

# Liability of the (voluntary) association executive committee

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## What does liability mean?

In principle, liability means taking responsibility for misconduct that has caused damages. Liability also means taking responsibility for an obligation arising from a loss event, a contract or another legal relationship.

The liability of the association's executive committee is a duty to compensate or make amends for damages arising as a result of an activity within the association, by a member of the association or by a third party that was not carried out with the necessary care. Liability takes the form of compensation for damages and/or lost profits.

### Four big misconceptions about liability in an association:

- "Because the association is pursuing a "good object", it and its governing bodies can never be held liable."
- "Because somebody is working voluntarily for an association, nothing can happen to them."
- "Because the articles of association provide that the association is only liable with its own assets, nobody can be held personally liable."
- "Because legal articles on associations do not stipulate anything about <sup>1</sup> the liability of governing bodies, there is no liability in this regard."

## Preconditions for liability

The following four preconditions must **all** be met for there to be a duty to compensate:

### 1. Damages

Damages must have been incurred in the form of financial loss or qualified emotional pain, i.e. a reduction in assets, increase in debt or loss of profit. Evidence of the damages must be provided by the injured person.

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<sup>1</sup> Articles 60 to 79 of the Swiss Civil Code.

## 2. Breach of a governing body duty or a legally protected right (Property, limb, life)

As much care must be taken in performed assigned tasks as one should be able to expect from a conscientious association executive committee in the same situation. In addition to the legal definitions, the definitions of obligations set out in the association's articles of association and regulations also play a key role. Note: Obligations may be breached both by "action" and "non-action".

## 3. Causal connection between damages and infringement

Damages must have been caused by the breach of an obligation/failure or the harmful event. The injured person must provide proof of this connection

*Examples:*

*A very busy head of tournaments at a sports club forgets to order the gaming licences for the members of the association in time (breach of duty to exercise care). The organisation incurs a fine as a result (damages). The breach of his duty was the cause of the damages.*

*At the end of a show held by a theatre organisation, the chair of the association fires off some flares. One of them flies into the neighbouring building's warehouse, causing it to burn down (breach of the legally protected right of "property") and need to be replaced. The breach of the property right was the cause of the damages.*

## 4. Blame

The liable person must be capable of making rational judgments and have intentionally (the desire to act in a certain way being fully aware of the consequences) or negligibly caused the damages. Those who do not act with the necessary care are acting negligibly. **Important:** Criteria such as lack of specialist knowledge, incompetence or lack of time are irrelevant and not applicable here.

## Liability of the executive committee

The association's executive committee is usually elected by the general meeting for a term of office.<sup>2</sup> Note: Giving up the term of office at an improper time (i.e. at a particularly inopportune moment for the association) can lead to liability if the association can prove that it has incurred damages as a result.<sup>3</sup>

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<sup>2</sup> Article 65 (1) of the Swiss Civil Code.

<sup>3</sup> See Article 404 (2) of the Swiss Code of Obligations.

There are no legal requirements for how an executive committee is to be organised.<sup>4</sup> Generally speaking, the executive committee is a collective body, which means that it acts collaboratively and is jointly liable. The provisions set out in the articles of association and rules of procedure and practices within the association are to be applied. Note: Having different units responsible for different aspects of the association does not result in a release from liability, but the obligation for the other unit heads is limited to general monitoring and oversight.

*Example: An association has failed to pay social security contributions for its employees. The entire executive committee is jointly liable for the damages, not the treasurer alone.*

The executive committee may delegate the management to one of the managers, but this should be provided for in the articles of association and rules of procedure and thus covered. Note: Delegating the management to one of the managers does not release the executive committee from its liability, but limits its obligation to general monitoring and oversight.

By law, any individual executive committee member may represent the association (power of representation).<sup>5</sup> If powers of representation need to be limited, this must be set out in the articles of association or in a valid rule of procedure. To ensure that this limitation applies permanently to third parties, it must be made known externally (e.g. through an entry in the commercial register, by pointing to the relevant provision in the articles of association).

## **Disclaimer and reduction of compensation**

If the general meeting has approved a transaction, the executive committee cannot be deemed to have breached its duties. The same applies to transactions undertaken by the executive committee that have been approved by the general meeting. However, this does not apply to facts that the executive board has intentionally kept quiet.

There is no breach of duties if the injured party consented to the damaging activity (e.g. consent given by an athlete to the risks of a competition).

If the injured person is extensively at fault, the executive committee cannot be held liable. If the injured person is only slightly at fault, the person liable is found to be only slightly negligible or the executive committee term of office was carried out free of charge, the compensation ultimately to be paid may be reduced. Note: Executive committee work being carried out free of charge does not constitute an exemption from liability. However, it will help to reduce the compensation to be paid. This should not be relied upon, however.

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<sup>4</sup> See also <[http://www.vitaminb.ch/static/files/arbeitshilfen/Ressorts\\_im\\_Verein.pdf](http://www.vitaminb.ch/static/files/arbeitshilfen/Ressorts_im_Verein.pdf)>f.

<sup>5</sup> See Article 55(2) of the Swiss Civil Code.

## How big is the risk of being held liable?

If the association itself is damaged, this will rarely result in a complaint. It's rare for one of the other executive committee or association members to complain to the association about a guilty executive committee member, especially because members do not have any financial shares in the association, but still carry the risk of bearing the costs of proceedings. Generally, association members choose other forms of protest: dismissal or stepping down themselves.

The biggest risk concerns personally injured third parties or personally injured association members, accompanied by an inability to pay on the part of the association. Social security is also inflexible<sup>6</sup>: By law, the executive committee is jointly and secondarily liable for social security contributions owed, meaning that it will be held accountable if the association is unable to pay.

The burden of proof for showing that the conditions of liability have been met usually falls with the complainant.<sup>7</sup>

A time limit: The limitation period for claims related to the damaging event is a maximum of 10 years.<sup>8</sup>

### Liability prevention for association members: a checklist

#### Before election

- Do I know the obligations that I, being on the executive committee, will be subject to by law and under the articles of association and rules of procedure of the association?
- Do I have the necessary skills to exercise the duties associated with the position or am I prepared to acquire these skills?
- Do I have enough time to carry out the duties associated with the position?
- How do I rate the other executive committee members in terms of care, time put into the role and skills?
- What is the association's financial situation?

#### During the term of office

- Are we living up to the articles of association and rules of procedure in our day-to-day work?

<sup>6</sup> Article 52 (2) of the Federal Law on Old-age and Survivors' Insurance.

<sup>7</sup> Article 8 of the Swiss Civil Code.

<sup>8</sup> Articles 60 and 127 of the Swiss Code of Obligations.

- Are we making decisions within the executive committee carefully (namely based on sufficient information, in a correct process, without any conflicts of interest among decision makers)? Are decisions by majority votes accepted?
- In an executive committee with different units: Do I know what is happening in the other units? Am I adequately informed?
- If the management is delegated: Is this covered in the articles of association and in rules of procedure (organisational set-up)? Is the executive committee kept adequately informed by management?
- Do we have any employed workers in the association? If yes: Is the association registered as an employer with the relevant OASI body and are social security contributions being paid?
- What is the association's financial situation?
- Are there any major risks of damages being caused by the association, association members or third parties?
- Are certain risks reasonably insurable and, if yes, are the association's insurance policies up to date (public liability, property, transport, vehicle and event insurance, etc.)?
- Are we in the executive committee making the necessary arrangements for limiting risks (security measures)?
- And a recurrent question to be asked on a periodic basis: Am I competent enough and do I have enough time for the position?

**At the end of the term of office/after stepping down:**

- Have I finished off tasks I have started as far as possible?
- Have I communicated my departure sufficiently in advance for a suitable successor to be found?
- Have I carefully handed over my position and tasks to my successor?

**A word about D&O insurance**

D&O insurance covers court (or out-of-court) defence and proceeding costs as well as any payment of damages. Its coverage is subject to many restrictions, however: Mostly the insurer will only pay for incidents that occurred during the term of the policy. The bigger the agreed coverage amount, the higher the premiums (and, despite this, there are still many exclusions).

Taking out D&O insurance must be approved by the general meeting in each case and may not be decided solely by the executive committee. Only a few insurance companies offer

D&O insurance for associations, and will not offer it in particular if the association is not entered in the commercial register.

Another option for releasing liability is to include an indemnity clause in the articles of association. In such a clause, the association agrees to cover the costs of proceedings and payment of damages if the executive committee is sued by association members or third parties. However, it should provide for this; at the most, for slight negligence. And in principle such a clause is only useful to an executive committee for as long as the association itself is solvent.

**The conclusion:**

If an executive committee runs its association conscientiously and carefully, the risk of liability is not big. There is no cure-all solution for undoing negligent behaviour or action.

**Further literature**

The principles of the association as a "legal person" are set out in Articles 60 to 79 of the Swiss Civil Code. In addition, other legal articles also apply to associations.

With regard to liability, these include in particular the provisions on the governing bodies of a legal person (Article 55 of the Swiss Civil Code), the provision on liability for OASI contributions (Article 52(2) of the Federal Law on Old-age and Survivors' Insurance), the provisions on unlawful acts (Articles 41 to 61 of the Swiss Code of Obligations) and the provisions from individual contractual relationships (general contractual law, Article 97 et seq. of the Swiss Code of Obligations; public procurement, Article 394 et seq.; employment contract law, Article 319 et seq. of the Swiss Code of Obligations).

Since the law gives a lot of leeway in the area of association organisation (i.e. not much mandatory statutory law), the articles of association and other legal documents such as the rules of procedure or implementation provisions of the association, as well as daily practices within the association, are of great importance (see Article 63 of the Swiss Civil Code).

For more detailed (legal) information on the topic of liability within voluntary association executive committees, please see the following work: Purtschert, Tina: Die zivilrechtliche Verantwortlichkeit des ehrenamtlichen Vereinsvorstandes ("The civil liability of a voluntary association executive committee", Dissertation at University of Zurich, Zurich/Basel/Geneve 2012

Work aid on the legal principles of an association

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