AG considers that Italian tax withholding and reporting requirements for property intermediation services are not contrary to EU law

Italy – Digital platforms – Withholding tax obligations – Reporting requirements – Free movement of services

On July 7, 2022, Advocate General (AG) Szpunar of the Court of Justice of the European Union (CJEU or the Court) rendered his opinion in case C-83/21. The case concerns the compatibility with EU law of Italian legislation based on which providers of property intermediation services – including digital platform operators, are required to withhold tax and report certain data on short-term rental transactions performed by individuals.

In line with previous case-law, the AG concluded that the reporting and tax withholding obligations do not breach EU law. However, in the AG's view, the obligation to appoint a tax representative constituted a disproportionate restriction on the freedom to provide services.

Background

Starting June 1, 2017, Italy introduced a new tax regime for short-term rentals – i.e. accommodation services rendered for a maximum period of 30 days, provided by individuals outside a commercial activity. Under the rules, intermediaries were required to (i) collect information relating to short-term rental agreements and report it to the tax authorities, and (ii) withhold a 21 percent tax on payments performed by the users of the services and remit it to the Italian treasury. Non-resident intermediaries without an Italian permanent establishment were required to appoint a tax representative to comply with the withholding and reporting obligations.

The plaintiff is an Irish-based company operating a digital platform, which allows potential guests to connect with professional or non-professional hosts offering accommodation services. The plaintiff brought an action for annulment of the Italian decree and a related Circular. Following several proceedings, the Consiglio di Stato (Council of State, Italy) decided to refer preliminary questions to the CJEU whether the disputed regime:

- falls within the scope of Directive 2015/1535 of on procedures for the provision of information in the field of technical regulations and of rules on information society services ('Directive 2015/1535')
- falls within the scope of Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'),
- falls within the scope of Directive 2006/123 on services in the Internal market ('Directive on services'),
- is prohibited under the EU free movement of services (Article 56 of the Treaty on the Functioning of the EU – TFEU.

The text of the Directive 2015/1535 provides that Member States are required to communicate in advance to the Commission 'technical regulations' which impact the provision of online services. Failure to do so would make the legislation unenforceable. The Directive on services and the Directive on electronic commerce were introduced with the aim of creating a legal framework that ensures the free movement of (online) services between Member States, by prohibiting Member States from introducing restrictive measures related to services, and respectively information society services, as defined under EU law. The text of the directives indicates several areas in which this prohibition does not apply, including 'the field of taxation'.

The AG's opinion

The AG first analyzed if the regime under dispute is governed by Directive 2015/1535, and therefore whether Italy was obliged to communicate the rules to the Commission. The AG noted that the objective of the withholding and reporting requirements was to ensure proper taxation of property rental activity, and not to regulate intermediation services. Consequently, in the AG's view, the contested regime doesn't qualify as 'technical regulation' for the purpose of the Directive, and therefore its enforceability was not linked to fulfilling any requirements under this directive.

The AG continued by analyzing the plaintiff's claim that the contested regime restricts the EU freedom to provide services. The AG noted that the CJEU's decision in case C-674/20 – see ETF Issue 474, is directly applicable to the Italian reporting obligation, and consequently the measure does not breach the freedom to provide services.

In respect to the withholding obligation, the AG rejected the plaintiff's claim that the withholding requirement constitutes indirect discrimination against cross-border service providers. Whilst it is up to the referring court to determine whether the plaintiff's claim that most property intermediation platforms present on the Italian market are non-resident, the AG noted that, in his view, the argument was unfounded. Building from the plaintiff's observation that in case of short-term rental contracts the level of risk is higher where the lessor is an individual, the AG noted that these transactions are also difficult to audit for tax purposes, as compared to cases where the lessor is a professional. Therefore, in the AG's view, a withholding tax obligation imposed on the intermediary which handles the payment seemed reasonable. Furthermore, the withholding requirements were not targeted at

regulating the service providers, but instead aimed to tax the rental of immovable property located in Italy. The AG also acknowledged that the withholding obligations may represent an obstacle to the freedom to provide services, but noted that the restriction was justified on the grounds of the effective collection of tax and preventing tax evasion. Based on these considerations, the AG concluded that the obligation to withhold tax does not breach the freedom to provide services.

On the other hand, as regards the obligation to appoint a tax representative to comply with the withholding and the reporting requirements, the AG noted that based on settled case-law such measures constitute a disproportionate restriction on the freedom to provide services and is therefore precluded by EU law.

Finally, the AG also noted that the regime under dispute falls within the 'field of taxation' and the measures are therefore excluded from the scope of the Directive on electronic commerce and the Directive on services in the internal market.

EU Tax Centre comment

Whilst AG opinions are non-binding on the CJEU, the current opinion is consistent with the settled case-law on this topic, and in particular with the CJEU's decision on the Belgian reporting requirements contested by the same plaintiff (case C-674/20).

From 2023 onwards, following local implementation of the latest revision of the Directive on Administrative Cooperation (DAC7), Member States' tax authorities will receive and automatically exchange information on income earned by sellers on digital platforms, including income derived from the provision of accommodation services.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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