TRANSPORTATION ADMINISTRATION IN THE FEDERAL REPUBLIC — WITH EMPHASIS ON AVIATION

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I. INTRODUCTION

THE PRESENT TRANSPORTATION situation in the Federal Republic can only be understood in light of the component parts that were determinative in its development. At the war's conclusion the transportation system was in ruins; aircraft and automobiles had disappeared and the remaining means of transportation were considerably decreased. Moreover, the post-war increases in population made a difficult situation even worse.1 As a result of the partition of Germany, many traffic routes were cut, isolating many areas along the Iron Curtain and leaving seaports without part of their back country. The traffic flow, which before the war had been primarily east-and-west, was now predominately north-and-south. Because of the changes brought about by the war and the economic recovery spurred by the growing industrial areas, the transportation system not only had to be rebuilt but also expanded. In addition, post-war transportation became much more international in scope, especially with the advent of the European Economic Community. The main problem confronting the formation of a transportation policy was, therefore, in the field of infrastructure.2

II. INFRASTRUCTURE

A. Background

After the war, reconstruction and adaptation of the German railways was of major importance. The first step was the initiation of a program to replace all steam-powered engines with Diesel or electric engines by 1980.3 Consequently, the speed of trains has been increased considerably. In spite of this modernization, however, transportation by rail has been decreasing. In the face of this decline, economic dictates have necessitated a reduction in service, and plans are being formulated for a cut-back, espec-

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1 The average number of persons living on one square kilometer in the Federal Republic was 171 in 1938 against 235 in 1964. 29 DIE VERKEHRSPOLITIK IN DER BUNDESREPUBLIK DEUTSCHLAND 1949-1965, at 20 (1966) [hereinafter DIE VERKEHRSPOLITIK].

2 For a general survey of this development, see 29 DIE VERKEHRSPOLITIK 20. The Federal Republic has among the European countries the greatest traffic density. Sebohm, Konzeption für den Ausbau der Verkehrsinfrastruktur, Schiene und Strasse 35 (1965).

3 Id. at 37.
The different measures of rationing railway service have been laid down in a bill which has met with some opposition by the Federal Council. The enormous increase in motor vehicle traffic placed road construction in a position of special importance. In 1957 a government highway expansion program was enacted covering a twelve-year period which began in 1959. The federal trunk roads other than the autobahns are also being improved. With regard to the federal inland waterways, there exists several four-year expansion programs. Due to financial shortage these programs are only partially completed. Cooperation between the Federation and the Länder, which contribute financial aid, is necessary. Many of the projects are of international importance, for instance, the canalization of the Moselle from Koblenz to Diedenhofen (France), which has been jointly carried out by Germany, France, and Luxemburg. The waterways near the coasts have to be deepened to meet the requirements of deep-going vessels. The policy as to inland waterways is influenced by the location of the German seaports which, mainly for geographical reasons, are at a disadvantage in comparison to the Atlantic seaports of the Netherlands and Belgium. The expansion of the inland waterways, therefore, is aimed at connecting the German seaports with the inland industrial areas. The question whether the Treaty establishing the European Economic Community is applicable to sea-navigation and seaports gives rise to some dispute. Be that as it may, in any case the problems of the German seaports involve questions of the European Economic Community.

B. General Survey Of The Government's Policy Regarding Infrastructure

The latest government resolution concerning a national transportation policy is dated 26 January 1966. Predominance is given to the creation of a modernized railroad system adapted to the economic changes which have taken place. Along with these measures, action shall be taken to increase the efficiency and effectiveness of the transportation system by the use of the most suitable modes of transportation. The adequate expansion of infrastructure, with special attention to a coordination of the different modes of transportation, is given a third priority. The necessary invest-

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5 Bundesratsdrucksache 243/66 (1966).
6 On an average, in the Federal Republic one kilometer of the road network is used by 408,500 cars per year as against 173,000 in the United States. PRESS AND INFORMATION OFFICE, LEISTUNG UND ERFOLG 102 (1966).
7 BGBI. 659.
8 See 29 DIE VERKEHRSPOLITIK 142.
ments shall be concentrated on that mode of transportation which will most economically satisfy the different transportation requirements, taking into account regional factors of the economic structure in different parts of the Federal Republic. One of the main points is the improvement of transportation conditions in the local communities.

First of all, problems of infrastructure arise in connection with urban expansion. As in most populous countries, the most acute transportation problems arise in metropolitan areas, especially in regard to automobile traffic. City and regional planning must be coordinated with transportation facilities, as reflected by recent federal legislation. Accordingly, the building code stipulates that with regard to building programs, transportation requirements have to be observed. The Federal Act of 8 April 1965, enumerates the principles which territorial planning must follow. Article 2 stipulates among other things that the economic, social, and cultural development in different regions must be coordinated with transportation facilities which means, in effect, that transportation conditions require improvement. Under article 11 the government is required to make periodic reports on the progress related to this law. The first report points out that in the overcrowded regions transportation problems can only be solved by a coordination of the different modes of transportation.

The recognition of urban transportation problems resulted in federal legislation calling for an investigation on the possibilities for improvement of transportation conditions in towns. Pursuant to this directive a commission of experts prepared a comprehensive report with recommendations for the improvement of the infrastructure as well as for the regulation of traffic. To meet the transportation requirements in overcrowded regions, certain measures are being tried out. The infrastructure facilitating the individual transportation by cars, especially roads and parking places, has to be improved. However, for technical and financial reasons, it is impossible to solve the transportation problems merely by improving the infrastructure facilitating individual traffic. Increased public transportation of passengers must be promoted because of its attractiveness as a space-saving device. Besides an actual increase in the facilities, public transportation must perform in such a fashion as to attract the individual traveler. This necessitates a close cooperation between the carriers, for instance by the creation of common tariffs enabling a pas-

11 See Raumordnungsbericht, supra note 4. In Frankfort, for instance, the number of cars increased from 48,695 in 1956 to 117,914 in 1961. Brundert, Innerstädtische Probleme der Stadt Frankfurt am Main, Schiene und Strasse 222 (1966). As to the probable increase of individual traffic see Wehner, Voraussichtliche Entwicklung des Personennahverkehrs, Schiene und Strasse 214 (1965).


14 Raumordnungsbericht, supra note 4. For the discussion on this report see Deutscher Bundestag, 5. Wahlperiode, 89. Sitzung, p. 4136.

15 Raumordnungsbericht, supra note 4, at 42.


17 Bundestagsdrucksache IV/2661. See also Die kommunalen Verkehrssprobleme im Bundesrepublik Deutschland (Hollatz & Tamms ed. 1961).

18 As to the Ruhr District see Meyers, Wie sieht die Landesregierung von Nordrhein-Westfalen die Verkehrsentwicklung der Stadtlandschaft Rhein-Ruhr an, Schiene und Strasse 42 (1965).
enger to use different means of transportation with only one ticket, as is the case in the city of Hamburg. Another possibility of transferring part of the automobile traffic to public carriers may be by means of taxation measures, which has been recommended by the commission of experts. Up to now, however, the public carriage of passengers still shows a downward movement. Attempts to introduce a "park and ride system" in Frankfort have not been successful. According to statistics for the year 1966, public transportation showed a decline of 200 million over 1965.

The thinly populated rural areas present different transportation problems. Railway services to these areas are operated at a loss and it is mainly in these regions that a curtailment of railroad traffic is being planned. However, it is necessary to connect these areas with the overcrowded regions in order to improve their economic structure. The solution is in an expansion of trunk roads. The elimination of rail service will have serious consequences on local traffic unless it is replaced by other modes of transportation. The government has asked the Federal Ministry of Transport to investigate whether such a replacement will necessitate legislative action. The answer seems clearly in the affirmative because existing regulations are not sufficient to reach an optimal disposition of traffic in all cases. The legislative measures being presently examined are intended to promote a closer cooperation between the different carriers. As a possible last resort it has been proposed that a carrier be entitled to the exclusive public transportation rights in a specified district. In this case the carrier would be obliged to furnish services on non-profitable segments. By granting such a monopoly the availability of public transportation will be improved in regions which so far have not been attractive to public carriers. The carrier that provides transportation on non-profitable routes will be compensated by the profit derived as the exclusive carrier in the remaining parts of the district. Because of the controversial nature of such a proposal, adoption seems unlikely.

III. ORDERING OF TRANSPORTATION POLICY

The infrastructure policy is closely related to what may be called ordering of transportation policy. This policy is intended to regulate the functioning of the different modes of transportation as a whole and as a part of the national economy. Since 1949, the federal government has steered a middle course between a free versus a controlled economy in its

19 For the cooperation of carriers in the Ruhr District see König, Die Verkehrsauflagen des Ruhrgebiets aus der Sicht des Siedlungsverbandes Ruhrkohle, Schiene und Strasse 216 (1966).
20 See Die kommunalen Verkehrssprobleme in der Bundesrepublik Deutschland, op. cit.
21 Brundert, supra note 11.
23 Raumordnungsbereich, supra note 4, at 77, 84. For the special situation of the regions along the Iron Curtain, see 29 Die Verkehrspolitik 34.
25 Ibid.
transportation policy. While a system of controlled economy would not be in conformity with the liberal principles espoused in the Republic's Constitution, the economic recovery after the war could not have been accomplished without dirigistic measures. This State control was initially conceived as a stimulus to the economy as a whole rather than as a policy to accomplish the coordination and regulation of transportation itself. As the economy advanced, the degree of State control was reduced. On the other hand, the competition among the transportation carriers has been growing with the result that some governmental control has once again become necessary to divert the dissipation of some of the necessary but less competitive forms of transportation. Moreover, the great changes in the economic structure have been deeply influencing transportation, and this also has necessitated governmental action. The different means of government control are reflected by the legislation on transportation.

A. Regulation Of Transportation Offered

A license is required for the commercial carriage of goods by road. In addition, if this carriage is performed over a distance of more than fifty kilometers from the residence of the carrier, the number of licenses issued and the volume of the carriages is limited. Thus, the supply can be regulated according to the demand. In addition, restrictions are imposed on the carriage of goods by non-commercial enterprises, principally in regard to taxation. As for the public carriage of passengers by road for remuneration or business purposes, it too has to be licensed, with regular carriage bearing more restrictions than irregular carriage.

Regarding railroads, most rail transportation is performed by the State-owned German Railways which is a legal entity but which is controlled by the Federal Ministry of Transport. The remaining railroads are controlled by the Länder. According to a law of 29 March 1951, a new railroad may be built and operated only if (1) German Railways is not interested in its operation and (2) there is a need for the service. The situation, as far as regulating the offer of railroad transportation by licensing procedures, is no problem because there are no applicants.

B. Regulation Of Tariffs

Besides a more or less intense regulation of the carriage offered, the regulation of tariffs introduces a second element of government control by linking the license with the approval of the tariffs. Under the existing provisions tariffs may be changed in case of abuse by the carrier or for reasons of public interest. Through this device low tariffs may be imposed to enable students and other low-income groups to take advantage

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26 For a determination see Predoehl, Verkehrspolitik 268 (2d ed. 1964).
27 See DIE VERKEHRSPOLITIK 55.
31 Allgemeines Eisenbahngesetz, [1951] I BGBl. 255.
of the carrier's service. However, in enforcing these provisions, the economy of any enterprise must not be affected.

C. Further Measures

In spite of these regulative measures and partly because of the dirigistic measures on tariffs mentioned above, the competition among the different modes of transportation is not balanced and further coordination and harmonization is necessary. Reasonable competitive conditions have to be created. It appears, however, that harmonization of competitive conditions between the carriers is not possible on a national basis alone, but depends on the action of the European Economic Community in the field of the joint transportation policy envisaged by the Rome Treaty. The EEC has conducted preliminary investigations on the harmonization of the competitive conditions for railroads, inland navigation, and road haulage.\(^2\) However, international cooperation in the form of definite plans will require a great deal of time.

One definite sign of progress in international harmonization is in the area of road traffic. Since highway traffic does not stop at the frontiers of a country, strong efforts have been made by the European Conference of Transport Ministers (CEMT) for a unification of the rules on road traffic in a number of European countries. The governing principles have been agreed upon and the CEMT Member States are supposed to follow these principles in their national legislation. In its program on transportation policy of 26 January 1966,\(^3\) the federal government has pointed out that it favors the work of CEMT, especially in regard to a harmonization of the general principles and methods of transportation policy, the financial situation of railroads, and road safety.

IV. Transportation Administration in General

According to Article 73 of the Constitution, the Federation exercises exclusive legislative control over “the Federal Railways and aviation.” As for the other modes of transport, under articles 72 and 74 the Länder may exercise legislative functions in the transportation field, provided that the Federation has not exercised its power to legislate regarding:

- sea and inland navigation and waterways, meteorological services, road traffic, automobilism, construction and maintenance of trunk roads and railroads except the Federal Railways.

In fact, federal laws dealing with all these areas have been enacted leaving only little room for additional legislation by the Länder. Thus it can be said that the legislation on transportation is, in practice, almost completely uniform throughout the Länder. It must be borne in mind, however, that

\(^2\) Amtsblatt der Europäischen Gemeinschaften, 29 June 1964, p. 1598. As to the interdependence of national transportation policy and EEC policy see Seehofer, Verkehrspolitisches Zwischenbilanz, Schiene und Straße 28 (1964); as to transportation problems in respect of the European integration in general see Prödl, op. cit. supra note 26, at 322-33.

\(^3\) Press and Information Office Bull. No. 13 at 95 (1966).
the influence of the Länder on transportation legislation is considerable because many laws and government orders in the transportation field require the consent of the Federal Council. This affects the transportation administration insofar as it sometimes prevents a further centralization of administrative functions proposed by the federal government.

The responsibilities for administration over transportation differ from those of legislation in that the former power in the carrying out of the transportation laws is divided between the Federation and the Länder. The Federation administers through its own agencies only the enactments concerning the Federal Railways and certain parts of navigation and inland waterways. The administration of the remaining branches of transportation over which the Federation exercises legislative functions is carried out by the Länder authorities on behalf of and through the direction of the Federation, the Länder, and the local governments have to be coordinated as the federal laws have to be carried out according to directions of the Federal Ministry of Transport. As for the little transportation legislation enacted by the Länder, it is carried out by the Länder authorities independent of the administrative directions of the Federation.

The central body of the federal transportation administration is the Federal Ministry of Transport. Coordination of the federal and Länder transportation administration authorities is relatively easy in all cases in which the Federal Ministry of Transport is empowered to give directions. In the remaining cases, cooperation may be reached by joint action. Such cooperation is especially necessary regarding traffic planning of the Länder and local governments on the one hand and federal agencies on the other. This may be achieved by means of a comprehensive plan on traffic routes by the federal government and corresponding regional plans by the Länder. The Federal Act of 8 April 1965, stipulates that basic questions of planning by the Federation and Länder have to be jointly discussed by both the federal and the Länder governments. Plans and measures by the Federation, the Länder, and the local governments have to be coordinated according to this law. Under certain circumstances a plan of one administrative agency may become binding for another. Some coordination is also effected by the conference of the Länder transportation ministries and its committees, in which the Federal Ministry of Transport takes part.

As far as other administrative authorities outside the transportation field are concerned, such as economic or financial bodies, the coordination on the federal level has to be achieved between the diverse federal ministries. If agreement cannot be reached, the Cabinet has the final authority.

V. Aviation Administration

A. Development Of Aviation Administration

The development of the German aviation administration has been influenced by the dualism between the Federation and the Länder or, in

84 Raumordnungsgesetz, [1965] I BGBl. 306.
other words, between centralization and decentralization. Though not in strict conformity with the Constitution of 1919, the aviation administration since 1920 has not been performed by the Länder authorities but by the Federal Ministry of Transport (Reichsverkehrsministerium). After 1933, centralization was intensified and resulted in the creation of an Air Ministry (Reichsluftfahrtministerium) which exercised all administrative functions for both civil and military aviation. This situation continued until the end of World War II.

Proclamation Number 2\(^2\) of the Allied Control Council prohibited German production, maintenance, or operation of any aircraft or any parts thereof. Furthermore, the manufacture, import, export, transport, and storage of aircraft and ground equipment for servicing, testing, or aiding the operation of aircraft were forbidden.\(^3\) As the exigencies subsided, civil aviation was revived in the Allied zones of Germany. A Civil Aviation Board was established by the Allied High Commission on 20 June 1949. Among its responsibilities were the granting of traffic rights to foreign airlines and the acquisition, construction, and operation of airports. However, the origin of the present developments in German aviation administration can be traced to the post-war lifting of the prohibitions on the building, use, and possession of certain kinds of balloons, gliders, and model aircraft. Finally, in 1955 the Federal Republic of Germany regained full sovereignty in the air.

The Constitution of 1949 made no provisions concerning aviation administration. The administrative functions that were later transferred to German authorities were, in most instances, exercised by the Länder.\(^7\) With the re-entry of aviation in the Allied zones, it became evident that its administration could only be performed on a national scale by the Federation. Accordingly, the Constitution was amended by transferring aviation administration to the federal government.\(^8\) This did not mean, however, that aviation administration was exercised exclusively by the federal government. As mentioned,\(^9\) the Constitution allows the Länder to exercise administrative functions on behalf of the Federation, the latter being entitled to regulate this administration by direction. Therefore, by the Law of 8 February 1961,\(^40\) such functions have partly been transferred to the Länder governments.

B. Functions Of The Federal Ministry Of Transport

Under Article 31 of the Air Navigation Act, all administrative functions in the field of aviation are performed by the Federal Ministry of Transport or by the agencies designated by it, unless otherwise specifically pro-

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\(^{2}\) Section VIII, No. 30, 20 Sept. 1945.
\(^{9}\) See Part IV supra.
\(^{40}\) [1961] I BGBI. 69.
vided. The aviation department of the Federal Ministry of Transport is composed of sections on air law and legislation, general and economic matters of aviation, air transportation, airports, aeronautical and engineering research, air traffic control, and international cooperation in aviation. The Aviation Council, a panel of experts from the diverse branches related to aviation, serves as a consultative body. It is divided into several committees whose recommendations are of considerable value in the formulation of aviation policy and in influencing legislative measures. The Federal Ministry exercises supervision over the subordinate federal agencies and a form of control over the Länder aviation authorities. Besides these supervisory functions, the following are included among the duties carried out by the Federal Ministry of Transport:

1) legislative recommendations to Parliament,
2) orders, partly with the agreement of other ministries and the consent of the Federal Council,41
3) administrative provisions, partly with the consent of the Federal Council,
4) recognition of foreign licenses for flight personnel,
5) certification of air transportation enterprises that operate air services with aircraft heavier than 5,700 kilograms or that operate scheduled air services which go beyond the borders of the area in which the enterprise has its headquarters,
6) exit permission for German aircraft if such flights are not generally allowed,
7) entrance permission for foreign aircraft if such flights are not generally allowed under multilateral or bilateral conventions,
8) establishment of areas under air traffic control services,
9) establishment of areas prohibited or restricted for flights, and
10) negotiation of bilateral and multilateral air transport agreements in conjunction with the Ministry of External Affairs.

C. Functions Of The Federal Agency Of Air Traffic Control Services

The functions of this agency are enumerated in the Law of 23 March 1953,42 and include:
1) performance of air traffic services operations,
2) planning and testing of air traffic services, procedures, and equipment,
3) establishment and maintenance of air traffic services installations if not provided by airport operators,

41 The national German air law is based on three main laws:
(c) The Order of 19 June 1964, [1964] I BGBI. 370. This order regulates the administrative procedure to be applied in granting the various licenses provided for by the Air Navigation Act.
42 [1953] I BGBI. 70.
4) training of air traffic services personnel including the issuance of licenses for operating and engineering personnel of the agency as well as of flight crew members,

5) collection and promulgation of notice to airmen including air navigation charts, and

6) examination and supervision of air traffic services installations and equipment in ground vehicles as well as cooperation in issuing and verifying type and series certificates of air traffic services equipment aboard aircraft.

Under Article 32 of the Air Navigation Act, the agency is authorized to issue orders concerning the conduct of aircraft in the air and on the ground, provided that the Federal Ministry of Transport transfers such functions to the agency.

D. Functions Of The Federal Office Of Civil Aeronautics

The functions of this office, which are similar to those of the United States Federal Aviation Administration, are enumerated in the Law of 30 November 1954. The functions of the office are, among others:

1) type certification of aircraft and aircraft equipment,

2) airworthiness certification,

3) registration of airplanes, rotorcraft, airships, and powered gliders,

4) licensing of aircraft maintenance engineers,

5) aircraft accident investigation, and

6) cooperation in search and rescue operations along with the Federal Agency of Air Traffic Control Services, military, and police services.

The office is also responsible for the licensing of airline transport and all personnel incident to the flight and maintenance of aircraft. According to Article 32 of the Air Navigation Act, the office is authorized to issue orders regulating details on the construction, verification, and operation of aircraft, provided that the Federal Ministry of Transport transfers such functions to the office. The operational control over the carriers certificated by the Federal Ministry of Transport has already been transferred.

E. Functions Of The Länder Authorities

As previously noted, the Länder do not have any legislative jurisdiction over aviation and no original administrative power in the area. However, administrative functions may be transferred to them pursuant to Article 31 of the Air Navigation Act. The main functions of the Länder in aviation administration are as follows:

1) granting of licenses to the various types of pilots if the Federal Office of Civil Aeronautics is not competent,

2) licensing of airports except for the determination as to the extent

43 [1954] I BGBl. 354. This law is presently being amended due to the necessary changes in the procedure to be followed regarding proof of compliance with the appropriate airworthiness requirements.

the public interest will be affected by the establishment and operation of an airport intended to serve the general traffic,

3) decisions on buildings and obstructions around airports in regard to the construction of clearance areas around airports,

4) licensing of air transport enterprises which operate only non-scheduled services with aircraft up to 5,700 kilograms maximum permissible gross weight or which operate scheduled air services which do not go beyond the borders of the area in which the enterprise has its headquarters,

5) permission for take-offs and landings outside the licensed airports, and

6) permission for the special use of the airspace, deviation from minimum safe altitudes, and air inspection service, insofar as it has not been delegated to the Federal Agency of Air Traffic Control Services or to the Federal Office of Civil Aeronautics.

F. Specific Parts Of Aviation Administration

The division of administrative competence between the federal and Länder authorities shows clearly that matters of major importance are handled by the federal authorities. What authority the Länder do exercise is mainly regional in scope. The following examples will illustrate how this system works in practice.

1. Safety Administration

The bulk of the German national air law consists of safety provisions. Consequently, most functions of aviation administration are geared to the safety of air traffic. As for ensuring the airworthiness of aircraft and other flight material, the Federal Office of Civil Aeronautics will soon be the only responsible agency after the amendment to the Air Navigation Act becomes effective. The office will also be responsible for the inspection of aircraft and other flight material. Up to now such verification and inspection has been performed by two scientific research institutions independent of the aviation administration. The inspection reports of these organizations have served as the basis for decisions on airworthiness handed down by the federal or Länder administrative bodies. This system has proved to be inadequate because of its lack of necessary centralization and because the inspections came after the construction, alteration, or repair of aircraft contrary to Part II of Annex 8 to the Chicago Convention, which stipulates that aircraft shall be inspected during the course of construction in accordance with a system of inspection approved by the State. Accordingly, the appropriate provisions on the verification are now being amended to provide that the inspections will be performed during the construction, alteration, or repair of the aircraft by specially qualified personnel of the enterprise engaged in such work. The enterprise is, however, authorized to make inspections only after being licensed by the

48 Deutsche Versuchsanstalt für Luft- und Raumfahrt (DVLR) and Deutsche Forschungsanstalt für Luftfahrt (DFL).
Federal Office of Civil Aeronautics, which may also exercise control over the inspection system and regulate details on the construction and operation of aircraft.

Aircraft accident investigation and airworthiness of aircraft are related in that the purpose of both is the prevention of further accidents. If the accident is not caused by personnel failure, technical matters regarding airworthiness are involved and, for this reason, the Federal Office of Civil Aeronautics as the central technical body in the field of aviation administration is authorized to perform accident investigations. The investigation itself is regulated by administrative provisions issued by the Federal Ministry of Transport. The results are set out in an aircraft accident report which must state the cause or, if this is impossible, the probable cause of the accident. The office takes the necessary measures indicated by the results of the investigation, such as issuing airworthiness directives. In addition, the appropriate bodies (Ministry of Transport, Federal Agency of Air Traffic Control Services, and Länder authorities) are informed of the results of the investigation. It should be noted that the accident reports do not have any binding force on the courts or the agencies handling personnel licensing and, therefore, it is a decision for the licensing agency whether it will cancel or order the suspension of a license if the aircraft accident report contains evidence of a personnel failure.

A general safety provision of great importance is Article 29 of the Air Navigation Act, which stipulates that the aviation authorities have the responsibility of preventing dangers to the safety of air navigation and to public safety incident to air navigation. The instructions of the air traffic control services to the pilots are based on this provision as well as the airworthiness directives of the Federal Office of Civil Aeronautics. More importantly, however, the general air inspection services of the Länder authorities performed at the airports function according to this provision. They may, for instance, prevent the take-off of an aircraft if they discover that the necessary documents are not in order. At the smaller landing sites the air inspection services will be performed by private persons, in most cases members of aviation sports clubs, who, by delegation from the appropriate Länder authorities, exercise certain police functions. Special administrative provisions ensure the competence of these inspection services.

2. Aircraft Noise Abatement

The necessary measures required for aircraft noise abatement pose special problems of coordination between the diverse administrative bodies on the federal, Länder, and local government level. Several principles on noise abatement serve as general guidelines in the area.


47 These reports have resulted in an action brought against the Federal Office of Civil Aeronautics by an operator whose aircraft, according to the accident report, had crashed because of failure of the operator's personnel. The courts, however, decided that a person who is found negligent in such a report may not be sued because the report has merely the character of an expert opinion. As such, it is not a precedent in a civil or criminal suit against the aircraft operator.
1) An aircraft shall be licensed only if its technical equipment is such that the noise caused by its operation does not exceed the noise accepted as inevitable for that particular aircraft as determined by actual technical standards.  

2) Airports shall be licensed only after the aircraft noise level is considered. In some instances the license may be granted on the condition that adequate measures will be taken to protect the population against this noise. Länder aviation authorities, acting on behalf of the federal government, act as licensing bodies which, to be effective, must cooperate with the local governments around the airports as well as with the Federal Agency of Air Traffic Control Services.

3) Aircraft shall be operated in such a way as to avoid as much as possible inevitable noise. Besides definite minimum flight altitudes, a certain degree of noise protection is being achieved by the prescription of standard departure routes at airports. This is accomplished by the Federal Agency of Air Traffic Control Services in cooperation with the airport authorities and the local governments. Some airports, such as Düsseldorf, have prohibited aircraft take-offs at night.

Some additional noise abatement measures indirectly result from the federal law relating generally to building codes which stipulates that in community planning the requirements of transportation must be given due consideration. Such measures would be within the discretion of the local governments. Due to the lack of coordination with the aviation authorities, in many cases settlement around airports has not been prevented. There is some trend, however, to prevent the construction of houses in areas under strong noise influence in the vicinity of airports either by amending the Air Navigation Act or the federal law relating to building codes. Such an amendment would necessitate action chiefly by the Federal Ministries of Transport, Health, and Building.

Recently, a group of parliamentarians drafted a bill relating to the protection against aircraft noise in the vicinity of airports. The bill provides for the establishment of zones of noise exposure. In zone 1 dwellings must not be built. The resettlement of habitants, on a voluntary basis, will be subsidized by allowing the property owner to sell out to the airport at a reasonable price. In zone 2 no new dwellings may be built and owners of existing dwellings may claim compensation for their noise insulation expenses. In zone 3 erection of hospitals, schools, and similar buildings is prohibited, and dwellings may be built only if they are equipped with noise insulation. The appropriate committees of the Federal Diet have been

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52 Bundestagsdrucksachen V/355-56.
53 For details concerning the noise exposure index of this bill, see Fluglirm, seine Messung und Bewertung, seine Berücksichtigung bei der Siedlungsplanung, Massnahmen zu seiner Minderung, expert report, Göttingen, 1963.
studying the draft along with the questions of aircraft noise in general, and a number of technical and medical experts have been heard on the problem. It is doubtful whether the initiators of the draft will find a majority in Parliament. As for the federal government, it has made it clear that, while fully appreciating the need to take measures to reduce aircraft noise, it cannot support the draft because it thinks it impracticable. Among its reasons, the Government cites the prohibitive financial expenditures called for under the draft to be paid by the airports as compensation.

3. Airport Planning

The ten international airports in existence in the Federal Republic and West Berlin at the close of the war were expanded in the fifties with the existing aircraft and others that seemed probable for the near future in mind. However, air traffic has increased to such an extent that some airports are clearly inadequate today. The cities also grew at an unprecedented rate, partially surrounding the airport locations. Therefore, in Munich and Hamburg, new airports are being planned to supplement the outmoded facilities which are located too near the centers of the cities. At other airports longer runways with greater clearance soon will have to be built.

Since the establishment and maintenance of airports is considered to be a public function, the international airports are controlled by the Federation, the Länder, and the local governments although the airports are legally organized as private enterprises. The Federation, originally a partner to the Berlin, Köln/Bonn, Frankfort, Hannover, Nuremberg, and Stuttgart airports, has for financial reasons resigned from the Nuremberg and Stuttgart enterprises and will soon resign from the Hannover company too. Thus, the financial aid will be left to the Länder and the local governments alone, but only after part of the starting assistance to these airports had been paid by the Federation.

Although these ten airports serve primarily international air transportation, domestic air traffic has also been increasing. Therefore, the overcrowding has encouraged thoughts of establishing additional airports to accommodate local air traffic. The overcrowding is especially prevalent in the North Rhine-Westphalia area. This local air traffic seems still to be in an experimental stage, and firm plans await the public demand for it, which currently seems unlikely.\textsuperscript{5} The airports that exist apart from the ten international airports\textsuperscript{6} are mainly used for private flights. An increased use in these smaller landing sites by commercial aviation would almost surely necessitate additional air traffic control services.

As mentioned, the licensing agencies for the airports are the Länder authorities. Article 6 of the Air Navigation Act stipulates that, before a license is granted, it shall in particular examine whether the requirements

\textsuperscript{5} In the German Republic there are about 150 airports and more than 500 landing sites. See \textit{WEGWEISER DER DEUTSCHEN ZIVILLUFTFAHRT} 15 (The Federal Ministry of Transport ed. 1967).


of the surrounding areas and of the regional and urban development have been taken into account. Moreover, the license application of an airport intended to serve public traffic will be refused if the public interest would be unduly impaired by its operation. This necessitates coordination between the diverse administrative authorities involved which is carried out by a special procedure.\(^7\)

4. Personnel Licensing

The administrative functions concerning personnel licensing are divided between the Federal Office of Civil Aeronautics and the Länder authorities. Such licensing is uniformly regulated by the Air Navigation Act, orders, regulations and administrative directions. Therefore, the same qualification standards exist everywhere within the Federal Republic. If problems arise, they will be treated by a committee composed of Federal and Länder officials and, as far as necessary, by directions from the Federal Ministry of Transport. The Länder governments are free to transfer their licensing functions to regional agencies, thus enabling applicants to reach the appropriate authorities more easily.

In spite of uniform standards, some problems may arise due to the diverse licensing authorities if airmen change their domicile within the Federal Republic. It may be possible that an applicant will be granted a license by the appropriate agency, whereas such a license may have been refused in his former domicile. This same mobility of personnel also makes it impossible to give exact information on the number of airmen licensed. The Länder authorities are only able to specify the number of licenses issued and cannot definitely say whether a license is still valid or whether its holder is still alive. However, the Federal Office of Civil Aeronautics collects all information on airmen in the Federal Republic and acts as a form of clearing office. Before granting a license, the appropriate Länder authority should check with the Federal Office of Civil Aeronautics to see whether a license has already been refused, cancelled or suspended by another authority, or whether grounds exist for such refusal. Any violation of the aeronautical provisions should be brought to the attention of the Federal Office of Civil Aeronautics and the appropriate Länder authority in order to enable them to take the necessary restrictive measures.

5. Licensing of Air Transport Enterprises

Under Article 20 of the Air Navigation Act, the use of aircraft for commercial purposes requires a license. Flight plans, tariffs, and conditions of transportation have to be approved by the licensing agency. The license is granted on condition that detailed standards, part of which are laid down in Annex 6 of the Chicago Convention, are followed in the operation of aircraft. Although the licensing function is divided between the Länder authorities and the Federal Ministry of Transport, as a practical matter, the Federal Ministry is responsible for licensing enterprises using aircraft heavier than 5,700 kilogramms. The licensing of carriers is rela-

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tively trouble free since standards are uniform throughout the Federation. Slight deviations are required, however, when flights for special purposes are involved. For example, advertising flights are subject to a special permission by the appropriate aviation authority in the area. When obtained the permission is valid throughout the Federal Republic, but the regulations as to the hours, altitudes, etc., under which the advertising flights may be performed differ because of regional peculiarities. If a uniform regulation is needed, the Federal Ministry of Transport might issue appropriate administrative directions.

6. State Control over the National Carriers

The control functions over the licensed national carriers are exercised by the Federal Ministry of Transport and the Länder authorities. The Federal Ministry of Transport has transferred its operational control to the Federal Office of Civil Aeronautics to be exercised by inspecting the enterprise, its aircraft, facilities, and personnel. Besides the operational control, the licensing agency is entitled to investigate whether the prescribed licensing standards are still being met by the enterprise. This means among other things that the enterprise must remain on a sound economic basis because otherwise the safe operation of the aircraft might be affected.

Recently, questions concerning the carriers' liability have been settled by negotiations between the licensing authorities and the carriers. According to Articles 44 through 52 of the Air Navigation Act, the liability of the carrier for injury or death to passengers under the contract of carriage corresponds exactly to the limits of the Hague Protocol. Nevertheless, both are considered insufficient, and the federal government favors their increase. In the government's opinion, the liability of the carrier in international and the carrier in domestic transportation should not differ. Accordingly, it is not willing to increase the present national liability limits until liability on international traffic is settled by the Diplomatic Conference planned for the near future. The government has, however, asked the carriers licensed by the Federal Ministry of Transport to provide for higher amounts of liability in their conditions of carriage. The Länder have followed this procedure with the carriers over whom they exercise control. The result of these efforts is an agreement among the carriers to liability limits of $58,000, exclusive of legal fees and costs, with the further agreement not to avail themselves of any defense under Article 20 (1) of the Warsaw Convention or the respective national provision in Article 45 of the Air Navigation Act. This regulation corresponds to the Interim Arrangement of 16 May 1966, which applies to carriage to, from, or through the United States. As a very rare example of German administrative practice, the regulation was arrived at on a voluntary basis.

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Another aspect of state control over the national carriers results from a certain antagonism between scheduled and non-scheduled services. To date Lufthansa is the only certificated German carrier performing scheduled air transportation. Because of the competition by foreign airlines, it was necessary to build up a German airline able to meet this competition. This meant that there was a need for regulatory measures to limit the competition from other German carriers. Subsidies to Lufthansa would have been ineffectual if traffic which might have been served by Lufthansa passed to other carriers. Therefore, in regard to scheduled air services, Article 21 of the Air Navigation Act stipulates that certification may be refused to a carrier if the public interest would be adversely affected by the addition of another scheduled air service.\(^{61}\)

Non-scheduled enterprises are not required to meet this diversion standard.\(^{62}\) Therefore, a number of large irregular carriers grew up which are enjoying a phenomenal expansion due to the increase of air tourism. The tariffs of these carriers are much below those of the scheduled services, making possible a strong competition between Lufthansa and these irregular carriers on certain routes. Regulatory measures to stem this competition from the non-skeds may therefore become necessary in the public traffic interest. The legal basis for such restrictions is Article 22 of the Air Navigation Act which provides that the licensing agency is authorized to prescribe conditions or to prohibit the transportation offered by irregular carriers if public traffic interests are substantially affected by the irregular transportation.\(^{63}\)

The scope of article 22 is not limited to air transportation and can be utilized for the protection of railroad traffic. Up to now, air services have not been serious competitors with the German Railways and it seems unlikely that such competition will arise in the future. Geographical distances in the Federal Republic are relatively short, and for a trip of up to 350 kilometers, rail transport can be considered as fast and as economical as air transportation.\(^{64}\) Although domestic air transportation continues to increase, it cannot yet be considered a serious competitor to other modes of transportation. Therefore, the transportation policy regarding aviation is aimed at regulating air transportation itself, that is, the balance between scheduled and non-scheduled services. The problem of defining these two groups may cause some difficulties. The term non-scheduled services is given a liberal interpretation, thus permitting certain regular flights without the requirement of a license for scheduled services.\(^{65}\)

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\(^{61}\) A similar law exists for road traffic which expressly states that the public interest is affected by the admission of a new transportation enterprise if an existing carrier already offers or is prepared to offer adequate transportation.


\(^{63}\) See Rinck, *Die internationalen Elemente im Lufttransport*, 1966 ZLW 5.

\(^{64}\) Bongers, *Charterverkehr, Position am Markt*, Flugwelt 83 (1967).

\(^{65}\) As to the definition of non-scheduled air services, see Meyer, *Der internationale Luftlinienverkehr und der internationale entgeltliche Gelegenheitsverkehr nach geltendem Recht und de lege ferenda unter besonderer Berücksichtigung einer Koordinierung des europäischen Luftverkehrs*, 1954 ZLR 223.
7. Penalty Procedures

Under German law civil fines for violation of an administrative provision may be imposed by administrative authorities, whereas criminal penalties are dealt with by the courts. The prosecution of these civil offenses is normally performed by the Länder authorities because there exists no federal body empowered to prosecute. This means that if an airman violates an administrative provision which was promulgated by the Federal Office of Civil Aeronautics or by the Federal Agency of Air Traffic Control Services, that agency will have to inform the appropriate Länder authority and request prosecution of the violation. The Länder, in turn, are unable to prosecute without the aid of the federal agencies because they do not exercise administrative powers over the provision violated, and thus are unable to judge the offense by their own knowledge. Therefore, it has been advocated that for civil violations of aviation administrative provisions the issuing authority be given the power to prosecute. The necessary legislative amendments in preparation stipulate that where administrative functions are exercised by the Federation, the Federal Office of Civil Aeronautics and the Federal Agency of Air Traffic Control Services will be responsible for the prosecution of non-criminal offenses. Accordingly, the Länder authorities would be responsible for the prosecution of offenses only to the extent they exercise aviation administration.

8. Air Traffic Control

After responsibility for the air traffic control in the upper airspace was taken over by the Eurocontrol Agency in 1964, the sole responsibility for the airspace below rests with the federal agency. The government advocates a coordination of the national and Eurocontrol air traffic control services in order to achieve the most economic solution. Currently, the national administration of the air traffic control services is centralized but coordination with the military services is needed.

VI. Conclusions

As may be seen from the various amendments in the field of aviation legislation, there is a very definite trend toward further centralization. This indicates that sufficient coordination between the federal and Länder authorities was lacking under the original administrative system. Centralization, in this context, should not exclusively be understood as a transfer of administrative functions from the Länder to the Federation, but also as an expansion of the activities of the Länder authorities acting under directives on behalf of the Federation.

Apart from this trend toward centralization, a trend toward deeper coordination is apparent as to all those administrative authorities which are not under the leadership of a single body. The Federal Law of 8 April

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1965" illustrates this trend by attempting to coordinate the orders of diverse administrative authorities in respect to the planning of the territorial structure within the Federal Republic. From the German point of view and experience, the creation of the United States Department of Transportation seems to be a step on which the United States should be congratulated.

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