

Finanzdelegation

Délégation des finances

Delegazione delle finanze

Joint Committee on Finance



100 ans

Eidgenössische Finanzkontrolle

Contrôle fédéral des finances

Controllo federale delle finanze

Swiss Federal Audit Office



125 Jahre

Third party Liability : a "Growing Risk"

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Introductory Comments

My task today is difficult, if not impossible. I am going to speak about a risk, that as far as I know – and I have been in office for quite a while - has never become a reality. My task also involves convincing you that this risk is a grave threat to the Confederation. In addition, this risk is hidden behind a complex statutory provision that is particularly incomprehensible to anyone who is not a lawyer. The statutory provision in question originated in 1958, and I am willing to claim that what we are dealing with here is a constantly "growing risk". As you can see, my task is not an easy one!

This would not be the first time my words are received with expressions of sympathy or even boredom. I first tried, a few years ago, to bring the daunting Art. 19 of the Liability Act (VG)¹ to the attention of the Heads of the Federal Finance Administration, and to table a motion in the Federal Assembly to have it repealed. So far, I have not been successful ... That is why I am all the more surprised that this Article has suddenly become an issue in federal risk analysis, and that even the Federal Audit Office (SFAO) is taking it seriously. The potential risk has been identified and the appropriate studies are underway. When I was asked to present this paper, I was amazed. In any case, I welcome this opportunity to present my old concern to such an appropriate audience. So, what is the issue at hand?

¹ Federal Act on the Liability of the Confederation and the Liability of Government Members and Officials of 14 March 1958 (Liability Act, VG; SR 170.32)

1 The Legal Basis

When restricted to the elements that are relevant to our discussion, Art. 19 VG² states as follows: If an organisation that does not form part of the Federal Administration is entrusted by the Confederation with public duties and unlawfully causes losses to a third party in the course of carrying out such duties, the Organisation is liable in the first instance. If the organisation is not capable of paying the damages due, the Confederation will be liable for the amount unpaid to the aggrieved party. Finally, there are provisions on recourse against the guilty parties, but these are not of particular interest to us at this time.

The following four principles are essential: (1) the organisation in question does not form part of the Federal Administration. (2) The organisation has been entrusted by the Confederation with public duties. (3) Someone in this organisation is acting unlawfully, i.e. they are violating a written or unwritten rule of law (unlawful conduct) or damaging or misusing an object of legal protection (unlawful result). (4) A third party incurs a loss, which the organisation is unable to repay. The result is the following: The Confederation has secondary liability for the unpaid loss.

2 Interpretation of Art. 19 VG

2.1 Which organisations are being referred to?

Let us begin by asking the following question: What type of organisations does the Confederation actually shoulder secondary liability for? If we backtrack, we see the provision was drafted in 1956. The Federal Council Report on the new law contains the following statement: "As aforementioned, this provision will eliminate a loophole in the applicable law, and will also expressly regulate the liability of organisations that do not form part of the Federal Administration in the event that such organisations are entrusted by the Confederation with carrying out specific tasks (for example, implementing quota restrictions). Organisations include institutions, such as the Swiss Accident Insurance Organisation, as well as public and private corporations and organisations (clearing houses, grain and fodder cooperatives, consortiums). ..."³. Another part of the text reads as follows: "It is, however, important that all organizations, associations/unions, consortiums etc. together with their personnel that have been entrusted by the Confederation with special duties also be included, even if they do not form part of the federal

² "1 In the event that an executive body or an employee of an organisation that does not form part of the Federal Administration is entrusted by the Confederation with public duties and unlawfully causes losses to a third party or to the Confederation in the course of its activities related to such duties, the following provisions shall apply:

- a. for losses occasioned to a third party, the organisation shall be liable to the aggrieved party in accordance with Articles 3-6. In the event that the organisation is unable to pay the damages due, the Confederation shall guarantee payment to the aggrieved party of the unpaid amount. Recourse of the Confederation and the organisation against the guilty body or employee shall be governed by Articles 7 and 9.
- b. the guilty body or employee shall be liable in the first instance for the losses occasioned to the Confederation and thereafter the organisation. Articles 8 and 9 shall apply.

² Liability under criminal law shall be governed by Articles 13 et seq.

³ The organisation will issue a ruling on contentious claims filed by third parties or by the Confederation against the organisation, or on claims filed by the organisation against guilty bodies or employees. This ruling shall be subject to an appeal to the appropriate Federal Appeals Commission in accordance with the Federal Act on Administrative Procedure, and, in the final instance, to an administrative court appeal to the Swiss Federal Supreme Court. The appeal procedure shall be governed by the Federal Act on the Administration of Justice of 16 December 1943."

³ BBI 1956 I 1402

administration. We may recall enlisting the services of such organisations to perform tasks related to the wartime economy ..."⁴. It is quite clear that we were dealing with a different world at that time, one in which agricultural and cooperative organisations carried out federal tasks. If anyone at that time had raised the issue that the Confederation had secondary liability for the activities carried out by these organisations, it may have seemed surprising at first, but was not reason for panic at the time. Risks related to these organizations still seemed fairly manageable to the Confederation in those days. Any mention of the Swiss National Accident Insurance Organisation (SUVA) at the time should have immediately prompted our attention: Should the Confederation be a "lender of last resort" to the SUVA?

Many of the aforementioned organisations still exist to this day in one form or another. I am not an expert in this field, but I am familiar with the 'Proviande' (previously known as the Cooperative for Animals for Slaughter and Meat Processing) as well as the Swiss Association for Swiss Brown Stock Breeding. I will venture to claim that no one knows how many of these agricultural organisations actually exist, let alone what their tasks are. This is rather concerning. In plain language, this means that we do not know what the Confederation is liable for. When considering today's "gene technology", one may wonder what risk these at first sight seemingly "harmless" agricultural organisations actually represent to the Confederation.

In addition to these agricultural organisations, there are currently many other organisations entrusted by the Confederation with public duties. We are living in a globalized, computerized, networked world – as we call it these days. Change and flexibility have not only affected the world and the economy, but have also changed the face of the government, which now engages in outsourcing, privatisation, and competition. The make-up of federal activity has been drastically changed. Art. 19 VG, however, has remained unchanged. It may even have fallen into oblivion for lack of earth-shattering cases, even though the Confederation has accepted liability and still does for large-scale enterprises such as the SBB (Swiss Federal Railways), the Swiss Post Office, Skyguide (formerly Swisscontrol), the Federal Institute of Technology (ETH), the Paul Scherrer Institute (PSI), the Swiss Electrotechnical Association (SEV), the Swiss Agency for Therapeutic Products (Swissmedic), which are about as big as you can get. This list is long enough to make anyone feel uneasy. I could add several hundred names more, but don't want to bore you. The list of semi-private (semi-public/partly state-controlled) organisations available at the Office of Personnel was last updated in December 1993. It includes a grand total of 233 organisations. Based on Art. 19 VG, the Confederation shoulders liability, as lender of last resort, for all these organisations provided they are organisationally and financially independent of the Confederation and they are entrusted by Confederation with public tasks. So, when these organisations are incapable of paying for the losses they have caused, the Confederation actually assumes an insurance-type role. A phone call I received from one of the persons responsible for setting up Swissmedic perfectly illustrates the issue at hand. The caller asked me the very appropriate question of whether it would be possible for Swissmedic to forego taking out insurance, given that in any case the Confederation would have to accept liability. First I was speechless, even though I had some sympathy for his position. I subsequently used all my powers of persuasion to convince him that it was better for the new institution to be insured than to wait for the coffers to run dry and rely on the Confederation to cover the shortfall. Taking out an insurance policy obviously costs money, but these expenses can easily be passed on. The

⁴ BBl 1956 I 1399

secondary liability of the Confederation, on the other hand, is free, which amounts to improper cross-subsidisation. Shouldn't the Confederation at least be indemnified?

On the one hand, the Confederation bears an enormous risk, without being fully aware of this and without ever having conducted a comprehensive risk analysis. On the other hand, the Confederation generally wields no influence over the management of these organisations. The Confederation is therefore accepting liability in the dark, without any special intervention or control options. The risk analysis that is underway should remedy the first part of the problem to some extent. This will at least finally reveal the risk borne by the Confederation, but it will not, however, solve the second part of the problem. Whether the Confederation should assume liability, and if so, on what terms and with what amount of leverage, remains an open-ended question. I will come back to this question later.

2.2 What is a Federal duty under Public Law?

Furthermore there is the question of interpretation: when is a federal duty deemed to be governed by public law?

In addition to public tasks, many of these businesses have other tasks, which they compete for with other businesses and which do not qualify as public duties. The Swiss Post Office is a good example of this situation. Ensuring a basic service for all is most certainly a public duty. Where is the limit? How should this limit be defined? There does not seem to be a reliable answer to this question either.

Someone once asked me whether or not the activities of the airline Swiss had not become a public service, as the Confederation held a third of Swiss' shares. Did the Confederation not publicly declare its interest in this activity by participating and electing a federal representative to the board of directors, and was there not a statutory basis for such participation in the Aviation Act⁵? I was shocked at the question and immediately said no. Swiss' activities are clearly private, and are not rendered public by the Confederation's participation. The same holds true for the Expo.02, to mention a second well-known example ...

This interpretation is clear enough; unfortunately there is no guarantee that the courts will share this view. Professor Wiegand, who is an expert in civil law, has taken the argument further. He assumes that in the case of the cantonal banks, the canton bears a basic risk of liability, even now that the cantonal guarantee has been abolished, for as long as a cantonal bank is operated on the basis of a public contract⁶. When and on what terms does such a contract exist? As you can see we are also dealing with a Pandora's box here, which may still have many surprises in store.

In my opinion, the interpretation of Art. 19 VG should conform to the following guidelines: An organisation that does not form part of the Federal Administration acts in the place of the Confederation. This is only possible if the organisation does so on a clear statutory basis. It is not,

⁵ Art. 102 Federal Aviation Act of 21 December 1948 (Aviation Act, LFG; SR 748.0)

⁶ W. Wiegand, Zur Haftung für privatisierte Staatsbetriebe, in recht 1999, Heft 1, p. 16.

however, sufficient for the statutory basis merely to cover the financing or subsidizing of the organisation. What is needed is legislation that expressly defines the activity that has been outsourced. Here I have the support of the Constitution, no less: "Administrative functions may be assigned by legislative enactment to organisations and persons under private or public law that do not form part of the Federal Administration."⁷ Legal provisions relating to subsidies alone may well involve a public interest, but there is no delegation or fulfilment of a public duty in terms of the VG (take the examples of Swiss and Expo.02). Fortunately, the Swiss Federal Supreme Court has also concurred with this view in the case of the Swiss Office for the Development of Trade⁸.

3 Other Federal Guarantees and Liabilities

If federal liability were based only on Art. 19 VG, the case would be clear. We would at least know exactly where the problem lies. In reality, there are numerous other provisions that may give rise to federal liability.

Certain companies enjoy the benefit of federal government guarantees, such as the Swiss Post Office. You will search for the relevant statutory provisions in vain. The legal right of existence of the government guarantee is based on a statement made by Federal Councillor Leuenberger in Parliament (the Federal Council): "... In the event of insolvency in payment transactions, the Swiss Post Office's assets, and in particular its officially provided capital, would be used first as security. Should this prove insufficient to cover the debt, the 'owner' will be liable, the 'owner' being the Confederation. The Confederation is therefore liable in any case, so the expression 'government liability' and any statutory enactment related to it are actually more declaratory and psychological in their nature. ..."⁹. Things evolve quickly, and that is why the Confederation now shoulders an enormous public risk that no amount of legal discussion will make go away, even if the reasons for imposing this burden were purely psychological ...

Based on Art. 35 para. 2, of the Financial Budget Act¹⁰ (??), the Confederation also manages the central treasury of the Swiss Federal Railways and the Swiss Post Office, and safeguards their solvency. This boils down to an indirect federal guarantee. Based on this provision, the Confederation must step in to help the Swiss Federal Railways and the Swiss Post Office when they are unable to honour their obligations.

In addition, the Confederation might also be in for trouble from the organisation celebrating its anniversary today, the SFAO. The SFAO does after all carry out audits not only for the Confederation, but also for numerous organisations outside the Federal Administration, such as the Federal Institute(s) of Technology, the Intellectual Property Institute or even the World Intellectual Property Organisation (WIPO). Any mistake made by the SFAO would raise tricky liability issues, and could even result in vicarious liability. The same holds true for all public authorities performing supervision-related tasks. I will only mention the Swiss Federal Banking Commission (SFBC), which I have myself represented in court. So far we have always managed to

⁷ Art. 178 para. 3 of the Federal Constitution of 18 April 1999 (BV; SR 101)

⁸ BGE 107 Ib 6f.

⁹ Off.Bul. NC 1996 2345

¹⁰ Federal Budget Act of 6 October 1989 (Federal Budget Act, FHG; SR 611.0)

come up smelling of roses, albeit slightly bruised in this last case, but that could change and damages could be costly...

There are many federal risks I could add to the list. There are numerous different types provisions in different fields that justify federal liability, each provision having its own legitimacy. No one, however, seems to have an overview.

4 Conclusion

It is absolutely vital that the issue of federal liability be clarified. I have high hopes of the risk analysis process. At least we will be taking a step in the right direction towards becoming aware of and identifying risks that we can't even imagine today. The Confederation must take action and manage its risks.

A first step could include the repeal of Art. 19 VG. There is no reason why the state should be liable for anything based on the contents of a Pandora's box. Instead of relying on Art. 19 VG we should seek the correct solution in each individual case. This can be done on a contractual basis or through legislation. This approach would have the advantage that the Confederation would only take risks consciously and find custom-made solutions for each risk. You may have noticed that I have not yet made any reference to Swisscom. We have broken new ground in the case of Swisscom where the application of the VG was consciously and deliberately excluded in the Telecommunications Business Act¹¹. From a general point of view, repealing Art. 19 VG would only represent, as mentioned above, a first step. Subsequently, the remaining provisions related to state liability should also be examined.

I do realize that in voicing my concerns I am disregarding the problems that could arise for the parties involved. Some people may be counting on and depending on the secondary liability of the Confederation. The state has obligations that private industry does not have ... Have no fear, we are still far from carrying out the radical solution that I've been pushing for. For the time being, we need to wait and see what happens with the risk analysis, at least in order to see who is affected by it. That's when the debate will really begin ...

¹¹ Art. 18 para. 2 of the Federal Telecommunications Business Organisation Act of 30 April 1997 (Telecommunications Business Act, TUG; SR 784.11)