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OPINION STATEMENT

Opinion Statement ECJ-TF 2/2023 on the ECJ decision of 22 December 2022 in Case C-83/21, Airbnb Ireland and Airbnb Payments UK on accessory tax obligations imposed on digital service providers

Prepared by the CFE ECJ Task Force
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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on CJEU's decision of 22 December 2022 in case C-83/21, Airbnb Ireland and Airbnb Payments UK[2], decided following the Opinion of AG Szpunar delivered on 7 July 2022.[3] Inter alia, at issue was the compatibility with the freedom to provide services of the tax obligations imposed by the Italian government on service providers offering their intermediation services regarding real estate located in Italy. The Court found admissible to impose the obligation to collect and report data and to withhold tax on the intermediated payments. However, it held disproportionate to request them the appointment of a tax representative resident in Italy.

This case covered other issues such as: i) whether the tax obligations imposed by the Italian government on service providers would fall within the scope of three directives regulating the provisions of services within the EU, which would require communicating it to the Commission prior to its enactment, and; ii) whether the domestic referring court is bound to phrase the preliminary ruling questions following the wording proposed by the parties in the domestic procedures. Those questions will not be covered in this Opinion Statement, which focuses solely on compatibility with fundamental freedoms and, specifically, with the freedom to provide services.

I. Background, Facts, and Issues

1. 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 on the lessors' accounts, charging a service fee to the lessor.

2. 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[4] covering contracts concluded directly with the tenants or through the intermediation of online platforms.[5] This law was further implemented by a decision of the director of the Tax Authority[6] and clarified by an Interpretative Circular.[7]

3. 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;[8] ii) to withhold tax on the payments they intermediate, whenever they also intermediate on the payment[9] iii) to appoint a resident tax representative, in case they were neither resident nor had a permanent establishment in Italy. Failure to

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[2] 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: 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.

[4] Decree-Law n.º 50 on urgent financial measures converted with developments by Law n.º 96 of 21 June 2017, hereinafter referred to as Decree Law 50 of 2017.

[5] Art. 4(1) of Decree Law 50 of 2017, as reproduced in para. 9 and 10 of Airbnb Ireland, supra n. 2.

[6] Decision 132395, of 12 July 2017.

[7] Interpretative circular 24 of the Italian Tax Authority, of 12 October 2017.

[8] This information would have to be communicated to tax authorities until 30th of June of the year following that to which the information relates. See Airbnb, , supra n. 2, para 12 and art. 4(4) of Decree Law 50.

[9] See Airbnb, , supra n. 2, para 12 and Art. 4(5) of Decree Law 50.

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.

4. The applicants (Airbnb Ireland UC and Airbnb Payments UK Ltd) considered the regime inadmissible on several grounds. In what is relevant to the current Opinion Statement (compatibility with fundamental freedoms), they claimed that the regime infringed the EU's freedom to provide services.

5. 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.

6. 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. The relevant question for 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?
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> (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?
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> (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?"

7. In his Opinion, AG Szpunar concluded that the obligation to provide information would not infringe on the freedom to provide services, merely by reference to the Court's decision on Airbnb Ireland[10] and without making any further remark.[11]

[10] BE: ECJ, 27 Apr. 2022, Case C-674/20, Airbnb Ireland UC v. Région de Bruxelles-Capitale, Case Law IBFD.
[11] See AG Szpunar Opinion of 7 July 2022, supra n. 3, para 48-50.

8. He reached the same conclusion concerning the obligation to withhold the tax. In this case, the AG analysed in detail the arguments raised by the claimants.

9. First, and unlike the claimants, the AG 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.[12] For the AG, 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 argues 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 believes that it is "perfectly consistent to impose the obligation to withhold tax on intermediaries involved in the payment of rent".[13]

10. 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".[14] For the AG, 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".

11. The AG 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.[15]

12. Interestingly, and despite not acknowledging the (factual) discrimination, AG Szpunar still considered that the legislation constituted an "obstacle"[16]Ito the freedom to provide services, although it could be 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".[17]

13. Third, and in what concerns the obligation to appoint a tax representative, the AG reached a different conclusion and considered it as a non-justified and disproportionate infringement of the freedom to provide services. He did so point by reference to, inter alia, the Court's decision on *Commission v Spain*,[18] 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.[19]

[12] See AG Szpunar Opinion of 7 July 2022, supra n. 3, para 58.
[13] See AG Szpunar Opinion of 7 July 2022, supra n. 3, paras 61-62.
[14] See AG Szpunar Opinion of 7 July 2022, supra n. 3, para 63.
[15] See AG Szpunar Opinion of 7 July 2022, supra n. 3, para 65.
[16] See AG Szpunar Opinion of 7 July 2022, supra n. 3, para 66 also labeled as "restriction" in paras 68- 70. In the French version, in which the Opinion was originally redacted, the AG used the term "entrave". The German and the Dutch versions use, in this paragraph, the concept of restriction.
[17] See AG Szpunar Opinion of 7 July 2022, supra n. 3, para 68.
[18] ES: ECJ, 11 Dec. 2014, Case C-678/11, European Commission v. Kingdom of Spain, Case Law IBFD.
[19] See AG Szpunar Opinion of 7 July 2022, supra n. 3, paras 80 and 81.

II. The Judgment of the CJEU

14. The CJEU, following the Opinion of AG Szpunar, concluded that both the reporting and withholding obligations were admissible. However, it held that the obligation to constitute a tax representative is a disproportionate infringement of the freedom to provide services.

15. Regarding the tax reporting obligation, it started by noting that the legislation at stake was not (directly) discriminatory even if 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 service were "too uncertain and indirect for the obligation laid down to be regarded as capable of hindering that freedom [to provide services]".[20]

16. The obligation also did not amount to factual discrimination, even if "almost all the online platforms concerned, particularly those which also manage payments, are established in Member States other than Italy" [21]. That was attributable to the "development of the technological means and the current configuration of the market for the provision of intermediation services",[22] 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".[23] Accordingly, the Italian regime was "not merely ostensibly neutral" since it applied to "all providers of property intermediation services".[24]

17. Following the AG'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.[25] In any event, those additional costs (of collecting and supplying data to tax authorities) were considered "lower", taking into account that they would fall on data which is already "stored and digitalized" by intermediaries.[26]

18. The Court moved to the assessment of the withholding tax obligation. The Court recognized that the Italian law distinguished between the resident service provider ("tax collector") and the non-resident one ("person liable to pay the tax")[27]. However, such differentiation[28] 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 authority.[29]

19. 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 permanent establishment in Italy. The regime "requires them to take steps and to bear, in practice, the cost of remunerating that representative."[30] Accordingly, it would act as a "hindrance" to be regarded as a prima facie "restriction on the freedom to provide services".[31]

20. After acknowledging a substantial body of cases in which the Court held the constitution of a tax representative as contrary to the free movement at stake in the case, it concluded that there was no

[20] See Airbnb Ireland, C-83/21, supra n. 2, para. 45.
[21] See Airbnb Ireland, C-83/21, supra n. 2, para. 46.
[22] See Airbnb Ireland, C-83/21, supra n. 2, para. 47.
[23] See Airbnb Ireland, C-83/21, supra n. 2, para. 47.
[24] See Airbnb Ireland, C-83/21, supra n. 2, para. 48.
[25] See Airbnb Ireland, C-83/21, supra n. 2, para. 49.
[26] See Airbnb Ireland, C-83/21, supra n. 2, para. 50.
[27] Art. 4(5) and 4(5a) of the Decree law 50, supra n. 4. See Airbnb Ireland, C-83/21, supra n. 2, para. 53.
[28] Subject to confirmation by the domestic referring court.
[29] See Airbnb Ireland, C-83/21, supra n. 2, para. 54
[30] See Airbnb Ireland, C-83/21, supra n. 2, para. 59.
[31] See Airbnb Ireland, C-83/21, supra n. 2, para. 59.

"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 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".[32]

21. Consequently, it moved 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",[33] and the need to "ensure the effective collection of tax".[34]

22. Moving to proportionality analysis, it started by noting that the Italian legislation was adequate ("appropriate" in the Court's words) to pursue those justifications.[35]

23. 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".[36] This was supported on the following reasons: 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 providers"; ii) even if 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; iii) there was no possibility of appointing a non-resident or established tax representative.[37]

24. 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 one (i.e. the obligation to appoint a resident or established tax representative) was a disproportionate infringement to the freedom to provide services.

III. Comments

III.1 Introduction

25. Globalisation, digitalisation and the strengthening of the EU internal market allowed 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, sometimes, after comparing) different providers of goods and services. A group of them focus on services (the so-called "service-oriented platforms") and serve 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.

26. 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 allows them to present their offering at a lower price than their physical competitors.

[32] See Airbnb Ireland, C-83/21, supra n. 2, para. 60.
[33] Both mention in Airbnb Ireland, C-83/21, supra n. 2, para. 62.
[34] See Airbnb Ireland, C-83/21, supra n. 2, para. 63.
[35] See Airbnb Ireland, C-83/21, supra n. 2, para. 64-69.
[36] See Airbnb Ireland, C-83/21, supra n. 2, para. 72.
[37] See Airbnb Ireland, C-83/21, supra n. 2, para. 73.

27. From a tax perspective, their relevance resides not only on the income they earn but also (and as we will see, for most EU Member States, mainly) on the money that flows through them (whenever they also intermediate on the payments, which is often the case).

28. In what concerns their own business profits, it is usually only captured by their State of "elective" 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 where the underlying goods or services are provided. Therefore, according to bilateral tax treaties following the OECD MC, that prevents them from being taxed on their business income in the States where they decide to provide services insofar as they do not have a permanent establishment 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.

29. However, the relevance of the platforms for tax purposes cannot be limited to their own business profits. They also intermediate in an increasingly higher number of transactions, having real-time data on the revenue accrued by providers offering goods and services in EU Member States. Accordingly, more than taxpayers, they become interesting to tax authorities as information providers, i.e. as third parties who hold tax-relevant information of other taxpayers.

30. The relevance of digital platform operators for the proper functioning of the tax system has been recently recognised 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 shall be effective as of the 1st of January 2023.

31. The case at hand precedes the adoption of the directive. However, it remains relevant for ascertaining whether its requirements are in accordance with EU primary law[40] and the margin of action of the EU legislator in future amendments of this directive.

32. From 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; iv) limits to the duty of cooperation by third parties to the tax relationship.

III.2 Factual discrimination

33. Neither the AG nor the Court considered that the legislation at hand amounted to factual discrimination even if, 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.

34. 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. On the contrary, it appears clear that the incidence of a (tax) rule plays no role in the factual discrimination assessment.

35. However, the Court scrutinises carefully 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 the criteria used are not discriminatory (i.e. can be more easily met by residents than non-residents).[41]

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[38] Enough to trigger a permanent establishment under the applicable bilateral treaty.

[39] Council Directive (EU) 2021/514, of 22 March 2021, amending Directive 2011/16/EU on administrative cooperation in the field of taxation

[40] Even if 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 an exhaustive harmonization at the EU level. See Judgment of 1 July 2014, Ålands Vindkraft (C-573/12) ECLI:EU:C:2014:2037, para, 57.

[41] See Airbnb Ireland, C-83/21, supra n. 2, para. 43-47.

36. This decision is consistent with the judgment of the Court in Vodafone.[42] In that case, the turnover tax at hand would cover only or almost only non-resident taxpayers. However, the Court acknowledged that this was a result of the application of a criterion (turnover of a company) which was considered "neutral" and "non-inherently" discriminatory, which, accordingly, would not be a problem.[43]

37. Focusing not on a legal analysis of the criterion but on the impact or incidence of a measure would have its shortcomings, as it could lead to: i) deciding 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; iii) systematic uncertainty, given the difficulty to define, from a legal perspective, the percentage of in-scope non-residents that would deem a measure to become 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.

38. However, focusing on the design is not immune to shortcomings either. It is true that it allows a more stable and objective criterion which 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. that 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.

III.3 Withholding Taxes on Digital Platforms

39. The Court, by upholding the Italian withholding tax regime imposed on short-term rental online digital platforms in the terms 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 intermediate on payments; ii) for the adoption of the regime by other Member States; iii) for the adoption of an EU-wide directive regulating the introduction of an EU-wide regime for online digital platforms operators.

40. 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 taxable 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 to as a business expense; ii) on the other hand, 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 a variety of business transactions. However, and according to the Court, the additional compliance costs would anyhow be marginal and imposing the burden on the digital platforms appears to be commensurate to the benefit obtained by the digital platforms.

[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] See Vodafone, supra n. 42 , 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 (2020), Journal Articles & Opinion Pieces IBFD, section 3.4 on indirect discrimination.

[44] See Vodafone, supra n. 42 , para. 48.

III.4 Admissibility of the Obligation to Appoint a Tax Representative

III.4.1 Introduction

41. One of the most puzzling aspects of the decision concerns the Court's analysis regarding the obligation of constituting a tax representative.

42. As the Court points out, it is true that its case law does not set the "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 fundamental freedoms.

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

44. There will always be available justifications, such as the need to fight against (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 them, 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, the Court considers that any other requirement to go 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[47] nor to the Recovery Directive.[48] Furthermore, even if reliance on those directives could bring additional hurdles (as compared with the domestic scenario), those will 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]

45. 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 cases, disproportionate to the need to safeguard the effectiveness of fiscal supervision.

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

47. Regarding the first two, the Court appears to be putting forward conditions that, in the future, may lead to allowing the obligation of 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 one (in effect, a certain minimum -threshold criterion);

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[45] See Airbnb Ireland, C-83/21, supra n. 2, 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; 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, 11.3.2011, p. 1–12.

[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 L 84, 31.3.2010, p. 1–12.

[49] See Airbnb Ireland, C-83/21, supra n. 2, para. 74.

[50] See Airbnb Ireland, C-83/21, supra n. 2, para. 73.

second, the existence of alternative ways that are equally effective, such as the introduction of an effective mechanism to collect information on the taxpayer; third, a reasonable justification as to why a non-resident representative would not be equally effective.

48. In what concerns the third, 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 renders 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.

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

III.5 Limits to the duty of cooperation by third-parties

50. The Court has not provided any guidance regarding the limits to the duty of cooperation by third parties on the tax collecting proceedings regarding related taxpayers (i.e. not at arms' length). Nor could it be since it was asked to answer on the compatibility of a measure with fundamental freedoms.

51. 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 could have to be enforced by the Member States in which the operators are residents via the Mutual Assistance directives). This may lead to the fragmentation of the internal market as digital platforms operators would have to face (and screen, constantly) the rules and regulations of every single municipality in which they provide services (i.e. and in the case of short-term rentals, all the municipalities in which a to-be rented property is situated).

52. 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 which would allow the competent tax authority to set out accessory tax requirements on the platforms. The AG general considered that there would be a relevant nexus insofar as the tax obligations related to real estate located in the territory of the competent tax authority.

53. DAC7 addresses this issue but on a limited basis and merely in what concerns 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.

54. To avoid further fragmentation of the internal market, the Commission could consider proposing secondary law that would effectively harmonise the procedural tax requirements to be requested for online digital platforms. Said harmonisation would not force Member States (and the respective regions or

[51] See Airbnb Ireland, C-83/21, supra n. 2, para. 73.
[52] Regardless of whether they are the taxpayers or third-parties with relevance for tax purposes.

municipalities) to introduce those requirements. However, it would require them, in case they decide to adopt them, to follow the common rules laid down in secondary law.

IV. The Statement

55. The Court decision in Airbnb clarifies the limits of Member States' action concerning the imposition of tax-related obligations to non-taxpayers and reaffirms the inadmissibility of imposing the appointment of tax representatives.
56. Although provided with a new opportunity, the Court did not further clarify the conditions by 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 has already been addressed in our previous Opinion Statement on the Vodafone case.[53]
57. Airbnb appears to prevent any discussions on the validity of DAC7 in what concerns the reporting obligations. Furthermore, Airbnb might facilitate the introduction of withholding tax regimes also with non-resident withholding agents.3
58. 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 case 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 EU Commission could consider a proposal to harmonise the respective regimes through a directive.

[53] 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 (2020), Journal Articles & Opinion Pieces IBFD, section 4.