

GERMANY¹

INTRODUCTION

This country fiche provides a summarised overview of the national regulatory framework impacting upon short-term letting² services in the collaborative economy.³ While the collaborative economy model is now present in many different areas (e.g. car-sharing platforms like Uber in the transport sector or bike-sharing schemes in leisure), this report concentrates exclusively on the accommodation sector.

The document at hand focuses on the subjects of market access, liability and tax. As such, this country fiche describes the rules applicable to providers of short-term lettings (such as home owners) and platforms that offer a service enabling short term rentals through their website (for instance, Airbnb).

MARKET ACCESS AND LIABILITY LEGISLATION - PROVIDERS OF SHORT TERM LETTINGS IN THE COLLABORATIVE ECONOMY

NATIONAL LEVEL

In DE, the legal framework regulating market access in the collaborative economy sector can be introduced both by the federal state and by the regions (Laender).

At national level, any short-term letting needs to be declared to the regional Trade Office⁴. This announcement is declaratory in character, i.e. there are no requirements which need to be met besides the declaration itself. The regional Trade Office then forwards the relevant documents to the regional Finance Office. As a rule, it is also necessary to apply for a building permit from the relevant authority (even if no new building is erected) if a property within an area originally built for residential purposes will be used for short-term rental purposes⁵.

The liability of all providers (peers⁶ and professionals⁷) for non-compliance with the applicable market access rules is not regulated as such at national level. Nonetheless, it should be noted that in relation to contractual liability, the rules of the civil code concerning lettings do not apply to home-swapping (as it is not letting), but rather such arrangements are governed by the general rules of contract law / law of obligations⁸.

REGIONAL LEVEL

In this part, information is provided in relation to Berlin and Bavaria. This is not to imply that there are no other rules in other regions, but for the purposes of this document Berlin and Bavaria were selected to provide a sample of the regional rules.

¹ Country report last updated 10/06/2019.

² In this regard, we refer to short term rentals of one's house, usually offered by the house owner on a daily or weekly basis.

³ For the purposes of this report, the collaborative economy is defined as the economy of sharing: a market place where consumers decide to co-use, rather than own certain goods and rely on each other to get the services they need. Cf: http://ec.europa.eu/growth/single-market/services/collaborative-economy_en.

⁴ Paragraph 14 and 55 of the Gewerbeordnung (Industrial Code of 22.02.1999 with later amendments, <https://www.gesetze-im-internet.de/bundesrecht/gewo/gesamt.pdf>).

⁵ The *Verordnung über die bauliche Nutzung der Grundstücke*, (Regulation concerning the constructional use of land property, 26.06.1962, BGBl. I S. 1548 "BauNVO").

⁶ Private individual offering services on an occasional basis, according to the Commission Communication *A European agenda for the collaborative economy*, Brussels, 02.06.2016, COM(2016) 356 final.

⁷ Defined for the purposes of this study as an individual acting in a professional capacity.

⁸ In respect of DE, see §§ 280 et seq. BGB.

BERLIN

In the Berlin region, whilst the law sets a general prohibition of use of residential properties for purposes other than their intended use, including ‘short-term rentals’, a system of licenses has been set in place allowing for some exceptions to this prohibition.⁹ Hence, dwellings can only be used for other purposes if and when the competent district authority grants a license.¹⁰ Primary and secondary residences (full apartments)¹¹ can only be rented out for collaborative economy purposes if a license is granted. Nevertheless, the primary residence can be rented out as long as the surface rented does not exceed 50% (including bathroom and kitchen which is considered to be co-used by the owner in that 50%) without any licensing requirements¹².

The licence applicant is required to provide a list of documents, such as full justification for the reasons for the application and a proof of ownership of the house¹³. The application cannot be done electronically and needs to be delivered to the district office (every district office can establish its own specific procedure).¹⁴ Moreover, since the law does not explicitly set out to whom the licence is granted, both the proprietor and the tenant (upon receiving consent from the landlord¹⁵) have the right to apply (to the district office in the area of Berlin where the house is located). According to the law, the licence is granted if an overriding public interest¹⁶ or a legitimate private interest exists, which prevails over the public interest in preserving residential areas. The law further specifies when such an overriding private interest would exist in the case of short term rentals: for primary residences a licence could be granted for short rentals as long as it is ensured that the main aim of the place, i.e. serving for living purposes, is not altered (e.g. when the owner/tenant is away on a holiday)¹⁷, while for secondary residences a licence could be granted for rentals counted in weeks or days as long as their total length does not exceed 90 days per year¹⁸. A license can also be granted if replacement housing is offered as compensation for the housing facility which would be no longer used for housing purposes.¹⁹ The licence is granted against a fee of 100 euro for primary residences and 150 euro for secondary residences.²⁰

If a dwelling is used for tourist-related purposes without the required license, this constitutes an infringement of law and the provider may be liable to pay a fine of up to 500 000 euro.²¹

⁹ Article 2(1)(1), 2(1)(2) ZwVbG. Gesetz über das Verbot der Zweckentfremdung von Wohnraum (Zweckentfremdungsverbot-Gesetz - ZwVbG); “Law on prohibition of illegal repurposing of legal estates”, 29.11.2013, published in GVBl 2013, 626, last amended 09/04/2018, GVBl. S. 211

<http://gesetze.berlin.de/portal/?quelle=ilink&query=WoZwEntfrG+BE&psml=bsbeprod.psml&max=true>.

¹⁰ Paragraph 3 of the ZwVbG.

¹¹ Secondary residences can now also be rented out, following a decision of the Administrative Court Berlin of 9th August 2016, ruling that secondary residences should be available for collaborative economy purposes upon obtaining a license (Administrative Court Berlin, Judgment of 09.08.2016, Case no. 6 K 151.16, <https://openjur.de/u/897224.html>) and the subsequent amendment to the law, introduced on 09/04/2018.

¹² Paragraph 2(2)(5) ZwVbG.

¹³ Please see the website of the Berlin Municipality for a full list of the required documents, available here: <https://service.berlin.de/dienstleistung/328146/>.

¹⁴ Paragraph 1(1) ZwVbG. It is also clear from the websites of individual districts that the applications need to be submitted as a hard copy (cf. e.g. the website of the Berlin-Mitte district in relation to the repurposing applications). <http://www.berlin.de/ba-mitte/politik-und-verwaltung/aemter/amt-fuer-buergerdienste/buergeraemter/bereich-wohnen/>.

¹⁵ Paragraph 3(3) of the ZwVbG.

¹⁶ Par. 3(2) ZwVbG specifies that such an *overriding public interest* is generally considered to exist when the housing would serve the aim of providing the public with community facilities to be used for upbringing, education, supervision or health-related purposes, as explained also in the Municipality’s Resolution, p. 17. The law does not state explicitly when such an overriding public interest would be observed and therefore such a decision should be made on a case-by-case basis.

¹⁷ Par. 3(3)(2) ZwVbG.

¹⁸ Par. 3(3)(3) ZwVbG.

¹⁹ Par. 3 (1) ZwVbG.

²⁰ As explained on the website of the Municipality of Berlin, available here: <https://service.berlin.de/dienstleistung/328146/>.

²¹ Paragraph 7(4) ZWEGW - Gesetz über das Verbot der Zweckentfremdung von Wohnraum, Law of 10.12.2007, Bavarian Official Journal, p. 864, <http://www.gesetze-bayern.de/Content/Document/BayZwEWG200>.

BAVARIA

In Bavaria, the main piece of legislation applicable is the Law on the Prohibition of Repurposing of Real Estate (ZwEWG)²². The law allows for the introduction of a *prima facie* prohibition of repurposing of real estate at municipal level and consequently of renting out the properties for collaborative economy purposes²³. However, it is up to the municipalities to decide whether they wish to introduce such a prohibition.

Rentals of over 50% of a property require a licence.²⁴ Notwithstanding, entire properties can still be rented out for up to 8 weeks in a calendar year without a licence.²⁵ A licence, if required, can be granted if there is a valid public interest, an overriding private interest or when replacement housing has been offered.²⁶

The relevant municipality must make a decision within three months, unless otherwise specified in an established official timetable²⁷ (the length of which must be proportionate to the administrative burden). If no decision is made during the specified time, the licence shall be considered granted.²⁸ The exact amount of the fees to be paid upon submitting the application is to be determined by the municipalities.

The repurposing of real estate without the required license is an infringement of law and the provider may be liable to pay a fine up to 500 000 euro²⁹.

CITY LEVEL

BERLIN

The rules identified above for the region of Berlin are also applicable to the city of Berlin.

MUNICH

In the municipality of Munich, a licence needs to be applied for when a property is used for short-term rentals³⁰ unless the rental surface does not exceed 50% of the surface of the flat or, in case of renting out over 50% of the surface, the rental period does not exceed eight weeks per year.³¹

The licence for short-term rentals shall be granted only in exceptional cases if there is an overriding public interest or a private interest worthy of protection (e.g. to protect one's jeopardised economic base of existence)³², or against compensation³³: either monetary or in the form of replacement housing.³⁴ In cases of temporary change of purpose the monthly monetary compensation which would equal the value of an average rent in Munich should be paid.³⁵ The application should be submitted to the Department of Living and Migration and it should consist of the completed form and the relevant accompanying documents, including inter alia the plan of the housing in question. The municipality must make the decision within 12 months once all the required

²³ Article 1 of the Act (ZwEWG).

²⁴ Art. 1(1) ZwEWG.

²⁵ Article 1(3) ZwEWG.

²⁶ Article 2(1)(1), Article 2(1)(2) ZwEWG.

²⁷ Article 2(2) ZwEWG.

²⁸ Article 2(2) ZwEWG.

²⁹ Art. 4 ZwEWG.

³⁰ Paragraph 5(1) ZeS Satzung der Landeshauptstadt München über das Verbot der Zweckentfremdung von Wohnraum (ZeS) – Regulation of the Regional Capital Munich on the prohibition of repurposing of Real Estate, MüABl. S. 494, 05/12/2017, available at <https://www.muenchen.de/rathaus/Stadtrecht/vorschrift/999.html>.

³¹ Paragraphs 4(1)(1), 4(1)(3) ZeS.

³² Paragraph 5(2) ZeS. 6(2) ZeS.

³³ Paragraph 5(2) ZeS.

³⁴ Paragraphs 7(1); 8(1) ZeS.

³⁵ Paragraph 8(3) ZeS.

documents are completed. If the decision has not been made, the licence is to be considered as granted.³⁶ The licence can be passed on to the legal successor/persons or somebody who gains possession of the property³⁷.

The repurposing of real estate without the required licence is an infringement of law and the provider may be liable to pay a fine up to 500 000 euro.³⁸

MARKET ACCESS AND LIABILITY LEGISLATION - COLLABORATIVE ECONOMY PLATFORMS

NATIONAL LEVEL

DE does not have a special regime for online platforms/mobile applications in general or specifically for those active in the accommodation sector, besides the general legislation implementing the E-commerce Directive. Additionally, aside from the obligations resulting from this directive, no other obligations were identified. Nevertheless, there are ongoing discussions in Germany in relation to setting out a regulatory framework in the collaborative economy.³⁹

As for liability for collaborative economy platforms, the Federal Court of Justice has affirmed that a platform would lose the exemption if it checks the completeness and correctness of the contents before their release⁴⁰. Additionally, case law has arisen on the monitoring of providers' activities⁴¹ (platforms storing information provided by collaborative economy providers must act with the diligence that can reasonably be expected from them so as to detect and prevent certain types of illegal activity⁴²), on user ratings (in the case of a complaint about a rating made by an anonymous user, the platform has to search for documents which prove that the service has actually taken place, and then send them to the party affected by the complaint⁴³) and conditions under which platforms can be held liable (liability requires that the platform is acting as an "interferer", that there is an infringement of an object of legal protection and a violation of reasonable audit and control obligations of the platform).

REGIONAL LEVEL

Aside from the obligations resulting from the E-commerce directive, information obligations are imposed in the region of Berlin. As of 1 September 2018, every short rental advert on an internet platform needs to be accompanied by the obligatory registration number of the property, which makes it easier for the authority to track - for instance - that the providers do not exceed the limit of 90 days for year for secondary residences.⁴⁴ This obligation does not require the providers to take a proactive approach, but rather requires them to provide information upon request from authorities⁴⁵.

³⁶ Paragraph 5(5) ZeS.

³⁷ Paragraph 5(4) ZeS.

³⁸ Paragraph 14(1) ZeS.

³⁹ Cf. for instance various briefings and analyses of the German Parliament: <https://www.bundestag.de/resource/blob/422762/dba2f255d095bec790b14090a886d484/wd-5-027-16--pdf-data.pdf>, last accessed 14/06/2019, <https://www.bundestag.de/resource/blob/377486/21fc4300787540e3881dbc65797b2cde/sharing-economy-data.pdf> last accessed 14/06/2019, <http://dip21.bundestag.de/dip21/btd/18/113/1811399.pdf> last accessed 14/06/2019.

⁴⁰ BGH, GRUR 2011, 1038 Rdnr. 22 – Stiftparfum.

⁴¹ BGH, GRUR 2011, 617 Rdnr. 40 – Sedo; BGHZ, 194, 339 Rdnr. 19 – Alone in the Dark; BGH, GRUR 2013, 1229 Rdnr. 35 – Kinderhochstühle im Internet II; BGH, MMR 2015, 674 Rdnr. 51 – Kinderhochstühle im Internet III. EuGH, GRUR 2011, 1025 Rdnr. 119, 141-143 – L'Oréal/ebay; BGHZ 158, 236 – Internetversteigerung I; BGH, GRUR 2008, 702 Rdnr. 51 – Internetversteigerung III; BGHZ 191, 19 Rdnr. 21 – Stiftparfum.

⁴² BGH, NJW 2008, 758 ff. – jugendgefährdende Medien.

⁴³ "Ärztbewertungsportal III" BGH, MMR 2016, 418 ff.

⁴⁴ Paragraph 5(6) ZwVbG.

⁴⁵ Paragraph 2(3) ZwVbG.

TAXATION RULES - SHORT TERM LETTINGS IN THE COLLABORATIVE ECONOMY

NATIONAL LEVEL

DE has not introduced any specific tax rules applicable to the collaborative economy at national level. As a consequence, the general national tax rules apply to collaborative economy providers.

Each individual person who is domiciled or habitually resident in Germany is subject to unlimited income tax.⁴⁶ Hence, the amounts earned from short-term rentals are to be declared in the individuals' fiscal declarations.⁴⁷ Anyone who rents rooms in their own apartment / house to third parties against remuneration earns income from letting or leasing⁴⁸ or income from commercial activity.⁴⁹ Such a commercial activity can generally only be assumed if specific circumstances in the individual case are present, giving the impression that the provider participates in economic dealings in a self-employed, sustainable and profit-oriented manner. The rental of housing regularly will not fulfil these requirements.

In terms of VAT, service providers with a relatively low turnover may benefit from the so-called "small business rule".⁵⁰ According to this provision, VAT need not be paid or listed if the gross revenues are below 17,500 euro for the previous calendar year and expected to be under 50,000 euro for the current calendar year. The aim is to exclude minor ancillary entrepreneurial activities (i.e. second jobs) from tax obligations in order to simplify administration.

CITY LEVEL

There are specific taxation rules introduced at the municipal (not regional) level.

Since 1 January 2014, the city state of Berlin charges an occupancy tax on providers of short-term accommodation.⁵¹ The tax rate is 5% of the price for the room.⁵²

There is no additional tax introduced at the city level in Munich. The City Council of Munich did prepare a Law on Tax for overnight stays, yet it was declared void by the Administrative Court of Munich⁵³. This decision was then upheld by the Court of Appeal and the Federal Administrative Court.⁵⁴

⁴⁶ Paragraph 1 Income Tax Act of 8th October 2009, last amended 17/08/2017, Einkommensteuergesetz in der Fassung der Bekanntmachung vom 8. Oktober 2009 (BGBl. I S. 3366, 3862), das zuletzt durch Artikel 9 des Gesetzes vom 17. August 2017 (BGBl. I S. 3214) geändert worden ist, available here: <https://www.gesetze-im-internet.de/estg/ESTG.pdf>.

⁴⁷ Paragraph 21(2) EStG, with the exception of home owners who can earn up to 520 euro per year in rent of their own house without the need to declare it in the fiscal declaration.

⁴⁸ Paragraph 21 EStG.

⁴⁹ Paragraph 15(2) EStG.

⁵⁰ Paragraph 19 UStG.- VAT law of 21/02/2005, last amended 18/07/2017 Umsatzsteuergesetz in der Fassung der Bekanntmachung vom 21. Februar 2005 (BGBl. I S. 386), das zuletzt durch Artikel 11 Absatz 35 des Gesetzes vom 18. Juli 2017 (BGBl. I S. 2745) geändert worden ist, available at https://www.gesetze-im-internet.de/ustg_1980/UStG.pdf.

⁵¹ Paragraph 1(1) Law on Accommodation Tax in Berlin of 18.12.2013, Gesetz über eine Übernachtungssteuer in Berlin, Übernachtungssteuergesetz, vom 18.12.2013, GVBl. 2013, 924, hereinafter: ÜnStG, available at <https://www.berlin.de/sen/finanzen/steuern/downloads/artikel.57924.php>.

⁵² Paragraph 5(1) ÜnStG.

⁵³ VG München, 30.06.2011 - M 10 K 10.5725, <https://openjur.de/u/423518.html>.

⁵⁴ Bavarian Administrative Court of Appeal - VGH Bayern, judgment of 22.03.2012 - 4 BV 11.1909, Federal Administrative Court - BVerwG, judgment of 14.08.2012 - 9 B 29.12.