

Third civil chamber : short-term rentals (« Airbnb » type) and prior authorization

18/02/2021



Compliance to the « Services Directive » of the system subjecting the short-term rentals (« Airbnb » type) to a prior authorization.

Ruling no 195 of 18 February 2021 (17-26.156) - Cour de cassation (Court of Cassation) - Third Civil Chamber -
ECLI:FR:CCAS:2021:C300195

Dismissal

Only the french version is authentic

Summary

Renting furnished housing, on more than one occasion in the course of a single year for a term of less than one year, such as renting for overnight stays, for a week, or for a month, to clients who are travelling and who do not establish the rented space as their principal residence within the meaning of Article 2 of the Act of 6 July 1989 constitutes a change in the use of a space used for housing and, consequently, is subject to prior authorisation. This does not include the following : rentals offered to students for a duration of less than nine months ; offering, after the entry into force of the Act of 23 November 2018 of a mobility lease of a duration from one to ten months ; renting space used for housing that consists of the main place of residence of the renter for a maximum term of four months.

Appellant(s) : Cali Apartments, property investment company (société civile immobilière)

Respondent(s) : the chief public prosecutor at the cour d'appel (Court of Appeal) of Paris and the City of Paris, represented by its current mayor

Facts and procedure

1. According to the ruling under appeal (Paris, 19 May 2017), the public prosecutor at the Tribunal de grande instance (Paris district court) filed a motion for a summary procedure based on Article L. 631-7, paragraph 6 of the Construction and Housing Code, against the Cali Apartments property investment company (société civile immobilière), owner of an apartment located in Paris, in order to see it ordered to pay a fine and to see the property return to its use as a residential property. The mayor of the City of Paris participated voluntarily in the proceedings.
2. In a ruling on 15 November 2018 (Third Civil Chamber, appeal no. 17-26.156, published), the Cour de cassation (Court of Cassation) referred a question for a preliminary ruling to the Court of Justice of the European Union dealing with the applicability of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, on services in the internal market, for recurrent rental, even on a non-professional basis, of a furnished space used for lodging that is not used as a main place of residence of the renter to clients who are travelling that are not setting up residence in said space and, if so, on the applicability of national regulations such as provided for in Article L. 631-7 of the Construction and Housing Code, Articles 9 and 13 of the Directive and, if applicable, on the interpretation of Articles 9, paragraph 1, subsections b) and c) and 10, paragraph 2, subsections d) to g), of the Directive under Articles L. 631-7 and L. 631-7-1 of the Construction and Housing Code.

Reviewing pleas

On the second plea, appended hereafter

3. In application of Article 1014, paragraph 2 of the Civil Procedure Code, it is not necessary to have a specially reasoned decision on this plea which is clearly not of such a nature as to entail quashing.

On the first plea

Statement of plea

4. Cali Apartments objects to the ruling for applying Articles L. 631-7, paragraph 6, and L. 651-2, paragraph 1 of the Construction and Housing Code, whereas :

"1°/ by applying Articles L. 631-7, paragraph 6, and L. 651-2, paragraph 1 of the Construction and Housing Code that subject the rental of a furnished space to obtaining an administrative authorisation, without establishing, as required by Article 9, paragraph 1, subsection b) of Directive 2006/123/EC of 12 December 2006, that this restriction of the freedom to offer services is justified by a compelling reason of general interest, the cour d'appel (Court of Appeal) infringed the principle of primacy of European Union law ;

"2°/ by applying Articles L. 631-7, paragraph 6, and L. 651-2, paragraph 1 of the Construction and Housing Code, without establishing, as required by Article 9, paragraph 1, subsection c) of Directive 2006/123/EC of 12 December 2006, if the objective pursued by these provisions could be realised by a less restrictive measure, the cour d'appel (Court of Appeal) infringed the principle of primacy of European Union law ;

3°/ by applying the aforementioned provisions when, relating to a "furnished space used for repeated use as lodging for short periods for travelling clients that do not establish their residence in that space", their implementation does not depend on criteria that, as is required by Article 10 of Directive 2006/123/EC of 12 December 2006, provides a framework giving competent authorities the power to evaluate them in order that they not be used arbitrarily, the court infringed this text, and infringed the principle of the primacy of European Union law ;

4°/ by applying the aforementioned provisions, when it results from Article L. 631-7-1 that the conditions under which the necessary authorisations are delivered are "determined by deliberation of a municipal council", concerning "social diversity objectives" and including depending on "characteristics of the housing market" and on "the need to not further worsen the shortage of housing", the cour d'appel (Court of Appeal) infringed the requirements of Article 10 of Directive 2006/123/EC of 12 December 2006 and infringed the principle of the primacy of European Union law."

Court's response

5. In a ruling on 22 September 2020 (Cali Apartments SCI and HX versus the chief public prosecutor at the cour d'appel (Court of Appeal) of Paris and the City of Paris, C-724/18 and C-727/18), the Court of Justice of the European Union ruled that :

1°/ Articles 1 and 2 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, on services in the internal market, must be interpreted within the meaning that the directive applies to a regulation of a Member State relating to rental activities in return for remuneration of furnished properties intended for housing to travelling clients that are not establishing residence in said property, with these activities occurring regularly and for short durations, both professionally and non-professionally.

2°/ Article 4 of Directive 2006/123 must be interpreted within the meaning that a national regulation that requires that certain rental activities of properties intended as residential housing be subject to prior authorisation relates to the concept of the "authorisation scheme", within the meaning of point 6 of this article.

3°/ Article 9, paragraph 1, subsections b) and c), of Directive 2006/123 must be interpreted within the meaning of a national regulation that, in order to guarantee a sufficient supply of housing intended for long-term rental at affordable prices, subjects certain rental activities of furnished properties intended for housing to travelling clients that are not establishing residence in said property in return for remuneration, occurring regularly and for short durations, to an authorisation scheme beforehand that is applicable in certain municipalities where rental values are particularly high. This authorisation scheme is justified by a compelling reason of general interest linked to the fight against a shortage of rental housing and proportionate to the pursued objective, in that this cannot be carried out by a measure that is less restrictive, as an a posteriori inspection would take place too late to be genuinely effective.

4°/ Article 10, paragraph 2, of Directive 2006/123 must be interpreted within the meaning of it not opposing a national regulation instituting a scheme that subjects the exercise of certain rental activities of furnished spaces intended for long-term residence in exchange for remuneration. This is established on criteria that are based on renting the space in a manner that is "repetitive and for a short duration to travelling clients who do not establish their residence in the space" and which grants local authorities the power to specify, within the framework established by this regulation, the conditions for granting authorisations that are established by this scheme concerning the social diversity objectives and depending on the characteristics of the local housing markets and the need to not worsen the shortage of housing. It does so by linking them to the need for an obligation of remuneration in the form of an ancillary and concomitant transformation of spaces having other uses into housing, as long as the conditions for granting the authorisation comply with the requirements set out by this provision, and that this obligation can be met under conditions that are transparent and affordable.

6. Firstly, it follows that Article L. 631-7, paragraph 6 of the Construction and Housing Code, which subjects the activity, in certain municipalities, of renting a furnished space intended for long-term housing in a manner that is repetitive for short durations for travelling clients that do not establish residence in the space, to prior authorisation, is justified by a compelling reason of general interest related to the fight against the shortage of rental housing and proportionate to the pursued objective in that this cannot be carried out by a measure that is less restrictive, as an a posteriori inspection would take place too late in the process to be genuinely effective. It therefore meets the requirements of Article 9, paragraph 1, subsections b) and c), of Directive 2006/123.

7. Secondly, Article L. 631-7 of the Construction and Housing Code, in its formulation resulting from the Act of 24 March 2014 applicable to the dispute, defines, in its paragraph 2, the spaces intended for housing as "all categories of housing and similar spaces, including transitional housing, housing for concierges, housing for household employees, housing for civil servants, housing integrated into a commercial lease, furnished spaces offered for rental under the conditions of Article L. 632-1."

8. Article L. 632-1 of the same code refers to Title 1 bis of the Act of 6 July 1989, on "relationships between owners and renters in furnished primary residence housing". Article 25-7 of this act provides for rental of furnished lodging, when it is the principal residence of the renter, is offered for a minimum term of one year, except for students, for whom this term is reduced to nine months.

9. It results that the fact of renting furnished housing, on more than one occasion in the course of a single year for a term of less than one year, such as renting for overnight stays, for a week, or for a month, to clients who are travelling and who do not establish it as their principal residence within the meaning of Article 2 of the Act of 6 July 1989 constitutes a change in the use of a space used for housing and, consequently, is subject to prior authorisation. This does not include the following : rentals offered to students for a duration of less than nine months ; offering, after the entry into force of the Act of 23 November 2018 of a mobility lease of a duration from one to ten months ; renting space used for housing that consists of the main place of residence of the renter for a maximum term of four months.

10. It results that Article L. 631-7, paragraph 6, of the Construction and Housing Code meets the requirements of clarity, objectivity, and non-ambiguity of Article 10, paragraph 2, subsections d) and e) of Directive 2006/123.

11. Lastly, in terms of compliance with the requirements provided for in Article 10 of the directive of the criteria that the legislator indicated to structure the conditions for granting authorisations, it should be noted that Article L. 631-7-1 of the Construction and Housing Code gives the mayor of the municipality where the building is located the power to grant prior authorisation for changing property use. It also gives the municipal council the duty of setting the conditions under which the authorisations are granted and compensation is determined. This depends on the housing market and the need to not worsen the housing shortage, and so therefore obliges the local authorities to determine the conditions for obtaining authorisations, taking into consideration the objective of general interest related to the fight against a shortage of housing. It follows that the criteria set by Article L. 631-7-1, paragraph 1, to structure the exercise of the power of evaluation of competent authorities are, in themselves, justified by a reason of general interest within the meaning of Article 10, paragraph 2, subsection b) of the directive.

12. With regard to the requirement of the proportionality of the conditions for granting authorisation for a change in use to the pursued objective, provided for by Article 10, paragraph 2, subsection c) of the directive, it should be noted that :

1°/ in that it attributes the power for setting the conditions for granting authorisations to local authorities, and if applicable, the power to choose to impose a compensatory obligation, the regulation of Article L. 631-7-1 guarantees the appropriateness of the authorisation scheme in specific circumstances for each of the municipalities concerned, about which the local authorities have specific knowledge ;

2°/ the local regulations of the City of Paris, in that they provide for a compensatory obligation, do not go beyond what is necessary to achieve the pursued objective. It follows from the evidence provided that this obligation effectively responds to a shortage of housing. The supply of permanent housing at affordable economic conditions, for the entire territory of this municipality, is not adequate to meet demand, and the development of furnished spaces intended as housing for travelling clients not establishing their residence in said spaces, causes prejudice to the supply of rental housing for use as primary residences, bringing about a weakening of the traditional rental market and obliging residents to search farther away in order to find housing ;

3°/ the compensatory obligation provided for in the regulations of the City of Paris, in its municipal regulations adopted in December 2008, amended on the 17, 18, and 19 November 2014, as was the case for the regulations adopted in December 2018, is proportionate to the pursued objective. The amount of this obligation, which is related to spaces with equivalent surface areas, except in sectors that have "reinforced compensatory obligations" where the spaces offered in compensation must represent twice the surface area of the surface requested for a change of use, sectors which correspond to zones where the City of Paris has a priority objective of protecting housing, seems adapted to the sparse rental market in the municipality as a whole, and the objective of developing supply of housing in certain zones where housing is more specifically protected, to favour social diversity. In the "reinforced compensatory obligation" sector, the amount of the compensatory obligation is related to spaces with equivalent surface areas if the spaces are converted into social housing rental units. This approach is compatible with maintaining a rental activity of furnished spaces for travelling clients that do not set up residence in said spaces, when, even in reinforced compensatory obligation sectors, it does not impede the exercise of this activity in relation to the increased profitability of this type of rental in comparison with residential leases and the possibility of meeting the compensatory obligation, not only by converting other spaces, held by the person concerned and used for other purposes, into residences, but also by other mechanisms, such as the purchase of "commercial-type" (commercialité in French) rights, from owners seeking to convert properties with another type of use into residences, and as such contributing to the maintenance of a stable level of long-term housing supply.

13. The criteria provided for by Article L. 631-7-1, as implemented by the City of Paris, therefore comply with the principle of proportionality of Article 10, paragraph 2, subsection c) of the directive.

14. With regard to compliance with the conditions of clarity, non-ambiguity and objectivity provided for by Article 10, paragraph 2, subsections d) and e) of the directive, Article L. 631-7-1, while it does not itself determine the conditions for granting authorisations, but gives that power to local authorities, structures the methods used by these authorities to determine the conditions for granting the authorisations provided for by setting the pursued objectives and by imposing criteria by which the conditions for granting authorisation are determined. It is therefore sufficiently clear and precise to avoid the risk of arbitrariness on the part of local authorities in the determination of the conditions for granting authorisations.

15. Lastly, with regard to prior public notice, transparency, and accessibility of the conditions for granting authorisations, provided for in Article 10, paragraph 2, subsections f) and g) of the directive, Article L. 631-7-1 of the Construction and Housing Code, in that it refers the determination of conditions for granting authorisation for changes of use and the eventual amount of compensation to the municipal councils, does not violate these requirements once, pursuant to Article L. 2121-25 of the General Code of Territorial Collectivities, the minutes of the meetings of the municipal council are posted in the city hall and published online on the web page of the municipality concerned, which allows any person seeking such an authorisation to be informed on the conditions for obtaining said authorisation.

16. It follows that Articles L. 631-7, paragraph 6, and L. 631-7-1 of the Construction and Housing Code comply with Directive 2006/123 of 12 December 2006.

17. Having noted that it followed from the evidence presented that the property of Cali Apartments offered short-term rentals, on occasion, for travellers, without having requested authorisation for a change of use, the cour d'appel (Court of Appeal) correctly ruled, without violating the principle of the primacy of European Union law, that this party infringed the provisions of Article L. 631-7 of the Construction and Housing Code, and incurred the fine provided for in Article L. 651-2 of the same code.

18. The plea is therefore unfounded.

ON THESE GROUNDS, the Court :

DISMISSES the appeal ;

President : Mr Chauvin

Reporting Judge : Mrs Collomp, Judge Referee

Avocate-General : Mrs Vassallo, First Advocate-General

Lawyer(s) : SCP Spinosi et Sureau – SCP Foussard et Froger

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