

LEGAL PERSONALITY AT LOCAL LEVEL - 11 COUNTRY CASES SUMMARY



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INTRODUCTION

Following the request of the Ukrainian Specialised Parliamentary Committee on Local Self-Government, the Council of Europe is providing extended and comprehensive support on the issues concerning legal personality at local level in Ukraine. The present overview was prepared by the Council of Europe's Centre of Expertise for Good Governance in the framework of the Programme "Enhancing decentralisation and public administration reform in Ukraine" with the contribution of its expert Mr Sorin Ionita. This report is based on the 11 detailed country cases reports which had been prepared in September 2021 in the framework of the following initiatives:

- Programme "U-LEAD with Europe: Ukraine – Local Empowerment, Accountability and Development Programme": France, Germany, Italy, Poland and Slovenia,
- Swedish-Ukrainian Project "Support to Decentralisation in Ukraine": Latvia and Sweden,
- Council of Europe Programme "Enhancing decentralisation and public administration reform in Ukraine": Albania, Greece, Moldova and Romania.

The document is structured in accordance with the questionnaire formulated by the Specialised Parliamentary Committee.

OVERVIEW

1. Among the 11 countries surveyed here, there is broad convergence among the European cases summarised in the table below on the fact that the **Administrative Territorial Unit (ATU) is the entity with legal personality**: on tier 1 (municipalities) and in a number of cases in tier 2, 3 (rayons, regions). The respective elected bodies (mayor, council, president of region etc.) only represent their ATUs, but **do not have separate legal personality**. They act exclusively in the name and on behalf of the legal person to which they belong.
2. The dilemma about the legal personality at the local level in countries which were part of USSR seems to originate in the old practice of the Soviet Union to **grant legal personality to each local institution**: the rapporteur for Latvia makes this clear in her response to Question 15. Latvia abandoned this practice in 1994 with the new Law on Local Governments, which defines the organs as representatives of the municipality like in the rest of Europe. Other countries like Moldova still have the old arrangement where for example the rayon council has legal personality separate from the rayon as ATU, so some degree of ambiguity may still exist on this aspect.
3. The best European-style definition of municipality (ATU of tier 1) is found in the Italian Civil Code: *comune* is the **legal entity** to which the **public legal personality** is attributed. Legal personality confers a precise status, i.e. ownership of rights and protection by the legal system. The constitutive elements of the *comune* are: (i) **population** (all the people who reside permanently on the municipal territory); (ii) **territory** (the space within which the municipality exercises its jurisdiction and is at the same time the subject of law); (iii) **assets** (all the economic activities of the *comune*, i.e. the goods and rights it possesses).
4. Not all national legal systems define the municipality as clearly as the Italian one, but nevertheless they treat it in the same way, whether explicitly or implicit in the legal doctrine; the comments from rapporteurs are clear in this respect. Mutatis mutandis, what is true for municipalities is also true for upper-level ATUs: the **region / province / department are the legal person**, and their elected councils / presidents etc. are just the authorities representing the respective legal person, in conditions specified by the law.

5. It follows from here that the often-used phrase “self-governing authority” is wrong: technically speaking, the authority (council, mayor) cannot be “self-governing”. It is the ATU (the legal person, the *comune*) which is governing itself through its elected authorities. How much “self-governed” it is, depends on the degree of real decentralisation in every country.
6. It also follows that the ATU is sued in court when there are claims against it, and its elected authorities (the mayor, sometimes with the approval of the council) represent it in court.
7. By contrast, there is much higher variation among countries regarding the norms to hold the elected officials and civil servants accountable for their actions; the table below illustrates this. Some enjoy more protection, like civil servants in Italy; some are not even defined as civil servants, but hired on the basis of the general Labour Law, like in Latvia. In most cases they may be personally liable under the law for damages decided against the municipality in court, especially when malicious intent or gross negligence can be proven.
8. “Municipality” is not a term found in the text of the law in most countries, but one used mainly – and loosely – in common speech when referring to ATUs of tier 1 (local communities with elected organs). Its meaning can be imprecise in languages which do not have the word as such, depending on what is chosen to equate it with: the community or its institutions? A further confusion may appear in Romania and Moldova, where for cultural-historic reasons a number of large cities are labelled “*municipia*” in law. This is largely symbolic and does not matter in practice; the general term “municipality” still refers to all ATUs of tier 1, not only those large cities.
9. Some countries have municipal **bankruptcy laws**; others do not. However, this is mostly a matter of terminology, because the practice is more similar across countries than it may seem. Even where such laws exist, they are different from those applicable to commercial companies and create a softer regime for ATUs with degrees of severity (financial distress, insolvency) under which the public property is protected, cannot be sold and the legal personality of the ATU remains unaffected. The national government or the courts may eventually appoint a commissioner or special administrator, temporarily reducing the attributions of the local authorities, but this happens extremely rarely. Most situations when the mayor or the council are suspended occur for reasons other than the financial problems of the municipality: serious breaches of the law, incapacitation or political stalemate in the council. In brief, where it exists the “municipal bankruptcy” in Europe operates more like a financial recovery mechanism.
10. In conclusion, the general tendency – whether the law is called “municipal bankruptcy”, “municipal insolvency”, or when there is no such law at all – is for the national institutions to assist the municipality with recovery plans, negotiated arrangements and financial transfers, in order to solve the matter expeditiously. France is a special case because it has a strict ex-ante control on the budget planning and execution of local governments, exerted by national authorities through the office of the Prefect and the Ministry of Finance, in order to prevent excessive debts and financial mismanagement in the first place. Other countries supervise closely the local budget deficits, even if the mechanisms may be more informal than in France.
11. With respect to the management of the process of consolidation of local governments, the **Greek and (partly) Albanian** cases are the most useful (and recent) examples of negotiated transition to a structure with fewer and larger municipalities, but with the preservation of ancillary and symbolic representation of smaller communities. The details are in the full text of the two cases.

1. ***Who has legal personality (is a legal entity and hence recognised as subject of legal rights and responsibility) in your country at local level, the community (or “administrative territorial unit”) or the authority (council, executive...)?***

- **Albania:** Administrative Territorial Units (ATU) – municipalities and regions.
- **France:** ATU – *communes*, departments, regions, Special-Status communities, Overseas Territories.
- **Germany:** ATU – municipalities, districts and *Länder* do, as communities; their authorities / organs (of the Federal Republic, *Länder*, districts, municipalities) never have the status of legal persons. They are not subject of legal rights and responsibilities, but always act exclusively in the name and on behalf of the legal person to which they belong.
- **Greece:** ATU – municipalities and regions.
- **Italy:** ATU – municipalities (*comune*), regions.
- **Latvia:** ATU – municipalities.
- **Moldova:** ATU – municipalities, rayons and ATU Găgăuzia; but also the mayors and rayon councils.
- **Poland:** ATU – municipalities (*gmina*), *Powiats*, *Voivodeships*.
- **Romania:** ATU – municipalities and counties (“*județe*”).
- **Slovenia:** ATU – municipalities.
- **Sweden:** ATU – municipalities and regions.

2. ***In case in your country local communities or “administrative territorial units” are granted legal entity status (and hence recognised as subjects of legal rights and responsibilities), does the State possess a similar legal status?***

- **Albania:** Yes, similar status.
- **France:** Yes, similar status.
- **Germany:** Yes, similar status.
- **Greece:** Yes, through central and deconcentrated bodies.
- **Italy:** Yes, similar status.
- **Latvia:** Yes, the State is the “initial legal entity” under public law.
- **Moldova:** Yes, similar status.
- **Poland:** Yes, similar status.
- **Romania:** Yes, exerted through Ministry of Finance and the Prefects.
- **Slovenia:** Yes, similar status.
- **Sweden:** Yes, exerted in other areas than ATUs.

3. ***In case in your country local communities or “administrative territorial units” are granted legal entity status (and hence recognised as subjects of legal rights and responsibilities), who has the legal personality at other levels (region, sub-region, county...)?***

- **Albania:** The 12 regions.

- **France:** Departments, regions, inter-municipal entities.
- **Germany:** Districts, *Länder*.
- **Greece:** The 13 regions.
- **Italy:** Regions, provinces, and metropolitan cities.
- **Latvia:** The five Planning Regions are derived legal entities.
- **Moldova:** Rayons (32) and Găgăuz Autonomous Unit.
- **Poland:** *Powiats* and Voivodeships (similar to rayons and oblasts in Ukraine).
- **Romania:** The 41 counties ("*judete*").
- **Slovenia:** Nobody else; regions (oblasts) are just statistical units.
- **Sweden:** The 20 regions.

4. ***In case intermediate-level communities (regions, sub-regions, counties...) are not granted legal entity status, which authority has such a status at these levels?***

- **Albania:** N/A
- **France:** N/A
- **Germany:** N/A
- **Greece:** N/A
- **Italy:** N/A
- **Latvia:** N/A
- **Moldova:** N/A
- **Poland:** N/A
- **Romania:** N/A
- **Slovenia:** N/A
- **Sweden:** N/A

5. ***Which act stipulates the legal personality/status of the State, local communities and, as the case may be, other levels of government (region, subregion, county...): the Constitution or the Law? In case it is stipulated by law, is it a general or special law? Please indicate the title of this law and provide a link to it, if available.***

- **Albania:** Constitution and special laws.
- **France:** Special legislation (the act of "*établissement public*") but it is implicit in the spirit of the Constitution, case law dating back to the 18th-19th centuries and "consubstantial with the concept of decentralisation".
- **Germany:** Legal personality of ATUs not explicitly written, but implicit in the Basic Law for the Federal Republic of Germany and the Constitutions of the *Länders* (except Bavaria and North Rhine-Westphalia, where it is explicit).
- **Greece:** Constitution, plus details in special legislation.
- **Italy:** Constitution (art 114.1), Civil Code and Law on Local Authorities.
- **Latvia:** General (Law on State Administration) and special legislation.
- **Moldova:** General legislation (Civil Code).

- **Poland:** Constitution and the special laws on local self-government.
- **Romania:** General legislation: Administrative Code, which incorporated pre-existing special laws.
- **Slovenia:** Constitution and special laws on local self-government.
- **Sweden:** Constitution, plus details in special legislation.

6. ***In case in your country a notion “municipality” or its analogue is stipulated in the legislation, is this notion applied to a community or a territorial unit? Or does this notion apply only/also to a local self-government authority (councils or their executive bodies)?***

- **Albania:** Municipality means community / territorial unit.
- **France:** Municipality means *commune* / territorial unit, not its council.
- **Germany:** Municipality means community as a corporation / legal person, defined by its territory and the citizens living there.
- **Greece:** Yes, municipality means community / territorial unit.
- **Italy:** Municipality means the territory.
- **Latvia:** Municipality means local community / territorial unit; it may refer to its organs when these act on behalf of the former.
- **Moldova:** Municipality in common speech means community / territorial unit; unrelated, “*municipium*” is a special legal designation for the 13 largest cities in the Republic of Moldova.
- **Poland:** Municipality means the *gmina* as ATU, not its authorities; however, this is not a legal term but just one used in current speech for international comparisons.
- **Romania:** Municipality in common speech means community / territorial unit; unrelated, “*municipium*” is a special legal designation for the largest 103 cities of the country.
- **Slovenia:** Municipality means local community.
- **Sweden:** Municipality means community / territorial unit.

7. ***May bankruptcy proceedings be instituted against a local community or “administrative territorial unit” in your country? (yes or no)***

- **Albania:** No.
- **France:** No.
- **Germany:** No, the State is supervisor of debts and implicit guarantor.
- **Greece:** No, but there are procedures to solve “over-indebtedness”.
- **Italy:** Yes.
- **Latvia:** No.
- **Moldova:** No.
- **Poland:** No.
- **Romania:** Yes, in a soft form, under different law than for companies, operating in two steps: financial distress and insolvency.

- **Slovenia:** No, and the municipal borrowing is capped.
- **Sweden:** Yes, but in practice it does not happen, situations are solved through negotiations and government assistance.

8. ***If you answered “yes” to question No.7, please answer the following question. Do general bankruptcy proceedings applicable to other legal entities apply to local communities or “administrative territorial units” in your country? If any special proceedings are in place, what are key criteria of bankruptcy of a local community or “administrative territorial unit” and three to four special aspects that make bankruptcy proceedings against local communities or “administrative territorial units” different from bankruptcy proceedings against other legal entities?***

- **Albania:** N/A
- **France:** The State exerts strict ex-ante control on local budget deficits through Prefects and Regional Financial Courts. The local accountant / cashier are employees of the State.
- **Germany:** N/A
- **Greece:** N/A
- **Italy:** The Law on Local Administration specifies bankruptcy proceeding against local authorities, different from those applicable to companies: “state of financial distress”, defined as inability to perform or balance the budget. The bankruptcy procedure does not lead to the liquidation of the municipality; in addition, the debts of the municipality may be paid by the State.
- **Latvia:** No, however special legislation regulates how situations of budget distress are solved.
- **Moldova:** N/A
- **Poland:** Municipal bankruptcy is not possible under the law.
- **Romania:** In situations of arrears of payments specified by the law, including non-payment of salaries, a recovery plan and/or a special administrator appointed by court takes over some functions of the elected representatives (mayor).
- **Slovenia:** N/A
- **Sweden:** General procedures apply, but the situation is in practice avoided.

9. ***Do the laws of your country provide for suspension of local self-government authorities of a local community or “administrative territorial unit” (local councillors or executive bodies) from the management of affairs when the local community or “administrative territorial unit” enters into voluntary administration? (yes or no)***

- **Albania:** Yes.
- **France:** Yes.
- **Germany:** No. In serious situations of breaching the law, the State can suspend local authorities and appoint a State Commissioner.
- **Greece:** N/A
- **Italy:** Yes.

- **Latvia:** Mayors can be removed from office by Parliament decision, and temporary administration installed, but as a consequence of serious breaching of the law, not because of budget deficits.
- **Moldova:** N/A
- **Poland:** Yes.
- **Romania:** Yes, partly: the chief executive (mayor) is suspended from daily budget management and approval of expenditures, which passes to the special administrator (rarely, if ever, happened in practice).
- **Slovenia:** No.
- **Sweden:** No voluntary administration. The mayor can be suspended after an audit if very serious mismanagement occurred (it does not happen in practice).

10. ***If you answered “yes” to question No. 9, please elaborate what are conditions for introduction of the voluntary administration, what government authority is responsible for the voluntary administration, and what is the period of voluntary administration?***

- **Albania:** Municipalities are in financial distress when debt is higher than 80% of the annual revenues. The Ministry of Finance is notified and may decide to implement budget aid or financial supervision. Municipalities are in insolvency if debt is higher than 130% of the annual revenues or fail to implement the recovery plan agreed with the Ministry. In this case, the government decides to place them under voluntary administration.
- **France:** The mayor and the council can be suspended by a ministerial decree and/or revoked by a decree of the government, following a proposal by the Prefect, for serious and repeated breaches of obligations. In case of emergencies the local authorities can also be suspended for up to one month by the Prefect and replaced by “special delegation” (but this situation almost never occurred).
- **Germany:** Länder ministries in charge of local affairs can suspend local authorities (see point 9) and bring the situation back within the limits of the law, by action proportional with the cause, and with the aim to restore the incapacitated state organ expeditiously.
- **Greece:** N/A
- **Italy:** When financial distress is declared, but also in other cases (political stalemate in council; proven links with mafia) the government and the President of the Republic suspend / remove from office the elected representatives and appoint a commissioner to supervise the recovery plan (top civil servant in the Ministry of Interior).
- **Latvia:** Parliament decision to suspend local authorities for misconduct or for being blocked politically, not because of budgetary problems. The decision for the Parliament is prepared by the Ministry of Regional Development, voted on by the Government before its submission to the Parliament. It happened in 2020 with Riga City Council.
- **Moldova:** N/A
- **Poland:** The Prime Minister appoints a replacement / commissioner in various cases of incapacitation of the mayor; in extreme cases the council can be dissolved.

• **Romania:** There are two situations under the law: “financial crisis” declared by the local council, when a recovery plan must be carried out under the supervision of the Court of Accounts; and “insolvency”, when salaries are not paid for more than 120 days, or arrears of payments older than 120 days reach up to 50% of the annual local budget, and a special administrator is appointed by a judge.

• **Slovenia:** N/A

• **Sweden:** N/A

11. ***Do claimants, both legal entities and individuals, lodge their claims with a local community or “administrative territorial unit” in regard to any and all local issues? Do the laws of your country allow that a person may file a lawsuit directly with a local self-government authority or its official, but not with a local community?***

• **Albania:** Claims are filed against the municipality.

• **France:** Interested persons can sue the ATU; the Prefect can do it for decisions breaching the law. Only if local officials commit mistakes or crimes “in private capacity”, not on duty, they are sued individually.

• **Germany:** Claims are filed against the ATUs. Three Länder may allow in very rare cases action against the mayor, but still the ATU will cover the damages.

• **Greece:** Claims are filed against the public authorities (mayor, council), not against the local community.

• **Italy:** Claims are filed against the municipality or the official.

• **Latvia:** Claims are filed against the municipality.

• **Moldova:** Claims are filed against the municipality.

• **Poland:** Claims are filed against the municipality (good for citizens, as they do not have to determine which body within the municipality is responsible).

• **Romania:** Claims are filed against the municipality.

• **Slovenia:** Claims are filed against the municipality, not its representative bodies.

• **Sweden:** Claims are filed against the municipality; citizens and entities can request a legality check on municipal decisions.

12. ***Does your country hold officials of local self-government authorities disciplinarily or financially (civilly) liable for ineffective or unlawful decisions (where such decision results from a political position, error or incompetence, but is not a criminal offence)? If so, may damages be recovered from the property of the official at fault rather than from the property of the local community or “administrative territorial unit” (for example, joint and several liability of the local community/“administrative territorial unit” and the official or recovery from the official by recourse)?***

• **Albania:** Public organs and their employees are responsible for damage caused to private parties with their own property only in cases when deceit can be proven. Disciplinary procedures against local officials in serious cases are exerted by the Council of Ministers.

• **France:** Local officials cannot be sued in court for ineffective or unlawful decisions, unless they commit a criminal offence. Local accountants have a different type of accountability (they are employees of the State).

- **Greece:** Public officials are responsible under the civil law only for damages produced to the municipality, in cases of deceit or gross negligence; the municipality is responsible for damages to third parties. Disciplinary procedures against local officials can be launched by the state representatives in the territory (supervisory function). Removal from office happens in case of criminal conviction.
- **Italy:** The municipality and the civil servant are jointly liable for damages decided in court, so either of them can be sued. In practice the vast majority of actions are against the municipality.
- **Latvia:** The municipality is accountable materially for damages in court; it may recover the money from the official in cases of intent or gross negligence. Local employees are not civil servants, so they are responsible to the municipality under Labour Law.
- **Moldova:** Officials are jointly responsible for the decisions they made in office, and become personally responsible only if illegal actions have taken place.
- **Poland:** The municipality is fully responsible to third parties, but it can start its own procedure against officials.
- **Romania:** Officials are financially liable for unlawful decisions if this is determined by an inspection from the Court of Accounts (national auditor).
- **Slovenia:** Officials are liable for damages committed with intention or as a result of gross negligence, otherwise the municipality is liable.
- **Sweden:** Yes, complex mechanism (can be detailed on demand).

13. ***What legal status do the local self-government authorities have if the local community or “administrative territorial unit” is a legal entity and hence recognised as subject of legal rights and responsibility? How is the scope of the legal personality of local self-government authorities defined in this case?***

- **Albania:** The municipality is the legal entity; elected municipal councils and the mayors represent it.
- **France:** Legal personality can only belong to a *local self-government unit: commune, province, region*. Public *authorities* are natural persons who are invested (by election or appointment) with a public office to act as organs in the name of the legal person.
- **Germany:** The municipality is the legal entity; elected / career officials represent it according to rules.
- **Greece:** The settlements (communes, sub-units of municipality) do not have legal personality.
- **Italy:** Only the municipality is the legal entity.
- **Latvia:** The municipality is the legal entity; elected / career officials represent it according to rules.
- **Moldova:** The authorities as such do not have legal personality separate from that of the corresponding territorial unit.
- **Poland:** The municipality is the legal entity; elected / career officials represent it according to rules.
- **Romania:** The municipality is the legal entity; elected / career officials represent it according to rules.

- **Slovenia:** The municipality is the sole legal entity; elected council and mayor represent it; the supervisory body is appointed by the council.
- **Sweden:** The municipality is the legal entity; elected / career officials represent it according to rules.

14. ***Who can act on behalf of a local community or “administrative territorial unit” directly in court? On what grounds? Do the laws of your country allow that a local community or “administrative territorial unit” is represented in external relations (in court, for example) by the State or a government authority?***

- **Albania:** ATUs (municipalities and regions) are represented by the mayors / presidents.
- **France:** The municipality is represented in courts by the executive authority, mayor or president, who may need an authorisation by the council, depending on the type of procedure.
- **Germany:** The municipality is represented in courts by the mayor, who can delegate this right. Approval is needed from the council on important cases.
- **Greece:** ATUs (municipalities and regions) are represented legally by the mayors / presidents or delegates.
- **Italy:** The top executive of the respective municipality: *comune, provincia*, region etc. The state cannot represent lower-level authorities.
- **Latvia:** The chairperson or qualified delegates decided by the local council.
- **Moldova:** ATUs (municipalities, *rayons* and ATU Găgăuzia) are represented by the mayors / presidents / the *Başkan*; no provision for representation by the State.
- **Poland:** The top officials (mayors, president) represent the municipality in court. The State takes this role only indirectly in special situations, when there is a temporary special commissioner.
- **Romania:** ATUs (municipalities and counties) are represented by the mayors / presidents; external legal services can be bought. The State cannot represent municipalities except in situations of joint responsibility under the EU Treaties.
- **Slovenia:** The municipality is represented by the mayor.
- **Sweden:** The municipality is represented in court by the executive board; the function can be delegated.

15. ***If in your country the State or a local community “administrative territorial unit” has changed their legal personality over the past thirty years, please indicate how long did the transformation take and what were the milestones of the transformation?***

- **Albania:** Significant territorial consolidation reform in 2014, with international support and after a brief period of consultation.
- **France:** ATUs have legal personality. Reforms may change the limits of ATUs, competences, powers or resources, even its name, but this has no impact on legal personality.
- **Germany:** During the German reunification after 1990, the East German municipalities (State organs) were redefined in law according to the West German model.
- **Greece:** Two big rounds of reform (consolidation) in the past 30 years; fewer and bigger municipalities and regions. Older (smaller) units on both tiers lost legal personality.

- **Italy:** N/A
- **Latvia:** The Soviet practice to grant legal personality to all authorities was changed in 1994 (Law on Local Governments) and the new system reinforced in 2001-2002 (laws on administration).
- **Moldova:** Găgăuz Autonomous Unit created with special status in 1994; soft separatist actions afterwards, including referendum. Between 1998 and 2003 the rayons were abolished and replaced with 9 counties (“*județ*”), but the change was reversed after 2003.
- **Poland:** Municipalities obtained legal personality fast (1990); *Powiat* and *Voivodeships* in 1999.
- **Romania:** No major change in the past 30 years.
- **Slovenia:** N/A
- **Sweden:** N/A

16. ***If in your country the State or a local community/“administrative territorial unit” changed their legal personality amid external or internal armed conflicts, were any risks identified for the territorial integrity or national security as a result of this change? If so, what preventative actions were taken to avoid these risks?***

- **Germany:** Strengthening the municipalities through decentralisation has been partly a reaction to the Nazi regime centralism.
- **Moldova:** Territories on the left bank of the Dniester (Transnistria) broke away from the country in 1992 to form an unrecognised Republic.

FOR NOTES

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The present layout of the summary was produced in the framework of the Council of Europe Programme
“Enhancing decentralisation and public administration reform in Ukraine”