The CJEU rules that Italian tax withholding and reporting requirements for property intermediation services are generally not contrary to EU law

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

On December 22, 2022, the Court of Justice of the European Union (CJEU or the Court) gave its decision in case C-83/21. The Court found that 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 does not infringe the freedom to provide services. However, in the Court's view, the obligation to appoint a tax representative resident in Italy represented a disproportionate restriction on the freedom to provide services and was precluded by EU law.

Background

Starting from June 1, 2017, Italy introduced a new tax regime for short-term rentals – i.e. accommodation services provided by individuals outside a commercial activity, for a maximum period of 30 days. 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 established in Italy to comply with the withholding tax obligations.

The plaintiff in case C-83/21 is an Irish-based company operating a digital platform, which allowed potential guests to connect with professional or non-professional hosts offering accommodation services. The plaintiff brought an action before a regional administrative court for annulment of the Italian decree and related circular implementing and interpreting the tax regime for short-term rentals. Following several proceedings, the Consiglio di Stato (Council of State, Italy) decided to refer to the CJEU on whether the disputed regime:

- falls within the scope of Directive 2015/1535 laying down a procedure 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 Directives indicate several areas in which this prohibition does not apply, including 'the field of taxation'.

On July 7, 2022, Advocate General (AG) Maciej Szpunar of the CJEU recommended that the Court finds that the regime under dispute does not infringe the freedom to provide services. Nevertheless, in the AG's view, the obligation to appoint a tax representative represented a disproportionate restriction on the freedom to provide services – see ETF Issue 480.

The CJEU decision

The CJEU first analyzed if the regime under dispute is governed by Directive 2015/1535, the Directive on electronic commerce and the Directive on services in the internal market. The Court recalled its previous case-law based on which the text of Directive 2015/1535 indirectly confirms the exclusion of 'fiscal provisions' from its scope. In the Court's view, the regime under dispute qualifies as 'fiscal provisions' and falls within the 'field of taxation'. Therefore, the CJEU found that the regime was excluded from the scope of the Directives mentioned above.

The Court continued by analyzing the plaintiff's claim that the contested regime restricts the EU freedom to provide services. In this respect, the CJEU noted that the requirement to collect and report data related to short term-rentals applies to all intermediaries (legal entities and individuals), irrespective of the jurisdictions in which they are based or the method of providing the services (via digital means or other methods). Furthermore, the reporting requirements were not targeted at regulating the service providers, but instead aimed at combating tax avoidance at the level of the property owners. Based on these considerations and citing its judgment in case C-674/20 (see ETF Issue 474), the CJEU concluded that the reporting obligation does not breach the freedom to provide services.

As regards the withholding obligation, the CJEU noted that the same reasoning applies as in the case of reporting requirements. In particular, the Court took the view that the measure impacted Italian and foreign intermediaries equally and as a result it did not hinder their freedom to provide services.

On the other hand, as regards the obligation to appoint a tax representative to comply with the withholding requirements, the CJEU observed that the requirement only applied to foreign intermediaries with no Italian presence. This resulted in an additional burden – the steps required to appoint a tax representative and the cost of the service, which represented an obstacle to the cross-border provision of property intermediation services.

In the Court's view the restriction could be justified on the grounds of the effective collection of tax, prevention of tax avoidance and the need for effective fiscal supervision. Nevertheless, the CJEU considered that the measure under dispute went beyond what was required to achieve these objectives. In this respect, the Court noted that the obligation applies without distinction to all providers of property intermediation services without a permanent establishment in Italy who have chosen to collect rents or consideration relating to the contracts covered by the disputed regime, without distinction based on, for example, the volume of tax revenue collected or liable to be collected annually on behalf of the Treasury.

The Court also rejected the justification brought by the Italian tax authorities, who argued that appointing a tax representative established in Italy was necessary in order to ensure the effective enforcement of the rules. The Court noted that rules do not allow for the option that that tax representative may reside or be established in a Member State other than Italy. The CJEU considered irrelevant the assumption that the residence condition is the best way of ensuring that the tax representative's obligations are performed effectively. Whilst acknowledging that the supervision of a foreign representative may be more difficult that of a domestic tax representative, the CJEU recalled its previous case-law based on which administrative difficulties do not constitute a ground that can justify a restriction on a fundamental freedom. Therefore, the Court concluded that the obligation to appoint a tax representative was precluded by EU law.

ETC comment

The CJEU's decision in case C-83/21 is consistent with settled case-law on this topic - in particular with the Court'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. However, DAC7 does not deal with the collection and remittance of tax, as was the case in the case at hand.

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

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