

Case C-724/18

Request for a preliminary ruling

Date lodged:

21 November 2018

Referring court:

Cour de cassation (France)

Date of the decision to refer:

15 November 2018

Appellant in cassation:

Cali Apartments SCI

Respondents in cassation:

Procureur général at the Cour d'appel de Paris (Court of Appeal, Paris, France)

Ville de Paris

...

THE COUR DE CASSATION (Court of Cassation, France) ... has delivered the following judgment:

Ruling on an appeal brought by Société Civile Immobilière Cali Apartments ...

against the judgment delivered on 19 May 2017 by the Cour d'appel de Paris (Court of Appeal, Paris, France) ... in the dispute between:

1. the Procureur général (Public Prosecutor) at the Cour d'appel de Paris (Court of Appeal, Paris) ...
2. and the Ville de Paris (City of Paris, France), ...

respondents in cassation;

...

...

- 1 It follows from the judgment under appeal ... that the Procureur de la République (Public Prosecutor) lodged an application for interim measures on the basis of the sixth paragraph of Article L. 631-7 of the Code de la construction et de l'habitation (Construction and Housing Code), against the company ... Cali Apartments ..., owner of a studio located in Paris, with a view to the company being ordered to pay a fine and change the use of the property back to residential. The mayor of the City of Paris intervened voluntarily in the proceedings.
- 2 The Cour d'appel (Court of Appeal) held that it was established that the studio, which had been offered for rent through a website, had been let, without prior authorisation, for sporadic, short periods to a transient clientele, which is contrary to the provisions of Article L. 631-7 of the Construction and Housing Code. It ... ordered Cali Apartments to pay a fine of EUR 15 000, ... and to change the use of the premises back to residential.
- 3 Cali Apartments criticises the judgment for ordering it to pay a fine and change the use of the premises back to residential when, according to the first ground of appeal, in applying the sixth paragraph of Article L. 631-7 ... of the Construction and Housing Code, the Cour d'appel (Court of Appeal) has infringed the principle of the primacy of European Union law, in so far as it has not established that that restriction on the freedom to provide services was justified by an overriding reason relating to the public interest and that the objective pursued could not be attained by means of a less restrictive measure, as required by Article 9(b) and (c) of Directive 2006/123/EC of 12 December 2006 [on services in the internal market]

The admissibility of the first ground of appeal ...:

4 ...

5 ... [the ground of appeal is admissible]

The ground of appeal:

6 ...

** Provisions of national law*

7 Under Article L. 324-1-1 of the Code du tourisme (Tourism Code), ...:

'Any person letting furnished tourist accommodation, whether or not the accommodation is classified as such for the purposes of this Code, must have made a prior declaration thereof to the mayor of the municipality in which the accommodation is located.'

8 ...

...

- 9 In addition, depending on the nature and location of the premises to let, the lessor may be subject to the provisions of the Construction and Housing Code governing change of use of residential premises.
- 10 As provided in Article L. 631-7 of the Construction and Housing Code, in municipalities with more than 200 000 inhabitants and in the municipalities of Hauts-de-Seine, Seine-Saint-Denis and Val-de-Marne, change of use of residential premises is subject to prior authorisation under the conditions set out in Article L. 631-7-1 of that code. Law No 2014-366 of 24 March 2014 on access to housing and the regeneration of urban planning added a final paragraph to that provision which states that the repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there constitutes a change of use under that provision.
- 11 Article L. 631-7-1 of the Construction and Housing Code lays down the procedure for obtaining the authorisation provided for in Article L. 631-7:

'Prior authorisation for change of use shall be granted by the mayor of the municipality in which the property is located, It may be subject to an offset requirement in the form of the concurrent conversion of non-residential premises into housing.

Authorisation for change of use shall be granted on an individual basis. It shall cease to have effect upon the definitive termination, for any reason, of the beneficiary's professional practice. However, where authorisation is subject to an offset requirement, it is the premises, and not the individual, which are granted that status. The premises offered as an offset shall be listed in the authorisation which is published in the property file or entered in the land register.

...

For the application of Article L. 631-7, a decision adopted by the municipal council sets the conditions for granting authorisations and determining the offset requirements by quartier (neighbourhood) and, where appropriate, by arrondissement (district), in the light of social diversity objectives, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage. ... '.

- 12 A temporary authorisation scheme may also be established by the municipal council, under Article L. 631-7-1 A of the same code, which provides that a decision adopted by the municipal council can establish a temporary authorisation scheme for change of use, allowing natural persons to let residential premises for short periods to a transient clientele which does not take up residence there. The decision sets the conditions for the granting of that temporary authorisation by the mayor of the municipality in which the premises are located... . It also determines the criteria for that temporary authorisation, which may relate to the duration of

the rental contracts, the physical characteristics of the premises and the location of the premises, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage. Those criteria may vary according to the number of authorisations granted to the same owner.

13 According to Article L. 631-7-1A of the Construction and Housing Code, it is not, however, necessary to obtain an authorisation for change of use if the premises constitute the lessor's main residence for the purposes of Article 2 of the Law of 6 July 1989; that is to say, if the dwelling is occupied for at least eight months per year, except owing to professional obligations, health reasons or force majeure, by the [lessor] or his/her spouse or by a dependant.

14 Article L. 651-2 of the Construction and Housing Code lays down the penalties and measures applicable in the event of non-compliance with those provisions:

'Any person who infringes the provisions of Article L. 631-7, or who fails to comply with the conditions or requirements under that article shall be liable to pay fine of EUR 25 000.'

...

...

* *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*

* *Article 2 of the Directive*

15 The ... purpose of the 'Services' Directive is to establish 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.

16 In accordance with Article 2(1) of that directive, it is applicable to services supplied by providers established in a Member State. According to Article 4, 'service' means any self-employed economic activity, normally provided for remuneration by a provider. A provider is any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service. According to [recital] 34 of the Directive, remuneration constitutes consideration for the service in question.

17 Articles 1 and 2 of the Directive lay down a number of matters and activities which are excluded from its scope of application.

18 The activity of the short-term letting of furnished accommodation is not among the excluded activities.

- 19 Moreover, it follows from the case-law of the Court of Justice of the European Union [judgment of 30 January 2018, *X and Visser*, C-60/15 and C-31/16, EU:C:2018:44, paragraph 110 and the operative part] that the provisions of Chapter III of the Directive, concerning freedom of establishment of service providers, apply to a situation where all the relevant elements are confined to a single Member State. It follows that the absence of any foreign aspect does not prevent the Directive from applying.
- 20 A rental contract involves the supply of an asset for consideration.
- 21 Therefore, the first question is whether the repeated short-term letting, including on a non-professional basis, of furnished accommodation for residential use not constituting the lessor's main dwelling to a transient clientele, which does not take up residence there, against consideration, constitutes a service provided by a service provider established in a Member State for the purposes of Article 2 of the Directive, and thus falls within its scope of application.
- 22 If so, the question then arises as to whether national legislation such as that provided for in Article L. 631-7 of the Construction and Housing Code, which is additional to the declaration scheme provided for in Article L. 324-1-1 of the Tourism Code in respect of the letting of furnished tourist accommodation, constitutes an authorisation scheme for the abovementioned activity for the purposes of Articles 9 to 13 of Directive 2006/123 ..., in so far as it makes the change of use of the premises offered for rent subject to authorisation in certain geographical areas, or whether it is merely a requirement subject to the provisions of Articles 14 and 15.
- * *Article 9 of the Directive*
- 23 While the national legislation constitutes an authorisation scheme for the purposes of the Directive, it should be recalled that, under Article 9 of that directive, Member States are not to make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
- a) the authorisation scheme does not discriminate against the provider in question;
 - b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
 - c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.
- 24 Cali Apartments considers, in the first place, that the authorisation scheme introduced by the legislature is not justified by an overriding reason relating to the public interest.

- 25 Article 4 of the Directive defines ‘overriding reasons relating to the public interest’ as reasons recognised as such in the case-law of the Court of Justice.
- 26 The Law of 24 March 2014 ‘on housing and the regeneration of urban planning’, which introduced the sixth paragraph of Article L. 631-7 of the Construction and Housing Code, had the objective of ‘responding to the deterioration of conditions for access to housing and the exacerbation of tensions on the property markets, in particular by addressing market failures, protecting owners and renters and increasing the supply of housing while maintaining balanced land-use, since housing is a basic necessity and the right to decent housing is and objective protected by the Constitution’ (the Government’s explanatory memorandum to the draft law).
- 27 According to decision No 2014-691 DC of 20 March 2014 of the Conseil constitutionnel (Constitutional Council) ruling on the constitutionality of the sixth paragraph of Article L. 631-7, deriving from the Law of 24 March 2014, the legislature was pursuing an objective of general interest by introducing that provision, since its intention was to set out the scope of application of a mechanism for tackling the shortage of rental housing and to define certain exceptions in favour of renters.
- 28 One of the criteria set by Article L. 631-7-1 of the Construction and Housing Code for determining the conditions for granting authorisations is the social diversity objective, according to, *inter alia*, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage.
- 29 The question therefore arises as to whether the objective pursued by the legislature, relating in particular to the need to tackle the shortage of rental housing, constitutes an overriding reason relating to the public interest for the purposes of the case-law of the Court of Justice of the European Union, particularly in so far as it could constitute a social policy objective recognised as such by the Court.
- 30 Cali Apartments also submits that the authorisation scheme introduced by the sixth paragraph of Article L. 631-7 of the Construction and Housing Code, is not proportionate to the objective pursued in that less restrictive measures could have been adopted to tackle the shortage of rental housing, such as, for example, limiting the number of nights for which a short-term let may be offered for rent or making short-term letting subject to a specific tax.
- 31 According to the abovementioned decision of 20 March 2014 of the Conseil constitutionnel (Constitutional Council), the provisions of the sixth paragraph of Article L. 631-7 are consistent with the objective of tackling the housing shortage.
- 32 Moreover, it should be noted that the scope of application of the authorisation scheme for change of use, provided for in the sixth paragraph of Article L. 631-7 of the Construction and Housing Code, is limited:

- it is obligatory only in municipalities with more than 200 000 inhabitants and in the municipalities of Paris’ three neighbouring departments;
 - it concerns only lets which satisfy certain conditions: the property must be furnished accommodation for residential use; the property must be let repeatedly and for short periods to a transient clientele which does not take up residence there;
 - it does not apply to dwellings which constitute the lessor’s main residence, that is to say, dwellings which the lessor occupies for at least eight months per year;
 - a temporary authorisation scheme is provided for in Article L. 631-7-1 A of the Construction and Housing Code.
- 33 The question arises as to whether the objective pursued justifies such an authorisation scheme, thus defined, for change of use.
- * *Article 10 of the Directive*
- 34 Under Article 10 of the Directive, concerning the conditions for the granting of authorisation:
1. Authorisation schemes are to be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.
 2. The criteria referred to in paragraph 1 are to be:
 - a) non-discriminatory;
 - b) justified by an overriding reason relating to the public interest;
 - c) proportionate to that public interest objective;
 - d) clear and unambiguous;
 - e) objective;
 - f) made public in advance;
 - g) transparent and accessible.
- 35 Under Article L. 631-7 of the Construction and Housing Code, an authorisation for change of use may be required where furnished accommodation is repeatedly let for short periods to a transient clientele which does not take up residence there. Cali Apartments submits that those criteria are neither clear nor objective.
- 36 The question arises as to whether those criteria are sufficiently clear and objective, within the meaning of Article 10, in so far as they do not refer to thresholds, but

are based on the concepts of ‘repetition’, ‘short [periods]’ and ‘transient clientele which does not take up residence there’.

- 37 Article L. 631-71 of the Construction and Housing Code lays down the procedure for obtaining an authorisation.
- 38 Cali Apartments submits that since the conditions for granting authorisations and determining the offset requirements by *quartier* (neighbourhood) and, where appropriate, by *arrondissement* (district) are set by each municipal council, rather than being laid down by law, the requirements for publicity, transparency and accessibility provided for in Article 10 are not fulfilled.
- 39 In accordance with Article L. 2121-25 of the Code général des collectivités territoriales (General Local Authorities Code), the minutes of the municipal council meetings are displayed in the town hall and are available online on the website of the municipality.
- 40 Article L. 631-7-1 of the Construction and Housing Code provides that the conditions for granting authorisations are to be set in the light of social diversity objectives, according to, in particular, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage. Cali Apartments submits that those criteria do not fulfil the requirements for clarity and objectivity laid down in Article 10.
- 41 The question arises as to whether those criteria fulfil the requirements for clarity and objectivity laid down in Article 10.
- 42 Since the issues raised in the ground of appeal are relevant to the outcome of the appeal, referral to the Court of Justice of the European Union is required.
- 43 It is therefore necessary to stay the appeal proceedings pending a ruling by the Court of Justice.

ON THOSE GROUNDS:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Having regard to the definition of the purpose and scope of application of Directive 2006/123/EC of 12 December 2006, as set out in Articles 1 and 2 thereof, does that directive apply to the repeated letting for short periods, against consideration, including on a non-professional basis, of furnished accommodation for residential use, not constituting the lessor’s main residence, to a transient clientele which does not take up residence there, particularly in the light of the concepts of ‘providers’ and ‘services’?
2. If the above question is answered in the affirmative, does national legislation such as that provided for in Article L. 631-7 of the Code de la construction et de

l'habitation (Construction and Housing Code) constitute an authorisation scheme for the abovementioned activity for the purposes of Articles 9 to 13 of Directive 2006/123 of 12 December 2006, or solely a requirement subject to the provisions of Articles 14 and 15?

In the event that Articles 9 to 13 of Directive 2006/123/EC of 12 December 2006 are applicable:

3. Should Article 9(b) of that directive be interpreted as meaning that the objective of tackling the shortage of rental housing constitutes an overriding reason relating to the public interest capable of justifying a national measure which requires authorisation to be obtained, in certain geographical areas, for the repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there?

4. If so, is such a measure proportionate to the objective pursued?

5. Does Article 10(2)(d) and (e) of the Directive preclude a national measure which requires authorisation to be obtained for the 'repeated' letting of furnished accommodation for residential use for 'short periods' to a 'transient clientele which does not take up residence there'?

6. Does Article 10(2)(d) to (g) of the Directive preclude an authorisation scheme whereby the conditions for granting authorisation are set, by decision of the municipal council, in the light of social diversity objectives, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage?

...

GROUNDS ANNEXED to the present judgment [the two grounds examined are set out to a sufficient standard in the grounds of the judgment]

...