filling the national treasury, but that the general overriding rule regards environmental issues.²⁰³ This becomes apparent from the recent changes in the basis of levying 'BPM'. Nowadays owners of more polluting passenger cars and motor vehicles need to pay a higher 'BPM' rate compared to a more environmentally friendly passenger car or motor vehicle. In the Netherlands it is possible to receive a refund on the paid 'BPM' but only if the passenger car or motor vehicle is exported to- and registered in another MS. To receive a refund is a difficult and lengthy procedure.²⁰⁴

In *Weigel*²⁰⁵ the ECJ ruled that a registration tax on passenger cars and motor vehicles does hamper free movement. The ECJ also stated that the Treaty gives no guarantee that an individual which moves residence from one MS to another, does not encounter taxes in the MS of destination.²⁰⁶ In this case Article 45 TFEU was the basis for the proceeding. This ruling can also be applicable to the free movement of goods if the foreign goods do not

¹⁹⁹ <http://www.duurzameenergiethuis.nl/mobiliteit/marktaandeel-zuinige-autos-stijgt-fors-in-nederland-5045.html> and <http://www.compendiumvoordeleefomgeving.nl/indicatoren/nl0537-Energielabels-persoonauto%27s.html?i=9-53>

²⁰⁰ Case C-242/05 *G. M. van de Coevering v. Hoofd van het District Douane Roermond van de rijksbelastingdienst* [2006] ECR I-05843, para 28.

²⁰¹ Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, para 32; Case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, para 37.

²⁰² Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105 and Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105 and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1.

²⁰³ <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/betaal-ik-minder-bpm-bij-de-aanschaf-van-een-zuinige-auto.html>

²⁰⁴ <http://www.rdw.nl/nl/particulier/auto/uitvoeren/Pages/Eenautouitvoeren.aspx> and <http://www.bpmberekenen.com/bpm-teruggave-bij-export.html>

²⁰⁵ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 54-55, 60.

²⁰⁶ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 54-55 and 60.

encounter any disadvantage compared to national goods which already bear these taxes.²⁰⁷ In *Weigel*²⁰⁸ the ECJ ruled that every MS is allowed to decide whether to impose a registration tax or not. In *De Danske Bilimportører*²⁰⁹ the ECJ ruled that registration taxes are part of the national tax systems and should therefore not be examined against Article 34 TFEU but against Article 110 TFEU. According to fixed ECJ case law²¹⁰, for example *Commission v. Italy*²¹¹ and *Diamantarbeiders*²¹², an internal tax is, contrary to a measure having equivalent effect ex Articles 28 and 35 TFEU, every unilateral applied financial burden, regardless of the denomination or the structure thereof, which is levied on goods because these goods cross borders, although it is not a customs duty *stricto sensu*. Thus, if 'BPM' can not be tested in the light of Article 34 TFEU it can also not be tested in the framework of Article 28 TFEU as these Treaty Articles fall under the same Title of the Treaty. Because, according to the ECJ²¹³, a registration tax is an internal tax it can not be tested in the light of free movement of goods. 'BPM' as an internal tax can not infringe on the free movement of goods. The ECJ decided that registration taxes can be tested for its compatibility with Article 110 TFEU. This will be done in paragraph 6.2.1.

6.1.2: VAT

6.1.2.1: Is the Dutch VAT compatible with EU free movement of goods?

According to the ECJ in *Weigel*²¹⁴, VAT levied on registration of imported motor vehicles is an internal tax which needs to comply with EU law, however not with Articles 28 or 45 TFEU, but under Article 110 TFEU²¹⁵ as this Treaty Article relates to internal taxation. 'BPM' and VAT are both part of the internal tax system and will therefore be tested for compatibility with Article 110 TFEU which will take place in paragraph 6.2.2.

6.2: The Netherlands and its compatibility with the EU taxation provisions

In the previous paragraphs 'BPM' and VAT have been compared for their compatibility with EU free movement of goods. In the following paragraphs 'BPM' and VAT will be tested for their compatibility with EU taxation. Article 110 TFEU, the Sixth Tax Directive and the proposal for a Council Directive on passenger car related taxes will be tested.

6.2.1: 'BPM'

6.2.1.1: Is Article 110 TFEU applicable?

In *Bergandi* the ECJ decided when Article 110 TFEU is applicable. Article 110 TFEU is applicable;

²⁰⁷ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 54-55, 60.

²⁰⁸ This was concluded in Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 47, 49.

²⁰⁹ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, paras 35, 39-43.

²¹⁰ Case 158/82 *Commission v Denmark* [1983] ECR 3573, para 18; Case C-130/93 *Lamair* [1994] ECR I-3215, para 13; Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145, para 15; Case C-234/99 *Nygård* [2002] ECR I-3657, para 19.

²¹¹ Case 24/68 *Commission v. Italy* [1969] ECR 193, para 9.

²¹² Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders v. SA Ch. Brachfeld & Sons* [1969] ECR 211, paras 15-18.

²¹³ C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, para 34.

²¹⁴ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 64.

²¹⁵ Case C-234/99 *Nygård* [2002] ECR I-3657, para 19; Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777, para 20.

‘...whenever a fiscal levy is likely to discourage imports of goods originating in other Member States to the benefit of domestic production.’²¹⁶

Article 110 TFEU is therefore applicable to taxes on importation, exportation²¹⁷ as well as the taxes levied on the usage of goods.²¹⁸ ‘BPM’ is a fiscal levy on the registration for the usage of goods. Thus, Article 110 TFEU is applicable to the Dutch ‘BPM’.

6.2.1.2: Is the Dutch ‘BPM’ compatible with Article 110 TFEU?

According to Article 110 TFEU, non-discriminatory internal taxation is lawful if the levying thereof is not in excess of that imposed on similar domestic products and if the internal tax imposed on products of other Member States does not indirectly protect other products. Registration tax in the Netherlands is applicable to all passenger cars and motor vehicles registered for use in the Netherlands. Thus, ‘BPM’ is non-discriminatory. There is a difference between directly discriminatory and indirectly discriminatory. Directly discriminatory means that taxation ‘overtly treats domestic and other goods differently’²¹⁹. ‘BPM’ is not directly discriminatory because it treats national and foreign goods the same. Indirectly discriminatory²²⁰ means that a tax may ‘appear to comply with EU law although, in reality, placing non-domestic goods at a disadvantage’²²¹. The gross ‘BPM’ is 19% of the original catalogue price plus a surcharge depending on the CO₂-emission of the passenger car or motor vehicle. The percentage used for the calculation of the ‘BPM’ to be paid depends on the actual value. For the actual value, the age and kilometres driven as well as the general condition of the passenger car or motor vehicle are decisive. ‘BPM’ does not indirectly discriminate non-domestic passenger cars and motor vehicles due to the fact that;

- fixed criteria are being used to determine the amount of ‘BPM’ that has to be paid and
- ‘BPM’ is applicable to both domestic and imported passenger cars and motor vehicles;
- ‘BPM’ is due at the same moment in the trade process.

According to the ECJ in *UCAL*²²² and *Nygård*²²³, an internal tax, such as the ‘BPM’, can infringe on Article 110 TFEU. The ECJ ruled that such a tax infringes if the revenue is intended for financing activities which are only meant for national taxable goods and hence partly compensate the tax burden pressing on these national goods. The ‘BPM’ revenue is not intended for one specific goal. It is intended for the general means. The ECJ²²⁴ ruled that an internal tax on the registration of passenger cars and motor vehicles does not account for an infringement of Article 110 TFEU. The ECJ concluded in *Cura Anlagen*²²⁵ that proportional registration taxes on new passenger cars and motor vehicles are not infringing Article 110 TFEU.²²⁶ Concluding, ‘BPM’ is indiscriminately levied over passenger cars and motor

²¹⁶ Case 252/86 *Bergandi* [1988] ECR 1343, para 25.

²¹⁷ Case 142/77 *Staten Kontrol v. Larsen* [1978] ECR 1787, para 24.

²¹⁸ Case 252/86 *Bergandi* [1988] ECR 1343, para 27.

²¹⁹ Davies 2007, p. 113.

²²⁰ Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, para 47; Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 37; Case 112/84 *Michel Humblot v Directeur des services fiscaux* [1985] ECR 01367, para 10, 14.

²²¹ Davies 2007, p. 113.

²²² C-347/95 *UCAL* [1997] ECR I-04911, para 29.1.

²²³ C-234/99 *Nygård* [2002] ECR I-3657, para 49.

²²⁴ C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, para 35.

²²⁵ C-451/99 *Cura Anlagen GmbH v. Auto Service Leasing GmbH* [2002] ECR I-03193, para 69.

²²⁶ Hamstra 2008/2009, p. 8.

vehicles imported or not and at the same moment in the trade process.²²⁷ Based on this and *Cura Anlagen* 'BPM' does not infringe on Article 110 TFEU.

6.2.1.3: What is the opinion of the ECJ on registration taxes in regard to EU taxation and does the Dutch 'BPM' comply with that opinion?

The ECJ determined in *Weigel*²²⁸ that internal registration taxes must be examined under art. 110 TFEU. The ECJ²²⁹ also determined that registration taxes do not comply with the exemption stated in the Council Directive on tax exemptions applicable to permanent imports from a MS of the personal property of individuals²³⁰. According to the ECJ in *Ministério Público*²³¹ Member States are allowed, on the grounds of Article 110 TFEU, to impose registration taxes on passenger cars and motor vehicles imported from another MS as long as the taxable value is determined on actual value as well as fixed requirements that take into account the depreciation of the passenger car or motor vehicle. This must guarantee that the taxes levied never exceed the remainder of taxes on a similar passenger car or motor vehicle that is already registered in the MS of registration. 'BPM' is levied on all passenger cars and motor vehicles registered in the Netherlands and calculated according to the actual value and objective criteria such as the age of the car, the CO₂-emission per kilometre and the general condition. In *Weigel*²³² the ECJ concluded that Member States are not allowed to levy discriminating registration taxes, imported or not. This requirement is fulfilled by the 'BPM' as the tax is levied on all passenger cars and motor vehicles registered in the Netherlands, imported or not, and from Dutch origin or not. 'BPM' is therefore in concordance with ECJ case law.

6.2.1.4: Is the Dutch 'BPM' compatible with the Council Directives on consumption taxes?

The Council Directive on tax exemptions applicable to permanent imports from a MS of the personal property of individuals²³³ is not applicable to registration taxes in general as described in Article 1 (2) of this Directive. The Council Directive on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another²³⁴ is only applicable to the temporary import of means of transportation. Temporary importation concerns mostly the cross border renting of cars which will further be disregarded.

6.2.1.5: Is the Dutch 'BPM' compatible with the EU VAT Directive?

According to the Supreme Court in the Netherlands ('*Hoge Raad*')²³⁵ 'BPM' can not be regarded as a turnover tax ex Article 33 (1) VAT Directive.²³⁶ The VAT Directive is therefore inapplicable to the Dutch 'BPM'.²³⁷

²²⁷ C-213/96 *Outokumpu Oy* [1998] ECR I-01777, para 24.

²²⁸ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 81.

²²⁹ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 47.

²³⁰ Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105.

²³¹ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

²³² Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 81, 87, 89.

²³³ Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105.

²³⁴ Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105.

²³⁵ 'HR' (Highest Court of the Netherlands, '*Hoge Raad*') 13 September 2000, LJN AA7073.

²³⁶ Hamstra 2008/2009, p. 7.

6.2.1.6: Is the Dutch 'BPM' compatible with the proposal for a Council Directive?

According to the proposal for a Council Directive on passenger car related taxes, the Member States should change their registration tax system to be in accordance with one of the following 3 measures;

- 1) The abolishment of registration taxes;
- 2) Establishing a registration tax refund system or
- 3) Restructuring registration taxes and annual circulation taxes to be partially or totally based on CO₂-emission.

The Dutch government adapted the 'BPM' from June 2010 onwards, decreasing the registration tax rate from 45,2% to 27,4% with a surplus based on CO₂-emission in 2010. In 2011 'BPM' was decreased to 19% with a surplus based on CO₂-emission. The goal of the Dutch government is to abolish registration taxes in the year 2018 and replace them with an ACT based on CO₂-emission and kilometres driven.²³⁸ The plans of the Dutch government are at the moment in concordance with the proposal. In the Netherlands there is a possibility for refund on 'BPM', although the procedure is time consuming and difficult. As the measures suggested in the proposal are alternatives and not cumulative, the Dutch registration tax complies with the situation in the proposal.

6.2.2: VAT

6.2.2.1: Is the Dutch VAT compatible with Article 110 TFEU?

Article 110 TFEU requires internal taxation to be non-discriminatory and non-protective while the tax may not be in excess of that imposed on similar domestic products. The Netherlands levies 19% VAT on all new passenger cars and motor vehicles. Also on those passenger cars and motor vehicles imported from another MS from which can not be proven that VAT within the EU has been levied already. The Dutch VAT thus treats all passenger cars and motor vehicles the same. It does not put non-domestic goods at a disadvantage as it has to be paid for all passenger cars and motor vehicles. The Dutch VAT does therefore not infringe on Article 110 TFEU.

6.2.2.2: Does the Dutch VAT comply with the EU VAT Directive?

According to Article 97 (1) VAT Directive the minimum VAT to be levied must be 15%. In the Netherlands the standard VAT rate is 19%.²³⁹ The MS of destination is the MS that is entitled to levy VAT.²⁴⁰ Double VAT levying is therefore precluded. The Netherlands does levy VAT on "new" passenger cars and motor vehicles even though VAT has already been paid in the MS of purchase if the payment of VAT can not be proven.²⁴¹ According to the VAT Directive the occurrence of double taxation needs to be prevented. This is possible via restitution in the Member State of purchase. In the Netherlands restitution is possible if the person who exports the passenger car or motor vehicle has a VAT-number ex Article 30 (1) jo. Article 17b (2) Dutch VAT law. Thus in order to receive restitution you need to be an entrepreneur. The Dutch VAT is in accordance with the VAT Directive

²³⁷ Hamstra 2008/2009, p. 7.

²³⁸ <http://www.rivm.nl/bibliotheek/rapporten/500076012.pdf>

²³⁹ The reduced VAT rates will not be researched as these rates are not applicable to taxes levied on passenger cars and motor vehicles.

²⁴⁰ http://www.europarl.europa.eu/ftu/pdf/en//FTU_4.18.2.pdf

²⁴¹ http://www.dasimport.nl/uw_voordeel.asp?p=BTW

6.3: Belgium and its compatibility with the EU provisions on free movement of goods: duties, charges and taxes

As in paragraph 6.1 the same topic was discussed, although with regard to a different MS, the same approach will be used to test in this paragraph the Belgium taxes on passenger cars and motor vehicles for their compatibility with EU free movement of goods. Therefore the same questions will be used.

6.3.1: 'BIV'

The following questions will be disregarded in this paragraph as the same answers that were given in paragraph 6.1.1 regarding the Netherlands apply as well in the case of Belgium;

- What is subject to free movement?
- Does the product fall within the scope of the definition 'goods'?
- What is the opinion of the ECJ on registration taxes in regard to EU taxation and does the Belgian 'BIV' comply with that opinion?

Regarding the last question, the Belgian 'BIV' will only be tested for its compatibility with the ECJ case law as the case law was already explained in paragraph 6.1.1.6.

6.3.1.1: Is the Belgian 'BIV' a measure having equivalent effect or a tax?

'BIV' is part of the Belgian tax system and is an internal tax levied on the first registration by each owner of road vehicles, aircrafts and boats for usage on the Belgian infrastructure irrespective of the origin of these motor driven vehicles. The 'BIV' rate is based on the power of the engine and the age of the motor driven vehicle. In Walloon however, the CO₂-emission is also taken into account. Thus can be concluded that 'BIV' is systematically applied based on objective criteria and irrespective of the origin of the motor driven vehicle. Therefore, 'BIV' can be categorised as a tax and will be tested in the light of Articles 28-30 and 110 TFEU, the Treaty Articles on fiscal trade barriers.

6.3.1.2: What are the rules which national measures need to comply with to be compatible with EU free movement of goods?

The Treaty Articles which are going to be tested are Article 28 TFEU and Article 30 TFEU. Article 28 TFEU is applicable when the tax is levied because of EU border crossing and when that tax has a restrictive effect. As 'BIV' is levied when registering a motor driven vehicle for usage in Belgium the tax is not levied on the mere fact that a motor driven vehicle crossed the Belgian border. 'BIV' is an internal tax indiscriminately applied to all motor driven vehicles registered in Belgium and therefore has no restrictive effect. Also needs to be seen if 'BIV' is a trading rule. 'BIV' is an internal tax levied on all motor driven vehicles irrespective of their origin and based on objective criteria, it can not be regarded as a trading rule. Thus, 'BIV' complies with Article 28 TFEU. Article 28 (2) TFEU states that Article 30 TFEU applies;

'...to products originating in Member States and to products coming from third countries which are in free circulation in Member States.'

'BIV' is levied upon registration of a passenger car or motor vehicle and not because the passenger car or motor vehicle crosses the border. Thus Article 30 TFEU is not applicable. Article 30 TFEU and Article 110 TFEU are mutually exclusive. 'BIV' needs to be tested for its compatibility with Article 110 TFEU. This test will take place in paragraph 6.4.1.

6.3.1.3: Does the Belgian 'BIV' comply with the proportionality principle?

*Cassis de Dijon*²⁴² and *Beer purity*²⁴³ 'BIV' is proportional when it is effective and when it does not go beyond what is necessary to achieve the intended goal. The goal of levying 'BIV' is to decrease the CO₂-emission in Belgium.²⁴⁴ The biggest portion of 'BIV' revenue is used to complete the national budget. The 'BIV' rate depends on the age of the motor driven vehicle as well as on engine power. In Walloon also on the amount of CO₂-emission per kilometre. It is the intention of the resigned Belgian cabinet to base the entire levying of 'BIV' on CO₂-emission per kilometre. But due to the fact that there is no functioning government until this moment, these plans have not been approved yet.²⁴⁵ There is no actual research information available on Belgium to determine if this way of calculating 'BIV' has an effect on CO₂-emission. Without further proof of effectiveness, it is difficult to say that the Belgian 'BIV' complies with the proportionality principle.

6.3.1.4: Does the Belgian 'BIV' comply with ECJ case law on registration taxes in regard to free movement?

'BIV' is an internal registration tax. With regard to the Dutch 'BPM' a lot of cases were brought before the ECJ, while for 'BIV' there is no relevant case law. Because there is no relevant case law, the ECJ case law regarding the Dutch 'BPM' will be used for the 'BIV'. This is possible because the registration taxes of Belgium and the Netherlands are similar. Both taxes are internal taxes, levied on the registration of passenger cars and motor vehicles to be able to use those passenger cars and motor vehicles in Belgium or the Netherlands and at the same time in the trade process. However Belgium levies 'BIV' every time a motor driven vehicle changes ownership. Both tax rates depend on the age of the passenger car or motor vehicle. Another difference is that Belgium bases the tax amount also on engine power while the Netherlands bases it also on the catalogue price of the passenger car or motor vehicle. The core of both registration taxes is the same. Thus the case law of the ECJ regarding the Dutch 'BPM' is applicable to the Belgian 'BIV'. According to the ECJ in *Weigel*²⁴⁶ it is not possible to test 'BPM' against the free movement of goods. This can be concluded for the Belgian 'BIV' as well. The ECJ ruled in the *De Danske Bilimportører*²⁴⁷ that registration taxes must be tested in the light of Article 110 TFEU, which also applies to the 'BIV'. This test will take place in paragraph 6.4.1. Because 'BIV' can not be tested against free movement of goods it can also not infringe it. Thus, Belgian 'BIV' complies with ECJ case law.

6.3.2: VAT

6.3.2.1: Is the Belgian VAT compatible with EU free movement of goods?

VAT is just as 'BIV' part of the internal tax system and should therefore not be tested in the light of Articles 28-30 TFEU, but in the light of Article 110 TFEU. This will take place in paragraph 6.4.2 regarding EU taxation.

²⁴² Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8.

²⁴³ Case 178/84 *Beer purity* [1987] ECR 01227, para 28.

²⁴⁴ <http://www.mobimix.be/thema/fiscaliteit>

²⁴⁵ http://docs.vlaamsparlement.be/docs/handelingen_commissies/2010-2011/c0m079eco10-09122010.pdf

²⁴⁶ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, paras 64-65, 81.

²⁴⁷ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, paras 34, 39-43.

6.3.3: Comparison with the Netherlands

There are some differences and similarities between the registration tax levied in the Netherlands and the one levied in Belgium. Both registration taxes are levied on registration of passenger cars and motor vehicles, although Belgium extends the applicability of that registration tax to aircrafts and boats. There are differences between the registration tax levied in Belgium and in the Netherlands. The registration tax levied in the Netherlands is only levied on first time registration. The registration tax is therefore only levied once! While in Belgium the registration tax levied is not based only on first time registration but on registration in general.²⁴⁸ Thus, in Belgium, every time a motor driven vehicle is sold and changes ownership registration taxes need to be paid. Herein lies the difference in the amount of registration tax that has to be paid. For example the registration of a "new" Volkswagen Passat with a diesel engine 1.9 litre of 66 kW and 90 pk in Belgium costs € 4.957,00 while in the Netherlands that would cost € 6.690. When the Dutch car is being re-sold, no further registration tax needs to be paid. While the Belgian car, when being re-sold a registration tax needs to be paid again by the new owner. The amount of registration tax for the constituent owner is the original registration tax minus the deduction due to the age of the passenger car or motor vehicle. So in the situation where that same car is sold after 4 years in the Netherlands that would amount to € 0,- registration tax. The same car would cost € 2.974,20 on registration tax in Belgium. If that car would be re-sold again after 4 years the next owner would not pay any registration taxes in the Netherlands while in Belgium the new owner would need to pay € 1.982,80. In total for that eight year old Volkswagen Passat the registration tax paid would amount to € 6.690 in the Netherlands and € 8.922,60 in Belgium. That is a difference of € 2.232,60. Belgium has an exemption on paying 'BIV' when a person obtains a motor driven vehicle through a divorce or a separation.²⁴⁹ In the Netherlands there is no such exemption as the registration tax only needs to be paid on first time registration in the Netherlands.

6.4: Belgium and its compatibility with the EU taxation provisions

The compatibility of the Belgian taxes on passenger cars and motor vehicles with EU free movement of goods was the topic of paragraph 6.3. The upcoming sub paragraphs will answer the same sub questions as were used when testing the taxes on passenger cars and motor vehicles in the Netherlands. Not all questions will be addressed as the same answer applies for the Belgian taxes on passenger cars and motor vehicles. This regards the following questions;

- Is the Belgian 'BIV' compatible with the Council Directives on consumption taxes?

These Directives²⁵⁰ are not applicable to this research and will therefore be excluded from further research.

- What is the opinion of the ECJ on registration taxes in regard to EU taxation and does the Belgian 'BIV' comply with that opinion?

With regard to this question only the part of compliance will be described. For the opinion of the ECJ see paragraph 6.2.1.

²⁴⁸

<http://www.verzekeringenpyfferoen.be/acrobac%20reader/Belasting%20op%20de%20Inverkeerstellin%20g.pdf>

²⁴⁹ <http://belastingen.vlaanderen.be/nlapps/docs/default.asp?id=331>

²⁵⁰ Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105 and Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105.

6.4.1: 'BIV'

6.4.1.1: *Is Article 110 TFEU applicable?*

In *De Danske Bilimportører*²⁵¹ the ECJ determined that registration taxes should be examined under Article 110 TFEU. Article 110 TFEU is according to the ECJ in *Bergandi* applicable;

*'...whenever a fiscal levy is likely to discourage imports of goods originating in other Member States to the benefit of domestic productions.'*²⁵²

&

*'...Article 95 of the EEC Treaty also applies to internal taxation which is imposed on the use of imported products where those products are essentially intended for such use and have been imported solely for that purpose.'*²⁵³

It can thus be applied to taxes on the usage of goods, like the 'BIV'. Thus, Article 110 TFEU is applicable to the 'BIV'.

6.4.1.2: *Is the Belgian 'BIV' compatible with Article 110 TFEU?*

According to Article 110 TFEU internal taxation is legal if it is non-discriminatory and non-protective. 'BIV' is levied on every motor driven vehicle when registered for use in Belgium, regardless of its origin, based on the power of the engine and takes into account the age of that specific motor driven vehicle. Walloon takes into account the CO₂-emission as well. 'BIV' is therefore non-discriminatory. However, this test shows if the national tax is directly discriminatory. A national registration tax could also be indirectly discriminatory when it places non-domestic motor driven vehicles at a disadvantage.²⁵⁴ The 'BIV' criteria are applicable to all passenger cars and motor vehicles and therefore 'BIV' does not have an indirect discriminatory effect, nor is it protective. Concluding, 'BIV' is non-discriminatory and non-protective.

According to the ECJ it is still possible for an internal tax, such as the 'BIV', to infringe on Article 110 TFEU on condition that the collected tax revenue is meant for financing national taxable goods and thus compensate the national tax burden.²⁵⁵ The 'BIV' revenue is intended for the general budget and therefore is not used for compensation of the tax burden on national goods. On this ground, 'BIV' does also not infringe Article 110 TFEU. According to the ECJ, a registration tax is not infringing Article 110 TFEU. 'BIV' is thus non-discriminatory as it is levied on all motor driven vehicles at the same time in the trade process regardless of the origin of the motor driven vehicle. Although it seems that 'BIV' is compatible with Article 110 TFEU it does not comply fully due to the fact that in the fixed criteria Belgium does not take into account the actual value of the motor driven vehicle as required by the ECJ in *Ministério Público*²⁵⁶.

²⁵¹ C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, para 43.

²⁵² Case 252/86 *Bergandi* [1988] ECR 1343, para 25.

²⁵³ Case 252/86 *Bergandi* [1988] ECR 1343, para 27.

²⁵⁴ Davies 2007, p. 113.

²⁵⁵ C-347/95 *UCAL* [1997] ECR I-04911, para 21, 23 and C-234/99 *Nygård* [2002] ECR I-3657, para 22.

²⁵⁶ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

6.4.1.3: What is the opinion of the ECJ on registration taxes in regard to EU taxation and does the Belgian 'BIV' comply with that opinion?

Every MS is allowed to levy registration taxes provided that these taxes are non-discriminatory, non-protective and the taxable value of the registered motor driven vehicle is based on actual value²⁵⁷ and objective requirements. These requirements need to take into account the depreciation of the motor driven vehicle. To make sure that the same tax rate is levied for motor driven vehicles independent of their origin.²⁵⁸ 'BIV' is levied on all motor driven vehicles each time of registration and is based on fixed criteria, but does not take into account the actual value. 'BIV' is non-discriminatory and non-protective as it is levied on every motor driven vehicle registered in Belgium, imported or not and the revenue is intended for the general budget. Due to the fact that for determining the amount of 'BIV' the actual value of the concerned passenger car or motor vehicle is not taken into consideration the Belgian 'BIV' does not comply with ECJ case law.

6.4.1.4: Is the Belgian 'BIV' compatible with the EU VAT Directive?

There is no ECJ case law nor Belgian case law regarding the question if 'BIV' falls under the scope of the VAT Directive. However, the Netherlands levies a similar registration tax called 'BPM'. The Supreme Court of the Netherlands ruled that 'BPM' is not a turnover tax ex Article 33 (1) VAT Directive. Therefore the VAT Directive is inapplicable to 'BPM'. It is safely to conclude that the same goes for the Belgian 'BIV'. Because 'BIV' shares the same principal constituents, such as an internal tax, levied on the registration of passenger cars and motor vehicles based on fixed criteria. Thus, 'BIV' can be characterised as an internal registration tax, not a turnover tax which makes the VAT Directive inapplicable.

6.4.1.5: Is the Belgian 'BIV' compatible with the proposal for a Council Directive?

'BIV' should be compatible with one of the 3 measures from the proposal for a Council Directive on passenger car related taxes;

- 1) The abolishment of registration taxes;
- 2) Establishing a registration tax refund system or
- 3) Restructuring registration taxes and annual circulation taxes to be partially or totally based on CO₂-emission.

The Flemish Minister of innovation, Ingrid Lieten²⁵⁹, proposes to abolish the registration tax 'BIV', but only for electric cars. This is not the intention of the proposal. The intention is that registration taxes in total should be abolished. Because taxes on passenger cars create problems for the operation of the internal market. 'BIV' is in principle non-refundable unless the motor driven vehicle has been registered in another MS within 6 months after registration in Belgium.²⁶⁰ The Belgian registration tax is supposed to be amended into a tax based on CO₂-emission. But, as until now Belgium does not have a government there are no signs of amending the 'BIV' any time soon. With that in mind, at the moment Belgium is not in compliance with the proposal for a Council Directive. As soon as Belgium has a government and the plans of that government are made public, a final conclusion can be given. For now Belgium does not comply with the proposal. As the European Commission proposed that

²⁵⁷ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

²⁵⁸ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

²⁵⁹ <http://www.ingridlieten.be/article/lieten-wil-verkeersbelastingen-voor-elektrische-wa/>

²⁶⁰ <http://www.arval.be/dut/lease/dienstverlening/fiscaliteit/belasting-op-inverkeerstelling.html>

compliance with the proposal, should be reached at the latest in 2016²⁶¹ it is to be seen if Belgium will make that deadline.

6.4.2: VAT

6.4.2.1: *Is the Belgian VAT compatible with Article 110 TFEU?*

Article 110 TFEU states that internal taxes levied on products of other Member States can not be in excess of taxes levied on similar national products nor can internal taxes be used for the protection of other products. Belgium levies 21% VAT on all “new” motor driven vehicles, domestic or foreign, and on motor driven vehicles imported from another MS where no VAT was paid. As, the tax rate of 21% is levied on all new motor driven vehicles and imported vehicles over which no VAT was paid there is nothing of the kind excessive nor protective. The way Belgium levies VAT over motor driven vehicles does not infringe Article 110 TFEU.

6.4.2.2: *Does the Belgian VAT comply with the EU VAT Directive?*

The Belgian VAT rate is set on 21%. Based on Article 97 (1) VAT Directive a minimum VAT should be levied of 15%. As the VAT Directive does only state a minimum VAT rate that should be levied and no maximum VAT rate is determined, there exists a wide range of VAT rate possibilities. Belgian VAT complies with the minimum VAT rate required according to the VAT Directive. With regard to the refund system, the Belgian VAT desk²⁶² describes that VAT can only be refunded partially on cars and related goods (50%) to entrepreneurs. Belgium VAT complies with the VAT Directive.

6.4.3: *Comparison with the Netherlands*

Both registration taxes in Belgium and the Netherlands are internal taxes. The ECJ decided in multiple cases²⁶³ that registration taxes are part of the internal tax system. Belgium and the Netherlands base the registration tax rate on the age of the passenger car or motor vehicle. Belgium also bases it on the engine power while the Netherlands also bases it on the catalogue price. Belgium levies at least € 61,50 and at the most € 4.957 ‘BIV’ per registration. In the Netherlands 19% of the catalogue price, excluding the CO₂-emission surplus, of the passenger car or motor vehicle is levied. Due to the fact that the Netherlands calculates the rate of registration tax to be paid partially on the CO₂-emission and the sales of more environmentally friendly passenger cars and motor vehicles has increased²⁶⁴, the Netherlands complies with the proportionality principle. In Belgium however, the goal of the ‘BIV’, decreasing the CO₂-emission, and the way ‘BIV’ is calculated, in which system the CO₂-emission is not being taken into account, do not correspond. Therefore, ‘BIV’ does not comply with the proportionality principle. It is clear that the Netherlands, by changing the way the rate of ‘BPM’ is calculated from a catalogue price based system to a CO₂-emission based system, will in the near future comply with the proposal for a Council Directive on passenger car related taxes²⁶⁵. Belgium however has not yet made any change in the way the ‘BIV’ rate

²⁶¹ Commission decision of 5 July 2005, proposal for a Council directive on passenger car related taxes, COM (2005) 261 final, see chapter III.

²⁶² <http://www.vatdesk.be/content/view/53/62/lang.english/>

²⁶³ C-47/88 *Commission v Denmark* [1990] ECR I-4509, paras 12-13; Case C-402/09 *Ioan Tatu v. Statul român prin Ministerul Finanțelor și Economiei and Others* [2011] ECR 00000, para 32; Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paras 38-41; Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, paras 34, 42.

²⁶⁴ <http://www.rijksoverheid.nl/nieuws/2011/06/01/gerichtere-impuls-schoon-en-zuinig-rijden.html> and <http://www.duurzameenergiethuis.nl/mobiliteit/marktaandeel-zuinige-autos-stijgt-fors-in-nederland-5045.html> and <http://www.compendiumvoordeleefomgeving.nl/indicatoren/nl0537-Energielabels-personenauto%27s.html?i=9-53>

²⁶⁵ European Commission ‘Proposal for a Council Directive on passenger car related taxes’ COM(2005) 261 final of 7 May 2005.

is calculated, although the Walloon region individually uses CO₂-emission as part of the calculation for the 'BIV' rate. Because in Belgium there is no actual government, no important changes can be expected in the near future.

With regard to VAT the difference exists in the VAT rate levied in both countries. In Belgium 21% is levied while in the Netherlands 19% is levied. Another difference is that Belgium has two reduced VAT rates, one of 12% and one of 6% while the Netherlands only knows one reduced rate of 6%. Both VAT rates, normal rate and reduced rates, in Belgium and in the Netherlands comply with the minimum rates stated in Articles 97 (1) and 99 (1) VAT Directive. According to the VAT Directive there should be a possibility to get a refund on the levied VAT to avoid double taxation. In Belgium there exists a possibility of getting a refund on the paid VAT on cars but only for entrepreneurs, not for private individuals, and only a 50% refund is possible. The Netherlands also knows a refund possibility similar to that of Belgium with the difference that the Netherlands does refund the whole paid VAT, or the residual VAT when it does not concern a "new" passenger car or motor vehicle. VAT can be refunded in the Netherlands when a passenger car or motor vehicle is being exported and if the exporter can present a VAT-number. Dutch and Belgian VAT is in accordance with the VAT Directive.

Chapter 7: Conclusion

In the first 5 chapters the theoretical framework for this research was described. In chapter 6 the theoretical framework was tested for its compatibility with EU free movement of goods and taxation. The central research question which will be answered in this chapter is; to what extent are the different types of taxes on passenger cars and motor vehicles in the Netherlands and Belgium compatible with the EU provisions on free movement of goods and taxation?

Within the EU the Member States levy a wide range of taxes on passenger cars and motor vehicles. This can be concluded from the variety of charges and from the amount of different ways to calculate the taxes due. Therefore the total amount of taxes that has to be paid on passenger cars and motor vehicles can vary immensely between Member States.²⁶⁶ Every MS has the choice to levy registration taxes or not and at different rates. They can do so because there is no harmonization in this field except for Directives with a specific topic, such as the VAT Directive²⁶⁷ and the two Council Directives on consumption taxes²⁶⁸. The rate must be based on objective criteria to bring national policies in accordance with EU law and the tax must be non-discriminatory.²⁶⁹ The Dutch 'BPM' and Belgian 'BIV' meet the set conditions of being non-discriminatory and based on objective criteria (age of the car, a percentage of the catalogue price of the passenger car or motor vehicle (the Netherlands), the CO₂-emission per kilometre (the Netherlands and the Belgian region Walloon) and the power of the engine (Belgium)). Both the Netherlands and Belgium levy registration taxes. Registration taxes can not be seen as customs duties ex Articles 28-30 TFEU *'when they are applied systematically to both domestic and imported products. Such taxes may be considered contrary to Articles 28-30 TFEU only if they produce the effect where the trade in passenger cars and motor vehicles completely ceases or becomes insignificant.'*²⁷⁰ 'BPM' and 'BIV' are applied systematically to all passenger cars and motor vehicles that need to be registered for use in the considered Member States. Due to the fact that trade on passenger cars and motor vehicles within the Netherlands and Belgium did not come to a cease nor became insignificant, 'BPM' and 'BIV' can therefore not be considered contrary to Articles 28-30 TFEU. Registration taxes thus need to comply with the conditions laid down in Article 110 TFEU. The ECJ ruled in *De Danske Bilimportører*²⁷¹ that registration taxes can not be tested for their compatibility with Articles 28 *et seq* TFEU because registration taxes are internal taxes. According to the ECJ it is possible to test registration taxes for their compatibility with Article 110 TFEU.

Each MS has the autonomous authority to levy registration taxes on passenger cars and motor vehicles. *'There is no EU rule which prohibits the imposition of such taxes. This means that car taxation policy decisions fall within the discretion of Member States, who may unilaterally choose the level at which they wish to levy any taxes relating to motor vehicles*

²⁶⁶ Kunert & Kuhfeld 2007, p. 306-316.

²⁶⁷ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1.

²⁶⁸ Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a MS of the personal property of individuals, OJ L 105 and Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one MS from another, OJ L 105.

²⁶⁹ http://ec.europa.eu/taxation_customs/common/faq/taxation/faq_cartax_en.htm#3

²⁷⁰ http://ec.europa.eu/taxation_customs/common/faq/taxation/faq_cartax_en.htm#3

²⁷¹ Case C-383/01 *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen* [2003] ECR I-06065, paras 35, 39-43.

registration or use, or indeed whether they wish to do so at all.²⁷² Hence, the Netherlands levies 'BPM' and is allowed to levy that registration tax, as goes for Belgium and its 'BIV'.

However, according to Article 110 TFEU each MS is only allowed to levy a registration tax if that registration tax is applied under certain conditions. The internal tax needs to be non-discriminatory, non-protective and must not be in excess of the tax levied on similar domestic products. In *Ministério Público*²⁷³ the ECJ ruled that Article 110 TFEU allows registration taxes to be levied if the taxable value is based on actual value and fixed criteria for the depreciation of the passenger car or motor vehicle. The ECJ also ruled that the depreciation guarantees that the payable tax does not exceed the tax that remains on similar passenger cars and motor vehicles which are already registered in the MS. The Dutch 'BPM' satisfies the requirements set by Article 110 TFEU and the ECJ, as the actual value is determined by the age and kilometres driven as well as the general condition of the passenger car or motor vehicle, which is one of the fixed criteria. There are two other fixed criteria; age of the passenger car or motor vehicle and CO₂-emission per kilometre. Taking into consideration the age of the car shows that the depreciation of the passenger car and motor vehicle is included. This guarantees that the levied 'BPM' does not exceed the remaining tax on similar passenger cars and motor vehicles already registered in the Netherlands. According to the ECJ²⁷⁴ it is still possible for internal taxes to infringe on Article 110 TFEU even though that tax complies with criteria of that provision. The revenue of the levied internal tax should also not be intended to finance activities meant for national taxable goods which can thus compensate the national tax burden. 'BPM' also complies with this requirement because the 'BPM' revenue that is collected is intended for the general means. The ECJ²⁷⁵ also ruled that an internal tax on the registration of passenger cars and motor vehicles does not account for an infringement of Article 110 TFEU on condition that the tax is proportional²⁷⁶. The goal for levying 'BPM' is increasing the sale of more environmentally friendly cars²⁷⁷ and is necessary to comply with the EU suggestions on CO₂-emission stated in the proposal for a Council Directive on passenger car related taxes. As, sales of more environmentally friendly cars has increased over the passed 3 years the Dutch 'BPM' reaches its set goal. 'BPM' fulfils the criteria of being effective and not going beyond what is necessary to achieve the goal set and is therefore proportional. Because there are no alternatives for reaching the set goal, other than lowering the sales price which does not lie within the competences of the Dutch government, 'BPM' is not beyond what is necessary to achieve the set goal. 'BPM' is also just levied once on first time registration of a passenger car or motor vehicle in the Netherlands which makes it proportional. Concluding, 'BPM' is indiscriminately levied over the registration of passenger cars and motor vehicles regardless of their origin, at the same moment in the trade process²⁷⁸ and is therefore not infringing on Article 110 TFEU.

'BPM' also complies with the proposal for a Council Directive as the Dutch government is working towards abolishing the registration tax calculation based on a percentage of the catalogue price of a passenger car or motor vehicle, replacing it by an ACT based on the CO₂-emission per kilometre of the passenger car or motor vehicle²⁷⁹, which hence shifts the tax burden to the user. Thus, until now the Dutch 'BPM' is in accordance with the proposal for a Council Directive.

²⁷² http://ec.europa.eu/taxation_customs/common/faq/taxation/faq_cartax_en.htm#3

²⁷³ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

²⁷⁴ C-347/95 *UCAL* [1997] ECR I-04911, para 29.1; C-234/99 *Nygård* [2002] ECR I-3657, para 49.

²⁷⁵ C-451/99 *Cura Anlagen GmbH v. Auto Service Leasing GmbH* [2002] ECR I-03193, para 69.

²⁷⁶ Case 120/78 *Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8; Case 178/84 *Beer purity* [1987] ECR 01227, para 28.

²⁷⁷ <http://www.rijksoverheid.nl/documenten-en-publicaties/vragen-en-antwoorden/betaal-ik-minder-bpm-bij-de-aanschaf-van-een-zuinige-auto.html>

²⁷⁸ C-213/96 *Outokumpu Oy* [1998] ECR I-01777, para 24.

²⁷⁹ <http://www.rivm.nl/bibliotheek/rapporten/500076012.pdf>

On first sight Belgium seems to be in compliance with Article 110 TFEU in the levying of its 'BIV'. Belgium uses fixed criteria like the power of the engine, the age of the motor driven vehicle and Walloon the CO₂-emission per kilometre. 'BIV' is levied on all motor driven vehicles on registering for use in Belgium. Therefore, 'BIV' is non-discriminatory and non-protective. Because the age of the car is one of the fixed criteria for setting the rate of 'BIV' this registration tax is not in excess of the tax levied on similar domestic motor driven vehicles already registered in Belgium. However, Belgium does not take into account the actual value of the motor driven vehicle. The actual value is one of the requirements set by the ECJ in *Ministério Público*²⁸⁰, in order to guarantee that the registration tax levied does not exceed the amount of registration tax residing on similar already registered vehicles. The non-confirmation with this last requirement results in the non-compliance of the Belgian 'BIV' with Article 110 TFEU. As, the compliance of 'BIV' with the proportionality principle is also questionable due to the fact that the goal for levying 'BIV' and the criteria on which it is calculated do not correspond, the Belgian registration tax is not in accordance with EU law. At the same time 'BIV' is levied every time a motor driven vehicle changes ownership within Belgium. This can be seen as being disproportional. 'BIV' in its current state is thus not necessary nor effective to achieve the intended goal of lowering the CO₂-emission.

According to the above, the Dutch 'BPM' is not infringing on EU free movement of goods nor on EU taxation. However, 'BPM' still gives me an ambivalent feeling. Although it is not in conflict with EU regulations, it still hinders the internal market in general due to the time consuming and financial implications of de-registering and registering. The hindrance does not exist because of a distinction or a limitation. It is a hindrance which exists because of extra time and costs in the MS of origin for de-registering the passenger car or motor vehicle and in the MS of destination for registering that same passenger car or motor vehicle. Almost every MS levies registration taxes.²⁸¹ Member States that have a large car or motor vehicle production, sell cars at lower prices and levy lower or no registration taxes.²⁸² This indirectly creates a barrier to intra-EU trade. Within an internal market it must be possible for consumers and producers to buy and sell products where they want to, without being restricted to the territory of their own MS. What adds to the internal market deficit is the fact that there is only harmonization with regard to passenger cars and motor vehicles for VAT, temporary importation and personal property. The choice of levying registration taxes or not and the height of these taxes differ within the EU, which creates more hindrance for the internal market. For example, from 1993 until 1997 the Netherlands was levying 45,2%²⁸³ 'BPM' on the catalogue price of the passenger car or motor vehicle, while Belgium was levying 25% 'BIV'. However, according to *Commission v. Denmark*²⁸⁴ Article 110 TFEU does not preclude the levying of excessive registration taxes. Member States can levy a tax rate which they seem fit. A study²⁸⁵ by TiS.PT by order of the European Commission shows that the researched Member States do not always give refunds on the registration taxes when a passenger car or motor vehicle is de-registered in order to move it to another MS. The differences between the amount of registration taxes levied, not always being able to get a

²⁸⁰ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

²⁸¹ A study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, on Vehicle Taxation in the Member States of the European Union, p. 28.

²⁸² A study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, on Vehicle Taxation in the Member States of the European Union, p. 28.

²⁸³ http://www.belastingdienst.nl/variabel/bpm/bpm-56.html#P1455_105433

²⁸⁴ C-47/88 *Commission v. Denmark* [1990] ECR I-04509, para 10.

²⁸⁵ A study conducted for the European Commission (DG Taxation and Customs Union) under the contract TAXUD/00/310 of January 2002, on Vehicle Taxation in the Member States of the European Union, p. 28.

refund and the lengthy and time consuming procedures for getting refunded on these taxes when de-registering creates a financial barrier for the free movement of persons and workers. My ambivalent feeling is strengthened by the fact that the ECJ acknowledges this in *Marie Lindfors*²⁸⁶. According to *Weigel*²⁸⁷ and *Marie Lindfors*²⁸⁸ national registration taxes on passenger cars and motor vehicles do hamper free movement and that these taxes can cause obstacles to the free movement of persons and workers. However, the ECJ also states that the Treaty does not give any guarantee that an individual moving residence from one MS to another, does not encounter taxes in the MS of destination.²⁸⁹

In the meantime, the different registration taxes on passenger cars and motor vehicles in the Member States has caught the attention of the EU. The European Commission submitted a proposal in which the different registration taxes in time should be abolished. Therefore 'BPM' and 'BIV' in their current form will probably not last for long. Due to their importance to the Dutch and Belgium revenue, 'BPM' and 'BIV' will be replaced by an EU proof tax or duty.²⁹⁰ The Netherlands is reforming 'BPM' into a tax system based on CO₂-emission and the amount of driven kilometres per year. This should be accomplished by 2016 according to the suggestions stated in the proposal for a Council Directive on passenger car related taxes²⁹¹. The Dutch government set the goal of abolishing 'BPM' and restructuring ACT to be calculated on CO₂-emission and the amount of driven kilometres per year for 2018. With the recent change of 'BPM' the Dutch government is well on their way in reaching the suggestions of the European Commission. In Belgium there is no presiding government and there are no pending plans to abolish or amend the current 'BIV'.

VAT has been harmonised in the VAT Directive based on Article 113 TFEU. The Dutch VAT complies with the VAT Directive. The minimum amount of VAT levied should be 15% ex Article 91 (1) VAT Directive. In the Netherlands the rate is set on 19% ex Article 9 (1) Dutch VAT law. Thus, herewith the Dutch VAT law complies with the VAT Directive. According to the VAT Directive double taxation must be precluded. Double taxation can be avoided by restitution on the paid VAT. In the Netherlands it is possible to receive restitution on the paid VAT if you can submit a VAT-number ex Article 30 (1) jo. 17b (2) Dutch VAT law. Therefore, Dutch VAT is in compliance with the VAT Directive. The same goes for Belgian VAT. As in the Netherlands, Belgium complies with the minimum VAT rate requirement of 15%. Belgium levies 21% ex Belgian Royal Decree nr. 17. In Belgium, VAT can be refunded on cars and similar goods and just for 50% of the VAT paid and just to entrepreneurs.²⁹² Belgium is thus in compliance with the VAT Directive. What the intention of the European Commission is in the VAT Directive regarding refunds is unclear. Total refunds for everyone, or only for entrepreneurs, or is it also possible to give partial refunds? As long as these questions are unclear a formal conclusion can not be made. National refund systems can result in double taxation for private individuals. As the internal market was not only created for entrepreneurs but for all EU citizens, this together with the levying of different registration taxes in each MS hampers free movement in general and thus the functioning of the internal market. The EU VAT Directive does also only state a minimum of VAT to be levied and not a maximum, which results in numerous different VAT rates within the EU, which can be seen as a barrier as well.

²⁸⁶ C-365/02 *Marie Lindfors* [2004] ECR I-07183, para 31.

²⁸⁷ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 54.

²⁸⁸ C-365/02 *Marie Lindfors* [2004] ECR I-07183, para 31.

²⁸⁹ Case C-387/01 *Harald Weigel and Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg* [2004] ECR I-04981, para 55.

²⁹⁰ 'DGA Fiscaal, *BPM in strijd met Europese Wetgeving?*', Drs. A.M.M. Thomassen, p. 8.

²⁹¹ Commission decision of 5 July 2005, proposal for a Council directive on passenger car related taxes, COM (2005) 261 final, see chapter III.

²⁹² <http://www.vatdesk.be/content/view/53/62/lang.english/>

The registration taxes and VAT levied on passenger cars and motor vehicles in the Netherlands and Belgium are fully compatible with EU free movement of goods. Although these still cause hinder for the internal market. Both VAT systems are compatible with EU taxation. As far as compatibility with Article 110 TFEU concerns, the Netherlands complies fully. Belgium however does not comply due to the ruling of the ECJ in *Ministério Público*²⁹³ that registration taxes must be based on the actual value and fixed criteria. However, Belgium does not take into account the actual value when determining the 'BIV' rate. Belgium also does not comply with the required proportionality principle because the goal for levying 'BIV' is not in accordance with the way in which the 'BIV' rate is calculated.

²⁹³ Case C-393/98 *Ministério Público, António Gomes Valente and Fazenda Pública* [2001] ECR I-01327, para 44.

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