



**LIABILITY OF LOCAL ELECTED REPRESENTATIVES  
FOR ACTS OR OMISSIONS  
IN THE COURSE OF THEIR DUTIES**

Local and regional authorities in Europe, No. 67



# **LIABILITY OF LOCAL ELECTED REPRESENTATIVES FOR ACTS OR OMISSIONS IN THE COURSE OF THEIR DUTIES**

Report by the Steering Committee on Local and Regional Democracy (CDLR)  
prepared with the collaboration of Maître Philippe Petit

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## FOREWORD

This publication contains:

- Recommendation No. R (99) 8 of the Committee of Ministers to member states on the financial liability of local elected representatives for acts or omissions in the course of their duties, and
- the report of the Steering Committee on Local and Regional Democracy (CDLR) on the liability of local elected representatives for acts or omissions in the course of their duties.

The CDLR study focuses on the four main types of liability arising from the performance of elective duties: civil liability, accounting liability, criminal liability and political liability. After having dealt with each of these types of liability separately, the CDLR endeavours to take a comprehensive look at the problem and to make the necessary connections between the different types of liability. The aim is to ascertain whether the existing provisions on the four types of liability can be re-worked into a coherent set of rules, allowing the protection of citizens' rights, their confidence in their elected representatives and the legal security of the latter.

Recommendation No. R (99) 8 and the guidelines proposed to member states are the result of this work in so far as financial liability is concerned. This recommendation was prepared by the CDLR on the basis of the conclusions of its report and takes account of the point of view expressed by the Congress of Local and Regional Authorities of Europe (CLRAE).



**RECOMMENDATION NO. R (99) 8 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE FINANCIAL LIABILITY OF LOCAL ELECTED REPRESENTATIVES FOR ACTS OR OMISSIONS IN THE COURSE OF THEIR DUTIES**

*(Adopted by the Committee of Ministers on 17 March 1999 at the 664th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage, and facilitating their economic and social progress;

Considering that active participation by citizens in the management of local public affairs, *inter alia* by taking on local elective functions, is a prerequisite for effective local democracy and that, in order to ensure such participation, it is essential to preserve both citizens' confidence in their elected representatives and the legal security of the latter;

Considering that the system of legal liability of local elected representatives consequently has a particular influence on the smooth operation of local and regional democracy;

Considering that, when establishing such a system, account must be taken at the same time of the legitimate interests of citizens, of the state, of the different territorial authorities and of elected representatives;

Considering that local elected representatives must be fully accountable to citizens and that legal liability of local elected representatives is an important aspect of more effective local democracy;

Considering, nonetheless, that the implementation of such liability raises legitimate concerns on the part of local elected representatives and that the adoption of specific provisions concerning their financial liability may be justified in view of their increasingly complex duties and their elective status;

Having regard to the report of the Steering Committee on Local and Regional Democracy (CDLR) on the liability of local elected representatives for acts or omissions in the course of their duties;

Having regard to the opinion of the Congress of Local and Regional Authorities of Europe on this matter (opinion 9 (1998)),

Recommends that the governments of the member states:

1. review the legal and administrative framework for the financial liability of local elected representatives, taking into account the principles and the proposals set out in the guidelines appended to this recommendation;
2. involve local elected representatives in the considerations about reforms to be undertaken in this area and on the procedure for implementing such reforms.

Appendix to Recommendation No. R (99) 8

*Guidelines concerning the financial liability of local elected representatives for acts or omissions in the course of their duties*

### **Definitions**

For the purpose of this recommendation:

- a. local elected representatives are those holding a direct or indirect electoral mandate within local authority assemblies (including those at intermediate level) or within their executive organs;
- b. the financial liability of local elected representatives refers to their obligation to repair the unjustified damage caused to an individual or to a legal person, including the local authority;
- c. damage is unjustified where, according to the law, the injured person does not have to bear it and can, therefore, claim for compensation.

### **Aims of the following guidelines**

The following guidelines aim essentially to ensure that:

- a. anyone having suffered unjustified damage as a result of an act or omission of local elected representatives receives full and rapid compensation;
- b. in general, action against local elected representatives is excluded where they acted in good faith;
- c. appropriate measures are taken, where necessary, to reduce the risks of financial liability encountered by local elected representatives.

## **I. Scope and application of the financial liability of local authorities and local elected representatives**

### *1. The injured person's right to sue and right to compensation*

The persons who suffered unjustified damage as the result of an act or omission of local elected representatives should always have the right to sue the local authority in question for compensation. In this framework, compensation should not be dependent on proof of misconduct on the part of the local elected representatives who may be individually responsible.

Given that the injured person can claim for compensation to the local authority, the possibility of direct action against local elected representatives should be either excluded or confined to cases of serious negligence or deliberate tortious intent on their part.

2. *Liability of elected representatives for damage caused to their local authorities*

Elected representatives' liability for damage caused to their local authorities should in general be confined to cases of serious negligence or deliberate tortious intent.

Where the law lays down no such restriction, the body that has the power to sue the liable elected representatives for compensation should be able to choose not to exercise its right to sue. This could be the case, for example, in the event of slight negligence, or where the good faith of the elected representatives concerned is not at issue and where, having regard to the circumstances, the latter have exercised care and attention.

3. *Personal liability for collegiate decisions taken in public<sup>1</sup>*

In the case of unlawful decisions taken by a collegiate body deliberating in public, it might be advisable to consider the appropriateness of excluding the personal liability of elected representatives having formally justified their opposition to these decisions, provided it is possible to know how each member of the collegiate body voted.

4. *Pecuniary administrative sanctions*

The application of any kind of automatic pecuniary sanction mechanism to elected representatives should be excluded; such sanctions should only be imposed following an adversarial hearing, either judicial or opening a right to judicial proceedings, and the finding of serious negligence or deliberate tortious intent.

5. *Judicial specialisation*

In view of the increasing complexity and technicality of the activities carried out by local authorities and the specific nature of the work of local elected representatives, it might be advisable to set up specialised sections, within the civil or administrative courts, competent to deal with the financial liability of elected representatives, and specific training should be provided for judges having to rule on such cases.

6. *Preliminary opinions from independent specialist bodies*

An alternative or adjunct to judicial specialisation might be to set up independent specialist bodies whose opinion should or could be sought by judges before ruling on the conduct of the elected representatives concerned and on the legality of the impugned decisions at issue and which elected representatives could have consulted beforehand.

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<sup>1</sup> When adopting this decision, the Representative of France indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, she reserved the right for her government to comply or not with paragraph I.3 of the Appendix to the recommendation.

## **II. Measures to reduce the risk of unintentional fault**

### *1. Simplifying the body of regulations*

Wherever possible, the number of laws, regulations and other rules that local elected representatives are required to apply, particularly ministerial decrees and circulars, should be reduced; the legislation in force in local authorities' main spheres of activity should be presented as consolidated legislation.

### *2. Informing and training local elected representatives*

Initiatives by local authorities aimed at establishing modern systems for the collection, organisation, analysis and processing of information concerning statutes and other prescriptive texts referring to local authorities should be encouraged and supported by all appropriate means.

Local authorities should be helped to improve training for local elected representatives, particularly with a view to familiarising those representatives with the legal texts they have to apply and the rules governing their liability in the event of infringement of these texts.

Steps taken by national associations of local authorities to improve training for local elected representatives with regard to the system of liability applicable to them and the relevant legal texts should be encouraged and supported by all appropriate means.

### *3. Internal legal controls*

Provision should be made to allow local authorities to organise internal legal control mechanisms, encourage their actual implementation and evaluate their performance at regular intervals so that, where necessary, measures can be taken to make them more effective.

## **III. Financial liability insurance for acts or omissions by local elected representatives**

### *1. Insurance for local authorities*

Local authorities should be allowed to take out insurance covering their financial liabilities.

### *2. Insurance for elected representatives*

Local authorities should be allowed to take out pecuniary liability insurance on behalf of their elected representatives for slight and unintentional negligence, when this kind of liability may be engaged.

### *3. Mutual insurance*

Local authorities or their elected representatives should be allowed to set up mutual insurance bodies to cover the risks mentioned above. Central government authorities could also encourage the setting up of such bodies by all appropriate means.

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prepared with the collaboration of Maître Philippe Petit





## INTRODUCTION

### 1. The question of the liability of local elected representatives

In Europe, the liability of local public authorities, a feature of states governed by the rule of law, is increasing in scope and magnitude with the passage of time. It embodies a general application of the principle enshrined in Article XV of the French Declaration of the Rights of Man and of Citizens of 26 August 1789:

“Society has the right to call on any public official to render an account of his administrative action.”

The balance now seems to be shifting in favour of the contemporary requirements of safeguards and responsibilities attaching to individuals, as opposed to the initial position of protection and independence of the public authorities founded on the concept of the public interest and the prerogatives of public authority attaching to society.

This general phenomenon affects in particular those involved in local public administration who are witnessing a process whereby their liability is widening so as to embrace not only acts but also omissions and not only action by them personally but also action by their fellow-workers and not only intentional actions but also lack of care.

As a counterpart or a counterbalance to the strengthening of local authorities, this greater liability varies of course according to the type of territorial organisation of states, that is according to whether they are federal or unitary states decentralised or centralised states.

This liability, shared between the public community (an abstract entity) and local elected representatives (natural persons), is however tending towards personalisation of the proceedings taken, which reflects a need at the present time to see public authority embodied in an individual and a demand from the public for a guilty party to be identified in cases where there is any risk, harm or victim.

This marked trend towards accountability derives, on the one hand, from the decline in the prerogatives of public authority and, on the other, from citizens' greater awareness of their rights against arbitrary actions. This trend is therefore an element of a more responsible and effective local democracy.

However, it raises fairly legitimate anxieties among the local representatives and, in certain countries, it seems it has already reached limits connected to their effectiveness and legal security.

In particular, as regards authorities founded on universal suffrage, whose legitimacy derives from elections, the implementation of their responsibility raises specific questions. The varied responses of the different states to this particular set of problems, which touch upon sovereignty and are associated in most cases with the Constitution itself, reflect both the history and the culture of the nations concerned. These responses result in fact from the sometimes difficult search for a fair balance in the protection of the various interests involved.

## **2. Interests which the rules on the liability of local elected representatives must reconcile**

The interests that need to be taken into account when establishing rules on the liability of local elected representatives are inherent in the concept of local democracy and the principle of the rule of law. These are the interests of the citizen (as a member of the public who has suffered harm, a taxpayer or an elector), of the elected representatives, of the local community as a whole and of the state.

### ***a. Victim's interest in obtaining compensation for damage suffered***

In all European states, the principle of *neminem laedere* applies to public authorities, that is they have a duty to pay compensation for any damage caused to citizens whenever their actions unlawfully infringe upon the latter's rights. There are nevertheless certain differences of opinion or even uncertainty about how this principle should work in practice. Issues such as the quantification of damage, the courts considered competent to deal with such cases, the procedures which should be followed and the amount of time which can elapse between the occurrence of the damage and its compensation are all open to debate, and the chosen solutions do not always meet with public approval.

### ***b. General interest in observance of the law and the maintenance of public order in society***

The state has a duty to ensure compliance with the rule of law and, more specifically, the observance of criminal laws under all circumstances. Because of the duties that they perform, any deviant behaviour on the part of local representatives is unquestionably particularly serious and the public demands that the state shows the utmost severity when dealing with such cases.

Society at large rightly insists that those involved in public administration not only obey the law but also observe a more stringent code of conduct in order to prevent the decision-making process degenerating from pursuit of the public interest into mere protection of vested interests or even the quest for personal gain, be it direct or indirect.

### ***c. Interest of citizens, the community and the state in the proper management of public funds***

The effective operation of local self-government is the essential question in which the interests of all the parties meet: the citizens, the local community, the state and the local elected representatives are all concerned in it.

Public property is the property of the taxpayers, who are entitled to call to account those who manage this property. Local elected representatives are chosen by their fellow citizens more for the purpose of managing than issuing rules and regulations: their managerial skills, like their honesty, are key factors in judging their fitness to assume the burden of public office which has been entrusted to them by the community they govern. The confidence of the citizens in their elected representatives and in their skills represents one of the basic elements of the good functioning of local democracy.

Holding them liable, therefore, is a way of punishing not only embezzlers but also those who squander public funds. The state, as representative and protector of the general interest of the community as a whole, plays a key role here, in particular by introducing accounting and financial management control systems.

***d. Elected representatives' interest in clear rules governing their personal liability and in not being accountable for failures of the system***

Elected representatives must enjoy legal certainty in the same way as any other citizen. They must be capable of ascertaining the obligations entailed in agreeing to exercise a mandate in the interest of the community. Their responsibilities must be distinctly defined, by a clear, stable and as simple as possible legal framework; they must not be made scapegoats for failures which are imputable to the system rather than to any personal failure.

***e. Electorate's interest in having elected representatives who can perform their duties without being paralysed by the threat of actions for damages***

A local elected representative who constantly has the threat of litigation hanging over him/her may, through failure to act, waste just as much public money as someone who is incompetent or dishonest. Good government thus requires that representatives of the local community be given not just the funds needed to carry out their duties but also a legislative framework that enables them to take the necessary managerial decisions in a responsible yet effective manner.

### **3. Definition of the scope of the study**

This study is based on information concerning fourteen Council of Europe member states. It might not cover every feature of every European state in this field, but the situations described are fairly representative of the main forms of liability to which local elected representatives in Europe are subject, the procedures for enforcing this liability and the problems encountered.

The report is focused mainly on the local elected representatives; however, its conclusions may also be applied, *mutatis mutandis*, to elected representatives of other territorial authorities of similar status and created by a process of administrative decentralisation, hence with no law-making powers.

The chosen title of this report calls for a few clarifications: First as regards the people in question – that is the local elected representatives – for it is important to distinguish between this category and the wider category of local representatives in general; and secondly as regards the “liability” referred to in the study.

***a. Distinction between “local elected representatives” and “local representatives”***

The term “local elected representative” refers to persons elected to public office at local level: this refers to members of local authority councils, who may also be vested with executive functions by the assemblies to which they belong, and also, in some countries, to directly elected mayors (or heads of local executives).

The meaning of the term “local representative” is wider than that of local elected representative, as it includes any holder of public office at local level. Thus, all the members of the decision-making bodies and executive organs of local authorities, whether elected (directly or indirectly) or appointed by another method are local representatives.

Even though this report deals specifically with elected representatives, the liability of non-elected local representatives may be addressed in much the same way. It can thus be said that, in general, the analysis and findings presented in the report apply equally to members of local executive bodies that are appointed rather than elected.

It is worth remembering, however, that for non-elected representatives, the issue of political liability is to be dealt with in somewhat different terms.

***b. The type of “liability” referred to in the study***

The “liability” to which local elected representatives are subject does not form a coherent conceptual whole because it is the product of several “liabilities” whose forms and intensity vary not only according to the interest being protected, but also according to the position of those concerned in relation to one another, the powers exercised, the nature of the harm liable to be caused and the character and gravity of any fault which may be punished (although fault is not always a requirement).

It will be observed that the events that give rise to the liability considered in this report are “acts or omissions of local elected representatives in the course of their duties”. The report is not concerned, therefore, with any liability (most notably civil and criminal) which elected representatives, in the same way as any citizen, may incur in their private lives.

In all of the countries looked at, one finds four main types of liability arising from the performance of elective duties: civil liability, accounting liability, criminal liability and political liability, each with its own rules. In order to give a clearer picture of the specific features of these, the first part of the report deals with each of these types of liability separately.

The various types of liability cannot be enforced in total isolation from one another. The second part of the report thus endeavours to take a comprehensive look at the problem, to make the necessary connections between the different types of liability and, finally, to ascertain whether the existing provisions on the four types of liability can be re-worked into a coherent set of rules.

In choosing which issues to focus on, the report has taken into account the work already done by the CDLR on subjects related to the liability of elected representatives, particularly those concerning the status of local elected representatives and the supervision of local authority activities.<sup>1</sup> The report has also taken into account the work done within the Council of Europe on raising standards in public life, including at local level.

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<sup>1</sup> See the CDLR reports on: *Status and working conditions of local and regional elected representatives* (study series “Local and Regional Authorities in Europe”, No. 46) and *Supervision and auditing of local authorities’ action* (study series “Local and Regional Authorities in Europe”, No. 66).

## **I. DIFFERENT TYPES OF LIABILITY**

### **A. The civil liability of local elected representatives**

It needs to be clear from the outset that the type of civil liability considered here is that which flows from a unlawful act or omission that has caused unwarranted damage. This category must be clearly distinguished from a public authority's obligation to compensate, wholly or in part, for special or undue damage that it causes to individuals, in a wholly legitimate way, in the public interest.<sup>1</sup>

#### **1. The obligation to compensate for wrongful damage**

In general, civil liability is incurred by personal fault; however, it may also be incurred by an act of an auxiliary, or even when there is no actual fault, in which case it is known as objective liability (liability without fault). When liability is incurred, it gives rise to an obligation to compensate the victim.

In all states governed by the rule of law, public authorities are liable if they fail to carry out their legal obligations, whether in making a decision (including exercising a regulatory function) or in implementing it. It follows that a citizen who has been unlawfully wronged is entitled to compensation in the event of a negligent act or omission by a public official, including the elected representatives of local authorities.

In several cases, this right to compensation is explicitly guaranteed by the constitution, for example in Italy, Slovakia and Spain. However, it can be held more generally to derive, at least implicitly, from constitutional or legislative provisions guaranteeing all citizens the right to challenge before a court the decisions of public authorities that infringe their rights.

Moreover, this right to compensation is often based not simply on provisions concerning relations between public authorities and citizens but also on the general rules governing liability for unlawful acts enshrined in the Civil Code.

Provided its application is not ruled out by clauses creating an exception, this additional legal ground allows proceedings to be brought against public officials liable for wrongful damage and thus provides victims with the opportunity to claim appropriate compensation from them.

#### **2. The principle of the liability of local authorities and its consequences for the imputability of the damage to elected representatives**

When a local authority body (or its administration) incurs liability, even where it is possible to bring proceedings directly against the elected representatives (or public officials) who are liable, there is a tendency to prefer bringing proceedings directly against the authority in its capacity as a public-law corporation.

This tendency results from a concern to protect not only elected representatives and public officials but also aggrieved citizens; in that the local authority is likely to be solvent, and the citizen will not be required to prove any individual liability. As far as elected representatives are concerned, the authority will provide a protective shield. Nevertheless, elected representatives are not protected from all liability because, as a general rule, an authority that has compensated the victim may bring an action for indemnity against an elected representative against whom proceedings have not been brought directly.

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<sup>1</sup> Typical cases of compensation for lawful acts may arise in the field of compulsory purchase for a public interest or in the field of urban planning.

Depending upon the country, the bringing of such an action for indemnity may require that the fault giving rise to the damage must be particularly serious, intentional and committed with criminal intent. States take differing views with regard to the obligations of locally elected representatives. In some countries, such representatives, like civil servants, are not public officials liable to incur direct personal liability on a quasi-professional basis, particularly since the local executive is not in all cases an elected representative but is often a public servant.

In a few cases, there are significant differences between the liability of members of local councils and that of the executive. Lastly, collegiate liability, when applicable, does not entirely preclude the possibility of individual (and, if appropriate, shared) liability of the elected representatives who belong to the body.

Table 1 summarises the situation of elected representatives with regard to civil liability and accountability for fault in the states under review. It is to be noted that in Switzerland, the liability of local elected representatives is regulated by legislation enacted by the cantons.

**Table 1: Civil liability of local elected representatives**

Country	Direct action against administration	Liability of elected representatives
<b>Austria</b>		An elected representative is personally liable only in the case of a criminal offence.
<b>Belgium</b>	The municipality is directly liable for the acts performed by its bodies in the course of their duties and within the limits of their competencies. A straightforward fault is enough to establish this liability.	According to the Court of Cassation, direct liability of municipalities can co-exist with the personal liability of the body, especially in the case of <i>mens rea</i> and serious fault. In practice, recourse action only happens in the case of exceptionally serious fault.
<b>France</b>	The administration, at every level (municipal, departmental, regional and state) is directly liable for damage caused, as a result of a fault, to third parties by its elected representatives.	The liability of elected representatives (and agents) may be incurred directly in the event of serious wrongful acts separable from the performance of duties. The trend, notwithstanding this direct civil liability of elected representatives, is to bring an action directly against the authority and the latter may then, if appropriate, bring a recourse action against the elected representative in question.
<b>Germany</b>	Actions by a third party, injured by a faulty act or omission, to establish liability are brought against the local authority on the basis of the Civil Code.	On the basis of Article 34 of the Federal Constitution, the breach, by the head of the executive (mayor for municipalities) of an “obligation relating to duties” deriving from an intentional wrongful act or gross negligence will confer on the administration a right to bring an action by way of recourse. This right of recourse is available regardless of the status of the head of the executive: whether s/he was elected directly or indirectly. Such right of recourse against the elected members of the council must be expressly provided for by the law of the <i>Länder</i> concerning the basis of local government ( <i>Kommunalverfassungen</i> ).
<b>Italy</b>	The administration is liable for wrongful damage caused to a third party by civil servants and public agents (elected representatives included) in the course of their duties, jointly with the person responsible. The third party can bring action against the administration, against the agent responsible or against both.	According to Art. 28 of the Constitution, civil servants and agents (elected representatives included) of the state and public communities are personally liable for acts which violate individual rights. The administration has a right of recourse against the person responsible.

<b>Luxembourg</b>	The administration is directly liable for wrongful damage caused to a third party by elected representatives.	The activity of collegiate bodies engenders only joint liability. Therefore, a burgomaster is liable for his/her personal activity but within the college of burgomasters and aldermen (the municipal executive body) the liability is collegiate: all the members of this body are jointly liable whatever their opinion or vote on the condemned decision.
<b>Portugal</b>	The Constitution (Article 22) and the Law on local autonomy (Article 90) provide for the joint liability of the administration for any damage caused to a third party by public agents (elected representatives included) in the course of their duties. The third party can bring action against the administration alone, against the agent responsible or against both.	The liability of the agent or body that incurs the fault is established. The administration has a right of recourse against the responsible person or body except if: <ul style="list-style-type: none"> <li>– the fault occurred in the performance of duties;</li> <li>– it was a straightforward fault;</li> <li>– the person responsible for the damage acted on the basis of compulsory instructions that s/he previously contested or which were confirmed to him/her in writing.</li> </ul>
<b>Romania</b>		Local elected representatives incur personal liability for their actions. According to the law on local public administration, local councillors are jointly liable for council decisions they pass.
<b>Slovakia</b>	The administration is directly answerable for damage caused, as a result of a fault, to third parties by its elected representatives.	
<b>Spain</b>	The administration is directly and objectively liable, without the need to seek out the culprit or define the fault, provided that the damage is real, quantifiable, identifiable and unlawful.	Elected representatives incur personal liability for their decisions, even in the case of a collegiate decision. “Members who voted in favour of decisions of local authorities shall be deemed to be liable for them” (Article 78-2, LRBRC).The rule, notwithstanding this direct civil liability of elected representatives, is that an action is brought directly against the authority and the latter may then, if appropriate, bring an action enforcing a right of recourse against the elected representative in question.
<b>Sweden</b>	According to the Law on Civil Infringements (272/1972), both the state and municipalities are liable for damage arising from an unlawful act or omission committed in the exercise of public authority.	Collegiate bodies are liable for both wrongful actions and omissions. Elected representatives are excluded from the category of “civil servants or public agents” who may incur personal liability; thus, civil liability on the part of elected representatives is exceptional.



<b>Switzerland</b>	In all cantons but one, local authorities are directly liable for the wrongful damage caused to third parties by their organs in the course of their duties. In about one half of all cantons the liability is linked to the existence of damage; in the other cantons a fault must be proved.	Where the municipality pays compensation for damage, it has a right of recourse against the official who caused the same, intentionally or through gross negligence. This right of recourse is thus available only in a case of gross negligence or intentional wrongful act.
<b>Turkey</b>	The administration is directly liable for the wrongful damage caused to third parties by elected representatives.	The elected representative is personally liable. The rule, notwithstanding this direct civil liability of elected representatives, is that an action is brought directly against the authority and the latter then, if appropriate, may bring an action enforcing a right of recourse against the elected representative in question.
<b>United Kingdom</b>	The administration is directly liable for the wrongful damage caused to third parties by a public agent (elected representatives included) in the course of his/her duties.	Local authorities bear collegiate liability for their own wrongful acts or omissions; no elected representative (or public agent) can be the subject of proceedings except in cases of blatant bad faith or gross negligence regarding decisions taken by local authorities.

## **B. The accounting liability of local elected representatives**

The principle here is different from civil liability, because it is not intended to protect the individual citizen, but the taxpayer and the community itself: The wrongful behaviour of the elected representative who causes damage to the latter sections of society generates the obligation to compensate. Moreover, this form of liability can also involve sanctions against the elected representative.

In the United Kingdom, local elected representatives may incur personal liability in the event of illegal expenditure for which they have voted. “Surcharging”, which dates back to the fifteenth century and is covered by the Local Government Finance Act 1982, is rarely resorted to (on average five cases a year) but may involve administrative and/or judicial action against the elected members of local councils. Various reform measures have been recommended involving compensation, disqualification from office and the introduction of a new offence of misuse of public office (bordering on a criminal offence).

In France, a local elected representative never operates as an accountant in principle and must not directly or indirectly handle public funds, that being a matter reserved only for official accountants. If he meddles in the handling of such funds, he becomes a *de facto* accountant and, accordingly, must render an account of his activities to the Regional Audit Chamber (and to the Court of Auditors on appeal). In the event of irregularities and the failure to secure a discharge, the accountant is declared to be in unlawful possession of public funds: he must pay back any sums of which he cannot justify the use.

Since the law of 29 January 1993 (the “Sapin Law”), elected representatives have been accountable to the Budgetary and Financial Discipline Court (CDBF) in the event of *de facto* improper handling of funds or refusal to implement a judicial decision or for unlawful advantages granted to others.

In Italy, the compensation for damage caused to communities by administrators or civil servants in the course of their duties has acquired a certain importance, as much as an external sanction for administrators’ and top managers’ liability resulting from their management supervision.

As in France, accounting liability belongs mainly to the treasurer and other accountants who handle public funds or are in charge of the management of municipal property; this liability extends to all public agents who are concerned in such handling or management.

The management report is checked by the Court of Auditors; if illegalities are found, an action in liability is automatically started. For this purpose, an *ad hoc* body of the public prosecution service is attached to the court with power to seek compensation for damage falling within the jurisdiction of the court.

If a collegiate body is responsible for illegalities, the liability falls only on the members who voted in favour of the illegal act. If the damage results from the behaviour of several persons, the Court of Auditors pronounces on the partial liability of every individual; nevertheless, each person is subsidiarily answerable for the damage produced by the others.

In Belgium, the accounting liability system is also founded on the principle that, in general, only the municipal collector may directly and personally commit his or her financial liability.

In Germany, the liability of local elected representatives towards their community is governed by legal provisions enacted by each *Land* and it may exist only if it is specifically stipulated by the local government law of the respective *Land*. For example, the local government law of North Rhine-Westphalia, Bavaria, Mecklenburg-Vorpommern, Thuringia and that of Brandenburg provide for liability of councillors who have failed to accomplish their duties deliberately or due to gross negligence; or who have taken part in a vote in which they knew that they could not lawfully take part; or have authorised illegal expenditure.

As for executive bodies, their liability is governed by the *Länder's* acts regarding civil servants (which are to be in accordance with a federal framework law). In general, they are answerable for damage resulting from intentional actions or gross negligence. The executive bodies also include the chief executive officers of the local authorities, that is mayors and heads of districts (*Landräte*) irrespective of whether they are elected directly or indirectly.

In Sweden, the financial liability of local elected representatives is very limited and must be enforced within a maximum of one year following the refusal of the deliberative assembly to grant a discharge from liability. The assembly may theoretically prosecute an elected representative for negligent administration; such proceedings are very uncertain in the case of financial losses arising in the course of duties. Thus, only internal proceedings involving an investigation and a penalty are hypothetically possible.

In Spain, the local authorities themselves may take proceedings against any local elected representatives who have engaged in fraud detrimental to the community.

According to the framework law relating to the Court of Auditors, local elected representatives and public agents have to compensate any prejudice suffered by the community because of the former's illegal acts or omissions. This liability may be direct (and therefore a shared and full liability) or subsidiary (hence a possible and limited liability).

Moreover, every individual who is bound to issue, justify or approve accounts and does not duly fulfil these obligations is formally warned by the Court of Auditors and must compensate for the respective damage. Coercive sanctions are available, and where appropriate the matter may be placed in the hands of the public prosecutor where there is an offence of non-compliance.

This procedure of transferring cases to the public prosecutor is also found in France, where it is applied more and more systematically.

In Portugal, local elected representatives and public agents must (directly or indirectly as the case may be) compensate for damage they inflict on the community. The fault is evaluated according to circumstances and the Court of Auditors may decide to set a limit to the amount to be paid by the accountable elected representative.

In the most serious cases, provided for by law, the Court of Auditors may decide fines, the amount of which varies according to whether there was intentional fault or negligence.

In Turkey, elected representatives are accountable for any damage to public property caused by an illegal act and must compensate for it. If the act implied malice, the consequences are more serious.

In Romania, the Jurisdictional College of the Court of Auditors sets fines for infringement of the law and the amount to be paid by elected representatives to the community for damage caused. This college may impose restrictive measures on the property of convicted persons. These measures will be implemented by the territorial bodies of the Ministry of Finance.

## **C. The criminal liability of local elected representatives**

### **1. Basis and general pattern of development**

Criminal liability differs from civil liability in that the interest involved is not merely that of the citizen or the taxpayer but that of society, that is the public interest and respect for public order and the law.

In contrast to civil liability, its basis is therefore first and foremost the existence of misconduct and not merely of damage. The misconduct must, in order to give rise to criminal liability, be specific and covered by legislation, in accordance with the general principle whereby offences and punishments must be strictly defined by law.

Most of the provisions which constitute the legal basis for the criminal liability of elected representatives are to be found in the criminal codes of the countries concerned, which usually contain sections on offences specific to public officials. Nevertheless the legislation relating to certain sectors, in particular protection of the environment and public health, provides for the criminal liability of elected representatives, particularly with regard to the misuse of their law-enforcement powers.

Whilst a criminal offence usually implies clear fraudulent intent (for example Article 121-3 of the French Criminal Code: “there can be no crime or offence without an intent to commit the same”), serious negligence may also be the subject of legal proceedings, even if there was no malicious intent.

In most countries, criminal proceedings against elected representatives, which had long been mainly concerned with dishonest acts, have been extended to include omissions, blatant lack of care, and negligence. It would seem from this development that the criminal liability of elected representatives in general, and of local elected representatives in particular, essentially meets the twofold need:

- on the one hand, to punish attempts by elected representatives to secure financial or other advantages for themselves or for a third party, so as to safeguard moral standards in politics;
- on the other hand, to punish conduct which prevents the authorities from functioning properly in terms of impartiality, equity or efficiency, to such an extent that their activities are no longer – or no longer appear to be – compatible with the public interest, which all public authorities have a duty to defend.

In view of the above, and in accordance with the principle that criminal liability primarily concerns individuals, it is unusual for the authority itself to be prosecuted directly (except in France since the 1994 reform of the Criminal Code, whereby, under Article 121-2, legal entities, including territorial authorities, other than the state can be held criminally liable in expressly defined circumstances).

In some cases, however, all of the members of a collegiate body may be held liable for the decisions of that body as well as for the actions of a subordinate.

There is a whole range of penalties, which vary according to the nature and gravity of the criminal offence concerned, from the straightforward pecuniary penalty of a fine (in which case there is some similarity with civil liability) to the penalty of deprivation of freedom (which is specific to ordinary criminal law), and to removal and disqualification from office (here there are closer similarities with political liability).

The following paragraphs present, with the help of tables, the main offences involving elected representatives, the types of conduct which incur their criminal liability, including the circumstances which may reduce or increase such liability, and the corresponding penalties.

## 2. Economic offences

Apart from terminological differences, there is a clear resemblance in the definitions of offences concerning circumstances in which elected representatives take advantage of their position to obtain financial advantages for themselves or for third parties. The most common examples of such offences are:

- *interference* (or the illegal acquisition of interests), that is acting in situations in which their own interests are directly or indirectly involved; this offence may be punished even if the conflict of interest does not result in an actual advantage;
- *insider dealing*, that is taking advantage of information that they possess by virtue of their position;
- *forgery* or the *use of forged documents* with intent to defraud, that is altering the content of a document and/or the use of such a document that has been altered;
- *trading in influence*, that is exerting, or trying to exert, an improper influence over decision-making, and accepting any advantage in consideration of such an influence (whether really existing and effective or not);
- *embezzlement* (or misappropriation of public funds), that is appropriating or using for their own private purposes either assets they have been given to perform their duties or funds for which they are responsible;
- *passive corruption*, that is accepting a favour, whether for the purpose of performing their duties properly or otherwise;
- *extortion*, that is demanding a favour whether for the purpose of performing their duties properly or otherwise.

Table 2 illustrates the rules concerning these offences in the countries examined. The meaning of the abbreviations used is explained in the key that follows it.

Table 2: Criminal liability of local elected representatives – economic offences

Country	Insider dealing	Interference/ Acquisition of interests	Forgery or use of forged documents	Trading in influence	Embezzlement/ misappropriation of public funds	Corruption	Extortion
Belgium (Walloon region)		<b>gMI</b> <b>I:</b> 3 months-2 years <b>F:</b> 3 000 BEC	<b>sMI</b> <b>I:</b> 10-15 years penal servitude <b>F:</b> 2 000 BEC		Law: <b>gMI</b> ; accepted legal opinion: <b>sMI</b> <b>I:</b> 1-6 months <b>F:</b> 1 000 BEC	<b>gMI</b> <b>I:</b> 8 days-6 months or 1 month-1 year <b>F:</b> 500 or 1 000 BEC	<b>gMI</b> <b>I:</b> 6 months-5 years <b>F:</b> 1 000 BEC
France	<b>gMI</b> <b>I:</b> up to 2 years <b>F:</b> 10 000 000 FF (between one and ten times the profit obtained)	<b>gMI</b> <b>I:</b> up to 5 years <b>F:</b> 500 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision	<b>gMI</b> <b>I:</b> up to 7 years, or 15 years for forgery of public documents <b>F:</b> 700 000 FF, or 1 500 000 FF for forgery of public documents <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in a professional or social activity; – disqualification from entering into public contracts; – confiscation of the object used in, intended to be used in, or resulting from, the offence	<b>gMI</b> <b>I:</b> up to 10 years <b>F:</b> 1 000 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision	<b>gMI</b> <b>I:</b> up to 10 years <b>F:</b> 100 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision	<b>gMI</b> <b>I:</b> up to 10 years <b>F:</b> 100 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision	<b>I:</b> up to 5 years <b>F:</b> 500 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision

<p><b>Germany</b></p>			<p><i>a. Forgery of documents</i>  <b>I:</b> up to 5 years or fine (6 months-10 years in very severe cases)  <i>b. Falsification of technical records and statistics, suppression of documents, tampering with boundary markers</i>  <b>I:</b> up to 5 years or fine  <i>c. Indirect false certification</i>  <b>I:</b> up to 3 years or fine (if the aim was to obtain a pecuniary benefit or to harm another person, 3 months-5 years)  <i>d. Alteration of official ID</i>  <b>I:</b> up to 3 years or fine  <i>e. Preparation of forgery of official ID</i>  <b>I:</b> up to 2 years or fine (if the act is gain motivated or gang related, 3 months-5 years)  <i>f. Procurement of false official ID</i>  <b>I:</b> up to 2 years or fine  <i>g. Abuse of identification papers</i>  <b>I:</b> up to 1 year or fine</p>	<p>No special criminal provisions on trading in influence. Specific cases are covered by provisions concerning abuse of authority</p>	<p><i>a. Embezzlement</i>  <b>I:</b> up to 3 years or fine (up to 5 years or fine in a case where the object is movable property entrusted to the offender)  <i>b. Breach of trust</i>  <b>I:</b> up to 5 years or fine (6 months-10 years in very severe cases)</p>	<p><i>a. Bribery of local elected representatives</i>  <b>I:</b> up to 5 years or fine  <i>b. Giving or taking bribes in the course of official duties</i>  <b>I:</b> up to 3 years or fine (3 months-5 years in very severe cases)  <i>c. Acceptance of gratuities (for local representatives performing administrative, not legislative functions)</i>  <b>I:</b> up to 3 years or fine  <i>d. Bribery of local civil servants</i>  <b>I:</b> 6 months-5 years (up to 3 years or fine for less severe cases and 1-10 years for very severe cases)  <i>e. EU anti-fraud and corruption law</i>            (Council Act of 27 September 1996 concerning Protocol to the Convention on the protection of the European Communities' financial interests)            Delivered 27 July 1998, Doc.496Y1023(01)</p>	<p><b>I:</b> up to 5 years or fine (1-15 years in very severe cases)            If the extortion was committed by means of force or threat with present danger to life or limb, the perpetrator shall be punished as for robbery.</p>
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<b>Italy</b>	<b>sMI</b> <b>I:</b> a. up to 2 years if the advantage looked for is not financial b. 2-5 years in other cases	<b>sMI</b> <b>I:</b> a. up to 2 years if the advantage looked for is not financial b. 2-5 years in other cases	<b>gMI</b> <b>I:</b> a. 3 months-2 years (less serious case) b. 1-6 years (serious case)	<b>sMI</b> <b>I:</b> a. up to 2 years if the advantage looked for is not financial b. 2-5 years in other cases	<b>gMI</b> <b>I:</b> 3-10 years (but 6 months-3 years for temporary misappropriation followed by restitution) <b>aP:</b> disqualification from holding public office (temporary when there are mitigating circumstances and the penalty is less than 3 years)	<i>a. For a legal act</i> <b>gMI:</b> 6 months-3 years <i>b. For an illegal act</i> <b>sMI</b> <b>I:</b> 2-5 years	<b>gMI</b> <b>I:</b> 4-12 years <b>aP:</b> disqualification from holding public office (temporary when there are mitigating circumstances)
<b>Portugal</b>				<b>I:</b> 6 months-5 years	<b>I:</b> 3-8 years for unlawful appropriation of public property (up to 4 years or fine up to 80 days if assets were hired, mortgaged or used for other pecuniary goals without being appropriated)	<i>a. Accepting bribes for an unlawful act</i> <b>I:</b> 2-8 years (up to 2 years if the act has not been executed or if there was no omission) <i>b. Accepting bribes for a lawful act</i> <b>I:</b> up to 1 year or <b>F:</b> up to 100 days	<i>a. Bribery</i> <b>I:</b> 2-8 years (up to 2 years if the act has not been executed or if there was no omission) <i>b. Extortion</i> <b>I:</b> up to 2 years (1-8 years if violence or serious threats are used) or <b>F:</b> up to 240 days



<b>Slovakia</b> <sup>1</sup>	<p><i>a. Misuse of information in trade contacts</i> <b>I</b>: up to 12 years (or fine or restriction to act)</p> <p><i>b. Unauthorised use of personal data</i> <b>I</b>: up to 2 years (or fine or restriction to act<sup>2</sup>)</p>		<b>I</b> : up to 5 years (or fine)		<p><i>a. Embezzlement in public tender or public sale</i> <b>I</b>: 6 months-8 years</p> <p><i>b. Misappropriation of public funds</i> <b>I</b>: up to 12 years (or fine or restriction to act)</p>	<b>I</b> : 1-5 years	<b>I</b> : 1-5 years
<b>Spain</b> <sup>3</sup>	<p><i>a. Profiting from undisclosed information to secure a stake in a related business venture</i> <b>sMI</b> <b>F</b>: 12-24 months <b>aP</b>: specific disqualification from exercising public duties or holding public office for 1-4 years</p> <p><i>b. Performing a professional activity in a business venture in which the civil servant or elected representative is required to intervene</i> <b>gMI</b> <b>F</b>: 6-12 months <b>aP</b>: suspension for 1-3 years</p> <p><i>c. Using secret or privileged information</i></p>	Interference itself is not a criminal offence but may constitute aggravating circumstances (e.g. for the offence of misfeasance in public office – intentional failure to honour an obligation)	<p><i>a. Serious lack of care</i> <b>sN</b> <b>F</b>: 6-12 months <b>aP</b>: suspension for 6 months-1 year</p> <p><i>b. Intentional act</i> <b>gMI</b> <b>F</b>: 6-24 months <b>aP</b>: specific disqualification for 2-6 years</p> <p><i>c. Issuing a forged certificate</i> <b>gMI</b> <b>aP</b>: suspension for 6 months-2 years</p>	<b>sMI</b> : acting with the deliberate intention of obtaining economic advantage <b>I</b> : 6 months-1 year <b>F</b> : one or two times the advantage obtained <b>aP</b> : specific disqualification for 3-6 months	<p><i>a. Misappropriating or agreeing to misappropriate public funds for personal gain</i> <b>sMI</b> <b>I</b>: 6 months-1 year If sum misappropriated is less than 50 000 ESP, 6 months-3 years If particularly serious, 4-8 years</p> <p><i>b. Using public funds for purposes</i></p>	<p><i>a. In carrying out an act or omission constituting an offence</i> <b>sMI</b> <b>I</b>: 2-6 years <b>F</b>: one to three times the value of the gift <b>aP</b>: specific disqualification for 7-12 years</p> <p><i>b. In carrying out an unlawful act</i> <b>sMI</b> <b>I</b>: 1-4 years <b>F</b>: one to three times the value of the gift <b>aP</b>: specific disqualification for 6-9 years</p> <p><i>c. In refraining from an action</i></p>	See under <i>Corruption</i>

1 For an act to be regarded as criminal, malicious intent is necessary unless the law explicitly provides that negligence is sufficient.

2 “Restriction to act” is restriction to perform a particular activity on a professional basis or a certain operation (for example driving a car). It does not necessarily imply removal from office.

3 Fines are calculated by means of day fines, which may range from 200 to 50 000 ESP.

	<p><i>for economic advantage</i></p> <p><b>sMI</b></p> <p><b>I:</b> 1-6 years (if prejudicial to public interest)</p> <p><b>F:</b> one to three times the advantage</p> <p><b>aP:</b> specific disqualification for 2-4 years (7 10 years if prejudicialpublic interest)</p>				<p><i>unconnected with public duties</i></p> <p><b>gMI</b></p> <p><b>F:</b> 6-12 months</p> <p><b>aP:</b> suspension for 6 months-3 years</p> <p>If funds are not repaid within ten days, the penalties under <i>a.</i> are applied.</p> <p><i>c. Misuse of public property</i></p> <p><b>sMI</b></p> <p><b>I:</b> 1-3 years</p> <p><b>aP:</b> specific disqualification for 3-6 years</p> <p><i>d. In public tenders or public sales</i></p> <p><b>gMI</b></p> <p><b>I:</b> 1-3 years</p> <p><b>aP:</b> specific disqualification for 6-10 years</p>	<p><b>gMI</b></p> <p><b>F:</b> one to two times the value of the gift</p> <p><b>aP:</b> specific disqualification for 1-3 years</p> <p><i>d. In carrying out a legal act appropriate to the post occupied</i></p> <p><b>gMI</b></p> <p><b>F:</b> 3-6 months</p> <p><b>aP:</b> suspension for 6 months-3 years</p>	
<b>Sweden</b>			No specific provisions for the public sector. General law applicable		No specific provisions for the public sector. General law applicable	<b>I:</b> up to 2 years (or fine); up to 6 years for a serious crime	
<b>United Kingdom</b>		Non-declaration of a pecuniary interest by a councillor is a criminal offence punishable by a fine for failure to comply					

**Key**

**sN:** Serious negligence, even in the absence of fraud, is enough to constitute an infringement.

**gMI:** General malicious intent is required (in order for there to be an infringement, there must be the will and an awareness to commit it).

**sMI:** Specific malicious intent is required (in addition to the will and an awareness to commit an illegal act, the person responsible must, according to the case, either have the intention to harm, or the will to obtain an unjustified advantage for him/herself or for a third party).

**I:** Imprisonment (minimum and maximum, regardless of mitigating or aggravating circumstances).

**F:** Fine (maximum amount).

**aP:** Ancillary penalties which are explicitly provided for in relation to this offence.

### 3. Other offences

In addition to financial offences there is a series of offences that directly concern elected representatives. The most common are:

- *abuse of authority*, that is the misuse of the authority with which they are endowed;
- *failure or refusal to take action* which they are obliged to undertake and what is inherent in the performance of their duties;
- *negligence* in the exercise of law-enforcement responsibilities, leading to accidents or to personal injury or death; such negligence is punishable under the general legislation governing unintentional injury and manslaughter.

In addition to the above, there are offences covered by special laws, in particular in respect of the environment, among others (relating for example to the violation of the Constitution and of the individual rights guaranteed therein).

Table 3 illustrates the rules concerning these offences in the countries examined. The meaning of the abbreviations used is explained in the key that follows it.



Table 3: Criminal liability of local elected representatives – other offences

Country	Infringements against the environment	Abuse of authority	Failure/refusal to take necessary action	Unintentional injury	Manslaughter	Endangering others
Belgium (Walloon region)		<b>gMI</b> I: 1-5 years	<b>gMI</b> I: 3 months-3 years F: 3 000 BEC	<b>Negligence</b> I: 8 days-6 months F: 500 BEC	<b>Negligence</b> I: 3 months-2 years F: 1 000 BEC	
France		<b>gMI</b> I: up to 5 or 7 years F: 500 000 or 700 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision	<b>gMI</b> I: up to 1 or 3 years F: 100 000 or 300 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision	Malicious intent is not required Depending on the length of work interruption (greater or less than 3 months): I: up to 1 or 2 years F: 10 000 or 300 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision		<b>gMI</b> I: up to 1 year F: 100 000 FF <b>aP</b> (discretionary): – deprivation of civil, civic and family rights; – disqualification from holding public office or from engaging in the activity in the course of which the offence was committed; – confiscation of sums of money or property unlawfully acquired; – displaying or distribution of the decision. – interdiction, for 5 years or more, to own or carry a weapon for which authorisation is needed; – suspension, for 5 years or more, of the driving licence (suspension might be limited to non-job related driving); – annulment of the driving licence and interdiction to apply for a new one for 5 years or more

<b>Germany</b>	<p><i>a. Pollution of soil, water or air; generation of noise and vibrations; illicit handling of hazardous waste; unauthorised operation of plants; endangerment of protected areas</i></p> <p><b>I</b> up to 3 or 5 years or a fine (if the perpetrator acts negligently, up to 1 or 3 years or a fine; in very severe cases, 6 months-10 years)</p> <p><i>b. Serious endangerment by release of poison</i></p> <p><b>I</b> up to 3, 5, 10 or 15 years or fine (depending on the gravity of the offence and the form of fault)</p>	<p>Local representatives are liable like any other offenders if they act as proxies for operation of municipal plants or facilities. If they act as representatives of regulatory or licensing authorities, they can only be liable as perpetrators in the case of common law offences. They are always liable if they act as accessories or instigators</p>		<b>I</b> up to 3 years or a fine	<b>I</b> 5-15 years (for life in very severe cases and 1-10 years in less severe cases)	No specific rule on this issue; there are however several criminal provisions covering abstract and concrete strict liability torts where abstract or concrete hazards implied or actually posed by certain acts carry a penalty
<b>Italy</b>	The cases of misuse of supervision right/duty are connected to delaying, omitting or refusing compulsory acts	<p><b>sMI</b></p> <p><b>I</b>: a. up to 2 years if the advantage looked for is not financial</p> <p>b. 2-5 years in other cases</p>	<p><i>a. refusal</i></p> <p><b>gMI</b></p> <p><b>I</b>: 6 months-2 years</p> <p><i>b. delay/failure</i></p> <p><b>I</b>: 1 year or:</p> <p><b>F</b>: up to 2 000 000 ITL</p>	Common law	Common law	Common law
<b>Portugal</b>	<p><i>a. Acts harmful to the diversity of plant and animal life and the subsoil</i></p> <p><b>I</b> up to 3 years (1 year in the event of negligence)</p> <p><b>F</b>: up to 600 days</p> <p><i>b. Pollution</i></p> <p><b>I</b> up to 3 years or</p> <p><b>F</b>: up to 600 days</p> <p><i>c. Pollution endangering life or health</i></p> <p><b>I</b> 1-8 years (up to 5 years for negligence)</p>	<p><b>I</b>: 6 months-3 years or</p> <p><b>F</b>: 50-100 days</p>	<p><i>a. In situations involving necessity or danger</i></p> <p><b>I</b>: up to 1 year (2 years in the event of serious danger), or</p> <p><b>F</b>: up to 120 days (240 days in the event of serious danger)</p> <p><i>b. Refusal to co-operate</i></p> <p><b>I</b>: 3 months-1 year or</p> <p><b>F</b>: 50-100 days</p>	<b>I</b> up to 1 year (2 years in the event of serious injury), or	<p><i>a. Negligence</i></p> <p><b>I</b>: up to 3 years or fine</p> <p><i>b. Serious negligence</i></p> <p><b>I</b>: up to 5 years</p>	<p><i>Threat</i></p> <p><b>I</b>: up to 2 years or</p> <p><b>F</b>: up to 240 days</p>

<b>Slovakia</b>	<p><i>a. Intent</i> <b>I:</b> up to 8 years (or fine or restriction to act)</p> <p><i>b. Negligence</i> <b>I:</b> up to 5 years (or restriction to act)</p>	<p><i>a. Intent</i> <b>I:</b> 6-10 years (or fine or restriction to act)</p> <p><i>b. Negligence</i> <b>I:</b> up to 3 years (or fine or restriction to act)</p>		<p><i>a. Negligence</i> <b>I:</b> up to 1 year (or restriction to act)</p>	<p><i>a. Intent</i> <b>I:</b> 10-15 years or exceptional penalty</p> <p><i>b. Negligence</i> <b>I:</b> 6 months-10 years (or fine or restriction to act)</p>	
<b>Spain</b>	<p><i>a. Crimes against regional planning or historic property</i> <b>gMI</b> <b>I:</b> 6 months-2 years <b>F:</b> 12-24 months <b>aP:</b> specific disqualification for 7-10 years</p> <p><i>b. Crimes against natural resources and the environment</i> <b>gMI</b> <b>I:</b> 4 months-3 years <b>F:</b> 8-24 months <b>aP:</b> specific disqualification for 7-10 years</p>	<p><i>a. For an arbitrary decision on an administrative matter</i> <b>gMI</b> Sole penalty applicable: specific disqualification for 7-10 years</p> <p><i>b. Proposing or appointing as a public official a person who does not satisfy the legal criteria for the post</i> <b>gMI</b> <b>F:</b> 3-8 months <b>aP:</b> suspension for 6 months-2 years</p>	<p>Only where the offence of disobedience is committed:</p> <p><i>a. Refusal to enforce legal decrees</i> <b>gMI</b> <b>F:</b> 3-12 months <b>aP:</b> specific disqualification for 6 months-2 years</p> <p><i>b. Failure to enforce the orders of superiors</i> <b>gMI</b> <b>F:</b> 1-24 months <b>aP:</b> specific disqualification for 1-3 years</p> <p><i>c. Refusal to take action required by the post to avoid an offence against the person</i> <b>gMI</b> <b>F:</b> 18-24 months <b>aP:</b> specific disqualification for 3-6 years</p>	<p><b>sN</b> <b>I:</b> 7-24 weekends, 6 months-2 years or 1-3 years, depending on the nature of the injuries</p>	<p><b>sN</b> <b>I:</b> 1-4 years</p>	No specific offence in the Spanish Criminal Code
<b>Sweden</b>	No specific provisions for local elected representatives. General law applicable	Misuse of office: <b>I:</b> up to 6 years (or fine)	Misuse of office: <b>I:</b> up to 6 years (or fine)			



**Key**

- sN:** Serious negligence, even in the absence of fraud, is enough to constitute an infringement.
- gMI:** General malicious intent is required (in order for there to be an infringement, there must be the will and an awareness to commit it).
- sMI:** Specific malicious intent is required (in addition to the will and an awareness to commit an illegal act, the person responsible must, according to the case, either have the intention to harm, or the will to obtain an unjustified advantage for him/herself or for a third party).
- I:** Imprisonment (minimum and maximum, regardless of mitigating or aggravating circumstances).
- F:** Fine (maximum amount).
- aP:** Ancillary penalties which are explicitly provided for in relation to this offence.

#### **4. Ancillary penalties**

The penalties of removal from office, disqualification from office and deprivation of electoral rights deserve special attention and discussion since they undermine the free expression of the universal suffrage. In most cases, they are ancillary penalties; but they could also be complementary penalties (which are not automatic and are pronounced by the judge according to the specific circumstances of the case).

These forms of criminal liability should not be confused with political liability or be used as a means of removing a political opponent from public life. They are therefore to be applied only in exceptional cases.

They must, nevertheless, be applied where appropriate, in order to prevent elected representatives who have committed serious offences from re-offending and thus protect the public from their acts.

Indeed, it is hard to understand cases in which elected representatives who have been given a prison sentence for serious and deliberate misconduct in connection with the performance of their duties maintain their status and the authority conferred on them by the office to which they were elected.

Table 4 presents the main provisions applicable in the countries examined, including provisions on suspension which applies before a final verdict and which is not a sanction, but rather an interim measure.



**Table 4: Criminal liability of local elected representatives – sanctions affecting voting**

Country	Suspension	Removal from office	Disqualification/loss of rights
<b>Belgium</b> <b>(Walloon region)</b>			Optional ancillary penalties for: – illegal arrest and detention by a civil servant; – forgery by a public official of a passport, gun licence, record book, movement order or certificate; – acting as a witness for a forged certificate issued by a public authority; – abuse of authority.
<b>Germany</b>	Not covered by law	In cases of loss of capacity to hold public office	<i>a. Loss of capacity to hold public office</i> Automatic in case of conviction for a felony for at least one year Optional (decided by a court) if specifically provided for by law on certain felonies and misdemeanours The duration of loss of rights is 2-5 years starting from the day the penalty has been completed. The Court can restore capacities lost if the loss has been effective for half the time for which it was imposed <i>b. Loss of right to vote</i> Optional (decided by a court) for 2-5 years if specifically provided by law. It is equally possible to restore rights before the end of this period

<b>Italy</b>	<p>Suspension is automatic only if provided for by law. This is the case, <i>inter alia</i>, of a conviction, even if not final, for embezzlement, corruption and extortion (for legal or illegal acts) and a conviction, confirmed on appeal for trading in influence</p> <p>Suspension ends if the person is found not guilty, even if the sentence is not final</p> <p>Suspension <i>ope legis</i> (resulting from law) should be differentiated from the suspension as temporary measure decided by the prefect when s/he starts the dismissal procedure, for example when there are serious public order reasons. The two measures may co-exist</p>	<ol style="list-style-type: none"> <li>1. Dismissal is automatic in the case of a final conviction for an offence qualifying for suspension</li> <li>2. Dismissal is an administrative act adopted by the Ministry of the Interior, upon proposal of the local prefect, as a sanction measure against the local elected representative when his/her behaviour is unlawful or involved a danger to the public order</li> </ol>	<p>The reasons causing dismissal also produce permanent interdiction to stand for an elected office (except in case of rehabilitation)</p>
<b>Portugal</b>		<p>Automatic in the event of final conviction for an offence concerning liability in exercising public duties</p>	<p><i>Ineligibility</i></p> <ul style="list-style-type: none"> <li>– loss of right to complete suspended mandate</li> <li>– loss of passive electoral rights for a period equal to that of the full current mandate</li> </ul>
<b>Slovakia</b>		<p>Mayor found guilty by court of intentional criminal offence</p>	
<b>Spain</b>	<p>Automatic for the duration of the sentence</p>	<ul style="list-style-type: none"> <li>– Absolute disqualification (permanent disqualification from all public honours, duties and posts) is automatic for the duration of all sentences of more than 10 years;</li> <li>– Specific disqualification (permanent disqualification from the posts or duties specified) may be ordered by the judge for the duration of sentences of less than 10 years</li> </ul>	<ul style="list-style-type: none"> <li>– Loss of the right to be elected for the duration of absolute disqualification;</li> <li>– Loss of the right to be elected to a post to which specific disqualification applies for the duration of disqualification</li> </ul>

<b>Sweden</b>	No specific provisions applying to local elected representatives	The assembly may revoke the mandate of a representative convicted by a final court decision of a crime punishable by imprisonment for 2 years or more An elected representative may be removed by the court if he/she has committed a crime for which the penalty is imprisonment for 2 years or more and, through the crime, he/she has proved <b>manifestly unsuited for the mandate</b>	No specific provisions applying to local elected representatives
<b>United Kingdom</b>	Councillors responsible for unlawful expenditure of over 2 000 GBP may be disqualified from office by the court for a specified period (the length of which being at the court's discretion)	An auditor who certifies as due any financial loss over 2 000 GBP arising from wilful misconduct is automatically disqualified (if he/she is a councillor) from being a member of a local authority for 5 years	A person may be disqualified from being elected as a member of a local authority if he/she: <ul style="list-style-type: none"> <li>– is employed by the local authority;</li> <li>– has been declared bankrupt or made a composition or an arrangement with his/her creditors;</li> <li>– has within 5 years before his/her election been sentenced to not less than 3 months imprisonment without the option of a fine;</li> <li>– has been disqualified under any enactment relating to corrupt or illegal practices</li> </ul>

## **D. The political liability of local elected representatives**

### **1. The different forms of political liability of local elected representatives**

The political liability of local elected representatives can take on different forms. The most important is without doubt their responsibility to the citizens whose votes at an election or in a referendum are a verdict on their elected representatives, the way in which they have fulfilled their mandate, their policies and their managerial ability. Voters thus have the opportunity to express disapproval of the failures of either individual representatives or of the local authority as a whole.

A second form of political liability is that of the executive body *vis-à-vis* the decision-making assembly, particularly when the former receives its mandate from the latter. The so-called “relationship of confidence” that is established between the local council (or majority of the council) and the executive that it has chosen to implement its political programme may be undermined. In this case voting provides the opportunity to “censure” the executive and withdraw its mandate.

The organs of local authorities are also politically answerable to the supervisory bodies. In some cases, the latter actually have the power to take measures – which extend as far as removal from office – in cases where there are serious problems because elected representatives are clearly incapable of fulfilling, or are no longer in a position to fulfil, the mandate given to them by the voters.

Finally, there is also the responsibility of elected representatives towards their political party. Even in the case of elections where voters vote for a party list, this form of responsibility is not covered by legislation and is therefore not included in this report.

Although the principle of political liability *vis-à-vis* the electors is generally applied (at least in the context of ordinary elections) in every democratic state, the other two forms of political liability do not exist in all European countries.

Moreover, the procedures for ensuring that a local elected representative can be held politically liable vary greatly from one country to the next, particularly as there are significant differences between the states concerned as to the very meaning of local government.

In addition to differences in the size and resources of local authorities, the very nature of local administrative and political organisation differs radically, in particular according to whether or not the state concerned is a federal one.

These fundamental differences must therefore be borne in mind when the question of the political liability of local elected representatives is considered, with regard both to the existence of such liability and to the manner in which provisions governing liability are enforced.

Information on some of the features of political liability in the countries under consideration is provided below. Further useful information may be obtained by reading the relevant parts of the CDLR’s survey of the legal control and auditing of local authorities’ action.

## 2. The situation in the analysed countries

In Spain, the functions of the local executive are carried out by the mayor at municipal level and by the president of the provincial council at provincial level. Both are freely appointed from among the members of the decision-making assembly and may be removed under the same conditions.

The British system is entirely different, in so far as in the United Kingdom the local executive function is performed by the person in charge of local administration, the chief executive. Moreover, there is no system under which the political liability of elected representatives can be invoked, apart from the voting system itself. The political liability of British elected representatives is thus associated solely with the ballot box and there appears to be no system for removing them.

Similarly, in Belgium, elected representatives are politically answerable only to their voters through regular elections.

In Germany, as a result of federalism, different systems prevail in the different *Länder*, which are totally free to define democratic principles, provided that they comply with the Basic Law. In most cases, the mayor and head of the district, although directly elected by the people, are temporary civil servants for their term of office. The deputy mayor and the deputy head of the district, in contrast, are elected by the people's representatives and also appointed temporary civil servants. The council cannot suspend a decision taken by the mayor in his sphere of competence. However, it may pass a vote of censure, which does not annul the effect of the decision.

In Baden-Württemberg and Bavaria, mayors, who are civil servants, are governed by the disciplinary code of the *Länder* and cannot be removed by the assembly: a decision to remove a mayor can be taken only by the administrative court. On the other hand, procedures for the removal of the mayor can be initiated by the local population (in Brandenburg upon request of 10 per cent of the citizens) or by two thirds of the council (in North Rhine-Westphalia). The decision on a possible removal is decided by means of a local referendum. The mayor is removed where the majority of votes cast supports the motion in as far as this majority amounts to at least 25 per cent of those entitled to vote.

In Sweden, the system largely reproduces the French form of parliamentarianism, with a collegiate body, the administrative commission, running the administration, and an executive whose members are appointed by the decision-making assembly. A member of the executive can be removed if he or she has been found guilty by a judgement having force of law of an offence punishable by imprisonment of two years or more. Thus, in such cases, it is the criminal liability of members of the executive which, if appropriate, will lead to their incurring political liability and possibly being removed from office.

In Turkey, the political liability of local elected representatives and the enforcement thereof are, outside elections, first and foremost a matter for the national authorities. The Council of State may thus dissolve a municipal council, upon request of the governor and through the Ministry of the Interior, in extremely narrowly defined cases, in particular where it has deliberated at a place other than that prescribed by law and considered political questions.



In the Slovak system, inaction on the part of local elected representatives may cause them to incur political liability. Thus, a member of a local assembly may have his term of office brought to an end if he is unjustifiably absent from meetings of the local assembly. Similarly, negligence and associated shortcomings may lead to local elected representatives incurring political liability and, in some cases, being removed from office.

In France, local elected representatives may be removed as a body, where, for example, the functioning of municipal councils is blocked. The chief municipal executive, personally, cannot be removed by the decision-making assembly but that assembly, without having to go so far, can freeze his powers by refusing to approve the budget, for example.

In Romania, the law provides for the accountability of the mayor before the local council for the functioning of the administration. However, the mayor, who is directly elected, cannot be dismissed by the deliberative body.

The mayor may be dismissed from office if he or she has repeatedly and with bad faith made decisions that were irrevocably annulled by a court on the grounds of having violated the Constitution, the laws of the country or the general interests of the state. The mayor's dismissal, based on a court's final decision, shall be made by a government decision, upon a proposal moved by the prefect.

Repeated absence of local elected representatives may be penalised, in France and in Romania, by the suspension of allowances, or indeed removal from office. Nevertheless, this form of liability, linked with absenteeism, appears to be enforced very rarely in practice.

In Italy, local elected representatives may be dismissed for infringements to the Constitution, for serious and repeated violations of the law or for serious reasons related to public order. Besides these reasons, the dismissal of the council may be decided if it becomes impossible to ensure the normal functioning of the community, for example if the budget has not been adopted within the legal time limits and when it appears that the action of the council is under the influence of a mafia-type association.

In Portugal, the municipal council supervises the action of the mayor and may adopt a motion of censure against the executive. The government cannot sanction these bodies; however, the responsible minister can, if need be, request the public prosecution service to bring an action before the administrative court in order to terminate the elective mandate of the elected representative or the body responsible for the illegal actions.



## II. ENFORCEMENT OF LIABILITY

### A. Enforcement of liability for financial damage

#### 1. Function of guaranteeing and function of sanctioning

On the topic of enforcement of the local elected representative's individual liability for financial damage caused in the course of his or her functions, a distinction should be drawn between the aim of safeguarding citizens (who can accept the idea of liability for mere misconduct in the performance of duties, or even liability arising from damage caused without any misconduct) and the aim of imposing penalties (which presupposes a wrongful and malicious intent).

The main trend seems to be to reserve civil and financial liability for the local authority as a whole and to proceed against local elected representatives personally only in cases of serious fault. The existence of serious fault may in such cases be characterised as a criminal offence, and in numerous countries a serious offence liable to give rise to financial liability for the elected representative, may, in the most extreme cases overlap with a criminal offence.

Spain has incorporated this distinction between safeguards and penalties within its legal system in a perfectly adequate manner. The liability of the administration is objective, that is to say no fault is required. A right of recourse by legal proceedings is possible against elected representatives and the public officials concerned on grounds of "fault, fraud or negligence of a serious nature". It thus seems that the same criterion is applied for establishing the civil liability or criminal offence of an elected representative or public official, that is to say in both cases there is serious personal wrongdoing or fraud.

In France, following the judgement of the *tribunal des conflicts* of 30 July 1873 in the case of Pelletier, the theory was developed of acts which are "separable from the performance of duties", that is to say those deriving from personal wrongdoing revealing "man in all his weakness, passion and carelessness", in the now famous terms used by the *commissaire du gouvernement*.

Such separable faults are contrasted with maladministration or straightforward fault. As in Spain, only proceedings enforcing a right of recourse regarding maladministration are available to the administration against the elected representative or the official. In the case of straightforward fault, this remedy is not available, even if the administration has been obliged to compensate for damage done.

The *tribunal des conflicts*, in France in a judgement of 15 January 1935 in the case of Thepaz, held, however, that (in criminal proceedings on that occasion) straightforward instances of maladministration or lack of care could amount to an offence of a criminal nature, without it being necessary to determine whether there had been any serious, personal fault separable from the performance of duties. Circumstances have moved on, but legislation has changed less rapidly.

## 2. Objective liability and liability for the actions of auxiliaries

Applying the general rules governing civil liability to elected representatives may have extremely important consequences, since these rules include not just the provisions applicable on the basis of liability in contract, in tort or for negligence (non-intentional tort), but also provisions on objective liability and liability for acts of auxiliaries.

Thus, in Italy, the possibility of relying on the Civil Code in proceedings against local elected representatives makes it possible to invoke their direct objective liability, for example in the event of the destruction of a building or of damage resulting from a dangerous activity undertaken by a public authority.

An issue worth studying is the liability of elected representatives for the acts or omissions of auxiliaries, in particular where powers have been delegated. Such liability is generally justified by the requirement to monitor the activity of auxiliaries (*culpa in vigilando*). But, in practice, such liability is close to objective liability, for the number of acts carried out under delegated powers is so large that systematic monitoring is impossible.

Most of the measures taken by local elected representatives are prepared by civil servants. The elected representatives, as representatives of the public authority, engage their liability for these decisions; however, many states enforce legal tools to make civil servants responsible for the results of their work in order to avoid elected representatives becoming scapegoats for incompetent, negligent or dishonest civil servants.

In France (according to the principle of complicity) and in Finland, the civil servant is liable jointly with the elected representative for decisions prepared by him or her unless he or she formally dissociates themselves (in France in writing) from the decision eventually taken.

Moreover, in France, the civil liability of elected representatives for the acts of their auxiliaries seems in general excluded, since public officials operate on behalf of the authority. The latter is a legal person that, in the event of damage, must take responsibility for its officials, subject to its right of recourse against them. If the situation were different, the liability of the elected representative, as principal and giver of orders, would be of a different kind and, where arising, would be a matter for the criminal courts.

In the United Kingdom, a civil servant may be liable if he or she were the subject of a delegation of powers.

In Romania, the civil servant who prepared the wrongful administrative measure is liable jointly with the administrative authority which issued it. This civil servant may be sued directly by the person who suffered the damage for an act or omission; however, the liability remains a shared one and therefore the civil servant has a right of recourse against the authority.

If the role of civil servants in the preparation of the decisions is essential and if it is true that they must be held accountable for their work, they must however not become scapegoats. In all states with the rule of law, accountability is the other face of power and the local elected representatives do not ask for the transfer of their legal liability to the civil servants, but rather for a clear and coherent definition of each party's liability.

### **3. Common law or specialised jurisdictions**

According to the country, the courts responsible for enforcing the civil liability of local elected representatives vary: civil court, administrative court, branches of the civil court dealing with different types of administrative disputes, or a combination of several courts.

In Denmark, an elected representative may be sued in the civil field before civil courts for gross faults.

In the United Kingdom, it is the High Court that has jurisdiction where appropriate, but to date proceedings have been extremely rare.

In Spain, in the sphere of civil liability, the matter is brought directly before the local authority. Through its plenary assembly, the local authority will first give a ruling on the damage claimed and in particular will approve the necessary budgetary credits. Afterwards, the matter becomes the responsibility of the courts, under ordinary procedures for civil liability and the imputation of wrongful acts (Article 78-1: Law Regulating the Basis of the Local Regime – LRBRL).

When the liability of individuals is at stake, local elected representatives are subject to different jurisdictions. For the elected members of the Autonomous Communities, the members of the executives, and of the assemblies, enjoy a special legal regime which extends exceptions to them and protects them, and they are subject either to the Civil Chamber of the Supreme Court or to the Civil Chamber of the Supreme Court of Justice of the Autonomous Community.

In Germany, the civil courts applying the general law are competent, and they apply Articles 31, 278, 831 and 839 of the Civil Code.

In Switzerland, a preliminary administrative procedure exists in some cantons. If this procedure has no result, the claim is brought before the civil courts, the Federal Court being the jurisdiction of the last resort. Actions against elected representatives in the case of fault or gross negligence are a matter for administrative courts.

In Sweden, the law on liability is applicable in theory to elected representatives (although they are treated only as a collegiate body). It is the territorial administrative court which rules on questions of legality of acts performed by the municipality; but it has no power to impute a wrongful act to a natural person. Compensation for damage resulting from the annulled decision will be sought before the district court, in the framework of a civil trial.

The same applies in France where the administrative court with territorial jurisdiction (on appeal: the administrative appeal courts and the Council of State) has jurisdiction to rule as to the legality of the measures adopted by all local authorities and public enterprises. It can review acts *ultra vires*, bring proceedings for acts *ultra vires*, or may compensate for damage (in judicial proceedings) but may not in principle impose pecuniary penalties on a personal basis directly upon local elected representatives. The situation in Italy is similar.

In Romania, the legality of administrative acts is monitored by specialised branches (called administrative dispute sections) of civil courts; the same sections may set compensation for possible pecuniary and non-pecuniary damage for persons wronged by administrative acts.

#### **4. An insurance system with few regulations**

Insurance for elected representatives for their civil liability is of course available only to the extent to which such personal liability can be the subject of legal proceedings. The different types of insurance for civil liability are subject to very few regulations and are mainly the work of the market.

It must be noted that even in the countries where the evolution towards more civil liability has a certain tradition the need for local elected representatives to take insurance against their possible civil implication has only recently been felt. This need has been amplified because of the increasing frequency of enforcement of this liability and of the ever-growing complexity of local political decisions. This is the explanation for the fact that insurance companies have many difficulties in quantifying risks and that they show little enthusiasm for this growth market.

The situation is even simpler in most of the central and east European countries. Because of the very short history of local democracy in the region, the novelty of the subject and the early stage in the development of insurance companies, there is little regulation in this field, no compulsion to take out insurance and no insurance company which is able to offer such a product.

Insurance contracts for local authorities were first developed in France. Today they are optional but highly recommended. Progress in the effectiveness, clarity and coherence of insurance policies is encouraging; in the 1960s there were more than 560 insurance companies, each having its own rules and methods, now there are only three basic models of insurance contracts, which can only be improved by each company. This harmonisation is mainly the result of the work of an *ad hoc* working group, made up of representatives of the elected representatives, the state and the insurance companies.

The average annual price of civil liability insurance for a local authority is around 5 French francs per inhabitant of the community.

Local elected representatives may take individual insurance for their civil liability at their own expense.

The “legal assistance” insurance has existed for ten years for local elected representatives, partially covering expenses induced by their defence and the recourse actions in legal proceedings in which they are involved. This is one of the most useful and popular insurance for elected representatives.

In Italy, authorities may, but are not obliged to take civil insurance. Elected representatives may also have insurance against the enforcement of their civil and accounting liability at their own expense.

In Spain, authorities may subscribe to insurance either on the private market, or with a mutual-type association. It should be emphasised that a huge majority of the authorities have insurance.

In Scandinavian countries, local authorities are in general obliged to take out certain types of civil liability insurance. However, individual insurance of elected representatives is either not permitted, as in Sweden, or theoretically possible but practically non-existent, as enforcement of individual civil liability of local elected representatives is exceptional in these countries.

In Germany, local communities usually take out insurance with specialised insurance companies, which, as a rule, also include provision for the personal liability of constitutionally appointed representatives of public bodies.

## **B. Enforcement of liability for criminal infringements**

### **1. The question of the immunity deriving from an elective mandate**

Local elected representatives are generally elected by direct suffrage, just as the members of national parliaments. Therefore, the question may arise as to whether, taking into account the democratic legitimacy of local elected representatives, they should not be granted an immunity from jurisdiction similar to parliamentary immunity.

It must be noted however that the system of parliamentary immunity is the heritage of a time when, because of a still incomplete democracy, it was necessary to give specific protection to the members of law-making assemblies in order to guarantee the principle of separation of powers.

The immunity was therefore justified by the need to ensure that the law-making process could take place without improper interference. But local elected representatives do not exert any law-making powers.<sup>1</sup>

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<sup>1</sup> Of course, this statement does not apply to members of regional assemblies in states where regions have law-making powers, such as Italy or Spain. *A fortiori*, this statement does not apply to parliaments of federated states.

Moreover, in several countries the principle of parliamentary immunity is being questioned and citizens find it difficult to comprehend why their elected representatives should not be subject to the judicial system when they do wrong. Against this background, extending the immunity to local elected representatives has no justification.

On the other hand, the question may arise as to whether it would be desirable to take into account the special situation of elected representatives, and in particular the constraints to which they are submitted when taking decisions, and to organise a system of liability which is clearly differentiated from the usual one.

In order to try to answer this question, it is necessary to further examine the experience of the countries under consideration with regard to the enforcement *in concreto* of the criminal liability of local elected representatives.

## **2. From gross fault to lack of care and negligence**

In this context, it is the aspect of fault through negligence that raises most problems since its scope is so wide and difficult to define. The same act or omission can be interpreted in different ways, in view of the financial, material and human resources available to the elected representatives concerned.

In France, the Law of 13 May 1996 (No. 96-393) took account of this problem regarding the offence of lack of care by requiring an assessment *in concreto* of local public conduct, so that the public prosecutor or other prosecuting authority must produce evidence of a lack of “normal diligence, having regard to the nature of the tasks, functions, authority, powers and resources”.

This *in concreto* approach to the criminal liability of elected representatives will also give rise, as a matter of fairness, to remedies of exoneration whereby, for example, account may be taken of that contributory action by other parties, such as public officials and civil servants (indeed, Article 12-1 of the French Criminal Code provides: “a person shall be liable only for his own acts”).

However, the proceedings have become increasingly frequent, particularly in relation to lack of care; Article 121-3 of the Criminal Code covers “cases of lack of care, negligence or deliberate endangering of others”; Article 223-1 of the Criminal Code penalises the offence of endangering others with one year’s imprisonment and a fine of 100 000 French francs.

This endangering of life or the physical integrity of another by “deliberate failure to fulfil an obligation as to safety laid down by law or regulation” is a formal offence that does not presuppose the occurrence of an accident or any damage.



Initially designed to punish driving under the influence of alcohol (without accident), it will apply to any breach of a safety rule. The Court of Cassation (Criminal Chamber) confirmed in a recent judgement that the criminal liability of the mayor derived primarily from the failure to give effect to his general policing powers under Article L 2212-2 of the General Code of Territorial Authorities.<sup>1</sup>

This criminal liability for failure to act (even where no accident occurs or no damage is caused) is without doubt the kind of liability which is proliferating the most rapidly and at the same time giving rise to the greatest debate.

Adverse impacts on the environment (from water, water purification stations, waste, rubbish tips, abandoned premises, etc.) are also classifiable as criminal infringements of which damage is not a necessary component. The concept of an “obstructive offence” where the infringement is constituted solely by failure to observe a law or regulation is developing in parallel with “infringements deriving from consequences”.<sup>2</sup>

Unintentional adverse effects on physical integrity and life (see Articles 222-19, 222-20 and 221-6 of the Criminal Code) attract criminal penalties and it is primarily the mayor, as the chief executive for the municipality, who is personally answerable for them. Mayors in France have recently and legitimately been shaken by the imposition of fines and suspended prison sentences.

This liability, which is beginning to extend to local officials (on the basis either of complicity, intervention or wrongful failure to act) relates particularly to cases involving public entertainment establishments.<sup>3</sup>

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1 We can mention the case of a French mayor convicted, on the basis of his police powers, for the malfunctioning of a water purification station, even though the municipal council had refused his request to permit the restoration of the respective station and therefore had prevented the mayor from acting. In another case, an elected representative was convicted for not accomplishing an obligation which was physically impossible to perform, with the explanation: “There always remains a solution to the elected representative when confronted by something impossible: resignation.”

2 Article 22 of the French Law on Water of 3 January 1992 makes detailed provision for and penalises action adversely affecting water quality and breaches of the Rural Code. Mayors are under an obligation to achieve certain results; the question of budgetary resources is not taken into account and lack of finance is not an exonerating excuse (Montbéliard Criminal Court, 2 December 1994).

Mayors are sometimes placed in paradoxical situations where the obligations incumbent on them are poorly described (Court of Cassation, Criminal Chamber, 3 April 1996, *Auvergne v. Eaux et Rivières de Bretagne*: works carried out on a river which destroy the breeding grounds of fish are punishable under Article 232-3 of the Rural Code, if no authorisation has been granted, and that is so even though the regulations which are to govern this procedure do not yet exist ...) and where they must tolerate contradictions in the law: urgent works carried out to secure the banks of a water course attract criminal penalties, but failure to carry them out would also constitute such an offence if anyone suffered an accident through collapse of a river bank ... since it would constitute deliberate endangering of others.

3 Criminal proceedings of this kind came into being primarily because of the fire at the dance hall in the municipality of Saint Laurent du Pont, Isère (38), where the mayor was found guilty by the Criminal Court, Lyon (20 November 1972).

Such criminal proceedings against a mayor in connection with public entertainment establishments developed<sup>1</sup> despite the adoption of the law of 13 May 1996 that, in relation to lack of care, requires production of evidence of “lack of normal diligence” in specific cases. For example, it is on the basis of wrongful failure to act (and not action taken) that elected representatives can be penalised for failing duly to refer a matter to a safety committee.

In France, this form of liability remains a matter of great debate, although of course there is no such debate relating to offences against probity (passive corruption, trading in influence, misappropriation of public funds), except perhaps as regards the offence of unlawful acquisition of interests (Article 432-12) and undue preference (Article 432-14) where wrongful and criminal intention is not required and where we come close to the so-called “material offence” which involves objective liability.<sup>2</sup>

Indeed, although in France, since the reform of the Civil Code, there is no longer such a thing as an unintentional offence, the judge will seek to establish intention in the violation, presumably deliberate, of a legal obligation, which is also deemed to be known (*nemo censetur ignorare legem*).

In Sweden, the system appears much simpler and comprehensible; the specific criminal liability of elected representatives for acts within the scope of their duties comes under the heading of “misuse of office”. Such abuse is either without importance (having regard to the powers of the elected representative: appraisal *in concreto*) and there is no finding of guilt, or of intermediate gravity where the possible penalties are fines and imprisonment of up to two years, or, conversely, particularly serious (“gross misuse of office”) which incurs a penalty of up to six years’ imprisonment .

The act or negligence must also be intentional, which limits punishment to intentional acts, although omissions may also be covered. Criminal proceedings for abuse of responsibility are not available against members of national or municipal assemblies.

In Spain, as regards the offence of lack of care or failure to act, a legal or special contractual obligation to act is required (which seems to provide more protection than the French basis for liability) linked primarily with the policing powers of the mayor and which are unlimited as regards their subject matter.

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1 Toulouse Criminal Court, 19 February 1997, fire at the thermal baths of Barbotan.

2 Undue preference, that is to say breach of the rules concerning public contracts awarded by local authorities, is a matter of discussion since no advantage or *quid pro quo* is necessary for the existence of the offence. The granting of local preference for undertakings established nearby is subject to criminal penalties, even if the elected representative obtains nothing in return. This severity presupposes, by way of counterpart, that the same rules apply in all European countries which thus have free access to the placement of local contracts. Similarly, incompatible involvement (or the unlawful acquisition of an interest) is an offence that does not necessarily involve dishonesty and is first and foremost an offence against rules of professional conduct.

In the United Kingdom, “criminal intention” or *mens rea* is an essential precondition for criminal proceedings against elected representatives to establish their liability for a positive act or an omission. This requirement of a clear element of intention should exclude mere lack of care and there are few or no recent examples of criminal proceedings against elected representatives connected with the discharge of their duties.

In Germany, the federal law determines the criminal penalties applicable to elected representatives. There is no punishable offence unless there is *mens rea*. Criminal proceedings against local elected representatives are rare, although the risk of prosecution has increased mainly in environmental matters where increasingly strict regulations often produce a feeling of insecurity among elected representatives.

A heated debate is going on at present with respect to the increasing legal constraints and pressure exerted by citizens, a debate which local elected representatives have instituted regarding the risks inherent in their duties which (as in France) they regard as fraught with danger, and needful of specific protection. The public, in contrast, seems to be calling for personalisation of liability consonant with the extent of the powers exercised.

In Italy, the liability is generally linked to an intentional fault. A collegiate body may, where appropriate, be answerable for abuse of power and refusal or omission of acts that fall within its competencies; the liability remains however individual and members who acted in good faith cannot be sued. The offence of omission concerns in particular the mayor (for example, when he or she does not take the emergency measures necessary to deal with water pollution or the security of public health). In general (except for refusal and omission of acts relating to one’s duties) the triviality of the consequences of the wrongful conduct constitutes grounds for mitigation.

In Belgium, the Criminal Code sets out a long list of offences which must not be committed by elected representatives in the course of their duties, but a number of these restrictions have rarely or never been applied. The elected representatives are concerned (as are any individual) by the provisions that condemn manslaughter through lack of care and involuntarily inflicted injuries. These offences are based upon the fault represented by the lack of anticipation and precaution.

The case-law likens the criminal fault to the civil fault, so that in both cases liability is linked to the minor fault. This situation can lead the criminal judge to take a more severe attitude in order to allow the victim compensation. This is criticised by the doctrine which suggests a limit to criminal liability in cases related to a straightforward fault (gross fault or the usual slight fault), which should be evaluated by taking into account the actual potential for vigilance and diligence by the defendant.

Cases where these regulations are applied are rare. However, as in France for the mayors, these provisions can be referred to in cases of accidents attributed to the lack of measures taken in the name of the policing powers of the burgomaster. In practice, it appears that the burgomaster and the deputy burgomasters (*échevins*) were sued and convicted solely in the case of death of the victim, as the prosecutor starts proceedings only if the facts present with a certain gravity. This cannot prevent any person who suffered damage from suing the wrongdoer before the correctional court.

In Turkey, the ordinary criminal law applies to elected representatives. However, in their case, it is a specific administrative authority (the court for civil servants) that first decides if a wrongful act is attributable to any of them and if the elected representatives in question should be sued before the regular courts.

In Switzerland, too, a system of prior authorisation at various levels is a requirement before certain proceedings can be brought for breach of federal criminal law and for crimes or offences committed in the performance of duties.

In Spain, local elected representatives are exonerated of their liability if they follow the opinions given by technical bodies in regulated matters and if they have acted in good faith.

In the United Kingdom, the possibility is being studied of creating specialised independent bodies instructed to give opinions prior to the beginning of the legal proceedings against elected representatives. If these proceedings are justified, the opinions will provide information for the judge. This solution might therefore limit the inconvenience of not having specialised judges.<sup>1</sup>

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1 These independent administrative authorities are actually part of a larger framework of re-organisation of a disciplinary liability system for local elected representatives suggested by the project “Modernising local government – a new ethical framework”; this re-organisation has two important parts:

- changes of the legal framework: the National Code of Local Government Conduct should be replaced by codes of conduct adopted by each municipality, taking into account a number of principles set forth by a model code prepared by the Local Government Association, approved by the Secretary of State for Environment, Transport and the Regions and adopted by both Houses of Parliament
- Creation of new quasi-judiciary bodies:
  - A Standards Committee for each municipality, elected by the council and having at least one or two independent persons as full members; this committee should be enabled to recommend sanctions for local elected representatives who fail to comply with the local code regulations;
  - A Standards Board comprising regional panels (as first instance authorities) and a national board (as appeal authority); it is recommended that their members be proposed by the local government authority and appointed by the aforementioned Secretary of State. The board could take disciplinary measures against local elected representatives failing to comply with the provisions of the respective local code: public censure, suspension of up to three months or disqualification from office for up to five years. Moreover, the board might also have a pro-active role in issuing guidance to municipal councils.

## CONCLUSIONS AND GUIDELINES

### 1. General remarks

The wide range of answers given by the member states under study regarding the question of liability of local elected representatives fully reflects the diversity of political systems; in view of the historical trend towards enlargement of the scope of such liability, it is clearly appropriate to consider ways in which a coherent and harmonised legal system could be established.

In an area that is so politically sensitive, in that it concerns major balances between the various legislative, judicial and executive powers, states will not be able to avoid, for too long, the updating of existing regulations.

The state must ensure the protection of individual rights against any abuse by public authorities, including elected representatives, but without hampering the capacity of action of the latter. Therefore a new balance seems to be necessary between the requirements of safeguards (legitimately demanded by the citizens of states) and the requirements of autonomy (which local decentralised authorities properly call for).

Whilst, by virtue of the principle of equality before the law, elected representatives should not escape the liability attaching to them (as for any citizen), the fact that their role stems from universal suffrage and the complexity of their new tasks (environment, town planning, economics, social matters) in modern states might imply that they are subject to special procedures.

Whilst equality before the law implies that they must accept full responsibility, equity requires that they should shoulder only their own responsibility and not run the risk of becoming scapegoats for the difficulties of modern society.

In this respect, in certain countries, elected representatives feel they are over-exposed to the threat of judicial proceedings. The current debate appears to concern the risk of disaffection of the citizen regarding elective office as a result of the increased risk of liability.<sup>1</sup>

This risk should not be ignored or under-evaluated as the competency and the devotion of the local political class is an indispensable precondition to an effective local democracy. On the other hand, reducing the protection of citizens and creating a situation of impunity for the representatives must be avoided.

Therefore, a new definition of the rules of the game of liability is now necessary for the sake of local democracy and greater legal certainty if we are to avoid future conflicts between competing legitimate interests.

The political liability of elected representatives does not seem to raise particular anxiety and calls for no comments other than those already made by the CDLR in its report on the legal control and auditing of local authorities' action.

On the other hand, it is necessary to underline the problems which arise in the enforcement of the liability of elected representatives for financial damage and violation of the criminal law.

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<sup>1</sup> In France, in the June 1995 municipal elections, 40 per cent of the outgoing groups were not represented.

## 2. Pre-emptive preventive action

It is necessary to take action even before local decisions are adopted and thereby anticipate, by preventive measures, damage which might be caused to citizens. In dealings with local authorities the citizen is often likely to be confronted with irreversible situations where the harm has already been done and no compensatory measure is adequate.

The effectiveness of the legal control procedures (including internal supervision and opinions to be given by specialised bodies) is the first guarantee for both citizen and elected representative. In this respect, the CDLR refers to the conclusions of its report on legal supervision and auditing of local authorities' action. However, this does not seem enough.

Indeed the task of the local elected representatives becomes more and more difficult. This is because, on the one hand, of the complexity of the decisions they must take and, on the other, because of the vast and articulated legal framework they must know and respect or enforce.

But the local elected representatives are not all experts in the fields of activities of local government and they are not always able to follow the evolution of laws and other regulations that govern their action.<sup>1</sup>

Five kinds of measures could contribute to limiting the problems that might involve the liability of elected representatives:

– ***Simplification of the legal framework***

The complexity and the rapid evolution of the legal regulations that govern the action of local authorities imply that in certain cases, the elected representatives cannot be aware of all their legal obligations, and the enforcement of their liability may be more a question of mere chance than of their diligence. It would be useful to reduce, as much as possible, the number of laws, regulations, etc. that local elected representatives have to follow, in particular ministerial orders and circular instructions. It is also recommended that the legal provisions in force in the local authorities' main fields of activity be presented in the form of consolidated legislation.

– ***Improvement of the information collection, organisation and processing systems, especially for legal texts***

New information technology offers accessible, cheap and very efficient tools in this domain. Criticism formulated is often linked more to ignorance regarding these tools and to a resistance to change rather than to real reasons. An on-line database which is well designed and well managed becomes at the same time a vast library and also a competent librarian, two things which are so much needed by local elected representatives.

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<sup>1</sup> For example, in France, where 7 500 laws and 80 000 decrees are in force and 10 000-15 000 circular instruction are issued every year, it does not seem very likely that elected representatives will be aware of all the regulations they must observe.

– *Training of local elected representatives*

Efforts in this respect must not be made only by the local authorities or, *a fortiori*, by the local elected representatives. National governments should co-operate with local authorities in order to improve training for local elected representatives mainly (but not only) on their legal obligations. Local authorities also should make significant efforts, including financial ones, to improve the competence of their elected representatives.<sup>1</sup>

– *Offer advisory (mainly legal) services for the local authorities*

Central authorities of some countries abandoned this kind of logistical help at the beginning of the administrative decentralisation process. Reliable and rapid services of this kind should be created in order to allow local elected representatives who so wish to be advised in case of doubt on the legality of a decision they must take.

– *Organisation of an efficient internal supervision*

It would be useful to mention the idea of local authorities setting up mechanisms of internal legal supervision. This would stimulate the effective implementation of their work and periodic evaluation of their performances in order to adopt, if necessary, adequate measures for the improvement of their effectiveness.

These different measures may contribute to the alleviation of problems concerning the enforcement of the liability of elected representatives but they cannot eliminate them completely. Therefore, certain modifications of the system of elected representatives' liability could be appropriate.

**3. Distinction to be drawn between maladministration and serious personal wrongdoing in the fields of civil and accounting liability**

In certain countries, the approach is to limit the direct liability of elected representatives according to seriousness of the fault they commit, without forgetting that the main aim is to safeguard citizens (and to compensate them for any damage suffered).

The idea is to allow direct proceedings against elected representatives only on the basis of a serious personal offence separable from the performance of duties; essentially, according to this approach:

- the elected representative assumes the serious wrongdoing in its various components (civil, accounting and possibly criminal);
- the authority assumes liability for maladministration in order to safeguard the citizen.

In the field of civil liability, it would be advisable to follow the example of several states and allow injured parties to sue the authority directly for damage and interest. On the other hand, the possibility of suing the elected representatives personally could be excluded or limited to the most serious cases.

It must be noted that this solution also protects the rights of the injured citizens as proceedings for liability could be followed without the need to identify the person (or the body) responsible for the fault and practically with no risk to the solvency of the local authority.

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<sup>1</sup> In France, for example, all local elected representatives are entitled to one day of training per year, paid for by the local authority and organised by training bodies which are accepted by the National Committee for the Training of Elected Representatives.

Of course, if the liability of the authority is engaged, it would be necessary to provide ways and means for implementing judicial decisions taken against the administration, since on occasion the administration resists such decisions through inertia.

In general, liability of elected representatives would be enforced only internally. The authority would have a right of recourse against the responsible elected representatives; this right could be denied (or the authority could decide not to make use of it) in cases of slight fault or after considering the diligent behaviour of the elected representative concerned.

A similar solution could also be found for the question of the accounting liability of elected representatives: any mechanism of automatic sanction could be avoided and elected representatives could be liable in cases where the proven illegality is intentional or of a certain gravity.

Another sensitive question is that concerning individual liability for collegiate decisions, in particular when decisions are taken by executive bodies. In this respect, it seems better to establish that elected representatives are liable only for decisions they have supported.

However, this solution also presents a certain risk, as the whole activity of the collegiate body could be blocked if some of its members voted systematically against any decisions in order to avoid being held responsible for them. This risk is undoubtedly less important where the liability is internal (the elected representative is answerable only to the authority) and it is limited to cases of serious fault.

The direct liability of the authority also allows avoids any inconvenience arising from the liability for the acts of auxiliaries and from the objective liability. In these cases, any automatic sanction against the elected representative beyond the aim of protection of the victim seems unjustified.

#### **4. The question of limiting the criminal liability according to the gravity of the fault**

The increase in the number of criminal proceedings against elected representatives, in France as in other countries, is not only due to the expansion of the sphere of their criminal liability, but also to the fact that injured third parties often try to obtain satisfaction, via criminal proceedings, for the economic loss they have suffered. To this one should add the very important media impact of criminal proceedings against elected representatives; these proceedings may even become, in extreme cases, a political weapon. We are witnessing therefore a real move from civil to criminal liability.

There are several reasons for this phenomenon. First, the principle according to which criminal proceedings block civil ones, which prevents civil action from being pursued if a criminal one is pending. Second, the advantages of the criminal proceeding when compared to the civil one: it is generally faster and less expensive for the victim; moreover, the proof of the facts that produced



the damage must be made by the prosecutor (who obviously has better means of inquiry than the individual). Third and last, when the criminal sentence has been given, compensation for damage should be quick and effortless for the victim (subject to being able to quantify the damage without any particular difficulty).

Therefore, limitation – where non-exclusion – of direct civil liability of elected representatives could also have a positive effect on the number of complaints brought by the citizens, as this would lead them to ask for compensation directly from the authority. Moreover, the criminal judge would be more at liberty to estimate the seriousness of the fault committed by the elected representatives, as the statement of personal liability would no longer be the necessary precondition for the compensation of the victims.

The question is whether further steps should be taken and whether the criminal liability of elected representatives should be limited if their good faith is not really challenged.

There is of course no question of limiting the liability of a dishonest elected representative, who takes advantage of his or her office to obtain direct or indirect unwarranted benefits of any nature. On the contrary, the trend is nowadays rather to punish more severely infringements against integrity committed in the course of public duties.

However, as shown above, criminal liability of elected representatives can also be enforced for acts or omissions considered as showing negligence or lack of care, namely when using (or not) their policing powers; this also happens in situations when elected representatives seem to have acted with normal diligence.

In other words, the question arises as to whether the liability of elected representatives for involuntary offences in relation to the protection of the physical integrity of a third party (especially endangering life and inflicting involuntary injuries) should not be subject to the gravity of the fault.

This limitation of the enforcement of liability against elected representatives might be an appropriate response to the preoccupation mentioned above and would not aim at impunity but rather to encourage citizens to exercise their electoral mandate. Criminal liability (which must be clearly distinguished from compensation for damage which can be awarded even when no fault exists) would be evaluated in relation to intent and to the seriousness of the fault, as well as to circumstances (including ignorance, a lack of adequate information or the means available to the elected representative).<sup>1</sup>

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<sup>1</sup> This transposition to criminal liability of a distinction proper to the area of civil liability of the administration is gradually establishing itself in French law: Law 96-1093 of 16 December 1996 amending the regulations applicable to officials of territorial authorities provides, in Article 11, that the authority must safeguard its officials, even in cases of criminal wrongdoing, provided that the circumstances constitute maladministration and not an act which is separable from the performance of duties and is attributable only to the official.

Thus, it may be concluded that the administration remains primarily liable in the event of maladministration, that is an act inseparable from the performance of duties, which has given rise to damage (even in the case of damage without fault). The physical presence of elected representatives behind the local authority does not become apparent in this case unless there is a straightforward fault:

- for the authority, ordinary civil liability;
- for elected representatives, criminal liability in cases of serious acts (which will include pecuniary compensation for victims or the possibility of a right of recourse).

The CDLR considers that such a limitation of the liability of local elected representatives may be justified. However, it is aware of the fact that, in such a sensitive field, it is of extreme importance to make any change according to the wishes of the people. Every state should therefore evaluate whether the implementation of such changes in the criminal liability of elected representatives is desirable and consistent with citizens' expectations.

## **5. Specialisation of judges**

The specificity and complexity of local authorities' action must not be underestimated. An ever growing technicality, a legal framework which is vast and overlapping, increased demands from citizens: all are reasons for anxiety in elected representatives but also in judges who have to take decisions concerning administrative acts.

Moreover, the fact should not be overlooked that the administration, in some European countries, in view of its very extensive tasks, may be guilty while its representatives are not; that an illegal act of the administration is not necessarily linked to an illegal act of its elected representatives.

Several solutions may be suggested in order to give judges the necessary means to be able to make judgements, with full knowledge of the facts and without excessive research, on actions against local authorities or their elected representatives.

- *Specific, theoretical and practical training for judges who are called to make judgements on this type of affairs*
- *Judicial specialisation*

On historical grounds, several countries have developed entirely separate administrative courts. On the other hand, other countries have created specialised branches of ordinary courts. Both solutions seem to have had good results and could be suggested for countries that want to reform their judicial system.

- *Preliminary opinion from independent specialist bodies*

An alternative or adjunct to the previous two measures might be to set up independent specialist bodies whose opinion should or could be sought by judges before ruling on the appropriateness or otherwise of the conduct of the elected representatives concerned and of the impugned decisions at issue.

## **6. Limitation of the consequences of elected representatives' liability enforcement**

The activity of local elected representatives might sometimes have very important material implications, so severe that they cannot be entirely compensated for by the guilty person. Some countries have introduced liability ceilings. If established on a sound basis, these ceilings may have a positive contribution, without demotivating elected representatives.

However, the simplest and most effective way to reduce these consequences is to favour insurance. The practical possibility of taking out insurance depends not only on the legal framework, but also on the supply of adequate insurance products. However, the enforcement of provisions in this field would most certainly contribute to the stimulation of the market. Several measures might be taken in this respect.

### **– *Insurance for local authorities***

In order to encourage local authorities to take out civil liability insurance, it might be useful to make explicit provision in order to allow local authorities to take out this type of insurance. Such insurance might also help to limit the number of recourse actions brought by authorities against their elected representatives where the latter have acted in good faith.

### **– *Insurance for elected representatives***

In countries where local authorities provide no (or an insufficient) legal shield to protect elected representatives, it would be beneficial to make explicit provision to allow local authorities to take out insurance on behalf of their elected representatives for acts performed in the course of their duties, particularly in cases of slight and unintentional negligence. In any case, elected representatives should at least be allowed to take this type of insurance at their own expense.

### **– *Mutual insurance***

Central authorities should permit and stimulate the creation, by local elected representatives or local authorities, of mutual insurance bodies to cover the risks mentioned above.

### **– *Collection and disclosure of the information needed in order to quantify insurance risks***

A measure that might stimulate authorities and elected representatives to take out insurance is the organisation, at national level, of a coherent system for the collection and disclosure of information concerning local authorities' civil liability and local elected representatives' civil and accounting liability. This would enable elected representatives and insurers to better quantify such risks.



## GLOSSARY

### **Accounting liability**

The obligation on public officials (representatives, civil servants, employees) to make good the financial loss they cause to their community.

### **Bad faith**

Improper behaviour, a mixture of insincerity, dishonesty and disloyalty, which, when ascertained by a judge, may result in unfavourable treatment of the person responsible. This may take the form of aggravated liability, loss of a benefit or the curtailment of a right, according to the circumstances.

### **Civil liability**

The obligation on natural or legal persons, public or private, to make good the loss arising from either breach or poor performance of a contract, in which case this refers to contractual liability. Or breach of the general duty not to cause harm to others through personal acts, objects in one's care, or through the acts of persons for whom one is responsible, in which case it refers to liability in intentional or non-intentional tort.

### **Civil servant**

A person defined as such in the general regulations on state civil servants or those of local authorities, appointed to a permanent post and occupying a grade in the administrative hierarchy.

### **Criminal liability**

The obligation on natural or legal persons, public or private, to answer before the criminal courts, under conditions laid down by law, for any acts they have committed which are classed as criminal offences and are punishable by law (summary offences, misdemeanours or felonies).

### **Damage/loss/harm**

The harmful consequences experienced by a person arising from a wrongful action by another. The damage suffered should be considered as the criterion for compensation.

### **Deliberate tortious intent**

The expression refers to a fault that is committed deliberately with the intention of causing harm to another person or with full awareness of its harmful consequences.

### **Good faith**

There are two accepted uses of the expression:

Firstly, it may refer to the honesty that should govern the entry into and performance of legal transactions, particularly contracts.

It may also refer to the mistaken and non-culpable belief in the existence or non-existence of an act, a right or a legal rule.

In certain circumstances, good faith can give rise to exemption from liability in criminal matters, when malicious intent is claimed (for example error in law).

**Intentional act**

The term refers to an act carried out with intent by the perpetrator who had previously weighed up the consequences. If it is wrongful, an intentional act becomes deliberate tortious intent.

**Lack of care**

An attitude that consists of acting without taking all the precautions that care would demand.

**Local elected representative**

A person elected to public office at local level: this refers to members of local authority councils, who may also be vested with executive functions by the assemblies to which they belong, and also, in some countries, to directly elected mayors (or heads of local executives).

**Local representative**

This is a wider notion than that of a local elected representative, as it includes any holder of public office at local level. Thus, all the members of the decision-making bodies and executive organs of local authorities, whether elected (directly or indirectly) or appointed by another method are local representatives.

**Malicious intent/*mens rea***

Fraudulent manoeuvre intended to deceive one of the parties to a legal transaction, usually a contract, in order to obtain his/her consent.

In criminal law, malicious intent refers to the mental element in an offence, that is the fact that the offender was willing to commit an offence (see Deliberate tortious intent).

**Negligence**

An attitude that consists of not taking all the precautions required and which would have been taken by a reasonably careful person.

**Non-intentional fault**

This term is used where a person has committed a wrongful act without intending to do so: the fault is treated purely as a result and is assessed accordingly. As a rule, criminal law requires that intention be established before sanctions can be imposed, except in cases of lack of care; this is not the case in administrative law.

### **Objective liability/liability without fault**

Liability is said to be objective when it obliges the person declared liable to compensate for loss caused without fault by him/her.

### **Offence/infringement**

An action described as such by statutes or regulations and clearly defined in terms of its material and intentional elements: if committed, it is likely to engage the criminal liability of its perpetrator, whether a natural or legal person. In criminal law, there can be no offence without legislation, and the principle is that “offences and penalties are matters of law”.

### **Personal fault**

With regard to the liability of a public official, the term refers to a wrongful act that, in the view of both the administrative and ordinary courts, is of a nature such as to engage the personal and pecuniary liability of the public official towards the victim, even if the former was performing a duty at the time.

Personal fault is usually the result of improper behaviour on the part of the person concerned, and consequently the authorities no longer act as a screen between that person and the victim. Personal fault and serious negligence have a tendency to mean the same thing in public law.

### **Political liability**

The obligation incumbent on persons elected to public office to answer to the electors or certain supervisory bodies for the acts or omissions carried out during their term of office.

### **Public official**

This is a wider notion than that of civil servant, as it includes any person (including elected representatives) working for a public authority, answerable to that authority and paid by it.

### **Serious negligence**

In the assessment made by the judge, this refers to a certain degree of seriousness of the wrongful act. A finding of serious negligence enables the parties to a legal relationship, under the judge’s supervision, to draw certain legal inferences.

Serious negligence can be compared to gross negligence, which, in administrative law, is the only kind of fault that engages the liability of certain public services, as well as that of the person who committed the fault, by way of a right of recourse. This is the case for the fire services and the police, and more generally for all public services faced with genuine difficulties in carrying out their work and which are recognised as such by the judge.

### **Slight negligence**

This consists of any failure to carry out a previously established obligation regardless of the seriousness.

**Wrongful act or fault**

Intentional or unintentional failure to carry out an obligation previously established in laws and regulations, and arising from error, lack of experience, lack of care, negligence or malicious intent on the part of its perpetrator.

**Wrongful act that is intrinsically connected with the performance of duties/ maladministration**

In France, with regard to the liability of a public official, the term refers to any wrongful act that is not a personal fault and therefore cannot engage the person's civil liability towards the authorities or members of the public. The wrongful act will be considered as maladministration, and the authorities will act as a screen between the victim and the person who actually committed the fault. On the other hand, it does not rule out disciplinary action against the person concerned.