



Euro Tax Flash from KPMG's EU Tax Centre



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CJEU decides that Belgian tax reporting requirements for property intermediation services are not contrary to EU law

[Belgium – Digital platforms – Reporting requirements – Free movement of services](#)

On April 27, 2021, the Court of Justice of the European Union ('CJEU' or 'Court') rendered its [decision](#) in case C-674/20. The case concerns the compatibility with EU law of Belgian regional legislation based on which providers of property intermediation services – including digital platform operators, are required to report certain data on tourist accommodation transactions. The Court found that the rules do not fall within the scope of the Directive 2000/31/EC on electronic commerce (the Directive) and do not infringe the free movement of services.

Background

In December 2016, the Brussels Capital Region introduced a flat-rate regional tax on tourist accommodation establishments. The tax had to be self-assessed and paid by the persons operating the tourist accommodations, and any intermediary was required to provide – if requested, details including the length and location of a tourist's stay.

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. Following a request from the regional tax authorities to provide information on tourist transactions carried out in 2017, the plaintiff brought an action for annulment of the reporting order before the Constitutional Court of Belgium. The Constitutional Court decided to refer to the CJEU on whether the disputed request:

- falls outside 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'), and
- is prohibited under the EU free movement of services (Article 56 of the Treaty on the Functioning of the EU – TFEU).

The Directive on electronic commerce was 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 information society services, as defined under EU law. The text of the Directive indicates several areas in which this prohibition does not apply, including 'the field of taxation'.

The CJEU decision

The Court first analyzed if the measure under dispute is governed by the Directive on electronic commerce, and therefore precluded by it. For this purpose the Court noted that, based on the recitals of the Directive, 'the field of taxation' is specifically excluded from its scope.

The Court noted that the Directive was adopted based on an EC Treaty article (i.e. Article 95 of the EC Treaty, subsequently reproduced in Article 114 TFEU) which excludes 'fiscal provisions'. Based on settled case-law, this wording has a broad meaning and covers not only all areas of taxation, but also related aspects, such as procedural rules. Furthermore, the recitals to the Directive state that that 'taxation' is excluded from its scope and that that Directive 'does not aim to establish rules on fiscal obligations'.

As regards the question of whether the disputed order falls within the 'field of taxation', the Court noted that – although the request was not addressed to the persons liable to pay the tourist tax, but to persons who have acted as intermediaries, the fact remains that the authorities that receive the information are the tax authorities. Furthermore, the request is based on rules that form part of tax legislation and the requested information is indissociable from that legislation, as it is the means of identifying the person liable for payment of the tax, the basis for assessment of the tax and, therefore, the amount of tax.

Consequently, the CJEU concluded that the contested measure falls within the 'field of taxation' and therefore the provisions of the Directive are not applicable in the case under dispute.

The Court continued by analyzing the plaintiff's claim that the contested measure restricts the EU freedom to provide services. The Court reiterated its settled case-law based on which national legislation applicable to all business operators active in that Member State, that does not regulate the services rendered by the operators and that has an uncertain and indirect impact on their ability to provide the services, does not breach the freedom to provide services.

In this respect, the CJEU noted that the measure under dispute applies to all providers of property intermediation services, irrespective of their place of establishment or the medium through which the services are provided – i.e. digital, or otherwise. Responding to the plaintiff's arguments that digital platform operators are in practice particularly impacted by the requirements, the Court noted that this merely reflects their larger market share and larger number of transactions. As such, in the Court's view, the measures do not discriminate based on the manner in which the services are provided.

In the Court's view, the reporting requirements are not targeted at regulating the service providers, but instead aim to allow the regional tax authorities to determine whether the flat-rate tourist tax was correctly declared. Additionally, the only consequence of the requirements is an increase in the costs of providing services, which – based on settled case-law, does not hinder the freedom to provide services, provided that it impacts all service providers. As confirmed by the plaintiff itself in a previous non-related case brought to the CJEU, the information requested by the Belgian regional authorities is already retained by the operator, and any reporting costs would be limited.

In light of the above, the CJEU concluded that the measure under dispute does not breach the EU free movement of services.

EU Tax Centre comment

A similar case – C-83/21, brought forward by the same plaintiff, is still pending with the CJEU (see [E-news Issue 133](#)). The case concerns the compatibility with EU law of the Italian reporting requirements imposed on online property intermediation service providers. A main difference consists in the fact that in Italy such operators also have the obligation to withhold tax on payments performed by the users of the services and remit it to the Italian treasury. A hearing in case C-83/21 took place on April 28, 2022.

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.

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