Legal Situation of using drones in Germany

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When may I fly? – Use of airspace

The German Air Traffic Act constitutes the “Freedom of the Air”:

The airspace is **open for use by aircraft**,  
But only **as far as** it is not restricted by law.
When may I fly? – Model planes and UAS

- Only “aircraft” defined in the law may profit from the freedom of the air.
- The Air Traffic Act initially only applied to model planes i.e. hobby use.
- Did commercially used drones profit form the “freedom of the air”?
- In 2012 a new definition was added:
  
  Also considered as aircraft are unmanned aerial vehicles, including their control station, which are not used for the purpose of sports or of recreational activity.
  
  (non official translation)

- For illustration:
When may I fly? – The “use based approach”

The amendment introduced a **“use based approach”** (in contrast to the **“risk based approach”** in EASA’s technical opinion:

- Flying at a picnic for enjoyment of the family on the weekend → **model plane**
- Flying for supervising work on a construction site the next working day → **UAS**

→ **Result**: Confusion, lack of understanding or disregard of applicable rules.
When may I fly? – Liability insurance

- Rules for using model planes or UAS are quite different.
- But: Holders of model planes and UAS are always liable for the use.
- They must always take out third party liability insurance before taking off.
- The law requires:
  - The insurance has to cover at least 750,000 units of account (for aircraft < 500 kg MTOM).
  - It must be from an insurance provider authorised for Germany.
  - A free proof of insurance must be provided.
  - The proof must be carried during the operations.
When may I fly? – Implementation of the German Air Traffic Act

The German Air Traffic Act is implemented through a number of regulations. The Air Traffic Regulation (LuftVO) in its version of 2015 provides the most relevant limitations on the “freedom of the air” for UAS:

- **Sec. 19 Air Traffic Regulation** – **prohibited** use of airspace
- **Sec. 20 Air Traffic Regulation** - **requirements for permit** to fly
When may I fly? – Forbidden use of air space – **UAS only**

- The use of **UAS** is **generally prohibited**:
  1. Operation beyond visual line of sight (no augmentations allowed); or
  2. above > 25 kg MTOM.

- **Exceptions** **may** be granted:
  - In **absence of a risk for public safety or law and order and**
    - (a) for operations are limited **segregated airspace or**
    - (b) do not go beyond the **limits of air traffic at an aerodrome**.

- Operation may take place outside segregated airspace **if restricted to all of the following**
  - (i) Operation within visual line of sight (**reintroduces restriction (1) above**),
  - (ii) Agricultural or forestry related purpose,
  - (iii) Not more than 50 meter above ground or water, **and**
  - (iv) Outside controlled airspace.
When may I fly? – Use with permission UAS

- If not prohibited, operating UAS always requires prior permission (exceptions for police and armed forces).

- In contrast – use of model planes is generally free if below 5 kg MTOM, electronic engine, not close to aerodromes or above gatherings of people.

→ Going back to the initial scenario:

- The aircraft with electronic engine below 5 kg MTOM is operated on the weekend in the recreation area as a model plane, without need of permission.

- The same aircraft is used for supervising work at the construction site the next working day as a UAS, requiring prior permission.
When can I fly? – Competence for permission

- Competence depends on MTOM:
  - **Over 150 kilogram MTOM** – European Aviation Safety Agency (EASA, Cologne);
  - **Below 150 kilogram MTOM** – Federal administration / ordered management of the administration of the federal states.

- In Germany air law is **Federal Law**
- But it is **executed by the “Bundesländer”** in commission.
When can I fly? – Local authorisation administrations

- Under the federal constitution, Germany has
  - 16 Federal States (‘Bundesländer’) – with some having more than one local air traffic administration,
  resulting in
  - 22 local air traffic administrations
  ➔ Permits to fly have to be obtained from the local administration responsible for the area where the flight will take place.
When can I fly? – Decisions on granting permission

- **The administration is bound to grant the permission** as long as:
  - the intended use **does not endanger air traffic or public safety and policy**, 
  - the intended use does not violate **legislation on data protection** particularly relevant for the use of UAS.

- In addition, the permission may be made subject to
  - **further ancillary provisions, requirements and conditions** (e.g. **expert opinion** on the suitability of the terrain and airspace used, expertise in operations etc.).

- Local administrations follow common principles (NOTAM).

  → But through different legal interpretations **decisions may greatly vary**.
When can I fly? – Obtaining permissions

- Two types of permissions:
  
  (1) General Permission;
  (2) Single Permission – above 5 kg MTOM or combustion engine.

- Different approaches depending on the Federal State...
  
  - Some issues permissions for 2 years
  - Some only for 1 year – e.g. in Brandenburg, Saxony
  - Some Federal States allow transfer of permissions from another State
  - Some Federal States require transfer fees or full check of the permission.

- Single permissions are limited to one time uses, determining a certain date, time, place, specific surrounding conditions and specific purpose.
When can I fly? – General permissions

Even general permissions are further restricted:

- Only up to 5 kg MTOM and without combustion engine
- **No** operations:
  - above gatherings of people;
  - above scenes of accidents, disaster zones and other incident scenes;
  - above correctional facilities, military facilities, industrial facilities, power plants and facilities in the energy production and distribution sector, unless permitted by the owner;
- **Additional conditions** may be required by the local administration.
When may I fly?

How may I fly?

Which data may I collect?
How can I fly? – Scope of application of the LuftVO

- UAS are **legally considered aircraft**

→ The **rules of the air for aircraft** have to be followed.
May I fly over private property without permission of the owner?

- German Civil Code protects private property, including the air space.
- But: The “freedom of the air” derives from the more specific law.

→ Result: „obligation to tolerate“.

→ But also a weighing of interests is required.

- The use of the UAS must not result in nuisance or intrude privacy.
When may I fly?

How may I fly?

Which data may I collect?
Which data may I collect? – Data Protection

- **Prior to granting the permit:** The local authority has **to check that data protection requirements are observed.**

- The drone user has the **obligation of proof** that no data protection rules are violated.
Which data may I collect? – Initial summary

Data Protection Rules are “technology-neutral“.

Specific relevant regulatory areas for the collection of data by drones are:

- **Data Protection Acts (EU and national)**
- **Copyright Laws**
- **German Criminal Code – and ancillary penal laws**
Which data may I collect? – Data Protection

- Not applicable for the pure private/individual use – not relevant for model plane use

- But for UAS:
  - Gathering of data must be kept at a minimum required for the use described in the permit to fly.
  - Generally requires a permit by the data subject.
  - In lack of a permit, general rule:

  The interests of the data controller in the data must outweigh the personal interests of the data subject.
Which data may I collect? – Copyright Law

Pictures of buildings:

- **Works of architecture which stick out of the mass of commonplace constructions** may be **copyright protected**.

  → No photography of filming **without permission** from the copyright holder.

**Exception:**

Tourists may take photos of and **film buildings from public roads, streets or squares** is admissible (so-called “Freedom of Panorama”).

**BUT:** The concept may not apply to the aerial view from drones!
Pictures of Persons - German law regulating art copyrights:

In principle, an image of a person can only be distributed or publicly displayed with the prior consent of the person illustrated.

**Exceptions:**

1. Images categorised as being part of the “sphere of contemporary history”;
2. Persons only appear as an accessory in the background next to a landscape or another locality;
3. Pictures of gatherings, public processions, and similar activities;
4. The distribution or the display of images categorised as serving for the greater good of art (without having been ordered).
Use of UAS may also have a criminal law impact:

- **Section 94 StGB (German Criminal Code)** – Acts of treason (theft of state secrets);

- **Section 96 StGB** – treacherous spying; exploring state secrets;

- **Section 109g StGB** – security endangering images (pictures of military facilities etc.);

- **Section 201a StGB** – injury of personal living sphere by visual recordings.
Data protection law will become harmonised across the EU Member States. The General Data Protection Regulation (EU) 2016/679 entered into force on 24 May 2016.

It applies from 25 May 2018 – allowing a two year transition period.

The GDPR is still technology neutral – it does not mention drones.

Harmonised data protection rules may help professional drone users establish a Europe wide business – together with the expected EU rules on drones to be developed by EC/EASA.
For additional information, we invite you to visit our website www.bho-legal.com with latest news and data base on relevant laws on drones.

...or contact me directly...

Thank you very much!

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