

*This is a slightly abridged version of the original report which is available in German and French at <<http://www.efv.admin.ch/d/themen/eignerpolitik/index.php>> and <<http://www.efv.admin.ch/f/themen/eignerpolitik/index.php>>*

## **Report**

**by the Federal Council on outsourcing and management of Confederation tasks  
(the corporate governance report)**

13 September 2006

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Chairmen, ladies and gentlemen,

We hereby submit the report on outsourcing and management of the tasks of the Swiss Confederation (the corporate governance report) and request that you take formal note of it.

At the same time, we propose that you dispose of the following parliamentary interventions:

02.3464 Recommendation by the Council of State Management Committee, 19 September, 2002: Review of Confederation holdings in private sector enterprises;

04.3441 Proposition by the Council of State Management Committee, 13 September 2004: Administrative management in circle three;

05.3003 Motion by the National Council Finance Committee, 15 February 2005: The "four-circle" model.

On behalf of the Swiss Federal Council:

President of the Confederation, Moritz Leuenberger  
Chancellor of the Confederation, Annemarie Huber-Hotz

## Summary

*The lack of standard criteria for outsourcing tasks to independent entities of the Confederation and, frequently, the quite marked differences in the legal form and management of these entities are meeting with increasing dissatisfaction. Parliament has therefore requested a better basis for outsourcing tasks and more consistent management of these independent entities. This report by the Federal Council is in response to that request.*

*The report begins by breaking down the tasks into different types, thus providing a basis for decision-making that relies on standard criteria for outsourcing tasks to independent entities of the Confederation. The breakdown divides the tasks of the Confederation into four types as follows:*

- Ministerial tasks cover, first and foremost, tasks in connection with policy preparation (for example, drafting legislation), and all of the services that are clearly the responsibility of government and that may often involve major initiatives affecting constitutional rights (for example, national defence). These tasks cannot be readily outsourced and are incumbent upon federal central government.*
- Monopoly-type services in the training, research and cultural fields, among others. These are tasks which are clearly services, but for which there is no market as such. They can be readily outsourced when there is very little need for co-ordination and no great potential for synergies with other tasks of the Confederation. In view of the absence of regulation by the market and the sometimes substantial financial assistance provided by the Confederation, even when these services are outsourced, appropriate policy influence must be brought to bear on independent entities and the performance of their tasks.*
- Economic and safety supervisory tasks include regulatory duties, such as those of the Federal Banking Committee, Federal Communications Commission (ComCom), Swissmedic, Competition Commission (COMCO) or the postal services regulator. These are tasks that must be outsourced, primarily because independence is the requirement for their implementation.*
- The provision of market-based services includes infrastructure services, such as those provided by the Swiss Post and the Swiss Federal Railways for instance. Outsourcing is necessary for the commercial success of the entities entrusted with these tasks.*

*Upstream services needed by the federal government in order to carry out its own tasks (information technology, real estate, etc.) are not included in the typology. For these "internal services", the question is not so much outsourcing as whether they should be provided internally or purchased on the market ("make or buy").*

*This report gives 28 guidelines, in all, on eight key aspects of managing independent entities: their legal form, governing bodies, Confederation representatives, liabilities, special powers, strategic objectives, control and supreme oversight, finances and taxation. An explanatory*

*report by the Federal Finance Administration on the Federal Council's report on corporate governance examines in detail the importance of each of these aspects as they currently stand and reviews and explains the guidelines.*

*These guidelines apply to the three types of task which are amenable to outsourcing, then organised into a management model specific to each type of task. Normally, a public institution will be the organisational form that is best suited to entities providing monopoly-type services or economic and safety supervisory services, while a joint-stock company will be the appropriate legal form for those providing market-based services. In its capacity as owner, the Federal Council gives direction to all of these independent entities through strategic objectives. Moreover, its control of these entities will be tightened up. The guidelines and management model serve as a reference. They go some way to harmonising the law for setting up and managing independent entities of the Confederation, particularly public institutions, while in no way claiming to be definitive in each and every case. Departures from the guidelines may therefore be made where duly warranted. The guidelines also provide Parliament with a key basis for exercising supreme oversight over the Federal Council.*

*In addition, the report explains the division of roles within the Confederation for the purposes of managing these entities. Parliament will determine the legal bases for contracting out these tasks, conferring independence and selecting the organisational form of these entities of the Confederation. It will also exercise supreme oversight and, where funding decrees are concerned, may rule on the allocation of central government funds provided to independent entities (the Swiss Federal Institutes of Technology, Swiss Federal Railways etc.). The Federal Council shall act in the capacity of owner on behalf of the Confederation. It shall appoint, among other governing bodies the board of directors or institute board and the external auditor and shall exercise its rights at general assemblies; it shall formulate its expectations of the board of directors or institute board as strategic objectives and shall monitor their attainment. The division of internal government roles in preparing and co-ordinating issues for the attention of the Federal Council is based on either of two models:*

- The department concerned and the Federal Finance Administration share the tasks of preparing and co-ordinating issues relevant to owner policy for market-based service providers and monopoly-type service providers which play an important role in the federal budget, (e.g. Swiss Federal Institutes of Technology). For the purposes of task sharing, the department concerned is responsible primarily for preparations concerning appointment issues, for developing strategic objectives and for preliminary work relating to control by the Federal Council. The Federal Finance Administration is responsible primarily for issues relating to pension funds, the sale and purchase of shares, recapitalisation, financial directives and the distribution of profits. Each service shall co-operate with the other in its areas of responsibility.*
- The department concerned bears sole responsibility for the preparation and co-ordination of issues relevant to owner policy for monopoly-type service providers which have a more modest budgetary impact (e.g. the Swiss Federal Institute of Intellectual Property) as well as entities responsible for economic and safety supervisory tasks. Consultation with the Federal Finance Administration on issues relating to capital endowment, pension funds,*

*responsibility for and presentation of accounts is compulsory. The Federal Finance Administration is there to assist the department concerned with any other issues in its capacity as a services and skills centre.*

*The department concerned refers issues relevant to owner policy to a service that is separate, on an organisational level, from services carrying out economic and safety supervisory tasks; if possible, this service must not be involved in the technical supervision or procurement of services.*

*The report concludes with an overview of follow-up work. If the Federal Council approves the report, the basic principles and guidelines it contains shall serve as directives. They shall be observed by government in preparing for outsourcing duties and conferring legal independence on entities unless there are duly established reasons for departing from them.*

*The guidelines should also be applied to entities that are already independent at this point. This concerns, first and foremost, entities whose organisational form is currently under consideration or review, independently of this report. This is the case for the Swiss National Accident Insurance Fund (SUVA), for instance, under the review of the Accident Insurance Act and the Swiss Institute of Comparative Law under government reforms. Secondly, the guidelines should be applied chiefly to those entities which require adjustments to management or control.*

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## **Report**

### **1 Introduction**

#### **1.1 Background and objectives**

The lack of standard criteria for outsourcing<sup>1</sup> by central government and of any standardised management model that can be used for legally independent entities is increasingly seen as unsatisfactory and has given rise to various parliamentary recommendations and initiatives.

02.3464 Recommendation by the Council of State Management Committee, 19 September, 2002: Review of Confederation holdings in private sector enterprises;

04.3441 Proposition by the Council of State Management Committee, 13 September 2004: Administrative management in circle three;

05.3003 Motion by the National Council Finance Committee, 15 February 2005: The " four-circle " model.

The recommendations and initiatives above essentially requested that the Confederation adopt a standard model for outsourcing and for consistent management of independent bodies. This report takes these requests into account: it begins by describing those tasks of the Confederation which lend themselves to outsourcing and then outlines ways in which the management of independent entities can be improved.

The report has two objectives: the first is that future outsourcing should be organised in a consistent manner and in accordance with standard criteria. The second is to improve and standardise the management of independent entities. It is public institutions that require the most adjustments. With this in view, this report gives 28 guidelines on the organisational form of independent entities and the influence that the Confederation can exert in its role as owner. Depending on the tasks transferred, these guidelines shall serve as a management model.

#### **1.2 Purpose of the report**

This report covers the outsourcing of tasks and the management of independent entities. It is based on a breakdown of tasks by type. The typology covers the tasks performed by the federal government or by independent Confederation entities and categorises them by characteristics pertinent to outsourcing and management. It identifies four types of task. This approach extends and substantially refines the four-circle model. The latter model defines circles in accordance with a number of different criteria, such as type of task, management tools applicable or legal status of the public institution responsible for the tasks, the typology given in this report consistently looks first and foremost at the nature of the task. The type of task serves not only as a basis for informing decisions on future outsourcing but also as a

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<sup>1</sup> See definition in section 2.

reference standard for structuring the management of independent entities and the tasks for which they are responsible.

Independent entities are bodies or enterprises which:

- carry out the tasks of the Confederation,
- are legally independent, and
- are owned by the Confederation or of which the Confederation is the main or majority shareholder.

Examples are the Swiss Federal Institute of Intellectual Property, the Federal Financial Market Supervisory Authority (FINMA), Swissmedic, the Swiss Institute of Comparative Law, SUVA, the Swiss Post, Swiss Export Risk Insurance, Swisscom, Swiss Federal Railways, Skyguide and RUAG.

The guidelines apply only by analogy to entities that are decision-making commissions and therefore not legally independent (e.g. Federal Communications Commission (ComCom), Swiss Federal Gaming Commission and others).

The management model does not apply to enterprises (such as the Swiss National Bank or the Export Promotion Organisation OSEC). While the latter do carry out Confederation tasks, they are not owned by the Confederation, nor is it a main or majority shareholder in these enterprises.

This report addresses the performance of tasks that policy actors consider to date to be the responsibility of the State. It therefore focuses on the Confederation's current schedule of tasks without fundamentally calling it into question.

This report does not set out to review the necessity for or scope of State tasks or the possibility of privatising them. The Federal Council is addressing this issue, among others, as part of its systematic review of the tasks of the Confederation. Nor does the report address new ways of dividing tasks between the public and private sectors – such as "Public Private Partnerships".

As regards organising the execution of tasks, the report primarily focuses on how to manage tasks which have been outsourced and delegated to independent entities of the Confederation. In contrast, improving the execution of tasks inside the federal government is an issue that comes under government reforms and other restructuring plans.

In the last analysis, this focus on managing independent entities shows how the Confederation influences these entities in its capacity as owner. The influence that it exerts on the performance of tasks inside and outside government through special legislation is outside the scope of this report, but will be taken into account in reviewing certain issues (e.g. division of roles<sup>2</sup>). The same applies to cross-cutting issues in the areas of competition law and public

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<sup>2</sup> See section 6.



procurement legislation. In view of the forthcoming reforms, issues relating to staff and pension funds are not addressed in this report.

### **1.3 Contents of the report**

The structure of the report is as follows:

It begins by explaining the concept of "outsourcing" and the reasons for refining the four-circle model (Section 2).

The nature of the task is a key determinant in any decision to contract out. The possibility of outsourcing therefore has to be considered on the basis of a classification of task types (the task typology). The task typology identifies four broad types of task carried out by the federal government and the independent entities of the Confederation in accordance with management-specific criteria and determines which type of task seems to be suitable for outsourcing (Section 3).

The report then goes on to present the various elements that enable the Confederation to control and manage independent entities and improvements in the form of 28 guidelines (Section 4).

The primary factor in control and management is the task that the independent entity has to perform. The report therefore proposes several management models suited to the different types of task (Section 5).

The report then deals with the division of roles among the various actors involved in the management and control of independent entities and proposes improvements that could be made, chiefly at Federal Council and federal government level (Section 6).

Lastly, Section 7 outlines the priorities for the introduction of the principles put forward in the report.

## **2. Outsourcing**

### **2.1 Concept and forms**

The concepts of privatisation, decentralisation and outsourcing have meanings which vary in the context of the reorganisation of State tasks. This report uses the following definition: *privatisation* – as the name suggests – necessarily implies the complete transfer of a State task or asset to the private sector. *Decentralisation*, on the other hand, refers to changes occurring within the public sector, such as a transfer of task execution from central Federal Government to a public law entity. The generic term outsourcing encompasses two forms of transfer.

The authors consulted identify the *object* of outsourcing as being:

- tasks,
- task performance,
- organisational entities,
- public assets.

When a *task is outsourced*, it is the task itself which is the object of outsourcing; the State removes it from its catalogue of tasks and it ceases to be a State task. Strictly speaking, the task is relinquished (complete privatisation).

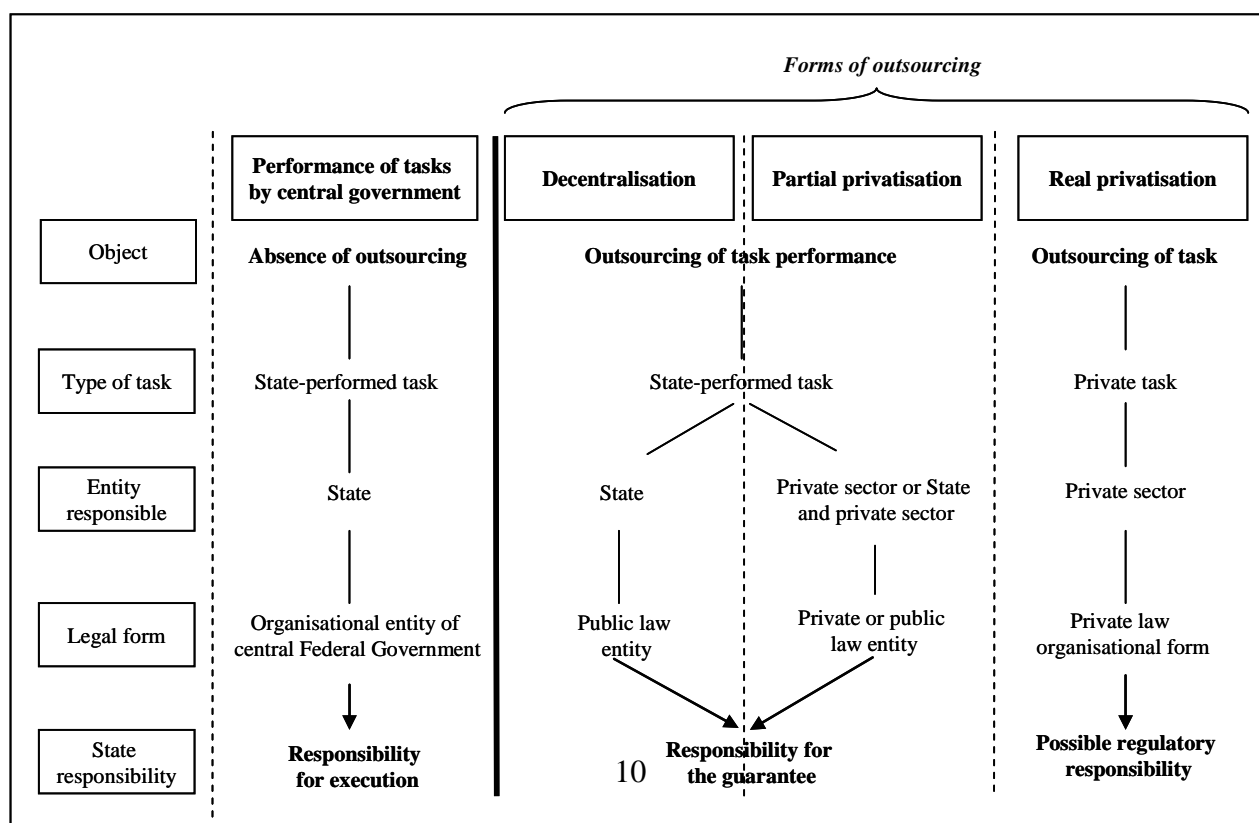
When the *performance of the task is outsourced*, on the other hand, it is only the responsibility for executing State tasks that is transferred to a third party outside central Federal Government; the task remains a State task.

When *organisational entities are outsourced*, central Federal Government entities become legally independent and are turned into public or private law enterprises.

Lastly, outsourcing can also concern the assets required to perform tasks. If the State assets needed by an organisational entity are transferred to private individuals, the public authorities relinquish their responsibility.

However, dividing outsourcing up strictly by object does not adequately reflect the existing forms thereof, the different objects not lending themselves to separate implementation. On the contrary, all sorts of combinations can be envisaged. By way of example, the outsourcing of task performance often takes place in conjunction with the awarding of independence to the competent body, and independence is never granted without the simultaneous outsourcing of a task, or at least responsibility for its execution. Likewise, assets are generally transferred at the same time as responsibility for task performance, as in the case of the transfer of infrastructure to the Swiss Federal Railways. In this context, a number of different forms of outsourcing can be identified (Figure 1).

**Figure 1: Forms of outsourcing**



There is no reason to talk about outsourcing when tasks are performed by central Federal Government. The Confederation decides on the quantity and quality of the services needed to carry out a federal task and entrusts the execution thereof to a central government entity. It thus has primary and entire responsibility for the task to be accomplished. Decentralisation and partial privatisation imply that responsibility for performing a task is transferred to a third party outside central Federal Government, but the task remains a federal one.

In this case, the Confederation's responsibility is confined to guaranteeing that the quality and volume of the task in question are satisfactory (responsibility for the guarantee). If responsibility for executing tasks is delegated to an entity which has become independent and which belongs solely to the Confederation – therefore excluding a private body being responsible (e.g. a public institution) – this report talks about decentralisation. Examples of decentralisation include the Swiss Federal Institute of Intellectual Property and Swissmedic. Partial privatisation is the term used, however, when task execution is entrusted to an entity assuming part or all of the responsibilities, or at least not ruling them out. Swisscom and RUAG are examples of partial privatisations.

Lastly, *outsourcing of tasks (full privatisation)* is the most extreme form of outsourcing. In such cases the Confederation relinquishes the group of tasks involved and leaves it to the individuals to decide whether they wish to provide the services in question themselves. When it is in the public interest, the State may if necessary perform certain regulatory functions or provide incentives (financial assistance, responsibility as regards regulations), the laws of the market largely determining the volume and quality of the service. This report deals with decentralisation and partial privatisation. It does not tackle full privatisation<sup>3</sup>.

## **2.2 Existing outsourcing by the Confederation and the justification for it**

The authors consulted give various reasons for outsourcing, such as adjusting to international or technological developments, productive and allocative efficiency<sup>4</sup>, or else the depoliticizing of task execution. Outsourcing in recent years has seen the Federal Council employing similar arguments:

- guaranteed competitiveness and matching to the market,
- adjustment to the international environment, particularly in a context of market liberalisation,
- better adjustment to the requirements of the economy,
- strengthening of entrepreneurial independence,

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<sup>3</sup> If task execution is entrusted to an exclusively private responsible enterprise as part of a partial privatisation, the Confederation relinquishes its position as owner. Only organisations and enterprises of which the Confederation is the owner or the main or majority shareholder are the subject of the management model and guidelines described below.

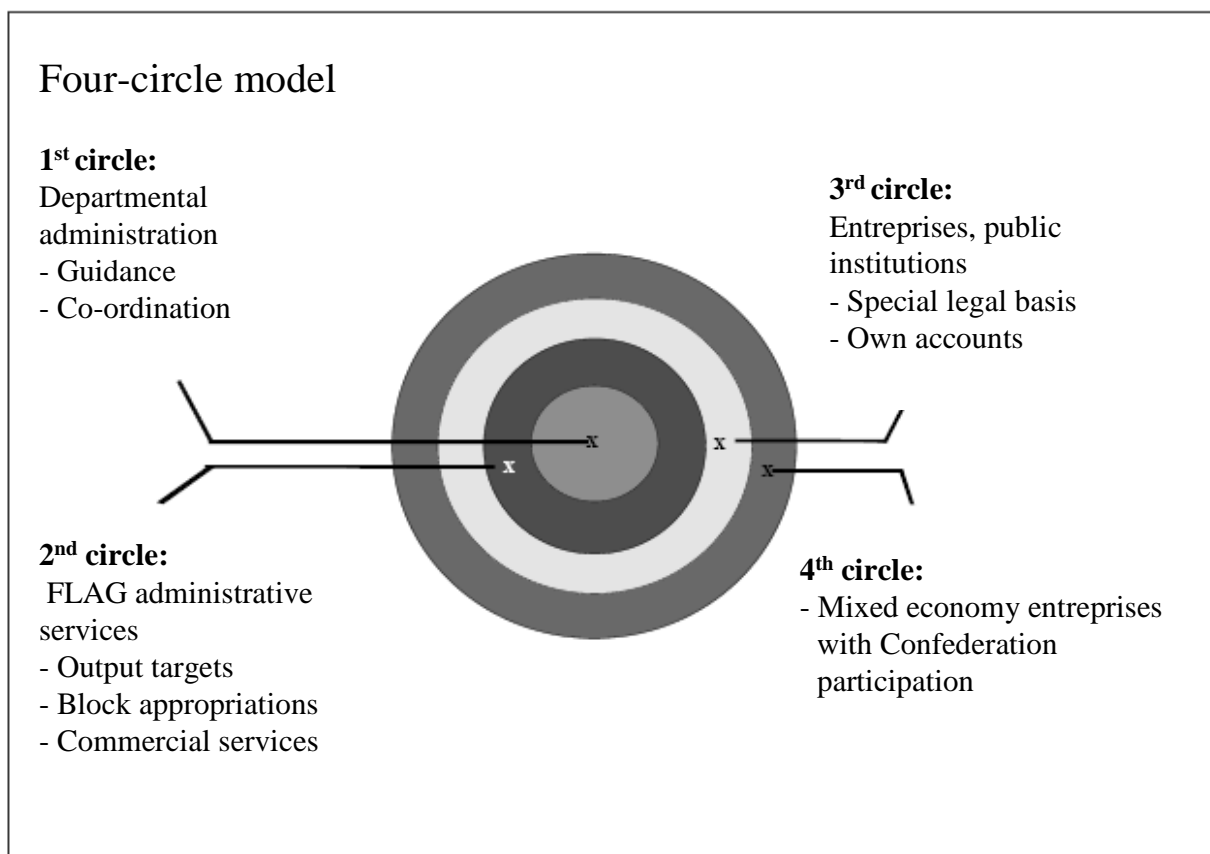
<sup>4</sup> It has to be ensured that goods and services are of the desired quality and quantity and can be produced and consumed at the right time and in the right place. If outsourcing can enhance the directive function of market prices, then it will help to increase allocative efficiency.

- increased efficiency,
- improved acceptance by customers,
- opening up to third party participation.

These examples show that, in the final analysis, transfers were always designed to increase effectiveness (doing the right things) and/or efficiency (doing the things right, i.e. acting in an economical manner) when performing tasks.

### 2.3 Four-circle model

For the purpose of outsourcing operations carried out in recent years, the Federal Council borrowed from the so-called four-circle model. The latter was introduced as part of the FLAG project (management based on output targets and block appropriations). The entities responsible for performing tasks were grouped in four circles, the object being to bring Federal government management and that of the holdings and groups closer together<sup>5</sup>: The further an entity is from the centre in the four-circle model, the more it will be governed by the market. Conversely, the closer it is to the centre, the more influential policy factors will be as regards task execution.



5 Report: Management based on output targets and block appropriations, April 1996, which can be consulted at [http://www.flag.admin.ch/d/archiv\\_d/konzeptbericht1996.doc](http://www.flag.admin.ch/d/archiv_d/konzeptbericht1996.doc) (in German).

The *first circle*, closest to the centre, comprises the organisational units which provide policy management and coordination services for both internal and external use (general secretariats, offices responsible for interdepartmental tasks, offices paying subsidies). These units are under very tight policy guidance.

The *second circle* is made up of the offices managed on the basis of output targets and block appropriations (e.g. Meteoschweiz, Swisstopo, Swissmint). Compared to the offices in the first circle, they have greater operating independence, but nevertheless remain part of the departmental structure as central Federal Government entities do not have legal status and do not keep their own accounts. The services to be provided by a FLAG office are drawn up in detail before the start of a mandate.

The *third circle* consists of enterprises and establishments that are 100 % Confederation-owned (e.g. Swissmedic, Swiss Federal Institute of Intellectual Property). In the majority of cases, they are legally independent, have their own management bodies and keep their own accounts. The independence and extent of the responsibilities of third-circle enterprises and establishments are laid down in an organisation act.

The *fourth circle* encompasses mixed-economy enterprises which perform Federal tasks and whose capital is partly in Confederation hands (Swisscom or RUAG, for example). All fourth circle enterprises are incorporated, are mainly guided – in the execution of their tasks – by the principle of (regulated) competition and, by virtue of their joint stock company status, are open to private equity participation.

## **2.4 Measures needed**

The four-circle model gives a good insight into the degree of independence of Confederation entities. It has also been extensively referred to in publications devoted to new public management and the modern conduct of government.

It is, though, a purely descriptive model, its importance lying especially in the fact that:

- it raises awareness of the Federal Government's possibilities of opening up to market mechanisms, and
- helps with the classification of forms of organisation and different degrees of independence.

It does, however, define the various circles according to different criteria. In the first circle, for example, the nature of the tasks is in the forefront (policy preparation). As for the second circle, it comprises the FLAG administrative units and the management concept constitutes the selection criterion. Finally, the third and fourth circles group the organisational units according to their legal form: public institution in the third circle and joint stock company under private or public law in the fourth.

In the first place, a definition of this sort resting on heterogeneous criteria does not allow all the Confederation's organisational units to be allocated to a circle. By way of example, Swiss

Post ought, as an establishment, to be put in the third circle but, because of the nature of the tasks performed, it is closer to the enterprises in the fourth circle such as Swisscom or the Swiss Federal Railways.

Secondly, the legal form serves as a demarcation criterion in the third and fourth circles, but this does not make it possible automatically to deduce the degree of independence. By way of example the SUVA, which is a public institution, is even now much less closely managed by the Confederation than the Swiss Federal Railways, as a joint stock company under public law.

Thirdly, because it is purely descriptive, the four-circle model provides neither material criteria for outsourcing, nor any detailed rules on the manner of managing outsourced entities. There was therefore nothing systematic about outsourcing in the past, the decisions tending rather to be *ad hoc*. So the OECD's criticism of member countries on this score, which compared the results of outsourcing to an administrative "zoo", also applies to Switzerland<sup>6</sup>.

It is true that homogeneous management instruments are used in the FLAG administrative units in the second circle. Similarly, management of the enterprises close to the market in the fourth circle is relatively homogeneous. The third circle, however, is extremely heterogeneous and contains administrative entities performing very different tasks. The heterogeneity of the enterprises concerned rules out uniform management for the time being, and this is all the more worrying in that the third circle comprises organisational units carrying out monopolistic tasks or governmental tasks which are often important from a State perspective. Parliament has therefore demanded on several occasions that the issue be clarified.

The four-circle model has other weaknesses, namely a rather substantial gap between the first and second circles and a somewhat vague distinction between the second and third circles – i.e. the boundary between central and decentralised Federal Government. The fact is that the entities in the first and second circles belong to central Federal Government and that there is less difference between them as regards their degree of independence than is the case of the entities in the second and third circles; there are not, however, any normative criteria for distinguishing between the second and third circles, which indicate whether or not a body responsible for federal tasks still belongs to central Federal Government.

The four-circle model is therefore in urgent need of revision. What is required is a model which, first of all, provides normative support when it has to be decided whether a task should be outsourced or kept within central Federal Government. In the second place, if outsourcing is essential, the model must show how the execution of the outsourced tasks should be managed.

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6 See OECD, Public Sector Modernisation, p. 7: "Most OECD countries have been creating non-commercial bodies outside the core public service on an ad hoc basis, resulting in an administrative 'zoo'. This reduces the transparency of government for the citizen, and may compromise oversight and accountability within government."

### **3. Task typology**

#### **3.1 Introduction**

The Federal Government and the Confederation's independent entities perform an extremely varied range of tasks, covering not just the traditional responsibilities of the State in the areas of national defence, foreign relations, social welfare, inland security and guaranteeing the financial resources needed to perform tasks (collecting taxes and duties), but also such activities as preparing and giving advice on policy, providing services in the areas of training and culture and guaranteeing universal service thanks to proper infrastructure. Some of these tasks need to be closely monitored, while others are better performed at a certain distance from Federal Government. Listing the Confederation's responsibilities in the form of a typology of tasks provides a base that can be used to determine which tasks should fall to Federal Government and which others would be better transferred to Confederation entities made independent for reasons of effectiveness and efficiency. In classifying very varied tasks according to criteria specific to outsourcing and management, task typology is designed to serve as a reference and an indicator of the degree to which tasks are suitable for outsourcing when the time comes to choose how the independent entities in charge of task execution should be managed.

Task typology also takes account of how tasks change. Priorities can shift over time if, for example, certain activities prove to be more exposed to competition because of exogenous factors (events abroad, new technologies, etc.) or a new idea of the State. So certain tasks could, in the course of time, be put into another category or simply removed from the typology if they ceased to be governmental in nature.

Task typology is a classification of tasks based on an *ideal grid*, a sort of 'toolkit' for systematically checking whether a task is suitable for outsourcing. It is not, however, a mechanistic approach or a method for distinguishing automatically between tasks that can be outsourced and those that have to remain within central government; task typology does not eliminate the need to look at each outsourcing decision on a case-by-case basis. Policy appraisal remains necessary – for two reasons in particular.

First, not all tasks can be allocated unarguably to one of the main types of task identified. On the contrary, tasks very often have differing characteristics, so it is up to policy-makers to attribute the appropriate importance to each characteristic and then put tasks into a particular type according to their priorities.

Second, it is not in fact specific tasks that are outsourced, but whole entities that become independent, and an entity usually takes on several tasks which are often not of the same type. Apart from task-specific criteria, organisational criteria can also play a part in the decision to outsource, with the size of the entity being particularly important. This is because the granting of independence implies setting up a certain form of organisation, which would not make much sense for a very small entity. In drawing up the organisational units' catalogue of tasks, it is important to build the principle of priorities into policy decisions, and thought should be

given to grouping small organisational units together so as to achieve a critical size with a view to possible outsourcing.

Outsourcing decisions therefore belong to the world of policy-making and should not be taken mechanically. The object of the task typology, however, is to provide a worthwhile instrument with which to assess future outsourcing systematically on the basis of uniform criteria. It will still be possible to depart from the ideal solutions, but this will have to be justified and not just a chance outcome.

## **3.2 Drawing up the task typology**

### **3.2.1 Classification according to three functions**

The ideal task classification is based on the functional considerations of politology which distinguishes between regulatory tasks, policy preparation and service provision. Regulatory tasks include market controls - such as those exercised by the postal service regulator or Federal Communications Commission (ComCom) - and supervision, the prudential nature of which is crucial, as in the case of financial market supervision. Policy preparation consists mainly of all the activities involved in preparing legislation and in administrative management, as is done by general secretariats or the financial authorities. Finally, service provision encompasses activities such as infrastructure-based universal services, and also services in the areas of education and culture as well as all the upstream services that the State needs in order to perform its own activities (provision of a computer network, administrative premises, etc.).

These functional considerations provide a basic grid for drawing up the task typology. However, it does not differentiate sufficiently to help with decision-making about outsourcing and management, since each fundamental function can sometimes include tasks which are performed more effectively and efficiently by central government, and sometimes others which in principle lend themselves to outsourcing. Drawing up a task typology focussed on outsourcing has therefore to rely on yet other criteria.

### **3.2.2 Criteria for deciding on suitability for outsourcing**

The authors provide a multitude of concrete decision-making criteria for determining whether tasks lend themselves to being outsourced. As a rule, they are grouped according to their legal, political and economic nature (macroeconomics and business administration). With reference to these viewpoints, the decision-making criteria indicate whether a task is performed more efficiently and effectively by government or by an independent entity. For each criterion, the efficacy and effectiveness of task execution are decisive factors in the appraisal. In the following chapters, these four viewpoints will be illustrated by means of various decision-making criteria.



### 3.2.2.1 Legal viewpoint: the question of government authority

From the legal viewpoint, it is important to know to what extent the outsourcing of certain tasks is compatible with the principles of a constitutional state. To this end, it is necessary to begin by determining whether the tasks are the responsibility of government.

In the case of tasks which are the responsibility of government (often referred to as police authority tasks<sup>7</sup>), the recipients of services are “subject to the law”, the State being entitled to intervene in the rights of individuals<sup>8</sup>. State provision of services connected with education and culture are not the government’s responsibility (service administration tasks), any more than the internal services (auxiliary administration tasks) that the government needs to carry out its work (e.g. data processing, real estate management, etc.).

Because government measures are binding in nature, they must have democratic legitimacy and, as a result, do not really lend themselves to outsourcing. On the other hand, there is no subordinate relationship between the State and the recipients of services when the activities involved are not the government’s responsibility. In principle, individuals are free to have recourse to such services and outsourcing them is easier to envisage.

The intensity of the measures that are the responsibility of government differs according to the individual rights concerned. For example, a financial market supervisory authority that refuses to give a bank the authorisation to carry out a banking activity is acting on governmental authority. Swiss Post is also exercising governmental authority when it tells individuals where they may install their letter boxes and what they should look like. To determine whether, in the context of an outsourcing decision, a task comes under the heading of government, it is therefore vital to assess the degree to which government measures impinge on the rights of the individuals or companies concerned (i.e. whether the company is not allowed to pursue its activity, or all that is involved is a restriction on the choice of a letter box).

### 3.2.2.2 Policy viewpoint: the question of policy guidance

From the *policy viewpoint*, the question of the degree of policy influence on task execution is central. Policy briefly defines all the Confederation’s tasks in the Constitution and legislation. The political room for manoeuvre in task execution and the need for control in addition to the law can, however, differ depending on the situation.

The following criteria provide an understanding of policy guidance:

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7 Police authority is referred to in connection with the restrictions imposed on individual rights and liberties. The administration of services, on the other hand, provides individuals with benefits. As for auxiliary administration, this groups together all those activities which are directly linked to the smooth running of the police authorities or the administration of services (“internal services”).

8 A broader definition often includes foreign policy and policy preparation among the tasks which are the responsibility of government.

- *Legal normative density*: in many cases, the legislation relating to task execution deals only with the principle, the details being subject to political room for manoeuvre. Where other tasks are concerned, on the other hand, there is only limited political freedom of action as regards their implementation. The result is that higher goals, such as guaranteeing legal security, have to have detailed regulations at the legal level (e.g. extensive prescriptions concerning the awarding of patent rights and trademark protection). So there is little scope left for policy influence on task execution.
- *Dependence on technical or international norms*: it is not only detailed legal provisions that influence policy. Exogenous framework conditions can also impose restrictions, this being particularly true of services of a highly technical nature or which are subject to scientific criteria as, for example, in the area of air safety or research.
- *Market regulation*: the existence of a functioning market can impact on the fundamental aspects of task execution. When supply and demand determine how a service is delivered on the competitive market, additional control over task execution is almost unnecessary. When, on the other hand, the State has a monopoly for a particular service and there is no other supplier, regulation via the market is lacking and it is up to the politicians to determine to what extent a good or a service should be provided and what its quality should be.
- *Dependence on general tax revenues*: if a task is to a large extent financed from general tax revenues, the need for it to be democratically legitimate increases and task execution has to be closely monitored politically.
- *Security of supplies*: in the case of some services, great importance is attached to the availability of a wide-ranging universal service, the desired quality level of which, however, the market cannot always guarantee. This mainly concerns services relating to network provision (e.g. road traffic, electric power). The required universal service has to be defined by the politicians.
- *The need for independence*: the legislator is able deliberately to exclude policy influence over the performance of certain tasks so as to enhance the credibility and neutrality of the body responsible for the tasks in question. This mainly involves the supervisory authorities taking decisions on a case-by-case basis, showing complete impartiality and independently of any policy influence.

To sum up, policy guidance is especially necessary when task implementation has not been regulated in detail by the law or by technical provisions and international norms. The lack of market regulation, dependence on general tax revenue and the importance of having secure supplies increase the need for policy guidance. On the other hand, policy guidance of tasks requiring a large measure of independence should be voluntarily limited.

When it outsources, the Confederation relinquishes detailed control and gives the independent entity a certain amount of freedom of action in executing its tasks. So this step is only warranted when the freedom of action granted is not subsequently counteracted by political

influences. Tasks requiring a considerable degree of guidance ought therefore to be performed centrally.

Conversely, tasks in which policy-making independence is important or where there is limited room for manoeuvre for exogenous reasons (legal control or market regulation) do lend themselves to outsourcing. Outsourcing emphasizes independence and makes it easier to adapt smoothly to changes in the framework conditions (increased effectiveness). At the same time, it removes the need to set up systems designed to guarantee independence (e.g. fire wall) which would be needed if the task were carried out by federal government (increased efficiency).

### 3.2.2.3 Macroeconomic viewpoint: the question of matching to the market

The *macroeconomic viewpoint* raises the question of matching a product to the market. The following criteria are decisive:

- *Nature of the goods/services*: State services can be provided for the benefit of the economy in general or be commercial in nature. In the former instance, they are seen as important to achieving environmental, social or policy-related goals but, not being profitable for private providers, they are either not supplied at all or at least not in sufficient quantity or to the required quality standard. The said services are therefore cofinanced by the State. This broad definition includes, in particular, public goods in the strict sense, such as national defence, and also merit goods such as State services in the areas of education and culture<sup>9</sup>. Such goods are not marketable, or at least only subject to very tight restrictions.
- The word “commercial” is used, however, to refer to services intended to make a profit, for which there is a market and whose market price determines supply and demand. Such goods and services are marketable. While the quality and quantity of commercial goods and services are determined by supply and demand, it is for the policy-makers to decide on the level of supply of the goods in question to the general economy (e.g. prescriptions concerning the quality, quantity and price of the service concerned). So commercial goods lend themselves to outsourcing better than goods aimed at the general economy.
- *Competitive environment*: the competitive environment question is closely linked to that of the nature of the goods and services. Whereas competition is in principle non-existent or limited when it comes to goods aimed at the general economy, commercial services obey the laws of competition, so that a degree of entrepreneurial flexibility is needed for

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<sup>9</sup> Pure public goods have two characteristics: firstly, consumption of the good by a user does not imply any reduction in consumption by other users (non-rivalry) and secondly, it is impossible to prevent someone from consuming the good, or else the cost of exclusion would be prohibitive (principle of non-excludability). National defence is a typical example of a public good. Non-rivalry in consumption and the principle of non-excludability do not apply to merit goods, the latter being goods whose social utility exceeds individual utility (positive externality). The State therefore provides encouragement with regard to merit goods which would not otherwise be consumed in the desired quantities. They are often described as “non-pure public goods”, examples being education and preventive measures in the field of health.

tasks performed in a competitive environment. This can be reinforced by outsourcing. In addition, the risk of competitive distortions between those carrying out State and private tasks is patent in the case of tasks executed in a competitive environment. By reducing the policy influence, the outsourcing of such tasks lessens the risk of State organisational units enjoying better conditions than private players in the market.

- *Financing of services*: services can be financed from general tax revenue, emoluments or receipts which depend on market prices. Marketable goods and services are in principle financed by receipts which depend on market prices, while non-marketable goods and services are financed by general tax revenue and emoluments. Democratic considerations tilt the balance in favour of policy guidance when tasks are largely financed from general tax revenue or emoluments. According to the “he who pays commands” principle, it is up to the policy-makers to decide – in broad outline and in addition to the legislation – what purposes general tax revenue and emoluments should be assigned to when concrete tasks are performed. From this point of view, goods financed by receipts which depend on market prices lend themselves to outsourcing more easily than those that can be financed from general tax revenue.

Marketable tasks are thus tasks of a commercial nature, subject to competition and financed from receipts which depend on market prices. Such tasks on the whole lend themselves very well to outsourcing. The less marketable a task is, the less suited it is to outsourcing.

#### 3.2.2.4 Business administration viewpoint: the question of synergistic potential and of the need for coordination

The *business administration viewpoint* concerns the costs and utility of an internal provision of services as opposed to outsourcing. It depends first of all on the milieu in which the tasks are performed and on the following criteria:

- *Need for coordination*: some tasks require close coordination and harmonisation between various administrative entities. This is true for the preparation and coordination of policy, and also of “upstream services” such as guaranteeing the compatibility of the data-processing solutions used for the Confederation’s central accounts. Centralising such services makes coordination between administrative units easier. Likewise, standardising coordination procedures in Federal Government (office consultations, coreporting procedures) helps to promote a coherent policy-making process. In addition, an organisational unit of central government which knows exactly what the needs of the administrative units involved and the government’s internal procedures are will be better placed to provide upstream services than will an independent entity. On the other hand, the government’s internal coordination procedures are sometimes time-consuming and relate to services which need little coordination with other tasks, so that they can act as a brake. If, moreover, services are provided in a dynamic market context, constant adjustments to a rapidly changing environment will have to be made as flexibly as possible. In cases such as these, outsourcing would increase the effectiveness and efficiency of task execution.

- *Synergistic potential for the acquisition of upstream services*: the execution of certain Confederation tasks requires very specific resources and upstream services which have to be acquired and managed in a targeted manner. Other federal tasks, on the other hand, involve resources of a very similar nature, the acquisition and management of which can be centralised without occasioning any qualitative or quantitative losses<sup>10</sup>. The Federal Government has volume advantages when it comes to the acquisition or provision of upstream services for task execution (e.g. the purchase of computer hardware and software, office equipment, personnel management, etc.). As long as tasks involve similar upstream services, having them executed by central government allows maximum benefit to be derived from these volume advantages. This is not the case in a sector such as research, an activity often requiring specific premises and laboratories which have to meet all sorts of safety criteria. What is more, the data processing solutions needed for complex calculations differ appreciably from the customary office automation norms, so that research offers scant potential for synergies with the resources needed by central government. There will therefore be a tendency to outsource such tasks, which require specific resources. And as there are in any case no synergies to be expected from the purchase and management of specific upstream services, outsourcing will not result in any loss of efficiency. On the contrary, it will in some cases improve organisational flexibility and so facilitate access to resources and their management (increased effectiveness and efficiency). By the same token, it will remove the need for the Federal Government to provide specific upstream services.
  
- *Visibility*: the need to have an independent identity constitutes a special case where the need for coordination is concerned – a sort of “negative” synergy effect. In certain areas, such as research, education, culture and health, the Confederation provides services for which the credit and recognition hinge directly on the prestige and reputation of the provider. In this connection, gaining independence gives Confederation entities more opportunities to stand out and gain a reputation than if they continue to belong to central government, so their outsourcing does promote more effective task execution. The argument is also valid where private financing of services is concerned. Some tasks are attractive to sponsors, these including cultural tasks and those coming under the heading of research. However, sponsors will only provide grants if they have the necessary guarantees that their money will be used as scheduled. Gaining their legal independence gives these entities the right to use their assets as they see fit and makes them more attractive to sponsors. Finally, where tasks relating to supervision are concerned, granting independence to the body responsible at the same time makes task execution more effective. Visibility does not always play such an important role in the case of other tasks which sometimes even benefit from belonging to Federal Government. This is, for example, the case of development assistance, a task of which the position in negotiations is considerably strengthened by the fact that it is officially a government task.

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<sup>10</sup> An issue that is sometimes discussed in the relevant literature, but which will not be dealt with here, is whether some resources are so exclusive as to constitute a barrier to market entry. This question would be subject to the “matching the service to the market” criterion.

For business administration reasons to do with coordination and utility, it is not as a general rule wise to outsource tasks requiring a great deal of coordination and with a lot of synergistic potential. Tasks needing considerable visibility, on the other hand, should be outsourced in the interests of efficient task execution.

### **3.3 Drawing up types of task**

On the basis of the fundamental functions of the government and the independent Confederation entities, as outlined in chapter 3.2.1 (policy preparation, regulatory activity and service provision), and with the help of the decision-making criteria concerning outsourcing listed in chapter 3.2.2 (government, policy guidance, market matching, synergistic potential and the need for coordination), four types of task with characteristics comparable to outsourcing will be discussed below.

Where regulatory activity is concerned, the situation is fairly homogeneous, meaning that this fundamental function can constitute a type of independent task (“supervisory tasks relating to the economy or safety”).

A distinction has to be made, however, where service provision is concerned. The tasks assigned to this fundamental function lend themselves to outsourcing to such widely differing degrees that subtypes need to be identified.

“Market-based services” comprise commercial tasks which are very well matched to the market and for which there is a genuine market. The need for policy guidance is therefore rather slight and can be confined to establishing a framework. With regard to the guarantee of efficiency and effectiveness, the need for coordination with other tasks is also not very great.

Those tasks which clearly constitute services, but for which there is no market as such, are assigned to the “monopoly-type services” type of task. They also require a high level of policy guidance.

Upstream internal services represent a particular form of service needed to perform tasks (data processing, movable property and real estate, etc.). The question of outsourcing these “internal services” is less of an issue than that of “making or buying” and the two will be dealt with separately below.

Tasks which are clearly the responsibility of government are also part of services. They are notable in part for substantial involvement in constitutional rights and hardly lend themselves to outsourcing.

The same is true with regard to policy preparation, which is why services relating clearly to government and policy preparation are grouped together under “ministerial tasks”.

The present report therefore focuses on four major types of task to be taken into consideration when outsourcing tasks and granting independence to organisational units of the Confederation, as well as in managing them:

- ministerial tasks (chapter 3.3.1)
- monopoly–type services (chapter 3.3.2)
- economic and safety supervisory tasks (chapter 3.3.3)
- provision of market–based services (chapter 3.3.4).  
Tasks of the “internal services” type will, for the above–mentioned reasons, be dealt with separately from the typology of tasks (chapter 3.3.5).

### 3.3.1 Ministerial tasks

Entities performing ministerial tasks	General secretariats, Federal Finance Administration, area of Defence (national defence), OFP, ODM, federal offices, etc.
Object	Policy preparation, services clearly the responsibility of government
State sovereignty	These cover sovereign as well as non-sovereign tasks
Policy guidance	Marked need for democratic legitimacy and detailed guidance because the tasks are mainly financed from general tax revenue and only the broad lines of policy preparation can be determined by legislation
Market matching	Not significant; services provided for the general economy; financed mostly from general tax revenue
Synergistic potential and need for co-ordination	Substantial need for coordination; task execution often has to be coordinated with the sphere of activity of other tasks and services of the Confederation, cantons and communes and also other countries; the tasks depend on similar upstream services, resulting in potential synergies as regards their acquisition; visibility is of lesser importance; no need for the entities responsible for these tasks to adopt their own visual identity.
Special features	The distinction compared to monopoly–type services lies above all in the need for detailed guidance, as well as in the potential for synergies and the need for coordination or the need for a separate visual identity

Ministerial tasks require close policy monitoring, have considerable synergistic potential and need a lot of coordination. They include policy preparation linked, for example, with legislation. Ministerial tasks also include services which loom large in constitutional rights or which require close policy monitoring for other reasons. Examples are national defence and the work of the police.

In the case of ministerial tasks, all the criteria show that they have to be provided by central government. In particular, the tasks involved in preparing policy can be only very broadly defined by legislation. This means that close coordination and financing from general tax revenue are essential in order to arrive at a coherent policy. There is no special requirement, such as the need for visibility, that would suggest outsourcing.

### 3.3.2 Monopoly-type services

Entities providing monopoly-type services	National museum of Switzerland, Swiss Federal Institutes of Technology and research institutes, the Swiss Federal Institute of Intellectual Property, Skyguide, etc.
Object	Services for which there is little or no competition, either because of a failure of the market or because of legislation.
State sovereignty	In the majority non-sovereign tasks.
Policy guidance	Variable; normally relatively significant, sometimes restricted by law or exogenous framework conditions.
Market matching	Moderate to slight; mostly services provided for the benefit of the general economy; financing from general tax revenue and/or emoluments and partly also third-party funds.
Synergistic potential and need for co-ordination	Little potential for synergies, the tasks often requiring specific resources and support processes; task execution needs very little coordination within government; rather, sound task execution needs the entities responsible to gain the standing and profile of independent bodies.
Special features	In the majority of cases, serious need for a separate visual identity (visibility) and legal independence.

Monopoly-type services can be very varied and comprise a wide range of tasks. Where such services are concerned, free competition is limited by a failure of the market or by legal provisions<sup>11</sup>. And yet the services provided in the areas of education, research and culture do come into some sort of competition with similar services by other providers and can be directly assigned to particular types of client. Which explains the importance of the entities responsible for these tasks gaining a reputation as independent entities and being seen as such in specialist circles and by potential clients (visibility). Lastly, independence enables them to use their assets as they wish, which makes them more attractive to sponsors.

But it is true that of all the tasks amenable to outsourcing, this type needs the closest policy guidance. In the first place, the law has in principle deliberately left some room for manoeuvre, and the execution of the bulk of the tasks in question continues to depend on public monies. Also, the services are partly the responsibility of government and are market-driven to only a limited extent.

11 These are either services involving natural monopolies, which are provided more efficiently and effectively by a single supplier (e.g. patent and trademark registration in one and the same place), or merit goods – mainly in the areas of education and culture – which are not supplied in sufficient quantity from the macroeconomic standpoint, given that individual utility is less important than the general interest.



The distinction between entities providing monopoly-type services and those given ministerial tasks has to be made on the basis of the main task. When it is not immediately obvious whether an entity is performing mainly ministerial tasks or providing monopoly-type services, the solution is to determine whether, from the task standpoint, it has special features which would warrant outsourcing. By way of example, museums should be outsourced because of the specific knowledge required and the special needs involved as regards real estate management and staff (e.g. constraints in terms of security in buildings and special working hours for staff). The need for visibility, especially so as to attract grants from sponsors, also argues in favour of outsourcing.

### 3.3.3 Economic and safety supervisory tasks

Entities performing economic and safety supervisory tasks	Surveillance of the economy: Federal Communications Commission (ComCom), PostReg, Competition Commission (COMCO), price surveillance, etc. Safety surveillance: Federal Financial Market Supervisory Authority (FINMA), Swiss Federal Gaming Commission, Swissmedic, the Office in charge of investigating aircraft accidents, the Service in charge of investigating public transport accidents, etc.
Object	a) Economic surveillance (surveillance of the functioning of the markets and emerging market regulation). b) Safety surveillance (protection of the population or market players from hazards relating to specific market services).
Sovereign task	Services which are sovereign tasks
Policy guidance	Little; room for political manoeuvre is intentionally limited so as to ensure that tasks are performed independently of any political influence.
Market matching	Little; monopoly-type services.
Synergistic potential and need for co-ordination	Little; the need for specific resources restricts potential synergies; task execution requires almost no co-ordination or networks within government.
Special features	The monopoly-type nature of these tasks, plus the fact that they are sovereign tasks, basically argues in favour of centralised service provision. So the decisive criterion as regards outsourcing these tasks is not their affinity with the market, but their particular need for independence or to keep the political world at arm's length. Since economic and safety supervisory tasks are often executed by very small entities, the question is whether various entities should be grouped together in the event of outsourcing so as to improve efficiency, or whether

	<p>their independence should instead be guaranteed by organisational demarcations within central government (e.g. decision-making committees).</p>
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This type of task encompasses two categories of regulatory task<sup>12</sup>, namely those in the area of economic and also safety surveillance:

The term *economic supervisory tasks* encompasses all the surveillance activities that come into play in adjusting the functioning of the markets and their failings with regard to goods and services assignment, and also price setting. An example of these tasks is the regulation and surveillance of overall market trends, which is the responsibility of the Competition Commission (COMCO) and the price supervisor. The object of economic surveillance is to prevent behaviour which would be harmful to the free market economy, such as cartels and price fixing. Also under the heading of economic supervisory tasks come the regulation and surveillance of specific market sectors, which are the responsibility of the postal service regulator where the postal market is concerned, Federal Communications Commission (ComCom) for telecommunications and the rail network's independent path allocation service. This sort of specific surveillance is often needed for emerging markets; it can be gradually reduced, as the markets in question are opened up and liberalized, and then replaced by surveillance of overall market trends.

Prudential aspects have priority when it comes to *safety supervisory tasks*. The latter serve to protect the population or certain market players from a range of very varied hazards deriving from the provision of specific market services. Examples include economic risks in the case of the Federal Financial Market Supervisory Authority (FINMA), more technical risks with the Federal Nuclear Safety Inspectorate and health risks with Swissmedic.

Although the task areas of the entities responsible for economic and safety supervisory activities do differ, the tasks are comparable in terms of how pertinent it is to outsource them. Economic and safety supervisory tasks relate to the regulation of private individuals' economic activities. Preventing the negative effects of market failures (economic supervisory tasks) and protecting health and good faith in business relations (safety supervisory tasks) bring benefits for the economy as a whole. The fact that these services are the responsibility of government and that they are monopolistic in nature would in principle also argue in favour of their being provided by central government. In order to make the execution of these tasks more credible, and hence more effective, the law awards a high degree of independence to the entities responsible for economic and safety supervisory tasks. What is particularly important is that decisions should in each instance be free of political influence – this in order to ensure

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12 The term regulation is used here to refer to the application and implementation of laws, particularly in the area of surveillance. A broader definition of the term would also include the preparation of legislative documents. However, this activity comes under the ministerial task heading, in accordance with the task typology developed in the report.

their objectivity and neutrality. The need to preserve this independence, which is so important, means that economic and safety supervisory tasks should be outsourced, while any room for political manoeuvre which goes beyond the law should be severely restricted.

In practice, it is not always easy to distinguish between entities providing monopoly-type services and those responsible for economic and safety supervisory tasks (e.g. Skyguide, Swissmedic and the Swiss Federal Institute of Intellectual Property). The distinction does not in itself have any influence on the decision to outsource, given that these two types of task have to be performed outside central government. The type of task is important from the guidance point of view, however, bearing in mind that monopoly-type services have to have stricter guidance (relating to the entrepreneurial aspect and tasks) than in the case of economic and safety supervisory tasks, where political independence plays a crucial role when taking decisions. This more marked independence will only be granted on a limited basis, however, and solely to entities with economic and safety supervisory tasks which clearly have priority. From this point of view, Swissmedic belongs rather to those entities that perform economic and safety supervisory tasks, while the Swiss Federal Institute of Intellectual Property and Skyguide are among the entities providing monopoly-type services.

#### 3.3.4 Market-based services

Entities providing market-based services	Swiss Post, Swisscom, Swiss Federal Railways, RUAG, etc.
Object	Services subject to competition (sometimes regulated).
Sovereign tasks	non-sovereign tasks
Policy guidance	Little; the law guarantees a minimum service (mandate to ensure universal service, concessions, etc.); services are moreover a function of the market.
Market matching	Mainly marketable services financed from receipts which depend on market prices.
Synergistic potential and need for coordination	Little; task execution at least partly requires specific resources (staff, data processing, buildings, infrastructure) and very little co-ordination or networking within government; on the other hand, having its own visual identity (visibility) gives the entity responsible for the tasks an advantage from the marketing viewpoint.
Special features	It is important to create conditions identical to those of other competitors

With market-based services, proximity to the Confederation can result in market distortions and penalise other competitors, but this risk is lessened by granting independence to the entities providing the said services. The other criteria also argue in favour of outsourcing; given that the quality and quantity of supply are mainly determined by the market, the need for policy guidance is slight. These services are not the responsibility of government and are mainly provided in a competitive environment and at the market price. Under these

circumstances, creating an independent entity makes it easier to gain the upper hand vis-à-vis the competition (visibility). To which it may be added that a degree of policy guidance is necessary in the area of universal service. Services provided in this context are therefore settled at the legal level, their realization often taking place as a result of implementation orders or by means of specific agreements on services.

### 3.3.5 Internal services

“*Internal services*” include tasks such as the acquisition and management of movables and real estate, data processing resources, staff and finance, which are executed inter alia by the Federal Finance Administration. Internal services are tasks of a mainly commercial nature. Their status as services provided solely upstream of task execution by the State prevents them being put in a particular task typology category. The question of outsourcing – combined with the granting of independence to a Confederation entity – does not apply to these services. It is more a question of deciding whether they continue to be provided inside or should be purchased outside, from individuals (‘make or buy’). In the case of both the Confederation and big private companies, the need for made-to-measure solutions and security of supplies (e.g. preferential assistance in the event of a computer breakdown) argue in favour of internal provision of services.

## 3.4 Conclusion

In the light of the above explanations, the following recommendations may be made with regard to future outsourcing:

1. While monopoly-type services, economic and safety supervisory tasks and market-based services are amenable to outsourcing, this is not recommended in the case of ministerial tasks. The latter must be performed within the central Federal Government, but can be managed along the lines of the FLAG model if the efficiency and effectiveness of their execution so require.
2. The way to distinguish between entities with ministerial duties and those providing monopoly-type services is to consider what is specific to them where their tasks are concerned. An entity cannot be said to be providing “monopoly-type services” unless, given its specific needs (e.g. resources or visibility), outsourcing is expected to make for more effective and efficient task execution. Otherwise, the tasks are ministerial tasks whose execution is the responsibility of central Federal Government.
3. Entities performing economic and safety supervisory tasks enjoy a considerable degree of independence. Although their activity is the responsibility of government and the entities concerned are financed from emoluments, the methods of execution can in no way be subject to policy guidance. Which explains the importance of being prudent and only entrusting “economic and safety supervisory tasks” to entities whose political independence the law expressly wishes to preserve.

## **4 Management of independent entities of the Confederation**

### **4.1 Introduction**

The Confederation manages the execution of its tasks first and foremost through special legislation and decrees, supplemented where necessary by directives (applicable chiefly to federal government), and through conditions set either by contract or by decision (chiefly applicable to concessionaires).

In order to increase effectiveness and efficiency, the Confederation relinquishes certain tasks performed by federal government and entrusts them to a body or enterprise of which it is the owner or main or majority shareholder. In the following text, the expression "independent entities" will be used to refer to these bodies and enterprises, since most of them are the result of outsourcing and conferring legal independence on government units. The status of the Confederation (referred to as the owner) as owner or main or majority shareholder gives it some influence over the development of independent entities and the federal tasks incumbent upon them.

Whether the Confederation is the owner or a shareholder is directly dependent on the federal tasks delegated to them. The organisational form must:

- a. confer the powers and latitude that independent entities need in order to carry out their tasks efficiently; and,
- b. ensure that the Confederation, *as owner*, has a degree of influence and control consistent with the public interest objective of its ownership or shareholding.

While drafting this report, several independent entities were analysed from the standpoint of their organisational structure, particularly the managerial and control rights of the Confederation in its capacity as owner. Two areas in particular appear to require action.

- a. Some aspects of management are not sufficiently standardised, which hampers the smooth operation of the management channels internal to the public institution (e.g. collaboration between governing bodies) and between the public institution and the Confederation (its oversight activities, for example). In contrast, management regulations for joint-stock companies appear to be adequate overall since the application of private law is compulsory in their case.

The management of these public institutions must be improved. Some elements of management must be clarified and better coordinated and any regulatory loopholes should be closed. To this end, the Confederation will refer to both national and international principles of "Corporate Governance" and to Swiss company law, which already incorporates several typical premises of corporate governance.

- b. Some public institutions and joint-stock companies can also be torn between their organisation and the independence that it entails on the one hand and the Confederation

with its wish to be kept informed and have direct control over the execution of the task, on the other.

Hence the importance of revising the different management elements in the future to take fuller account of the specifics of each type of task. This approach must ensure that the Confederation can exert all the necessary influence, while respecting the operating independence of the independent entities as far as possible.

At the core of this analysis are 28 guidelines. In future, they will provide the basis for optimising and standardising the organisational structure and management of independent entities of the Confederation. A brief outline of these guidelines is given below; they will then be applied to the various types of task and condensed into a specific management model for each.

There are certain themes that this report does not address, such as personnel policy and pension fund regulations for independent entities, given the reform projects underway.

## **4.2 Management elements**

### **4.2.1 Legal form**

*The choice of legal or organisational form<sup>13</sup> is crucial for defining other management elements. The form must be appropriate for the specific aspects of the task delegated to the independent entity.*

How independent entities are managed depends on their legal or organisational form. When the organisational form is one subject to public law, the Confederation is able to establish the organisational regulations of the independent entity and, among other things, define its own rights as the owner of information and carrying out intervention to suit its own needs. When the legal form is subject to private law, the organisational regulations and the rights of the Confederation as owner are already largely dictated by private law.

The public institution is the commonest form of organisation under public law while the joint-stock company is the primary legal form under private law. Mixed forms, which are a cross between public law and private law, exist as well: the best example being the joint-stock company incorporated under special public law. The organisational form of the latter is very close to that of a joint-stock company incorporated under private law. With this form, the Confederation can reserve the right to information and intervention in its capacity as owner under special legislation, which it would not be able to do if only private law applied. In principle, the use of mixed forms would also be possible for other legal forms subject to private law, such as limited liability companies and co-operative societies. However, this overlapping of legal spheres can sometimes give rise to demarcation problems. Any form of organisation which would give the Confederation an advantage over other shareholders in

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<sup>13</sup> Private law regulates in detail the organisational forms authorised, regardless of specific circumstances; it establishes a *comprehensive typology of legal forms*. In Switzerland, public law does not contain any abstract regulations on the organisational structure of public institutions, for example. Public institutions therefore do not have any set legal form.

terms of rights to information and intervention becomes particularly problematic when it comes to stock exchange listings: joint-stock companies listed on the stock exchange are required to adhere to the equal treatment principle under the law governing capital markets, which means giving investors the same access to information liable to affect share prices and is therefore stricter than the equal treatment principle under joint-stock company law.

The Confederation's need for special rights to information and intervention differs with the task concerned. With monopoly-type tasks that are financed from general fiscal revenues or emoluments, the Confederation has a greater right to information and intervention than with tasks supplied on a market basis, which are financed by income that is a function of market prices.

So that the Confederation can ensure that it has special rights to information and intervention, an independent entity to which the government has delegated its responsibilities or which provides monopoly-type services financed by general fiscal revenues or emoluments must be set up as a "public institution", an organisational form which is governed by public law. The joint-stock company is a legal form reserved for entities which are financed primarily by income determined by the price for their services on the market (regulated, as the case may be), which services are not government responsibilities, meet the condition of economic independence and are therefore open to third-party shareholders. Other legal forms and structures, namely mixed forms under public law, can be envisaged in exceptional circumstances given the diversity of the tasks of the Confederation. However, such exceptions must be justified.

Restricting the legal and organisational forms authorised for independent entities of the Confederation helps to standardise organisational regulations.

The Confederation has delegated certain economic and safety supervisory tasks to decision-making Commissions (for example the Swiss Federal Gaming Commission, Competition Commission (COMCO) and Federal Communications Commission (ComCom). While the latter are part of the decentralised administration, they are only administratively attached to their respective departments and are therefore substantially independent. However, in contrast to independent entities of the Confederation they do not have a legal personality and have no capacity to act. Neither are they bodies or enterprises within the meaning of this report. A decision-making Commission is a form of organisation that must be reserved for entities which require a degree of political independence in order to carry out the tasks assigned to them, but for which legal independence is not advisable either for the individual entity (e.g. because it is not large enough) or group of several entities (e.g. because of undesirable interdependencies or a lack of synergistic potential).

## **Guideline on legal form as a management element**

### **Principle no. 1**

In principle, the organisational form of the independent public institution which is subject to public law should be assigned to independent entities carrying out federal functions. The legal form of the joint-stock company should be reserved for entities:

- a) which supply most of their services on the market (regulated, as the case may be);
- b) which meet the conditions necessary for their economic autonomy;
- c) which carry out activities not the responsibility of government; and
- d) in which third parties may acquire interests.

Other legal forms under private law or organisational forms under public law broadly drawn from private law should only be the option selected in exceptional and duly warranted instances.

#### 4.2.2 Governing bodies

*The number of governing bodies, their composition and co-operation shall ensure effective and efficient management and supervision at operations level.*

An independent entity must have reliable internal management and supervision. Therefore, the number of governing bodies it has should be no more than required for efficient and effective management. Those bodies must have the necessary technical and operating abilities to exercise their function in accordance with their responsibilities. For this purpose, the appointment of members of the board of directors or institute board should be in accordance with a predetermined requirements profile that lists industry-specific technical and managerial abilities that the board must possess. These requirements alone are not sufficient to ensure that the Confederation's interests are safeguarded on the board of directors or institute board<sup>14</sup>. When exercising its right to appoint members, the Federal Council must therefore ensure that the members of such bodies identify with the thrust of the strategic objectives of the Federal Council and thus are committed to promoting the interests of the Confederation on the board of directors or institute board<sup>15</sup>.

The governing bodies of independent entities of the Confederation must also be clearly defined in terms of personnel and powers in order to ensure that they work together in line with the "checks and balances" principle. The legal duty of trustworthiness incumbent upon members of boards of directors or institute boards and managers and clear rules on the

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<sup>14</sup> The strategic objectives of the Federal Council have no binding legal effect on the board of directors of a joint stock company.

<sup>15</sup> Regarding the *legal* aspect of representation of the interests of the Confederation by Confederation representatives engaged under a contract or the law, see section 4.2.3.



procedure to be adopted in the event of conflicts of interest should, moreover, reinforce the integrity of the independent entity and its governing bodies and avoid any potential damages.

This requires linking the right to make appointments with the duty of supervision. Company law lends itself to this inasmuch as it is the responsibility of the annual general meeting to appoint and supervise the board of directors, which in turn appoints and supervises management. In contrast, where public institutions are concerned, the Federal Council generally appoints all governing bodies – including the executive board, which it does not itself supervise. Henceforward, it is the board of directors or institute board of the public institution which will generally appoint the executive board, subject to the approval of the Federal Council. The board of directors or institute board has ultimate authority to appoint executive boards carrying out economic and safety supervisory tasks. The Federal Council relinquishes its right of approval because such entities must be independent in the execution of their practical tasks. In future, it will also be possible to remove members of the governing bodies of public institutions during their term of office as provided for in the current regulations applicable to joint-stock companies.

With reference to public institutions, the status of the external audit body, its powers and reports, must also be standardised and determined along similar lines to company law. This should substantially improve the internal operation of audit bodies, while eliminating duplication between them and the Swiss Federal Audit Office (SFAO), which is responsible for financial oversight.

Furthermore, the Swiss Federal Audit Office shall be the mandatory audit body for any private audit company that is under the supervision of an independent entity.

These measures will improve primarily the management and supervision of public institutions. In contrast, little improvement is required in the case of joint-stock companies, since company law specifically defines the organisational structure, the division of powers between the governing bodies of the joint-stock company and the procedures for appointment and removal.

## **Seven guidelines on governing bodies as management elements**

### **Principle no. 2**

Independent entities of the Confederation shall have light structures and the powers of their different governing bodies shall be clearly regulated.

### **Principle no. 3**

Normally, no one person should be a member of more than one body of an independent entity.

### **Principle no. 4**

The Federal Council appoints the board of directors or institute board and the external audit body for public institutions. The public institution's board of directors or institute board appoints an executive board composed of one or more members, subject to the approval of the Federal Council. Such approval is not required for entities responsible for economic or safety supervisory tasks.

### **Principle no. 5**

The Federal Council draws up a requirements profile listing those which members of the board of directors or of the institute board must satisfy in order to ensure that it is able to form an objective independent opinion. The Federal Council exercises its right to appoint on the basis of this requirements profile and ensures that the interests of the Confederation are appropriately represented on the board of directors or institute board of independent entities.

### **Principle no. 6**

The members of the board of directors or institute board and the executive board protect the interests of the independent entity. Members with a conflict of interest must relinquish claims to election. Enduring conflicts of interest are a bar to membership of the board of directors or institute board and the executive board.

### **Principle no. 7**

For the duration of their mandate, the members of the governing bodies of public institutions may be removed when there is just cause.

### **Principle no. 8**

The status and powers of audit of the audit body and the recipients of its report shall be defined along similar lines to company law.

#### 4.2.3 Representatives of the Confederation

*Henceforward, the Confederation should be represented on boards of directors or institute boards by persons receiving instructions only if the requirements profile or the conduct of Confederation policy so requires.*

In its capacity as owner, principal or majority shareholder, the Confederation still has a key role in the appointment of the board of directors or of the institute board. Hence, the majority of members of a board of directors could be described as representatives of the Confederation. Strictly speaking, representatives of the Confederation are members who are bound by contract or by legislation to represent the interests of the Confederation on the body on which they sit and the Federal Council may give them specific instructions. By appointing or delegating its representatives, the Federal Council defends its interests in the very heart of the executive body of independent entities and obtains direct information from the board of directors or the institute board by virtue of their duty to keep it informed. The representatives of the Confederation may be government officials or third parties. They are bound by law or by contract to defend the interests of the government. Instruction of the Confederation representative targeting a particular field is another possibility.

The interests of the independent entity may conflict with those of the Confederation. Representatives then face a dilemma: their position as representatives of the Confederation dictates that they defend its interests, while their mandate as members of the board requires them to safeguard the interests of the independent entity. That is why the Confederation should only be represented on boards by persons acting under instructions where this is necessary. There are two possible alternatives: either the board of directors or the institute board requires the presence of representatives of the Confederation because only they possess the knowledge required (requirements profile), or the Confederation has no other means (for example special legislation or legally binding strategic objectives) of defending its interests.

#### **Guideline on representatives of the Confederation as a management element**

##### **Principle no. 9**

The Confederation should henceforward be represented on the board of directors or the institute board of independent entities by persons acting on instructions only if its interests cannot adequately be defended without such representatives or if the requirements profile of the board of directors or the institute board so requires.

#### 4.2.4 Liabilities

*The liabilities of the Confederation and of its entities must be reduced to the essentials.*

At the present time, the Accountability Act applies if damages arise in the execution of a public task. The independent entity charged with executing that task is liable to the person affected whether or not it is at fault (causal liability). If the entity is unable to assume liability,

the Confederation is accountable to the injured party (subsidiary liability). However, the Confederation and the entity can also ensure that governing bodies and officials assume accountability (by seeking recourse), if the harm caused was due to deliberate or grossly negligent breach of their duties.

In contrast, if damages occur in the course of a private activity, the accountability regime applicable is that of private law. Hence an independent entity is liable for damages only if the injured party can prove that the entity was at fault, either intentionally or through gross or slight negligence, (negligent liability). Governing bodies and officials may be held liable for slight negligence in the event of claims as well.

The application of the Accountability Act is doubly advantageous for the injured party. Causal liability means that it is *easier* to obtain damages and subsidiary liability makes obtaining damages *more certain*.

Conversely, because private accountability law does not provide for causal or subsidiary liability unless there are specific regulations to that effect, it is to the Confederation's advantage. Moreover, since governing bodies and officials are already liable in the event of slight negligence, recourse is easier.

Independent entities are responsible for government tasks. In the event of damages, the Accountability Act will therefore apply in principle. If independent entities essentially operate on the market and conduct business under the private law framework, it is difficult to apply the Accountability Act. In such cases, the accountability of the independent entity must therefore be subject exclusively to private law. Likewise, its governing bodies and officials must be made subject to private accountability law. The way to do so is to specify in the Organisation Act that the accountability regulations of private law shall apply. The Confederation therefore has no further accountability.

As part of its economic and safety supervisory duties, the Confederation supervises various *private* activities (the operation of nuclear power plants, the manufacture, distribution and sale of medications, for instance), although it is outsourcing steadily more of these tasks to independent entities (Swissmedic, Federal Financial Market Supervisory Authority (FINMA), Federal Nuclear Safety Inspectorate, for instance). Given that the tasks of economic and safety supervision are public duties, any injured party is free to take legal action against the Confederation or the independent entity responsible for such supervision rather than directly against the enterprise supervised by them and its governing bodies. This is an interesting option for injured parties, given that they do not have to provide evidence of blame (causal responsibility), making the procedure relatively straightforward, and that the independent entity and Confederation are solvent.

The liability risk for the Confederation can have very serious consequences in both scope and scale. Legally and practically speaking, if an enterprise subject to supervision commits a serious fault while the Confederation or independent entity has committed only a minor breach of its official duties, it would be inappropriate for the Confederation to assume full liability.

According to the jurisprudence of the Federal Supreme Court, independent entities carrying out economic or safety monitoring duties shall only be held liable if they are in essential breach of their official duties. However, they shall not be accountable for damages resulting from breaches of the obligations carried out by enterprises subject to supervision.

For the first time, the Federal Council is proposing, in the dispatch on the Federal Financial Market Supervisory Authority (FINMA), to include this accountability regulation specifically in the Financial Market Supervision Act (FINMA Act). By doing so, it is aligning itself with Federal Supreme Court jurisprudence and with international trends.

The Confederation has agreed to take on *specific* liability, guarantees, bonds and conditional commitments for certain independent entities. In future, the Confederation should only give such additional commitments in duly warranted exceptional cases by issuing stricter directives on risk policy (for example regular checks on strategic directives, compulsory insurance where applicable, etc.).

### **Three guidelines on liabilities as a management element**

#### **Principle no. 10**

The accountability of independent entities conducting the bulk of their business in the market and in a private law framework and that of their governing bodies and officials is regulated solely under private law.

#### **Principle no. 11**

Entities implementing economic and safety supervisory tasks shall be liable only if they are in essential breach of their official duties and if damage does not result from breaches of the obligations of one of the enterprises subject to supervision.

#### **Principle no. 12**

With respect to independent entities, the Confederation should only assume liabilities and give guarantees, bonds and conditional commitments that are enterprise-specific. In which case, it shall specify strict requirements for risk management and shall routinely survey, evaluate and notify accountability risks.

#### 4.2.5 Special powers

*Powers to legislate, acquire shares and conclude co-operation agreements as well as powers to supply ancillary services for profit – with reference to a proper legal basis – shall be vested in independent entities only if such powers serve the higher interests of the Confederation.*

Independent entities may be vested with powers to legislate without approval in exceptional cases and in accordance with a regulation on delegation, only for the purposes of settling technical issues of secondary importance. The delegation of legislative powers is excluded in competitive fields because of the distortions to which they could give rise.

Regulations on emoluments are not technical nor of secondary importance; they should therefore be adopted by the board of directors or institute board only if they have been approved by the Federal Council. Entities whose services are financed by emoluments or indemnities from the Confederation must also submit their staff regulations to the Federal Council for approval. Staff costs are the highest cost item, particularly in the services sector. As such, they determine the cost of services provided by independent entities.

Co-operation and acquiring interests are important for those entities which provide mainly commercial services. It is therefore important that they have powers to conclude co-operation agreements and acquire interests, always providing that the latter help to ensure or increase the value of the enterprise on a lasting basis, that they can be managed efficiently and that any risks can be sufficiently accounted for. The other independent entities shall generally carry out their assigned tasks themselves.

Entities which are not primarily involved in the market are moreover authorised to provide ancillary services for profit only if the latter are closely related to their main task and do not financially or materially prejudice that task. Further, ancillary services provided for profit must not distort competition. They require a legal basis.

### **Three guidelines on special powers as a management element**

#### **Principle no. 13**

Only in exceptional cases, under a regulation on delegation, are independent entities granted powers to issue regulations with an impact outside the entity. Such powers are restricted to technical provisions and issues of secondary importance.

#### **Principle no. 14**

Public institutions may conclude co-operating agreements and acquire interests only in exceptional circumstances and only then if consistent with their social business purpose and the medium-term strategic objectives formulated by the Federal Council. Independent entities set up as joint-stock companies under private law may conclude co-operation agreements and acquire interests within the limits prescribed by company law, in other words, in keeping with their business purpose. Interests may be acquired only if they help to ensure or increase the value of the enterprise on a long-term basis, if they can be properly managed and risks are adequately taken into account.

#### **Principle no. 15**

Provided that there is a legal basis for so doing, public institutions are authorised to provide ancillary services for profit as long as the latter are closely related to their primary task, do not prejudice the fulfilment of that task, do not distort competition and as long as the services overall cover at least the costs they generate.

#### 4.2.6 Strategic objectives

*In its capacity as owner, the Federal Council must manage all of the independent entities by setting medium-term objectives and maintaining a broad overview.*

The organisation act of an independent entity serves as the basis for managing the independent entity and for setting out its powers and responsibilities as distinct to those of the Confederation. The latter defines the content and scope of the assigned tasks in special legislation.

However, it is not possible for the Confederation to manage the development of its independent entities by legislation alone, since legislation regulates the main points over the longer term. It needs an instrument that will enable it to influence the independent entity and the performance of its tasks in the medium term, with the aim of safeguarding its higher interests.

From now on, the Federal Council, in its role as owner, should manage all independent entities by setting strategic objectives. The only case in which these objectives should be set by the board of directors or institute board rather than the Federal Council is for entities

conducting economic and safety supervisory tasks. This special regulation therefore allows the latter entities greater independence than others in the performance of their tasks.

Strategic objectives may relate to:

- the development of the entities through *enterprise-related* directives, and
- the outsourced tasks, through *task-related* directives.

Enterprise-related directives define, among other things, commercial policy priorities and aim to consolidate or increase the value of the enterprise. Task-related directives establish priorities for the performance of tasks or the use of any indemnities paid. Through directives such as these, the Confederation safeguards the public interest in task-related areas (security of supply, for example). The more market-based the tasks that the entity implements, the more important it is for the Confederation to put its management stamp on enterprise-related directives. In contrast, the Confederation will place the main management focus on task performance if this is not regulated by the market or by detailed legislation, if it is supported by financial contributions or exposes the Confederation to substantial risks.

The Confederation procures services from several of its independent entities, which it remunerates from general fiscal revenues. The services procured and paid for by public funds may involve the entire range of activities delegated to the independent entity (for example, procurement of training services from the Swiss Federal Institutes of Technology or infrastructure from Swiss Federal Railways). They may also include the procurement of services from its entities (for example, assistance in drafting legislation). Generally, such orders should also be defined in the strategic objectives, although these should contain only the basic principles for future orders, where applicable. The transparency that this brings to the greatest financial and material interdependencies between the Confederation and the independent entities enables the Federal Council to manage and oversee these entities from a broader perspective. However, in a competitive environment, service procurement should not figure in the strategic objectives. In the latter case, the Confederation must decide, direct and control without regard for its interests as owner. That is why, for instance, in the regional passenger transport sector where railways other than the Swiss Federal Railways can bid and procurement orders are issued in conjunction with the Cantons, the orders must be issued, managed and controlled without regard to the strategic objectives framework. In all other cases, procurement orders should henceforward be issued with strategic objectives in mind.

At present, the Federal Council already approves strategic objectives for enterprises active in the market without consulting Parliament. In contrast, the latter is involved in approving the services order for the Swiss Federal Institutes of Technology. Parliamentary approval is required for the substantial indemnities needed in the sector of the Swiss Federal Institutes of Technology. In future all entities will be managed with the help of strategic objectives set by the Federal Council<sup>16</sup>. When independent entities such as the Swiss Federal Institutes of Technology for instance, are largely dependent on indemnities, Parliament can exercise its power and set priorities for the use of allocations. The Federal Council has to take this into

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<sup>16</sup> Solely in the case of entities conducting economic and safety supervisory tasks, are strategic objectives subject to approval by the board of directors or institute board, not by the Federal Council.



account in its strategic objectives. On the other hand, Parliament will no longer have direct influence over the strategic objectives as a general rule; the aim here is to ensure proper separation of powers and responsibilities of the legislative and the executive.

As a general rule, strategic objectives are binding on the board of directors of public institutions and public joint-stock companies to the extent when the organisation act of the entity expressly so provides. They are also binding in practice, though not legally so, on the board of directors of independent entities set up as joint-stock companies subject to private law: the board of directors cannot afford to ignore the intentions of the principal or majority shareholder, otherwise it risks being removed from office or not appointed a second time.

### **Two guidelines on strategic objectives as a management element**

#### **Principle no. 16**

As owner, the Confederation sets higher medium-term objectives in order to provide strategic direction for independent entities. Through these strategic objectives, which have been broadly standardised, it influences the development of the entities, whether bodies or enterprises ("enterprise-related directives") and their tasks ("task-related directives") based on this overall approach. How much guidance is given at task level varies depending on whether the performance of the task is delegated:

- is described only in broad outline in the legislation and is barely regulated by the market;
- is largely financed by general fiscal revenues;
- could entail high risk for the Confederation.

#### **Principle no. 17**

It is the responsibility of the Federal Council to adopt strategic objectives for independent entities. The board of directors defines strategic objectives only for entities responsible primarily for economic and safety supervisory tasks. For independent entities which are largely dependent on the financial support of the Confederation, Parliament may decide on the utilisation of these resources in finance orders. The Federal Council must take Parliament's decision into account in formulating strategic objectives.

#### 4.2.7 Control by the Federal Council

*In its capacity as owner, the Federal Council's control of public institutions should be strengthened. The Federal Council should itself assume control of entities which are politically and strategically important and are financed largely through indemnities.*

The bases on which control by the Federal Council is currently exercised are still very uneven and sometimes inadequate. If any undesirable developments are found, the Federal Council must be able to take the necessary steps. Here, too, there are shortcomings in the legislation on the organisation of public institutions. In future, the organisation acts of public institutions

must uniformly provide for the following bases so that the Federal Council is able to exercise control: a report by the board of directors on meeting the strategic objectives, a management report by the public institution for publication, a report by the external auditor and a report by the Swiss Federal Audit Office on any audits conducted during the year under review. In future, the Federal Council should be able to remove from office members of governing bodies whom it has appointed to any of the public institutions for substantial reasons during their term of office<sup>17</sup>. If there is any doubt as to the proper exercise of powers, the Federal Council should be able to refuse to give its discharge. By so doing, it reserves the right to take legal action for damages against the body concerned. Withholding the discharge is already possible in theory, but giving the Federal Council the express right to approve the management report further underscores this fact.

In future, the Federal Council must be able to take the following steps when inspections indicate that public institutions are performing badly (currently or foreseeably):

- change the strategic objectives;
- withhold approval of the management report;
- refuse to give discharge to the board of directors;
- remove members of the board of directors or of the institute board during their term of office;
- enter liability claims against the governing bodies.

Generally, the Federal Council has sole responsibility for this control function. For public institutions that are not so politically and strategically important and are not highly dependent on the Confederation for indemnities, it may allow the departments concerned to carry out all or part of this function.

In a joint-stock company, the control that can be exercised by the shareholder, hence by the Confederation, is necessarily regulated by company law. The latter determines the information (or reports) that the board of directors and audit body should present to the annual general meeting or to the shareholder, chiefly when the accounts are submitted. Detailed information, particularly when intended exclusively for the principal or major shareholder can violate the rights of minority shareholders, which are protected by company law or by major provisions of capital markets law, if the company is a listed company. The steps that can be taken in the event of any untoward developments are also governed by joint-stock company law. For instance, the annual general meeting has the right to remove members of the board of directors at any time without assigning cause (art. 705 Swiss Code of Obligations), or to demand a special audit (art. 697a Swiss Code of Obligations).

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<sup>17</sup> See above, section 4.2.2, guideline no. 7.

## **Five guidelines on control by the Federal Council as a management element**

### **Principle no. 18**

For the purposes of carrying out its control function, the Federal Council shall receive the following documents in due time:

- the report or interim report by the board of directors on attaining strategic objectives,
- the management report by the board of directors,
- the audit report by the external auditor (if it is not already included in the management report),
- the report by the Swiss Federal Audit Office on any review of the public institution relating to financial supervision.

The Federal Council may provide for this control function to be carried out entirely or in part by the departments concerned.

### **Principle no. 19**

The minimum content of public institution management reports is determined as indicated in joint-stock company law.

### **Principle no. 20**

The public institution management report is submitted to the Federal Council (or department concerned) for approval prior to publication.

### **Principle no. 21**

In the case of public institutions the Federal Council (or department concerned) decides whether to discharge the board of directors each year.

### **Principle no. 22**

The external auditor's report on public institutions is determined as indicated in joint-stock company law.

#### 4.2.8 Parliamentary oversight

Parliamentary oversight typically requires a certain distance from the decision-making and control functions of the Federal Council; it focuses on the essentials. As regards financial oversight by Parliament, the distinction provided for in the Constitution between oversight and Federal Council control is of secondary importance. Parliament has vast powers of oversight and intervention as a result of its budgetary independence and its powers to approve

the State account. In this instance, it also benefits from the support of the Swiss Federal Audit Office.

As concerns oversight of the independent entities, Parliament oversees the manner in which the Federal Council defends the Confederation's interests. In this way it joins with Federal Council control (section 4.2.7) strengthening and thereby improving it.

Control by the Federal Council and Parliamentary oversight end where the independence and accountability of the independent entities begin. This rule holds for public institutions and even more so for joint-stock companies. As regards the latter, private law and, where applicable, capital markets law set clear limits on the Confederation's right to information and intervention.

Parliament is responsible for defining oversight. For reasons to do with the separation of powers, the Federal Council abstains from setting guidelines and therefore confines itself to the discussion of principles. More details are given in the explanatory report by the FFA.

#### 4.2.9 Finances and taxes

*It is important to improve the financial management of independent entities. Specific financial and fiscal provisions that hinder competition are to be abolished as far as possible.*

From now on, all independent entities will keep their own accounts.

It is not possible to set a definitive figure on the total capital endowment that should be allocated to independent entities. In general, they will only be allocated what is strictly necessary to carry out their tasks (notably to cover liabilities) consistent with industry practice for market service providers. Any State guarantees should also be taken into account.

Consolidation of the Confederation's accounts gives an overview of the state of its assets, finances and revenues, disregarding internal transfers. Public institutions owned by decentralised government are generally required to present consolidated accounts. Under the new Financial Budget Act, the Federal Council may either include other independent entities in the circle of firms required to submit consolidated accounts or exempt entities owned by decentralised government from this requirement. In order to ensure overall consolidation, the Federal Council must issue requirements on the submission of accounts to the entities in question.

For public institutions, most of the organisation acts currently state only that they are generally funded by revenues in line with market prices, emoluments and indemnities. In other words, the law is silent on the method of financing a task once it is outsourced. Is it to be financed exclusively by emoluments and prices paid, or is the Confederation to grant indemnities as well? The organisation act will therefore no longer regulate the overall financing of the entity, just financing for each individual task or group of tasks. Distinguishing between the various tasks and their funding in this way will help give a truer reflection of costs. It will also render the main financial flows between the Confederation and

the entity more transparent. This will avoid mixed accounts in which indemnities serve to finance areas in which emoluments are already received for the task in question, or in which emoluments are received to finance services that the Confederation has already purchased.

Other new developments concern only public institutions: in future, the utilisation of any profits a public institution may earn will not be laid down by legislation. This is a decision that will be taken – in much the same way as at an annual general meeting of a joint-stock company – by the Federal Council, when it approves the accounts<sup>18</sup>. It will therefore be in a better position to take into account the interests of the Confederation and the needs of the independent entity.

As regards taxation, public institutions today have special tax status deriving exclusively from their legal form: they are exempt from paying direct taxes to the Confederation, cantons and communes, independently of any public interest or utility purpose. In future, all public institutions shall be subject to tax on their commercial services in the same way as the private sector. The organisation act should explicitly provide for this. However, the possibility of distortion of competition by public institutions cannot be totally ruled out: those partially subject to tax should also be required to keep a special account showing, and therefore preventing, any cross-subsidies.

#### **Six guidelines on finances and taxes as a management element**

##### **Principle no. 23**

Independent entities keep their own accounts.

##### **Principle no. 24**

The capital endowment for independent entities takes into account guarantees provided by the Confederation (liquidity guarantees for example), actual needs (including accountability cover) and industry practice. The capital endowment is interest free.

##### **Principle no. 25**

The Federal Council issues requirements on the submission of accounts to independent entities whose accounts are grouped with the government account (whole-of-government accounting).

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<sup>18</sup> The reserves strictly necessary for operation must be provided for in the organisation act. They are already constituted for the determination of profit. In ruling on the utilisation of profits, the Federal Council may decide to constitute other reserves.

**Principle no. 26**

The method of financing public institutions (emoluments, indemnities and receipts in line with market prices) is determined by the organisation act and is dependent on the nature of the task.

**Principle no. 27**

The Federal Council decides each year how any profits earned will be utilised when it approves the public institution's accounts.

**Principle no. 28**

Tax liability shall be dependent on activity, not on the organisational form of the public institution. In the event of partial liability, the latter shall be required to keep a special account.

**5 Specific management model for each type of task****5.1 Monopoly-type service providers**

Monopoly-type service providers shall take the organisational form of an independent public institution. The Confederation as owner can thus secure the rights to information and intervention to which it is entitled given the substantial financial support it provides, the lack of market regulation and the fact that certain tasks are State functions.

These public institutions shall generally have the following governing bodies: a board of directors or institute board, an executive board and an external auditor. The Federal Council appoints the audit body and the board of directors or institute board. It may remove members of either body in the course of their term of office if it has substantial reasons to do so. An executive board composed of one or more members may be appointed or removed from office by the board of directors subject to the approval of the Federal Council.

In exercising its right to appoint members, the Federal Council shall ensure that the board of directors or institute board has the experience specified in the requirements profile to assume the responsibilities of a governing body and is committed to supporting the interests of the Confederation.

The size of the governing bodies of entities providing monopoly-type services shall be that required for carrying out their responsibilities.

The powers of the governing bodies shall be clearly demarcated and each shall be independently staffed. The presence of members of the executive board on the board of directors or the institute board shall be authorised only in exceptional cases, if duly justified.

Both the members of the board of directors or the institute board and the members of the executive board shall defend the interests of the independent entity and relinquish claims to election in the event of any temporary conflict of interests. Persistent conflicts of interest shall result in exclusion from the body.

The terms of reference of the external auditor and the recipient of its report shall be specified along lines similar to company law.

The Federal Council only appoints Confederation representatives who are *legally* bound to defend the interests of the Confederation to boards of directors or institute boards when there is no other way of meeting the requirements profile<sup>19</sup>.

Entities providing monopoly-type services are, for the most part, subject to public law and therefore are accountable under accountability law. However, entities essentially subject to private law are another option. In the future, they should all be uniformly accountable under private law.

By way of exception, monopoly-type service providers have the right, to issue general provisions of a technical nature and of secondary importance, subject to a regulation on delegation. Regulations on emoluments and staff regulations require approval by the Federal Council. Such providers shall only conclude co-operation agreements or acquire shares in exceptional circumstances and in keeping with their social business purpose and the medium-term objectives of the Federal Council. They may provide ancillary services for profit where there is a legal basis, provided that such services are closely related to their primary task, that they do not prejudice fulfilment of that task, do not distort competition and cover all of the costs they generate.

As owner, the Federal Council provides direction for these entities by setting strategic objectives, mainly through task-related directives but also through enterprise-related directives. Any orders to perform services are also managed by strategic objectives. When these entities are to a large extent dependent on the general fiscal revenues of the Confederation, parliament may exert an influence over the utilisation of resources through funding decrees.

The Federal Council exercises its control as owner by means of the following documents: the report or interim report by the board of directors or institute board on meeting strategic objectives, the auditor's report, and the report by the Swiss Federal Audit Office on any reviews relevant to financial supervision conducted in the course of the year. The minimum content of the management and auditor's reports is based on lines similar to company law. The management report is submitted to the Federal Council for approval prior to publication. If, in exercising its control as owner, the Federal Council finds any undesirable developments, it must be able to take the necessary steps. It may modify the strategic objectives, refuse to approve the management report, to discharge the board of directors or the institute board or

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<sup>19</sup> Mainly representatives from the administration whose own administrative experience is useful to the board of directors or institute board.

the audit body, remove members of both bodies from office or make liability claims against them.

These entities keep their own accounts. If they are part of decentralised government, the accounts are grouped together with the government account in line with the whole-of-government accounting principle. The Federal Council may make exceptions, if not, it establishes guidelines for the presentation of accounts.

The total capital endowment of these entities depends on actual needs<sup>20</sup> and takes into account guarantees provided by the Confederation<sup>21</sup>. In the organisation act, the Confederation defines the method of financing for each of the tasks transferred to these entities. If an entity providing a monopoly-type service conducts commercial activities, it is liable for tax. The fact that such entities are required to keep a special account precludes any cross-subsidisation. If the independent entity makes a profit, the Federal Council decides how it is to be used. It also ensures that the entity has the requisite reserves.

## **5.2 Entities performing economic and safety supervisory tasks**

Entities responsible for economic and safety supervision carry out tasks which are State functions. They should therefore be given the organisational form of independent public institutions in order to emphasise the public service nature of their functions. If it is inadvisable from a legal standpoint to create an independent entity, the tasks of economic and safety supervision may be transferred to a decision-making commission<sup>22</sup>.

The governing bodies and organisation of economic and safety supervisory entities are along similar lines to those for entities providing monopoly-type services, with two exceptions: the board of directors or institute board has the final say in appointing the executive board and the Federal Council foregoes its powers of approval, highlighting the singular independence that entities responsible for economic and safety supervision enjoy. The second exception relates to the external auditor. It is compulsory to have external audits carried out by the Swiss Federal Audit Office if any private audit companies are under the supervision of one of these entities.

The singular independence that the Confederation must grant entities performing economic and safety supervisory tasks requires that it forego appointing representatives legally bound to defend its interests to the board of directors or the institute board.

Since entities responsible for economic and safety supervision carry out tasks that are functions of the State, they are accountable in principle under accountability law. Under a special regulation they are liable only if they are in breach of their fundamental official duties

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<sup>20</sup> Capital serves to cover liability, for example.

<sup>21</sup> A liquidity guarantee by the Confederation, for example.

<sup>22</sup> Decision-making committees are not independent from a legal standpoint. However, the same management model principles may apply by analogy.



[] and if the damage sustained is not the result of a breach of obligations by one of the bodies they supervise.

Exceptionally, subject to a regulation on delegation, entities carrying out economic and safety supervisory tasks have the right to issue general conceptual provisions that are technical in content and of secondary importance. Regulations on emoluments and staff regulations are subject to approval by the Federal Council. Given the sensitive nature of their tasks, entities with economic and safety supervisory functions may not acquire shares or conclude co-operation agreements and may not carry out any ancillary activities for profit.

Entities responsible for economic and safety supervisory tasks must also be managed by medium-term strategic objectives. As they must carry out their tasks with a degree of independence comparable to that of the judiciary, the board of directors or institute board has the final say in approving the strategic objectives. For important economic and safety supervisory tasks, the Federal Council may hold discussions with the board of directors or institute board as indicated in art. 7 of the National Bank Act.

The financing of entities responsible for economic and safety supervisory tasks is broadly along the same lines as for monopoly-type service providers (c.f. section 5.1), except that the question of tax liability does not arise since they provide no commercial services.

### **5.3 Entities providing market-based services**

The legal form for entities providing market services should be that of a private-law joint-stock company and only in exceptional and duly justified circumstances that of a public-law joint-stock company, for example in the case of the Swiss Federal Railways, since its financing is dependent on a Confederation contribution.

Private and public-law joint-stock companies have the following governing bodies: an annual general meeting, a board of directors, an executive board and an external auditor.

These are all separately staffed except in duly justified exceptional circumstances. Appointment and removal as well as the responsibilities of these bodies are governed by company law. The Federal Council exercises its right to appoint members at the annual general meeting on the basis of a profile of requirements that the board must satisfy and ensures that the latter has the necessary operating and technical expertise; it also ensures that the interests of the Confederation are adequately represented.

When drafting the articles of corporation, the Federal Council ensures that there are clear rules on conflicts of interest on the board of directors and the executive board. The organisation act for entities set up as joint-stock companies under public law may include directives to this effect.

Representatives of the Confederation who act under instruction may be delegated or appointed to the board of directors of private-law joint-stock companies if there is no other way of defending the interests of the Confederation or if the requirements profile for the board

so requires. The requirements profile of joint-stock companies incorporated under public law may also require that a representative under the instructions of the Confederation have a seat on the board of directors; however, such representation to defend the interests of the Confederation is an option that is used less and less often: strategic objectives can be made legally binding on the board of directors of joint-stock companies incorporated under public law as a requirement of the organisation act.

Entities providing market services operate under private law and are therefore subject to private law accountability provisions.

Entities providing market services generally have the right, if a regulation on delegation so provides, to issue general provisions that are technical in content and of secondary importance. This said, they have no power to legislate in areas in which there is competition because there is a risk that it could lead to distortions. If entities providing market services receive emoluments, the regulations on emoluments must be approved by the Federal Council<sup>23</sup>. Joint-stock companies incorporated under private law issue their own staff regulations. For joint-stock companies incorporated under public law, general directives on personnel regulations may be provided within the framework of the strategic objectives.

In the interests of their commercial success, it is important that entities providing market services are able to establish co-operative agreements and acquire shares in keeping with their assigned purpose. Such acquisitions must nevertheless help to ensure or increase the value of the enterprise on a lasting basis, for efficient management and sufficient consideration of risk.

Company law establishes the managerial and control rights of shareholders – and therefore of the Federal Council – of joint-stock companies incorporated under private law. The same applies to the steps that shareholders can take in the event of undesirable developments. The strategic objectives of the Confederation are binding, although not legally so, on the board of directors of joint-stock companies set up under private law. The board is accountable to the Federal Council subject to the provisions of company law on the protection of minorities and any provisions of capital markets legislation. The pursuit of private interests, as owner, in procuring services could distort competition. Therefore the procurement of services must not figure in the strategic objectives of entities providing market services.

The organisation act for entities providing market services which have been set up as joint-stock companies under public law, should define the strategic objectives of the Federal Council such that the board of directors is legally bound by them and accountable for them. If joint-stock companies set up under public law are largely dependent on financial contributions from the Confederation, Parliament can rule on the utilisation of these funds in its finance orders. The Federal Council must take that ruling into account in formulating its strategic objectives. Moreover, company law also regulates the means of management and control that can be used by the Confederation; stock exchange listing must be in accordance with the provisions of the legislation on capital markets.

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<sup>23</sup> Approval of the regulations on emoluments and rates by the Federal Council should be provided for in the technical regulations of joint-stock companies incorporated under private law and in the organisation act of joint-stock companies incorporated under public law.

Market service providers keep their own accounts in accordance with the directives of company law on the presentation of accounts as a minimum requirement. The capital endowment of such entities depends on their actual needs – accountability cover, for example – and industry custom and practice, allowing for any guarantees provided by the Confederation; the minimum amount is specified in company law. Entities providing market services are liable to tax. The use of profits is regulated by company law.

## 6 Division of roles

### 6.1 Introduction

Various stakeholders are involved in the management and control of independent state-owned entities: Parliament, the Federal Council, the central federal administration and the Swiss Federal Audit Office, each of which have different roles to play. In order to be effective, powers and responsibilities must be well co-ordinated. Hence, the need to delineate the scope of powers of all of the actors clearly.

When implementing this principle of the organisation legislation at government level, in particular, one should be aware that as regards these independent entities the Confederation is not only the owner but also has other potentially conflicting roles. The following table gives an overview of these roles, their object, their purpose and their respective responsible bodies in government.

**Table : the various roles of the Confederation**

Roles of the Confederation	Object	Purpose	Preparation/co-ordination (current situation)
Owner	<i>Independent entity</i> , owned by the Confederation e.g. (the Swiss Post) or in which the Confederation is a main or majority shareholder (e.g. Swisscom) and which performs federal tasks that have been outsourced (universal postal service by the Swiss Post, for instance.	Long-term development of the independent entity so as to ensure that the task transferred will be duly accomplished.	Varies from one case to another; general secretariats or specialised offices, sometimes by agreement with the FFA.

Responsible for technical supervision	<i>Federal tasks</i> conducted by third parties which are not part of central government (patents, for instance)	To ensure that the tasks are carried out in a technically (including legally) correct and economic manner	Specialised Office (e.g. Federal Office of Public Health)
Responsible for economic and safety supervision	Regulation and supervision of the <i>market and certain (partially liberalised) sectors of the market</i> (marketing of medications or operation of nuclear power plants, for instance).	To ensure the proper functioning of emerging markets (e.g. the postal market); protect the population (nuclear energy field, for instance) and/or market players (financial markets, for example)	Dedicated service/decision-making committee, sometimes a specialised office.
Procurement of market services	<i>Marketable services including preparatory and partial services</i> procured by the Confederation and assigned to third parties which are not part of central federal government (e.g. regional transport)	To utilise the specific know-how and existing infrastructure of third parties	Specialised office

The Confederation's role as owner could lead to potential conflict between its role in the procurement of services and its responsibilities for technical monitoring and economic and safety monitoring:

– Role as owner versus responsibility for technical supervision: from the standpoint of both technical supervision and owner policy, the aim of the Confederation is the technically correct performance of tasks. While technical supervision focuses on the public interest in carrying out tasks, considerations relating to business economics, hence, cost-effectiveness are also part of the owner's role<sup>24</sup>.

– Role as owner versus responsibility for economic and safety monitoring: as it is responsible for economic and safety monitoring, the Confederation has a duty to issue objective requirements, for no purpose other than the public interest, in order to correct a potential

<sup>24</sup> For instance, should the Confederation impose technical supervisory measures on its independent entity if implementing them will entail major investment and they are therefore not to the advantage of the Confederation as an owner?

market failure and avoid exposing the population to risk. In contrast, as the owner of an independent entity operating in a regulated market, its first priority is its own economic interests as owner and therefore the welfare of only one party on the market<sup>25</sup>, whose best interest would be to have as little regulation as possible and therefore less costly production.

– Role as owner vs. purchaser of services: as a purchaser, it is in the best interest of the Confederation to procure services from the company that makes it the best offer. As owner, it would tend to procure services from its own independent entities<sup>26</sup>.

The preparation and coordination of issues relevant to owner policy should be organised at administrative level so as to ensure that these different interests are taken into account by policy-makers, that decisions are taken in full cognisance of the interests at stake and priorities set with due consideration. Priorities cannot be set at a lower level, given that the Federal Council has full responsibility for fulfilling these various roles, it is under an obligation to set them.

The main options for the division of roles in central government for the purpose of the defence of interests in relation to owner's policy are as follows:

- a. Only one central government service prepares and co-ordinates issues relevant to owner policy for the Federal Council (known as the single-tier variant). This service is separate, on an organisational level, from the departments concerned and from services which have a technical, economic or safety monitoring role and purchase services. The OECD recommends this type of centralised option<sup>27</sup>.
- b. The department concerned and the FFA share the tasks of preparing and coordinating issues relevant to owner policy (two-tier variant). When they work together, the department concerned is primarily responsible for the preparatory work for appointments, for developing strategic objectives and for preparatory work relating to Federal Council control. The FFA is responsible chiefly for issues relating to pension funds, buying and selling shares, recapitalisation, financial directives and profit distribution. Each service co-operates with the other in its particular area of responsibility. This is the option currently applied by the Department of the Environment, Transport, Energy and Communications and the Federal Finance Administration for the Swiss Federal Railways, the Swiss Post, Swisscom and Skyguide.

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<sup>25</sup> For instance, should the Confederation issue a regulatory measure if it penalises its independent entity?

<sup>26</sup> Should the Confederation not, say, procure the services that it needs only from its independent entity (to boost its operation) even if its competitors offer the same services on terms at least as economically attractive? Conflicts of interest between service procurement and its interests in owner policy terms arise only when such services are governed by competition law. Conflicts of interest are strongest when invitations to tender are issued and mandates awarded.

<sup>27</sup> See the OECD Guidelines on Corporate Governance, section I, A, on this issue. "There should be a clear separation between the state's ownership function and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulation. Therefore, in order to avoid any conflict of interests, the ownership function should be kept separate for all federal administration entities that are customers or suppliers of the independent entities." In section II, D, the OECD Guidelines state that the exercise of ownership rights may be facilitated by setting up a co-ordinating entity within the state administration or, more appropriately, by the centralisation of the ownership function within a single administrative unit.

- c. The department concerned bears sole responsibility for preparing and coordinating issues relevant to owner policy (decentralised option). This is the option currently applied for the Swiss Federal Institute of Intellectual Property and the Swiss Federal Institutes of Technology, for example. The general secretariat (Swiss Federal Institute of Intellectual Property) or specialised office (Swiss Federal Institutes of Technology) prepares and coordinates owner-policy related issues.

The single-tier option ensures the greatest transparency and takes better account of conflicts of interest that could arise from the different roles of the Confederation. Technical, economic and safety supervision interests are handled separately from owner policy and, hence, are directly taken into consideration in the policy decision-making process.

This said, conflicts of interest are also reduced to a minimum when the departments concerned are required to prepare and coordinate issues relevant to owner policy via a unit of the department which has no function in technical, economic or safety surveillance and which does not procure services on the market. In most cases, a service responsible for owner policy within the general secretariat of the department concerned is required. This is possible both for the two-tier and decentralised option.

Since the Confederation is seeking to achieve task-related objectives as an owner or shareholder of its independent entities, the unit tasked with the preparation and co-ordination of issues relevant to owner policy must have specific expertise in each task area. The single-tier variant provides the greatest distance, at organisational level, between the service responsible for owner policy and the federal offices that have the task-related expertise. Central level should therefore build up its own task-specific expertise or ensure good circulation of information with the specialised office, which would entail expenditure. In contrast, in the other two options, the service responsible for owner policy has access to task-specific expertise at no great expense. The single-tier option therefore entails higher staff costs.

As regards independent entities, the "group interests" of the Confederation, as they are referred to, are expressed mainly through budget policy. They are more easily defended if the single-tier option is used, since just one service is responsible for preparing and co-ordinating owner-policy related issues – provided that it possesses the necessary expertise. Interests relating to group budget policy can also be represented in the two-tier variant, through the participation of the FFA. Consequently, the single-tier option ensures the greatest transparency in the event of any conflicts of interest for policy-makers as well as from the group perspective, but it is the least efficient in terms of resources needed. Conflicts of interest can also be reduced to a minimum with the two-tier option and the decentralised option as long as the department concerned has a dedicated service for the preparation and co-ordination of owner-policy related issues. Moreover, the latter two options are more efficient and more effective than the single-tier option. The co-operation of the FFA on crucial budget policy issues, which is possible with the two-tier option, makes it easier to defend the group interests pursued by the Confederation than does the decentralised option.

## 6.2 Current situation

The following actors are currently involved in the management and control of independent entities:

The *Federal Assembly* establishes the key elements, chiefly:

- by enshrining in law the tasks for which independent entities are responsible; and
- by differentiating between the powers and responsibilities of the independent entity and the Confederation in the organisation act.

As part of its oversight function, the Federal Assembly ensures that the Federal Council implements legal directives and that it therefore controls the independent entities. The one exception to this form of indirect oversight is when independent entities, such as the Swiss Federal Railways, benefit from Confederation *indemnities*. In this case, the Federal Assembly votes the appropriate resources and decides how they are to be *utilised*, in addition to special legislation. This gives it " direct oversight powers " over the use of resources by independent entities.

The *Federal Council* executes the mandate given in the organisation act and assumes the role of owner of independent entities. Which gives it responsibility for the following duties in particular: appointing governing bodies in general, issuing enterprise-related directives and task-related directives by setting strategic objectives; supervising independent entities, chiefly by requiring that it be kept informed by reports on meeting the objectives set and the submission of regular accounts<sup>28</sup>. It oversees companies such as Swisscom, Swiss Federal Railways and Skyguide itself, as well as the Swiss Post, with the assistance of the department concerned and the Federal Department of Finance. On the authority of the Federal Council, the departments ensure management supervision and analyse the documentation submitted by the independent entities for the submission of the report and accounts. The Federal Council has delegated its rights as shareholder in RUAG to the Swiss Federal Department of Defence, Civil Protection and Sports, which can also rely on the support of the Federal Department of Finance.

The Federal Council has largely delegated its powers of control as owner over public institutions (with the exception of the Swiss Post) to the *departments concerned*. This work is partly done by the general secretariats and partly delegated to the office concerned, thus uniting potentially opposing functions of the Confederation (c.f. Section 6.1).

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<sup>28</sup> In its capacity as owner, the Confederation has a duty to implement task-related management, given that the justification for ownership is precisely that it confers a duty to ensure that the federal tasks entrusted to it will be carried out. Moreover, it is difficult to separate enterprise management from task management, particularly at strategic level. In practice, owner-policy directives do not always cover the same ground as technical supervision directives: owner-policy directives are mainly policy/strategy oriented, while technical supervision also requires directives of a more technical and operating nature. Furthermore, only tasks that remain federal tasks even once they have been outsourced to parties outside central government are subject to technical supervision. In contrast, management of tasks by the Federal Council as owner cover private sector tasks executed by independent entities as well as transferred federal tasks. Furthering technical supervision is also part of the control exercised by the Federal Council for federal tasks

The *Swiss Federal Audit Office* is the supreme financial supervisory body of the Confederation. At the same time, it assists the Federal Assembly with its oversight and the Federal Council in the exercise of its control functions.

The Swiss Federal Audit Office is responsible for the financial supervision of public institutions. Its report is sent to the Finance Delegation, and the Federal Council is informed only of the main conclusions of this review in the annual report by the Swiss Federal Audit Office. As part of its supervisory duties, the Swiss Federal Audit Office also reviews enterprises in which the Confederation holds 50 % or over of the registered share capital. In this case, it carries out its review only by arrangement with the board and by calling on both internal and external audits. It submits its report to the board for presentation at the annual general meeting. The Federal Council and the Finance Delegation are informed of the review.

As well as this, for some independent entities, such as Swissmedic and Swiss Federal Institute of Intellectual Property, in addition to its financial supervisory duties, the Swiss Federal Audit Office is appointed as the external auditor.

### **6.3 Redefining roles**

#### **6.3.1 Powers to manage and control independent entities**

*The Federal Council acts as owner and so generally has the sole right to information, intervention and control in dealings with all of the independent entities. The legal powers of the Federal Assembly are reserved.*

In contrast to wholesale privatisation, the need for political legitimacy does not cease when a task is outsourced to an independent entity. The more financial support the Confederation has to provide for the performance of that task and the more it has to commit itself through guarantees to an independent entity carrying out the task – which it is therefore accountable for – the greater is the need for such legitimacy.

At present, independent entities of the Confederation are often medium-to-large principals and employers. Their direction and control requires an overarching approach that only the Federal Council is in a position to provide. In contrast, the control of less politically or strategically important entities which are less dependent on Confederation indemnities does not have to rest totally with the Federal Council (Swiss Federal Institute of Intellectual Property, for example). The Federal Council may, in this case, delegate some or all of its control function to the departments concerned.

Weighing up the interests that are concentrated in the hands of the Confederation is another task that should also in principle – given the potential strains – fall to the Federal Council. The task of the administration is to prepare the bases for decision-making that will permit the Federal Council to set priorities for all of the different functions in its hands.



### 6.3.2 Division of central federal government roles

*The department concerned and the Federal Finance Administration share the tasks of preparing and co-ordinating issues relating to owner policy for market-based service providers and entities providing monopoly-type services which play an important part in the federal budget.*

*The department concerned bears sole responsibility for preparing and co-ordinating issues relevant to owner policy for monopoly-type service providers with a modest budget impact, and for economic and safety supervisory entities.*

*A service of the department concerned prepares and co-ordinates owner-policy related issues. This service is separate, at organisational level, from services carrying out activities relating to economic and safety supervision and, if possible, does not conduct any activity related to technical supervision or to procurement.*

Primarily in the interests of efficiency, the Federal Council waives the reorganisation of responsibilities for the preparation and co-ordination of owner-policy related issues at administrative level along single-tier lines as described in section 6.1. The preparation and co-ordination of these issues continues to be the responsibility of the departments concerned; there, the tasks are carried out by a service which is separate, at organisational level, from services carrying out economic and safety supervisory tasks and, which, if possible, does not conduct any activity related to technical supervision or procurement. The collaboration of the FFA depends on the independent entity's impact on the federal budget: generally this impact is smaller if an independent entity is largely financed by emoluments, as is the case for economic and safety supervisory entities and for monopoly-type service providers that are not largely dependent on Confederation indemnities (Swiss Federal Institute of Intellectual Property, for example). The preparation and co-ordination of owner-policy related issues in this case is the responsibility of specialised departments; the FFA is consulted only on issues relating to capital endowment, pension funds, responsibility for and presentation of accounts.

Monopoly-type service providers, which are largely dependent on Confederation support (such as the Swiss Federal Institutes of Technology), or in which the latter has a major shareholding as in the case of market-based service providers<sup>81</sup>, have a markedly larger budget impact. In view of legitimate group interests at budget policy level, closer collaboration with the Federal Finance Administration is necessary. The Federal Finance Administration is responsible chiefly for issues relating to pension funds, buying and selling shares, recapitalisation, financial directives and profit distribution. In contrast, the departments concerned are primarily responsible for preparations for appointments, the development of strategic objectives and preparatory work related to control by the Federal Council. Each service co-operates with the other in its particular area of responsibility.

## **7. Outlook**

### **7.1 Introduction**

If the Federal Council approves this report, the task typology principles and management guidelines it contains will serve as directives. The said principles and guidelines will have to be complied with in preparing and coordinating the files on independent entities - that is unless they are waived for justifiable reasons. The following chapters briefly describe the most important implementation stages for the Federal Council.

### **7.2 Future outsourcing decisions**

The typology of tasks indicates what tasks ought ideally to be performed inside or outside central Federal Government and how to assess management and independence needs with respect to the execution of outsourced tasks. It is an important tool for identifying future outsourcing in that it provides uniform criteria for policy-making decisions.

The present report assesses the need to outsource, especially where economic and safety supervisory tasks are concerned, the need for the entities performing such tasks to be independent involving a systematic review of their accession to independent status. With this in mind and with reference to the OECD report on regulatory policy, the Department of the Environment, Transport, Energy and Communications will be considering between now and end-2006 how to set up a coherent regulatory framework for the various infrastructure sectors and how to increase the independence of the sector-specific regulatory authorities (Federal Communications Commission [ComCom], the postal market regulator, the possible regulator of the electricity market for example). It will be particularly important to weigh up the advantages and disadvantages of outsourcing and of setting up a body for infrastructure regulation rather than separate decision-making committees. The outcome of this analysis will also determine the procedure linked to economic and safety supervisory tasks in other areas.

In principle, it is also possible to determine retroactively whether outsourcing so far has satisfied the recommendations of the ideal typology and whether the right tasks have been outsourced. That said, the Federal Council clearly prefers a forward-looking approach. Attaching tasks and entities to central government retroactively ought to be seen only as an exceptional measure.

### **7.3 Performance of tasks by central Federal Government**

The present report deals mainly with task execution outside central Federal Government, but it should not be forgotten that the bulk of federal tasks will continue to be performed inside Federal Government. In seeking to carry out federal tasks with even greater efficiency and effectiveness, two points need to be taken into consideration.

First, the Federal Council has since 1997 had a new form of administrative management, namely management based on output targets and block appropriations (FLAG). The object of this new approach is to focus central government action more on measurable services and

results, to delegate tasks and responsibilities to the appropriate administrative units, to make administrative management more efficient and to use management instruments with a proven track record in the private sector. Following the positive experiences and the outcome of the December 2001 appraisal, the Federal Council decided to pursue the FLAG reform, and to simplify and gradually extend it. With the aim of strengthening the reform process at federal level, it devised a global strategy and included it in the message of 24 November 2004 concerning the complete revision of the Federal Act on Confederation finances. As of 2007, 23 central federal government administrative units will be managed by the FLAG, meaning that the Federal Council has achieved its strategic objectives for the current term. There are possible ways of increasing efficiency and effectiveness – especially in administrative units which

- provide interdepartmental services with the potential for rationalisation;
- perform a large proportion of rather repetitive operating tasks;
- can clearly attribute their services to inside or outside beneficiaries;
- can clearly define and measure their services.

At the end of 2008, moreover, the Federal Council will be setting out, in its next report to the supervisory committees of the two Chambers, the extension of the FLAG within the federal government in a national and international context.

Secondly, the new accounting model, with the generalised and systematic introduction of charging for services – with its impact on credits – brings greater transparency between administrative units and establishes competition between providers of similar internal services. As part of the development of service charging, it will be important to look precisely at the strategic issues of relaxing the purchase obligation applying to the Confederation's administrative units and of make or buy decisions concerning specific services. Apart from the cost transparency resulting from charging for services, it is also important to promote efficient and competitive service provision within central Federal Government.

#### **7.4 Optimising the management of independent entities**

In future, it will be necessary when granting entities their independence to take into account the principles behind the management of independent entities, as set out in this report, which now serve as a reference for the choice of organisational form.

These guidelines must also be taken into account in ongoing or planned reviews of the provisions of organisation law – e.g. in the case of the revision of the organisation law of the SUVA in connection with the revision of the law on accident insurance, or of that of the Swiss Institute of Comparative Law as part of the reform of government.

Apart from these ongoing reviews, the legal form of the independent entities will have to be adjusted whenever there are no clear regulations with regard to management and control. Most of the biggest discrepancies with the management model principles are to be found in the public institutions (Swiss Federal Institute of Intellectual Property, Swissmedic, etc.), which is why the Federal Council is giving them priority with regard to implementing the management model.

The following three approaches can be envisaged, depending on the adjustments required.

#### 7.4.1 Taking measures without the required legal adjustments

In exercising its role as owner, the Federal Council will immediately make the required adjustments when the principles can be implemented without any legal amendments – subject to the Orders governing departmental organisation being adjusted. If this is not already the case, it will in future base itself on a set of requirements for appointing boards of directors and will take care to ensure that the Confederation's interests are equitably represented; it will exercise caution in delegating or appointing Confederation representatives and will do so only in exceptional and duly justified cases, it being possible to amend orders as required. The principles of the division of roles when preparing cases involving ownership policy can in theory also be implemented within federal government without any legal amendments.

#### 7.4.2 One-off amendments to legislation

Other principles, such as those relating to the number and size of bodies and to their management and control, can be implemented by means of one-off amendments to the organisation laws. The Federal Council will not decide on the timing and context of such amendments until it has been informed of the results of the parliamentary debate on the present report. At present, such amendments are on the agenda in connection, particularly, with the Swiss Federal Institute of Intellectual Property (optimisation of management and audit, review of organisational structures and of the need for a Confederation representative, *inter alia*), Swissmedic (optimisation of its management and audit tools, approval of the regulation on emoluments by the Federal Council) and the Swiss Federal Railways (inclusion in the law on strategic objectives).

#### 7.4.3 Complete overhaul of organisation laws

When the number of amendments, or the importance thereof (change in legal form, for example), requires a comprehensive overhaul of organisation laws or of the organisational structure of an entity, such amendments will be reviewed separately.

In view of the increasing liberalisation of postal markets in Switzerland and abroad, it is important in particular to ascertain whether it is necessary to change the status of Swiss Post from that of a public institution to that of a public limited company. The Department of the Environment, Transport, Energy and Communications is currently considering this issue and, at the same time, looking at the possibility of making the postal market more open. The consultation on the total revision of the Postal Service Act and the Postal Organisation Act is scheduled for 2007.

## **7.5 Other work**

The present report is based on an inventory of selected independent Confederation entities and focuses on a certain number of important management issues. Areas of management not taken into account include staff, pension funds, legal reports and legal protection (regulations governing the legal relations between independent entities and their clients or users). Taking every conceivable management area into consideration would have been outside the scope of this report, in addition to which many of these areas are currently the subject of reforms. The Federal Council will decide what subsequent work should be undertaken once it knows the outcome of the parliamentary debate.