Provisional text

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 7 July 2022 (1)

Case C-83/21

Airbnb Ireland UC,
Airbnb Payments UK Ltd
v
Agenzia delle Entrate,
other parties to the proceedings:
Presidenza del Consiglio dei Ministri,
Ministero dell'Economia e delle Finanze,
Federazione delle Associazioni Italiane Alberghi e Turismo – Federalberghi,
Renting Services Group Srl,
Codacons – Coordinamento delle Associazioni e dei Comitati di tutela dell'ambiente e dei diritti degli utenti e dei consumatori

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Information society services – Electronic commerce – Online property intermediation platform – Directive 2000/31/EC – Article 1(5)(a) – Directive 2006/123/EC – Services in the internal market – Article 2(3) – Exclusion of the 'field of taxation' from those directives – Directive (EU) 2015/1535 – Procedure for the provision of information in the field of technical regulations and of rules on information society services – Article 1(1)(e) and (f) – Concepts of 'rule on services' and 'technical regulation' – Rental of immovable property for the purposes of accommodation for a maximum period of 30 days – Obligation on providers of property intermediation services, including on an online platform, to transmit to the tax authorities the details of the rental contracts and to withhold tax at source on payments made – Obligation on service providers without a permanent establishment in Italy to appoint a tax representative – Article 56 TFEU – Freedom to provide services – Restrictive nature – Justification – Effectiveness of tax supervision and preventing tax evasion – Proportionality – Third paragraph of Article 267 TFEU)

Introduction

1. Online platforms are providers of 'information society services', or to put it more simply, services over the internet, which allow not only professionals but also individuals not carrying on an economic

activity to offer services of various kinds to consumers by connecting them with one another.

2. The development of such platforms has made it possible for a large number of individuals to provide services outside a full-scale economic activity and to benefit from those services at prices that are often much lower than those charged by professionals. Thus, the abovementioned platforms have contributed, if not to the creation of previously non-existent markets, at least to the exponential development of particular service markets owing to the increase in both supply and demand. At the same time, they have contributed to the aggravation of many social, political, administrative and legal problems associated with the massive growth of those services.

3. The question therefore arises as to the extent to which online platforms must also contribute to solving the problems associated with their operation. The search for such solutions must, of course, be carried out in compliance with the law, and in particular with EU law. The characteristic feature of services provided over the internet is that they can be easily provided across borders – on the internet, the geographical location of the provider and recipient of a service is irrelevant. The specific nature of online platforms lies in the fact that their services, which are provided over the internet and may therefore be, in principle, cross-border, are strongly linked to the services subsequently provided by their users, those services being mostly 'real' and having a precise physical location. Those platforms have thus profoundly changed the nature of cross-border services, not only by allowing them to be provided and used on a massive scale, but also by giving them a mixed character, in the sense that those services are strongly linked to subsequent services which do not have that quality.

4. That genuine paradigm shift requires a rethinking of certain principles of EU law, in particular the principle of freedom to provide services, in order to address the new challenges posed by the operation of online platforms. The present case provides the Court with the opportunity to rule on the measures which Member States may adopt in response to one of those challenges, namely that of the tax treatment of services provided via online platforms.

Legal context

European Union Law

5. Article 1(1) and (5)(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (2) provides:

'1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

…

5. This Directive shall not apply to:

(a) the field of taxation;

…'

6. Article 1(1) and Article 2(3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (3) provide:

'*Article 1*

1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

…

Article 2

…

3. This Directive shall not apply to the field of taxation.'

7. Article 1(1)(b) and (e) to (g) of 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 (4) states:

'For the purposes of this Directive, the following definitions apply:

…

(b) "service" means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

…

(e) "rule on services" means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

For the purposes of this definition:

(i) a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner;

(ii) a rule shall not be considered to be specifically aimed at information society services if it affects such services only in an implicit or incidental manner;

(f) "technical regulation" means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations shall include:

…

(iii) technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

…

(g) “draft technical regulation” means the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.’

8. In accordance with the first subparagraph of Article 5(1) of that directive:

‘Subject to Article 7, Member States shall immediately communicate to the [European] Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where those grounds have not already been made clear in the draft.’

Italian law

9. Article 4 of decreto-legge n. 50 convertito con modificazioni dalla L. 21 giugno 2017, n. 96 – Disposizioni urgenti in materia finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo (Decree-Law No 50, converted with amendments by Law No 96 of 21 June 2017, on urgent financial measures, initiatives to assist regional or local authorities, further action to support areas affected by seismic events, and development measures) of 24 April 2017, (5) as amended (‘Decree-Law No 50’), establishes the tax regime for short-term property rentals outside a commercial activity (‘the tax regime at issue’).

10. The tax regime at issue applies 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’ (Article 4(1) of Decree-Law No 50).

11. As from 1 June 2017, income from such rental contracts is optionally subject to a flat-rate withholding tax at a rate of 21%, instead of the standard income tax (Article 4(2) of Decree-Law No 50).

12. Persons who pursue property intermediation activities relating to the abovementioned rentals, ‘as well as those who operate online platforms’, are obliged to transmit information relating to rental contracts concluded through their intermediary before 30 June of the year following the year to which that information relates. The failure to disclose, or the incomplete or inaccurate disclosure of, information is subject to financial penalties (Article 4(4) of Decree-Law No 50).

13. Persons resident in Italy who pursue property intermediation activities, ‘as well as those who operate online platforms’, when they receive the rents or considerations relating to the abovementioned rental contracts, or when they intervene in the payment of those rents and considerations, must, as tax collectors, withhold 21% of the amount of the rents and considerations upon payment to the beneficiary and pay that to the tax authorities. In the event that the option to apply the flat-rate withholding tax is not exercised, the withholding is considered to be an advance payment (Article 4(5) of Decree-Law No 50).

14. Non-resident persons pursuing the same activities who have a permanent establishment in Italy fulfil the obligations arising from the tax regime at issue through their permanent establishment. Non-resident persons considered as not having a permanent establishment in Italy are obliged to appoint a tax representative as the taxable person. Where no tax representative is appointed, persons resident in Italy who belong to the same group as the persons referred to above are jointly and severally liable with them for the implementation and payment of the tax withheld from the amount of the rents and considerations relating to rental contracts (Article 4(5a) of Decree-Law No 50).

15. The implementing provisions of Article 4(4), (5) and (5a) of Decree-Law No 50 had to be established by decision of the Director of the Tax Authority.

Facts, procedure and questions referred for a preliminary ruling

16. The applicants in the main proceedings, Airbnb Ireland UC and Airbnb Payments UK Ltd (together '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. (6)

17. Airbnb brought an action before the Tribunale amministrativo del Lazio (Regional Administrative Court, Lazio, Italy) seeking the annulment, first, of Decision No 132395 of the Director of the Tax Authority of 12 July 2017 implementing the tax regime at issue and, secondly, of Interpretative Circular No 24 of the Tax Authority of 12 October 2017 concerning the tax regime at issue.

18. In support of its action, Airbnb submitted that the tax regime at issue had introduced a 'technical regulation' or a 'rule on services' into Italian law and that it should therefore have been communicated in advance to the Commission, pursuant to the first subparagraph of Article 5(1) of Directive 2015/1535. Airbnb also argued that the obligations under that regime relating to the transmission of information and taxation infringed the principle of freedom to provide services. Airbnb further argued that the obligation to appoint a tax representative for any person operating an online property intermediation platform who is not resident or established in Italy constituted a disproportionate restriction on fundamental freedoms such as the freedom to provide services.

19. By judgment of 18 February 2019, the court of first instance dismissed the action. Airbnb lodged an appeal against that judgment with the referring court.

20. By decision of 11 July 2019, received at the Court on 30 September 2019, the referring court submitted to the Court a request for a preliminary ruling concerning several provisions of EU law. By order of 30 June 2020, *Airbnb Ireland and Airbnb Payments UK* (C-723/19, not published, EU:C:2020:509), the Court declared that request manifestly inadmissible owing to lack of information enabling it to give a useful answer to the questions asked, while stating that the referring court was entitled to submit a new request for a preliminary ruling.

21. In those circumstances, the Consiglio di Stato (Council of State, Italy) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) How are the terms "technical regulation" for information society services and "rule on services" in respect of the information society, referred to in [Directive 2015/1535] to be interpreted and, in particular, are those terms to be interpreted as including tax measures not directly aimed at regulating the specific information society service, but which affect the way in which it is provided in practice in the Member State, in particular by imposing on all property intermediation service providers – including, therefore, operators not established in that State which provide their services online – ancillary obligations for the effective collection of taxes payable by landlords, such as:

(a) the collection and subsequent transmission to the tax authorities in the Member State of information relating to short-term rental agreements entered into as a result of the intermediary's activity;

(b) the deduction of the portion due to the tax authorities from the amounts paid by tenants to landlords and subsequent payment of those amounts to the Treasury[?]

(2) (a) Do the principle of 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 2000/31 and 2006/123] 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 2000/31 and 2006/123], 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 2000/31 and 2006/123] – where the above questions are answered in the affirmative – however be limited in accordance with [EU] law by national measures such as those described 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 2000/31 and 2006/123], 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?

(3) Must Article 267(3) TFEU be interpreted as meaning that, where a question of the interpretation of (primary or secondary) [EU] law is raised by one of the parties and accompanied by a precise indication of the wording of the question, the court is still entitled rephrase that question, by identifying, at its discretion, to the best of its knowledge and belief, the relevant provisions of [EU] law, the national provisions potentially in conflict with them, and the lexical content of the reference, provided that it is within the bounds of the subject matter of the dispute, or is the court obliged to refer the question as worded by the applicant?'

22. The request for a preliminary ruling was received by the Court on 9 February 2021. Written observations were submitted by Airbnb, the Federazione delle associazioni Italiane Alberghi e Turismo – Federalberghi (Federation of Italian Hotel and Tourism Associations, 'the Federalberghi'), the Italian, Belgian, Czech, Spanish, French, Dutch, Austrian and Polish Governments and the Commission. Airbnb, the Federalberghi, the Italian, Spanish and French Governments and the Commission were represented at the hearing held on 28 April 2022.

Analysis

The first question referred for a preliminary ruling

23. By its first question, the referring court asks, in essence, whether Article 1(1)(f) of Directive 2015/1535 must be interpreted as meaning that national legislation which imposes on intermediaries in the short-term rental of immovable property, including those pursuing their activity online, the obligation to collect and transmit to the tax authorities information relating to rental contracts concluded as a result of the intermediary's activity and, where those intermediaries are involved in the payment of rent, the

obligation to withhold the tax due on the amounts paid by the lessees to the lessors and to pay that tax to the Treasury constitutes a 'technical regulation' within the meaning of that provision.

The applicability of Directive 2015/1535 to tax provisions

24. The parties to the dispute and interested parties present at the hearing were questioned by the Court as to the applicability of Directive 2015/1535 to measures such as those of the tax regime at issue in the light of the fact that paragraph 1 of Article 114 TFEU, which constitutes the legal basis of that directive, excludes, in paragraph 2 thereof, the application of paragraph 1 'to fiscal provisions'.

25. I must point out at the outset that I share the view expressed, inter alia, by the French Government, that Article 114(2) TFEU does not preclude, as a matter of principle, the applicability of Directive 2015/1535 to tax measures. Indeed, that provision must be interpreted as referring to a harmonisation of those provisions which could be classified as 'positive harmonisation'. Such measures are taken, as regards direct and indirect taxes, on the basis of Article 113 TFEU.

26. By contrast, Directive 2015/1535 does not bring about such positive harmonisation. That directive is limited to establishing rules to prevent Member States from adopting measures contrary to the proper functioning of the internal market. Those rules consist in a procedural obligation to notify certain provisions at the draft stage, for the purpose of checking that they comply with internal market rules. Such a check does not amount to harmonisation of those provisions by EU law, as provided for in Article 114(1) TFEU. While Directive 2015/1535 does bring about harmonisation, it concerns the procedural rules for the Member States' adoption of legislative, regulatory or administrative provisions.

27. In my view, Article 114(2) TFEU does not, therefore, exclude the applicability of Directive 2015/1535 to tax provisions such as those at issue in the present case.

The classification of the provisions of the tax regime at issue as 'rules on services'

28. A 'technical regulation' within the meaning of Article 1(1)(f) of Directive 2015/1535 constitutes, inter alia, a 'rule on services' as defined in Article 1(1)(e) of that directive.

29. As a reminder, under that definition, a 'rule on services' is a requirement of a general nature relating to the taking-up and pursuit of information society service activities, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at such services.

30. It is common ground that services such as those provided by Airbnb constitute information society services within the meaning of Directive 2015/1535. (7) It remains to be determined whether the various obligations on short-term property rental intermediaries under the tax regime at issue fulfil the other criteria set out in the definition of a 'rule on services'.

31. Whether those obligations relate to information society services 'in an explicit and targeted manner' or only 'in an implicit or incidental manner' within the meaning of the second subparagraph of the definition in Article 1(1)(e) of Directive 2015/1535 is a matter of debate between the parties.

32. On the one hand, the Federalberghi submits that the tax regime at issue merely extends to short-term property rentals the existing tax regime that applies to long-term rentals. In its view, the purpose of that regime is not to regulate intermediation services as such, but to tax property rentals effectively by preventing tax evasion in that sector. Moreover, it states that the various obligations imposed on intermediaries by the abovementioned regime are formulated in a technologically neutral way, in the sense that they are incumbent on both intermediaries that operate online and those that operate by other means. According to that party, the presence of offline operators in the short-term rental market is not purely hypothetical.

33. On the other hand, Airbnb argues that, in reality, the tax regime at issue was designed specifically to target property rentals concluded through online platforms such as the one operated by Airbnb. I am sympathetic to that argument. It is clear from the information in the file submitted to the Court that the tax regime at issue was adopted in order to counteract mass tax evasion in the sector of short-term property rentals concluded between individuals. It is well known that it is thanks to those online platforms, such as the one operated by Airbnb, and therefore thanks to the services of the information society, that that sector has grown so significantly. If intermediaries operating by other means exist in that sector, their market share must, in my view, be minimal.

34. The situation at issue in the main proceedings therefore does not simply concern the application to information society services of pre-existing rules applicable to providers operating offline, (8) but the establishment of rules the purpose of which is to resolve problems which have arisen specifically in the internet environment and which are therefore specifically addressed to providers of online services. (9)

35. Thus, in my view, it is permissible to consider that the obligations on intermediaries under the tax regime at issue are specifically aimed at information society services, without the mere technology-neutral wording of the national provisions at issue being able to alter that assessment. (10)

36. However, that analysis takes into account only one aspect of the problem, namely the mere specific use of information society service providers. It is true that such an approach may be sufficient in the situation concerning rules the purpose of which is to regulate the very conditions of the taking-up and pursuit of an online activity (11) or to prohibit such an activity. (12) However, in a situation such as that at issue in the main proceedings, which concerns provisions with a different objective, the very complex definition of a 'rule on services' requires, in my view, a more nuanced interpretation in order to determine correctly whether those provisions fall within the scope of the obligation to notify and the penalty which accompanies that obligation in the event of its being disregarded, namely the non-enforceability against individuals of the provisions which should have been notified. (13)

37. Such a more nuanced interpretation requires a determination of whether the provision claimed to be a technical regulation has the specific objective of regulating the taking-up or pursuit of an information society service. A combined reading of the first subparagraph and point (i) of the second subparagraph of Article 1(1)(e) of Directive 2015/1535 leads me to conclude that the wording of that second provision, according to which 'a rule shall be considered to be specifically aimed at information society services where … [its] specific aim and object … is to regulate such services in an explicit and targeted manner', must be understood as requiring that a rule relating to such services must have as its specific aim and object to regulate in an explicit and targeted manner the *taking-up and pursuit* of those services, that is to say the matters referred to in that first provision.

38. As regards the various obligations imposed on intermediaries under the tax regime at issue, I share the view of some of the interested parties which submitted observations in the present case, in particular the Polish Government, that those obligations do not have the specific aim and object of regulating the taking-up or pursuit of property intermediation services via the internet.

39. First, as regards the obligation to collect and provide information, it must be stated, in my view, that it is in no way intended to regulate the taking-up or pursuit of intermediation services in short-term property rentals. The provision of information to tax authorities is not intended to regulate, or even monitor, the intermediary's activity, but only to regulate the activity of its lessor customers. That obligation therefore only concerns the intermediary's activity 'in an incidental manner' for the purposes of the first subparagraph and point (ii) of the second subparagraph of Article 1(1)(e) of Directive 2015/1535. While that obligation is a direct consequence of the pursuit of intermediation services in respect of immovable property situated in Italy and rented out by natural persons, it is not, however, contrary to Airbnb's contention, a precondition for pursuing that activity (14) and does not determine the manner in which or the conditions under which it is pursued. The same obligation arises *ex post* as a result of the pursuit of the activity and does not concern the intermediary's relations with its customers but concerns only those with the tax administration. (15)

40. Secondly, as regards the obligation to withhold tax, it is clear that it is more directly related to the pursuit of the intermediation service, in so far as that service includes intermediation in the payment of rent. By fulfilling that obligation, the intermediary transfers to the lessor not the whole of the rent received, (16) but only the remaining amount after withholding tax.

41. However, the objective of the obligation to withhold tax, like the obligation to provide information, is not to regulate the intermediation service but to tax the underlying property rental activity. The withholding of tax by the intermediary involved in the payment is merely an instrument for achieving that objective. That obligation, like the obligation to collect and provide information, therefore concerns the intermediation service only in an incidental manner. In that regard, it should be noted, as the French Government rightly points out, that the technique of withholding tax is commonly used in various fields unrelated to information society services, such as employment relationships or the taxation of capital income. That instrument is therefore in no way specific to information society services.

42. The argument, raised by Airbnb, that the intermediary concerned is forced to adopt technical and organisational procedures in order to comply with the obligations arising from the tax regime at issue cannot alter my assessment of the obligations at issue from the point of view of Directive 2015/1535. The adoption of such procedures would constitute internal measures of the service provider concerning its relations with the authorities of the Member State in which the place of supply of the services underlying its intermediation service is located. However, such measures do not affect the pursuit of its own service. That would be the case only if the incidental obligations imposed on a service provider were to require it to change the way in which it provides that service, such as by requesting additional information from its customers.

43. Thirdly and finally, the obligation to appoint a tax representative is not mentioned by the referring court in its first question referred for a preliminary ruling. However, for the sake of completeness, I note that, in accordance with my analysis in relation to Article 1(1)(e) of Directive 2015/1535, that obligation falls outside the definition of a ‘rule on services’ since it is not intended to regulate the taking-up or pursuit of an information society service, but is merely an administrative consequence of the pursuit of such a service, closely linked to the obligation to withhold tax.

De facto technical regulations linked to fiscal measures

44. Also discussed at the hearing was the question as to whether the obligations arising, for intermediaries, from the tax regime at issue should be classified as ‘de facto technical regulations’ for the purposes of point (iii) of the second subparagraph of Article 1(1)(f) of Directive 2015/1535, as rules on services which are linked to fiscal measures.

45. However, as argued by the French Government, such rules accompany fiscal measures which are intended to influence the consumption of certain goods or services, such as products which are less harmful to the environment or more energy efficient. That is not the objective of the tax regime at issue. Its objective is, as the Italian Government convincingly submits, to facilitate the collection of taxes and to prevent tax evasion. The obligations at issue are therefore tax measures in the proper sense and cannot be described as ‘de facto technical rules’. (17)

Proposed answer to the first question

46. I therefore propose that the answer to the first question referred for a preliminary ruling should be that Article 1(1)(f) of Directive 2015/1535, read in conjunction with Article 1(1)(e) thereof, must be interpreted as meaning that national legislation which imposes on intermediaries in the short-term rental of immovable property, including those pursuing their activity online, the obligation to collect and transmit to the tax authorities information relating to rental contracts concluded as a result of the intermediary’s activity and, where those intermediaries are involved in the payment of rent, the obligation to withhold the tax due on the amounts paid by the lessees to the lessors and to pay that tax to the Treasury does not constitute a ‘technical regulation’ within the meaning of that first provision.

The second question referred for a preliminary ruling

47. By its second question, the referring court asks whether Directives 2000/31 and 2006/123 and Article 56 TFEU must be interpreted as precluding national legislation which imposes on intermediaries in the short-term rental of immovable property, including those pursuing their activity online:

(a) the obligation to collect and transmit to the tax authorities information relating to rental contracts concluded as a result of the intermediary's activity;

(b) where those intermediaries are involved in the payment of rent, the obligation to withhold the tax due on the amounts paid by the lessees to the lessors and to pay that tax to the Treasury, and

(c) the obligation to appoint a tax representative if the intermediary in question does not have a permanent establishment in Italy.

The obligation to provide information

48. As regards the obligation to collect and transmit information, the Court held, in its judgment in *Airbnb Ireland*, (18) that the Belgian legislation, which imposed obligations similar to those at issue in the present case, was excluded from the scope of Directive 2000/31 in so far as it fell within the 'field of taxation' within the meaning of Article 1(5)(a) of that directive.

49. In my view, the same conclusion must be drawn with regard to the concept of the 'field of taxation' within the meaning of Article 2(3) of Directive 2006/123, with the result that the national legislation at issue in the present case should also be excluded from the scope of that directive.

50. Moreover, the finding of the Court in the judgment in *Airbnb Ireland* (19) that Article 56 TFEU does not preclude the Belgian legislation is directly transposable to the present case.

The obligation to withhold tax

51. In the judgment in *Airbnb Ireland*, (20) the Court held (i) that the obligation to provide information imposed on providers of intermediation services in short-term property rentals is excluded from the scope of Directive 2000/31 in that it falls within the field of taxation, since the recipient of that information is the tax authorities, (ii) that the obligation is part of a tax regulation and (iii) that the information which that obligation requires to be transmitted is indissociable, as regards its substance, from that legislation, since that information is capable of identifying the person actually liable for payment of the tax, the basis for assessment of the tax and, consequently, the amount of tax.

52. The same applies *a fortiori* to the obligation to withhold tax, which is purely fiscal in nature. There can therefore be no doubt that that obligation, like the obligation to provide information, falls within the 'field of taxation' within the meaning of Article 1(5)(a) of Directive 2000/31 and Article 2(3) of Directive 2006/123.

53. It must therefore be held that the obligation to withhold tax is excluded from the scope of Directives 2000/31 and 2006/123.

54. Next, as regards Article 56 TFEU, the Court held in the judgment in *Airbnb Ireland* that that provision does not preclude the obligation on a property intermediary to collect and transmit information, on the ground, inter alia, that, according to its case-law, Article 56 TFEU does not cover measures the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and the provision of services within one Member State. (21)

55. However, in its observations, Airbnb indirectly disputes that conclusion of the Court, arguing that the case-law on which it is based concerns taxes and charges on the cross-border providers' own activities

and that the additional costs referred to in that case-law were directly caused by that taxation. According to Airbnb, its obligations under the contested tax regime arise not from the taxation of its own activity, but from the taxation of the activity of its lessor customers. Airbnb argues that the case-law on which paragraph 46 of the judgment in *Airbnb Ireland* is based is therefore not applicable in the present case.

56. That argument is not unfounded, at least as far as the obligation to withhold tax is concerned. That obligation constitutes a much greater burden than a mere obligation to provide information, not least because of the financial liability to which it gives rise, not only towards the State of taxation but also towards customers. It therefore appears necessary to analyse its compliance with Article 56 TFEU.

57. As a reminder, according to settled case-law, Article 56 TFEU precludes the application of national measures which prohibit, impede or render less attractive the exercise of the freedom to provide services. (22)

58. Airbnb submits, in the first place, that the tax regime at issue, and in particular the obligation to withhold tax, constitutes indirect discrimination against cross-border service providers, on the ground that 'almost all' of the property intermediation platforms present on the Italian market, and 'more particularly those which also manage payments', are established in other Member States. In my view, that argument must be understood as meaning that, according to Airbnb, the Italian legislature, by imposing the obligation to withhold tax only on intermediaries involved in the payment of rent, discriminated against non-resident platforms, which are usually involved in payments, as compared with resident intermediaries, which are usually not.

59. The accuracy of the factual premiss on which that argument is based can only be verified by the referring court. Nevertheless, from the point of view of the freedom to provide services, Airbnb's argument does not seem to me to be well founded.

60. First, as regards the imposition of the obligation to withhold tax only on intermediaries involved in the payment of rent, it would clearly be difficult to impose that obligation on intermediaries which do not offer such an additional service. However, the most important element, in my view, is the fact that the intermediary's choice to provide that service is not accidental but, on the contrary, addresses concerns similar to those which led the Italian legislature to adopt the tax regime at issue.

61. It should be noted, as Airbnb, moreover, acknowledges in its observations, that, in the case of short-term rental contracts, the level of risk is much higher in the situation where those contracts are concluded between natural persons than where the lessor is a professional and the lessee a consumer. In the former situation, the lessee, on the one hand, is not always in a position to ensure in advance the actual quality of a property not belonging to a tourism professional, or its existence, and does not enjoy the protection conferred on consumers; the lessor, on the other hand, often does not have the same capacity as a professional to ensure the actual payment of the rent by the lessee. Thus, the intermediary, by guaranteeing that the lessee will be able to access the property only on the condition that he or she has paid the rent and that the lessor will receive his or her money only after the lessee has taken possession of the property and has ascertained that it meets the terms of the contract, not only facilitates the payment procedure but also creates the safe conditions necessary for the development of the short-term property rental sector by non-professionals as a mass market.

62. The public authority wishing to tax that rental activity is faced with similar difficulties. The activity of a large number of natural persons who are not subject to the various obligations incumbent on professionals is, by its nature, difficult to audit for tax purposes. It is therefore perfectly consistent to impose the obligation to withhold tax on intermediaries involved in the payment of rent for the same reasons as those for which they offer such a service.

63. Secondly, the fact that the majority of intermediaries involved in the payment of rent are established in Member States other than that in which the rented property is located is due to the fact that the online provision of services does not require establishment in a specific place and that the activity is concentrated

in a limited number of economic entities specific to the online platform market. (23) By contrast, the nature of those services, in particular the service associated with involvement in payment, does not prevent them from being provided by non-resident service providers rather than resident ones. The case-law cited by Airbnb, (24) concerning foreign language teachers, that is to say, a group which, by its nature, is capable of including a large proportion of foreign nationals, cannot therefore be transposed to the present case.

64. In the second place, Airbnb submits 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.

65. In my view, that argument is also unfounded. 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. The services provided by intermediaries such as Airbnb are indissociable from those rental activities because they have no economic value of their own. In my view, there is therefore a sufficiently broad connecting link to enable that Member State to impose on intermediaries obligations in relation to the taxation of rental contracts for immovable property situated in its territory, without making any distinction as regards the place of establishment of those intermediaries. (25) Non-residents are therefore not, from that point of view, in a different situation from that of residents.

66. I conclude from that that the obligation to withhold tax imposed on intermediaries under the tax regime at issue does not give rise to discrimination against non-resident operators. However, it seems to me that such an obligation could be considered an obstacle to the freedom to provide services as a measure likely to make the exercise of that freedom less attractive.

67. Such an obligation requires the operators concerned to play a new role, since they will be intermediaries not only between lessors and lessees, but also between lessors and the tax authorities, which entails greater financial liability, first, towards the tax authorities for the exact payment of the tax due and, secondly, towards the lessors, who will be entitled to consider that they are relieved of their tax obligations as a result of the tax withheld by the intermediaries. Thus, the exercise of the freedom to provide services, in particular those relating to intermediation in the payment of rents, is accompanied by an additional risk which would not exist in the absence of the obligation to withhold tax. (26)

68. However, I consider, contrary to Airbnb's submission, that that obstacle is fully justified. In that regard, the Italian Government raises the necessity of ensuring the effective collection of tax on income from the short-term rental of immovable property and the prevention of tax evasion in that sector. It should be noted that, according to settled case-law, such an objective constitutes a reason in the public interest capable of justifying a restriction on a freedom of the internal market. (27)

69. The withholding of tax (or a tax deduction) at source is a universally used tax measure of a technical nature which not only makes it possible to ensure the effective collection of tax, but also constitutes a measure enabling increased simplification and legal certainty for taxpayers. Moreover, for an operator which is in any event in possession of the funds that constitute the basis of the tax assessment, as is the case of an immovable property intermediary involved in the payment of rent, the obligation to transfer part of that money to the tax authorities does not present an inordinate burden.

70. As several interested parties which submitted observations in the present case pointed out, the Court has recognised the measure of withholding tax as justifying a restriction on a freedom of the internal market. (28) While it is true, as Airbnb points out, that that conclusion concerned situations in which non-resident taxpayers received income from domestic sources, (29) I see no reason why it cannot be applied in situations such as that at issue in the case in the main proceedings. The difficulty in recovering tax arises not only from the place of establishment or residence of the taxpayer but also from several other factors, one of the most significant being the large number of taxpayers each receiving a relatively low income. It appears quite clear to me that the levying of an amount of tax from a large number of small taxpayers

requires much more effort and resources than the recovery of the same amount from a single large taxpayer. It is therefore perfectly legitimate to use the method of withholding tax at source in a situation where a single intermediary receives and pays back the income subject to the tax in question to several taxpayers, even where that entails an additional administrative burden for that intermediary. It is also clear that such a measure enables the effective prevention of tax evasion by imposing on an operator, which has no personal interest in evading the tax, the liability for payment of that tax to the tax authorities.

71. Thus, that obligation to withhold tax does not appear to me to be in any way disproportionate in the light of the legitimate objectives of the effective collection of tax and preventing tax evasion. In particular, the solution advocated by Airbnb, consisting in voluntary agreements between intermediaries and the tax authorities for the transmission of information, appears to me to be clearly less effective, precisely because of its voluntary nature. After all, taxation cannot be based on voluntary actions.

72. As regards Airbnb's argument that the obligations imposed on intermediaries under the tax regime at issue, in particular the obligation to withhold tax, are inconsistent, it must be observed that the choice made as to the persons and types of rental contract affected by those obligations results from the scope of the tax regime at issue and falls within the sole competence of the Member State concerned. (30) Moreover, the introduction of specific rules for short-term rentals, the economic function of which is different from that of long-term rentals, and for natural persons not acting on a professional basis, for whom the tax regime is naturally different from that for legal persons and professionals, does not seem to me to be in any way inconsistent.

73. Finally, the fact that an intermediary such as Airbnb may theoretically be subject to obligations similar to those at issue in the present case, but which are different in certain details, in different Member States in which it offers its services, results from the fact that those services, although they are online services provided at a distance, are linked to the underlying property rental services, the conditions of supply and, in particular, the taxation of which are not harmonised at EU level. However, that cannot call into question my finding that the measures which the Member States may adopt, within the sphere of their competences, to regulate those property rental services are justified.

74. Ultimately, I consider that Article 56 TFEU does not preclude an obligation to withhold tax such as that provided for by the tax regime at issue.

The obligation to appoint a tax representative

75. As a reminder, an intermediary which is subject to the obligation to withhold tax and is not resident in Italy is required, under the tax regime at issue, to appoint a tax representative for the purposes of compliance with that obligation. It is clear from the clarifications provided by the Italian Government at the hearing that, although it is not expressly provided for in the texts, that representative must logically be resident in Italy, failing which his or her appointment would be entirely ineffective.

76. As a purely fiscal measure linked to the obligation to withhold tax at source, the obligation to appoint a tax representative clearly falls, like the two other obligations on intermediaries under the tax regime at issue, within the 'field of taxation' within the meaning of Article 1(5)(a) of Directive 2000/31 and Article 2(3) of Directive 2006/123, with the result that that obligation is excluded from the scope of those two directives.

77. It is nevertheless still necessary to ascertain whether the obligation to appoint a tax representative complies with Article 56 TFEU.

78. In that regard, Airbnb submits from the outset that such an obligation, which applies only to foreign residents, is directly discriminatory towards providers from other Member States and is, consequently, contrary to Article 56 TFEU.

79. I am not convinced by that argument. From a tax point of view, non-residents are not always in the same situation as residents, which may justify a difference in treatment, without that difference giving rise to discrimination. (31)

80. By contrast, the Court has already held, in the judgment in *Commission* v *Spain*, (32) 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.

81. I am of the opinion that, contrary to what the Italian Government appears to suggest, the finding of the Court in that judgment is not an assessment 'in a single case', but is the result of the application of the principles governing the interpretation of Article 56 TFEU to the obligation to appoint a tax representative imposed on service providers established in other Member States. Indeed, that judgment was already based on a precedent. (33) However, the differences between the legislation at issue in those two cases were not held to be decisive by the Court. (34) Moreover, the reasons put forward by the Italian Government to justify the obligation to appoint a tax representative are substantially the same as those put forward by the Spanish Government in the case which gave rise to that judgment, namely the necessity of effective fiscal supervision and the prevention of tax evasion. (35)

82. It follows that the obligation to appoint a tax representative is contrary to Article 56 TFEU.

Answer to the second question referred for a preliminary ruling

83. In the light of the considerations which I have set out above, I propose that the answer to the second question referred for a preliminary ruling should be that Article 1(5)(a) of Directive 2000/31 and Article 2(3) of Directive 2006/123 must be interpreted as meaning that national legislation which imposes on intermediaries in the short-term rental of immovable property, including those pursuing their activity online, obligations to collect and transmit information, withhold tax and designate a tax representative, as provided for by the tax regime at issue, is excluded from the scope of those directives and that Article 56 TFEU must be interpreted as meaning that it does not preclude those first two obligations, but does preclude the third.

The third question referred for a preliminary ruling

84. By its third question, the referring court asks whether Article 267 TFEU must be interpreted as meaning that, where a question concerning the interpretation of EU law is raised by one of the parties, a court or tribunal against whose decisions there is no judicial remedy under national law retains the power to rephrase independently the questions to be referred to the Court for a preliminary ruling or whether is it obliged to reproduce the questions as formulated by the party requesting the reference.

85. In that regard, the referring court states that, in the present case, the parties have requested that specific questions be referred to the Court concerning the interpretation of EU law and that, in its view, failure to comply with that request could lead to the recognition of State liability and, consequently, in the Italian legal system, that of a judge as a natural person.

86. However, it is clear from the Court's settled case-law that although a national court or tribunal against whose decisions there is no judicial remedy under national law is in principle required to make a reference for a preliminary ruling where it finds that a question concerning the interpretation of EU law is raised before it, the determination and formulation of the questions to be put to the Court devolve upon the national court or tribunal alone and that the parties to the main proceedings may not determine their tenor. (36) The system established by Article 267 TFEU does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Thus, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of EU law does not mean that the

court or tribunal concerned is compelled to consider that such a question has been raised within the meaning of Article 267 TFEU. (37) The same applies to the content of the questions.

87. Furthermore, in submitting a reference for a preliminary ruling, the national court or tribunal is bound to observe the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court of Justice, (38) requirements which the parties are not bound to observe when formulating their proposals for questions for a preliminary ruling. Responsibility for complying with those requirements is therefore a matter for the national court alone if it is not to have that request or certain questions rejected as inadmissible.

88. I therefore propose that the answer to the third question should be that Article 267 TFEU must be interpreted as meaning that, in the event of a question of interpretation of EU law raised by one of the parties, a national court or tribunal against whose decisions there is no judicial remedy under national law retains the power to rephrase independently the questions for a preliminary ruling.

Conclusion

89. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) as follows:

(1) Article 1(1)(f) of 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, read in conjunction with Article 1(1)(e) of that directive, must be interpreted as meaning that national legislation which imposes on intermediaries in the short-term rental of immovable property, including those pursuing their activity online, the obligation to collect and transmit to the tax authorities information relating to rental contracts concluded as a result of the intermediary's activity and, where those intermediaries are involved in the payment of rent, the obligation to withhold the tax due on the amounts paid by the lessees to the lessors and to pay that tax to the Treasury does not constitute a 'technical regulation' within the meaning of that first provision.

(2) Article 1(5)(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') and Article 2(3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that national legislation which imposes on intermediaries in the short-term rental of immovable property, including those pursuing their activity online:

(a) the obligation to collect and transmit to the tax authorities information relating to rental contracts concluded as a result of the intermediary's activity;

(b) where those intermediaries are involved in the payment of rent, the obligation to withhold the tax due on the amounts paid by the lessees to the lessors and to pay that tax to the Treasury, and

(c) the obligation to appoint a tax representative if the intermediary in question does not have a permanent establishment in Italy,

is excluded from the scope of those directives.

Article 56 TFEU must be interpreted as meaning that it does not preclude national legislation which establishes the obligations referred to in (a) and (b) and that it precludes national legislation which establishes the obligation referred to in (c).

(3) Article 267 TFEU must be interpreted as meaning that, in the event of a question of interpretation of EU law raised by one of the parties, a national court or tribunal against whose decisions there is no judicial remedy under national law retains the power to rephrase independently the questions for a preliminary ruling.

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1 Original language: French.

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2 OJ 2000 L 178, p. 1.

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3 OJ 2006 L 376, p. 36.

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4 OJ 2015 L 241, p. 1.

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5 GURI No 144 of 23 June 2017.

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6 More precisely, it is Airbnb Ireland that operates the internet platform on EU territory, while Airbnb Payments UK, at the time of the facts in the main proceedings, managed the payments.

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7 Judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 1 of the operative part).

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8 See judgment of 3 December 2020, *Star Taxi App* (C-62/19, EU:C:2020:980, paragraphs 64 to 66).

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9 See judgment of 12 September 2019, *VG Media* (C-299/17, EU:C:2019:716, paragraph 36).

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10 See judgment of 12 September 2019, *VG Media* (C-299/17, EU:C:2019:716, paragraph 37).

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11 Such as that at issue in the case giving rise to the judgment of 3 December 2020, *Star Taxi App* (C-62/19, EU:C:2020:980).

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12 Such as that at issue in the case giving rise to the judgment of 12 September 2019, *VG Media* (C-299/17, EU:C:2019:716).

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13 That penalty originates in the case-law. See, inter alia, judgment of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 2 of the operative part).

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14 If that obligation is accompanied by penalties, those penalties do not, however, take the form of a prohibition on pursuing the intermediation activity, but of simple financial penalties.

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15 Unless the fact of permitting lessors to pursue a rental activity without the knowledge of the tax authorities were to be considered an important element of the intermediation service at issue. However, that would amount

to a presumption of fraud.

16 Less the amount of its fee.

17 See, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 96 and 97).

18 Judgment of 27 April 2022 (C-640/20, EU:C:2022:303; *'the judgment in Airbnb Ireland'*, paragraph 1 of the operative part).

19 Paragraph 2 of the operative part of that judgment.

20 See paragraphs 32 to 34 of that judgment.

21 Paragraph 46 of that judgment and the case-law cited.

22 See the recent judgment of 3 March 2020, *Google Ireland* (C-482/18, EU:C:2020:141, paragraph 26).

23 See, in that regard, Perrot, A., 'L'économie digitale et ses enjeux: le point de vue de l'économiste', *AJ Contrats d'affaires Concurrence Distribution*, No 2, Dalloz Revues, February 2016, p. 74.

24 Judgment of 26 June 2001, *Commission* v *Italy* (C-212/99, EU:C:2001:357).

25 See, on the scope of Member States' tax competences, Opinion of Advocate General Kokott in *Google Ireland* (C-482/18, EU:C:2019:728, points 42 to 47).

26 See, to that effect, judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 159).

27 See the recent judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 160).

28 Judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 160 and the case-law cited).

29 See, however, judgment of 11 December 2014, *Commission* v *Spain* (C-678/11, EU:C:2014:2434, paragraph 47), in which the Court permitted, albeit in the form of an *obiter dictum*, such an obligation on providers of cross-border services.

30 See, to that effect, judgment of 16 March 2021, *Commission* v *Poland* (C-562/19 P, EU:C:2021:201, paragraph 38).

31 See, as regards the situation of resident and non-resident taxpayers, inter alia, judgment of 14 December 2006, *Denkavit Internationaal and Denkavit France* (C-170/05, EU:C:2006:783, paragraphs 23 to 25). The same reasoning may, in my view, be applied with regard to persons who, although not taxpayers, are nevertheless liable for payment of tax to the Treasury.

32 Judgment of 11 December 2014 (C-678/11, EU:C:2014:2434, in particular paragraphs 57 to 59 and 61).

33 Namely the judgment of 5 July 2007, *Commission* v *Belgium* (C-522/04, EU:C:2007:405).

34 See judgment of 11 December 2014, *Commission* v *Spain* (C-678/11, EU:C:2014:2434, in particular paragraphs 54 and 55).

35 See judgment of 11 December 2014, *Commission* v *Spain* (C-678/11, EU:C:2014:2434, in particular paragraph 44).

36 The parties, on the other hand, have the right of access to a court with jurisdiction to make a reference for a preliminary ruling.

37 See, for a recent reminder of that case-law, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraphs 53 to 58).

38 Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraphs 68 and 69).