

tenants in financial distress. On the grounds, the judge puts the severity of the breach in perspective analogously to article 7:244 Dutch CC: she sublet a room without having left the home herself. As a mesne tenant, responsible for safeguarding the landlords' interests in the proper use of the home, she was there during the subtenancy to fulfil that duty of care. The landlords claim was denied.<sup>33</sup>

### 3. Social tenancy

The fewer cases of subsidised housing show the same *rationes decidendi*, even though the public disapproval – less of an issue in the private sector – is big in cities as Amsterdam, where subsidised housing is scarce.

In a case pending in 2016, the social housing corporation filed for eviction of a tenant for 42 breaches of the subtenancy prohibition. The judge denied because the tenant, first of all, only subletted a room. Secondly, she was a good tenant for 21 years prior to that. Thirdly, at that time, it was impossible to 'anticipate on the use of Airbnb, because that did not exist at the time of the conclusion of the tenancy contract'. Lastly, the public law justification for eviction, found in depriving the housing market from scarce social housing, was denied too: tenants on a waiting list for social

housing were not disadvantaged, because the tenant never left her home.<sup>34</sup>

### III. Conclusion

The growing number of conflicts in apartment buildings has led to a revised article 27 of the 'model division arrangement' in 2017, which is an adaptable basis for notaries establishing apartment rights. This will hopefully lead to more clarity in the future.

In both the private and social housing sector, the distinction in articles 7:221 and 244 Dutch CC is used to nuance the severity of the breach that should justify termination and eviction. More recent cases show that 'unaware' tenants will not be excused in the future, since the public debate on liveability has become widespread in the media and entered the Dutch courts. ■

33 See M. van Kogelenberg, 'Onderverhuren via Airbnb? Een riskante bijverdienste voor de onderverhuurder', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2016/4, p. 153.

34 Court of Appeal The Hague 9 May 2017, ECLI:NL:GHDHA:2017:1361 and Court of First Instance Rotterdam 6 November 2015, ECLI:NL:RBROT:2015:7899. Eviction admitted in a case in which the mesne tenant had left the dwelling: Court of First Instance Noord Holland 29 May 2018, ECLI:NL:RBNHO:2018:4584.

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## Regulating Airbnb in Portugal

### I. Introduction

All over Europe, EU member states and others countries are looking for solutions to deal with the significant increase of the tourism industry linked with new business models that are using transport platforms and short-term rental platforms<sup>1</sup>.

It is necessary to reflect on issues like fair competition, consumer protection, safety laws, sustainable development, gentrification, among others, to conclude how these new economic activities can comply with national laws and EU legislation.

In Portugal, tourism has grown exponentially in recent years, creating a lot of pressure on some areas of the country, especially Lisbon, Oporto and the Algarve. Despite the importance of tourism for the Portuguese economy, the discussion about its advantages and disadvantages has been quite intense.

Local accommodation ("Alojamento Local – AL") is a relatively recent legal concept, first introduced in 2008 (Decree-Law 39/2008), which has seen its relevance grow exponentially over the last few years.

The AL is closely linked to digital platforms such as Airbnb and Booking (which has increasingly been investing in this sector and not only in tourism ventures).

The concept of AL means both the premises used for the short-term rental and the short-term rental contract. The AL contract is the onerous contract entered into by the operator of the AL and the client for the provision of temporary

accommodation services (Art. 2 Decree-Law 128/2014). It is a short-term rental contract.

This contract is currently regulated by Decree-Law 128/2014<sup>2</sup>, which lays down a regime specifically on AL, setting it apart from the regime for tourism companies ("empresendimentos turísticos"), like hotels (regulated by Decree-Law 39/2008). Decree-Law 128/2014 was already amended by Decree-Law 63/2015 and by Law 62/2018.

### II. Regulation of short-term rental hosts

#### 1. Registration requirements

There is a registration requirement for AL premises since 2008.

AL premises can be classified as (Art. 3 Decree-Law 128/2014):

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1 Portugal is not an exception: Vera Gouveia Barros, *Turismo em Portugal* (FFMS 2015) 67.

2 See Manuela Patrício, *Direito do Turismo e do Alojamento Turístico* (Almedina 2016) 161 ff; Aristides Rodrigues de Almeida, 'A Actividade de Exploração de Estabelecimento de Alojamento Local' (2017) 3 RED <<https://www.cije.up.pt/revistared?year=2017>> accessed 18 November 2018; Maria Olinda Garcia, 'Arrendamento de Curta Duração a Turistas: Um (Im)propriedade Denominado Contrato de Alojamento Local' (2017) 3 RED <<https://www.cije.up.pt/revistared?year=2017>> accessed 18 November 2018.

- House (“moradia”), independent building for a single family;
- Apartment (“apartamento”), autonomous unit of a building or part of a building which can be used independently;
- Accommodation facilities (“estabelecimento de hospedagem”): a set of rooms integrated in an autonomous unit of a building, in a building or in a part of a building which can be used independently. This type of AL can, in turn, be classified as a hostel if the number of places for users in a dormitory is higher than the number of places for users in a room;
- Room (“quarto”). The room must be part of the residence of the operator of the AL and this residence must correspond to his tax domicile.

Registration of the AL is effected by prior notice with deadline (“comunicação prévia com prazo”), addressed to the Mayor, through a public electronic platform. A registration number is issued.

The prior notice with deadline mechanism means that the non-opposition to the notice by the municipality within 10 days (20 days in the case of hostels) allows the host to start renting the AL (Arts. 6-9 and 7-1). Within 30 days the municipality carries out an inspection to verify compliance with the legal requirements (Art. 8-1).

## 2. Limits

There are no limits on how often hosts may offer their apartment for short-term rental. However the host cannot have more than nine apartments in a building if those nine apartments represent more than 75 % of the number of apartments.

## 3. Health and safety requirements

There are general requirements regarding the facilities and the equipment upkeep conditions. It is required that the facilities are connected to the public water supply system or in alternative have a private water system subject periodic evaluations.

It is also required that there is a connection to the public sewage system or, in alternative, to have a private well-dimensioned system of septic tanks, and that there is hot and cold running water.

Regarding specific health and safety requirements, short-term rentals must have rooms with windows which connect directly with the exterior, in order to assure the correct ventilation conditions, as well as adequate furniture and equipment. There must be a system to block out the exterior light, which is a very typical Portuguese requirement to ensure a relaxed night. There must be a door locking system to guarantee the security and the privacy of the guests and the cleanliness and sanitation of the spaces must be assured.

Concerning safety, there are also requirements regarding the fire risk, namely the existence of fire extinguishers and first aid kits.

## 4. Relationship with the landlord

The general rule in Portugal is that the hosts who are not owners of the apartments or houses need the authorization of their landlord in order to sub-let the unit. The landlord can terminate the rental agreement if there is any sub-letting activity on the apartment without his authorization. Regard-

ing a use for short-term rental this rule applies in a subsidiary way.

## 5. Anti-discrimination rules

The offer of the host must not be discriminatory<sup>3</sup>.

The principle of equality is currently enshrined in Art. 13 of the Portuguese Constitution preventing discrimination "on grounds of descent, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social status or sexual orientation".

## III. Regulation of short-term rental platforms and liability

### 1. Registration requirements

The Portuguese law does not include any registration requirement for short-term rental platforms. Some operate with country based offices and some directly from abroad in an open market. They have to comply with Portuguese rules, namely some included in Decree-Law 128/2014, but there is not a specific act that regulates their activity.

### 2. Duty to verify and display the registration number

There is a registration duty for hosts in Portugal. All the information is centralized in a national database.

Platforms are required to display the hosts' registration number in their listings.

Although few articles of Decree-Law 128/2014 are directly applicable to the platforms, Art. 23-1 and sets forth that the intermediation a) of contracts concerning AL facilities which are not registered or have outdated records, or b) of contracts which imply the breach of the rental contract or the use authorization, shall be punished with a fine of up to € 40 000.

Platforms have therefore a duty to verify the registration number and other elements of the premises.

Platforms may also be required to disclose the identity of hosts if public authorities want to investigate whether the host is violating the short-term rental regime or any other law.

### 3. Collection of taxes

Recently, some platforms have agreed to directly collecting the tourism fee and handing it over to the government. This fee is determined based on the number of nights that the foreign tourists stay in the city. This collection mechanism is already at place in Lisbon<sup>4</sup> and Oporto<sup>5</sup> and other municipalities are now working towards also concluding agreements with the platforms for this purpose.

## IV. The two main debates

There are at least two academic debates sparked by the short-term rental platforms and the recently approved legislation tries to shed some light on them.

3 Jorge Morais Carvalho, *Manual de Direito do Consumo* (5th edn, Almedina 2018) 70 f.

4 <<http://www.cm-lisboa.pt/noticias/detalhe/article/cml-e-airbnb-assinam-acordo-sobre-taxa-turistica>> accessed 18 November 2018.

5 In August 2018, Airbnb had already collected 8.1 million euros: <<https://bit.ly/2BehSkq>> accessed 18 November 2018.

The first is related with the gentrification process and the common understanding that there are parts of the city centre that should have limits regarding short-term rental supply.

The recently approved legislation provides a solution to regulate and mitigate this issue.

Since November 2018 the City Council can define restricted areas (“áreas de contenção”). In these restricted areas, there are limits to the number of possible AL. Apart from that there is also a limitation of seven AL per person. The restricted areas must be approved through a City Regulation and the deliberation must be based on the purpose of preserving the social reality of neighbourhoods and places. The limitations apply only to new registration requests.

The second debate is related to the fact that the use of an apartment for short-term rental leads to a more intense use of the common parts of the building. The question being whether it is possible for the other owners oppose to the use of the apartments for short-term rental<sup>6</sup>.

Different Portuguese courts have been confronted with this issue and there have been contradicting decisions. For some courts the short-term rental is a commercial activity that requires the existence of a commercial permit<sup>7</sup>. Other courts state that this is a dwelling related activity meaning that the dwelling permit associated to the building is enough<sup>8</sup>.

Although the recently approved legal amendment (Law 62/2018) does not directly regulate this question it points in the direction of a dwelling permit being enough by providing some solutions that aim at balancing out the relations between the owner of the short-term rental and his neighbours.

Firstly, in the case of hostels, the neighbours have to authorize the activity.

Secondly, the neighbours may ask the municipality for the cancelation of the register of the short-term rental if the activity disrupts the normal use of the building or the rest of the neighbours.

Finally, the building may impose the duty on the short-term rental to pay an additional contribution. This additional contribution is limited to 30 % of the normal contribution and aims at compensating for the more intense use of the common parts of the building.

## V. Consumer protection

Regarding consumer protection, the main question that needs to be answered is whether the short-term rental can be qualified as a consumer contract.

Art. 2-1 of the Consumer Protection Act defines consumer as “any person who is supplied with goods, services or rights, intended for non-professional use, by a person exercising with professional character an economic activity that aims at obtaining benefits”<sup>9</sup>.

The qualification of the guest as a consumer will depend on the nature of the use given to the accommodation. If the accommodation is integrated in a professional activity of the guest (for example, going to a business meeting), s/he will not be a consumer. If the guest is acting outside the scope of his/

her professional activity, s/he will be a consumer. The analysis must be carried out in each case, taking into account the use that the person intends to give to the accommodation.

The question is more complex regarding the activity of the host. The professional exercise of an economic activity that aims at obtaining benefits implies a minimum of stability or permanence in the exercise of this activity, but it does not have to be the only or the main professional activity.

Decree-Law 128/2014 seems to impose the professional exercise of the short-term rental activity.

In fact, it requires, among other things, the registration of the AL, a declaration to the tax authority, several quality requirements and the availability of a complaints’ book. These requirements only make sense in relation to someone who carries out the activity with a minimum of stability or permanence, even if it is not his/her main activity.

Therefore, we must conclude that, in view of Portuguese law, the host should always be considered as a trader.

Thus, in Portugal the qualification of the guest as a consumer will depend only on the private or professional use that he or she wishes to give the accommodation. In view of the subject-matter of the contract, we risk concluding that most of these contracts will be consumer contracts.

The consequence is the application of consumer law to these contracts.

## VI. Conclusions

The growth of tourism in recent years has generated a great deal of pressure on some areas of Portugal, especially Lisbon, Oporto and the Algarve.

Short-term rental contracts have been specifically regulated since 2008, requiring a registration to start the activity. The premises can be classified as houses, apartments, accommodation establishments (including hostels) and rooms, with different requirements.

Short-term rental platforms have a duty to verify the registration number and can be fined if they intermediate a contract with the participation of an unregistered host.

Since November 2018 the City Council can define restricted areas where there are limits to the number of short-term rentals.

Short-term rental contracts will generally be qualified as consumer contracts under Portuguese law. ■

6 See Fernanda Paula Oliveira, Sandra Passinhas and Dulce Lopes, *Alojamento Local e Uso de Fração Autónoma* (Almedina 2017).

7 Court of Appeal of Lisbon (“Tribunal da Relação Lisboa”), Procedure n. 12579-16.0T8LSB.L1-8 (20/10/2016); Court of Appeal of Oporto (“Tribunal da Relação do Porto”), Procedures n. 13721/16.7T8PRT.P1 (27/04/2017) and 24471/16.4T8PRT.P1 (11/04/2018).

8 Court of Appeal of Oporto (“Tribunal da Relação do Porto”), Procedure n. 4910/16.5T8PRT-A.P1 (15/09/2016); Supreme Court (“Supremo Tribunal de Justiça”), Procedure n. 12579/16.0T8LSB.L1.S1 (28/03/2017).

9 See Jorge Morais Carvalho, *Manual de Direito do Consumo* (5th edn, Almedina 2018) 23 ff.