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TAXATION OF DIGITAL SERVICES IN THE CONTEXT OF FREEDOM TO PROVIDE SERVICES[1]

Abstract

The presented paper is dedicated to the taxation of digital services in the light of one of the basic freedoms of the European internal market, namely the freedom to provide services according to Art. 56 of the Treaty on the Functioning of the European Union. The taxation of digital services is currently characterized by the application of uncoordinated unilateral mechanisms by individual States, most often in the form of a digital services tax (DST). The author first provides a categorization of these unilateral mechanisms, especially in the field of direct and indirect taxes, and then considers the so-called "other unilateral mechanisms" consisting of inter alia special procedural legal institutes (e.g. the obligation of the digital platform as an intermediary to withhold tax). Subsequently, the author provides an overview of the interpretation of the provisions of Art. 56 of the Treaty on the Functioning of the European Union in three cases discussed by the Court of Justice of the European Union concerning unilateral mechanisms of taxation of digital services.

Key words: digital services tax, digital platform, unilateral mechanisms, freedom to provide services

JEL Classification: K34.

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1. Introduction

Taxation of digital services is a dynamic field in which there is a rich scientific debate and often contradictory views. At the same time, initiatives are being developed to adopt a **multilateral digital taxation solution** for as many countries as possible, whether EU Member States or under the OECD/G20 Inclusive Framework. In addition, the issue of taxation of digital services also has a budgetary dimension. The assessment of the current state of taxation of digital services is also significant in the context of the potential of introducing a new own resource of the EU budget based on a digital tax and the assessment of the limits of its introduction [Popovič, Benko 2022: 83 – 98]. However, the absence of a coordinated or harmonised system for the taxation of digital services so far has led to the fact that the current legal status of the taxation of digital services can be defined as consisting in the application of **unilateral measures** by individual States which are applied within the tax sovereignty of States and within their tax jurisdiction.

One of the features of *uncoordinated* and *unharmonized* unilateral mechanisms is their diversity. Different national approaches to the issue can make it significantly more difficult to adopt a unified solution based on a global consensus [OECD 2018: 1]. At the same time, inconsistent measures can make an already complex tax system even more complex on their own [European Commission 2021]. These unilateral mechanisms are criticized for the fragmentation of the internal market. There are opinions that the fragmentation of the internal market declared in the context of unilateral measures is just another name for the 'different taxes of individual Member States' to which individual Member States are entitled in the absence of harmonisation [Clifford Chance 2018: 9]. Other authors emphasize that the objected fragmentation of the internal market by unilateral measures would require identification and assessment of the impact of unilateral measures on the internal market at the specific level, and not just a general declaration of this risk [Haslehner 2019: 40].

Fragmentation of the internal market is just one aspect of the unilateral mechanism which are mostly perceived as negative. In addition, these unilateral digital taxes are also questioned as regards their discriminatory nature and focus on foreign technology companies, which is related to the setting of thresholds [Sábo 2020: 74]. On the other hand, the European Commission notes that digital businesses also have to pay their **fair share of taxes** [European Commission: 2018]. Tax justice is thus often referred to as the reason for introducing these digital taxes, although it can be considered whether this is the case in reality [Štrkolec, Hrabčák 2022: 162].

Regarding the assessment of unilateral digital taxes in the internal market, it can be observed that often these unilateral mechanisms are objected to in the sense that national legislation violates the **freedom to provide services guaranteed by Art. 56 of the Treaty on the Functioning of the European Union** *(hereinafter referred as "TFEU").* In this regard, the main aim of the submitted paper is to provide an analysis of the available decision-making of the Court of Justice of the European Union *(hereinafter referred as "CJEU")* regarding unilateral digital taxes and to point out the criteria taken into account in the judicial review of these unilateral mechanisms in the light of the prohibition set out in Art. 56 TFEU. That objective firstly requires clarification and some definition of the unilateral digital taxation mechanisms, in particular in the field of indirect and direct taxation. Subsequently attention is devoted to the basis of the freedom to provide services, as regulated in Art. 56 TFEU and defining the selected tax implications. Then in the fourth chapter, the paper provides an overview and analysis of selected CJEU decisions directly related to digital unilateral taxes and attempts to compare them.

2. Some thoughts on taxation of digital services by unilateral mechanisms

Despite the diversity of unilateral mechanisms, different classifications can be encountered for clarity. In particular, digital services taxes (DST), digital advertising taxes (DAT) and digital permanent establishment (digital PE) are distinguished. For the purposes of this paper, a distinction can be made between unilateral mechanisms in the field of indirect taxation and direct taxation. In the field of **indirect taxes**, tax policies aiming at taxing the gross revenues resulting from the provision of digital services. Tax policies relating to total gross revenues are seen as a temporary solution. These are digital turnover taxes that are criticised for a number of reasons. De lege lata, these taxes tend to be included in the group of turnover taxes, but opinions on the essence, concept and even legitimacy of these taxes are not uniform. It is declared that these unilateral digital taxes constitute extended and at the same time different types of tax regimes between the taxation of corporate profits resulting from the digital economy and the taxation of revenues through a special or excise tax, or the taxation of specific transactions in the digital economy outside the framework of corporate profits taxation [Irimia, Tamas-Szora, Dobra 2021: 103]. On the other hand, the need to distinguish these digital taxes from both online sales and value added taxes is emphasised [Vázquez 2023]. However, the **hybrid nature** of these unilateral digital taxes is most often emphasized, where they are referred to as a kind of **hybrid between taxes on gross revenues, taxes on specific transactions and corporate taxes**. One of the problems with

these unilateral digital taxes, defined de lege lata as turnover taxes, is that they do not fall within the scope of the double tax treaty system, with the result that they can and are likely to lead to double or even multiple taxation. The criticism of these de lege years of turnover taxes and the emphasis on their hybrid nature thus lies in the fact that through these taxes are ultimately taxed those profits that, in their different legal definition and while respecting established principles and the basic mechanism of taxation of profits, would not be subject to taxation at all [Irimia, Tamas-Szora, Dobra 2021: 103].

At the same time, we could also distinguish a solution in the field of **direct taxation**, where tax policies are aimed at capturing the so-called "**significant digital presence**" of a business in a certain jurisdiction, by defining new thresholds for a permanent establishment. Unlike digital services taxes (DST) and digital advertising taxes (DAT), a unilateral digital permanent establishment is characterised by the fact that if a digital permanent establishment is created, profits of such enterprise will be taxed under the direct taxation system. Thus, the tax base will be based on the company's profit after its adjustment within the limits of tax regulations. At the same time, it is undisputed that the permanent establishment, the conditions for its establishment and its possible modifications fall within the scope of double taxation treaties [Geringer 2021: 9]. However, the problem is that 'only' a nationally defined digital permanent establishment goes well beyond the permanent establishment frameworks defined in the concluded bilateral double taxation treaties. When assessing the feasibility of applying this concept of a unilateral mechanism in practice, it is essential to assess the interrelationship between bilateral tax treaties and national tax rules.

We have chosen the aforementioned categorization of unilateral mechanisms for direct and indirect taxation, among other reasons, because from the point of view of EU law, it is also related to the different **tax powers of the EU** in the area of harmonized indirect taxation and then in the area of direct taxes. Following up similarly from the point of view of the member states, it is important for the assessment of their **tax sovereignty**. It should be emphasized that even the CJEU consistently rules that, although direct taxes undoubtedly fall under the jurisdiction of the member states, these member states must nevertheless comply with EU law when exercising it, especially the fundamental freedoms guaranteed by the TFEU.

As mentioned above, the unilateral mechanisms are characterised, inter alia, by their **diversity**. In addition to the above defined types of unilateral mechanisms, i.e. digital turnover taxes and digital permanent establishments, the selected **'other' types of unilateral mechanisms** through which certain transactions in the digital economy are taxed cannot be forgotten. The group 'other unilateral mechanisms' includes a variety of tax law instruments

which cannot be attributed to either turnover taxes or direct tax solutions because they have certain specificities. These specifics can be found, for example, in

- unusual scope (e.g., online gambling),
- focusing only on specific business models (e.g., collaborative platforms),
- a specific qualification under national law (e.g., equalization levy), or
- may also consist of specific provisions of a rather procedural nature which, while not imposing a new tax liability, reflect innovative approaches to certain already taxable transactions.

These other unilateral mechanisms reported in the procedural area are aimed at involving digital platforms in the tax collection process, in particular as regards the collection of local tourist taxes on accommodation (Slovak Republic, Belgium), but exceptionally also as regards the collection of income tax in specific situations overlapping with the areas of operation of digital platforms (Italy).

3. Baselines of the freedom to provide services according to Art. 56 TFEU and its application in tax matters

The fundamental freedoms of the internal market must also be fulfilled in the tax area, and it is clear from primary law that the internal market does not automatically mean the *unification* of Member States' tax rules [Široký 2018: 86]. The exercise of the freedom to provide services presupposes the **cross-border** provision of services, which considers three modalities of this cross-border element. In the case of an active provision of a service, the service provider shall be moved to another Member State. On the other hand, in the case of the passive provision of a service, the recipient of the service is moved to another Member State. The third modality reports a situation where a service object is transferred, while neither the provider nor the recipient of the service is moved from the Member State of establishment [Široký 2018: 97].

Transactions in the digital economy are basically **cross-border** in most cases, and the issue of taxation of digital services is essentially linked to the rules of **cross-border taxation**. However, an exception may be, for example, the taxation of the income of final service providers within territory and jurisdiction of a certain state (it means drivers for the Uber and Bolt digital platforms and hosts for the Airbnb platform). However, when it comes to intermediation of these final services, it is provided by collaborative platforms established in a State other than the State of provision of the final service.

The essential requirements for exercising the freedom to provide services can be observed from the case-law of the CJEU. The Court has consistently pointed out that Art. 56 TFEU precludes the application of any national legislation which renders the provision of services **between Member States more difficult** than the provision of services within a single Member State [CJEU C-591/17: para 135] and at the same time national measures which **prohibit, impede** or **render less attractive** the exercise of the freedom to provide services are restrictions on that freedom [CJEU C-591/17: para 136]. Furthermore, the provision in question according to the Court of Justice requires the **removal of any restrictions** on the freedom to provide services based on the fact that the provider is established in a Member State other than that in which the service is provided [CJEU C-625/17: para 28].

At the same time, however, the case-law of the Court of Justice regarding Art. 56 TFEU consistently underlines that the prohibition laid down in this Article does not apply to measures:

- the sole effect of which is to cause **additional costs** for the service in question; and
- which **apply equally** to the provision of services between Member States and to the provision of services within a Member State [CJEU C-482/18: para 26].

In this context, it is necessary to consider the **nature of tax obligations**. The implementation of tax-legal relations brings property loss to the obligated entity. Similarly, obligations of a non-monetary nature lead to the fulfilment of one's own tax obligation. Therefore, tax science has established that the only form of tax-legal relations is the monetary form, and their core is the fulfilment of own tax liability consisting in the payment of tax. [Babčák 2022: 104]. By their nature, tax obligations thus cause **additional costs for service providers** (as regards the first condition for exemption from the prohibition set out in Art. 56 TFEU). The Advocate General stated in her Opinion in Case C-482/18: *'However, in the case of taxes and duties it must be borne in mind that they constitute a **burden per se** and thus always reduce the attractiveness of a service. An examination of taxes based on non-discriminatory restrictions would therefore make all national chargeable events subject to EU law and thus seriously call into question the sovereignty of the Member States in tax matters. This would run counter to settled case-law according to which the Member States are free, in the absence of harmonisation in the Union, to exercise their powers of taxation in that area.'* [Advocate General Juliane Kokott C-482/18: para 36].

4. Decision-making by the Court of Justice of the EU regarding digital taxation (rather, its selected aspects) and freedom to provide services

At EU level, the CJEU's rullings slowly contribute to the so called **negative harmonisation**[2] of selected partial aspects of the taxation of digital services by unilateral mechanisms, in particular as regards the application of the prohibition of restrictions on the freedom to provide services according to Art. 56 TFEU. In the field of taxation of digital services, these rullings of CJEU are decision after decision to be established on the basis of request for a preliminary ruling by national authorities and a certain constant direction can also be observed. In this preliminary ruling proceedings, the Court assessed whether certain aspects of national legislation on digital taxation should be interpreted as infringing EU law, in particular the freedom to provide services. However, the CJEU's rullings available so far does not concern directly the taxation of digital services as such, i.e. it does not concern itself with the possibility of imposing national digital taxes by the States. Whether in the light of the requirement for genuine link or a tax nexus.[3] In that regard, Mason, R. and Parada, L. submit that the decisions of the CJEU in *Vodafone* (that is Judgment of the Court (Grand Chamber) of 03 March 2020 in Case C-75/18) and *Tesco* (that is Judgment of the Court (Grand Chamber) of 03 March 2020 in Case C-323/18), where the CJEU dealt with **progressive taxation of turnover**, imply for digital services taxes (DST) that the CJEU will not be receptive to challenge those taxes [Mason, Parada 2020: 30]. There are three cases heard before the CJEU that can be mentioned in particular, namely:

- Case C-482/18 concerning the Hungarian Internet advertising tax *(which can be included in the category of digital turnover taxes);*
- Case C-674/20 concerning the regional tax on tourist accommodation establishments in Brussels Capital Region, Belgium *(which can be included in the category of 'other' types of unilateral mechanisms)* and
- Case C-83/21 concerning Italian legislation on the taxation of short-term rental income *(which represents a special unilateral mechanism related to direct taxation, but*

[2] However, particularly in the field of taxation, negative harmonisation is preferable to be considered rather in the field of direct taxation. The relevance of the case-law of the CJEU in the field of positively harmonised indirect taxes is, of course, undeniable but consists in particular in providing an interpretation of provisions of EU law. [For more details see: Štrkolec et al. 2011: 135].

[3] The requirement of a genuine link has been interpreted In the context of EU law by the Advocate General in a preliminary ruling heard before the CJEU in Case C-482/18, and it is particularly useful to assess the specific criterion of a previously defined requirement of a genuine link, namely in the context of digitalisation or services provided via the internet. [See: Advocate General Juliane Kokott C-482/18].

from the point of view of its nature it can also be included in the group of "other" unilateral mechanisms).

4.1. Hungarian Internet Advertising Tax in Case C-482/18

In Case C-482/18, the Court assessed certain procedural aspects of the Hungarian internet advertising tax, namely the **obligation to register for tax purposes** and the associated **tax fines**. As indicated above, the Court has not dealt with and has not interpreted at all on the actual taxation of online advertising by this special tax, as applicable in Hungary. On the contrary, the Court stated directly at the beginning of its assessment that the national reffering court itself asks only for a possible restriction on the freedom to provide services pursuant to Art. 56 TFEU which does not consist in the taxation of providers of advertising services such as, but which consists in the registration obligation imposed on those providers and, consequently, in the related mechanism of tax fines [CJEU C-482/18: para 24].

With regard to the circumstances of the case, from a procedural point of view, the Hungarian Law No XXII of 2014 on the Taxation of Advertisements *(hereinafter referred as „Hungarion Law on the taxation of advertisements")* imposed on advertising publishers as taxpayers who are not registered for the purposes of any tax at the Hungarian State Tax Office a **obligation to register**, which they are obliged to comply with on the prescribed form within 15 days from the of commencing an activity that is subject to the tax . In the event of failure to comply with the obligation to register or at the request of the tax office, the law regulates the imposition of a total **series of fines**, while the tax office decides on the failure to comply with the taxpayer's obligation **for each day** of the infringement. The first fine for non-compliance with the registration obligation is set at HUF 10 million, each additional fine being imposed in the amount of three times the fine previously imposed. A fine of up to HUF 1 billion may be imposed on the same taxpayer for failure to comply with the registration obligation. Compared to this specific regulation of the Hungarian Internet Advertising Tax, Hungarian Law No XCII of 2003 on General Tax Procedures, as a general rule, provides that the resident automatically fulfils the registration obligation for tax purposes by submitting the application for registration to the competent court that keeps the business register together with the application for the tax identification number. A fine of half a million or one million HUF may be imposed on a resident taxpayer for failure to comply with this general registration obligation [See: CJEU C-482/18: para 3 – 10].

Obligation to register

Firstly, the obligation to register was assessed by the Court in such a way that, it **does not** create an **additional administrative burden** on advertising service providers different from that on residents. Although Hungarian tax residents are exempt from this specific registration obligation, the exemption would also apply to providers of advertising services if they were already registered for the purposes of any other tax levied in Hungary [CJEU C-482/18: para 33]. The Court has assessed this registration obligation as an administrative formality, in so far as its fulfilment does not entail more difficult steps compared to the registration of other taxpayers. In the case of the registration obligation, a breach of the freedom to provide services has not been identified by the Court.

Tax fines and proportionality

However, a different situation arises in the case of tax fines associated with the breach of this registration obligation. The Court points out that the system of penalties under the Hungarian Law on Advertising Tax applies, *formally*, equally to all taxpayers who fail to comply with the registration obligation in question, irrespective of their Member State of establishment. However, in order to assess the specific case, the Court emphasised, rather than defining it formally, that the sanction regime under the Hungarian Law on Advertising Tax provides for penalties which are *considerably stricter* than those under the Law on Tax Code [CJEU C-482/18: para 43] and that only non-established taxpayers in Hungary bear the *real risk* of imposing such penalties [CJEU C-482/18: para 41].

Those aspects indicate a **difference in treatment** between taxpayers who are and are not registered for tax purposes in Hungary, which, according to the Court, constitutes a restriction on the freedom to provide services prohibited within the meaning of Art. 56 TFEU and therefore infringes that article [CJEU C-482/18: para 44].

As indicated above, the prohibition set out in Art. 56 TFEU is not absolute and such a restriction may nevertheless be warranted. Such a restriction on that freedom must, however, in any event respect both judicaly defined and doctrinally respected requirements according to which that restriction must be:

- justified by overriding reasons of public interest,
- suitable to ensure the achievement of the objective pursued and
- proportionate, i.e. it must not go beyond what is necessary in order to attain it [CJEU C-482/18: para 45].

In general, the imposition of fines of an amount sufficient to ensure the repressive function of sanctions, i.e. to deterring obliged entities from breaching a given obligation, is respected. As regards the attribute of proportionality of the sanctioning system introduced by the Hungarian Law on Advertising Tax, the Court found that system to be **disproportionate**, for a number of reasons. The system of penalties under the Hungarian Advertising Tax Act allows the accumulation of several fines over several days without giving the infringer the opportunity to submit comments and assess the infringement itself. At the same time, there is no link between the seriousness of the breach of the registration obligation and the exponential increase in the penalty within particularly short deadlines and a taxpayer established in another Member State does not have, although it would have acted with due diligence, the possibility of avoiding this increase in the penalty, whereby the law directly imposes these fines on the competent authority day after day [CJEU C-482/18: para 49 – 51].

4.2. Obligation of intermediaries (including digital platforms) to provide information to the tax authorities in Case C-674/20

The preliminary ruling in Case C-674/20 concerned a **regional tax on tourist accommodation establishments** in Brussels Capital Region, Belgium. The Court assessed the Belgian law, namely the Order of the Brussels Capital Region of 23 December 2016 on the regional tax on tourist accommodation establishments, which introduced the obligation of intermediaries to provide certain information to tax authorities with the aim of identifying persons liable for that tax. Under this regulation, an **intermediary** is understood to mean: 'any natural or legal person who, 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' [CJEU C-674/20: para 14]. Subsequently, the intermediaries' obligation to provide certain information consisted in the fact that, 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 [CJEU C-674/20: para 17].

In that judgment, the Court emphasised, first of all, that even procedural provisions and the obligations imposed by them in order to identify the taxable person and to determine the

amount of tax are, by their very nature, inseparable from the legislation of which they form part. These provisions also fall within the 'field of taxation', which is explicitly excluded from the scope of the Directive 2000/31. [CJEU C-674/20: para 34].

Subsequently, the legislation in question was assessed in the context of the prohibition to restrict the freedom to provide services pursuant to Art. 56 TFEU. In assessing the obligation to provide certain information in a specific case, it was decisive and the Court emphasised that the legislation imposes that obligation on intermediaries:

- irrespective of where those intermediaries are established, i.e. regardless of the Member State of its establishment and at the same time
- irrespective also of the way in which those economic operators mediate, whether digitally or by other methods of connection [CJEU C-674/20: para 40].

The mentioned criteria were not taken into account only in this matter, but also follows from the settled case-law of the Court of Justice that legislation which is applicable **to all operators**[4] carrying out their activities on national territory, which does not regulate the conditions concerning the provision of services and the restrictive effects which it might have on the freedom to provide services are too uncertain and too indirect to be regarded as capable of restricting that freedom, does not preclude the prohibition laid down in Article 56 TFEU [CJEU C-674/20: para 42].

Despite the foregoing, Airbnb's digital platform in the proceedings objected to the possible **discriminatory effect** of the legislation at issue in the sense that, in practice, that legislation only affects the intermediary services of digital platforms more specifically. Therefore, according to Airbnb, this legislation is non-discriminatory only in theory. Although the objection in question was not rebutted by the Court, it also pointed to

- the **development of technological means** and
- the **current configuration of the market** for the provision of property intermediation services and

[4] In this respect, however, it is possible to compare the Slovak legal regulation of the so-called tourist tax, namely Act no. 582/2004 Coll. On Local Taxes and Local Fee for Municipal Waste and Small Construction Waste. Slovak Law No. 582/2004 Coll. With the effect from 11th December 2022 stipulated the Institute of the tax payer representative for accommodation tax, which is a a natural person or legal entity that mediates temporary accommodation between a tax payer and a taxable person for renumeration through the operation of a digital platform with an offer of facilities in the territory of the municipality providing paid temporary accommodation, i.e. the operator of the digital platform and not another intermediary. It is possible to consider whether this legal regulation would not be problematic as it selects digital platform operators from other intermediary service providers using other means of communication. See also 9Simić 2022: 22-31].

stated 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” [CJEU C-674/20: para 44]. In concluding the reasoning of the decision, the Court also considered the fact that, precisely in the case of intermediary services provided digitally, the potential additional costs associated with complying with the obligation to provide such information appear to be small, since the data concerned are stored mechanically [CJEU C-674/20: para 47]. In the event of such a obligation, conflict with Art. 56 TFEU was also not identified.

4.3. Obligation to appoint a tax representative under the Italian legislation in Case C-83/21

From the point of view of direct taxation, reference can be made to the Case C-83/21 concerning Italian legislation on the taxation of short-term rental income. In the present case, since it concerns the field of direct taxation, the Court first emphasised that the Member States are also obliged to comply with Art. 56 TFEU even in the context of the adoption of the legislation such as and are required to exercise their tax powers in non-harmonised areas in accordance with EU law [CJEU C-83/21: para 41]. The Italian legislation with effect from 01 June 2017, entitled ax regime for short-term rentals, introduced taxation of short-term rental income and distinguished and applied to three entities involved in the short-term rental transaction, namely (i) landlords (property owners), (ii) intermediaries and also (iii) entities operating online portals, i.e. digital platforms. At the same time, this law differentiates three types of obligations, namely:

- the first obligation - to collect and communicate data concerning concluded contracts to the tax authorities,
- the second obligation - to withhold the tax due from the sums paid by the lessees to the lessors and to pay that tax to the Treasury *(following their involvement in the payment, when the digital platforms receive the payment from the lessee and remit it to the lessor, unless the lessee objects)*, as a withholding tax at the preferential rate of 21% or as a payment on account of a tax consequently fixed at a higher rate, and
- third obligation - **to appoint a tax representative in Italy** unless they have a permanent establishment [CJEU C-83/21: para 33].

Similarly, as in the previous cases, the Court referred to settled case-law, which emphasizes that the prohibition laid down in Art. 56 The TFEU does not preclude national legislation which, inter alia, covers all types of economic operators operating in the national territory

and does not select those operators based on their place of establishment and whether they act digitally or by other means [CJEU C-83/21: para 43 and 45].

As regards the third obligation to appoint a tax representative, in that regard, the Court took account of the fact that that obligation formally concerns intermediaries which do not have a permanent establishment in Italy. In addition, the occurrence of this obligation also depends on whether the intermediary collects or does not collect rent or consideration from the lessee, i.e. **whether it provides such a service**, where it is also obliged to withhold a tax. In the light of the circumstances, the imposition of the obligation to appoint a tax representative and, at the same time, to bear the associated costs in practice, according to the Court, discourages those entities from carrying out intermediary services, at least in a way that corresponds to their wishes [CJEU C-83/21: para 59].

Since the restriction of freedom prohibited by Art. 56 TFEU, it is necessary to examine further whether such a national measure is justified by overriding reasons in the public interest. According to Italy, such reasons consisted in combating tax evasion in the short-term rental sector, which was also recognised by the Court of Justice itself. Moreover, and consequently, the measure in question must also be **proportionate** and must not go beyond what is necessary to achieve that objective, namely the fight against tax evasion. In that regard, the following factors were decisive for assessing the proportionality of that obligation imposed, according to the Court.

The obligation to appoint a tax representative in a particular case is imposed on persons who are not directly taxpayers but are (only) "entities responsible for paying tax" and participate in the fulfilment of the tax obligation that arises to the lessor as the owner of the property. These entities participate in the fulfilment of the tax obligation by virtue of their position as "entities responsible for paying tax" under the tax withholding obligation. This obligation is imposed on all entities that do not have a permanent establishment on the territory of Italy and do not distinguish, for example, the amount of tax revenue that these entities pay or are likely to pay to the Treasury in order to combat tax evasion. The fight against tax evasion is already being pursued by the first reporting obligation imposed and also by the second tax withholding obligation imposed. In that context, the Court emphasised that the proportionality of that obligation would mean that there are no other appropriate measures to ensure the fight against tax evasion which would interfere with the freedom to provide services to a lesser extent. According to the Court, the imposition of that obligation cannot be regarded as proportionate even in the light of the large number of transactions and immovable property which may be the subject of mediation, which, on the other hand, may make the role of the competent tax authorities more difficult. In addition, the Court found it

disproportionate in the circumstances that the possibility of a tax representative of residing or being established in a Member State other than Italy was not admissible either. Ultimately, according to the Court, such administrative difficulties do not justify obstacles to fundamental freedoms [CJEU C83/21: para 71-76.]

Taking into account the circumstances of the case, the Court, in contrast to previous rulings, in which it assessed the imposition of the obligation to appoint a tax representative directly to the taxpayer [CJEU C-83/21 para 71], identified in particular case C-83/21 a breach of the prohibition to restrict the freedom to provide services pursuant to Art. 56 TFEU [CJEU C-83/21: para 77].

5. Conclusion

The present paper dealt with the assessment of unilateral mechanisms of taxation of digital services in the context of the freedom to provide services pursuant to Art. 56 TFEU by analysing selected CJEU decisions. Attention has been focused on the unilateral mechanism, inter alia, because efforts to harmonise the taxation of digital services at EU level lie in the directives proposals as recently as 2018 introduced within the so-called European Digital Tax Package. This package includes proposals for directives in the field of both direct and indirect taxes. However, neither of these directive proposals has achieved the required unanimity for Member States to adopt them. However, the taxation of digital services would not be the first time that EU harmonisation efforts *(in particular in the field of direct taxation)* were not successfully received.

Despite the lack of harmonisation, the situation about unilateral digital taxation mechanisms is also specific in that these *de jure* mechanisms constitute unilateral measures implemented by states individually, where there is no coordinated action in this area and at the same time these mechanisms *de facto* follow on from the transnational initiatives developed so far. Their common feature is that unilateral mechanisms are more or less a manifestation of tax sovereignty of states in up to now non-harmonised areas. Also these unilateral mechanisms are aimed at protecting the tax base in the market jurisdiction in which the digital services are provided and in which their users are located.

In addition to the decisions described in the paper, other decisions of the CJEU its conclusions in the field of both indirect and direct taxation are of course relevant for digital taxation as well. Relevant decision-making activities in the field of indirect taxation can be identified, for example, with regard to the taxation of turnover by progressive tax rates. Of

particular importance will also be the rulings of the CJEU on the selected context of double (non)taxation in the internal market and bilateral tax treaties, as well as other decisions aimed at the realisation of the fundamental freedoms of the internal market. Elements of negative harmonisation can also be identified in this field, in relation to selected partial aspects of digital taxation. At the same time, the CJEU also emphasized a specific requirement regarding the (non)distinction of means of communication, whether digital or other methods of communication are used. In general terms, it can be stated that the decision-making of the CJEU in the field of tax relations are characterised, inter alia, by balancing and determining the boundaries between the general interests of the Member States in the field of taxation on the one hand, and the fundamental freedoms applied in EU law, on the other.

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