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Advocate General's Opinion C-83/21 | Airbnb Ireland and Airbnb Payments UK

Tax regime for short-term rentals imposing obligations on property intermediaries: the freedom to provide services does not preclude the obligation to collect and transmit information or to withhold tax

However, the obligation to appoint a tax representative constitutes a disproportionate restriction on the freedom to provide services

Airbnb is a global group which operates the property intermediation platform of the same name on the internet, facilitating the connection, on the one hand, of lessors who have accommodation and, on the other hand, 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, if there has been no dispute on the part of the lessee.

An Italian law of 2017 establishes a new tax regime for short-term property rentals outside a commercial activity, covering Airbnb as an operator of a property intermediation platform, and applying to contracts for the rental of residential property by natural persons outside a commercial activity for a maximum period of 30 days, whether concluded directly with the tenants or through persons who pursue property intermediation activities or operators of online platforms. As from 1 June 2017, income from such rental contracts is subject to a schedular withholding tax at a rate of 21% and information relating to rental agreements must be transmitted to the tax authorities. When they receive rents, persons resident in Italy who pursue property intermediation activities as well as those who operate online platforms, must, as tax collectors, withhold 21% of the amount of the rents and pay that to the tax authorities. Non-resident persons considered as not having a permanent establishment in Italy are obliged to appoint a tax representative as the taxable person.

Airbnb Ireland UC and Airbnb Payments UK Ltd, which belong to the global Airbnb group, brought an action seeking the annulment of the decision of the Director of the Tax Authority implementing the tax regime at issue. On Airbnb's appeal, the Consiglio di Stato (Council of State, Italy) asked the Court to interpret several provisions of EU law relating to obligations imposed by national law on intermediaries in the short-term rental of immovable property.

In his Opinion delivered today, Advocate General Maciej Szpunar considers first of all that the obligation to collect and provide information to the tax authorities and the obligations to withhold tax and to appoint a tax representative do not constitute technical regulations within the meaning of Directive 2015/1535.¹ It follows that Italy was not obliged to communicate them in advance to the Commission for them to be enforceable against individuals. The national court had in fact raised the issue of the failure to inform the Commission of the Italian law and the non-applicability of the Italian provisions to Airbnb.

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 (OJ 2015 L 241, p. 1).

Referring to the judgment in *Airbnb Ireland*,² the Advocate General then observes that Article 56 TFEU³ in relation to the freedom to provide services does not preclude the obligation to collect and transmit information or to withhold tax. As regards the withholding of tax, although it constitutes a much greater burden than a mere obligation to provide information, it does not constitute indirect discrimination against cross-border service providers, as Airbnb asserts in its argument that almost all of the property intermediation platforms present on the Italian market are established in other Member States. According to the Advocate General, it is perfectly consistent to impose the obligation to withhold tax on intermediaries involved in the payment of rent, given that the activity of a large number of natural persons who are not subject to the obligations incumbent on professionals is, by its nature, difficult to audit for tax purposes. Furthermore, the tax regime at issue does not concern the taxation of Airbnb's services, but the taxation of the rental of immovable property located in Italy which underlies those services. Consequently, there can be no doubt that that regime falls within the tax competence of the Italian Government.

By contrast, as regards the obligation to appoint a tax representative, the Advocate General points out that the Court has already held, in the judgment in *Commission v Spain*,⁴ that an obligation to designate a tax representative imposed by the Spanish legislation on cross-border service providers for the purposes, specifically, of the transmission of information and the withholding of tax constitutes a disproportionate restriction on the freedom to provide services and is therefore contrary to Article 56 TFEU. It follows that the obligation to appoint a tax representative, imposed by Italian law, is contrary to Article 56 TFEU.

Finally, the Advocate General outlines the legal context of the relevant EU law. He is of the view that all of those obligations, which fall within the field of taxation, are excluded from the scope of Directives 2000/31 on information society services and 2006/123 on services in the internal market. It follows that national legislation which imposes them is also excluded from the scope of those directives.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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² Judgment of 27 April 2022, *Airbnb Ireland*, C-674/20 (see [Press Release No 66/22](#))

³ '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.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.'

⁴ Judgment of 11 December 2014, *Commission v Spain*, C-678/11.