European Union

*Georg Kofler, Alfredo Garcia Prats, Werner Haslehner, Eric Kemmeren, Michael Lang, João Félix Pinto Nogueira, Christiana HJI Panayi, Stella Raventós-Calvo, Isabelle Richelle and Alexander Rust**

Accessory Tax Obligations Imposed on Digital Service Providers, Opinion Statement ECJ-TF 2/2023 on the ECJ Decision of 22 December 2022 in *Airbnb Ireland and Airbnb Payments UK* (Case C-83/21)

In this CFE Opinion Statement, submitted to the EU Institutions in June 2023, the CFE ECJ Task Force comments on the ECJ decision in *Airbnb Ireland and Airbnb Payments UK* (Case C-83/21), wherein the Court decided, inter alia, that it was compatible with the freedom to provide services for the Italian tax authorities to impose tax obligations on service providers offering their intermediation services regarding real estate located in Italy, including the obligation to collect and report data and to withhold tax on the intermediated payments. It held, however, that it was disproportionate to request that they appoint a tax representative resident in Italy.

1. Background, Facts and Issues

Airbnb Ireland UC and Airbnb Payments UK are, respectively, an Irish subsidiary and a UK subsidiary of the Airbnb group. In a nutshell, the group provides intermediation services between owners of real estate and those seeking to rent real estate through an online platform. The platform allows seekers of rental units to find lessors with available units. It also intermediates the payments, collecting the rental fee from the lessees in advance and depositing it in the lessors' accounts, charging a service fee to the lessor.

In 2017, the Italian government adopted a law setting out a new tax regime for short-term (i.e. up to 30 days) rentals concluded by physical persons outside a commercial activity[1] covering contracts concluded directly with the tenants or through the intermediation of online platforms.[2] This law was further implemented by a decision of the director of the tax authorities[3] and clarified by an interpretative circular.[4]

This new regime imposed three obligations on entities providing property intermediation services, including specifically "those who operate online platforms": (i) to collect and transmit to the tax authorities information relating to the rental contracts they intermediate;[5] (ii) to withhold tax on the payments they intermediate whenever they also intermediate the payment;[6] and (iii) to appoint a resident tax representative in the event that they were neither resident nor had a permanent establishment (PE) in Italy. Failure to appoint the representative would deem any Italian-resident group member to be jointly and severally liable with the entity operating the online platform for the obligations imposed on them, including the obligation to withhold the tax.

The applicants (Airbnb Ireland UC and Airbnb Payments UK Ltd) considered the regime inadmissible on several grounds. Their claim (in respect of what is relevant to the current Opinion Statement, i.e. compatibility with the fundamental freedoms), was that the regime infringed the EU freedom to provide services.

* **The CFE ECJ Task Force is formed by CFE Tax Advisors Europe and its members are Alfredo Garcia Prats (Professor at the University of Valencia), Werner Haslehner (Professor at the University of Luxembourg), Eric Kemmeren (Professor of International Taxation and International Tax Law at the Fiscal Institute Tilburg of Tilburg University), Georg Kofler (Chair of this Task Force and Professor at the Institute for Austrian and International Tax Law of WU Vienna), Michael Lang (Professor at the Institute for Austrian and International Tax Law of WU Vienna), João Félix Pinto Nogueira (Deputy Academic Chairman at IBFD and Professor at Law School, Universidade Católica Portuguesa), Christiana HJI Panayi (Professor at Queen Mary University of London), Stella Raventós-Calvo (President of AEDAF and Vice-President of CFE), Isabelle Richelle (Co-Chair of the Tax Institute – HEC - University of Liège, Brussels Bar) and Alexander Rust (Professor at the Institute for Austrian and International Tax Law of WU Vienna). Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. The CFE ECJ Task Force was founded in 1997 and its founding members were Philip Baker, Paul Farmer, Bruno Gangemi, Luc Hinnekens, Albert Raedler†, and Stella Raventós-Calvo. For further information regarding this Opinion Statement of the CFE ECJ Task Force, please contact Prof. Dr. Georg Kofler, Chair of the CFE ECJ Task Force or Aleksandar Ivanovski, Tax Policy Manager at info@taxadviserseurope.org.**

1. IT: Decree Law no. 50 on urgent financial measures converted with developments by Law no. 96 of 21 June 2017 [hereinafter: Decree Law 50].
2. Art. 4(1) Decree Law 50, as reproduced in paras. 9 and 10 of IT: ECJ, 22 Dec. 2022, Case C-83/21, *Airbnb Ireland UC plc, Airbnb Payments UK Ltd v. Agenzia delle Entrate*, Case Law IBFD.
3. IT: Director of the tax law authorities, Decision 132395 (12 July 2017).
4. IT: Tax authorities, Circular 24 of the Italian Tax Authority (12 Oct. 2017).
5. This information would have to be communicated to tax authorities by 30 June of the year following that to which the information relates. *See Airbnb* (C-83/21), para. 12 and art. 4(4) Decree Law 50.
6. *See Airbnb* (C-83/21), para. 12 and art. 4(5) Decree Law 50.

Consequently, they brought an action before the first instance court (the Regional Administrative Court of Lazio, Italy) seeking annulment of the decision and interpretative circular implementing the regime. The court dismissed the action.

The applicants appealed before the Italian Council of State, which decided to stay the proceedings and refer three preliminary (sets) of questions to the Court of Justice of the European Union (ECJ). The question relevant to this Opinion Statement reads as follows:

> (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?

In his Opinion, Advocate General Szpunar[7] concluded that the obligation to provide information would not infringe the freedom to provide services, merely by reference to the Court's decision in *Airbnb Ireland* (Case C-674/20),[8] without making any further remarks.[9]

He reached the same conclusion concerning the obligation to withhold the tax. In this respect, the Advocate General analysed in detail the arguments raised by the claimants.

First, and unlike the claimants, the Advocate General considered that imposing the obligation to withhold tax solely on platforms intermediating payments and not on platforms not providing such a payment service would not amount to indirect discrimination. The fact that non-resident platforms are usually involved in such payment services and resident intermediaries did not lead him to another conclusion.[10] For the Advocate General, the extension of the obligation to withhold tax to all intermediaries (including those not intermediating payments) "would clearly be difficult". Moreover, according to him, the risks concerning short-term rental agreements are much greater when those agreements are concluded between natural persons than when the landlord is an entrepreneur and the tenant is a consumer. He argued that this is also true for states wishing to tax these rental activities. The activities of a large number of individuals who are not subject to the various obligations applicable to entrepreneurs are obviously difficult to control from a tax perspective. Therefore, he opined that it is "perfectly consistent to impose the obligation to withhold tax on intermediaries involved in the payment of rent".[11]

Second, the Italian withholding tax regime did not indirectly discriminate even if "the majority of the intermediaries involved in the payment of rent are established in Member States other than that in which the rented property is located".[12] For the Advocate General, the decisive element was not the factual location of (most or all of) covered entities by the tax legislation but the fact that "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 Advocate General also referred to the existence of a genuine tax nexus for applying the withholding obligation also to non-resident service providers, since such services "are indissociable from those rental activities" related to real estate located in Italy. Accordingly, and taking into account that nexus, non-resident and resident service providers were not in a different position.[13]

Interestingly, and despite not acknowledging the (factual) discrimination, Advocate General Szpunar still considered that the legislation constituted an "obstacle"[14] to the freedom to provide services, but this was fully justified by the need to ensure the effective collection of tax ("on the income from the short-term rental of immovable property") and the need to prevent "tax evasion".[15]

7. IT: Opinion of Advocate General Szpunar, 7 July 2022, Case C-83/21, *Airbnb Ireland UC plc, Airbnb Payments UK Ltd v. Agenzia delle Entrate*, Case Law IBFD.
8. BE: ECJ, 27 Apr. 2022, Case C-674/20, *Airbnb Ireland UC v. Région de Bruxelles-Capitale*, Case Law IBFD.
9. *See* AG Opinion in *Airbnb* (C-83/21), at paras. 48-50.
10. Id., para. 58.
11. Id., paras. 61-62.
12. Id., para. 63.
13. Id., para. 65.
14. Id., para. 66 also labeled as "restriction" in paras. 68-70. In the French version (the original), the AG used the term "entrave". The German and Dutch versions use, in this paragraph, the concept of restriction.
15. AG Opinion in *Airbnb* (C-83/21), at para. 68.

Third, regarding the obligation to appoint a tax representative, the Advocate General reached a different conclusion. He decided that this obligation was not justified and was a disproportionate infringement of the freedom to provide services. He made reference, inter alia, to the Court's decision in *Commission v. Spain* (Case C-678/11),[16] noting the similarity between the arguments raised by the Italian government in this case with those that had been invoked by the Spanish government in the preceding decision, namely the necessity of effective fiscal supervision and the prevention of tax evasion.[17]

2. The ECJ Decision

The ECJ, following the Opinion of Advocate General Szpunar, concluded that both the reporting and withholding obligations were admissible.[18] It held, however, that the obligation to appoint a tax representative was a disproportionate infringement of the freedom to provide services.

Regarding the tax reporting obligation, it started by noting that the legislation at stake was not (directly) discriminatory even though it differentiated between entities offering similar services (intermediation of short-term rentals) with a different business model (online or not). According to the Court, the obligation was imposed on all (online) operators exercising their activity in the territory without differentiation. Accordingly, any restrictive effects on the freedom to provide services were "too uncertain and indirect for the obligation laid down to be regarded as capable of hindering that freedom [to provide services]".[19]

The obligation also did not amount to factual discrimination, even though "almost all the online platforms concerned, particularly those which also manage payments, are established in Member States other than Italy".[20] That was attributable to the "development of the technological means and the current configuration of the market for the provision of intermediation services",[21] and the higher burden (higher data points to be provided) is "merely a reflection of a larger number of transactions by those intermediaries and their respective market shares".[22] Accordingly, the Italian regime was "not merely ostensibly neutral" since it applied to "all providers of property intermediation services".[23]

Following the Advocate General's Opinion, the Court reaffirmed that the measures do not concern the provision of services as such but merely create additional costs (affecting domestic and cross-border service provisions in the same way) and fall outside the scope of the freedom to provide services.[24] In any event, those additional costs (of collecting and supplying data to tax authorities) were considered "lower", taking into account that the necessary data is already "stored and digitalized" by intermediaries.[25]

The Court then moved to the assessment of the withholding tax obligation. The Court recognized that the Italian law distinguishes between a resident service provider ("tax collector") and a non-resident one ("person liable to pay the tax").[26] However, such differentiation[27] would not create a higher burden for non-resident service providers compared with resident ones. Regardless of their different designation, both resident and non-resident service providers must withhold tax at source and pay the 21% withholding tax to the tax authorities.[28]

Finally, the Court focused on the obligation to appoint a tax representative. The Court started by noting that the obligation would only apply to non-resident entities without a PE in Italy. The regime "requires them to take steps and to bear, in practice, the cost of remunerating that representative".[29] Accordingly, it would act as a "hindrance" to be regarded as a prima facie "restriction on the freedom to provide services".[30]

After acknowledging a substantial body of cases in which the Court found the constitution of a tax representative to be contrary to the free movement at stake in the case, it concluded that there was no:[31]

> principle of incompatibility between the obligation to appoint a tax representative … 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.

Consequently, it moved on to the analysis of the Italian regime. Taking into account its rationale, the Court held that it could fall under the following admissible justifications: the need to prevent "tax avoidance", the need for "effective fiscal supervision"[32] and the need to "ensure the effective collection of tax".[33]

Turning to the proportionality analysis, it started by noting that the Italian legislation was adequate ("appropriate" in the Court's words) to pursue those justifications.[34]

On the second prong of the proportionality test (necessity), the Court decided that the obligation to appoint a tax representative exceeded "what is necessary to achieve the objectives of that regime".[35] The following reasons supported this conclusion: (i) the regime applied to all non-residents "without distinction based on, for example, the volume of the tax revenue collected or liable to be collected annually on behalf of the Treasury by those pro-

16. ES: ECJ, 11 Dec. 2014, Case C-678/11, *European Commission v. Kingdom of Spain*, Case Law IBFD.
17. AG Opinion in *Airbnb* (C-83/21), at paras. 80 and 81.
18. *Airbnb* (C-83/21).
19. Id., para. 45.
20. Id., para. 46.
21. Id., para. 47.
22. Id., para. 47.
23. Id., para. 48.
24. Id., para. 49.
25. Id., para. 50.
26. Arts. 4(5) and (5a) Decree Law 50. *See Airbnb* (C-83/21), at para. 53.
27. Subject to confirmation by the domestic referring court.
28. *See Airbnb* (C-83/21), at para. 54
29. Id., para. 59.
30. Id., para. 59.
31. Id., para. 60.
32. Both mentioned in *Airbnb* (C-83/21), at para. 62.
33. Id., para. 63.
34. Id., paras. 64-69.
35. Id., para. 72.

viders"; (ii) even though a large number of transactions make the task of the tax authorities complex, "it does not, however, entail … reliance on a measure such as the obligation to appoint a tax representative", particularly taking into account that online platforms were already providing information and withholding tax on the intermediated payments; and (iii) there was no possibility of appointing a non-resident or established tax representative.[36]

The Court decided that the first and second requirements (i.e. the obligation to provide information and to withhold taxes) were admissible, but the third (i.e. the obligation to appoint a resident or established tax representative) was a disproportionate infringement on the freedom to provide services.

3. Comments

3.1. Introduction

Globalization, digitalization and the strengthening of the EU internal market allowed for the emergence of new business models, such as that of online digital platforms. In a nutshell, these entities allow for an online match between demand and supply or, in other words, for customers to find (and, often, compare) different providers of goods and services. A group of digital platforms focuses on services (the "service-oriented platforms") and serves a wide range of markets, such as transportation, meal delivery, grocery delivery, medical appointments and (short-term) rentals. The platform at stake, in this case, is a service-oriented one operating in the latter field.

Online platforms are now part of our day-to-day life. Year after year, they increase their market share in the sectors in which they operate. The fact that they can operate in scale without mass makes them particularly efficient and is one of the reasons that they can present their offering at a lower price than their physical competitors.

From a tax perspective, their relevance is due not only to the income they earn but also (and as will be seen, mostly for EU Member States) the money that flows through them (whenever they also intermediate payments, which is often the case).

Their own business profits are usually only captured by their "elective" state of residence. Digital platforms can be considered as "elective" taxpayers insofar as they can operate from anywhere in the world without a physical presence in the state in which the underlying goods or services are provided. By applying bilateral tax treaties following the OECD Model (2017),[37] they can avoid being taxed on their business income in the states where they decide to provide their services insofar as they do not have a PE in that state. The only state that may tax their business income is the state where they locate their effective management (or where they have a qualifying physical presence),[38] which, for these types of businesses, is mostly an issue of election.

However, the relevance of the platforms, for tax purposes, cannot be limited to their own business profits. They also intermediate in an ever increasing number of transactions and have real-time data on the revenue accrued by providers of goods and services in EU Member States. Accordingly, beyond their role as taxpayers, they are becoming interesting to tax authorities as information providers, i.e. as third parties who hold tax-relevant information on other taxpayers.

The relevance of digital platform operators for the proper functioning of the tax system has been recently recognized at the EU level with the adoption of DAC7.[39] This Directive, inter alia, requires platform operators to report the revenue derived through their platform from selling goods and services. This reporting obligation is effective as of 1 January 2023.

The case at hand precedes the adoption of the Directive. It remains, however, relevant in ascertaining whether its requirements are in accordance with EU primary law[40] and the margin of action of the EU legislator in respect of future amendments to this Directive.

Among the many issues addressed by the Court, this Opinion Statement will focus on the following: (i) factual discrimination; (ii) withholding tax regimes; (iii) admissibility of tax representatives; and (iv) limits to the duty of cooperation by third parties to the tax relationship.

3.2. Factual discrimination

Neither the Advocate General nor the Court considered that the legislation at hand amounted to factual discrimination even though, according to the claimants, the obligations emerging from domestic law would only or mostly apply to non-residents. This finding appears to be aligned with the more recent case law of the Court.

In this case, the Court appears not to be concerned with the finding that a certain tax measure factually applies solely or almost exclusively to non-residents. In contrast, it appears clear that the incidence of a (tax) rule plays no role in the factual discrimination assessment.

However, the Court carefully scrutinizes the legal criterion that leads to that factual result, considering it admissible solely when it can be equally met by residents and non-residents alike. For the Court, factual discrimination should be ascertained by taking into account not the result or impact of the measure but its design and whether or not

36. Id., para. 73.
37. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
38. Enough to trigger a permanent establishment under the applicable bilateral tax treaty.
39. Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation ST/12908/2020/INIT, OJ L 104 (25 Mar. 2021), Primary Sources IBFD.
40. Even though the Court tends to be more lenient when it comes to ascertaining compatibility of directives with primary EU law, particularly when the Court considers that secondary law proceeded to exhaustive harmonization at the EU level. *See* SE: ECJ, 1 July 2014, Case C-573/12, *Ålands Vindkraft AB v. Energimyndigheten*, ECLI:EU:C:2014:2037, para. 57.

the criteria used are discriminatory (i.e. can be more easily met by residents than non-residents).[41]

This decision is consistent with the decision of the Court in *Vodafone* (Case C-75/18).[42] In that case, the turnover tax at issue covered only or almost only non-resident taxpayers. The Court, however, acknowledged that this was the result of the application of a criterion (turnover of a company) that was considered "neutral" and "non-inherently" discriminatory, which, accordingly, would not be a problem.[43]

Focusing not on a legal analysis of the criterion but on the impact or incidence a measure would have has its shortcomings, as it could lead to: (i) a decision based on economic impact studies; (ii) changing the conclusions throughout the years in accordance with eventual material changes on the number of non-residents impacted by the measure; and (iii) systematic uncertainty, given the difficulty in defining, from a legal perspective, the percentage of in-scope non-residents that would deem a measure to be discriminatory. It could also prevent states from levying taxes on certain sectors simply due to the fact, as in the case at hand, that most of the players in that sector were non-residents.

However, focusing on the design also has shortcomings. It is true that it allows for a more stable and objective criterion that is easier to ascertain and apply. However, the Court does not provide further guidance on the more fundamental and underlying question, i.e. how to identify cases where there is factual discrimination, i.e. where, despite the use of a neutral criterion, residents can ("inherently") more easily meet such criterion than non-residents.[44] This case offered an opportunity to do so.

3.3. Withholding taxes on digital platforms

The Court, by upholding the Italian withholding tax regime imposed on short-term rental online digital platforms in the manner it does, clears the way: (i) for the extension of the regime to any other platform operators (and not only service-oriented platforms) insofar as they are intermediate payments; (ii) for the adoption of the regime by other Member States; and (iii) for the adoption of an EU-wide directive regulating the introduction of an EU-wide regime for online digital platforms operators.

Insofar as the increased compliance cost imposed on the platforms is not passed on to consumers, Member States introducing the (reporting and) withholding obligations have a double benefit: (i) on the one hand, the costs imposed do not decrease taxable profits in their own jurisdiction (assuming that the platform is active but not liable to tax there) creating a mismatch between the state creating the procedural tax burden and the state in which that procedural tax burden will be deducted as a business expense; (ii) the benefits derived from those added business costs are solely felt in their own jurisdiction. This clears the path for the inception of similar obligations in respect of a variety of business transactions. However, and according to the Court, the additional compliance costs would, in any event, be marginal and imposing the burden on digital platforms appears to be commensurate with the benefit obtained by the digital platforms.

3.4. Admissibility of the obligation to appoint a tax representative

One of the most puzzling aspects of the decision concerns the Court's analysis of the obligation to appoint a tax representative.

As the Court points out, it is true that its case law does not establish a "principle of incompatibility between the obligation to appoint a tax representative … and the freedom to provide services".[45] Nor could it, taking into account the role played by the Court in preliminary ruling proceedings. However, given the abundant case law on the matter,[46] one should note that it may be practically impossible for a Member State to design a tax representative regime for intra-EU situations that would comply with the fundamental freedoms.

The regime will always be prima facie discriminatory. The rationale of a tax representative regime is precisely to allow for the tax authorities to have an interlocutor who has residency or a PE in the same territory, which is why a representative is not needed for residents and non-residents with a PE.

There will always be available justifications, such as the need to fight (tax) avoidance, to ensure effective fiscal supervision and to ensure effective collection of tax. However, any domestic regime will (almost necessarily) systematically exceed what is necessary to pursue this objective, taking into account the broad subjective and objective scope of the mutual assistance directives. Insofar as there is an abstract possibility to make use of the Mutual Assistance Directive (2011/16),[47] the Court considers that any other requirement goes beyond what is needed to ensure the effectiveness of fiscal supervision and of tax collection. Interestingly, the Court neither refers to the Mutual Assistance Directive (2011/16) nor to the Recovery Directive (2010/24).[48] Furthermore, even if reliance on those directives could create additional hurdles (as com-

41. *Airbnb* (C-83/21), at paras. 43-47.
42. HU: ECJ (Grand Chamber), 3 Mar. 2020, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, EU:C:2020:139, Case Law IBFD.
43. Id., para. 49. *See also* CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2020 on the ECJ Decision of 3 March 2020 in Vodafone Magyarország Mobil Távközlési Zrt. (Case C-75/18) on Progressive Turnover Taxes*, 60 Eur. Taxn. 12, sec. 3.4. (2020), Journal Articles & Opinion Pieces IBFD, on indirect discrimination.
44. *See Vodafone* (C-75/18), at para. 48.
45. *Airbnb* (C-83/21), at para. 60.
46. *See*, for instance, BE: ECJ, 5 July 2007, Case C-522/04, *Commission of the European Communities v. Kingdom of Belgium*, Case Law IBFD; PT: ECJ, 5 May 2011, Case C-267/09, *European Commission v. Portugal*, Case Law IBFD; and ES: ECJ, 11 Dec. 2014, Case C-678/11, *European Commission v. Kingdom of Spain*, Case Law IBFD.
47. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD.
48. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L84 (2010), Primary Sources IBFD.

pared with the domestic scenario), they would be considered as "administrative difficulties [which] do not constitute a group that can justify a restriction on a fundamental freedom guaranteed by EU Law".[49]

Accordingly, even in the absence of a "principle of incompatibility" of the appointment of a tax representative with EU law, the fact is that such an appointment appears to be, in all instances, disproportionate to the need to safeguard the effectiveness of fiscal supervision.

When testing necessity, the Court appeared to attach relevance to reasons that were never considered previously, such as: (i) the amount of tax collected via the providers of rental properties; (ii) the complexity of auditing domestic providers of real estate; and (iii) the failure to appoint a non-resident representative.[50]

Regarding the first two, the Court appears to be putting forward conditions that, in the future, may lead to allowing for the obligation to have a resident tax representative. According to the Court's explanations, national legislation would have to consider, first, the amount of tax that would be collected by a foreign platform relative to the burden of the cost of appointing a representative (in effect, a certain minimum threshold criterion); second, the existence of alternative ways that are equally effective, such as the introduction of an effective mechanism to collect information on the taxpayer; and third, a reasonable justification as to why a non-resident representative would not be equally effective.

Regarding the third consideration, the Court considered the fact that the Italian legislator "has not provided for the possibility that th[e] tax representative … may have the option of residing or being established in a Member State other than Italy".[51] It appears difficult to understand the significance of that option since non-resident entities[52] would always have the possibility of appointing themselves, which would render the regime absurd and detached from its rationale and "justifications". This would render it ineffective from the outset since the representative would not bring any added value to the tax proceedings in comparison with the representation made by the "to-be-represented" entity.

Additional routes are still available for Member States to overcome the added difficulties brought about by non-resident taxpayers or withholding agents, such as imposing, for certain sectors or activities, and on a non-discriminatory basis: (i) a requirement to provide an email address on which valid tax notifications could be served; (ii) the obligation to provide a list of assets that could be seized in the event of non-compliance with the (withholding) tax obligations, including amounts in bank accounts, including their country of location; (iii) an increase (to quarterly or monthly) of the requirement to deposit the withheld tax amounts, banning entities with outstanding tax debts (i.e. that fail to provide that quarterly or monthly deposit) from operating in their market.

3.5. Limits on the duty of cooperation by third parties

The Court has not provided any guidance regarding the limits on the duty of cooperation by third parties on the tax collection proceedings regarding related taxpayers (i.e. not at arm's length). Nor could it since it was only asked to address the compatibility of the measure with the fundamental freedoms.

That does not mean that the question lacks relevance for EU law purposes. In fact, the power to levy taxes is, in many Member States, shared between the central, regional and local levels, allowing each of these levels to levy taxes (within the limits set up by domestic law). This means that any region or municipality is able to set up reporting and withholding tax requirements such as those adopted by the Italian government in 2017 (which might have to be enforced by the Member State in which the operators are resident via the Mutual Assistance directives). This may lead to fragmentation of the internal market, as digital platform operators would have to face (and constantly screen) the rules and regulations of every single municipality in which they provide services (i.e. and in respect of short-term rentals, all the municipalities in which a rental property is situated).

The Court also does not provide any guidance on the nexus that needs to exist between the activity of the online digital platform and the activity performed in a given territory that would allow the competent tax authority to set out accessory tax requirements on the platforms. The Advocate General considered that there would be a relevant nexus insofar as the tax obligations relate to real estate located in the territory of the competent tax authority.

DAC7 addresses this issue but on a limited basis and merely in respect of the reporting requirements. And, even within those requirements, Member States (and their regions and municipalities) are not prevented from introducing other or more stringent reporting requirements.

To avoid further fragmentation of the internal market, the Commission could consider proposing secondary law that would effectively harmonize the procedural tax requirements to be imposed on online digital platforms. Such harmonization would not force Member States (and the respective regions or municipalities) to introduce those requirements. However, it would require them, in the event they decide to adopt them, to follow the common rules laid down under secondary law.

4. The Statement

The Court's decision in *Airbnb* clarifies the limits of Member State action concerning the imposition of tax-related obligations on non-taxpayers and reaffirms the prohibition against imposing a requirement to appoint tax representatives.

49. *Airbnb* (C-83/21), at para. 74.
50. Id., 73.
51. Id.
52. Regardless of whether or not they are the taxpayers or third parties that have relevance for tax purposes.

Although the Court was provided with a new opportunity to do so, it did not further clarify the conditions under which a neutral criterion, at face value, would amount to factual discrimination (i.e. when it is not "inherently neutral" or can be more easily met by residents). This issue was addressed in the CFE's previous Opinion Statement on the *Vodafone* (Case C-75/18) case.[53]

Airbnb appears to prevent any discussions on the validity of DAC7 regarding reporting obligations. Furthermore, *Airbnb* might facilitate the introduction of withholding tax regimes with non-resident withholding agents.

Finally, *Airbnb* does not prevent Member States (and the respective regions and municipalities) from imposing reporting and withholding tax obligations on the platforms operating within their territories. In the event that they effectively decide to do so autonomously, online platforms may be faced with thousands of different tax (procedural) regimes, increasing their compliance costs exponentially and hindering their capacity to offer their services within the internal market effectively. For that reason, the European Commission could consider a proposal to harmonize the respective regimes through a directive.

53. CFE ECJ Task Force, *supra* n. 44, at sec. 4.