Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

27 April 2022*

(Reference for a preliminary ruling – Internal market – Article 114(2) TFEU – Exclusion of fiscal provisions – Directive 2000/31/EC – Information society services – Electronic commerce – Online property rental platform – Article 1(5)(a) – Exclusion of the field of taxation – Definition – Regional legislation concerning a tax on tourist accommodation establishments – Provision requiring intermediaries to provide, on a written request, certain particulars concerning the operation of those establishments to the tax authority with the aim of identifying persons liable for that tax – Article 56 TFEU – No discrimination – No restriction)

In Case C-674/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Constitutional Court, Belgium), made by decision of 26 November 2020, received at the Court on 10 December 2020, in the proceedings

Airbnb Ireland UC

v

Région de Bruxelles-Capitale,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, J. Passer, F. Biltgen, N. Wahl (Rapporteur) and M.L. Arastey Sahún, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Airbnb Ireland UC, by D. Van Liedekerke, advocaat, and by A. Laes and M. Van Lierde, avocats,

– Région de Bruxelles-Capitale, by C. Molitor, avocat,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

* Language of the case: French.

– the French Government, by N. Vincent and T. Stéhelin, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman and J. Hoogveld, acting as Agents,

– the Austrian Government, by J. Schmoll, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by W. Roels, S. Kalėda, P.-J. Loewenthal and L. Armati, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(5)(a) and Article 15(2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), of Articles 1 to 3 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) and of Article 56 TFEU.

2 The request has been made in proceedings brought by Airbnb Ireland UC for annulment of Article 12 of the order of the Région de Bruxelles-Capitale (Brussels Capital Region, Belgium) of 23 December 2016 on the regional tax on tourist accommodation establishments.

Legal context

European Union law

Directive 2000/31

3 Under recital 12 of Directive 2000/31:

'It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded [from] the scope of this Directive.'

4 Recital 13 of that directive is worded as follows:

‘This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.’

5 Recital 21 of that directive states:

‘The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities, such as on-line information, on-line advertising, on-line shopping, on-line contracting …’

6 Article 1 of Directive 2000/31, entitled ‘Objective and scope’, provides:

‘1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

…

5. This Directive shall not apply to:

(a) the field of taxation;

…’

7 Article 3(2) of that directive provides:

‘Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.’

8 In accordance with Article 3(4) of that directive, a derogation from that prohibition is possible – provided that it is proportionate in the light of the objective pursued – only on grounds of public policy, the protection of public health, public security or consumer protection.

9 Article 15(2) of that directive is worded as follows:

‘Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.’

Directive 2006/123

10 Article 1 of Directive 2006/123, entitled 'Subject matter', provides:

'1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.

…'

11 Under Article 2 of that directive, entitled 'Scope':

'1. This Directive shall apply to services supplied by providers established in a Member State.

…

3. This Directive shall not apply to the field of taxation.'

12 Article 3 of that directive, entitled 'Relationship with other provisions of [EU] law', provides:

'1. If the provisions of this Directive conflict with a provision of another [EU] act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other [EU] act shall prevail and shall apply to those specific sectors or professions. …

…

3. Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.'

Belgian law

13 The order of the Brussels Capital Region of 23 December 2016 on the regional tax on tourist accommodation establishments (*Moniteur belge*, 6 January 2017, p. 509; 'the order of 23 December 2016') introduces a flat-rate tax per night of occupation payable by every operator of a tourist accommodation establishment, which includes tourist accommodation in homes when provided in return for payment ('the flat-rate tourist tax').

14 In accordance with Article 2(8) of the order of 23 December 2016, 'intermediary' is defined as 'any natural or legal person that, in return for remuneration, makes an accommodation unit available on the tourist market, promotes a tourist accommodation establishment to tourists or offers services through which operators and tourists can contact each other directly'.

15 In accordance with Article 3 of that order, the flat-rate tourist tax is calculated by multiplying a basic amount per accommodation unit, reduced for home accommodation, by the number of overnight stays by tourists in that accommodation unit.

16 It is apparent from Article 4 of that order that the flat-rate tourist tax is payable by the operator of the tourist accommodation establishment or, if it is insolvent or unknown, by the property owner, and from Article 7 of that order that the person liable to pay that tax must submit a monthly declaration to the tax authority.

17 Article 12 of the order of 23 December 2016 provides:

'Intermediaries shall, for the tourist accommodation establishments in the Brussels Capital Region in respect of which they act as intermediary or carry on a promotion strategy, provide the officials designated by the Government, on a written request, with the particulars of the operator and the details of the tourist accommodation establishments, and also the number of overnight stays and of accommodation units operated during the past year.

An administrative fine of EUR 10 000 may be imposed on an intermediary who fails to respond to the written request referred to in the preceding paragraph.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Following the entry into force of the order of 23 December 2016, the tax authority of the Brussels Capital Region sent to Airbnb Ireland, on 10 February 2017, a request for information concerning persons liable to pay the flat-rate tourist tax that were using its services ('the first request for information').

19 On 31 March 2017, Airbnb Ireland expressed reservations as regards that request and proposed discussing it with the regional authorities. On 8 August 2017, the tax authority of the Central Brussels Region sent Airbnb Ireland a further, more detailed, request for information concerning nine tourist accommodation establishments located in the Brussels Capital Region ('the second request for information').

20 On 8 September 2017, Airbnb Ireland stated that it would not comply with that request, as a result of which, on 10 November 2017, the tax authority of the Brussels Capital Region imposed on it nine fines of EUR 10 000 each.

21 Between the first request for information and the second request for information, Airbnb Ireland brought an action on 10 July 2017 before the referring court, namely the Cour constitutionnelle (Constitutional Court, Belgium), for annulment of Article 12 of the order of 23 December 2016.

22 The referring court, after noting that it was apparent from the *travaux préparatoires* that the order of 23 December 2016 was intended, by introducing the flat-rate tourist tax, to ensure that the tourist sector would contribute to the financial burdens caused by tourism and to harmonise the taxation of tourist accommodation establishments in the Brussels Capital Region, was careful to state that intermediaries, including Airbnb Ireland, were neither liable to pay that tax nor required to levy it, Article 12 of that order making them subject instead to a duty to provide information on the written request of the tax authorities, failure to comply with that duty making them liable to an administrative fine of EUR 10 000.

23 Stating that, according to the Court's case-law, an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service, must be classified as an

'information society service' under Directive 2000/31 (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraph 69), the referring court, which takes the view that the intermediaries covered by the order of 23 December 2016 are primarily providers of such an intermediation service, questions the relevance, in the present case, of that directive, given that Article 1(5)(a) of that directive provides that it is not applicable to 'the field of taxation'.

24 The referring court is uncertain, in particular, as to the interpretation of those terms and the appropriate classification of Article 12 of the order of 23 December 2016 in that regard. That article forms part of tax legislation, but Airbnb Ireland nevertheless maintains that the exclusion laid down in Article 1(5)(a) of Directive 2000/31, which is to be interpreted strictly, is not applicable in the present case, with the result that Article 12 of that order falls within the scope of that directive. However, Article 12, by the duty to provide information which it imposes, does not satisfy the conditions, laid down in Article 3(4) of Directive 2000/31, under which Member States may adopt measures restricting the freedom to provide information society services.

25 In those circumstances, the Cour constitutionnelle (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(5)(a) of Directive [2000/31] be interpreted as meaning that national legislation under which the providers of an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation are required to provide, on a written request by the tax authorities and on pain of being fined, "the particulars of the operator and the details of the tourist accommodation establishments, and the number of overnight stays and of accommodation units operated during the year ended", with the aim of identifying persons liable for a regional tax on tourist accommodation establishments and their taxable income, falls within the "field of taxation" and must, therefore, be regarded as excluded from the scope of that directive?

(2) If the reply to the first question is in the affirmative, must Articles 1 to 3 of Directive [2006/123] be interpreted as meaning that that directive applies to national legislation such as that described in the first question referred? In the alternative, must Article 56 [TFEU] be interpreted as applying to such legislation?

(3) Must Article 15(2) of Directive [2000/31] be interpreted as applying to national legislation such as that described in the first question referred and as authorising such legislation?'

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Article 1(5)(a) of Directive 2000/31 must be interpreted as meaning that a provision of the tax legislation of a Member State requiring intermediaries, in respect of tourist accommodation establishments that are located in a region of that Member State and for which they act as intermediary or carry on a promotion strategy, to provide the tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, must be regarded as

being indissociable, as regards its nature, from the legislation of which it forms part and, accordingly, falls within the 'field of taxation' which is expressly excluded from the scope of that directive.

27 First, it must be borne in mind that Directive 2000/31 was adopted on the basis, inter alia, of Article 95 EC, the wording of which was reproduced in Article 114 TFEU, which excludes from its scope, in paragraph 2, 'fiscal provisions'. In the judgment of 29 April 2004, *Commission* v *Council* (C-338/01, EU:C:2004:253, paragraph 63), the Court stated that those words covered not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules. It also stated that the detailed arrangements for the collection of taxes of whatever kind could not be disassociated from the system of taxation or imposition of which they form part (judgment of 29 April 2004, *Commission* v *Council*, C-338/01, EU:C:2004:253, paragraph 66).

28 Secondly, that interpretation also follows from the position of those provisions within the Treaties. Article 114(2) TFEU forms part of Chapter 3, entitled 'Approximation of laws', which follows Chapter 2, entitled 'Tax provisions', within Title VII, concerning 'common rules on competition, taxation and approximation of laws' of the FEU Treaty. Consequently, anything relating to Chapter 3, namely the approximation of laws, does not, and cannot, relate to that which falls within Chapter 2, namely tax provisions.

29 Thirdly, the same reasoning prevails as regards secondary legislation adopted on the basis of Article 95 EC and then Article 114 TFEU. That is also apparent from the literal interpretation of the broad terms used in Article 1(5)(a) of Directive 2000/31, namely the 'field of taxation', which therefore call for a broad interpretation, as the Court has acknowledged, for example, with regard to the concept of 'field of transport', which is wider than that of 'transport services' (judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 41).

30 Fourthly, those considerations are borne out by a reading of recitals 12 and 13 of Directive 2000/31, which state that that directive excludes from its scope 'taxation' and that that directive 'does not aim to establish rules on fiscal obligations'.

31 In the present case, it is common ground that services such as those provided by Airbnb Ireland are information society services under Directive 2000/31, the Court having thus defined an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service (judgment of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112, paragraphs 49 and 69).

32 However, as the referring court has observed, the applicability of that directive to the dispute in the main proceedings is subject to the condition that Article 12 of the order of 23 December 2016 – which requires intermediaries, for tourist accommodation establishments that are located in the Brussels Capital Region and in respect of which they act as intermediary or carry on a promotion strategy, to provide the tax authority, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year – cannot be regarded as falling within the 'field of taxation', as, if it could be so regarded, Article 12 of the abovementioned order would be outside the scope of Directive 2000/31, in accordance with Article 1(5)(a) of that directive.

33 In that regard, it should be pointed out that, while it is true that Article 12 of the order of 23 December 2016 is addressed not in itself to the persons liable to pay the flat-rate tourist tax, but to persons who have acted as intermediaries in the operation of tourist accommodation in return for payment, and that its purpose is the provision of information to the authorities in the Brussels Capital Region, on pain of being fined, the fact remains that, in the first place, the authorities in receipt of that information are the tax authorities; in the second place, as the referring court itself observes, that article forms part of tax legislation, namely the order of 23 December 2016; and, in the third place, the information which that provision requires to be transmitted is indissociable, as regards its substance, from that legislation, since that information alone is capable of identifying the person actually liable for payment of the tax, the basis for assessment of the tax, namely the location of the home accommodation, the number of accommodation units and the number of overnight stays and, consequently, the amount of tax.

34 The answer to the first question is therefore that a provision of the tax legislation of a Member State requiring intermediaries, in respect of tourist accommodation establishments that are located in a region of that Member State and for which they act as intermediary or carry on a promotion strategy, to provide the regional tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, must be regarded as being indissociable, as regards its nature, from the legislation of which it forms part and, accordingly, falls within the 'field of taxation' which is expressly excluded from the scope of Directive 2000/31.

The second question

Admissibility

35 The Italian and Austrian Governments take the view that the second question is inadmissible in so far as the referring court has not provided the information required in Article 94(c) of the Rules of Procedure of the Court of Justice in support of the reliance on Articles 1 to 3 of Directive 2006/123 and on Article 56 TFEU and did not clarify which inferences it intended to draw for the resolution of the dispute in the main proceedings from the requested interpretation of those provisions. In their submission, the necessity of that question is therefore not apparent from the order for reference.

36 It should be noted that the second question is divided into two parts, the first part seeking to ascertain whether Articles 1 to 3 of Directive 2006/123 preclude national legislation such as that at issue in the main proceedings and the second concerning the compatibility of such legislation with Article 56 TFEU.

37 As regards the first part of the second question, it is true that the referring court has not provided any information in support of the reference to Articles 1 to 3 of Directive 2006/123, with the result that the Court has not been informed of the reasons which prompted that court to inquire about the interpretation of those provisions or the connection between them and Article 12 of the order of 23 December 2016, contrary to the requirements laid down in Article 94(c) of the Rules of Procedure (see, to that effect, order of 30 June 2020, *Airbnb Ireland and Airbnb Payments UK*, C-723/19, not published, EU:C:2020:509, paragraph 29). The first part of the second question referred for a preliminary ruling is therefore inadmissible.

38 As regards the second part of the second question, on the other hand, the request for a preliminary ruling refers to Article 56 TFEU several times in the referring court's summary of all the grounds relied on by Airbnb Ireland. Consequently, the Court is in a position to identify the precise connection established by that court, in the specific context of the main proceedings, between that provision and Article 12 of the order of 23 December 2016. The second part of the second question must therefore be held to be admissible and a reply must be given as to its substance.

Substance

39 By the second part of its second question, the referring court asks, in essence, whether or not legislation such as that at issue in the main proceedings, which imposes an obligation on providers of property intermediation services, irrespective of their place of establishment and the manner in which they mediate, in respect of tourist accommodation establishments that are located in a region of the Member State concerned and for which they act as intermediary or carry on a promotion strategy, to provide the regional tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, contravenes the prohibition laid down in Article 56 TFEU.

40 First of all, it should be noted that Article 12 of the order of 23 December 2016 lays down an obligation to comply with a request for information from the tax authorities for all intermediaries whose activity concerns tourist accommodation establishments located in the Brussels Capital Region, irrespective of where those intermediaries are established and, consequently, regardless of the Member State in which they are established, and irrespective also of the way in which those economic operators mediate, whether by digital means or in accordance with other methods of connection.

41 Such legislation is therefore not discriminatory and does not, as such, concern the conditions for the provision of intermediation services, but merely requires service providers, once that service has been provided, to retain the particulars for the purposes of the accurate levying of the tax relating to the rental of the property in question from the owners concerned.

42 In that regard, it is apparent from settled case-law that national legislation which is applicable to all operators exercising their activity on national territory, the purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned and any restrictive effects of which on the freedom to provide services are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom, does not contravene the prohibition laid down in Article 56 TFEU (judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, paragraph 25 and the case-law cited).

43 While accepting that it is not discriminatory in theory, Airbnb Ireland submits that, in practice, Article 12 of the order of 23 December 2016 specifically affects mediation services such as those which it provides.

44 It is true that the development of technological means and the current configuration of the market for the provision of property intermediation services lead to the finding that intermediaries providing their services by means of an online platform are likely, under legislation such as that at issue in the main proceedings, to be faced with an obligation to transmit data to the tax authorities which is more frequent and greater than that imposed on other intermediaries.

However, that greater obligation is merely a reflection of a larger number of transactions by those intermediaries and their respective market shares. Consequently, there is no resulting discrimination.

45 Next, it should be noted that, by their very nature, tax obligations entail additional burdens for service providers.

46 The Court has had occasion to point out that measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and the provision of services within one Member State, do not fall within the scope of Article 56 TFEU (see judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 32 and the case-law cited).

47 Lastly, even if the obligation imposed on all intermediaries to provide information to the tax authorities, at their request, concerning the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, may create additional costs, in particular in connection with the search for and storage of the data concerned, it should be noted, particularly in the case of intermediation services provided by digital means, that the data at issue are stored by intermediaries such as Airbnb Ireland, with the result that, in any event, the additional cost to those intermediaries that is created by that obligation appears to be limited.

48 It is sufficient, in that regard, to refer to the statements made by Airbnb Ireland in the case which gave rise to the judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112), according to which it stated that it offered as a service 'a system for rating hosts and guests which is available to future hosts and guests', which automatically entails the retention of the data relating to them.

49 The answer to the second part of the second question is therefore that legislation such as that at issue in the main proceedings, which imposes an obligation on providers of property intermediation services, irrespective of their place of establishment and the manner in which they mediate, in respect of tourist accommodation establishments that are located in a region of the Member State concerned and for which they act as intermediary or carry on a promotion strategy, to provide the regional tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, does not contravene the prohibition laid down in Article 56 TFEU.

The third question

50 The third question referred for a preliminary ruling concerns the interpretation of Article 15(2) of Directive 2000/31 and is based on the premiss that that directive is applicable to the dispute in the main proceedings. It follows from the answer given to the first question that that is not the case. There is therefore no need to answer the third question.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **A provision of the tax legislation of a Member State requiring intermediaries, in respect of tourist accommodation establishments that are located in a region of that Member State and for which they act as intermediary or carry on a promotion strategy, to provide the regional tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, must be regarded as being indissociable, as regards its nature, from the legislation of which it forms part and, accordingly, falls within the 'field of taxation' which is expressly excluded from the scope of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').**

2. **Legislation which imposes an obligation on providers of property intermediation services, irrespective of their place of establishment and the manner in which they mediate, in respect of tourist accommodation establishments that are located in a region of the Member State concerned and for which they act as intermediary or carry on a promotion strategy, to provide the regional tax authorities, on the latter's written request, with the particulars of the operator and the details of the tourist accommodation establishments, as well as the number of overnight stays and of accommodation units operated during the past year, does not contravene the prohibition laid down in Article 56 TFEU.**

[Signatures]