

**Oficina Antifrau
de Catalunya**



Institutional Public Sector Entities and the Criminal Liability of Individuals

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1. Introduction

Territorial public administrations set up entities with their own legal personality to perform specific tasks in order to functionally decentralise public administration, produce goods and services for the market, make public management more effective, become more efficient in their operational performance, ensure greater accessibility or quality in service delivery and also to circumvent administrative law.

Nowadays, administrative structures put in place by public administrations are extremely varied, and notwithstanding efforts to streamline them over recent decades, their number and their legal framework in terms of procurement, human resources management and control are quite diverse.

Institutional public sector regulation is scattered across a range of general and specific provisions. As a starting point, the Catalan Government's competence for self-organisation of the Administration is recognised in Article 150 of the Statute of Autonomy of Catalonia. Furthermore, the Public Sector Legal Framework Act (the LRJSP) includes some regulatory aspects concerning institutional public sector entities.

In the case of the Catalan Government Administration, apart from the specifics which will be discussed below in relation to the different types of entities, the institutional public sector's overarching structure is set out in Legislative Decree 2/2002 of 24 December enacting the recast Catalan State-owned Enterprise Charter Act (hereinafter the Catalan State-owned Enterprise Charter) and Legislative Decree 3/2002 of 29 March enacting the recast Catalan Public Finance Act (hereinafter the Catalan Public Finance Act).

As for the local institutional public sector, the basic legal framework is set by the Local Authority Regulation Act 7/1985 of 2 April (the LBRL) which has been implemented by an assortment of provisions including Decree 179/1995 of 13 June enacting the Local Authority Works, Activities and Services Regulations (ROAS).

The specific features of the regulations for setting up certain entities additionally need to be borne in mind. Likewise, as will be seen later, the legal framework of these entities is also affected by other provisions such as those relating to public procurement, transparency and accounting.

The following pages provide an overview of the Catalan Government Administration's institutional public sector. This is followed by a brief description of the position at the local level. Subsequently, and in view of the foregoing, the application to institutional public sector entities of the criminal liability system for individuals set out in the Criminal Code is analysed.

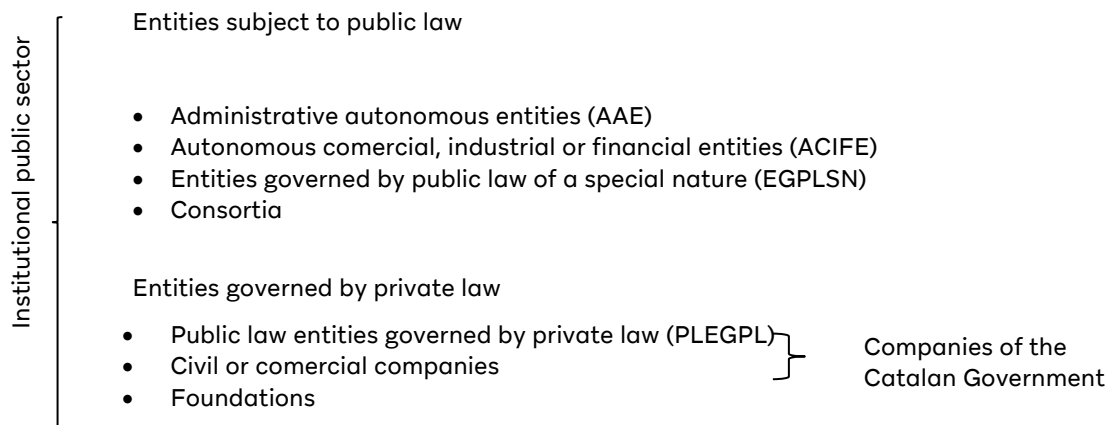


2. The Catalan Government Administration's institutional public sector

The Catalan Government Administration's institutional public sector is made up of the entities in which the Catalan Government Administration has a direct or indirect majority shareholding. Other entities in which the Catalan Government Administration has a parity or minority shareholding are also treated in the same way when they are attached to this administration.

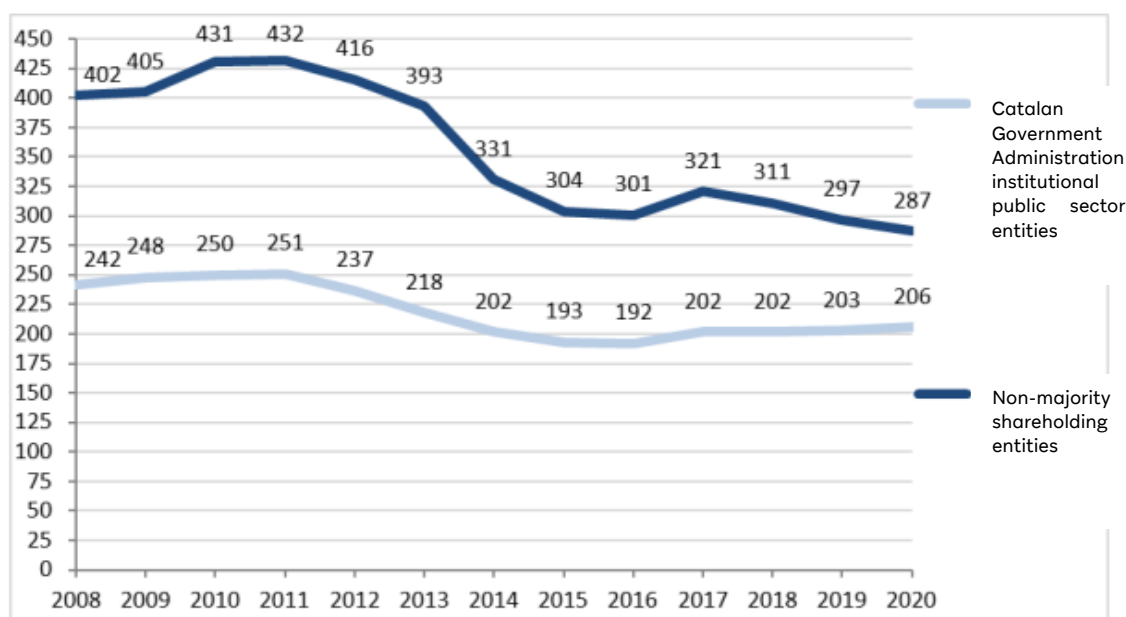
There are several ways of classifying Catalan Government Administration institutional public sector entities. The criterion used below is their legal framework: either public law or private law:

Figure 1: Catalan Government Administration institutional public sector classification



The Catalan Government Administration institutional public sector is now very large, comprising a total of 287 entities in which the Catalan Government Administration has a majority shareholding. There are also another 206 entities in which the Catalan Government Administration has a non-majority shareholding.

Figure 2: Evolution of Catalan Government Administration public sector entities¹



Information on the entities that make up the public sector and their structure can be found in the Catalan Government’s Public Sector Register, set up by the Financial Measures Act 12/2004 of 27 December. The Register is a public inventory of all the Catalan Government Administration’s instrumental entities and its purpose is to ensure publicity and monitor management and legal changes.²

Table 1: Catalan Government Administration institutional public sector entities. By type³

Catalan Government Administration institutional public sector													
Legal nature	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Another legal nature	3	3	3	4	5	4	2	1	1	1	1	1	1
Consortia	64	68	63	64	60	53	52	52	54	60	59	61	60
AAE	27	26	25	23	23	22	20	20	20	20	20	20	20
ACIFE	5	5	5	3	3	2	2	2	2	2	2	2	2
EGPLSN	6	8	8	8	8	8	8	7	7	7	7	7	7
PLEGPL	38	40	43	43	42	42	40	39	39	39	40	40	44
Foundation	35	36	42	46	44	40	39	37	35	36	36	36	33
Comercial company	64	62	61	60	52	47	39	35	34	37	37	36	39
Total	242	248	250	251	237	218	202	193	192	202	202	203	206

¹Source: http://economia.gencat.cat/web/content/70_entitats_sector_public/arxius/evolucio-registre-sector-public-generalitat-catalunya-2008-2020.pdf (last accessed: April 2022).

²Section 19 in the Financial Measures Act 12/2004 of 27 December.

³Source: http://economia.gencat.cat/web/content/70_entitats_sector_public/arxius/evolucio-registre-sector-public-generalitat-catalunya-2008-2020.pdf (last accessed: April 2022).



The Catalan Government's Public Sector Register provides information on the public sector entities including the ministry to which they are attached, the means of ownership, the degree of ownership, their legal form, their role or purpose, their classification in ESA terms and any public authority to which they may be attached.

It also shows that over a quarter of the entities are in-house procurement entities. Under the Public Sector Contracts Act 9/2017 of 8 November (LCSP), an in-house procurement entity is a public or private law legal entity over which a contracting authority has a direct or indirect control, similar to that which it would have over its own services or units; more than 80 percent of the activity of the entity receiving the order is undertaken in the performance of the tasks entrusted to it by the contracting authority placing the order; all of its capital or assets are publicly owned or contributed when it is a private law entity, and status as an in-house procurement entity is expressly recognised in their bylaws or acts establishing them.⁴

Finally, institutional public sector entities have a relationship with the administration to which they report. The relationship with the Catalan Government Administration or with a local authority will vary depending on whether they are public or private law entities. Furthermore, the entity will be attached to one or another public administration depending on its configuration. In particular, the LRJPS sets out the criteria for deciding which public administration consortiums and foundations should be attached to. The assignment of an entity to one public administration or another may determine the legal framework applicable to, for example, its staff, budget, accounting and control.

2.1 Public law entities

a. Self-regulatory administrative entities

There are two main features of self-regulatory administrative entities. Firstly, the operations they perform are basically administrative or development tasks. Secondly, there is their legal framework since they are governed by administrative law.

General legislation does not specifically lay down provisions relating to these entities and their legal framework is set out in the regulation of establishment.⁵

b. Self-regulatory commercial, industrial or financial entities

Self-regulatory commercial, industrial or financial entities deliver public services or produce public goods. They may receive fees or prices as consideration for these services or goods.

⁴Section 32 LCSP.

⁵Thus, for example, the School of Public Administration 4/1987 of 24 March states that it is an autonomous administrative body with its own legal personality, administrative and financial independence and full capacity to act in the performance of its tasks.



They have to be established by law which sets out their duties, the financial resources to be allocated to them, the basis of their organisation and their legal framework. Subsequently, in a decree the government implements their organisation and legal framework, endorses their bylaws and specifies the ministry to which they will be attached and the assets to be assigned to them.⁶

In self-regulatory commercial, industrial or financial entities, prior inspection is replaced by audits carried out under the supervision of the Catalan Government's Audit Office.⁷

c. Special public law entities

These entities are also governed by public law but have a special legal framework laid down by their regulation of establishment.⁸

d. Consortiums

Consortiums are public law entities set up by various public administrations or entities in the institutional public sector, either among themselves or with the involvement of private entities, to carry out activities of common interest to all of them within their remit. They have their own legal personality.⁹ If private entities are involved, the consortium may not be for profit.

Consortiums may undertake activities to promote, deliver or jointly manage public services and any other activities provided for by law.

As for their legal framework, under current legislation consortiums must be established by means of an agreement signed by the participating administrations, public agencies or entities and are governed by the budgeting, accounting and control system of the public administration to which they are attached. Their staff may be established or non-established public employees.

The LRJSP lays down the grounds for determining one public administration or another. Under this regulation, the consortium's bylaws specify whether a consortium in which the Catalan Government Administration takes part is assigned to this public administration in accordance with the criteria set out in the regulation. In particular, the consortium will be attached to the Catalan Government Administration when the latter has the majority of votes in the governing bodies; has the power to appoint or dismiss the majority of the members of the executive bodies; has the power to appoint or dismiss the majority of the members of the executive staff; has greater control over the

⁶Article 3 Catalan State-owned Enterprise Charter.

⁷Article 16 Catalan State-owned Enterprise Charter.

⁸Thus for example the Catalan Tax Code stipulates that the Catalan Tax Agency is a public law entity. Its operations are governed by this regulation and by its implementing rules and its internal regulations (section 211(1) Catalan Tax Code Act 17/2017 of 1 August enacting the first, second and third divisions concerning the Catalan Government's Tax Administration).

⁹Sections 118 et seq. Public Sector Legal Framework Act 40/2015 of 1 October and 113 et seq. Legal and Procedural Framework for Government Agencies in Catalonia Act 26/2010 of 3 August



operations of the consortium due to special regulations; has the power to appoint or dismiss the majority of the members of the governing body; funds over fifty percent, if not more, of the consortium's operations taking into account both the contribution to equity and the financing allocated each year; has the greatest percentage share of equity ; and has a greater number of inhabitants or geographical extension depending on whether the purposes defined in the bylaws are geared towards delivering services to people or undertaking actions in the territory.¹⁰

2.2 Private law entities

Private law entities generally engage in operations designed to yield a financial return. However, as will be seen this is not the case for foundations.

Some private law entities are considered to be state-owned enterprises. In particular, the Catalan State-owned Enterprise Charter classifies as Catalan Government undertakings public law entities governed by private law and civil code partnerships or companies which are majority owned by the Catalan Government or when they manage public services and in which the Catalan Government has the power to appoint all or part of the management bodies or has a direct or indirect shareholding of at least 5% of the share capital.¹¹

a. Public law entities governed by private law

Public law entities governed by private law are entities that are set up to perform activities such as providing or managing public services or producing goods and services for consideration. They may also be entities that engage in market activities. Public law entities governed by private law may be vested with administrative powers for the performance of their operations.

These entities may only be set up with the approval of an Act of Parliament.¹² They use public law in their dealings with the Catalan Government Administration and private, civil, commercial and labour law in their dealings with third parties.

b. Civil code partnerships or companies

The Catalan Government Administration may have a majority shareholding in civil code partnerships or companies (e.g. public limited companies or limited liability companies). These companies may manage public services or undertake economic operations by offering goods and services on the market.

These entities are set up under civil and commercial law and their organisation and operations are governed by private law. Nevertheless, in some issues such as procurement and public transparency they are bound by public law.

¹⁰Section 120 LRJSP.

¹¹Article 1 Catalan State-owned Enterprise Charter.

¹²Article 21 Catalan State-owned Enterprise Charter.



These partnerships and companies are set up by decision of the government.

The Catalan Government Administration may also have a minority shareholding in civil code partnerships or companies. When these partnerships and companies manage public services and the Catalan Government Administration appoints all or part of the management bodies or directly or indirectly holds at least five percent of the share capital, then they are related undertakings.

c. Foundations

Foundations are non-profit entities with their own legal personality through the allocation of Catalan Government Administration financial assets or rights in order to fulfil public interest purposes.

Catalan Government Administration public sector foundations meet either or both of the following conditions:¹³

- a. More than 50% of the foundation's assets are made up of assets or rights contributed or assigned by the Catalan Government Administration or any of its public sector entities.
- b. The Catalan Government Administration or its public sector entities or posts representing them has an absolute majority of the voting rights on the board of trustees.

The Catalan Government Administration may set up foundations in conjunction with individuals. These foundations may only help to perform activities within the remit of the Catalan Government.

The LRJSP says that the foundation's bylaws are to specify the public administration to which the foundation is attached. In particular, under this regulation a foundation will be attached to the Catalan Government Administration when the latter has a majority of trustees; has the power to appoint or dismiss the majority of the members of the executive bodies; has the power to appoint or dismiss the majority of the members of the executive staff; has the power to appoint or dismiss the majority of the members of the board of trustees; funds over fifty percent, if not more, of the foundation's operations taking into account both the contribution to assets and the financing allocated each year, and has the greatest percentage share of equity.¹⁴

Foundations are governed by private law just like civil partnerships and companies in which the Catalan Government Administration has a stake. However, they are also subject to several administrative legislation regulations (for example, the LCSP and the Transparency, Access to Public Information and Good Governance Act 19/2014 of 29 December).

¹³Section 174 Act 5/2017, of 28 March, on fiscal, administrative, financial and public sector measures

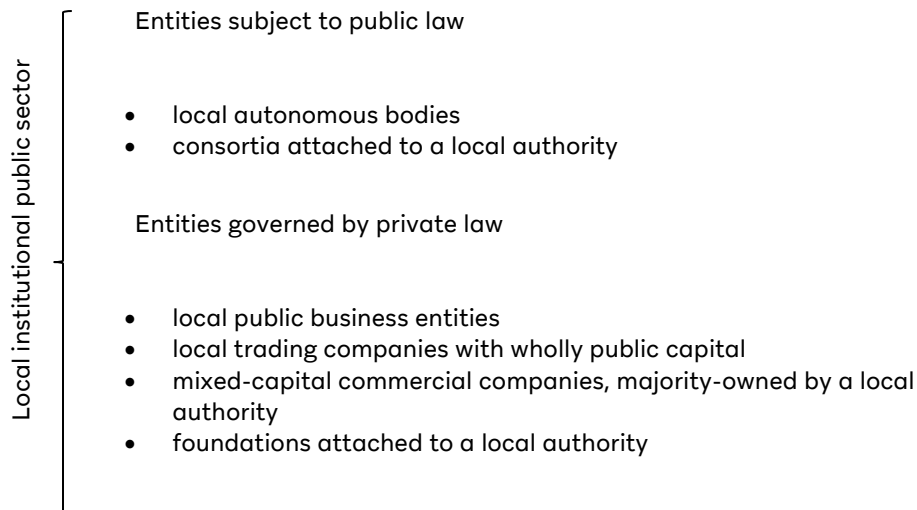
¹⁴Section 129 LRJSP.



3. Brief discussion of the local institutional public sector

There are some differences in the layout of the local institutional public sector with respect to the Catalan Government Administration's institutional public sector which are briefly examined below.¹⁵

Figure 3: Local institutional public sector classification



3.1 Public law entities

In the case of local authorities, the institutional public sector governed by public law is made up of local self-regulatory bodies and consortiums attached to a local authority.

The LBRL refers to the provisions on self-regulatory bodies in the LRJSP. Self-regulatory bodies are set up by the local council plenary which also approves their bylaws.¹⁶

Consortiums attached to a local authority have the same legal status as consortiums attached to the Catalan Government Administration, although in this case they meet the requirements set out in the LRJSP for their attachment to a local authority to manage works or services.¹⁷

3.2 Private law entities

Private law entities at the local level are public undertakings, companies with wholly public or semi-public capital and foundations attached to a local authority.

¹⁵Concerning the resizing of the local public sector, see the additional provision nine of the LBRL.

¹⁶Section 85B LBR and articles 201 and 202 ROAS

¹⁷From a general point of view, sections 118 et seq. LRJSP, 113 et seq. Act 26/2010 of 3 August. On setting up local consortiums, see section 57 LBRL and articles 312 et seq. ROAS.

Firstly, public undertakings are public law entities governed by private law with their own legal personality and assets, self-regulated management and financed by market revenue.¹⁸ They are also set up by the local council plenary which endorses their bylaws.¹⁹ These corporations may have administrative powers and deliver or manage services or produce public-interest goods.

Secondly, companies manage public services and are governed by private law except in areas where budgetary, accounting, financial control, efficiency control and procurement regulations apply to them.²⁰ Companies may be wholly state-owned or semi-public or attached to a local authority.

Finally, foundations may also be attached to local authorities when they meet the criteria set out in the LRJSP.

4. Criminal liability of institutional public sector entities

4.1 Criminal liability of legal entities in the Criminal Code

One of the new features introduced by the 2015 Criminal Code is the regulation of the framework of criminal liability of legal entities which entails the transfer of the criminal liability of certain individuals to the legal entity.

In particular, Article 31 of the Criminal Code stipulates that legal entities are criminally liable for offences committed in their name or on their behalf and for their direct or indirect benefit and for offences committed in the performance of corporate activities and on their behalf and for their direct or indirect benefit by individuals and in the circumstances specified in the article.

However, as will be seen below, this framework does not apply to all legal entities, and in particular not to territorial public administrations such as the Catalan Government Administration and local authorities. Equally, it does not apply to most institutional public sector entities.

By contrast, the criminal liability framework for legal entities may be applicable in certain circumstances to some institutional public sector entities. This is the case of state-owned undertakings. However, as shown below, this framework is only applicable under certain circumstances.

¹⁸Section 103 LRJSP.

¹⁹Section 85A LBRL.

²⁰Section 85B 211 LBRL.



4.2 Application of the criminal liability legal framework to institutional public sector entities

a. Public sector entities excluded from the criminal liability framework

Article 31(d) of the Criminal Code stipulates that provisions relating to the criminal liability of legal entities do not apply to institutional public administrations, regulators, agencies and public undertakings. Likewise, they do not apply to any other entity exercising public sovereign or administrative powers.

Despite the differences in terminology, it is clear from a reading of Article 31(d) of the Criminal Code that the criminal liability framework for legal entities does not apply to public sector entities governed by public law. Similarly, it does not apply to public law entities covered by private law.

Likewise, these provisions do not apply to companies when they wield administrative powers. In this respect, Article 31(d)(2) of the Criminal Code lays down that if they wield administrative powers, i.e. a legal power conferred in the public interest, the regulations on the criminal liability of legal entities do not apply.²¹

Finally, these provisions do not apply either to Catalan Government Administration foundations or to any attached to a local authority. Here, Chief State Prosecutor's Office Circular 1/2016 of 22 January on the criminal liability of legal entities pursuant to the reform of the Criminal Code made by Act 1/2015 (hereinafter Circular 1/2016) excludes them, although public sector foundations may not exercise administrative powers.²²

b. Public sector entities covered by the criminal liability framework

The criminal liability framework for state-owned undertakings that do not wield administrative powers varies on the basis of the public shareholding in their capital. The Criminal Code also introduces some differences depending on their operations.

1. Companies with majority public capital

The Criminal Code provides for the application of the criminal liability framework to Catalan Government Administration companies, wholly publicly-owned local companies and companies majority-owned by a local authority.

However, application is limited if either of the following circumstances prevails:

²¹Sections 2(2)(b) LPACAP and (2)(2)(b) and 113 (state companies) LRJSP.

²²Section 174(3) Act 5/2017 of 28 March.



- The companies carry out public policies, i.e. implement decisions and measures adopted by public institutions to take action and address public problems.
- The companies deliver general economic interest services, i.e. they undertake operations considered to be in the public interest which may or may not be subject to market discipline and are covered by public service obligations.

In these two scenarios, only the penalties set out in Article 33(7)(a) and (g) of the Criminal Code, i.e. a fine and judicial intervention, are applicable to them. In all other cases, e.g. when companies render general economic interest services, the regulations governing the criminal liability of legal entities apply.

Specifying the scope of these circumstances is tricky. Thus CSPO Circular 1/2016 points out that: "Ultimately, the classification and relevance of the service provided will be decided by analysing the specific public purpose of each company since from a functional perspective of public assets, the concept of public service should not be seen as tied to or constrained by administrative categories."

Finally, the same regulation includes as an exception to the above restriction cases in which the court finds that the purpose of setting up the company was to evade any potential criminal liability.

2. Companies with minority public capital

Catalan Government Administration related undertakings and semi-public local companies are not state-owned undertakings.

Consequently, the criminal liability framework for legal entities outlined in the Criminal Code is applied to its full extent.

However, there may be some restrictions in these cases due to circumstances such as the control or influence which public sector entities have over these companies or when they have been awarded contracts for works or service concessions.²³

²³Additional Provision 22 concerning section 15 Public Sector Contracts Act 9/2017 of 8 November.



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