

Italy: Airbnb Ireland and Airbnb Payments UK (C-83/21)

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1. Introduction

The Case C-83/21 (*Airbnb Ireland and Airbnb Payments UK*) concerns the compatibility of Art. 4, paras. 4, 5 and 5-*bis*, of Decree Law No. 50 of 24 April 2017 with the Directive 2015/1535/EU¹ and with the fundamental freedom to provide services. The above-mentioned Italian provisions establish a number of obligations on persons that intermediate short-term rentals of Italian real estate essentially concerning the collection and submission of tax relevant information and the withholding tax obligations.²

The present contribution will analyse Case C-83/21 and focus exclusively on the infringements of the fundamental freedom to provide services.

2. Applicable law

Art. 18(1) of the TFEU (Art. 12 TEC) provides:

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

In addition, Art. 56(1) TFEU (Art. 49 TEC) provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

1 Directive (EU) 2015/1535 of The European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services.

2 The rules at issue were implemented by means of the Order No. 132395 issued by the Revenue Agency on 12 July 2017 and the Interpretative Circular No. 24 of the Revenue Agency of 12 October 2017.

Art. 4 (paras. 4, 5 and 5-bis) of Decree Law No. 50 of 24 April 2017 provides some obligations for persons that manage intermediated rentals of Italian real estate, including digital platforms which allow landlords to find potential tenants, if the intermediated rental is for a residential property for a period not longer than 30 days (short-term rental). The obligations consist of:

- (i) The obligation to collect and submit information to the Revenue Agency relevant to each tenancy intermediated. The information to be collected and submitted is name and surname of the landlord, tax identification number of the landlord, duration of the tenancy, amount of the rent and address of the property;
- (ii) The obligation to levy a 21% withholding tax on the payment of the rent if the intermediaries receive the payment of the rents on behalf of the landlords and/or if they are involved in the payment; and
- (iii) The obligation to appoint an Italian tax agent in order to fulfil the obligations at points (i) and (ii), if the intermediary is not resident in Italy and does not have a permanent establishment in Italy.

3. The facts of the case

The applicants in the main proceedings, Airbnb Ireland Unlimited Company and Airbnb Payments UK Ltd (hereinafter jointly “Airbnb”), belong to the global Airbnb group, which operates the property intermediation platform of the same name on the internet. That platform facilitates the connection, first, of lessors who have accommodation with, secondly, persons seeking that type of accommodation, by collecting from the customer the payment for the provision of the accommodation before the start of the rental and transferring that payment to the lessor after the rental has begun, if there has been no dispute on the part of the lessee.

For income tax purposes, Airbnb is not resident in Italy and does not have a permanent establishment in Italy. As such, it is subject to the obligations at point (i), (ii) and (iii) described in the previous paragraph.

Airbnb filed an action in front of the Regional Administrative Court (“*TAR*”) of Latium, seeking the annulment first, of Decision No. 132395 of the Director of the Revenue Agency of 12 July 2017 implementing the tax regime at issue and, secondly, of Interpretative Circular No. 24 of the Revenue Agency of 12 October 2017 concerning the same tax regime. Airbnb argued that such acts, and the legislation that they are implementing, trigger an infringement of the Directive 2015/1535/EU and of the fundamental freedoms, in particular the freedom to provide services and the freedom of establishment.

The *TAR* issued the judgment No. 2207 on 18 February 2019 dismissing the arguments of the companies which then appealed the judgment in front of the Council

of State. On 18 September 2019, the Council of State issued the ordinance No. 03708 and thus referred three questions to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling. As already indicated, the author’s comments under paragraph I.4 will focus exclusively on the second question referred to the CJEU, i.e. on the question dealing with the compatibility of the rules concerning the Italian tax regime applicable to short-term rentals with the freedom to provide services, as reported below:

- (2) (a) Do the principle of the freedom to provide services set out in Article 56 TFEU, and, if deemed applicable in the present case, the similar principles which may be inferred from Directives [2006/123] and [2000/31] preclude a national measure that imposes, on property intermediaries operating in Italy – including, therefore, operators not established in Italy which provide their services online – obligations to collect information relating to the short-term rental agreements concluded through them and subsequent transmission of that information to the tax authority, for the purpose of the collection of direct taxes payable by users of the service?
- (b) Do the principle of the freedom to provide services under Article 56 TFEU, and, if deemed applicable in the present case, the similar principles which may be inferred from Directives [2006/123] and [2000/31], preclude a national measure that imposes, on property intermediaries operating in Italy – including, therefore, operators not established in Italy which provide their services online – and involved at the payment stage of the short-term rental agreements entered into through them, the obligation to levy, for the purpose of collecting direct taxes payable by users of the service, a withholding tax on those payments, with subsequent payment to the Treasury?
- (c) May the principle of the freedom to provide services under Article 56 TFEU, and, if deemed applicable in the present case, the similar principles which may be inferred from Directives [2006/123] and [2000/31] – where the above questions are answered in the affirmative – however be limited in accordance with [EU] law by national measures such as those described above under (a) and (b), in view of the fact that the tax levy relating to direct taxes payable by service users is otherwise ineffective?
- (d) May the principle of the freedom to provide services referred to in Article 56 TFEU and, if deemed applicable in the present case, the similar principles which may be inferred from Directives [2006/123] and [2000/31], be limited in accordance with [EU] law by a national measure that imposes, on property intermediaries not established in Italy, the obligation to appoint a tax representative required to comply, in the name and on behalf of the intermediary not established in Italy, with the national measures described under (b), in view of the fact that the tax levy relating to direct taxes payable by users of the service is otherwise ineffective?

4. Comments

As indicated above, the national rules at issue concern three different obligations. The first obligation consists of the obligation for Airbnb to collect and submit information to the Revenue Agency relevant to each tenancy intermediated. The information to be collected and submitted is name and surname of the landlord, tax identification number of the landlord, duration of the tenancy, amount of the rent and address of the property.

In this respect, Airbnb stated that the obligation to collect and submit information concerning the rentals discriminates against intermediaries, which provide their services through digital platforms, compared to other operators such as hotels and B&Bs, which provide short-term rentals and do not have similar obligations.

In the author's view³, it seems doubtful that, as alleged by Airbnb, intermediaries in the market of short-term rentals (such as the appellants) are comparable to operators (such as hotels and B&Bs) that provide outright short-term rentals. Indeed, Airbnb provides a service (i.e. the intermediation) which is different from the service to provide short-term rentals only. In its judgement delivered on 22 December 2022 related to the case at stake (hereinafter the "Judgement"), the CJEU took the view that intermediaries in the market of short-term rentals (such as the appellants) are not comparable to operators (such as hotels and B&Bs) that provide outright short-term rentals. In this respect, the author expressed the same view on commenting the AG's opinion.⁴ The CJEU focused on the activity of intermediation only (and not on the activity of providing rental services). In this respect, the Judgement also stressed that the regime at issue imposes that obligation on all third parties who have intervened in Italy in a short-term property rental process, whether they are natural or legal persons, whether or not they are resident or established in that territory, and whether they act via digital means or via other means of putting the parties in contact.

Moreover, the tax regime at issue appears to be "part of an overall strategy to combat tax avoidance in that sector, which is a frequent occurrence, by means, in particular, of the introduction of such an obligation". Accordingly, the Italian tax regime on short-term rentals has been considered by the CJEU as not discriminatory.

The arguments of the CJEU are also grounded on the findings of its previous case law, particularly on the judgment related to the Case C-674/20 ("Airbnb Ireland")⁵ concerning the compatibility of the Belgian legislation with Art. 56 TFEU. In detail, the national legislation at issue in Case C-674/20 introduced an obligation on providers of property intermediation services, irrespective of their place of establishment and the manner in which they mediate, to transmit to the tax authorities certain particulars of tourist accommodation transactions. The CJEU concluded in Case C-674/20 that measures, the only effect of which is to create additional costs for a particular service and which affect the provision of services in the same way irrespective of the provider's Member State, are not likely to hinder

3 The Author expressed such position also in G. Maisto, *Italy: UBS Real Estate (C-478/19 and 479/19) and Airbnb Ireland and Airbnb Payments UK (C-83/21)* in: G. Kofler et al., (eds.), *CJEU – Recent developments in direct taxation 2021* (Vienna: Linde 2022), pp. 253-262.

4 Ibidem.

5 CJEU, 27 April 2022, C-674/20, *Airbnb Ireland*, EU:C:2022:303.

the free movement of services.⁶ The finding of the CJEU on this point is also in line with the opinion (the “Opinion”) delivered by Advocate General Maciej Szpunar (“AG”) on 7 July 2022.⁷

With reference to the second obligation under examination referred to the CJEU, dealing with the intermediary’s obligation to levy a 21% withholding tax on the payment of the rent, Airbnb challenged that the withholding tax obligation applies solely to intermediaries collecting rental payments who are primarily non-residents. Airbnb also argued that the withholding tax obligation triggers a difference of treatment vis-à-vis other persons that provide similar services in the same market (intermediation of short-terms rentals) with different means (that is, seemingly, not through an online digital platform) and those that do not provide payment services. According to Airbnb’s position, in addition to the imposition of administrative burdens on intermediaries such as Airbnb, this obligation would render the service provided by the applicants less attractive compared to similar intermediation services provided by intermediaries who do not provide services in connection with the payment of the rents. In this respect, Airbnb also submitted that, by imposing the same obligation to withhold tax on residents and non-residents, the Italian legislature discriminated against those non-residents who, in so far as they are not subject to the tax competences of Italy, are in a different situation from that of residents.

The Judgement concluded that such an obligation has not an arbitrary scope of application as withholding tax can apply solely to intermediaries who collect payments or act in the collection of those rents or consideration.

The conclusion of the Court differs from that of the AG who in his Opinion concluded that the obligation under analysis could be considered (a) an obstacle to the freedom to provide services as a measure likely to make the exercise of that freedom less attractive; (b) justified by the need to prevent tax evasion (CJEU, 26 February 2019, C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 and Others*, ECLI:EU:C:2019:134, para. 160) even if the withholding tax obligation is related to payments collected in another Member State. The Judgement had a different (and reasonable)⁸ view: indeed, according to the CJEU, it does not follow from the 2017 tax regime that such burden is greater for providers of property intermediation

6 The finding of the CJEU in case C-674/20 is on the same line as its previous case law: see in this respect CJEU, 22 November 2018, C-625/17, *Vorarlberger Landes-und Hypothekenbank*, EU:C:2018:939, para. 32; CJEU, 8 September 2005, C-544/03 and C-545/03, *Mobistar and Belgacom Mobile*, EU:C:2005:518, para. 31; and CJEU, 11 June 2015, C-98/14, *Berlington Hungary and Others*, EU:C:2015:386, para. 36.

7 Opinion of Advocate General Szpunar, 7 July 2022, C-83/21, *Airbnb Ireland e Airbnb Payments UK*, EU:C:2022:545.

8 The Author expressed the same position in G. Maisto, *Italy: UBS Real Estate (C-478/19 and 479/19) and Airbnb Ireland and Airbnb Payments UK (C-83/21)* in: G. Kofler et al., (eds.), *CJEU – Recent developments in direct taxation 2021* (Vienna: Linde 2022), pp. 253-262.

services established in a Member State other than Italy than it is for undertakings which have an establishment in Italy, regardless of their different designation.⁹ Certainly, that tax regime imposes on them the same obligations to withhold tax at source on behalf of the tax authority and to pay the 21% withholding tax to that authority (the collection of which is carried out as a full discharge of the tax liability where the owner of the immovable property concerned has opted for the preferential rate, and as a payment on account where that is not the case). Therefore, Italian legislation does not introduce discrimination on the basis of the place of establishment of the intermediary and it is not contrary to Art. 56 TFEU.

Even if such finding can be considered as reasonable, in the author's opinion some reflections might, however, be made on the widening of the withholding tax obligation under the regime at issue. It is noteworthy that the withholding agent: (i) does not reside in the source State; (ii) does have no PE in the source State; (iii) is not the payor; and (iv) is connected with the payment. It is a rather remarkable move of withholding obligations which provides a wider scope of application compared to the traditional perimeter which is generally applied by domestic tax legislations.

Airbnb argued that the obligation to appoint an Italian tax agent triggers discrimination between intermediaries that are not resident in Italy and do not have an Italian permanent establishment and Italian-resident intermediaries that are not subject to this obligation. This obligation does indeed introduce a difference of treatment between operators in the same market on the basis of their place of establishment, which should be regarded as a *prima facie* infringement of the freedom to provide services (see para. 59 of the Judgement).

Since the obligation to appoint a tax agent seems to be meant to ensure that the obligations imposed by Italian legislation are properly fulfilled by non-resident operators, it seems appropriate to analyse whether this discrimination could be justified by the need to prevent tax avoidance and ensure the effective collection of taxes. It is noteworthy that in its case law¹⁰, the CJEU concluded that the requirement to appoint a tax agent in the territory of a Member State could be justified if there are no other less-restrictive measures that would be able to achieve the same objective. In this respect, the CJEU stressed that the measure under examination is not proportionate considering that the appointment of a tax agent under the Italian tax law is due without any distinction based on, for example, the volume of tax revenue collected or liable to be collected annually by those providers. The CJEU also referred to the Case C-678/11 (*Commission v Spain*) in which it was argued that administrative difficulties do not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EU law. According to such

9 Such finding is however subject to the assessment of the referring court.

10 Particularly CJEU, 11 December 2014, C-678/11, *Commission v. Spain*, EU:C:2014:2434, and CJEU, 5 July 2007, C-522/04, *Commission v. Belgium*, EU:C:2007:405.

case law, the CJEU found that it is not crucial that the supervision of such a representative by the tax authorities of a Member State may be more difficult where that representative is in another Member State. In light of these arguments, the CJEU found that it does not appear that the monitoring of compliance with the obligations incumbent on the service providers concerned in their capacity as persons liable to pay the tax could not be ensured by means less prejudicial to Art. 56 TFEU than the appointment of a tax representative residing in Italy. Accordingly, the CJEU concluded that the obligation to appoint a tax agent is not proportionate because non-resident intermediaries without an Italian permanent establishment could be offered the option to either fulfil their obligations themselves or appoint an Italian tax agent to do that.¹¹ Indeed, there seems to be no reason why the non-resident intermediary would not be able to fulfil its tax obligations on its own and, therefore, it seems more appropriate, as the CJEU concluded, if such operators were offered the option to appoint a tax agent rather than being obliged to do so.¹²

In conclusion, some final remarks can be made with reference to the wider impacts that the Judgement might have on current legislation of Member States, i.e. the impacts not limited to the tax regime under examination. There is now a stronger position of the CJEU according to which any mandatory appointment of a tax agent could, in principle, be considered, such as a restriction infringing the EU law, if it could not be justified by the overriding reasons in the public interest pursued by the national legislation at issue (see, in this respect, also CJEU, 5 May 2011, C-267/09, *Commission v Portugal*). Accordingly, Member States should consider amending the current domestic legislation providing for the mandatory obligation to appoint a tax agent for non-resident persons, if any. In this respect, for example, it is worth remarking that Italian legislation still provides for some other domestic rules in which the appointment of a tax agent is mandatory for non-resident entities for the purposes of collecting direct taxes. In particular, reference is made to the rules dealing with the application of the substitute tax on interest and dividends related to some securities deposited with non-resident intermediaries, which seem not to be justified by any overriding reasons in the public interest.¹³ Therefore, one can predict that if the Italian legislator does not amend these rules, Italy would still be exposed to the risk of being considered responsible for additional infringements of EU law.¹⁴

11 See CJEU, 11 December 2014, C-678/11, *Commission v. Spain*, EU:C:2014:2434, para. 58.

12 See in this respect also G. Maisto, *Italy: UBS Real Estate (C-478/19 and 479/19) and Airbnb Ireland and Airbnb Payments UK (C-83/21)* in: G. Kofler et al., (eds.), *CJEU – Recent developments in direct taxation 2021* (Vienna: Linde 2022), pp. 253-262.

13 Reference is made to: Art. 9 of Legislative Decree No. 239 of 1 April 1996; Art. 26-*quinquies* and Art. 27-*ter* of Presidential Decree No. 600 of 29 September 1973.

14 In this respect, it is noteworthy that European Commission in its decision related to the infringement procedure INFR(2008)4421 considered that Italian law providing for the mandatory obligation imposed to some non-resident insurance companies to appoint a resident tax agent was contrary to the freedom to provide services.