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AVOCATS



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Renting out your flat on an “Airbnb” type platform - Beware: it’s not that simple

Renting out one’s flat via an “airbnb” type platform is very popular and some people see it as a way to make money. But is it as simple as that in Switzerland and more particularly in the canton of Vaud? The answer for the moment is no. This is all the more the case as the canton of Vaud, which wants to “*avoid both distortion of competition and the removal of flats from the housing market*”^[1] has amended the cantonal law on the exercise of economic activities (LEAE).

Many people have the impression that renting out their flat through a platform such as “airbnb” is very simple and can be done with a simple “click”. They forget that this type of rental is subject not only to federal private law but also to lesser-known cantonal public law rules. In addition to these rules, there may also be regulations of the PPE.

From the point of view of federal private law, the rental by a tenant of his flat via a platform such as “airbnb” is assimilated to subletting.

Subletting is governed by Article 262 of the Swiss Code of Obligations.

On the basis of this article, the tenant, who wishes to rent his flat via a platform, must imperatively obtain the prior agreement of the lessor, i.e. the owner.

In theory, he should obtain the agreement of the landlord for any new tenancy or subtenant. It is therefore advisable to obtain a general agreement in principle for any tenancy, irrespective of the duration and the person of the subtenant, and to insert this agreement in the rental agreement or in an amendment to the agreement.

If the lessee fails to seek the lessor’s consent, he risks being notified of the termination of his lease. He also runs the risk of having to pay the lessor the profits made.

The lessor may, however, refuse his consent on the grounds mentioned in Article 262 CO.

One of these grounds is the abusive nature of the subletting and the amount of the “sublet” is particularly targeted here.

The principle is that the subletting must not be for profit and a comparison between the main rent and the subletting rent will be made. However, it is accepted that the tenant may receive remuneration for additional services such as furniture, possible renovation work, services etc. A difference between the main rent and the subletting rent is therefore allowed. A margin of 20% is often allowed for the furniture.

If the tenant is considering subletting via a platform in order to earn an income, the question of rent is also essential and a clause in the lease agreement that, for example, the landlord allows subletting for profit or whatever the amount of the “sublet” is very important.

If the subletting is abusive or if it is carried out on terms other than those agreed with the landlord, the tenant again runs the risk of being notified of the termination of the lease. He also runs the risk of being ordered to pay the lessor the profits made, i.e. the difference between the main rent and the sublet rent and/or the profit made.

Another reason for the landlord’s refusal is that the subletting presents major inconveniences for him.

In a decision of 4 April 2019 (ATF 5A_436/2018), the Federal Court held that a PPE regulation could prohibit the rental of flats on an irregular basis, by the day, week or month.

Thus, the existence of such a provision in a PPE regulation not only prohibits the landlord from subletting his own flat via a platform but is also obviously a reason for the landlord to refuse subletting by his tenant via such a platform.

From the point of view of cantonal public law, since 1^{er} July 2022, a new title entitled “Economic activities subject to registration” and a

new chapter entitled “Rental or subletting of short-term accommodation”, i.e. the new articles 74b to 74e, have been introduced into the Vaud cantonal law on the exercise of economic activities (LEAE).

According to Article 74b(1), *“the provision of all or part of a dwelling in return for payment for at least one night’s stay constitutes a rental or subletting of accommodation within the meaning of Article 4a(1) and this chapter”*.

According to Article 74c, *“the natural or legal person who rents out or sublets accommodation shall notify the municipality of the place where the accommodation is located at least ten days before the first night’s stay and shall provide it with the information required for the keeping of the Register of Renters*.

In particular, the lessor shall provide the notice given to the lessor and prescribed by Article 262 CO, as well as any useful information on compliance with the time limit and requirements of Article 15, paragraph 2 RLPPL.

The hirer shall keep a register allowing the control of the persons accommodated (copy of an identity card or passport) and mentioning the precise periods of accommodation (arrival and departure dates).

The lessor shall submit a copy of the register provided for in paragraph 3 to the competent municipal authority every month.

According to Article 74d, *“the municipalities shall keep a register of natural or legal persons offering for rent or sublet accommodation within their territory, subject to the exceptions defined in Article 74e”*.

In other words, the tenant (but also the owner) who rents out his accommodation via a platform must announce this 10 days in advance to the municipality, regardless of the duration of the rental and from the first night onwards.

This announcement must be made for each tenancy and the tenant must provide the agreement of the landlord. He must also keep a register of the persons accommodated and mention the dates of arrival and departure. This register must be submitted to the local authority each month. The purpose of this announcement and register is to ensure that the tourist tax has been paid. This tax concerns visitors, hoteliers, accommodation providers and accommodation platforms.

Tenants who rent out their accommodation via a platform must also comply with the requirements set out in Article 15, paragraph 2 RLPPL, i.e. the implementing regulation of the Act of 10 May 2016 on the preservation and promotion of the rental stock

Article 15 RLPPL, which has also just been amended as of 1st July 2022, reads as follows: *“a dwelling or part of a dwelling is subject to a change of use when it is withdrawn from the ordinary residential rental market*.

In particular, the total or partial removal of accommodation from the standard rental stock by making it available in the form of furnished rental with services or on collaborative economy platforms when it exceeds 90 days per calendar year constitutes such a change of use”.

In other words, the tenant who rents his flat via a platform for a period of more than 90 days over the calendar year is in fact changing the use of the accommodation.

In the event of a change of use of a residential dwelling, a request for authorisation must first be made to the municipality of the location of the dwelling in accordance with the Vaud cantonal law on the preservation and promotion of the rental stock (LPPPL).

This law *“aims to combat the shortage of housing by keeping rented accommodation on the market that corresponds to the needs of the population”*. Thus, if the housing concerned falls into a shortage category, the authorisation will in principle be refused. In 2022, only the districts of Aigle, Broye-Vully and Jura-Nord Vaudois (except for the town of Yverdon-les-Bains) are not in a shortage situation.

It should be noted, however, that housing which belongs to the owner and in which he or she, a close relative of the owner, an ally or a registered partner lives, is not subject to the LPPPL. In other words, there will be no change of use and no need for prior authorisation if it is the owner himself who rents out the property via a platform.

It should also be noted that the change of use of a commercial premises to a dwelling is not subject to the LPPPL. The same applies to the rental of commercial premises via a platform such as Airbnb.

By amending the LEAE, from 1 July 2022, the canton of Vaud intends, as already mentioned above, to “avoid both the distortion of competition” between the traditional hotel industry and rental via a platform “and the removal of flats from the housing market”. In doing so, the canton is making it more difficult to rent via platforms such as Airbnb, and a tenant wishing to “sublet” his or her flat on a regular basis and over a long period of time would be well advised to seek information and advice beforehand.

[1]<https://www.lacote.ch/aud/aud-lactivite-des-sites-de-location-comme-airbnb-sera-mieux-cadree-1156418>

Source :

***[https://www.wg-avocats.ch/en/actualites/tenancy-law/renting-out-your-flat-on-an-airbnb-type-platform-beware-its-not-th
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