

THE NEW ANDALUSIAN DECREE ON PRIVATE HOUSES FOR TOURIST USE. ANALYSIS UNDER THE LIGHT OF THE EUROPEAN AGENDA FOR THE COLABORATIVE ECONOMY

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Andalusia has recently joined the group of regions that regulate the use of private homes in Spain. To this end, Andalusia approved the Decree 28/2016, of February 2, of housing for tourism purposes and amended Decree 194/2010, of April 20, on holiday apartments. It is clear from its headline that this rule is divided into two essentially different parts: a first one that regulates the dedication, by its owners, of residential nature houses to the accommodation activity; and a second one that contains several modifications of the legal regime of the tourist apartments, the traditional modality of the promotion of accommodation. The main difference between private dwellings for tourist use and tourist apartments is that, while the first one only provides an accommodation service to the user, in the second one a series of complementary tourist services are added to accommodation service, such as daily cleaning or concierge.

The object of this work is centered, due to its importance and relevance, in the analysis of the new legal regime of private dwellings dedicated to tourist use in Andalusia, highlighting their differences and similarities more relevant to similar regimes in other Spanish regions, pointing out the novelties introduced in this matter, as well as possible gaps and the main interpretive problems that might exist.

The Andalusian executive based the elaboration of this rule in the modification operated in Law 29/1994, of November 24, of Urban Leases (hereinafter LAU), by Law 4/2013, of June 4, of measures of flexibilization and promotion of the housing rental market. Recall that the new text of the LAU expressly excluded from its scope “*the temporary assignment of use of the whole of a house furnished and equipped in conditions of immediate use, commercialized or promoted in tourist channels and carried out with a lucrative purpose, when it is subject to a specific regime, derived from its sectoral regulations*” (article 5 letter e). The reason for this exclusion, reproduced by the explanatory memorandum of the Andalusian regulation, is the significant and continued increase in previous years of the use of private homes as tourist accommodation. At the root of this increase, the Andalusian

lusian Decree places new forms of travel, the desire of tourists to maintain a more direct relationship with residents of the chosen destination and the new marketing channels of tourism, among which the new Internet portals stand out. Within these, and although the Andalusian Decree does not allude to them expressly, they emphasize especially those that have been included, with more or less justification, within the phenomenon known like “*collaborative economy*”. The Andalusian regulation of the channels of commercialization of the tourist supply is object of consideration in this work.

As justification for this rule, the Andalusian executive assumes that “*the offer of this channel is very broad and is not always accompanied, as would be desirable, an excellent service, or a minimum guarantee*”. Without forgetting that, as previously stated, the increasingly habitual use of private homes as tourist accommodation “*could be giving coverage to situations of intrusion and unfair competition, which go against tourist destinations*”. Such a problem guides all the regulation contained in the Andalusian Decree, so that its main objective will be to establish minimum guarantees of quality and safety for the users.

Although the new Article 5 (letter e) of the LAU makes it clear that private homes for tourist use must be ceded to the user “*in its entirety*”, the Andalusian Decree ignores this requirement and introduces, as a novelty with respect to the rest of regional regulations, a double modality of private housing for tourist use: those ceded in their entirety and those that do it for rooms. However, the differences in the legal regime of both modalities are scarce. The main difference refers to the maximum capacity of both modalities. Although the maximum number of accommodation places likely to be offered by any dwelling for tourist use will always be determined by the provisions of their occupation license, that number can never be higher, in the case of fully furnished housing, fifteen places. In the case of dwellings assigned by rooms, to six places, in neither of the two modalities can be exceeded four guests per room (article 5.2 of the Andalusian Decree) and without the relevance of the age of the guests.

Regardless of the modality of private housing for tourist use, the Andalusian Decree requires that all tourist accommodation be located in residential properties (Article 3.1). This raises a problem of compatibility between urban planning and tourism regulations, since urban planning in Spanish municipalities does not usually accept the coexistence of tourist and residential uses in the same area or sector of the city, much less on the same plot or property. The exclusion of such coexistence of uses is justified by the discomfort usually generated by tourism -essentially in terms of noise pollution and deterioration of the common areas of the buildings- for the residents of the building.

The Andalusian decree is based on the assumption that the assignment of private dwellings must always have a commercial nature, that is to say, it should pursue an economic benefit for its owner, which is why free assignments are excluded by stating that “*tourist purposes means those [...] where the accommodation service is to be offered by price [...]*” (Article 3.1). In addition, the Andalusian Decree also requires the notes of habituality and tourist purpose regarding these assignments, for which the Andalusian Decree establishes a *iuris tantum* presumption (Articles 3.1 *in fine* and 3.2): it will be presumed that the house is given in the usual way and for tourist purposes when it is commercialized or promoted in tourist channels. The Decree itself also provides a genuine interpretation of what should

be understood by channels of tourism: travel agencies, companies that measure or organize tourism services and channels that include the possibility of accommodation (Article 3.3). The most interesting modality of “channels” is the one referring to the channels in which the possibility of reservation of accommodation is included. The Andalusian Decree is referring to the commercialization of tourist places through Internet, and when referring to these channels as operators other than travel agencies and traditional intermediary companies, it seems undoubtedly that it is thinking of experiences fit in the phenomenon of the *collaborative economy* –or *sharing economy*–, as opposed to the classic forms of commercialization of tourist products. As is well known, digital platforms form a framework used increasingly for the commercialization of private homes for tourism use, through Internet portals that put in direct contact with owners and tourists, without the need to resort to traditional market intermediaries tourist.

The European Commission bases itself on the general consideration of collaborative platforms as intermediaries providing *information society services* and as such can not, under any circumstances, be subject to prior specific authorization or equivalent instrument. But not all collaborative platforms fall within this favorable and flexible regime of information society services. The European Commission excludes “false” collaborative platforms, which in this way conceal the nature of mere *professional service providers*, offering “underlying” and “additional” services to authentic information society services. To identify them the Commission institutes the theory of *control* or *significant influence*: when the intermediaries between service providers –in this case, the owners of the private houses– and the consumers –tourists– exert on the former a control or influence of this nature it must be considered that such intermediaries are not genuine collaborative platforms but merely *professional service providers* who do not offer real services of the information society but other services of an *underlying* or *additional* nature. In order to identify the *significant* nature of the control or influence exercised over the service provider, the European Commission provides three criteria that must be fulfilled cumulatively: a) That the intermediary determines the final price of the service (this requirement would not be fulfilled if it only recommends it or if the supplier can alter the one initially fixed by that one); b) That the intermediary establishes *mandatory terms and conditions* for the service provider that determine their relationship with the user (for example mandatory instructions or market maintenance clauses), and c) That the intermediary owns the property of the *essential goods* for the provision of the service. When these requirements are met, such activities should be classified as alien to the collaborative economy, and it is possible that these *false* collaborative platforms may be subject to the regulation of their sector of activity –in this case, the tourist legislation of each Member State–, including previous administrative authorizations.

As a final thought, it can be considered that the Andalusian Decree on private housing for tourist use remains within the scope marked by its predecessors in other Autonomous Communities, both in terms of market access requirements –responsible statements– and those referred to their commercialization. Among the most important novelties of the Andalusian norm would be the possibility of ceding the housing by rooms, against the criterion of the LAU, or the express consideration of the rental of tourist houses as a *tourist service* at the same level as those included in the Tourism Law of Andalusia. Among the

most important absences are certain requirements for the commercialization of the home, such as the insurance policy against personal injuries or materials damages that may be suffered during the stay, some fire protection elements –fire extinguishers or blankets– or WiFi. It is also missing, as in other regions of Spain, the existence of a legal mechanism that reconciles definitively the requirements of urban planning with the tourist nature of these houses. Finally, the doctrine has revealed the desirability of extending the responsibility for the commercialization of clandestine housing to tourist intermediation channels, so that the subjects susceptible to be punished for this behavior are not only their owners, but also the channels that commercialize tourist housing not adapted to legal requirements.