Airbnb and the Swedish Tenancy Legislation: An Analysis of Unexplored Possibilities

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ABSTRACT

This article discusses the possibilities of Airbnb in a Swedish context, with a focus on rental apartments. Although Airbnb has become more common, it has so far had a limited impact in Sweden compared to many other countries. One of the presumed reasons for this is the relatively strict tenancy legislation.

Two aspects of the tenancy legislation that are central in an Airbnb-context are that a tenant may not sublet an apartment without the permission of the landlord or the Rent Tribunal, according to Ch. 12 Sec. 39 and 40 of the Land Code (SFS 1970:994), and that the landlord is not allowed to charge the tenant a higher rent than the one that has been specified in the tenancy agreement, according to Ch. 12 Sec. 19 of the Land Code. Since the landlord does not have an economic incentive to allow such sublets if the landlord cannot charge an *extra* fee, this has led to a situation where rental apartments rarely are being sublet through Airbnb, even when they are not being used by the tenant, e.g. during vacation periods.

This article analyses the possibility to create a commercial model which makes it possible for the *landlord* to charge an extra fee for allowing the tenant to sublet the apartment short-term through e.g. Airbnb and also makes it possible for the *tenant* to, in turn, charge the sublessee a rent that is higher than the tenant's own rent. The main conclusion is that it is possible to construct such a model, thereby giving both the landlord and the tenant economic incentives to sublet the rental apartment during shorter periods of time when the apartment is not used by the tenant. The article further analyses the practical implications of relevant regulations in the tenancy legislation, and how landlords and tenants may use the commercial model in a way that corresponds to the legislation's requirements.

1. INTRODUCTION

1.1. AIRBNB AND THE SWEDISH CONTEXT

Just like in countries all over the world, Sweden has seen the rise of the 'sharing economy', with Airbnb[1] serving as one of the front figures. The growth of Airbnb has led to an increase in short-term subletting, as well as an increased discussion about the Swedish housing legislation and its adaptability in the sharing economy-context. However, a report prepared for the European Commission has found that sharing economy platforms do not appear to be as popular in Sweden as elsewhere in

[1] The focus of this article is Airbnb, since it is the largest intermediary platform for short-term sublets in an international context. The article is, however, of course also relevant for similar platforms.

Europe.[2] One of the presumed reasons for this is that the Swedish housing regulation is considered inadequate for the short-term subletting situations facilitated by Airbnb and similar services.[3]

In the Swedish context, the housing legislation can give rise to four different types of situations, depending on which type of housing that is being sublet and whether the agreement covers the whole dwelling or just a part of it:

1. Subletting a rental apartment that the tenant rents from a landlord (*hyresrätt*), which as a main rule requires the landlord's approval.
2. Subletting a tenant owner apartment (*bostadsrätt*[4]) in a multi-dwelling building owned by a tenant owner association, which as a main rule requires the approval of the board of directors of the association.
3. Subletting a dwelling of which the owner has full ownership (in the form of a detached house or a condominium, *ägarlägenhetsfastighet*), which does not require permission from another party.[5]
4. Subletting only a part, e.g. a single room, while still retaining the rights to use the rest of the dwelling, which does not require permission even if the dwelling is a *hyresrätt* or *bostadsrätt*.[6]

In an Airbnb-context, the most relevant types of sublets are those of rental apartments and tenant owner apartments. This stems from the

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[2] See Sofia Ranchordás, 'Home-Sharing in the Digital Economy: The Cases of Brussels, Stockholm and Budapest' (2016) Paper prepared for the European Commission, p. 47. <https://ec.europa.eu/docsroom/documents/16950/attachments/1/translations/en/renditions/pdf> accessed 15 June 2018

[3] Ibid. p. 50.

[4] A *bostadsrätt* is an apartment within a building that is owned by a tenant owner association. When buying a *bostadsrätt*, the buyer does not become the legal owner of the apartment, but instead becomes a member of the tenant owner association and acquires an *exclusive right to use* the apartment. Since the tenant owner association is the legal owner of the apartments in the building, the owner of the *bostadsrätt* needs the permission of the board to sublet the apartment.

[5] The Swedish form of condominium, *ägarlägenhetsfastighet*, is still uncommon in Sweden. It was introduced in 2009 and at the end of 2017 only 1321 such apartments had been built, see Statistics Sweden, 'Fastighetsbeståndet, korrigerad 2018-01-18'. <http://www.scb.se/hitta-statistik/statistik-efter-amne/boende-byggande-och-bebyggelse/fastighetstaxeringar/fastighetstaxeringar/pong/tabell-och-diagram/fastighetsbestandet/> accessed 15 June 2018

[6] Regarding rental apartments, see Ch. 12 Sec. 41 of the Land Code, *Jordabalken*, and Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018) p. 261 ff. Regarding tenant owner apartments, see Ch. 7 Sec. 8 of the Tenant Owner Apartment Act, *Bostadsrättslagen*, (SFS 1991:614) and Bob Nilsson Hjort & Ingrid Uggla, *Bostadsrättslagen: en kommentar* (Norstedts Juridik 2014) 7 kap. 8 § section *01. Partiell sublokation*.

fact that the demand for short-term rentals through Airbnb is biggest in the major cities, where rental apartments and tenant owner apartments constitute the majority of the dwellings. These two types together represent 90 % of the dwellings in Stockholm, 80 % of the dwellings in Gothenburg and 82 % of the dwellings in Malmö.[7]

The focus of this article is to examine the legislation on rental apartments (situation 1) and its possibilities in an Airbnb-context, which has not yet been analysed deeper in the Swedish context. Before the closer aim of the article is presented, however, we first need to understand the context by analysing the regulations on subletting a rental apartment.

1.2. THE REGULATIONS ON SUBLETTING A RENTAL APARTMENT AND THEIR IMPLICATIONS IN AN AIRBNB-CONTEXT

1.2.1. THE TENANT'S POSSIBILITY TO SUBLET THE APARTMENT WITHOUT THE LANDLORD'S CONSENT

As mentioned in section 1.1 above, the main rule is that the tenant needs the approval of the landlord to be allowed to sublet the apartment, according to Ch. 12 Sec. 39 of the Land Code. There are, however, exceptions to this rule. If the landlord does not permit the tenant to sublet the apartment, then the tenant may appeal to the regional Rent Tribunal, *Hyresnämnden*, according to Ch. 12 Sec. 40 of the Land Code. The Rent Tribunal shall allow the tenant to sublet if certain conditions are met, and the decision of the Rent Tribunal cannot be appealed.[8] In an Airbnb-context, it is also important to note that if the tenant wants to sublet the apartment to several different sublessees during a period of time, then the tenant needs the landlord's (or the Rent Tribunal's) permission in each separate case.[9]

The conditions that need to be met for the Rent Tribunal to give its permission for the tenant to sublet are found in Ch. 12 Sec. 40 of the Land Code, which states that the Rent Tribunal shall give its permission if:

> '1. the tenant because of age, sickness, temporary work or studies in another town, a longer stay abroad, special family circumstances or other comparable circumstances has considerable reasons to sublet, and
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> 2. the landlord does not have a legitimate reason to refuse.'

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[7] See Statistics Sweden, 'Vanligast med 2 rum och kök på 57 kvadratmeter', < http://www.scb.se/hitta-statistik/artiklar/2016/Vanligast-med-2-rum-och-kok-pa-57-kvadratmeter/ > accessed 15 June 2018

[8] See Ch. 12 Sec. 70 of the Land Code.

[9] See e.g. the official report SOU 2007:74, *Upplåtelse av den egna bostaden*, p. 29.

The first condition that needs to be met is thus that the tenant has *considerable reasons* to sublet the apartment. The condition is relatively strict, as indicated by the fact that the reasons need to be *considerable*. The section exemplifies a number of situations that are considered to constitute considerable reasons but is also applicable on other comparable situations. A common denominator of the different reasons is that the tenant has a substantial reason not to use the apartment during a period of time but still has a legitimate interest in retaining the right to return to the apartment.[10] An example of a situation that is not considered to constitute a considerable reason is when a tenant wants to sublet solely to earn monetary compensation – not even if the tenant due to economic difficulties is temporarily unable to pay the rent.[11]

In earlier versions of the section, the requirements were even more strict and only covered situations where the tenant because of sickness or other unexpected events could not use the apartment during a period of time.[12] The tenant also needed to show that the tenant would leave the apartment for 'some time' and that it was probable that the tenant would return to the apartment within a foreseeable period of time. At the end of the 20th century, the section was made more permissive. The change was motivated by the will to make the law more permissive for tenants who were sick or elderly, or persons that wanted to try living together with a partner, since these categories of tenants had a hard time showing that it was *probable* that they would *return* to the apartment within a foreseeable period of time.[13] The change was also motivated by the view that it was too strict to demand that the tenant was *forced* to leave the apartment due to circumstances that the tenant could not influence, and the lawmaker pointed out that the tenant could have considerable reasons to sublet due to more or less voluntary choices (e.g. when trying a new job in a different city or when 'test-living' with a partner).[14] The change was implemented by removing the requirement stating that the tenant would have to leave the apartment for 'some time'.[15] This does, however, not mean that the time aspect does not affect the assessment. The Rent Tribunals regularly deny appeals by tenants who wish to sublet during periods of less than a month, since the tenant rarely is considered to have a considerable reason to sublet in these cases.[16]

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[10] See Leif Holmqvist & Rune Thomsson, *Hyreslagen: en kommentar* (Norstedts Juridik 2015), 40 §.

[11] See the official report SOU 1991:86, *Ny hyreslag*, p. 127-128.

[12] See government bill prop. 1968:91, *med förslag till lag angående ändring i lagen den 19 juni 1942 (nr 429) om hyresreglering m.m. och om fortsatt giltighet av lagen, m.m.,* Supplement A p. 225.

[13] See government bill prop. 1997/98:46, *Ändringar i hyreslagen m.m.*, p. 20.

[14] Ibid.

[15] Ibid. p. 57.

[16] See the official report SOU 2017:86, *Hyresmarknad utan svarthandel och otillåten andrahandsuthyrning*, p. 172.

The section was, yet again, made even more permissive in 2009, when the situation *a longer stay abroad* was added as a considerable reason.[17] Since the probably most common reason for a tenant to leave the apartment is when the tenant leaves on a holiday, this section is especially interesting in an Airbnb-context. The reason for the change was that the lawmaker wanted to increase the possibilities for tenants to sublet, thereby counteracting the prevalent lack of dwellings in urban areas.[18] The lawmaker further concluded that being able to sublet the apartment many times can be a prerequisite for the tenant to be able to travel abroad for a longer period of time.[19] It was also clarified that the situation is not applicable if the tenant will be staying abroad only during 'one or a few months'.[20] It is thus unclear how long the stay needs to be to constitute a *longer stay abroad*, but based on the preparatory works the duration likely needs to be at least three months. Finally, although the section exemplifies longer stays *abroad*, this does not exclude longer stays within the country, if the situation is comparable to a stay abroad.[21]

Even if the tenant has considerable reasons to sublet the apartment, the Rent Tribunal shall deny the application if the second condition of Ch. 12 Sec. 40 of the Land Code is not met, i.e. if the landlord has a *legitimate reason* to refuse. The typical example of a situation where the landlord has a legitimate reason for a refusal is when the sublessee is known to be a disorderly person and therefore could be expected to disturb neighbours.[22]

1.2.2. THE RENT TRIBUNAL'S CASE LAW ON AIRBNB

The limits of Ch. 12 Sec. 40 of the Land Code in regard to subletting a rental apartment through Airbnb has not been tried by any of the eight regional Rent Tribunals. The Rent Tribunal in Stockholm has, however, tried the applicability of the corresponding legislation for *tenant owner apartments*. To understand the relevance of this decision, we first need to briefly compare the legislations on rental and tenant owner apartments.

As mentioned in section 1.1, an owner of a tenant owner apartment needs the approval of the board of directors to be able to sublet the apartment. The board's decision may be appealed to the Rent Tribunal,

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17 See SFS 2008:1074, *Lag om ändring i jordabalken*.

18 See government bill prop. 2008/09:27, *Ökade möjligheter till andrahandsuthyrning*, p. 9.

19 Ibid. p. 10.

20 Ibid. p. 21. The lawmaker did thus not clarify how many months that are needed for a stay to be considered *longer*. It did, however, not share the commission of inquiry's opinion that a longer stay should be at least six months, cf. the official report SOU 2007:74, *Upplåtelse av den egna bostaden*, p. 90.

21 Ibid. p. 21 f.

22 See e.g. Charlotte Andersson & Emil Andersson, *Lägenhetsbyten och andrahandsuthyrning* (Norstedts Juridik 2015), p. 28 and government bill prop. 1997/98:46, *Ändringar i hyreslagen m.m.*, p. 19.

in the same way as a tenant may appeal the landlord's decision. The corresponding rules for both situations are very similar, but where a tenant needs to have a *considerable reason* to sublet, an owner of a tenant owner apartment only needs to have a *reason*.[23] As in the case of rental apartments, the Rent Tribunal shall deny the appeal of the owner of the tenant owner apartment if the tenant owner association has a *legitimate reason* to refuse the owner to sublet. In short, these sections in the regulations on rental apartments and tenant owner apartments are very similar, but the legislation on subletting a tenant owner apartment is more permissive.[24]

In 2015, the Rent Tribunal in Stockholm tried a case where an owner of a tenant owner apartment wanted the Tribunal's permission to sublet the apartment to seven different people during a period of approximately one month.[25] The contact with the sublessees had been established through Airbnb. The owner of the tenant owner apartment had recently moved and wanted to sublet the apartment during the period before the new owner of the apartment moved in, to avoid paying double costs for two different dwellings. The Tribunal stated that this may constitute an acceptable *reason* according to the Tenant Owner Apartment Act.[26] However, the Tribunal found that the intended sublets showed more similarities with a commercial hotel business than with the purposes that the legislation was aimed at, since the rental fees were in level with hotel fees, the number of sublets were high and the durations of the stays were short. As such, the owner of the apartment was not considered to have a *reason* for subletting the apartment in the way that she desired, according to the interpretation of Ch. 7 Sec. 11 of the Tenant Owner Apartment Act. Finally, the Rent Tribunal further found

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[23] See Ch. 7 Sec. 11 of the Tenant Owner Apartment Act. The similarities between these regulations are not by chance. They were originally almost identical, but the regulation on tenant owner apartments was revised and the rules on sublets of this kind of apartments were made more permissive in 2003 and 2014, see government bill prop. 2002/03:12, *Olika bostadsrättsfrågor*, p. 68-72 and government bill prop. 2013/14:142, *Ökad uthyrning av bostadsrättslägenheter*, p. 11-14.

[24] The reasons for this are, among other things, that the owner of a tenant owner apartment has paid for the apartment and that the exclusive right to the apartment constitutes a right that can be said to be somewhere in-between an ownership right and a tenancy, see government bill prop. 2002/03:12, *Olika bostadsrättsfrågor*, p. 49-50 and government bill prop. 2013/14:142, *Ökad uthyrning av bostadsrättslägenheter*, p. 12-13.

[25] See Hyresnämnden i Stockholm [The Rent Tribunal in Stockholm] Case No. 8741-15, 2015-08-17.

[26] Cf. government bill prop. 2013/14:142, *Ökad uthyrning av bostadsrättslägenheter*, p. 13 f. where the lawmaker stated that the owner of a tenant owner apartment in some cases should be allowed to sublet even if the owner will not return to the apartment, for example if it is hard to sell because of the state of the market. It should, however, be mentioned that similar reasons have not been mentioned in the preparatory works on the corresponding regulations on rental apartments.

that the association also had *legitimate reasons* to refuse the sublets since the high number of unknown people in the building would lead to inconveniences for the other apartment owners.

A central point of the case that was tried by the Rent Tribunal in Stockholm is that the Rent Tribunal found that an owner of a tenant owner apartment may have a *reason* to sublet during a period of time, but not a legitimate *reason* to sublet the apartment through several subsequent short-term sublets of a commercial nature. This could be interpreted in two ways. Either the Rent Tribunal meant that the apartment owner's *reason* to construct the sublets this way was purely to earn money, which the lawmaker explicitly has stated does not constitute a *reason*.[27] The reasoning could also be understood in the way that *each separate* subletting did not fulfil the requirements to constitute *reasons* because the time periods were too short – an interpretation that is based on the fact that the apartment owner needs the association's or Rent Tribunal's permission for each separate subletting. Irrespective of which of the interpretations that was the basis for the decision, it is clear that several subsequent short-term sublets of a commercial nature does not constitute a *reason* that gives the apartment owner the right to sublet without the association's permission. The case further shows that irrespective of the apartment owner's reason for subletting, the association has a *legitimate reason* to refuse because of the fact that the high number of unknown people in the building would lead to inconveniences for the other apartment owners.

Although the case that was tried by the Rent Tribunal in Stockholm only concerned tenant owner apartments, the outcome in a case regarding a rental apartment would almost undoubtedly have been the same, because of the similarities between the two regulations (and the fact that the regulation on tenant owner apartments is more permitting).

It should, however, be noted that Sweden has eight different Rent Tribunals and the decision of a Rent Tribunal to allow or deny a tenant or an owner of a tenant owner apartment to sublet may not be appealed further.[28] As such, there is no court of record that creates precedents in these cases, and there is a risk that different Rent Tribunals may judge similar cases differently. The different Rent Tribunals, however, continually work together and exchange opinions to mitigate this risk

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[27] Ibid. p. 14.

[28] See Ch. 12 Sec. 70 of the Land Code regarding rental apartments and Ch. 11 Sec. 3 of the Tenant Owner Apartment Act regarding tenant owner apartments. At the time when this article is being written, however, the government is drafting a government bill which could make it possible to appeal these decisions. If the government bill is put forward in its current form and the legislative proposals are enacted, it will be possible for the Rent Tribunal to allow a decision to be appealed to Svea Court of Appeal, if the case is of importance to guide the application of the law, see the government's referral to the Council on Legislation (5 July 2018), Lagrådsremiss, *En modernare och mer ändamålsenlig prövning av hyres- och arrendenämnden*, p. 49 ff.

and to create a uniform interpretation of the legislation.[29] Further, the cited decision corresponds well with the preparatory works and nothing indicates that other Rent Tribunals would judge similar cases differently.

In regard to rental apartments, the conclusion is therefore that a tenant will not be able to use Airbnb for short-term subletting of the tenant's apartment, if the landlord does not allow it.

1.3. THE LACK OF INCENTIVES FOR THE LANDLORD TO ALLOW SHORT-TERM SUBLETS

What has been analysed so far is the possibility to *forcibly* sublet the apartment without the landlord's approval. The landlord can of course choose to allow these kinds of short-term sublets, if the landlord so wishes. The relevant question is then if a landlord can be expected to allow a tenant to use Airbnb for short-term subletting. The common view on this question is, however, that a landlord does not have any incentives to do so. There are two main reasons for this.

The first reason is that short-term sublets are linked to increased risks and inconveniences for the landlord and the other tenants in the building. The risks and inconveniences that usually are mentioned are the risks of increased wear and/or damage to the apartment or other parts of the property as well as an increased risk of disturbances and other inconveniences due to the many unknown people that would be staying in the building.[30] Because of these reasons, in connection with the fact that the tenant's aim of subletting short-term usually is to earn extra money, SABO [the Swedish Association of Public Housing Companies] and Fastighetsägarna [the Swedish Association of Property Owners] jointly recommend that landlords do not allow commercial short-term sublets.[31]

The second reason for the common view that landlords cannot be expected to allow a tenant to use Airbnb for short-term subletting is closely related to the first one and is that the landlord is not allowed to charge the tenant a higher rent than the one that has been specified in the tenancy agreement.[32] This means that the landlord, if the landlord voluntarily allows the tenant to sublet the apartment short-term even though it is not required, will not be able to charge economic compensation that covers the increased risks, nor the increased

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[29] See e.g. the foreword to Charlotte Andersson & Emil Andersson, *Lägenhetsbyten och andrahandsuthyrning* (Norstedts Juridik 2015).

[30] See e.g. Fastighetsägarna [the Swedish Association of Property Owners], 'Korttidsuthyrning av bostadsrätt' < http://www.fastighetsagarna.se/fakta/brf/andrahandsuthyrning/riktlinjer-for-uthyrning-av-bostadsratt/ > accessed 15 June 2018

[31] See Fastighetsägarna & SABO 'Riktlinjer för andrahandsuthyrning' (Alfredssons 2015), p. 6.

[32] Ibid. p. 8 and Ch. 12 Sec. 19 of the Land Code.

administrative costs related to administering the subletting.[33] From an economic point of view, the landlord thus would not have any incentives to allow commercial short-term sublets through Airbnb.

However, the main point of this article is to argue that it is possible for the landlord to charge an extra fee to allow short-term sublets through Airbnb and similar services, thereby creating economic incentives for the landlord to allow such sublets.

2. THE AIM OF THE ARTICLE – A COMMERCIAL MODEL THAT GIVES THE LANDLORD INCENTIVES TO ALLOW SHORT-TERM SUBLETS

Both the EU and the Swedish lawmaker are generally positive toward an increased use of the services of the sharing economy.[34] However, as was concluded in the previous sections, a tenant will not be able to use Airbnb for short-term subletting of the tenant's apartment, if the landlord does not allow it. Further, the landlord cannot be expected to allow short-term sublets if the landlord does not gain an extra monetary compensation. The possibility of charging such an extra fee for allowing short-term sublets has not been analysed in a Swedish context and it is not an actual practice on the market. The main implications of this is that many apartments are not used when the tenant is away – especially during vacation periods[35] or weekends. These are also the periods when the demand for apartments through Airbnb can be expected to be the highest.[36]

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[33] This does not mean that the landlord is unable to sue the tenant for e.g. reparation costs if the sublessee damages the apartment, see Ch. 12 Sec. 24 of the Land Code and e.g. Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018), p. 257-259. Such a proceeding is, however, associated with 'unnecessary' time and costs, compared to the alternative of not allowing the subletting to begin with.

[34] Regarding the Swedish lawmaker, see e.g. Kommittédirektiv 2015:136*,* in which the government appointed a commission of inquiry to analyse various models that facilitate sharing economy-transactions between private individuals, and to examine whether there was a need to change the existing legislation to better promote positive developments of the sharing economy. See also the commission of inquiry's official report, SOU 2017:26 *Delningsekonomi på användarnas villkor*.
Regarding the EU, see e.g. Comission, 'A European agenda for the collaborative economy', (Communication) COM (2016) 356 final. <https://ec.europa.eu/docsroom/documents/16881/attachments/2/translations/en/renditions/pdf> accessed 15 June 2018

[35] Which rarely will be for a long enough period of time to constitute a *considerable reason* to sublet, see section 1.2.1 above.

[36] The vacation periods are also the periods when the amount of unauthorised sublets in Sweden are the highest, where Airbnb is suspected to be one of the contributing factors, see the official report SOU 2017:86, *Hyresmarknad utan svarthandel och otillåten andrahandsuthyrning*, p. 177 f.

The specific aim of this article is thus to analyse if, under the Swedish tenancy legislation, it is possible to construct a commercial model through which the landlord may demand extra compensation when allowing a tenant to use the apartment for short-term subletting through Airbnb.

2.1. THE FRAMEWORK OF THE AIRBNB-MODEL – THE INVOLVED PARTIES AND THEIR INTERESTS

Before we take a closer look at the possibilities of charging an extra fee for the short-term subletting, we need to look at the different parties that are involved, and the interests that the commercial model (henceforth called the 'Airbnb-model') needs to satisfy. In other words, we need to lay down the framework of the model in order to see which legal questions and considerations that it gives rise to and that need to be analysed to determine if the Airbnb-model is possible to construct.

On a general level, the Airbnb-model includes three different parties and two different relations (exluding Airbnb, whose intermediary function is not analysed further in this article). The three different parties are the *landlord*, the *tenant* and the *sublessee* and the two relations are between the *landlord* and the *tenant* and between the *tenant* and the *sublessee*.

As mentioned above, the interest of the *landlord* is to be able to charge an extra fee for allowing short-term sublets.

The *tenant*, in turn, will generally – just like the landlord – have an interest in charging the sublessee a fee that is higher than the tenant's own rent for the relevant period of time that the apartment is being sublet. In other words, the tenant also has an interest in charging a premium and thereby earning extra monetary compensation when subletting short-term (especially since the Airbnb-model would include the extra fee charged by the landlord). This interest partly stems from the fact that the tenant, in relation to the landlord, is responsible for the sublessee's actions and in the worst case might lose the apartment if the sublessee misbehaves to a substantial extent.[37] The sublet might also involve an increased risk of damages to the tenant's possessions, e.g. furniture.[38] Finally, the tenant of course generally has an interest in earning extra income if it is possible to do so by subletting the apartment when the tenant is not using it.[39]

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[37] See e.g. Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018), p. 257-259.

[38] It should however be mentioned that, in the case of sublets through Airbnb, this risk is decreased through Airbnb's 'Host Guarantee', see Airbnb 'The $1,000,000 Host Guarantee' < https://www.airbnb.com/guarantee?locale=en > accessed 15 June 2018

[39] Cf. Boverket [National Board of Housing, Building and Planning] *Rapport 2015:39, Andrahandsmarknaden: hyror, utbud och institutioner* (Boverket 2015), p. 70, where Boverket carried out a survey examining the tenant's/owner's reasons for subletting houses, tenant owner apartments and rental apartments. 54 % answered that their reason for

Finally, the *sublessee* of course has an interest to pay as little rent as possible. The relevant question in this context is, however, if the sublessee is willing to pay a rent that exceeds the tenant's own rent for the apartment, since the interests of the landlord and the tenant to *both* gain a premium from the short-term sublet would otherwise not be able to be met. The short answer to this question is that sublessees are willing to pay such a premium. Since the sublessees are looking for short-term accommodation, their other possibilities are mainly hotels or hostels. The comparable costs a sublessee is willing to pay is therefore decided by the costs of staying at a hotel or hostel, which generally are more expensive per night than the daily cost of a monthly rent of a rental apartment. This intuitive assumption has also been confirmed in a study of the Airbnb-market in Stockholm, carried out by the European Commission.[40]

In conclusion, both the landlord and the tenant have an interest in earning an extra monetary compensation through the short-term sublet, and the sublessee can be expected to be willing to pay such a premium. The relevant legal questions that then arise are if (i) the tenant is allowed to charge a higher rent from the sublessee than the tenant's own rent (thereby earning a premium that can be split with the landlord) and (ii) if the landlord is allowed to charge the tenant an extra fee (henceforth called the 'Airbnb-fee') for allowing the short-term sublet.

3. THE SWEDISH TENANCY LEGISLATION'S REGULATIONS ON RENT

The main regulations on rent in the tenancy legislation are applicable both on the relation between the landlord and the tenant, i.e. the first-hand lease, and on the relation between the tenant and the sublessee, i.e. the sublet agreement. Before the exceptions for both of these relations are analysed, the relevant rules are therefore briefly explained.[41]

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subletting was 'Of economical reasons' or 'Good extra income', and 36 % because of 'Work/study in another town or travel abroad'. It should also be mentioned that 83 % of the sublets were long-term (more than three months) and 17 % between 0-3 months.

[40] See Commission, 'Study on the Assessment of the Regulatory Aspects Affecting the Collaborative Economy in the Tourism Accomodation Sector in the 28 Member States (580/PP/GRO/IMA/15/15111J) Task 4, Market Case study – Stockholm' (European Union 2018) p. 13, which specifies that the average monthly rent for long-term apartments in Stockholm in 2016 were 1009 EUR, the average monthly rate for Airbnb listings of an entire room/apartment was 3837 EUR and the average monthly rate for a hotel room was 5019 EUR.

[41] For a comprehensive explanation in English of the Swedish rental legislation and the implications of the collective bargaining system, see e.g. Haymanot Baheru, 'Swedish Legislation of Residential Tenancies: An Interaction between Collective Bargaining and Mandatory Regulation' (2017) Revista Electrónica de Direito no. 3.

3.1. THE MAIN RULE – THE COLLECTIVE BARGAINING SYSTEM AND FAIR RENTS DECIDED BY THE APARTMENT'S UTILITY VALUE

The basis of the regulations on rent in Ch. 12 of the Land Code is that the landlord and the tenant (or the tenant and the sublessee) are free to negotiate and decide the level of the rent themselves.[42] However, the legislation on residential tenancies is partly characterised as a social protection legislation and is formed to ensure a general protection of residential tenants.[43] Residential tenants are thereby guaranteed a certain amount of protection, due to the social importance of a tenant's need of a legally secured dwelling. As such, although the landlord and the tenant in principle are free to decide the rent themselves, the tenancy legislation provides a safeguard to prevent unfairly high levels of rent.

A tenant who is unhappy with the rent may appeal to the regional Rent Tribunal, which will decide if the rent is *fair* or not. The fairness of the rent is decided by an assessment of the 'utility value' (Sw. *bruksvärde*) of the apartment.[44] If the rent is unfairly high compared to the utility value of the apartment, the Rent Tribunal shall determine the fair level of rent that shall be paid instead.[45]

The utility value of the apartment is determined by a comparison with the rent for other comparable apartments in the same municipality and whose rents have been negotiated through the so-called collective bargaining system, or through a general fairness assessment if such a comparison cannot be made.[46] The comparison is based on the apartment's general quality, benefits connected to the apartment and other factors that have an impact on the apartment's value in the view of a tenant, compared to other comparable apartments.[47] Examples of factors that affect the utility value are size, level of modernity, layout, location within the building, general standard and soundproofing, elevators, laundry and storage facilities, the building's location and proximity to public transportation, etc.[48] Factors that *do not* affect the utility value are e.g. the year that the building was built, the landlord's costs of production, operation and management costs, and the tenant's personal preferences or needs.[49]

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[42] See e.g. Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018), p. 78.

[43] See e.g. the official report SOU 2017:86, *Hyresmarknad utan svarthandel och otillåten andrahandsuthyrning*, p. 37 f.

[44] See Ch. 12 Sec. 55 of the Land Code.

[45] Ibid.

[46] Ibid.

[47] See the official report SOU 2000:33, *Bruksvärde, förhandling och hyra – en utvärdering*, p. 22.

[48] See government bill prop. 2009/10:185, *Allmännyttiga kommunala bostadsaktiebolag och reformerade hyressättningsregler*, p. 67.

[49] Ibid p. 22. The rent for newly built houses may, during the first 15 years, however be decided differently, see Ch. 12 Sec. 55 c of the Land Code.

As mentioned, the utility value is mainly decided by a comparison with apartments whose rents have been determined through the *collective bargaining system*. In short, the collective bargaining system decides the rents for the collective residential rental apartments that are included in the system, through negotiations between organisations representing tenants on one hand and landlords on the other. The system is very widespread – almost all buildings that contain more than two residential apartments are included.[50] The system also indirectly regulates the rents for (the very few) apartment buildings that have no affiliation with a tenants' union, through the negotiated rents' impact on the utility value of the unaffiliated apartments.

The tenancy legislation is based on the idea that several tenants unions exist, but in practice almost all residential tenants (90 % of all residential rental apartments) are represented by Hyresgästföreningen [the Swedish Tenants' Union].[51] The landlords are predominantly represented by two different associations: SABO [the Swedish Association of Public Housing Companies] which represents the municipal housing companies and Fastighetsägarna [the Swedish Association of Property Owners] which represents the private landlords.

In conclusion, the rents of residential apartments in Sweden are decided through the collective bargaining system. An agreement between the tenants' union and the landlords' association directly decides the rents of the affected apartments. If the tenants' union and the landlords' association cannot reach an agreement (or if the relevant apartment is not included in the system), the rent can instead be decided by the Rent Tribunal, which determines the utility value of the apartment through a comparison with other apartments whose rents have been decided through the collective bargaining system.

4. THE TENANT'S POSSIBILITY TO CHARGE THE SUBLESSEE A RENT THAT IS HIGHER THAN THE TENANT'S OWN

4.1. THE MAIN RULE – ONLY A LIMITED EXTRA FEE FOR FURNISHED APARTMENTS IS POSSIBLE

As was briefly mentioned in section 3, the tenancy legislation's main regulations on rent are applicable both on the relation between the landlord and the tenant and on the relation between the tenant and the

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[50] See Tore Ljungkvist, *Skälig hyra – en studie av bruksvärdessystemet* (Jure 2015), p. 26. It should also be noted that an agreement on a collective bargaining procedure covers the whole residential building, even if some of the tenants are not members of a tenants union (unless the tenant and landlord in writing has agreed that the tenant opts out), see Sec. 3 of the Collective Bargaining Act [Hyresförhandlingslag] (1978:304).

[51] See Hyresgästföreningen [the Swedish Tenants Union], 'Hyresförhandling' < https://www.hyresgastforeningen.se/var-verksamhet/vad-vi-gor/forhandlar-hyror/ > accessed 15 June 2018

sublessee. This means that the *fairness* of the rent that the sublessee has to pay to the tenant for the sublet apartment can be tried by the regional Rent Tribunal, in the same way that the tenant may appeal to the Rent Tribunal if the landlord charges an unfairly high rent.[52] This further means that the fairness of the rent also will be measured by the utility value of the apartment. Since the utility value is derived from the *apartment itself*, the utility value is the same for both the tenant and the sublessee (since the same apartment is the object of both agreements). Therefore, if the tenant charges the sublessee a rent that is higher than the tenant's own, the sublessee may appeal to the Rent Tribunal which will judge the rent to be unfair and change it.

There is, however, a common factor that can give the tenant right to charge a premium from the sublessee in relation to the tenant's own rent. If the tenant rents an unfurnished apartment and, in turn, sublets the apartment equipped with the tenant's own furniture, then the tenant may charge a higher rent. In other words, the utility value of the apartment increases due to the fact that it is furnished. The Rent Tribunal generally accepts an increased rent of 5-15 %, depending on to what extent the apartment has been furnished and on the quality of the furniture.[53]

The tenant thus, as a main rule, has a possibility to earn 5-15 % of the tenant's own rent as a premium when subletting. This sum, however, is not enough to fully satisfy the interests of both the landlord and the tenant to share a large enough premium when subletting short-term through Airbnb (see section 2 above). We therefore need to look at another exception to the main rule that restricts the rent, to see if the tenant is able to charge a high enough rent to fulfil the conditions for the commercial Airbnb-model that we are looking to create.

4.2. THE EXCEPTION – HIGHER RENTS MAY BE CHARGED WHEN THE APARTMENT IS BEING SUBLET FOR RECREATIONAL PURPOSES

The tenancy legislation contains an exception to the abovementioned main rule on the rent level's connection to the utility value of the apartment. The exception states that the sublessee cannot turn to the Rent Tribunal and claim that the rent exceeds the apartment's utility value, if the duration of the sublet is less than nine months and the apartment is being sublet for *recreational purposes*.[54] The types of sublets that we currently are analysing will never reach a duration of nine

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[52] The sublessee may also demand a retroactive repayment of any rent that has been paid within a year and that has exceeded the 'fair' rent as decided by the Rent Tribunal, see Ch. 12 Sec. 55 e of the Land Code.

[53] See the official report SOU 2007:74, *Upplåtelse av den egna bostaden*, p. 63.

[54] See Ch. 12 Sec. 53 of the Land Code, which states that Ch. 12 Sec. 55 is not applicable in these cases. Also Ch. 12 Sec. 55 e is exempt in these cases, which means that the sublessee cannot demand retroactive repayment, cf. footnote 52 above.

months, and this part of the exception is therefore satisfied. The relevant condition is instead if the apartment is being sublet for *recreational purposes*, and if this condition is fulfilled in the case of short-term sublets through Airbnb.

The tenancy legislation does not state how the term *recreational purposes* is defined, nor has it been defined or discussed further in the preparatory works. The definition of the term has, however, been analysed by the Rent Tribunal in Stockholm, in Case No. 8171-06, 2007-09-27.[55]

In the case, the Rent Tribunal stated that the definition of 'recreational purposes' has not been described in the legislation, nor in the preparatory works or in earlier precedents. Because of the lack of a definition, the Tribunal found that the interpretation of the condition should be understood in light of the purpose of the legislation and of the how the wording is understood in its normal 'non-judicial' usage. The interpretation in each separate case should, according to the Tribunal, as a main rule be based on the circumstances when the parties entered into the agreement, and that the purpose of the sublet should be decided by how the parties intended for the apartment to be used. The Tribunal continued by explaining that the purpose of the sublet is not decided by how the parties themselves classify the sublet in the agreement, because this would mean that the parties could circumvent the purpose of the legislation through their own definition.[56] The definition in the agreement is, however, one of the factors that is taken into account in the overall assessment of the purpose of the sublet. The Tribunal finally concluded that the description of the purpose of the sublet that was being tried was more similar to a complementary dwelling than a sublet for recreational purposes.

The kinds of sublets that are being examined in this article are short-term sublets through Airbnb, with a specific focus on situations when the tenant does not use the apartment because the tenant has left on a trip during the holiday. If the sublessee is a person that is visiting the city during a holiday, the sublet should – according to the reasoning

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[55] It should be noted that the cited case was appealed to Svea Hovrätt [Svea Court of Appeal], which is the court of record that creates the precedents in these cases, see Sec. 10 of the Law (1994:831) on the Judicial Process of Certain Tenancy Cases in Svea Hovrätt. Svea Court of Appeal tried the case and came to the same conclusion as the Rent Tribunal, see ÖH 7232-07. Svea Court of Appeal, however, merely stated that it did not find any reason to "make another assessment than the one made by the Rent Tribunal". It is therefore unclear if Svea Court of Appeal made the same assessments regarding the term *recreational purposes* as the Rent Tribunal did.

[56] See also ÖH 9977-09 [Svea Court of Appeal], where the court found that an agreement constituted a 'normal' residential tenancy agreement, although the contract stated that the tenant only was allowed to use the apartment for recreational purposes. The reason for this was that the court found that it had been shown that none of the parties had intended for the apartment to only be used for recreational purposes.

in the case from the Rent Tribunal – be classified as a sublet for recreational purposes. This means that the tenant is able to charge a rent that exceeds the utility value of the apartment, without a possibility for the sublessee to appeal to the regional Rent Tribunal. This, in turn, satisfies the prerequisite mentioned in section 2.1, i.e. that the tenant is able to generate a premium which exceeds the tenants own rent for the apartment.

In this context, it should also be noted that some people use Airbnb when travelling for work purposes. Due to the lack of clarity in regard to the definition of 'recreational purposes' in the tenancy legislation, it is unclear if work purposes could be considered to be included in the definition of recreational purposes. The case from the Rent Tribunal suggests that sublets for work purposes would not be included in this definition, mainly because 'work' is not included in how 'recreational' is understood in the normal 'non-judicial' usage of the word. The purpose of the legislation is, further, to prevent that a tenant exploits e.g. a lack of dwellings (which might force sublessees to pay more because of the difficulty to find available dwellings) to charge an unfairly high rent.[57] Sublets for recreational purposes are explicitly excluded since the protective motives of the legislation do not arise in these kinds of situations.[58] A sublet for work purposes might, however, give rise to such considerations, for example if the worker *must* live in the city for a period of time and there is a lack of dwellings (in contrast to a person on vacation, who enjoys the voluntary choice of travelling to whichever city the person pleases).

In conclusion, a tenant may charge the sublessee a higher rent if the apartment is being sublet to a sublessee that will use it for recreational purposes, which in turn satisfies one of the preconditions for the Airbnb-model to work (that the tenant may charge a premium which exceeds the tenants own rent for the apartment). To be entirely sure that the sublet is included in this category, however, the landlords and tenants that use the model should make sure that the sublease agreement is formulated explicitly as a lease to use the apartment only for recreational purposes.[59] Further, they need to make sure that the sublessee also intends to use the apartment for recreational purposes and not for work purposes.

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[57] See government bill prop. 1987/88:162, *Om hyran vid andrahandsupplåtelse av bostadslägenheter, m.m.*, p. 11.

[58] Ibid. p. 13.

[59] In practice, this can be achieved by adding the prerequisite to the tenant's terms and conditions when listing the apartment on Airbnb. These terms and conditions become a part of the legally binding agreement between the tenant and the sublessee when they reach an agreement through Airbnb, see section 8.1.2 of Airbnb's Terms of Service. < https://www.airbnb.se/terms > accessed 20 September 2018

5. THE LANDLORD'S POSSIBILITY TO CHARGE THE TENANT AN EXTRA AIRBNB-FEE FOR ALLOWING SHORT-TERM SUBLETS THROUGH AIRBNB

A central aspect of this part of the analysis is that the landlord's permission to sublet short-term is something that can be regarded as an extra contractual right, i.e. a right that the tenant is not already ensured through the rights that are directly derived from the tenancy itself and safeguarded through Ch. 12 of the Land Code. A tenant would, of course, not accept a system where the tenant needs to pay extra for a right that is already included in the rights that the tenant is guaranteed through the tenancy legislation (and therefore already paid for through the rent).[60] The tenant would in such a case instead be able to appeal to the Rent Tribunal, which would grant the tenant permission to sublet without an extra cost. However, as concluded in section 1.2.2, the tenancy legislation does not include a right for the tenant to enforce the allowance of the landlord in the case of short-term sublets, and the allowance is therefore regarded as an extra contractual right.[61]

As was mentioned in section 3.1, the Swedish tenancy legislation departs from the premise that the landlord and the tenant are free to negotiate and agree on the level of the rent themselves. The next question that is relevant in the analysis of the Airbnb-model is therefore not if they *can* agree on an extra rent for the short-term subletting, but if the agreed extra compensation constitutes *rent* or if it should be classified as payment for a separate agreement and not a part of the tenancy agreement. The question is relevant because the tenancy legislation's special provisions are only applicable on fees that are classified as rent (i.e. fees that are considered to be a part of the tenancy agreement). If the extra Airbnb-fee is classified as rent it therefore has to be adapted to the tenancy legislation, whereas a fee that is not classified as rent as a main rule would constitute a separate agreement, which would be interpreted through the use of common principles of contract law.[62]

My assessment is that the extra fee should be classified as rent, thereby making the tenancy legislation applicable. The reasons for this,

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[60] The same can of course also be said regarding the tenants' union, which will safeguard the tenant's rights in the negotiations with the landlord, cf. section 5.2.1 below.

[61] Cf. e.g. RBD 44:81 [the Rents and Tenancies Court of Appeal] (which was the court of record until 1994, when it was dissolved and Svea Court of Appeal became the new court of record). In this case the tenancy agreement contained a generally formulated consent by the landlord for the tenant to sublet the apartment. The consent was regarded as a contractual provision which could be renegotiated. See further Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018) p. 258 f.

[62] Cf. official report SOU 2004:91, *Reformerad hyressättning*, p. 139-140, where the same question was analysed in regard to the classification of tenants' options to include or exclude domestic appliances or other services provided by the landlord.

as well as the practical implications of the fee's classification as rent, are explained in the following sections.

5.1. IS THE AIRBNB-FEE CLASSIFIED AS RENT OR DOES IT CONSTITUTE A SEPARATE AGREEMENT?

The definition of 'rent' is not clarified in the tenancy legislation, nor in the older preparatory works. It has, however, been analysed in the doctrine and official reports. In these documents, the definition of rent has been discussed in the context of payment for *services* in connection with the tenancy agreement. The conclusion in these documents has been that services that are connected to the 'core area' of the tenancy should be interpreted as a part of the tenancy agreement, and that the payment in these cases constitutes rent.[63]

The exact limit for which services that should be considered to be connected to the 'core area' of the tenancy is unclear. The most discussed example is when the landlord gives tenants the option to add or remove domestic appliances or in other ways change the physical standard of the apartment. These options are considered to fall within the 'core area' and the compensation therefore constitutes rent.[64] Services that constitute a complementary function to the apartment, without changing the apartment's physical constitution, are, however, harder to classify.[65]

Although the definition of 'rent' is unclear in the case of services in connection with the tenancy agreement, there should be less doubt regarding the classification in the case of the extra Airbnb-fee for allowing short-term commercial sublets. As mentioned in section 5, the landlord's permission to commercially sublet an apartment short-term through Airbnb is regarded as an extra contractual right. If the tenant is given such a right in the tenancy agreement, the agreement should be regarded as a *mixed* agreement, since the tenant then may use the apartment for *mixed purposes*, i.e. both for residential purposes and commercial purposes (when the landlord's conditions for allowing the use of the Airbnb-model are met).[66] In other words, the right to use the apartment for short-term commercial sublets through Airbnb does not

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[63] See Anders Victorin & Anders Dahlquist-Sjöberg, *Flexibilitet och besittningsskydd* (Kungliga Tekniska Högskolan 2003), p. 18 and 21, official report SOU 2004:91, *Reformerad hyressättning,* p. 138 ff. and official report SOU 2008:94, *Tillval i hyresrätt*, p. 128 ff.

[64] Ibid.

[65] See e.g. official report SOU 2008:94, *Tillval i hyresrätt*, p. 130, where it is mentioned that payment for services in the form of e.g. dry cleaning, ticket bookings and food deliveries does not constitute rent if the services are provided in separate agreements, but may constitute rent if the services are a part of the tenancy agreement.

[66] It is important to note that the apartment needs to be explicitly let for mixed purposes, see further section 5.2.3 below.

constitute a *service*, but instead an extra contractual right in the form of an extension of the *purpose* of the tenancy agreement.

The tenancy legislation does not hinder tenancy agreements that allow for the apartment to be used for mixed purposes, and examples of such uses are when the tenant is given a contractual right to use the apartment both as a dwelling and as a dental practice or as an atelier.[67] It should be noted that the apartment in these cases will be legally classified as a residential apartment (in contrast to a commercial apartment), as long as the residential component of the tenancy is not only of trifling importance compared to the commercial component.[68] This means that the compulsory protective provisions of the legislation that are aimed at residential apartments often are applicable in situations where apartments are being let for mixed uses, including the situations discussed in this article. The assessment of the *fairness* of the rent can however be affected by the commercial component even if the tenancy is legally classified as a residential tenancy (see further section 5.2.3 below). In this part of the article, however, it is enough to note that the court has tried the fairness of rents for apartments that have been let for mixed purposes, and has not made a distinction between the payments pertaining to the different uses – the payment for both uses has constituted *rent*.[69] Since the right to use an apartment for short-term commercial sublets through Airbnb should be regarded as a contractual right to use the apartment for commercial purposes, the Airbnb-fee should be considered to constitute *rent*.

The non-compulsory nature of the Airbnb-fee (i.e. that the tenant does not need to pay the fee if the tenant does not use the possibility to sublet short-term) does not change this assessment, and can be compared to the discussion on options to add or remove domestic appliances which have been deemed to constitute rent, regardless of their non-compulsory nature.[70] The same can be said regarding the fact that the Airbnb-fee is a 'one-time' fee, as compared to most other costs which usually are periodical and affect the monthly level of the rent,

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[67] See e.g. Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018) p. 38 ff.

[68] See government bill prop. 1967:141, *med förslag till lag angående ändring i vissa delar av lagen den 14 juni 1907 (nr 36 s. 1) om nyttjanderätt till fast egendom m.m.*, p. 124.

[69] See e.g. RBD 11:84 [the Rents and Tenancies Court of Appeal].

[70] See official report SOU 2004:91, *Reformerad hyressättning,* p. 138 ff. and official report SOU 2008:94, *Tillval i hyresrätt*, p. 93.

In this context, it should also be mentioned that this fact also means that the penal prohibition on separate compensation as *a condition* for letting an apartment in Ch. 12 Sec. 65 of the Land Code is not applicable on the Airbnb-fee, cf. Kjell Adolfsson & Sten Hillert, *Hyresrätt som dellikvid* (Iustus Förlag 1991) p. 66, Anna Christensen, *Hemrätt i hyreshuset* (Juristförlaget 1994) p. 332 and the official report SOU 2017:86, *Hyresmarknad utan svarthandel och otillåten andrahandsuthyrning*, p. 52.

which in the discussions on options to add or remove domestic appliances has not been deemed to change the fee's nature as rent.[71]

In conclusion, the extra Airbnb-fee that a landlord will charge a tenant for short-term commercial sublets through Airbnb should be regarded as payment for an extra contractual right to use the apartment for a specified commercial purpose, and the fee should be classified as rent.

5.2. THE PRACTICAL IMPLICATIONS OF THE AIRBNB-FEE'S CLASSIFICATION AS RENT

Since the Airbnb-fee is classified as rent, the tenancy legislation is applicable. This has certain practical implications that should be noted by a landlord that wants to use the Airbnb-model. The central implications are briefly explained in the following subsections.

5.2.1. THE COLLECTIVE BARGAINING SYSTEM IS APPLICABLE ON THE AIRBNB-FEE

As mentioned in section 3.1, almost all buildings that contain more than two residential apartments are included in the collective bargaining system, and it is therefore important to note the implications of the system when analysing the Airbnb-model.

The main implication of the collective bargaining system's applicability in this context is that the landlord has an obligation to negotiate with the tenants union before increasing the rent of one or more apartments.[72] If the landlord does not fulfil this obligation, and instead enters into an agreement with the tenant (i.e. charges the tenant the Airbnb-fee for allowing the short-term sublet without prior negotiation with the tenants union), then the agreement is null and void.[73] In these cases, the landlord needs to repay the Airbnb-fee to the tenant (with interest).[74] The landlord is, further, also liable to pay damages to the tenants union because of the non-compliance with the obligation to negotiate.[75]

The obligation does not require the landlord (or the landlords association) and the tenants union to actually enter into an agreement. The landlord is only obligated to initiate the negotiation. If the landlords'

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[71] See official report SOU 2004:91, *Reformerad hyressättning,* p. 136 ff. and official report SOU 2008:94, *Tillval i hyresrätt*, p. 65. Although the reasons for this was not explicitly discussed in the reports, it is a natural consequence of the fact that the legal definition of a tenancy agreement does not require the compensation (rent) to be of a reoccurring nature, see NJA 1948 s. 101 [Swedish Supreme Court].

[72] See Sec. 5 of the Rent Bargaining Act (1978:304). The definition of 'rent' in this act is interpreted extensively, just as the definition in Ch. 12 of the Land Code, see Anders Victorin, *Kollektiv hyresrätt* (Norstedts 1980) p. 189 f.

[73] See Sec. 23 of the Rent Bargaining Act.

[74] Ibid.

[75] See Sec. 26 of the Rent Bargaining Act.

association and the tenants union do not reach an agreement, then the landlord and the tenant may negotiate individually or take the case to the regional Rent Tribunal, which will try the fairness of the rent.[76]

This being said, my own assessment is that there should be a high chance that the landlord (or the landlords association) and the tenants union will be able to reach an agreement in these cases, if they choose to use the model. The Airbnb-model does in a way constitute an extra cost for the tenants, but the cost is associated with an even higher income through the short-term sublet. Tenants who do not wish to use the possibility to short-term sublet their apartments will, further, not have to pay anything extra. Since the sublessees in general are willing to pay a relatively high premium compared to the tenant's monthly rent,[77] the tenants union and the landlords association should be able to agree on fees that fairly split the extra income between the landlord and the tenant.

5.2.2. THE AIRBNB-FEE MUST BE SPECIFIED IN THE TENANCY AGREEMENT OR IN A COLLECTIVE BARGAINING AGREEMENT

Ch 12. Sec. 19 of the Land Code specifies that the rent of the apartment must be specified in the tenancy agreement or in a collective bargaining agreement.[78] This section has less implications for landlords that are a part of the collective bargaining system, since these landlords generally will fulfil this requirement through collective bargaining agreements with the tenants union. The section, however, has bigger implications for (the few) landlords that do not need to adhere to the bargaining rules.

The main practical effect of Ch. 12 Sec. 19 of the Land Code in these cases is fairly self-explanatory – even the landlords that are not part of the collective bargaining system will need to negotiate with their tenants and may not add the Airbnb-fee before having reached agreements with the tenants. The landlord also has to follow the procedural rules set out in Ch. 12 Sec. 53-55 d of the Land Code. However, these procedural rules are not the focus of this article and will not be described further here.[79]

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[76] See Sec. 24 and 25 of the Rent Bargaining Act. See also e.g. Bertil Bengtsson, Richard Hager & Anders Victorin, *Hyra och annan nyttjanderätt till fast egendom* (Norstedts Juridik 2013) p. 138 f. and Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018) p. 219.

[77] Cf. footnote 40.

[78] See Ch. 12 Sec. 19 of the Land Code. If the rent is decided through a collective bargaining agreement, then the tenancy agreements needs to contain so-called bargaining clauses, which state that the tenants are bound to the agreements between the tenant's union and the landlord (or landlord's association), see Sec. 2 of the Rent Bargaining Act.

[79] For more information on these rules, see e.g. Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018) p. 217 ff.

Ch. 12 Sec. 19 of the Land Code further states that the *amount* of rent for rental apartments needs to specified in the tenancy agreement. The purpose of the provision is to make sure that the tenant is able to calculate the extent of the tenant's financial obligations beforehand.[80] As such, the landlord is not allowed to e.g. yearly adjust the rent in accordance with a specified index or in other ways reserve the right to one-sidedly change the rent. The rent does, however, not need to take on a fixed value during the whole rental period. The parties may agree on a rent that is e.g. 7000 SEK the first year, 8000 SEK the second, and 9000 SEK the third year.[81] The only costs, pertaining to the rent, whose amounts do not need to be specified are costs for heating, cooling, hot water, electricity and fees relating to water and sewage systems. These costs may instead be based on the tenant's actual use of the services.

The fact that the rent needs to be specified does not hinder the Airbnb-fee. The preparatory works explicitly specify that different rents may be charged for different periods as long as they have been specified beforehand. This can be achieved when the landlord negotiates with the tenant or tenant's union. In the latter case, it's also possible to specify different rent levels in the collective bargaining agreement, for example by specifying that apartments in different size intervals, or based on the number of rooms, are charged certain fees. It is also possible to specify different fees for apartments in different parts of the cities (where apartments in the central parts would be charged a higher fee), and so on.

Although Ch. 12 Sec. 19 does not hinder the Airbnb-fee, it does however limit the possible designs of the fee. Because of the provision, it is not possible to construct an Airbnb-fee that would be calculated as a *percentage* of the extra rent that the tenant charges the sublessee (i.e. a percentage of the part of the sublessee's rent that exceeds the tenant's own rent). Such a calculation of the fee might otherwise have been an appealing solution, because of its fairness and straightforward enforcement (a tenant that is able to charge a higher rent from the sublessee thereby would have to pay a higher Airbnb-fee to the landlord, whereas a tenant that would not be able to charge as much would have to pay less for the possibility to sublet short-term). It could be argued that a percentage-based Airbnb-fee should be allowed since it does not contravene the underlying reasons behind the prohibition of rents with non-specified amounts, because the tenant in this case would be able to calculate the extent of the financial obligations since the tenant itself would directly decide the level of the Airbnb-fee through the rent that the tenant charges the sublessee (and because the provision's protective purpose is already met, since the tenant will charge a premium that exceeds the extra cost of the Airbnb-fee). The preparatory works,

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[80] See government bill prop. 1973:23, *med förslag till ändring i jordabalken, m.m.*, p. 159 f.
[81] Ibid. p. 160.

however, clarify that Ch. 12 Sec. 19 of the Land Code is to be interpreted strictly and the only unspecified costs of rent that are allowed are the costs for heating, water, etc. that have been specified in the article.[82]

In conclusion, the Airbnb-fee needs to be specified in the tenancy agreement or in a collective bargaining agreement beforehand and cannot be applied by the landlord on an ad-hoc basis. Ch. 12 Sec. 19 of the Land Code further prevents the fee from being calculated as a percentage of the premium that the tenant charges from the sublessee, and the fee therefore needs to be specified numerically in the agreements.

5.2.3. THE REGIONAL RENT TRIBUNAL CAN TRY THE FAIRNESS OF THE AIRBNB-FEE

The third central implication of the fact that the Airbnb-fee is classified as rent is that the tenant is able to appeal to the regional Rent Tribunal, which then will try the fairness of the fee. The fairness will be tried in accordance with the main rules that have been explained in section 3.1. As mentioned, the 'utility value' of an apartment is mainly based on physical factors such as size and layout, level of modernity, location within the building and in the city, proximity to transportation, etc. The Airbnb-model, however, does not affect the physical factors of the apartment, but rather how the apartment may be *used*. The relevant question in this section is therefore if the legislation allows for increased utility values that are connected to *mixed uses* of an apartment, i.e. that the apartment is used both for residential and commercial purposes.[83] Otherwise, the Airbnb-model would not be able to affect the Rent Tribunal's assessment, which would undermine the model if a tenant raises complaints and appeals to the Rent Tribunal.

The preparatory works have not discussed the effects of mixed uses of apartments on the apartments' utility values.[84] The question has, however, been discussed in court cases. Bostadsdomstolen [the Rents and Tenancies Court of Appeal] tried the question in RBD 11:84, where a tenancy apartment was used both for residential and for commercial purposes.[85] The court found that the allowance to use the apartment for

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[82] Ibid.

[83] Cf. Section 5.1 above.

[84] Cf. government bill prop. 1974:150, *angående riktlinjer för bostadspolitiken, m.m.*, p. 470 ff., government bill prop. 1983/84:137, *med förslag till ändringar i hyreslagstiftningen*, p. 67 ff., government bill prop. 1993/94:199, *Ändringar i hyresförhandlingslagen, m.m.*, p. 79 f, government bill prop. 2005/06:80, *Reformerad hyressättning*, p. 48 and government bill prop. 2009/10:185, *Allmännyttiga kommunala bostadsaktiebolag och reformerade hyressättningsregler*, p. 66 ff. See, however, government bill prop. 1968:91, *med förslag till lag angående ändring i lagen den 19 juni 1942 (nr 429) om hyresreglering m.m. och om fortsatt giltighet av lagen, m.m.,* Supplement A p. 53, where it was briefly mentioned that the compared apartments normally should be used in the same way.

[85] See also RBD 22:84 and RBD 20:89.

commercial purposes constituted a benefit that affected the assessment of the fairness of the rent. The court then continued by clarifying that the assessment of the fair rent is affected both by the nature of the commercial use and to what extent the commercial use is allowed. The court finally found that the rent should be calculated based on the different uses. If a part of the apartment is used as a dwelling and another part for commercial purposes, then the rent should be decided by calculating the different utility values of the separate parts. If the apartment instead is alternately used as a dwelling during a period of time and for commercial purposes during other periods, then the rent should be calculated based on the durations of the different uses.

In this context, it is also important to note that a condition for the mixed purposes of use to have an impact on the fairness-assessment, is that the apartment *explicitly is let for mixed purposes*. As such, it is not enough that the tenant *actually* uses the apartment for mixed purposes. This was clarified in RBD 22:84 [the Rents and Tenancies Court of Appeal], where the court found that the commercial part of the use of an apartment did not affect the assessment of the fair rent, since the apartment was not being let for mixed use but only as a residential apartment. The landlord could therefore not demand a higher rent because of the commercial use but was instead pointed to the possibility to claim a breach of contract, since the apartment had been used for a purpose that was not included in the purpose of the parties' agreement.

In the context of the Airbnb-model, the landlords therefore need to ensure that the tenants' possibility to commercially sublet the apartment short-term through Airbnb, i.e. the *mixed use* for both residential and commercial purposes, is clearly stated in the tenancy agreement. This right can be combined with restrictions, and it is for example possible to reach an agreement which states that the tenant may only commercially sublet short-term when the tenant leaves the apartment for vacation, for a maximum period of two months per year, etc.[86] It is also possible to add a condition that the tenant needs the landlord's approval in each specific case. These additions to the tenancy agreements may be added through renegotiations between the landlord and the tenants union through a collective bargaining agreement (see section 5.2.1 above).

It should also be noted that the utility value of the apartment's use for *commercial purposes* of course is affected by similar factors as the assessment of the utility value for residential purposes, i.e. size and layout, level of modernity, location within the building and in the city, etc. These factors need to be taken into account when the Airbnb-fee is

[86] The parties are free to agree on provisions as long as the provisions do not violate any compulsory rules in the tenancy regulation. Regarding the possible scope of different kinds of provisions, see e.g. Erika P Björkdahl, *Hyra av bostad och lokal* (Iustus förlag 2018), p. 64 ff.

decided, to ensure that the Airbnb-fee would be considered to be fair in an assessment by the Rent Tribunal. As mentioned in section 5.2.2, this can be achieved in the collective bargaining agreement by specifying different Airbnb-fees for apartments in different size intervals, in different parts of the city, etc.

In conclusion, the landlord's allowance to let the tenant sublet the apartment short-term through Airbnb, which constitutes a short-term commercial purpose, is a factor that may be included in the Rent Tribunal's assessment of the utility value of the apartment. A prerequisite for this is, however, that the apartment explicitly is being let both for residential purposes as well as commercial purposes, in the form of short-term commercial sublets. The regulations that allow a tenant to appeal the rent to the Rent Tribunal therefore do not constitute a hindrance to the Airbnb-model.

6. CONCLUSION

The Swedish case law has shown that a tenant will not be able to sublet an apartment to short-term sublessees through Airbnb without the landlord's permission. The landlord cannot be expected to permit such sublets without earning extra compensation, which generally is prohibited through Ch. 12 Sec. 19 of the Land Code that states that the landlord may not charge a higher rent than the one which is specified in the tenancy agreement.

As has been described in the article, however, the legislation should not constitute a hindrance to the construction of a commercial Airbnb-model, which makes it possible for both the landlord and the tenant to earn a premium when using the apartment for short-term sublets through Airbnb and similar services. There are, however, certain aspects that need to be observed for the model to fulfil the requirements of the tenancy legislation:

1. The apartment should only be sublet short-term to sublessees that will use it for recreational purposes. This should be explicitly stated in the sublease agreement and the tenant should also make sure that the sublessee actually intends to use the apartment for recreational purposes. Further, work purposes are most likely not included in the definition of recreational purposes.[87]
2. The landlord must negotiate with the tenant or tenants association before using the model and charging an extra Airbnb-fee.[88]
3. The Airbnb-fee must be specified in the tenancy agreement or in a collective bargaining agreement. Further, the Airbnb-fee must be specified as a numerical amount, and may not be charged as a percentage of the extra rent earned by the tenant.[89]

[87] See section 4.2 and 5.
[88] See section 5.2.1.
[89] See section 5.2.2.

4. The apartment must be explicitly let for mixed uses, i.e. both for residential purposes and commercial purposes, the latter in the form of short-term commercial sublets.[90]

Aspect 2-4 stem from the fact that the Airbnb-fee legally should be classified as rent. The classification also means that the tenant may appeal the level of rent to the regional Rent Tribunal, which then will assess the fairness of the total rent, including the Airbnb-fee, based on the utility value of the apartment. As discussed in section 5.2.3, the *use* of the apartment (i.e. the possibility to use the apartment for commercial short-term sublets) is a factor that may be taken into account in the Rent Tribunals assessment as long as the mixed use is explicitly agreed between the landlord and the tenant.

The possible use of the Airbnb-model is, from a practical perspective, to a large extent dependent on if Hyresgästföreningen [the Swedish Tenants Union] deems it to be desirable for tenants. My own assessment is that the chances of this should be fairly good. The Airbnb-model gives the tenants a chance to earn extra money and avoid 'unnecessary' rent when the apartment is not being used. Further, the use of the model is voluntary, and it does not have a direct impact on tenants who choose not to use it. The model might also lead to a decrease in the number of unauthorised sublets, which has increased during recent years.[91] These advantages of course need to be weighed against the fact that the model would lead to more unknown people in the apartment buildings, which might lead to inconveniences for the other tenants.

It might be argued that the model could be abused to circumvent the regulations on rent or be used during longer periods of time when a 'real' sublessee in need of a dwelling could have used the apartment instead. The regulations on rent can, however, already today be circumvented by dishonest landlords that collude with a 'fake' tenant.[92] In the case of abuse during longer periods when a 'real' sublessee could have used the apartment, this could be counteracted through provisions in the agreements stating when the Airbnb-model may be used (e.g. when the tenant leaves the apartment for vacation for a month or two and for a maximum period of two months per year). The correct use of the model might also be safeguarded by the tenant's union.

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[90] See section 5.2.3.

[91] Cf. the offical report SOU 2017:86, *Hyresmarknad utan svarthandel och otillåten andrahandsuthyrning*, p. 177-178.

[92] In these cases, Ch. 7 Sec. 31 of the Land Code states that the sublessee enjoys all the legal rights that the sublessee would have had if there had not been a 'fake' tenant in-between, i.e. the sublessee is considered to be a normal tenant in relation to the landlord, and not a sublessee. The section is applicable when the landlord and the tenant are colluding to circumvent the legislation, and would therefore also be applicable in cases of collusion through the use of the Airbnb-model.

In conclusion, the Airbnb-model might give rise to some aspects that need to be handled for the model to work in a way that satisfies all involved parties, but these aspects should not be insurmountable.