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Real Estate

**Schellenberg  
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# Lease of Holiday Apartments

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## Key Take-aways

- 1.** When renting holiday apartments, condominium ownership law, tenancy and subtenancy law as well as further federal, cantonal and municipal laws must be considered.
- 2.** The sublandlord requires an approval of the main landlord in each case of subleasing a holiday apartment through Airbnb if the landlord does not grant a general approval in advance.
- 3.** Pursuant to the legal regulations, the landlord has to notify the competent cantonal authority of any foreign nationals whom he accommodates commercially.

# 1 Introduction

The **demand for holiday apartments in certain tourist regions of Switzerland has significantly increased** during the Corona crisis. In contrast, the demand in cities has decreased due to a lack of international tourism. When renting out holiday apartments, condominium ownership law, tenancy and subtenancy law as well as further federal, cantonal and municipal laws must be considered.

## 2 Private Law

### 2.1 Condominium Ownership

When renting out an apartment, the landlord must first consider **condominium-principled ownership law** if the landlord is the owner of an apartment in a building with several condominium owners.

In general, condominium owners are free to use their apartments at their discretion. However, they are not allowed to damage the common parts, installations and facilities of the building or to impair their function and external appearance. This **freedom** may be explicitly **restricted** by the purpose specified in the rules governing the condominium ownership or implicitly restricted by the circumstances, in particular by the previous use. In a 2019 decision (BGE 5A\_436/2018), the Swiss Federal Supreme Court ruled that it depends on each individual case whether the lease of holiday apartments via a home-sharing-platform still corresponds to the purpose of "home" as defined in the condominium ownership rules. In the specific case, the Federal Supreme Court considered on the basis of the overall circumstances (luxury home, use of the remaining apartments mainly as main residences, explicit prohibition to operate non-quiet businesses) that the lease was a case of **"hotel-type accommodation"** which was **outside the purpose of "home"** and therefore inadmissible. Hence, considerable restrictions on leasing via home-sharing platforms may apply due to the permissible use under the condominium ownership rules.

### 2.2 Tenancy Law

In principle, **ordinary tenancy law** applies to the leasing of holiday apartments. However, the provisions on the lease of residential and commercial premises such as the protection against abusive rents (which do not apply to luxury apartments), protection against terminations, prohibition of tie-in transactions (entering into contracts which are not directly related to the lease) or notice periods for apartments, expressly **do not apply to holiday apartments** rented for a **maximum of three months**. However, other provisions such as the notice period of two weeks in case of renting out furnished rooms or the rights and obligations of the landlord and the tenant in the event of defects do apply.

### 2.3 Sublease

In 2019, the Swiss Federal Council considered a revision of the tenancy law to regulate rentals via home-sharing platforms, but ultimately rejected the idea. Thus, the provisions regarding the subleasing of apartments remain unchanged: the tenant/sublandlord **requires approval of the main landlord** in case of

subleasing. This approval is required regardless of the duration of the sublease and must also be obtained for short subleases. The landlord can grant a general approval, but does not have to. If the landlord does not provide a general approval, the approval must be obtained for each separate sublease. Pursuant to **mandatory tenancy law**, the main landlord may only **refuse approval for any of the following three reasons**:

- the tenant/sublandlord refuses to inform the main landlord of the conditions of the sublease;
- the terms and conditions of the sublease are abusive compared to those of the main lease agreement; or
- the sublease would lead to substantial disadvantages for the landlord.

The conditions of the sublease are **abusive** if the sublandlord **makes a profit** from the sublease. The rent for the sublease may be slightly higher than the rent for the main lease, but only to the extent that this compensates for a higher risk of loss of rent, additional services or costs (e.g. cleaning, Wifi, amortisation of rented furniture). Where the sublandlord does make a profit, the landlord **is under no obligation to refuse** consent. The sublandlord making a profit with the consent of the landlord is not illegal or invalid. In particular, the subtenant cannot challenge the rent as abusive, as short-term rental is not subject to the respective protective provisions.

It is controversial whether the landlord has a **right of termination** if the tenant/subtenant does not obtain his approval, even if the landlord would have no right of refusal.

The tenant/sublandlord is liable to the main landlord for ensuring that the subtenant does not use the premises in any other way than the tenant himself is allowed. The main landlord can directly request the subtenant to comply. Therefore, the main landlord can, for example, have the subtenant evicted if the main rental agreement ends. Otherwise, **the main lease agreement is completely independent from the sublease agreement**. The main landlord has no direct rights and obligations towards the subtenant. The general provisions of tenancy law apply between the sublandlord and the subtenant. If the sublandlord wishes to transfer obligations of the main lease agreement to the subtenant, such obligations must be expressly integrated into the sublease agreement.

## 3 Public Law

### 3.1 Federal Level

#### 3.1.1 Notification Obligations

Pursuant to legal regulations, the landlord must **notify the competent cantonal authority of any foreign nationals whom he or she accommodates commercially**. Any lease of property for remuneration, whether professional or occasional, is considered to be commercial. The notification obligation also applies where the tenant has a Swiss residency permit. The landlord must complete a registration form indicating the information in the identification document and have it signed by the foreign tenant. The tenant is therefore required to present his/her identification papers. The registration form must then be submitted to the competent cantonal authority. Landlords who deliberately or negligently violate their notification obligations may be fined.

### 3.1.2 Foodstuffs Law, Fire Protection and Federal Disability Equality Act

Where the lease of holiday apartments involves the supply of food (e.g. coffee or tea) or articles of daily use (e.g. shampoo), the **Federal Act on Foodstuffs and Utility Articles** applies. This means, *inter alia*, that the "business" must be registered with the supervising authority, a self-monitoring concept must be in place to ensure compliance of the supplied food with the Foodstuffs Act, and that the applicable food labelling rules must be observed. Landlords of holiday apartments are advised **not to provide food or commodities**.

Cantonal **fire protection regulations** and the **Federal Disability Equality Act** stipulate stricter requirements for larger accommodation establishments and public buildings than for apartments. Hence, landlords of individual holiday apartments or the corresponding buildings will usually not be subject to these regulations due to their limited size and lack of public access.

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## Cantonal and municipal regulations of holiday apartments vary substantially.

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### 3.1.3 Federal Act on Secondary Homes

Pursuant to the Federal Act on Secondary Homes, new holiday apartments in municipalities with more than 20 percent of secondary apartments may only be approved if they are offered permanently and exclusively for short-term use by guests at market and local conditions and (i) are located in the same house in which the owner has his/her main residence or (ii) are not tailored to the owner's personal needs and are managed within the framework of structured accommodation services. Offering holiday apartments on a home-sharing platform **is not considered as being managed within the framework of structured accommodation services**. If the owner does not have his/her main residence in the same building as the holiday apartment, intended letting via a home-sharing platform is not sufficient to obtain permission to build the holiday apartment.

### 3.1.4 Taxes

Income from the lease of holiday apartments is **subject to profit/income tax**. In addition, a landlord who generates a turnover of more than CHF 100,000 per year with the lease of holiday apartments is **subject to VAT**.

### 3.1.5 Authorization Act

Pursuant to the **Authorization Act** (*Lex Koller*), non-EU nationals with a B-permit may only acquire residential real estate in Switzerland if they use such property as their main residence. As a rule, renting out the main residence as a holiday apart-

ment is prohibited. However, if the main residence is given up due to a change of circumstances (e.g. new place of work), renting it out as a holiday apartment is permitted.

## 4 Cantonal Level

### 4.1 Regulations Governing Home-Sharing Platforms

In the **Canton of Geneva**, there are specific regulations imposing limits on the rental business. Since March 2019 (BGE 1C\_472/2018), entire apartments may not be leased for more than **90 days per year** via home-sharing platforms such as Airbnb, pursuant to article 4a of the cantonal Act on Demolition, Transformation and Renovation of Residential Homes (Règlement d'application de la loi sur les démolitions, transformations et rénovations de maisons d'habitation), unless the change of use has been authorized.

In the Canton of **Basel-Stadt**, the conversion of an apartment's use from private to commercial short-term leasing requires a building permit.

The **city of Bern** intends to introduce a similar regulation as the Canton of Geneva for its historic district. The **cities of Lucerne and Zurich** are considering a solution similar to the one in the Canton of Basel-Stadt.

### 4.2 Permissions

The obligation to obtain a **permit** to lease holiday apartments is regulated on a cantonal level. A permit to lease holiday apartments **is required only in exceptional cases**. For example, the **Canton of Berne** requires a permit for the commercial provision of overnight accommodation. However, the offering of individual holiday apartments or rooms is not considered to be commercial. Only if more than ten beds are offered, a permit may be required. The **Canton of Graubünden** does not require a permit. In the **Canton of Valais**, authorization is only required if the property is leased for commercial purposes with hotel services. While occasional leasing against payment is already considered to be commercial in the **Canton of Valais**, it is likely that no additional hotel services (room service, breakfast) are provided on a regular basis. In the **Canton of Geneva**, a permit is also required, but only for leases for commercial purposes for more than 90 days per year. Other cantons have similar regulations. In addition, certain municipalities do not require a permit, but do require landlords of holiday apartments to register with the authorities (mainly to ensure the payment of the tourist fee).

## 5 Municipal Level

### 5.1 Zoning Legislation

The municipalities determine the permissible use of properties within the zoning regulations. With regard to residential zones, it needs to be examined on a case-by-case basis whether, in particular, the commercial lease of holiday apartments is in line with the applicable zoning regulations.

### 5.2 Tourist Fee

In many municipalities a **tourist fee** is charged on overnight stays by tourists. These tourist fees must be collected by the landlords of holiday apartments and paid to the municipalities.

The regulations vary and must be reviewed separately for each municipality. In some cantons (in the Canton of Geneva since 1.9.2020), **Airbnb** has concluded an **agreement on flat-rate invoicing**, so that landlords of holiday apartments leased through Airbnb no longer have to issue separate invoices to the guest for tourist fees.



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