

Germany: Privatization of Air Traffic Control

May 2015



This report is provided for reference purposes only.
It does not constitute legal advice and does not represent the official
opinion of the United States Government. The information provided
reflects research undertaken as of the date of writing.
It has not been updated.

Germany: Privatization of Air Traffic Control

*Jenny Gesley
Foreign Law Specialist*

SUMMARY The original wording of article 87d of the German Basic Law precluded privatization of air traffic administration. A first constitutional amendment in 1992 was interpreted to permit only corporatization. In order to allow functional privatization and implement the European Union Single European Sky framework, article 87d of the Basic Law was amended a second time in 2009.

I. Relevant Provision in the Basic Law

Article 87d of the German Basic Law (Grundgesetz) deals with air traffic administration. The current version reads as follows:

(1) Air traffic administration shall be conducted under federal administration. Air navigation services may also be provided by foreign air navigation service providers that are authorized in accordance with European Community law. Further details are set out in a federal law.

(2) A federal law requiring the consent of the Bundesrat may delegate responsibilities for air traffic administration to the Länder acting under federal commission.¹

The original wording of article 87d as it appeared in the Basic Law in 1961 was as follows:

(1) Air traffic administration shall be conducted under direct federal administration.

(2) A federal law requiring the consent of the Bundesrat may delegate responsibilities for air traffic administration to the Länder acting under federal commission.²

After a constitutional amendment in 1992, the article read as follows:

(1) Air traffic administration shall be conducted under direct federal administration. A federal law determines if it shall be organized under public law or private law.

¹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] art. 87d, May 23, 1949, BUNDESGESETZBLATT [BGBl] I at 25, <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf> (all translations by author). An unofficial English translation is available at http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf but does not include sentence 3 of article 87d, paragraph 1.

² Gesetz zur Einfügung eines Artikels über die Luftverkehrsverwaltung in das Grundgesetz (11. Änderung des Grundgesetzes) [Act to Insert an Article on Air Traffic Administration into the Basic Law (11th Amendment to the Basic Law)], Feb. 6, 1961, BGBl I at 65.

(2) A federal law requiring the consent of the Bundesrat may delegate responsibilities for air traffic administration to the Länder acting under federal commission.³

The current version was inserted through a second constitutional amendment in 2009.⁴

A. Definitions and Constitutional Procedure

Some preliminary definitions of terms and an explanation of the procedure to amend the Basic Law will be helpful in understanding the reasons that made the constitutional amendments necessary.

1. Privatization

Privatization is generally divided into corporatization, or formal privatization; functional privatization; and material privatization.⁵ Before and after the first constitutional amendment, the question as to whether article 87d, paragraph 1 of the Basic Law allowed privatization and, if so, at what level, generated intense debate.

a. Corporatization, or Formal Privatization

Corporatization, or formal privatization, describes the process by which the administration of public tasks is transferred to a corporation organized under private law and normally formed specifically for that purpose. The corporation is 100% state owned, and the federal government retains full control of the public task and the corporation.⁶

b. Functional Privatization

Functional privatization refers to a situation in which the federal government remains responsible for fulfilling the public task but vests public authority in nongovernmental actors to accomplish this. The nongovernmental actors are not fully government owned.⁷

c. Material Privatization

Material privatization entails a complete functional transfer to the private sector and a permanent transfer of asset ownership. In addition, the government divests itself of the provision function so that the service is no longer a public task.⁸

³ Gesetz zur Änderung des Grundgesetzes [Act to Amend the Basic Law], July 14, 1992, BGBl I at 1254.

⁴ Gesetz zur Änderung des Grundgesetzes (Artikel 87d) [Act to Amend the Basic Law (Article 87d)], July 29, 2009, BGBl I at 2247.

⁵ Christian J. Tams, *Art. 87 d I GG und die Neuordnung der Flugsicherung* [Art. 87 d, Para. 1 Basic Law and the Reorganization of Air Traffic Control Services], 2006 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1226, 1227.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

2. Federal Administration

a. Direct Federal Administration (*bundeseigene Verwaltung*)

The term “direct federal administration” (*bundeseigene Verwaltung*) refers back to articles 86 and 87 of the Basic Law. Article 86 describes direct federal administration as administration through federal administrative authorities without legal personality.⁹ Article 87 lists matters that are conducted through direct federal administration.

b. Federal Administration (Bundesverwaltung)

In general, the Basic Law uses the term “federal administration” to differentiate it from administration by the German states. Scholars debate if the term also denotes a certain type of administration by the Federation.¹⁰ Federal administration allows for either direct or indirect federal administration of public tasks.¹¹ Indirect federal administration is administration conducted through federal corporations or institutions established under public law.¹² Such administration can be conducted through public or private law subjects as long as the federal government retains sufficient control of the public task.¹³

3. Constitutional Procedure

Article 79 of the Basic Law describes the procedure for amending the Basic Law. According to that provision, the Basic Law may be amended only by a law expressly amending or supplementing its text. The amending law needs to be approved by two thirds of the members of the German Parliament (Bundestag) and two thirds of the votes of the Federal Council (Bundesrat). The Federal Council is the constitutional body through which the German states participate in the legislative process.

⁹ SACHS GRUNDGESETZ KOMMENTAR [SACHS COMMENTARY ON THE BASIC LAW] commentary on art. 86, margin no. 13 (Michael Sachs ed., 7th ed. 2014).

¹⁰ *Id.* commentary on art. 86, margin no. 48; BONNER KOMMENTAR ZUM GRUNDGESETZ [BONN COMMENTARY ON THE BASIC LAW] commentary on art. 87d, margin nos. 21–25 (Rudolf Dolzer et al. eds., 154th update Oct. 2011).

¹¹ SACHS GRUNDGESETZ KOMMENTAR, *supra* note 9, commentary on art. 87d, margin nos. 9–11; GRUNDGESETZ KOMMENTAR [BASIC LAW COMMENTARY] commentary on art. 87d, margin nos. 5, 6 (Volker Epping & Christian Hillgruber eds., 2009); GRUNDGESETZ KOMMENTAR BAND 2: ART. 70 BIS 146 [BASIC LAW COMMENTARY PART 2: ART. 70 TO 146] commentary on art. 87d, margin no. 9 (Ingo von Münch & Philip Kunig eds., 6th ed. 2009).

¹² BASIC LAW art. 86, para. 1, beginning of sentence 1; SACHS GRUNDGESETZ KOMMENTAR, *supra* note 9, commentary on art. 86, margin nos. 14, 15.

¹³ SACHS GRUNDGESETZ KOMMENTAR, *supra* note 9, commentary on art. 87d, margin no. 12.

B. History

1. Pre-enactment of Article 87d of the Basic Law

The Basic Law as it was originally enacted in 1949 did not contain a provision concerning civil aviation, because no. 2a of the Occupation Statute of Germany (Besatzungsstatut) of April 12, 1949, reserved powers in that area exclusively for the occupation authorities.¹⁴ The restrictions ended in 1955 when the Occupation Statute was terminated.¹⁵ In 1961, the new article 87d was introduced into the Basic Law.¹⁶

2. First Constitutional Amendment

Article 87d of the Basic Law in its original version mandated that air traffic administration be conducted under “direct federal administration.” In 1990, the federal government passed an act to amend the Air Traffic Act to allow for greater flexibility in managing personnel and infrastructure and to guarantee efficient handling of air traffic by replacing the federal agency with a private company.¹⁷ The amending act therefore intended to corporatize air traffic administration by transferring the task to a private limited liability company (Gesellschaft mit beschränkter Haftung, GmbH) in which the federal government was the sole shareholder. The company was subject to the legal and technical oversight of the Federal Ministry of Transportation. The amending act further postulated that the company was intended to employ private employees as opposed to public servants.¹⁸

The German President at the time, Richard von Weizsäcker, refused to sign the amending act into law because he concluded that it violated article 33, paragraph 4 and article 87d, paragraph 1 of the Basic Law.¹⁹ Article 33, paragraph 4 of the Basic Law mandates that the regular exercise of sovereign authority generally be entrusted to members of the public service. He reasoned that the work of an air traffic controller is essentially a public task and therefore must be performed by a public servant rather than, as the amending act provides, by a private employee. In addition, he argued that article 87d, paragraph 1 in its original version did not allow for corporatization because it clearly stated that air traffic administration must be conducted under direct federal administration. Direct federal administration refers back to the definition in article 86 of the Basic Law.²⁰

¹⁴ Occupation Statute Promulgated on the 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones, May 12, 1949, OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY, Sept. 23, 1949, no. 1 at 13, available at http://www.cvce.eu/content/publication/2003/10/21/6750efd3-4b34-4fec-9a4a-df0ff125d302/publishable_en.pdf.

¹⁵ BONNER KOMMENTAR ZUM GRUNDGESETZ, *supra* note 10, commentary on art. 87d, margin no. 2.

¹⁶ Gesetz zur Einfügung eines Artikels über die Luftverkehrsverwaltung in das Grundgesetz, Feb. 6, 1961, BGBl. I at 65.

¹⁷ Entwurf eines zehnten Gesetzes zur Änderung des Luftverkehrsgesetzes [Draft Tenth Act to Amend the Air Traffic Act] DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT DRS.] 11/6261, at 10.

¹⁸ *Id.*

¹⁹ Unterrichtung durch den Bundespräsidenten [Letter from the Federal President] BT DRS. 12/67, at 1.

²⁰ *Id.* at 2.

Because of the former President's refusal to sign the amending act into law, the Basic Law was amended and a second sentence added to article 87d, paragraph 1, which allowed for establishing air traffic administration under public law or private law. As a result, the German Air Traffic Control Limited Liability Company (Deutsche Flugsicherung, GmbH) was founded, in which the federal government was the sole shareholder.²¹ Nevertheless, the possibility of establishing "direct federal administration" under public or private law was criticized as seriously inconsistent with the structure of the Basic Law.²²

3. *Second Constitutional Amendment*

In 2005, the legislative branch introduced the Air Traffic Control Act (Flugsicherungsgesetz).²³ Again, the Federal President, Horst Köhler at the time, refused to sign it into law.²⁴ The draft act envisaged a capital privatization of the German Air Traffic Control Limited Liability Company. The Federal President outlined in his letter to the federal government that the unambiguous wording "direct federal administration" in article 87d of the Basic Law only allowed for corporatization and not capital privatization, and that that interpretation was supported by the legislative history of the provision.²⁵

He elaborated that capital privatization as provided for in the draft act would not allow for sufficient control of the public task.²⁶ Section 16 of the draft act permitted the transfer abroad of the company seat after twenty years. Such a transfer did not sufficiently safeguard the continued control of the public task by the federal government, because there was no law to that effect in place. Furthermore, with regard to company law, sufficient control of the public task would not be guaranteed if the federal government held only a blocking minority. Lastly, the draft act allowed complete privatization after sixteen or twenty years, which means that federal control under company law would cease after that time.²⁷

In 2009, the project to reform air traffic control was revived to address the Federal President's earlier objections and, in particular, to comply with the European Union (EU) Single European Sky (SES) framework. The SES legislative framework consists of four basic regulations (SES I package) covering the provision of air navigation services, the organization and use of airspace,

²¹ BONNER KOMMENTAR ZUM GRUNDGESETZ, *supra* note 10, commentary on art. 87d, margin no. 3.

²² *Id.* commentary on art. 87d, margin no. 22; SACHS GRUNDGESETZ KOMMENTAR, *supra* note 9, commentary on art. 87d, margin no. 3; GG KOMMENTAR BAND 3 ART. 83–146 [GG COMMENTARY PART 3 ART. 83–146] commentary on art. 87d, margin no. 2 (Hermann v. Mangoldt, Friedrich Klein & Christian Starck, eds., 6th ed. 2010).

²³ Entwurf eines Gesetzes zur Neuregelung der Flugsicherung [Draft Act to Reorganize Air Traffic Control] BT DRS. 16/240.

²⁴ Unterrichtung durch den Bundespräsidenten – Gesetz zur Neuregelung der Flugsicherung [Message from the Federal President – Act to Reorganize Air Traffic Control] BT DRS. 16/2362.

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

²⁷ *Id.*

and the interoperability of the European Air Traffic Management Network.²⁸ The regulations adopted in 2004 were revised and extended in 2009 (SES II package).²⁹ The SES framework divides airspace into functional blocks according to traffic flows rather than national borders.³⁰ The division of airspace into functional blocks made it necessary to amend article 87d of the Basic Law again, because “direct federal administration” prohibits administration by foreign authorities.

The “opening clause” of the current version of article 87d, paragraph 2, sentence 2 of the Basic Law is not an alternative to federal administration according to sentence 1, but rather a subcategory of it. This clause concerns only air traffic control and not air traffic administration.³¹ Areas that fall into the category “air traffic control” are listed in the EU SES regulations. Sentence 2 postulates an exception to the general rule of sentence 1 for the area of air traffic control.

It is worth noting that debates continue as to whether article 87d, paragraph 1, sentence 2 of the Basic Law in its current version allows for capital privatization of air traffic administration with the federal government holding only a minority interest, as originally provided in the draft Air Traffic Control Act.³² The current versions of the Air Traffic Act (*Luftverkehrsgesetz*)³³ and the Aviation Security Act (*Luftsicherheitsgesetz*)³⁴ do not include such an option. Instead, article 31b of the Air Traffic Act states that air traffic control is handled by a private limited liability company that is fully owned by the federal government.

²⁸ Regulation 549/2004 of the European Parliament and of the Council of 10 March 2004 Laying Down the Framework for the Creation of the Single European Sky (the Framework Regulation), 2004 O.J. (L 96) 1; Regulation 550/2004 of the European Parliament and of the Council of 10 March 2004 on the Provision of Air Navigation Services in the Single European Sky (the Service Provision Regulation), 2004 O.J. (L 96) 10; Regulation 551/2004 of the European Parliament and of the Council of 10 March 2004 on the Organisation and Use of the Airspace in the Single European Sky (the Airspace Regulation), 2004 O.J. (L 96) 20; Regulation 552/2004 of the European Parliament and of the Council of 10 March 2004 on the Interoperability of the European Air Traffic Management Network (the Interoperability Regulation), 2004 O.J. (L 96) 26.

²⁹ Regulation 1070/2009 of the European Parliament and of the Council of 21 October 2009 Amending Regulations (EC) No 549/2004, (EC) No 550/2004, (EC) No 551/2004 and (EC) No 552/2004 in order to Improve the Performance and Sustainability of the European Aviation System, 2009 O.J. (L 300) 34.

³⁰ Regulation (EC) 549/2004, arts. 2, para. 25 & 11, para. 1(b).

³¹ SACHS GRUNDGESETZ KOMMENTAR, *supra* note 9, commentary on art. 87d, margin no. 23; GRUNDGESETZ KOMMENTAR, *supra* note 11, commentary on art. 87d, margin no. 7.

³² BONNER KOMMENTAR ZUM GRUNDGESETZ, *supra* note 10, commentary on art. 87d, margin nos. 38–45; GRUNDGESETZ KOMMENTAR, *supra* note 11, commentary on art. 87d, margin no. 17.

³³ *Luftverkehrsgesetz* [Air Traffic Act], Aug. 1, 1922, REICHSGESETZBLATT I at 681, as amended, art. 31b, <http://www.gesetze-im-internet.de/bundesrecht/luftvg/gesamt.pdf>.

³⁴ *Luftsicherheitsgesetz* [Aviation Security Act], Jan. 11, 2005, BGBl I at 78, as amended, <http://www.gesetze-im-internet.de/bundesrecht/luftsig/gesamt.pdf>.