Provisional text

JUDGMENT OF THE COURT (Second Chamber)

22 December 2022 (*)

(Reference for a preliminary ruling – Internal market – Article 114(2) TFEU – Exclusion of fiscal provisions – Directive 2000/31/EC – Information society services – Electronic commerce – Online property intermediation platform – Article 1(5)(a) – Exclusion of the 'field of taxation' – Directive 2006/123/EC – Services in the internal market – Article 2(3) – Exclusion of the 'field of taxation' – Directive (EU) 2015/1535 – Article 1(1)(e) and (f) – Concepts of 'rule on services' and 'technical regulation' – Obligation on providers of property intermediation services to collect and transmit to the tax authorities data on rental contracts and to withhold tax at source on the payments made – Obligation on service providers that do not have a permanent establishment in Italy to appoint a tax representative – Article 56 TFEU – Restrictive nature – Legitimate objective – Disproportionate nature of the obligation to appoint a tax representative – Third paragraph of Article 267 TFEU – Prerogatives of a national court or tribunal against whose decisions there is no judicial remedy under national law)

In Case C 83/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 26 January 2021, received at the Court on 9 February 2021, in the proceedings

Airbnb Ireland UC plc,

Airbnb Payments UK Ltd

v

Agenzia delle Entrate,

intervening parties:

Presidenza del Consiglio dei Ministri,

Ministero dell'Economia e delle Finanze,

Federazione delle Associazioni Italiane Alberghi e Turismo (Federalberghi),

Renting Services Group Srls,

Coordinamento delle Associazioni e dei Comitati di tutela dell'ambiente e dei diritti degli utenti e dei consumatori (Codacons),

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, M.L. Arastey Sahún, F. Biltgen, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: M. Szpunar,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 28 April 2022,

after considering the observations submitted on behalf of:

– Airbnb Ireland UC plc and Airbnb Payments UK Ltd, by M. Antonini, S. Borocci, A.R. Cassano, M. Clarich, I. Perego, G.M. Roberti, avvocati, and D. Van Liedekerke, advocaat,

– the Federazione delle Associazioni Italiane Alberghi e Turismo (Federalberghi), by E. Gambaro, A. Manzi and A. Papi Rossi, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and by C. Molitor, avocat,

– the Czech Government, by T. Machovičová, M. Smolek and J. Vláčil, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the French Government, by N. Vincent and T. Stéhelin, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and J. Hoogveld, acting as Agents,

– the Austrian Government, by M. Augustin, A. Posch and J. Schmoll, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by L. Armati, P. Rossi and E. Sanfrutos Cano, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 electric commerce') (OJ 2000 L 178, p. 1), 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 (OJ 2006 L 376, p. 36), Article 1(1)(e) and (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 (OJ 2015, L 241, p. 1), and Article 56 and the third paragraph of Article 267 TFEU.

2 The request has been made in proceedings between Airbnb Ireland UC plc and Airbnb Payments UK Ltd, on the one hand, and the Agenzia delle Entrate (Tax Authority, Italy), on the other, concerning the legality of a provision of Italian law relating to the tax regime applicable to property intermediation services relating to short-term rentals.

Legal context

European Union law

Directive 2000/31

3 Under recital 12 of Directive 2000/31:

‘It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded form the scope of this Directive.’

4 Recital 13 of that directive states:

‘This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.’

5 Article 1 of that directive, entitled ‘Objective and scope’, 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;

…’

Directive 2006/123

6 Under recital 29 of Directive 2006/123:

‘Given that the Treaty provides specific legal bases for taxation matters and given the Community instruments already adopted in that field, it is necessary to exclude the field of taxation from the scope of this Directive.’

7 Article 2 of that directive, entitled ‘Scope’, provides, in paragraph 3 thereof:

‘This Directive shall not apply to the field of taxation.’

Directive 2015/1535

8 Article 1(1) of Directive 2015/1535 states:

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

…

(e) “rule on services” means 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 [those] services …

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 include:

(i) laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions;

(ii) voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications;

(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.

…'

9 The first subparagraph of Article 5(1) of that directive provides:

'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

10 Article 4 of decreto-legge n. 50 – 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 on urgent financial measures, initiatives in favour of territorial bodies, further action to support areas affected by seismic events, and development measures) of 24 April 2017 (Ordinary Supplement to GURI No 95 of 24 April 2017), converted with amendments by Law No 96 of 21 June 2017 (Ordinary Supplement to GURI No 144 of 23 June 2017), in the version applicable to the dispute in the main proceedings ('the 2017 tax regime'), entitled 'Tax regime for short-term rentals', is worded as follows:

‘1. For the purposes of this article, short-term rentals shall mean contracts for the rental of residential property for a maximum period of 30 days, including those which provide for the provision of services for the supply of household linen and the cleaning of the premises, entered into by natural persons, outside a business activity, directly or through persons engaged in property intermediation activities, or persons operating online portals, by putting persons seeking premises in contact with persons who have building units for rent.

2. As from 1 June 2017, income stemming from short-term rental contracts entered into on that date or thereafter shall be subject to the provisions of Article 3 of decreto legislativo n. 23 – Disposizioni in materia di federalismo Fiscale Municipale [(Legislative Decree No 23 on provisions concerning local tax federalism)] of 14 March 2011 (GURI No 67 of 27 March 2011), at the rate of 21% when opting for payment of a substitute tax in the form of a flat-rate withholding tax.

3. The provisions of subparagraph 2 shall also apply to gross amounts deriving from subletting contracts and contracts for pecuniary interest concluded by the borrower which have as their object the use of the property by third parties, where they are concluded under the conditions laid down in subparagraph 1.

…

4. Persons who engage in property intermediation activities, and persons who operate online portals, by putting in contact persons seeking premises with persons who have building units to let, shall transmit the data relating to the contracts referred to in subparagraphs 1 and 3 concluded by their intermediary before 30 June of the year following that to which those data refer. The failure to transmit those data, in full or in part, or the transmission of inaccurate data may give rise to the penalty laid down in Article 11(1) of decreto legislativo n. 471 – [Riforma delle sanzioni tributarie non penali in materia di imposte dirette, di imposta sul valore aggiunto e di riscossione dei tributi, a norma dell’articolo 3, comma 133, lettera q), della legge 23 dicembre 1996, n. 662] [(Legislative Decree No 471 on the reform of non-criminal tax penalties in the field of direct taxation, value added tax and tax collection, pursuant to Article 3(133)(q) of Law No 662 of 23 December 1996)] of 18 December 1997 (Ordinary Supplement to GURI No 5 of 8 January 1998). The penalty shall be reduced by half if transmission takes place within 15 days of the deadline or if, within the same period, the data are properly transmitted.

5. Where they collect the rents or consideration relating to the contracts referred to in subparagraphs 1 and 3, or where they act in connection with the payment of those rents and consideration, persons resident in the territory of the State who engage in property intermediation activities, and persons who operate online platforms, by putting in contact persons seeking premises with persons who have building units to let, shall, in their capacity as tax collectors, withhold 21% of the amount of the rents or consideration when payment to the beneficiary is made and shall pay that tax. … Where the regime referred to in subparagraph 2 is not opted for, the sum withheld shall be deemed to be a payment on account.

5a Where they collect the rents or consideration relating to the contracts referred to in subparagraphs 1 and 3, or where they act in connection with the payment of those rents and consideration, non-resident persons referred to in subparagraph 5 who have a permanent establishment in Italy, within the meaning of Article 162 of the consolidated law on income tax, resulting from decreto del Presidente della Repubblica n. 917 – [Approvazione del testo unico delle imposte sui redditi (Decree of the President of the Republic No 917 approving the consolidated law on income tax)], of 22 December 1986 (Ordinary Supplement to GURI No 302 of 31 December 1986), fulfil the obligations arising from the present article through their permanent establishment. For the purposes of compliance with the obligations arising from this article, non-resident persons considered not to have a permanent establishment in Italy shall appoint, in their capacity as person liable to pay the tax, a tax representative, chosen from among the persons listed in Article 23 of decreto del Presidente della Repubblica n. 600 – [Disposizioni comuni in materia di accertamento delle imposte sui redditi (Decree of the President of the Republic No 600 laying down common provisions on the assessment of income tax)] of 29 September 1973 (Ordinary Supplement to GURI No 268 of 16 October 1973).

5b The person who collects the rents or consideration, or who acts in connection with the payment of those rents or consideration, shall be liable for payment of the visitor's tax referred to in Article 4 of Legislative Decree No 23 of 14 March 2011, and of the visitor's tax …, and responsible for compliance with the other obligations laid down by law and by municipal rules.

6. The provisions for implementing subparagraphs 4, 5 and 5a of this article, including those relating to the transmission and retention of data by the intermediary, shall be established by decision of the director of the tax authority, adopted within 90 days of the entry into force of this decree.'

11 The 2017 tax regime was amended by decreto-legge 30 aprile 2019, n. 34 – Misure urgenti di crescita economica e per la risoluzione di specifiche situazioni di crisi (Decree-Law No 34 of 30 April 2019 on urgent measures to promote economic growth and for the resolution of specific situations in times of crisis, GURI No 100 of 30 April 2019, 'the 2019 Law'), converted with amendments into Law No 58 of 28 June 2019 (legge del 28 giugno 2019 n. 58, Ordinary Supplement to GURI No 151 of 29 June 2019).

12 Under Article 13c(1) of the 2019 Law, Article 4(5a) of the 2017 tax regime is supplemented as follows:

'Where no tax representative is appointed, persons resident in the territory of the State who belong to the same category 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 consideration relating to the contracts referred to in subparagraphs 1 and 3.'

13 Article 13c(4) of that law provides:

'In order to improve the quality of the tourism offer, to ensure the protection of tourists and to combat unlawful forms of accommodation, and for tax purposes, … a special database of accommodation and buildings intended for short-term rental located in the national territory, which are identified by means of an alphanumeric code, hereinafter referred to as "the identification code", to be used in any communication relating to the supply and promotion of services to users, shall be established.'

14 In accordance with Article 13c(7) of that law, 'owners of accommodation facilities, persons engaged in property intermediation activities and persons who operate online portals, by putting in contact persons seeking premises or parts of premises with persons who have building units or parts of building units to let, shall publish the identification code in communications relating to supply and promotion'.

15 Lastly, under Article 13c(8) of the 2019 Law, 'non-compliance with the provisions referred to in subparagraph 7 shall give rise to the imposition of a fine ranging from EUR 500 and EUR 5 000' and 'in the event of reoccurrence of the offence, the penalty shall be increased by twice the amount due'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 The applicants in the main proceedings operate the online Airbnb property intermediation portal, which facilitates the connection of lessors who have accommodation with persons seeking that type of accommodation, by collecting from the customer the payment relating to the provision of the accommodation before the start of the rental and by transferring that payment to the lessor after the rental has began, if there has been no challenge on the part of the lessee.

17 The applicants in the main proceedings brought an action before the Tribunale amministrativo regionale per il 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 2017 tax regime and, second, of circolare interpretativa n. 24 dell'Agenzia delle Entrate – Regime fiscale delle locazioni brevi – Art[icolo] 4 [del regime fiscale del 2017] (Interpretative Circular No 24 of the Tax Authority on the 'tax regime for short-term rentals – Art[icle] 4 [of the 2017 tax regime]') of 12 October 2017, in the version applicable to the main proceedings, relating to the application of that tax regime.

18 By judgment of 18 February 2019, that court dismissed that action, holding that (i) the 2017 tax regime had not introduced a 'technical regulation' or a 'rule on services', (ii) the obligation to transmit contract data and to apply a withholding tax at source did not infringe either the principle of freedom to provide services or the principle of free competition and, (iii) the obligation to appoint a tax representative, where a person operating an online property intermediation portal is not resident or established in Italy, met the requirements of proportionality and necessity established by the case-law of the Court on freedom to provide services.

19 The applicants in the main proceedings brought an appeal against that judgment before the referring court, the Consiglio di Stato (Council of State, Italy).

20 By decision of 11 July 2019, received at the Court on 30 September 2019, the referring court submitted to the Court three questions for a preliminary ruling concerning several provisions of EU law.

21 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 for a preliminary ruling manifestly inadmissible, while stating that the referring court was entitled to submit a new request for a preliminary ruling together with information enabling it to give a useful answer to the questions referred.

22 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 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?

(3) Must [the third paragraph of] Article 267 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 [to] 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?'

Consideration of the questions referred

The first and second questions referred

The applicability of Directives 2000/31, 2006/123 and 2015/1535 to fiscal measures

23 By its first question, the referring court asks the Court, in essence, whether the expressions information society services' 'technical regulation' and 'rule on [information society] services' in Directive 2015/1535 must be understood as also covering tax measures which are not directly intended to regulate a specific information society service, but which are such as to regulate the actual exercise of the activity in question in the territory of the Member State concerned.

24 In parts (a) to (d) of the second question referred, the referring court mentions Directives 2000/31 and 2006/123, should the principles they lay down be 'deemed applicable in the present case'.

25 As regards, in the first place, Directive 2000/31, as the Court pointed out in paragraphs 27 to 30 of the judgment of 27 April 2022, *Airbnb Ireland* (C 674/20, 'the judgment in *Airbnb Ireland*', EU:C:2022:303), that directive was adopted, first, on the basis, inter alia, of Article 95 EC, the terms of which were reproduced in Article 114 TFEU, which excludes from its scope, in paragraph 2, 'fiscal provisions', a term which covers not only all areas of taxation, but also all aspects of taxation. Second, that interpretation also follows from the fact that Article 114(2) TFEU forms part of Chapter 3, entitled 'Approximation of laws', which follows Chapter 2, entitled 'Tax provisions', within Title VII of the FEU Treaty, the subject matter of which is 'Common rules on competition, taxation and approximation of laws', so that everything relating to Chapter 3, namely the approximation of laws, does not relate to what falls within Chapter 2, namely tax provisions. Third, that reasoning applies as regards secondary legislation adopted on the basis of Article 95 EC, followed by Article 114 TFEU, since it is supported by the literal interpretation of the broad terms used in Article 1(5)(a) of Directive 2000/31, namely 'field of taxation'. Fourth, those considerations are borne out by recitals 12 and 13 of Directive 2000/31.

26 As regards, in the second place, Directive 2006/123, it should be noted, first, that that directive excludes from its scope, in accordance with the terms used in Article 2(3) of that directive, 'the field of taxation'.

27 Second, recital 29 of that directive is explicit as regards the ground for the exclusion in question, since it recalls that the FEU Treaty provides specific legal bases for taxation matters and that, given the instruments of EU law already adopted in that field, it is necessary to exclude the field of taxation from the scope of that directive.

28 In view of the generality of the term 'field of taxation', as well as the express legal bases laid down in that regard by the FEU Treaty, the considerations set out in paragraph 25 above are therefore also valid as regards the exclusion of the 'field of taxation' from Directive 2006/123.

29 As regards, in the third place, Directive 2015/1535, it should be noted that that directive refers to 'the [FEU] Treaty, and in particular Articles 114, 337 and 43 thereof'. Thus, it should be noted at the outset that the exclusion laid down in Article 114(2) TFEU concerning 'fiscal provisions' also applies in relation to that directive, for the reasons set out in paragraph 25 of the present judgment.

30 Furthermore, the content of Directive 2015/1535 indirectly confirms the exclusion of 'fiscal provisions' from its scope, since the wording of Article 1(1)(f)(iii) of that directive refers, among de facto technical regulations, to technical specifications or other requirements or rules on services which are 'linked to fiscal or financial measures'. They are not therefore actual tax measures, but only measures linked to tax measures (see, to that effect, judgment of 8 October 2020, *Admiral Sportwetten and Others*, C 711/19, EU:C:2020:812, paragraph 38); the latter therefore remain, as such, outside the scope of that directive.

31 Accordingly, it is necessary to determine whether measures such as those introduced into Italian law by the 2017 tax regime fall 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, and are therefore 'fiscal provisions' within the meaning of Article 114 TFEU, which Directive 2015/1535 expressly refers to.

32 As is apparent from paragraph 10 of this judgment, the 2017 tax regime amends the Italian tax legislation on short-term rentals, whether those rentals are carried out, in accordance with Article 4(1) of that regime, 'directly or through persons engaged in property intermediation activities, or persons operating online portals'.

33 Three types of obligation are now imposed on all the abovementioned persons, namely, the obligation to collect and communicate to the tax authorities data relating to the rental contracts concluded following their intermediation; next, in view of their involvement in the payment of rent, the obligation to withhold the tax due from the sums paid by the lessees to the lessors and to pay that tax to the Treasury, either as a discharge or as a payment on account depending on the choice made by the lessors, and, lastly, in the absence of a permanent establishment in Italy, the obligation to appoint a tax representative in that State.

34 In the first place, as regards the obligation to collect and transmit to the tax authorities data relating to rental contracts concluded following the property intermediation, it is important to note that, while it is true that such a measure is not in itself addressed to the persons who are liable to pay the tax, but to natural or legal persons who have acted as intermediaries in short-term rentals, and that its purpose is the provision of information to the tax authority, on pain of a fine, the fact remains that (i) the authority which is the recipient of that information is the tax authority, (ii) that measure is part of a tax law, namely the 2017 tax regime, and, (iii) the information which that obligation requires to be transmitted is indissociable, as regards its substance, from that legislation, since that information alone is capable of identifying the person actually liable for payment of the tax, thanks to the location of the rentals and the identity of the lessors being specified, to enable the tax base of that tax to be determined on the basis of the sums collected and, consequently, to determine the amount of that tax (see, by analogy, judgment in *Airbnb Ireland*, paragraph 33).

35 Therefore, that obligation falls within the scope of 'fiscal provisions' within the meaning of Article 114 TFEU.

36 In the second place, as regards the obligation to withhold at source the tax due on the sums paid by lessees to lessors and to pay that tax to the Treasury, either as a withholding tax at the preferential rate of 21% or as a payment on account of a tax consequently fixed at a higher rate, depending on the choice made by the lessors, it must be stated that, as the Advocate General observed in point 52 of his Opinion, these are measures which are 'purely fiscal in nature' since they consist in withholding tax on behalf of the tax authority and, next, in paying the sum withheld to that authority.

37 In the third place, as regards the obligation imposed on providers of property intermediation services not established in Italy to appoint a tax representative, it must be observed that it is also a tax measure, since it seeks to ensure the effective collection of taxes concerning the withholding at source carried out by service providers established in another Member State, in particular those operating online portals, in their capacity as 'person responsible for the tax'.

38 It follows from the foregoing that the three types of obligation introduced by the 2017 tax regime into Italian law fall within the 'field of taxation', within the meaning of Article 1(5)(a) of Directive 2000/31 and of Article 2(3) of Directive 2006/123, and are therefore 'fiscal provisions' within the meaning of Article 114 TFEU, which Directive 2015/1535 expressly refers to. Therefore, those measures are excluded from the respective scope of those three directives.

39 The answer to be given to the first and second questions referred therefore involves only the examination of the lawfulness of measures such as the 2017 tax regime in the light of the prohibition laid down in Article 56 TFEU.

40 It must be concluded that, by those questions, the referring court asks, in essence, whether that provision must be interpreted as precluding measures such as the three types of obligation set out in paragraph 33 of the present judgment.

The lawfulness of measures such as those stemming from the 2017 tax regime in the light of the prohibition laid down in Article 56 TFEU

41 As a preliminary point, it should be noted that compliance with Article 56 TFEU is binding on Member States even in the context of the adoption of legislation such as the 2017 tax regime, despite the fact that that regime relates to direct taxes. According to settled case-law, whilst direct taxation falls within their competence, the Member States must nonetheless exercise that competence consistently with EU law (judgment of 23 January 2014, *Commission* v *Belgium*, C 296/12, EU:C:2014:24, paragraph 27 and the case-law cited).

42 It is therefore appropriate to consider in turn the three types of obligation imposed by the 2017 tax regime.

43 In the first place, as regards the obligation to collect and communicate to the tax authorities data relating to rental contracts concluded following property intermediation, it is apparent, first of all, from the wording of the 2017 tax regime that that regime 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. The reform implemented by the 2017 tax regime relates, as is apparent from the reasons leading to its adoption, to the tax treatment of all short-term rentals and is, as is apparent from the file submitted to the Court, 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.

44 Such legislation is therefore not discriminatory and does not, as such, concern the conditions for the provision of intermediation services, but merely requires service providers, once that service has been performed, to retain the particulars for the purposes of the accurate levying of the tax relating to the rental of the property in question from the owners concerned (see, by analogy, judgment in *Airbnb Ireland*, paragraph 41).

45 In that regard, it is apparent from settled case-law that national legislation which is applicable to all operators exercising their activity on national territory, the purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned and any restrictive effects of which on the freedom to provide services are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom, does not contravene the prohibition laid down in Article 56 TFEU (judgment in *Airbnb Ireland*, paragraph 42 and the case-law cited).

46 The applicants in the main proceedings contest this by arguing that almost all the online platforms concerned, and more particularly those which also manage payments, are established in Member States other than Italy and, therefore, the 2017 tax regime affects in particular intermediation services such as those which they provide. At the hearing, they added that, in actual fact, that tax regime had been intended for platforms which manage payments, and exclusively for those platforms.

47 In that regard, it is true that the development of technological means and the current configuration of the market for the provision of property intermediation services lead to the finding that intermediaries providing their services by means of an online platform are likely, under legislation such as that at issue in the main proceedings, to be faced with an obligation to transmit data to the tax authorities which is more frequent and greater than that imposed on other intermediaries. However, that greater obligation is merely a reflection of a larger number of transactions by those intermediaries and their respective market shares (judgment in *Airbnb Ireland*, paragraph 44).

48 In addition, in the present case, contrary to the Court's finding in the judgment of 12 September 2019, *VG Media* (C 299/17, EU:C:2019:716, paragraph 37), the wording of the 2017 tax regime is not merely ostensibly neutral, since it actually refers to all providers of property intermediation services, in particular, as the Commission pointed out at the hearing, estate agents.

49 Next, the Court has had occasion to point out that measures, the only effect of which is to create additional costs in respect of the service concerned and which affect in the same way the provision of services between Member States and the provision of services within one Member State, do not fall within the scope of Article 56 TFEU (judgment in *Airbnb Ireland*, paragraph 46 and the case-law cited).

50 Lastly, even if the obligation imposed on all suppliers of property intermediation services to collect and supply information to the tax authority concerning data relating to rental contracts concluded following their intermediation may give rise to additional costs, in particular in connection with the search and storage of the data concerned, it should be noted, especially in the case of intermediation services provided digitally, that the data concerned are stored and digitalised by intermediaries such as the applicants in the main proceedings, so that, in any event, the additional cost resulting from that obligation for those intermediaries appear to be lower.

51 Therefore, that first type of obligation does not entail a restriction on the freedom to provide services as guaranteed by Article 56 TFEU.

52 In the second place, as regards the obligation to withhold at source the tax due on sums paid by lessees to lessors and to pay that tax to the Treasury, it should be noted, first, for the same reasons as those set out in paragraphs 43 to 48 of the present judgment, that the 2017 tax regime concerns, in that regard, all third parties who have intervened in a short-term property rental process, whether they are natural or legal persons, whether or not they are resident or established in Italian territory and whether they act via digital means or via other means of putting the parties in contact, provided that they decided, in the context of the provision of their services, to collect the rents or consideration relating to the contracts covered by the 2017 tax regime, or to act in the collection of those rents or consideration.

53 Second, it is true, however, as the Commission states in its observations, that, where the service provider is established in a Member State other than Italy, it acts as 'person liable to pay the tax', in accordance with Article 4(5a) of the 2017 tax regime, whereas, where it is established in Italy, it has the status, under

Article 4(5) of that regime, of ‘tax collector’, that is to say, a tax substitute, which has the consequence, as regards the Treasury, of substituting that tax collector for the taxpayer and rendering it liable to pay the tax.

54 Even if it must be held, as did the Advocate General in point 56 of his Opinion, that this second type of obligation causes providers of property intermediation services a much greater burden than that concerning 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 does not follow from the 2017 tax regime, subject to the assessment of the referring court, that that burden is greater for providers of property intermediation 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. 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.

55 Therefore, it does not appear, as regards the second type of obligation, that legislation such as the 2017 tax regime, 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 such provision within a single Member State may be regarded as prohibiting, impeding or rendering less attractive the exercise of the freedom to provide services (see, to that effect, judgment of 3 March 2020, *Google Ireland*, C 482/18, EU:C:2020:141, paragraphs 25 and 26 and the case-law cited).

56 In the third place, as regards the obligation to appoint a tax representative in Italy, it follows from the very wording of Article 4(5) and (5a) of the 2017 tax regime that it applies only to certain providers of property intermediation services without a permanent establishment in Italy, described as ‘persons liable to pay the tax’, whereas providers of such services established in Italy, described as ‘tax collectors’, that is to say, tax substitutes, are not subject to it.

57 In that regard, it is important to note that that third type of obligation does not concern all providers of property intermediation services which are not established in Italy and are involved in the process of short-term rental of immovable property located in Italy. The obligation to appoint a tax representative depends on those service providers’ choice whether or not to collect the rents or consideration relating to the contracts covered by the 2017 tax regime, or whether or not to intervene in the collection of those rents or consideration, that is to say, to fulfil, in practice, the second type of obligation and to withhold on that basis part of the sums collected, as a discharge when the owner of the immovable property concerned has opted for the preferential rate of 21%, and as a payment on account where that is not the case.

58 However, it must be stated that the 2017 tax regime treats providers of property intermediation services carrying out those collections or interventions differently depending on whether or not they have a permanent establishment in Italy.

59 Thus, it cannot be disputed that, by requiring providers of property intermediation services which do not have a permanent establishment in Italy and wish to incorporate in their services such collections or such interventions, to appoint a tax representative in that Member State, the 2017 tax regime requires them to take steps and to bear, in practice, the cost of remunerating that representative. Such constraints cause those operators a hindrance of such a kind as to deter them from providing property intermediation services in Italy, in any event in accordance with the conditions corresponding to their wishes. It follows that that obligation must be regarded as a restriction on the freedom to provide services, prohibited, in principle, by Article 56 TFEU (see, by analogy, judgment of 5 May 2011, *Commission* v *Portugal*, C 267/09, EU:C:2011:273, paragraph 37).

60 That said, the referring court was right to state that the Court had not, in its case-law, set out a principle of incompatibility between the obligation to appoint a tax representative laid down by national legislation or national regulations in respect of natural or legal persons resident or established in a Member State other than that of taxation and the freedom to provide services, since, in each individual case, the Court

examined, in the light of the specific characteristics of the obligation at issue, whether the restriction which it entailed could be justified by the overriding reasons in the public interest pursued by the national legislation at issue such as those relied on before the Court by the Member State concerned (judgments of 5 July 2007, *Commission* v *Belgium*, C 522/04, EU:C:2007:405, paragraphs 47 to 58; of 5 May 2011, *Commission* v *Portugal*, C 267/09, EU:C:2011:273, paragraphs 38 to 46; and of 11 December 2014, *Commission* v *Spain*, C 678/11, EU:C:2014:2434, paragraphs 42 to 62).

61 Consequently, it is appropriate to examine the obligation imposed on the 'persons liable to pay the tax' to appoint a tax representative in the light of the case-law referred to in paragraph 60 of the present judgment.

62 First, as regards the grounds put forward by the Member State concerned to justify the restriction referred to in paragraph 59 above, these relate to the fight against tax avoidance in the short-term rental sector, which, according to the referring court, includes a 'structurally high rate of tax avoidance'. In that regard, it must be noted that the Court has held on numerous occasions that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions of the exercise of the fundamental freedoms guaranteed by the FEU Treaty (judgment of 11 December 2014, *Commission* v *Spain*, C 678/11, EU:C:2014:2434, paragraph 45 and the case-law cited).

63 Similarly, the need to ensure the effective collection of tax constitutes an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services (judgment of 11 December 2014, *Commission* v *Spain*, C 678/11, EU:C:2014:2434, paragraph 46 and the case-law cited).

64 The obligation to appoint a tax representative in Italy imposed on providers of property intermediation services performing the collections or interventions referred to in paragraph 58 of this judgment which do not have a permanent establishment in that Member State is precisely part of the pursuit of that objective. Since, in their capacity as 'persons liable to pay the tax', those providers are responsible for withholding the tax at source on behalf of the Italian authorities, those authorities wish to ensure, through the tax representative, that that task has been successfully carried out and that the amounts received, duly collected, were then correctly transferred to the tax authority; it should be borne in mind that it is easier for providers of property intermediation services established in Italy to perform that supervisory task, given that – provided they withhold such sums – they acquire *ipso jure*, as is apparent from paragraph 53 of the present judgment, the status of 'tax collectors', that is to say tax substitutes.

65 It is, moreover, paradoxical for the applicants in the main proceedings to complain that, by adopting the 2017 tax regime, the Italian authorities introduced a general presumption of tax avoidance or evasion based on the fact that a service provider is established in another Member State, a presumption which is precluded by Article 56 TFEU (judgment of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C 53/13 and C 80/13, EU:C:2014:2011, paragraph 56 and the case-law cited), when that system, on the contrary, confers on them the task of withholding at source, on behalf of the tax authority, the sum corresponding to the tax due and of paying it to the Treasury, a task the supervision of which the Italian legislature sought to facilitate by means of the appointment of a tax representative in Italy.

66 It must therefore be held that a tax measure such as the third type of obligation resulting from the 2017 tax regime pursues a legitimate objective compatible with the FEU Treaty and is justified by overriding reasons in the public interest.

67 Second, it cannot be disputed that that type of obligation is, in circumstances such as those in the main proceedings, appropriate for attaining the objective of combating tax avoidance.

68 It is important, in particular, to draw attention to the fact that, as the Advocate General noted, in essence, in points 2 and 3 of his Opinion, the use of providers of property intermediation services operating an online portal, such as the applicants in the main proceedings, has developed exponentially and that those services, which, performed via the internet, may therefore be, in principle, cross-border, correspond, however, to rental operations which, for their part, have a precise physical location and, consequently, are capable of being taxable depending on the tax law of the Member State concerned.

69 Furthermore, whether the provision of the property intermediation services in question is carried out by providers carrying on their activity by means of online portals, such as the applicants in the main proceedings, or whether they are carried out by more traditional economic operators, such as estate agents, it must be noted that those rentals are often of short duration within the meaning of Article 4(1) of the 2017 tax regime. Consequently, whatever the manner in which the service providers concerned intervened, the same immovable property situated in Italy may be let on numerous occasions in the course of a given tax year by a lessor for the benefit of lessees who may be resident in other Member States, through the intermediary of services providers themselves, as the case may be, established in the territory of another Member State, which are, notwithstanding, responsible for withholding at source the sum corresponding to the amount of tax due by the lessor and to pay that sum to the tax authority. It must therefore be held that the obligation imposed on providers of property intermediation services without a permanent establishment in Italy to appoint a tax representative in that Member State is appropriate for ensuring the attainment of the objective of combating tax avoidance and permitting the proper collection of tax.

70 Third, it is necessary to ascertain whether a measure such as the third type of obligation resulting from the 2017 tax regime does not go beyond what is necessary to achieve that objective.

71 First of all, the examination of the proportionality of such a measure leads to the conclusion that, unlike the cases giving rise to the judgments cited in paragraph 60 of the present judgment, in which the natural or legal persons concerned by the obligation to appoint a tax representative within the territory of the Member State of taxation were taxpayers, that obligation covers, in the present case, service providers who acted as persons liable to pay the tax and who have already, on that basis, collected the amount corresponding to the tax due from the taxpayers, namely the owners of the immovable property concerned, on behalf of the Treasury. The fact remains that, even in such a situation, the proportionate nature of such an obligation implies that there are no measures capable of meeting the objective of combating tax evasion and the correct collection of that tax by the tax authority concerned which are less prejudicial to the freedom to provide services than the obligation to appoint a tax representative resident or established in the territory of the Member State of taxation.

72 Next, since that obligation applies without distinction to all providers of property intermediation services without a permanent establishment in Italy who have chosen, in the context of providing their services, to collect rents or consideration relating to the contracts covered by the 2017 tax regime, or to intervene in the collection of those rents or consideration, without distinction based on, for example, the volume of tax revenue collected or liable to be collected annually on behalf of the Treasury by those providers, it must be held that the third type of obligation resulting from the 2017 tax regime exceeds what is necessary to achieve the objectives of that regime.

73 Lastly, even though it is true that the large number of transactions and immovable property which may be the subject of a transaction through the involvement of the property intermediation providers concerned makes the task of the tax authorities of the Member State of taxation complex, it does not however entail, contrary to the Italian Government's contention, reliance on a measure such as the obligation to appoint a tax representative resident or established in the territory of that State since, in the first place, the first type of obligation is precisely intended to provide those tax authorities with all the information enabling the identification of taxpayers liable to pay the tax and to determine its tax base, in the second place, the second type of obligation allows that tax to be withheld at source and, in the third place, the Italian legislature has not provided for the possibility that that tax representative, through whom it is able to ensure the proper collection of taxes by those service providers and the effective transmission of the corresponding sums to the Italian Treasury, may have the option of residing or being established in a Member State other than Italy.

74 In that regard, the mere assertion that the residence condition is the best way of ensuring that the tax obligations incumbent on the tax representative are performed effectively is irrelevant. Whereas the supervision of such a representative by the tax authorities of a Member State may prove to be more difficult where that representative is in another Member State, it is however clear from the case-law that administrative difficulties do not constitute a ground that can justify a restriction on a fundamental freedom

guaranteed by EU law (see, to that effect, judgment of 11 December 2014, *Commission* v *Spain*, C 678/11, EU:C:2014:2434, paragraph 61 and the case-law cited).

75 In those circumstances, 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 Article 56 TFEU than the appointment of a tax representative residing in Italy.

76 Accordingly, it must be stated, as did the Advocate General in point 82 of his Opinion, that the obligation to appoint a tax representative is, in circumstances such as those of the 2017 tax regime, contrary to Article 56 TFEU (see, to that effect, judgments of 5 July 2007, *Commission* v *Belgium*, C 522/04, EU:C:2007:405, and of 11 December 2014, *Commission* v *Spain*, C 678/11, EU:C:2014:2434).

77 In the light of all the foregoing considerations, the answer to the first and second questions referred is that Article 56 TFEU must be interpreted as meaning that:

– first, as regards rentals of a maximum duration of 30 days in respect of immovable property situated in the territory of a Member State, it does not preclude legislation of that Member State requiring providers of property intermediation services – irrespective of their place of establishment and the manner in which they intervene – to collect and then transmit to the national tax authority the data relating to the rental contracts concluded following their intermediation, and, where those service providers have received the corresponding rents or consideration or intervened in their collection, to withhold at source the amount of tax due on the sums paid by the lessees to the lessors and to pay it to the Treasury of that Member State;

– second, as regards rentals of a maximum duration of 30 days in respect of immovable property situated in the territory of a Member State, it precludes legislation of that Member State requiring providers of property intermediation services, where those providers have received the corresponding rents or consideration or have intervened in their collection and where they reside or are established in the territory of a Member State other than the State of taxation, to appoint a tax representative which resides or is established in the territory of the Member State of taxation.

The third question referred for a preliminary ruling

78 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 to the main proceedings, a court or tribunal against whose decisions there is no judicial remedy under national law nevertheless retains its discretion to rephrase the questions to be referred to the Court for a preliminary ruling or whether is it obliged to refer the questions as worded by the party to the main proceedings requesting the reference.

79 As the Court has recently had the opportunity to point out, where there is no judicial remedy under national law against the decisions of a national court or tribunal, that court or tribunal is in principle obliged to make a reference to the Court of Justice within the meaning of the third paragraph of Article 267 TFEU where a question concerning the interpretation of EU law is raised before it (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C 561/19, EU:C:2021:799, paragraph 32 and the case-law cited).

80 A national court or tribunal against whose decisions there is no judicial remedy under national law cannot be relieved of that obligation unless it has established that the question raised is irrelevant or that the EU law provision in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C 561/19, EU:C:2021:799, paragraph 33 and the case-law cited).

81 In that regard, it is appropriate to recall that it follows from the relationship between the second and third paragraphs of Article 267 TFEU that the courts and tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of EU law is necessary to enable them to give judgment. Accordingly, those courts and tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of EU law that has been raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C 561/19, EU:C:2021:799, paragraph 34 and the case-law cited).

82 Therefore, it is solely for the national court or tribunal before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions that it submits to the Court (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C 561/19, EU:C:2021:799, paragraph 35 and the case-law cited).

83 In that regard, it should be borne in mind that the system of direct cooperation between the Court of Justice and the national courts established by Article 267 TFEU is completely independent of any initiative by the parties in the main proceedings. The latter cannot deprive the national courts of their independence in exercising the discretion referred to in paragraphs 81 and 82 above, in particular by compelling them to make a reference for a preliminary ruling (see, to that effect, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C 561/19, EU:C:2021:799, paragraph 53 and the case-law cited).

84 It follows that 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 impose or change their wording (see, to that effect, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C 561/19, EU:C:2021:799, paragraphs 54 and 55 and the case-law cited).

85 In the light of all the foregoing considerations, the answer to the third question referred for a preliminary ruling is that 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 to the main proceedings, the determination and formulation of the questions to be referred to the Court is a matter for the national court alone and those parties may not impose or alter their wording.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. Article 56 TFEU must be interpreted as meaning that:

– **first, as regards rentals of a maximum duration of 30 days in respect of immovable property situated in the territory of a Member State, it does not preclude legislation of that Member State requiring providers of property intermediation services – irrespective of their place of establishment and the manner in which they intervene – to collect and then transmit to the national tax authority the data relating to the rental contracts concluded following their intermediation, and, where those service providers have received the corresponding rents or consideration or intervened in their collection, to withhold at source the amount of tax due on the sums paid by the lessees to the lessors and to pay it to the Treasury of that Member State;**

– **second, as regards rentals of a maximum duration of 30 days in respect of immovable property situated in the territory of a Member State, it precludes legislation of that Member State requiring providers of property intermediation services, where those providers have received the corresponding rents or consideration or have intervened in their collection and where they reside or are established in the territory of a Member State other than the State of taxation, to appoint a tax representative which resides or is established in the territory of the Member State of taxation.**

2. 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 to the main proceedings, the determination and formulation of the questions to be referred to the Court is a matter for the national court alone and those parties may not impose or alter their wording.

[Signatures]

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* Language of the case: Italian.