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# SMS and civil liability - the German perspective

The implementation of Safety Management Systems (SMS) at international airports was one of the most considerable changes in the regulatory framework for the operation and licensing of aerodromes in recent years. According to an ICAO requirement that came into effect in November 2005, international airports must have a Safety Management System in place as a fundamental prerequisite for aerodrome licensing. As an ICAO Standard, this requirement under Annex 14 to the 1944 Chicago Convention on International Civil Aviation, must be transposed into binding national legislation by each ICAO member state.

For Germany, s. 45 of the Aviation Licensing Order (Luftverkehrszulassungsordnung - LuftVZO) provides accordingly that the aerodrome operator is obliged to maintain the airport's safety and comply with the pertaining regulations. Said obligation is further elaborated in s. 45 b LuftVZO, newly introduced in 2007, which specifically provides for the introduction, maintenance and development of a Safety Management System. In this context, the German legislator has put forward certain minimum standards a Safety Management System has to meet in order to be legally compliant, namely in regards of organisational structures and documentation requirements. Moreover, the new s. 45 c

LuftVZO requires an airport operator to employ an Airport Safety Manager with far reaching competencies in scrutinising all safety-relevant issues.

With the requirement for SMS, ICAO responds to recent trends towards airport privatisation and commercialisation, resulting in intensified economic pressure on the operation of airports.

Management decisions in the airport industry now increasingly involve trade-offs between safety and financial efficiency. Also, environmental objectives are potentially in conflict with safety objectives. Often the trade-offs are not made in favour of safety. The safety argument is often based on uncertainty

and ambiguity, whereas financial and environmental performance is measurable. ICAO has recognised that considerable safety improvements cannot be achieved with the traditional concept of compliance with prescriptive regulation alone.

Today's complexity of the aviation industry requires a more adaptive, flexible and quicker safety regulatory regime.

## Basic principles

Based on the definition of a system as an entity that is composed of several interrelating and interacting elements, SMS may be best described by an inventory of certain elements that it should contain. In most SMS



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conceptions the following ten core elements are represented:

- Safety Policy / Safety Culture;
- Safety Manager / Key Safety Personnel;
- Occurrence Reporting Scheme;
- Investigation & Analysis of Occurrences;
- Risk Management;
- Safety Training;
- Auditing;
- Documentation & Promotion;
- Safety Committees
- Emergency Planning.

Traditionally the investigation of safety occurrences in aviation was focused on identifying the ultimate act in a chain of events that triggered the accident. Often this was some kind of wrong behaviour e.g. a deviation from procedures, an error in judgement, an error due to inattention, or deliberate acts committed mainly by frontline personnel.

The SMS philosophy is based on a more holistic understanding of accident causation, comprising the total context in which an accident or unsafe act occurs. The factors enabling an unsafe act also include latent unsafe conditions that may have been present in the system well before the accident

occurred. Such latent conditions are often not easily detected in the first place, as they might have been the result of decisions or acts from regulators, management, or other people dislocated in time and space from the accident. The aim of SMS is to prevent accidents as a product of managerial actions and organisational conditions.

The SMS concept implies a transfer of responsibility from the regulator to the airport operator. The safety responsibility of the operator becomes much more comprehensive than just ensuring compliance with regulations. The idea of SMS in essence constitutes a paradigm shift from a prescriptive to an objective based regulation.

#### Impacts on civil liability

Whereas the establishment of SMS is an obligation under public law, it impacts significantly on the civil liability of aerodrome operators under German law. The bases for liability are manifold but have in common that they require the operator to be at fault in violating certain safety obligations. It is recognised in German case law, that generic safety obligations arise from providing grounds or facilities to the general public. Accordingly

under general notions, aerodrome operators are required to maintain the safety of runways and taxiways, check-in areas and other areas in and out of the terminals.

Against this background, SMS constitutes an effective means to minimise considerably the operators' liability exposure when duly established, regularly controlled and diligently complied with. This holds true, as SMS can be used as a source to determine said generic safety obligations for the peculiarities of the aerodrome at hand and further elaborate the notion of fault.

#### SMS determining the pertaining liability regime

Under German case law, the common standards of safety for running grounds open to the general public need further elaboration when applied to a particular case in order to establish the liability at hand. There are various sources for such specific obligations. It is generally held that namely regulations under public law can be used to determine the pertaining safety regime in more detail. It is understood that such public law rules put forward minimum safety standards that the addressee shall not fall short of.



SMS generates specific rules for specific hazards, relying on constant monitoring and reviewing processes of safety relevant operations at airports

Accordingly, SMS gain considerable importance in assessing aerodrome operators' potential liability. This far-reaching impact was already recognised by the Technische Universität Berlin (Technical University Berlin), which published a Model-SMS-Handbook in close collaboration with the Munich Airport in 2005, sponsored by the German Federal Ministry of Transport, Building and Urban Affairs. The aim of the 2005 Model-SMS-Handbook was to provide German airports guidance in establishing Safety Management Systems, adapted to their specific needs, whilst at the same time unifying certain features for SMS in Germany.

For questions of liability, besides reporting and documentation requirements (annual), hazard and risk assessments will be of particular relevance. By introducing such reviewing processes, SMS becomes a learning exercise in finding appropriate and flexible responses to an ever-changing safety environment. The ultimate goal would be to:

- Identify hazards
- Analyse risks
- Designate possible avoidance/monitoring measures for hazards/risks
- Specify possible effects of occurrence; and

- Analyse hazard/risk monitoring and/or prevention measures.

These findings are a basis for standard operating procedures coined in safety information and recommendations for the personnel in charge.

In spite of their respective names, both procedural measures are indeed binding on the personnel addressed and only differ in importance (safety recommendations having more weight)

A Safety Information on ramp safety, for example, may refer to general traffic rules on speed and minimum safety distances using simple language, showing some pictures of past accidents. The aim is to improve the safety culture among the front line personnel on the spot, by raising the awareness of certain (potential) hazards whilst pointing to the respective regulations. A Safety Recommendation on the other hand will be more detailed and technical in nature when describing the obligations to be followed and will, in most instances, address the managerial level.

SMS generates specific rules for specific hazards, relying on constant monitoring and

reviewing processes of safety relevant operations at airports. These regulations are aimed at the maintenance and improvement of safety standards and there are, in principle, no other considerations (beyond safety issues) to be taken into account when formulating the respective obligations. It is arguable against this background that such SMS regulations are not only minimum standards under the general case law on public law regulations, referred to above, but rather constitute the governing safety regime at large. Hence, SMS-compliance may exclude liability altogether as an injured party could not base their claim on any other legal ground. This is the case, as SMS follows a holistic approach and would already encompass all considerations to be legally relevant under the applicable safety regime. Accordingly, only in cases where (evidently) SMS-regulations would fail to address the respective hazards, there should be scope for the claimant to rely on other more general considerations outside the SMS regime at hand.

### Negligence (Verschulden) and SMS-compliance

The operator's liability will only arise in cases of fault. German law distinguishes between



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intent (Vorsatz) and negligence (Fahrlässigkeit). In principle, the notion of negligence is determined under German law on the basis of objective standards, taking into account the commonly required practices of the specific industry at hand. In any event, the particular act giving rise to a potential claim can only be qualified as negligent where the danger thus caused to the injured party is foreseeable and preventable.

Again SMS-regulations gain importance. The chief aim of SMS is to detect potential hazards at an early stage by installing a constant monitoring and reviewing process. Respective findings are then coined in safety information and recommendations. Against this background, it is arguable that dangers not (yet) detected under SMS-processes of close scrutiny should be qualified as un-foreseeable for the injuring party when determining whether negligence is given. Indeed, it is understood in German case law that adherence to safety regulations may in principle exclude negligence. This shall not be the case where said rules are (evidently) insufficient.

### SMS to mitigate personal liability risks for Senior Management

Under certain circumstances Senior Management may face personal liability for damage caused in the operations of the airport. In such circumstances, SMS may mitigate their respective exposure.

As a general rule, the airport operator is

expected to maintain acute awareness of any upcoming risk in its operation. Although the Senior Management cannot be held liable for not knowing about any latent risk in the operation of the airport, they must be capable of demonstrating that information on risks is actively sought by putting in place appropriate means for systematic hazard identification. They must also be able to demonstrate that they have responded adequately on any risk being identified in the system. Against this background, documentation and reporting requirements under SMS gain vital importance.

### Conclusion

SMS is an effective and efficient means to create a safety culture, which is aimed at mitigating risks connected with modern aviation for human lives and the environment. The Final Report on the tragic airliner accident at Milan Linate Airport in October 2001 highlighted these implications by concluding:

*"It is the opinion of the investigating team [that] the absence of a functioning Safety Management System is the main cause for most of the discrepancies found and should be considered as one of the main contributing factors to the accident." (Agenzia Nazionale per la Sicurezza di Volo, 2004)*

At the same time, a well-established and adaptive SMS contributes to mitigating the

financial risks in the event of an accident giving rise to a claim. Indeed, compliance with SMS safety standards may exclude liability in such cases.

The introduction and maintenance of an evolving SMS constitutes, against this background, a valid tool to overcome trade-offs between safety and financial restraints put on airport operators. Indeed, a system aimed at minimising the occurrence of (fatal) accidents, and concurrently the liability exposure, creates a win-win-situation in its true meaning for all parties involved in modern air transport.

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He gained extensive experience in airport operations as Airport Duty Manager and in other functions with Munich Airport. Beside his operational duties he has been involved in consultancy projects in Athens, Brussels, Madrid and Bangkok.

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