

# General Principles of Administrative Law

## § 3 Administrative Bodies and Distribution of Competences

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## **§ 3 Administrative Bodies and Distribution of Competences**

- A) General Aspects**
- B) Decentralization, Deconcentration, Devolution**
- C) Competences ratio loci, ratio materiae and ratio instantiae**
- D) Problems of Outsourcing and Privatization**
- E) European Charter of Local Self-Government**

## A) General Aspects

### Clear arrangement of competences:

- creates “points of contacts” for the citizen regarding “his” administrative problems
  - shall assure that a task is fulfilled by the public entity which has the material equipment /staff corresponding to the demands of this task
  - shall assure implementation of the law by creating areas of responsibilities
- Clear arrangement of competences as condition for real implementation of the law in a democracy
- Unclear arrangement of competences: Instruments of dictators

## A) General Aspects

- No unlimited competences
- Every competence is limited by the competences of other public authorities – parallel competences should be avoided
- Every administrative action has to respect the arrangement of competences predicted by law
- Infringement of the arrangement of competences → illegality
- Competences cannot be changed by contract in general

# A) General Aspects

## Forms of competences:

### *Compulsory administrative task:*

- ↪ the public authority is obliged to fulfil the task
- ↪ In case of non-respect of this obligation: illegality

### *Facultative administrative task*

- ↪ the public authority may fulfil the task
- ↪ but it is not necessary

## B) Decentralization, Deconcentration, Devolution

### **Deconcentration:**

- weakest form of decentralization
- redistributes decision making authorities and financial and management responsibilities among different levels of the national government.
- may include territorial deconcentration

### **Devolution:**

- transfer of authority for decision-making, finance, and management to (quasi-)autonomous units (with legal personality, own budget, own personal)
- In general: municipalities (with right of self-government)

## C) Competences ratio loci, ratio materiae and ratio instantiae

### *Competence ratio materiae*

↳ which “sort” of public authority is competent for a specific task

### *Competence ratio loci*

↳ territorial aspect

### *Competence ratio instantiae*

↳ hierarchic competences:

- right to supervise subordinate authorities (to which extent)?
- right to give orders to subordinate authorities?
- right to act in place subordinate authorities vis-à-vis the citizen ?

## D) Problems of Outsourcing and Privatization

[ECtHR, judgement of 2004/11/30, application no. 35091/02 \(Mykhaylenky and Others v. Ukraine\)](#)

41. In their further observations, the Government maintained that, although the **debtor company was State-owned, it was a separate legal entity and the State could not be held responsible for its debts under domestic law.**

Accordingly, the enforcement of judgments given in the applicants' favour could not be carried out at the expense of the State budget.

42. The applicants maintained that the company was a public one working under State contract. The work performed by the company had not been paid in full by the Ministry for Emergencies. This situation created debts for the company. The applicants further maintained that, under domestic law, the owner was liable for an entity's debts if that entity lacked funds to honour its obligations.

43. The issue arises therefore whether the State is liable for the debts of a State-owned company which is a separate legal entity and whether it can be held responsible for the ultimate failure to pay the applicants the amounts awarded to them in the judgments against that company.



44. In this respect the Court considers that the Government have not demonstrated that Atomspetsbud enjoyed sufficient institutional and operational independence from the State to absolve the latter from responsibility under the Convention for its acts and omissions.

45. The Court notes that it is not suggested by the Government or by the materials in the case file that the State's debts to the company [...] had ever been paid in full or in part, which implies that the State is liable for the company's ensuing debts. The debtor company had operated in the highly regulated sphere of nuclear energy and conducted its construction activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control on account of environmental and public-health considerations [...]. Moreover, the management of the company was transferred to the Ministry of Energy as of May 1998 [...]. In the Court's opinion, these elements confirm the public nature of the debtor company regardless of its formal classification under domestic law. Accordingly, the Court concludes that there are sufficient grounds to deem the State liable for Atomspetsbud's debts to the applicants in the special circumstances of the present case, despite the fact that the company was a separate legal entity..

46. Accordingly, the Court finds that the applicants' complaint is compatible *ratione personae* with the provisions of the Convention, and dismisses the Government's objection in this respect

## D) Problems of Outsourcing and Privatization

### **Material nucleus of the arrangement of competences:**

- The competent authority shall act by its own personal – because the law confers not only formal but material decision powers: the competent authority shall act by itself
- Limits transfers of factual responsibilities
- Limits outsourcing and privatization: A public authority does not fulfil its tasks, if it confers them to private actors without retaining a minimum of decision power for itself

### **Consequences of violations of these limits:**

- Ultra vires
- Or: Imputation of the act to the public authority but: illegality of the act which may be invalid or gives reason to state liability

## D) Problems of Outsourcing and Privatization

### Recommendation No R(93)7 on privatisation of public undertakings and activities

#### Scope and definitions

The present recommendation sets out certain principles by which member states should be guided in the interests of natural and legal persons (including groups of persons) in connection with privatisation.

For the purpose of this recommendation:

a. "**privatisation**" means:

- i. the total or partial **transfer from public to private ownership or control** of a public undertaking so that it **ceases to be a public undertaking**;
- ii. the **transfer to a private person of an activity previously carried on by a public undertaking** or public authority, whether or not accompanied by a transfer of property;

[...]

## D) Problems of Outsourcing and Privatization

### Recommendation No R(93)7 on privatisation of public undertakings and activities

#### Scope and definitions

[...]

b. "**public undertaking**" means any undertaking over which the public authorities may exercise **directly or indirectly a dominant influence by virtue of their ownership** of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

i. hold the **major part of the undertaking's subscribed capital**;

or

ii. control the **majority of the votes** attaching to shares issued by the undertaking;

or

iii. can **appoint more than half of the members of the undertaking's administrative, managerial or supervisory body**;

c) "**public authority**" means:

i. any entity of public law of any kind and at any level;

ii. any private person, when exercising prerogatives of official authority.

## D) Problems of Outsourcing and Privatization

### Recommendation No R(93)7 on privatisation of public undertakings and activities

#### **Section 1: Protection of the democratic rights of citizens**

Where proposed privatisation or a programme of privatisation is important, whether by reason of its scale or of the number of the public undertakings or the nature of the activities involved, the public authorities **should ensure that the general public receives the information necessary for the effective exercise of democratic control.**

Information should be given on the **reasons** for the decision to privatise and the **conditions** under which the privatisation is to take place.

The disclosure of such information should only be limited to the extent that the **general interest or requirements of confidentiality guaranteed** by law render this necessary.

The public authorities should indicate the **reasons which have led them not to disclose** such information, unless such indication would of itself prejudice the interests which gave rise to such non-disclosure.

## D) Problems of Outsourcing and Privatization

### Recommendation No R(93)7 on privatisation of public undertakings and activities

#### **Section 2: Protection of users' and consumers' rights**

In the case of privatisation concerning:

- a public utility, such as the provision of public transport, telecommunications, water, gas, electricity, as well as any other activity determined by national law to be in the nature of a public utility, or
- a monopoly providing goods or services to a large public which will continue to be a monopoly after privatisation,

the conditions of the privatisation should be determined with due regard to the **continuity, accessibility (including price)** and quality of the service in the public interest. Consultation of consumers or users should take place where this is appropriate.

The interests taken into account pursuant to the previous paragraph should, if necessary, **be safeguarded by means of a regulatory authority [...]** with effective possibilities to compel compliance on the part of the privatised undertaking or on the part of the person carrying out the privatised activity [...].

Before proceeding to such a privatisation, the public authorities **should inform**, by any appropriate means, **the users or consumers** of the ways in which they intend to protect the interests taken into account pursuant to the two preceding paragraphs.

## D) Problems of Outsourcing and Privatization

[Recommendation No R\(93\)7 on privatisation of public undertakings and activities](#)

### Section 5: Protection of potential purchasers

The procedures for privatisation should be **established with due regard to the need for transparency and equal treatment of potential purchasers**. These aims may be achieved by a variety of means, for example, public tender or competitive sale.

Where a privatisation involves, in particular, sale by public tender or competitive sale:

- a) potential purchasers should receive adequate information to enable them to assess their interests in the privatisation;
- b) potential conflicts of interest involving those concerned with the privatisation should be avoided

## E) European Charter of Local Self-Government

### European Charter of Local Self-Government

- entered into force on 1/9/1988
- In Georgia in force since 1/4/2005 (with some restrictions)
- One of the rare CoE Conventions signed and ratified by all CoE Member States – but a ‘late bloomer’
- Is flanked by the [Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority](#) (only ratified by 8 Member States and not by Georgia)
- Monitored by the [Congress of Local and Regional Authorities](#)

### **Basic idea:**

- Preservation and guarantee of local autonomy
- binding for national governments.
- but also taking into account different national traditions in local self-government.
- It is very complicated to find commonalities in this area of law and even more complex to dare a comparative approach on municipality law.



## E) European Charter of Local Self-Government

### Explanatory Report:

The purpose of the European Charter of Local Self-Government is to make good the lack of common European standards for measuring and safeguarding the rights of local authorities, **which are closest to the citizen and give him the opportunity of participating effectively in the making of decisions affecting his everyday environment.**

The Charter commits the parties to applying basic rules **guaranteeing the political, administrative and financial independence of local authorities.** It is thus a demonstration, at European level, of the political will to give substance at all levels of territorial administration to the principles defence since its foundation by the Council of Europe, which considers its function to be the keeping of Europe's democratic conscience and the defence of human rights in the widest sense. Indeed, it embodies the conviction that the degree of self-government enjoyed by local authorities may be regarded as **a touchstone of genuine democracy.**

## E) European Charter of Local Self-Government

### **Article 2 – Constitutional and legal foundation for local self-government**

The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

## E) European Charter of Local Self-Government

### Article 3 – Concept of local self-government

1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, **to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.**

2. This right shall be exercised by councils or assemblies composed of members **freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them.** This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.

**What is a „substantial share“?**

**Which areas should be included?**

## E) European Charter of Local Self-Government

### Article 4 – Scope of local self-government

1. The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.
2. Local authorities shall, within the limits of the law, **have full discretion to exercise their initiative with regard to any matter** which is not excluded from their competence nor assigned to any other authority.
3. **Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen.** Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.
4. Powers given to local authorities **shall normally be full and exclusive.** They may not be undermined or limited by another, central or regional, authority *except as provided for by the law.*
5. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.
6. Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.

## E) European Charter of Local Self-Government

### **Article 5 – Protection of local authority boundaries**

Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.

- Changes are possible, not every local authority has to be maintained for ever.
- But certain basic conditions have to be met.

## E) European Charter of Local Self-Government

**Article 6 – Appropriate administrative structures and resources for the tasks of local authorities**

**Article 7 – Conditions under which responsibilities at local level are exercised**

- Articles 6 and 7 deal with organizational and staff matters.
- Important is that representatives have to be „paid“.

## E) European Charter of Local Self-Government

### Article 8 – Administrative supervision of local authorities' activities

1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.
2. Any administrative supervision of the activities of the local authorities shall **normally aim only at ensuring compliance with the law** and with constitutional principles. Administrative supervision may however be exercised **with regard to expediency** by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.
3. Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept **in proportion to the importance of the interests** which it is intended to protect.

## E) European Charter of Local Self-Government

### Article 9 – Financial resources of local authorities

1. Local authorities shall be entitled, within national economic policy, **to adequate financial resources of their own**, of which they may dispose freely within the framework of their powers.
2. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.
3. Part at least of the financial resources of local authorities shall **derive from local taxes and charges** of which, within the limits of statute, they have the power to determine the rate.
4. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.
5. The protection of financially weaker local authorities calls for the institution **of financial equalisation procedures** or equivalent measures which are designed **to correct the effects of the unequal distribution** of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.



## E) European Charter of Local Self-Government

### **Article 9 – Financial resources of local authorities**

6. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.
7. As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.
8. For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.

## E) European Charter of Local Self-Government

### **Article 10 – Local authorities' right to associate**

1. Local authorities shall be entitled, in exercising their powers, **to co-operate** and, within the framework of the law, to **form consortia** with other local authorities in order to carry out tasks of common interest.

2. The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.

3. Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.

### **Article 11 – Legal protection of local self-government**

Local authorities shall have the right of **recourse to a judicial remedy** in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.