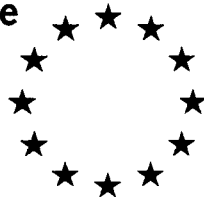


Council of Europe
Conseil de l'Europe



502

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For debate in the Standing Committee
Pour débat à la Commission Permanente
* See Rule 12 (4) - Voir article 12 (4) du Règlement *

Congress of Local and Regional Authorities of Europe

Congrès des pouvoirs locaux et régionaux de l'Europe

Strasbourg 13 October 1998



CG (5) 23
Part II

FIFTH SESSION

**THE PRELIMINARY DRAFT RECOMMENDATION
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON THE FINANCIAL (CIVIL AND ACCOUNTING) LIABILITY
OF LOCAL ELECTED REPRESENTATIVES
FOR ACTS OR OMISSIONS IN THE COURSE OF THEIR DUTIES**

EXPLANATORY MEMORANDUM

* Objections to the Standing Committee procedure must reach the Head of the Congress Secretariat a clear week before the meeting of the Standing Committee; if 5 members object, the report will be submitted to the Plenary Session.

Les éventuelles objections à l'examen en Commission Permanente doivent parvenir au Chef du Secrétariat du Congrès une semaine avant la réunion de la Commission Permanente; si 5 membres du Congrès présentent des objections, le rapport sera soumis à la session plénière.

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

- a. Considering that the aim of the Council of Europe is to achieve a 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;
- b. 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 safeguard, at the same time, citizens' confidence in their elected representatives and the legal certainty for the latter;
- c. 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;
- d. 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;
- e. Considering that local elected representatives must be fully accountable to citizens and that the current trend towards the accountability of local elected representatives is an important aspect of more effective local democracy;
- f. Considering, nonetheless, that this trend 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;
- g. 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";

Recommends that the governments of the member states:

- 1. to undertake the appropriate reforms of the legal and administrative framework for the financial liability of local elected representatives, taking into account the principles and the proposal set out in the guidelines appended to this recommendation;
- 2. involve local elected representatives in any discussion on reforms to be undertaken in this area and on the procedure for implementing such reforms.

Guidelines concerning the financial (civil and accounting) liability of local elected representatives for acts or omissions in the course of their duties

Definitions

This recommendation adopts the following definitions:

- civil liability: the obligation to make good the loss resulting from non-fulfilment or poor fulfilment of a contract, or from a breach of the general duty not to cause harm to others through one's own actions, objects in one's keeping or persons for whom one is responsible;
- accounting liability: the obligation on public officials, including elected representatives, to make good any financial loss caused to their community;
- local elected representatives: those holding a direct or indirect electoral mandate within local authority assemblies (including those at intermediate level) or within their executive organs.

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

The injured person's right to sue and right to compensation

Anyone who believes that he or she has suffered prejudice as a result of an unlawful act or omission by a local elected representative should always have the right to sue for damages against the local authority in question. However, direct action against local elected representatives should be either excluded or confined to cases of serious negligence or deliberate tortious intent on their part.

Anyone having suffered unlawful prejudice as the result of an act or omission by a local elected representative must be entitled to full and rapid compensation. Such compensation should not be dependent on a finding of misconduct or negligence on the part of the local elected representative responsible.

The authority's right to sue the elected representative responsible

The authority must have the right to bring court proceedings for compensation against the local elected representative responsible for loss sustained as a result of an unlawful act or omission; it must have the right to bring recourse proceedings against the elected representative responsible where it has had to pay for damages caused to a third party.

Nonetheless, elected representatives' liability to their local authorities should be confined to cases of serious negligence or deliberate tortious intent. Where no such restriction is laid down by law, the authority should be able to choose not to exercise its right to sue, 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.

Individual liability for collective decisions

In the case of unlawful decisions taken by a collegiate body, the personal liability of elected representatives who opposed those decisions should generally be excluded.

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 and the finding of serious negligence or deliberate tortious intent.

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 would be appropriate to set up special 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.

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 appropriateness or otherwise of the conduct of the elected representatives concerned and of the impugned decisions at issue.

II. Measures to reduce the risk of unintentional fault

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.

Informing and training local elected representatives

National governments should encourage and support local authorities wishing to introduce modern systems for the collection, organisation and processing of information concerning statutes and other prescriptive texts.

They should co-operate with local authorities 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.

Legal advice service for local elected representatives

Government authorities should set up a reliable, rapid legal advice service to provide assistance to local elected representatives seeking help when in doubt as to the lawfulness of a decision they are required to take.

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 illegal acts or omissions by local elected representatives

Insurance for local authorities

Explicit provision should be made to allow local authorities to take out civil liability insurance covering financial risks. Such insurance might 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

Explicit provision should be made to allow local authorities to take out pecuniary liability insurance on behalf of their elected representatives for acts performed in the course of their duties, namely in cases of slight and unintentional negligence.

Mutual insurance

Explicit provision should be made to allow local authorities or their elected representatives 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.

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

A coherent system should be set up at national level for the collection and disclosure of information concerning local authorities' civil liability and local elected representatives' civil and accounting liability, so as to enable elected representatives and insurers better to quantify such risks.